

Charitable and Private Foundations in Ukraine

By Alexander Vinnikov¹

Unlike many countries, Ukraine has no special law on foundations. Indeed, before adoption of the Law on Charities in 1997, Ukraine had no foundations whatsoever: all Ukrainian nonprofits operated as associations, with three or more founders, and for the mutual benefit of their membership. Today, foundations do exist in two forms: charitable foundations, established under the Law on Charities, and private foundations, established under the Civil Code. This article will provide an overview of the laws governing foundations and take note of some of their problems and inconsistencies.

Both charitable and private foundations can be created by a sole corporate or individual founder. The provisions of the Civil Code governing institutions apply to private foundations. The same provisions apply to charitable foundations (paragraph 4 of article 83 of the Civil Code), though in the event of conflict between the Civil Code and the Law on Charities, the latter applies to charitable foundations. The Law on Charities also regulates associations for certain purposes.

Registration procedures

The Omnibus Law on Registration of Legal Entities, effective since July 2004, sets forth the procedures for registering foundations. Whereas private foundations are subject to the same procedure as business corporations, charitable ones become legal entities after getting the registration certificates as provided in the Omnibus Law. Article 3 of that law states that special provisions for registering charities (and some other nonprofits) can be found in the applicable law, i.e. the Law on Charities. The result is that charitable foundations are subject to double registration: by the Ministry of Justice, under the Law on Charities and CMU Decree # 382/98; and then by the public registrar under the Omnibus Law. This section will address the provisions applicable to all foundations first, and then the additional provisions applicable to charitable foundations.

Article 24 of the Omnibus Law on Registration requires the founder(s) or their authorized representatives to submit the following to the public registrar:

1. a formal application for registration;
2. a notarized copy of the decision to set up the foundation;
3. two notarized copies of the founding act; and
4. the original receipt for the registration fee.

If the papers are submitted properly, the public registrar in a district or a town shall check whether there are legal reasons for refusing to register the entity. Such reasons are listed in article 27 of the Omnibus Law; the most important one is breaching the law. The denial of registration may be challenged in the administrative court of the local jurisdiction.

The founding act shall be made, signed, and approved in writing by all the founder(s) of the entity, unless another procedure for approval of the founding act is provided for by the applicable law (par. 1, article 87 of the Civil Code). No oral agreements or obligations of the founder(s) are effective in Ukraine, unlike many European Union members. Founder(s) also may cancel the founding act until registration is completed. Under article 88 of the Civil Code, the founding act must specify the foundation's goal, the assets to be transferred to it as necessary for achieving its goal, and the governance structure. If the founding act in the will lacks some of the required provisions, the public registrar has the authority to add them. The goal or the structure of governance in foundations can be amended only by approval of the competent court, as provided by article 103 of the Civil Code.

Article 90 of the Civil Code requires that the name of a foundation specify the scope of its activities. Should the foundation change its name, it must announce the change in printed media authorized to publish registration information and notify all its contractual counterparts.

To reiterate, all types of foundations must follow the forgoing procedure. In addition, charitable foundations are subject to an additional registration procedure, which they must complete first. We turn now to that.

Under article 8 of the Law on Charities, the Ministry of Justice or its local agency considers the foundation's application. A charitable foundation's founder(s) or authorized representatives must submit the following:

1. an application for registration (a form approved by Ministry of Justice and not compatible with application form under the Omnibus Law);
2. the minutes of the founders' meeting or the notarized decision by the founder;
3. two notarized copies of the founding act;
4. personal data on the founder and the members of the governance bodies;
5. the data on local branches of the charitable foundations (plus their minutes) and/or representatives in other jurisdictions; and
6. the original receipt for the registration fee.

The authority must grant a registration certificate before the organization can register with a public registrar.

The most problematic implications for charitable foundations arise from outdated regulations concerning the territorial status of a charitable foundation. Article 7 of the Law on Charities stipulates that charities shall have local, national ("pan-Ukrainian"), or international status. The applicable regulations restrict setting up offices and branches outside of the foundation's residence jurisdiction, because a charitable foundation seeking national or international status must have representatives or branches in 14 or more Ukrainian oblasts.

Another serious drawback for charitable foundations is that the registration procedure takes two months, whereas registering a private foundation takes just three working days.

Registration fees are a small disparity favoring charitable foundations: 17 Ukrainian hryvnias (UAH) or \$3.50 to register a local charity; 34 UAH (\$7) for a national one, and 51 UAH (\$10) for a charity of international status. By contrast, the uniform fee is currently 170 UAH (\$35) for registering any legal entity, including a private foundation, by the public registrar – and a charitable foundation registered previously by the Ministry of Justice is exempt from paying this fee. In sum, a charitable foundation can register for between 17 and 51 UAH, whereas a private foundation must pay 170 UAH to register.

Governance

Any foundation, whether private or charitable, must have a board and a supervisory committee appointed by the founder under article 99 of the Civil Code or articles 5 and 17 of the Law on Charities, respectively. Any decisions by the board require approval by a majority vote of the attending members, unless otherwise provided for by the founding act. Any decisions on amending the founding act, disposing of 50% or more the foundation's property, or liquidating the foundation

require a supermajority vote: three-fourths of the board members in attendance (articles 98 and 99 of the Civil Code).

Paragraph 3, article 92 of the Civil Code imposes liabilities on the members of governance bodies of any legal entity. They must act in the best interests of the entity, in a prudent and reasonable manner, and without exceeding their statutory powers. Limitations on acting on behalf of the entity are null and void as for the third parties, unless the third party was to be aware of such limitations. All provisions on conflict of interest, except transactions with affiliated persons, must be specified in the founding act or bylaws of a foundation.

The Civil Code imposes more severe liabilities on board members. They can be dismissed at any time, unless the founding act specifies otherwise (paragraph 3, article 99 of the Civil Code). Any decisions by the general meeting and/or the board may be claimed by the founder(s) or members at court (paragraph 5, article 98 of the Civil Code).

Minimum capital and investments

Ukrainian law does not require the founder(s) to transfer any minimum capital or specific types of assets, in cash or in kind, to establish a charitable or private foundation. However, the founding act should specify some assets assigned for statutory purposes. Under article 102 of the Civil Code, the actual transfer should be done after registration is completed. Article 96 of the Civil Code indicates that the founder(s) shall not bear any other liabilities for the obligations of the foundation and vice-versa, except ones made before registration is completed.

Charitable foundations may not take loans or pledge their assets, under article 19 of the Law on Charities. Further, maintenance costs (rent, salaries, etc.) must not exceed 20% of the total income of a charitable foundation within a fiscal year (article 20 of the Law on Charities). Private foundations are not subject to such a restriction.

Investments in business companies (except banks and some other financial institutions) are allowed for all types of Ukrainian nonprofits. Ukrainian law does not provide any regulations on investments yet.

The Civil Code provides that foundations and non-business corporations must not pursue profits and redistribute them among founder(s) and members. Under the Law on Charities, further, charitable foundations must spend all income from their corporate activities on either programmatic activities or on reinvestments (article 22).

Taxation

Charitable foundations enjoy substantially more generous tax exemptions than private foundations, though the deductibility for donors is the same for both types of foundation.

Pertinent rules are set forth in paragraph 7.11 of the Law on Corporate Income Tax, # 334/94, and the National Tax Administration Decree on the Registration of Tax-Exempt Organizations, # 355/00. All registered charitable foundations can get tax-exempt code 0005; private ones are eligible for code 0011.

Paragraph 7.11.3 of the Law on Corporate Income Tax exempts charitable foundations from paying tax on the following:

1. non-assigned and/or assigned donations from any residents of Ukraine (including proceeds from fundraising events, such as auctions, charitable concerts, or festivals, under article 19 of the Law on Charities);

2. investment income (interest, dividends, royalties, and insurance premiums);
3. subsidies from the national and local budgets, and public development funds;
4. income from related business activities; and
5. non-assigned and/or assigned donations from any nonresidents, including humanitarian and technical assistance under the international treaties and the laws of Ukraine.

Charitable foundations also enjoy another significant exemption, from Value Added Tax (its flat rate is 20% in Ukraine). Thus, donations in kind assigned for beneficiaries or for other charitable, non-business activities are exempt in full (paragraphs 3.2.5 and 5.1.21 of the Law on Value Added Tax, # 168/97).

Private foundations, under paragraph 7.11.5 of the Law on Corporate Income Tax, are not exempt from paying taxes on non-assigned donations from residents of Ukraine. Legally, a private foundation is not entitled to any VAT-exempt donations of in kind and/or humanitarian assistance. In addition, private foundations are the only type of nonprofits subject to taxation of retained income (paragraph 7.11.9 of the law on Law on Corporate Income Tax).

As for deductibility, since April 2005, donations to both charitable and private foundations are deductible for corporate donors, if they amount to 2-5% of the company's taxable income (profit) declared in the previous fiscal year (paragraph 5.2.2 of the Law on Corporate Income Tax). Similar deductions are provided for individual donors: their tax credit may amount to 2-5% of their year taxable income, if donated to any nonprofit registered in Ukraine (paragraphs 5.3.2 - 5.3.4 of the Law on Individual Income Tax # 889/03).

Dissolution

The rules here are the same for both types of foundation. The court may make a legal resolution on liquidating a foundation as provided for by article 38 of the Omnibus Law. The legal grounds for liquidation by the court are as follows:

1. breaching in certain respects the law for setting up the foundation;
2. systematic activities prohibited by the law and/or the founding act;
3. failure to submit tax and financial reports pursuant with the applicable law over a year;
or
4. filing a notice on the absence of the foundation at its registered office into the Uniform Register.

Conclusion

A special law on foundations is not a top priority in Ukraine, with the new Civil Code is in effect. However, the Law on Charities needs a number of amendments to comport with the Civil Code and the Omnibus Law on Registration of Legal Entities.

Notes

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