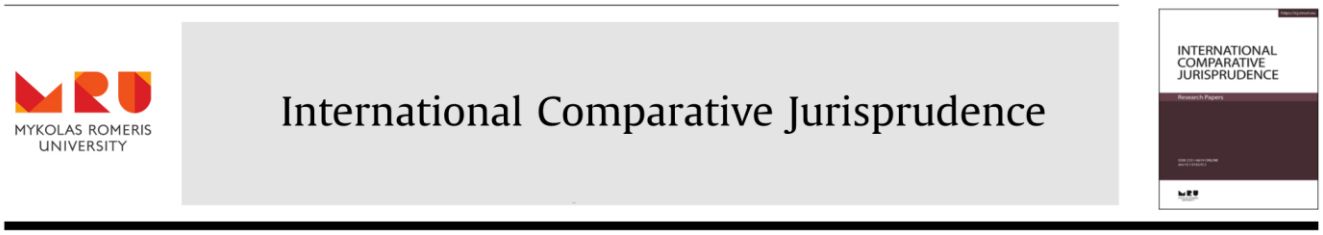
International Comparative Jurisprudence 2019 Volume 5 Issue 1
ISSN 2351-6674 (online) DOI: http://dx.doi.org/10.13165/j.icj.2019.05.007



LEGAL REGIME OF PROPERTY OF UKRAINIAN LEGAL ENTITIES

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Received: 14 October 2019; accepted: 5 April 2019
DOI: http://dx.doi.org/10.13165/j.icj.2019.05.007

Abstract. This article examines the existing legal regime of property of legal entities under Ukrainian legislation. Various forms of legal right to property are analysed by the author: ownership, right of economic and operational management, right to use and other real rights and rights of obligation (rights *in personam*). Most existing titles are controversial, both from a theoretical and practical standpoint. From a theoretical standpoint, it is rather hard to distinguish these forms one from another and to point out their peculiarities. This is especially true about rights of economic and operational management, which were designed in the Soviet period for the purposes of the Soviet economy, but somehow remained in modern Ukrainian legislation. As existing case law shows, this leads to numerous legal disputes which reveal, in particular, the problems of liability of a legal entity and its property independence. The most notorious among these disputes are analysed in the paper, including the dispute between the Ukrainian state and Ukrainian trade unions regarding property transferred to them by the former USSR, the dispute between certain Ukrainian companies and the Russian Federation on property expropriated in Crimea. Based on the analysis, the author suggests certain solutions to existing problems. First, the author insists on recognizing legal entities as property owners. Second, the author proves that public companies need more detailed regulation and are to be provided a clear legal status. It is preferable to stipulate these issues in the Civil Code of Ukraine thus providing comprehensive regulation on all types of legal entities.

Keywords: legal entities, property, ownership right, other real right, right of economic management, public companies, liability, seizure

Introduction

The legal bases for legal entity property ownership are essential, both theoretically and practically, because they determine the possibilities the legal entity has in relation to its property. These are important for economic transactions and for identifying the liability to creditors.

The difficulty examined here is that in Ukraine legal entities may be owners and non-owners. Their property rights were stipulated under Soviet law and have survived to this day, despite considerable reforms of civil law. These include the rights of economic and operational management. The controversial nature of these property rights is especially evident in private enterprises that are not referred by law to business companies, but judicial precedents have recognized them as such.

There are a number of issues found in the regulation of rights of a legal entity (usually a corporation) to property transferred by a member of the entity as a contribution to share capital, and not as ownership but possession (use). Therewith, it is difficult to identify the value of the contribution and, respectively, the member's share in the share capital. It is also unclear whether state registration of the legal entity's rights to this property is required, provided it is real estate.

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A separate group of problems arises from the fact that in the Soviet period property was frequently transferred by the state to non-state-owned legal entities (for example, Trade Unions) without specifying legal title. At the time it was generally accepted to be limited to the term "property transfer"; in the modern legal context this has caused legal disputes regarding the rights to this property.

It is also important to identify public corporations' property legal regime, which would facilitate the solution of the issue of whether the state may be held liable for corporate debts as a founder.

1. Models of legal entity property rights in Ukraine

1.1. General remarks

One of the prerequisites for the participation of legal entities in property relations is the existence of their property. For that matter, it is important to determine the legal bases for property possession of legal entities.

As a rule this is established through *ownership right*: when establishing a legal entity, founders normally transfer their property to the legal entity under ownership right, and during its activity after the registration the legal entity purchases property on a contractual basis or else it creates property for the entity (e.g. it manufactures products).

Ukrainian legislation also provides that the founder or founders may transfer their property to the legal entity for *use* only. In this case, it is important to identify the legal title of the property to be used; this process often comes with serious challenges. Firstly, there may not be an analogous relationship to contractual use of the property (ie. rental or the use of property without any consideration), as the relations between the founders and the legal entity are fundamentally different from contractual ones – these are corporate relations. Secondly, if a legal entity has a sole founder who transferred his/her property to use of the legal entity, there emerges the issue of whether property, purchased by the entity on other grounds, should also be considered under the ownership of the entity. Thirdly, Ukrainian laws still include some atavisms of Soviet law, represented by economic and operational management – these were the rights under which property belonged to state-owned enterprises[2] in the USSR. Despite reforms, these rights have been preserved and may apply not only to state-owned enterprises and foundations[3], but also to private companies.

Thus, in Ukraine there are legal entity that are owners and non-owners, which result in certain specifics in civil transactions with their property and the property liability of their members.

1.2. Property ownership rights of legal entities

Ownership right provides the property owner with maximum opportunities to dispose of their property and effect various transactions and other legal acts (para. 1 of Art. 316 and paras. 1 and 2 of Art. 319 of the Civil Code of Ukraine). Hence, it is important to identify the individual who determines the legal entity's will and thus, whether there are any restrictions for legal entities as owners of property contributed to their capital in terms of the rights to their property.

If the legal entity is the owner of the property, its will is formed and expressed in a specific way depending on the type of legal entity. Provided it is a corporation, its will is formed and expressed depending on the model of

[2] The term 'state-owned enterprise' is unknown in European legislation. However, it is familiar in Soviet legislation and legislation of some post-Soviet countries including Ukrainian legislation. This term identifies commercial legal entities founded by the state.

[3] The term 'state-owned' foundation' also is frequently used in some post-Soviet countries, including Ukraine, and identifies foundations created by the state.

corporate governance. It is exactly for the sake of formation of the corporation's will that its shareholders seek to concentrate in their hands the respective stock of shares, which enables them to directly or indirectly influence profit distribution and the corporation's property formation and disposal. Therefore, it is more important to know who the beneficiary is, rather than whether the legal entity is the owner.

However, the concept of the beneficiary is not defined in detail in Ukrainian corporate law (in the respective Civil Code articles, Law on Joint-Stock Companies and on Limited and Additional Liability Companies), but is provided in the Law on preventing and counteracting to legalization (laundering) of the proceeds of crime, terrorist financing, and financing proliferation of weapons of mass destruction. It is the definition from this Law that is used in other laws, e.g. On State Registration of Legal Entities, Individual Entrepreneurs and Public Organizations etc. It was suggested that the data on beneficiaries should be published on the Unified State portal of public data, which was announced by the Prime Minister and the Minister of Justice of Ukraine in 2017[4]. However, this portal does not currently include these data.

The aforementioned indicates that in Ukraine the issue of the beneficiary is more relevant for criminal law than for civil law, which does not allow for the regulation of the correlation of the powers of the owner and the beneficiary of a corporation.

Restrictions of the rights of legal entities that are owners of the contributed property to the free disposal of their property may be represented by the prohibition on certain types of legal entities to distribute commercial proceeds amongst their members (shareholders). This mainly applies to not-for-profit organizations (according to Ukrainian law, non-entrepreneurial corporations[5]). However, this prohibition also refers to certain entrepreneurial corporations. For example, in the case of a stock exchange established as a joint-stock company (hereinafter – JSC), its shareholders are not paid dividends (part 1 Art.21 of the Law on Securities and Stock Market), though the legal nature of a JSC implies the distribution of profits as dividends paid to the shareholders.

1.3. Other property rights of legal entities

There are several models of property rights that apply to a legal entity regarding property that it does not own[6].

1.3.1. Sometimes this right is considered a *right of claim* (a right of obligation, *in personam* right).Under Ukrainian legislation property may be transferred by a member to the legal entity for the use, and therefore it is intended to be returned to the member at a later point in time. In this case, the challenge is to determine the value of the contribution and, accordingly, the value of the shareholder's share in the share capital. Since a shareholder's contribution is not the property but rather the right to use of the property, it must be to be evaluated as such. Nonetheless, Ukrainian law does not provide any specific guidelines. In practice, the evaluation of this contribution involves a valuation of the property transferred by the shareholder to the corporate use to determine the remuneration for the use thereof, the period of use and the other parameters.

Since the use of the shareholder's property will not be remunerated to the shareholder, it will be regarded as shareholder contribution and will accordingly determine the shareholder's share in the share capital.

[4] According to the Prime Minister's announcement, the data was to be disclosed and placed on the web-site https://data.gov.ua

[5] According to the Civil Code of Ukraine (article 83, para 2) all the corporations are divided into entrepreneurial and non-entrepreneurial. These terms are analogous to 'commercial' and 'non-commercial' corporations, or 'for-profit' and 'not-for-profit' corporations which are common for European law.

[6] In this article legal entities which do not have ownership rights to the property contributed by their founders (shareholders) are called 'non-owners'. These legal entities may hold property transferred to them by their founders (shareholders) on various grounds, except for ownership right.

In these cases, the legal regime of this property is rather ambiguous: it is transferred to the corporation for gratuitous use, although the amount of money which is not received by the shareholder from the corporation for such use forms another kind of the shareholder's property – his or her share in the share capital. Hence, this shareholder both retains the ownership of the property transferred to the company and acquires share in the share capital, which provides the individual with the right to claim for return of property within the time and on the terms stipulated by the respective property transfer agreement. Additionally, the property cannot be seized for repayment of corporate debts as it is not under company ownership, but remains under ownership of the shareholder.

1.3.2. In Ukraine there are also legal entities – non-owners that have *real rights* (rights *in rem)* to property either transferred to them by the founders when establishing these legal entities, or purchased by the entities on different grounds in the course of their operations. The owner of the property in this case is the founder of the legal entity. This model was typical for public (state-owned) enterprises and foundations under Soviet law. It was based on the concept of the single and indivisible right of state ownership (Venediktov, 1948), which did not allow for its division among state-owned enterprises and foundations which were entitled to *operational management* (Tolstoy, 1986). This division was further impossible due to Soviet law's rejection of split ownership and the unacceptability of trust ownership.

Despite the fundamental changes in economic relations in Ukraine since the country gained independence in 1991, and the corresponding legislative reforms, rather than renouncing the "dioecious" state ownership, this model has evolved further. There has emerged another version of ownership rights – the *right of economic management*. Today this is generally regarded as the basis on which property is assigned to state-owned enterprises (Kryazhevskikh, 2004), while operational management rights are only assigned to state foundations.

Though it may seem strange, the generation of non-owner companies in Ukraine did not terminate there. The matrix of Soviet law continued sculpting them. With the adoption of the Commercial Code of Ukraine in 2003, the legal community needed to contend with a very wide variety of types of legal entities and their rights to property. This Code provided for the existence of private non-owner companies possessing property under the right of economic management or operational management, e.g. legal entities, founded by public organizations and consumer cooperatives. A rather complicated situation can be also be found regarding the property rights of so-called private enterprises[7], which will be discussed below.

These examples illustrate a rather controversial situation regarding the regulation of legal entities' rights to property in the Ukrainian law (Spasibo-Fateeva, 2007 and 2014). As a result, by preserving the rights developed by Soviet law-makers and adapting only to the economic and legal realia of the complete dominance of state property, Ukrainian law-makers further expanded the horizons of quasi-ownership rights (operational and economic management). Therewith, there have been no attempts made to enact fundamental reforms on the property rights of legal entities. In addition, law-makers did not use the concept of the trust as a special type of ownership, as introduced in the Civil Code of Ukraine (part 2 Art. 316), which could in fact replace retro-Soviet law, though it has been criticized by academics and practitioners (Maidanyk, 2014). As a result, trust property did not supplant the Soviet models of real rights, but actually remained non-compulsory in the Ukrainian context in respect to legal entity property right.

1.3.3. A possible variation is a complex model of a legal entity property rights wherein the legal entity is a part owner of the property. This applies to gas supply and gasification companies (Naftogaz, in particular), which are owners of some of their property but also hold some state property under the right of economic management, (namely, the Unified Gas Transportation System of Ukraine ('On Principles of Natural Gas Market Functioning', 2010; Decree of the Cabinet of Ministers of Ukraine No. 770 of 20 August 2012).

[7] Private enterprise is a special form of corporation provided for by the Commercial Code of Ukraine, which resembles limited liability company in many respects. The essence of this form will be further described in more detailed way.

A model in which a combination of real rights *(in rem)* and obligation rights *(in personam)* is found is also possible. For example, in the case of leasing a state-owned uniform property complex (UPC), the leasing company, while not being the owner, gains all the income from the operations of the UPC (Art. 23 of the Law of Ukraine On Leasing State and Municipal Property) and is also the owner of all other property besides the one it leased.

1.3.4. Finally, it is also important to note that there are cases where the rights under which a legal entity possesses property are *uncertain and vague*. This uncertainty arises from the use in the Soviet legislation of the term *transfer* of state property to non-state legal entities without determining the legal implications for such transfer, i.e. the right under which they own the property in question. At times the law indicated that the state property transferred to management, and at other times that it transferred to *gratuitous exclusive possession* (Resolution No. 66 of 12.12.1921; Resolution On Labour centres 05.04.1922).

A fine example of the above mentioned is the practice of transfer of property by the state to trade union organizations, dating as far back as the early 20th century, by which the state transferred numerous properties (premises, holiday houses, and other facilities). Neither the 1922 nor 1964 Civil Code of the Ukrainian SSR provided for the clear legal mechanism of the state's alienation of its property to non-state organizations[8] (collective farms, cooperatives and NGOs). This approach of the Ukrainian legislator of the time reveals its intention to avoid turnover of real estate.

For quite a long time the state did not manifest itself as the owner of the property previously transferred to the trade unions, but in 1992 and 1994 two resolutions ("On Property Complexes and Financial Resources of Public Organizations of the Former USSR Located in Ukraine" and "On Property of All-Union Public Organizations of the Former USSR") were adopted by the Verkhovna Rada of Ukraine which was followed by the adoption, in 2007, of the Law On Moratorium on Alienation of Property Owned by the Trade Union Federation of Ukraine by the same. These legal acts were aimed at preserving the state ownership of the property transferred by the Soviet state to the trade unions more than 70 years earlier: firstly, by temporarily recognizing the ownership rights of the state, and subsequently by vesting the Ukrainian state with the right of free disposal, including the right to privatization.

Numerous legal disputes ensued, including those relating to the property that had already been alienated by the unions: properties that were contributed to the share capital of private companies established by trade unions and then sold by these companies to third parties. The state claimed for the return of its property from the illegal possession by third parties. Over time, case law revealed different approaches to resolving these disputes. From the late 1990s until the mid-2000s the state's vindicatory actions were dismissed. However, since 2007 these suits have been upheld by courts on the grounds that the state did not transfer its property to trade unions granting them ownership rights to such property[9]. Nevertheless, the courts did not clarify under which rights the trade unions possessed and used the property transferred to them by the state for such a long time. It appeared that while they were the legal owners of some property, trade unions also possessed other property on other

[8] Under Soviet law all the legal entities which were not created by the state were called 'non-state organizations'. They were represented by some types of non-commercial corporations only, such as trade unions and non-governmental organizations.

[9] See, for example: Resolution of the Supreme Court of Ukraine dated 22.11.2007 in case 3-416k07, retrieved from: http://reyestr.court.gov.ua/Review/1291052; Resolution of the Supreme Court dated 13.03.2018 in case 5002-22/3237-2011, retrieved from: http://reyestr.court.gov.ua/Review/72863325; Resolution of the Supreme Court dated 10.05.2018 in case 17/5007/98/11, retrieved from: http://reyestr.court.gov.ua/Review/74025136; Resolution of the Supreme Court of Ukraine dated 04.11.2014 in case№ 3-166rc14, retrieved from: http://reyestr.court.gov.ua/Review/41479727; Resolution of the Supreme Economic Court of Ukraine dated 26.11.2014 in case 47/296, retrieved from: http://reyestr.court.gov.ua/Review/41578545

grounds (suppose, real rights, similar to operational management of state-owned enterprises) and that was obviously nonsense (Spasibo-Fateeva, 2007, 2019).

This is not the only example that demonstrates the challenges arising from the use of the term "transfer of property" without indicating under which right it is transferred. A similar situation was observed with the social, cultural, and welfare facilities (premises used by state-owned enterprises such as canteens, clubs, kindergartens, children's recreation camps, etc.), which were *"transferred"* gratuitously during privatization, provided that the rest of the state's property was privatized for the workers (para. 2 of Art. 24 of the 1992 Law of Ukraine On Privatization of Property of State Enterprises). However, after some time (in 1997 and 1999) the state passed regulations aimed at securing the ownership of this property (Resolution of 15 July 1997 No. 757; Order of 19 May 1999 No. 908/68).

2. Certain issues of regulation of the property rights of legal entities under Ukrainian law

While the Civil Code of Ukraine requires all legal entities to be owners, the opposite approach is observed in the Commercial Code of Ukraine, where Art. 133 provides for three types of property rights for legal entities: 1) ownership; 2) other real rights provided for by the Commercial Code of Ukraine (these include economic management and operational management) and the Civil Code of Ukraine (the right of possession and use, which should be understood as servitude, emphyteusis, and superficies); 3) other rights as defined under contract with the property owner. Thus, according to the Commercial Code of Ukraine, legal entities may not be considered owners of their property, which may be owned by them under the rights of obligation (contractual rights) or under real rights different from the rights of ownership.

Although the current legislation attempts to make a clear distinction between the above two types of property rights under which legal entities may possess their property without having ownership right to it (i.e. real rights and rights of claim), in some cases these types are mixed together. This is how *hybrid* rights, of both a real and obligational (contractual) nature, have emerged. Despite the fact that economic management is positioned as a real right (*in rem*) (Sherbyna, 2018), in practice, economic management contracts came into common use and in 2013, standard economic management contract for the parts of the unified gas transmission system of Ukraine (between the owners and gas transmission or gas distribution entities) was developed. It was approved by the Resolution of the National Energy and Utilities Regulatory Commission (NEURC) No. 226 of 7 March 2013, and registered in the Ministry of Justice of Ukraine on 27 March 2013 under No. 494/23026.

It should be noted that this symbiosis of real and obligation rights is fundamentally different from the regulation of such real rights as servitude, emphyteusis, and superficies (Articles 402, 407 and 413 of the Civil Code of Ukraine), which may also stem from a contract. Apparently, a legal entity's rights to the property it does not own, but which is in its economic or operational management, depends significantly on the property owner.

2.1. Aspects which demonstrate full dependence of holders of economic and operational management rights on the owner of the property.

i) If there is an economic management contract, it must be properly executed by the legal entity as the holder of the right of economic management. Therefore, the owner of the property is entitled to observe the compliance of the legal entity's actions within the bounds of the contract, and consequently the exercise of property rights by the entity. Moreover, this observation is continuous.

ii) The property owner establishes the scope of the user's (ie. the legal entity's) rights, and not only in regards to the law and by-laws, but also in regard to its charter.

iii) The owner exercises its powers in respect of the property transferred to the legal entity by managing the entity through the appointment of a manager and entering into a contract with him/her.

Therefore, through these legal mechanisms, the owner retains full control over their property during the entire period of such property being in the legal entity's possession. All of this is not possible in the case of other real rights in the property (rights in the property of others, *jura in re aliena*) as provided for by the Civil Code of Ukraine (right of possession, servitude, emphyteusis, superficies),[10] where the total control over the person to whom the property was transferred by the owner for use is excluded.

2.2. In addition to the above, it is reasonable to note other differences between the real rights (particularly, real rights in the property of others, or *jura in re aliena)* regulated by the Civil Code and the Commercial Code of Ukraine which are determined by the nature of these rights.

i) One can agree with the *absoluteness* of the rights of economic and operational management. However, the absoluteness extends only to relations between the holders of these rights and all other persons; it does not extend to the relations between the entity and the property owner . The civil relations between the property owner and the holders of economic management and operational management rights are relative.

Other real rights in property, as provided for by the Civil Code of Ukraine (i.e. servitude, emphyteusis and superficies), are different. Their absolute nature provides for no exceptions. The holder of these rights is opposed by an unlimited number of obliged persons who only have to refrain from actions that impede the exercise of these rights. That is, their obligation, including that of the property owner, is passive in nature. This is not impeded by the fact that certain real rights in the property of others can be established by contract.

ii) *Independence* from the right of ownership can be found in the fact that the real rights in the property of others are exercised independently, irrespective of the exercise of rights by the owner. That is, the owner possesses, uses, and disposes of their property at their own discretion, taking into account, however, the existence of certain burdens that limit their capabilities, namely the rights in the property of others.

The holders of the rights in the property of others (servitude, emphyteusis and superficies) also exercise their rights at their discretion. However, the scope of their powers is narrower than that of the owner whose right to the property is burdened with their rights.

The holders of the rights of economic management or operational management are far from being always able to exercise their rights independently. On the contrary, they often require the consent of the owner or have to comply with the respective legal mechanisms established by the owner.

iii) The *resale right* is an inherent characteristic of real rights and one of the manifestations of their absolute nature, which fundamentally distinguishes them from the rights of obligation (contractual rights). The essence of this right lies in the fact that the transfer of ownership of the property to another person does not lead to the termination of the *jura in re aliena* of this property.

This is not typical for the rights of economic and operational management, which are not transferred to other individuals in the event of a change of the owner.

As a rule, in case of privatization of a property assigned to a state enterprise, the state ceases to be the owner of such property, but at the same time the right of economic management terminates. It is transformed into the private property right. Consequently, in such a scheme of change of ownership, two real rights are subject to

[10] The Civil Code of Ukraine provides for four types of real rights in the property of others: the right of possession, servitude, emphyteusis, superficies. Although the right of possession is frequently determined as a separated real right in the European legislation, the Ukrainian legislation recognizes it as the one.

termination at one time – the state's ownership right and the right of economic management. As an aside , it is not clear in this case which right is succeeded to the private owner who privatized the state property.

iv) The *transferability* of the rights in the property of others characterizes them as objects that can be alienated. This applies to emphyteusis (para. 2 of Art. 407 of the Civil Code of Ukraine, except for the cases contemplated by para. 3 of that Article) and superficies (Art. 413 of the Civil Code of Ukraine). However, the Civil Code of Ukraine does not provide for transferability of the right of possession and the servitude is not subject to alienation (para. 4 of Art. 403 of the Civil Code of Ukraine). That means that two out of four rights in the property of others stipulated in the Civil Code of Ukraine are *non*-transferable.

The rights of economic and operational management are also non-transferable. These rights may not be sold, whereas alienation is allowed for the property being in economic or operational management. Here is a definite similarity of these rights and the ownership, where the right cannot be alienated itself.

v) It is important to also compare *in whose interest* real rights are established. Whereas the rights in the property of others are established for the benefit of the person who becomes their holder, the rights of economic and operational management are established for the benefit of the property owner. The state assigns property to state-owned entities to make profits from their operations.

It is important to mention the difference in the way the issues related to competing interests of the owner and the holder of the rights in the property of others are addressed. Therewith, while the emphyteuta and the superficiary have priority compared to owner, the economic management or operational management rights holders, vice versa, cede to the owner.

The aforesaid testifies to the fundamental differences between the rights of the property of others and those of economic and operational management, as well as to rather controversial legal regulation of the property rights of non-owner legal entities, which does not always agree with the regulation of real rights (ownership rights and rights in the property of others).

3. Problems of the legal regime of property of particular types of legal entities under Ukrainian laws

3.1. The legal regime of property belonging to private enterprise

The Civil and Commercial Codes of Ukraine contain numerous controversies as to the regulation of the types and forms of legal entities and their property rights (*Civil and Commercial Codes,* 2014). The Civil Code of Ukraine provides for only two forms of incorporated private legal entities – corporations and foundations – whereas the Commercial Code provides for more variety, making it impossible to understand in which way they differ from the corporations (the most salient example: business corporations[11]). This is clearly illustrated by the example of the so-called *private enterprises* (hereafter: PE). Neither theorists nor practitioners have been able to explain the differences between PEs and limited liability companies (Spasibo-Fateeva *et al.,* 2007).

According to Art. 113 of the Commercial Code of Ukraine, a PE "*operates under the private property rights*" of one or more persons (apparently, founders), which makes it impossible to identify the legal grounds on which the property is transferred to this legal entity. Therefore, it is impossible to determine whether the PE itself is the owner or not. Thus, some PE articles of association stipulate that the PE is the owner, while others, that they it is

[11] According to the Civil Code of Ukraine (article 84) all the entrepreneurial corporations are divided into two types: manufacturing cooperatives (*vyrobnychii kooperatyv)* and business corporations (*hospodarski tovarystva)*, represented by limited and additional liability companies, JSCs, full and limited partnerships. Thus, business corporations are a kind of commercial corporations.

not the owner of the property transferred by their founders. This paradoxical situation is also reflected back onto the founders of the PE.

If a PE is the owner of the property, the founder may not be the owner, because property may not be owned by two persons simultaneously. Founder's rights are similar to corporate rights, while the legal position of the PE's founder is virtually the same as that of a member of a business corporation. However, since the PEs are regulated separately from business corporations in the Commercial Codes of Ukraine (PEs are covered in part 11, whereas business corporations are addressed in part 9, where Art. 80 does not include PEs as business corporations), for a long time they were considered a special form of legal entities, different from business corporations. Therefore, the rights of PE founders were not identified as corporate rights, which were deemed inherent by the shareholders of business corporations only.

All this brought about significant problems in the resolution of disputes between a PE and its founder, as under the procedural legislation of Ukraine, corporate disputes (disputes between a business corporation and its shareholder) were within the jurisdiction of commercial courts (p. 4 para. 1 Art. 12 of the Commercial-procedural Code, valid until 2013 – The Law of 10.10.2013 No. 642-VII amended this Article respectively), whereas disputes between other legal entities and their members (founders) were within the jurisdiction of general courts. One of the reasons was the uncertainty regarding the rights of founders of PEs and the formal lack of grounds to consider them corporations. Secondly, problems appeared in establishing the object of the PE founder's rights; his issue was inevitable; for example, should the founder of the PE die and his/her heirs need to understand what they could inherit (Spasibo-Fateeva, 2014), or in the case of a division of property between spouses, one of whom was the founder of a PE (Spasibo-Fateeva, 2012). In addition, these questions would also arise should the founder intend to sell his or her questionable property.

Currently, this problem cannot be resolved on the basis of any specific legal ruling. Therefore, the general notarial practice when documenting agreements and notarizing them has been to align the definition of PE founder's rights with those of the share in the share capital of a business corporation (i.e. corporate rights). A similar approach has been observed since 2012 in various precedents; the courts commenced equating PEs to business corporations, while disputes between founders and the PE have been referred to as corporate. This was directly confirmed by the Plenum of the Supreme Economic Court of Ukraine in its Resolution No 4 of 25.03.2016 'On Certain Practical Issues, Arising from Corporate Disputes'. It is evident that the Ukrainian law-maker reacted to case law and altered the Commercial-procedural Code, where Art. 20 explicitly provided for these disputes to be referred to as in the jurisdiction of commercial courts. Nevertheless, no alterations were made in the Commercial Code of Ukraine, which resulted in an atypical situation for the legislation, wherein the problem was solved in the procedural but not in substantive law. It has remained nearly unchanged in terms of PE regulation since 1991[12]. For over 20 years, all persons who have encountered issues within a PE, including founders, have experienced significant difficulties in legal engagements.

It is also very complicated if the PE is not the owner. In this case, following the logic, the owner of the property is the founder, and if there are several founders, they are co-owners. In this model the legal status of the PE's property is identical to that of a state enterprise which is owned by the state and economically managed by other enterprises. However, the meaning of this legal status is unclear since it is not based on a concept similar to the one developed in the Soviet period in relation to state property.

However, if the PE's founder is the owner, in the event of his/her death it is clear what will be inherited – the property in possession of a PE. Moreover, in the case of a division of property between spouses, if one or both of them are founders of the PE they may divide the PE's property, because it is jointly owned by them.

[12] The PE as a form of legal entity was initially introduced by the Law on Enterprises in Ukraine, adopted in 1991. It then was repealed, but the provisions about PEs was moved to the Commercial Code of Ukraine.

Nonetheless, it should be mentioned that in practice the legal status of the PE's property and the rights of spouses to the property have long been destabilizing the positions of the supreme judicial authorities of Ukraine. Thus, in 2007, the position of the Supreme Court of Ukraine was as follows: the property of the PE is not a part of the joint property of spouses. The second spouse is only entitled to a share in the profit received from the activities of the PE (Resolution of the Plenum of the Supreme Court of Ukraine No. 11 of 21/12/2007, para. 29).

However, in 2012, the Constitutional Court of Ukraine took the opposite position by ruling that the property of the PE is subject to the joint property of spouses **(**Decision of the Constitutional Court of Ukraine No. 17-rp/2012 of 19/09/2012, 2012).

Accordingly, the Supreme Court of Ukraine also changed its approach and in 2013 ruled that even if the spouses contribute their joint property to the capital of a PE founded by one of them, the ownership of that property is transferred to the PE, and the ownership right of the other spouse (i.e., a real right) is transformed into a claim right (a right of obligation), the essence of which is the right to claim payment of half the value of the contributed property in the event of division of the joint property (but not the ownership of the property itself), or the right to claim a half of profit received from the activities of the enterprise, or half of the property remaining after the liquidation of the PE (Resolution of the Supreme Court of Ukraine dated 02.10.2013 in case 6079цс13).

The cases related to succession of a PE's property are resolved in the same way. Therefore, if the PE's property was formed upon the PE's founding out of the contributions of one of the spouses, then the other spouse may demand recognition of his/her right to half of the property rights of the deceased spouse (rights in the PE's property). However, the other half will be inherited as per standard procedure.

The confusion as to the legal regime of the property of PEs and similar companies of uncertain legal status was done away with after the adoption by the Supreme Economic Court of Ukraine (in 2016) of the legal position according to which by their essence and legal nature these companies are business corporations (Resolution of Plenum of the Supreme Economic Court of Ukraine No 4 of 25.03.2016, 2016). In their conclusion the Court relied on the approach expressed by the Constitutional Court of Ukraine, which established the criterion for classifying legal entities as business corporations: the existence of a share capital.

Thus, undoubtedly, the PE was a legal error, which the courts attempted to remove and they managed to succeed. In any case, in regards to the case law based on procedural law and on the legal positions of the supreme judicial authorities, the issue of property and corporate rights of founders of PEs has been settled. However, this question has not been solved generally in terms of the formation of these legal entities and the entering into contracts with their property and the property of their founders, as long as the provisions of the Commercial Code have not been altered with regard to PEs. It appears that the best option to solve these problems is the cancelation of Art. 113 of the Commercial Code. Even this would merely confirm what was already adopted in the procedural legislation – equating PEs to business corporations.

3.2 Legal regime of the property of consumer cooperatives and legal entities established by them

The legal status of consumer cooperatives is regulated by the Civil and Commercial Code of Ukraine as well as the Laws On Cooperation and On Consumer Cooperation, whose provisions contradict one another. For example, according to para. 1 Art. 9 of the Law On Consumer Cooperation consumer cooperatives, their associations, and the legal entities established by them are owners. However, the Commercial Code of Ukraine (para. 5 of Art. 111) does not recognize them as owners.

There is a certain contradiction in the definition of the holders of the consumer cooperatives' ownership rights. Para. 6 of Art. 9 of the Law provides that these include *members* of a consumer cooperative, *personnel* of cooperative enterprises and organizations (that is legal entities established by a consumer cooperative), as well

as *legal entities* whose "share in the share capital is determined by the relevant charters". Without focusing on the obvious flaws in the wording of this article, we note the fact that the members of a consumer cooperative are named as the holders of the ownership rights in the property. Consequently, the consumer cooperative itself cannot be the owner, because otherwise there would be two owners of the same object – the property of the cooperative.

However, if we consider the members of a legal entity to be the owners in the entity's property, then it follows that this property will belong to them on the basis of joint ownership. Then it is not clear what the company itself will be to its property (Kucherenko, 2005). However, it is uncommon for the members to be recognized in the charters of consumer cooperatives as co-owners of the cooperative's property.

It should be noted that the situation was the same for the rights in the property of peasant farms (farming enterprises). To date, this has been rectified and such farms are now recognized as the owners of their property. For unknown reasons, no changes have been made in the legislation on consumer cooperation as yet.

As for the rights to the property of the companies created by a consumer cooperative, due to the contradictions in the legislation of Ukraine, a very strange situation has arisen where such companies registered in the Western part of Ukraine are, as a rule, owners of their property, and those registered in the Eastern part of Ukraine are non-owners. In most cases these companies possess their property under the right of economic management, and in Dnipro Region – the right of operational management.

It is obvious that these ambiguities in legislation must be removed and the regulation of the rights in the property of cooperatives, including consumer ones, as well as legal entities established by them, must be unified – all of the aforementioned must be recognized as owners of their property. It is also unnecessary to regulate cooperatives under numerous laws; it is sufficient to have one law on cooperatives.

4. Effects of members' obligations on legal entity's property

4.1. Legal entity's property as the object of seizure for the obligations of their members (founders), and regulations on financial liability

4.1.1. In regards to the seizure of a person's property, it is the consequence of certain obligations which have not been fulfilled. These may be the obligations either the legal entities or of their founders (members or shareholders) which involve their liability.

One of the features of a legal entity is its independent liability. It means that neither its members (founders or shareholders) are liable for its debts, nor is the legal entity liable for the debts of its members. This is provided for in Articles 80 and 96 of the Civil Code of Ukraine. However, there may be exceptions. For example, the law provides for the liability of members of full and limited partnerships, additional liability companies and the liability of the state or local communities for the obligations of the state-owned and municipal[13] enterprises and foundations.

The members (founders or shareholders) of legal entities may also be held liable under court decisions. An example of this is the application by the courts of the "corporate veil piercing" doctrine, which proves the unlawful or unscrupulous actions of the person or persons who form or influence the decisions of a legal entity's body --as a rule a JSC-- that has caused damage. Nonetheless, this issue goes beyond the subject of this paper.

[13] The terms 'municipal enterprise' and 'municipal foundation' are frequently used in Ukrainian legislation and comes from soviet legislation. They identify corporations and foundations created by local authorities.

The problem of the liability of legal entities and their members is multi-faceted and is to be considered within a separate article. Therefore, we will touch upon the issues of admissibility of seizure of the property of legal entities of different legal status for the debts of their members, since the response to it depends on the legal status of the property.

So, our first point will concern the independent liability of a legal entity regardless of its rights in property and taking into account only the diversity of the types of legal entities, some of which involve liability of their members for their obligations. This is a provision of the doctrine of legal entities.

When it comes to the seizure of the legal entity's property:

(i) this may or may not be related to the actions of its members;

(ii) these actions may constitute a violation of law, or may be viewed in the context of corporate governance, in particular, from the bona fide perspective;

(iii) it may generally be determined by other legal relations among the members of the legal entity, i.e. they may be unrelated to his/her activities.

In this respect, since liability in corporate relations deserves a dedicated study, we will limit our work to the possibility of seizure of the legal entity's property for its member's obligations which is not related to the operations of this legal entity. Therewith, we are to consider the above issues regarding the legal regime of property of different legal entities, i.e. owners and non-owners.

The key point that we may proceed from is the provision that "the owner is liable to the extent of all of his/her property". Having become a debtor, the property owner must repay the debt, and provided he/she fails to do so, then there are enforcement mechanisms through which the debt will be recovered. In particular, those include seizure of the debtor's property (para. 5 of Art. 48 of the Law of Ukraine 'On Enforcement Proceedings'), owned by him/her but may be held by other persons (Art. 53 of the same Law). In the latter case, it is necessary to prove that the property held by such other persons is indeed owned by the debtor.

Hence there arises the problem of whether or not the property transferred by the debtor, a member of a legal entity, under the ownership or any other real right should be considered the debtor's property. This problem becomes especially acute when it comes to a public legal entity founded by the state or a local community (Spasibo-Fateeva, 2017; Kucherenko, 2007; Posykaliuk, 2015).

4.2. The possibility of seizure of a public company's property

In the Ukrainian legislation the legal status of public companies[14] is regulated inconsistently and contradictorily. The status of *public* may refer to different companies:
i) So-called national joint-stock companies – NJSCs (NAK) -- that are fully owned by the state.

ii) other companies referred to in the Commercial Code of Ukraine as "public-sector enterprises", which include various business corporations, whose share in the share capital is at least 50 % owned by the state;

[14] The concept of public company in Ukrainian legislation is very different from the concept of public company in European legislation. Whereas in European legislation (particularly in British legislation) public company refers to a company who offers its shares to the public through a stock exchange, in Ukraine, a public company is a joint-stock company whose controlling block of shares belongs to the state, or a state-owned or municipal enterprise whose property is owned by the state or local society and given to the company under the right of economic or operational management, etc.

iii) state and municipal enterprises, performing commercial activities, whose property is owned by the state or community, but economically managed by these enterprises;

iv) JSCs joint-stock companies whose shareholders are legal entities of public law of other countries (for example, the public joint-stock company Prominvestbank, whose major shareholder (over 99% shares) is a public corporation in the Russian Federation called Vnesheconombank, established by the Russian Federation);

v) state enterprises engaged in commercial activities, whose property is owned by the state and assigned to these enterprises under the right of economic management.

For various types of public companies, the procedure of seizure of property for the obligations of their founders is significantly different, but nevertheless, this process involves difficulties in identifying object and subject of ownership to property. It is helpful to provide a case illustrating the issue.

In Ukraine a JSC whose shares are state-owned is referred to as a national joint-stock company (NJSC, or NAK). Its legal status is not regulated in the unified manner. According to the common rule, JSCs as entities are considered owners, while their shareholder (the state) owns the shares. Therefore, the shares are subject to seizure for the state obligations.

However, in Ukraine there are NJSCs that possess other property rights: a part of the property is owned by them, while the rest is in their economic or operational management, use or control. The controversy is not only in the fact that the same legal entity has property under different real rights, but also in the way this affects the seizure of property. On the one hand, according to Ukrainian laws, both the owner and the company having the right of economic management are liable with all their property and therefore, the type of right under which a NAK holds its property doesn't have any legal impact on the seizure of the NAK's property. On the other hand, legislation has established considerable limitations to NAK's rights to property and liability: (a) Art. 7 of the Law of Ukraine 'On Pipeline transport' prohibits alienating and encumbering real estate, main pipeline transport (fixed assets) and the NAK's shares etc.; (b) following para. 13 of the NAK's Charter (approved by the Resolution of the Cabinet of Ministers of Ukraine of 14 December 2016 No. 1044), a NAK is not liable for its obligations with state-owned property, transferred to it for economic management or use of control.

Thus, the situation is not simple: the liability of the average JSC, NJSC, and even amongst the particular types of these entities varies significantly and it is not always clear who and to what extent will be liable for any debts: the JSC *per se*, or its shareholder – the Ukrainian state.

This uncertainty also involves the liability of state-owned enterprises and their founder – the Ukrainian state – which is represented by a particular state body and its officials. For instance, at one point in time the Ukrainian state strongly objected to seizing an An-124-100 "Ruslan" aircraft, which was in possession of the state-owned enterprise Antonov Aeronautical Scientific-Technical Complex (Antonov ASTC). The aircraft was seized by the sheriff of the Canadian province of Newfoundland for the enforcement by the Canadian authorities of the final decision of the Arbitration Institute of the Stockholm Chamber of Commerce of 30 May 2002, made in favour of the TMR Energy Ltd. in the dispute initiated by the latter against the State Property Fund of Ukraine.

In this case, the Ukrainian party to the dispute (the State Property Fund of Ukraine) was arguing that a state enterprise possessing (under the right of economic management) but not owning state property is not obliged to forfeit that property for the debts of the state ("PACTA SUNT SERVANDA", 2003).

However, in 2018 in a similar dispute, saw a number of Ukrainian companies as plaintiffs claim for the seizure of the property of the Russian Federation to enforce the decision of the Hague Court of Arbitration (under case PTS No. 2015-36). According to that decision, the amount of USD 139 million and USD 20 million was seized from the Russian Federation, represented by the Ministry of Justice, as compensation to the Ukrainian

companies for their losses in real estate expropriated in Crimea after its unlawful annexation. The Ukrainian companies claimed that the decision of the Hague Court of Arbitrations could be enforced by the seizure of shares of the public JSCs Prominvestbank and Sberbank of Russia, owned, respectively, by the public corporation Vnesheconombank and the RF Central Bank. The plaintiffs considered the shares as the property of Russian Federation, but not the property of particular Russian companies.

The problem, however, lies in the fact that according to the Law of the Russian Federation "On the Bank of Development" (adopted in 2007), Vneshekonombank is a state corporation and the owner of its property; therefore it may not be seized to recover the debts of the Russian Federation. Nevertheless, the Supreme Court of Ukraine delivered a judgment instructing the seizure of the shares of these banks. The the grounds for this decision were based on the conclusion that the Russian Federation is the true owner of the shares, not Vnesheconombank, despite the provisions of its Charter; these grounds are disputable and unconvincing. In particular, para. 98 of the judgement is especially ambiguous: it indicates that while enforcing a court judgment the court is merely required to identify that the property arrested and seized, according to the law of Ukraine, is owned by the Russian Federation, and not by other foreign or Ukrainian persons (Resolution of the Supreme Court in case No. 796/165/18, 2019). Therefore, only one conclusion can be drawn: that the Supreme Court of Ukraine did not identify whether the Sberbank and VTB shares were in the ownership of the Russian Federation and whether they may be subject to seizure. In this way, the Supreme Court in left the resolution of this issue to the state enforcement officer (Spasibo-Fateeva, 2019).

In this context it is reasonable to recall the approach of the European Court of Human Rights, which decided that unitary enterprises and foundations do not have institutional independence from the state and act as their bodies, thus making the state itself liable for their activities (2007). The analysis of these cases attests to the fact that the European Court of Human Rights solved the problem of holding the Russian Federation liable for the debts of state-owned enterprises or foundations.

Meanwhile it is still an open issue whether it is possible to apply this approach to holding a state corporation liable for state debts (in the case of a NJSC or JSC, where 100% shares are owned by the state), especially if its charter includes the provision stating that the corporation itself is the owner.

Conclusions

The aforesaid shows that in Ukraine, the legal regime regarding property belonging to the legal entities is highly varied, at times insufficiently defined and at times – controversial and contradictory. Thus a fundamental review is required. We believe that the existing variety of organizational and legal forms and types of legal entities in Ukraine is unjustified. Many of these entities have no special legal status. In this respect, it appears that some integration of entities and legal forms would be reasonable to allow certain legal entities, provided for in the Commercial Code of Ukraine, to be classified as business corporations, cooperatives, or foundations. In particular we refer to private enterprises, which are in fact business corporations and therefore it would be logical to repeal the legislative provision determining their legal status while obliging existing private enterprises to be reregistered in compliance with one of the existing types of business corporations. Before private enterprises are reregistered, it would be correct to consider them as limited liability companies in practice and thus to apply the provisions of limited liability companies. It is necessary to cancel such rights as economic and operational management. Legal entities having these property rights must be recognized as property owners. In the case where founders (members) of legal entities intend to set limits to the execution of the rights to some of the property belonging to the legal entity, it may be stipulated in the charters or, for some legal entities, it may be specified by law (i.e. for JSCS whose shares are owned by the state).

Public companies require more detailed regulation and must be provided clear legal status. It is preferable to stipulate these issues in the Civil Code of Ukraine, thus providing comprehensive regulation on all types of legal entities.

These reforms would also lead to clarification of the property liability of a legal entity; if a legal entity is the owner of its property, then all property may be subject to seizure. In this way it would be possible to terminate disputes regarding the possibility of seizing the property of public enterprises for state debts, as well as vice versa – when the claims are being made to hold the state liable as a founder of an enterprise, but where the property but not ownership has been transferred i to the enterprise.

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