

PECULIARITIES OF LEGAL STATUS OF COMPANIES WITH STATE PARTICIPATION IN THE ENERGY SECTOR

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In the modern Russian system of energy entities, the companies with state participation prevail. These companies are characterized, primarily, by a special legal status, which reflects elements of private and public regulation.

The specific nature of the legal status of the companies with state participation in the energy sector is directly related to the strategic importance of these companies for ensuring the energy law order of the country and the economy of the state as a whole. Therefore, the primary goal of the legal regulation of the activities of these companies is to serve the public interest and to implement the will of the state.

However, private interests can also be pursued in the companies with state participation. In these cases, the law is designed to ensure a balance of interests of the parties and to delimit their spheres of influence through imperative regulation.

Availability of a special mechanism to protect the rights of members in such companies containing a lot of administrative and legal elements is also an important feature of the legal status of the companies with state participation in the energy sector.

This article discloses the peculiarities of the legal status of the companies with state participation in the energy sector using companies in the nuclear energy and gas sectors as an example, and provides their comparative legal analysis.

The performed research contains an attempt to classify the companies with state participation in the energy sector on various grounds; various options are presented to improve the regulatory legal framework governing the legal status of the entities under study.

Keywords: *energy law, legal status of companies with state participation, energy legislation, legal regulation of private law relations, legal regulation of public law relations.*

At the present stage of development of the energy law order in Russia, the companies with state participation become the main subjects of legal relations. At the same time, the internal structure of the

company of this type is characterized by the direct participation of the state in corporate relations in the capacity of the shareholder (member) through the system of its management bodies.

As rightly noted by I.S. Shitkina, “participation of the state in corporate legal relations is a form of fulfillment of the economic and social functions of the state specified, inter alia, in the Constitution of the Russian Federation”. [1] It may be noted that the extent of direct participation of the state in the corporate relations of individual companies is directly linked to the goals of these companies, which, as a rule, are essential for the state and the society. It is no coincidence that, according to the Federal Property Management Agency, [2] the state acts as the shareholder (member) of the companies primarily in the military-industrial complex, the energy sector, in the transport sector, etc. — those industries that have priority and strategic importance for the development of the national economy, ensuring the safety of citizens, and ensuring the sustainable functioning of the most important social institutions.

Despite the fact that so far the legal doctrine has not developed a universal definition that discloses the essential features of the company (corporation) with state participation, individual declarations of the legislator’s will attempt to define the concept of these entities.

In particular, the Federal Law *On Energy Saving and Enhancement of Energy Efficiency and On Amending Certain Legislative Acts of the Russian Federation* contains a legal definition of an entity with participation of a state or a municipality, which are:

“legal entities a share in the authorized capital whereof is owned by the Russian Federation, a constituent entity of the Russian Federation, a municipality, and is more than fifty percent and (or) in respect of which specified entities have the right to directly or indirectly control more than fifty percent of the total voting stock (shares) constituting the authorized capital of these legal entities;

state or municipal unitary enterprises;

state or municipal institutions;

state companies, state corporations;

legal entities the property whereof or more than fifty percent of stocks or shares in the authorized capital of which are owned by state corporations”. [3]

A different definition of the company with state participation is given in the Management of

Federal Property State Program of the Russian Federation approved by Resolution of the Government of the Russian Federation No. 327 dated April 15, 2014, which specifies that the companies with state participation mean business entities whose stocks (shares) in the authorized capital are in federal ownership (regardless of size).

The latter definition is more universal for commercial legal entities, participation of the state in which attracts scientific interest of researchers. Unlike the definition given in Federal Law 261-ΦЗ, this definition does not make the key feature of the company with state participation dependent on the quantitative size of this participation. This approach seems reasonable since according to clause 1, Article 124 of the Civil Code of the Russian Federation, the constituent entities of the Russian Federation (republics, territories, regions, cities of federal significance, autonomous region, autonomous districts as well as urban and rural settlements, and other municipal formations) act on an equal basis with other parties to relations governed by the civil law, both individuals and legal entities. Clause 2 of the said article specifies that the rules governing participation of the legal entities in relations governed by the civil law shall apply to the subjects of civil law specified in clause 1 of the article unless otherwise implied by law or the peculiarities of these subjects. Therefore, as a general rule, the share of participation of public legal entities in legal entities is not limited to any minimum. On the contrary, there are examples when the state owns only a part of the authorized (share) capital remaining as a result of privatization. Herewith, the state acting as the member of the business entity owning even a small share in the authorized (share) capital of the company will have a special status and some individual (special) corporate rights, which will be analyzed below in this work.

A classification that allows distinguishing not only public and private entities, but also mixed legal entities [4], in which the private interests of individual members (shareholders) coexist with the public interest of the state on equal terms, among the legal entities was proposed in the works by M.I. Kulagin.

For the purpose of research on the legal status of the companies with state participation, it is advisable to distinguish the companies with full state participation, which will include unitary enterprises, state corporations, state companies, public companies, various types of state institutions (state, budget-funded, autonomous) as well as LLCs and JSCs with absolute (100%) participation of the state, and the entities with partial participation of the state, where private shareholders (members) act together with the state acting as the member.

The companies with partial state participation arouse the greatest interest for the scientific research. As O.A. Makarova rightly notes, “while participating in a joint-stock company, which is a business entity, the state pursues the goal of satisfying social needs and public interests, and therefore, a conflict between the objectives of such a company related to profit making, and the social, economic, and political objectives of the state as the shareholder of this joint-stock company is inevitable”. [5]

Thus, the company with state participation is characterized, among other things, by the presence of public interest guaranteed by the special corporate rights of its members, and the activity of such corporations is aimed at ensuring the interests of the ultimate consumer of benefits. [6]

The most pressing need for such a mechanism is experienced by the companies with state participation in the energy sector, which are of strategic importance for development of the national economy and the energy security of the state.

The legal status of the companies with state participation in the energy sector is usually determined at the level of federal laws, and it has its own peculiarities for each branch of the Russian energy industry. Within the framework of this study, the peculiarities of the legal status of the companies with state participation in the field of nuclear energy as well as the companies with state participation in the legal entities of the gas industry will be considered.

A significant peculiarity of the legal status of the companies with state participation in the

field of nuclear energy is the presence of a key entity in the system of these businesses, namely, the State Atomic Energy Corporation Rosatom (Rosatom).

In general, the state corporation is a unique model of the legal entity combining the functions of a state body with the ability to control the activities of other legal entities and the authority of the subject of civil transactions. [7] It can be assumed that the presence of the state corporation in the system of entities of the nuclear industry should ensure organizational unity and centralization of the corporate governance of the nuclear power industry complex of the domestic state. At the same time, the goals of the corporation activities have public nature, and they are similar to the goals of the state body in terms of their characteristics.

In the system of entities of the nuclear industry, a three-tier mechanism for legal regulation is formed, in which the state delegates a significant part of the public authority to Rosatom, and the state corporation, in its turn, acts on behalf of the Russian Federation as the shareholder with regard to joint-stock companies of the nuclear power industry complex, shares of which are in federal ownership [8] and manages the property of subordinate institutions.

Article 8.1. of the Law on Rosatom establishes the powers of Rosatom relating to exercise of the rights of the owner of the property of the subsidiary enterprises, analysis of which allows to conclude that all primary corporate powers are granted to the Corporation: the right to participate in the management of subordinate entities, the right to receive a share of profits from their activities, the right to information, and other rights typical of any member of the corporation.

In addition, among other things, the law provides for certain powers of the state corporation, which are characteristic only for structures of this type, which include, for example, the powers to approve candidates for key managerial and production positions of subordinate entities. Another vivid example of special competence is the Corporation’s authority to give mandatory assignments to subordinate entities. According to the court practice [9], such assignments can be documented in the form of the minutes of

meeting on development or implementation of a project and they will serve as the basis for the obligations of entities controlled by the Corporation.

The legal status of the nuclear business entities themselves is characterized by the absolute corporate control of such entities by the state; herewith, this control arises as a result of transfer of the entire share capital to state ownership.

Therefore, a situation arises in which the state has absolute corporate control in the system of multiple separate legal entities performing various activities, but united by a single industry affiliation and subordinate to Rosatom State Corporation. While participating in such legal entities, the state actually acquires the attributes of a sole member of the business entity.

It is noteworthy that pursuant to Part 22, Article 4 of the Federal Law *On Peculiarities of Management and Disposal of Property and Shares of Entities Operating in the Field of Nuclear Energy Use, and On Amendments to Certain Legislative Acts of the Russian Federation*, subsidiary joint-stock companies of the parent joint-stock company in the field of nuclear energy use as well as their subsidiary joint-stock companies are not covered by the rule provided for in Article 98 of the Civil Code of the Russian Federation and Article 10 of the Federal Law *On Joint-Stock Companies*, according to which no business entity consisting of one entity may act as a sole member of the joint-stock company.

The system of entities of the nuclear power industry is characterized by the consolidation of stocks (shares) of subsidiaries owned by one entity being an integrated company that consolidates civil assets of the Russian nuclear industry, Joint-Stock Company Atomic Energy Power Corporation (Atomenergoprom, JSC), all the shares of which are in the federal state ownership. At the same time, this organization is also included in Rosatom State Corporation.

Therefore, the companies with state participation in the field of nuclear energy are characterized by the presence of a single centralized system with full state participation, the dominant position in which is occupied by Rosatom implementing the state policy in the field of “peaceful atom” as a whole and the nuclear

weapons complexes of the country. The next link in the system of entities is Atomenergoprom, JSC, the base (parent) company in the field of nuclear energy, which ensures the full production cycle in the field of nuclear energy, from uranium mining to construction of nuclear power plants and power generation. [10]

The final links are the subsidiaries of Atomenergoprom, JSC, which, as a rule, provide for separate processes of the nuclear energy production cycle: from uranium mining and enrichment to generation and sale of electricity.

The situation is different in the companies with state participation in the gas sector, where there is a global energy company, Gazprom, PJSC, which forms a large-scale corporate group ensuring a full technological cycle of production related to exploration, mining, transportation, storage, processing, and sale of natural gas and gas condensate. [11]

Gazprom, PJSC, is of exceptional importance for the economy of the Russian Federation, which certainly affects its legal status and the legal status of its subsidiaries.

Gazprom, PJSC, is a public joint-stock company which was established in accordance with the Decree of the President of the Russian Federation dated November 5, 1992, *On the Reorganization of State Gas Concern Gazprom into Russian Joint-Stock Company Gazprom* and the Resolution of the Council of Ministers, the Government of the Russian Federation dated February 17, 1993, *On Establishment of Russian Joint-Stock Company Gazprom*. [12] The Articles of Association of Gazprom, PJSC, also specify that this company together with its subsidiaries performing activities to ensure efficient functioning and development of the Unified Gas Supply System and reliable supply of gas to consumers acts as a single complex.

The Federal Law *On Gas Supply in the Russian Federation* (the Law *On Gas Supply*) sets forth the legal definition of the Unified Gas Supply System, which means the property production complex consisting of technologically, organizationally and economically interconnected and centrally controlled production and other facilities intended for production, transportation, storage,

and supply of gas, and owned by the entity incorporated in the form and manner established by the civil laws that obtained the facilities of the said complex in ownership upon privatization or that created or acquired them on other grounds provided for by the laws of the Russian Federation.

According to the Decree of the President of the Russian Federation dated November 5, 1992, On the Reorganization of State Gas Concern Gazprom into Russian Joint-Stock Company Gazprom, Gazprom is an entity that owns the Unified Gas Supply System within the Russian Federation.

Therefore, the specific nature of the legal status of Gazprom, PJSC and its group is primarily related to the status of the company as the owner of the Unified Gas Supply System. [13]

Article 15 of the Law On Gas Supply establishes the minimum amount of state participation in the authorized capital of Gazprom, PJSC, which shall not be less than fifty percent plus one share of the total number of ordinary shares of this entity. This implies the statutory full corporate control by the state over the activities of the company and its group and the ability to take key management decisions.

Public interest and strategic importance of Gazprom, PJSC, and the companies of its group are additionally ensured by the provisions of the Law On Gas Supply, according to which the sale and other methods of alienation of ordinary shares owned by the state as well as the liquidation of the company shall be possible only on the basis of the federal law.

As rightly noted by V.V. Romanova and S.S. Fil in their work *On Peculiarities of Legal Regulation of Corporate Relations in the Energy Sector on the Example of Gazprom, OJSC*, “another main feature of the legal status of Gazprom at the present stage follows from the status of Gazprom, OJSC, of a strategic enterprise”. This implies restrictions on participation in the share capital of the company of foreign investors, certain peculiarities of bankruptcy and privatization procedures.

Group companies of Gazprom, PJSC, can be conditionally classified by type of activity as follows:

- companies involved in exploration and production of products (Gazprom Dobycha Urengoy, LLC; Gazprom Geologorazvedka, LLC);

- companies involved in transportation, storage, and distribution of products (Gazprom Gazoraspredeleniye, JSC; Gazprom Transgaz Moscow, LLC);

- companies involved in processing of products (Gazprom Pererabotka, LLC);

- companies involved in sale of products (Gazprom Export, LLC; Gazprom Mezhhregiongaz, LLC);

- true energy companies (Mosenergo, PJSC, Gazprom Energoholding, LLC);

- financial entities (Gazprom Investholding, LLC; Gazprom Capital, LLC);

- support companies, the main activities of which are design and construction of gas infrastructure development projects, system maintenance, security, etc. (Gazprom Svyaz, LLC; VNIPIgazdobycha, PJSC);

- other companies consolidating non-core assets, social projects, media.

Almost all companies of the group are characterized by the absolute participation of the parent company in these companies and a centralized management mechanism, which is implemented upon making key decisions. At the same time, some enterprises are integrated into a single structure within the group depending while uniting the smaller parts of the holding structure on the basis of their core activities or on a territorial basis. The activities of Gazprom Energoholding, LLC, which performs corporate governance in generating companies of the group, [14] while being a wholly-owned subsidiary of Gazprom, PJSC, can be an obvious example of such a complex model of management.

Therefore, among other things, it is typical of the companies with state participation in the gas sector to form a holding vertical with the direct implementation of state corporate control through the superior body of the parent company. Herewith, the parent company itself unites public interests of the state as well as private interests of investors, which is one of the significant differences between the companies with state

participation in the gas industry and similar companies in the nuclear energy industry.

Upon consideration of peculiarities of the legal status of the companies with state participation in the energy sector, the issue of protection of corporate rights of the members (shareholders) in such companies is also very important.

Protection of the corporate rights is generally ensured by a set of measures aimed at restoration of the infringed corporate right or mitigation of adverse consequences of violation of the corporate right. The rights of the members in all major corporate legal relations are subject to protection by universal methods of protection of civil rights provided for by Article 12 of the Civil Code of the Russian Federation.

In the corporations with state participation in the energy sector, such protection is complicated by the presence of the state among the members (shareholders) of these corporations, the will of which is predominant for the corporation's activities.

The absence of a codified act setting forth uniform principles of regulation and protection of the rights upon participation of the Russian Federation in the corporations in the energy sector should also be noted. This regulation is currently ensured through the complex application of federal laws (*On Joint-Stock Companies*, *On Privatization of State and Municipal Property*), bylaws (the Decree of the President of the Russian Federation dated August 4, 2004 *On Approval of the List of Strategic Enterprises and Strategic Joint-Stock Companies*, the Resolution of the Government of the Russian Federation dated December 3, 2004, Order of the Federal Property Management Agency No. 228 dated July 26, 2005), and special regulatory legal acts governing legal relations within certain energy sector (the Law *On Rosatom*, the Law *On Gas Supply*, Resolution of the Government of the Russian Federation No. 627 dated September 29, 2007, etc.).

A distinctive feature of the legal regulation of status of the companies with state participation in the energy sector is application of the rules governing relations concerning management of state property, most of which are public norms, in addition to the rules of business and corporate

law. Therefore, the activities of the companies with state participation in the energy sector are covered by a special method of legal regulation combining both imperative and optional features.

One of the special measures aimed at protection of the rights of the state (as the member of the energy company) is the right of the representative of the state to participate in the management bodies of the joint-stock companies in the energy sector: the board of directors, the supervisory board, and appointment of the representatives to attend the general meetings of shareholders. Candidates for representatives and their resolutions on issues relating to corporate governance, in their turn, are negotiated with the federal executive body of the Russian Federation, which performs state administration in the field of the state's energy. Herewith, if in accordance with Resolution of the Government No. 738, a special right to participation of the Russian Federation in management of the joint-stock companies (the "golden share") is applied in these companies, a list of issues on which government representatives in the management bodies vote according to directives shall be additionally determined.

Therefore, by creating such a centralized mechanism for management of the joint-stock companies in the nuclear industry, the interests of the state as the principal member and beneficiary shall be further protected against possible abuses by separate bodies of individual corporations.

Protection of the corporate rights of the members in the companies under consideration is often ensured by a special mechanism for negotiation of a particular type of transactions, while the conditions, under which certain types of transactions fall under such a regime, are established by a bylaw. Such a mechanism, in particular, is provided for in the system of entities in the nuclear industry, where certain types of transactions are approved by representatives of Rosatom, and in some cases, by the Government of the Russian Federation.

Moreover, the preemptive rights are often established for property owned by the companies with state participation in the energy sector. So, for example, Part 2, Article 8 of the Federal Law *On Peculiarities of Management and Disposal of Property and Shares of Entities Operating in the*

Field of Nuclear Energy Use, and On Amendments to Certain Legislative Acts of the Russian Federation provides for the preemptive right of the Russian Federation to purchase, at the initial price determined in accordance with the laws of the Russian Federation, stocks (shares in the authorized capital) of the legal entities included in the list of Russian legal entities provided for by the Federal *Law On the Use of Nuclear Energy* that may own nuclear materials, nuclear facilities upon levy of execution on the stocks owned by the company (shares in the authorized capital), including cases when the shareholders (holders of shares in the authorized capitals) of these legal entities are declared insolvent (bankrupt).

Therefore, to protect the rights of the state acting as the principal member of the company in the field of nuclear energy, among other things, a provision is made for a special method of protection that is implemented through the existence of certain preemptive rights.

As rightly noted by V.V. Romanova due to the fact that the peculiarities of corporate governance in the energy sector enshrined in special laws usually relate to determination of the procedure for settlement of transactions in corporate shares, corporate property, participation of the state as the shareholder of the corporations, [15] peculiarities of protection of the rights of members of these corporations are inextricably connected with protection of public interest pursued by the corporations in the energy sector. Herewith, the methods for protection of the corporate rights of members in such corporations more frequently acquire an administrative form, due to the nature of the relations that are formed in connection with participation of the state in the corporations of this type.

Summing up the analysis of the legal status of the companies with state participation in the energy sector, it can be established that the companies of this type are characterized by special rights and additional obligations arising from the specific nature of the legal status of these companies ensuring sustainable development of strategic sectors of the national economy.

In the implementation of the state policy in the sphere of energy, it is necessary to observe

the balance of interests of the parties, which in certain cases may be represented by both the private investors and the state represented by its public entities.

To arrange for sustainable activities of the entities in the nuclear energy and gas industries, unique legal models were created. Each of them is of separate interest for study. While the entities of the nuclear industry are consolidated around Rosatom, which exercises public authority like a government body, the system of gas industry entities is characterized by a vertical holding structure upon ensuring the special rights of the state as the key shareholder of this structure.

The legal status of the companies with state participation in the energy sector is aimed primarily at ensuring public interest and implementation of strategic and social goals of these entities. These companies are characterized by the centralized regulation in the presence of additional mechanisms for protection of the owner against possible abuse by the management bodies.

The legal regulation of the companies of this type is ensured by a number of regulatory legal acts, and it is comprehensive. The complex of sources that establish the specific nature of the legal status of the companies with state participation in the energy sector is broken, and it is reflected in the regulatory legal acts of various industries and levels of legal force. To overcome this fragmentation, it is proposed to go into the issue of securing the rules that establish uniform principles for functioning of the companies with state participation at the level of general laws on the legal entities. At the same time, these general principles can be specified at the level of special laws that establish peculiarities for a particular industry.

Availability of a sufficient number of mechanisms for protection of the corporate rights of the state (acting as the principal member in corporate legal relations), resulting in a stable operation of the system of energy companies and minimizing the risks of violation of the corporate rights belonging to the state, is also a vivid example of the special legal status of the companies with state participation in the energy sector. ■

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