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ON DEVELOPMENT TRENDS OF CORPORATE REGULATION IN THE RUSSIAN FEDERATION AND ABROAD

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Energy law, just like some other complex law branches, serves to regulate a number of relations that are cross-disciplinary in nature. Cross-disciplinary interrelations with such law branches as anti-trust and corporate law are the most evident. Many studies on corporate law have been published up to date. However, only few of the numerous publications focus on specific issues of corporate regulation. Therefore, the monograph edited by V.V. Romanova, LL.D., Topical Issues and Tasks of Corporate Law, is undoubtedly of interest. It addresses two problems: the legal regulation of corporate governance in predominantly state-owned companies and the legal regulation of greenmail prevention. So far, these problems, while clearly of concern for both practice and research, have not been duly examined in the Russian literature. The applicability of this study stems from the fact that state companies and companies with significant state participation have taken the lead over the years of new Russian economy development. It can hardly be viewed as a typical model for a country building a market-based economy and, therefore, for the law of a market economy. As for the greenmail issue, answers to the arising questions can also be found in the legal plane of the economic life that is still new for Russia.

Keywords: *energy law, corporate law, specific aspects of corporate governance in the energy sector, corporate governance in state-owned energy companies, greenmail.*

In the post-Soviet period, Russian energy law, just like some other complex law branches, serves to regulate a number of relations that are cross-disciplinary in nature. Cross-disciplinary interrelations with such law branches as anti-trust and corporate law are the most evident. Many studies on corporate law have been published up to date. However, only few of the numerous publications focus on specific issues of corporate regulation. Therefore, the monograph edited by V.V. Romanova, LL.D., *Topical Issues and Tasks of Corporate Law* **[1],** is undoubtedly of interest. It addresses two problems: the legal regulation of corporate governance in predominantly state-

owned companies and the legal regulation of greenmail prevention. So far, these problems, while clearly of concern for both practice and research, have not been duly examined in the Russian literature.

The applicability of this study stems from the fact that state companies and companies with significant state participation have taken the lead over the years of new Russian economy development. It can hardly be viewed as a typical model for a country building a market-based economy and, therefore, for the law of a market economy. As for the greenmail issue, answers to the arising questions can also be found in the legal plane of the economic life that is still new for Russia.

While state-owned companies in Russia are numerous, the legal regulation of corporate governance has gaps and inconsistencies. Special emphasis should be given to the issues relating to establishment and assignment of authorities to management bodies of a state-owned joint-stock company, as well as forms and procedure of issue of mandatory instructions of shareholders.

To improve the legal regulation of corporate governance, a legal analysis of foreign legislation and case law in this field is of value. However, it should be taken into account that the existing situation with opportunities for global harmonization of corporate law of different countries is rather controversial.

As practice shows, company management principles of different countries have similarities, however, corporate law is yet to cross national borders to provide examples of international unification of law. This problem has not been resolved even in the European Union.

Identification of specific aspects of the legal regulation of corporate governance in predominately state-owned companies in the Russian Federation as compared to other countries' regulation is important from at least two perspectives. First, we should not blindly follow foreign practices, because they are country-specific. Nevertheless, they are of interest in terms of their potential use for methodological purposes and the accumulated case law. Second, managerial decisions of predominantly state-owned companies are currently viewed differently in different jurisdictions, therefore, the understanding of the qualification of managerial decisions from the point of view of foreign law, e.g., in terms of liability, has an important practical bearing. Furthermore, understanding of the reasons why corporate law unification in the EU failed to make meaningful progress can give us a clue to achieving favorable results in the Union State, the more so because the meaning of state participation in the member states is comparable to that of Russia.

During the period of reforms in the Russian legislation in both private and public law, the purpose of the law policy was to give relations involving the government a special status. Meanwhile, the existing *special regulation* system has major gaps or fails to recognize the specific nature of relations arising in certain sectors of economy. This applies to the energy sector to a great extent.

The current institution of liability for decision-making in both private and public law relations needs a serious rethinking. In terms of public law regulation, both scientific research and law-making activities have been focused on determination of the state bodies' powers of administrative authority. Meanwhile there has been a lack of attention to the issues of activities of the state as a party to civil law relations and the guarantor of public interests at the same time. However, the balance between these interests is one of the key factors necessary for successful economy development, especially in the energy industry as it is the principal branch of the country's economy.

Whereas the decision-making center determining both the strategy and course of action of companies is the corporate management that shall adopt responsible, well-balanced decisions to promote the interests of the company, its individual shareholders, investors, i.e., common market players and the government as a special type of shareholder whose interests are objectively wider than those of any business entity. The development of the policy of the state as a company shareholder, its implementation in the corporate management bodies, as well as a potential legal mechanism addressing these issues shall balance the two differently directed tasks: operation in the domestic and international markets under market competition conditions, on the one hand, and implementation of social functions not included

in the agenda of other market players, on the other hand. This dilemma shall be resolved, in particular, in such issues as: the improvement of the institution of directives, the regulation on liability of government representatives in joint-stock companies and on delineation of responsibilities between authorities and officials determining the position of the state as a shareholder.

Dwelling on these issues, V.V. Romanova rightly noted that the current legislation fails to make a distinction between the liability of representatives and that of the officials adopting binding voting instructions, and explained the usefulness of including such provisions in the existing laws, because, if a member of the board of directors in fact only voices the shareholder's instruction as stipulated by the power of attorney, those who determined the position of the state as a shareholder shall be liable for any damages to the public caused by such decisions [2].

V.V. Romanova's suggestion to include provisions on liability of the government officials adopting directives for timely communication of these directives into legislative acts is also noteworthy [3].

Under present-day conditions, the question of positioning of the state participating in business relations has become particularly important in the global context. The doctrine recognizing a distinction between the state's acts jure imperium et jure gestionis that existed in the Soviet times changed dramatically following the collapse of the socialist bloc.

The question of the status of the state as a party to private law relations has a long history. It became particularly pressing in the 1930s, when the USSR created specialized entities, all-union foreign trade associations (FTAs), authorized specifically to consummate foreign trade transaction. Pursuant to the then existing laws, these FTAs had a status of legal entities, operated using the for-profit model and engaged in the stream of commerce in their own name. It was declared initially that the FTAs were not liable under the government's commitments, and the government was not liable under the FTA's commitments. It was a relatively new law structure at the time, but, considering the increasingly important role of the USSR in international trade, it was adopted by other countries and became generally recognized after the Council for Mutual Economic Assistance was established (January 1949). The FTA's autonomy from the government in fact extended to all forms and types of its activities, as well as arising relations. It was confirmed by the ruling of the Arbitration Commission for Foreign Trade at the Chamber of Commerce and Industry of the USSR (now the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation) dated July 19, 1958 in a then landmark case: a claim of an Israeli company, Jordan Investments, Ltd, seeking to recover USD 2,396,440.69 from the FTA Soyuznefteeksport. [4]

The new Russian legislation also adopted the concept of severing the liability between the company and the state (except for public enterprises). The response of other countries, however, has changed significantly in terms of both substantive and procedural approaches. Multiple new legal doctrines have arisen linking the state's public actions to its benefits (unjustified benefits) in the business of state-owned companies. The practice of displacing liability of the state and companies controlled by it currently emerging abroad can lead to courts' imposing liability for decisions made by the company's management bodies on the state. In this regard, V.V. Romanova's proposals on unification of provisions on corporate governance of state-owned companies, including at the international level, are of interest. [5]

Problematic aspects of legal regulation associated with the need to combat greenmail have been extensively researched by foreign legal studies. [6] Results in Russia are less impressive.

Suffice it to say that the current Russian legislation still lacks the concept of greenmail, making it much more difficult to implement anti-greenmail measures. Many companies, including strategic ones, have been targeted by greenmailers. Examples of greenmailing are ample in the media and remain a matter of considerable debate.

One of the key issues of greenmail prevention is establishing liability of both natural persons and legal entities for actions that could be characterized as greenmail. Some foreign studies characterize such actions as torts or, as the case may be, as criminal offenses. In Russian practice, the qualification of unscrupulous actions of shareholders can be developed based on the concepts of liability in tort law stipulated by the

existing legislation. However, the practice gives reason to extend forms of liability. In this vein, we should support the provisions developed by V.V. Romanova on the possibility to develop Russian administrative and criminal legislation for the improvement of the legal regulation of greenmail prevention.[7] This approach stems from the fact that corporate governance implies, apart from securing the shareholders' rights or protecting the rights of the *weaker party*, the shareholder's duty to ensure stable operation of the company. This follows from the fundamental principle of civil and business law: good faith. Any shareholder's actions contrary to the principle of good faith are unlawful.

Conflicts may arise not only due to differences in understanding of the common company interests, on the one hand, and personal rights and interests of the shareholder, on the other hand, but also due to intentional provocations under unfair competition conditions. In the first case, it may be abuse of rights and the respective material liability. In the second case, malicious unlawful acts constituting administrative or criminal offenses are involved. With this in mind, we should emphasize the question of criminal law liability of legal entities recently raised by professor A.I. Bastrykin. [8]

The development of anti-greenmail laws implies the need to assess the possibility to influence the behavior of a greenmailer objectively and to predict the effect of the proposed legal initiatives in the context of a cross-border shareholding structure and cross-border activities of the company itself.

Greenmailing actions are designed to create a conflict. An elemental analysis based on conflictology methods clearly shows that this vice cannot be eradicated, therefore, we should try to minimize it, in particular, by legal means. This pessimistic prediction is due to the fact that actions qualified as greenmail can be performed by shareholders who can be represented by any legal person. The motive can belong to the realm of mental issues of a natural person or be associated with competitors' malicious intent and serve as a means of unfair competition.

With such an extensive range of potential greenmailers, their conflict practices, and methods they use to disrupt companies' business, we shall choose adequate legal remedies and, possibly, measures to prevent disruptive practices.

The only means of protection against shareholders' mental proneness to conflict is the corporate law itself establishing reasonable criteria to determine shareholders' capacity to exercise their rights while securing legal interests of the other shareholders on the grounds that the scope of the company's actions instigated by the greenmailer disrupts the ordinary course of business, thus infringing upon the interests of the other shareholders. As proneness to conflict of a person as a biological entity knows no limits, law can only provide protection against unreasonable claims to some extent. It means that, a refusal to provide unnecessary information or reporting can lead to court action, but shall be eventually recognized as lawful in court.

It would be overoptimistic to expect statutory regulation to develop a universally applicable formula for protection against unfair claims. What is more, the institution of good faith itself is implemented in civil law via judicial discretion rather than statutory definitions. Therefore, it seems reasonable to resort to supplementary legal instruments that could help protect interests of shareholders and the society as a whole against potential greenmailers. It can be a shareholder agreement to the extent permitted by the current laws. We should also consider the feasibility of protective resolutions of general meetings establishing the ways in which company members can exercise their rights.

Finally, the third issue that needs attention is the area of soft law, namely, Corporate Codes of Conduct. The end goal is to turn them into good or customary business practices according to Articles 5 and 6 of the Russian Civil Code. Corporate law can also guarantee some degree of contractual freedom in relations between shareholders, a shareholder and the company in order to impose reasonable boundaries on implementation of shareholders' rights.

The proposed approaches require the adjustment of the existing laws and the creation of a case history aimed at the development of the good faith institution for regulation of corporate relations.

An analysis of the Russian legislation and case law shows that institutions of tort law have failed to make adequate progress over the past quarter century. It is largely caused by the fact that the very concept of liability in the national law is still lacking economic, social, and moral certainty.

It seems that the concept of legal liability as applied to the issue in question shall not emanate from governmental chambers or committees of the State Duma. Instead, relevant legal initiatives shall be created by Chambers of Commerce as a kind of codifiers of business rules. This is how documents used in the course of business and applied by courts, such as, for instance, INCOTERMS, came to be.

The second group of greenmail-related issues originates from malicious forethought in the course of unscrupulous competitive practices rather than biological or social mentality, both in Russia and abroad.

Here, it makes sense to mention the sphere of administrative and criminal offenses. In this regard, certain development trends of the law and litigation practice should be noted.

A draft new Administrative Code and Code of Administrative Procedures was recently submitted to the State Duma by the government. It contains significantly expanded provisions on liability in the sphere of competition regulations.

We should also mention the draft Resolution of the Plenum of the Supreme Court of the Russian Federation on amendments to the Arbitration Procedure Code of the Russian Federation. The issue concerns liability for administrative offenses committed abroad, but causing implications in the Russian Federation. Adding an article on liability for greenmail to the Russian Criminal Code would be consistent with foreign practices defining an act punishable under criminal law as blackmail [9].

References

1. Topical Issues and Tasks of Corporate Law : monograph : The Legal Regulation of Corporate Governance in State-Owned Companies : The Legal Regulation of Greenmail Prevention / V.V. Romanova, F.J. Säcker, M.V. Frommann [et al.] ; edited by V.V. Romanova. Moscow : Yurist Publishing House, 2020. P. 236.
2. Romanova V.V. Current State and Problems of the Legal Regulation of Corporate Governance in State-Owned Companies in the Russian Federation / V.V. Romanova // Topical Issues and Tasks of Corporate Law : monograph / edited by V.V. Romanova. Moscow : Yurist Publishing House, 2020. P. 48–49.
3. Romanova V.V. Current State and Problems of the Legal Regulation of Corporate Governance in State-Owned Companies in the Russian Federation / V.V. Romanova // Topical Issues and Tasks of Corporate Law : monograph / edited by V.V. Romanova. Moscow : Yurist Publishing House, 2020. P. 48–49.
4. Chamber of Commerce and Industry of the USSR Law Section // Arbitration Case Law Part II Rulings of the Arbitration Commission for Foreign Trade 1951–1958. Moscow : Progress Publishing House, 1972. P. 140–145.
5. Romanova V.V. Current State and Problems of the Legal Regulation of Corporate Governance in State-Owned Companies in the Russian Federation / V.V. Romanova // Topical Issues and Tasks of Corporate Law : monograph / edited by V.V. Romanova. Moscow : Yurist Publishing House, 2020. P. 48–49.
6. https://www.investopedia.com/terms/g/greenmail.asp
7. Romanova V.V. Recommendations and Suggestions on the Improvement of Anti-Greenmail Legal Regulation / V.V. Romanova // Topical Issues and Tasks of Corporate Law : monograph / edited by V.V. Romanova. Moscow : Yurist Publishing House, 2020. P. 219–232.
8. Kozlova N. Greenmail. Alexander Bastrykin — On New Corporate Raid Tactics and Necessary Amendments to the Law / N. Kozlova // Russian Business Newspaper. URL: https://www.ippnou.ru/print/007350/.
9. Lee R.C. What is the Difference Between Greenmail and Blackmail and are Both Illegal? / R.C. Lee // Quora. 2017. September 27.