



## **Issues of Legal Forms of the Mediated Implementation of the Right of Public Property and Self-financing**

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### **ABSTRACT**

The article considers the nature of the relationship mediating the right of public ownership. The author studies the legal status of a public enterprise, its place in the system of legal forms of indirect realization of the right of state and municipal property. Depending on the type of property rights pertaining to the interrelation of state and municipal property the unitary enterprises are divided into types: Based on the principle of operational management and based on the principle of economic management. The article critically examines the question of the necessity of the right of economic management, because of the wide scope of rights of the enterprises towards public ownership. Also attempted to define criteria for distinguishing between the scope and functional purpose under consideration of limited real rights in the sphere of state and municipal sectors of the economy. According to the results of the study conclusions are formulated about the absence of objective necessity of the existence of legal reality in two types of unitary enterprises due to lack of legal regulation of the essential differences of their tasks. The author proved that the legal form of corporations is not suitable for public property rights in those areas where the foreground is implementation of public interests but not a profit making.

**Keywords:** Legal Forms, Right of Public Property, Self-financing, Public Ownership, Property Rights

**JEL Classifications:** D23, H82, K11

### **1. INTRODUCTION**

The essence of public property is shown in the relations of domination, assignment and distribution of material benefits for satisfaction of public interests (Mazayev, 2004). Unlike a private property public property (part of which has two forms – State and municipal) has the known purpose – The purposes of its use are derivative of the purposes of the corresponding public institution. G.A. Gadzhiev fairly notes that the purpose of objects of public property and also volume and content of its forms (public property) is predetermined by the tasks of maintaining common causes facing the state (Gadzhiev, 1996). At the same time public interests which satisfaction is provided as a result of use of public property aren't limited by economic sphere but can be found practically in any plane of social life. In particular, it is about the social and political purposes consisting in ensuring the forward balanced development of society which level allows institutes of democracy to function normally; about the social purposes expressing influence of economic activity on a structure

of society, its condition and a standard of living of his members; at last, about the cultural purposes connected with preservation and reproduction of cultural wealth and formation of material conditions of growth of spiritual capacity of society and each member of it (Kulikova, 2012).

### **2. MAIN PART**

Poly-functionality of public property causes a legal polyformism of its implementation; at the same time each legal form of implementation of public property has to be subordinated to the solution of a specific objective (or group of uniform tasks) within the common system purposes through prism of which their efficiency is subject to an assessment.

A public property is presented by two components. One of them is in the legal regime of the state treasury extending to the property which isn't assigned to the state legal entities; the similar norm is provided in the relation "the part of municipal property which

isn't distributed." It is, mainly, about means of the relevant public budgets that follows from literal interpretation of articles 214, 215 of the Civil Code of the Russian Federation (further – the Civil Code of the Russian Federation) (The State Duma of the Russian Federation, 2013), though D.L. Komyagin fairly notes that a participation of the state treasury in a property turn brings it for a concept framework actually of property because confirms investment with a quality of the subject of the corresponding legal relationship. The implementation of rights of the state and municipal ownership for the property which is in the mode of treasury is carried out by authorized bodies of the government and local government within the legal relationship regulated by the budget legislation (Komyagin, 1999).

Other part of public property is distributed between the state and municipal organizations of legal entities, forming a material basis of implementation of the functions by them; depending on legal form of the legal entity the corresponding property is in the mode of the right of economic maintaining or the right of operational management. The unitary enterprises founded on the right of economic maintaining are among subjects of the first ones; a number of the second ones are state enterprises, establishments (autonomous, budgetary, state) (Aleksieva et al., 2010).

As the enterprises and institutions are allocated with the status of the legal entity and independently act in civil circulation so far as they can be defined as forms of the mediated implementation of the right of public property.

Besides economic companies of 100% or other prevailing participation of the public owner and also the state corporations and state companies can be also legal forms of the mediated implementation of the right of public property. Feature of the property regime of these legal entities is that the property acquired as a result of their activity or property transferred to them as a contribution is equal belongs to them on the property right; i.e., this property is not state or municipal from legal point of view.

Despite essential external differences of legal regimes of functioning of the property belonging to the unitary enterprises and establishments as economic maintaining and operational management respectively, on the one hand, and economic companies, state corporations, state companies, being legal entities of property with other intrinsic prerequisite of their association in the general category of legal forms of the mediated implementation of the right of public property, the fact that all listed institutes are legal forms mediating the economic relations of the split (divided) property.

The emergence of the latter one is explained by the complication of economic relations at a certain stage of which a degree of concentration of the capital causes requirement of separation of possession of the capital from process of management of production therefore legal entities of property are pushed the background, and the operating group begins to carry out their functions (Rubanov, 1987); representatives of the latter are allocated with the volume of the economic power, necessary for implementation of the corresponding functions which was

“undividedly” belonging to owners. This process is objectively characteristic of any economic system of an appropriate level of development, however a set of legal forms by means of which the problem of a legal mediating of the relations of the split property is solved can't be formed by specifics of national legal systems. This model of the economic relations has a name of the divided (split) property; this splitting is not on the “horizontal” characteristic of classical models of the general property (condominium and co-tenancy), and forms subordinated option of structure of the relations of property at which each of subjects is incomplete, but nevertheless the valid owner, having competences, various character and volume (Venediktov, 1948; Mozolin, 1992).

The main problem of legal registration of relations of the divided property is in the conditions of domestic legal system, in our opinion, consists that the classical principle of the Roman property right is the basis for a paradigm of a legal regulation of the relations of property – “each thing can have only one owner” (Malykhina, 2004). This model which is quite meeting requirements of civil circulation of Ancient Rome but absolutely unsuitable for a modern level of development of system of the economic relations, has received legal fixing in the current Civil Code of the Russian Federation. It is natural that in these conditions the legislator has been forced to stack legal regulation of the relations of the divided property of real and liability laws. The latter has been adapted for legal registration of the relations of the divided property couldn't express fully economic essence of the last therefore the legal models created by them have been de-balanced from the point of view of a ratio of interests of subjects of these relations.

Today there are two main groups of the legal forms mediating the relations, uniform by the economic nature of the split property differentiated by criterion of the formal owner. The economic companies, the state corporations and the companies designated by a positive law as owners are the first group; the unitary enterprises and establishments which are allocated with public property on the basis of the limited real rights are the second (Kulikova, 2012).

The concept of development of the civil legislation of the Russian Federation in part 6.3 of the third section of this document defines economic companies with 100% or other decisive participation of public institutions in their property as a priority form of the “mediated” implementation of public property. The problem of legal registration of separation of the capital from the capital property is solved here within obligations and legal model at which a company admits the uniform and only owner of the property is irrespective of its sources (deposits to authorized capital, the income from business or other activity), and participants are allocated with the known set of the rights in relation to company which when using a classical dichotomy of property rights are estimated as obligations; the general set of the rights is listed in article 67 of the Civil Code of the Russian Federation. According to G.S. Shapkina, pointing out obligation character of the relations of the shareholder and company the Civil Code and the Law “On Joint-stock Companies,” eliminates a wrong definition in article 11 of the Law of RSFSR “On the enterprises and business activity” where it was said that the property of closed joint stock company (which, besides was unreasonably identified with the

limited liability company) belongs to its participants on the right of common ownership» (Mozolin and Maleina, 2005).

As a result of use of such approach the positive law creates, at first sight, consistent legal model of corporation with the property mode and the scheme of legal communications, quite clear for “classical” civilians. Actually it is consistency of “transcendental object”; having looked at her through a prism of those tasks for which solution she has been created, we find a deep contradiction between essence of the economic relations and a legal regime, urged to mediate them. Legal designs of corporations in modern Russian civil law simply ignores a “proprietary” element in legal status of their participants, reducing them to a role of creditors, and the creditors protected less than creditors in the “usual” civil obligation. The model of corporation realized in the existing Russian legislation “overturns upside down” all system of the economic relations of joint-stock property: The companies created only for management of property of shareholders of a “magic” image find the status of owners as shareholders as V.P. Mozolin said “on position of their owners,” are forced “to be content” with the legal status of the creditor in the obligation. Natural result of the similar decision is the problem of insufficient legal security of participants from unfair actions of the executive bodies realizing often in the activity not interests of participants (Mozolin and Maleina, 2005).

In the conditions of market economy, the joint-stock company regulated by the existing civil legislation is considered as the private-law institution not subject to control from the state of the activity which is carried out within operation of the law.

There is a problem of harmonization of a functional purpose of public property and use of a legal regime mediating it legal forms of the state corporation and state company as types of noncommercial legal entities. A standard basis of their existence are in article 7.1, 7.2 of the Federal law “On non-profit organizations.” As V.P. Mozolin fairly notes any nation-wide purposes and functions which are going beyond purely business activity, integrally connected with need of receiving have arrived joint-stock company with the pro-state or municipal interests, from the point of view of the current law in attention cannot be accepted. In the conditions of market economy, the joint-stock company regulated by the existing civil legislation is considered as the private-law education not subject to control from the state of the activity which is carried out within operation of the law (Mozolin, 2010).

Told demonstrates that the legal form of corporations is unsuitable for implementation of the right of public property in those spheres where there is an implementation of public interests, but not generation of profit.

From the point of view of told it is necessary to estimate critically the idea of total replacement of the unitary enterprises expressed in point 6.3 of the third section of the concept of development of the civil legislation of the Russian Federation, including the state enterprises of territorial subjects of the Russian Federation and the municipal state enterprises and economic companies

with 100% or other decisive participation of public educations in their property without the corresponding legal correction of legal designs of corporations.

The matter is that according to paragraph 1 of article 7.1 of the Federal law “On non-profit organizations” the ownership of the property given to the state corporation by the Russian Federation belongs to the state corporation; the question of what subjective rights the Russian Federation has for this property the current legislation leaves open.

Essential lack of legal statuses of the state corporations and companies is the total uncertainty of their property mode. The matter is that according to paragraph 1 of article 7.1 of the Federal law “On non-profit organizations” the ownership to the property transferred the state corporation by the Russian Federation belongs to the state corporation; the question of what subjective rights for this property the Russian Federation has, the current legislation leaves open. In the opinion expressed in literature, unlike “classical” corporations, splitting of property in this case occurs, and two types of state ownership on the same property are created: Property of Russia as the states – the subject of civil law and property of the state corporations as legal entities – also subjects of civil law (Mozolin, 2010). Meanwhile, it is obvious that the property right in his classical understanding to property of the state corporation at the Russian Federation is absent; for an explanation of the nature of these legal relationship V.P. Mozolin offers complicated one-object model of the property right. Unfortunately, the answer to a question of the maintenance of the property right of Russia to property of the state corporation remains open, and his statement is removed the remark on that, “during existence of the state corporation the right of Russia for the state property transferred by her stops. It is restored on the property transferred to corporation and got by the state on the property newly created and acquired by the state corporation during its action” (Mozolin, 2010).

Comparison of volume of authority which current laws about the state corporations (companies) give to the Russian Federation allows to draw a conclusion that their set is similar to the rights of participants of economic societies (The current legislation doesn’t contain uniform model of management in the state corporations and the companies. Structure of governing bodies and their power are defined by the federal law on the basis of which each of the specified legal entities is created). As a result, difference of the state corporation and company from the last consists, mainly, in their reference to number of non-commercial legal entities and, as a result, – investment with special legal capacity. Comparison of volume of authority which current laws about the state corporations (companies) give to the Russian Federation allows to draw a conclusion that their set is similar to the rights of participants of economic societies. As a result, difference of the state corporation and company from the last consists, mainly, in their reference to number of noncommercial legal entities and, as a result, – investment with special legal capacity. It is necessary to recognize that such approach corresponds to a problem of management of public property to a large extent, however in the conditions of the approach to the mechanism of creation of the state corporations and

companies embodied in the current legislation only on the basis of the federal law and extreme uncertainty of their property mode it is difficult to estimate the last as legal forms of implementation of the right of public property which will be able to become real practical alternative to both economic societies, and “traditional” for domestic legal system organizational and legal to forms of the enterprises and establishments.

The legal mechanism of “splitting” of property in the last is based on formal preservation of the property right to property of the legal entity for his founder; the unitary enterprise and establishment receive “share” of the economic power in the form of so-called secondary (or limited) the real rights presented in modern Russian legal system by the right of economic maintaining and the right of operational management. Keeping of the last is based on a triad of competences, characteristic of the “classical” property right, but with one essential reservation – if for the first limits are set only by the law, then for the secondary real rights the limiter – will of the owner is entered additional. The analysis of legal status of the last both in absolute legal relationship of property, and in relative legal relationship with the enterprise (establishment) demonstrates that the maintenance of the property right to the property which is object of the secondary real rights is exposed to considerable transformation, moving from direct impact on a thing to the influence mediated by behavior of subjects of the specified rights. The criterion of a type of the limited real right mediating the property isolation is the cornerstone of division of the unitary enterprises into types. The federal law “On the state and municipal unitary enterprises” (further – The law on the unitary enterprises) creates a legal basis of activity of two types of the unitary enterprises – based on the right of economic maintaining and based on the right of operational management (the state enterprises). Differentiation of legal persons not owners by criterion of level of the public owner (The Russian Federation, the subject of the Russian Federation, municipality), reflecting the developed structure of public property caused by factors of political property doesn’t exert special impact on their civil status).

The criterion of a type of the limited real right mediating the property isolation is the cornerstone of division of the unitary enterprises into types. The federal law “On the state and municipal unitary enterprises” (further – the Law on the unitary enterprises) creates a legal basis of activity of two types of the unitary enterprises – based on the right of economic maintaining and based on the right of operational management (the state enterprises) (The State Duma of the Russian Federation, 2013). The first step towards restoration of a public component in legal status of the unitary enterprises has been made with restoration in system of subjects of civil law of the enterprises founded on the right of operational management, which have received the name of state plant (factory, economy). It should be noted that this form at the first stage had character of the economic sanction applied to the federal enterprises for violations in the property sphere and unsatisfactory economic activity within 2 years; subsequently in legal regulation of such subjects other tendency is found – the state enterprises receive certain privileges in the sphere of the state orders, this form at the first stage had character of the economic sanction applied to the federal enterprises for violations in the

property sphere and unsatisfactory economic activity within 2 years; subsequently in legal regulation of such subjects other tendency is found – the state enterprises receive certain privileges in the sphere of the state orders, etc. The introduction of the Civil Code of the Russian Federation of 1994 “marks” a final legal recognition of the state enterprises as “normal” subjects of civil legal relationship, at the same time existence not only the state enterprises of federal level of property, but also the state enterprises of territorial subjects of the Russian Federation and the municipal state enterprises is provided; the right of operational management has taken the independent place in system of the real rights.

These rights as legal institutes significantly differentiate legal regimes of use of public property to the economic sphere; have been constructed on uniform methodological approach, which cornerstone the idea of introduction additional is (in comparison with the property right), of restrictions by means of which the owner provides realization of the interest; as in this case it is about the owner as whom public education so far as it is correct to speak not about interest of the owner, and about public interest which expresses the last acts. The system of the specified restrictions is shown in categories of a subject and the purposes of activity of the unitary enterprise, and also institute of control by the owner of target use and the order by the enterprise by the separate types of property assigned to him (first of all immovable) in the form of consent on his alienation; concerning the state enterprise the set of such restrictions extends due to inclusion in their number of obligatory tasks of the owner. Is result not only “narrowing” of the right of operational management of volume of competences forming the contents in comparison with the right of economic maintaining which is shown in the plane of the legal relationship of the state enterprise mediating realization of this right with the third parties but also essential features of legal status of an economic entity in the “vertical” relations with participation of the government and municipal bodies exercising the rights of the public owner of property of the enterprise.

The existence in modern economical and legal system of Russia of two types of functionally identical forms of legal entities causes need of definition of spheres of their application for public sector of economy. Many of the scopes of each of the specified forms established by this norm are completely identical (use of property concerning which there is a privatization ban, production withdrawn from circulation or it is limited transferable, activity for the solution of social tasks); others, differing in their verbal formulations, don’t find differences of substantial property. The deep reason of a similar situation – in the functional unity of both legal forms predetermined by uniform essence of public property (Kulikova, 2012). The category of object of activity of the unitary enterprise expressing a certain sphere of functioning of the last not a state to give a clear idea of criteria of differentiation of scopes of each of his types as each of them (certain spheres of use of public property) keeps quality whole, shown at the level of his essence. Therefore, specification of this essence expressed by the all-system purpose of realization of public interest as reflections of general welfare at the level of a concrete element of economic system (enterprise) by means of category of object of activity won’t allow to find objective criteria for the solution of an objective.



The solution of the latter one lies in the plane of a way of the organization of satisfaction of public interest, directly appearing in a funding mechanism for activity of the unitary enterprises. As it has been noticed earlier the differentiation of legal statuses of the types of the enterprises based on public form of ownership is shown in the property and administrative plane: The enterprises on the right of economic maintaining within the object of activity determined by the charter are rather free, independently organizing the activity at the expense of own income; activity of the state enterprises is subordinated by will of the owner by means of institutes of orders, obligatory for the enterprise, and estimates of the income and expenses.

Self-financing is the back side of economic freedom; the principle of self-financing can't be in a basis of activity of the state enterprises, on allocated with economic freedom in that degree which is necessary for independent generation of profit. We will allow such principle only concerning the public enterprises on the right of economic maintaining and that with some reservations.

There is a position of D.V. Petrov who has offered the economic forecast of the corresponding type of social and useful activity as criterion of the choice of a concrete form of economic use of public property: The possibility of extraction during her implementation of the profit sufficient for self-sufficiency, means admissibility of implementation of such activity in the form of the enterprise of which property isolation is the cornerstone ("Right of Economic Maintaining and Operational Management", 2002). Unfortunately, a closer examination becomes obvious that this criterion isn't capable to resolve finally a problem of differentiation of scopes of types of the unitary enterprises because it only reduces degree of legal definiteness in the matter, but doesn't eliminate her finally: It is obvious that any concrete forecast of economic results will be always based on value judgment of his authors.

Meanwhile, the stated position clearly demonstrates defects of the legal designs of the unitary enterprises created by a positive law. As we specified earlier, profitability of social and useful economic activity can't be the basis for system of an assessment of efficiency of activity of the legal entities founded on public form of ownership; we believe that similarly it can't be also criterion (at least, the basic) differentiations of scopes of their concrete legal forms. From paragraph 4 of article 8 of the Law on the unitary enterprises it is easy to see that the most part of the bases of creation of both types of the unitary enterprises of kinds of activity included in "sets" doesn't belong to economic spheres for which profitability or unprofitability are a priori inherent qualities. A striking example is the sphere of housing and communal services: Depending on the size of a tariff for services of the housing and communal services organization her activity makes profit (and considerable – in view of that the activity connected with operation of municipal networks and infrastructures belongs to natural monopolies), and can be unprofitable and be subsidized from the relevant budget. On the other hand, there are examples of quite profitable activity which public importance excludes their implementation by the commercial organizations – health care, education, etc.; inadmissibility of use of criterion of profitability is obvious to an assessment of efficiency of such activity.

### 3. CONCLUSIONS

We believe that the majority of types of socially useful activity can be organized as on commercial (based on self-sufficiency at the expense of profited) and on the noncommercial basis; at the same time gratuitousness of the related activity can be a public interest for the sake of which the state (municipal) enterprise is created.

From our point of view, we believe obvious a conclusion about lack of the objective factors causing need for the Russian economical and legal system of existence of two types of the public enterprises because distinctions of the legal regimes of economic use of the state and municipal property mediated by the corresponding legal forms aren't defined by differentiation of the tasks realized by public institutions in the economic sphere. An increase of independence of the public enterprises by investment with their right of economic maintaining has been directed to increase an efficiency of a social production, however it was acceptable only in the conditions of the organization of the last on the basis of public (state) property or during the period, transitional to market economy. In the conditions of the developed market economy based on a private property, "private" subjects of business activity have to carry out the corresponding functions. Expansion of economic freedom for the public enterprises inevitably attracts decrease in level of a subordination of the relations between the owner and the enterprise that doesn't allow to integrate the latter into the uniform control system of public property subordinated to the purpose of realization of public interests fully. On the other hand, change of legal status of the state enterprises because formal positioning of it is a positive law as commercial legal entities are in the known contradiction with problems of public property is necessary and it leads to the emasculation of essence of a legal form of its management.

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