

CONDOMINIUMS AND ITS OWNERS ASSOCIATIONS

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Abstract

Legal personality of legal persons is special. Its scope is entirely at legislator's disposal. One of the typical representatives of this entity group is owners association. Flat ownership is strongly influenced by non-legal aspects and this is reflected in the legal regulations and the scope of association subjectivity as well. Certain recommendations for the construction of association legal person can be found in international documents, those have only advising character. Ideal form of administration execution of owners associations might not exist; nevertheless European comparison of the institute can remove weak points and lead to optimal legal regulation.

Key words

Owners Association, Condominium, Legal Personality, Guidelines on Condominium, Limited Personality.

I. Introduction

Condominium as a special ownership form has a tradition in European countries and in North and South America as well. No matter how the concepts of flat (condominium) ownership are different from the point of internal structure, i.e. theoretical concept used,² they have one thing in common – internal administration execution, i.e. the formation of co-owners' will. This happens on the foundation called owners association (*wspólnota mieszkaniowa*, *Eigentümergeinschaft*, *Gemeinschaft der Wohnungseigentümer*). The basic question in all forms of associations is their legal nature. The recommendation of the authors of Guidelines on Condominium Ownership of Housing for Countries in Transition³ says that an ownership association should be in the form of legal person. Furthermore, they say that Central European countries that implement the institution of flat ownership and relevant associations do not use the form of legal person especially for social reasons.

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² Legal science defines four concepts of housing ownership – (i) monistic that appears in two forms, one of them prefers house constituting and the latter flat as an exclusive subject of ownership right; (ii) dualistic that is further divided into co-owner version (seeing a house as the major subject and flat as the minor subject), and flat ownership version preferring the position of a flat as determining; (iii) dualistic-monistic; and finally (iv) anti-ownership.

³ United Nations, Economic Commission for Europe, 2003.

Modern European legal regulations of condominium stem from the pattern that became Article 664 of the French Code Napoleon from the year 1804⁴. It is more than obvious that if the property is in the co-ownership of more persons, these have to participate in the administration of this property as well as decision-making about it. The share belonging to the co-owner represents the rate of their rights and obligations. Decision-making process efficiency, frequently made by a heterogeneous group of involuntary owners, is higher if the relations between them are resolved by the association with legal personality.

II. Condominium in the Czech Republic

The institution of ownership was included into the Czech system of law only in the 1960s⁵, namely by the Act No. 52/1966 Coll. on Individual Ownership of Flats. The fact is that it happened under the conditions of socialistic government, by means which does not correspond to the modern concept of this institution.⁶ Firstly, only ownership right acquisition in favorem by natural persons (period terminology described them as “citizens”) was acknowledged. It was possible to acquire one flat only, eventually a house. Until the efficiency of the amendment to the Act on Individual Ownership of Flats from the year 1978 it was possible to acquire only flats in buildings where all flats were sold. According to period literature⁷ only ca. 8 thousand flats were privatized by the form mentioned and others – approximately the same number – were built. Until the beginning of 1990s ca. 30 thousand flats were in the form of “individual” property.

Certain intermezzo in the development of legal regulations of flat ownership is represented by flat transfers according to the Act No. 42/1992 Coll. on Regulation of Property Relations and the Settlement of Property Entitlements in Cooperatives (Transformation Act). This legal regulation referred to cooperative flat transformation exclusively.

Real establishment of the institution was adopting the Act No. 72/1994 Coll. which regulates some co-owner relations to buildings and some ownership relations to flats and commercial property and amends some acts – Act on Flat Ownership (hereinafter “Flat Act”). This regulates flat ownership as a special form of co-ownership of buildings (more precisely block of flats)⁸, where a co-owner of a building is the owner of the flat or non-residential property as spatially determined part of the building and at the same time (accessory) share owner of common parts of the building. Such defined ownership can be established only in buildings where there are at

⁴ LEYSER (1958) or MORIARTY (1974).

⁵ In Western Europe it was carried just after the Second World War SRN (1951) Gesetz über das Wohnungseigentum und das Dauerwohnrecht (dWEG); Austria (1948) Wohnungseigentumsgesetz (WEG). Both legal regulations stem from the approbation of superficial principle.

⁶ Cf. e.g. ZDOBINSKÝ (1965).

⁷ ZUKLÍNOVÁ (1979).

⁸ DVORÁK (2010).

least two flats, eventually non-residential areas, eventually at least one flat and one non-residential area. Whereas the Act on Individual Ownership of Flats was based on the so called monistic concept, Flat Act is based on the dualistic concept in the co-ownership concept.⁹

III. Legal nature of association and European connotations

As mentioned above an association is a legal person. It is a person which is non-traditionally based on involuntarily membership where minimally passive participation is required.¹⁰ The membership originates independently of primary will of the person who becomes the owner of a unit in accordance with Flat Act. Hence, the membership is accessory connected to the unit ownership, eventually to the inseparable share ownership of the common parts of the building.

Capacity for rights and liabilities of unit owners association is special.¹¹ The association can acquire only rights which are essentially related to the so called building administration. Building administration is understood as maintenance, operation and repairs of common parts of the building. Thus, it is a question where the legal personality of the association reaches. The possibility to restrict legal personality of legal persons is given just by their difference from persons whose personality is universal in principle.¹² It consists in their special mission, i.e. in case of association, just the building administration execution. In this relation, Hurdík (2003) tends to limit the scope of legal personality of a legal person only to the basic aim, which is pursued by the institutor by its means. This issue was dealt by courts as well¹³, nevertheless in our opinion it brought much more confusion into the concept of legal form of associations than there was before. The resolution cited enabled to acquire a plot of land (parking place) on behalf of the flat owners association. Regardless of purpose incorrectness¹⁴ of the resolution, there appeared misunderstanding of the principle of associations. In the statements of the reasons the Regional Court in Hradec Králové presents the thesis that particular plot of land is connected to the built-up area of the block of flats in the ownership of the plaintiff (to wit: unit owners association). It

⁹ LUBY (1971).

¹⁰ JEHLIČKA (1994).

¹¹ HURDÍK (2003).

¹² Ibid.

¹³ Cf. the Decision of the Regional Court in Hradec Králové from 8 October 2002 Record No. 30 Ca 44/2002-16.

¹⁴ We suppose that the association can acquire things and rights in order to control the building but any other. By accepting the viewpoint represented by the resolution cited it comes to disproportionate extensive interpretation which ruins the essence of the scope of special subjectivity of owners association. DVOŘÁK (2007).

does not distinguish the subjectivity of the association and its members.¹⁵ The plot of land is (as the author checked in the Land Registry) in the shared ownership of individual association members not in the ownership of itself.

In our opinion, thoughts about extending the subjectivity towards entrepreneurial activities of the association as it is presented by the part of professionals are not correct either.¹⁶ The explanatory report to the Flat Act expresses clearly the incorrectness of registering association into the Commercial Register. This brings among other things necessary subsumption of such a person into entrepreneurs in accordance with § 2 par. 2 sec. a) Commercial Code. Although such association would not operate as an entrepreneur it would be seen as such from the point of view of the form (also fictive entrepreneur).¹⁷ Thoughts about extensive personality concept are problematic from the tax point of view as well. An association is liable to favourable taxation as so called non-profitable organization in accordance with the regulation §18 par. 3 Act No. 586/1992 Coll. on Income Tax.

The overview of opinions mentioned above and their contradiction are only a recurrent evidence of the fact that the legislator was obviously missing courage to formulate clearly the concept of a legal person of an association and another of social experiments in the field of housing law appeared.

Obligatory membership as well as impossibility to leave the association without transferring flat ownership seems to be reasonable. The reasons can be seen in constitutional resolutions which include certain liabilities besides protection of rights of subjects. Particularly, we mean the regulation of Article 11 par. 3 of Charter¹⁸. It is a normative resolution of so called Hedeman's concept¹⁹ emphasizing the existence of ownership right limits. After all, mentioned guidelines recommend obligatory membership in a non-profitable legal person of the administrator as this is the only way how to keep to the purpose of the legal regulation – proper administration of common parts of the building.

Both countries involved (Germany and Austria) have undergone major changes in the field of legal regulations of flat ownership in the past years. Austria which has known legal regulations on flat ownership since the end of 1940s has been struggling to find the way between the German and Anglo-Saxon-French model²⁰ of flat ownership. Finally, it set in the latter. Similarly to the looking for the way to the flat own-

¹⁵ The First-republic doctrine distinguished between the personality of legal entity and its members: "The legal person is defined as the person different from the individual persons. The property of the legal person is not the property of its members." In details TILSCH; SVOBODA (1925); further administrative resolution Bohuslav 1256 from the year 1922. Cited according to DVOŘÁK (2007).

¹⁶ ŠTRAUS (2009).

¹⁷ ELIÁŠ; BEJČEK; HAJN; JEŽEK a kol. (2007).

¹⁸ Constitutional Act No. 2/1993 Coll. the Charter of Fundamental Rights and Freedoms as amended.

¹⁹ FIALA (2005).

²⁰ DVOŘÁK (2007).

ership, the determination of legal personality among owners association members caused a problem. The original association (Wohnungseigentümer-gemeinschaft) was transformed into the current form which is called Eigentümergemeinschaft. Apparent terminological change has brought a major change. After the WEG amendment in 1999 it was transformed from ad hoc eligible entity into the form of legal person with limited legal capacity (beschränkte Rechtsfähigkeit)²¹ which is always determined in particular cases by the administration of the property.

The real “upstream swimmer” is Germany. Not only does local regulation represent a completely rare and often criticised concept of flat ownership²² but local legal regulations did not identify an association as a subject of law until 2005. A significant change is the Decision of the Federal Court No. BGH V ZB 32/05 from 2 June 2005. Legal sentence in the verdict says that the association (Gemeinschaft der Wohnungseigen-tümer) has legal personality if its legal acts are related to the administration of property in the shared ownership. The verdict granted partial legal personality (Teilrechtsfähigkeit)²³ to the association. The cited verdict represented the first step in the professional debate about the topic mentioned. Final petrification of legal personality was made by the effectiveness²⁴ of the amendment § 10 of the German Act on Flat Ownership from 2007. It says that unit owners association is able to gain rights and to oblige to third persons and flat owners within all things related to the shared ownership of the property.²⁵ Association organizational structure gives evidence about partial capacity of unit owners association. Unit owners association has its own regulations (association regulations) that help unit owners to regulate their rights and liabilities. It exceeds the options of mere association in accordance with § 741 an. BGB and approaches it to a club. In accordance with the regulation § 25 par. 1 of dWEG the ownership meeting makes decisions about things related to the association administration with majority. This decision is binding for unit owners who did not attend the meeting or those who voted against. This is a typical sign of subjects with legal capacity. There can be seen similarities to corporations also in the similar regulation of right to vote of unit owners, quorum and decision-making minutes.²⁶ Legal personality is reflected from the action point of view when the association has capacity to be a party to an action.²⁷

It has to be distinguished between representing a person and their own volition. While legal actions of a member on behalf of the association are in the form of legal representation, the action of statutory body represents the action by legal person

²¹ Cf. § 18 par. 1 WEG. In details see BÖHM (2002).

²² Undoubtedly, it has historical-legal background – Savigny’s aversion to a flat as a subject of ownership right.

²³ WILHELM (2007).

²⁴ 26 March 2007.

²⁵ JENIßEN et. al. (2008).

²⁶ NEUDEKOVÁ (2007).

²⁷ BECKER; KÜMMEL; OTT (2010).

itself. Here Czech legal regulations correspond to the original socialistic doctrine²⁸. On the contrary, in Western Europe (especially in German speaking countries) the concept of so called *organschaftliche Vertretung*²⁹ is more common where any action either by the representative or body is representation.³⁰

IV. Conclusion

The future of a new legal regulation of condominium ownership in the Czech Republic depends on the relation to the new Civil Code. The original intention, that flat ownership remains to be regulated by a special act, has been abandoned. At present there are debates about the incorporation of legal regulation on flat ownership into the general codex. Unfortunately the reasons which led the submitter are unclear. In the whole Western Europe flat ownership is regulated by a special act. Furthermore, the codex writers advised the independence of legal regulation in the “brown” book of individual law.³¹ Thus, the question is whether it is a well-considered step in the case of incorporation of flat ownership into the general law or whether it is only the result of the fact that the whole project is unclear.

Whatever the result of legislative efforts is it misses important consistent socio-economic research which should create ideological foundation for the legal regulation of housing policy. It is a conceptual and practical activity of the state where legislative and economic tools are used to regulate housing market and enable achievement of set targets in the field of housing.

The unit owners association represents an important legal person, the legal regulation of which affects a significant part of population. Hence, it deserves more consistent regulation and first of all clear vision that legislators lack.

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Act No. 42/1992 Coll. on Regulation of Property Relations and the Settlement of Property Entitlements in Cooperatives as amended (Zákon č. 42/1992 Sb., o úpravě majetkových vztahů a vypořádání majetkových nároků v družstvech ve znění pozdějších předpisů).

Act No. 513/1991 Coll. Commercial Code as amended (Zákon č. 513/1991 Sb., obchodní zákoník ve znění pozdějších předpisů).

²⁸ Under the influence of teaching especially of S. N. Bratus e.g. BRATUS (1984); accordingly KNAPPOVÁ; ŠVESTKA; DVOŘÁK (2005).

²⁹ Cf. e.g. § 26 BGB; in details e.g. BERGHOFF (2005).

³⁰ De lege ferenda will be corrected in the draft of a new Civil Code § 156 an.

³¹ ELIÁŠ; ZUKLÍNOVÁ (2001).

- Act No. 52/1966 Coll. on Individual Ownership of Flats as amended (Zákon č. 52/1966 Sb., o osobním vlastnictví k bytům ve znění pozdějších předpisů).
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Ownership in a condominium or townhome association offers an opportunity for home ownership without many of the added day-to-day responsibilities, such as snow removal or yard maintenance. In a CIC, owners are members of an association composed of all owners in the community. The association administers the CIC through its board of directors. Administration includes setting and enforcing rules regarding the use and operation of the community and the individual units. Depending on when a particular CIC was formed and its governing documents, chapters 515 or 515A of the Minnesota Statutes may also apply to particular circumstances.