JOINT-STOCK FORM OF CORPORATE CONTROL: FEATURES OF THE FORMATION AND FUNCTIONING OF ITS CIVIL-LAW MECHANISMS

INTRODUCTION

This article is devoted to the research of civil law mechanisms for the formation and implementation of a joint-stock form of corporate control in the Russian Federation.

LITERATURE REVIEW / STATE-OF-ARTS / RESEARCH BACKGROUND

The organization and activities of the institution of corporate control have been widely studied in the works of such legal scientists as: Mogilevsky S.D. (MOGILEVSKY, 2004, p. 327), Shitkina I.S. (SHITKINA, 2019), Kurbanov R.A. (CORPORATE, 2021), Gabov A.V. (CORPORATE, 2018), Ruchkina G.F. (CORPORATE, 2020). However, the research of such an important form of corporate control as joint-stock control is a promising area of scientific research in Russian corporate law. In this regard, the legal analysis of civil law mechanisms for the formation and implementation of a joint-stock form of corporate control will create a basis for a comprehensive study of not only the institution of corporate control as a whole, but also the mechanism of functioning of the joint-stock companies themselves as the main type of corporate organizations in the Russian Federation.

METHOD ALSO CALLED MATERIALS AND METHODS OR EXPERIMENTAL METHODS

This article in the process of cognition of state-legal phenomena were used: a) General scientific methods (formal-logical, systemic, structural-functional, concrete-historical); b) General logical methods of theoretical analysis (analysis, synthesis, generalization, comparison, abstraction, analogy, modeling, etc.); c) private scientific methods (technical and legal analysis, specification, interpretation, etc.) (ZALESNY; GONCHAROV 2019, p.51-61; ZALESNY; GONCHAROV 2020, p.1-6; GONCHAROV et all 2021a, p.362-366; GONCHAROV et all 2021b, p.367-373; GONCHAROV et all 2021c, p.374-382; GONCHAROV; CHIMITOVA 2020, p. 86-95).

MAIN PART

The current Constitution of the Russian Federation has established as the basic economic rights and freedoms of Russian citizens their ability to engage in any form of entrepreneurial activity that is not prohibited by law. (CONSTITUTION, 2021) At the same time, citizens can accumulate their efforts by creating commercial organizations, whose main purpose of activity is to extract profit. However, as noted by a number of researchers, the interests of the founders, participants, and owners of commercial organizations, as a rule, do not coincide; in addition, they may contradict state and public interests. (GONCHAROV, 2021a, p.431-436; 2021b, p. 411-416; 2021c, p. 395-401) These contradictions can be resolved outside the activities of commercial organizations by the possibility of state and public control, GONCHAROV, 2021d, p. 363-368; 2021e, p. 498-505) and inside - by various forms of corporate control. (GONCHAROV, 2021f, p.483-490; 2021g, p. 468-475) At the same time, the most interesting is the joint-stock form of corporate control, which is distinguished by complex mechanisms of formation and functioning. The mechanisms of forming a joint-stock form of corporate control are understood as the methods by which the implementation of this form of control is possible. These mechanisms are civil law, since they are either provided for by the norms of civil law, or follow from existing civil law norms.
It is possible to distinguish the following civil-legal mechanisms for the formation and implementation of the joint-stock form of corporate control:

Firstly, such a mechanism will be the purchase of placed shares (purchase of shares). A shareholder who wishes to become the owner of a controlling stake has the opportunity to achieve this goal by purchasing the company’s shares placed on the securities market. In turn, the acquisition of a controlling stake is aimed at obtaining and implementing absolute shareholder control. Most often, such a task is entrusted to professional participants in the securities market. This is due to the fact that this activity is associated with significant factors, for example, such professional market participants have the necessary information or know the sources from which it can be obtained. They have valuable experience in dealing with shareholders who sell their shares, and can help their clients avoid legal errors and conflicts with current legislation.

The activity of professional stock market participants is associated with a constant presence in the center of the struggle for the formation of absolute shareholder control. Such a struggle takes place both between the shareholders of this joint-stock company, and between third-party subjects of corporate control relations. It happens that the professional participants of the stock market themselves are drawn into this struggle (defending the interests of their clients, or defending their own interests).

Secondly, the Russian practice of corporatization during the privatization of state-owned enterprises and the accumulation of capital by new owners contained many cases of using such a mechanism for forming a joint-stock form of corporate control as the creation of a “managing” organization. The essence of the mechanism is the creation by interested parties of a new legal entity, with the aim of further exchanging their shares for shares of that joint-stock company in order to gain control over which the new legal entity was created. Most often, these stakeholders are the managers of the joint-stock company itself, who already have quite large blocks of shares in their hands. The new organization is conventionally called “management”, since if it is successful and a controlling stake in the required joint-stock company is formed on its balance sheet, there is a real opportunity to influence this joint-stock company through corporate control.

Thus, the creation of a “managing” organization can be viewed as a mechanism for the formation of a joint-stock form of corporate control on an ongoing basis. At the same time, if the consolidation of the controlling stake does not become permanent, then in any case it will be long-term, that is, it will allow interested parties to solve strategic and tactical tasks.

The third type of mechanism for the formation of a joint-stock form of corporate control is obtaining a power of attorney, which is inherently temporary. This mechanism consists in the fact that quite a lot of large Russian joint stock companies arose in the process of privatization of state and municipal property. Such companies consist of thousands and tens of thousands of small shareholders scattered throughout Russia. In total, such shareholders may own 10 or more percent of the voting shares of the company.

The ability to use this mechanism for the formation of a joint-stock form of corporate control follows from the fact that most of the rights of shareholders (for example, the right to participate in general meetings of shareholders, the right to receive certain information about the company’s activities, the right to nominate their candidates to the management bodies of the company in the presence of a certain package voting shares of the company and others) can be sold both personally and through the institution of representation. The power of attorney for voting, in this case, must contain information about the person represented and about the representative, with the help of which it is possible to clearly personify them (in particular, name or title, place of residence or location, passport data). Such requirements follow from clause 1 of Art. 57 of the Federal Law “On Joint Stock Companies”. (ON, 1995)

The very mechanism of forming a joint-stock form of corporate control by obtaining powers of attorney is based on the use of a psychological approach when working with hundreds and thousands of small shareholders.

The fourth mechanism is cited by Mogilevsky and calls it “downscaling”, (MOGILEVSKY, 2004, p. 327) the essence of which boils down to the fact that on the basis of the existing structural divisions of the enterprise (the main joint stock company), independent joint stock companies
are created. The “parent” company transfers part of its assets to the authorized capital of new companies in the form of contributions, and receives all 100 percent of the shares of these actually subsidiaries on its balance sheet. The decision to establish subsidiary joint-stock companies is made either by the general director of the main joint stock company, or by the board of directors, or by the general meeting. Who exactly will make the decision depends on the instructions of the company’s internal documents and the size of the transferred assets.

When all the necessary legal procedures have been carried out and the registration of new joint stock companies takes place in accordance with the procedure established by law, then the sole owner of the new joint stock companies is the main joint stock company, for the sake of forming a joint stock form of control in which everything was started.

The next step is to offer the shareholders of the main joint stock company to exchange their shares for the shares of the newly created joint stock companies. After analyzing all of the above mechanisms for the formation of a joint-stock form of corporate control, it is possible to formulate two main conclusions.

1. No matter how difficult the task of forming a joint-stock form of corporate control in a particular joint-stock company (in particular, absolute joint-stock control), the implementation of this task directly depends only on the budget that is allocated for these purposes. The interested person can always achieve the concentration in their hands of absolute corporate control over the joint-stock company, in whatever joint-stock company they try to achieve this, but there is only one limitation - the economic feasibility of the entire action being carried out. As can be seen from the above analysis, the Russian peculiarity lies precisely in the fact that the coincidence in time of the two processes - the emergence of the majority of joint-stock companies as a result of privatization and the formation of the legislative framework governing these legal relations - leads to the fact that today, for the first time the plan as a mechanism for the formation of a joint-stock form of corporate control is precisely the legal impact. This mechanism allows you to seriously save financial resources and entirely depends on only one thing - the professionalism of the performer, who implements the task assigned to him.

2. The second conclusion that I would like to draw on the basis of all of the above is that since the implementation of a joint-stock form of corporate control is nothing more than a matter of technology and depends only on the professionalism of a particular contractor, it means that the interests of those who exercise corporate control in a particular joint stock company should be entrusted to professionals. In particular, this concerns the protection of the interests of persons exercising absolute shareholder control.

The joint-stock form of corporate control is primary and reflects the interests of the shareholders of this company. Decisions in a joint-stock company are made not by individual shareholders (even if they have a controlling stake), but by specially created management bodies in the company. The implementation of the joint-stock form of corporate control occurs indirectly through the activities of the board of directors of the joint-stock company and its executive body. The corporate governance model is a three-tier system, which consists of shareholders, a board of directors and a sole (collegial) executive body, more on which below.

The role of the sole (collegial) executive body is that it carries out direct day-to-day management of the joint-stock company. It can be said that he manages the property that the shareholders “transferred” to him for management, forming a joint-stock company. The Board of Directors makes decisions on the most important issues that are of decisive importance for the life of the joint-stock company in the interval between shareholders’ meetings. The board of directors ensures accountability and responsibility of the company's management for the quality and results of work, monitors the observance of the rights of shareholders in the company on behalf of shareholders, although at the same time it is itself subject to control by shareholder.
The implementation of the joint-stock form of corporate control occurs indirectly through the activities of the board of directors of the joint-stock company and its executive body. The election of these governing bodies takes place at general meetings of shareholders. Hence, it follows that the implementation of the shareholder form occurs through the mechanisms associated with the convocation, organization and holding of a general meeting of shareholders. The protection of shareholders' rights and a rational combination of interests of various subjects of joint-stock legal relations are guaranteed by legal norms governing the very procedure for convening, organizing and holding general meetings of shareholders, sanctions for violation of the norms and norms governing the status, competence, the procedure for the creation and operation of management bodies of a joint-stock company, as well as control behind them and the possibility of bringing to adequate responsibility if necessary.

It is necessary to pay some attention to the competence of the general meeting of shareholders, since it does not have the right to consider and make decisions on issues not referred to its competence by the Federal Law "On Joint Stock Companies". The general meeting does not have the right to go beyond its competence, to replace other management bodies of the company, for example, to perform the functions of the board of directors provided for in Art. 65 of the Federal Law "On Joint Stock Companies" (subject to the exception to this rule provided by the specified law: in companies with the number of shareholders - owners of voting shares of less than 50, the charter may provide that the functions of the board of directors are performed by the general meeting of shareholders - paragraph 1 of Art. 64 of the Law). The general meeting does not have the right to interfere with the operational management of the company's activities carried out by the company's executive body. Issues referred to the competence of the general meeting of shareholders cannot be transferred to the decision of the executive body of the company. Issues referred to the competence of the general meeting of shareholders cannot be transferred to the decision of the board of directors of the company, with the exception of issues provided for by the Federal Law "On Joint Stock Companies".

The competence of the general meeting is determined by Art. 48 of the Federal Law "On Joint Stock Companies", but not exhaustively. So, paragraphs 3 and 4 of Art. 39 of this Federal Law determine the procedure for placing shares by private or open subscription, indicating that this is possible only by decision of the general meeting of shareholders. Paragraph 2 of Art. 33 entrusts the general meeting with making a decision on the placement of bonds and other securities convertible into shares by the company. If we talk about the rights of a shareholder, then he can participate in the general meeting in person, or through a representative, which in a certain sense can be considered a nominal holder of shares and a trustee. Such persons are obliged to provide information about the shareholders in whose interests they hold shares at the time of drawing up the list for participation in the general meeting.

The implementation of the joint-stock form of corporate control directly begins with the opportunity to nominate your candidates to the board of directors of the joint-stock company, to the audit commission and the counting commission, to nominate your candidate for the position of the sole executive body, and also to make your proposals on the agenda of the annual general meeting of shareholders. These proposals and data on the nominated candidates must be received by the joint-stock company no later than 30 days after the end of the financial year, unless a later date is provided for by the charter of the company.

After a shareholder seeking to implement a joint-stock form of corporate control has nominated his candidates to the management bodies of the company and proposed his issues to the agenda of the general meeting of shareholders, the most important thing for him becomes the possibility of real participation at this meeting, which consists of two elements: availability of data about a specific shareholder on the list for participation in the general meeting of shareholders; actual attendance at the general meeting of shareholders.

The list of shareholders must be drawn up in accordance with the requirements of the current legislation in order to be considered a document justifying the right of a shareholder to participate in the general meeting. It must contain the name of the shareholder (last name, first name and patronymic), and for legal entities - the name (full and abbreviated - in strict accordance with the register records of state registration), as well as the address that indicates the place of residence (for individuals) or postal address (for legal entities). In the list, opposite
the name of each shareholder, the number and category (type) of shares that he owns should be indicated. Bringing the specified data in the list allows you to identify the real participants of the general meeting and avoid any unwanted manipulations in the voting process on the agenda. The list of shareholders can be controlled by the interested parties themselves - shareholders wishing to take part in the general meeting. Each shareholder can find out whether he is included in the list and whether the requisites required by law are indicated correctly. The obligation to provide the list rests with the executive body of the company.

The elimination of violations committed when compiling the list depends on the nature of these violations. Technical errors can be corrected by the company at the request of the interested person. Based on the fact that the preparation and holding of the general meeting of shareholders is entrusted to the board of directors, this body should be requested to make corrections. Corrections in accordance with the law are permissible in two cases: if the rights of persons not included in the list at the date of its compilation are violated; if it is necessary to eliminate errors made when compiling the list. In this case, a person who became a shareholder after the list was drawn up does not lose the right to participate in this general meeting, but either participates in the meeting in person (by proxy of the person included in the list), or this person included in the list, undertakes to vote at the general meeting in accordance with the instructions of the acquirer of the shares.

As a result, if a shareholder seeking to implement a shareholder form of corporate control is included in the list of shareholders entitled to participate in this general meeting of shareholders, and has been able to verify this personally, having read the list, or has received the necessary power of attorney, such a shareholder faces another the task is to actually attend the general meeting of shareholders. This issue is extremely important due to the fact that when voting at a meeting, the votes of the shareholders present are taken into account, which is enshrined in Art. 49 of the Federal Law "On Joint Stock Companies": “The decision of the general meeting of shareholders on an issue put to a vote is adopted by a majority of votes of shareholders - owners of voting shares of the company participating in the meeting, unless otherwise provided for by this Federal Law”. (ON, 1995)

CONCLUSIONS AND FURTHER RESEARCH
The most significant from the point of view of the implementation of the joint-stock form of corporate control are decisions taken at the general meeting of shareholders. First of all, these are the results of the elections to the governing bodies of the joint-stock company. We are talking about elections to the board of directors of a joint-stock company and the choice of the sole executive body of the company (if its elections are attributed to the competence of the general meeting of shareholders). Article 66 of the Federal Law "On Joint Stock Companies" provides that the election of members of the board of directors of a company is carried out by cumulative voting. In this case, the number of votes per one voting share is equal to the number of members of the board of directors.

This method guarantees the rights of shareholders who own large, but not controlling, stakes. Such a cumulative vote allows a shareholder to cast votes (in accordance with the shares he owns) to one candidate or several, without distributing them among all persons included in the voting ballot, which increases the chances of candidates nominated by such shareholders who own non-controlling stakes. The candidates who receive the largest number of votes are considered elected to the board of directors of the company. At the same time, it is obvious that the larger the number of members of the board of directors, the more chances the minority shareholders have to nominate their candidates to such a board of directors. In order to reduce the chances of minor shareholders for their representation on the board of directors, majority shareholders may seek to fix in the charter of the joint-stock company the minimum number of members of the board of directors or propose to determine the number of members of the board of directors at a general meeting of shareholders.

Thus, in the process of preparing and holding the general meeting, the shareholder implements a joint-stock form of corporate control both by nominating his candidates to the management bodies of the joint-stock company, and by voting on the proposed items on the agenda of the meeting.
REFERENCES


Joint-stock form of corporate control: features of the formation and functioning of its civil-law mechanisms

Este artigo é dedicado à pesquisa de mecanismos de direito civil para a formação e implementação de uma forma conjunta de controle corporativo na Federação Russa. Segundo os autores, a forma conjunta de controle societário é a forma mais importante de influência sobre os participantes das relações jurídicas corporativas dos acionistas das sociedades de ações conjuntas. O artigo examina a influência da forma conjunta de controle corporativo sobre o funcionamento das empresas de ações conjuntas como a forma mais importante de organizações corporativas na Rússia.


Abstract

This article is devoted to the research of civil law mechanisms for the formation and implementation of a joint-stock form of corporate control in the Russian Federation. According to the authors, the joint-stock form of corporate control is the most important form of influence on participants in corporate legal relations from the shareholders of joint-stock companies. The paper examines the influence of the joint-stock form of corporate control on the functioning of joint-stock companies as the most important form of corporate organizations in Russia.

Keywords: Joint-stock company. Corporate control. Commercial organization. General meeting. Civil law mechanisms.

Resumen

Este artículo se dedica a la investigación de mecanismos de derecho civil para la formación e implementación de una forma conjunta de control corporativo en la Federación de Rusia. Según los autores, la forma de control corporativo de acciones conjuntas es la forma más importante de influencia en los participantes en las relaciones legales corporativas de los accionistas de las sociedades anónimas. El documento examina la influencia de la forma de control corporativo de las acciones conjuntas en el funcionamiento de las sociedades anónimas como la forma más importante de organizaciones corporativas en Rusia.