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SUPERVISORY BOARD INDEPENDENCE: IN A SEARCH FOR RESOLVING THE PROBLEM

The financial crisis in the US, Southeast Asia, Eastern Europe and some emerging markets has identified several fundamental deficiencies in the functioning of the corporate and financial sectors, particularly in corporate governance [1]. Ownership concentration is often the most effective response against weak enforcement and compliance with corporate governance standards. There are some problems with this, namely the issue of control over the activity of the executive body, the loyalty of the supervisory board.

There are two main models of solving this problem in the world: American model proposes the concept of independent directors into the governing bodies; German - mandatory participation of employees in the supervisory board (codetermination principle), which is reflected in the Fifth Directive and thus becomes compulsory for all EU member-states.

In Ukraine, on the one hand, the american model has already been borrowed, but the process of active integration into the European community is underway, including the implementation of EU law standards. Therefore, analyzing the appropriateness of borrowing a particular model is really important. In this article, it is argued about legal borrowing or more known in Western legal science as «legal transplant» [2, p. 112; 3; 4, p. 839-845; 5, p.

3-15; 6, p. 3]. It should be noted that even the corporate law of those states, which once served as a model for the establishing of company law systems of the post-Soviet countries (so called transition states), is also an example of borrowing certain principles, legal norms, institutions from foreign countries [7, p. 386; 8, p. 287; 9, p. 1137; 10].

Analysis of recent research papers. The legal status of the sSupervisory board has been the subject of research by a considerable number of scientists, among which it is worth to mention O.R. Kibenko, V.A. Vasilyeva, O.A. Belyanovich, O.M. Vinnyk, A.V. Myagkiy, A.V. Zelisko , I.V. Lukach and others. However, the issue of foreign influences, which led to the corresponding tendencies of the development of the supervisory board as an element of corporate governance was not researched.

The purpose of the article is to find out the effects of foreign law on the supervisory board and the prospects for further improving its legal status in Ukraine.

The Ukrainian model of corporate governance has not such body like a board of directors (as in the US or Russia), but a supervisory board. At the same time, the Law of Ukraine “On Joint-Stock Companies” provides the provisions on “independent directors” (Part 3, Article 53) [11]. This innovation is based on the model of western economies, the legislation of which includes the independent persons in the management and supervision of the company.

In accordance with NYSE (New York State Exchange) standards, no director qualifies as «independent» unless the board of directors certifies that the director has «no material relationship» with the company, either directly or as a partner, a shareholder, or an official of another company that has relations with the company.

According to Nasdaq standards: “An independent director should not be an official or employee of the company or its subsidiaries or any other person having relationships that, in the opinion of the board of directors of the company, may interfere with the exercise and independent decision making in the performance of directors’ duties [12].

On the one hand, the use of the wording «independent director» would be welcomed. In the case of a simple translation into a foreign investor’s language, the latter understands who he is because the independent director designates a person with similar powers in the law of the United States, England, and other states of the Anglo-American corporate governance system (e.g, India Companies Act, 2013). In the post-Soviet space, the concept of independent directors has been also implemented. According to Part 5 of Article 54 of the Law of the Republic of Kazakhstan «On Joint Stock Companies» at least 30%

of the Board of Directors shall be independent directors in each joint stock company [13].

On the other hand, it should be noted that the influences of US corporate law were noticeable in the above countries from the very beginning of the formation of their corporate law. Therefore, the concept of «independent director» fits into the board of directors (of Kazakhstan (Kazakhstan Article 53 of the Law of the Joint Stock Company Law) or the Russian Federation. Functionally, the board of directors «provides general managing of the company» (part 1, item 53 of the Law of the Republic of Kazakhstan «On Joint Stock Companies», part 1, article 64 of the Law of the Russian Federation «On Joint Stock Companies») [14].

The situation in Ukrainian Company Law is somewhat different. Company Law of Ukraine refers to the continental system of Company Law. The Ukrainian governance model does not provide with a board of directors (as in the US, the Russian Federation, etc.), but a supervisory board. The model of governance structure in Ukraine is formed on the basis of the Geman two-tiered model of company management. And the concept of independent directors was borrowed on the basis of the Anglo-American model. And here there is a certain conflict.

First, the capital structure in the US and continental Europe is different. In the US, typically thousands or even tens of thousands of persons are the shareholders of a company. Therefore, the feasibility of introducing professional independent directors (who would control top management actions) is justified.

The majority of the most Ukrainian joint-stock companies is concentrated in the hands of one or more major shareholders who fully control the enterprise, including enough votes to dismiss any member of the supervisory board or executive body. The stock market does not have a large number of active minor shareholders for whose interests this institution is intended to guarantee. The question is whether the introduction of this institute is appropriate at all?

Apologists of the German model of corporate governance argue about the need to include in the board of directors representatives of workers and employees of the company. The assertion that an independent director will indeed be independent is questioned by them. The independent director can be controlled by simple bribery or misrepresentation due to ignorance of the specifics of the business activities of the enterprise. Therefore, it is worth analyzing the case for the inclusion of company employees instead of independent directors.

Klaus Hopt among the benefits of employee involvement over independent directors states the following:

1) intra-entrepreneurial effect; employees are more motivated than independent directors because they think about the company as «their own», while for independent directors it is a purely business relationship without going into corporate and other relationships within the company. In addition, the representation of company employees in the supervisory board is usually conducted through representatives of elected representatives with the participation of trade union bodies. Thus, the motivation of these individuals is not only due to material benefits, but also the opportunity to achieve better career success through quality and conscientious representation of the labor collective in the supervisory board.

2) effect on the stock market and the economy as a whole; the involvement of employees in the supervisory board promotes mutual understanding between the shareholders, - in the language of Karl Marx's Capital, - by the owners of the means of production and the employees employed by them. Such dialogue, in turn, reduces the risk of strikes, etc.

3) social effect; the feeling that employees are involved in the management of the enterprise has a positive social effect on public relations in general [15, 1354-1355].

On the one hand, given into account a two-tiered Ukrainian corporate governance structure, the idea of attracting hired employees as a counterpart to the members of the supervisory board of elected majority shareholders is logical. In our opinion, the participation of employees in the supervisory board causes an increase of the level of company social responsibility, in particular in the issues of dismissal of employees, their social security, the expediency of transferring certain production processes outside Ukraine (in particular, to China) in order to reduce the cost and competitiveness of the company.

The opponents argue that the worker's participation causes some troubles for economic processes in the enterprise (protests against the reduce of workers' remuneration, reduction of their number). And as a consequence this aggravates the position of the enterprise in comparison with its foreign competitors. In our opinion, is not true in Ukrainian realities. The average wage in Ukraine is still one of the lowest. Therefore, the reasons for the low competitiveness lie in another - in the unwillingness of shareholders to update the means of production, to apply innovative technologies in production.

Employees in the supervisory board are more concerned that the company's profit is distributed, for the increase of salaries of employees, the expansion of production (and, consequently, the increase in the number of required jobs), and not be aimed solely at paying shareholders' dividends. Thus, employee involvement is not only felt at the company level, but at its micro level influences the improvement of the socio-economic situation in the whole state.

On the other hand, it is much easier to influence on employee (direct subordination according to job responsibilities) than on an independent person who is an independent director: 1) the risk of losing a job causes a higher level of dependence; 2) the influence of trade union committees of workers, the ability of trade unions to protect properly their interests can now be called into question, since in the vast majority of trade union representation at the enterprises is declarative in nature, without real impact on enterprise management; 3) the level of social responsibility of an individual employee, his ability to put the interests of the workforce above his own can be questioned.

Therefore, each of the existing models (the institute of independent directors or the mandatory participation of employees in the supervisory board (the principle of codetermination)) does not give confidence in achieving the goal of restraining management from abuse and avoiding the company's focus solely on meeting the shareholders' interests without taking into account the interests of the public. However, in the context of the weakness of trade unions, their weak interaction with each other, the risk of dismissal without the possibility of finding an alternative job, it seems more appropriate at this stage of the socio-economic development of the state to use the institute of independent members of the supervisory board (independent directors).

It should also be paid an attention to the following. The supervisory board consists of elected shareholders or persons who represent their interests (hereinafter referred to as shareholders' representatives) and of independent directors. Thus, the body is called the «supervisory board», and it includes the independent directors. Functionally, the supervisory board in Ukraine: 1) protects the rights of shareholders, 2) controls, 3) regulates the activities of the executive body and 4) manages the company.

Having adopted the anglo-american model of independent directors, the executive body of the ukrainian joint-stock company continues to be called the director, etc. According to Part 3 of Art. 58 of the Law of Ukraine "On Joint-Stock Companies" the executive body of a joint-stock company may be collegial (board, directorate) or sole (director, general director). The executive body in Ukraine has traditionally remains with the soviet structure which has passed into the legislation of an independent Ukraine as part of the Soviet heritage.

While in some other countries (for example Kazakhstan), having adopted the American model of corporate governance, the executive body does not consist of the directors. That means that the legislator of Kazakhstan has completely refused to borrow the soviet structure of enterprise management. There is also another option (the Russian Federation) where the board of

directors (supervisory board) consists of directors and the executive body is also designated as director.

The fact of having an institute of independent directors is often a tribute to the state's attempt to conform to the «western style of corporate governance» [16, p. 13] without providing the independent directors with proper influence to manage the processes occurring in the JSC. In Ukraine, the requirements for the independent directors (compared to other countries where there is a potential for abuse) are well spelled out in the law. But at the same time, the question of the real possibility of independent directors' influence on the economic activities of the company needs further study.

Thus, the position of director appears in the two bodies with completely different competence - supervisory and executive. And such duplication does not contribute to the simplicity and comprehensibility of national company law from the point of view of a foreign investor, who, because of the same name, can identify them for himself.

Conclusion. Therefore, it seems that the double wording “independent member of the supervisory board (hereinafter referred to as the independent director)” should be avoided (as in Article 2 of the Law of Ukraine “On Joint Stock Companies”), leaving only the wording “independent member of the supervisory board”. And in this case we do not see a problem that the formulation will be different from the typical for the anglo-american system «independent director». In our opinion, this is precisely the case when a legal transplant has to obtain its own authentic name in the recipient state. It is essential that, by its nature an “independent member of the supervisory board” really fulfills the role assigned to the “independent director” in the country of legal transplant's origin. In this case, the purpose of legal transplanting will be achieved.

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Kovalyshyn O.R. Supervisory Board independence: in a search for resolving the problem

In the article, the author research the urgent issue of the application of legal borrowings (legal transplants) in the field of commercial law and corporate

governance in Ukraine. It focuses on the fact that absolutely autonomous development of business law in the aspect of globalization and participation of Ukraine in the most international organizations is impossible. The process of implementation of legal borrowings is certainly accompanied by a number of advantages and disadvantages of their application. The minimization of the latter should be among the goals not only of comparative law, but also of the special legal sciences.

There are two main models of solving this problem in the world: American model proposes the concept of independent directors for improving the corporate governance; German model proposes mandatory participation of employees in the supervisory board (codetermination principle), which is reflected in the Fifth Directive and thus becomes compulsory for the all EU member-states.

The author analyzes the borrowed american model, which was embodied in the Law of Ukraine “On Joint Stock Companies”.

At the same time, it is emphasized the article that today there is a process of active integration into the European community, including the implementation of EU law standards. This applies in particular to the EU Company Law. Therefore, the European model of ensuring the independence of the supervisory board through the involvement of company employees (the principle of codetermination) is analyzed.

The author concludes that each of the existing models (american concept of independent directors or german mandatory participation of employees in the supervisory board (the principle of codetermination)) does not give confidence in achieving the goal of restraining the management from abuses and avoiding the company’s focus solely on satisfying the interests of shareholders without the interests of a state and society. However, in the context of the weakness of trade unions in Ukraine, their weak interaction with each other, the risk of dismissal without the possibility of finding an alternative job, it seems more appropriate at this stage of the socio-economic development of the Ukrainian company law to use the American concept of independent members of the supervisory board (independent directors).

Keywords: legal transplant, legal borrowing, independent director, supervisory board, principle of codetermination, corporate governance, Ukraine