

DIRECTIVE MODEL OF CORPORATION MANAGEMENT WITH THE PARTICIPATION OF THE STATE IN THE SPHERE OF THE MILITARY-INDUSTRY COMPLEX

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The subject. The variety of existing models of management of commercial corporations at the current stage requires their assessment, including in relation to certain areas of economic activity. This article examines the legal aspects of the principles of construction and content of a directive model of organization management using the example of corporations with state participation in the field of the military-industrial complex. The procedure for directive voting in the bodies of the corporation is analyzed.

The purpose is to identify the determination and the essence of directive model of corporate management in the field of the military-industrial complex.

Methodology of the research includes legal analysis of the Russian corporative legislation, directives of the Russian Government and judicial practice.

The main results. The basics of regulatory regulation in this area of corporate relations are disclosed. Local regulations ensuring the formation of a directive model of corporate management are investigated. The review of competence of bodies of corporation with participation of public legal entities is given. Options are proposed for a legal assessment of the liability of persons who are members of the bodies of the corporations in question.

General rule is proposed: in the case of voting in the bodies of a corporate organization, a representative of the state is released from responsibility if he acted on the basis of the issued directive (recommendation).

Conclusions. The regularities of the development of corporate legislation on the issues under consideration and the influence of various factors on them are revealed.

1. Introduction. The process of building a system of corporate authorities and endowing them with appropriate competence depends on many factors. The choice of a corporation management model can be determined by economic, social, geographical, cultural and other factors [1; 2, pp.78-89; 3, pp.73-81; 4, pp.30-45; 5; 6; 7].

In economic and legal studies, the main ones are identified - outsider (many shareholders who do not own large blocks of shares), insider (concentration of control and share capital in the hands of one person or group of people) [8, p. 564-565] and specific models of corporate management - directive (application of guidelines of public legal entities), beneficial (indirect corporate control over the corporation through its ultimate beneficiaries) and “impersonal” (hiding the real manager of the corporation) [9; 10, p. 378-398].

Models of corporate governance, depending on the composition of shareholders, are also divided into Anglo-American (outsider with the participation of independent and individual members), Asian (with significant participation of banks and affiliates), continental (significant share of participation of banks) [11, pp. 104-107], family (family business groups) and Russian (developing with elements of other models) [12, p. 74-82]. There are also shareholder (priority of the interests of shareholders), managerial (control over the corporation in the hands of management), labor (mandatory election of members of the labor collective to the management bodies of the corporation), state (ensuring public legal interests) and stakeholder models (ensuring the interests of shareholders, employees, creditors, counterparties and other persons when managing a corporation) [8, p. 1012-1015].

The sphere of activity of the economic entity is significant for choosing the appropriate management model. In particular, the works of economists examine the role of the military-industrial complex (DIC) in ensuring sustainable socially-economic development and national security of the country [13, p. 53-60].

The current work studies the legal basis for

its formation, prerequisites for future development, as well as the content of the directive model for managing domestic corporations in the field of the defense industry.

2. Prerequisites for the formation of a directive management model.

As a result of the transition in the 90s of the last century to a market model of the economy in Russia, based on mixed capital, corporate governance included elements of historically existing and borrowed foreign models. We are talking about both the management of Soviet enterprises (the institution of directive voting) and capitalist public corporations (the institution of independent directors and information disclosure). The determining factor in the application of elements of various management models is also corporate compliance, which reduces the risks of violation of legislation, corporate rights and legitimate interests of participants in corporate relations, as well as digitalization of the corporate management process [14, p. 229-244].

For the first time in Russia, the directive management of enterprises is regulated in regulatory legal acts of the Soviet period. Thus, the directives determined the organizational structure of enterprise management and the basis for its improvement (clause 2.3.1 of the Intersectoral Methodological Recommendations “Improving the Organizational Structures of Management of Enterprises and Production Associations”, approved by the State Labor Committee of the USSR) and contributed to the strengthening of planned and contractual discipline (for example, Letter of Instruction State Arbitration Court of the USSR dated January 20, 1972 No. I-1-3).

In the 90s of the twentieth century, the Government of Russia approved the Concept of State Property Management and Privatization in the Russian Federation (1999), since at that time the state was a participant (shareholder) in 2,500 companies, where the share exceeds 25 percent of the authorized capital, representing basic industries National economy. In addition, a special right – “golden share” – was used in relation to 580 joint stock companies.

A directive should be understood as a

guideline to a representative of a public legal entity (Russian Federation, a subject of the Federation, a municipality), defining the will of his principal (represented) on voting issues on the agenda at meetings of the general meeting and the board of directors of the corporation [9, p. 256-261].

At the present stage, a directive often refers to administrative documents of state bodies of a regulatory and organizational nature (for example, acts of the Russian Ministry of Defense) and international organizations (the European Union, the International Organization for Standardization, etc.).

Directives, depending on the duration of their validity, can have a one-time (single use) or ongoing (multiple) nature of application. Relevant government agencies often approve directive (recommendation) forms.

Orders of the Government of Russia determine joint-stock companies, in respect of which directives are issued to representatives of the interests of the Russian Federation with their participation in the work of corporate bodies (in particular, in relation to the companies “Aeroflot”, “Vneshtorgbank”, “Gazprom”, “Rosneft”, “Russian Railways”, etc.).

State industrial policy in the field of development and activities of organizations, as well as state ownership in the defense industry, is approved by acts of the President of Russia. Methodological recommendations for managing the procurement activities of joint-stock companies with state participation and defense industry organizations are being adopted (approved by the Board of the Military-Industrial Commission of the Russian Federation on February 15, 2017).

In this study, we will further discuss corporations with the participation of the Russian Federation in the defense industry.

3. The concept and characteristics of a directive model of corporate management.

A directive management model is a form of organization of a system of corporate authorities with the participation of public legal entities, in which the implementation of their competence proceeds on the basis of directives (recommendations), determining the will of the

individual, sent by competent persons that determine the unified economic policy of the corporate organization.

Based on the content of the proposed definition, we can highlight the following features of a directive management model:

1.1. Participation of a public legal entity in the authorized capital and (or) in the bodies of a corporate organization. Directive management primarily comes from the will of shareholders (participants) of commercial corporations. It is important to take into account that the directive management model is traditionally formed in those corporations whose authorized capital is distributed among other shareholders - individuals and (or) legal entities (in addition to the state). The model under consideration is unusual for corporate organizations, the sole shareholder (participant) of which is a public legal entity, since its decision is formalized in the form of an act of the authorized body of the public legal entity, and not a directive.

Thus, with the sale (privatization) of at least one share (part of the share in the authorized capital) of a corporation out of one hundred percent owned by the state, a directive management model can be formed. In a number of industries, in particular in the defense industry, where the production of dual-use products (military and civilian) is possible, the controlled entry of private shareholders could supplement the leadership of an economic entity with new management, which would increase its competitiveness and expand its sales markets.

The directive model is characteristic of corporations, the management of which combines private and public aspects, including those expressed in the issuance of governing directives (recommendations) that determine the will of a person acting in the interests of a public legal entity while the corporation retains a number of powers and production and economic initiatives.

In corporations, the authorized capital of which is distributed exclusively among private individuals (individuals or legal entities), the considered directive management model is not formed under any circumstances.

The possible formation of a directive management model in joint stock companies in the

defense industry is debatable, where the state uses the right of veto (“golden share”) in cases where the issuer’s shares do not belong to a public legal entity. On the one hand, a golden share provides the right of access to state representatives to the company’s documents, the participation of a representative in the general meeting of shareholders, special rules for concluding a number of major transactions and interested party transactions (clause 1 of Article 51, clause 4 of Article 79, clause 1 Article 81 and paragraph 10 of Article 91 of the Federal Law of December 26, 1995 No. 208-FZ “On Joint-Stock Companies”), as well as the fact that special law is established in order to ensure the defense capability of the country and the security of the state (Article 38 of the Federal Law of December 21, 2001 No. 178-FZ “On the privatization of state and municipal property”). On the other hand, practice shows that in corporations in the defense industry the state retains participation in the authorized capital and does not sell its entire block of shares. And yet, the inclusion of state representatives in the bodies of a corporate organization, as well as those exercising their participation in the work of these bodies, may indicate a directive form of management.

1.2. Representation of public legal entities in corporation bodies. The presence of representatives of a public legal entity in the bodies of a corporation (general meeting or board of directors) is a necessary condition for qualifying the management system as “directive”.

In practice, directives (recommendations) are issued to two categories of persons:

- representatives of interests at the general meeting;
- members of the board of directors.

In regulations, the categories “representative of interests” and “member of the board of directors” are used as identical categories, when designating a person representing the interests of a public legal entity and acting on the basis of a directive (recommendation) [15, p.54-62].

The following persons can act as a representative:

- in the general meeting of shareholders (participants): civil servants (acting without an

agreement),

- on the board of directors: civil servants (acting without an agreement) and other persons (who have entered into an agreement to represent interests in a public legal entity). Work on the board of directors often requires the involvement of professionals and specialized specialists who are not always government officials.

The powers of representatives in the bodies of the corporation are not alienable and cannot be transferred to third parties. The powers of a member of the board of directors represented by a state or municipal employee are automatically terminated upon their dismissal, and the powers of persons acting under a contract - upon termination of the contract.

These persons must carry out the functions assigned to them in good faith, wisely, strictly adhere to directives (recommendations), promptly notify about meetings of the corporation’s bodies, participation in which requires the development of directives (recommendations), initiate the convening of a meeting and include issues proposed publicly on the agenda of the meeting of the board of directors - legal education.

1.3. Directive and recommendation.

Directives (recommendations) are issued exclusively in written form. The issuance of directives orally is not permitted by law, since these guidelines will not have the property of legal certainty, and a person representing the interests of public law may deviate or distort the original goals and objectives of the instructions.

In practice, a directive refers to more stringent instructions for execution (for example, when voting in the board of directors on issues of approving the agenda of a general meeting, increasing the authorized capital by placing additional shares or forming executive bodies). That is, directives are issued upon the exercise of competence by the bodies of the corporation, defined by law, charter, regulations on the board of directors and other local regulations [16, pp. 230-235].

Recommendations are issued on “other issues” on the agenda of the general meeting or the board of directors, in particular, on the approval of a strategic business plan, budgets or operational plans

for the development of the corporation.

Recommendations should not be considered as “softer” than directives or guidelines. The form of recommendations emphasizes exclusively the content of the issue, which requires discussion and allows for variable approaches to solving it. At the same time, the general position of public law education is contained in the recommendations.

In this matter, we should recall the works of V.V. Laptev, which formulated the third method of legal regulation in economic relations - recommendations [17, p. 68-71]. The method of recommendations contains a formulated position of a public legal entity represented by a competent authority, which must be taken into account in their work by persons representing a public legal entity in corporations. In exceptional cases, deviation from a directive (recommendation) is permitted, in particular when such a vote would obviously cause losses to the corporate organization.

4. Directive management of corporations in the defense industry.

Features of the management of corporate organizations with the participation of public legal entities through the issuance of directives (recommendations) are regulated by regulatory legal acts, as well as acts of government bodies, for example, the Government of Russia in order No. 752-r dated March 27, 2021, the Ministry of Defense of the Russian Federation in the Regulations on Military-Technical Council of the Ministry of Defense of the Russian Federation (1998), etc.

Directives are issued not only on issues of participation of representatives in the bodies of a corporate organization, but also on current economic activities. In particular, the directive may indicate the need to improve the quality of management of procurement activities, commission an inventory of rights to the results of intellectual activity, etc. Directives are also issued for the purpose of appointing the relevant person to the position of head of the organization.

The activities of federal executive authorities and the implementation of state policy in the defense industry are largely determined by

the Board of the Military-Industrial Commission of the Russian Federation (under the Government of the Russian Federation), formed by Decree of the President of the Russian Federation of September 10, 2014 No. 627.

When examining the directive model of corporate management as a whole, it is important to take into account the competence of the Federal Property Management Agency (Resolution of the Government of the Russian Federation of June 5, 2008 No. 432), which prepares and presents:

- to the Ministry of Finance of Russia draft directives for voting at general meetings of shareholders in joint-stock companies included in a special list approved by the Government of Russia, and at general meetings of participants in limited liability companies, shares in the authorized capital of which are in federal ownership;

- written directives to state representatives in the management bodies of joint-stock companies, the shares of which are in federal ownership and (or) in respect of which a special right (“golden share”) is used, for voting at general meetings of participants in limited liability companies (clause 5.15.6 and 5.29 of the Regulations on the Federal Property Management Agency).

In relation to the second case, approximate forms of state directives have been established for representatives on the board of directors and at the general meeting of shareholders of a company whose shares are owned by the Russian Federation (Order of the Federal Property Management Agency dated July 26, 2005 No. 228).

Regarding corporate organizations in the defense industry, directives are adopted that define requirements for enterprise managers (for example, Directive of the Government of the Russian Federation of June 18, 2018 No. 4440p-P7), issues of the production and economic cycle of activities (Directive of the Government of the Russian Federation of March 3, 2016 No. 1472 -P13, dated December 6, 2018 No. 10068p-P13, etc.) and others.

In order to implement the Directive of the Government of the Russian Federation No. 4440p-P7, the board of the Military-Industrial Commission of the Russian Federation approved the basis for the formation of a personnel reserve - Unified methodological materials for the formation and

development of the federal personnel reserve for management personnel of the military-industrial complex.

The Russian Ministry of Industry and Trade has created a structural unit subordinate to it - the Federal Center for Monitoring Personnel Training for Russian Defense Industry Organizations.

The given examples indicate that the directive (recommendation), being an act of an authorized body, has acquired the property of a corporate governance instrument, since its action directly affects the course of production and economic activities of corporate organizations in the defense industry.

General meeting of shareholders (participants). Directives (recommendations) can be and, as a rule, are issued to representatives of a public legal entity on all issues on the agenda of the general meeting of shareholders (participants) of the company. The type of general meeting - annual or extraordinary - is not of fundamental importance from the point of view of the procedure for issuing the directive.

The directive (recommendation) allows the representative to vote clearly at the general meeting, in connection with which, it seems reasonable to indicate to the representative that in the event of introducing additional issues (for which directives were not issued), not specified in the agenda and inconsistent with the public law education, you should vote "against" any decisions.

The issue of approval of the annual report by the general meeting of shareholders is difficult, since a variable interpretation of the directive is possible due to the fact that the report includes not only establishing information about the enterprise (information about the legal entity, management and control bodies, the position of the company in the industry or the number of major transactions and interested party transactions), but also the ways of developing his business (development prospects, business risk factors, results of execution of orders, compliance with corporate ethics, etc.).

Recommendations on the execution of a transaction in cases where its completion by virtue of law or the company's charter is approved by the

general meeting of shareholders (participants) is issued on the basis of an analysis of accounting documentation (for major transactions) and affiliation of persons (for interested party transactions). In practice, such a recommendation should contain, in fact, the essential or basic terms of the transaction, prepared on the basis of an analysis (calculation of the results) of the consequences of concluding a transaction on various conditions.

Board of Directors. Issues within the competence of the board of directors on which a directive can be formed are:

- approval of the agenda of the general meeting of shareholders (participants);
- increasing the authorized capital of the company by placing the company of additional shares within the limits of the number and categories (types) of authorized shares, if the charter of the company in accordance with the law falls within its competence;
- making decisions on participation and termination of the company's participation in other organizations;
- formation of the executive body of the company and early termination of its powers, if the charter of the company refers to this within its competence;
- recommendations on the amount of dividend on shares and the procedure for its payment;
- resolving issues regarding the approval of interested party transactions and major transactions, etc.

The directive management model determines the general economic policy of an economic entity. This model does not exclude the use of elements of a "participatory" management model [18, p. 51-56] corporation, in which employees take an active part in managing the organization and actively interact with its management, like national enterprises in Russia (see: Federal Law of July 19, 1998 No. 115-FZ). The effectiveness of the management model with the participation of society's employees is proven by economists [19] and legal scholars [20, p. 38-39].

The directive management model also has a drawback - the lack of efficiency in making

management decisions, since the procedure for issuing directives (recommendations) is formalized and therefore lengthy.

Economic assessments of the management efficiency of defense industry enterprises make it possible to formulate the foundations of sustainable development. Thus, the achievement of these goals is facilitated by the introduction of in-house management companies (within industrial complexes), the use of trust forms of organizations and the creation of special bodies (departments, departments) that eliminate the possibility of bankruptcy of the enterprise and promote the sustainable functioning of the production system [21]. In essence, we are talking about the need to attract “third-party” professional management, for example, independent members of the board of directors, which also corresponds to the recommendations of the Bank of Russia on corporate governance (2014).

It seems possible to build a directive model for managing military-industrial complex corporations, ensuring the investment attractiveness of the company for minority shareholder investors, for example, in terms of management decisions in the field of production of civilian products (along with military products) or the use of non-core assets of the enterprise.

Exploring the significance of the activities of corporations in the defense industry, ensuring the security of the country, various economic and legal development paths are proposed [22, p. 10-19]. Since corporate organizations of the military-industrial complex work, as a rule, in the structure of vertically integrated complexes, the directives of a public legal entity that ensure the military-political tasks of the state, enshrined in the Military Doctrine of the Russian Federation (2014) and the Naval Doctrine of the Russian Federation (2022) are seen as effective and organizationally justified).

5. Legal responsibility of a public legal entity and its representatives.

There are two approaches to directive voting. According to the first approach, the state, being an independent participant in public relations, bears the same corporate responsibility for the directives (recommendations) issued by it as other participants in corporate relations by

virtue of clause 3 of Art. 53.1 of the Civil Code of the Russian Federation [23, 171-182]. At the same time, the behavior of a representative who voted in the bodies of the corporation in accordance with the prescribed directive cannot be considered guilty, since it is a job and a duty, and not a right (for example, by virtue of paragraph 107 of the Corporate Governance Code, 2014). It is no coincidence that these representatives are called “dependent”, since they do not formulate and only communicate the will of a public legal entity when making corporate decisions [24, pp. 12-14].

The second approach is based on the explanations of Art. 53 of the Civil Code of the Russian Federation, specified in paragraph 7 of the resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation dated July 30, 2013 No. 62, by virtue of which a member of a collegial body of a corporate organization whose decisions entailed losses is not exempt from liability, including in cases where these decisions were adopted on the basis of issued directives. In this case, the universal rule applies regarding the reasonableness and integrity of persons when participating in the work of the corporation’s bodies (clause 1, article 71 of the Law on JSC, clause 1, article 44 of the Law on LLC).

Violation of a directive (recommendation) by a member of the board of directors acting in the interests of a public legal entity, as a general rule, should be considered as grounds for early initiation of re-election of this member of the board of directors. This rule should be enshrined in the Law on JSC and the Law on LLC.

For representatives of public legal entities represented by civil servants, in case of violation of the directive, disciplinary liability should be established; and for other persons – contractual liability (for example, property). This provision serves as a guarantee in case of dishonest actions of his representative. The release of representatives from liability, including in cases where their vote was determined by directive, is a change in the fundamental principle of conscientious and reasonable behavior of participants in public relations. Even if we take into account the fact that a person’s behavior was determined and directed by a directive (recommendation), the general rules on

liability are not canceled (Articles 53 and 53.1 of the Civil Code of the Russian Federation). By exercising his representation in the corporation's bodies through the relevant persons, he counts on their professional and competent approach, which effectively ensures his interests. In this regard, full relief from liability is only possible in cases where the representative voted on the directive and was not aware of the negative legal consequences (for example, when the decision caused damage to the corporate organization, but the consequences of such damage were not obvious and could not be objectively taken into account in work of a representative) [25, p. 22-26].

The issue of the responsibility of representatives is directly related to the right and the real possibility of a public legal entity to quickly control the activities of a representative, including through notifications of decisions made, their discussion, business correspondence, etc. Exempting a representative from liability for losses caused to the corporation in the absence of the state's ability to provide operational control will not correspond to the essence of the directive management model, since the model under consideration involves taking into account the interests of the state, which determines the production policy of the corporation in the defense industry. The defendant in a claim for compensation for losses caused to a corporation is a person who has the actual ability to determine the actions of a legal entity, and in the case under consideration - a public legal entity (paragraph 4, paragraph 32 of the resolution of the Plenum of the Armed Forces of the Russian Federation of June 23, 2015 No. 25, paragraph 2 clause 4 of the resolution of the Plenum of the RF Armed Forces dated December 21, 2017 No. 53). You can come across an approach according to which holding a representative (for example, a member of the board of directors) liable is possible only if he deviates from the issued directive. It seems that what matters is not the fact of voting contrary to the issued directive (deviation from it), but the consequences of such voting - a contradiction to the interests of a public legal entity.

It seems difficult to assess cases of participation of a representative of a public legal

entity in the bodies of a corporation in the absence of an issued directive (recommendation), including on issues for which a directive is not issued (for example, on a small transaction, but the issue of approval of which is put on the agenda for discussion). The limits of the representative's competence and the possibility of vesting him with discretionary powers, allowing him to effectively ensure the interests of the state even in the absence of a directive, require assessment. We believe that if the goals are achieved, then the interests of the state will be ensured. In practice, there are also cases where the issued directive was based on unreliable initial data (for example, a technical error in using indicators in calculating the consequences of a business transaction or the use of forged documents). During the discussion of the relevant issue, a representative, with due diligence, can discover these facts and vote in the interests of the state, deviating from the directive, which must be immediately reported to the public law entity, indicating the reasons for such deviation. As a legal consequence of the issues under study, a general rule is proposed: in the case of voting in the bodies of a corporate organization, a state representative is exempt from liability if he acted on the basis of an issued directive (recommendation). The special rule involves assessing the degree of conscientiousness of behavior of a representative of a public legal entity when participating in the work of the bodies of a corporate organization on the basis of an issued directive (in case of deviation from it or its non-compliance; in its absence), taking into account the actual circumstances under which the corresponding decision was made.

6. Conclusion.

The conducted research allows us to draw conclusions that the issues of the directive model of corporate management in the defense industry require their detailed enshrinement in corporate legislation. Acts of government bodies that form the position of a public legal entity in the form of directives (recommendations) for their representatives in the bodies of a corporate organization are a key instrument of the management model under consideration, ensuring the implementation of state policy in the defense industry.

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