Науково-дослідний інститут приватного права
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Навчально-науковий юридичний інститут
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Законодавство про акціонерні товариства: новації та перспективи

ЗБІРНИК НАУКОВИХ ПРАЦЬ
за матеріалами
XVIII Міжнародної науково-
практичної конференції

23 жовтня 2020 року

Київ - Івано-Франківськ, 2020

УДК 347(477)(082)
ББК 67.9 (4Укр)404я43
К68

Рекомендовано до друку Вченою Радою Науково-дослідного інституту приватного права і підприємництва імені академіка Ф.Г.Бурчака НАПрН України (протокол № 9 від 30.09.2020 року)

К68 Законодавство про акціонерні товариства: новації та перспективи [текст]: *Збірник наукових праць за матеріалами XVIII Міжнародної науково-практичної конференції (23 жовтня 2020 року, м. Івано-Франківськ)* / НДІ приватного права і підприємництва імені акад. Ф. Г. Бурчака НАПрН України; за ред. д-ра юрид. наук, акад. НАПрН України В.В.Луця. Київ - Івано-Франківськ, 2020. 143 с.

ISBN 978-617-7087-87-7

У збірник включені тези наукових доповідей учасників Міжнародної науково-практичної конференції, організованої Лабораторією проблем корпоративного права Науково-дослідного інституту приватного права і підприємництва імені академіка Ф. Г. Бурчака НАПрН України спільно з навчально-науковим юридичним інститутом ДВНЗ «Прикарпатський національний університет імені Василя Стефаника» та проведеною у м. Івано-Франківську 23 жовтня 2020 року. У тезах доповідей висвітлюються результати наукових досліджень порівняльно-правової характеристики корпоративного права України та інших європейських країн, а також проблемні аспекти адаптації законодавства України до європейського права.

Для студентів, слухачів, курсантів юридичних факультетів, науковців, практичних працівників та всіх зацікавлених осіб.

ISBN 978-617-7087-87-7

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THEORETICAL ASPECTS OF CIVIL LIABILITY OF OFFICERS OF BODY CORPORATE MANAGEMENT

The legal personality of a legal entity is embodied in the activities of its management bodies, the purpose of which is to strive to achieve the results of business activities and meet other interests of the legal entity, its participants (founders). However, in the process of interaction between the management bodies of a legal entity, situations arise when the participants in such interaction pursue different or mutually exclusive goals, which is due to the polar desire to secure corporate interests, which leads to a corporate conflict.

According to Yu. V. Zhornokuy, under the conditions of non-transparency of the majority of domestic joint-stock companies, their main advantages are implemented through current management and decision-making, largely through shadow schemes involving officials of the corporate governance body. Under such circumstances, it is easy to underestimate the profit or even harm the legal entity. Therefore, for a shareholder who has received the appropriate corporate rights, but does not have a real opportunity not only to influence, but also to control management decisions, investments are risky.

At the turn of the XX - XXI centuries, the legislation of Eastern European countries has increased the trend towards convergence of the national legal system with the legal systems of other countries. An important factor in effective cooperation in the international

economic sphere is an effective mechanism for protecting participants in corporate legal relations, which is achieved by introducing stable global legal practices into the national legislative space.

One of these is the construction of the legal liability of officials of the corporate governance body for the harm caused by their actions in the relevant area.

In Ukraine, the regulatory implementation of this legal structure is associated with the spread of threats to the stability of the banking system, such as the implementation of risky operations by banks (excessive lending to persons associated with the bank).

The study of this institution requires terminological certainty of the concept of corporate governance, which has more economic content than legal. Moving in this direction, it should be recognized that its formula is that the subject of such management is the one who ensures the legal personality of the legal entity, which is revealed in its known features.

Consequently, the corporate governance system consists of the management bodies of the legal entity, which ensure its organizational unity and participation of the legal entity in civil turnover on its own behalf. Such bodies are the Supreme management body - the corporate rule-making body (general meeting of participants (shareholders) and the executive management body – the management board, the directorate (director).

Today, there are five main models of corporate governance that are based on historical, cultural, and industry-specific factors. (Anglo-American, German, Japanese, Soviet, and post-Soviet). It is considered that these models of corporate governance have a territorial context of financial capital concentration. The development of each of them received not only a theoretical basis, but also a practical scope of its application. Despite this, the principle of building the corporate governance structure of a legal entity remains a factor of their unity.

Due to the differentiated nature of corporate governance and the multidimensional nature of its legal personality, the scope of authority to manage a corporation cannot be concentrated within the authority of a single entity.

This variation in the competence of corporate governance bodies of a legal entity provides for differentiation of the level of legal

responsibility of their subjects. Its criterion is the content of the activities of the relevant body in relation to ensuring the legal personality of a legal entity, through the implementation of such features as the latter's structural unity and participation in civil turnover on its own behalf, which provides for the presence of administrative, economic and organizational and administrative components.

From the above, the scope of legal responsibility includes subjects of corporate governance, whose competence includes the exercise of their executive powers. These are the officials of the executive body of corporate governance of a legal entity.

This logic, in one form or another, is contained in the Law of Ukraine «On joint stock companies», the article 63 of which establishes the responsibility of officials of joint stock company for losses caused to the company by their actions (or inaction), and further in article 89 of the commercial code of Ukraine, establishing responsibility of officials for damages caused by other than joint stock companies acts done with excess or abuse of power, actions, committed in violation of the procedure for their preliminary approval or other decision-making procedure, and so on.

The studied aspect of the issue establishes the general conditions of legal responsibility of corporate governance officials. As of today, the doctrinal definition and normative provision in the legislation is that such conditions are the unity of the subjective and objective elements of the tort, which in our opinion is not justified.

The granting of administrative, economic, organizational and administrative powers to the officials of the corporate governance body of a legal entity to manage it and the property belonging to it forms the fiduciary nature of such relations.

In turn, fiduciary relations between a legal entity, its founders (shareholders) and officials of the relevant corporate governance body form a different legal model of interaction between them. Confidence in the integrity and goodwill of the party with whom the principal is in a relationship based on his trust does not imply that he expects irrational behavior of the attorney.

Because the fiducia between participants of these relations creates higher risks of abuse, it is correct, in our opinion, to establish legal factors of not only reasonable compensation to the injured party,

which is the institute of compensation of harm as such, but also to establish the prevention of abuse, other types of malevolent behavior increased the legal liability of officers of body corporate legal entity management by exception guilt as a condition of responsibility. In this method, the existing disparity in the legal capabilities of participants in the studied trust relationships is balanced, one of which is in a legally weak state.

It should be noted that these ideas of the rights of the weak side are formed in the doctrine of the law in the early twentieth century in the works of J. S. Hambarov. Therefore attempt to justify the existence of «innocent responsibility» and the distribution of limits on corporate relations makes sense and has a clear legal tradition.

In the opinion of Joffe A. S. the obligation to compensate the damage that was caused without fault, has a stimulating effect on such person – mobilizes this person to look for and introduce into the sphere the new funds contributing to if not solve, mitigate or reduce the manifestations of that force majeure. In other words, such a duty is related to influencing the consciousness and will of the person who caused the harm, so it is a responsibility.

Thus, the principle of civil liability regardless of the fault of the delinquent becomes a reasonable balance in ensuring the interests of the legal entity and the implementation of the professional competence of the corporate governance body and its officials.

Thus, the basis of professional competence of an official of the corporate governance body of a legal entity is the objective compliance of its actions and decisions with the business standard. The level of such competence should allow this person not only to prevent them from committing actions or making decisions that may cause harm, but also to predict the possible negative consequences of their own professional activities. In turn, establishing the responsibility of an official, regardless of his guilt, only increases the requirements of care and attention that are imposed on him.

The following conclusions can be seen from the above.

First, the significance of the fault of an official of a corporate governance body is leveled by the obligation of the necessary level of competence, which not only presupposes the predictability of possible negative consequences of this person's activities in the field

of corporate governance, but also requires their prejudice. It is obvious that the responsibility of a person for the occurrence of such negative consequences is the result of professional incompetence, that is, guilt.

Therefore, guilt as a subjective attitude of a person to actions that are committed by it in the field of corporate governance, their consequences are absorbed by the possibility of not only prejudice, but also foreseeing possible negative phenomena due to the proper level of professional competence of the person.

It should be noted that the science of financial management has developed methods for managing financial risks, the main importance of which is the functioning of appropriate mechanisms to minimize their negative consequences, including limited risk concentration, hedging, diversification, risk avoidance, risk distribution, and so on.

Such a characteristic feature of risk as a manifestation of an uneven assessment of this objective phenomenon implies the presence of a level of management qualification and the ability to predict its occurrence and neutralize the negative consequences associated with its identification, assessment, prevention and insurance.

Thus, an important feature of the activity of officials of the corporate governance body of a legal entity is the awareness of accepting the risks of their activities and managing them. In the above case, on the one hand protection of the rights, interests and legitimate expectations of parties to corporate legal relations, including legal entities increases, and on the other hand, to objectivists threshold standards of integrity of civil servants of the corporate governance requirements of their professional competence increase. Through the principle of «innocent (objective) responsibility» of officials of the corporate governance body for harm caused when making and implementing management decisions, the rights, interests, and legitimate expectations are filled with real content.

Under the above conditions, the reason for the release of such an official from responsibility is only a case (causa), that is, a circumstance that the person was not able to foresee by taking appropriate measures of his professional care, which are required of him under specific conditions.

Наукове видання

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В редакції авторів наукових статей
Комп'ютерна верстка: Ігор КОЗИЧ
Правка: Вікторія ВАСИЛЬЄВА

Підписано до друку 15.10.20 Формат 60x84/16. Папір офсетний. ум.друк.арк. 18,5 Наклад 300 прим.
Зам. №2/20-21.
Віддруковано в навчально-науковому юридичному інституті ДВНЗ «Прикарпатський національний університет
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