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CORPORATE REORGANIZATIONS: INTERNATIONAL EXPERIENCE

The article is devoted to the issues of corporate reorganizations in Ukraine and abroad. The ideas of the author relate to comparison of legal support by choosing certain types of corporate reorganizations, their difference between the countries and between each other. The author indicates the peculiarities of each type of reorganizations abroad, their advantages and disadvantages. Recommendations as to solving a problem of lack of corporate reorganizationtypes in terms of managing them in the national legislation have been given. Mergers and acquisitions are considered by the author as the most popular reorganization types, so its scope and significance for Ukrainian economy are presented in figures.

Keywords: corporate reorganization, merger, division, taxation, types of reorganization.

Касьянова А. Реорганизация корпораций: международный опыт. *Статья посвящена вопросам реорганизации предприятий в Украине и странах за ее пределами. Идеи автора обращены к сравнению юридического подспорья при выборе определенных видов реорганизации, к их разнице в исследуемых странах и между собой. Автор описывает особенности каждого вида реорганизации, их достоинства и недостатки. Даны рекомендации по решению проблемы недостатка выбора видов корпоративной реорганизациии управления ними в национальном юридическом контексте. Слияния и поглощения признаны автором самым популярным видом реорганизации, следовательно, их масштаб и значимость для украинской экономики представлены в цифрах.*

Ключевые слова: реорганизация предприятий, слияние, разделение, налогообложение, типы реорганизаций.

Background. In the modern economy, reorganization of corporations, irrespective of their scope and kind of activity, appears to be a perennial problem while achieving multidirectional goals: starting from the period when a company gets from the ground, is on the rocks, gets rid of the dead wood in managerial system or, on the contrary, wants to bear fruits or branch out into new markets. In connection with this, companies plough money into planning such cooperative strategies as mergers, amalgamations, divestitures and restructuring. In the media we often hear or read about acquisitions and mergers among large companies in Ukraine and abroad, some of them are really much spoken of.

While structuring the purchase and sale of a corporate business in the USA or in the EU, an important decision must be made, namely whether to cast the transaction in the form of taxable purchase (stock or assets) or tax-free reorganization.

Analysis of the recent researches and publications. The questions concerning the research of the problems of corporate reorganizations were considered in the works of Y. M. Palyga, V. J. Pavlov, G. T. Pyatnytska, V. M. Grynyova, V. A. Yevtushevskiy, D. V. Zadukhaylo, I. A. Ignatyeva, J. M. Umantsiv [1–8]. Reorganization issues are the object of discussion in American university reviews and are the object of application in big corporations all over the world.

The **aim** of the article is to describe and compare at least some basic corporate reorganization issues, explaining the difference between the terms «restructuring» and «reorganization», studying advantages and disadvantages of each type of reorganization according to legislation of different countries and listing the most significant M&A deals in Ukraine recently.

Material and methods. In the article, the author reviews milestone points of a company reorganization, its directions and types in order to, using a comparative method of a research, analyze main principles of reorganizing companies in different countries and, using interdisciplinary method of research, understand the influence of law principles and rules on the process of reorganization in economics. In the article, there were collected, classified and analyzed information and data of the US Revenue Code, the EU Council Directive, Ukrainian Civil Code, M&A Ukraine Database.

Results. Corporations reorganize and restructure themselves for various reasons and in numerous ways. Companies reorganize themselves to increase profits and improve efficiency. The reorganization of a company typically addresses the efficiency component in an attempt to increase profits. Corporate reorganization normally occurs following new acquisitions, buyouts, takeovers, other forms of new ownership, or even the threat of filing for bankruptcy [9]. A reorganization is only feasible where, as an economic matter, the shareholders of the acquired company are willing to continue to own an equity interest in the combined entity.

Further in this article, we will consider the types of reorganizations which deal with the purposes of taxation and are supported by legislation of the USA [10] and the EU-countries [11]. In tax-free reorganization, the tax attributes of the acquired company will be inherited by the buyer, either directly (in the case of an asset reorganization) or because they are retained by the acquired company itself (where that company remains in existence and its stock is acquired). Similar treatment is available in the case of a taxable stock purchase, but not a taxable asset purchase. In any event, substantial limitations may affect the ability of the buyer to take advantage of loss carryovers and other favorable tax attributes.

Countries typically have specific rules for tax-free reorganization in their tax laws. In the USA, the objective of these rules is not to grant a tax

exemption to the companies or shareholders involved, but to «neutralize» the tax consequences of business reorganization, so that the reorganization involves neither a tax advantage nor a tax disadvantage. The term «tax-free» is a misnomer because the tax is not eliminated, but will be realized when a later taxable transaction occurs [9]. In other words, reorganization refers to the sale or merger of a company that involves a change in ownership, legal and management level changes, as well as a change in stocks. It is a court-supervised formal process that restructures a company's finances after it faces bankruptcy. Though one of the aims of reorganization is to restructure company's operations, finances or management, there is a slight difference between the terms «restructuring» and «reorganization». In common words, restructuring tends to be used in the context of a troubled company or turnaround situation, while reorganization, though it might very well be a part of that, but more generally it refers to a more «elective decision» by management to change structure in order to improve efficiency, to achieve a desired strategic objective, etc. The above cases are not universal, but are widespread indeed.

In addition to meeting the continuity of interest requirement, reorganization must meet various technical requirements under the U.S. Revenue Code, Part III, Paragraph 368 [10]. The precise requirements vary with the particular form of reorganization used. The Code presupposes seven types of reorganizations which are legislatively declared and collated in four categories.

In a typical A reorganization, the target corporation's assets and liabilities become assets and liabilities of the acquiring corporation and the target corporation ceases to exist. Type B reorganization is an acquisition of stock of the target corporation in exchange solely for voting stock of the acquiring corporation, provided that the acquiring corporation has «control» (generally 80 % ownership) of the target corporation immediately after the transaction while type C reorganization is an acquisition of «substantially all» the assets of the target corporation in exchange for voting stock of the acquiring corporation followed by a liquidation of the target [9]. Some peculiarities of transaction created a close to type C reorganization where there takes place the transfer of «substantially all» of the target corporation's assets to an acquiring corporation, provided that the target corporation or its stockholders (or a combination of the two) has «control» (generally 80 % ownership) of the acquiring corporation immediately after the transfer. In this case, we are talking about acquisitive D reorganization. A recapitalization (type E reorganization) is a reshuffling of an existing corporation's capital structure. A recapitalization transaction involves the exchange of stocks and securities for new stocks, securities or both by a corporation's shareholders. The move concerns just one company and the reconfiguration of the company's capital structure. Possible scenarios include a stock-for-stock recapitalization plan, a bonds-for-bonds move and a stocks-for-bonds transaction. Type F reorganization rules generally apply

to a corporation that changes its name, the state where it does business or when it makes changes in the company's corporate charter, in which case a transfer is deemed to occur from the prior corporation to the new company. Type G reorganization involves bankruptcy by permitting the transfer of all or some of a failing company's assets to a new corporation. One caveat is that the stock and securities of the controlled corporation are distributed to the previous company's shareholders under Type D (transfer reorganization) rules for distribution [12].

Before making decision which type of reorganization to choose, a company should understand the goals of reorganization, decide whether to reorganize in the form of taxable purchase (stock or assets) or a tax-free reorganization, assess the legal consequences of the decision made and estimate the resources which the company possesses, as well as it should talk to counteragents and potential partners of reorganization. All these factors determine the advantages and disadvantages of different types of reorganization for each company individually. They are presented in *table 1*.

Business restructurings and reorganizations have become common for multinational corporations, being a normal reaction of the market needs and forming adequate competitive edges. The impact of the EU law on aspects of corporate reorganizations is resulted in the so-called Merger Directive [11]. The term «corporate reorganization» is used in a generic way, encompassing the types of transactions covered under the Merger Directive, transfers of seat and internal transfers of assets. The Merger Directive introduces tax rules aimed at ensuring that cross-border restructuring operations would not be at a disadvantage compared to similar domestic operations. Such operations may be necessary in order to create in the Union conditions analogous to those of an internal market and to ensure the effective functioning of such an internal market. Therefore, corporate reorganizations ought not to be hampered by restrictions, disadvantages or distortions arising in particular from member state tax provisions. The Directive contains specific rules on how to attain this objective [13].

Only certain types of transactions are protected by Merger Directive (*table 2*).

As to Ukrainian legislation, the term «reorganization» has several interpretations in law depending on the purposes of legal regulation of certain confidential relations.

The Civil Code of Ukraine [14] practically does not regulate relations of reorganization (this term is mentioned in the Code only once), addressing them as the issues of termination of activity of one legal entity and creation or transformation of another one. According to the Article 104 of the Civil Code of Ukraine, termination of a legal entity occurs as a result of transfer of its property, responsibilities and rights to another legal entity or several succession-seekers in one of the following ways: division, split, transformation, merger, takeover. These are types of reorganization.

Table 1

A comparative study of advantages and disadvantages of different types of corporate reorganizations in the USA*

Category	Type	Advantages	Disadvantages
Acquisitive	A	First, type A is flexible. Second, money or other property can be transferred without disqualifying the transaction as long as continuity of interest is met	First, money or other property transferred is indemnification, so some gain may be required to be recognized. Second, shareholders of either entity may be dissent so that their shares should be redeemed. Third, acquiring entity must assume all liabilities of a target entity
	B	Although the acquiring entity can only transfer a voting stock, the target entity can transfer any kind of stock, though the stock-only-transactions are quite simple. In addition, target shareholders act individually, meaning that the target company's and the acquiring company's shareholders are not directly involved	First, in this stock-only-transaction, solely voting stock must be transferred from the acquirer. Second, reimbursement cannot be transferred, and as a result, no gain recognition is available. Third, minority interest problems may emerge if 100 % control hasn't been established
	C	First, this type has considerable freedom in the consideration given as opposed to Type B. Moreover, unlike Type A, only the target liabilities of which were negotiated will be assumed. Second, buyers can purchase only selected assets of the business and not liabilities to minimize the risk. Third, an asset purchase allows buyers to allocate the purchase price among the assets to reflect their fair market value. This results in a step-up of tax basis, allows higher depreciation and amortization deductions, and results in future tax savings	First, it is difficult to define which assets the purchaser wants to acquire. Usually, businesses sell a subsidiary or a division with their assets. Second, an asset sale typically requires numerous third party consents, approvals. The third parties view the transaction in order to renegotiate their contracts, that delays the deal and adds to the transaction costs. Third, if there are any liabilities that the buyer is not including in the purchase, parties have to make sure that the purchase is not being made for less than the fair value of the assets and following the sale the company will still be sufficiently capitalized to pay its liabilities. Otherwise, the transaction may violate fraudulent conveyance laws. Parties would need to obtain a solvency opinion, which add to the transaction costs
Divisive	D	For the divisive type: permits corporate division without tax consequences if no indemnification is involved. For the acquisitive type: allows smaller target corporation to retain its existence	Control requirements of 50 % for an acquisitive reorganization and 80 % for a divisive reorganization

* Made by the author using the sources [10, 15–19].

End of the table 1

Category	Type	Advantages	Disadvantages
Corporate restructu-ring reorga-nization	E	This type allows for major changes in corporate equity structure. It becomes easy to raise capital through the sale of common stocks instead of taking a debt. However, an owner will be giving up partial ownership of his company once the stocks are sold. An owner will retain control of his business under recapitalization. There will be created two classes of stocks- common and preferred stocks. An owner will be keeping the preferred stock that will allow him to run the company and keep the common stock available for purchase	First, this process can be expensive as well as complex for business. Companies need to hire attorneys, valuation experts and tax advisors for structuring and documenting a recapitalization. Second, there can be adverse tax consequences if preferred stocks are distributed through recapitalization. The company's needed cash might get drained by preferred stock dividends
	F	First, survivor is treated like the same entity as prede-cessor, thus, tax attributes of predecessor are retained. Second, a change in the name of a corporation could be qualified as a type F reorganization. Third, the taxable year of the transferor does not end on the date of transfer merely because of the transfer. Such is not the case of other types	First, there must be ensured only one operating company is involved. In other case, a type A, C or D reorganization may be used. Second, the new corporation must continue at least one significant line of the business of the old corporation or must employ a significant portion of the old business assets. Third, continuity of ownership should be maintained throughout the transaction. Even a temporary change of ownership during the transaction could taint the entire transaction, and F status may be disallowed
Bank-ruptcy	G	First, discharge from bankruptcy clears most debts or creditors can exchange debts for stock tax-free. Second, once a debtor is declared bankrupt, most unsecured creditors are unable to pursue further legal action. Third, the requirement of debt repayment will stop once a company enters bankruptcy. All further communications regarding the debts should take place between the creditors and the bankrupt's trustee in bankruptcy	First, the ability to access credit will be difficult to obtain for a period of time after bankruptcy. Moreover, bankrupts will lose most of their valuable property. Second, if a bankrupt does not cooperate with the trustee and fulfill certain duties, he or she may be dealt with by the courts. Third, trustees are able to investigate bankrupt's past dealings and in some instances will recover property that the trustee has transferred before the date of the bankruptcy

Table 2

Types of tax-facilitated transactions in the EU-countries*

Type of a reorganization	Definition	Cash payment to the transferring company or companies	State of the company after reorganization
Merger	an operation whereby one or more companies transfer all their assets and liabilities to another existing company in exchange for the issue to their shareholders of securities representing the capital of that other company; or: two or more companies transfer all their assets and liabilities to a company that they form, in exchange for the issue to their shareholders of securities representing the capital of that new company	cash payment not exceeding 10 % of the value of the issued securities may be additionally made	a company may be dissolved without going into liquidation
Upstream merger	an operation whereby a company, on being dissolved without going into liquidation, transfers all its assets and liabilities to the company holding all the securities representing its capital		a company may be dissolved without going into liquidation
Division	an operation whereby a company transfers all its assets and liabilities to two or more existing or new companies, in exchange for the pro rata issue to its shareholders of securities representing the capital of the companies receiving the assets and liabilities	cash payment not exceeding 10 % of the value of the issued securities may be additionally made	a company may be dissolved without going into liquidation
Partial division	an operation whereby a company transfers one or more branches of activity to one or more existing or new companies, leaving at least one branch of activity in the transferring company, in exchange for the pro- rata issue to its shareholders of securities representing the capital of the companies receiving the assets and liabilities		a company is not dissolved
Transfer of assets	an operation whereby a company transfers all or one or more branches of its activity to another company in exchange for the transfer of securities representing the capital of the company receiving the transfer	no cash payment is allowed	a company is not dissolved
Exchange of shares	an operation whereby a company acquires a holding in the capital of another company such that it obtains a majority of the voting rights in that company, or, holding such a majority, acquires a further holding, in exchange for the issue to the shareholders of the latter company, in exchange for their securities, of securities representing the capital of the former company	cash payment not exceeding 10 % of the value of the issued securities may be additionally made	the target company becomes a subsidiary of the acquiring company
Transfer of the registered office of a SE or SCE**	an operation whereby an SE or an SCE transfers its registered office from one Member State to another Member State	a company is not wound up and no new legal person is created but the resident of the first member state ceases to be its resident and becomes resident in another member state	

* Made by the author using the sources [11, 13].

** Societas Europaea or Societas Cooperativa Europaea.

The Article 109 describes split-off as along-standing type. Moreover, in Ukraine there are no legislatively secured provisions concerning reorganizations. In some countries, the absence of provisions relating to reorganization can be explained by the fact that capital gains are not subject to tax.

However, not every reorganization of an enterprise can be connected with termination of activity because a reorganized enterprise often continues to exist after a new company has split off from it. Such an enterprise needs to make appropriate changes to the statutory documents or to re-register.

Reorganization of an enterprise which misuse its monopoly position at the market may also be carried out through its compulsory division in the manner prescribed by law.

In a broader sense, reorganization is a complete or partial replacement of the owners of corporate rights of an enterprise, is a change in the organizational and legal form of business organization, is elimination of certain structural units or creation of some new ones on the basis an old enterprise, the consequence of which would be a transfer or taking possession of its property, funds, rights and responsibilities by a successor.

The form of the future reorganization of an enterprise is determined, first of all, by the reasons and motives which encourage the owners and management of an enterprise to make reorganization. There are the following directions of reorganization in Ukrainian legislation:

- integration of a going-concern enterprise. Is carried out by way of merger, consolidation, takeover;
- division of a going-concern enterprise. Is carried out by dividing or splitting of an enterprise;
- transformation of an enterprise. In this case, changes in size of an enterprise are not stipulated.

In spite of the variety of possibilities to reorganize a company, in Ukraine and abroad the first place is taken by the agreements concerning the market of mergers and acquisitions. According to the statistics that is shown in the AEQUO merger market report [20], the number of M&A deals in Ukraine in 2015 amounted 140, the most significant among them were those which will be presented further in the *table 2*.

One can state about flurry of activity on the M&A market in Ukraine which could be observed in 2016 as well. The number of deals 2,5 times increased compared with 2015. According to the M&A Ukraine Database [21], the highest number of such transactions is in banking (25 deals), in construction (9 deals) and in agricultural sector (8 deals).

Table 3 represents the most significant M&A deals in Ukraine during the last two years indicating the Target firms, the Buyers, as well as the total amount of transactions.

In order to portray the whole situation on the Ukraine's M&A market we cite the analytical center Ukrainian Institute For the Future [14] which outlines 12 countries which are the biggest investors in this sphere: Cyprus (7,2 % in the total M&A bulk), Russian Federation (6,0 %), Canada (3,6 %),

China, Kazakhstan, the United States, Great Britain, France, Estonia, UAE, Oman, Belize – 2,4%.

Table 3

Eleven most significant M&A deals in Ukraine in 2015–2016*

Target Company	Buyer	Buying Country	Amount of Transactions, m. EUR
2015			
Lukoil Ukraine	AMIC Energy Management GmbH	Austria	300
Looksery Inc.	Snapchat Inc.	The United States	132
«Inter» TV Channel	Group DF Limited	Ukraine	100
Astelit (Lifecell)	Turkcell	Turkey	90
Arena Enter-tainment	Primespot Securities Ltd.	Great Britain	40
BaDM LLC	Imara Trust Company Limited	Mauritius	27
«Barvinok» retail	Evrotek Group	Ukraine	10,6
Borshahivs-kiy Chemical and Pharmaceutical Plant	Pharma-ceutical Firm «Darnitsa»	Ukraine	7,7
Omega Bank PJSC	Ukrainian Business Group Corporation	Ukraine	6,9
Ilyichevsk Shiprepair Yard	Waysell Holdings Limited	Cyprus	6,3
2016			
Medisvit	Into-Sana	The United States	N/A
3 Mob	Vodafone	Russian Federation	3 billion UAH
Oil-extraction plant «Ellada»	Kernel	Ukraine	96 m. $
Ukrainian Bank of Reconstruction and Develoment	Bohai Commodity Exchange	China	83 m. UAH
PrivatBank	Ministry of Finance of Ukraine	Ukraine	148 billion UAH**
Parus Business Centre	Vaqif Aliyev, proprietor	Azerbaijan	50 m. $
Myhiivsk hydroelectric station	EMSA LLC	Ukraine	52 m. UAH
AEGON	TAC	Ukraine	N/A
Data Group	Horizon Capital	Cyprus	N/A
NORD	Duoput	Russian Federation	N/A
Consolidated Minerals	China Tian Yuan Manganese Ltd.	China	N/A

* Made by the author using the sources [14, 20–22].
** Additional capitalization.

Still, there is not elaborated any legislative code or directive in Ukraine which presupposes division of reorganizations by their types depending on tax purposes. It means that tax motives to reorganize companies in Ukraine.

Conclusion. In corporate finance theory the maximization of shareholder value is considered to be the main striving of any organizational and financial transformation which a company survives, that is why it is important that any of the chosen reorganization types should meet the requirements the company sets. The legal aspect of reorganization is also important as it is tightly connected with legislation, its forms and requirements in each single country. Unlike the USA or the EU, in Ukraine the tax system does not provide for transactions described in this article. The types of reorganization presented above reveal their peculiarities, which help understand their specification and possibility (as well as impossibility) to choose one of them while reorganizing a company. The variety of divisive, acquisitive and corporate reorganization alternatives, which are proposed by foreign legislation systems, which were considered in this article, is also widely applied in corporate management at different foreign enterprises. Extension of national legislation in this aspect would also enable to apply corporate reorganizations in our country on a broader scale, the most popular of which still are mergers and acquisitions, which refer to the Type A of reorganizations in American corporate finance legislation. That is why we considered it important to describe and compare basic corporate reorganization issues, explaining the difference between the terms «restructuring» and «reorganization», studying advantages and disadvantages of each type of reorganization according to legislation of different countries.

When the top priority is to make existing business viable by reorganizing it through merger or division, it is necessary to think about Ukrainian rules in civil or commercial law that would make mergers, acquisitions or divisions more transparent, as well as to think about their tax implications. The above problem is an object of development in our country and of our future investigation.

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Касьянова А. Реорганізація корпорацій: міжнародний досвід.

Постановка проблеми. *В сучасній економіці реорганізація корпорацій, незалежно від їх масштабу та виду діяльності, представляється постійною проблемою при досягненні різноспрямованих цілей: починаючи з періоду, коли компанія починає свій розвиток або знаходиться у кризовій ситуації, або реорганізує управлінську систему, або ж навпаки, є процвітаючою і прагне завойовувати нові ринки. У зв'язку з цим компанії вкладають гроші у планування та зміну корпоративних стратегій, таких як злиття, приєднання, виділення, поділ та інші види реструктуризації. Структуруючи купівлю та продаж корпоративного бізнесу в США або в ЄС, необхідно прийняти важливе рішення щодо того, чи здійснювати трансакцію у вигляді оподатковуваної купівлі (акцій чи активів) або реорганізації без оподаткування.*

Аналіз останніх досліджень і публікацій. *Дослідження проблем корпоративних реорганізацій були розглянуті в працях Є. М. Палиги, В. У. Павлова, Г. Т. П'ятницької, В. М. Гриньової, В. А. Євтушевського, Д. В. Задихайла, І. А. Ігнатьєвої, Ю. М. Уманціва. Питання реорганізації – предмет обговорення в огляді американських університетів і об'єкт застосування у великих корпораціях у всьому світі.*

Мета *статті – описати та порівняти деякі основні проблеми корпоративної реорганізації, пояснити різницю між термінами «реструктуризація» та*

«реорганізація», вивчити переваги та недоліки кожного типу реорганізації відповідно до законодавства різних країни та окреслити найважливіші угоди M&A в Україні протягом останніх років.

Матеріали та методи. *У статті автор розглядає найважливіші етапи реорганізації компанії, її напрями та типи для того, щоб, використовуючи порівняльний метод дослідження, проаналізувати основні принципи реорганізації компаній у різних країнах та, використовуючи міждисциплінарний метод дослідження, зрозуміти вплив правових принципів і правил на процес реорганізації в економіці.*

Результати дослідження. *Корпорації реорганізуються з різних причин і численними способами. Причиною, як правило, є збільшення прибутку та підвищення ефективності. З організаційно-економічної точки зору реорганізація можлива лише тоді, коли акціонери придбаної або реорганізованої компанії готові продовжувати володіти часткою власного капіталу на об'єднаному або знову створеному підприємстві. Від цього також залежить тип реорганізації, який обирається. У цій статті розглядаються типи реорганізацій, які стосуються цілей оподаткування та підтримуються законодавством США, країн ЄС та України.*

Висновки. *У теорії корпоративних фінансів максимізація акціонерної вартості вважається основним прагненням будь-яких організаційно-фінансових перетворень, які компанія переживає, тому важливо, щоб будь-який із обраних типів реорганізації відповідав вимогам компанії. Різні альтернативні варіанти корпоративної реорганізації, запропоновані іноземними законодавчими системами, які були розглянуті в цій статті, широко використовуються в корпоративному управлінні на різних іноземних підприємствах. Розширення національного законодавства у цьому аспекті також дозволило б застосувати корпоративні реорганізації в нашій країні у більш широкому масштабі. Тому ми вважаємо важливим описати та порівняти основні питання корпоративної реорганізації, вивчаючи переваги та недоліки кожного типу реорганізації відповідно до законодавства різних країн.*

Коли головним пріоритетом є життєздатність існуючого бізнесу, яка досягається шляхом реорганізації, злиття або поділу, необхідно подумати про українські норми в цивільному та господарському праві, які зроблять злиття, придбання чи поділ більш транспарентними і забезпечать відповідні податкові умови таких перетворень.

Ключові слова: реорганізація підприємств, злиття, поділ, оподаткування, типи реорганізацій.