

**SEPARATE PROBLEMS OF JURISDICTION AND COMPETENCE OF
PARTICIPANTS' IN A LIMITED LIABILITY COMPANY GENERAL
MEETING LEGISLATIVE DETERMINATION**

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The reason for writing this article is a big amount of judicial acts on litigation settlements, which appear from corporate relations, realisation of rights by participants of Limited Liability Company. But these settlements are inconsistent; this fact shows existence of serious legal gaps, ambiguousness of use of rule of substantive law by courts. For example, it is subject to gaps in legislation in effect related to order of convening of a general meeting of participants of Limited Liability Company, permissions assigning, order of participant exclusion, who make non-completely share capital payment, and also systematically don't carry out or carry out inappropriately responsibilities or thwart company goal by his actions, with that other participants collectively have 60% of votes or less.

In case when conscientious participants hold according to the Statute of Company percentage equal to the amount of as a whole not less than 60%, they in general are deprived of the opportunity to carry out general meeting of participants and to exclude unfair participant from the company, which make non-completely share capital payment to statutory fund of the company, and also systematically don't

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carry out or carry out inappropriately responsibilities or thwart company goal by his actions.

Viewing corporate cases economic courts ambiguously apply provisions of article 58 of Law of Ukraine “On economic courts” [1] in reference to participants of the Limited Liability Company, which make non-completely share capital payment to statutory fund of the company.

In one cases courts considered that participant, who non-completely share capital payment to statutory fund, did not acquire corporate right equal to the amount defined in the Statute, that is why he held in general meeting quantity of voices equal to made share capital. For example, judgement of Superior Economic Court in the case № 1/170-13/41 (1/664-27/260) of January 16, 2007 [2]; judgement № 12/277ПН of August 27, 2008, of Donetsk Appeal Economic Court [3]; judgement of Economic Court of Vinnytsia Region in the case № 7/237-07 of May 13, 2008 [4].

In analogous cases opposite judgments are made by Economic Courts, for example judgment Superior Economic Court in the case № 37/144-07 of April 10, 2008 [5]; decision of Kharkiv Appeal Economic Court in the case № 13/265-09 of April 20, 2010 [6]; recommendations of Presidium of Superior Economic Court of Ukraine of December 28, 2007, “On the practice of legislation use on hearings of cases, which arise within corporate relations (as amended on” of June 18,2009)[7].

Such scientists as O. Garagonich, O. Yefimov, O. Kibenko, O. Kovalishin, V. Kravchuk, V. Mozolin, L. Netska, P. Povar, I. Spasibo-Fatyeyeva and others dealt with the subjects on legal status of Limited Liability Company, its mechanism of corporate management. But those questions did not find ways of decision, which would be prevalent in scientific works.

For understanding of essence of Limited Liability Company as organizational-legal form of legal entity first of all such legal categories as founder and participant

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of economic company, corporate rights, statutory fund, share in the statutory fund, voting capital need explanation.

Corporate enterprise is established (part 5 of article 63 of Economic Code of Ukraine) [8], as usual, by two or more founders by common agreement (contract), act on the basis of joint property and/or entrepreneurial or labour activity of founders (participants), their joint business management, on the bases of corporate rights, including by means of department, which are established by them, taking part by founders (participants) in company profit and risks sharing. Corporate enterprises are group enterprises, enterprises, which are established in the form of economic company and also other companies, including which are established on private property of two or more persons. According to the article 140 of Civil Code of Ukraine [9] Limited Liability Company is company established by one or several persons, statutory fund of which is divided into parts, size of which is determined by the Statute. Similar definition of Limited Liability Company (especially in respect of corporate organisation) can be found in part 3 of article 80 of Economic Code of Ukraine [8], in article 50 of Law of Ukraine “On economic companies” [1].

Sources of formation of company’s property (part 2 of article 66 of Economic Code of Ukraine) are:

- financial and material shares of founders;
- profit, got from realisation of goods, services, other types of economic activity;
- income from securities;
- credits of bank and other creditors;
- capital investment and state budget grants;
- property, bought from other economic entities, organisations and citizens as required by law;

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- other sources that are legal in Ukraine.

Company is owner of (article 12 of Law of Ukraine “On economic companies”) [1]:

- property, transferred to it by participants as contribution to statutory (complex) fund;
- goods, made by company as a result of economic activity;
- got income,
- other property, received on legal grounds.

Company bears risk of accidental loss or property damage, which is company's property or is taken on lease, unless otherwise provided by the Statute.

Consequently one of the sources of formation of company's property are contributions to statutory (complex) fund, transferred to it by participants (paragraph 1 of part 1 of article 115 of Civil Code of Ukraine [9], paragraph 1 of part 1 of article 12 of Law of Ukraine “On economic companies” [1]). Therefore Limited Liability Company belongs to that model of legal entities, in which founders (participants) transfer to this legal entity their property with the purpose of formation of statutory (complex) fund, forfeit freehold interest in the property, but instead receive obligatory rights that are named “corporate rights”.

Determination of corporate rights is contained in range of legal acts, for example, in article 167 of Economic Code of Ukraine [8], article 2 of Law of Ukraine “On joint-stock companies” [10], item 14.1.90 of Tax Code of Ukraine [11]. Analysis of mentioned legal standards gives an opportunity to separate such main elements of corporate (obligatory, property and non-property) rights:

- right on participation in management of economic organisation;
- receiving of certain part of income (dividends) of this economic organisation;

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- receiving of assets of economic organisation in case of its liquidation in the amount and in accordance with the procedure established by the legislation.

Other powers, provided by law and statutory documents, can belong to participant of corporate entity. Corporate rights prove membership in economic organisation that is based on share in statutory (complex) fund.

This means that corporate rights of a person related to certain economic organisation are complex of received powers on it as a result of membership and participation in formation of statutory (complex) fund.

Total share of founders and participants of economic company (article 87 of Economic Code of Ukraine [9]) is statutory fund of company. Size of statutory fund is total cost of such shares (part 1 of article 144 of Civil Code of Ukraine [9]). Statutory fund of Limited Liability Company is due to be paid by participants of company before the end of first year from the day of company's registration (article 52 of Law, pat 3 article 144 f Civil Code of Ukraine)

Analysis of Ukrainian legislation gives an opportunity to separate such main functions of statutory (complex) fund as:

- sources of formation of initial capital of economic organisation (basic and floating assets), which are necessary for carrying out of economic activity;
- initial capital of economic organisation (basic and floating assets), which are the basis for carrying out of economic activity;
- guarantees of economic organisation's property of minimal size for credit;
- basis of estimate of distribution of profits (dividends) and assets.

Size of statutory fund of Limited Liability Company, shares of its participants is determined by the Statute of company. This size with an allowance for results of financial and economic activity is also shown fully under position of passive balance "Statutory fund" (item 37 of Standard of business accounting 2 "Balance", approved

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by Decree of Ministry of Finance of Ukraine of March 31, 1999, № 87, registered by Decree of Ministry of Justice of Ukraine of June 21, 1999, № 396/3689 [12]). But the main function of initial capital, which means real financing of economic activity, carry out only shares (their parts), which are paid, which influence directly on financial results of company's economic activity, and thereafter provide such elements of corporate rights as right on receiving by participants of certain part of income (dividends), assets of economic company. Correlation of paid and non-paid statutory fund characterizes financial means of enterprise.

Therefore high-priority basis of formation of company's property, which provides economic activity, establishment of added value, is real property, transferred by participants of company, which means such elements of corporate rights as right on receiving of certain part of income of company, part of assets of company, connected to real share capital payment to statutory fund of participant. Plenum of Supreme Court of Ukraine reached the same conclusion. According to the part 4 of item 30 of Decree of Plenum of Supreme Court of Ukraine "On practice of Consideration of corporate disputes by courts" № 13 of October 24, 2008, [13] In case if participant made (incompletely paid) non-completely share capital payment to statutory fund of the company, he is paid real cost of part is proportional to share capital payment.

Legal categories "statutory fund", "share of statutory fund" have double meaning. The first meaning is liability side, source of formation of initial capital with determination of its "planned" size, and "planned" sizes of parts in it and cost of shares of participants; the second meaning is complex of real property (basic and floating assets), which consist of complex of shares of company's founders and participants and real share capital payment to statutory fund according to article 87 of Economic code of Ukraine, article 144 of Civil Code of Ukraine.

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According to article 19 of Civil Code of Ukraine property as special item is separate thing, complex of things, and also property rights and liabilities. Property rights are non-consumptive thing. Property rights are determined by corporeal rights. Systematic analysis of articles 144, 328, 346, 611 of Civil Code of Ukraine gives an opportunity reach a conclusion that participant of Limited Liability Company does not acquire property rights on corporate rights as to made share capital payment to statutory fund.

Therefore it is necessary to make a conclusion about double content of legal categories “statutory fund”, “share of statutory fund”, and also direct connection of complex of corporate rights with real share capital payment to statutory fund of economic organisation.

This conclusion is proved by legal standards.

1. According to part 2 of article 86 of Economic Code of Ukraine share, valued at hryvnia, is a part of participant and founder in statutory fund. Order of estimation of shares is determined in statutory documents of economic company, unless otherwise provided by legislation.

2. Property of company (article 66 of Economic Code of Ukraine) consists of commercial and non-commercial assets, and also other valuables, cost of which is recorded in independent balance sheet of company.

3. Levying of execution upon part of property of Limited Liability Company, which is proportional to part of company’s participant in statutory fund, under personal debts (article 149 of Civil Code of Ukraine), is allowed only in case of insufficiency of participant’s other property with the purpose of satisfaction of requirements of creditors. Creditors of such participant have right to demand pay-out of cost from company, which is proportional to part of debtor in statutory fund of company, or separating of certain part of property levying of execution. Part of

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property, which has to be separated, or amount of finance, which is equal to this cost, is settled according to balance sheet, which is made up as on the date of demands of creditors. Levying of execution upon the whole share of participant in statutory fund of Limited Liability Company forfeits participation in company. Therefore it is referred to determination of property's cost, but not to cost index of sources of its formation.

4. The same conclusion can be reached out of content of article 54 of Law of Ukraine "On economic companies", article 148 of Civil Code of Ukraine. After disaffiliation of participant with Limited Liability Company, value of part of companies property equal to share in statutory fund is paid to participant. Pay-out is made after approval of annual account, and in term of 12 months of the date of day of disaffiliation. Upon the demand of participant and as subject to participant's consent share can be returned wholly or partially in kind.

Certain part of income, received by company in the current year up to the moment of disaffiliation, is paid to participant that leaved. Property, transferred by participant to company only for use, is returned in kind without reward.

5. Part 3 of article 147 of Civil Code of Ukraine provides that share of company's participant can be alienated before the whole pay-out only in the part that is already paid-out. It is important to turn attention to sequence of lawgiver in this question. Before coming in effect of Civil Code of Ukraine and making amendments to part 2 of article 53 of Law of Ukraine "On economic companies" participant of Limited Liability Company could transfer share (its part) to third persons only after whole share capital payment to statutory fund.

Participants of Limited Liability Company have right to participate in company's management in order determined in the Statute, except as otherwise permitted by law (article 116 of Civil Code of Ukraine). Limited Liability Company's

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management is carried out by participants non-directly, but under executive establishment, determined by law and the Statute.

The highest body of Limited Liability Company is general meetings of its participants. They consist of participants of company or appointed by them representative. Participants have number of voices proportional to size of their parts in statutory fund (size of part is sum of participant's shares to statutory fund).

General meetings of participants of Limited Liability Company are not permanent management body, are convened at least twice a year, unless otherwise provided by statutory documents. Opportunity to convene unscheduled general meetings of participants of Limited Liability Company is provided by law.

General meetings of participants are considered authorized, if participants (authorized representative), which hold as a whole more than 60% of votes, are present on them (part 1 of article 60 of Law of Ukraine "On economic companies"). In theory and practise such demand of competence of collegiate authority is called quorum.

Question on order of quorum determination related to the whole planned or formed size of statutory fund, quantity of participants, which are present on meetings, is raised. Analysis of legislation in effect and practise of its use gives an opportunity to reach a conclusion on different approaches, for example:

- the first approach is correlation of formed statutory fund (which is taken for 100%) and parts of participants, which are present on meetings and hold amount of voices that is proportional to their parts (part 1 of article 60, paragraph 4 of article 58 of Law of Ukraine "On economic companies");
- the second approach is determined in part 5 of article 53 of Law of Ukraine "On economic companies" – correlation of complex of shares' parts of formed statutory fund, which belong to participants, and shares of participants, which

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are present on meetings and hold amount of voices that is proportional to such complex of shares' parts of formed statutory fund. According to content of articles 52, 53 of Law of Ukraine "On economic companies" real paid share in statutory fund is not taken into account as determination of quorum;

- the third approach comes out of article 55 of Law of Ukraine "On economic companies" – legal successor can become participant of Limited Liability Company only in case of will of entry to Limited Liability Company and also consent of other participants. Quorum in such case is determined on the analogy of demands provided by article 53 of Law of Ukraine "On economic companies".

It is necessary to reach a conclusion that norms of Civil Code of Ukraine and Law of Ukraine "On economic companies" settle questions of quorum, determination of amount of voices on a division of participants of Limited Liability Company in general meetings, cost of shares in company's property, first of all according to real (formed shares) in statutory fund.

Question on order of determination of quorum under decision-making on exclusion of participant from membership of Limited Liability Company due to the fact of non-complete or partial share capital payment is raised.

According to demands of article 144 of Civil Code of Ukraine (article 52 of Law of Ukraine "On economic companies") statutory fund of Limited Liability Company should be paid by participants of company before the end of the first year as from the date of company's state registration. If participants before the end of the first year as from the date of company's state registration did not make (non-completely make) their shares, general meetings of participants make on of such decisions:

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- on exclusion from membership of those participants that did not make (non-completely make) their shares, and on determination of order of repartition of shares in statutory fund;
- on decrease of statutory fund and determination of order of repartition of shares in statutory fund;
- on liquidation of company.

All three possible decisions are exclusive competence of general meetings of participants of Limited Liability Company. Main point of exclusive competence on these questions is provided in article 145 of Civil Code of Ukraine – reserved matters of general meetings of company’s participants can not be transferred by them to making decision by executive body of company. All these decisions are directed to creation of certain negative consequences for participant-breaker and are form of corporate responsibility, and also are directed to providing framework for functions of statutory fund, legal rights and interests of creditors of company and other participants. In the process of decision-making on exclusion from membership of those participants that did not make (non-completely make) their shares, according to article 64 of Law of Ukraine “On economic companies” these participants do not vote, do not bear a part in meetings and in voting on order of repartition of shares in statutory fund. Exclusion of participant from company leads to consequences provided by articles 4, 55 of this Law.

General meetings of company’s participants make decision by simple or qualified majority of votes. From the questions mentioned items “a”, “b” of article 41 of Law of Ukraine “On economic companies” and also in the process of decision-making on exclusion of participant from company, decision is considered as made if for it were given votes of participants, which hold more than 50% of general amount of votes of company’s participants. Other questions are decided by simple majority of

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votes. Every participant, bearing part in meetings, can influence on decision-making by voting for or against it or by not voting.

Therefore determination of quorum taking into account amount of voices of participant (participants) in part of non-paid share in the process of decision-making on exclusion of this participant will lead (in substance) to influence on such decision, and also to influence on decision related to order of repartition of shares or decision about liquidation of company.

Based on the above it is necessary to reach a conclusion that:

- participants of Limited Liability Company have amount of voices that is proportional to real made shares into statutory fund of company;
- exclusion of participant from membership of company belong to exclusive competence of general meetings of participants within the meaning of the fact that mentioned competence can not be transferred with the purpose of decision of other management bodies. From the perspective of principle of justice, provided by law interest, provisions of part 2 of article 124 of Constitution of Ukraine [14], participants, which hold more than 50 % of general amount of voices of company's participants, in case of absence (impossibility of assembling) competent management body, can realize their rights on exclusion of unconscientious participant by means of judicial recourse with certain demand;
- with the purpose of elimination of mentioned and other gaps of determination of legal status of Limited Liability Company, management mechanisms and internal corporate control, the most appropriate decision is to pass Law of Ukraine "On Limited Liability Companies".

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ОКРЕМІ ПРОБЛЕМИ ЗАКОНОДАВЧОГО ВИЗНАЧЕННЯ КОМПЕТЕНЦІЙ ТА ПРАВОМОЧНОСТІ ЗАГАЛЬНИХ ЗБОРІВ УЧАСНИКІВ ТОВАРИСТВА З ОБМЕЖЕНОЮ ВІДПОВІДАЛЬНІСТЮ

Бойчук Р. П.

У статті автор аналізує прогалини чинного законодавства щодо порядку виключення учасника зі складу учасників товариства, який не повністю вніс свій внесок до статутного капіталу товариства, а також який систематично не виконує або неналежно виконує обов'язки, або перешкоджає своїми діями досягненню цілей товариства, при цьому коли інші учасники в сукупності володіють шістдесятьма або менше відсотками голосів. На основі проведеного дослідження робить висновки та пропонує зміни в чинне законодавство.

Ключові слова: товариство з обмеженою відповідальністю, порядок скликання загальних зборів учасників товариства з обмеженою відповідальністю, виключення учасника з товариства з обмеженою відповідальністю.

ОТДЕЛЬНЫЕ ПРОБЛЕМЫ ЗАКОНОДАТЕЛЬНОГО ОПРЕДЕЛЕНИЯ КОМПЕТЕНЦИИ И ПРАВОМОЧНОСТИ СОБРАНИЯ УЧАСТНИКОВ ОБЩЕСТВА С ОГРАНИЧЕННОЙ ОТВЕТСТВЕННОСТЬЮ

Бойчук Р. П.

В статье автор анализирует пробелы действующего законодательства о порядке исключения участника из состава участников хозяйственного общества, который не полностью внес свой вклад в уставный капитал общества, а также систематически не выполняет или ненадлежащим образом выполняет обязанности, или препятствует своими действиями достижению целей общества, при этом когда другие участники в совокупности владеют шестьюдесятью или менее процентов голосов. На основе проведенного исследования делает выводы и предлагает изменения в действующее законодательство.

Ключевые слова: общество с ограниченной ответственностью, порядок созыва общего собрания участников общества с ограниченной ответственностью, исключение участника из общества с ограниченной ответственностью.

MODERN LEGAL RESEARCHES

**SEPARATE PROBLEMS OF JURISDICTION AND COMPETENCE OF
PARTICIPANTS' IN A LIMITED LIABILITY COMPANY GENERAL MEETING
LEGISLATIVE DETERMINATION**

Boychuk R. P.

In the paper some challenges concerning gaps in economic legislation have been reviewed. Described issues are related to: involuntarily removal of an LLC member , who does not pay full shareholder fee, and who does not execute or conducts responsibilities of LLC member improperly, or precludes by his actions from achievement of company purposes, herewith other participants collectively own sixty or less percent of votes. The author has given the definition of the owner and shareholder (member), voting rights (corporate rights), foundation documents, share capital, share of stock, share of assets. The author has analyzed various points of view concerning the definition of voting rights (corporate rights) of LLC shareholder, Stockholders' Equity and share of stock, and difference between voting right and the amount of their contribution to the business. Court practice concerning efficient resolution of complex commercial and corporate disputes and legal means for prevention of conflicts between LLC members have been researched by author.

Keywords: Limited Liability Company, order of general meeting convening of participants' in a Limited Liability Company, participant expulsion from Limited Liability Company.