

SOME ISSUES CONCERNING UNIFICATION AND HARMONIZATION OF EUROPEAN FOUNDATION LAW

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Abstract

The European Union needs unified legislation regulating private juridical relations in the fields of property rights, contracts, torts and status of legal entities (companies and non-profitable organizations) etc. all over Europe. However it is still complicated to harmonize and unify law of inheritance and family law, as these spheres are not connected with the internal market and Member States have their particular traditions in this field. As we know, according to the Article 95 of the EC Treaty, the approximation of the provisions laid down by law should have as their object the establishment and functioning of internal market.

European Civil Code lacks in sound foundation and sufficient grounds. Therefore the codification appears to be premature whereas the unification of single institutes of private law seems to be reasonable and timely. In particular, must be unified the institute of foundations and rules governing their activities.

The European foundation sector is a major economic force and makes significant contributions to the public good of Europe. If we refer to the foundation law of EU countries, as long as there are no suitable directives or decisions aimed at harmonizing of standards concerning the foundations (a project of European Foundation Statute has not been adopted yet), there are less relevant discrepancies. European Foundation Statute would provide further benefits to the foundation sector. It would help to clarify terms and the concept of foundations as organizations with their own resources and independent governance. It would also help to develop a common definition of “public benefit purpose” foundations, as currently the term “foundation” is much too loosely used. But now within the EU each Member State has a slightly different understanding of what foundations are.

There are legal barriers to cross-border activities of foundations of the Member States both in civil law and in tax law. As in company law, most of the barriers can be overcome, but this leads to compliance costs which will often be higher than they would be in company law, given that the legal and personal environments vary (foundation and tax laws of the Member States seem to have more legal uncertainties inter alia because of much less case law and fewer specialized lawyers, and because board members of foundations may be less experienced in legal issues).

A European Foundation Statute will become a law, which would do much to overcome the barriers which impede foundations’ cross-border activities. The Statute would have the effect of unleashing foundations’ potential economic impact on public-good activities.

Key words: Foundations, European Foundation Statute, economic activities, cross-border activities of foundations, Civil law.

Introduction

In last few decades the question of the possible harmonization and unification of European private law was particularly actual and controversial, as well as the question of how to implement them. This process goes slowly, but steadily, however the discussion about the degree of unification of private law rules, which must be achieved in the EU, is continuing. Harmonization is a policy of the European Community to achieve uniformity in laws of Member States to facilitate free trade and protect citizens. Harmonization is an important concept now in the European Union for creating common standards across the internal market in accordance with EC Treaty. Attention should be paid to the fact that the unification as a special case of harmonization is not possible to execute in the same degree to all the institutions of private law. One of the basic institutions of civil law is the institution of a legal entity, which was subjected to harmonize, but the question of the European Foundation Statute is still opened. Certain aspects of the topic were discussed in the scientific papers and articles of Christian von Bar, Jan M.

Smits, Anastasia Vezyrtzi, Jürgen Basedow, Mauro Bussani, Angelika Fuchs and other famous scientist in the field of civil law.

In Ukraine the problems of unification and harmonization of the European Private Law have been analyzed in civil literature, in particular, in the scientific works of Anatoliy Dovgert, Ruslan Stefanchuk etc. However, today a huge number of issues related to the development of unified rules of the European private law and European foundation law, had left unresolved.

In consideration of the above mentioned, there is a need to analyze the social relations that arise in connection with the establishment, functioning and regulation of institutions, which have determined the choice of the theme of this article.

Scientific problem: The development of European Foundation Statute as a separate act or part of the future European Civil Code should lead to the unification of the understanding of foundations, their legal status as a legal personality, the consolidation of a unified concept of “public purpose”, and, most importantly, to the relief of cross-border

activities, as well as to the reduction of the costs for cross-border activities. However, it is still uncertain what should be in the European Foundation Statute.

Object of this article – the process of the harmonization and unification of the private law, and particularly foundation law, in European Union members.

Aim of this article. The aim of this article is to study the theoretical aspects of harmonization and unification of the private law across the Member States, and particularly their foundation laws, and expose the necessity to find the best way to unify rules about foundations in EU, the formulation of the theoretical conclusions and practical recommendations aimed at ensuring the optimization of activity of the foundations.

The realization of the mentioned objectives of this study determinate the formulation and solution of the following main **tasks of this article**:

- To present the historical development of harmonization process of private law in EU Member states;
- To expose the problems and issues of European law on foundations.
- To uncover the importance of the European foundation statute.

Research methods: During the study were applied scientific and special techniques that allowed us to study legal phenomenon in the unity of social content and legal form. In the study were used techniques such as dialectical, historical, comparative-legal, logical-semantic, dogmatic-legal, formal and legal, method of complex analysis and other methods.

Private Law of European Union: possible degree of the harmonization

Before considering the particular regulation of foundations in Member States it is very important to pay attention to the whole process of the unification within the EU, its stages and the results that were achieved input harmonization of private standards.

Since 1982, the commission was set up under chairmanship of professor Ole Lando (commission on European contract law). The main task of this commission was the creation of the Principles of European Contract Law, which would be deployed are common to all EU standards and principles, which mediate the contractual relationships. Commission's work lasted more than 10 years and was finished by publication in 1995 the first part of "Principles of European Contract Law", in 1999 and 2003, came the Second and Third parts of this work. Processes with respect to convergence of legal systems of EU countries have moved on. The European Parliament in its Resolution of 26 May 1989 (OJC 158 (6/28/1989)) and Resolution of 6 May 1994 (OJC 205 (25/7.1994)), called the legal community to the creation of the European Code of Private Law. Based on these parliamentary resolutions Dutch Ministry of Justice organized a conference in 1997 under the slogan «Towards a European Civil Code». During this conference it became clear that most of the European lawyers favor the idea of forming a pan-European codification of private law that can solve the problem of intensive comparative study, which will be free from the constraints associated with the need to represent national interests. Despite some skeptical comments, the basic response of the overwhelming majority of the participants to the idea of creating a European Civil Code was so positive and constructive that the establishment of a European study

group seemed to offer sufficient prospect of success.

In this context it looks logical the creation of the research team, dedicated to the development of the European Civil Code - Study group on a European Civil Code (SGECC) headed by Dutch scientist Christian von Bar (chairman of the Study Group on a European Civil Code), and a study group on matters of private law (Research group on EC Private law (Acquis Group)). The last group was represented by its speaker, Prof. Gianmaria Ajani, and coordinated by Prof. Hans Schulte-Nölke. These groups presented at the beginning of 2009 Draft Common Frame of Reference (for European Private law)-DCFR: Principles, definitions, and Model Rules of European Private Law. Lawyers working on a project of the Member States united in the Network of Excellence under the auspices of the European Commission under the EU Sixth Framework Programme. The Acquis Group, founded in 2002, currently consists of more than 30 legal scholars from (nearly) all EC Member States and accession candidates who will contribute their research in national teams. As a reaction on activities of EU institutions in the field of European contract law, the Acquis Group targets a systematic arrangement of existing Community law which will help to elucidate the common structures of the emerging Community private law. In order to achieve this, the Acquis Group primarily concentrates upon the existing EC private law which can be discovered within the *acquis communautaire*.

As Christian von Bar says: «But contract law alone is not enough. We have been arguing right from the beginning - and feel reassured by the results right now emerging from a study commissioned to us by the EU-Commission "on property law and non-contractual liability law as they relate to contract law" – that certain areas of private law are so closely connected with contract law that they have to be taken into consideration as well»¹. We should wholly agree with the expressed points of view. Unification must undergo not only the norms of the contract law, but also property law and law of torts, the law of secured transactions indeed.

Unification process continued and continues today. But this process of unification is not touched on all areas of private law. The reason is that family law and law of succession are not only the core of the cultural tradition of each country, but, in addition, it is difficult to find a legal basis for their harmonization, as they are not connected with the internal market.

But the complexity of the unification of individual institutions is not the only obstacle in establishing European Civil Code. The main obstacle is that, in contrast to the nineteenth century codifications which could rely on sources limited in scope and origin, modern legal comparison is both purpose are oriented and pragmatic. Due to the "richness and complexity" of the comparative materials to be taken into consideration, a transnational codification demands evaluation of already existing rules, understanding of the purpose served by each rule and its implementation by the courts, and synthesis and careful transfer to every linguistic framework.

Even in the work of Christian von Bar, we can find a similar view: "As chairman of the Study Group on a European

¹ A Common Frame of Reference for European Private Law - Academic Efforts and Political Realities Christian von Bar .Electronic Journal of Comparative Law, vol. 12.1 (May 2008) // <http://www.ejcl.org/121/art121-27.pdf>.

Civil Code, which is heavily involved in the drafting of the Academic and therefore “Draft” Common Frame of Reference, I should pause for a moment and make one point ‘parenthetically’, and that is that one should not lose any time on the question whether or not all of this is “in reality” about the creation of a European Civil Code. The “reality” is that it does not matter whether one responds to this in the positive or in the negative. It clearly has to be answered in the negative if by a “European Civil Code” we mean a legislative instrument like the Code Napoléon, the Codice civile or the Bürgerliches Gesetzbuch. That is definitely not the idea, not even mine! (My reasons for that, however, would have nothing to do with political or “diplomatic” considerations of any sort; I simply believe that such a major step requires more time and more detailed knowledge about each other’s systems than we possess today)².

There is a more optimistic position regarding the possibility of establishing a European Civil Code as a single pan-European instrument for all countries of EU. As Massimo Bianca says: “Europe needs a single Civil Code, it is unlikely that the target will be reached in a short time. Some continental civil codes are seen not only as a body of rules. They are seen rather as the expression of cultural inheritance, motive of national pride, and means of political influence of the State. Similar considerations may concern the Common Law. That is why it is very difficult for some Member States to give up their juridical tradition and accept to conform their domestic Private Law to a foreign code. These difficulties must not dissuade us from working hard for a European Civil Code and, first of all, for a European Contract Code. Directives can assure only similar rules whereas Europe must try to get not similar, but common rules”³.

In Ukraine, most of the jurist maintains the second position (Anatoliy Dovgert, Ruslan Stefanchuk etc.). Anatoliy Dovgert points out: “In what way out of harmonized national civil laws will appear a law which is new quality in this world? There are two ways: codification and cultivating. The last approach consists of the accumulation of doctrines, and in educating a new generation of comparatives lawyers. This is a long dialogue of legal cultures. The second path, codification, is to create (based on the already achieved level of harmonization) of the World Code of private law. Uniformitarianism of private law on a global scale already exists now in some sectors, such as human rights, or - the basic conditions of supply. The European Code that will be created in the next decade, no doubt, will have planetary significance, and may become the prototype of the World Code of Private Law”.

In our opinion, today it is expedient way to achieve greater uniformity is “cultivation”. Due to the fact that many institutions may not be standardized, and because of different traditions in different countries EU.

Since 1957, the development of the European Union (EU) and its accompanying supranational legislation and jurisprudence have had an intense effect on the formulation of domestic law within the Member States, which now include all major Western European states based on the Continental

legal tradition of single institutes of Private Law, in particular such subjects of the private relation as the foundations. Of particular note is the fact that the EU encompasses countries that do not follow the Continental tradition, so the process of developing supranational legislation that they can all agree on has served to further harmonize the various legal traditions in a number of different areas. But this fact still remains a problem in creating of unified code.

European Foundation Law: current situation and prospects

One of the key institutions of private law, which is subject to unification, is the institute of the foundation. This sector which is developing in recent years is very dynamic. There are currently number of foundations ranges between 90,000 and 110.000 in 27 EU Member States. Lately many Member States decided to reform their foundation laws and tax laws in order to encourage the growth of foundation/charities sector. These reforms have taken place in the last few years, both in civil law countries (Austria, Belgium, Germany, Italy, France etc.) and in the common law countries (England and Wales).

Importance and volume of the sector of foundations determined the emergence of the idea of a European Foundation Statute. This idea was a part of the considerations of the High Level Group of company law experts set up by the European Commission in 2001 to make recommendations on a modern regulatory framework in the EU for company law. According to the final report of the High Level Group, a European Foundation is worth considering but should not take priority in the short or medium term, because it would not be imperative for the conduct of cross-border activities⁴. Later from December 2005 until March 2006 the Directorate-General Internal Market undertook a further “Public consultation on future priorities for the Action Plan on the Modernization of Company Law and Corporate Governance”, which also asked whether it would be considered useful to carry out an examination on the feasibility of a European Foundation Statute. And then in autumn 2007 the consortium (the Max Planck Institute for Comparative and International Private Law in Hamburg and the University of Heidelberg) started its work and finished the study in November 2008. This study showed the need to create a single European Foundation Statute, similar to those Statutes, which govern the Societas Europaea, Societas Cooperativa Europaea, Societas Privata Europaea⁵.

Now within the EU each Member State has a slightly different understanding of what foundations are. Foundations are independent, separately constituted non-profit bodies with their own established and reliable sources of income. They are usually but not exclusively funded by an endowment, and have their own governing boards. They have been given goods, rights, and resources to perform work and provide support for public benefit purposes, either by supporting organizations or individuals or by operating their own programs. They do not have members, but associate private resources for public interest purposes.

But in common law countries (Cyprus, Ireland, Malta

² A Common Frame of Reference for European Private Law - Academic Efforts and Political Realities Christian von Bar. Electronic Journal of Comparative Law, vol. 12.1 (May 2008) // <http://www.ejcl.org/121/art121-27.pdf>

³ Massimo Bianca, Progressive Codification of European Private Law, An Academic Green Paper on European Contract Law, KLI, 2002,p. 133-136.

⁴ Final Report of the High Level Group of Company Law Experts // http://ec.europa.eu/internal_market/company/modern/index_en.htm#background

⁵ This form is currently being proposed by the European Commission to be introduced across the European Union.

and the United Kingdom) legislation distinguishes between “charitable trusts”, “charitable company”, and newly created “charitable incorporated organization”. However, these legal forms only have certain similarities with the features of the public benefit foundations (absence of membership and corporate structures and legal personality. For the matter of that, in the United Kingdom it seems to be common to regard all “charities” as one single category (without a distinction between charitable trust, charitable company and charitable incorporated organization). The legislation of the US unlike the one of common law countries, uses the term “foundation”, although the understanding of which differs significantly from the “foundation” in the civil law country. In the United States, a “foundation” is a sub-category of a tax-exempt “charity” (trust or non-profit corporation) defined by some functional criteria depending on the source of its income. The Internal Revenue Code distinguishes between “private foundations” (usually funded by an individual, family, or corporation) and public charities (other charities that raise money from the general public). Private foundations have more restrictions (e.g., prohibition from controlling affiliated enterprises) and fewer tax benefits than public charities.

In addition to the above mentioned features the European foundations are generally (but not always): are created for an indefinite period, exist under control of public authorities, and should not allow dividing the received profits (donation, gift, inheritance, etc.) between the founders or between the members of foundation executive body.

But the lack of common terminology and understanding of the term “foundation” is not the only reason for European Foundation Statute to be created. There are other civil law barriers in some Member States (e.g., recognition procedures), and in tax law the vast majority of the Member States only grant tax benefits to resident foundations but not to non-resident foundations. In practice, the usual way to overcome the existing tax law barriers seems to be to establish one or more other foundations or non-profit organizations which comply with national laws of the states in which they are to engage in activities.

Undoubtedly the great importance has a practice of European Court of Justice for changes of the foundation laws and tax laws in the Member States. Decision in the Hein Persche case and Judgment in the Stauffer Case have a great importance.

The ECJ released its judgment on 14 September, 2006 in the so called “Stauffer Case” (C386/04). Walter Stauffer is an Italian resident foundation. It derived rental income from German real estate in 1997, which was subject to German corporate tax. Since the German law stipulates that exemption from corporate tax only applies to resident entities, i.e. entities that have their registered office and/or governance structure in Germany, Stauffer decided to bring the case to the Justice and invoked an infringement of the European legislation, namely the freedom of establishment and free movement of capital.

The ECJ ruled that the differential treatment of resident and non-resident charitable foundations constitutes an unjustified breach on the free movement of capital (article 56 of the Treaty) but only where Germany recognizes the charitable status of the Stauffer foundation according to the German Law. Since the referring Court had already recognized the charitable status of Stauffer, the ECJ considered Stauffer to be comparable with

a German charitable foundation. Consequently it decided that the foundation should be exempted from real estate tax in Germany.

The ruling of the ECJ is a significant step for the income tax treatment of non-profit organisations operating in other European countries, since many national legislations do not grant exemptions to foreign organisations operating on their territory.

In the Hein Persche case the ECJ has ruled that tax laws which discriminate against donations to public-benefit organizations based in other EU Member States are against the EC Treaty, as long as the recipient organizations based in other Member States are to be considered “equivalent” to resident public benefit organizations.

In addition to the slow pace of the infringement procedures and ECJ procedures, the main problem again is that they only address the tax issue and do not provide solutions to the administrative and legal barriers that foundations face (for example, the highest barriers exist when a foundation considers transferring or has effectively transferred its seat to another Member State. Member States adhering to the “real seat” doctrine will even require the foundation to dissolve itself in such a case. In the other Member States there are usually no rules which allow such a transfer).

The foundations need positive laws as the courts only fix problems after they occur. ECJ case law may not give sufficient legal certainty to proceed since the ECJ can only interpret the law in specific cases, but not map out the more detailed legal rules that may be necessary for planning and carrying out complicated business transactions.

Conclusions

We are aware that our insight into certain aspects of the perspective of the establishment of common European Civil Code and creating of unified and harmonized regulations on public and private foundations in the EU may be controversial, especially in current conditions. We’ve attempted to analyze different theories and positions concerning feasible ways of improvement of European private law. We realize that there are differences between positions concerning the future of European private law. Therefore, in accordance with the first position the European Civil Code can be possibly created. Even if creation of this act takes “more time and more detailed knowledge about each other’s systems than we possess today”⁶. And the adherents of the second position assert inability of the modern civil law science to generate pan-European Civil Code as obligatory act for all Member States. As we have also indicated, we believe that now “cultivation” is the most expedient way to achieve uniformity in regulation of private relations. This “cultivation” will result unification of particular civil law institutes. And then on the basis of these unified institutes creation of single European Civil Code will be on the cards.

In reference to the foundations which are one of the key institutions of private law it should be mentioned that they have also become the subjects to unification in last decade.

The last studies in this field and practice of the European Court of Justice showed that foundations in the EU need

⁶ A Common Frame of Reference for European Private Law - Academic Efforts and Political Realities Christian von Bar . Electronic Journal of Comparative Law, vol. 12.1 (May 2008) // <http://www.ejcl.org/121/art121-27.pdf>.

to set up common tax and civil regulation which would be nondiscriminatory for residents and non-residents public-purpose and other foundations. In our opinion European Foundation Statute would provide further benefits to the foundation sector. It would help to clarify terms and the concept of foundations as organizations with their own resources and independent governance. It would also help to develop a common definition of “public benefit purpose” foundations, as currently the term “foundation” is much too loosely used. European Foundation Statute can also be called up to eliminate the administrative and legal barriers that foundations face when they transfer their seat to another Member State or in case of providing trans-border activities.

Even if common act - European Civil Code for Member States isn't created, further unification of foundation law would be extremely important for all private spheres of the society.

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