# LIABILITY OF CORPORATE OFFICIALS IN THE FIELD OF CORPORATE GOVERNANCE. MODERN TENDENCIES

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# LIABILITY OF CORPORATE OFFICIALS IN THE FIELD OF CORPORATE GOVERNANCE. MODERN TENDENCIES

**Problem formulation.** The legal personality of a legal entity is embodied in the activities of its governing bodies, the purpose of which is to achieve results of entrepreneurial activity. However, in the process of interaction between the governing bodies of a legal entity, there are such situations when the participants of such interaction pursue goals directed differently or even oppositely, which is due to the polar aspirations to realize their own corporate interests.

This very idea, in the opinion of Professor Yu. Zhornokuy, is the basis for a corporate conflict[1]. The scholar points out that in the conditions of non-transparency in the activities of most national joint-stock companies, their main advantages are realized through day-to-day management and decision-making, which in their turn are largely realized through shadow schemes, in which the governing body officials are involved. In such conditions, it is easy to underestimate profits or otherwise cause harm to a legal entity. Therefore, investments are risky for a shareholder who has obtained corporate rights, but does not have a real opportunity not only to influence, but also to control the process of managerial decision-making[1].

In the light of the above, the problem of legal liability of corporate officials of a legal entity for their decision-making requires a profound theoretical rethinking. Therefore, the relevance of theoretical work on the issue of liability of the governing body and their officials for actions harming the interests of a legal entity is beyond doubt.

**Analysis of recent research and publications.** The issue has been researched by many scholars, including Yuriy Basin, Beymut Shermukhametov, Lado Čanturia, Iryna Spasibo-Fateeva, Valentyna Vasilyeva, Evgeniy Sukhanov, Vladimir Vitushko, Wan Fauzian Wan Yusoff, Idris Adamu Alhaji, Schipani, Khaled Abdelkader Muftah Otman, Koji Funatsu, Diksha Kakkar, Jenifer Piesse and others. At the same time, the legal aspects of the nature of this liability in connection with the conditions of its incurrence have not been paid attention to and are the subject of this publication.

**Purpose formulation.** On the cusp of the 20th and 21st centuries, the tendency towards convergence of the national legal system with the legal systems of other states intensified in the legislation of the Eastern European states. Investment capital attraction requires transparency in the corporate governance system. An effective mechanism for protecting participants in corporate legal relations, which can be achieved by borrowing various legal practices from the world, is becoming an important factor in effective cooperation in the international economic sphere.

One of such practices is the concept of legal liability of the governing body officials for harm caused by their actions in the relevant field.

In Ukraine, the regulatory implementation of this concept is associated with the spread of such threats to ensuring the stability of the banking system as the execution of risky transactions (excessive lending to persons associated with the bank).

**Main body.** The study of this institution requires terminological definiteness of the concept of corporate governance, which has rather economic than legal content.

In this connection, one should recognize that the formula of corporate governance is that the subject of such governance is one who ensures the legal personality of a legal entity. This formula reveals itself in its certain features.

Thus, the corporate governance system consists of the governing bodies of a legal entity, ensuring its organizational unity and its participation in civil circulation on its own behalf. The bodies are a supreme governing body with the rule-making powers (a general meeting of participants or shareholders), a board of supervisors and an executive governing body (an executive board, a directorate or a director).

In view of the differentiation of the nature of corporate governance, of the multidimensionality in the enjoyment of its legal personality, the scope of powers to govern a corporation cannot be concentrated within the powers of the only subject. First of all, due to the imbalance of legal aspirations and capabilities (competence) of the subject of corporate governance, the concentration of leverages in the hands of a single person affects the efficiency of making and implementing managerial decisions.

The variability of the competence of corporate governance bodies of a legal entity provides for the differenti-



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ation of the level of legal liability of its natural persons. Its criterion is the content of the activity of the relevant body in relation to ensuring the legal personality of a legal entity, through the implementation of such characteristics of the latter as structural unity and participation in civil circulation on its own behalf, and it assumes the presence of administrative and economic components as well as of organizational and executive ones.

Today one can distinguish five basic models of corporate governance depending on the factor of historical, cultural and industry specificity (Anglo-American, German, Japanese, Soviet and Post-Soviet models). It seems that the above-mentioned models of corporate governance are distinguished as they have territorial differences in the mechanism of financial capital concentration. The development of each of them has not only a theoretical basis and practical applicability, but also individuality[2].

Thus, the Anglo-American model of corporate governance is characterized by a binary structure, including the general meeting of shareholders (the supreme governing body) and the board of directors as expressing its will (the executive body).

In turn, the German model of corporate governance is characterized by a multicomponent structure, in which binarity is a characteristic of the supreme body of corporate rule-making.

The supreme governing body is the general meeting. In the period between the work of the general meeting the board of supervisors performs the functions of control, of protection of shareholders' interests and of governance.

The executive body is represented by a panel (executive board) or by a sole person (director).

Despite this, at the same time, the principle of corporate governance structure of a legal entity is the factor of its unity.

The first (basic) level of structure is the corporate governance body, formed by a participant (or a founder) of a legal entity with the aim of concentrating capital and consolidating interest in achieving the goals of its activities. This body is the general meeting. It is the primary one in the corporate governance system. This body determines the governance model of the legal entity. By its formation, the participants (or founders) are given exclusive powers to determine the "fate" of a legal entity and directions of its activities.

In the period between the work of the general meeting, the board of supervisors performs governance functions on its behalf.

The second level of the corporate governance structure of a legal entity is the creation and operation of the body for implementing and executing decisions adopted by the supreme corporate governance body. Depending on the organizational and legal form of the legal entity, this level may be manifested in variable forms (an executive board, etc.). Thus, the general competence of the supreme governance body is diversified into special powers vested in the relevant executive corporate governance bodies of a legal entity, specifically created by the supreme governance body.

In China, the Corporate Law requires corporations to form three statutory and indispensable corporate governing bodies: (1) the shareholders, acting as a body at the general meeting; (2) the board of directors; and (3) the board of supervisors. In addition, the Corporate Law introduced two new statutory corporate positions: the Chair of the board of directors ("Chair") and the CEO[3].

Unlike in the Chinese model of corporate governance, in Ukraine as well as in Germany supervisory board oversees the board of directors, and the members of the board of directors are appointed by, and may be dismissed by, the board of supervisors[4].

From the above, the subjects of corporate governance, whose competence includes the exercise of their executive powers are subject to legal liability. These are the officials of the executive body of corporate governance.

This logic was laid down in some form in the Law of Ukraine "On Joint Stock Companies", Article 63 of which establishes the liability of officials of the bodies of a joint stock company for damages done to the company by their actions (or omission)[5]. Then, in 2015, it was also laid down in the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Concerning the Protection of Investors' Rights" [6], which amended Article 89 of the Commercial Code of Ukraine, establishing the officials' liability for damage caused by their actions committed with excess or abuse of official powers, their actions committed in violation of the procedure for the preliminary approval or of other decision-making procedure, etc.[7] In the banking sector, civil liability of the corporate governance body officials was introduced by the Law of Ukraine "On Amendments to the Law of Ukraine "On Banks and Banking Activities" Concerning the Determination of the Particularities of Corporate Governance in Banks", which aggravated liability for persons associated with the bank, first of all, for heads of banks (Article 42), when making decisions affecting the financial condition of the bank[8].

The aspect of the issue, covered in the present work, establishes the general conditions for legal liability of the corporate governance officials. For the time being, it has been doctrinally defined and legislatively enshrined not only in Ukraine, but also in most European countries that such conditions are the unity of subjective and objective elements of tort, which, in our opinion, is unjustified.

The vesting of officials of the corporate governance body of a legal entity with administrative and economic powers as well as with organizational and executive ones to manage the legal entity and its property forms the fiduciary nature of their relations.

Trust between members of society is the main factor in their interaction. Such trust lies not only in the plane of the cultural development of society, but also dialectically passes into the economic sphere. The existence of this phenomenon in the field of corporate governance is obvious. Its essence lies in the commission by officials of the

corporate governance body of legally significant actions, although in the interests of a legal entity, but exclusively at their own discretion, that is the nature of the good faith and the degree of the reasonableness of such actions is subjective. In such a case, the legal entity relies exclusively on the fiduciary nature of such relations.

In turn, the fiduciary nature of relations between a legal entity, founders (shareholders) and officials of the relevant corporate governance body forms another legal model of interaction between them. Confidence in the good faith and benevolence of the party with which the trustor is in legal relations, based on his trust, does not provide for the expectation of the trustee's irrational conduct.

Consequently, such relations lack proportionality. In their structure, there is no balance in the mechanisms for counteracting unfair conduct, which, for example, may be expressed in certain types of securing performance of obligations.

Since *fiducia* between the participants in these relations increases risks of the abuse of rights, it is correct, in our opinion, not only to establish reasonable compensation to the injured party, which is the institution of compensation for harm as such, but also to prevent unbenevolent conduct by aggravating legal liability of the corporate governance body officials by excluding guilt as a condition for its incurrence. In such a way, there is balancing the existing disproportion in the legal resources of the participants in the fiduciary relations being studied, with one of these participants being in a legally weak position.

The similar approach has been adopted in common law states. The precedent of *Caparo Industries PLS v Dickman* is widely known. The House of Lords, following the Court of Appeal, set out a "three-fold test", developed by Lord Bridge (the "Caparo Test"): 1. Whether the defendant's conduct was reasonably foreseeable. 2. Whether is sufficient proximity between the parties for a duty to be imposed. 3. Whether or not it is fair, just and reasonable to impose a duty of care[9].

The first stage in the three-fold test is foreseeability. This has to do with the ability of the defendant to foresee the type of harm which the claimant suffered. This means that the injury of the claimant must have been foreseen by the defendant. Also, it has to be determined that the act of the defendant towards the claimant was negligent[10].

The second stage in Caparo is proximity, this is the degree of closeness between the defendant and plaintiff. It was formerly called neighbour principle in Donoghue v Stevenson[10].

However, it was defined by Lord Oliver in Caparo to not be closeness in the sense that the defendant was meant to protect anyone who is a claimant, but in the sense that the questions should be asked: in what capacity was the interest to be served and from what was he intended to be protected[11]?

The third stage of the three-fold test of the duty of care is fairness, justice and reasonableness. This stage focuses on whether the duty of care should be imposed on the defendant. A duty of care is imposed where the courts thought it to be fair, just and reasonable to impose such duty[11].

It should be noted that such ideas of protecting the rights of the weaker party have been formed in legal doctrine since the beginning of the 20th century in the works of Yu. Gambarov[12]. Therefore, the attempt to justify the existence of "strict (objective) liability" and the extension of its bounds to the corporate law sphere makes sense and has a clear legal tradition.

It is known that the objective elements of a civil offense, which include the wrongful conduct, harm caused and a causal relationship between the wrongful act and its result, are static, and their presence is a precondition for the incurrence of civil liability.

At the same time, the subjective element is variable. The guilt of a person as a subjective element may be absent, which does not exclude the ability of bringing a person to civil liability in some cases. This provision is the main argument of the theory of infliction, the supporters of which, as a basis for civil liability, recognize only the existence of the fact of causing harm and a causal relationship between the person's conduct and the negative consequences. At the same time, the subjective grounds for this harm are of no importance for the legal qualification of the person's acts. According to O. Ioffe, the duty to compensate for the harm caused without any guilt has a stimulating effect on the person as it prompts him or her to find and introduce new measures into his or her sphere of activities that will help, if not eliminate, at least mitigate or reduce the display of such insuperable force[13].

Thus, the principle of the incurrence of civil liability, regardless of the guilt of the delinquent, becomes a reasonable balance in ensuring the interests of a legal entity and in realizing the professional competence of a corporate governance body and its officials.

Thus, the professional competence of a corporate governance body official is based on the objective compliance of his actions and decisions with the business standard. The level of this competence should not only to prevent the official from taking actions or making decisions that may cause harm, but also to predict the possible negative consequences of his own professional activities. In turn, establishing the official's liability, regardless of his guilt, only increases the demands of care and diligence made on him.

Prominent Soviet scholar B.S. Antimonov, while substantiating the effectiveness of the principle of infliction as a condition of liability, pointed out that through it, a person is instigated not only to avoid what we call "guilty conduct", but also, moreover, it makes the person develop new methods and means to reduce the risk to zero by all means, sparing no strength, time, and costs[14].

In this context, attention should be paid to the position of Professor R. Maydanyk, who points out that '… the content of the concept of guilt of directors is established through the concept of reasonable and good faith conduct. At the same time, the director's responsibility should be excluded in case of missteps falling within the limits of business risk. The actual official's liability should be determined through the objective comparison of the decisions

of the corporate governance body with the established customs, the business practice standards (the standard of a "good boss")'[15].

In support of the justifiability of this statement, one should cite the practice of the Ukrainian Supreme Court, which in its rulings noted that "… persons acting on behalf of a legal entity must act not only within the limits of their powers, but also in good faith and reasonably. A relationship of trust develops between a business entity and its official (in particular, a chief executive officer or a director) in the process of business activities, in connection with which this person's wrongful conduct may be expressed not only in his failure to fulfill obligations directly established by the constituent documents of the entity or in excess of his powers when performing certain actions on behalf of the entity, but also in improper or unfair performance of actions not falling within the limits of normal economic risk, in making obviously ill-advised or extravagant decisions" [16,17].

The practice of law enforcement in the states of the Anglo-Saxon legal system has been developing in a similar way.

In particular, in his work *Individual Liability of Company Officers* Neil Foster has substantiated that where an offence under any of the relevant statutory provisions committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or a person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Where the affairs of a body corporate are managed by its members, the preceding subsection shall apply in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate[18].

This case is familiar in the area of company law as stating the former standard of care required of directors, but if not actually yet overruled it should probably now be regarded as having been "overtaken" by a much higher standard of care[18].

In applying the decision in Wotherspoon the Court of Appeal certainly affirmed, as noted, the need for attention to be paid to the "objective" question of what a director "ought to have known", rather than the subjective issue of their actual knowledge[18].

An example of the regulation of this issue in Australian law should also be given.

The legislation which operates in NSW at the moment is s 26 of the OHS Act 2000 (NSW), the essential parts of which are as follows: 26 Offences by corporations-liability of directors and managers (1) If a corporation contravenes, whether by act or omission, any provision of this Act or the regulations, each director of the corporation, and each person concerned in the management of the corporation, is taken to have contravened the same provision unless the director or person satisfies the court that: (a) he or she was not in a position to influence the conduct of the corporation in relation to its contravention of the provision, or (b) he or she, being in such a position, used all due diligence to prevent the contravention by the corporation. (2) A person may be proceeded against and convicted under a provision pursuant to subsection (1) whether or not the corporation has been proceeded against or been convicted under that provision[18].

**Conclusions.** As it appears from the aforesaid, the conclusions are the following.

Firstly, the significance of the guilt of a corporate governance body official is smoothed over by the necessity of the certain level of his competence, by which not only the foreseeability by this person of possible negative consequences of his or her activities in the field of corporate governance is presumed, but the prevention of such consequences is also required. It is obvious that the responsibility of a person for the such negative consequences is the result of professional incompetence.

Thus, guilt, as a subjective attitude of a person to the actions performed by him or her in the field of corporate governance and their consequences is absorbed by the ability of preventing possible negative phenomena owing to the appropriate level of professional competence of an official.

It should be noted that in financial management there have been developed some methods for managing financial risks, the main importance of which is the functioning of appropriate mechanisms to minimize their negative consequences, including limiting risk concentration, hedging, diversification, risk avoidance, risk distribution, etc.[19]

Secondly, economic activities in a market economy are objectively associated with numerous risks. They are of economic nature and are objectively manifested, and through the probability of risk realization, the uncertainty of its consequences and the variability of its level, the risk also acquires a subjective assessment[19]. It is this characteristic of risk as a manifestation of the unequal assessment of this objective phenomenon that presupposes the level of management qualifications and the possibility of predicting risk event and neutralizing the negative consequences in the context of its identification, assessment, prevention and insurance[19].

Thus, the awareness of risk-taking in one's activities and risk management becomes an important characteristic of the activities of the corporate governance body officials. In this case, on the one hand, the protection of the rights, interests and legitimate expectations of participants in corporate legal relations, including a legal entity, is strengthened, and on the other hand, the threshold value of the level of good faith of the corporate governance body officials with respect to the requirements of their professional competence is objectified. Through the principle of "strict (objective) liability" of the corporate governance body officials for the harm caused during the adoption and implementation of managerial decisions, rights, interests, and legitimate expectations are filled with real meaning.

In the above context, the basis for the exemption of such an official from liability is only a case (causa), that is a circumstance the person has not been able to foresee by taking appropriate measures of his professional diligence required in specific conditions.

In this vein, Professor M. Braginsky's idea that the main task of civil law is to equalize the rights of the participants in legal relations by establishing special rights for one of them is correct. This is achieved either by recognizing supplemental rights of the weaker party or by establishing supplemental duties on the stronger party[20].

In addition to the form of doctrinal argument of the justifiability of expanding the bounds of liability of the corporate governance body officials for causing harm to a legal entity, the principle of protecting the weaker party determines the possibility of protecting not only subjective civil rights of the shareholder, but also his or her legal interest. It requires expanding the range of jurisdictional ways to protect subjective civil rights and interests of both a legal entity and its participants (founders), other interested parties, the procedural form of which is the institution of a derivative claim, which is the subject of further scientific discussions for the author.

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**Резюме**

***Коструба А.В.*** **Юридична відповідальність посадових осіб корпорації в сфері корпоративного управління: сучасні тенденції.**

Одним із шляхів усунення корпоративних конфліктів є інститут відповідальності посадових осіб органу корпоративного управління юридичної особи.

На сьогодні доктринально визначено й нормативно закріплено в законодавстві не лише України, а й більшості країн Європи, що такими умовами є єдність суб'єктивних та об'єктивних елементів делікту, що, на нашу думку, є невиправданим.

Фідуціарність відносин між юридичною особою, засновниками (акціонерами) і посадовими особами відповідного органу корпоративного управління формують специфічну юридичну модель взаємодії між ними. Впевненість у порядності й доброзичливості сторони, з якою довіритель перебуває у відносинах, заснованих на його довірі, не передбачає очікування ірраціональної поведінки повіреного.

Отже, такі відносини позбавлені пропорційності. Одна зі сторін має підвищену вразливість. Так, у структурі таких відносин відсутня збалансованість механізмів протидії недобросовісної поведінки.

Оскільки фідуція між учасниками зазначених відносин створює підвищені ризики зловживання правом, коректним, на нашу думку, є встановлення юридичних факторів не тільки справедливої компенсації потерпілій стороні, яким є інститут відшкодування шкоди як такої, а й встановлення превенції такого зловживання, інших видів недоброзичливої поведінки посиленням юридичної відповідальності посадових осіб органу корпоративного управління юридичною особою шляхом виключення провини як умови настання відповідальності.

У такій спосіб відбувається збалансування наявної диспропорції в юридичних можливостях учасників досліджуваних довірчих відносин, один із яких перебуває в юридично слабкому стані. Аналогічний підхід закріплений у країнах системи загального права. Відомим є судовий прецедент у справі Caparo Industries PLS v Dickman.

Підставою звільнення посадової особи від відповідальності стає тільки випадок (causa) – обставина, яку особа не може передбачити прийняттям належних заходів професійної дбайливості, необхідних у конкретних умовах.

**Ключові слова:** корпоративне управління, відповідальність посадових осіб корпорації, юридична особа, органи управління, випадок в праві, відповідальність без вини.

**Резюме**

***Коструба А.В.*** **Юридическая ответственность должностных лиц корпорации в сфере корпоративного управления: современные тенденции.**

Одним из путей устранения корпоративных конфликтов является институт ответственности должностных лиц органа корпоративного управления юридическим лицом. Автором приводится, что поскольку фидуция в сфере корпоративного управления создает повышенные риски злоупотребления правом, целесообразным является установление юридических факторов не только компенсации, но и превенции от возможных злоупотреблений должностных лиц путем исключения вины как условия их ответственности. Основанием освобождения должностного лица от ответственности становится только случай (causa) – обстоятельство, которое лицо не может предсказать принятием надлежащих мер профессиональной заботливости, необходимых в конкретных условиях.

**Ключевые слова:** корпоративное управление, ответственность должностных лиц корпорации, юридическое лицо, органы управления, случай в праве, ответственность без вины.

**Summary**

***Anatolii Kostruba.*** **Liability of Corporate Officials in the Field of Corporate Governance. Modern Tendencies.**

One of the ways to eliminate corporate conflicts is the institution of liability of the corporate governance body officials. The author points out that since *fiducia* in the field of corporate governance increases risks of abuse of right, it is advisable to establish both the compensation for harm caused and the prevention from possible abuse of officials by excluding guilt as a condition for their responsibility. The basis for the exemption of an official from liability is only a case (causa), that is a circumstance the person is not able to foresee by taking appropriate measures of professional diligence required in specific conditions.

**Key words:** corporate governance, liability of corporate officials, legal entity, corporate governance bodies, case in law, strict (objective) liability.

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# МЕТА ПІДГОТОВЧОГО ПРОВАДЖЕННЯ В ЦИВІЛЬНОМУ СУДОЧИНСТВІ

**Постановка проблеми.** Осмислення місця і ролі підготовчого провадження при здійсненні цивільної процесуальної діяльності неможливе без формулювання питання стосовно його мети та завдань. Правильне визначення мети підготовчого провадження сприяє належному законодавчому оформленню даної стадії, чіткішому закріпленню прав і обов'язків суду й учасників судового процесу, системній побудові ЦПК України.

**Аналіз останніх досліджень і публікацій.** До проблеми підготовчого провадження у цивільному судочинстві зверталися Н.Л. Бондаренко-Зелінська, С.С. Бичкова, С.В. Васильєв, О.В. Гетманцев, К.В. Гусаров, І.О. Ізарова, В.В. Комаров, В.А. Кройтор, М.П. Курило, Ю.В. Навроцька, Ю.Д. Притика, Г.П. Тимченко, С.Я. Фурса та інші науковці.

**Формулювання мети статті.** Мета статті полягає в аналізі цілей підготовчого провадження в цивільному судочинстві.



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