SOME LEGAL PRINCIPLES FOR TERMINATION OF CHARITIES

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The article reveals some legal principles of termination of charitable organizations. It is proven that the consequences of termination of a charitable organization (reorganization or liquidation) have differences in legal aspects. In the event of reorganization, the assets of a charitable organization are transferred to its successors, which, according to the direct norm of the Law, can be one or more charitable organizations. In the event of liquidation of a charitable organization, all its assets remaining after satisfying the creditors' claims are subject to transfer to one or more charitable organizations. The procedure for such transfer is determined in the statutory documents or in a court decision. If there are no charitable organizations to which the assets remaining after settlements with creditors can be transferred, these assets must be directed to the State Budget of Ukraine.

During the termination of a charitable organization through reorganization, legal succession occurs, that is, the rights and/or obligations of the organization being terminated are transferred to the newly created organization(s). An essential aspect inherent only to charitable organizations is the subject composition during reorganization. According to the requirements of the previous Law of Ukraine "On Charity and Charitable Organizations", the reorganization of a charitable organization into a legal entity, the purpose of which is to make a profit, was prohibited. That is, a charitable organization could be reorganized, for example, into a non-profit public organization or a credit union. This situation led to the fact that the assets belonging to the reorganized charitable organization could be transferred to different legal entities, which, although they did not have the purpose of making a profit, but used different mechanisms and schemes for "withdrawal" of the assets obtained during the reorganization.

Keywords: charitable activities, charitable organizations, principles, consequences, public administration body, international charitable organizations, human rights defender, legal aid, methods of charity, termination.

Currently, the legislator provides the organization with the opportunity to independently determine the procedure for transferring the remaining property. And only in the event that the organization itself has not established the appropriate procedure, then it is determined in the court decision. In general, we agree with the above theses of domestic legislation, because they are based on the principles of dispositivity, which are inherent in private law relations. However, we would still like to emphasize the exceptional role of the previously stated position that before satisfying the claims of creditors, a charitable organization must fulfill the previously assumed obligations to provide charitable assistance to beneficiaries, as well as take into account the interests of benefactors in the process of further transfer of assets. It is advisable to pay more attention to the procedure for transferring the assets remaining after satisfying the claims of creditors of a charitable organization that has been liquidated to the charitable organization or organizations that have been determined. The transfer of property

during reorganization should not be confused with the transfer of assets during liquidation. In the first case, the organizations to which the property is transferred also have certain obligations. At the same time, when transferring the remaining assets of a charitable organization that is being liquidated, we can talk about a unilateral transaction. Yes, it would be wrong to call the legal form of the transfer of assets a donation agreement. After all, in such a case, the organization that transfers the assets has the right to control their use in accordance with the purpose. In our situation, the charitable organization transfers the assets and ceases to exist forever, that is, it cannot have any rights or obligations after that, its legal connection with the charitable organization(s) to which the assets are transferred is lost. The transfer of property to one or more specific charitable organizations could be certified by a regular act of acceptance and transfer. Since the liquidation commission (liquidator) has the full range of powers to manage the affairs of a charitable organization being liquidated, and the chairman of the commission, its members or the liquidator of a legal entity represent it in relations with third parties and act in court on its behalf, it would be logical to conclude that it is the liquidation commission (liquidator) that must ensure the transfer of property to specific organizations. This position is especially strengthened given that it is this entity that has complete information about the assets remaining after satisfying creditors' claims. In our opinion, another situation should be analyzed in detail: when, after the completion of the liquidation procedure of a charitable organization (entering relevant information into the Unified State Register of Legal Entities, Individual Entrepreneurs and Public Organizations), certain property is discovered that was not identified and, accordingly, sold during the liquidation process. Ukrainian legislation does not offer any options for getting out of such a situation not only for charitable organizations, but also for legal entities in general. However, a certain attempt to regulate such cases was made in the Russian Federation, where at the legislative level it was proposed to fix the possibility of resuming the liquidation procedure. The court appointed a liquidator from among the arbitration managers. Such a legal construction is quite important from a practical aspect, as it can be applied to different types of legal entities. However, it should be emphasized that in this case it may not be about the restoration of the liquidated organization, but only about the restoration of the liquidation procedure. However, the implementation of such an institution should be comprehensive and accompanied by the adoption of norms that would establish the terms of resuming the liquidation procedure, subjects who have the right to apply to the court for such restoration, a detailed procedure for the distribution of the identified property, the powers of the appointed liquidator, etc.

If the termination of a charitable organization occurs through its reorganization, the legal consequences of such termination will be radically different from those listed above.

The basic point in the case of termination of a charitable organization through reorganization is the presence of succession. The essence of this concept is not disclosed at the level of domestic legislation, however, it has been repeatedly discussed in academic circles.

Some scientists hold the opinion that during succession, the right itself is transferred from one person to another by virtue of a direct indication of the law or contract. Another group of scientists defends the position according to which in the case of succession from one person (subject of law) to another, not only rights but also obligations are transferred [1, p. 148].

According to a number of scientists, the following approach can be proposed to the definition of the concept of "transfer of rights and (or) obligations": "the transfer of an obligational right and (or) obligations from one subject of civil law (predecessor) to another (transferee) means the transferee's entry into interaction with a specific person (debtor or creditor) with the simultaneous withdrawal of the predecessor from interaction with this person, as well as the transfer of the boundaries of lawful behavior: the establishment of these boundaries for the second subject by removing them in relation to the behavior of the first subject"[7].

Instead, according to the provisions of Part 2 of Article 18 of the current Law, the legal successors of a charitable organization in the event of its reorganization must be one or more char-

itable organizations. Under these circumstances, it does not matter how the reorganization of a charitable organization occurs, by merger, accession, division or transformation, in any case, only one or more charitable organizations can be legal successors.

Although the legal acts of some foreign states still contain norms that only prohibit the reorganization of charitable organizations into business companies (the Republics of Uzbekistan and Moldova, the Russian Federation), we believe that the modern approach of the domestic legislator is more successful in avoiding cases of misappropriation of the assets of a charitable organization in the process of its reorganization.

It is interesting that foreign legal doctrine also expressed opinions that denied the expediency of the existence of a ban on the reorganization of non-profit organizations into commercial ones. Thus, Nuzhdin T.A. argues that for non-profit organizations of the corporate type this prohibition should not be established. In this case, such organizations lose the opportunity to act in accordance with the "changing dynamics and the need to adjust the nature of the organization's activities", and the prohibition on reorganization in this sense will result in significant economic losses for such organizations [2, p. 112]. It is unlikely that one can agree with this opinion given the legal nature and goals of charitable organizations.

In view of the above and taking into account the provisions of the Law and the Civil Code of Ukraine on the reorganization of legal entities, succession in the case of reorganization of charitable organizations should be understood as the transfer of property, rights and obligations from the terminated charitable organization to its successor (s) in accordance with the law.

Depending on the type of reorganization of the charitable organization, we will also consider the possible legal consequences:

1) Merger and accession.

In the case of a merger, two or more charitable organizations cease to exist with the simultaneous transfer of all their property, rights and obligations to the newly created charitable organization. In contrast to this situation, when it comes to accession, one cannot speak of the creation of a new charitable organization. After all, in the event of an accession, one charitable organization ceases to exist with the simultaneous transfer of its property, rights and obligations to the charitable organization that already exists at the time of termination.

The provisions of Part 2 of Article 18 of the Law give grounds to argue that the merger of a charitable organization with any other legal entity, except a charitable organization, contradicts the legislation. After all, in such a case, the rights, obligations and property of the organization being reorganized will not be transferred to the charitable organization, as required by the Law. At the same time, the legislation of Ukraine does not prohibit the merger of a charitable organization with other legal entities (other than charitable organizations) if, as a result of the reorganization, the newly created legal entity will be charitable. Only in this case will the requirement of the Law be met and the legal successor to the reorganized charitable organization will be another charitable legal entity [5].

1) Division.

A charitable organization that has made a decision to reorganize by division is terminated. Instead, all its property, rights and obligations are transferred to two or more newly created charitable organizations. It is obvious that each of the successor organizations receives only part of the property, rights and obligations, however, the total amount of property, rights and obligations received by the successor charitable organizations must correspond to the amount that was in the organization that was terminated [8].

In addition, it is important to pay attention to the fact that the legislation does not establish requirements for the ratio of property, rights and obligations that are transferred. That is, one charitable organization may, for example, receive more property, but fewer property obligations, and another - vice versa.

However, Part 5 of Article 107 of the Civil Code of Ukraine balances this situation in view of the need to protect the rights of creditors. According to this norm, the successor legal entity formed as a result of the division bears subsidiary liability for the obligations of the terminated legal entity, which, according to the distribution balance, were transferred to another

successor legal entity. If there are more than two legal successors formed as a result of the division, they shall bear such subsidiary liability jointly and severally.

The experience of legal support of the specified issue in foreign countries, and especially in the European Union and EU Member States, is interesting. The Sixth EU Directive, devoted to the issue of division of joint-stock companies, proposes to divide it into two types: 1) division by creating new companies; 2) division by joining existing companies [3].

In the first case, the process and legal consequences of the division of a legal entity coincide with those contained in domestic legislation. The second type of division of a legal entity, proposed in the Sixth EU Directive, has no analogue in the modern regulatory and legal framework of Ukraine. Its essence lies in the fact that a legal entity that is being terminated transfers all its rights and obligations to more than one operating legal entity.

Without a doubt, the above provision cannot be applied in domestic practice, since at present there are no legal mechanisms and norms that would ensure its use. However, one should agree with the opinion that the introduction of this type of division of legal entities would have positive consequences for the reorganization not only of charitable organizations, but also for legal entities in general.

3) Transformation.

Taking into account the provisions of Art. 108 of the Civil Code of Ukraine [4], the transformation of a charitable organization is a change in its organizational and legal form. That is, a charitable organization that existed in the form of a charitable society can be transformed into both a charitable foundation and a charitable institution. At the same time, the Law excludes the possibility of transforming a charitable organization into a public association or other legal entity, even if it is non-profit. All property, rights and obligations of the previous organization are transferred to the new charitable organization created as a result of the transformation [6].

Therefore, depending on the type of termination (reorganization or liquidation), the legal consequences for a charitable organization also differ. During reorganization, the assets of a charitable organization are transferred to its successors, which, by virtue of the direct instruction of the Law, may be one or more charitable organizations. In the event of liquidation of a charitable organization, all its assets remaining after satisfying the claims of its creditors must be transferred to one or more charitable organizations. The procedure for such transfer is determined by the constituent documents or in a court decision. In the absence of charitable organizations to which the assets remaining after satisfying the claims of creditors are transferred, these assets are directed to the State Budget of Ukraine.

In the process of terminating a charitable organization through reorganization, legal succession occurs, that is, the rights and (or) obligations of the organization being terminated are transferred to the newly formed organization(s). A fundamentally important point that is unique to charitable organizations is the subject composition in the case of reorganization. In accordance with the requirements of the previously effective Law of Ukraine "On Charity and Charitable Organizations", the reorganization of a charitable organization into a legal entity whose purpose is to make a profit was prohibited. That is, a charitable organization could be reorganized, for example, into a non-profit public organization or a credit union. This situation obviously contributed to the fact that the assets belonging to the reorganized charitable organization could be transferred to various legal entities, which, although they could not make a profit, had different mechanisms and schemes for "withdrawing" the assets obtained during the reorganization.

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ДЕЯКІ ПРАВОВІ ЗАСАДИ ПРИПИНЕННЯ БЛАГОДІЙНИХ ОРГАНІЗАЦІЙ

В статті розкрито деякі правові засади припинення благодійних організацій. Доведено, що наслідки припинення благодійної організації (реорганізація або ліквідація) мають відмінності у юридичному аспекті. У разі реорганізації активи благодійної організації переходять до її правонаступників, якими згідно з прямою нормою Закону можуть бути одна або кілька благодійних організацій. У випадку ліквідації благодійної організації, усі її активи, що залишаються після задоволення вимог кредиторів, підлягають передачі одній чи кільком благодійним організаціям. Порядок такої передачі визначається у статутних документах або ж у судовому рішенні. Якщо немає благодійних організацій, куди можна передати активи, що лишилися після розрахунків з кредиторами, ці активи мають бути спрямовані до Державного бюджету України.

Під час припинення благодійної організації шляхом реорганізації відбувається правонаступництво, тобто перехід до новоствореної (-их) організації (-ій) прав та/або обов'язків організації, що припиняється. Суттєвим аспектом, притаманним лише благодійним організаціям, є суб'єктний склад при реорганізації. Згідно з вимогами попереднього Закону України «Про благодійництво та благодійні організації», реорганізація благодійної організації в юридичну особу, метою діяльності якої є отримання прибутку, була заборонена. Тобто, благодійну організацію могли реорганізувати, наприклад, у неприбуткову громадську організацію або кредитну спілку. Така ситуація призводила до того, що активи, які належали реорганізованій благодійній організації, могли переходити до різних юридичних осіб, котрі хоча й не мали мети отримання прибутку, але використовували різні механізми та схеми для "виведення" одержаних при реорганізації активів.

***Ключові слова**: благодійна діяльність, благодійні організації, засади, наслідки орган публічної адміністрації, міжнародні благодійні організації, правозахисник, правова допомога, способи благодійності, припинення.*