PECULIARITIES OF THE LEGAL PROCEDURE FOR EXTRAORDINARY TRANSACTIONS IN THE ACTIVITIES OF STATE ATOMIC ENERGY CORPORATION ROSATOM

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Special legal procedure for settlement of major transactions as well as interested-party transactions, according to the general rule, is aimed at protection of the rights and legitimate interests of the members of the corporation against unwanted actions of the managers in the management of the corporation's assets. Since the sole founder of State Atomic Energy Corporation Rosatom is the Russian Federation, when this corporation settles major and interested-party transactions, a special legal procedure established by a special law and aimed at ensuring protection of state property against possible abuses by persons engaged in the bodies of this corporation and, accordingly, protection of public interest is applied. The research was conducted due to practical problems arising out of the existing legal uncertainties in the settlement by State Atomic Energy Corporation Rosatom (the Corporation) of transactions requiring a special approval procedure, which includes transactions related to acquisition, alienation or possibility of alienation by the Corporation of property, value of which exceeds the amount established by the Supervisory Board of the Corporation (the major transactions) as well as the interested-party transactions of the Corporation.

Keywords: *energy law, legal regulation in the field of use of nuclear energy, transactions requiring special approval procedure, State Atomic Energy Corporation Rosatom.*

The relevance of the research is due to practical problems arising out of the existing legal uncertainties in the settlement by State Atomic Energy Corporation Rosatom (the Corporation) of transactions requiring a special approval procedure, which includes transactions related to acquisition, alienation or possibility of alienation by the Corporation of property, value of which exceeds the amount established by the Supervisory Board of the Corporation (the major transactions), as well as the interested-party transactions of the Corporation.

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The mechanism of legal regulation of major and interested-party transactions settled by State Atomic Energy Corporation Rosatom is complex, and it is implemented through application of the general rules on major and interested-party transactions contained in the corporate laws of the Russian Federation as well as through special rules established by industry sources of law.

This complex regulation, certainly, creates certain conflicts in the complex implementation of the relevant rules by the law enforcer.

Therefore, *comprehensive and complex study of the specified issue* will create good grounds for overcoming the gaps and uncertainties arising in practical activities, and will contribute to development of the institution as a whole.

The goal of this study is a comprehensive analysis of general and specific laws to identify theoretical and practical problems arising in the settlement by the Corporation of major and interested-party transactions, and to develop proposals to improve the existing laws governing the mechanism under study.

To achieve the specified goals, *the following tasks were set*: to identify the general concepts of major and interested-party transactions, to identify the distinctive features of the procedure for settlement by the Corporation of major and interested-party transactions, to analyze judicial practice in relation to the legal regulation of settlement by the Corporation of major and interested-party transactions, and to investigate consequences of a violation of the procedure for settlement by the Corporation of major and interested-party transactions.

The theoretical significance of the study consists in identification of peculiarities of the procedure for settlement by the Corporation of major and interested-party transactions, a comparative legal analysis of this procedure as compared to the general procedure for settlement of these transactions by commercial corporations, and development of special mechanisms for legal regulation of the Corporation's extraordinary transactions.

The practical significance of the study is in the author's attempt to develop legal mechanisms that will prevent potential abuses in the management of the Corporation's assets and will have a positive impact on development of the nuclear industry as a whole.

The specific suggestions of the author on the subject of the study can be used to further improve the legal regulation in the field of use of nuclear energy.

The civil laws of the Russian Federation provide for certain types of transactions of legal entities to settle which, due to their probable ability to cause serious risks for the business owners (members, shareholders), a special procedure for their approval shall be complied with. The mentioned special procedure consists in the fact that to settle this type of transaction, the general competence of the sole executive body of the legal entity is not sufficient, and approval by other management bodies, as a rule, directly expressing the will of the business owners, is required. In the scientific literature, this type of corporate transaction is usually called extraordinary [1].

Pursuant to the further analysis of the current laws, this special procedure for approval of extraordinary transactions is implemented not only in commercial corporations. In particular, Federal Law No. 7-ФЗ *On Non-Profit Organizations* dated January 12, 1996, provides for individual cases when the special procedure for approval of major and interested-party transactions is required for organizations, for which profit making is not the main objective.

In view of the fact that, according to subclause 7, clause 3, Article 50 of the Civil Code of the Russian Federation, the state corporations are classified as non-profit organizations, the general provisions of Federal Law No. 7-ФЗ *On Non-Profit Organizations* dated January 12, 1996, shall apply to the organizations of this form of incorporation.

Since the activities of the state corporations are mainly related to implementation of public interest in a particular industry, the issue of the

risk associated with the possible adverse consequences of unfair actions of persons being members of the bodies of these corporations is the most relevant.

To prevent the risk of these adverse consequences for the state corporations, the laws governing the activities of these corporations provide for a special procedure for approval of the extraordinary transactions by the bodies that mainly consist of representatives of the public authorities of the Russian Federation [2].

In particular, Federal Law No. 317-ФЗ dated December 1, 2007 On State Atomic Energy Corporation Rosatom (hereinafter referred to as the Law on Rosatom) specifies that in State Atomic Energy Corporation Rosatom, resolutions on settlement of major and interested-party transactions shall be adopted by the supervisory board of the Corporation, which consists of nine members, eight of whom are representatives of the President of the Russian Federation and the Government of the Russian Federation.

Therefore, it can be noted that the Federal Law on Rosatom, in general, has a similar mechanism for the legal regulation of the extraordinary transactions as compared to that established for the commercial corporations. The only difference is that, de facto, the controlling member of the Corporation is the Russian Federation.

The peculiarities of the Corporation's extraordinary transactions, which will be discussed further, result from this material circumstance.

The Law *On Rosatom* does not define the concept of major transactions, and does not contain provisions that reveal the procedure for settlement of these transactions either. The mentioned law only refers the issue of making a resolution to settle a transaction or several interrelated transactions for acquisition, alienation or possibility of alienation of property by the Corporation, the value of which exceeds the amount established by the supervisory board of the Corporation, to the exclusive competence of the Supervisory Board of the Corporation.

In other words, in accordance with the provisions of the Law on Rosatom, there is no concept of the "major transaction" in the generally accepted form for State Corporation Rosatom. The supervisory board of State Corporation Rosatom set a limit on the value of the property, transactions in which are subject to approval by the supervisory board of the Corporation. Therefore, the cost attribute of a transaction comes to the fore in the determining the major status of a transaction settled by the Corporation and applying the relevant procedure to negotiate such a transaction.

It is particularly remarkable that such a specific definition of the major transaction indirectly specified in clause 15, Article 24 of the Law *On Rosatom* is significantly more limited than that contained in corporate laws and used in the activities of joint-stock companies and limited liability companies.

The concept of the major transaction applicable to the commercial corporations has undergone significant changes in recent years. For example, in 2017, the criterion for such a transaction to fall outside the ordinary course of business was taken as the basis of the definition of the major transaction.

As noted by the Plenum of the Supreme Court of the Russian Federation in its Resolution No. 27 dated June 26, 2018, to qualify the transaction of a business entity as the major one, at the time of its settlement, the transaction shall simultaneously have two features [3]: quantitative, which is expressed through the extent to which the amount of the transaction exceeds the value of a part of the company's assets established by the law as of the reporting date; as well as qualitative, which, in its turn, is manifested in the falling of the transaction outside the ordinary course of business.

However, a qualitative feature in qualifying the major transaction cannot be applied in the activities of State Corporation Rosatom, since the criteria for ordinary course of business do not correlate with the legal status of the Corporation due to the following circumstances.

The law determines that transactions that do not fall outside the ordinary course of business mean any transactions settled in the ordinary course of business of the relevant company or other organizations performing similar activities, whether or not these transactions were settled by this company earlier, if these transactions do not result in cessation of activity of the

company or a change in its type or a significant change in its scale.

Meanwhile, the legal status of the Corporation is determined by the federal laws and regulations of the Russian Federation, and the functions and the goals of the Corporation activities are also established by the regulatory legal acts of the Russian Federation. In other words, the activities of the Corporation are strictly regulated at the level of federal laws, and the corporation itself does not have the right to perform any other activities not provided for by the relevant regulatory legal acts. In these circumstances, it seems impossible for the Corporation to settle transactions falling outside the ordinary course of business. And all transactions settled by the Corporation, on the other hand, will fall under the criteria of ordinary course of business.

Therefore, the legislator reasonably did not take into account the general trends in the laws on major transactions in the regulation of these transactions in the activities of the Corporation. To determine the size of transactions settled by the Corporation, only a quantitative feature is applied. It is more flexible as compared to the general regulation of the major transactions under the laws on business entities since the cost criterion is established by the resolution of the Corporation's body, namely the Supervisory Board, which can promptly regulate the criterion of size depending on current performance indicators of the Corporation. At the same time, such regulation of this mechanism creates additional uncertainties in the qualification of a particular transaction as a major one and application of the relevant procedure to it since the absence of firm criteria set forth in the law may cause variability of the size of such a transaction for a short period.

It is particularly remarkable that the legislator has not defined the procedure for settlement of the major transactions by the Corporation, in contrast to the procedure for regulation of interested-party transactions, in which the mechanism for adoption of resolutions on approval of such a transaction is detailed and established. As a result of a comprehensive analysis of the rules governing the settlement by the Corporation of major transactions, it can be concluded that the procedure for approval of the major transactions of the Corporation is non-regulatory in nature and is established immediately at the time of considering the approval of a particular transaction having the major transaction attribute. This circumstance also confirms the existing uncertainty of the legal regulation of the mechanism for settlement by the Corporation of the major transactions.

According to the public annual accounts of State Atomic Energy Corporation Rosatom for 2015 to 2018 [4], on average, the Supervisory Board of the Corporation adopts no more than five resolutions on approval of the major transactions per year. Such a small number of approved transactions testifies to the inadequate work of one of the main mechanisms for protection of corporate control caused by the lack of proper regulation of the procedure for settlement of these transactions and establishment of strict criteria for qualifications. Relevant problems and uncertainties arise therefrom in the practical implementation of the set norms.

Since the legal models of corporate governance in the energy sector are characterized by securing the priority areas of activity of key companies at the level of federal laws [5], it is proposed to legislate a fixed criterion for determining the size of a transaction, based on a quantitative feature by analogy with the general procedure provided for the business entities. This measure will make it possible to additionally protect public interest and increase state control over strategic activities implemented by the Corporation. It is additionally proposed to take measures to work out a unified procedure for settlement of major transactions by the Corporation and set forth this procedure by the mandatory rule of the federal law.

Part 1, Article 29.1. of the Law *On Rosatom* also establishes a special procedure for settlement by the Corporation of transactions (among which the law directly distinguishes loan, credit, pledge, surety), in which there is an interest of the persons listed in the law.

At the same time, the specified persons are deemed to be interested in the transaction in cases where "they, their spouses, parents, children, full and half siblings, adoptive parents and adopted children, and/or their affiliates: 1) are the

party, beneficiary, intermediary, or representative in the transaction; 2) own (individually or jointly) twenty and more percent of shares (interest, units) of a legal entity that is the party, beneficiary, intermediary, or representative in the transaction; 3) hold offices in the management bodies of a legal entity that is the party, beneficiary, intermediary, or representative in the transaction, offices in the management bodies of the management organization of such a legal entity, except for the positions in the Corporation's joint-stock companies and their subsidiaries as well as the subordinate enterprises".

Therefore, an interest in settlement of a transaction by the Corporation is determined by the composition of its members: any civil transaction in which there is an interest of persons listed in the law may mean the interested-party transaction.

The generally accepted concept of the interested-party transaction in the commercial corporations was significantly modified by Federal Law No. 343-ФЗ dated July 3, 2016 On Amending the Federal Law On Joint-Stock Companies and the Federal Law On Limited Liability Companies with Regard to Regulation of Major and Interested-Party Transactions, which, in particular, excluded the feature of affiliation, having replaced it with the concepts of the "controlling entity" and the "controlled entity" and having specified the relevant definitions. Herewith, to be recognized as the controlling entity, among other things, "more than fifty percent of the votes in the supreme management body of the controlled entity or the right to appoint (elect) the sole executive body and/or more than 50 percent of the collegial management body of the controlled entity" is required. Note that the earlier quantitative criterion of participation required to determine the interest was twenty percent or more of the total number of votes in the supreme body of the company.

The concept of the interested-party transaction specified in the Law *On Rosatom* has not undergone changes similar to those related to this concept in the joint-stock companies and the limited liability companies. It seems that this is connected, primarily, with a special type of relations developing in the Corporation in connection with the implementation of its corporate governance.

Special regulation of the procedure for settlement by the Corporation of the interested-party transactions is aimed at protection of the public interest that is implemented in the activities of the Corporation. The concept of the interested-party transaction of the Corporation established by the Law on Rosatom takes into account the specific character of the legal status of this entity. In particular, "other officials of the Corporation" are listed among the persons who may be deemed to be interested in the settlement of the transaction by the Corporation. The legislator purposefully does not limit the range of officials who may be deemed to be interested in the settlement of the transaction by the Corporation: taking into account the complex management system of the Corporation, individual officials can make management resolutions on transactions, which may include transactions considered in this study that require the special approval procedure.

Therefore, the legislator additionally protects the interests of the Corporation against possible abuses by its officials at various levels.

Meanwhile, to harmonize the provisions of the laws on interested-party transactions, it seems necessary to take into account amendments introduced into the generally accepted concept of the interested-party transaction by Federal Law No. 343-ФЗ dated July 3, 2016, in the Law *On Rosatom*.

First of all, it is proposed to exclude an indefinite feature of affiliation from the definition of the interested person, having replaced it with the concepts of the "controlling entity" and the "controlled entity".

This measure will significantly simplify the procedure for determining the range of persons interested in the settlement of the transaction by the Corporation, and it will also facilitate the task of the courts in settlement of issues related to classifying a particular civil transaction as the interested-party transaction and application of the relevant procedure, which will be guided by a uniform definition of the concept of the interested-party transaction.

The Law *On Rosatom* contains two exceptions, in the presence of any of which, a transaction having the features of the interested-party transaction may be released from a special regulatory procedure for interested-party transactions of the Corporation.

The first group of exceptions includes cases when the persons listed in Part 1, Article 29.1. of the Law *On Rosatom* "hold offices in the joint-stock companies of the Corporation and their subsidiaries as well as in subordinate enterprises".

Moreover, Part 2 of the said Law establishes "a set of two general conditions for exclusion of the interested-party transactions from the scope of the mechanism of the Corporation's interested-party transactions (the binding nature of the transaction according to the federal laws (other regulatory legal acts of the Russian Federation) and the calculation of transactions within fixed prices and tariffs established by authorized agencies in the field of state regulation of prices and tariffs)". [6]

If in the second case, the provision of the Law *On Rosatom* actually duplicates the general exceptions to the special procedure for settlement of the interested-party transactions established for the joint-stock companies and the limited liability companies, in the first case, there is an element of special regulation.

It seems that the provisions on exclusion of persons holding offices in the joint-stock companies of the Corporation and their subsidiaries as well as in the subordinate enterprises, from the interested persons are intended to ensure prompt interaction within the system of enterprises of the nuclear industry, while eliminating the need to approve transactions settled within this system.

Part 8, Article 29.1. of the Law *On Rosatom* specifies the consequences of violation of the mechanism for settlement of the interested-party transactions of the Corporation. In particular, in case of its violation, the relevant transactions may be declared invalid upon the claim of the Corporation, the Government of the Russian Federation, or an authorized federal executive body. It follows from a comparative analysis that the consequences of the violation of the procedure for settlement of these transactions by the Corporation are similar to those applied in business entities. Differences appear in the list of entities that may bring an action for invalidation of these transactions and clearly demonstrate the specific nature of the legal status of the Corporation.

Therefore, the peculiarities of settlement by State Atomic Energy Corporation Rosatom of the transactions that require compliance with the special approval procedure set forth in special laws relate to the qualifying features of these transactions, the procedure for their settlement, and the conditions for their invalidation. At the same time, the specific nature of its legal status is demonstrated at any stage of settlement of the extraordinary transactions by the Corporation.

Summing up the results of the study, it can be stated that at the current stage, the degree of scientific elaboration as well as the level of practical application of the mechanism for settlement of the extraordinary transactions of the Corporation are not high enough.

At the same time, the strategic role of State Atomic Energy Corporation Rosatom and the nuclear industry as a whole implies considerable state control over the activities of the participants of civil legal relations. Herewith, the legislator laid the foundations for the mechanism of such control, one of which is the special procedure for approval of the extraordinary transactions.

By application of this procedure to the state corporation, the legislator purposefully linked one of the most efficient corporate control institutions with the activities of the public entity that has a special legal status and expresses state interests. The study of the procedure for the extraordinary transactions in the Corporation once again underlined the phenomenon of the form of incorporation of the state corporation, which, by its formal features, does not pertain to corporate legal entities; however, it represents the majority of corporate and legal entities and legal regulation methods.

The current conditions of the institution of extraordinary transactions in the Corporation cannot be considered acceptable, because despite the existing significance of the institution for the prevention of corruption abuses and protection of public interest, the mechanism of the extraordinary transactions in the Corporation is practically not applied. The existing gaps in the legal

regulation of this mechanism as well as the lack of a clearly defined procedure for performance of certain actions prior to settlement of the extraordinary transaction contribute to it.

Therefore, it seems necessary to introduce relevant amendments into to the Federal Law *On State Atomic Energy Corporation Rosatom* and to take into account the changes that have occurred in the laws governing the general procedure for settlement of the extraordinary transactions in business entities, which was developed, among other things, on the basis of many years of law enforcement practice and is an effective mechanism for protection of corporate control, which is essential in the activities of any state corporation.

Herewith, it is necessary to refrain from blind application of the general procedure for the extraordinary transactions to the Corporation's activities taking into account the specific nature of the legal status of this entity and its need for the prompt fulfillment of its functions upon direct participation of the state authorities of the Russian Federation, and also taking into account the complex holding structure of nuclear industry entities.

The foregoing makes it possible to determine that there is a need to reform the institution of extraordinary transactions in the Corporation and increase its importance among the mechanisms of state control over the activities of the state corporations. At the same time, such a reform should be carried out on the basis of the integrated application of the rules of various branches of law, and it should take into account the phenomenon of the state corporation as a special form of incorporation. ■

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