PROBLEMS OF LEGAL REGULATION OF DEFINITION OF THE NOTIONS "CORPORATE RELATIONS" AND "CORPORATE RIGHTS"

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Articolul este dedicat analizei prevederilor legilor ucrainene care conțin definiții ale noțiunilor precum „relații corporative" și „drepturi corporative", precum și prevederilor legilor, în cazul în care sunt utilizate aceste noțiuni. Articolul identifică defecte și neconcordanțe în reglementarea juridică a problemelor de mai sus și propune modalități și abordări pentru îmbunătățirea prevederilor legii.
Cuvinte cheie: relații corporative, drepturi corporative, unitate de afaceri, entitate comercială, asociație de afaceri, cotă în capitalul autorizat, dobândă de capital, transfer de drepturi corporative.

The article is dedicated to analysis of provisions of Ukrainian laws containing definitions of such notions as "corporate relations" and "corporate rights", as well as provisions of the laws, where such notions are used. The article pinpoints defects and inconsistencies in legal regulation of the above issues and proposes ways and approaches to improvement of the provisions of the law.
Keywords: corporate relations, corporate rights, business unit, business entity, business association, share in the authorized capital, equity interest, transfer of corporate rights.

Problem Statement in General

"Corporate relations" and "corporate rights" are key notions for research and efficient improvement of the laws.

In Ukraine there have been fundamental studies of the range of problems concerning corporate rights and corporate relations, and yet many issues remain uncovered, which in its turn has a negative effect on legislative regulation of relations in the corporate sphere and causes difficulties in practical terms.

The notions "corporate relations" and "corporate rights" are defined directly in the laws, in particular in the Commercial Code of Ukraine and the Law of Ukraine "Joint Stock Companies".

However, analysis of the laws currently in force shows some inconsistencies between such definitions and actual legal relations arising between business entities, and that such definitions do not cover specific features of all business units that are parties to commercial legal relations. Moreover, the notions "corporate relations" and "corporate rights" are used in the laws in varying contexts, suggesting lack of understanding of the legal nature of corporate rights.

In view of the above, improvement of definitions of the notions "corporate relations" and "corporate rights" and subsequent improvement of the laws using such notions and introduction of effective regulatory mechanisms is a dominating trend in development of contemporary market relations. That is why the above issues are relevant and shall be studied.

Setting Objectives of the Article (Task Definition)

Purpose of this article is to study formalized definitions of the notions "corporate relations" and "corporate rights" and provisions of the laws where such notions are used.

Such study will enable to identify defects in definition of the notions "corporate relations" and "corporate rights" and shortcomings in use of such notions in the laws, and to identify ways to eliminate such defects.

Object of the research are corporate legal relations and corporate rights.

Analysis of Recent Studies and Publications Laying Foundations for Solution of this Problem

Corporate relations and corporate rights have been extensively studied in legal literature. In particular, one can mention works by I. V. Spasybo-Fatieieva, S. Ya. Rabovska, Ya. S. Marushchak, A. V. Smitiukh, Yu. O. Symonian, V. M. Kravchuk, V. V. Sazonov, N. S. Butryn, S. S. Kravchenko, I. B. Sarkunova, O. A. Surzhenko, V. G. Otsel. Works by these authors contain analysis of the legal nature and special features of corporate relations and corporate rights.

However, not enough attention has been paid so far to analysis of the laws where such notions are used. And some issues regarding definition of the notions "corporate relations" and "corporate rights" require more thorough analysis, study and attention.

Presentation of Main Material of the Study and Substantiation of Scientific Results

"Corporate relations" and "corporate rights" are key notions for research and efficient improvement of the laws.

The notions "corporate relations" and "corporate rights" are directly defined in the Commercial Code of Ukraine [1] ("Commercial Code"). However, analysis of scientific literature shows that the above definitions are a source of objections and discussions on the part of the academia. Researchers have paid great attention to study of corporate relations and corporate rights, and still many issues remain controversial and unsolved.

The notions "corporate relations" and "corporate rights" are interrelated and interdependent. Correct definition of these notions is a prerequisite not only for efficiency and quality of further research and development, but also for improvement and harmonization of commercial and civil laws.

For instance, according to Part 3 of Art. 167 of the Commercial Code, corporate relations shall mean relations arising, changing and terminating with regard to corporate rights.

At the same time corporate rights are defined as rights of a person, whose share in the authorized capital (property) of a business unit is determined, and include competencies of such person to participate in management of the business unit, to receive a certain share of profits (dividends) of the business unit and assets in case of its liquidation under the law, and other competencies provided for by the laws and constituent documents (Part 3 of Art. 167 of the Commercial Code).

Similar definition of the corporate rights is given in par. 14.1.90, Part 14.1 of Art. 14 of the Tax Code of Ukraine.

Analysis of this definition proves that its scope is too narrow.

The notion of the business unit is defined in par. 1, Part 2 of Art. 55 of the Commercial Code. Business units are defined as legal entities established under the Civil Code of Ukraine, state-owned, municipal and other companies established under the above Code, and other legal entities carrying out commercial activity and incorporated in the manner provided for by the law.

In view of the above we can conclude that a holder of corporate rights may be not only a person (individual or legal entity) but also a community or the state.

Certainly, communities acquire and exercise civil rights and duties through local authorities, and the state through public authorities, but we believe that they cannot be identified as individuals or legal entities, because they are separate holders of corporate rights.

For instance, Ya. S. Marushchak interpreted corporate rights as a set of subjective property and non-property rights granted to a person owning a share in the authorized capital of a company, or shares of a joint stock company, or an equity interest in a unit trust of a production cooperative, which include the right to participate in management of the company, to receive a share of profits (dividends) and assets in case of the company's liquidation and other rights provided for by the laws and constituent documents of the company.

Analysis of this definition enables us to conclude that Ya. S. Marushchak noted that members of a production cooperative also had corporate rights, but he disregarded business units operating on the basis of constituent documents, other than articles of association.

Analysis of certain provisions of the Ukrainian laws shows that not all business units have an authorized capital, and yet their members have corporate rights.

For instance, in Part 1 of Art. 113 of the Civil Code of Ukraine [2], a legislator used the notion "authorized (contributed) capital" for definition of a business association. This is probably due to the fact that not all business associations operate on the basis of the articles of association.

According to Part 2 of Art. 87 of the Civil Code, a constituent document of a company shall mean articles of association approved by the members or a memorandum of association by and between the members, unless otherwise provided for by the law.

According to Part 1 of Art. 120 and Part 1 of Art. 134 of the Civil Code, general and limited partnerships shall be established and shall operate on the basis of the memorandum of association.

And if a limited partnership is established by one member, then the partnership's constituent document shall be a sole resolution (memorandum) (Part 3 of Art. 134 of the Civil Code).

One should note that with regard to business associations operating on the basis of the memorandum of association, the legislator uses the notion "contributed capital" and not "authorized capital" (Part 2 of Art. 120 and Part 2 of Art. 134 of the Civil Code).

Hence, the legislator applies the notion "contributed capital" to legal entities operating not on the basis of the articles of association.

At the same time, Part 4 of Art. 1 of the Law of Ukraine "Farming Business" [3] states that a farming business shall operate on the basis of a constituent document (articles of association – for a legal entity, agreement (declaration) establishing farming business – for an entity without legal personality). The constituent document stipulates, inter alia, procedure for creation of the entity's property (contributed capital).

Hence, the legislator demonstrates certain inconsistencies when using the notions "authorized capital" and "contributed capital".

During establishment of a cooperative a unit trust is created from contributions made by the founders (members) of the cooperative (Part 1 of Art. 95 of the Commercial Code, Part 1 of Art. 163 of the Civil Code, Art. 2 of the Law of Ukraine "Cooperation" [4]). Certainly, an owner of an equity interest in the unit trust of the cooperative holds corporate rights.

Corporate rights of a shareholder are defined in par. 8, Part 1 of Art. 2 of the Law of Ukraine "Joint Stock Companies" as a set of property and non-property rights of the company's shareholder arising from the shareholder's ownership of shares, which include the right to participate in management of the joint stock company, to receive dividends and assets of the joint stock company in case of its liquidation under the law and other rights and competencies provided for by the laws or constituent documents of the company.

Therefore, we may conclude that corporate rights are held not only by a person, whose share is determined in the authorized capital of a business unit, but a shareholder as well.

Here we witness a different approach, when transfer of corporate rights is associated with transfer of rights to securities in the form of shares.

As to determination of a person's share in property of a business unit, we believe that the legislator applied that pattern rather poorly. By contributing property to the authorized or contributed capital or a unit trust the founder of the business unit actually forfeits title to such property and instead receives corporate rights and determination of his/her/its share in the authorized or contributed capital or the unit trust.

Scope of corporate rights stated in the definition of the notion "corporate rights" in Art. 167 of the Commercial Code coincides with the scope of corporate rights defined in the Law of Ukraine "Joint Stock Companies".

Such scope of rights includes: 1) the person's competencies to participate in management of the business unit; 2) the person's competencies to receive a certain share of profits (dividends) of the business unit and assets in case of its liquidation under the law; and 3) other competencies provided for by the laws and constituent documents.

However, definition of the notion "corporate rights" in the Law of Ukraine "Joint Stock Companies" describes corporate rights as a set of property and non-property rights of the company's shareholder, which is clearly correct and substantiated.

For instance, when defining legal nature of the right of the business unit's member, I. V. Spasybo-Fatieieva has justly noted that such right is a comprehensive right consisting of all property and non-property rights of its holder. At the same time its non-property component can hardly be described as personal non-property right in its conventional meaning. Most likely, such rights are of organizational nature, supporting property rights [5, p. 411] (my translation).

Indeed, corporate rights, though conditionally, are divided into property rights and personal non-property rights, but still they are to be viewed as a set of interrelated and interdependent rights.

S. Ya. Rabovska believes it feasible to distinguish those companies, where members affect the company's activity with their work and create an additional product, which is further called dividends, for instance, in cooperatives, general partnerships, etc. So personalization of persons participating in such companies has a great effect on the company's activity. In other companies, where the main role is assigned to the member's contribution, such as joint stock companies, the right to participate in such companies is inherited together with a share in such companies [6, p. 8].

However, we believe that such approach is not entirely in line with legal nature of shares (securities) and shares in the authorized capital of the business unit.

For instance, Art. 177 of the Civil Code of Ukraine defines securities as an object of civil rights.

And according to Part 1 of Art. 178 of the Civil Code objects of civil rights may be freely alienated or transferred from one person to another through legal succession or inheritance or otherwise, unless they are withdrawn from civil-law circulation or have restrains on circulation or are inseparable from an individual or a legal entity.

According to Part 2 of Art. 163 of the Commercial Code, the following types of securities are used in business in cases provided for by the law: shares (…).

That is why shares are in free civil-law circulation.

Whereas a share in the authorized capital in certain cases is specified either in the Unified State Register of Legal Entities, Individual Entrepreneurs and Public Organizations ("Unified State Register") or in the articles of association of the business unit. In other words, it is not certified with any document, which, in our opinion, creates difficulties in practical terms in connection with transfer of corporate rights from one person to another.

I. V. Spasybo-Fatieieva has noted that right to a share in the authorized /contributed/ capital exists as an independent right, especially in terms of its transferability. Because it is not the member's corporate right that is alienated, but a share in the authorized /contributed/ capital. It is not the member's corporate right that is inherited, but a share in the authorized /contributed/ capital. It is not the member's corporate right that is pledged, but a share in the authorized /contributed/ capital [5, p. 407 – 408].

However, a share in the authorized capital is an abstract notion, and it has a definitive influence on the scope of the person's corporate rights.

According to Part 1 of Art. 190 of the Civil Code, property as a special object shall mean, inter alia, property rights and obligations.

Therefore, corporate rights should be the object of civil-law circulation. And a share in the authorized capital of the business unit shall be used as a basis for determining the scope of corporate rights.

Today it is customary for a share in the authorized /contributed/ capital of the business unit to be a subject of the civil-law circulation. But such practices do not meet the needs of the society to the full extent and are not consistent.

We support this position to the full extent.

This is due to the fact that transfer of corporate rights is possible only after a separate study in each particular case and verification of actual creation of the authorized capital, study of constituent documents and details stated in the Unified State Register.

It can be simpler than that. Corporate rights may be certified with a relevant certificate stating a member's share in the authorized (contributed) capital of the business unit and the fact of its actual creation.

According to Part 1 of Art. 3 of the Law of Ukraine "Securities and Stock Exchange" [8], a security is a document in an approved form with relevant details certifying the holder's monetary or other property right, determining relations with the issuer of the security and the person with a right to the security, and providing for performance of obligations under such security, as well as transfer of rights to the security and rights attaching to the security to other parties.

That is why for elimination of the existing inconsistency regarding legal nature of corporate rights at the legislative level it is necessary to establish a form and relevant details certifying corporate rights of a person in a business unit.

Such step will open the door to circulation of corporate rights as a set of property and non-property rights of the member of the business unit, and not an abstract share in the company's authorized capital.

Such approach has already been implemented in certification of the scope of property equity interests of members of collective agricultural entities.

Procedure for Determining the Scope of Property Equity Interests of Members of Collective Agricultural Entities and Documented Confirmation thereof, approved by Decree of the Cabinet of Ministers of Ukraine No. 177 dated February 28, 2001 [9], has determined a form of the certificate of title to property equity interest of the member of the collective agricultural entity (property certificate), which has greatly simplified circulation of property equity interests, use and sale thereof.

In this context one should note certain provisions of the Tax Code of Ukraine [10], stating that a taxable item is not sale of a share in the authorized capital, but alienation of corporate rights, which, in our opinion, is correct and substantiated (see, for instance, sub-par. (c), and par. 14.1.54, Part 14.1 of Art. 14, par. 14.1.55, Part. 14.1 of Art. 14, par. 14.1.81, Part 14.1 of Art. 14 of the Tax Code of Ukraine).

The Law of Ukraine "Management of Government Property" [10] uses the notion "corporate rights" in a rather untypical way.

Art. 3 of the Law of Ukraine "Management of Government Property" states that government property subject to management are corporate rights held by the state in authorized capitals of business units.

Then in the text of the law one comes across the phrase "business associations, in the authorized capital of which there are corporate rights of the state".

The same term is used in the Tax Code of Ukraine (par. 19-1.1.52, Part 19-1.1 of Art. 19, line 4, Part 49.19 of Art. 49 of the Tax Code of Ukraine).

Based on the above we can conclude that there exists the problem of harmonization of definitions and harmonization of use of respective terminology in Ukrainian laws.

In our opinion, such use of the notion "corporate rights" in legislative regulation is not appropriate.

In this case there is a confusion of the notion "corporate rights" and "share in the authorized capital". Corporate rights are owned by the member of the business association and they cannot be in its authorized capital. Authorized capital of the business association may only determine the scope of such rights.

Therefore, there is an error in the Tax Code as well: "in the authorized capital of which there are corporate rights of the state".

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