НОРМЫ И ПРАВИЛА

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Правовая природа российских институтов развития

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Аннотация: В настоящей статье институт развития рассматривается с точки зрения его правовой природы и организационно-правовой формы, в которой он может и должен осуществлять свою деятельность, а именно как лицо публичного права. Актуальность данной статьи обусловлена внедрением в отечественное законодательство понятия публично-правовой компании, которая является новой альтернативой государственным корпорациям. После принятия Федерального закона Российской Федерации от 3 июля 2016 года № 236-ФЗ «О публично-правовых компаниях в Российской Федерации и о внесении изменений в отдельные законодательные акты Российской Федерации» (с изменениями и дополнениями) обострились дискуссии о необходимости активного использования в российском праве понятия юридического лица публичного права. Возникла необходимость на законодательном уровне начать реализовывать общие принципы в отношении однотипных юридических лиц в рамках правовой матрицы, в которую возможно вписать все известные субъекты права.

Особая правовая природа институтов развития требует наличия специальной организационно-правовой формы, которая бы отвечала целям и задачам, поставленным перед ними. Использование практически всех положений теории юридического лица публичного права в современной практике сможет стать кардинальным решением для создания адекватной правовой формы для институтов развития, так как позволит учесть особенности формирования имущественной основы их деятельности, особенности управления институтом развития, целевую установку при принятии решений, возможность использовать инструменты государственного регулирования экономики при реализации делегированных им публичных функций.

Ключевые слова: банк развития, институт развития, лицо публичного права, публично-правовая компания, государственная корпорация развития, некоммерческая организация, инвестиционная деятельность

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LEGAL NATURE OF THE RUSSIAN DEVELOPMENT INSTITUTIONS

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Abstract: In the article, development institution is considered from its legal form and nature, in which it can and should carry out its activities, namely, as a subject of public law. The relevance of this article is expressed by the introduction in the Russian law of a public law company concept, which is a new alternative to state-owned corporations. On July 3, 2016, Federal Law No. 236-FZ “On Public Law Companies in the Russian Federation and on Amending Certain Legislative Acts of the Russian Federation” (with amendments and additions) was adopted. After its adoption, a new wave of discussions began to take place on the active use of such concepts as a legal entity of public law in Russian legislation. At the legislative level, it became necessary to implement general principles regarding legal entities of the same type in the framework of the legal matrix, into which it is possible to attribute all known subjects of law.

The special legal nature of development institutions requires a particular legal form that would meet the goals and objectives set for them. The use of almost all the provisions of the legal entity of public law theory, in modern practice, can be the correct decision to create the necessary legal form for development institutions. This will allow taking into account the features of the property base of their activities, peculiarities of management of the development institution, setting goals when making decisions, the ability to use specific tools of state regulation of economy in the implementation of public functions assigned to the development institutions.

Keywords: development bank, development institute, public law entity, public law company, state development corporation, non-profit organization, investment activity

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Introduction

Today, the need for further development of the theory of public law and public entity is becoming increasingly relevant in the Russian legal space. When there was a change in the name of one of the chief Russian development institutions from the State-Owned Corporation "Bank for Development and Foreign Economic Affairs" (Vnesheconombank) to the State Development Corporation "VEB.RF"[1], through amendments to the Federal Law of May 17, 2007, No. 82-FZ "On the "VEB.RF" State Development Corporation" (hereinafter - the "VEB.RF" State Development Corporation Law), which in turn were introduced by the Federal Law of November 28, 2018, No. 452-FZ[2], gives us a reason to reassess several provisions of this theory in the modern Russian legal field.

The practice of dividing legal entities into public and private is relatively new. In 2001, G. F. Shershenevich in his work, considered public legal entities that arise despite the will of private individuals[3]. To the characteristics of legal entities of public law, M. I. Kulagin attributed such signs as a state-power authority, that is, a specific procedure for the appointment of managers acting as bearers of state will, public rights and obligations[4]. Currently, more than ten features of a legal entity of public law are distinguished (see Tikhomirov Yu.A.[5], Chirkin V. E.[6], and others)[7].

In 2009, A. Y. Kurbatov wrote that in the Russian legal field, the concept of a legal entity of public law is quite doctrinal and can be used in three meanings – to indicate:

- all legal entities performing public functions;
- legal entities with established authority;
- state bodies, which have the status of a legal entity.

At the same time, he emphasized that this term should be used concerning only legal entities endowed with public functions[8]. The same position was held by E. B. Lauts, who noted that in determining the legal entity of public law, in any case, it is necessary to proceed from the empowerment of public-authority means in an organization [Lauts, 2012]. A. V. Vinnitsky agreed with her. He believed that an additional feature of a legal entity of public law, in comparison with an ordinary legal entity, is the presence of public functions [Vinnitsky, 2011].

Legal framework

Paying attention to foreign experience, we will see that the notion of public law entities is efficiently used in German law, where such entities are independent. They are created based on a specific legal act; such public law entities have non-commercial goals for activity, relevant authority, impossibility to be reorganized into a legal entity of private law, proper legal capacity, limitation of liability [Novikov, Popova, 2017]. In France, the theory of a public law entity is directly related to the concept of state ownership and falls under the special administrative-legal regime of public property. This is probable due to such criteria as belonging to a public legal entity and the purpose of realization of public interest [Talapina, 2005].

After the adoption of the Federal Law of July 3, 2016, No. 236-FZ "On Public Law Companies in the Russian Federation and on Amending Certain Legislative Acts of the Russian Federation" (with amendments and additions)[9], an active discussion was raised about the need for strenuous use in Russian law of a legal entity of public law concept. According to the Law, a public law company is a unitary non-profit organization created by the Russian Federation in the way prescribed by law, endowed with functions and authority of a public law entity and carrying out its activities in the interests of the state and society (Part 1 of Article 2 of the Law).

Within the framework of one legal matrix, into which it is possible to enter all known subjects of law, a need arose at the legislative level for the implementation of general principles regarding legal entities of the same type [Vaipan, 2011]. It is believed that the introduction of such concept will not change anything for public legal entities having an individual legal form in their current legal status[10]. In modern Russia, after the appearance of several public law companies[11], situations continually arise in which the concept of a legal entity of public law is the only possible explanation of the special tasks set by the state, which cannot be considered as ordinary participants in civil turnover.

One of the most significant tasks in creating public legal entities is the formation of economic development institutions, the functioning of which is aimed at achieving global socio-economic effect[12].

The definition of development institutions

The term "development institution" can be used both towards the subject of law (for example, a development bank) and towards the object of law (for example, a fund), as well as in the framework of specific legal regimes (territories of advanced social and economic development). Thus, according to the context, the term "development institution" can be understood in a broader or narrower sense.

In a broad sense, the development institution is an instrument of state regulation of the economy, aimed at supporting a specific area of the economy, territory, or category of busi-

1 Collected legislation of the Russian Federation. 05.28.2007. No. 22. Art. 2562.

2 Collected legislation of the Russian Federation. 12.03.2018. No. 49 (Part I). Art. 7524

3 See: Shershenevich G. F. Course of Civil Law. Tula, 2001. P. 119.

4 See: Kulagin M. I. State-monopoly capitalism and legal entity. M., 1987. P. 33-37.

5 See: Tikhomirov Yu. A. Legal entities in the field of public and private law. *Zhurnal rossiyskogo prava*. No. 6. 2009. P. 141.

6 See: Chirkin V. E. On the notion and classification of the legal entity of public law. *Zhurnal rossiyskogo prava*. No. 6. 2010. P. 87.

7 See: Kokurin A. V., Kokurina I. V. Some features of the legal entities of public law. *Probely v rossiyskom zakonodatelstve*. 2012. No. 2. P. 47-51.

8 See: Kurbatov A. On legal entities of public law. *Khozyaystvo i pravo*. M., 2009. No. 10. P. 77-85.

9 Collected legislation of the Russian Federation. 07.04.2016. No. 27 (Part I). Art. 4169.

10 See: Sukhanov E. A. Comparative corporate law. M.: Statut, 2014. P. 456.

11 By the Decree of the President of the Russian Federation of October 18, 2019, No. 504, the Military Construction Company was created -http://publication.pravo.gov.ru/Document/View/0001201910180009?index=6&rangeSize=1

12 See: Safonov M. S. National innovation system and methods of its regulation. *Gosudarstvennaya sluzhba*. 2016. No. 1. P. 60-66

ness entities. In a narrow sense, a development institution is a subject of law that performs public functions. It is focused on specific targets and created with the use of public funds mostly, co-financed with the assistance of private investors in the form of public-private partnerships. For several reasons, it is in the narrow sense that the development institution can be considered as a legal entity of public law.

Firstly, the development institution proceeds from the need to implement public interest in its activities. Even though the performance of development institutions may receive some income, it should not be aimed at systematic profit-making as its main goal. The income received in the framework of financing the development of a particular project should be sufficient only for the payback on the participation of the development institution in the project, since the activity of development institutions is determined by the regime of public interest[13].That is why, according to the federal law, the state-owned development corporation VEB.RF was created in the form of a non-profit organization.

It is important to note that in foreign countries development institutions are created both in the form of non-profit and commercial organizations. For example, the Industrial Development Bank of India is also involved in ordinary banking activities, representing a new generation of universal commercial banks[14].The Canadian Business Development Bank is not funded from the state budget and works as a commercial financial institution[15]. It is worth saying, that in some other countries the social orientation of entrepreneurship is much more developed and foreign institutions in the framework of their commercial activities cope with the realization of public interest.

The facts above show the importance of achieving public interest before the private interest in the framework of development institutions; this allows us to attribute it to the category of public law entities.

Secondly, the use of development institutions as representatives of public authorities, which at the same time are independent legal entities, is now becoming a trend in state regulation of market economy. According to R. M. Yankovsky, some institutions for innovation support, which implement state innovation policy, operate in the form of both commercial and non-profit organizations and can be recognized as state development innovation agencies[16]. VEB.RF acts as an agent of the government of the Russian Federation under federal laws on the federal budget, as well as with the agreement of December 25, 2009, No. 01-01-06/04-472 between the Ministry of Finance of Russia and Vnesheconombank on fulfilling the functions of an agent of the Government of the Russian Federation and on the issue of distribution of state guarantees of the Russian Federation.

Thus, VEB.RF performs the public functions transferred to it and allows it to be associated with the legal entity of public law.

Thirdly, the development bank also corresponds with such feature of public law entities as a particular procedure for the appointment of managers acting as state will holders. By Art. 9 of the Law "On the State Development Corporation VEB.RF", the Chairman of VEB.RF is a member of the Supervisory Board of VEB.RF ex officio and members of the Supervisory Board are appointed by the government of the Russian Federation. Similar examples can be found in foreign legislation. For example, the Chairman of the Board of Directors of the Canadian Development Bank is elected on the recommendation of the Minister of Industry of Canada[17], and the Manager of the Korean Development Bank is appointed by the President of the Republic of Korea on the recommendation of the Chairman of the Financial Services Commission[18]. It should be noted that each multilateral development bank has its procedure for electing an executive body; this is done to maintain a balance of interests between the member-states of such banks. For example, the permanent executive body of the Asian Infrastructure Investment Bank is the President, who is elected by a "super-majority"[19] of the member countries of the bank (Article 29 of the Articles of Agreement on establishing Asian Infrastructure Investment Bank).

The procedure for electing the governing bodies of development institutions also indicates that they can be recognized as entities of public law.

Fourth, a characteristic feature of legal entities of public law is the specific purpose of the property – to ensure the exercise of public authority[20]. The state transfers its property to a public legal entity without compensation, and after such a transfer loses contact with the property, except for control over its intended use. As rightly pointed out in the scientific literature, the traditional model of private property rights of legal entities cannot be applied to public law companies[21]. This conclusion can also be attributed to development institutions, the property base of which mainly consists of state property. As M. K. Krivtsova and I. V. Kodolov wrote, the choice of a state-owned corporation as the legal form was largely determined by the simplification of the processes

13 See: Makarova O. A. A new stage in the development of legislation on public companies. *Zakon*. 2017. No. 10. P. 145-153.

14 Industrial Development Bank of India website [Electronic Resource] URL: https://www.banktrack.org/bank/industrial_development_bank_of_india (Date accessed - June 1, 2018)

15 Banki.ru website [Electronic resource] URL: http://www.banki.ru/news/bankpress/?id=1598364 (Date accessed – April 10, 2019)

16 See: Yankovsky R. M. Legal regulation of state support for innovations in the Russian Federation. *Predprinimatelskoye pravo*. 2017. No. 3. P. 21-29.

17 Development Bank of Canada official website [Electronic Resource] URL: https://www.bdc.ca/en/pages/home.aspx (Date accessed - April 10, 2019)

18 Korea Development Bank official website [Electronic resource] URL: https://www.kdb.co.kr/ih/wcms.do (Date accessed - April 10, 2019)

19 According to Art. 28 of the Articles of Agreement on establishing Asian Infrastructure Investment Bank, the majority of votes is defined as two-thirds of the total number of managers representing at least three-quarters of the total votes of participants.

20 See: Chirkin V. E. The legal entity of public law. *Zhurnal rossiyskogo prava*. 2005. No. 5. P. 22-24.

21 See: Serova O. A. The right of ownership for public law companies. *Zakony Rossii: opyt, analiz, praktika*. 2017. No. 2. P. 15-22.

for restructuring and consolidating of state property in specific sectors of economy, flexibility in the use of financial resources, determining the directions of possible investments, financing the implementation of long-term programs[22]; this allows us to conclude that the form of a state corporation or public law entity is suitable for development institutions. Moreover, in the event of a crisis, the state will increase capitalization of the development institution, which shows its specific role and characterizes it as a legal entity of public law. As an example, we can mention the increase in VEB. RF capitalization by 300 billion rubles from the funds of the National Wealth Fund[23].

Fifth, a legal entity in public law has a specialized assignment, which is limited by the subjects of its competence formulated in a public law act[24]. In domestic law, development institutions have a specific (particular) legal capacity. As I.S. Shitkina writes, the objective of an organization is defined as the planned, desired, attainable result that has legal significance[25]; in this case, the goal is to ensure the development of the economy. This objective is always a priority over the commercial component of the project.

The issue of legal entities of public law currently takes a notable position because of the need to make a change in state-owned corporations. Some researchers have long spoken about state-owned corporations as public law entities. Even before the release of the Federal Law No. 263, the discussion already took place on the nature of state-owned corporations and legal entities of public law; E. O. Adarchenko wrote that state-owned corporations were legal entities of public law in their character; although there is no such term in Russian law, in practice, this form of legal entity is successfully used. According to the author, state-owned corporations are one of the types of public legal entities, together with the state itself and its authorities, as well as the Bank of Russia, the Accounts Chamber, and other structures, the regulation of which cannot be supplemented only by the provisions on legal entities contained in the Civil Code of the Russian Federation [Adarchenko, 2012]. In her dissertation research, D. M. Strikhanova proposed defining a state-owned corporation as a legal entity of public law, which was created for the realization of socially significant public interests in the economic sphere and which possesses its own authority, it entails a combination of private and public law elements in their status [Strikhanova, 2010]. O. A. Yastrebov advocated for the need to apply the concept of a legal entity of public law to all organizations that act on behalf of public law entities and/or in the public interest, which are not public authorities, but are endowed with certain power [Yastrebov, 2010]; in his opinion, state-owned corporations created in Russia are nothing more than institutions of a decentralized functional administration. Some researchers have argued that it is necessary to use the concept of a public law entity concerning specific state-owned corporations, for example, Deposit Insurance Agency[26] state-owned corporation.

Conclusion

Thus, the special legal nature of development institutions requires a particular legal form that would meet the goals and objectives set for them. The use of almost all the provisions of the legal entity of public law theory, in modern practice, can be the correct decision to create the necessary legal form for development institutions. This will allow taking into account the features of the property base of their activities, peculiarities of management of the development institution, setting goals when making decisions, the ability to use specific tools of state regulation of economy in the implementation of public functions assigned to the development institutions.

22 Krivtsova M.K., Kodolov I.V. The features of formation and functioning of state
corporations in the Russian economy [Electronic resource] URL: http://www.fa.ru/projects/mknrsa/skireports.pdf (Date accessed - June 1, 2018)

23 The government signed an agreement with Vnesheconombank to increase capitalization by 300 billion rubles from the NWF [Electronic resource] URL: https://tass.ru/ekonomika/5587227 (Date accessed - April 10, 2019)

24 See: Tarasov O. I. The concept and features of a legal entity of public law. *Zakon*. 2012. No. 8. P. 103-109.

25 See: Gabov A. V., Gubin E. P., Karelina S. A. et al. Corporate law: textbook. Edited by Shitkina I. S., M.: Statut, 2019. P. 735.

26 See: Zavoda E. A. Deposit Insurance Agency as a legal entity of public law. *Bankovskoye pravo*. M.: Yurist, 2008. No. 6. P. 10-15; Turbanov A. V. State Corporation "Deposit Insurance Agency" as a legal entity of public law. *Bulletin of Saratov State Law Academy*. Saratov: SGAP Publishing house, 2010, No. 2 (72). P. 100-113.

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