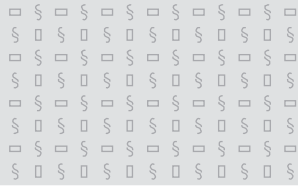




MASARYKOVA UNIVERZITA PRÁVNICKÁ FAKULTA

Legal personality, Legal persons, Trusts and trust- like instruments

Kateřina Ronovská
Faculty of Law, Masaryk University, Brno
The Czech Republic



Structure of the lecture:

Introduction (why?, how? etc.)

Person in legal sense and legal personality

Legal Person

Categorization and Characteristics of types of legal persons (generally)

Trust

Trust like forms

Discussions in 21 st century?



Terminology: „Person in legal sense“, „a legal person“, „a legal entity“

- In order to be eligible to hold/exercise subjective rights (and duties), one must be qualify as a „person“ in legal sense“
- Person in „legal sense“: a natural person or a legal person (germ. Rechtstäger), what else?
- What is and what is not person in „legal sense“?

Legal person (fiction or reality?, nexus of obligations?)

Legal entity (with/without legal personality?)



The Choupette case: „named in his will“

- <https://www.forbes.com/sites/megangorman/2019/02/20/why-one-of-karl-lagerfelds-legacies-might-be-estate-planning-for-your-pet/?sh=45f6041e433a>
- <https://www.thewealthadvisor.com/article/karl-lagerfelds-cat-locked-inheritance-battle>
- Karl Lagerfeld died in 2019, 270 mil. USD
- The seven beneficiaries are trying to access Lagerfeld's assets that include real estate in Paris and Monaco, a bookstore, and designer furniture.
- Choupette is a blue-cream tortie Birman cat who was owned by German fashion designer Karl Lagerfeld from 2011 until Lagerfeld's death in 2019 at the age of 85.



River Whanganui, New Zealand:

- <https://edition.cnn.com/2020/12/11/asia/whanganui-river-new-zealand-intl-hnk-dst/index.html>

River in India:

- <https://edition.cnn.com/2017/03/22/asia/india-river-human/index.html>

River in Bangladesh:

- <https://www.reuters.com/article/us-bangladesh-landrights-rivers-idUSKCN1TZ1ZR>



Legal personality - what is it?

- Legal personality is a eligibility to have a right and duties (f.e. hold property, enter into contracts etc.)
- Easy to accept by natural persons are persons in a legal sense (nature rights), although from a historic perspective not a given fact
- Other „entities“ existed (historically): universitas personarum (state, province, municipia, collegia), universitas rerum/bonorum, church

BUT! the theoretical concept of legal person was unknown till 19th centry!



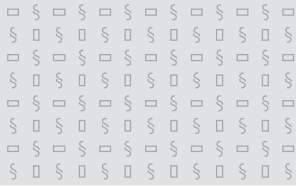
Church law

- pope Gregorius VII - 1075:
 - Church is an autonomous body, governed by its own internal laws, headed by the clergy
- *Persona Ficta*
- Strong influence in continental Europe in the middle ages (Ius Commune)
- First business „corporations“ (1600- East India Trading Company, one of the first joint stock companies)



Different theories and their influence today?

- Savigny: only natural persons have will:
legal persons can exist only as a legal fiction (fiction theory)
- Brinz: legal persons have no will - the assets are owned by the purpose (purpose is legal entity)
- Gierke: corporation have a body and soul, therefore have a will (theory of reality)
- Jehring: The legal person is the instrument for joint entitlement to the assets. Legal personality is a specific form of ownership..
- And many others....



Example no. 1: Switzerland (ZGB 1912, based on theory of reality)

- Eugen Huber: nature and legal persons are treated the same way (with a few exceptions)
- Theories are today in codes or in case law, tool for interpretation
- Numerus clausus of legal persons (protection of third parties)



Examples 2: The Netherlands (based on theory of reality)

- Meijers: Legal persons serve the interests of natural persons, but their interests are not identical. Legal person have an autonomous interest and therefore are recognized by law equally like natural persons (no fiction)
- Scholten: Legal persons social phenomena that present themselves in real life (no fiction) and are recognized as legal entities because otherwise they would not be adequately embedded in law



Example 3: Czech Republic (based on fiction theory)

- A legal person is an organised entity whose legal personality is provided or recognised by the law.
- A legal person may, without regard to its objects of activities, have rights and duties consistent with its legal nature.
- Numerus clausus of legal persons
- Only persons may have and exercise their rights. Duties may only be imposed upon and their performance enforced against persons.
- If anyone creates a right or imposes a duty upon something other than a person, such a right or duty shall be attributed to the person to whom it belongs according to the legal nature of the case.



What is legal person? diversity of perspectives

- An organized unit (purpose) that is endowed by force of law with legal personality (a creature of law)?
- A person in the legal sense - a self-contained person/subject of law (separate property autonomy and responsibility)?
- Entity which is having a deeper social essence?
- Type of ownership structure? (a form of property management)
- Nexus of obligations? (constitutes it/is a consequence of it)
- Instrument of financing?
- Mix of contract and property law and agency?



Legal person: main features?

General:

- Influence of State and Law on the formation/creation of a Legal Person
- Legal personality (i.e. legal subjectivity)
- Purpose of the legal person
- Organisational structure (at least minimum)
- Property autonomy and separate property liability

Identification:

- Name
- Registered office
- Nationality?



Categorization of legal persons (different criteria):

Source of regulation:

- Legal persons of public law (municipalities, chambers, public institutions/funds) vs. private law (associations, foundations, business corporations)

Trade unions?, Political parties?

Personal/propertial base:

- Corporation vs. Foundations

Purpose of existence:

- Business vs. non-business (private benefit vs. public benefit)



„Corporations“

- the oldest, most important, most widely used type of legal persons (entities)
- a combination of several persons for a specific purpose/objective
- membership principle
- separation of property spheres
- ability to decide to exist or not to exist (dissolution)

X

„Partnership“ (societies) - not always recognized as a legal person



„Foundations“

- personalised special-purpose assets
- Depend on the will of the founder,
- 3 characteristic features: purpose, property, organization
- „purpose“ a an epicentrum of foundation world
- membership conceptually excluded
- not be able to dissolve itself by its own discretionary decision of the board
- Other „institutions“ (private/public) - mix of features



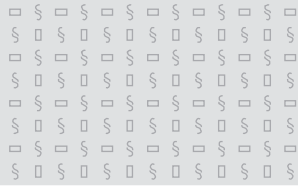
Legal Persons (private law) - system in the Netherlands (NBW)

- Legal persons: public and private law
 - Corporation (associations, business corporations, cooperatives)
 - Foundation



Legal Persons (private law) - system in Switzerland (ZGB + separate laws)

- Legal persons (private and public law)
- Public law - central, cantonal law
- Corporations (municipalities, chambers)
- Foundations and Institutions (Anstalten)
- Private law:
 - Corporation (associations, trade unions ZGB), business corporations and cooperatives (OR)
 - Foundation (family foundations, church foundations, pensions-foundations)



Legal Persons (private law) - system in the Czech Republic (CC + Business corporation Act)

- Legal persons
 - Corporation (associations, business corporations, cooperatives, trade unions...)
 - Fondation (foundation, foundation fund)
 - Institution

<http://obcanskyzakonik.justice.cz/index.php/home/zakon-y-a-stanoviska/preklady/english>

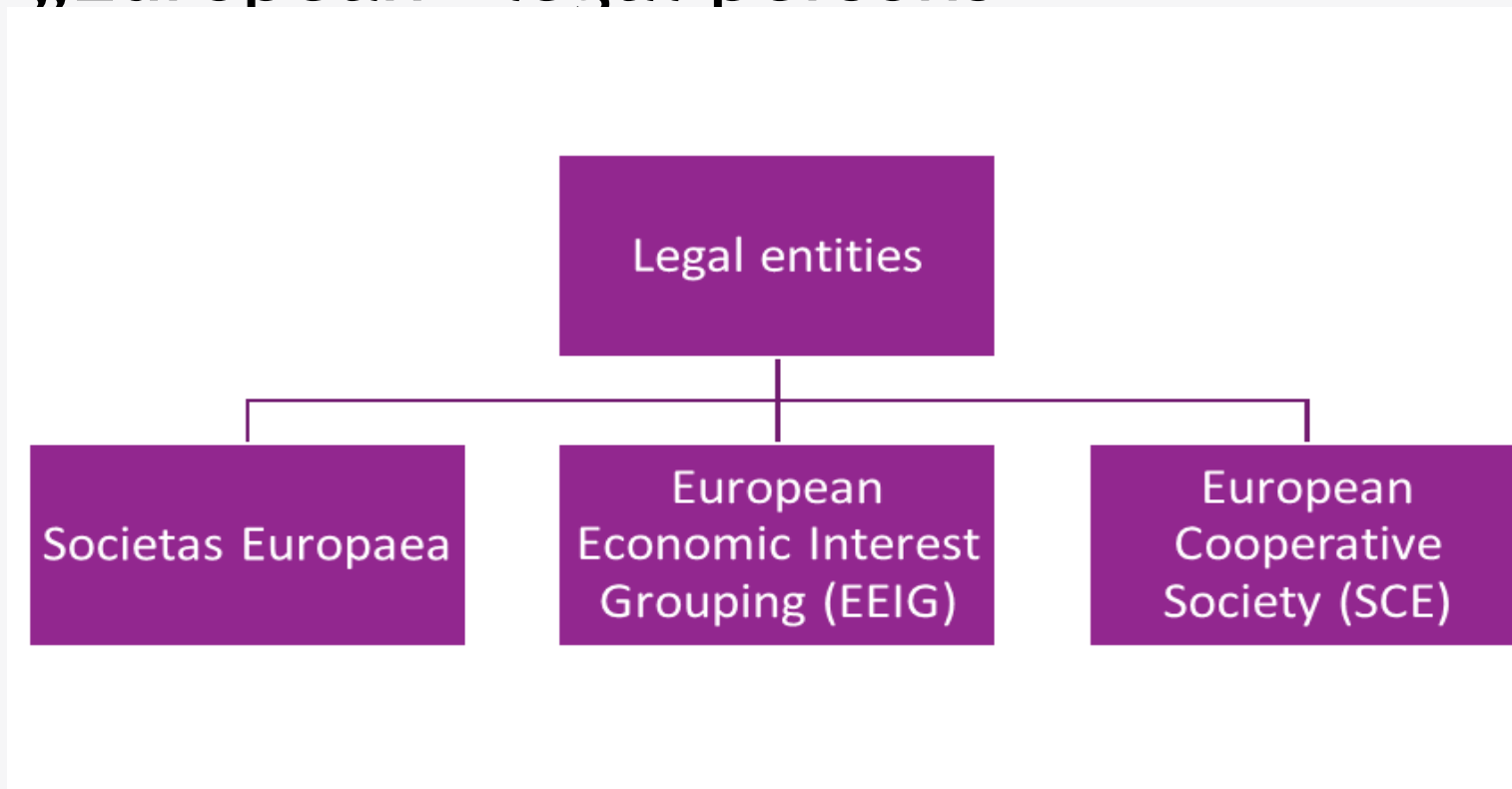


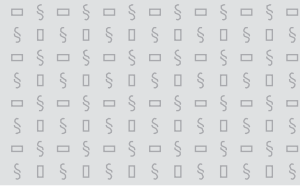
European Company Law

- Part of the EU law
- Concerns the formation, operation and insolvency of corporations in the EU
- Member states continue to operate separate companies acts that need to comply with EU Directives and Regulations
- The EU Directives govern in particular questions, f.e. invalidity of establishment, founding of joint-stock companies and the change of its capital, cross-border merges and divisions as well as the taxation of profits, etc.
- EU Regulations f.e. „*European*“ legal persons



„European“ legal persons





Freedoms for legal persons in European Law

Core of EU Law

Guarantee for mobility of businesses and professionals within the EU

- Freedom of establishment
- Free movement of services
- Free movement of capital

- Non discrimination rules



Freedom of establishment

- The EU law guarantees freedom of establishment to legal entities
 - making a profit by economic activity
 - Guaranteed if its seat or the centre of operations in any Member State
 - Cooperatives included
 - BUT excluded NGOs!
-
- Question: What if the NGO conducts economic activities? (next lecture)



Other „legal structures“? „entities“?

Trusts and trust(like) vehicles: different concepts I

- „Classical“ common law trust: divided ownership; trustee holds legal title (a formal ownership) to the trust assets; change of trustees requires transfer of legal title; beneficiary holds equitable title(an economical ownership)

3 actors:

- Settlor (founder) - trustee - beneficiary



Trusts and trust(like) vehicles: different concepts II

- Lichtenstein Truhänderschaft (trust-like):
- Czech Trust fund (trust-like): the ownership of trust fund assets is not liked to anybody; change of trustees does not require transfer of legal title to the trust assets;
- Quebec, Hungary, South Africa, French Fiducia, Luxembourg San Marino...
- In Italy solution „trust interni“ (also in Switzerland)
- Austrian (Privatstiftung)



Similar features of a foundation and trusts (functional approach):

- 3 elements: assets, purpose, organization
- Purpose - serve to a purpose, not to a specific person,
- Foundation/trust as a "vehicles" for purpose, a tool for resolving conflicts of interest
- Conflicts of interest are "omnipresent" in foundations/trusts (on many levels), foundations as conflicts of interest "per se"
- Rules for governance of the foundation (foundation governance)/position of trustee.
- The specific position of founder and beneficiary



Trusts, trust-like vehicles, foundations

■ What is different?

Foundations - Legal title is owned by the legal person

X

Trust/trust like vehicles are not a legal persons

Foundation may have „own“ interest; it is another „player“ in the game (important for balance of conflict of interests)



Trust fund, what is it?

- Relationship (obligation)? Set of obligations?
- Property? Way of „holding“ property?
- Person? Legal entity?
- or Something else?

„....one cannot define the essence of an institution as a series of relationships among three people when none of those people is essential to its existence ”. (Pierre Lepaulle, 1932)

For „civil law scholars difficult to understand:

„I can´t understand your trust!“

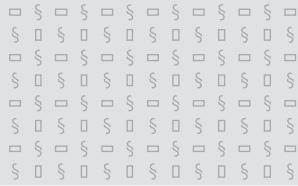
(Otto von Gierke in F:W. Maitland, Equity)

Trust can only be described, but never really „caught“ within a sound legal definition!



Czech Trust like vehicle „Svěřenský fond“ (Trust fund)

- Trust-like instrument (asset management)
- inspiration in Trust/fiducie (Quebec) § 1260 CCQ
- strange concept for Czech legal environment - problems
- different concept of ownership/patrimony (separated property without owner)
- „Fear of the unknown“ - getting better/more regulation
- question, if not better solution f.e. - Austrian Private Foundation (the same function)



Czech Trust fund: characteristic

- Autonomous assets (Quebec concept)
- NOT A TRUST! (although certain aspects of the common law trust are reflected)
- Originally a contractual concept (French fiducie)
- Modified (statute, registration of trusts)
- There is no property right of beneficiaries (x trust)
- No legal personality (x trust)
- Selected comparable foreign concepts in Europe (Austria, Liechtenstein, Cyprus)



Czech Trust fund - § 1448 ef CC

- (1) A trust fund is created by setting aside part of the property owned by the founder in such a way that the owner entrusts the trustee with the property for a particular purpose through a contract or disposition mortis causa, and the trustee obliges himself to keep and administer the property.
- (2) The creation of a trust fund establishes separate and independent ownership of the part of property and the trustee is obliged to assume the property and its administration.
- (3) The rights arising from the right of ownership in the property in a trust fund are exercised by the trustee in his own name and on the account of the trust fund; however, the property in a trust fund is not owned by the administrator/trustee or the founder, or the beneficiary.



Free movement of capital/Freedom of establishment in within EU, Case Law of ECJ (and EFTA):

- Examples of functional approach in the EU

For foundations:

- **Persche, Stauffer**

For trust (trust-like) structures

- **Olsen and others**
- **Panayi**



Conclusions

- Natural person vs. legal person
- Legal person is a „person“ by virtue of law, In continental Europe - formal concept, *numerus clausus* of legal persons
- Categorization of legal persons
- „Europeanisation“ for business companies (not only), freedom of establishment free movement of capital
- Trusts, „Trust-like“ vehicle, each country different unique concept (functionally similar to foundations)
- Case law of EFTA and ECJ



Questions:

- 1. What are the sources of the legal regulation of legal persons?
- 2. Try to categorize legal persons (on general level)
- 3. What is the distinction between foundation and corporation kind of legal person?
- 4. Legal persons of public and private law? Could you mention similarities and differences?
- 5. What is different between the legal person and trust (trust-like) form?
- Do you find concept of a legal person useful?



Thank you very much for your attention😊

katerinaronovska(et)gmail.com