WAYS OF TRANSFERRING ENTERPRISE OR CORPORATE RIGHTS TO MANAGEMENT BY PUBLIC OFFICERS IN CONDITIONS OF CONFLICTS OF INTEREST: ADMINISTRATIVE AND LEGAL ASPECT

Abstract. An important tool for preventing conflicts of interest between officials/officers is the transfer to management of the enterprises and/or corporate rights they own. Possession by a person of corporate rights of a company indicates that he has a private interest associated with this company. If such a private interest is present in the sphere of official powers of a person, in the exercise of which he can make decisions and take actions in relation to society, he will have a conflict of interests that requires resolution in the manner established by the Law of Ukraine “On the Prevention of Corruption”. The grounds for qualifying a conflict of interest for a civil servant who has corporate rights in a business company are disclosed. Legal ways of transferring corporate rights owned by a person to management are highlighted, namely: concluding a property management agreement with a business entity (except for an agreement for the management of securities and other financial instruments); concluding an agreement on managing a portfolio of financial instruments and/or funds intended for investment in financial instruments with an investment firm that has a license issued by the National Securities and Stock Market Commission to carry out activities for managing a portfolio of financial instruments; concluding an agreement on the creation of a venture mutual investment fund to manage transferred corporate rights with an asset management company licensed by the National Securities and Stock Market Commission to carry out asset management activities. A procedure has been established for complying with deadlines for notification of the transfer of enterprises and corporate rights in connection with a conflict of interest. In accordance with the Law of Ukraine “On the Prevention of Corruption”, the need to comply with statutory requirements regarding the timing of notification of the transfer of enterprises and corporate rights in connection with a conflict of interest is directly provided for.
Keywords: administrative and legal support, conflict of interests, corporate rights, prevention of conflict of interests, settlement of conflict of interests, civil servants, health care

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СПОСОБИ ПЕРЕДАЧІ В УПРАВЛІННЯ ПІДПРИЄМСТВ ЧИ КОРПОРАТИВНИХ ПРАВ ПУБЛІЧНИМИ СЛУЖБОВЦІЯМИ В УМОВАХ КОНФЛІКТУ ІНТЕРЕСІВ: АДМІНІСТРАТИВНО-ПРАВОВИЙ АСПЕКТ

Анотація. Важливим інструментом запобігання конфлікту інтересів посадових/службових осіб є передача в управління належних їм підприємств та/або корпоративних прав. Володіння особою корпоративними правами товариства свідчить про наявність у неї пов’язаного з цим товариством приватного інтересу. Якщо такий приватний інтерес буде наявний у сфері службових повноважень особи, реалізуючи які вона може приймати рішення, вчиняти дії стосовно товариства, у неї буде існувати конфлікт інтересів, який потребує врегулювання у порядку, встановленому Законом України «Про запобігання корупції». Розкрито підстави для кваліфікації конфлікту інтересів у державного службовця, який має корпоративні права в господарському товаристві. Виокремлено легальні способи передачі в управління належних особі корпоративних прав, а саме: укладення договору управління майном із суб’єктом підприємницької діяльності (крім договору управління цінними паперами та іншими фінансовими інструментами); укладення договору про управління портфелем фінансових інструментів та/або грошовими коштами, призначеннями для інвестування у фінансові інструменти, з інвестиційною фірмою, яка має видану Національною комісією з цінних паперів та фондового ринку ліцензію на проведення діяльності з управління портфелем фінансових інструментів; укладення договору про створення венчурного пайового інвестиційного фонду для управління переданими корпоративними правами з компанією з управління активами, яка має ліцензію Національної комісії з цінних паперів та фондового ринку на проведення діяльності з управління активами. Встановлено порядок дотримання строків повідомлення про передачу підприємств та/або корпоративних прав у зв’язку із конфліктом інтересів. Відповідно до Закону України «Про запобігання корупції» прямо передбачена необхідність дотримання нормативно встановлених вимог щодо
Problem formulation. The negative socio-legal phenomenon of corruption inherent in society is determined by a number of destructive political, socio-economic, ideological, organizational-managerial, and moral-psychological factors. Corruption is self-interested illegal actions of public officials or subjects of delegated authority contrary to legal public interests. The main causes of corruption are a high level of legal nihilism and the spiritual degradation of society, the archaic nature of the anti-corruption doctrine, the conflict of anti-corruption legislation, the lack of tradition to articulate the human-centered social mission of public administration, the dysfunction of the public administration system, the lack of a balanced anti-corruption infrastructure or the ineffectiveness of existing anti-corruption institutional mechanisms, the demoralization and demotivation of public employees, etc. In transitional societies, corruption is often perceived as an effective illegitimate means of achieving specific selfish goals. Analysts emphasize that corruption in Ukraine has acquired the characteristics of a systemic destructive phenomenon that poses an existential threat to the Ukrainian state. There is no doubt that with the introduction of martial law, corruption manifestations are particularly dangerous, as they undermine the country's defense capabilities, devalue European integration and Euro-Atlantic aspirations, and significantly reduce the trust of foreign partners and citizens in public authorities. Representatives of civil society emphasize the constant existence of a high corruption risk in the implementation of law enforcement and fiscal functions of the state, as well as in the fields of healthcare, education, land relations, etc. High corruption risks always exist when exercising discretionary public-authority powers by officials authorized to exercise the functions of the state or local self-government [1]. Prevention of corruption is defined as a constant strategic priority for the member states of the European Union [2, p. 261] and the Ukrainian state. At the same time, the State Anti-Corruption Program for 2023-2025 stated the imperfection of the legal regulation of prohibitions and restrictions in certain legal relationships and the lack of protection of prohibitions in many cases by measures of legal responsibility [3]. In this context, the legalization of effective legal instruments approved by leading democracies for resolving conflicts of interest in connection with the possession of enterprises or corporate rights by a subject of the power becomes of particular importance.

Analysis of recent research and publications. In domestic administrative and legal science, a tradition of systematic research of the organizational and legal
provision specifics of the transfer under the management of enterprises or corporate rights as a legal tool for preventing conflicts of interests at officials or subjects of delegated powers has not yet been formed. Specialists in the field of administrative law often touch on this problem indirectly. Thus, researching various aspects of prevention and settlement of conflict of interests in public-law relations through administrative law, Pastuh I. emphasizes the controversial nature of the relevant legal dogma and current legal procedures for transferring enterprises or corporate rights. He assumes that due to the transfer of corporate rights, their final alienation does not occur. As a result, the person continues to have a private interest, which may cause an actual conflict of interest in the future. The researcher states that Article 36 of the Law on the Prevention of Corruption in general does not ensure the prevention of conflicts of interest in connection with the presence of enterprises or corporate rights but only establishes restrictions on their ownership, use, and disposal [4, p. 221].

Separate works are devoted to the study of the problems of prevention and settlement of conflict of interests as a way of combating corruption [5], prevention and settlement of conflict of interests in the judiciary activity [2], conflict of interests in the public service field [6, p. 407-427], anti-corruption bans and restrictions on police activities [7], etc. A comprehensive analysis of the scientific work of domestic specialists gives reasons to assert the absence of a holistic objective understanding of the legal protection specifics of conflict of interests in connection with the possession of enterprises or corporate rights by a person.

Previously unsolved problems. Currently, there is an urgent need for the formation of a scientific dogma for the prevention of conflicts of interest in connection with the possession by a person of enterprises or corporate rights, an in-depth comparative analysis of positive foreign experience in the prevention of conflicts of interests in connection with the possession by a person of enterprises or corporate rights, a comprehensive study of the relevant law enforcement practice authorized entities for the prevention of corruption (primarily the National Agency for the Prevention of Corruption), clarification of compliance level by the individual categories of entities of the authority defined by law with anti-corruption norms regarding the prevention of conflicts of interests in connection with the possession by a person of enterprises or corporate rights, systematic analysis of judicial practice in the consideration of cases related to the prevention of conflict of interests in connection with the possession by a person of enterprises or corporate rights, etc.

The purpose of the article is to clarify the specifics of legal protection of conflict of interests in connection with the possession by a person of enterprises or corporate rights.

Presenting key material. According to Article 1 of the Law of Ukraine On the Prevention of Corruption, the main signs of a conflict of interest are the
possession by a person of official/representative powers and a private interest (property or non-property). Depending on the ratio of these features, a potential or actual conflict of interest arises. The persons specified in Clause 1, Subclause "a" of Clause 2, Part 1, Article 3 of the Law of Ukraine On Prevention of Corruption, are obliged within 60 days after being appointed (elected) to a position to transfer under the management of another person the enterprises and corporate rights belonging to them according to the procedure established by law. If, at the end of the stipulated 60-day period, the depository accounting system has a restriction on transactions with shares based on the relevant decision of the National Commission for Securities and the Stock Market to stop making changes to the depository accounting system, the persons specified in Clause 1, Subclause "a" of Clause 2, Part 1, Article 3 of the Law of Ukraine On Prevention of Corruption, are obliged to transfer such shares belonging to them under the management of another person within 60 days from the day of resuming the introduction of changes to the depository accounting system for the relevant shares [8]. In the above-mentioned cases, the specified persons are prohibited from transferring the enterprises and corporate rights belonging to them under the management for the benefit of their family members. This type of restriction is objectively determined by the desire to prevent a conflict of interests.

The Law of Ukraine On Prevention of Corruption prohibits the transfer of enterprise and corporate rights to the benefit of family members, as well as the conclusion of relevant contracts with business entities, investment firms and asset management companies in which family members work. The transfer of enterprises is carried out as determined by Part 2, Article 36 of the Law of Ukraine On Prevention of Corruption. Instead, the transfer of corporate rights must be carried out in one of the ways specified in Part 3, Article 36 of the Law of Ukraine On the Prevention of Corruption [8].

The transfer under the management of the enterprise is carried out taking into account the state of legal regulation of entrepreneurial activity. According to Article 42 of the Economic Code of Ukraine, 'entrepreneurship as a type of economic activity' is defined as an independent, initiative, systematic, at one's own risk economic activity carried out by economic entities (entrepreneurs) with the aim of achieving economic and social results and obtaining profit [9].

The practice of defining the category of corporate rights is quite controversial. Thus, in the Resolution of the Verkhovna Rada of Ukraine On Approving the Rules of Application of the Law of Ukraine On Taxation of Enterprise Profits dated June 27, 1995, No. 247/95-BP, corporate law was defined as the right to own a share in the statutory fund of a legal entity created in accordance to the legislation on business companies, including the right to manage and receive a corresponding share of the profit of such a legal entity [10]. Instead, the concept of rights of participants (founders, stakeholders, shareholders) of legal entities (corporate rights) legally
enshrined in Part 1, Article 96-1 of the Civil Code of Ukraine is interpreted as a set of powers that belong to a person as a participant (founder, stakeholder, shareholder) of a legal entity in accordance with the law and the company's charter. Corporate rights are acquired by a person from the moment of acquiring ownership of a share (a share, stock, or other object of civil rights certifying the participation of a person in a legal entity) in the authorized capital of a legal entity [10].

Note that there is no unified doctrinal definition of the corporate rights concept in domestic jurisprudence. Thus, Bigniak O. defines corporate rights as a certain set of powers of property and non-property nature arising in the participants of corporations and legal entities of the corporate type (quasi-corporate entities), determined by their property participation in the statutory (composite) capital of the respective legal entities [11, p. 86]. Kravchuk V. insists on defining corporate rights as a set of legal opportunities for a participant of a certain legal entity, the content of which is determined by its organizational and legal form [12, c. 261].

In general, scientists distinguish the following signs of corporate rights: corporate rights only belong to persons whose share is determined in the authorized capital of a legal entity; corporate rights only arise in relation to an entrepreneurial legal entity (corporate partnership); corporate rights have a complex structure, as they include non-property and property rights; the exercise of corporate rights is related to the property participation in the authorized capital of an entrepreneurial legal entity; corporate rights may be provided by law and local legal acts of an entrepreneurial legal entity (corporate partnership); ownership of corporate rights by a person is not considered to be their business activity; the law may establish limits for certain categories of persons regarding their ownership and/or their exercise of corporate rights [13, p. 108].

The National Agency for the Prevention of Corruption emphasizes that officials holding a responsible and particularly responsible position, as well as subjects of the declaration holding positions associated with a high and increased level of corruption risks also indicate in the declaration corporate rights, which are objects of the property right of a third party if the subject of the declaration or a member of their family receives or has the right to receive income from such an object or can directly or indirectly (through other natural or legal persons) act in relation to such an object of action, identical essence to the exercise of the right to dispose of it [14]. Such information shall not be indicated in the declaration if the relevant objects are owned by a legal entity specified in Clause 5-1, Part 1, Article 46 of the Law of Ukraine On Prevention of Corruption, and their main purpose is to be used in the economic activities of such a legal entity. In section 8 of the Corporate Rights declaration, the subject of the declaration must indicate their family member's share in the statutory (shared capital) of the company, the monetary and percentage expression of which is specified in the founding document of the company and the
Unified State Register of Legal Entities, Individual Entrepreneurs and Public Formations, regardless of the actual government. In addition, in the case of non-contribution to the authorized capital or partial contribution of it, the subject of the declaration or a member of their family has a financial obligation, and, in case of exceeding the declaration threshold, it must be declared in Section 13 Financial Obligations of the declaration [14].

Methodological recommendations of the National Agency for the Prevention of Corruption dated October 21, 2022, No.13 analyze in detail the duties of a person in connection with the existence of a conflict of interests and the rules for choosing a measure for the external settlement of a conflict of interests. In this document, due attention is paid to the applied aspects of conflict of interest settlement in connection with the subject's possession of the power of enterprises or corporate rights, namely: the method of notifying the National Agency for the Prevention of Corruption about the possession of enterprises or corporate rights by the person; violation of the restriction on combining with other types of activities in case of failure to transfer under the management of enterprises or corporate rights; correct settlement of the conflict of interests when the head of the state enterprise has corporate rights, and so on. Legal methods of transferring corporate rights belonging to a person under the management are distinguished, namely: conclusion of a property management agreement with a business entity (except for an agreement on the management of securities and other financial instruments); conclusion of an agreement on the management of a financial instruments portfolio and/or funds intended for investment in financial instruments with an investment firm that has a license issued by the National Commission for Securities and the Stock Market to conduct activities for the management of a financial instruments portfolio; conclusion of an agreement on the creation of a venture share investment fund for the management of transferred corporate rights with an asset management company that has a license of the National Securities and Stock Market Commission to conduct asset management activities. [15, p. 52]. Separate focus is put on clarifying the grounds for qualifying a conflict of interest in a civil servant with corporate rights in a business company. It is essential to realize that a conflict of interest does not arise for a civil servant if they does not have public-authority powers, during the implementation of which they can make decisions or take actions in relation to such a business partnership [15, p. 104]. A person's ownership of the company's corporate rights indicates that they have a private interest related to this company. If such a private interest is present in the sphere of official powers of a person, implementing which they can make decisions and take actions in relation to the company, they will have a conflict of interests that needs to be resolved in accordance with the procedure established by the Law of Ukraine On Prevention of Corruption.
It should be noted that the Law of Ukraine On Prevention of Corruption does not contain a legal definition of the generic definition of conflict of interest. As a result, the content of this category is indirectly determined through the prism of interpretation of actual and potential conflicts of interest. A classic example of an actual conflict of interests in connection with the ownership of corporate rights is the case of concluding an agreement on the provision of certain services to a state enterprise (among the potential counterparties that submitted their proposals to the head of the state enterprise, there is a business company in which the head has corporate rights; if the head of the state enterprise will consider the proposal of this business association, they will have an actual conflict of interests). Instead, a potential conflict of interest arises under the condition that contractual relations exist between a state-owned enterprise and a business partnership in which the head of the state-owned enterprise has corporate rights. Note that the head of a state-owned enterprise is empowered to make decisions and take actions related to the implementation of the terms of the contract concluded with this business partnership [15, p. 115].

In accordance with Part 5, Article 36 of the Law of Ukraine On Prevention of Corruption, a requirement is established to comply with the deadlines for notification of the transfer of enterprises and/or corporate rights in connection with a conflict of interests. Thus, a person will be considered to have properly fulfilled the specified requirement if they have fulfilled the following necessary conditions: they have personally notified the National Agency for the Prevention of Corruption about the transfer under the management of the enterprises and/or corporate rights belonging to them; such notification was made within 1 day from the moment of transfer under the management (and not from the moment of notarization of a copy of the relevant contract); a notarized copy of the concluded contract (and not a copy of such a contract or the original of a contract concluded in simple written form) was provided to the National Agency for the Prevention of Corruption [15, p. 53].

**Conclusion.** Summing up, we note that the signs of a conflict of interest are the presence of official/representative powers and private interest. An important tool for preventing the conflict of interests at officials is the transfer under the management of enterprises and/or corporate rights belonging to them. The anti-corruption imperative regarding the transfer under the management of enterprises and/or corporate rights is extended to the following subjects: persons authorized to perform the functions of the state or local self-government; officials of legal entities under public law, including in the healthcare field; members of the Council of the National Bank of Ukraine; persons who are part of the supervisory board (except for independent members) of a state bank, state enterprise or state profit-making organization, economic partnership, in the charter capital of which more than 50 percent of the stocks (shares) belong to the state. In accordance with the Law of
Ukraine On the Prevention of Corruption, the necessity of complying with the regulatory requirements regarding the terms of notification of the transfer of enterprises and/or corporate rights in connection with a conflict of interests is expressly stipulated. It is important to comply with the requirements of the law regarding the methods of transferring corporate rights belonging to a person under the management.

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