UNDERSTANDING THE PROPERTY WITHIN THE EU PRIVATE LAW

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Abstract. *The author of the article studies the concept of "property" in the understanding of the European Court of Human Rights and the establishment of such understanding's limits in the domestic systems of continental law. Generalization of theoretical approaches in regard to the definition of property, analysis and comparison of the results of its interpretation by national courts and the European Court of Human Rights has made it possible to conclude that the concept of property within the Art. 1 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms largely coincides with its general understanding within the system of legal knowledge of certain countries of the Romano-Germanic law system. It covers: things, as well as property rights and obligations. While defining the application limits of this concept, it has been established that the word "ownership" used in the Art. 1 of Protocol 1 to the Convention to denote economic value as synonymous with the concept of property. Therefore, ownership is any economic benefits (assets), objects of both tangible and intangible world, which are in the state of appropriation by an individual or legal entity. Moreover, the state of appropriation can be consolidated not only by means of property rights, but by other rights (real and obligatory, absolute and relative, etc.).*

Key words: *ownership, asset, real value, property, objects of civil rights.*

Introduction. The concept of "property" as an object of private and, in particular, civil law, is one of the controversial in the legal literature. It is due to the complexity and ambiguity of its essence. This indicates the special importance of the concept of property, especially in the light of international experience in its interpretation. In fact, it influence on the definition of specific rights and obligations of the parties, the moment of their occurrence, methods, limits of implementation, protection, etc. Therefore, the definition of "property" has repeatedly been the subject matter of scientific research. For example, these are the works of Lord MacKenzie Stuart (1982) "Legitimate Expectations and Estoppel in Community Law and English Administrative Law" [1, p. 55], Reynolds Paul (2011) "Legitimate Expectations and the Protection of Trust in Public Officials" [2, pp. 330–352], Barack-Erez Daphne (2005) "The doctrine of legitimate expectations and the distinction between reliance and expectation interests" [3]. Having analyzed the caselaw of the European Court of Human Rights (hereinafter – ECHR), the authors pay attention only to such types of property as legal (legitimate) expectations, leaving out other types of property. Moreover, the emphasis in the indicated works is made on their public component. Melkonyan Davit (2014) "Concept of the Rule of Law in the Case-Law of the European Court of Human Rights" pays attention to this type of object only in regard to revealing the concept of the rule of law [4]. István Gárdos (2018) "A vagyontárgy és a vagyon fogalma a Ptk.-ban" analyzes the property objects of civil rights in detail, but only within the concept of property rights and only within the national legislation of Hungary [5].

Therefore, the purpose of the article is to define the concept of "property" in the understanding of the European Court of Human Rights and establishing the limits of such understanding in national legal systems.

Methods that allow to achieve the set purpose are: generalization of theoretical approaches in regard to defining the concept of property; analysis and comparison of the results of its interpretation in the national legal systems and the European Court of Human Rights; determining the limits of applying this concept in caselaw.

Results. Having studied the concept of property within the understanding of the Art. 1 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Art. 1 of Protocol 1) it should be noted that it coincides with its general understanding in the legal knowledge system of certain countries of the Romano-Germanic law system for the most part, in particular countries with the law of pandects. Despite some terminological differences, it covers: things, as well as property rights and obligations.

The word "ownership" is used in the Art. 1 of Protocol 1 to denote an object that having economic value. Ownership, in this sense, is an economic category and synonymous with the concept of property. Therefore, ownership is any economic benefits (as-

sets), objects of both tangible and intangible world, which are in the state of appropriation by an individual or legal entity. Moreover, the state of appropriation can be consolidated not only by means of property rights, but by other rights (real and obligatory, absolute and relative, etc.).

Analysis. Integration processes taking place on the Eurasian continent, carrying out codification, re-codification (updating) of domestic civil law by the countries, whose national legal systems belong to the continental legal system, create the need to study the experience and legal doctrine on understanding the property embodied within international law. The practice of the European Court of Human Rights on applying the Art. 1 of Protocol 1 attracts attention. The fact is that the Art. 1 of Protocol 1 provides the right for every individual or legal entity to own one's property irenically, but the ECHR uses the term of "property" in a much broader sense while applying this norm than it is traditionally accepted by the legal doctrine and domestic legislation of some countries.

At first glance, it may seem that there are no problems in such an inconsistency. After all, the Convention for the Protection of Human Rights and Fundamental Freedoms and Protocol 1, which have been ratified by any state, that is, there was the consent to their binding force, become part of national law. Thus, the use of the term of "property" by national courts within the meaning of the ECHR should be considered lawful and that goes in line with European human rights standards, creating the preconditions for reducing the number of claims to the ECHR.

However, the official text of the Convention for the Protection of Human Rights and Fundamental Freedoms is in English and French, and both versions are considered equally authentic. At the same time, it is not entirely true. Each language has its own special forms of expression, terminological traditions, legal constructions, which are characteristic and understandable to a particular system of law. It is reflected in the authenticity of the content. An even greater difference can be observed while translating one of the texts into the national language of the signatory country. For example, the Art. 1 in the official translation of the text of Protocol 1 into Ukrainian is referred to as "Protection of Ownership", and the terms of "property" and "ownership" are used in its content [6]. Moreover, the first sentence of the specified norm states that everyone has the right to peacefully possess own property, while the second refers to the impossibility of deprivation of property other than in the interests of society and under the conditions provided by law and general principles of international law. This creates some uncertainty in the application of the Convention. Herewith, there are two possible options for understanding the content of the Art. 1 of Protocol 1 as a result of its interpretation. The first option – the specified norm is aimed at protecting only property rights. Only things of the tangible world can be its object. This norm refers to their owning. Since one can only own things. The second option – the word "ownership" is used to denote not a right, but an object that has economic value (asset, benefit). Ownership in this sense is an economic category and is used as a synonym fof the concept of property. Therefore, ownership is any economic benefits (assets), things of both tangible and intangible world, which are in the state of appropriation by an individual or legal entity. Moreover, the specified state can be consolidated not only by means of the property right, but also by other rights (real and obligatory, absolute and relative, etc.). A similar problem of interpretation arose in the Russian Federation, where the first sentence of the Art. 1 of Protocol 1 was translated not as the right to peaceful possession of property, but as the right of every person to respect own property.

In turn, juridical security and clarity of the norm, including international one, is one of the fundamental aspects of the rule of law enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms. The essence of this aspect is that any norm cannot be considered legal, if it is not stated so readable as to be clear to a citizen to regulate his behavior ("Brumărescu v. Romania", application No. 28342/95; "Amann v. Switzerland", application No. 27798/95; "Gawęda v Poland", application No. 26229/95).

Discussion of determining the concept of property. Analysis of the caselaw of the ECHR makes it possible to argue that the term of "ownership" contained in the Art. 1 of Protocol 1 is used in the sense of the economic benefit, which can be the subject matter of both tangible and intangible world. It is indicated by the decisions of the ECHR to reveal such property categories as assets ("Pressos Compania Naviera S. A. and Others v. Belgium" (1), application No. 17849/91, decision dated from October 28, 1995); funds ("Stran Greek Refineries and Stratis Andreadis v. Greece", application No. 13427/87, decision dated from November 21, 1994; "Burdov v. Russia", application No. 59498/00, decision dated from May 7, 2002, clause 40); profit ("Mellacher and Others v. Austria", applications No. 10522/83; 11011/84; 11070/84, decision dated from December 19, 1989), goodwill, as accumulated intangible assets of the enterprise ("Van Marle and Others", applications No. 8543/79, 8674/79, 8675/79 and 8685/79, decision dated from June 3, 1986), property of economic value ("Tre Traktorer Aktiebolag v. Sweden", decision dated from July 7, 1989, series A, No. 159). A similar perception of the term of "ownership" is indicated by some researchers of the Convention [7, pp. 58–65].

Thus, the term of "ownership" in the Art. 1 of Protocol 1 is used as a synonym for the word "property", and in its broadest sense [8].

Comparing the concept of property within the meaning of the Art. 1 of Protocol 1 with the concept typical for countries with the continental legal system, it should be noted that they mostly coincide in their content. Thus, estates ("The Former King Of Greece and Others v. Greece", application No. 25701/94, de-

cision dated from November 23, 2000), land plots, houses ("Sporrong and Lonnroth v. Sweden", decision dated from September 23, 1982, applications No. 7151/75; 7152/75, series A, No. 52) are covered by well-known concepts: real thing, immovable property (thing), real estate (Articles 5:17, 5:18, 5:19 of the Civil Code of Hungary, Part 1 of the Art. 181 of the Civil Code of Ukraine, the Art. 117 of the Civil Code of the Republic of Kazakhstan, Part 1 of the Art. 130 of the Civil Code of the Russian Federation, Parts 1, 2, 3, 4 of the Art. 459 of the Civil Code of the Republic of Moldova, etc.). And the painting ("Beyeler v Italy" [GC] dated from January 5, 2000, application No. 33202/96), the person's belongings in the apartment ("Novoseletskiy v. Ukraine", application No. 47148/99, decision dated from February 22, 2005) are movables (5:38 §1 of the Civil Code of Hungary, Part 5 of the Art. 459 of the Civil Code of the Republic of Moldova, Part 2 of the Art. 181 of the Civil Code of Ukraine, Part 2 of the Art. 130 of the Civil Code of the Russian Federation, Part 3 of the Art. 117 of the Civil Code of the Republic of Kazakhstan, etc.). Together with real estate, the latter are part of the generic concept of a thing and form such types of property (values, assets) as individual things or sets of things. They are the things of the external tangible world in relation to a man.

The category of property includes animals. Although they are part of the tangible world, but they are not always covered by the notion of things in the national laws of different countries. They are sometimes defined as special objects of civil rights, that is, objects that are different from other known ones. And they are only covered by the legal regime of things, but they are not things (as defined, for example, in the Art. 180 of the Civil Code of Ukraine).

Profits arising from property, for example, rent ("Mellacher and Others v. Austria", applications No. 10522/83; 11011/84; 11070/84, decision dated from December 19, 1989) are covered by well-known concepts: products, fruits and income.

Shares of the company (decision on the admissibility of applications No. 8588/79 and 8589/79 "Lars Bramelid and Anne-Marie Malmstrom v. Sweden" dated from October 12, 1982; "Sovtransavto Holding v. Ukraine", application No. 48553/99, decision dated from July 25, 2002) are such objects of civil law as securities (Articles 3:213, 3:214, 3:222, 3:228, 6:565 of the Civil Code of Hungary, Chapter 14 of the Civil Code of Ukraine, the Art. 480 of the Civil Code of the Republic of Moldova, the Art. 128 of the Civil Code of the Russian Federation, paragraph 2 of Chapter 3 of the Civil Code of the Russian Federation, etc.). If the securities are documentary, then they are mostly covered by the regime of things (the right to securities). If they are non-documentary, such as shares, then the regime of things does not arise. Non-documentary securities are only a type of property such as legal claims (property rights and obligations). And it brings shares closer to another group of objects of civil law – participation interests in the authorized capital.

Money like securities is recognized as property [9]. The theory of law is based on the fact that cash, which exists in the form of banknotes and coins, has all the features of movables. Non-cash unlike cash is not things, does not have physical substance, is intangible. It constitutes property claims, property rights [10]. Hungarian scholars in the field of civil law come to the same conclusion [5]. This type of property is perceived in a similar way by the ECHR. Moreover, property is recognized not only by property claims against the bank and the corresponding obligations to the client arising from the contract ("Gayduk and Others v. Ukraine" decision on the admissibility of applications No. 45526/99), but also by legal claims based on other legal facts. It may be, for example, claims for payment of money on the basis of court decisions ("Burdov v. Russia", application No. 59498/00, decision dated from May 7, 2002, clause 40), arbitral awards ("Stran Greek Refineries and Stratis Andreadis v. Greece", application No. 13427/87, decision dated from November 21, 1994).

The ECHR, in the meaning of the Art. 1 of Protocol 1, recognized those rights (obligations) as property, which form part of the estate ("Marckx v. Belgium", decision dated from April 27, 1979, paragraph 64; decision on the admissibility of the application No. 10741/84 "S. v. the United Kingdom" dated from December 13, 1984). But this approach is not a novelty for civil law. It is followed not only in theory [11, 12], but also in legislation. For example, the domestic legislation of Ukraine both indicates that the estate includes all the rights and obligations that belonged to the ancestor at the time of the estate's opening and are not terminated due to his or her death (the Art. 1218 of the Civil Code of Ukraine), and clarifies its list. In particular, the hereditary property also includes: rights to land plots, including the right to use (the Art. 1225 of the Civil Code of Ukraine); participation interests in the right of joint ownership (the Art. 1226 of the Civil Code of Ukraine); the right to receive the amounts of wages, pensions, scholarships, alimony, other social benefits that belonged to the ancestor (the Art. 1227 of the Civil Code of Ukraine); the rights to the bank (financial institution) deposit (the Art. 1228 of the Civil Code of Ukraine); the rights to receive insurance benefits (insurance compensation) (the Art. 1229 of the Civil Code of Ukraine); the rights to compensation for damages, non-pecuniary damage and payment of penalties (the Art. 1230 of the Civil Code of Ukraine), etc. The duties of the ancestor are also considered property to be inherited (the Articles 1232-1, 1281 of the Civil Code of Ukraine).

The ECHR also included goodwill as a type of property. It is understood as the accumulated intangible assets of a legal entity: its name, business reputation, business relations (including the clients), trademarks, etc. ("Van Marle and Others", applications No. 8543/79, 8674/79, 8675/79 and 8685/79). Goodwill (value of business reputation) is an intangible asset, whose value is defined as the difference

between the market price and the book value of assets as a whole property complex, resulting from the use of the best management qualities, dominant position at the market of goods, services, new technologies, etc. The specified concept forms a certain idea about the concept itself. Goodwill is revealed as an intangible asset there. In contrast to the national legislation of certain countries, European caselaw considers goodwill as a generic term. That is, it consists of individual elements that contain the individuality of certain objects of civil law (name, business reputation, trademarks, geographical indications, etc.), but are perceived as part of the whole. And this whole, in turn, is part of a single property complex of a person. Therefore, despite the fact that some researchers identify goodwill with a business reputation [13, pp. 49–52], the majority of them rightly believe that the former is much broader than the latter [14; 15; 16, pp. 83–87]. At least, it is how the ECHR perceives it.

It is believed that a patent for intellectual property in the meaning of the Art. 1 of Protocol 1 is also recognized as property ("Smith Kline and French Laboratories ltd against the Netherlands", application No. 12633/87; Lenzing AG v. The United Kingdom, application No. 38817/97). At the same time, a significant number of countries whose national legislation is part of the Romano-Germanic legal system, do not take the patent as property, but only as a security document certifying intellectual property rights to an invention, utility model, industrial design (as defined, for example, 6. §11 Hungary, 1995. évi XXXIII Act on Patent Protection of Inventions, the Art. 462 of the Civil Code of Ukraine, paragraph 13 of the Art. 1 of the Law of Ukraine "On Protecting the Rights to Inventions and Utility Models", the Art. 1354 of the Civil Code of Russia Federation). Property is considered to be the property rights certified by a patent. In other words, the civil law object is not the patent itself, but the rights from the patent. And the decisions of the ECHR should be taken precisely in this sense.

It is sometimes argued in the legal literature that the ECHR refers national court decision on the existence of a debt to property. It is also an asset of a person. However, such a point of view deserves criticism. Since, the decision of the national court, which came into force, does not give rise, but only confirms the existence of property rights to receive the debt, eliminates doubts about the right to debt, creates confidence of an authorized officer that the right to receive the debt will eventually be transformed into property such as money or other types of property. But the right to a debt itself, its origin and existence does not depend on a court decision. Thus, the asset is not a court decision, but a legal claim of the debt. And the right to peaceful possession of this asset is guaranteed in the Art. 1 of Protocol 1.

Having studied the caselaw of the ECHR, some researchers believe that, for example, the case of "Tre Traktorer Aktiebolag v. Sweden" (decision dated from July 7, 1989, series A, No. 159) defined the property as licenses to carry out certain types of business activities, and the case "Pine Valley Developments Ltd and Others v. Ireland" (application No. 12742/87) defined property as permits issued by public or local authorities to take certain actions. At the same time, the position of those researchers who, by analyzing these categories of cases, come to the conclusion that a license or permit is not property (asset), is more substantiated, as it is sometimes claimed [17, p. 60], but things the intended use of which generates (necessarily generates) a property benefit. The license only creates the possibility of unimpeded target-oriented use of existing tangible benefits to obtain new property [18]. Therefore, it is the available things (assets) related to future property benefits and the expected benefits are the property in the above cases of the ECHR.

Thus, as one can see, the concept of property within the meaning of the Art. 1 of Protocol 1 and the civil law of a number of countries, despite some terminological differences, largely coincides in the content. And such their ratio should be positively evaluated. Since, there is an urgent need to search for existing legal concepts in the doctrine at the stage of re-codification of domestic civil law, which takes place in different countries, against the background of constant continuous processes of integration in order to characterize and understand the legal structures applicable by the ECHR. Such an approach greatly simplifies further acquaintance, study, apprehension of new legislation, makes it more specific for legal enforcement, prevents the duplication of the same concepts embodied in different language forms, allows to maintain the traditional style of thinking of legal experts and maintains approaches to the presentation of the norm's text.

The conclusions indicate the need and perspectives for further research on this topic. In fact, the course chosen by Ukraine for European integration requires from national courts while considering cases the use of the term of "property" in the understanding of the ECHR. Such an approach to legal enforcement will meet European human rights standards; will create the preconditions for reducing the number of applications to the ECHR.

Divided loyalty

In accordance with the statement of the article's author there is no divided loyalty.

Expression of gratitude

The article is performed under the individual plan of the author's scientific work.

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