

The executive of a state-owned enterprise: an analysis of his powers and the characteristics of his official capacity

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Abstract. Among the existing legal forms of public ownership, a special place is reserved for state-owned enterprises. One of the most contentious issues in terms of legal regulation of the activity of state-owned enterprises is the status of the executive of a state-owned enterprise. This article seeks to define the legal status of the executive of a state-owned enterprise, analyze his powers and the characteristics of his official capacity, and attempt to fill current gaps in legislation which establishes his legal status.

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Introduction

Among the existing legal forms of public ownership, a special place is reserved for state-owned enterprises; revived in the system of juridical persons in the mid-90s of the last century as a sanction applied to federal state enterprises for the inappropriate and ineffective use of property, the institute of state-owned enterprises assumed over time the capacity of a legal foundation for the operation of business entities engaged in managing public property, which went on to occupy their own niche in the country's economic system.

The institute of state-owned enterprises is currently common in China [1], where state-owned enterprises quite successfully compete with private ones [2].

It should be noted that amid the economic crisis this institute is also getting increasingly popular in the developed countries of the West [3].

Currently, despite the emergence of its "alternative" forms – namely, the institute of trust management and joint stock companies with a government stake – "economic-purpose" state property is still used mainly in the form of unitary enterprises. [4]

In a number of countries, like, for instance, China, legislation thoroughly regulates the activity of state-owned enterprises [5]. At the same time, despite a keen interest evinced in this form of enterprises by researchers, including foreign ones [6], a great many theoretical and practical aspects of the activity of state-owned enterprises are yet to be regulated by legislation in Russia. One of the most contentious issues in terms of legal regulation of the activity of state-owned enterprises is the status of the executive of a state-owned enterprise.

Russian legislation regulating the structure of the governing bodies of state-owned enterprises limits legal regulation to just the status of the executive. Based on the provisions of Article 21 of the Federal Law "On State and Municipal Unitary Enterprises", in cases provided for by federal laws and regulatory enactments issued pursuant to them, unitary enterprises can have advisory bodies (scholarly, pedagogical, scientific, scientific-technical councils, etc.) instituted in them. Pursuant to "The Concept of Managing State Property and Privatization in the Russian Federation" [7], there was passed the RF Government Resolution # 234 "On the Procedure for Entering into Employment Contracts with and the Appraisal of the Executives of Federal State Unitary Enterprises", dated March 16, 2000 (as amended on June 20, 2011) [8], which instituted the Provisions "On Holding a Competition to Fill the Vacancy of the Executive of a Federal State Unitary Enterprise" and "On Conducting the Appraisal of the Executives of Federal State Unitary Enterprises". The Order of the Ministry of Economic Development of the RF # 49, dated March 2, 2005, instituted the standard employment contract with the executive of a federal state unitary enterprise [9].

Main part

The executive of a state enterprise, who pursuant to Item 1 of Article 21 of the Federal Law "On State and Municipal Enterprises" is appointed the proprietor of the unitary enterprise's property and is answerable to it, is its sole executive body.

The bylaws of a state-owned enterprise are worked out pursuant to Article 9 of the Law "On State and Municipal Enterprises" and the Resolution of the Government of the RF # 872, dated December 15, 2007 (as amended on September 7, 2011) "On the

Creation and Regulation of the Activity of Federal State-Owned Enterprises” [10]. Many RF constituents have worked out standard agreements (contracts) with the executive of a state enterprise. Thus, the Decree of the Committee for Managing the City’s Property of the Government of Saint Petersburg # 103-r, dated July 6, 2011, instituted the standard form of the employment contract with the executive of a state state-owned institution in Saint Petersburg [11].

Concluding a contract with the executive of a state-owned enterprise is preceded by a competition to fill the position of the executive. In charge of organizing the competition is a corresponding federal executive body, which coordinates and regulates activity in a corresponding sector or sphere of management: it forms a committee on staging the competition, approves its line-up, and organizes the activity. The committee’s line-up, apart from members of the federal executive body, includes a voting member of the Federal Agency for State Property Management and can also include a voting representative of the President of the Russian Federation in the federal district where the state-owned enterprise is located. In considering a candidacy for the position of the executive of a state-owned enterprise from the military-industrial complex, the committee includes a voting member of the Ministry of Defense of the Russian Federation and a voting permanent member of the Military-Industrial Commission of the Russian Federation, who fills the federal civil service position under a contract of service. [12]

The executive independently resolves all issues related to the activity of the state-owned enterprise, except for those RF legislation places within the ambit of other bodies. The foundation of the legal status of the executive of a unitary enterprise is formed by Article 21 of the Federal Law “On State and Municipal Unitary Enterprises”, Item 1 whereof in a maximally abstract manner defines the powers of the executive: he acts on behalf of the state-owned enterprise with full authority, inter alia, represents its interests, makes deals in the prescribed manner on behalf of the state-owned enterprise, approves of the structure and personnel of the enterprise, oversees the hiring of employees at such an enterprise, concludes, makes modifications to, and terminates employment contracts with them, issues orders, and grants powers of attorney in the manner prescribed by legislation [13]. It is apparent that said provisions should be concretized on the level of acts defining the enterprise’s legal status. Pursuant to Item 2 of Article 52 of the Civil Code of the Russian Federation [14], the juridical person’s foundation document is an act wherein the procedure for

managing the juridical person has to be defined; the bylaws of a state-owned enterprise serve as its foundation document. It should be noted that the law’s provisions related to managing the enterprise define the executive’s scope of duties quite abstractly. Whereas in terms of his powers, the executive’s legal status is elaborated and concretized in the Standard Employment Contract with the Executive of a Federal State Unitary Enterprise [15]. We can clearly see here a complete mix-up of the functional purpose of said documents, as a result of which the employment contract, which is an agreement between the employer and the employee, in accordance with which the employer agrees to grant the employee a job related to job responsibilities agreed upon and the employee agrees to personally fulfill the job responsibilities stipulated in the agreement and abide by the organization’s internal labor regulations [16], has turned into a status-type document for the enterprise as a whole. Without contesting the substantial nature of the executive’s labor relations, which is associated with that “... placing his labor at the disposition of the owner of the property, he acts in the organizational-managerial sphere ” [17], which suggests that in the employment contract with the organization’s executive there are specific administrative-legal elements present [18], we, nonetheless, believe that the powers of the governing bodies should be defined in the bylaws, since it is the bylaws that are a document defining the legal position (legal status) of the enterprise as a juridical person [19]. The executive as a governing body is a legal form formed by an aggregate of powers, the content of which cannot be made dependent upon the specific “person” of the executive.

Item 2 of Article 21 of the Law “On State and Municipal Unitary Enterprises” restricts the rights of the executive of a state-owned enterprise. These restrictions are associated with the characteristics of the executive’s official capacity and the nature of his interrelationship with the owner of the unitary enterprise’s property and are exclusive by nature. The executive of a unitary enterprise cannot be a founder (member) of the juridical person, hold offices and engage in other paid activity in government bodies, local self-government bodies, commercial and non-commercial organizations, can engage in teaching, scientific, and other creative activity but cannot engage in entrepreneurial activity, cannot be the sole executive body or member of the collegial executive body of a commercial organization, except when membership in the bodies of a commercial organization is within the executive’s scope of duties, and cannot take part in strikes.

Basically, it is about preventing executives from undertaking secondary employment. Article 276 of the Labor Code of the Russian Federation establishes a different rule: the executive of an organization can hold paid offices in other organizations but only with the assent of an authorized body of the juridical person or the owner of the organization's property, or a person (body) authorized by the owner. Thus, if we go by the rule established by Article 5 of the Labor Code of the RF, then Article 21 of the Federal Law "On State and Municipal Unitary Enterprises" should not be applied.

Clarification should also be sought on the Law's provisions which prohibit the executive from being a founder (member) of the juridical person. It is apparent that in this case the legislator means prohibiting one from being a member (founder) of a commercial organization [19]. And here we logically arrive at the issue of whether the executive can be a member of public organizations. For if the law applies its prohibition (which is apparent given the literal interpretation of the law) to one intending to be a member of a public organization, it is clearly an encroachment upon the rights of the executive as a citizen. On the other hand, the ineffectiveness of this kind of restricting the executive's rights limits the capacity of the property owner himself to conduct an effective HR policy in the area of entrepreneurial activity [20].

Inferences

The findings of this study can be formulated in the following inferences.

Item 2 of Article 21 of the Law "On State and Municipal Unitary Enterprises" restricts the rights of the executive of a state-owned enterprise. These restrictions are associated with the characteristics of the executive's official capacity and the nature of his interrelationship with the owner of the enterprise's property and are exclusive by nature. At the same time, Article 276 of the Labor Code of the RF establishes a different rule: the executive of an organization can hold paid offices in other organizations but only with the assent of an authorized body of the juridical person or the owner of the organization's property or a person (body) authorized by the owner. Thus, if we go by the rule established by Article 5 of the Labor Code of the RF, then Article 21 of the Federal Law "On State and Municipal Unitary Enterprises" should not be applied.

The Federal Law on "State and Municipal Unitary Enterprises" in a maximally abstract manner defines the scope of duties of the executive body of a state-owned enterprise; rules on the executive's legal

status are elaborated in the Standard Employment Contract with the Executive of a Federal State Unitary Enterprise, which was instituted by the Order of the Ministry of Economic Development of the RF # 49, dated March 2, 2005, "On Instituting the Standard Employment Contract with the Executive of a Federal State Unitary Enterprise". As a result, we have a situation where the set and content of powers of the executive body of a state-owned enterprise is concretized on the level of the employment contract entered into by the owner and the executive of the enterprise, which, while formally being a legal form of labor relations, in point of fact assumes the capacity of an act that defines the legal status of the governing body of the state-owned enterprise. Such an approach, on the one hand, ignores the functional purpose of the employment contract, while, on the other, it contradicts Item 1 of Article 53 of the Civil Code of the RF, which states that the system of the juridical person's governing bodies and their status can be defined only by laws, other legal acts, and the foundation documents.

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