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Compulsory Termination of Legal Entities: Civil Legal and Criminal Issues

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Abstract:

In the conditions of reforming of Ukrainian legislation, in the context of its harmonization with the law of the European Union, the research of the institute of legal entities is becoming more and more important. Fifteen years after the Civil and Economic Codes of Ukraine came into force, the various laws of Ukraine 'On State Registration of Legal Entities, Individual Entrepreneurs and Public Formations' have been introduced, and the Code of Ukraine on Bankruptcy Procedures was adopted, which will come into force on October 21, 2019, the legal regulation of the procedure for termination of legal entities has undergone significant changes. Many debates arise when it comes to compulsory liquidation procedures, the need to ensure proper legal regulation of the protection of the interests of bona fide creditors, the competence of legal entities at the stage of its termination, etc. This, in turn, necessitates a careful study of the legal framework, an analysis of the issues that arise in connection with this, and the filling of the gaps in the regulation of their main aspects.

Keywords: legal liability; liquidation of legal entity; criminal liability of legal entities; Civil Code of Ukraine.

JEL Classification: K15; P37.

Introduction

The purpose of this scientific article is to carry out a detailed theoretical analysis of individual problems of civil and criminal nature of the compulsory termination of legal entities, as well as to substantiate their own position on the investigated issues. Both domestic and foreign legal scholars have devoted their work to the consideration of this scientific issue, in particular: O.V. Bezuh (2016), S.M. Bratus` (1947), O.M. Hnatov (2015), V.P. Gribanov (1961), O.V. Dzera and N.S. Kuznetsova (2002), O.P. Provotorov (2019), V.S. Shcherbina (2005) and others. At the same

time, it is still advisable to comprehensively study the problems of compulsory termination of legal entities both in Ukraine and abroad. A legal entity is an entity established and registered in accordance with the procedure established by law. The question of the legal nature of legal entities has been the subject of lively debate for centuries. It should be briefly noted about the existence of: the theory of fiction, according to which a legal person is an abstract concept created by a lawmaker for practical purposes (Brother 1947; Vasilyev 1992); the theory of a targeted property or a personalized purpose that views a legal entity solely as property intended to serve a specific purpose (Tolstoy and Sergeev 1996; Moroz 2015); the theory of interest according to which a legal entity is regarded as protected by law the interests of a group of people (Genkin 1939); realistic theory that involves the recognition of a legal entity as a certain intellectual reality created by the human mind (Gribanov 1961); theories of personified property (Sukhanov 1994), etc. At the same time, modern scientific sources emphasize that in economic market relations, their subjects act not as individuals, but primarily as economic entities, whose will is determined by economic laws (Bezuh 2016).

In the foreign legal literature, the characteristic features of a legal person (corporation) are considered as follows: 1) is a subject of law different from an individual; 2) has a continuous succession, that is, its existence is supported by the constant succession of new persons who substitute those who have died or was eliminated in another way (Keenan 1987; On Amendments to Some Legislative Acts… 2013). For example, in the United Kingdom, companies registered under the Companies Act, or under previous legislation, fall into two main categories, namely public companies and private companies (Akhmetshin *et al.* 2018a; Akhmetshin *et al.* 2018b). A public company is defined as a company with liability of participants within the shares owned by them or a company with responsibility of participants within the limits guaranteed by them, and is such that has registered capital; the founding agreement of such a company states that it is a public company and complies with the terms of the Company Law on the name, size of the nominal share capital and in relation to it the registrar of companies must issue a certificate of incorporation stating that it is a public company (Ukrainian Code of Bankruptcy Procedure… 2018).

All other companies incorporated under the Companies Act are private companies (Pennington 1995). In France, legal entities of a private law nature are also referred to as unions. Unions can be of the following types: associations, partnerships and associations of economic interests. Associations of France are associations of non-profit-making entities. Their activity is aimed at achieving social, cultural, scientific, charitable, i.e. ideal goals. Associations in France are recognized as socially useful (Alcoholics Anonymous Society) and not recognized as socially useful, the former having broader rights than the latter. However, a merger based on economic interests does not have a direct purpose for profit. The main task is to carry out a single economic policy of the participants (Dzera and Kuznetsova 2002).

In turn, according to the definition contained in the Civil Code of Ukraine (hereinafter – the CC of Ukraine), it follows that the obligatory features of a legal entity as an organization are: its creation and registration in the manner prescribed by law; availability of their own civil capacity and capacity, as well as separate property; the opportunity to speak independently in civil proceedings, as well as to be a plaintiff and defendant in court (On the State Registration of Legal Entities… 2003). Despite the different approaches to the legal nature and the various legal regulations, the role and importance of legal entities is constantly increasing in different countries of the world. In fact, mergers with the status of legal entities open up a great deal of opportunities for their founders, including:

(1) to create the new entity, which in addition will be an independent subject of liability to third parties;
(2) create a so-called 'constitution' for this entity – a statute that will regulate the principles of its operation within the limits set by the state standards (legislative regulation);
(3) to create an 'asset', because a corporate entity can be the subject of alienation (it is a share in the authorized capital);
(4) attract different types of investments by promoting the activities of the respective legal entity;
(5) cause social effect, because the legal entity will be able to act as employer, taxpayer, counterparty in civil transactions, etc.

1. Legal grounds for compulsory termination of legal entities

The convenience of a legal entity as a form of business is evidenced in particular by the UK experience. For example, since April 2001, the UK government has adopted the Limited Liability Partnership Act. So far, there have been only two types of partnerships: General Partnership and Limited Partnership, in which at least one partner has unlimited liability for the company's obligations. The main feature of limited liability partnerships is that this legal form has been able to combine the positives of both ordinary companies and all existing partnerships. However, unlike these partnerships, a limited liability partnership is an independent legal entity. That is, it is recognized as an

independent legal entity for all purposes: contracts, agreements, liability, etc. However, in terms of taxation, this legal form is seen as a partnership: at the tax level, taxpayers are perceived as partners (Poputarovsky 2008). At the same time, any legal entity as a subject of law may be terminated either voluntarily or by compulsion. Issues of compulsory termination of legal entities in times of dynamic development of financial and economic relations, as well as the widespread predicate crimes as socially dangerous unlawful acts, which preceded the legalization (laundering) of proceeds of crime, are of particular relevance. The importance and necessity of covering this issue in Ukraine is essential for foreign, in particular European, countries and companies as potential investors. Such an analysis helps to find ways to minimize the risks of investing in corporate entities under Ukrainian law.

Thus, in Ukraine, as in many foreign countries, there are two forms of termination of legal entities: reorganization and liquidation. According to Art. 104 of the Civil Code of Ukraine (2003), a legal entity is terminated as a result of a reorganization (merger, acquisition, division, transformation) or liquidation. The difference between the legal regulation of these relations in Ukraine and the world practice, as a rule, in the majority, is that the main purpose of the reorganization processes is the termination of the legal entity as a subject of law. As Z.V. Romovska points out, while preparing the draft of the CC of Ukraine, the expediency of preserving the term 'reorganization' as a way of termination of legal entities by certain members of the working group strongly was denied – 'there is no such thing in the world, there is only liquidation' (Romovska 2005).

However, as of today such term is in the CC of Ukraine, it is widely used and has always been used in domestic law enforcement practice. The peculiarity of regulating these relations is that reorganization in Ukraine can by definition be carried out by force also on the basis of decisions of public authorities, which are not judicial(Abramov *et al.* 2018; Shashkova 2018). Concerning the implementation of compulsory reorganization of a legal entity by the decision of the relevant state authorities, the current legislation of Ukraine is granted the right to make such decisions regarding all economic entities only to the Antimonopoly Committee of Ukraine as a state body with a special status, the purpose of which is to ensure state protection of competition in business activities and in the field of public procurement (On the Antimonopoly Committee of Ukraine 1993).

This right is granted to the Antimonopoly Committee of Ukraine, in particular, by the Law of Ukraine 'On Protection of Economic Competition' of January 11, 2001, № 2210-III and the Economic Code of Ukraine (hereinafter – the EC of Ukraine). According to Art. 53 of the Law of Ukraine 'On Protection of Economic Competition' and Art. 40 of the Civil Code of Ukraine, in case the economic entities abuse the monopoly position in the market, the Antimonopoly Committee has the right to decide on the compulsory division of the monopoly entities. Such decision may not be less than six months. Compulsory division as a type of economic and organizational sanctions for violation of the legislation on protection of economic competition is applied by the Antimonopoly Committee of Ukraine in cases where an economic entity holding a monopoly (dominant) position in the market abuses it (Shcherbina 2005).

According to Part 5 of Art. 40 of the Civil Code of Ukraine, the reorganization of a monopoly entity subject to compulsory division is carried out at the discretion of the entity, provided that the monopoly position of that entity is eliminated on the market. This position was also taken by the Supreme Economic Court of Ukraine, which in Clause 9 of Clarification dated September 12, 1996, No. 02-5/334 'On some issues of practice of resolving disputes related to the creation, reorganization and liquidation of enterprises' (On some issues disputes resolution practices ... 1996) stated that the decisions of the Antimonopoly Committee of Ukraine or its territorial divisions on the compulsory division of monopoly entities are not grounds for their reorganization, but grounds for its implementation at the discretion of the entity itself, provided that its position on the market. In case of disagreement with this resolution, an enterprise, association, business company may, in accordance with the Commercial Code of Ukraine, apply to the Commercial Court for a declaration of its invalidation. This position is consistent with Art. 55 of the Constitution of Ukraine (1996), according to which everyone is guaranteed the right to appeal in court the decisions, actions or omissions of state authorities, local self-government bodies and officials.

At the same time, it is emphasized in the literature that the law does not prosecute monopoly entities, but only prohibits the abuse of a monopoly (dominant) position in the market (Semeniuk 2003). On the other hand, according to the analysis of the legal framework on this issue, there is no real opportunity to enforce the decision of the Antimonopoly Committee of Ukraine on forced separation. This is also confirmed by the current law enforcement activities of the designated public authority. With regard to another form of termination, according to Art. 110 of the Civil Code of Ukraine, the legal entity is liquidated:

(1) by a decision of its participants or the body of a legal entity authorized by the constituent documents, including in connection with the expiration of the term for which the legal entity was created, the achievement of the purpose for which it was created, and in other cases provided by founding documents;

(2) by a court decision on liquidation of a legal entity because of violations that cannot be eliminated during its creation, upon a claim by a participant of a legal entity or a relevant body of state power;
(3) by a court decision on liquidation of a legal entity in other cases established by law – upon a claim by the relevant state authority.

If a public authority has filed a lawsuit for liquidation of a legal entity, a liquidator may be appointed by this authority if it is vested with the relevant powers. If the value of a legal entity's property is insufficient to satisfy a creditors' claims, a legal entity shall take all necessary steps required by law to restore solvency or be declared bankrupt. At the same time, the peculiarities of bank liquidation are established by the Law on Banks and Banking. Article 247 of the Economic Code of Ukraine (2003), in turn, states that in cases prescribed by law, an administrative economic sanction may be applied to an economic entity in the form of its liquidation by a court decision. According to Art. 6 of the Bankruptcy Code of Ukraine (2018), the liquidation of bankruptcy is defined as one of the legal procedures applicable to the debtor. According to Art. 96-6 of the Criminal Code of Ukraine (2001), liquidation can be applied to legal entities as a measure of criminal nature in the commission of such crimes by its authorized person:

- 'Actions aimed at forcibly altering or overthrowing the constitutional order or seizing state power',
- 'Encroachment on the territorial integrity and inviolability of Ukraine',
- 'Subversion',
- 'Unlawful imprisonment or kidnapping',
- 'Hostage capture',
- 'Bribery of a voter, a referendum participant',
- 'Creation of unlawful paramilitary or armed forces',
- 'Theft, misappropriation, extortion of firearms, ammunition, explosives or radioactive materials, or seizure by fraud or abuse of office',
- 'Terrorist act',
- 'Engaging in a terrorist act',
- 'Public calls for an act of terrorism',
- 'Creation of a terrorist group or terrorist organization',
- 'Promoting a terrorist act',
- 'Financing terrorism',
- 'War propaganda',
- 'Production, propagation of communist, Nazi symbolism and propaganda of communist and national socialist (Nazi) totalitarian regimes',
- 'Planning, preparing, unleashing and waging an aggressive war',
- 'Violation of the laws and customs of war',
- 'Genocide',
- 'Crimes against persons and institutions with international protection',
- 'Mercenarism'.

At the same time, on January 5, 2011, the Law of Ukraine 'On Liability of Legal Entities for Corruption Offences' (2009) lapsed, which also provided for the possibility of liquidation of legal entities as a measure of punishment for committing on behalf and in the interests of such a legal entity by its founder (participant, expired) or an authorized individual of a particular corruption offence.

2. Procedure for liquidation of a legal entity in the system of Ukrainian legislation

Based on the analysis of the above provisions, we can conclude that compulsory liquidation can be applied in the manner and on the basis determined by the laws of Ukraine. Therefore, the compulsory liquidation of legal entities, regardless of their organizational and legal form, can be carried out solely on the basis of a court decision (sentence) in cases that can be conditionally divided into three groups:

(1) when creating a legal entity, violations that cannot be eliminated (upon the claim of its participant or the relevant state authority);
(2) a legal entity-debtor is declared bankrupt;
(3) as a measure of criminal nature.

However, in the implementation of court decisions on liquidation in the above cases, there are certain problems of enforcement and discussion in practice. For example, with regard to the liquidation of a legal entity by virtue of a court decision not related to its bankruptcy, it should be noted that as of today the preconditions for this can be only violations committed in the creation of a legal entity that cannot be eliminated. According to Part 2 of

Art. 38 of the Law on State Registration, as amended by the Law of Ukraine 'On State Registration of Legal Entities and Individual Entrepreneurs' of May 15, 2003 (the amendment has expired), the reasons for the court decision on the termination of the legal entity were clearly stated unrelated to bankruptcy of a legal entity. At this time, there is no comprehensive list of grounds for a court decision to terminate a legal entity that is not related to the bankruptcy of a legal entity, in the current Law of Ukraine 'On State Registration of Legal Entities, Individual Entrepreneurs and Public Formations' (2003), which, in our view, is a manifestation of the drawbacks of legislative technology. In this regard, we propose to reproduce the relevant provisions in the applicable rules of the said legislative act (in particular, to define such grounds as: the court's invalidation of a state registration of a legal entity because of violations committed during its creation, which cannot be eliminated; inconsistency of the minimum size of the authorized (composite) capital with the requirements of the legislation, etc.). It should be added that there is a need for clearer regulation in the law and the procedure for liquidation of a legal entity in connection with the expiry of the term for which the legal entity was created and the purpose for which it was created.

As for the liquidation of a legal entity in bankruptcy proceedings, for example, discussions are underway as to the effectiveness of establishing a rule according to which, from the day a court order resolves the recognition of a debtor bankrupt and the opening of a liquidation procedure, the arrest imposed on the property of a debtor declared bankrupt and other restrictions are abolished for the disposal of such debtor's property, and the imposition of new arrests or other restrictions on the disposal of the bankrupt's property is not allowed (for example, individual debtors created and full partnerships, whose liabilities bore full joint and several liability, brought their financial condition to insolvency so that, after the opening of liquidation proceedings in bankruptcy, arrests and bans would be removed from their own (personal) property).With regard to liquidation as a measure of criminal nature, it was introduced by the Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine on Implementation of the European Union Visa Regime Liberalization Action Plan for Ukraine on the Liability of Legal Entities' (2013).

It should be noted that the legislator does not introduce the possibility of 'criminal prosecution' for legal entities, but instead applies to legal entities 'measures of a criminal nature' for acts committed by another person (natural person). Thus, according to the current legislation, bringing a legal person to criminal liability remains outside the legal field, instead, the legislator provided for the possibility to apply to a legal person measures of a criminal nature (Frost 2015).In the legal literature there are three concepts of understanding the criminal liability of legal entities: (1) complete denial of the institution of criminal liability of legal entities (Bulgaria, Hungary, Belarus); (2) full recognition of the institution of criminal liability of a legal entity. In some countries, the principle of criminal liability of a legal entity does not eliminate the criminal liability of an individual. This principle is enshrined in the French Penal Code, followed by the People's Republic of China, Lithuania, Moldova, Estonia. The Penal Code of Iceland and Norway stipulates that sanctions against a legal entity may be applied even if a specific perpetrator (individual) is not identified or cannot be punished for a crime; 3) the use of indirect criminal liability of legal entities. The example is Germany, Austria, etc. (Mikhailov 2008; Tsymbalyuk 2014).

According to O.P. Provotorov, the procedure for applying liquidation as a measure of criminal nature includes three stages: (1) making a court decision to apply to the legal person measures of a criminal nature in the form of liquidation; (2) carrying out the liquidation procedure by a court decision, which applied this type of measures of criminal nature to a legal entity; 3) entering information in the single state register on the termination of the legal entity that committed the crime (Provotorov 2019). O.M. Hnatov, for his part, believes that 'the forced liquidation of a legal entity as a measure of criminal influence is a consequence of the completion of criminal proceedings by a court sentence, but the legal consequences are civil'; 'in case of non-execution of a court sentence in a voluntary manner, obstruction of enforcement, etc., it must be enforced in accordance with the Law of Ukraine 'On Enforcement Proceedings' (Hnatov 2015, 2016).

However, with regard to the scholars' views cited above, it should be noted that no legal act regulates the procedure of liquidation of legal entities as a measure of criminal nature. Therefore, the uncertainty, in particular, of issues such as: the procedure for appointing a liquidation commission (a liquidator) (it is worth agreeing that a liquidation commission is a specially created body, which is vested with its own statutory powers and performs the functions of bodies of management of a legal entity on the basis of the law (Gnat 2016), its personnel, features of approval of intermediate liquidation and liquidation balances, algorithm and legal basis of actions of the state registrar, mechanism of protection of interests of bona fide creditors, etc. casts doubt on the feasibility of the procedure under consideration.

On the other hand, as explained in the Explanatory Note to the Draft Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine (Implementing the EU Visa Regime Liberalization Action Plan for Ukraine on Liability of Legal Entities)' (2015) in order to counteract criminal activity in a number of international treaties, including, inter alia, the Criminal Convention for the Suppression of Corruption, the Council of Europe Convention

on the Prevention of Terrorism, the International Convention on the Fight against Corruption, financing of terrorism, to which Ukraine is also a party, envisages the obligation of States parties to impose liability on legal entities for the offences provided for in these international legal acts. Adoption of this law was aimed at ensuring the implementation of the recommendations of the Group of States against Corruption (GRECO), the Special Committee of Experts of the Council of Europe on the Evaluation of Anti-Money Laundering Measures (MONEYVAL), as well as addressing the implementation of certain international treaties of Ukraine in terms of establishing responsibility of legal entities.

Conclusion

Summarizing the above, we consider that it is possible to conclude that it is necessary to further investigate the problems of compulsory termination of legal entities and develop proposals with the aim of improving the current legislation of Ukraine, both to protect the interests of participants of civil and commercial traffic, and to fulfil Ukraine's international obligations. In particular, it seems appropriate:

- to abandon the legislatively enshrined potential for forced reorganization based on decisions of state authorities. This, it seems, should be done solely for the enforcement of the judgment and for an exhaustive list of grounds;
- to set out in the Law of Ukraine 'On State Registration of Legal Entities, Individual Entrepreneurs and Public Formations' an exhaustive list of grounds for termination of a legal entity on the basis of a court decision that is not related to its bankruptcy;
- to clearly regulate in the legislation of Ukraine the procedure for liquidation of a legal entity in connection with the expiration of the term for which the legal entity was created and the achievement of the purpose for which it was created and on other grounds specified by the constituent documents;
- to detail the procedure for applying the legal consequences of opening a liquidation procedure for a bankrupt legal entity;
- to adopt a special law to define the procedure for liquidation of a legal entity as a measure of criminal nature, in which, among other things, to specify the scope of this law (for example, in our opinion, it should not apply to certain legal entities of public law), and to provide for effective mechanisms for protecting the interests of bona fide creditors.

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