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CIVIL RELATIONS IN NON-ENTREPRENEURIAL SOCIETIES AND FOUNDATIONS: CURRENT STATUS OF REGULATION AND PROSPECTS OF ADAPTATION TO ACQUIS EU

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The article examines non-entrepreneurial organizations through the lens of public interest ideas as a global goal for their creation, as well as the possibility of pursuing private interest without the purpose of profit. First and foremost, the right to freedom of association is a prerequisite for creating associations. The acquis communautaire, including, but not limited to, EU legislation, adopted in the framework of the European Community, Common Foreign and Security Policy and Cooperation, is in the process of being unified and harmonized. in Justice and Home Affairs. The benchmark for national legal regulation is the case law of the European Court of Human Rights on the criteria for securing the right to freedom of association and property rights, as well as regulating the legal status of supranational organizations (EEIG, SCE and prospective FE, AE).

Key words: non-entrepreneurial society, foundation, freedom of association, acquis communautaire, supranational organizations.

John D. Lewis has analysed Otto von Gierke Genossenschafstheorie[1] and come down the conclusion that the need for association of persons arose as a result of the natural personality peculiarities. In particular, the most egocentric, isolated person is more fiction than a legal person within the meaning of *persona ficta*. Thus, a person as a member is born in a family, race, community, in the end, a member of the whole, but his relationship in the united groups gives him the opportunity to fully develop [9, p. 60].

In English law non-entrepreneurial organizations appeared in the Middle Ages as: 1) corporation persons in the partnership; 2) unincorporated associations; 3) trusts. They all fall under the *ultra vires* principle – legal capacity was limited to the purpose of creation, which is reflected in the constituent documents. In France, according to Le Chapelier Law, 1791, arose associations and guilds as a result of the anti-corporate spirit of the French Revolution. Separately, the prohibition of informal organizations, which

[1] Genossenschafstheorie can not be translated experimentally, for example, as the theory of association , the theory of co-operation, or the theory of society, as a result, in the legal literature it is used without translation

numbered more than 10 members (according to Code Pénal, 1810). 16.10.1830 the Decree of the Belgian government granted the right to associate citizens with political, religious, philosophical, literary, industrial or commercial goals. Freedom of association was proclaimed with the limited agreement capacity and ownership. Later, in accordance with certain types of legal entities, in particular, mutual benefit societies (Decree of 11.06.1874) and trade unions (Decree of 31.03.1989) acquired full legal personality, and according to the Decree of June 27, 1921 all non-profit organizations as legal entities. The so-called "German" group of states from ancient times recognized guilds, leagues, communes and fraternities that freely existed in accordance with the traditions of Roman law. So, in view of it influence, was supported the concept of capable organizations – universitas[1], and non-capable – societas[2]. Like the German states in Italy, there was the freedom to establish non-profit organizations in accordance with the constitutional law of the Kingdom of Italy, based on Piedmont Statute, 1848. Legal personality was initially received by religious organizations in accordance with Decree of 07.07.1866 No. 3036, but regulation of non-commercial entities in the Civil Code of 1865 (similar to France) did not receive [12, p. 17–22].

Foundations have passed somewhat different way. According to James Allen Smith and Karsten Borgman modern understanding of the foundation corresponds to such European institutions as endowment, trust, fondacion, fundacao, fonds, Stiftung, stichting, stiftelse, saatio, that they all have in common that allows them to be combined into one legal phenomenon [8, p. 2]. Researchers are convinced that the prerequisite for the establishment of these institutions was the foundations of European philanthropy, in particular the creation of hospitals, monasteries, municipal alumni funds, guilds, universities, etc.

So, they conclude that foundations during the development did not have a firm understanding of the legal entity, undergone changes in philanthropic motives, tasks and strategies, and were subjected to political and social influence. Therefore, the following periods of development of institutions can be outlined:

1) *ancient period* in which vivid examples of foundations were the Academy of Plato, the school of Epicurus or the Alexandria Library of Ptolemy. An example of modern foundations can be considered *xenones* or *xenodochia*;

2) *medieval period* is inherent in the ideology of charity and the Christian commitment to sacrifice, which gradually began to enter to the legal doctrine. Medieval foundations were *caritas*. In addition, the theory of natural joint ownership and state (public) support was its origin. Illustrative is the creation in the twelfth century of a new form of institutions – hospitals. Thus, in Paris there were more than 60 of them, in Florence - more than 30, and in Ghent - about 20;

3) during *the period of reforms and the early modern era* as a result of socio-political changes, the sphere of philanthropy was transferred to public institutions. An example is the Statute of Charitable Uses (1601) of Henry VIII for creations of charitable foundations in all cities of that time in England. In addition, in the eighteenth century, new forms were born – endowments and trusts; about half of them supported poor people. It should be noted that the English legal doctrine did not pay much attention to the legal person as a form of existence of these relations, the greater aspect relied precisely on their content [1, p. 72–73];

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[1] ūniuersitās – Latin: collective creation or property, corporate organization people (community). See: Oxford Latin Dictionary. Edited by *P. G. W. Glare*. Oxford. The Clarendon Press. 1982. P. 2094.

[2] societas – Latin: fact or condition of existences tion association for Achievements spare some goals partnership; a group of people combined with one goal. See: Oxford Latin Dictionary. Edited by *P. G. W. Glare*. Oxford. The Clarendon Press. 1982. P. 1778.

4) *period of distinction in national regulation diverse* was marked by the preconditions for the emergence of foundations. Thus, France began to dominate the concept of the role of the state; in Spain in accordance with the Decree of Carlos IV the alienation of real estate belonging to hospitals and charitable institutions took place; States of the "Norwegian" group (Denmark and Sweden) have justified charity as one of the functions of the state in order to expand the role of the public sector in the public life of its subjects, or (Norway) has passed the care of education or charity to local authorities as representatives of the crown. In Germany, on the contrary, this sphere of public life remained private, in particular, there was a certain drop in capital from business to the third sector[1]. In addition, after the First World War there was a certain incorporatizations of foundations under confessional and ideological umbrella organizations, so-called "welfare federations» (Wohlfahrtsverbände). Greece having ancient philanthropic traditions, was characterized by a lack of independence from state control of foundations, in contrast to the sharp disagreement between the church and the state or private and public sectors [8, p. 3–29].

According to Cristiana Cicoria, the importance of the so-called "third sector" caused by the importance of the development of civil society, democratization and European cohesion, strengthening the development of economic prosperity through the rapid advancement of goods and services of social value [4, p. 13]. In this regard, knowledge of non-entrepreneurial organizations should take place through the prism of ideas of public interest as a global goal of their creation, as well as the possibility of realizing private interest without the purpose of profit.

First of all, it concerns the right to freedom of association as a precondition for the creation of associations. This right is stipulated in Part 1 of Art. 20 of the General Declaration of Human Rights, in particular on the right to freedom of peaceful assembly and association, and also in Part 1 of Art. 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which provides that everyone has the right to freedom of peaceful assembly and freedom of association with others, including the right to form and join trade unions in order to protect their interests. In the general sense, this right may be limited only in the context of public order, in particular national or public security, crime prevention, public health or public morals, the protection of the rights and freedoms of others [14, p. 9].

Somewhat different goal is pursued by the founders of private foundations. According to their historical development, the social precondition for their creation is the realization of philanthropic tasks. From a legal point of view, it is a question of the need to allocate certain property to a newly formed legal entity for the purpose of engaging in civil relations. Therefore, the substrate of creation is the union (or allocation) of the property. At the same time, achievement of the set goal should be ensured not by the activities of founders, but by third parties. Founders in the overwhelming majority have patronage in accordance with the purpose of establishing or implementing the principles of social responsibility of business [6, p. 20].

The doctrine of the Soviet period's lawyers about the essence of the legal entity covered ideas to analyse and determine the place among the participants in the legal relations of state organizations. It is about the theory of trust, state

[1] An example of this is the creation of the Carl Zeiss Stiftung , created in 1889 by allocating a share of Carl Zeiss AG and Schott AG.

body, personification of the state through its established legal entities, as well as the theory of administration, director, staff and others [18, p. 168–171].

The selection of an legal person is caused by a practical necessity, which is expressed in the following functions of this institution: 1) registration of collective interests; 2) capital pool; 3) reduction of entrepreneurial risk; 4) capital management [16, p. 111–112].

In the end, in order to distinguish between individual interests and the goals of the parties to legal relations, the absence of the institution of a legal entity will lead to chaotic civilian turnover. Recognizing the legal personality of legal entity, the state provides to all participants in the legal relations of a specifically specified counterparty – a person who has his own, different from the founders of law and duties (one of the first world legal positions in this regard is the decision Chamber of Lords in the case of Salomon v. A Salomon & Co. Ltd, 1897). At the same time, the term "corporation" and "legal entity" are used in accordance with different legal systems, but in general, the possibility of identifying a group of persons with legal personality [1, p. 99].

A legal entity in European law has long been regarded as a legal person. The most commonly used term is a *company*, which is understood as an association of persons who have united together for the purpose of joint activity, commerce or other purpose and is endowed with personality, in contrast to the contractual form of a civil partnership [5, p. 7, 11].

Speaking about the theory of legal entities, it should be understood that despite all the colourfulness and chaos of the field of civilist literature devoted to this problem, they all agree on the recognition that a legal entity is an independent phenomenon, separated of the other and is a new point of assignment of rights and responsibilities [17, p. 31]. To ensure the functioning of the economic system, civil law operates the notion of "person", which embeds the features that make it obviously personalize it among others. Such a mechanism of participation in civil relations is foreseen also for public entities (state, territorial community), which have no features of subjective concretization.

The essence of the legal entity is that it is a legal person, created by a synthetic way: the allocation of a certain part of the legal qualities, properties, and other elements of the legal personality of a person (not connected with his private, "physical" existence) and their further unification in a new form (within the legal form) for the purpose of the most complete realization of social and legal interests [15, p. 79].

Activities of non-entrepreneurial societies may be directed towards the realization of personal (own) rights and interests of the members (participants) or to achieve a socially useful goal, which can be determined by defining a group of persons on an appropriate basis (age, religion, politics, etc.) or by distinguishing a particular sphere of public life (environmental protection, public order, etc.) [19, p. 84–86]. Such social interest is connected with public interests, however, it should be understood that a state or a territorial community cannot ensure the realization of all social interests. As a result, along with the development of the "third sector" privatization of public life began [13, p. 30].

Summing up, we consider it expedient to express the following positions: firstly, the legal entity is a participant in civil relations and is given a legal individuality, which is expressed in the granting of its civil legal personality; secondly, the construction of a legal entity ensures the separation of another subject of legal relations, therefore, it has application both at the level of general theoretical research, and within certain branches of law, as a result of which there is a sectoral legal personality; thirdly, the legal nature of a legal entity consists in

the legally established structure of the existence of a social organization, which is formed as a result of socio-economic formations in the state, and is given the opportunity, on its own behalf, to act as a participant in legal relations.

In the legal literature there are division of goals of a non-entrepreneurial organization, including featuring their common understanding of investment, which is typical for businesses. For non-entrepreneurial organization, there is characteristic of acquiring certain functions of the state as opposed to social responsibility theories characteristic of entrepreneurship. As a result, non-entrepreneurial organizations have so-called "self-interest" that allows them to adapt to any purpose as "ideal" organizations (for example, *Idealverein* or *economic / idealistic Wirtschaftlicheverein* – in Germany) or not to distribute profits until the organization collects and does not centralize profits (for example, France). Thus, the general provisions remain: a) prohibition of distribution of profits between participants; b) in the case of profit he accumulated in the organization [12, p. 5–9].

Separate regulation was carried out for foundations and trusts. Thus, in general, the European tendencies towards the mentioned organizations were: the possibility of creating an *inter vivos* (selection or transition to a third person in life) or through a will; providing characteristics of the personality of the property (i.e. allocation of a certain fund); outline of the natural fiduciary property administrator; implementation of the concept *persona ficta*, and then the concept of a legal entity, according to the proposal of Pope Innocent IV (real name – Sinibaldo dei Fieschi), not just for organizations based as *collegia*, but also for foundations [12, p. 77–78].

The need for third-sector organizations to engage in civilian relations has given them such features as: 1) the outline of a formalized structure; 2) self-governance and the absence of direct public influence on them; 3) in accordance with the economic nature of the prohibition of the distribution of profits, which provides, even in the case of profit organization, it is not distributed between the founders or management bodies in the form of high wages; 4) the management does not involve self-interested managers as they strive for personal profit according to the organization; 5) they are not subject to reporting or control of potential investors; 6) they pursue a socially useful function, focusing on complementing the public's needs in public (social) goods and services [12, p. 13].

Nowadays, in connection with the processes of unification and harmonization of the special gaining acquis communautaire, which includes, but is not limited to, EU legislation adopted within the framework of the European Community, the Common Foreign and Security Policy and the Commonwealth of Justice and Home Affairs. The current EU acquis covers *primary legislation*: 1) Lisbon Treaty (TFEU); 2) The Treaty of Nice (TEU); 3) Amsterdam Treaty; 4) Maastricht Treaty; 5) Single European Act; 6) Roman treaties; and *secondary legislation*: directive; regulations; decision; recommendation or conclusion; source of law in the form of an international agreement; the general principle of the right of the European Community; decision of the European Court; joint strategy; joint actions; common position; decision; general position or principle.

The basis for regulating the relations of participation in non-entrepreneurial societies and foundations in Europe is the ECHR (the Convention for the Protection of Human Rights and Fundamental Freedoms), in particular the right to freedom of assembly and association, stipulated in Art. 11. Considering the content of this article and dealing with two different rights:

1) the right of association, including in respect of trade unions; and 2) the right to freedom of peaceful assembly. The concept of association in Article 11 of the ECHR is autonomous. Association membership is not defined by the laws of the Member States for the purpose of a broad understanding of this article. Therefore, the European Court defines the conformity of a certain type of association organization [2, p. 13].

The analysis of judicial practice of the European Court of Human Rights provides an opportunity to determine the following criteria for ensuring the right to freedom of association: 1) legislative prediction as a realization of an objective understanding of a democratic rule of law with comprehensible and publicly accessible norms regarding restrictions on the organization; 2) the limitation of the grounds for the prohibition of creation, that is, only in relation to the circumstances envisaged by the ECHR; 3) the need for a democratic society; 3) lack of discrimination [2, p. 17–22].

The ECHR provides for freedom of association only, that is, citizens should have the opportunity to form a legal entity in order to act collectively in the field of mutual interest. At the same time, there is no provision for the possibility of establishing of foundations. Thus, the freedom to create, to provide funds and to join a foundation is understood in the context of freedom to use the property guaranteed by Art. 1 of the First Protocol and includes the right to determine the place of property without proper state interference. The European Court of Human Rights has established that the restriction of freedom to provide money for a particular purpose is a restriction on freedom of expression (*Bowman v. The United Kingdom*). Thus, the institution is seen as a driving force that allows citizens and their organizations to enjoy freedom of expression and, possibly, other fundamental rights, and the laws of the Member States should also include the right to create non-membership types of voluntary organizations (foundations) [2, p. 23–28].

The difference in the understanding of the institution from the association is that the founders of the foundation, in addition to declaring their goal for the establishment of an organization, should also provide the following features: 1) to allocate the target property (endowment); 2) determine the purpose; 3) to stipulate in the statute the order of management; 4) appoint the first administration. Usually it is a question of the non-membership legal nature of foundation, which raises the question of funding such an organization that will not have membership fees or other types of payments. That is why there is a need to allocate certain property, especially when it comes to a permanent establishment. However, in the absence of the foundation's founding authority, the procedure for the compulsory alienation of the property of an institution in favour of public entities (for example, a territorial community) may be used to realize the purpose of the activity of such an foundation, which is the implementation of *cy-pres doctrine*[1], which originated in the UK [6, p. 26–27].

A rather important act in the area under study is European Convention is the Recognition of the Legal personality of International Non-Governmental Organizations (EST No 124), which according to Art. 1 may apply to associations, foundations and other private institutions that meet the following conditions: a) have a non-profit-making aim of international utility; b) have been established by an instrument governed by the internal law of a Party; c) carry on their activities with effect in at least two States; d) have their statutory office

[1] The doctrine provides that when such a trust has failed because its purposes are either impossible or cannot be fulfilled, the High Court of Justice or Charity Commission can make an order redirecting the trust's funds to the nearest possible purpose.

in the territory of a Party and the central management and control in the territory of that Party or of another Party.

Particular attention should be paid to the discussion aspects related to the adoption of this Convention. It is noted that the purpose of the Convention is the implementation of the provisions of Art. 11 ECHR, as a result of which the establishment of international associations should be applied in accordance with the law of the country in which it is established, prior to the establishment of international non-governmental organizations; on institutions should apply the same principles stipulated in the sense *mutatis mutandis* (edited), because of their special legal nature; the legal personality of the organization should concern not only the state recognition, but also the necessary activities of the organization itself in terms of the law (reporting, tax regimes, etc.), including the ethics of the organization [11, p. 117–118].

The principle of freedom of establishment (foundation) of a legal entity (first introduced in the Single European Act, 1987) covers the concept of "company" and "firm", which include organizations created in accordance with civil or commercial law, including cooperative associations or other private or public law entities, with the exception of those who are not profitable (Article 54 TFEU). In addition, the rules of the contractual part provided for the principles of cooperation with charitable organizations (23 Declaration of the Maastricht Treaty, 1992), the inviolability of religious and non-confessional or philosophical organizations, as well as interaction with sports associations (Articles 11, 29 of the Amsterdam Treaty, 1997).

Definition of the notions and the essence of non-entrepreneurial organizations came to Europe from the US as a result of the research of the category "non-profit organization", because the named entities were not considered fully as market participants. The TEC uses the phrase "non-profit making" (Article 48 (2)) to distinguish between legal entities in the form of companies and firms stipulated in article 43 of the TEC, which again does not understand the meaning of such a definition: to distinguish between non-profit activities or non-profit entities according to a report by Fontaine "Report on Non-Profit Associations in the European Community» (1988), they are defined as organizations within a permanent structure permitted by law, coordinating their efforts in pursuit of a common goal without any intention to profit members of the association. Thus, their features can be reduced to the following: 1) have a permanent structure; 2) distribute altruistic goals; 3) have members who do not distribute profits among themselves [4, p. 129–130].

All in all, these organizations, along with foundations, form the "third sector» or civil society. Therefore, regulation can be carried out indirectly through the establishment of appropriate rules for certain types of activities. Thus, such activities include culture and recreation, education and research, health, social services, environmental protection, housing development, protection of law, philanthropy, professional activities. By contrast, a separate activity may not have the features of a «third sector», such as a religious congregation, political parties, cooperatives, etc. [10, p. 48–49].

The EU acquis of companies (hereinafter referred to as "company law») or European Company Law was formed with the aim of wider and more functional transition to harmonization of law not only in order to unify the rights of EU member states regulating relations on the establishment and operation of organizations (in including the capital market relations), but also, based on economic theory, to develop regulatory principles to avoid gaps in law and legislation.

In general, the company law consists of two levels: the company law formed at the EU level and the company law in accordance with national legislation. Consequently, the EU law is formed from the main part (Treaty Law), where the form of fundamental freedom, namely freedom of creation (Articles 49, 54), takes the first place: form and structural changes; freedom of movement of capital (Article 63). However, there is the problem of obstructing the application of these two principles by national legislation, and therefore they have a potentially deregulating effect on national legislation. EU secondary law (Legislation) consists of directives that ensure the harmonization of national law (without the intention of full its unification). In addition, there are also General Principles of the Little Importance that are not directed (unlike European contract law) to universal unification [7, p. 13–15].

Company law directives apply to business entities, as the definitions refer to organizations whose responsibilities are limited to shares or shares. However, their significance for non-entrepreneurial associations and foundations is part of the general understanding of the development of company law and the regulation of the legal personality of legal entities as a whole. For example, certain guidelines may provide the Seventh Company Reporting Directive or the Eleventh Regarding Disclosure.

Freedom of association may concern not only the association of individuals, but also legal entities. In view of this, it is necessary to distinguish between non-entrepreneurial and business legal entities in the EU, in accordance with the Draft of Ninth Company Law Directive. The mentioned act has not yet been found with due support since the nature of the groups of companies varies in the member states of the EU. In particular, it can only be about protecting the rights of participants, equality of participation or the competence of such a group. As a result, the position prevails that the existing form of the European Society (SE) is sufficient [3, p. 307].

The final element analysis acquis EU to non-entrepreneurial associations and foundations is to regulate the legal status of supranational organizations with non-entrepreneurial nature, including already existing European Economic Interest Grouping – EEIG and European Cooperative Society – SCE, as well as the proposed European Foundation – FE and European Association (AE).

Today, according to paragraph 15 of the EU Strategic Framework and EU Action Plan, the development of the right to freedom of association, in particular, in labour relations, as one of the four universal standards of labour law, continues. In addition, the development of relations in non-entrepreneurial societies and foundations occurs indirectly through the interaction of EU institutions with civil society within the framework of the development of agricultural co-operation, consumer protection (ECC-net, European consumer centres network), development of culture and education (Pan European Federation, Cosme, Horizon 2020), trade union activity, health care, volunteering, etc.

Consequently, contractual regulation in the EU does not directly determine the status of non-entrepreneurial societies or foundations or relations in these entities. These are the general principles of freedom of creation (association), as well as the indirect regulation of relations with non-entrepreneurial spheres of functioning of the EU (health care, sports, religious activities, etc.). The practice of the European Court of Human Rights regarding the criteria for ensuring the right to freedom of association and property rights, as well as the regulation of the legal status of supranational organizations (EEIG, SCE and prospective FE, AE) serves as a benchmark for national legal regulation.

REFERENCES:

1. *Alexander Nékám* The Personality Conception of Legal Entity. Cambridge. Massachusetts. Harvard University Press. 1938.
2. Civil Society in Europe. Minimum Norms and Optimum Conditions of Its Regulation *Tymen J. Van der Ploeg, Wino J. M. Van Veen, Cornelia R. M.* Versteeghp. Cambridge University Press. 2017.
3. Company Law in the New Europe. The EU Acquis, Comparative Methodology and Model Law. *Janet Dine, Marios Koutsias, Michael Blecher*. Cheltenham, UK. Edward Elgar.
4. *Cristiana Cicoria* Nonprofit Organizations Facing Competition. The Application of United States, European and German Competition Law to Not-for-Profit Entities. Frankfurt am Main. Peter Lang GmbH Europäischer Verlag der Wissenschaften. 2006.
5. European Corporate Law *Adrian Dorrensteijn, Ina Kuiper, Geoffrey Morse Fritzes*. Stockholm.1995.
6. *Frits Hondius* The Law Governing Foundations and Similar Bodies // Associations and foundations. Multilateral meeting organized by the Council of Europe. Strasbourg, 27–29 November 1996.
7. *Grundmann Stefan*, European Company Law. Organization, Finance and Capital Markets. 2nd edition. Cambridge – Antwerp – Portland. Intersentia, 2012.
8. *James Allen Smith, Karsten Borgmann* Foundations in Europe: The Historical Context // Foundations in Europe. The Directory of Social Change. London. 2001
9. *John D. Lewis* The Genossenschaft-Theory of Otto von Gierke. A study in Political Thought. Madison. 1935.
10. *Klaus Neuhoff* Economic activities // Associations and foundations. Multilateral meeting organised by the Council of Europe. Strasbourg, 27–29 November 1996. Council of Europe Publishing.
11. *Marie-Odile Wiederkehr* European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations) (EST No. 124) // Associations and foundations. Multilateral meeting organised by the Counsil of Europe. Strasbourg, 27–29 November 1996. Council of Europe Publishing.
12. *Piero Verrucoli* Non-Profit Organizations (a comparative approach). Milano: Dott. A. Ginffré Editore, 1985.
13. *Savas, Emanuel S.* Privatization: the way to better government. Chatham House Publishers, Inc. Chatham. New Jersey. 1987.
14. T*ymen J. van der Ploeg* The Law Governing Associations // Associations and foundations. Multilateral meeting organized by the Council of Europe. Strasbourg, 27–29 November 1996.
15. *Архипов С. И.* Сущность юридического лица // Известия высших учебных заведений. Правоведение. 2004. № 5.
16. Гражданское право. Учебник. Часть I. Издание второе, переработанное и дополненное. / Под ред. *А. П. Сергеева, Ю. К. Толстого*. М.: «ПРОСПЕКТ», 1997.
17. *Ельяшевич В. Б.* Избранные труды о юридических лицах, объектах гражданских правоотношений и организации их оборота. В 2 т. Т. 1. М.: Статут, 2007.
18. *Козлова Н. В. П*онятие и сущность юридического лица. Очерк истории и теории: Учебное пособие. М.: «Статут», 2003.
19. *Кочин В. В.* Місце непідприємницьких товариств, що мають на меті реалізацію суспільних інтересів, у системі юридичних осіб // Юридичні особи публічного права: участь у цивільному обороті (Матвєєвські цивілістичні читання). Матеріали міжнародної науково-практичної конференції, Київ, 8 листопада 2016 року. К.: ТОВ «Білоцерківдрук», 2016.

ЦИВІЛЬНІ ВІДНОСИНИ У НЕПІДПРИЄМНИЦЬКИХ ТОВАРИСТВАХ ТА УСТАНОВАХ: СУЧАСНИЙ СТАН РЕГУЛЮВАННЯ ТА ПЕРСПЕКТИВИ АДАПТАЦІЇ ДО ACQUIS ЄС

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Ключові слова: непідприємницьке товариство, установа, свобода об'єднання, acquis communautaire, наднаціональні організації.

Стаття розглядає непідприємницькі організації через призму ідей суспільного інтересу як глобальної мети їх створення, а також можливості реалізації приватного інтересу без мети отримання прибутку. В першу чергу йдеться про право на свободу об'єднання як передумову створення асоціацій. Це право передбачено ч. 1 ст. 20 Загальної декларації прав людини, зокрема щодо права на свободу мирних зборів і асоціацій, а також у ч. 1 ст. 11 Конвенції про захист прав людини і основоположних свобод. Дещо іншу мету переслідують засновники приватних установ. Відповідно до їх історичного розвитку соціальною передумовою їх створення є реалізація філантропічних завдань. З юридичної точки зору йдеться про необхідність виділення певного майна новоствореній юридичній особі з метою участі у цивільних відносинах. Тому субстратом створення є об'єднання (або виділення) майна. Юридична особа у європейському праві досить давно розглядається як правосуб'єктна організація. Нині у зв'язку із процесами уніфікації та гармонізації особливої набирає acquis communautaire (acquis) («доробок спільноти»), що включає акти законодавства ЄС (але не обмежується ними), прийняті в рамках Європейського співтовариства, Спільної зовнішньої політики та політики безпеки і Співпраці у сфері юстиції та внутрішніх справ. Доки переважає позиція, що існуючої форми європейського товариства (SE) є достатньо. Останнім елементом аналізу acquis ЄС щодо непідприємницьких товариств та установ є регулювання правових статусів наднаціональних організацій, що мають непідприємницьку природу, зокрема вже існуючі європейські об'єднання економічних інтересів (European Economic Interest Grouping – EEIG) та європейські кооперативні товариства (European Cooperative Society – SCE), а також пропоновані європейська установа (European Foundation – FE) та європейська асоціація (AE). Договірне регулювання в ЄС безпосередньо не визначає статусу непідприємницьких товариств чи установ, або відносин у цих товариствах та установах. Йдеться про загальні принципи свободи створення (асоціації), а також опосередковане регулювання відносин щодо непідприємницьких сфер функціонування ЄС (охорона здоров'я, спорт, релігійна діяльність тощо). Орієнтиром для національного правового регулювання слугує практика Європейського суду з прав людини щодо критеріїв забезпечення права на свободу асоціації та права власності, а також регулювання правових статусів наднаціональних організацій (EEIG, SCE та перспективних FE, AE).