PRIVATE FOUNDATION AS LEGAL ENTITY: NATIONAL LEGAL DOCTRINE AND EUROPEAN LEGISLATIVE EXPERIENCE

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The article defines the institution, its characteristics as a legal entity of private law. It gives the comparative analysis of national civil law doctrine and EU member states. The ways of adaptation of Ukraine to the EU aquis are proposed and defined the modern understanding of institutions in the system of legal entities.
Keywords: foundation, legal entity, public benefit interest, the EU aquis.

The Civil Code of Ukraine (further – the CC of Ukraine) introduced the principle of separation of legal forms of legal entities for societies and institutions. This approach is justified, because the fixed principles of creating, managing entities and is the basis for regulation of all system entities. However, in contrast to the wide range of research status of societies (companies), institutions are cared for a relatively small circle of modern scientists. First of all, it is a monographic study by I. M. Kucherenko [10] and by D. S. Leshchenko [11] and I. P. Zhyhalkin [7]. As for the rest of the scientific achievements of the characteristics of institutions in the context of common problems institute legal persons or are some scientific articles.

This situation around institutions, in our view, caused an incredibly small number of institutions established in accordance with the CC of Ukraine, as well as certain of their identification with the public institutions that are created as legal entities of public law. With this in mind, we aim to carry out research status of legal persons of private law in the organisational and legal form of the foundation and the possibility of applying European experience in the regulation of this subinstitute.

Legal regulation of civil status of institutions in Ukraine was conducted by the Civil Code of the Ukrainian SSR in 1922, particularly Art. 15 provided that private entities with legal personality, such as: hospitals, museums, research institutions, public libraries, and so on, which may be established only with the permission of the relevant authorities. The following codification of Soviet civil law regulation of private institutions was not provided. Note only the ability to create collective institutions, interkolkhoz, cooperative and public organisations.

This slight adjustment period, the status of institutions due to two factors: 1) the transformation of scientific doctrine regarding private institutions; 2) nationalization of the economic sector in which institutions can operate. Note the first one, since the scientific achievements of pre-revolutionary scientists had an undeniable impact on the formation of the foundation of modern civil doctrine regarding private institutions.

The doctrine of legal entities in the nineteenth century was presented primarily works «On legal entities» (1876, Kyiv) [5] and «Development of the doctrine of legal entity» (1888, St. Petersburg) [4]. Named works were argued that the term «foundation» (учреждение) had become the part of private law doctrine from the German term «Stiftung» that has featured detached property rights are voluntarily transferred their primary entity to serve charitable purposes [5, p 21]. However, this understanding was not often evaluated as a legal entity in its classical sense. Yes, we are talking about the possibility of individual property that is targeted and lying heritage (hereditas jacens). Consequently, the theory formed the target property. According to research by L. Hervahen this theory belongs to Alois von Brinz, but its stumbling block was the subject of ownership of the target property, which recognized them as a target [4, p 56]. As a result, Brienz denying the theory of fiction creates a new fiction. Later V. B. Yelyashevych concluded that entities are also proprietary systems that the relevant legal system endowed with human personality [6, p.17].

Summing up, the general theory of legal entity is formed on the *substrate* postulates allocation of the *individual* who may be persons together, including the organization providing property or *property*. The fiction theory requires finding the actual «owner» of a legal entity that is not inherently realistic theory, according to which the entity is real and independent entity. Some manifestations of fiction theory can be monitored in public law, in particular, that should recall the final beneficial owner (controller) of legal entity according the Law of Ukraine «On prevention of legalization (laundering) of proceeds from crime, terrorist financing and the financing of proliferation weapons of mass destruction».

The concept of foundation is the result of the legislative process, the dynamics of which are characterized by the following approaches:

1) the purpose of creation is determined or prediction is obtaining benefit for third parties (destinator) – edition of the Draft of the CC of Ukraine, 08.25.1996;

2) the unity of property in an isolated entity without members, founded to achieve the target, which may be the needs of society (socially useful foundation) or needs of third parties - destinator (private and useful foundation) – edition of the Draft of the CC of Ukraine, 01.06.2000;

3) the current concept of foundation – edition of the Draft of the CC of Ukraine, 01.02.2002.

The foundation as a legal form of legal entity is identified in p. 3 art. 83 of the CC of Ukraine as an organization which creating by one or more persons (founders), who are not involved in its management, by union (selection) of their property to achieve the goals defined by the founders at the expense of the property.

Ahead of the CC of Ukraine developers laid quite complicated goal – to create the concept of a legal person which should correspond to European understanding, and based on leading Europe countries codified acts as well as keep in touch with previous organic laws to prevent radical changes in the law. Unlike business companies, driving force of regulation of the status of which was entrepreneurship, and non-entrepreneurial associations, which was the driving force behind the realization of freedom of association, foundations were virtually no catalyst in the dynamic regulation of their status.

A positive is the rejection of the concept of foundation that exists in Russia. Thus, according to ch. 1 art. 123.31 of the CC of RF the foundation is recognized a unitary non-commercial organization created by the owner to carry out administrative, social, cultural or other non-commercial functions. Thus, the Russian foundation is viewed through the prism of the theory of fiction, as well as through the design of a legal person is not the owner. As a result, on the one hand there is the possibility of denial of the concept of German foundation [3, p 357], the other – the need to consolidate [15, p 847–848].

The native researches of foundations in foreign countries are limited to the one work [12], which is the subject of legal regulation of charity, let alone form a derivative result. So, we try to overview the regulation of the status of foundation in EU.

The **German Civil Code** (further - BGB) defines the foundation (Stiftung) as one of the institutions of legal entities, along with the association, which requires the allocation of the property (Stiftungsgeschäft) and the recognition of the foundation by the competent public authorities of land where the institution (ch. 1 § 80). This targeted property must match the attributes endowment, which is now beginning to take Ukraine into regulation (e.g. endowment (permanent fund) higher education institution – the Law of Ukraine «On higher education»).

Transfer (separation) of the property must match the attributes listed § 81 BGB, and if the guaranteed long-term and stable foundation aim not compromise public good. In case of the life of the institution, which transferred the property to be consumed, the amount of such property must be grounded during that period, or provide at least 10 years of its existence. Also provided comments on the legal situation of land laws relative to religious institutions can not contravene this provision.

In addition, BGB are installed specifics about: the obligation to transfer the property of the founder of the foundation relevant transaction – endowment transaction / Stiftungsgeschäft (§ 82); establishing institutions under the covenant – testamentary foundation / Stiftung von Todes wegen (§ 83); apply to establishments legislation on associations (§ 86); features change objectives and termination institution (§ 87) and the transfer of property in case of the goal institutions (§ 88).

Overviews we pay attention to the legal orders of several EU countries. Thus, in **France** foundations are distributed on: public utility foundation, sheltered foundation without a legal entity, business foundation. They generally belong to organizations that aim to meet the needs of the public without the intention of making a profit [1, p. 54]. **Netherlands** law specifies foundation (Stichting), as a legal entity created by a legal act without a membership basis and which aims provided for in the statutes using the goods intended for this purpose [1, p.67]. In **Italy**, the foundation is determined as a legal entity established for that purpose [1, p. 61]. In turn, in the **UK** there are no definitions of foundation as a separate legal entity, but among associations can identify these movements, which include trust and unincorporated association, which in turn is a form of existence of the relationship, and no entity [1, p. 79].

The concept of a foundation (установа) than embodied in the CC of Ukraine, is also used in other legislation governing the special status of organizations as legal entities, and without that status, such as: banking institution (банківська установа), financial institution (фінансова установа), academic institutions (наукова установа), penal institution (установа виконання покарань), etc. O. I. Zozuliak outlines this legal position as «conventional name (designation) separate legal entities» [3, p. 313], while the implied author does not explain. We believe that this is not a conventional name (designation), and the use of false and outdated legal terminology that needs to change according to the modern understanding of legal phenomena and their relationship to the level of general legal and industry generalizations. An example of such a change can be called understanding of Advocacy of Ukraine, which was transformed from «voluntary professional public *association*» (Law of Ukraine «On Advocacy», 1992) to «non-governmental self-governing *institution*» (Law of Ukraine «On Advocacy and Advocacy activity», 2013), as a result of a delimited concept of «advocacy» as a legal phenomenon, and legal entities operating in the this sphere. That organization

mentioned above should not be construed as an institution within the meaning of certain organizational and legal forms, as well as relevant institutions in the broad sense.

The way to this understanding of legal phenomena is not require the creation of financial, banking or other institutions in organizational and legal form of the foundation. Civil law model of foundation further relates to legal entities of private law (ch. 3, Art. 81 of the CC of Ukraine), but regarding legal persons of public law may apply the provisions of the CC of Ukraine, unless otherwise provided by law (Art. 82 the CC of Ukraine). It is a public institution which can be used on the construction of civil law only limits on their participation in civil relations [9].

According to the provisions of the CC of Ukraine there are following features of foundations: 1) founders are not involved in the management of the foundation; property has targeted character (ch. 3, Art. 83, Art. 102 of the CC of Ukraine); 2) along with their main economic activity foundations may do business unless otherwise provided by law and if the activity meets the purpose for which they were created, and contributes to its achievement (Art. 86 of the CC of Ukraine); 3) created on the basis of individual or joint founding act drawn up by the founder (ch. 3, Art. 87 of the CC of Ukraine), which indicates its purpose, determined property being transmitted to the institution needed to achieve this goal management structure of the foundation (ch. 3, Art. 88 of the CC of Ukraine); 4) a special management procedures determined by art. 101 of the CC of Ukraine; 5) special procedure for change the purpose of the foundation and management structure (Art. 103 of the CC of Ukraine). For other provisions, they are not defined, so that the general provisions of the entities resulting conclusions expressed that civil status of foundation requires additional regulation [11, p. 28; 7, p. 140].

Now the legal literature raised the question of whether the division of legal persons in societies and foundations and the adequacy of such a division. In particular, O. I. Zozuliak convinced that the foundation belongs to a group of unitary non-entrepreneurial entities, which have the following features: 1) features associated with participation in such entity: a) no membership; b) a ban on the founding management; c) organizational character relationships during economic activity; d) obtained as a result of income is not distributed among the founders; 2) features related to the legal status of the property: a) special procedure of property; b) the purpose of the property; c) a legal entity requires mandatory union property, and if one or the allocation of assets it owns; 3) features associated with activity: a) meet social needs and interests of individuals who are not their members; b) range of people who use non-entrepreneurial legal entity is not quantified as a general rule; c) the direction of the determined will of the founder; 4) signs associated with civil liability for its own obligations, particularly secondary liability in the event of failure of the founder property [8, p. 242]. These features should be taken very critical, especially for the desire researcher artificially distinguish types of unitary entities. In particular, the following questions arise:

– what is the difference between organizational management in a unitary legal entity and corporate entity, despite the fact that the general definition of legal person is an organization?

– prohibit the distribution of profits is a common feature of non-entrepreneurial legal entity, so on what basis it relates to traits associated with participation in such entity?

– what is the procedure of forming property of the legal entity is a special feature of these entities, if it also can provide other types of legal entities (joined stock company, limited liability company, state enterprises, etc.)?

– features that characterize the activities associated with such entities as socially useful, but why in this case public good feature is ignored in the study of non-entrepreneurial entities?

The problem with these ideas, we believe, is wrong methodological approaches and research methods of non-entrepreneurial entities. We believe that the author is trying to distinguish artificially types of unitary type non-entrepreneurial entities, given the legal regulation of their status as legal entities of private and public law that has been done in various scientific positions that sometimes contradict the principles of construction of private entities.

Thus, author defines the following organizational and legal form of unitary non-entrepreneurial entities such as: the foundation (установа), institution (заклад), fund (фонд). Note the definition of the legal forms and give their views on the appropriateness of such a division.

Under the foundation (установа) author understands the legal entity of public law, created by one or more founders, who are not involved in its management, to achieve the goal that the founders identified in various areas of public administration and bear subsidiary liability for its obligations [8, p. 327]. Criticizing regulation status by the CC of Ukraine, the author refers to the argument ignoring objective of the legislator and other specific features of each type of foundation [8, p. 316], but what meaning should be in detail the purpose of the legal person in the formation determining the society or foundation? Moreover, other arguments in justification of its position researcher draws from literature 70s-80s of the twentieth century (i.e. 20-30 years before the adoption of the current CC of Ukraine) at a time when idea of private foundation was not possible. Further arguments in favour of this position are supported distorted arguments jurist who

erected contrary to what the public entities involved in civil relations can be made by using the legal form of the foundation, but that does not mean that all institutions are public authorities.

Under the institution (заклад) author refers to the legal entity (both public and private law) founded by one or more founders, who are not involved in its management, are obliged to finance the activities of the institution by combining assets to achieve the goal of which is defined by the founders in educational and scientific, historical, cultural and medical fields [8, p. 351]. On the basis of these definitions, it is difficult to establish the legal significance of individual features, including what the nature of the obligation to finance the activities of the institution (contractual, statutory and legislative), and what civil legal features are detailed objective of the institution?

In our opinion, the use of the term «institution» made for the purpose of legal status for entity (school, health facilities, restaurant management facility) with out features of legal form. For example, *municipal research institutions (комунальні наукові установи)* are founded in the form of *municipal enterprises (комунальних підприємств)* (paragraph 2 ch. 1, Art. 7 of the Law of Ukraine «On Scientific and Scientific-Technical Activities») and in the case of training researchers of higher education in third (education and research) level of higher education is *an education institution (заклад освіти)* (pp. 1 p. 2 of the license conditions of educational activities of educational institutions, approved by the Cabinet of Ministers of Ukraine, 30.12.2015, № 1187). So, really is a terminological problem, not the problem of the existence of new types of legal forms. It should also give the view that the establishment and the establishment is not identical to the concept, as a foundation is one of the legal forms of non-entrepreneurial organizations and institution – a conditional feature [13, p. 319].

The fund (фонд), in turn, is built on the foundations of the absence of membership entity acting for the purpose of accumulation funds for charitable, educational, environmental, medical and other socially useful purposes [8, p. 368]. However, given the objective, what is a difference between the fund from foundation as defined in the CC of Ukraine and what is an aim of civil legal separation of fund? Unfortunately, there is no further author's argument.

The regulation of the foundations in EU countries and in accordance with the EU aquis, referred to the Company Law, i.e. the legal regulation of the status of legal persons in their broadest sense. Today the European Commission developed Proposal for a Council regulation on the Statute for a European Foundation (2012/0022 (APP)), such as regulation of the European Cooperative Society and European economic interest Grouping. Separately, we note that the Fundamental Principles on the Status of NGOs in Europe [1] provide for regulation of the right to freedom of association, which is not typical for foundations that are created for other purposes.

In particular, it is proposed that the European foundation (further – FE) are entities with a public benefit purposes activities. Such a socially useful purpose concentrated in areas that are important for European citizens and the European economy. In particular, it concerns such activities as art, culture, environment, civil rights, consumer protection, etc. (Art. 5). Given the peculiarities of the national legislation of member states are also invited to define a minimum assets in the amount of at least 25 000 Euros (Art. 7), which respectively constitute the limits of liability of such FE. In addition, FE must have full capacity, allowing for unlimited public benefit and 10 percent of turnover unrelated to this activity, which accounted for in separate accounts (Articles 9-11).

Other provisions relating to the legal status of FE have much in common with the foundations that originate from BGB. So, it relates to methods of creation (including through the covenant), the formation of the target property, public order, not of membership and so on.

Now civil regulation of foundation is mostly general in nature, so only needs clarification in the light of harmonization with EU aquis. In particular, it concerns the regulation of the authorized capital of detail and order management, and legal share of equity remaining after liquidation of the foundation. In addition, the regulation requires the proper ratio category of foundation as a legal entity and endowments as the whole property, which has drawn attention in scientific studies [12, p. 16]. We should emphasize that endowment target is used for realization of socially useful purposes and can be created by any person of private law accordingly separated from its own funds. However, managing endowments should be a professional player in financial services, despite improving the status of a private institution may acquire a new character. Thus, such foundations may include features that prove their social benefits.

Thus, the civil status of private foundations complies with the European doctrine and EU aquis, particularly in the absence of membership, targeted nature of the property and appropriate economic goals. This organizational form is sufficient for economic activity and allocation of certain types, including funds and institutions, does not meet either domestic or European legal doctrine. This understanding of legal persons for their functional purpose enables to allocate their branch status and not a separate type of legal form, which requires a corresponding change in the law and legal thinking.

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Кочин В. В. Приватна установа як юридична особа: національна правова доктрина та європейський законодавчий досвід

Стаття визначає поняття установи, її ознаки як юридичної особи приватного права. Здійснено порівняльний аналіз вітчизняної цивільно-правової доктрини та законодавство країн–членів ЄС. Запропоновано шляхи адаптації законодавства України до aquis ЄС та визначено сучасне розуміння установи у системі юридичних осіб.

Ключові слова: установа, юридична особа, суспільно корисний інтерес, aquis ЄС.

ВПРОВАДЖЕННЯ РЕЗУЛЬТАТІВ НАУКОВИХ ДОСЛІДЖЕНЬ НАУКОВО-ДОСЛІДНОГО ІНСТИТУТУ ПРИВАТНОГО ПРАВА І ПІДПРИЄМНИЦТВА ІМЕНІ АКАДЕМІКА Ф. Г. БУРЧАКА НАПрН УКРАЇНИ У ЗАКОНОТВОРЕННЯ

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