

LEGISLATION ON PUBLIC COMPANIES IN VARIOUS LEGAL SYSTEMS

Anastasiya V. Bessonova, Vladimir S. Sinenko, Marina A. Sorokoletova, Aleksey S. Fedoryaschenko¹
Anna A. Kulikova²

¹Belgorod State University, Russia

²The Institute of service sector and entrepreneurship (branch) of DSTU in Shakhty, Russia

ABSTRACT

The article provides an overview of public corporation legal regulation in the Anglo-American and continental European law and order. A comparative analysis was conducted concerning the organization and the activities of public and private companies. The reasons for this classification of legal entities were identified. The tendency of legal regulation unification concerning public corporations in the European Union countries was indicated.

Keywords: public company, private corporation, public joint stock company, stock exchange, share capital

INTRODUCTION

The processes of globalization cause the unification of legal regulation among certain segments of public life, primarily in the economic sphere. At the same time, considering the experience of regulatory regulation in individual legal institutions, it is necessary to take into account the social-economic conditions that took place in a specific historical situation of the analyzed relations origin and development. In particular, when the legal status of public societies in different states is compared, it is necessary to remember the differences not only of legal systems, but also of economic conditions in which they exist and develop. Besides, the role of law in social-economic development stimulation of a particular legal system and a particular state should be taken into account.

The public status of a corporation assumes the possibility of free investment in the stock market by the placement of shares among an undetermined number of persons. By providing this opportunity to a company it is necessary to remember the need to protect both existing and potential investors. Thus, we can expect quite strict mandatory regulation of public companies and the existence of a certain degree of freedom concerning private companies in the legislation of various states. At that, the requirements for the disclosure of information about company activities have a tendency to a significant increase. An example of this is the adoption of the Sarbanes-Oxley Act (2002) [1] in the US, which significantly tightened the requirements for the preparation and the disclosure of corporation financial statements. It is rightly noted in the special literature that this development of the situation actualizes the question of company public status advantages and disadvantages correlation [2]. In order to identify the similarities and the differences of this structure, we will analyze the experience of the relevant legislation in various legal systems.

METHODOLOGY

Various general scientific methods and the methods of logical cognition are used in the work: analysis and synthesis, systemic, functional and formal-logical approaches. The development of conclusions was facilitated by the application of formal-legal and comparative-legal methods.

DISCUSSION AND RESULTS

Analyzing the state of public company legal regulation, as well as their comparison with non-public (private) companies, one should turn to the American experience first of all. The very appearance of such a classification of companies can be attributed to Anglo-American law. And only then this structure was borrowed in the continental European legal system.

So, all business corporations in the American legal tradition are divided into public and private ones. However, it should be borne in mind that both public and private (closed) corporations are the versions of a single organizational and legal form - "a company limited by shares". These corporations exist either in the form of a public company (publicly held, or public limited company (PLC)), or in the form of a private company, or a "closed corporation". The main difference between them is that the status and the activities of public companies for the purpose of increased protection of interests among their participants and third parties from various abuses are rigidly "regulated", not only by federal laws and the laws of individual states, but mainly by the Federal Commission acts on valuable securities and stock exchanges [3].

European joint-stock companies and limited liability companies evolved historically as two distinct, separate types of legal entities (corporations). Therefore, in the continental law, the shares of joint-stock companies and the shares of limited liability companies represent different objects of civil rights with different legal regimes, which is conditioned by the fundamental differences in the status of these corporations and their participants. In Anglo-American law, the property of both "public" and "private" corporations is divided into units denoted by a single term - "share", since their legal regime is basically the same, because it is about one and the same organizational and legal form of a corporation. In all cases, their participants are the owners, or the "shareholders".

From the standpoint of European corporate law, only joint-stock companies can be divided into public and non-public companies, meaning the establishment of more stringent requirements for the status of "public joint-stock companies" due to the fact that their shares are quoted on stock exchanges.

The United States of America has no general federal legislation regulating corporate relations, including the status of business corporations. Each of the states regulates this bloc of relations independently on the basis of the laws they adopt. There is the Model Law on Enterprise Corporations (Model Business Corporation Act 2002 (MBCA) [4]) at the federal level.

American experience of public corporation legal regulation is also specific by the fact that there are actually four public corporation regimes. These legal regimes are delineated depending on the ways of their securities placement, as well as on the volumes of their trade. The features of various regimes basically differ in the requirements and the standards of public disclosure of information on a corporation activity. In short, they can be represented in the following form.

1. The most stringent legal regime is applied to the corporations whose shares are listed by a stock exchange. At that the company must comply with the requirements of a stock exchange on the amount of information provided. Besides, it is necessary to comply with the requirements of the law concerning the trading by securities and of stock exchanges.
2. The corporations whose shares are not registered on an exchange are exempt from additional exchange control. However, a corporation itself includes at least 500 shareholders and the volume of its net assets exceeds 1 million dollars. However, they are subject to the requirements of security trading law.
3. The corporations of the first two groups that have at least 300 shareholders and which also presented an open subscription to their securities are exempted from duties. Additional responsibilities of this legal regime are reduced to mandatory provision of financial reports to the Security Trading Commission.
4. All other public corporations do not have the abovementioned responsibilities, but in most cases they initiate financial reports on their own initiative to increase the demand for their securities.

Thus, it is clear that the increased requirements for legal regulation and the volume of disclosed information are presented to those corporations whose securities are as widely spread as possible and are actively traded on a stock exchange. Thus, such organizations have an increased responsibility to their holders of securities, potential buyers, creditors and other persons.

In American corporate law (both in federal law and the law of individual states), it is noteworthy that public companies are usually common (classical) ones. Historically, if a type of corporation is not specified in a regulatory act, then it is a public company [5] with a large number of shareholders, a dispersed structure of share capital, whose shares are traded on a stock exchange. Non-public (closed) corporations began to stand out in the legislation only in the middle of the 20th century.

The right of Great Britain is known as one of the most stable and attractive for business entities. In England, the status of companies is determined by a number of laws (statutes). The Companies Act of 2006 is among them, above all [6]. This statute does not contain a legal definition of "a company" concept.

By virtue of Art. 4 - 6 of the Law, legal entities are created in the form of public and private companies. Depending on the responsibility of company participants the companies are divided into: the companies where the liability of participants is limited by the value of shares (company limited by shares); the companies in which the liability of participants is limited to the size of a certain guarantee (company limited by guarantee); the companies in which the liability of participants is unlimited one (unlimited company).

While private companies can be established in any of these three varieties, public companies may be established as limited liability companies.

The Company Act defines a private company limited by shares as any company that is not a public company. Any company will be considered as a public one if it meets the following criteria:

- it must be registered as a public limited company (Section 1 (4));
- the memorandum should contain an indication that a company is a public limited company (Section 1 (2)), and a company name should end with the words "public company limited by shares" or the corresponding abbreviation PLC (Section 25 (1));
- the share capital claimed by a company must be at least £ 50,000 (Section 11);
- if the number of company members (shareholders) is less than two people for more than 6 months, then the only member (a shareholder) of a company is recognized as a liable one for all obligations of the company;
- the shares of a public company may be traded on a stock exchange or on an organized market out of stock exchange (Alternative Investment Market); such companies are also commonly referred to as "publicly quoted" or "publicly traded", or "listed companies".

In the UK, the largest companies are aimed at the listing in a regulated market, which usually means the Main Market, managed by the London Stock Exchange, that is, they are the companies the shares of which are quoted on a stock exchange (listed companies) [7].

Apparently, the general idea of public company separation is similar to the situation observed in American corporate law. And this is by no means an accident, of course. The American, and, actually, English legal system has the same historical roots.

At the same time, it is also necessary to take into account the fact that the division of legal entities into public and non-public (private) ones is also present in continental European law. However, it concerns only joint-stock companies, which are considered as an independent form of legal entity, unlike a limited liability company, for example. E.A. Sukhanov writes that in the European legal order joint-stock companies are usually divided into two types, depending on the admission of shares of such a company to the quotation on a stock exchange. Joint-stock companies whose shares are admitted to quotation are represented by large organizations with a large number of shareholders. For example, there are only about 900

of such companies in Germany. This makes it necessary to have significant control over all aspects of their activities, both in the interests of their participants (present and potential ones), creditors, and also in public interests. Other companies are small organizations as a rule whose activities are not subject to such a strict control [8].

Article 2326 (1) of the Italian Civil Code [9] stipulates that the name of a company, regardless of its formulation, must contain an indication that it is a joint-stock company. The SC of Italy (article 2325-bis (1)) covers two forms of companies that are classified as the companies of the risk capital market: 1) the companies with the shares registered on a regulated market (mercati regolamentati); 2) the companies with the shares distributed among an unlimited circle of persons (diffuse frailpubblico). The provisions of the section including Art. 2325-2332 of SC of Italy are applied to the to the companies whose shares are quoted on regulated markets, that is, to public companies [10].

The Commercial Code of France (2000) singles out a joint-stock company that applies to a public subscription and a joint-stock company that does not apply to a public subscription. For the first one an authorized capital must be at least 225,000 euros, for the second one the corresponding capital must be at least 37,000 euros. Special rules are established both during the creation and in the process of activity for the joint-stock companies, the shares of which are placed by an open subscription [11]. The vast majority of joint-stock companies in France are created as the companies with a small number of shareholders, and only a few of them are transformed into corporations whose shares are quoted on an exchange. The admission to a stock exchange depends on the publication of a number of annual reports [12].

The creation of the European Union required the unification of corporate legislation. The Council of the European Union adopted more than 10 directives on the law of companies, the second of which (1976) was directly devoted to joint-stock companies (public companies) and their share capital [13]. The harmonization of the law on companies in the European Union was continued with the entry into force of EU Council Regulation No. 2157 on the Statute of a European Company issued on 8 October 2001 [14]. This document establishes the mechanism of a joint-stock company creation and management, which is called the European joint-stock company. One of the most interesting moments is the circumstance that the founders of a European company can be only such joint-stock companies that develop the share capital by the way for a public subscription to shares application, that is, by public joint-stock companies (Article 2 of the Regulations).

On the basis of the above-mentioned document, the Parliament of the United Kingdom adopted the Regulation on the activities of European public limited companies (2004) [15].

CONCLUSIONS

This brief survey of foreign experience shows that the analogues of company division into public and non-public ones are available both in the Anglo-American and in the continental law and order. With all the existing differences in different states, such a classification has almost the same basis and the division occurs for the same purposes. The separation of public companies (corporations, societies) is intended to protect a wide range of persons who invest (or are going to invest) their capital in the shares of such legal entities. Such protection is carried out by the presentation of mandatory requirements to their activity and the disclosure of relevant information.

In our opinion, the most detailed definition of a public corporation status is given by the United States. The analysis of the American experience concerning legal regulation makes it possible to distinguish four legal regimes of public companies with various degrees of rigidity, which are allocated depending on the methods of their security placement, as well as on the volumes of their trade.

As a rule, increased requirements for public corporations include the establishment of:

- a sufficiently high minimum of authorized capital;

- an increased volume of information about a company performance to be disclosed;
- the requirements for a minimum number of participants in a public business corporation;
- the requirements of the quantitative and qualitative composition of corporation management bodies (in particular, the establishment of a supervisory board and a board of directors).

These and some other increased legislative requirements for a company and the operation of public companies constitute a commensurate fee for the possibility of free raising of funds at a stock market. The need to acquire such a status should be determined taking into account the objectives of a company and a specific economic situation in a particular state.

REFERENCES

- Sarbanes-Oxley Act (2002)* // <https://www.sec.gov/about/laws/soa2002.pdf> (accessed 14 May 2017).
- Boot A., Gopalan R., Thakor A. *To be a public company or not to be* // https://www.academia.edu/20541968/TO_BE_A_PUBLIC_COMPANY_OR_NOT_TO_BE (accessed 14 May 2017).
- Sukhanov E.A., 2014. "American corporations in the Russian law" (on the new edition of Chapter 4 of RF Civil Code) // *Journal of Civil Law*. # 5. pp. 8-9 (In Russian).
- Model Business Corporation Act (MBCA)* // http://www.lexisnexis.com/documents/pdf/20080618091347_large.pdf (accessed 14 May 2017).
- O'Neal H. F. 1972 *Close Corporation Legislation: A Survey and an Evaluation* // *Duke Law Journal*. P. 867-868.
- Companies Act 2006*. // UK Laws. Legal Portal. [Electronic resource] – Access mode: http://www.uklaws.org/acts_uk/document208/index.htm (accessed 14 May 2017).
- Hannigan B. 2014. *Company Law*. 4th ed. Oxford, P. 16.
- Sukhanov E.A., 2014. *Comparative corporate law*. M.: Statute, 456 p. (In Russian).
- Codice Civile Italiano 2003* // <http://www.dossierazienda.it/fonti/codcivile0.htm> (accessed 14 May 2017).
- Pernazza F. 2012 *Corporations and Partnerships in Italy*. Kluwer Law International. 2nd ed. P. 61.
- Code de Commerce de France* // <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000005634379> (accessed 14 May 2017).
- Andenas M., Wooldridge F. 2009 *European Comparative Company Law*. Cambridge, P. 64.
- Second Council Directive 77/91/EEC of 13 December 1976* // <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:31977L0091> (accessed 14 May 2017).
- Council regulation (EC) №. 2157/2001 on the statute for a European company (SE) (Luxembourg, 8.X.2001)* // <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:294:0001:0021:en:PDF> (accessed 14 May 2017).
- European Public Limited-Liability Company Regulations 2004 (SI 2004 No. 2326)* // <http://www.legislation.gov.uk/uksi/2004/2326/regulation/43/made> (accessed 14 May 2017).