

УКРАЇНА НА ШЛЯХУ ДО ЄВРОПЕЙСЬКОГО ПРИВАТНОГО ПРАВА В СФЕРІ ЕКОНОМІЧНИХ ВІДНОСИН

(Матвєєвські цивілістичні читання)

Матеріали міжнародної науково-практичної конференції
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Р 46 Україна на шляху до європейського приватного права в сфері економічних відносин. Матвеевські цивілістичні читання. Матеріали міжн. наук.-практ. конф. Київ, 22 жовт. 2021 р. / Р. А. Майданик, В. В. Цюра, Р. Б. Сабодаш, В. О. Бажанов, О. М. Залізко, Б. С. Щербина та ін.; відп. ред. Р. А. Майданик. К.:2021. –252 с.

Видання присвячене актуальним науковим і практичним проблемам приватного права України в сфері економічних відносин в умовах європеїзації. Видання підготовлене на основі матеріалів Матвеевських цивілістичних читань «Україна на шляху до європейського приватного права в сфері економічних відносин», що відбулися 22 жовтня 2021 року та були організовані кафедрою цивільного права Навчально-наукового інституту права Київського національного університету імені Тараса Шевченка.

До збірки увійшли наукові доповіді провідних науковців і практикуючих юристів, які спеціалізуються на питаннях цивільного права.

Видання адресоване вченим, науковим співробітникам, викладачам юридичних факультетів і вищих навчальних закладів, аспірантам, а також працівникам судів, прокуратури, адвокатури, іншим особам, які вивчають і застосовують доробки правової науки і практики.

Редакційна колегія не здійснює наукового редагування поданих матеріалів. Текст друкується відповідно до поданого автором рукопису без змін і доповнень із збереженням стилю та орфографії автора. Редакційна колегія не відповідає за можливі порушення автором прав інтелектуальної власності.

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**LEGAL MECHANISM FOR ASSESSING THE RIGHTS OF
SHAREHOLDERS UNDER THE CONDITIONS OF
OBLIGATORY CONSOLIDATION OF CORPORATE
CONTROL**

Ensuring the protection of rights of parties in corporate relations under the conditions of obligatory consolidation of corporate control requires the definition of a fair price of a small block of shares in a joint-stock company that is subject to compulsory disposal in favor of a beneficiary.

There is no doubt that observance of the balance of interests of parties in corporate legal relations in this area is achieved by the conflict free mechanism of its pricing.

According to Article 652 of the Law of Ukraine On Joint Stock Companies, the price of mandatory sale of shares is regulatory determined by the largest of the following:

1) the highest price of a share at which the claimer, his/her affiliated persons or third persons acting jointly with him/her, acquired shares of this company within 12 months preceding the date of acquisition;

2) the highest price at which the claimer, his/her affiliated persons or third persons acting jointly with him/her indirectly acquired the title to shares of this company within 12 months preceding the date of acquiring dominant control block of shares by such party, provided that the cost of the company's shares being directly or indirectly owned

by such legal entity, according to its latest annual financial statements, is at least 90 percent of the total value of assets of such legal entity;

3) market value of the company's shares, defined on the basis of an independent assessment as of the last business day preceding the day of acquiring a dominant block of shares of the company.

At the same time, most scientists engaged in researching corporate relations are united in the position of imperfect legislative mechanism for determining the price of sale. Thus, O. Bihniak expresses certain doubts about the appropriateness of Article 8 of the Law of Ukraine On Joint Stock Companies, which establishes the procedure for approving the price of mandatory sale of shares by the Supervisory Board (or the Company's executive body).

According to the scientist, providing protection of the rights of minorities is envisaged particularly through state regulation of the stock market, which shall facilitate the transparency of securities market dynamics and conditions for optimal pricing. He is supported by other scholars. In particular, representatives of the Kharkiv law school Shvydka T.I. and Logvinenko S.S. draw conclusions about the need for legislative changes in the procedure for determining the fair price of redemption of shares. The emphasis is put on the need to ensure safeguard for the rights of minority shareholders within the framework of the squeeze-out procedure, particularly by expanding the powers of the National Securities and Stock Market Commission.

Indeed, the mechanism for determining the price of mandatory sale of shares gives rise to many questions.

Firstly, the organized capital market in Ukraine is in the process of its formation, which significantly reduces the coefficient of regulatory nature of part 2 Article 8 of the Law of Ukraine On Joint Stock Companies establishing the market value of emission securities in circulation on organized capital markets as an average course based on the results of regular trading.

It is necessary to cite open statistical data.

According to the annual report of the National Securities and Stock Market Commission for 2020, the volume of trading in the securities market amounted to 1000.99 billion UAH (31.4 billion Euros) in 2020.

As a comparison, in 2020, the volume of trading in the Warsaw Stock Exchange (Poland) was 236 billion Euros, while the daily trading volume in the New York Stock Exchange was 60.2 billion US dollars.

As of 1 of August 2021, among 1225 public joint-stock companies 166 share issues were included in exchange lists.

On the other hand, the involvement of an estimator to determine the market value of emission securities by a corporation's Supervisory Board created by a majority, approval by this body of the property market value corporate management creates a threat to the existence of a conflict of interest due to the potential impact on the results of such estimation. Incidentally, part 3 Article 8 of the Law of Ukraine On Joint Stock Companies provides that the approved value of property may differ within 10 percent of the value determined by the estimator.

Within the limits of the powers provided by the National Commission, certified copies of reports on an independent assessment of market value of an ordinary share of joint-stock companies is regularly provided for revision to the State Property Fund of Ukraine as a body carrying out state regulation of estimation.

According to public information from the Annual Report of the National Securities and Stock Market Commission for 2020, the State Property Fund of Ukraine provided a revision of 98 reports on the assessment of an ordinary registered share, according to which:

- 46 reports are classified as generally meeting the requirements of statutory instruments on property valuation, but have minor shortcomings not affecting the validity of the assessment;

- 15 reports - as having significant shortcomings affected the reliability of the assessment, but may be used for the purpose defined in the report after correction of these shortcomings;

- 37 reports of 98 - are poor-quality and unprofessional and cannot be used.

That is, in 38% of cases, the requirement of fair price of mandatory sale of shares was not fulfilled.

Thus, the procedure for obligatory disposal of shares does not provide a clear and transparent procedure for determining the price and relevant preventive measures against the unfair behavior of beneficiaries having statutory capacity to influence the pricing of shares.

The analysis of judicial practice confirms the stated issues in the field of administration of law. In the resolution of 24 of November 2020, the Grand Chamber of Supreme Court expressed the opinion regarding the fair price of redemption (*Resolution of the Grand Chamber of Supreme Court of 24 of November 2020 in the case No. 908/137/18*): “... one of the important elements of observing the criterion of proportionality when interfering with the right to peaceful possession of property is to provide fair and reasonable compensation (paragraph 7.25)”.

As of today, the appropriate procedure has not been provided. The position of the Grand Chamber of the Supreme Court regarding the outlined range of issues clearly indicates the need for systemic changes in the mechanism of obligatory consolidation of corporate control. It is obvious that its introduction into legal framework requires more effective compensatory levers to ensure the rights of a weaker party, which, in our opinion, are the cessation of ownership of shares as a result of alienation or acquisition of such right *under the claim of a person concerned by virtue of a court decision*.

Under action proceedings, a court assesses the criterion of justice in determining the value of a company's shares being disposed and verifies the grounds for creation of rights of action and their regulatory reasonableness.

Fair price determines the fair value of a share considering the economic indicators of the company, which determine the prospect of

its development. In this case, the company is subject to an assessment as an entity, but not as a set of assets or the binding demand for payment of dividends.

It should be noted that the regulatory requirement for fixed price may not correspond to the fair balance criterion. *On the model of Japan and Hong Kong, the price of acquirement shall have an exceptionally low threshold value of the relevant price.*

Currently, it is widely recognized that the market price cannot serve as a benchmark to achieve fair value, since it may be discounted relative to the cost of a liability.

When deciding on fair compensation alternative methods of evaluation should be considered, such as discounting cash flows (technique used to calculate the current (present) cost of expected revenues and expenses, comparison of multiples and quotation of shares in the securities market, analog assessment method, etc.

Incidentally, the positive experience of judicial control of the pricing procedures is enshrined in the law of Germany (*Articles 327b, 327C of the Germany Law On Joint Stock Companies*).

In the UK, the form of judicial control over the procedure for compulsory acquisition of ownership of shares is the court discretion to independently determine the terms on which the offeror is entitled and obliged to purchase shares (*Article 988 of the Law on Companies of 2006*), including in the case of establishing their unfair value.

Corporate legislation of Hong Kong provides compensatory mechanism against potential abuse by the holder of the dominant block of shares in a joint stock company, which includes the competence of a court, under the request of a minority shareholder, to decide on the absence of right of compulsory redemption of shares of minority shareholders, establishment of a fair price of acquisition, and has a discretion to independently exercise any powers if, at the request of the shareholder, it believes that the company's affairs are or was conducted in a manner unfairly harming the interests of shareholders.

In this case, the court may adopt any order which, in its opinion, is necessary and issue an order to restrict the company's business or an order to perform actions, an order to appoint a recipient or manager of the company's property or its part. Herewith, the court may even specify the powers and responsibilities of the recipient or manager and determine the remuneration.