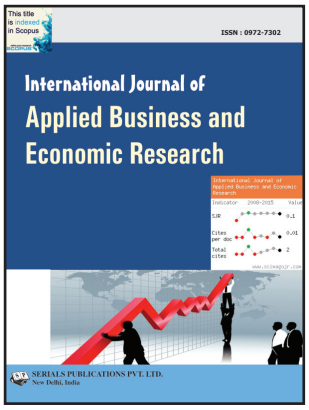

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The State Enterprise in the System of Legal Entities That Mediate the Right of Public Ownership

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ABSTRACT

The essence of public ownership is presented in relations of domination, appropriation and distribution of public goods to meet public interests. Unlike private property, public property has a known purpose – the purpose of use is derived from the goals of appropriate public company. Polyfunctionality of public ownership has a significant legal polymorphism in its implementation; in addition, each of the legal forms of implementation of public property should be subordinated to the solution of a particular problem (or group of homogeneous tasks) in the framework of the purposes through the prism of which their effectiveness is subject to an assessment.

Publicly-owned property is divided into two parts. One part is the legal regime of the state treasury applicable to property not assigned to state legal entities; a similar rule is provided in respect of the "not distributed" part of municipal property. The other part of the property which is in public ownership is distributed between the state and municipal organizations legal entities, forming the material basis for the exercise of their functions; depending on the legal form of the legal entity the property is in the regime of the right of economic management or right of operative administration. Among the first constituent entities are unitary enterprises based on the principle of economic management; the second group – state-owned enterprises, institutions (Autonomous, state-financed, public). As enterprises and institutions have the status of a legal entity and independently act in civil circulation so far as they can be defined as a form of indirect exercise of the right of public ownership.

JEL Classification: K49, H41, H89, K10.

Keywords: State enterprise, operative administration, public property, economic management, state corporations.

1. INTRODUCTION

The essence of public ownership is in relations of domination, appropriation and distribution of public goods to meet public interests (Mazayev, 2004). Unlike private property, public property has a known

purpose – the purpose of use is derived from the goals of an appropriate public company. "The scope and content of these (state and municipal – author's note) forms of ownership are determined by the objectives for the management of general affairs and they are determined by the purpose of objects of state and municipal ownership. Thus the public interests whose satisfaction provided by the use of public property are not limited to the economic sphere, but can be discovered virtually in any plane of social existence. In particular, we are talking about the social and political order, which consists in ensuring the sustainable balanced development of society, which allows normal functioning of democratic institutions; on social order, expressing the impact of economic activities on the social structure of society, the state and level of social life; finally, on the cultural goals associated with the preservation and reproduction of spiritual values and the formation of the material conditions for the growth of the spiritual potential of the society and each of its members.

A polyfunctionality of public ownership has a significant legal polymorphism in its implementation; in addition, each of the legal forms of implementation of public property should be subordinated to the solution of a particular problem (or group of homogeneous tasks) in the framework of the purposes, through the prism of which their effectiveness is subject to an assessment.

Publicly-owned property is divided into two parts. One part is the legal regime of the state treasury, applicable to property not assigned to state legal entities; a similar rule is provided in respect of the "not distributed" part of municipal property. We are talking mainly about the means of public budgets, which follows from a literal interpretation of articles 214, 215 of the Civil code of the Russian Federation (further – GK the Russian Federation), although, as D. L. Komyagin pointed out "participating in legal relations regulated by the civil law, the state treasury will not fit into the framework of this law define that allows to speak about the state treasury, as a kind of emerging subject of rights and duties" (Komyagin, 1999). The exercise of the rights of state and municipal ownership of the property being in the treasury is carried out by authorized bodies of state power and local self-government in the framework of relations regulated by the budget legislation.

The other part of the property which is in public ownership is distributed between the state and municipal organizations legal entities, forming the material basis for the exercise of their functions; depending on the legal form of the legal entity, the property is in the regime of the right of economic management or right of operative administration. Among the first constituent entities are unitary enterprises based on the principle of economic management; the second group – state-owned enterprises, institutions (Autonomous, state-financed, public). As enterprises and institutions have the status of a legal entity and independently act in civil circulation so far as they can be defined as a form of indirect exercise of the right of public ownership.

In addition, the legal forms of indirect exercise of the right of public ownership are also classified as business companies with 100% or otherwise a prevailing participation of the public owner as well as state corporations and state companies. Feature of the property regime of these legal entities is that the property referred to them as a contribution (deposit, etc.) as well as property acquired as a result of their activities belongs to them by right of ownership; that is, from the formal legal point of view is not state or municipal.

2. RESULTS

Despite the significant external differences between the legal regimes of the functioning of property owned by unitary enterprises and institutions on the rights of economic management and operative administration respectively, on the one hand, and economic companies, state corporations, state companies which are the subjects of property rights, on the other, an essential prerequisite for combining them into the general category of legal forms of an indirect exercise of the right of public ownership is that all of these institutions – the legal form mediating economic relations of split property.

The latter is due to the increasing complexity of economic relations, at a certain stage of which the separation of management process from ownership of capital takes place as a result of the subjects of property rights are relegeted to the background and the management group begins to execute their function (Rubanov, 1987); the concentration of capital reaches such an extent that the effective management by the owner or group of owners becomes impossible. In order to the manager had the opportunity to carry out their functions, the owners are forced to share with him a part of their economic power; therefore, the property, hitherto one and indivisible is divided or "split" between several entities.

The breakdown of economic power is carried out vertically forming a subordinate (vertical) variant of structure of property relations in contrast to the so-called "horizontal" models of complex ownership presented by the Institute of general property (a participatory share ownership or common ownership) (Mozolin, 1992). A.V. Venediktov wrote that "in a divided ownership the division of power and interest between several individuals and groups... does not occur "horizontally", as it is in the case with common–participatory share (condominium) or joint (gesamteigentum) property and "vertically", i.e. when each of the owner does not have a part of the same rights of ownership (defined or undefined) but entitlements of a different nature and scope. When the ownership is divided there is the division of power and interest between the two entities each of which is incomplete, but still valid owner it does't matter how the power and participation in the benefits of one owner of property is limited by power and participation in the same benefits of the other" (Venediktov, 1955).

This process is characteristic of any economic system with the appropriate level of development, but a set of legal forms by which the problem of legal mediation of relationships of split ownership is solved can be developed with the specificities of the national legal systems.

The main problem of legal registration of relations of shared ownership in the domestic legal system, in our view, is that the basis of the paradigm of legal regulation of property relations is based on the classic principle of Roman law of property – "every thing can have only one owner" (Malykhina, 2004). This model meets the requirements of civil circulation of Ancient Rome, but is totally unsuitable for the modern level of development of the system of economic relations have received legal form in the acting civil code. Naturally, in these conditions the legislator had to put the legal regulation of relations of shared ownership in a "Procrustean bed" of classic designs of the proprietary and contractual rights. The latter being adapted to the legal relations of shared ownership are unable to express fully the economic substance of the latter, with the result that legal modeld created by them turned out to be unbalanced from the point of view of the correlation of interests of subjects of these relations.

Today there are two main groups of legal forms pertaining relations of shared ownership that are single by their economic nature are differentiated according to the criterion of formal ownership. The first

group includes companies, public corporations and companies having the positive law as the owners; the second includes unitary enterprises and companies that are granted with a public property on the basis of limited rights (Kulikova, 2016).

As a priority form of "indirect" implementation of public ownership the Concept of development of civil legislation of the Russian Federation, as follows from paragraph 6.3 of the section III of this document specifies the business companies with 100% or otherwise a decisive participation of public legal entities in their property. The task of the legal aspects of the separation of a capital-function from capital ownership is solved in the framework of the law of obligations model in which the company is the single owner of its property, regardless of its sources (capital contributions, profits from business or other activities), and the participants are endowed with a known set of rights in relation to company with the classic dichotomy of property rights are assessed as a liability; the total set of the rights listed in the article 67 of the Civil code. According to G.S. Shapkina, "pointing to the contractual nature of relations between shareholder and the company, the Civil code and the Law "On joint stock companies", thereby eliminates the erroneous interpretation contained in article 11 of the RSFSR Law "On enterprises and entrepreneurial activities", which stated that property of the joint stock company of the closed type (which, moreover, wrongly identified with the limited liability partnership) is owned by the participants in the common ownership".

As a result of using this approach the positive law creates a consistent, at first glance, legal model of the corporation with understandable property regime for the "classical" jurists and the scheme of legal relations. Actually it is the consistency of the "thing in itself"; by looking at it through the prism of the tasks for which it was created, we find a deep contradiction between the essence of economic relations and the legal regime designed to mediate them. The legal design of corporations in modern Russian civil law simply ignores the "proprietary" element in the legal status of their members, reducing them to the role of creditors who are protected less than the creditors in ordinary civil obligation. Implemented in current Russian law model of corporation "turns upside down" the entire system of economic relations of share stock ownership: companies created solely for the purpose of management by shareholders "magically" acquire the status of owners Mozolin V.P. says the shareholders are "on the status of their owners" while in fact, forced to "settle" the legal status of the creditor (Bashkov & Silnov, 2015). The natural result of such decisions is the problem of insufficient legal protection of members against unfair actions of executive agencies that often implement its activities, not the interests of the participants and their own.

In a situation where the economic entity acts as a legal form of public ownership (as a sole or majority shareholder acts as public entity), the problems can be aggravated due to the considerable negative social impacts, due to the fact that this legal form was originally designed for professional business activities does not ensure the use of the property strictly for public purposes given by public "owner". As rightly observes V.P. Mozolin, no national purpose and function beyond the purely business activities, organically associated with the need for profit joint stock company with state or municipal interests, from the point of view of the current law into account may not be accepted. In a market economy, joint-stock company adjustable existing law, is considered as private education, is not subject to control by the state for activities carried out within the framework of the law. In addition, as rightly A.V. Boldyrev believes the corporate form does not preclude the fact that "... state authorities in favor of the immediate interests will not be accepted the decision on selling stake in the joint-stock company" (Boldyrev, 2010).

This indicates that the legal form of corporations for the realization of the right of public ownership in those areas where at the forefront is a public interest not a profit.

From the point of view of said it is important to critically assess expressed idea of total replacement of the unitary enterprises including state-owned enterprises of subjects of the Russian Federation and municipal state-owned enterprises and economic entities with 100% or otherwise a decisive participation of public legal entities in their property without appropriate legal adjustments of the legal structures of corporations in paragraph 6.3 of section III of the Concept of development of civil legislation of the Russian Federation.

The task of harmonization of the functional purpose of public ownership and mediating its use of the legal regime is more in line with the organizational-legal form of state corporations and state companies as nonprofit legal entities. The normative basis of their existence are in accordance with clause 7.1, 7.2 of the Federal law "On noncommercial organizations".

According to V.P. Mozolin "state corporations (companies) in their present form provided by the legislation carry out public law functions with functions of a private law character. The economic basis for such combination of functions in the form of one and the same legal entity was an innovation management nature of the activities of state corporations and granted them the right of state ownership of owned property" (Mozolin, 2010).

Unlike other legal entities, in the base of establishment of each public corporations and companies can only be a federal law; obviously this circumstance explains the fact that this type of organizations has not found wide application in practice.

A significant lack of the legal status of state corporations and companies is a complete uncertainty of their property regime. The fact that, in accordance with paragraph 1 of article 7.1 of the Federal law "On noncommercial organizations" the right of ownership to the property transferred to the state corporation of the Russian Federation is owned by a state corporation; the question of how a subjective right to this property has Russian Federation the legislation leaves open. For expressed in the literature view, in contrast to the "classical" corporations the splitting of ownership in this case takes place and creates two kinds of state ownership of the same property: the property of Russia as a state subject of civil rights and property of state corporations as legal entities – subjects of civil law. Meanwhile, it is clear that the right of ownership in its classic sense on the property of state corporation of the Russian Federation is absent; to explain the nature of these relations V. P. Mozolin suggests a complex single model of property rights. Unfortunately, the answer to the question about the content of the right of ownership of Russia in the assets of a state corporation remains open but its formulation is removed by the observation that during the existence of the state corporation Russia's right to the transferred state property shall be suspended. It recovered to transferred to the corporation property and acquired by government on a newly created property, and acquired by the state corporation during its action.

For public companies the situation is aggravated by the establishment of the duality of the legal regime of its property, as the company has a part of the latter on the right of trust management; in accordance with paragraph 2 of article 7.2 of the Federal law "On noncommercial organizations" types of property in respect of which the state company has trust management are defined by Federal law. Thus, the latter manages a part of the public property as the owner and a part as a trustee. Meanwhile, the design of trust management is mediated by positive law as the institute of law of obligations. As a result the status of a public company as a "manager of the state property" is formed by a quirky mix of proprietary and contractual elements.

3. DISCUSSION

The comparison of limits of powers with the laws on state corporations (companies) given to the Russian Federation allows to draw a conclusion that their set of rights is similar with rights of participants of economic company. As a result, the difference of state corporations and companies from the latter lies mainly in their reference to the number of non-profit legal entities and as a consequence of having special legal rights. It is possible to recognize that this approach is more in line with the task of managing public property, but in terms embodied in the legislation of approach to the mechanism of creation of state corporations and companies only on the basis of Federal law and limit the uncertainty of the property regime of the latter is difficult to assess the legal forms of the exercise of the right of public ownership which will be an alternative economic companies and unitary enterprises and institutions.

Designs of limited real rights such as the right of economic management and right of operative administration solve the problem of the legal mediation of splitting ownership by giving relevant limited real right to the trustee by the owner (as a unitary enterprise or institution) the content of which is constructed on the basis of the classic triad of powers (possession, use, disposal), the limits of which are defined by law and the will of the owner; the latter reserves the right of ownership, the content is not expressed in traditional property law entitlements, expressing the possibility of direct action on the item but the number of rights allows to influence the property indirectly impact on the behaviour of the manager.

The legislation differentiates unitary enterprises according to two criteria: depending on the level of public company, the founder and the type of property regime. Differentiation of the first criterion due to peculiarities of the structure of public ownership in the Russian Federation is represented by three levels: federal property, property of constituent entities of the Russian Federation, municipal property. According to this the paragraph 2 of article 2 of the Federal law "On state and municipal unitary enterprises" highlights the federal state-owned enterprises, state-owned enterprises of subjects of the Russian Federation, municipal enterprise (Kulikova, 2014). The classification determining the level realized in the form of unitary enterprises for public purposes (Federal, regional, local), meanwhile, has no fundamental impact on the status of the enterprise; the latter is designed by the legislator, irrespective of the kind of public ownership. The body having the company's rights of the owner of the property is only different; in addition, a separate order of creation (the procedure for determining the composition of the assets allocated to a unitary enterprise on the right of economic management or operational administration, procedure for the approval of the founding charter of the unitary enterprise and a contract with its manager) shall be determined by acts of the appropriate level (paragraph 5 of article 8 of the Federal law "On state and municipal unitary enterprises").

The differentiation in the current legislation of property regimes of unitary enterprises was the result of attempts to adapt the system of state management of the socialist economy to the new conditions. The idea of strengthening of the economic independence of state enterprises in the transition period was embodied in the right of full economic management under the Law of the RSFSR "On property" and equivalent in accordance with paragraph 2 of article 5 of the act to the right of ownership. With the introduction of Part one of the Civil code of the Russian Federation this right was transformed into the right of economic management; six months earlier, the form of the unitary enterprises was revived on the right of operational administration the legislation called the state enterprises. The term "state enterprise" appeared in the Presidential decree "On the reform of state enterprises" of 23 may 1994, No. 1003; in the

Resolution of the Government of the Russian Federation of 12 August 1994 No. 908 and of 6 October 1994 No. 1138 were adopted and approved the Standard charter of a state works (state factory,state economy), created on the basis of the liquidated federal state enterprise and the Procedure for planning and financing of activity of state works (state factories, state farms). By presidential decree of may 23, 1994 granting the status of state-owned enterprises was seen as a sanction against the government for improper use of federal funds, violations in the use of fixed real estate, absence of profit in the last two years. In the Resolution of the Government of the Russian Federation which approved the Procedure for planning and financing of activity of state works (state factories, state farms), on the contrary, the opinion of industrial departments was prevailed that is why the state enterprises at first, "trapped in the penalty box," has received significant privileges and benefits compared to other state-owned enterprises (including in matters of jobs, guaranteed orders, wages, etc.).

Thus, today the use of a public property in the economic sphere is not only de facto, but de jure is in a public ownership is mediated by the unitary enterprises of the two types, the basis of differentiation is the type underlying their property isolation of the property rights: right of economic management and right of operative administration. By its legal nature the latter are limited proprietary rights; the subjects of the right of economic jurisdiction or operational administration rights in their property rights are limited by the will of the owner in one or another extent. Legal forms of such restrictions are the object and purpose of the activities determined by the owner in the founding charter (clause 1, article 295 of the Civil code), the consent of the owner to dispose of real estate and some other property (paragraph 2 of article 295 of the Civil code). State-owned enterprise as the subject of the right of operative administration is limited to the object and purpose of the activities, immediate and mandatory tasks of the owner, the purpose of the property; even more narrow as a general rule by powers to the property belonging to him than the subject of the right of economic management (article 297, 298 of the Civil Codr) (Petrov, 2002, p. 135). While seemingly civil nature of this dichotomy which was based on the criterion underlying the separation of property of enterprise property rights, it has a managerial importance because it directly affects the legal status of the entity in the "vertical" relations with state and municipal authorities that implement rights of the owner of property of the enterprise. Specifying a different degree of economic freedom of enterprises and, consequently, their independence in relations with the public owner, the rights may mediate different degree of "management" of their subjects providing, thus, a direct impact on their legal status in the property-regulatory relations.

4. CONCLUSION

In comparison with the state-owned enterprises unitary enterprises on the right of economic management have a greater degree of economic freedom in the implementation of economic activities. As accurately noted by A.G. Didenko, the activity of the unitary enterprises based on the principle of economic management (in the terminology of the author the self-supporting enterprises) are subject to the principle "everything is permitted that is not expressly prohibited", while the activities of state-owned enterprises to a different principle "everything is allowed that is expressly permitted" (Didenko, 2003). In particular, it is shown that the state authority which controls a unitary enterprise has in relation to it a smaller set of managerial competences, the list of which is defined by clause 1 of article 20 of the Federal law "On state and municipal unitary enterprises". The analysis of the content of these powers leads to the conclusion that managing the activities of the unitary enterprises is reduced mainly to monitoring and solving key personnel

issues (concerning the director and chief accountant). In respect of state-owned enterprises provides the implementation of all the functional components of management including planning their activities: the authorized body has the right to bring to public enterprise binding orders for delivery of goods, performance of works, rendering of services for state or municipal needs, and to approve the estimate of revenues and expenditures of public enterprises (paragraph 2 of article 20 of the Federal law "On state and municipal unitary enterprises"). Thus, the status of state-owned enterprises included in the system of management of public property by any legal subordinate relations, mediating the implementation in relation to state-owned enterprises of all functional components of management differs significantly from the status of an enterprise on right of economic management which is relatively free in economic activity. It is remarkable that in foreign countries unitary and state enterprises are opposed to each other to an even greater degree; the latter generally have neither the legal nor economic independence. For example, state-owned enterprises act in civil circulation on its own behalf and on behalf of the state or of the subject (land, communities) do not have financial autonomy (all of their income and expenses pass through the state budget and the property by the decision of competent authorities can be used for all purposes, even if it is not related to the activities of the enterprise) are included in the system of government and directly managed by any public body (Ministry, Agency, local authority) do not pay taxes, etc.

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