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CORPORATE AGREEMENTS IN THE MECHANISM OF REALIZATION OF CORPORATE RIGHTS OF PARTICIPANTS OF LEGAL ENTITIES OF CORPORATE TYPE

Formulation of the problem. The trend of changes in the field of entrepreneurship in recent years is the active modernization of Ukraine's economy on the basis of innovation and investment model, which in turn causes constant complication of internal corporate relations between participants (founders) of corporate legal entities. Necessary conditions for the functioning of such legal entities are the existence of a full legal framework, ensuring effective and timely protection of the rights and legitimate interests of participants in corporate relations. In this regard, there is an objective need to develop and legislate modern mechanisms that could ensure the regulation of corporate organizational and managerial relations in accordance with economic realities, coordinated exercise of corporate rights by corporate legal entities and resolution of various corporate conflicts. One of the key elements of such a mechanism is a corporate agreement.

Such scientists as Z. A. Bereziy, O. A. Belyanevych, V. A. Vasylieva, V. V. Vasylieva, I. V. Venediktova, O. I. Vyhovskyi, O. M. Vinnyk, A.A. Hlushetskyi, A. B. Hryniak, O. V. Dzera, A. S. Dovhert, V. I. Zhabskyi, Yu. M. Zhornokui, Yu. O. Zaika, I. R. Kalaur, O. R. Kibenko, V. M. Kravchuk, A. V. Kostruba, N. S. Kuznetsova, V. V. Luts, R. A. Maidanyk, I. B. Sarakun, L. V. Sishchuk, R. O. Stefanchuk, S. V. Tomchyshen, V. I. Tsikalo and others explore the problems of legal regulation of relations in the sphere of conclusion of corporate agreements. At the same time, it should be noted that the doctrine today does not have a unified approach to determining the legal nature and purpose of a corporate agreement that necessitates further research on these issues.

Presenting of main material. In general, it should be noted that the world practice of applying corporate agreements in the field of streamlining corporate relations has a much longer history than the Ukrainian one. As indicated in the literature, in other countries corporate agreements have not only been institutionalized for a long time, but also actively used in business practice. Thus, corporate governance in 31% of public companies in Belgium

was structured through corporate agreements, in Italy - 23%, in France - 18%, in Spain - 13%, in Greece - 6%, in Lithuania - 21%, in Brazil - 25%, in Great Britain - 5% [1, p. 171].

Regarding the foreign experience of legal regulation of relations related to the conclusion of corporate agreements, it should be noted that the legislative approaches to this issue are quite diverse. For example, in the United Kingdom, the Companies Act 2006 is a regulatory act governing shareholder agreements. According to the provisions of this law, a shareholder's agreement is an agreement concluded either only between shareholders (all or some of them) or between a company and shareholders (all or some of them) [2]. In accordance with the provisions of British law, the shareholder agreement may provide conditions for contributions, corporate governance and voting procedures on certain issues, disposal of shares, as well as the resolution of disputes between shareholders [3, p. 124].

According to the provisions of the Swiss Mandatory Law, a shareholder agreement is an agreement between two or more shareholders that regulates the exercise of voting rights and sets restrictions on the alienation of shares, as well as the acceptance of additional obligations by shareholders in the interests of the company. [4, with. 65].

In Germany, the possibility of concluding corporate agreements is due to the general principle of freedom of contract, but in the context of determining the content of the contract, this principle is subject to certain restrictions. Thus, § 136 of the German Joint Stock Companies Act prohibits the conclusion of shareholder agreements that oblige the parties to vote in a certain manner on the instructions of the board or supervisory board [5].

As can be seen from the above, foreign legislators have a slightly different approach to resolving issues related to the conclusion of corporate agreements in their countries, but it should be noted that in most European countries the position of defining a corporate agreement as an agreement between shareholders concerning realization of corporate rights by them is a dominant one.

With regard to domestic legislation in the field of legal regulation of relations on the conclusion of corporate agreements, it should be noted that the institution of corporate agreements in Ukraine received its normative enshrinement quite recently, but not at the level of the Civil Code of Ukraine, but at the level of specialized laws. Thus, on March 23, 2017, the Verkhovna Rada of Ukraine adopted the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Concerning Corporate Agreements", which entered into force on February 18, 2018 [6]. Due to the adoption of this

Law, participants of corporate legal entities have received the opportunity to enter into corporate agreements in order to regulate their joint activities in the field of the governance of corporation, including influencing key issues of its activities. Thus, the Law of Ukraine «On Business Associations» was supplemented by Art. 511 which defines the concept of the agreement on the implementation of the rights of participants (founders) of a limited liability company. In accordance with the provisions of this article, the agreement on the implementation of the rights of participants (founders) of a limited liability company is an agreement on the peculiarities of the implementation of the rights of participants (founders) of a limited liability company. Under the agreement on the implementation of the rights of participants (founders) of a limited liability company, its parties undertake to exercise in the manner prescribed by such agreement, the rights granted to participants (founders) of the limited liability company and / or refrain from exercising these rights.

A similar concept of a corporate agreement was enshrined in Art. 7 of the Law of Ukraine «On Limited and Additional Liability Companies», which was also adopted in the process of corporate governance reform in 2018 [7]. According to this article, the agreement under which the members of the company undertake to exercise their rights and powers in a certain way or refrain from their implementation (corporate agreement) is free of charge and is made in writing. In addition, members of joint stock companies also have the right to regulate their corporate relations by concluding corporate agreements. Thus, Art. 261 of the Law of Ukraine «On Joint Stock Companies» establishes the concept of agreement between shareholders of the company as a contract, the subject of which is the realization of shareholders - holders of ordinary and preferred shares of shares and / or rights to shares provided by law, charter and other internal documents [8].

In general, it should be noted that the importance of legislative consolidation of the concept of corporate agreement for both the science of corporate law and for the activities of corporations is quite difficult to overestimate. After all, with the adoption of the Law of Ukraine «On Amendments to Certain Legislative Acts of Ukraine on Corporate Agreements» the final point in the long-term discussion on the legality of concluding corporate agreements has been set. Not to mention that participants of corporate legal entities have the opportunity to regulate their internal corporate relations in such a way as to make the management of the corporation as effective as possible and protect their corporate rights, in compliance with the requirements of current legislation. In this aspect, the two main functions of the corporate agreement -

regulatory and protective, the features of which are primarily due to the subject of the corporate agreement.

In this regard, it is appropriate to cite the opinion of O. O. Krasavchykov, who pointed out that the subject of the contract as its essential condition is what its regulatory function is aimed at. Since the contract defines a particular model of behavior of the parties, the condition of its subject is a «fragment of the general contractual program» behavior of the parties after the contract enters into force []. Thus, the subject of the corporate agreement determines the specifics of the regulatory function of the agreement, because it outlines the range of issues on which the parties to the corporate agreement can coordinate and mutually agree on joint activities in the field of corporate rights.

The attempt of the Ukrainian legislator to define the subject of the corporate agreement is positive, although it is rather vague. Thus, the analysis of the provisions of Art. 511 of the Law of Ukraine «On Business Associations», Art. 7 of the Law of Ukraine «On Limited and Additional Liability Companies», Art. 261 of the Law of Ukraine «On Joint Stock Companies» allows us to conclude that the subject of the corporate agreement is the implementation of corporate rights in the manner prescribed by the agreement or refrain from exercising these rights. In these articles we find the specification of ways to implement corporate rights as the subject of a corporate agreement. For example, Art. 511 of the Law of Ukraine «On Business Associations» states that the agreement on the implementation of the rights of participants (founders) of a limited liability company may provide for the obligation of its parties to vote in the manner prescribed by such agreement at the general meeting of participants (founders) limited liability company, to agree on the acquisition or alienation of shares at a predetermined price and / or in case of occurrence of circumstances specified in the contract to refrain from alienation of shares until the occurrence of circumstances specified in the agreement, as well as to perform other actions related to management, termination or allocation from it a new legal entity. The agreement on the implementation of the rights of participants (founders) of a limited liability company may provide conditions or procedure for determining the conditions under which the participant - a party to the agreement - is entitled or obliged to buy or sell shares in the authorized capital, and determine when such right or obligation arises.

At the same time, the way this legislative provision is formulated shows that the legislator has a dispositive approach to defining issues that can be regulated by a corporate agreement, allowing participants of corporate legal entities to regulate intra-corporate relations between them in the process of exercising their corporate rights. The same is said by V. A. Vasylieva, who

quite rightly notes that the subject of corporate agreements may be a certain redistribution of organizational rights, for which there is no mandatory regulation. Under such an agreement, the parties agree on the period and limits of the exercise of subjective rights of the owner of corporate rights. In addition, the content of this agreement may consist in the possibility of participants of a corporate legal entity to redistribute organizational rights among themselves. It is also worth noting that in order to comply with the terms of the corporate agreement the parties have the right to perform actions of a legal and factual nature, some of which cause certain civil consequences. For example, voting on the conclusion of a significant transaction [10, p. 27].

Indeed, despite the significant number of mandatory rules in corporate law, the advantage in the legal regulation of internal corporate relations between members of the corporation should be given to the dispositive method. Providing corporate legal entities with the opportunity to independently determine their behavior patterns, in particular, in the implementation of their corporate rights, first, will significantly reduce the level of state intervention in the field of corporate relations, where its participation is inappropriate, and secondly, will allow legal persons of the corporate type to exercise as effectively as possible the powers that constitute the content of corporate rights, taking into account their corporate interests, and, thirdly, to fill the gaps in the legislation.

In practice, the conclusion of a corporate agreement is a clear manifestation of the principle of dispositiveness, including freedom of contract, when participants of a corporate legal entity independently choose those models of behavior to exercise their corporate rights, which, in their opinion, are most effective for the satisfaction of corporate interests. At the same time during implementing the principle of dispositiveness it's necessary to adhere to the limits established by imperative corporate norms.

Examining the legal nature of corporate agreements, it is impossible not to mention another no less important feature, which determines the high level of conclusion of this type of agreement among the participants of corporations, namely the focus on the protection of corporate rights. In this regard, O. V. Bihniak quite rightly notes that the corporate agreement should be considered as one of the tools that can be used in the application of internal corporate protection mechanisms: at the general meeting, the supervisory board, the executive body, because these bodies relate to corporate governance. In this case, the question arises, what exactly allows us to consider the corporate agreement from the standpoint of protection of corporate rights. First, the right to enter into a corporate agreement is provided by law, which allows through corporate control to fix the contract algorithm of actions for protection in case

of violations. Secondly, with the help of a corporate agreement it is possible to resolve corporate conflicts, for example in situations when any decision by the general meeting or the supervisory board is impossible due to differences in positions of participants / shareholders with the same number of votes (50/50). This is a caveat in the agreement called «deadlock provision», which provides for the resolution of disputes on key issues of corporate governance and which is based on the principle of non-destruction of the entity only because the partners cannot agree on a problem. Therefore, the clearly defined conditions of «deadlock provision» are a means of protection at the stage of pre-trial settlement of the dispute with the use of alternative forms of protection. Third, being an internal agreement of a legal entity and having an organizational and legal component, a corporate agreement is a synergy of conditions regarding corporate governance and protection of corporate rights [11, p. 191-192].

A similar opinion is expressed by Yu. M. Zhornokui, who notes that the shareholder agreement has a protective function. Shareholders who have entered into an agreement have the opportunity to protect the company from unfriendly takeovers by competitors or abuse by members of the company's bodies, to prevent erosion of share capital or the emergence of unwanted shareholders, such as competitors or foreign individuals and legal entities. The protective function of the joint-stock contract is a kind of continuation of the protective effect of the law as a whole. The contract itself becomes a means of this influence, which is manifested in its focus on protecting the legitimate (economic, political, personal and other) interests of the parties (shareholders) and their ability to prevent corporate conflicts at least between its parties [12, p. 362].

Agreeing with the stated position, it should be noted that it applies not only to the conclusion of shareholder agreements, but also to other types of corporate agreements. It is seen that the characteristic feature of protection of corporate rights through the conclusion of a corporate agreement is that on the one hand it is carried out jointly and in agreement with all parties to the corporate agreement - members of the corporation for implementation of the corporate governance model, and on the other - by each party of the contract independently by the fulfillment of contractual obligations, for example, by voting at the general meeting, purchase or sale of a share in the authorized capital of the corporation, etc. From this we can conclude that the protection of corporate rights through a corporate agreement contains elements of self-defense, which are specified in Art. 19 of the Civil Code of Ukraine, such as: independence and initiative, orientation at protecting own rights and the rights

of others from violations and unlawful encroachments, preventing possible violations of corporate law.

In this regard, it is advisable to cite the opinion of V. V. Luts that in the implementation of self-defense of corporate rights and interests the actions of shareholder (participant, founder) are aimed at protecting not only their own corporate rights but also corporate rights and interests of other participants in corporate disputes, preventing other forms of illegal behavior in corporate legal relations [13, p. 80]. Yu. M. Zhornokuy holds a similar opinion, according to which the peculiarity of the mechanisms of self-protection of corporate rights is that they become most effective when implemented collectively, by uniting with other interested members of society [14, p. 148].

Thus, we can conclude that the coordinated and coordinated implementation by the participants of the legal entity of their corporate rights in the process of fulfilling the terms of the corporate agreement is by its nature a manifestation of self-defense of corporate rights, which is carried out to prevent violations of each interests of a group of members of the corporation in the process of corporate governance.

Conclusions

Summarizing the above, it should be noted that the conclusion of a corporate agreement is aimed at creating a general universal model of behavior, specific to an individual corporation in a certain period of time and in relation to a certain composition of participants. The key aspect in determining the subject of the corporate agreement is outlining and agreeing on the future behavior of the participants of the corporation, which are parties to the agreement, in the process of corporate governance. In addition to the regulatory function inherent in all civil law agreements, the corporate agreement performs a protective function, which is manifested in the fact that the corporate agreements are aimed both at preventing violations of the rights of each party to the agreement and at the protection of interests of a group of members of the corporation who have entered into a corporate agreement, in order to implement a certain model of corporate governance and prevent corporate conflicts.

1. *Andreev V.K., Laptsev V.A. Corporate law of modern Russia: a monograph. 2nd ed., Moscow: Prospect, 2017. 352 p.*
2. *Companies Act 2006. URL: <http://www.legislation.gov.uk/ukpga/2006/46/contents>.*
3. *Thomas K. R., Ryan C. The Law and Practice of Shareholders' Agreements. London, 2007. URL: <http://www.isbnplus.com/9780406982520>.*
4. *Doronin Yu. A. Contract on the order of realization of the rights of participants of economic societies. Journal of Russian law. 2009. № 10. P. 63- 68.*

5. Roth M. *Shareholders' Agreements in Listed Companies: Germany* // *Social Science Research Network*. URL: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2234348.
6. *The Law of Ukraine «On Amendments to Certain Legislative Acts of Ukraine Regarding Corporate Contracts dated 23.03.2017*. URL: <http://zakon.rada.gov.ua/laws/show/1984-19>
7. *The Law of Ukraine «On limited and additional liability companies» dated 06.02.2018*. URL: <https://zakon.rada.gov.ua/laws/show/2275-19#Text>
8. *The Law of Ukraine «On joint stock companies» dated 17.09.2008*. URL: <https://zakon.rada.gov.ua/laws/show/514-17#Text>
9. Krasavchikov O. A. *Civil legal contract: concept, content and functions. Interuniversity collection of scientific works, ed. L. A. Gupalo. Sverdlovsk, UrgU, 1980. P. 11.*
10. Vasylieva V. A. *Corporate transactions: concepts and features. Problems of protection of the rights of subjects of corporate legal relations: Proceedings of the International scientific-practical conference dedicated to the 10th anniversary of the Laboratory for the study of corporate law of the Research Institute of Private Law and Entrepreneurship of National Academy of Legal Sciences of Ukraine (September 23 - 24, 2011). Ivano-Frankivsk: Vasyl Stefanyk Precarpathian National University, 2012. P. 25-28.*
11. Bihniak O. V. *Protection of corporate rights: problems of theory and practice: monograph. Odessa: Legal literature, 2018. 408 p.*
12. Zhornokuy Yu. M. *Civil-legal nature of corporate conflicts in joint-stock companies: dis. for Dr. of Legal Sciences: 12.00.03; Kharkiv, 2016. 476 p.*
13. *Implementation and protection of corporate rights in Ukraine (civil and legal aspects): monograph / Ed. by V. V. Luts. Ternopil, Textbooks and manuals, 2007. 320 p.*
14. Zhornokuy Yu. M. *General provisions on protection of non-property rights of participants of business associations. Law and innovation. 2015. № 1. pp. 148–153.*

Syhydyn M.M. Corporate agreements in the mechanism of realization of corporate rights of participants of legal entities of corporate type

The article is devoted to the study of the role of the corporate agreement in the mechanism of realization of corporate rights of participants of legal entities of corporate type. It is noted that the world practice of applying corporate agreements in the field of corporate law has a much longer history than the Ukrainian one. It is established that the institute of corporate agreement in Ukraine received its normative consolidation together with the adoption on March 23, 2017 of the Law of Ukraine «On Amendments to Certain Legislative Acts of Ukraine Concerning Corporate

Agreements». The legislative approach to defining the concept and subject of a corporate agreement is analyzed. It is concluded that the legislator has a dispositive approach to determining issues that can be regulated by a corporate agreement, giving participants in corporate legal entities the opportunity to regulate internal corporate relations at their discretion. It is established that the characteristic feature of protection of corporate rights by concluding a corporate agreement is that on the one hand it is carried out jointly and in agreement with all parties to the corporate agreement - members of the corporation to implement the corporate governance model, and on the other - by each party on contractual obligations. That is, the protection of corporate rights through a corporate agreement contains elements of self-defense, which are specified in Art. 19 of the Civil Code of Ukraine.

Key words: a corporate agreement, corporate rights, legal entity of corporate type, shareholder, limited liability company, joint stock company.