

**THE FORMS OF INCORPORATION OF THE STATE ENTERPRISE AND
THE STATE JOINT-STOCK COMPANY: COMPARATIVE ANALYSIS**

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According to part 2 of article 22 of Economic Code of Ukraine (hereinafter referred to as - ECU) economic entities of state sector of economy are entities, which act on the basis of only state power, and also entities, state share in statutory fund of which is more than 50% or equal to value, which provides to country right on dominant influence on economic activity of these entities.

Entities of the state sector of the economy can be created or exist in a very limited amount of organizational and legal forms, which include such forms as [1, 2, 3, 4, 5]:

1) state commercial unitary enterprise (acts in accordance with Civil Code of Ukraine);

2) state fiscal unitary enterprise (acts in accordance with Civil Code of Ukraine);

3) joint-stock company (the main legislative acts regulating legal status of the forms is the Law “On joint-stock companies”; joint-stock company, in its turn, can exist in such forms as state management holding company and state holding company (Law “On holding companies in Ukraine”); national or state joint-stock company;

4) subsidiary enterprise established on state or municipal property;

5) state association (concern, other types);

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6) other, except joint-stock, forms of economic companies, mainly LLC (created in the process of privatization of small state enterprises or by establishing in collaboration with other entities, today almost do not exist) (Law “On economic companies”).

With the implementation of possibility of creation of joint-stock companies with one participant question on practicability of preservation of such form as government business enterprise is raised. So, in the joint research «State sector and functions of state in the period of crisis» state enterprise is called «a relic of socialist past», authors note that « existing structure of economic entities makes process of management more difficult and turned into one of the factors that can blunt the effectiveness of state sector. In this connection in Ukraine debates on problem of its deep reform took place» [1; p. 27].

The aim of this article is to determine, what differences between such forms, as a government business enterprise (hereinafter referred to as GE) and joint stock company with 100% state share in the statutory fund (hereinafter - the state JSC) exist today and whether preservation in legislation in effect of the form of state unitary commercial enterprise is justified.

1. Procedure of establishment.

State unitary enterprise is established by the competent authority in the assignments order on the basis of separated part of the state property without dividing it into parts, and is included into the sphere of its management (part 1 of article 73 ECU).

Procedure of establishment of state joint-stock company is much more difficult, because majority of public JSC are established in the process of privatisation or corporatisation, in other words by transforming of the existing state enterprise into JSC.

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In the case of establishment of new state joint-stock company state, represented by the body authorized to manage state property, is a founder (part 1 of art. 9 of the Law “On joint-stock companies”). In accordance with article 17 of the Law “On state property privatisation” in the process of transformation of state enterprise into joint-stock company under privatisation the state privatisation agency, which operate within the powers provided by legislation, is its founder.

Procedure of establishment of JSC as new, so in the process of privatisation / corporatisation is significantly more complex in comparison with the procedure of establishment of GE, because questions, related to the issue and state registration of issue of shares, assignment of the international identification number to shares, establishment of relations with the custodian and depository on accounting of share ownership of JSC, etc. (part 5 of article 9 of the Law “On joint-stock companies”), arise.

2. Property status. Liability under obligations.

Part 3 of article 73, parts 1, 2 of article 74 of Economic Code of Ukraine provides that property of GE is in the state ownership and assigned to the enterprise under **right of economic management**. According to part 1 of article 74 of Economic Code of Ukraine GE is responsible for the consequences of its activity by all the property that belong to it under the right of economic management.

Property of JSC belongs to it under right of ownership. However, for state JSC there are some exceptions, they are related, as a rule, to such subjects as national and state joint-stock company (NJSC and SJSC). I. A. Selivanova, analyzing in details the issues of property regime of these subjects, notes that the procedure of their establishment is significantly different from the procedures of privatization or corporatisation, in fact these JSC were created in a specific order. The property of such companies was formed through the transfer to their statutory fund of property of

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GE (organisations) and shares of corporatized enterprises of the whole sector (subsector) of economy. Moreover, the property is transferred to the statutory funds of NJSC / SJSC, and is defined as their property, and shares of corporatized enterprises, although are transferred to the statutory funds, are not the property of NJSC / SJSC; although there are cases when they are defined as property. At the same time, there are cases when the state property is transferred not to the statutory fund of SJSC (NJSC), but on its balance, without determination of company's rights, which it has in respect of such property. In that case, according to research of I. A. Selivanova, it can be argued that such property is not passed into the ownership of NJSC (SJSC) and remains the property of the state, which SJSC hold under the right of economic management [6; p. 216-217].

Statutory fund of GE is formed by the authorized body to the management of which it belongs. The size of the statutory fund of government business enterprise is set by the specified authorized body. Statutory fund of GE should be paid before the end of the first year from the date of state registration of such enterprise. There is no minimal size of statutory fund of GE.

According to part 1 of article 14 of the Law “On joint-stock companies”, the minimum size of statutory fund of the joint-stock company is 1250 of minimum wages, proceeding from the minimum wage rate applicable at the time of the registration of joint-stock company. According to part 3 of article 11 of the Law “On joint-stock companies” statutory fund should be entirely paid before the date of its registration, or more precisely, before the date of the general meetings of founders, on which decision on establishing of the company and approval of results of shares’ first issue will be made.

In contrast with JSC, norms, directed to preserving of the value of net assets, are not established. Previously such provision existed in ECU – p. 4 of art. 75 of ECU

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provided that “if value of assets of GE according to the results of its activity is less than size of statutory fund provided by the Statute of the enterprise, the body, to the sphere of control of which belong this enterprise, has to execute in accordance with the established procedure a reduction of statutory fund, but not less than established minimum size of statutory fund. However, by the Law of 11.04.2011 changes to ECU were made and the relevant norm was removed.

In relation to JSC there are a number of rules and restrictions, directed to protecting from reduction of company's net assets:

1) JSC can not pay dividends if the own capital of the company is less than the sum of its statutory fund, reserve capital and size of excess of the liquidation value of the preferred shares over their nominal value (item 1 of part 1 of article 31 JSC Law);

2) JSC can not exercise the repurchase of its shares, if the own capital of the company is less than the sum of its statutory fund, reserve capital and size of excess of the liquidation value of the preferred shares over their nominal value or would become less as a result of such repurchase (however, for a state joint-stock company, such a restriction does not matter, because it can not exercise the repurchase of shares from its shareholder - the state).

3) If after the termination of second and each following financial year the value of net assets of joint-stock company is less than statutory fund, the company has to declare about the reduction of its statutory fund and to register the appropriate changes in the Statute in accordance with the established procedure. If the value of net assets of the company is less than the minimum size of statutory fund under the law, the company is a subject to liquidation (p. 2 art. 155 of Civil Code of Ukraine).

GE form at the expense of profit (income) **specific (earmarked) funds** to cover the costs related to their activity: amortisation fund; production development fund; fund of consumption (wage); the reserve fund; other funds provided by the

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Statute of enterprise. The order of use of these funds is determined according to the approved financial plan.

JSC Law regulates creation only of reserve fund. However, in the JSC, which produces only common shares, reserve fund can be not formed. Reserve fund is necessarily formed only in those companies, which issue preferred shares (article 19 of the JSC Law). But SJSC do not issue preferred shares. Therefore, for SJSC formation of other funds, in addition to statutory fund, is not mandatory.

GE has to draw and to execute **annual and with a quarterly breakdown financial plan for each next year** (p. 1 of art. 75 of ECU). The financial plan is subject to approval before the 1st of September of the year preceding the planned year in respect to companies that are the subjects of natural monopolies and enterprises, planned estimated amount of net profits of which exceeds 50 million hryvnas, - by the Cabinet of Ministers of Ukraine; other enterprises – bodies, to management of which they belong.

Part of net profit of GE is transferred to the state budget (article 5 and part 1 of article 11 of the Law “On management of objects of state property”, the Order of payments to the state budget of part of the net profit (income) by state unitary enterprises and their associations, approved by Decree of Cabinet of Ministers of February 23, 2011, N 138; the Procedure of preparation, approval and control of the implementation of the financial plan of GE and state fiscal enterprise, economic company in statutory fund of which is more than 50% of shares (parts) owned by state, which belong to the sphere of management of the Public Assets Agency of Ukraine).

SJSC are also required to prepare a financial plan (p. 5 of art. 89 of ECU) and following the results of calendar year have to send part of the net profit for paying

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dividends in accordance with the procedure approved by the Cabinet of Ministers of Ukraine (p. 5 of article 11 of the Law “On management of objects of state property”).

Thus, the preparation of financial plan and payment of dividends legal regulation of GE and SJSC is almost identical.

In accordance with article 19 of the Law “On management of objects of state property” alienation of property of state enterprises and companies with state corporate rights over 25% in their statutory fund during the bankruptcy procedure is executed in accordance with the law on privatisation.

Asset package of GE can be **privatized** in accordance with the law on privatisation (this is basis for termination of GE), **leased** in accordance with the procedure defined in the Law “On lease of state property”, or **given into concession** in accordance with the Law “On concessions” of 16.07.1999 (this is the basis for liquidation of GE). In all cases GE is to be dismissed. In the case of giving of asset package in the concession liquidation of GE is provided, and in the case of privatisation or lease - termination of legal succession is executed. The property of JSC can not be disposed, as it is the property of the company and this provides stability of the organisational and legal form, and, respectively, higher level of protection of interests of creditors and employees of the company.

Both GE and SJSC are responsible under their obligations by the property belonging to them, however, the Law “On moratorium on the enforcement of property realisation” establishes the moratorium on the forced sale of property of GE and economic companies, in the statutory funds of which the state share is at least 25%. Under the forced sale of property of enterprises it is considered alienation of immovable property objects and other basic means of production, which provide keeping of the production activity of these enterprises, and also the shares (parts) owned by the state in the property of others economic companies and transferred to

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the statutory funds of these companies, if such alienation is carried out through levy of execution upon property of the debtor under decisions, which are subjects to execution by the State Executive Service, except decisions on the payment of wages and other payments, which belong to the employee in connection with labour relations, and decisions concerning the debtor's obligations to transfer to funds of compulsory state social insurance debt of paying fees to these funds, which arose before January 1, 2011, and with the authorities of Pension Fund of Ukraine debt of paying a single fee for obligatory state social insurance.

3. Limitations and peculiarities of economic activity

Analysis of the current legislation allows determining of the following features in the activity of GE:

1) GE is obliged to accept and execute brought to it in accordance with legislation state orders.

2) GE can not gratuitously transfer its property to other legal entities or citizens, except as provided by law.

3) GE has the right to alienate property objects related to fixed assets, only with prior consent of the authority, to management of which it belongs, and only on a competitive basis, unless otherwise provided by law. To dispose otherwise of property that belongs to fixed assets, GE has the right only within the powers and in way provided by ECU and other laws. The alienation of immovable property, as well as the air and sea vessels, inland navigation ships and railway rolling stock is executed on condition of additional approval in accordance with the established procedure of State Property Fund of Ukraine. State Property Fund of Ukraine is organizer of sale of immovable property according to the procedure established by the Cabinet of Ministers of Ukraine. Funds received from sale of property objects, related to fixed assets of GE, are used in accordance with the approved financial plan,

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unless otherwise provided by law. Funds received from sale of immovable property, net of balance (depreciable) value of such property, unless otherwise provided by law, shall be credited to general fund of State budget of Ukraine (the Procedure of alienation of objects of state property, approved by the Cabinet of Ministers of Ukraine of June 6, 2007, N 803; Procedure of conclusions of State Property Agency of Ukraine on alienation of state property, approved by the Decree of State Property Agency of Ukraine of February 02, 2012, N 10).

4) GE can not be **founders of economic entities** (Decree of the CMU “On regulation of economic entities’ activity, established with the participation of GE” of December 31, 1992, N 24-92).

5) GE can **carry out derecognition** of not fully depreciated fixed assets and to use **accelerated capital allowance** of fixed assets only with the consent of the authority, to management of which it belongs.

6) GE independently carries out the pledge of property, except asset package of enterprise, its structural subdivisions, buildings and structures, pledge of which is carried out under permission and conditions, approved by body, authorized to manage the relevant state property (articles 4, 11 of the Law “On pledge”).

7) Several GE can be united by the decision of the owner (authorized body) into state economic associations.

8) Transfer of property of GE into lease is carried out in a special manner established by ECU and the Law “On lease of state and municipal property”, of April 10, 1992, N 2269-XII.

9) State (municipal) enterprises, if there are grounds, are obliged to take measures to levy by way of recourse of losses from other economic entities or to levy losses from liable employees of enterprise in accordance with the requirements of labour legislation (article 228 of ECU).

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With regard to JSC, limitations of their economic activity can be divided into two groups:

a) restrictions in relation to all joint-stock companies (established by the Law “On joint-stock companies” - special rules of concluding of significant contracts or contracts under interestingness under section 13 of Law can be referred to them);

b) limitation only in relation to SJSC:

- part 1 of article 11 of the Law “On management of objects of state property” provides that SJSC, established in the process of transformation of GE, 100% state owned, can not transfer fixed property to other legal entities or citizens without compensation, except as provided by law. To dispose of property belonged to fixed assets; SJSC has the right only with prior consent of the authority, which manages corporate rights of state, and only on a competitive basis, unless otherwise provided by law. To dispose otherwise of property that belongs to fixed assets; SJSC has the right only within the powers and in the manner provided by the law.

- JSC created in the process of corporatisation, all shares of which are owned by state, carries out the pledge of property, which belongs to it by the consent of the body, which carries out management of state corporate rights in this society, in the manner provided for GE (article 11 of the Law “On pledge”).

4. Management bodies.

According to p. 6 of art. 73 of ECU the management authority of the state unitary enterprise is the head of the enterprise, which is appointed by the authority, to management of which company belongs, and is accountable to that body.

The head of the company works under contract, standard form of which is approved by CMU (Typical form of contract with the head of the company, which is in state ownership, approved by Decree of Cabinet of Ministers of Ukraine of August 2, 1995, N 597). Heads of GE quarterly before the 25th day of the month following

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the reporting period, submit to bodies, authorized to manage the relevant state property, report on achievement of indicators, provided by the contract. Annual report on the implementation of these indicators is submitted before February 15, of the year following the reporting year.

Established indicators and the financial plan, as well as reporting forms are in fact the only levers, which limit activity of GE heads. As practice shows, these levers are completely insufficient to provide adequate process of corporate management and effective economic development.

The system of corporate management in JSC is much more difficult. Functions of the general meetings in the SJSC are performed by state management body. The law “On management of objects of state property” provides that the state body performs the following functions directly, without convening of meetings of shareholders, if the corporate rights of state are equal 100 % in statutory fund of economic entity (at this level there are no significant differences between the JSC and GE).

But, in JSC an Observatory / Supervisory Board has to be established [7], and also as unipersonal executive body, so collegial can be established. Establishment of audit commission is also prescribed. The existence of the Supervisory Board and collegial executive body and audit commission makes decision-making process in company more balanced, reduces the risks associated with unipersonal leadership.

5. Bankruptcy.

Article 96 of the Law “On restoration of debtor’s capacity to pay or declaring it bankrupt” determines similar peculiarities of bankrupt declaring of GE and other enterprises, in statutory fund of which the share of state ownership exceeds 50 %, and of joint-stock companies with 100 % state share. Thus, in this sphere differences between those two organisational forms are absent.

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Taking all the aforesaid into consideration, we should note that today, between organisational forms of GE and SJSC there are still differences, which relate mainly to establishment procedure, property regime / economic activity and corporate management issues. However, those limitations, which touched on the possibility of concluding of contracts and other actions related to assets of these subjects are almost the same. Form of GE is not a unique form, aimed at the protection of state property; the same functions are successfully performed by the form of SJSC.

However, in comparison with JSC form of GE is determined as such that do not meet modern requirements on protection of state interests as a shareholder, does not have rules on keeping of net assets, its executive bodies operate without taking into account of rules for the implementation of large-scale contracts and contracts under interestingness. Moreover, those measures, which are applied in corporate law for JSC with the purpose of providing framework for effective management and elimination of risks in activity of organisation by forming of balanced system of corporate management in GE, are not active.

Taking this into account, we believe that such form as GE is really outdated, does not meet the requirements of modern market turnover and there is no sense in preserving of it for the future. However, the procedure of transformation of GE into JSC and other organisational forms should be gradual and complete by the implementation of the programme of state property privatisation.

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**ОРГАНІЗАЦІЙНО-ПРАВОВІ ФОРМИ ДЕРЖАВНОГО ПІДПРИЄМСТВА ТА
ДЕРЖАВНОГО АКЦІОНЕРНОГО ТОВАРИСТВА: ПОРІВНЯЛЬНО-ПРАВОВИЙ
АНАЛІЗ**

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Стаття присвячена з'ясуванню відмінностей між такими формами, як державне комерційне підприємство та акціонерне товариство із 100 % державною часткою в статутному капіталі. Дається також висновок щодо того, чи виправдане збереження в чинному законодавстві такої форми, як державне унітарне комерційне підприємство.

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Ключові слова: державне комерційне підприємство, акціонерне товариство, державне унітарне комерційне підприємство.

**ОРГАНИЗАЦИОННО-ПРАВОВЫЕ ФОРМЫ ГОСУДАРСТВЕННОГО
ПРЕДПРИЯТИЯ И ГОСУДАРСТВЕННОГО АКЦИОНЕРНОГО ОБЩЕСТВА:
СРАВНИТЕЛЬНО-ПРАВОВОЙ АНАЛИЗ**

Кибенко Е. Р.

Данная статья посвящена установлению отличий между такими формами, как государственное коммерческое предприятие и акционерное общество со 100 % государственной долей в уставном капитале. Также делается вывод относительно того, оправдано ли сохранение в действующем законодательстве такой формы, как государственное унитарное коммерческое предприятие.

Ключевые слова: государственное коммерческое предприятие, акционерное общество, государственное унитарное коммерческое предприятие.

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This article is devoted to the defining of the differences between such forms of incorporation as state commercial enterprise and joint-stock company with 100 % state participation in the statutory capital. Their foundation procedure, property regime, liability under commitment, formation of authorised capital, limitations and particular qualities of economic activity, governing bodies are examined. Questions on preparation of financial plan, dividend disbursement to the state-owned enterprises operating competitively and government corporations are interrogated. The author paid attention to the complexity of the system of the corporate governance in the government corporation. It is also made a conclusion on the legislation connected to the necessity of such form of incorporation as state unitary commercial enterprise which is not a unique form directed to the defense of state property and does not satisfy the demands of the existing in the present market turnover.

Keywords: state commercial enterprise, joint-stock company, state unitary commercial enterprise.