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Forms of implementation of corporate rights of the members of commercial corporations: history, current contradictions and development prospects

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Abstract. The purpose of the study is to identify problems arising from the discrepancy between the norms of the current corporate legislation, whose basic principles were laid down during the development of the industrial type of economic development, and the current stage, characterized by the active development of the post-industrial type of economy. The subject of the study is the forms of realization of the corporate rights of members in commercial corporations, and, above all, business entities. The research employs the following scientific methods of analysis: historical analysis of the influence of economic development factors (types of activity, scale of activity, significant resources) on the forms of exercising corporate rights of corporation members and analysis of correspondence of modern forms of realization of corporate rights to the system of interests of the members of post-industrial types of corporations at the modern stage of economic development. The research results. In the traditional economy of the industrial type, the main significant resource is non-current tangible and current assets. Today their cost estimate determines the volume of corporate rights. In the post-industrial economy, non-current intangible assets become the main significant resource; their evaluation seems to be problematic in a significant number of cases. The research reveals the problems of inconsistency of modern forms of realization of corporate rights of members in the post-industrial corporations with the system of interests of members — carriers of a creative resource (ideas, professional knowledge, etc.) — in such corporations. Practical implementation of the research outcome is realized in suggestions and recommendations that can be applied both in the field of improving corporate legislation and legal support of commercial corporations' activities. Among other things, a forecast of trends in the development of corporate legislation in terms of implementation of corporate rights has been worked out.

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Формы реализации корпоративных прав участников коммерческих корпораций: история, противоречия сегодняшнего дня, перспективы развития

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Аннотация. Цель исследования сводится к выявлению проблем, являющихся результатом несоответствия норм действующего корпоративного законодательства, основные принципы которого были заложены в период развития «индустриального» типа экономического развития, и современного этапа, характеризующегося активным развитием экономики «постиндустриального» типа. Предметом исследования являются формы реализации корпоративных прав участников коммерческих корпораций, и, прежде всего — хозяйственных обществ. Методология исследования включает исторический анализ влияния факторов экономического развития (виды деятельности, масштабы деятельности, значимые ресурсы) на формы реализации корпоративных прав участников корпораций и анализ соответствия современных форм реализации корпоративных прав системе интересов участников корпораций в «постиндустриальных» типах в современной экономике. Результаты исследования. В традиционной экономике индустриального типа основным значимым ресурсом являются внеоборотные материальные и оборотные активы. Их стоимостное выражение и определяет сегодня объем корпоративных прав. В постиндустриальной экономике основным значимым ресурсом становятся внеоборотные нематериальные активы, стоимостную оценку которых в силу их уникальности в значительном числе случаев дать невозможно. Выявлены проблемы несоответствия современных форм реализации корпоративных прав участников корпораций «постиндустриального» типа системе интересов участников — носителей «креативного» ресурса (идеи, профессиональные знания и т. д.) — в таких корпорациях. Область применения результатов исследования описана в предложениях и рекомендациях, которые могут быть использованы как в области совершенствования корпоративного законодательства, так и в правовом обеспечении деятельности коммерческих корпораций. В заключении сделаны выводы, включающие в себя в том числе и прогноз трендов развития корпоративного законодательства в части реализации корпоративных прав.

Ключевые слова: коммерческие корпорации, корпоративные права, постиндустриальная экономика, хозяйственные общества

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Introduction

A topical issue of legal science at the present stage is comprehension of the changes taking place in the modern world, including corporate relations, under the influence of the post-industrial economy development.

To a large extent, the classical system of corporate law, both in Russia and abroad, does not stimulate, and in some cases hinders, the development of corporations and corporate associations in *creative* post-industrial industries and businesses. This is primarily due to the differently oriented development vectors of such businesses and industries, and the vector of interests of commercial corporation members due to classical forms of exercising corporate rights.

This is the reason why corporate law needs to evolve in terms of improving existing and finding new organizational and legal forms of commercial corporations and ways of enforcing the corporate rights of their members.

This requires a sufficiently clear definition of the range of problems and areas of conflict of interest with the system of realizing the corporate rights of members that modern commercial corporations operating in both classic industrial spheres and post-industrial sectors of the economy face in their activities.

Theoretical framework

The theoretical basis of the study is the results of research on two aspects of the issue. First, we are investigating the corporate rights of members in commercial corporations. Secondly, we are examining the phenomenon of the post-industrial society development.

A significant number of works of domestic authors are devoted to the research on formation and implementation of corporate rights. Among the most topical areas are the works by A.V. Gabov, E.P. Gubin, D.V. Lomakin, I.S. Shitkina, devoted to the essence, structure and content of corporate legal relations, as well as forms of realization of property, non-property and preferential rights of members in business corporations (Gabov, Gubin & Karelina, et al., 2019).

We should also mention the works by S.D. Mogilevskiy in the field of concept and types of rights and responsibilities of corporate members (Mogilevskiy & Samoilov, 2007) and the paper by S.D. Mogilevskiy and M.A. Egorova devoted to the issues of corporate protection through corporate rights implementation (Mogilevskiy & Egorova, 2015).

Within the framework of this research, special attention is paid to the analysis of the corporate rights of members in such form of commercial corporation as a limited

liability company. Here we have also heavily relied on the works by S.D. Mogilevskiy (Mogilevskiy, 2010) and D.V. Lomakin (Shitkina (ed.), 2021).

One of the significant innovations of domestic corporate law is the emergence of a corporate contract, where additional forms of implementation of corporate rights of members in business entities can be established (Lomakin, 2018; Krylov, 2018).

No doubt, this is not a complete list of the authors contributing to the research of formation and implementation of corporate rights. However, giving the credit to such research it is worth noting that the authors do not focus on the specifics of the formation and implementation of corporate rights in relation to commercial corporations operating in the field of post-industrial economy.

Of course, it is impossible not to mention the studies of foreign specialists devoted to the analysis of the problems under consideration. I would like to mention following works: Seth C. Oranburg (Oranburg, 2019); Kapoor N.D. (Kapoor, 2015); Reinier H. Kraakman, Paul Davies (Kraakman, Davies & Hansmann, et al. (eds.), 2004); Adolf Augustus Berle, Gardiner C. Means (Berle & Means, 1933); Kenneth Clarkson, Roger Miller (Clarkson & Miller, 2019), Roberta Romano, Ralph K. Winter. (Romano, Winter, 1993).

The concept of a post-industrial economy (post-industrial society) appeared in the last third of the twentieth century. Among the main ideologists of the theory were J. Galbraith (Galbraith, 1985), D. Bell (Bell, 1999), P. Drucker (Drucker, 1993), A. Toffler (Toffler, 1980), J. Hage and Ch.H. Powers (Hage & Powers, 1992), R. Romano, and R.K. Winter (Romano & Winter, 1993). Russian researchers also gave certain attention to the issue. In this regard, we should mention the works by V.L. Inozemtsev (Inozemtsev, 2000). However, his focus was limited to the economic, social, and political consequences of the post-industrial society development. Basically, the impact on the legal system, including the issue of formation and implementation of corporate rights of members in commercial corporations operating in the sectors of the post-industrial economy, has not been studied so far.

This article is based on the author's works published earlier (Samoilov, 2022 a; Samoilov, 2022 b).

The development of corporate law in each historical period was conditioned by the specifics of economic relations that required certain ways of forming the capital stock of shareholders in entrepreneurial activities.

The specifics of the organizational and legal forms of commercial corporations and the specifics of implementation of corporate rights of their members were determined by the impact of the following factors:

- the main types of business activities,
- the scope of activities of business entities,
- the specifics of the resources that are most relevant for conducting business activities.

The current type of civilization development both in terms of types of business activity, scale of business and importance of necessary resources differs significantly from those historical periods when the foundations and basic principles of modern corporate law and forms of implementation of corporate rights of their members in commercial corporations were being formed.

Articulation of issue

To determine the necessary changes in the basic principles of corporate law, formation of new approaches to implement corporate rights of members of commercial corporations, definition of new approaches to improving the existing organizational and legal forms of commercial corporations, and creation of their new forms, consistent with the current level of economic relations development, it is necessary to focus on the following tasks.

First, it is necessary to learn how and why approaches to the basic principles of corporate law have changed in historical retrospect. Such analysis allows to identify regularities in the emergence of corporate legal forms and specifics of exercising corporate rights by their members under the influence of economic systems development in different historical periods. The identified patterns will help answer the basic question: to what extent existing forms of implementation of corporate rights correspond to contemporary realities.

Secondly, the corporations' members, when forming their capital stock, use the resources necessary to carry out economic activities. The value and significance of such resources necessary to achieve the objectives of the business corporation, ultimately determine the role and place of the particular corporate member and their corporate rights. As a result, we can conclude whether the basic principles of existing corporate law are adequate (inadequate) to the value characteristics of modern resource support activities of commercial corporations.

Thirdly, it is essential to classify commercial corporations operating in different sectors and areas and to match the system of interests of their members in terms of exercising corporate rights to the activities these corporations are engaged in and their resources. Based on this analysis, it is possible to determine where the current principles of corporate law and the system of owners' interests in exercising their corporate rights correspond, or conversely, do not correspond to the current stage of economic development.

Fourthly, we need to identify the trends in corporate legislation that have emerged as a result of the processes taking place in the economic sphere.

Although this article refers to Russian legislation, the issue is of a global character; moreover, domestic corporate legislation corresponds in its basic principles to the laws of other countries.

Discussion

To begin with, let us define the concepts of *corporation*, *commercial corporation* and *corporate rights* on the basis of the norms of current Russian legislation. Article 65.1 of the Civil Code of the Russian Federation defines a corporation as follows: “Legal entities whose founders (stockholders) have the participatory (membership) right in them and form the supreme body thereof in accordance with Article 65.3(1) of this Code are corporate legal entities (corporations)”¹.

¹ Civil Code of the Russian Federation (Part One) of November 30, 1994, No 51-FZ.

The Civil Code also provides an exhaustive list of organizational-legal forms of legal entities — commercial corporations. These include business companies (joint stock companies, limited liability companies), business partnerships (general partnerships, limited partnerships), production cooperatives, economic partnerships².

In today's economy, the main forms of commercial corporations are business entities.

A list of corporate rights in relation to business partnerships and companies is given in Article 67 of the Civil Code of the Russian Federation³. These include:

— property rights (the right to receive part of the current profits distributed among the members of the corporation, as well as the right to receive “capitalization” of a member's share in the share capital in various forms: sale, withdrawal from corporation, liquidation quota)

— non-property rights (rights to participate in management and control, and to get information)

— pre-emptive rights (under certain conditions, the right to retain one's share in the share capital of the corporation).

In fact, the organizational and legal forms of commercial corporations determined by the current Russian Civil Code are the result of the principles of corporate relations development in different historical periods. So, the issue of such evolution in retrospect, that is in different periods of civilizational development, comes to the forefront. We are particularly interested in when and why the prototypes of modern commercial corporations emerged and what factors influenced the formation of corporate rights of their members.

The term *corporation* comes from the Latin word *corpus*, denoting a body, or group of persons having their own collective system of interests and the right to enter into legal relations to protect and enforce them. However, such a group of persons in the Roman law was not deemed a legal entity as the concept of a legal entity at that time was not formed.

Non-industrial economy

The process of formation of corporations as a *group of persons*, united not only by community of interests, but also by formation of some rudiments of *capital stock* and implementation of corporate management rights (including formation of special corporate management bodies) took place in Europe in the Middle Ages. We can distinguish two basic types of entrepreneurial activity relevant at the time: merchants and craftsmen.

For merchants, money was the most important resource (buy goods — resell them at a profit). Because of the underdeveloped commodity-money relations, there was no need to concentrate large sums of money in a single pair of hands. Nevertheless, in order to carry out commercial (merchant) activities successfully it was necessary to defend, protect and lobby merchants' interests. It was then that corporate groups (prototypes of some forms of modern non-profit corporations), such as merchants'

² Civil Code of the Russian Federation (Part One) of November 30, 1994, No 51-FZ.

³ Civil Code of the Russian Federation (Part One) of November 30, 1994, No 51-FZ.

guilds, began to emerge. Their purpose was not to pool capital in order to conduct business, but rather to protect and represent their interests.

While the merchants of the Hanseatic League cities operated at their own risk, the Hanseatic League itself (as an alliance of trading cities) ensured collective security (including through the deployment of hired troops), representation and lobbying of the merchants of the Hanseatic League cities through their offices and trading posts.

Each merchant carried out their trading operations independently, taking all the risks and being responsible for all his possessions. No *outsiders* were allowed into their *family* business. In terms of modern law, merchants were individual entrepreneurs.

However, as trade relations developed and trade turnover grew, it became urgent to merge merchant capitals. A merchant ship or caravan belonging to one merchant was an easy prey for pirates and robbers but a large merchant caravan or a squadron of merchant ships could protect both the goods and the lives from attacks. Moreover, there was the problem of preserving the family capital, provided it was divided among several heirs.

That is how merchant associations where everyone was fully responsible for the results of the trading operation with his property emerged. They gave rise to the prototypes of modern general partnerships. There were those who were ready to risk their money in financing merchant operations for a portion of the profit without participating in the operations themselves. That was especially relevant for the organization of maritime trade (especially, requiring the use of large amounts of capital). Such associations became the prototype of today's faith-based partnerships.

As for handicraft production, it was based mainly on the manual labor of the craftsmen themselves. There was no need for large investments in such business as there was no mass manufacturing and/or machine production. As with merchants, craft associations appear to protect the interests and represent groups of artisans. Craftsmen's workshops as professional associations emerged.

The resource for uniting several craft workshops for the sake of carrying out production activities (for example, the fulfillment of large military government orders) was determined by the professional skills of the craftsmen themselves. That was how the prototype of modern production cooperatives based on personal labor came into being.

In fact, even if in small numbers, corporate associations with limited liability of members appeared at that time; their modern counterparts are economic societies.

The situation with trade changed dramatically during the period of active development of the colonies and emergence of manufactory production (even with the use of simple machines), which replaced individual craft production.

The need to raise large amounts of capital, both for permanent trade operations on a large scale with the colonies and creating large industrial manufactures (buildings, machinery and equipment) became urgent as small craft workshop could not equip many workplaces and ensure mass production through individual workers' specialized operations.

The most important resource required for the successful implementation of such business projects becomes, in modern parlance, the combination of non-current tangible (production) and current (cash) assets. As a matter of fact, successful large-

scale trade requires not only money (working capital) but also ships to transport goods, warehouses, factories (non-current tangible assets). Similarly, the organization of large-scale manufactory production requires premises, equipment (non-current tangible assets), and real money, including, for purchasing raw materials (current assets).

The crucial point is that any non-current tangible asset has a sufficiently clear monetary value. It is possible to contribute to share capital both property (e.g., a merchant ship, having evaluated it) and currency for its purchase or construction.

At the same time, the old forms of corporate partnerships did not fit into the new economic situation. Those who needed money for developing their business (merchants, industrialists) had to offer adequate conditions to those who were prepared to invest money or property in the business. Those who were ready to invest in a certain commercial or industrial enterprise for profit, were ready to risk what they had invested. But in the event of failure, such an investor was not prepared to take responsibility for failure with all his assets. The need arose to limit the liability of participants. However, those who had already invested in the project claimed influence over its realization and the right to quit the project. Equally, the initiator of the undertaking also wanted to limit his liability to what he had invested (a fundamental difference compared to partnerships and faith-based partnerships). Therefore, the need arose for such form of capital accumulation where the liability of the partners was limited to their contribution to the share capital. The issue of determining and fixing the rights (corporate rights) of the partners in such capital associations came up. The development of economic relations has thus led to the emergence of business companies and, above all, large joint stock companies.

The first full-fledged joint-stock company that placed its shares on the Amsterdam Stock Exchange was the Dutch East India Trading Company, formed in 1602. That fact, however, is challenged by the evidence that around 1250 in Toulouse, France, 96 shares of the Bazacle Millers' Society (*Société des Moulins du Bazacle*) were sold at a price that depended on the profitability of the mills owned by the society. Anyway, continued trade (rather than a one-off expedition) with South-East Asia required pooling of large amounts of capital but investors risked losing only what they had invested.

Such an approach also predetermined formation of basic principles for implementing the corporate rights of the members. They were determined primarily by what a member of such corporation invested in the development of the project, his share in the share capital, but not by his role and participation in the project, as it was before. Implementation of corporate rights in legal entities — business companies — is based on the member's share in the contributed capital.

Undoubtedly, the most logical form of exercising corporate rights, subject to limitation of liability, is the one based on the member's share in the joined capital. Indeed, if a member has invested the largest share, his losses may be greater than the losses of other members in the event of failure. So, it is only logical that he should also have a proportionate amount of corporate rights. The greater the contribution, the greater the potential loss, the greater should be the impact on management, control and information and the greater should be the share in current profits, capitalization, and the scope of pre-emptive rights. Such approach is characteristic of business entities.

And that is why the basis of any national economy up to now (including the domestic) are economic societies, clearly dominating both in their influence and in total number over other legal entities — commercial corporations in other legal forms of organization.

Industrial Economy

A radical change in economic development occurred as a result of the Industrial Revolution in the second half of the 18th and 19th centuries. The invention and use of the steam engine in industrial production led to transition from manual manufacturing to machine, factory production. It resulted in the transition from an agrarian society (dominated by subsistence farming) to an industrial society, mass commodity production, dramatic growth of goods turnover and development of commodity-money circulation. During that historical period the foundations and principles of modern industrial society, the consumer society, were laid.

The rapid growth of industry and goods turnover, in turn, determined a steady demand for the creation of a growing number of business entities, whose entrepreneurial activity was based on the share capital of members interested in the implementation and development of business projects. Capital in the form of non-current tangible and current assets with clear valuation became a priority resource to an even greater extent than before.

Capital is the fundamentals of an industrial economy. No wonder why Karl Marx called his seminal work *Capital*. Let us remember what he said about corporate rights (including property rights to profit). “Provide 10 percent, and capital agrees to any application, at 20 percent it becomes animated, at 50 percent it is positively ready to break its head, at 100 percent he tramples all human laws, at 300 percent there is no such crime that it would not risk, at least under pain of a gallows”. (To be fair, Marx used this phrase, quoting Thomas Joseph Dunning, his contemporary, the British trade-unionist and publicist.)

It is only natural that at that time the foundations of modern corporate law adequate to the industrial stage of economic development were laid. The idea of implementation of corporate rights in proportion to the share of the member in the joint capital (authorized capital) of business entities became dominant both in legal theory and in legislative practice.

In this sense, the XX century did not bring any fundamental changes in the development of corporate law and the form of implementation of corporate rights of members of commercial corporations.

As a matter of fact, a fundamentally new factor operating in the economy has manifested itself. We are talking about active development of the service sector along with the industrial and commercial spheres of the economy. With income growth in industrialized countries, services became highly demanded by consumers as a mass phenomenon. In XIX century, a poor peasant living on subsistence farming or a factory worker with a miserable salary could not think of spending money for services, for example, a hairdresser (his wife would cut his hair at home). The service sector worked

for a small group of consumers with a relatively high level of income. In the twentieth century (especially in the second half), the service sector gained a mass consumer.

As for the industrial economy, despite technological progress, the 20th century did not bring any fundamental changes as compared to the 19th century, however, those changes had an impact on the development of corporate legislation. For example, both large and small businesses (manufacturing, trade and services) required the formation of shareholdings. First, it was about the emergence of *specific rules of the game* in various forms and types of economic societies. Thus, domestic legislation divides economic societies into joint-stock companies (issuers of shares) and limited liability companies, as well as *clan* (non-public joint-stock companies and limited liability companies) and *non-clan* (public joint-stock companies).

Each legal form and organizational type of business entity has specifics of implementing corporate rights, which is determined by the specifics of their activities. For example, in joint-stock companies, a shareholder wishing to exercise the right to capitalization upon *withdrawal* must sell his or her shares. In limited liability companies it is possible to exercise the right to capitalization of their shares not only through its sale but also through withdrawal procedure.

In *big* business, where large corporations operate, public (open, not *clan*) joint-stock companies, with numerous members and free sale of shares without any restrictions and special procedures, have gained priority. Due to the scale of operations and large number of shareholders, the personal characteristics of a particular shareholder (unless, of course, he or she is the dominant owner) do not fundamentally affect the development of the business. The personal composition of the main mass of shareholders has no impact on the development of a corporation.

On the other hand, in closed, *clan* structures, a mechanism for exercising preemptive rights may be introduced. Such possibility is provided for in limited liability companies and non-public joint stock companies. What these types of companies have in common is that they form their membership in a *closed clan* system. The entry of a new member into a *clan* occurs with the consent of the *clan* itself or the clan members. Examples of such *closed clans* are extremely diverse and range from medieval knightly orders, Academy of Sciences, Masonic lodge or closed party (like the CPSU) to Cosa Nostra Mafia or Chinese triads. In *closed clan* economic societies (non-public joint-stock companies and limited liability companies) the instrument of pre-emption performs the function of creating conditions to prevent *unauthorized penetration* of third parties into the closed (clan) system (Samoilov, 2022 a). This is because in such *clan* structures, with a small membership, their personal composition and the system of personal relationships is often crucial to the development of business.

Another important point is that in some types of small businesses (e.g., in the service sector), in a competitive environment, the intangible, personal characteristics of the members of such *closed clan* structures (knowledge, professional skills, etc.) have become of crucial significance. The influence of this intangible (personal) factor led to the fact that in certain cases the members of the corporation became interested in exercising their corporate rights irrespective of a particular member's share in the joint capital. It became necessary to deviate from the classical formula of exercising

corporate rights in business companies: the scope of corporate rights is proportional to the share in the authorized capital.

In other words, conditions have developed where the scope of corporate rights has become determined not by the power of capital but through *the agreements of the corporate shareholders*. Thus, Paragraph 2, Clause 2, Article 28 of the Federal Law on Limited Liability Companies states:

The part of the company's profit intended for distribution among its participants (shareholders) shall be distributed in proportion to their shares in the company's authorized capital. A different procedure for distribution of profit among the company's participants (shareholders) may be established by the company's charter (Articles) or by the introduction of amendments into its charter (Articles) on the basis of the decision of the general meeting of the company's participants (shareholders), adopted by all its participants (shareholders) unanimously. Changes in, and removal of, provisions of the company's charter (Articles), which establish such procedure, shall be realized by decision of the general meeting of the company's participants (shareholders), taken by all its participants (shareholders) unanimously.

Paragraph 5, Clause 1, Article 32 of the Federal Law On Limited Liability Companies reads as follows:

The company's charter (Articles) adopted at the time of its establishment and the decision of the general meeting of the company's participants (shareholders) adopted to introduce amendments into the charter (Articles) by all participants (shareholders) unanimously may establish a different procedure for the determination of the number of votes held by its participants (shareholders). Changes in, and exclusion of, provisions of the company's charter (Articles), which establish such procedure, shall be affected by decision of the general meeting of its participants (shareholders), adopted by all the company's participants (shareholders) unanimously.

Paragraph 1, Clause 4, Article 21 of the Federal Law of the Russian Federation On Limited Liability Companies establishes that

The company's participants (shareholders) shall enjoy the preemptive right to buy the share or a part thereof of the company's participant (shareholder) at the price offered to a third person in proportion to the size of their shares, unless the company's charter (Articles) or the agreement between its partners stipulates a different procedure for the implementation of this right. The company's charter (Articles) may provide for the company's preemptive right to acquire the share, or the part thereof sold by its participant (shareholder), unless the company's other participants (shareholders) have used the preemptive right to buy the share or the part thereof⁴.

In other words, corporate law allows, at least in limited liability companies, members/shareholders to negotiate corporate rights such as the right to manage, the right to receive current profits, the possibility of exercising the pre-emptive right to purchase shares *out of proportion* to shares of members in the authorized (shareholders') capital.

However, the fundamental changes in the forms of implementing corporate rights have not occurred. Both in XIX century and in XX century the basic principle of

⁴ Federal Law No. 14-FZ of February 8, 1998, On Limited Liability Companies.

corporate rights has remained (with few exceptions) in proportion to the share in the share (authorized) capital.

Let us look at the current situation in the modern economy.

Post-industrial economy

The economy has been undergoing radical changes in recent decades. If in the twentieth century it was possible to talk about the dominance of the industrial economy, requiring large investments in business, expensive industrial and commercial property complexes, large amounts of working capital, in XXI century an increasing share of the economy is occupied not just by a *service* business: the most active development is noticeable in *intellectual, creative*, information, and digital economy. More and more businesses are appearing (including in the form of commercial entities), where the most important resource is not huge investments, expensive equipment, assets and property complexes but creative ideas, intellectual labor, sometimes with a minimum value of corporate assets (Samoilov, 2022a).

We call such corporations *post-industrial* corporations.

Thus, in the *post-industrial* or *creative economy* with intellectual component as an essential part, a fundamentally new factor that affects the formation of joint capital of business entities becomes evident.

In classical corporations of *industrial* type, the main significant resource is capital in the form of current and non-current tangible assets, expressed in monetary form. In *post-industrial* corporations, based on new knowledge, ideas, and creativity, the main significant resource is non-current intangible assets.

If monetary contribution to share capital of a business company by a member can be determined unambiguously, and contribution in the form of property, securities and other *tangible* assets can be determined with great certainty (based on market analogues), then how an asset in the form of an idea, know-how or other *intangible* asset can be determined at the time of share capital formation? An intangible asset based on idea is individual, unique and has no market analogues. It is practically impossible to evaluate a creative contribution in money due to the lack of market analogues (Samoilov, 2022a). Some ideas become multi-billion dollar businesses (Tesla Motors, Netflix, Google, Yandex), while others (most of them) end up without any market success. The question is how and in what way a new idea (especially a unique one) can be valued when it is contributed to the share capital of a company.

The basic principle of participation in exercising corporate rights is the *power of capital*. The member whose contribution is greater also receives a greater share in the share capital and hence a proportionately greater amount of corporate rights. What seems to be essential in *industrial corporations* turns into a problem in *post-industrial corporations*, built on the dominance of ideas as a significant resource. If we follow this basic principle, a member who contributes to *post-industrial* company an *industrial* resource with a clear cost estimate (current and non-current tangible assets), receives the overwhelming amount of corporate rights. For example, by a majority of votes in the supreme governing body the member — owner of the idea — may be rejected the right to participate in management or property rights, which are the basis of the

economic interests of the members in the commercial corporation. Quite naturally, the latter would hardly be interested in such a form of exercising corporate rights.

Thus, there is a divergence of vectors of interest between post-industrial corporations and their development and their members, carriers of ideas; it is conditioned by the classical forms of exercising corporate rights in proportion to the shares in the contributed capital. In other words, the *power of capital* dismisses the *power of creativity*.

Nevertheless, as has already been shown by the example of Russian law, at least in some forms of business companies (limited liability companies) the *power of capital* is secondary to the *power of contract* when exercising certain corporate rights (the right to manage, participate in the profit distribution, exercise the pre-emptive right). There comes an opportunity to exercise some corporate rights based not on valuation of the member's share in the share capital of the company, but on the value and significance for the development of an intangible asset which has no adequate valuation (idea, creativity, professional knowledge, etc.).

Such approach proves to be viable in *post-industrial* commercial corporations.

Conclusion

As a result of the above analysis, we can formulate the following conclusions:

1. Historically, specifics of the organizational and legal forms of commercial corporations and specifics of exercising corporate rights by their members have been determined by the impact of the following factors: the main types of business activities, the scope of business entities activities, the specifics of the most significant resources for conducting business activities.

2. In the traditional *industrial type of economy* (second half of the XVIII—XX centuries) the basic resource, necessary for successful development of corporation, was a resource with a clear cost estimate in the form of non-current tangible and current assets. It was during this period that the basic principle was established in corporate law: implementation of corporate rights in business corporations is carried out in proportion to the shares of their members.

3. Today, while traditional corporations of the *industrial type* persist, corporations of the new, *post-industrial type*, where intangible assets (ideas, creativity, professional knowledge, skills, etc.) are the main significant resource, are actively developing. Such intangible assets, due to their uniqueness and exclusivity, often cannot be valued due to the lack of market analogues. They require a combination of *capital* and *ideas*, which belong to different vectors of *post-industrial* corporations' interest of development and interests of their members, carriers of ideas, conditioned by classical forms of exercising corporate rights in proportion to shares in the joint capital.

4. The modern basic principles of implementing corporate rights of members in business companies based on the *power of capital* come into conflict with the realities of the current stage of society development (transition from industrial to post-industrial type of economic development).

5. The resolution of this contradiction also requires certain changes in the basic principles of modern corporate law. The point is that exercising of corporate rights in

post-industrial corporations should not be based on the principle of “the bigger the stake in the share capital, the greater the rights”, but should be regulated by an agreement of the members of such corporations in terms of the forms of exercising of their corporate rights. Such opportunities partially exist in limited liability companies where the *power of capital* complies with the *power of contract*.

6. The following trends in the development of corporate legislation can be predicted:

- In the existing organizational and legal forms of business companies (primarily of the *clan* type) one can expect a wider list of corporate rights whose implementation will not be related to the members' shares in the authorized capital, but will be determined by their agreement (including distribution of shares in the share capital of the corporation)

- It is possible to expect emergence of new legal forms of commercial corporations, where exercising of corporate rights will be based exclusively on a contractual basis.

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