СУЧАСНА СИСТЕМА МІЖНАРОДНОГО ПРАВА

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LEGAL REGIME OF PROPERTY OF STATE JOINT-STOCK COMPANIES IN UKRAINE: PROBLEM OF DETERMINATION AND IMPLEMENTATION

Problematic issues of determining the legal regime of property of state joint-stock companies, including those created in the process of corporatization of state-owned enterprises, are considered in this article. The specific features of the legal regime of property of this category of companies are analyzed, taking into account the specifics of their legal status and the participation of the state in the process of foundation and management of such companies. The author made the analytical generalization of the existing doctrinal approaches to determination of the legal regime of such property, legislative regulation in this area, non-uniform and inconsistent case law on the legal regime of property of state joint-stock companies. It is suggested to consider the property of such companies as exclusively state property, and the state joint-stock company is vested with only limited powers related to the use of such property within the framework of its statutory activities. Changing the legal regime of such property and its transfer to private ownership is possible due to the privatization procedures, and not as a result of transfer of such property by the state to the charter capital of a state joint stock company or corporatization of a state enterprise.

Keywords: state joint-stock company, property, state ownership, corporatization, privatization, powers of the owner.

State joint-stock companies are different in many aspects as compared to ordinary joint-stock companies. Their legal status, establishment, operation and corporate governance have intrinsic specific features being unique for this type of companies. This fact is recognized by the Law of Ukraine "*On Joint-Stock Companies*" dated 17 September 2008 which stipulates in Article 1(2) that activities of state joint-stock companies and state holding companies in which the sole founder and shareholder is the state represented by the authorized state authorities are governed by this Law, taking into account specific features envisaged by special laws. These specific features relate, in particular, to legal regime of the property used by state joint-stock companies in their operation. However, issues of the property legal relations in which these companies participate have not yet been governed by special legislative acts, leaving room for doctrinal debate and inconsistent court practice in this area. In view of this context our present research of these issues is timely and significant for the purposes of filling the loopholes in the current legislation and law enforcement practice related to state joint-stock companies.

The Ukrainian legal doctrine lacks uniformity in determination of legal regime of property of such companies. These issues have been considered, in particular, by O. Chernenko, Yu. M. Dzera, D.I. Pohribnyi, I.A. Selivanova, V.V. Vasylieva, A.M. Zakharchenko and other legal scholars. However, there is still a divergence of attitudes towards allocation of the property used by state joint-stock companies to the state ownership or private ownership of these companies.

The objective of this article is to explore the legal issues pertaining to property used by state joint-stock companies wholly-owned by the state and to determine its legal regime based on intrinsic features of such companies and taking into consideration current legislative regulation and court practice in Ukraine.

In order to attain this objective we should consider legal status of state joint-stock companies and legal background of their establishment. Many companies belonging to this category were created within the process of transformation of state enterprises, known as corporatization, pursuant to the Decree of the President of Ukraine № 210/93 "*On Corporatization of Enterprises*" dated 15 June 1993. Corporatization, as the process of transformation and change of the form of management of state-owned enterprises, should be distinguished from privatization, which provides for the change of ownership and control over the shares of state-owned entities to the benefit of private investors. The ultimate objective of the corporatization was the creation of open joint-stock companies in which the charter capital was divided by shares wholly-owned by the state [5, p. 208]. Corporatization allowed the Ukrainian state to retain control over an enterprise, while improving its system of management and its overall market positioning. However, this transformation changed only the legal form of state enterprises, introducing no amendments to legal regime of their property that remained controlled by the state. In our view, the regime of property rights of the entities emerged as a result of corporatization can be seen as an exception to the general rule established by Article 115(1) of the *Civil Code of Ukraine* dated 16 January 2003, according to which a commercial entity is the owner of the property transferred to it by the shareholders of the entity into ownership as a contribution to the charter capital. Contrary to this general rule, the state as the shareholder of an entity created by virtue of corporatization remains the owner of the property that was assigned to such entity.

There is no uniform approach in the Ukrainian legal doctrine to understanding of the legal regime of property of the state joint-stock companies. Two opposite approaches exist in the academic community of Ukraine concerning determination of the owner of the property transferred to the state joint-stock companies in which 100 percent of the shares are owned by the state. The proponents of the first approach presume full application of the general provisions regarding legal entities (including commercial entities) to all companies created with the participation of the state and recognition of all property transferred to the charter capital of a commercial entity as its private property (so-called 'civilist approach').

In particular, I. A. Selivanova believes that joint-stock companies that are entities of the state sector of economy should also be recognized as the owners of the property [8, p. 48]. She further indicates that there is no reasonable ground for the fact that the current legislation does not recognize joint-stock companies with the participation of the state, unlike joint-stock companies without such participation, as the owner of the property [6, p. 74]. Meanwhile, she admits that open joint-stock companies created by the state can be recognized by the legislation as both the owners of the property transferred to their charter funds and entities possessing this property on the basis of the right of economic authority [7, p. 219]. O. Chernenko underlines that any property transferred by the state as a participant to a state joint-stock company shall be included into its charter capital and becomes the property of a company. The

state retains corporate rights, while the joint-stock company acquires the rights of the owner [1, p. 130]. V. V. Vasylieva specifies that joint-stock companies created by means of corporatization acquire all transferred property of an enterprise into ownership [10, p. 169]. D. I. Pohribnyi asserts that the common feature of corporatization and privatization is that in these processes, on the one hand, the state's right of ownership in respect of the property of state enterprises terminates, but, on the other hand, the state acquires the relevant corporate rights [4, p. 6]. However, even legal scholars supporting such views ultimately admit that specific features of the legal regime of property of such companies are not determined on the legislative level [11, p. 162], and this causes the need to take into account, when establishing the legal regime of property of state joint-stock companies, the rules of special laws (if available) and rules of local acts, since they may contain provisions related to such legal regime [1, p. 133].

Another approach is based on the position that the state joint-stock companies have specific features in respect of their establishment and that the property transferred to the companies in which 100 percent of the shares are owned by the state is the state property. No change of the legal regime of the state property occurs due to the transfer of this property to the charter capital of a state joint-stock company. As it was observed in the legal doctrine, a change of the entity's corporate form does not automatically lead to a change of the legal regime of the property owned by such legal entity [9, p. 436]. The change of the state ownership can take place only when the state loses its ownership rights to the property, *e.g*. by the mechanism of privatization. The creation of an open joint-stock company by the state and the transfer of the state property to the charter capital of this company do not constitute alienation of the property into private ownership. Therefore, under Ukrainian law, making a contribution to the charter capital of a corporatized entity (joint-stock company) cannot be considered as the ground for changing the form of ownership of the state property [2, p. 60]. It was stressed in the legal doctrine that the state property assigned to a corporatized state commercial enterprise based on the right of economic authority will be operated by the newly-created joint-stock company on the basis of the right of economic authority until its privatization is completed [2, p. 61]. Therefore, it can be concluded that corporatization transformed state enterprises into open joint-stock companies with new corporate names, new organizational structures and new systems of management, but the assets of these companies remained the state property. In essence, the state retained the right of ownership of both the shares of the joint-stock companies created by means of corporatization and the property used by such companies to carry out their activities [3, p. 66].

The Ministry of Justice of Ukraine in Clause 1.3 of its Letter No. 19-32/2 "*Clarification of the Procedure for Registration of Rights of Ownership to the Objects of Real Estate Depending on Forms of Ownership*" dated 11 January 2007 also observed that joint-stock companies, in which the founder and sole shareholder is the state represented by the bodies of executive power, have a special legal regime of property, compared with other commercial entities established not within the procedure of corporatization. In particular, state property transferred to the charter fund of state joint-stock companies, created by means of corporatization, remained under state ownership and its alienation was only possible by the privatization bodies in accordance with the privatization procedures determined by law. Based on the foregoing, the Ministry of Justice of Ukraine explained that the owner of the state property transferred to the charter fund of a state joint-stock company is the state, represented by the Cabinet of Ministers of Ukraine (or any other body of executive power which was the founder of such a company).

There are legislative grounds for consideration of the property of such companies as the state property assigned to these companies on the basis of the right of economic authority. Following Article 13 of the Law of Ukraine "*On Privatization of State and Communal Property*" dated 18 January 2018, methods of privatization of property are the sale of properties under public or community ownership through auction, including an auction with conditions; an auction without conditions; an auction with step-by-step reduction of the opening price followed by submission of price offers; an auction with reduction of the opening price; an auction that involves reviewing price offers; and buyout of objects of privatization. This is the exhaustive list of methods of transfer of property into private ownership. Equally, the Law of Ukraine "*On Management of Objects of State Ownership*" dated 21 September 2006 does not provide for acquisition of the right of ownership by a state joint-stock company in respect of contributions transferred to its charter capital. Article 6(13) of the Law of Ukraine "*On Holding Companies in Ukraine*" dated 15 March 2006 directly stipulates that shareholdings or other property transferred to the charter capital of a state holding company remain in the state ownership and are assigned to it on the basis of the right of economic authority. Overall, the Ukrainian legislation does not contain provisions which would allow the state authorities to alienate the state property from the state ownership by making contribution to the charter capital of a state joint-stock company.

Article 145(2) of the *Commercial Code of Ukraine* dated 16 January 2003 provides that change of the legal regime of the property of a commercial entity is made on the basis of the resolution of the owner(s) of the property within the procedure established by this Code and other laws. In case of corporatization or transfer of property into the charter capital of a state joint-stock company there is no such separate resolution about transfer of the property into the ownership of a newly-formed joint-stock company. In essence, there must be a direct intention (express willingness) of a founder to transfer this property into the ownership of the newly-established entity. Following Article 145(3) and (4) of the *Commercial Code of Ukraine,* legal regime of the property of a commercial entity based on the state ownership can be changed through privatization of the property of the state enterprise or by leasing the integral property complex of the enterprise. The Code does not provide for such a change through transfer of the property to the charter capital of another entity. This corresponds with Article 345(1) of the *Civil Code of Ukraine* dated 16 January 2003, under which an individual or legal entity may acquire the right of ownership in case of privatization of the state property and communal property. This Code equally does not provide for another ground for acquisition of the state property into the ownership of a private person, apart from privatization. Therefore, privatization and lease of the integral property complex of the enterprise are the only methods of change of legal regime of the property from the state ownership into private ownership. Such change can take place only upon completion of the privatization procedure.

It should be admitted that the Ukrainian court practice in this area is non-uniform and rather inconsistent. In particular, the panel of judges of the Cassation Administrative Court in its *Ruling on Submission of the Case for Consideration by the Grand Chamber of the Supreme Court* dated 15 March 2019 (case No. 804/15369/13-a) acknowledged that "as of now, there are no clear legislative provisions

and likewise there is no legal conclusion of the Supreme Court of Ukraine concerning determination of the legal regime of property of joint-stock companies in which 100% of shares are owned by the state. Then this legal problem may arise in indefinite number of cases". In their *Dissent Opinion* dated 26 March 2019 in the case No. 804/15369/13-a the judges of the Supreme Court noted that the court practice on this issue is non-uniform and provided examples of contradictory court decisions taken on different cases in which the judges made completely opposite conclusions regarding legal regime of the property transferred to the charter capital of such companies (in particular, this Dissent Opinion refers to one case in which the company was recognized as the owner of this property, and two cases in which the state was held to remain the owner).

In fact, there are numerous judicial cases, in which high judicial authorities of Ukraine uphold the view that legal regime of property upon its transfer to the charter capital of a state joint-stock company remains unchanged, and this property should be qualified as the state property. Majority of these cases relate to the disputes arising in respect of registration of ownership rights to items of property (usually real estate) contributed to the charter capital of a state joint-stock company, in favour of such company. The courts continually and emphatically held that this property remains in the state ownership, and any registration of private title to it is illegal.

For example, in the *Resolution of the Supreme Court* dated 5 July 2018 in the case No. 915/826/16 the court indicated that the state represented by the Cabinet of Ministers of Ukraine changed the legal form of the state enterprise to public joint-stock company and determined the amount of its charter capital, but the property which formed the charter capital, including the contestable complex of non-residential premises, was not transferred to its ownership. The transfer and acceptance act executed in respect of the integral property complex transferred to the state enterprise contained no statement on transfer of the contestable property into private ownership of this enterprise. In a similar case settled by the *Resolution of the Supreme Court* dated 6 November 2018 in the case No. 925/473/17 the court stressed that, since the Cabinet of Ministers of Ukraine did not take decision on the change of legal regime of the contestable property, then no change of form of ownership from public to private took place.

In another similar case settled by the *Resolution of the Supreme Court* dated 8 May 2018 in the case No. 925/875/17 the court concluded that until completion of privatization within the established procedure this property shall remain the object of state ownership. The court rejected allegations of the company that change of the form of ownership from state into private ownership took place within the procedure of reorganization by transformation of the state enterprise into public joint-stock company during which the state of Ukraine exchanged one object of state ownership into another, namely that it transferred the property into charter capital of public joint-stock company and obtained the corporate rights to 100% shares of the company, while the company obtained the right of ownership to the transferred property.

The High Commercial Court of Ukraine in its *Resolution* dated 2 March 2006 in the case No. 3/90пд-05 indicated that an open joint-stock company created within the process of corporatization changes its legal form, but does not change the sector of economy. Alienation of property belonging to the state sector of economy can be made solely within the procedure established by laws, in particular, through its privatization. In this case the High Commercial Court of Ukraine established that transfer to the charter capital of the state joint-stock company of the shares of corporatized enterprises was the form of transfer by the state of its authorities on management of property.

In view of this analysis of the current legislation of Ukraine, court practice and legal doctrine, it may be submitted that the property used by state joint-stock companies in their economic activity will remain in the domain of the state ownership until completion of the privatization procedure. Mere transfer of this property into the charter capital of these companies by the state does not entail *ipso facto* change of its legal regime.

Conclusion. There are reasonable grounds to believe that the state property transferred to the charter capital of a state joint-stock company remains in the state ownership. Mere transfer of property to the charter capital of such entity cannot be considered as the legal ground for change of the form of ownership from the state ownership into the private ownership. Likewise, legal regime of the state property cannot be changed as a result of mere transformation of the state enterprise, in particular, within the process of corporatization. Transfer to the charter capital is the form of transfer by the state of its authorities on management of property, and such transfer does not evidence automatic acquisition of property rights by the joint-stock company. A joint-stock company created on the basis of the property of a state enterprise acquires the right of ownership to the property transferred by the state to its charter capital only through privatization and upon completion of its procedure. Until privatization this property shall remain the object of state ownership.

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ПРАВОВИЙ РЕЖИМ МАЙНА ДЕРЖАВНИХ АКЦІОНЕРНИХ ТОВАРИСТВ В УКРАЇНІ: ПРОБЛЕМА ВИЗНАЧЕННЯ ТА РЕАЛІЗАЦІЇ

Розглядаються проблемні питання визначення правового режиму майна державних акціонерних товариств, зокремаі тих, які було створено в процесі корпоратизації державних підприємств. Аналізуються особливості правового режиму майна цієї категорії товариств з огляду на специфіку їхнього правового статусу й участь держави в процесі заснування та управління такими товариствами. Зроблено аналітичне узагальнення наявних доктринальних підходів щодо визначення правового режиму такого майна, досліджено законодавче регулювання у цій сфері та узагальнено неоднорідну й непослідовну судову практику стосовно правового режиму майна державних акціонерних товариств. Пропонується вважати майно таких товариств виключно державною власністю, при цьому державне акціонерне товариство наділене обмеженими повноваженнями, пов'язаними з використанням такого майна в межах його статутної діяльності. Зміна правового режиму такого майна та його перехід у приватну власність можливі через застосування приватизаційних процедур, а не в результаті внесення такого майна державою до статутного капіталу державного акціонерного товариства чи корпоратизації державного підприємства.

Ключові слова: державне акціонерне товариство, майно, державна власність, корпоратизація, приватизація, повноваження власника.

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ПРАВОВОЙ РЕЖИМ ИМУЩЕСТВА ГОСУДАРСТВЕННЫХ АКЦИОНЕРНЫХ ОБЩЕСТВ В УКРАИНЕ: ПРОБЛЕМА ОПРЕДЕЛЕНИЯ И РЕАЛИЗАЦИИ

Рассматриваются проблемные вопросы определения правового режима имущества государственных акционерных обществ, в том числе тех, которые были созданы в процессе корпоратизации государственных предприятий. Анализируются особенности правового режима имущества данной категории обществ с учетом специфики их правового статуса и участия государства в процессе создания и управления такими обществами. Сделано аналитическое обобщение существующих доктринальных подходов касательно определения правового режима такого имущества, исследовано законодательное регулирование в этой сфере и обобщена неоднородная и непоследовательная судебная практика касательно правового режима имущества государственных акционерных обществ. Предлагается считать имущество таких обществ исключительно государственной собственностью, при этом государственное акционерное общество наделено ограниченными полномочиями, связанными с использованием такого имущества в рамках его уставной деятельности. Изменение правового режима такого имущества и его переход в частную собственность возможны вследствие применения приватизационных процедур, а не в результате внесения такого имущества государством в уставный капитал государственного акционерного общества или корпоратизации государственного предприятия.

Ключевые слова: государственное акционерное общество, имущество, государственная собственность, корпоратизация, приватизация, полномочия собственника.

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РЕГУЛЮВАННЯ ФУНКЦІОНУВАННЯ ОФШОРНИХ ЮРИСДИКЦІЙ

У світі існує значна кількість країн і територій, які надають податкові пільги аж до повного звільнення від податків зареєстрованим там компаніям, що використовуються в міжнародному бізнесі. Такі країни і території зазвичай називають офшорними зонами або міжнародними офшорними центрами. Завдяки розвитку міжнародного економічного співробітництва та лібералізації зовнішньоекономічних відносин використовувати офшори мають можливість платники податків практично всіх країн світу.

Ключові слова: офшорні зони, фінансові центри, офшорні компанії, офшорні центри, офшорний банк.

Постановка проблеми. Сучасну світову економіку важко уявити без функціонування офшорного бізнесу. Підприємці більшості країн використовують офшорні центри для максимізації прибутку, зменшення податків і захисту власного капіталу, переходячи до тіньового сектору, уповільнюючи економічний розвиток країни, створюючи перепони для трансформаційних процесів, котрі спрямовані на покращення добробуту держави. Українські підприємці не є винятком і вважаються одними з лідерів за кількістю створених офшорних компаній, діяльність яких негативно впливає на державний бюджет та економічне зростання. Економічні трансформації, що відбуваються на сучасному етапі в Україні, націлені на створення ринкової економіки, боротьбу з тіньовим сектором і всебічну співпрацю з Європейським Союзом. Тому ключовими проблемами держави є розширення зовнішньоекономічної діяльності, залучення інвесторів і запобігання порушення чи уникнення податкових зобов'язань для заощадження чи збільшення рентабельності виробничої або фінансової діяльності. Офшорний бізнес безпосередньо впливає на процеси економічного розвитку країн, адже використання офшорних компаній у міжнародній інвестиційній та зовнішньоторговельної діяльності досить поширене серед підприємств.

Виклад основного матеріалу дослідження. Однією з особливостей на сучасному етапі економічного розвитку в умовах глобалізації є функціонування офшорних зон, тобто таких фінансових центрів (або так званих податкових гаваней), які створюють для бізнесменів сприятливий валютно-фінансовий і фіскальний режим, а також високий рівень банківської та комерційної таємниці. Проте важливо зазначити, що сьогодні термін "офшорна зона" не має чіткого загальновживаного визначення, тому кожна країна самостійно визначає, які країни та території вважати офшорними зонами. В Україні повний список офшорних зон приведений у "Переліку офшорних зон", затвердженому Розпорядженням Кабінету Міністрів України від 23 лютого 2011 р. № 143-р [4].

Самі по собі офшори не є чимось поганим, адже це зона, де на законних підставах компаніям надають певні бонуси. Серед їхніх позитивних боків слід назвати:

- створення сприятливих інвестиційні умов, що є наслідком підвищення кількості та розмірів інвестиційних вкладів;