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PROPERTY OF LEGAL ENTITIES CREATED BY THE STATE LEGAL REGIME

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ABSTRACT

The article is devoted to the study of legal entities created by state property legal regimes. Philosophical, general scientific, special; dogmatic methods, and methods of interpretation of legal regulations were used in the course of the research. As a result of research, it has been established that the term "property legal regime" applies only to the property of an economic entity, both transferred to it and acquired by it as a result of economic activity. The author concludes that the only function performed by the authorized capital is to determine the share of the participant in the share capital of the company. The author analyzes scientific approaches to reforming proprietary rights to other's property and legal regimes of property of legal entities from the standpoint of socio-economic conditions in which the state of Ukraine finds itself. The legal regime of property acquired by state joint-stock companies beyond the limits defined in the charter remains undefined. All the above indicates the need for legislative regulation of legal entities created by the state property legal regimes.

KEYWORDS: *property legal regime, state-owned enterprise, authorized capital, proprietary rights, economic management, operational management.*

1. INTRODUCTION

By the statutory law of Ukraine – Civil Code of Ukraine (CC of Ukraine)[1] – the state participates in civil relations by creating legal entities of public law and private law. In this case, such criterion for the division of legal entities as the order of their creation is given in Art. 81 of the CC of Ukraine.[2]

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1 Civil Code of Ukraine, Art. 167.

2 Civil Code of Ukraine, Art. 81.

Without going into the discussion on the correctness of the criterion for the division of legal entities into legal entities of private law and public law choice, it can be proposed to focus on the legal regimes under which property belongs to legal entities established by the state. It should be noted that legal entities founded by the state are created under the:

1. CC of Ukraine (business associations);
2. Commercial Code of Ukraine (ComC of Ukraine):[3] these are state-owned enterprises;
3. other laws of Ukraine (Individual Deposit Insurance Fund, Territorial Police Agencies, etc.).

However, not all public authorities have the status of a legal entity. At the same time, these agencies are endowed with property, the legal regime of which is not clearly defined by the legislation of Ukraine.

The legal regime within the chosen research topic is characterized by a set of powers that can be exercised by a legal entity concerning the property transferred to it for economic activity. This is the right based on which the legal entity (business organization) carries out its economic activity. At the same time, as B.A. Yaskiv rightly notes[4] the content of the legal regime of the property of the business entity depends on the organizational and legal form of the legal entity. The author believes that the legal regime of the property of a legal entity is also determined by its affiliation to legal entities of public or private law. As a general rule, legal entities of private law own property on the right of ownership or other property rights provided by the CC of Ukraine. Legal entities of public law receive property in possession based on property rights provided by a special law. As of today, the ComC of Ukraine can be referred to as such a law.

However, the authors of "The concept of updating the Civil Code of Ukraine" proposed to eliminate the ComC of Ukraine and deprive the civil legislation of Ukraine of quasi-proprietary rights, "which are limited proprietary rights, i.e., relics of the socialist past, artificially created for the needs of the national economy".[5] In this regard, there is a need to study these proprietary rights and their proposed alternatives from the standpoint of European Union (EU) law and the current civil legislation of Ukraine.

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[3] Commercial Code of Ukraine.

[4] Yaskiv, B.A.: Legal regime of property of a joint-stock company, Legal Science, 6 2011, p. 68.

[5] Dovgert, A.S.; Kuznetsova, N.S.; Khomenko, M.M.; Buyadzhi, A.V.; Zakhvataev, V.M.; Kalakura, V.Y.; Kapitsa, Y.M.; Kot, O.O.; Kokhanovska, O.V.; Maydanik, R.A.; Stefanchuk, R.O.: The concept of updating the Civil Code of Ukraine, Kyiv, Publishing House "ArtEk", 2020, p. 128.

Since the state is the founder of legal entities whose property legal regime has been studied in the proposed paper, it is necessary to indicate that the state is a subject of public law. The concept of proprietary rights in modern civilization makes a distinction between the right to private property and the right to public property. The latter is considered as "regulated by law possibility of subjects of public relations to use at their discretion the property that belongs to them".[6] It is unlikely that the content of proprietary rights is affected by the form (type) of ownership. The indication of competence should be related to the peculiarities of the exercise of proprietary rights by the state through public authorities, which are endowed with the competence defined by law.

According to the authors of the analyzed paper, the concept of "public property right" is broader than "private property right", because the powers of the state as the owner are determined by the rules of both private and public law, in particular, on public property.[7] These are things withdrawn from civil circulation. Given the status of the state as a socio-political entity endowed with sovereignty, it establishes the rules of law and undertakes to comply with them itself. Article 19 of the Constitution of Ukraine provides for an imperative rule according to which subjects of public law such as public authorities, local governments, and their officials are obliged to act only on the basis, within the powers and in the manner prescribed by the Constitution and laws of Ukraine.[8] Hence the need to prevent abuse by public authorities acting on behalf of the state as the owner, exercising the powers (competence) granted to them.

2. MATERIALS AND METHODS

The theoretical basis of the study consists of articles by leading Ukrainian researchers in the field of civil law who have studied some issues of the legal entities property legal regime, in particular, the concept, functions, and procedure for authorized capital formation, the content of the property legal regime, and the concept, classification, and content of proprietary rights. "The concept of updating the Civil Code of Ukraine"[9] and monographic sources devoted to the said topic also became the basis for research.

The source base of the study covers regulations that determine the legal regimes of legal entities property (these are the Civil and Commercial Codes

[6] Dovhert, A.S.; Kharytonov, Ye.O.. Update of the Civil Code of Ukraine: formation of approaches, Odesa, Publishing House "Helvetyka", 2020, p. 674.

[7] ibid.

[8] Constitution of Ukraine, Art. 19.

[9] Dovhert et al., 2020.

of Ukraine), as well as other acts of civil legislation of Ukraine that regulate the legal status of certain types of legal entities and legal regimes of property belonging to them. The empirical basis of the study contains the articles of association of legal entities established by the state (state institutions of higher education and the state bank), as well as case law.

Philosophical (dialectical), general scientific (systemic, structural-functional, ascent from concrete to abstract, ascent from abstract to concrete), special (produced by non-legal sciences, in particular, analysis of written sources); separate (produced by legal science: dogmatic method, methods of interpretation of legal regulations) methods were used in the course of the research. The research was based on the dialectical method, which allowed for analysis of the legal regulation of legal entities created by the state property legal regimes. This made it possible to consider the legal regime of legal entity property as a dynamic legal phenomenon, to identify the main trends in reforming its legal regulation. This method of scientific knowledge also demonstrated the importance of this institution in the mechanism of proprietary rights of the state as the property owner and the founder of legal entities to which such property is provided for their economic activities' effective implementation.

The method of legal autopoiesis made it possible to consider the legal entities created by the state legal property regime as a legal phenomenon due to economic, political, and historical conditions. The system method allowed showing that to ensure the rights of the state as the owner of the property, legal entities of private law are endowed with property rights and the right of economic management, which form a single legal regime of property.

The structural-functional method made it possible to consider the legal entities created by the state property legal regime as a system of interconnected elements, to determine the conditions necessary for the existence of this legal phenomenon as a system. The analysis of written sources allowed us to analyze the higher education institutions, as well as the Public Joint Stock Company "State Savings Bank of Ukraine"[10] articles of association and to identify problematic issues of legal entities created by the state property legal regime legal regulation. The official legal method was used in the analysis of regulations and case law.

The use of the above methods necessitated the use of such research techniques as induction, deduction, analysis, theoretical synthesis, abstraction (definition,

[10] Articles of association of Public Joint-Stock Company "State savings bank of Ukraine", [https://www.oschadbank.ua/sites/default/files/files/about/%D0%A1%D1%82%D0%B0%D1%82%D1%83%D1%82%20%D0%9E%D1%89%D0%B0%D0%B4%D0%B1%D0%B0%D0%BD%D0%BA%D1%83.pdf], 10/11/2022.

restriction, generalization and division of concepts), description, characterization, explanation, proof, and refutation.

3. RESULTS AND DISCUSSION

The exercise of ownership right by the state also presupposes the provision of property to legal entities created by it on the grounds provided by law. The legal regime of the property of a legal entity created by the state can be determined by a set of powers concerning this property.

Thus, the state creates legal entities of private law (joint stock companies) and legal entities of public law (treasury and state commercial enterprises). Business associations and state-owned enterprises carry out economic (both business and non-business) activities, and the legislator indicates that they have authorized capital. Instead, public authorities, including those with the status of legal entities under public law, belong to budgetary institutions, which are non-profit organizations. The concept of "authorized capital" is not applied to budgetary institutions, according to the legislation of Ukraine.

The first legal definition of authorized capital outlines its main function.[11] Following this regulation, the authorized capital of the company determines the minimum amount of property of the company, which ensures the interests of its creditors. Thus, the legislator, in the CC of Ukraine, emphasizes the warranty function of the authorized capital. The concept of authorized capital is also given in the joint-stock and banking legislation of Ukraine, in particular, the Law of Ukraine "On joint stock companies"[12] and the Law of Ukraine "On Banks and banking activity"[13] through the prism of the order of its formation. Therefore, the authorized capital is considered as the company's funds formed through the placement of the company's shares of nominal value.

There are also different scientific views on the meaning of the concept of "authorized capital". Thus, according to I.V. Yershov,[14] the authorized (composed) capital should be understood as the set of contributions (shares, shares at face value) of the founders (participants) of the organization, registered in the constituent documents. In such a way, the researcher points to the possibility of the authorized capital formation in only business associations: property associations.

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[11] Civil Code of Ukraine, Art. 155.

[12] Law of Ukraine "On joint stock companies" (No. 435-IV of 16 January 2003), Art. 2.

[13] Law of Ukraine "On Banks and banking activity" (No. 2121-III of 7 December 2000), Art. 2.

[14] Yershov, I.V.: Business Law. Moscow: Publishing House "Jurisprudence", 2009, p. 688.

On the other hand, O.S. Yankova[15] considers the authorized capital as the monetary equivalent of property that must be transferred to the company (economic management, operational management) in the form of contributions to ensure its business activities and as payment by its participants property rights, registered in the manner prescribed by law and enshrined in the constituent documents. Obviously, the researcher proceeds from the realities of Ukrainian legislation, where the formation of authorized capital for state and municipal enterprises is considered a prerequisite.

The creation of authorized capital is associated with the functions that it should perform. The functions of the authorized capital include the initial, insuring, and the function of determining the share in the authorized capital of the company.[16] It is considered that for legal entities of private law the authorized capital performs the starting function. At the same time, not all members of the company pay contributions in full when establishing the company and, despite the legal regulation on payment of the contribution to the statutory capital of the company within six months from state registration,[17] there is no effective mechanism to force members to pay them on time.

No less controversial is the performance of the insuring function by the authorized capital of the company. In practice, there are many cases when the company is formally considered active, but there is no property and funds in the accounts, at the same time, the tax debt and debt to counterparties is tens of millions. Under these conditions, the authorized capital is deprived of the said function. The legislator actualizes the insuring function of the authorized capital for insurance companies (Law of Ukraine "On insurance":[18] the minimum authorized capital depending on the type of insurance is 1 or 10 million euros), banks (Law of Ukraine "On Banks and banking activity":[19] the minimum authorized capital is set at UAH 200 million), joint-stock companies (Law of Ukraine "On joint stock companies"[20] provides for a minimum authorized capital of 1250 minimum wages), etc.

[15] Yankova, O.S.: Legal regulation of the statutory fund of commercial organizations, Donetsk, Institute of Economic-Legal Research of the National Academy of Sciences of Ukraine, 2000, p. 20.

[16] Khort, Yu.V.: Functions of the statutory capital for the legislation of Ukraine, Power and law. Legal and Political Sciences: Collection of Scientific Works, 46 2009, p. 326.

[17] Law of Ukraine "On limited and additional liability companies" (No. 2275-VIII of 6 February 2018), Art. 14.

[18] Law of Ukraine "On insurance" (No. 85/96-VR of 7 March 1996), Art. 30.

[19] Law of Ukraine "On Banks and banking activity" (No. 2121-III of 7 December 2000), Art. 31.

[20] Law of Ukraine "On joint stock companies" (No. 435-IV of 16 January 2003), Art. 14.

The only function performed by the authorized capital is to determine the share of the participant in the authorized capital of the company. It is a question of the definition of threshold blocks of shares, a controlling block of shares, transfer of a share to heirs in a limited and additional liability company, etc.

Even though these functions of the authorized capital should apply to legal entities of private law, but, Part 3 of Art. 74 of the ComC of Ukraine provides for the formation of the authorized capital of a state commercial enterprise.[21] Instead, for state-owned enterprises, the regulations of the ComC of Ukraine[22] do not provide for the formation of authorized capital, although they indicate the sources of formation of such state enterprise property.

Thus, the legislator establishes a different approach to the formation of property to ensure the economic activity of state enterprises, which under the CC of Ukraine refers to legal entities of public law. It seems impractical to form the authorized capital for both state commercial and treasury enterprises.

Funds received from the State Budget for the authorized capital are immediately involved in economic turnover. As a rule, after enrollment, these funds are used to repay debts on the obligations of such an enterprise. Money is not accounted for in a separate bank account and is not separated from other income. Thus, the authorized capital of a state-owned enterprise is a constant and inviolable (unchangeable) value only in the articles of association and in the Unified State Register of Legal Entities, Individual Entrepreneurs, and Public Associations.

The fact that the concept of "authorized capital" does not correspond to modern economic and legal trends is evidenced by recent changes in the legislation of Ukraine on stock exchange activities. Thus, the Law of Ukraine "On amending certain legislative acts of Ukraine on simplification of the return of investments and the introduction of new financial instruments" [23] (new version of the Law of Ukraine "On securities and stock market"[24]), where the concept of "authorized capital" was replaced by "initial capital", enters into force.

Obviously, the term "initial capital" seems more appropriate because it implies that the funds that make up the initial (start-up) capital are used, in this case, for the organization and conduct of activities related to securities and the management of financial instruments. The initial capital a priori cannot be a con-

[21] Commercial Code of Ukraine, Art. 74.

[22] Commercial Code of Ukraine, Art. 76.

[23] Law of Ukraine "On amending certain legislative acts of Ukraine on simplification of the return of investments and the introduction of new financial instruments" (No. 738-IX of 19 June 2020).

[24] Law of Ukraine "On securities and stock market" (No. 3480-IV of 23 February 2006), Art.

stant, as the name indicates. In the course of carrying out activity the size of the initial capital changes. Due to this, the initial capital does not perform the functions that were used in the scientific literature for the authorized capital. Thus, the legislative consolidation of the concept of initial capital instead of the authorized capital reflects current trends in the economy and the organization of economic activities.

The inefficiency and inexpediency of applying the concept of "authorized capital" to state enterprises are also explained by the fact that the authorized capital of legal entities of private law is formed by the contributions of the founders (participants) of such legal entities. After the contribution of property as a contribution to the authorized capital, the ownership of such property is acquired by a legal entity. In the case of funds transferred to the authorized capital of a state-owned commercial enterprise, they, as well as other property, are assigned to such a legal entity under the right of economic management.

Because of the above, Art. 74 of the ComC of Ukraine justifies using the concept of the initial capital of a state commercial enterprise.[25] Finally, the same concept can be used to denote the funds provided to a state-owned enterprise to support its business activities.

As noted above, for the implementation of commercial economic activity, the provided property is assigned to state-owned enterprises on the right of economic management, as for the implementation of non-commercial management, state-owned enterprises own and use the relevant property on the right of operational management.[26,27]

At the same time, the ComC of Ukraine indicates that the right of economic management and the right of operational management are proprietary rights that are limited by law, as well as by the owner of the property. This legislative provision has been criticized by the authors of the draft "The concept of updating the Civil Code of Ukraine",[28] as it contradicts the legal nature of limited property rights. Thus, according to R.A. Maydanyk,[29] the right of economic management and operational management are relics of the socialist past, which keep Ukrainian law and modern society in the shadows of the methodology of the previous (Soviet) social order, which hinders the technological system and law in Ukraine. The point is that the state, as the owner acting through

[25] Commercial Code of Ukraine, Art. 74.

[26] Commercial Code of Ukraine, Art. 136.

[27] Commercial Code of Ukraine, Art. 137.

[28] Dovgert et al., 2020.

[29] Maydanyk, R.A.: Property law: priorities and prospects: Materials of Kyiv legal readings, Kyiv, Alerta, 2019.

authorized state bodies, reserves the right to seize property that is not used by the state-owned enterprise and to exercise control over the use of the property by state-owned commercial enterprises. Instead, "The concept of updating the Civil Code of Ukraine" proposes to replace these proprietary rights with fiduciary funds.[30] In support of this thesis, the authors refer to the experience of continental Europe, as well as the fact that title interests to another's property can be established only by law.

Other researchers in the field of civil law opinion also outline the inexpediency of the existence of the right of economic management and operational management but suggest applying the institution of usufruct to property used for non-commercial economic activity of such legal entities as state-owned enterprises and communal non-profit enterprises.[31] By the way, the usufruct is a new title interest to another's property, although it is known since ancient Rome.

At the same time, there is a dissenting opinion of researchers in the field of commercial law about the need to enshrine in the legislation of Ukraine the right to economic management and operational management. Moreover, some of them propose to foresee the substance and subjects of these rights in the CC of Ukraine.[32] According to O.I. Kharytonova,[33] while determining the legal nature of the rights of economic management and operational management, one should take into account the fact that they are "a means of ownership rights exercising", in particular, by the state.

Researching the legal nature of economic management and operational management rights, prof. I.V. Spasibo-Fateeva emphasizes that the latter are restrictions on the ownership right, in contrast to title interests to other's property, which is their encumbrances. Therefore, the rights of economic management and operational management are limited to proprietary rights.[34] At the same time, the author supports the thesis that the relationship between the establishment of the rights of economic management and operational management should essentially be considered material, and of administrative form.

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30 Dovgert et al., 2020.

31 Dovhert, A.S.; Kharytonov, Ye.O.. Update of the Civil Code of Ukraine: formation of approaches, Odesa, Publishing House "Helvetyka", 2020, p. 674.

32 Chubareva, O.Yu.: The place of the right of economic management and operational management in the system of property rights, European Perspectives, 3 2014, p. 193.

33 Kharytonova, O.I.: The right of economic management and the right of operational management: problematic issues, Current Issues of State and Law, 38 2008, p. 245.

34 Spasybo-Fatyeyeva, I.: Property rights under the Civil and Commercial Codes of Ukraine, Law of Ukraine, 4 2015, p. 60.

While analyzing the above approaches to the rights of economic management and operational management, it is necessary to refer to the concepts of the system of proprietary rights. Thus, V.V. Tsyura identifies the concepts of "title interests to another's property" and "limited proprietary rights".[35] However, H. Kharchenko rightly emphasizes the different criteria for the division (gradation) of property rights into these groups, pointing to the same substance of both.[36] At the same time, the author emphasizes the need for legislative consolidation of a broad concept of proprietary rights. The opposite point of view is substantiated by I.F. Sevryukova,[37] who proposes to limit the list of proprietary rights only to those provided for in the CC of Ukraine. According to the researcher, there are no other proprietary rights.

The above scientific reflections on the relationship between the concepts of "limited proprietary rights" and "title interests to another's property" illustrate the lack of a unified scientific approach to the system of proprietary rights. When starting the study of proprietary rights, it is necessary to take into account several circumstances that affect the formation of a proprietary rights system and determine its content.

There is no doubt that the adoption of the CC and the ComC of Ukraine is the result not only of a compromise between different scientific schools but also of a compromise to ensure the stability and economic security of Ukraine. Obviously, the implementation of changes and effective mechanisms for the management of state property takes time and progress. The step-by-step implementation of new institutions for the civil law of Ukraine can ensure the successful adaptation of the civil legislation of Ukraine to the legislation of the EU. Although EU law allows autonomy in the regulation of private relations at the discretion of the Member States, its compliance with the general principles of European law remains the general requirement. This is primarily because each of the EU countries has its history of development, traditions of legal regulation of relations, etc. It should also be noted that the entry into force (implementation) of new codes in foreign countries takes ten to twelve years to ensure a "painless" transition to new legal institutions.

Therefore, when borrowing new institutions to the civil law of Ukraine, it is necessary to take into account the time needed for adaptation and the possi-

[35] Tsyura, V.V.: Real rights and other's property: thesis of the candidate of juridical sciences, Kyiv, Taras Shevchenko Kyiv National University, 2007, p. 136.

[36] Kharchenko, H.: Separation of property rights in the doctrine of civil law, Entrepreneurship, Economy and Law, 5 2019, p. 73.

[37] Sevryukova, I.F.: Formation of the system of property rights in the civil law of Ukraine and some European countries: A comparative analysis and problematic issues, Constitutional State, 28 2017, p. 241.

bility of non-acceptance of the practice of a particular institution. Suffice it to mention the rental agreement and the difficulties with its understanding and application. In this regard, when settling the issues of securing property for business entities created by the state, it is necessary to pay attention to legal certainty to prevent abuse of the disposal of the relevant state property. Impulsive legal regulation of civil relations related to the exercise by the state of the powers of the owner may lead to harm to state interests. In this regard, it should be mentioned that the privatization and corporatization of state-owned enterprises without effective control mechanisms has led to the bankruptcy of the Lviv Bus Plant and many other former state-owned enterprises.

Before introducing new institutes such as fiduciary funds, there needs to be balanced. First of all, it is necessary to determine the legal nature (proprietary or obligative) of civil relations that arise concerning the fiduciary fund, which is crucial to protect the interests of the owner. It should also be reminded that the regulation of trust property relations in the legislation of Ukraine is ambiguous. Consolidation of trust property indicates its affiliation to property law institutions.[38] In addition, the legislator points to the possibility of trust ownership based on the contract, in particular, property management. Even more, questions are raised by the form,[39] which indicates: the right of the owner of the property from the moment of its transfer to trust ownership is terminated. In this situation, there is no longer a competition between the rights of the owner and the trustee, as the right of ownership ceased due to the establishment of the right of fiduciary ownership. In the conditions of such legal uncertainty, it is doubtful to assign property to state-owned enterprises based on a fiduciary fund, as the state may thus be deprived of the possibility of actual exercise and control over its property.

Usufruct as a title interest to another's property has also been known since Roman law, as the right to use and remove fruit from other people's things. Moreover, the concept of usufruct as a temporary property or functionally divided property was widespread, as the owner was deprived of the right to seize the thing, to establish an easement in respect of it, and so on.[40] At one time, the developers of the draft CC of Ukraine refused to introduce this concept into the legal system of Ukraine, despite the reception of certain institutions of Roman law.

The enshrinement of the usufruct in the civil legislation of Ukraine in the classical version to ensure the activities of state-owned enterprises will make

[38] Civil Code of Ukraine, Art. 316.

[39] Civil Code of Ukraine, Art. 597-1.

[40] Dozhdev, D.V.: Roman private law, Moscow, Norma, 2006, p. 784.

it impossible to seize surplus property that they do not use in their activities. Again, the interpretation of this institution in the Ukrainian version should take into account the existence of an easement in the civil law of Ukraine and, clearly, delineate the relevant legal constructions.

Overall, the justification for the existence of certain institutions in the legal system is explained by the effectiveness of their application. The example of the People's Republic of China demonstrates the successful combination of market and administrative command elements in the economy. The consequence of Ukraine's Soviet past is the enshrinement in the ComC of Ukraine of the right of economic management and operational management as the most justified at this stage of state development institutes for securing property for state and communal enterprises.

Given this, it is necessary to research the peculiarities of the rights of economic management and operational management. According to Art. 133 of the ComC of Ukraine,[41] these rights together with the right of ownership form the basis of the legal regime of property of the business entity. Thus, the legislator emphasizes that the attachment of property to a particular property right to the subject determines the legal status of the property provided to it.

While analyzing Chapter 14 of the ComC of Ukraine on the rights of economic management and operational management, it should also be noted that the right of economic management and operational management are proprietary rights, the content, and procedure for which are determined by law.[42] These proprietary rights are established based on administrative acts of public authorities or local governments. However, this regulation is violated by the Code of Gas Distribution Systems, approved by the "Resolution of the National Commission for State Regulation of Energy and Utilities "On Gas Distribution Systems Code"[43], which, contains an agreement for economic management of gas distribution system components. It seems that the right of economic management and operational management cannot be the subject of agreements, i.e., they are not alienable and can arise only based on acts of public authorities or local governments.

At the same time, the property cannot be assigned to the right of economic management and the right of operative management by legal entities that do not belong to business entities, as well as to state or communal enterprises. Moreover, only business entities – state and municipal commercial enterpri-

41 Commercial Code of Ukraine, Art. 133.

42 Commercial Code of Ukraine, Ch. 14.

43 Resolution of the National Commission for State Regulation of Energy and Utilities "On Gas Distribution Systems Code" (No. 2494 of 30 September 2015), Ann. 4.

ses – can own property on the right of economic management.[44] As already mentioned, the right of operational management ensures the activities of state and municipal non-profit enterprises, i.e., non-profit entities.[45] At first glance, the law clearly distinguishes between the subjective composition of the right of economic management and the right of operational management. However, it is worth taking a look at the Law of Ukraine "On higher education",[46] which provides for the assignment of property to state and municipal institutions of higher education on the right of economic management with a list of actions that such an institution cannot perform without the consent of the founder.

It is obvious that a higher education institution cannot carry out business activities to obtain and distribute profits. Therefore, the property cannot be assigned to it on the right of economic management, the legal regime of the property must be determined by the right of operative management.

Along with this, paragraph 2, part 2 of this article indicates that in addition to state or municipal property, a higher education institution, a scientific institution may have its revenues, which are recorded in special registration accounts of territorial bodies of the State Treasury of Ukraine or accounts opened with state banking institutions. The legislator designates these funds as their revenues, at the same time, does not provide for the emergence of private property rights of state and municipal institutions of higher education, as such a legislative structure would contradict the essence of the law that determines the legal status of such entity. Thus, the possibility of a higher education institution to dispose of the funds received from its activities at its discretion to ensure the implementation of objectives, listed in its articles of association, is enshrined in law.

An analysis of the higher education institutions articles of the association led to the conclusion that they regulated the issue of the legal regime of assigned property in different ways. Thus, the articles of association of the National University "Lviv Polytechnic"[47] and the Yaroslav Mudryi National Law University[48] stipulates that the property is assigned to them on the right of economic management (paragraph 16.1 of the Articles of association of the National University "Lviv Polytechnic" and paragraphs 11.2, 11.4 of the Articles of

[44] Commercial Code of Ukraine, Art. 136.

[45] Commercial Code of Ukraine, Art. 137.

[46] Law of Ukraine "On higher education" (No. 1556-VII of 1 July 2014), Art. 70.

[47] Articles of association of the National University "Lviv Polytechnic", [https://lpnu.ua/sites/default/files/2020/pages/60/nrstatutunulp-2019.pdf], 15/11/2022.

[48] Articles of association of Yaroslav Mudryi National Law University, [https://nlu.edu.ua/files/norm_doc/statut_nlu_20180625.pdf], 15/11/2022.

association of the Yaroslav Mudryi National Law University). Paragraph 12.1 of the Articles of association of Ivan Franko National University of Lviv[49] provides for two legal regimes of property:

– the right of economic management over the property transferred to the University by the Ministry of Education and Science of Ukraine;
– proprietary rights in respect of property acquired for its income, charitable contributions and gratuities, interest received from the placement of funds in the accounts of banking institutions, as well as property received from individuals and legal entities, local governments, including those made as charitable contributions.

Instead, the Articles of association of Taras Shevchenko National University of Kyiv (paragraph 9.2) stipulates that the state property received by the University, as well as the property acquired at the expense of the University from its economic activity, belongs to it on the right of operative management.[50]

As higher education institutions cannot carry out business activities to obtain and distribute profits and the studied articles of association contain appropriate prohibitions, the property should be provided to such entities under the right of operational management. Because of this, the Articles of association of Taras Shevchenko National University of Kyiv rightly reflects the right, which is the property basis of the activity.

At the same time, no fewer issues arise regarding the legal regime of legal entities of private law property, in particular, joint-stock companies. Since its founder is the state represented by its authorized bodies, it (the state) must establish effective mechanisms to protect its proprietary rights. Thus, paragraph 10 of the Articles of association of the Public Joint Stock Company "State Savings Bank of Ukraine"[51] (PJSC "Oshchadbank") states that the bank may own real estate, the total value of which does not exceed twenty-five percent of the bank's capital. At the same time, the Articles of association do not specify the capital in question, e.g., authorized capital, total capital at the time of acquisition of the property, or involved capital. In this regard, it would be logical to conclude that the rest of the real estate is assigned to PJSC "Oshchadbank" on

[49] Articles of association of Ivan Franko National University of Lviv, [https://lnu.edu.ua/wp-content/uploads/2015/01/StatLNU.pdf], 15/11/2022.

[50] Articles of association of Taras Shevchenko National University of Kyiv, [http://www.univ.kiev.ua/pdfs/statut/statut-22-02-17.pdf], 15/11/2022.

[51] Articles of association of Public Joint-Stock Company "State savings bank of Ukraine", [https://www.oschadbank.ua/sites/default/files/files/about/%D0%A1%D1%82%D0%B0%D1%82%D1%83%D1%82%20%D0%9E%D1%89%D0%B0%D0%B4%D0%B1%D0%B0%D0%BD%D0%BA%D1%83.pdf], 17/11/2022.

the right of economic management, which corresponds to the activities carried out by this banking institution.

It should be noted that PJSC "Oshchadbank", represented by territorial departments, often tries to change the legal regime of real estate from state to private. Thus, the Resolution of the Supreme Court[52] denied the claim of PJSC "State Savings Bank of Ukraine" represented by the Territorial Separate Off-Balance Division No. 10003/0511 branch – Dnipropetrovsk Regional Department of PJSC "Oshchadbank" to the Department of State Registration of Real Proprietary Rights of the Registration Service of the Pavlograd City District Department of Justice of Dnipropetrovsk region to cancel the decision of the state registrar of real estate rights to refuse to amend the record and the obligation to take action because the state bank did not provide documents that would confirm the emergence of its private property rights to the purchased non-residential premises.

Thus, the establishment of "safeguards" in the legislation of Ukraine in the form of restrictions on the acquisition of real estate in private ownership of legal entities of private law, created by the state, and restrictions on the disposal of state commercial and treasury enterprises in modern conditions is justified to protect proprietary rights of the state.

4. CONCLUSIONS

All of the above indicates the need to streamline the institutes of economic management and operational management, in particular, to legally define the mechanisms for establishing these proprietary rights, seizure of property not used in state enterprises, the procedure for granting consent to the alienation of fixed assets of state commercial enterprises. First of all, the content of the rights of economic management and operational management should be defined by law to prevent abuse by the governing bodies of legal entities created by the state. This will help ensure the exercise of control powers by the state as the owner of the property belonging to it, which is transferred to legal entities to ensure their business activities.

Moreover, the exhaustive definition of the content of these rights presupposes the existence of a list of property that cannot be alienated and can be alienated with the consent of the body to whose sphere of management belongs the legal entity created by the state; the grounds and procedure for the seizure of "surplus" property from state-owned enterprises, as well as the procedure for

[52] Resolution of the Supreme Court (No. 804/15369/13-a of 8 November 2019).

the transfer of property in the event of termination of legal entities. Equally important is the consolidation of the legal entities of private law, created by the state, and not only banking institutions property legal regime. These are, first of all, such strategically important entities as the State Concern Ukroboronprom, the joint-stock company Ukrainian Railways, and the joint-stock company Naftogaz Ukrainy, which are called upon to ensure the security of the state of Ukraine in all spheres of public relations. Obviously, it is necessary to distinguish between the legal regimes of property belonging to a legal entity of private law, created by the state, on the right of ownership and the right of economic management of objects. This, in turn, requires the development of a unified approach to the regulation of property, in particular, property relations of the state and legal entities created by it.

Thus, the establishment of "safeguards" in the legislation of Ukraine in the form of restrictions on the acquisition of real estate in private ownership of legal entities of private law, created by the state, and restrictions on the disposal of state commercial and public enterprises in modern conditions is justified to protect property, in particular, proprietary rights of the state. Legal certainty in these matters will ensure the protection of proprietary rights and interests of the state as the owner and avoid violations of the rights and legitimate interests of other participants in civil relations.

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