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UKRAINIAN LEGISLATION ADAPTATION IN SPHERE OF JOINT-COMPANIES REGULATION ACCORDING TO RULES OF EUROPEAN LAW

It is revealed problems and gaps in legislation of Ukraine of joint-companies regulation. The article investigates Directives of European Union on specified topics, as well as suggestions for improving legislation.

Key words: *law, joint-stock companies, adaptation of legislation, European Union, management of company, gaps in law, non-compliance legislation.*

Розкриті проблемні питання та прогалини законодавства України у сфері діяльності акціонерних товариств. Досліджені директиви Європейського Союзу щодо вказаної теми, а також пропозиції щодо вдосконалення законодавства.

Ключові слова: *право, акціонерні товариства, адаптація законодавства, право Європейського Союзу, управління товариством, прогалини у праві, невідповідність законодавства.*

Раскрыты проблемные вопросы и пробелы законодательства Украины в сфере деятельности акционерных обществ. Исследованы директивы Европейского Союза по указанной теме, а также предложения по совершенствованию законодательства.

Ключевые слова: *право, акционерные общества, адаптация законодательства, право Европейского Союза, управление обществом, пробелы в праве, несоответствие законодательства.*

Introduction. According to association between Ukraine and European Union, distinguishing importance of effective rules and methods using in legislative spheres of company founding and activity, corporate governance aimed full-fledged market economics creation, first side took on a duty to approximate its company founding and activity legislation, corporate governance to Rights of European Union [6, p. 200] Although, it is considered that Ukrainian legislation adaptation during its approximation to acquis communautaire should have wider and more reachable aims than only mechanical performance of conditions for joining EU member. Defining priorities in adaptation sphere it should also be oriented to recommendations of White Paper on preparation of associated countries of Central and Eastern Europe for integration into internal market of Union, which shares corporate acts of European Union legislation into three groups: which should be made in first stage of approximation (First and Second Directive), in second stage (Third, Eleventh and Twelfth Directives, EUEI Regulations) and not related to implementation of key approximation (Sixth Directive). The subject of article was researched by A. Wedin, K. Belikova, A. Inshakova, O. Kalinina, O. Kibenko and other scientists.

Aim of article is to examine problem issues and find gaps of legislation in sphere of joint-companies regulation as well as to compare norms of European directives with laws of Ukraine and propose ways of adaptation of legislation.

Limiting grounds recognizing company invalid. The first corporate directive 68/151/EU extends its effect on economic partnerships (joint stock companies, limited liability companies, share limited partnerships) as legislation harmonization of such kind of companies is urgent need, since their activity often goes beyond one country-member. There were included especially provisions concerning control over company creation into transparency Directive [10, p. 114].

The legislation of Ukraine does not take into account provisions of Art. 11 of Directive 68/151/ EU. The second part of Art. 38 of Ukrainian Law «On state registration of legal entities and persons-entrepreneurs» provides additional grounds of state recognition to invalid registration compared with those above in Directive. According to formal grounds company can be declared invalid if:

1. There is no constituent act or requirements for prior control over company creation, established by state, were underexposed.

2. The trade name, contributions, amount of share capital or company subject of activity are not listed in founding treaty or statute.

These two formal grounds are complemented by four material:

1. The actual object of company activity is illegal or violates public policy.

2. The national rules of making minimum contributions to charter capital of company are underexposed.

3. All company founders were incapacitated.

4. Despite national regulations, company was founded less than two founders [10, p. 115].

The invalidity shall entail termination of company activity, including its liquidation. Thus, the invalidity applies only to future time. The invalidity itself does not affect validity of any obligation undertaken by company to third parties or liabilities of third parties to company.

The grounds list of invalidity provided in Art. 11 is exhaustive, that company may be recognized as invalid only in cases mentioned in this article. In other cases company for any reason cannot be declared void, invalid or non-existent. The list of invalidity circumstances can only be reduced, but not extended by country-members.

The need to ensure rights of major investors. According to ch. 1, Art. 65 Ukrainian Law «On joint-stock companies» Person (and its affiliates acting jointly) who own shares based on their number, has become majority shareholder of company, within 20 days from date of purchase is obligated to offer to all shareholders of common shares company to purchase their shares, except buying of a majority stake in privatization process, at a price not less than market price. The legislation of many countries contains similar regulations aimed at protecting interests of minority shareholders. However, foreign law unlike domestic balances interests of small and large shareholders and provides usually not only right of minority shareholders to demand from large investors compulsory acquisition of their shares, but also right of a large investor in certain cases require minority shareholders forced sale of their shares. This is perfectly legal method of resolving conflict between majority shareholders and minority shareholders.

Addressing this issue is a step towards implementation of EU legislation on stock market, in particular Directive 2004/25/EU of European Parliament and Council of Europe on 21.04.2004 on absorption proposals. This Directive provides two mechanisms of protecting interests of shareholders:

1. Sell-out procedure − right of a shareholder who owns remaining shares demand from shareholder owning at least 90 percent of joint-stock company shares to buy remaining shares at a fair price.

As shows international experience possibility of predicting several thresholds for application of mandatory redemption law (sell-out) at a shares fair price of minority shareholders, it is reasonable prediction of Ukrainian Law «On Joint Stock Companies» implementation analogous predicted by Art. 65 sell-out when purchasing controlling stake in company bound to implement these actions as in acquisition of shares of more than 75 percent of shares as an additional inter-

mediate link between size of package, which entitles squeeze-out, which is determined at rate of 95%, and existing in Ukrainian Law «On joint-stock companies» right to sell-out, at rate of 50%.

2. Squeeze-out procedure − the right of a shareholder owning at least 90 percent of company share capital to require other shareholders of a joint stock company to sell him their shares at a fair price; Thus, problem of interests parity consideration of owners of large blocks of shares and minority shareholders by requiring sale of shares in legislation of many countries largely solved by use of rights to squeeze-out. In this case, majority shareholders when they reach a certain percentage of shares (from 90% to 98%) acquire right to demand from other shareholders sell their shares [4, p. 1]. Thus buying and selling shares is carried at fair value. It should be noted that in case of acquisition of certain shareholder stake (90 percent) of minority shareholders are completely excluded from processes that affect operation of company and decision making at meeting. In addition, concentration in hands of shareholder's major stakes liquidity of minority interest may be reduced, and minorities will be difficult to realize their shares at a favorable price at a public market. This will contribute to more effective corporate governance of company.

Issues of company reorganization. During joint-stock company reorganization following must be ensured:

1. The balance of succession between reorganization parties.
2. Joint-stock company shareholders' interests protection.
3. Creditors' interests protection.

Third Directive 78/855/ EC is dedicated to regulation of relations arising in connection with corporations mergers and acquisitions that have same nationality that regulates only reorganization that has national character. The provisions of Directive are partly reflected in legislation of Ukraine. For example, Third Directive sets out legal consequences of restructuring (they come from its entry into force): all rights and obligations of company-predecessor transfer to company-successor; shareholders of a company-predecessor are considered shareholders of company-successor; company-predecessor is considered non-existing as reflected in Art. 107 Civil Code of Ukraine.

As for individual rights of shareholders, following provisions of Third Directive are not reflected in legislation of Ukraine:

1. Art. 11 on possibility of acquaintance shareholders, not later than 1 month before date of general meeting on adoption of decision to merge, with such documents as: agreement on merging, annual accounts of company for last 3 financial years, bookkeeping conclusion, executive reports, expert conclusions;

2. Art. 15 on guarantee unprivileged shares holders same rights in newly created company as they had in company before merging [3, p. 25].

The provisions of Twelfth Directive № 2005/56 / EU are also not included in legislation:

1. The provisions of Art. 5 of Directive on details that must appear in contract of merger submitted executives for approval by General Meeting.

2. The provisions of paragraph 2 of Art. 7 of Directive on right of participants and employees of company to acquaint themselves with merger agreement not later than one month before date of general meeting.

3. The provisions of paragraph 1 of Art. 8 of Directive concerning terms of preparation and publication of auditor's report on merger for each of companies participating in cross-border merger.

4. The provisions of Art. 16 of Directive on workers participation and protection of their rights after approval of merger and creation of a new company.

5. The provisions of Art. 8 of Directive on auditor's report for each of merging companies.

The Sixth Directive 82/891/ EEU on 17 December 1982 contains a provision that determine order of division of companies in EU. Most of provisions of Sixth Directive is outsending, and a significant amount of Third Directive provisions apply to division. However, Art. 12 of Sixth Directive contains more detailed requirements of country-members' legislation relating to creditors' rights protection in companies which are involved in division. This is because in practice interests of creditors are often violated during division of company but during reorganization by merging or joining [11, p. 372].

If we analyze rules of art. 12, we can define three different protection schemes of creditors' rights and interests, one of which may be selected for implementation into national legislation by country-member:

а) the first scheme provides creditors right to demand on company that is divided necessary guarantees of obligations which arose before date of publication of reorganization terms. The creditor may demand guarantees only if it needs financial situation of companies which take part in reorganization and if creditors do not have yet such safeguards. While creditor will not be satisfied by company, which linked directly relevant obligations, other company-successors are severally liable for such requirements. Country-members may limit liability of companies other than company-successor value of net assets acquired them as a result of reorganization. Country-members may not provide joint and several liability company-successor if division procedure is supervised by a judicial authority, and if majority of creditors represented by at least three-fourths of general debt amount or debt to each class of creditors in company which is divided decided to abandon of such solidarity at a meeting held pursuant to Art. 23 (1) of Directive [11, p. 374];

б) the second scheme is based on consolidation in domestic law provisions that successor company are jointly liable for obligations of company-predecessor. In case of including such provision into national legislation, giving to creditors companies which are reorganizing, guarantee obligations or other legal representation from country-members are not required;

в) if government uses a combined system of of protecting interests of creditors, combining right of creditors to demand guarantees and several liability of company-successors for liabilities of company which was divided responsibility of all company-successors may be limited to value of net assets transferred to them as a result of reorganization.

So protection of creditors' interests during division is halved into two stages:

а) protection before reorganization (securing right to demand from company guarantees obligations);

б) protection after reorganization (establishment of joint and several liability of company-successors).

The analysis of foregoing leads to conclusion that legislation of Ukraine on reorganization during solving some problems related to reorganization creates at same time significant barriers to effective use of this tool in business. Therefore, consideration of Directives provisions can greatly simplify regulation process of joint-stock companies restructuring.

The possibility of opening joint-stock companies or branches of companies in EU. The freedom of establishment is considered to be one of essential freedoms in establishing European internal market. Article 49 and 54 in Treaty on Functioning of European Union (TFEU) grants persons and companies right to set up establishments and pursue economic activity within Member States of European Union, articles are however complicated and Court of Justice has in many case explained how these articles are to be interpreted.

A company is free to establish itself through a primary establishment in any Member State and has right to open up secondary establishment in another Member State. This can be done regardless if this is done just take advantage of more favourable legislation in first state. The transfer of entire or parts of a company's establishment fall outside scope of freedom of establishment, then national legislation determine if transfer is allowed or not. The outcome of a transfer varies widely because of differences in national law. In some cases a company is forced to wind-up and liquidate while in other cases transfer is allowed. This shows that there is a need for harmonisation in freedom of establishment for companies [1, p. 1].

The transfer of central management and control of a company to another Member State amounts to establishment of company in that Member State because company is locating its centre of decision-making there, which constitutes genuine and effective economic activity (Case C-81/87 Daily Mail [1988] ECR 5483 §12) [9, p. 25].

The immediate consequence of this is that those companies are entitled to carry on their business in another Member State through an agency, branch or subsidiary. The location of their registered office, central administration or principal place of business serves as connecting factor

with legal system of a particular State in same way as does nationality in case of a natural person. (Case C-212/97 Centros Ltd [1999] ECR I-1459 § 20) [9, p. 26].

EU Directive specifically designed to disclosure is Eleventh Directive 89/666/ЄEC. The Eleventh Council Directive apply to branches (separate units) joint-stock companies and limited liability companies located on territory of other country-members not country-member where company was founded as well as branches of companies from third countries. This Directive provides need for registration in a single (central) Registry of separate divisions (branches) of company, if they are in territory of another country-member than main company. The opening of Ukrainian company branches in EU is possible only under conditions specified in Eleventh Directive. This applies particularly to rules that are used to financial reporting and audit of such reporting. Here company definitely will face with challenge of drawing up and out in a manner prescribed by Directive 78/660 / EEU and 83 / 349 / EEU. So possibility of opening and conducting business through a branch Ukrainian and EU enterprises depends on adaptation and application of these accounting Directives [3, p. 32].

So a characteristic feature of directive regulation of company activity in EU, in which uniform rules appear, there is an exceptional competency of national legislator in terms of means and methods choosing to achieve results determined in directives, which causes soft approach of European legislator to regulating corporate relations. [2, p. 117].

Accordingly, when deciding an issue concerning a situation which lies outside scope of Community law, national court is not required, under Community law, either to interpret its legislation in a way conforming with Community law or disapply that legislation. Where a particular provision must be disapplied in a situation covered by Community law, but that same provision could remain applicable to a situation not so covered, it is for competent body of State concerned to remove that legal uncertainty in so far as it might affect rights deriving from Community rules (Case C-264/96 ICI [1998] ECR I-0000 § 34).

However, adaptation of Ukrainian legislation to European standards of company law in directive way on publicity, transparency and financial reporting corporations and establishment of responsibility for violation lead to solution of many problems in improving of joint-stock companies regulation in general.

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