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"Dead Souls" or Lost Shareholders in the Register: A Modern Classic

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The problem of “dead souls” has been known to Russia since the 19th century after the publication of the poem of the same name by N.V. Gogol. In our century, this concept has been transformed and means shareholders who are formally listed in the registers, but do not take an active part in the life of the legal entity. This category of shareholders is also called “lost”. In recent years, the issue of “dead souls” has been raised in the legal community more and more often, which indicates the practical importance of resolving this problem. Discussion of this issue is not limited to theoretical discussions, but is also reflected in specific initiatives of the legislator.

In this article, the authors analyze the bill being considered by the State Duma of the Russian Federation, which allows for the temporary suspension of some of the rights of shareholders who have not participated in the corporate governance for a long time. The authors also conduct a critical analysis of the emerging judicial practice, which provides joint-stock companies with the right, at their own discretion, to redeem shares belonging to such shareholders.

In addition, the article examines a possible mechanism for resolving the problem of “lost” shareholders, which allows maintaining a balance of interests between the company and the shareholder whose shares are planned for repurchase.

LEGISLATIVE INITIATIVE AND ALTERNATIVE IDEAS TO SOLVE THE PROBLEM OF "LOST" SHAREHOLDERS

In 2022, the State Duma of the Russian Federation adopted in the first edition the bill of Federal Law No. 103501-8 “On Amendments to the Federal Law “On Joint-Stock Companies” and Article 8 of the Federal Law “On the Securities Market”[1] (hereinafter referred to as the Bill), according to which a joint-stock company had the right to suspend in relation to shareholders who are “dead souls”:

[1] https://sozd.duma.gov.ru/bill/103501–8.

1 notifications about holding general meetings of shareholders (hereinafter referred to as GMS), if:

- for at least two consecutive years all messages sent to the shareholder by post service (for example, notifications about holding a GMS) were returned;
- voting ballots for the last two meetings of the GMS or absentee voting, between which at least three months have passed, directed to the shareholder, were returned; and
- the latest message, sent to the shareholder, contained a warning about the possibility of suspending the sending of messages to him.

2 payment of declared dividends if:

- at least two years in a row dividends sent to the shareholder were returned;
- dividends paid to the shareholder which were declared by the last two GMS decisions on the payment (declaration) of dividends, between the adoption of which at least three months have passed, were returned; and
- the shareholder was sent a notice on the possibility of suspending dividend payments.

The above-mentioned mechanisms for suspending part of the corporate rights (the right to receive information about the holding of a GMS and the right to receive dividends) of “lost” shareholders are intended to reduce the costs of companies for postal mailings and bank transfers, however, the problem of “lost” shareholders is broader and is not limited only to the financial costs of the company for compliance with corporate procedures.

Thus, there remains legal uncertainty regarding the fate of the votes held by “lost” shareholders. This issue becomes particularly acute in cases where one or more such shareholders collectively hold a significant stock of shares, since difficulties may arise with the quorum when holding a GMS and resolving issues requiring a qualified majority or unanimity of shareholders’ votes.

Due to the lack of legal regulation of the problem of “dead souls”, companies and shareholders are attempting to adapt the legal mechanisms already existing in domestic legislation to possible solutions.

As an option in practice, the mechanism of buyout of shares by the majority shareholder is used.2.

However, in order to use it, it is necessary to fulfill a number of rather complex, time-consuming and expensive conditions (the concentration by the acquirer, together with affiliates, of 95% of the shares as a result of a voluntary or mandatory offer, under which at least 10% of the shares were acquired).

At the same time, the appearance of fulfillment of these conditions is sometimes created artificially (for example, as a result of ordinary purchase and sale transactions, affiliates of the majority shareholder accumulate a 10% share stock in advance, which they then sell to the majority shareholder after his voluntary or mandatory offer).

2 Clause 1 of Article 84.8 of the Federal Law of 26.12.1995 No. 208-FZ “On Joint-Stock Companies”.

COURT POSITIONS ON SOLUTION OF "DEAD SOULS" PROBLEM

Also in judicial practice there are attempts to apply the rules on ownerless property to relations with "lost" shareholders.3**by analogy of the law**4**.**

On the one hand, the rationale for such an approach is clear: it can be assumed that a shareholder who has not participated in the activity of the company for a long time and does not exercise his corporate rights has waived his rights to shares. It can also be assumed that the owner of the shares is unknown in the case when the shares are listed in the register of shareholders for a person who has lost legal capacity, and his successors have not taken steps to make changes to the register of shareholders.

On the other hand, the possibility of applying the rules on ownerless property to uncertificated shares raises reasonable doubts, since the they represent a set of obligatory and other rights and do not have a physical form, that is, in essence, they are not things (i.e. property). Similar arguments are also found in judicial practice[5].

The Supreme Court of the Russian Federation made attempts to compensate for the existing gaps in the legislation. Thus, at approximately the same time, two decisions were made on cases where joint-stock companies as share issuers filed claims to registrars with demands for the transfer of shares of shareholders - legal entities that were liquidated, appealing to the above-mentioned provisions of civil legislation on ownerless property[6].

In both cases, the courts of the first three instances refused to satisfy the claims of the issuers, arguing their position as follows:7:

1. the plaintiffs did not prove the fact that the shares were ownerless or the fact that the plaintiffs owned these shares;
2. liquidated legal entities that were previously shareholders have legal successors i.e., of their participants, who have the right to a liquidation quota and to the distribution of property discovered after their liquidation;
3. Federal law dated 26.12.1995 Federal Law No. 208-FZ "On Joint-Stock Companies" (hereinafter referred to as the JSC Law) contains an exhaustive list of grounds for an issuer to repurchase its shares, and the fact that the register of shareholders does not contain up-to-date information on the composition of shareholders does not apply to such grounds.

Assessing the position of the courts in the above-mentioned cases from the point of view of the formal legal method, the arguments presented by the judicial bodies appear to be justified. At the same time, such an approach

3 Article 225 of the Civil Code of the Russian Federation.

4 Resolution of the Fifth Arbitration Court of Appeal dated 03.09.2021 No. 05AP-4554/2021 in case No. A51-18729/2020; Resolution of the Thirteenth Arbitration Court of Appeal dated 06.08.2021 No. 13AP-18560/2021 in case No. A56-81974/2020.

5 Resolution of the Seventh Arbitration Court of Appeal dated 14.12.2021 No. 07AP-11506/2021 (1), 07AP-11501/2021 (1) in case No. A27-24426/2020.

6 Determination of the Supreme Court of the Russian Federation dated 15.12.2022 No. 304-ES22-10636 in case No. A27-24426/2020; Determination of the Judicial Collegium for Economic Disputes of the Supreme Court of the Russian Federation dated 31.01.2023 No. 305-ES22-13675.

7 Resolution of the Arbitration Court of the West Siberian District dated March 30, 2022 No. F04-146/2022 in case No. A27-24426/2020.

to the problem of "lost" shareholders does not compensate for the existing legislative gap and does not contribute to the stability of civil circulation.

The Supreme Court of the Russian Federation, moving away from a purely formalistic approach, sent the cases back for a new trial, arguing that "the refusal of a claim on formal grounds related only to the plaintiff's incorrect reference to the provisions of the Civil Code of the Russian Federation regulating the circulation of ownerless property cannot be recognized as lawful."

In its rulings on the said cases, the Supreme Court of the Russian Federation set out a number of interesting, although not indisputable, ideas regarding the status of shareholders who have lost their legal capacity but continue to be listed in the register of shareholders, as well as the fate of shares belonging to such "lost" shareholders.

Thus, the Supreme Court of the Russian Federation noted the existence of a gap in the law regarding the issue of "dead souls" and stated that the liquidation of a shareholder – a legal entity leads to the same consequences as the withdrawal of a participant from the company. Consequently, a JSC or PJSC may buy out its shares from liquidated legal entities whose legal successors do not exercise their rights to the shares.

To implement such buyout, the Supreme Court of the Russian Federation refers to the analogy of the law and, on the basis of paragraph 2 of Article 72, Article 73, paragraph 3 of Article 75, paragraph 4.1 and paragraph 6 of Article 76 of the JSC Law, develops a mechanism for the transfer of shares from the "lost" shareholder to the issuer.

The proposed mechanism is as follows:

1. adoption by the GMS of the company of a decision to buy out the shares of a shareholder excluded from the Unified State Register of Legal Entities at a price not lower than their market value;

2. transfer of the purchase price to the notary's deposit at the location of the company;

3. an appeal by a company to the registrar requiring to make a record of the transfer of shares to it, or if the registrar refuses to do so, to the court with a claim against the registrar to compel the making the record.

Described mechanism looks quite ambiguous and raises a number of questions. It is obvious that the Supreme Court of the Russian Federation did not directly apply the analogy of the law, but rather tried to construct something new on the basis of parts of various existing corporate mechanisms (Articles 72 and 75 of the JSC Law describe different situations of buying out shares from a shareholder).

In addition, the Supreme Court of the Russian Federation, in essence, granted JSCs the right to extrajudicially deprive shareholders of corporate rights, which in the future may serve as the basis for abuses on the part of JSCs and shareholders.

This problem is particularly acute given that the Supreme Court of the Russian Federation, firstly, did not provide clearly formulated conditions under which a JSC can buy back the shares of a "lost" shareholder; secondly, it proposed a mechanism for buying back shares that does not include checking for violations of any rights of the "lost" shareholder; thirdly, it introduced a kind of fiction of consent from a "dead soul" to the buyback of his shares.

As of the date of this article, decisions have been made on cases referred by the Supreme Court of the Russian Federation for new consideration to courts of first instance[8], according to which the demands of the companies acting as plaintiffs were satisfied and the shares of

8 Decision of the Arbitration Court of Kemerovo Region dated 13.07.2023 in case No. A27-24426/2020; Decision of the Arbitration Court of Moscow dated 12.04.2023 in case No. A40-146631/21-48-1102.

"dead souls" are transferred to them. These decisions almost verbatim repeat the provisions of the resolutions of the Supreme Court of the Russian Federation, which indicates the formation of a certain and extremely ambiguous judicial practice.

MAINTAINING A BALANCE OF INTERESTS

In this regard, we would like to draw attention to another mechanism for resolving the problem of "dead souls", set out in one of the versions of the Bill. 9**, proposed by its authors prior to submission to the State Duma, but for some reason not included in the version submitted for consideration to the State Duma.**

The indicated version of the Bill proposed to fix the right of the company to buy out the shares belonging to "lost" shareholders. The proposed mechanism looked as follows:

1. the company exercises its right to suspend the sending of notices to the "lost" shareholder about the holding of the GMS and other information related to such meetings, as well as its right to suspend the payment of declared dividends to "dead souls", subject to the conditions for such suspension;

2. then, if more than three years have passed since the suspension of sending messages and paying declared dividends to the "lost" shareholder and provided that the company's articles contains the right to buy out the shareholders' shares, the GMS may adopt a decision to buy out the shares of "dead souls" at the market price and transfer the funds to the notary's deposit or to the bank accounts of the shareholders, about which the shareholders have the right to notify the registrar.

The proposed mechanism for buying out the shares of "absent" shareholders is also extrajudicial. At the same time, a shareholder whose shares could be bought out could potentially intervene in the buyout procedure at any time and suspend it, and if the buyout did occur, then within a year from the moment of the buyout, contact the registrar and demand the return of the shares bought out from him.

Thus, the process of buying out shares of "dead souls" would take quite a long time (five years), but a balance of interests would be maintained between the joint-stock company, which could resolve the problem with the "lost" shareholder without going to court, and the "lost" shareholder himself, since he would have the right to intervene at any time during the procedure for buying out his shares and within a year after the buyout and save his shares.

In addition, the approach formulated by the Supreme Court of the Russian Federation is aimed at regulating only part of the issue of "dead souls", when such shareholders are, firstly, legal entities, and secondly, are recognized as incapacitated. The idea set out in the abovementioned version of the Bill regulates a wider range of legal relations, granting the right to the company to buy out the shares of not only a "lost" shareholder deprived of legal capacity, but also a "lost" shareholder (who is both an individual and a legal entity) who has not lost legal capacity, but for some reason has withdrawn from the implementation of his corporate rights.

9 https://cloud.consultant.ru/cloud/cgi/online.cgi?req=doc&rnd=EYbuw&base=PRJ&n=211407#cgyK49UgDmw00EBX1.