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European Economic Interest Grouping (EEIG): Implementation in Ukraine

I. Introduction

The implementation of the European Economic Interest Grouping (EEIG) in Ukraine is determined by various regulatory acts. The Law of 21 November 2002 “On the Concept of the National Program of Association of Ukraine to the European Union” approved a concept, which provides that the association of Ukraine to the European Union is a gradual adoption and implementation of European regulations and legal acts. Next, the National Program of Association of Ukraine to the European Union, approved by the Law of Ukraine on March 18, 2004, № 1629-IV, provides that the adoption of legislation is a process bringing the laws of Ukraine and other legal acts in line with the *acquis communautaire*. Despite the fact that both concepts have similar names and a common subject, we believe that priority should be given to the latter because, on the one hand, it is confirmed by the law, and on the other hand, it was accepted later. After all, it is not a blind adaptation of the EU legislation, but to the EU *acquis*, in particular, as provided by the Cabinet of Ministers of Ukraine on February 24, 2016, № 160 “On amendments to some acts of the Cabinet of Ministers of Ukraine on the approximation of Ukraine to EU law (EU *acquis*)”.

However, literal adherence to the standards of EU law does not always indicate the possibility of implementing its provisions. Thus, for historical, cultural and civilizational factors form the legal structures. Therefore, we aim to consider the implementation of the EU *acquis* civil relations in the European Economic Interest Grouping (further – EEIG).

II. Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG)

The EEIG is the first supranational legal form, established in the EU by the Council Regulation (EEC) No 2137/85. Whereas a harmonious development of economic activities and a continuous and balanced expansion throughout the Community depend on the establishment and smooth functioning of a common market, offering conditions analogous to those of a national market, and whereas to bring about this single market and to increase its unity a legal framework which facilitates the adaptation of their activities to the economic conditions of the Community should be created for natural persons, companies, firms and other legal bodies in particular; so whereas to that end it is necessary that those natural persons, companies, firms and other legal bodies should be able to co-operate effectively across frontiers.

Grouping fundamentally differs from the society for its purpose, which is only in the promotion or development of economic activities of its members by providing them with opportunities to improve their own results, and the terms of such an additional character, the grouping's activities must be related to economic activities of its members but not replace it, because the concept of economic activity must be interpreted in the broadest sense.

According to Art. 3 of Council Regulation (EEC) No 2137/85 the purpose of a grouping shall be to facilitate or develop the economic activities of its members and to improve or increase the results of those activities; its purpose is not to make profits for

itself. Its activity shall be related to the economic activities of its members and must not be more than ancillary to those activities.

This status provides EEIG appropriate restrictions impossibility: a) exercise, directly or indirectly, a power of management or supervision over its members' own activities or over the activities of another undertaking, in particular in the fields of personnel, finance and investment; b) directly or indirectly, on any basis whatsoever, hold shares of any kind in a member undertaking; the holding of shares in another undertaking shall be possible only insofar as it is necessary for the achievement of the grouping's objects and if it is done on its members' behalf; c) employ more than 500 persons; d) be used by a company to make a loan to a director of a company, or any person connected with him, when the making of such loans is restricted or controlled under the Member States' laws governing companies. Nor must a grouping be used for the transfer of any property between a company and a director, or any person connected with him, except to the extent allowed by the Member States' laws governing companies. For the purposes of this provision the making of a loan includes entering into any transaction or arrangement of similar effect, and property includes moveable and immovable property; e) be a member of another European Economic Interest Grouping.

These features make it possible to assert that EEIG is a non-entrepreneurial (non-commercial) society. The formation of non-entrepreneurial (non-commercial) societies as part of the institute of legal entities in Ukraine is marked by a significant influence of public law, which in some cases unnecessarily converts this legal structure for the public-legal sphere. The specificity of the studied organizations is that they are in the so-called "third sector" of society, i. e. between self-governing administrative and economic spheres, resulting in a combination of legal status of public and private interests.

The EEIG uses in its definition the concept of "grouping", which we think is quite appropriate, because it allows a separation from other related concepts. It should be noted that the right to freedom of association is provided by both international and national laws and regulations. Ukrainian legislation uses the term "association" as more appropriate (special), because under it a voluntary union of individuals or organizations towards a common economic, political, cultural or any other purpose is meant. Therefore, we propose to realize freedom of association as one that provides the realization of collective interests in two forms: 1) freedom of peaceful assembly (meeting); 2) freedom of association.

As mentioned above, the EEIG was the first association that provided an opportunity to unite common interests. This process is quite logical, because the non-entrepreneurial (non-commercial) societies appeared before entrepreneurial (commercial) societies. Thus, a legal entity can be formed as a result of two types of phenomena: the term "company" (i. e. a set of people united to achieve a common goal) and "fund" (i. e. a set of assets, the combined permanent appointment to one goal). Contrary to public legal entity in the field of private law were "sodalitates", pursuing cultural objectives, as well as "collegia", i. e. socially useful (burial society) or professional (creative and production corporation) targets¹.

Therefore, the appropriate adjustment was another company that already has a business purpose – *societas Europaea* (Council Regulation (EC) No 2157/2001 of 8 October 2001) or European Cooperative Society (Council Regulation (EC) No 1435/2003 of 22 July 2003).

¹ Чезаре Санфилиппо, Курс римского частного права (*Sanfilippo, The Course of the Roman Private Law*), Moscow 2002, p. 47–49.

III. The principles of creation of the EEIG in Ukraine

Procedures for and protection of grouping interests in Ukraine may vary depending on the purpose pursued by a person. In one case, the right of association can be realized by varying degrees of unstable meetings, demonstrations; and the other – stable organization, including as a legal entity, not to meet the social needs of the mechanism for the centralization of capital (entrepreneurial (commercial) entities) and to protect the interests of certain sectors and populations².

Current Ukrainian legislation, in the absence of a single legal act that would regulate the legal status of non-entrepreneurial (non-commercial) societies, provides a wide range of structures that can be called informal non-entrepreneurial (non-commercial) societies, that are not recognized by the state as legal entities, including: labor groups, amateur theatres, initiative groups (collectives), virtual communities and various partnerships or clubs that are defined as follows.

Some rights of groups that do not find a legal entity can be traced for example in p. 4 of Art. 5 of the Law of Ukraine "On citizens' appeals": an appeal may be filed as a single person (individual appeal), and a group of people (collective) as a form of protection of civil rights of individuals. Thus, individuals have the right of association to implement the specifically identified legitimate interests. This association (group or collective) is kind of a transitional form of a non-entrepreneurial (non-commercial) society, which provides common interest to the association – an organized and personalized grouping.

Spasybo-Fateeva, observing the entrepreneurial (non-commercial) partnership as a civil law phenomenon, indicates that the non-entrepreneurial partnership has some similar features with the entrepreneurial (commercial) society, but there are some important differences: 1) the lack of purpose and profit distribution among its members; 2) the number of members should be at least two; 3) important part of the fees is a common activity; 4) management is carried out regardless of the size of property participation of persons; 5) members have property rights, similar to participants of economic partnerships; 6) the partnership alone is responsible³.

It is necessary to draw a clear distinction between the ways of foundations of such partnerships: the agreement and the establishment of a legal entity. It is very difficult to allocate separate forms of partnerships as society, because it is difficult to determine the base of entry in civil relations of its members of partnership with other participants of civil law, except for two forms (entity, agreement).

On the other hand, the basis of a partnership is an agreement between participants about joint activities, and therefore – a contract. This partnership is also a novelty for a system of entities in foreign law and is derived from the company as an organization. Thus, the German term "Partnerschaftsgesellschaft" has its roots in the concept of "Gesellschaft", which means "society". Therefore, we should agree with the position of *Yeganian* that there is a logical evolution from non-entrepreneurial (non-commercial) partnerships to the legal entity⁴.

² В.І. Борисова, До проблеми сутності юридичної особи (Еволюція цивільного законодавства: проблеми теорії і практики/Матеріали міжнародної науково-практичної конференції) (Borisova, The Problem of the Nature of the Legal Entity (Evolution of Civil Law: Problems of Theory and Practice/International Scientific and Practical Conference)), Kharkiv 2004, p. 124.

³ І. Спасибо-Фатеєва, Цивілістичний погляд на поняття партнерства (Spasybo-Fateeva, Civil View of the Concept of Partnership), Право України (Law of Ukraine) 12|2010, p. 6.

⁴ А. С. Еганян, Некоммерческое партнерство как субъект гражданского права (Yeganian, Non-Commercial Partnership as the Subject of Civil Law), Гражданское право (Civil Law) 2|2008, p. 19.

Council Regulation (EEC) No 2137/85 provides that European Economic Interest Groupings shall be formed upon the terms, in the manner and with the effects laid down in this Regulation. Accordingly, parties intending to form a grouping must conclude a contract which includes: a) the name of the grouping preceded or followed either by the words “European Economic Interest Grouping” or by the initials “EEIG”, unless those words or initials already form part of the name; b) the objects for which the grouping is formed; c) the official address of the grouping; d) the name, business name, legal form, permanent address or registered office, and the number and place of registration, if any, of each member of the grouping; e) the duration of the grouping, except where this is indefinite.

The Ukrainian civil law doctrine has examples of contractual grounds of a legal entity. According to p. 2 of Art. 87 of the Civil Code of Ukraine, constituent documents are approved by the members of the charter or foundation agreement between the parties, unless otherwise provided by law. Thus, the doctrine holds to the position that the contract is valid until the date of registration of the legal entity that applies to the relationship between the founders, who become members upon registration of a legal entity.

IV. Classification of legal entities and place of the EEIG

Legal entities can be classified using different, legally significant criteria (features). Obviously, one feature is not enough to determine the type of a legal entity as a separate independent participant of civil relations. Therefore, we consider it appropriate to use a set of features that will reduce the classification groups: 1) by the order of foundation (p. 2 of Art. 81 Civil Code of Ukraine), which allows to select the type of legal entity: a) a legal entity of private law; b) a legal entity of public law; 2) by the form of foundation (by the order of forming the substrate of the legal entity) (Art. 83 Civil Code of Ukraine), which can provide organizational legal forms of legal entities: a) society (Ukr. товариство); b) foundation (Ukr. установа); 3) by the interest that the founders pursue (e. g., Art. 103 Civil Code of Ukraine, Art. 1 of the Law of Ukraine “On public associations”, etc.), that allow to determine the specific requirements for the establishment, management, operation and termination of a legal entity: a) private benefit; b) public benefit; 4) by the purpose of activity, i. e. the directing of the results of activity of a legal person (Art. 84–85 Civil Code of Ukraine), that allow to determine special conditions for the creation, management and termination of a legal entity: a) entrepreneurial (commercial); b) non-entrepreneurial (non-commercial).

Since the purpose of the grouping is to promote the economic development or activities of its members and to improve or increase the results of such activities, we believe that the EEIG belongs to private benefit non-entrepreneurial societies. Its interest is the foundation of any activity, and it is understood as an element of social relations and activities relevant to the needs of private law, the essence of which is the subject depending on the objects and relationships of natural and social reality, important to ensure normal life.

Thus, we believe that the private benefit of a non-entrepreneurial society is legal entities in the organizational legal form of the society, created exclusively for the satisfaction of the interests of the members (participants) of the society.

According to p. 1 of Art. 1 Civil Code of Ukraine, rights are divided into non-material and material rights, depending on the object. Both rights can be combined. We believe that even if a non-entrepreneurial society is created based on such a combination (i. e., moral and property-related rights), one of these rights is, however, prevalent.

The constitution of Ukraine includes the following list of rights and interests: political, economic, social, cultural and other interests, with the exception of restrictions es-

tablished by law in the interests of national security and public order, public health or the rights and freedoms of others. However, it is necessary to distinguish this list of moral rights, the implementation and protection of which are realized through non-entrepreneurial societies in the form of association.

The term “association” (Ger. Assoziation, Fr. association, Ukr. асоціація) derives from the Latin word “associatio” – accession, adding that today the English version shall be construed as an organized group of people with a common interest or object⁵. However, there is no such term (“association”) in the Civil Code of Ukraine, whereas the Economic (=Commercial) Code of Ukraine construes the term as a legal form of associations of enterprises.

Art. 118 of the Economic (Commercial) Code of Ukraine regulates other forms of legal entities that are similar to the EEIG named in this Code as associations of enterprises (Ukr. об’єднання підприємств), that can provide only confusion in practice. The similarity of these two organizations is that they are created of two or more enterprises to co-ordinate their production, research and other activities to address common economic and social challenges. However, unlike the EEIG, members of this association may only be enterprises. Moreover, the Economic (Commercial) Code of Ukraine provides other forms of associations, such as: 1) association (асоціація) – a contractual union set up for the purpose of permanent co-ordination of business enterprises, united by one or more centralized production and management features of specialization and production co-operation, joint production by combining financial and participants’ financial resources for mainly economic purposes of the members; 2) corporation (корпорація) – a recognized contractual union set up through a combination of industrial, scientific and commercial interests of the enterprises that have teamed up with their delegation of certain powers of the centralized regulation of activity of each member governments to corporations; 3) consortium (консорціум) – a temporary charter union of enterprises to achieve joint economic goals of its participants (implementation of targeted programs, scientific-technical, construction projects, etc.); 4) concern (концерн) – a recognized statutory union of enterprises and other organizations based on their financial dependence on one or a group of union members with centralized functions of scientific, technological and industrial development, investment, finance, foreign trade and other activities.

Consequently, the most appropriate legal form to be adapted to the EEIG in Ukraine is the “association”. Additionally, attention should be paid to the fact that in accordance with Art. 121 of the Economic (Commercial) Code of Ukraine enterprises (companies) – i. e. members of associations of enterprises – retain the status of a legal entity regardless of the legal form of association.

These association members have the right to: a) voluntarily withdraw from the association on terms and in the manner determined by the memorandum about its formation or the charter of the association; b) be a member of other associations of enterprises unless the law, the constituent contract or the charter of the association provides otherwise; c) receive from the enterprise association in the prescribed manner information associated with those businesses; d) receive part of the profits from the activities of the association in accordance with its statute.

⁵ New Webster’s Dictionary and Thesaurus of the English Language, 1993, p. 56.

V. Rights and duties of members of a non-entrepreneurial society

Corporate rights can be characterized depending on the object on which they occur: organizational, proprietary, and moral rights. Therefore, in the following, these groups of corporate rights shall be analysed and compared with the rights of the members of a non-entrepreneurial society.

Organizational corporate rights divided into: 1) the right to join the company and out of it in due course; 2) the right to participate in the general meeting; 3) the right to elect and be elected to the company; 4) the right to participate in managing the company; 5) the right to sole administration of the company⁶.

We consider it appropriate to state that the members of societies, which are based on moral interests, have only organizational rights in it as the basis for the body of persons is moral interests (creative, professional, health, etc.) and the only property relations can be a matter of membership fees as legal fact-state.⁷

Proprietary corporate rights include: 1) the right to receive part of the profits as dividends to the company; 2) the right to receive part of the value of the company in case of liquidation; 3) the right to dispose of the shares (and for other corporations – part of the authorized capital), sell, transfer; 4) the right to bequeath the shares (share) inheritance; 5) the right to purchase additionally issued shares⁸.

Comparing this group of rights with the non-entrepreneurial society, it can be stated that this group of rights is further manifested in societies that implement the property rights of participants (for example, according to the Law of Ukraine “On Condominiums”). Thus, given the relationship of proprietary and organizational members’ rights, the principle “one person – one vote” may not always justify itself, so it is advisable to pay attention to the size of the share in the common property, which is transmitted to the management society, which formed the basis for the amount of votes of the total number of members.

The moral corporate law includes rights such as: 1) the right to obtain information about the company; 2) the right to be informed of the place and time of the general meeting, etc.⁹

The implementation of rights by members in a non-entrepreneurial society is impossible without discharge of their duties, which, taken together, constitute a stable relationship of participation (membership) in the society. Their consolidation is expected mainly in the statutory documents of the legal entity that can be divided as well as corporate rights into proprietary, moral and organizational rights.

Thus, organizational responsibilities include: adherence to the statute of the legal entity; implementation of decisions made by the bodies of the society; the implementation of proprietary obligations related to the implementation of property rights, which can be mainly traced to private benefit societies, which are based on unity property interests. The moral duties of members of a non-entrepreneurial society include the preservation of confidential information about the activities of the legal entity.

⁶ I. B. Саракун, Здійснення корпоративних прав учасниками (засновниками) господарських товариств (цивільно-правовий аспект) (Sarakun, Implementation of Corporate Rights of Members (Shareholders) of Economic Societies (Civil Aspect), Kyiv 2009, p. 29).

⁷ A. H. Соловіов, Право собственности профессиональных союзов Украины (Soloviev, Ownership of Trade Unions of Ukraine), Kharkiv 2002, p. 8.

⁸ Здійснення та захист корпоративних прав в Україні (цивільно-правові аспекти) (Implementation and Protection of Corporate Rights in Ukraine (Civil Aspects), Ternopil 2007, p. 100).

⁹ Саракун (Sarakun), see fn. 6, p. 29.

To avoid possible conflicts that may affect the subjective rights of both the organization and its members, constituent documents must specify: 1) the range of persons who may participate in the conclusion of transactions; 2) the procedure for approval of disputed transactions; 3) the rights and responsibilities of supervisors in case of creation; 4) the responsibility of officials and others.

VI. The consequences of the adaptation of Ukrainian legislation to the EU acquis in relations of intra-organizational relations

The adaptation of legislation can be made by improving the existing legislative norms, including the status of the society as the organisational legal form of an association of enterprises by expanding its subjects, or by introducing a new legal form. We believe that both ways are rational while maintaining the principles of establishment, operation and participation in the EEIG.

Mainly, adaptation concerns norms of Art. 7 of Council Regulation (EEC) No 2137/85: a) order of amendment to the contract for the formation of a grouping; b) order of the setting up or closure of any establishment of the grouping; c) order of the appointment of the manager or managers of a grouping, order of the notification that they may act alone or must act jointly, and the termination of any manager's appointment; d) order of a member's assignment of his participation in a grouping or a proportion thereof; e) order of exempting a new member from the payment of debts and other liabilities which originated prior to his admission.

Due to the fact that the EEIG is the "simplest" form of society (association), the management of such legal entity must be based on the following principle – each member shall have one vote. The contract for the formation of a grouping may, however, give more than one vote to certain members, provided that no one member holds a majority of the votes. A unanimous decision by the members shall be required to: alter the objects of a grouping; alter the number of votes allotted to each member; alter the conditions for the taking of decisions; extend the duration of a grouping beyond any period fixed in the contract for the formation of the grouping; alter the contribution by every member or by some members to the grouping's financing; alter any other obligation of a member, unless otherwise provided by the contract for the formation of the grouping; make any alteration to the contract for the formation of the grouping not covered by this paragraph, unless otherwise provided by that contract.

Separately, it is appropriate to consider adapting the provisions of Art. 21 of Council Regulation (EEC) No 2137/85 on profit distribution. Thus, the profits resulting from a grouping's activities shall be deemed to be the profits of the members and shall be apportioned among them in the proportions laid down in the contract for the formation of the grouping or, in the absence of any such provision, in equal shares. The members of a grouping shall contribute to the payment of the amount by which expenditure exceeds income in the proportions laid down in the contract for the formation of the grouping or, in the absence of any such provision, in equal shares.

Such relations within the organization do not correspond to the nature of the legal status of a non-profit organization that is defined in the Tax Code of Ukraine. Thus, according to the Tax Code of Ukraine, an unprofitable enterprise, foundation and organization (further – the non-profit organization) meets the following requirements: 1) founded and registered in the manner prescribed by law regulating the activities of the non-profit organization (according to list); 2) statutory documents should include banning the distribution of revenues (profits) or of the founders (participants), members of the organization, employees (except their remuneration, accrual single social contribu-

tion), members of management and other related persons; 3) statutory documents should provide for the transfer of assets to one or more non-profit organization or credited to income budget in the event of termination of a legal entity (as a result of its liquidation, merger, division, amalgamation or reorganization), except condominiums and associations of condominiums; 4) included supervisory authority in the Register of non-profit foundations and organizations.

VII. Conclusions

The EEIG is a form of economic co-operation within the European Union. Legal entities registered in Ukraine can build on the experiences of EEIG registered in EU member states. However, today registering an EEIG in Ukraine is very difficult.

Economic co-operation can have entrepreneurial or non-entrepreneurial purposes. The fact that the EEIG may not make profit suggests a non-entrepreneurial nature of the organization. But profits from the activities of the society are considered income that is shared among the members in the amount determined in the agreement on the establishment of the society, or in the absence of such provisions, in equal shares.

However, as discussed above, relations in an EEIG should be considered by national Ukrainian legislation in the same way as relations in a non-entrepreneurial society in the form of an association. Thus, its members should have equal rights to manage the legal entity, and important decisions are taken unanimously.