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INSTITUTIONALIZATION OF ECONOMIC ANALYSIS IN CORPORATE LAW

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Abstract. Foreign legal literature has been creating an interdisciplinary methodological basis for the economic analysis of law for a relatively long time, which is dictated by the need to find the most optimal model of legal regulation, including when determining variables that affect the formation of legal policy. It is worth noting that the methodology of scientific analysis previously used by legal science did not include economic analysis, undeservedly excluding this important toolkit for private law. In our understanding, the definition of an interdisciplinary approach in the formation of certain civil law structures should certainly serve the idea of determining the most effective, rational and viable model of interaction between economics, law and social relations. As a separate issue, it is proposed to consider the issue of institutionalizing economic analysis in improving corporate law in the context of increasing the economic efficiency of law enforcement practice. Actually, there are a lot of problems associated with the implementation of an interdisciplinary approach of economic and legal analysis in corporate law, ranging from the problems of theorizing transaction costs, conflict of directors, shareholders and creditors to the hypothesis of market efficiency (Efficient Market Hypothesis), the economics of mergers and acquisitions. In this context, our work does not pretend to be a depth of study of these processes, however, it is intended to determine the most important aspects of the interaction of economics and law in the further improvement of corporate law in the Republic of Kazakhstan.

Keywords: economic analysis of law, corporate law, methods of economic and legal analysis, economics of law, rule-making, economic efficiency of law.

КОРПОРАТИВТІК ҚҰҚЫҚТАҒЫ ЭКОНОМИКАЛЫҚ ТАЛДАУДЫ ИНСТИТУЦИОНАЛДАНДЫРУ

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Андатпа. Шетелдік заң әдебиеті құқықты экономикалық талдау үшін салыстырмалы түрде бұрыннан пәнаралық әдіснамалық базис құрады, бұл құқықтық реттеудің неғұрлым оңтайлы моделін іздестіру, оның ішінде құқықтық саясатты қалыптастыруға әсер ететін

ауыспалыларды айқындау қажеттігінен туындап отыр. Айта кету керек, заң ғылымы бұрын қолданған ғылыми талдау әдіснамасы экономикалық талдауды қамтымаған. Біздің түсінігімізде қандай да бір азаматтық-құқықтық құрылымдарды қалыптастыру кезінде пәнаралық тәсілді айқындау экономика, құқық және қоғамдық қатынастардың өзара іс-қимылының неғұрлым тиімді, ұтымды және өміршең моделін айқындау идеясына міндетті түрде қызмет етуі тиіс. Жеке проблемада құқық қолдану практикасының экономикалық тиімділігін арттыру бөлігінде корпоративтік құқықты жетілдіру кезінде экономикалық талдауды институционалдандыру туралы мәселені қарау ұсынылады. Шын мәнінде, экономикалық-құқықтық талдаудың пәнаралық тәсілін корпоративтік құқыққа имплементациялауға байланысты проблемалар, трансакциялық шығындарды теориялау проблематикасынан, директорлар, акционерлер мен кредиторлар конфликтологиясынан бастап нарық тиімділігінің гипотезасына дейін (Efficient Market Hypothesis), бірігу экономикасы және т.б сіңірулер. Осы тұрғыда біздің еңбегіміз көрсетілген процестерді зерттеу тереңдігіне үміттенбейді, алайда Қазақстан Республикасында корпоративтік құқықты одан әрі жетілдіру кезінде экономика мен құқықтың өзара іс-қимылының неғұрлым маңызды аспектілерін айқындауға арналған.

Кілт сөздер: құқықты экономикалық талдау, корпоративтік құқық, экономикалық-құқықтық талдау әдістері, құқық экономикасы, норма шығару, құқықтың экономикалық тиімділігі.

ИНСТИТУЦИОНАЛИЗАЦИЯ ЭКОНОМИЧЕСКОГО АНАЛИЗА В КОРПОРАТИВНОМ ПРАВЕ

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Аннотация. Зарубежная юридическая литература сравнительно давно создает междисциплинарный методологический базис для экономического анализа права, что продиктовано необходимостью в поиске наиболее оптимальной модели правового регулирования, в том числе при определении переменных, влияющих на формирование правовой политики. Стоит отметить, что ранее используемая юридической наукой методология научного анализа не включала в себя экономический анализ, незаслуженно исключая этот важный инструментарий для частного права. В нашем понимании определение междисциплинарного подхода при формировании тех или иных гражданско-правовых конструкций непременно должно служить идее определения наиболее эффективной, рациональной и жизнеспособной модели взаимодействия экономики, права и общественных отношений. Отдельной проблематикой предлагается рассмотреть вопрос об институционализации экономического анализа при совершенствовании корпоративного права в разрезе повышения экономической эффективности правоприменительной практики. Собственно, проблем, связанных с имплементацией междисциплинарного подхода экономико-правового анализа в корпоративное право, достаточное обширное количество, начиная от проблематики теоретизации трансакционных издержек, конфликтологии директоров, акционеров и кредиторов и заканчивая гипотезой эффективности рынка (Efficient Market Hypothesis), экономикой слияний и поглощений. В данном контексте

наш труд не претендует на глубину исследования указанных процессов, однако призван определить наиболее важные аспекты взаимодействия экономики и права при дальнейшем совершенствовании корпоративного права в Республике Казахстан.

Ключевые слова: экономический анализ права, корпоративное право, методы экономико-правового анализа, экономика права, нормотворчество, экономическая эффективность права.

Introduction. Turning to the history of the origin of the corporate way of organizing and conducting business, one should point out the main reasons for its occurrence. The complication of economic ties in the process of cooperation (taking into account the owners of means of production, employees, sellers, lenders, etc.) objectively required proper command management, well-coordinated coordination and economic planning. The natural evolution of such connections led to the formation of a stable form of management of all chains of complex entrepreneurial entity. The key factor here, of course, was the desire of all participants to reduce transaction costs by building vertical control methods and horizontal mechanisms of interaction with other persons involved in the process. In addition to transaction costs, the aim was to simplify the process of pooling capital, making investments and determining the degree of accepted risk by the owners of the invested capital. Thus, in a simplified form, a regular contract between two partners in the standard would require the consent of all parties to change it, which should be fixed by appropriate additional agreements. It is not possible to foresee all possible risks in the course of doing business at the beginning of the activity. This increased transaction costs to the detriment of the development of entrepreneurial initiative, reducing the success of any project. Thus, a stable legal structure of contractual relations was formed, in which the absolute consent of business participants was required only at the beginning when combining capital, determining the basic principles of doing business, and the further management of this business was determined by the majority of business participants, where the majority opinion was imposed on the minority.

The separation of invested capital and the distribution of probable risks of entrepreneurial activity led to the fact that the created corporate structures became independent participants in civil circulation, limiting the responsibility of capital owners, but possessing separate legal personality and capable of entering into legal relations on their own behalf on an equal basis with individuals.

In this sense, the economic analysis of corporate law as an interdisciplinary approach in the study of some problems of private law can explain both the existence of limits to the development of corporate structures and the possible ways to change and improve them.

Materials and methods. The methodological basis of the work was formed by the scientific works of Kazakh and foreign authors, international legal and national regulations, and expert opinions. General scientific methods were used, including comparative legal and formal legal approaches. Theoretical research methods such as modeling, logical analysis, and data analysis were also employed.

Results and discussion. The greatest progress in the economic analysis of law was made by scholars from the United States, giving birth to a whole school and offering tools to lawyers and economists applicable to specific legal doctrines and institutions. Briefly information about their contribution is given in the following table:

Name	Area	Key contribution
Ronald Coase	Economist	Coase's theorem, transaction costs
Gary Becker	Economist	Economic theory of crime and punishment
Richard Posner	Lawyer	Systematic economic analysis of all branches of law
Guido Calabresi	Lawyer	Tort Law Economic Analysis
Henry Manne	Lawyer	Economic analysis of corporate law

C. Sunstein/R. Thaler	Lawyer/Economist	Behavioral Analysis of Law and Economics («Nudge»)

Characteristic of Kazakh legal science is the almost complete absence of interdisciplinary research in the field under consideration. From the nearest neighboring countries, individual partial or complete studies are conducted in the Russian Federation (Karapetov, 2016). The most fundamental research in this area is conducted by representatives of the Chicago School of Economic Analysis of Law (Posner, 2004). In relation to corporate law, R. Coase is also involved in economic analysis (Coase, 1937). Previously, we devoted the possibilities of conducting interdisciplinary research and applying them to individual civil law structures in a separate paper (Nurmagambetov et al., 2025). In this paper, we will focus on some of the possibilities of conducting an economic analysis of some constructions of corporate law, and also try to explain the need to institutionalize economic analysis in corporate law.

As an illustrative example, let's consider several examples of the established practice of regulating corporate relations from the point of view of the applicability of economic analysis:

1. Agent problem.

Economists describe this problem as a feature of the corporate form of doing business associated with an increase in transaction costs for monitoring personnel performance when consolidating a business (Calabresi, 1968). The larger the business becomes, the more difficult it is to evaluate and stimulate its employees. The problems of agency relations were studied in the framework of economic theory, where the vision of theorists consisted of the fact that the agent to whom the principal delegates the development of a solution subjectively pursues the goal of maximizing his own material and intangible benefits, which in any period can lead to a clash with the interests of the principal (Jensen et al., 1976). To offset this effect, the principal is forced to increase the agent's remuneration to a level at which the agent will act in the interests of the principal. Finding a balance between the amount of transaction costs due to the consolidation of the corporate structure and the ability to compete with other companies that do not have such a complex structure directly affect the quality of management decisions. In this case, the economic analysis of the agent problem allows you to determine how you can achieve the desired behavior of the agent for the principal in managing the business. It should be borne in mind that at present, not only the interests of the principal and the agent may be present within the agency problem. It may also be necessary to take into account the interests of a number of other stakeholders associated with the corporation itself directly or indirectly, as indicated by some scientists (Blair& Stout, 1999).

At various times, economists have proposed authorial solutions to the agency problem, which boiled down to several solutions:

a) Linking agents' remuneration to the value of the company's shares by granting stock options. The use of such a methodology for assessing the effectiveness of managers has led to frequent deliberate distortions of financial statements and an artificial increase in their value.

b) Linking agent compensation to formalized metrics (KPIs) when combining fixed remuneration and option packages.

Currently, no uniform agent remuneration policy has been developed, but legal science, in conjunction with an economic analysis of this phenomenon, has yet to develop the most effective approach to solving the agent problem.

2. Limitation of liability of shareholders.

Historically, the emergence of corporate structures with equity capital occurred against the background of risk minimization factors when accumulating capital for the implementation of large projects for one investor. Attracting the capital of many small owners was preferable to bank loans, since the owners were not guaranteed a profit, but were offered a share in the expected profit. In this sense, the organic decision of the first regulators of joint-stock companies was to limit the liability of owners for the company's debts, thereby increasing the attractiveness of investments and minimizing risk. However, if the minimization of risks by limiting the responsibility of owners is aimed at the owners themselves, then the risks of default of such a corporate structure are mostly shifted to

counterparties or other creditors. This, in turn, interferes with market equilibrium, since such lenders are forced to include the risk of non-return in the price of loans (Easterbrook, 1996). At the same time, the effectiveness of such interaction between corporations and their creditors is very high if the cost of borrowing brings costs less than the profit that can be obtained by increasing the capitalization of the corporation.

3. Mergers and acquisitions.

One of the most researched topics of corporate law is the topic of mergers and acquisitions. From the point of view of economic analysis, we are interested in how the price of certain shares is formed by participants in the stock market. The position of economic theory boils down to two main methods of assessing a business: assessing future income or the current capitalization of a company. In this sense, the economic analysis of corporate law should focus on corporate governance as the starting point for determining the value of the company being absorbed. Thus, some scholars suggest that the process of mergers and acquisitions is considered to be subject to the laws of supply and demand, where potentially absorbed companies form demand, and absorbing companies form supply based on the understanding that ineffective corporate governance negatively affects the value of shares and creates a desire for other companies to be acquired as an undervalued asset (Manne, 1965).

Turning to the economic analysis of mergers and acquisitions when assessing the value of a company allows you to use additional tools, since it is impossible to determine the value of a company with a standard set of legal tools. In this case, the price is determined by the market value of the company's shares.

4. Minimum amount of authorized capital.

Turning to the history of corporations, it should be noted that early regulators pursued the goal in which the establishment of a minimum threshold for the authorized capital was to minimize risks for creditors of corporations, increasing the likelihood of satisfying the claims of such creditors at the expense of the balances of the authorized capital. However, the practice of stimulating entrepreneurial activity in most countries has shifted its focus in favor of reducing the requirements for entrepreneurs in terms of the formation of authorized capital. At the same time, there are many supporters of increasing the requirements for the minimum size of the authorized capital.

We believe that from an economic point of view, a differentiated approach to establishing requirements for the size of the authorized capital can be justified in relation to the business sector, since if the establishment of a high threshold for the size of the authorized capital for banks and financial institutions is justified to a greater extent, then it is difficult to agree with the establishment of large minimum thresholds for small businesses. It is the economic and legal analysis, in our opinion, that will make it possible to outline the limits of possible decisions to increase or decrease the size of the authorized capital in relation to any organizational and legal form of the subject, including based on the type of his activity.

Returning, in fact, to the consideration of the possibility of institutionalizing economic analysis in corporate law, it should be noted that it is too early to talk about the theory that has taken shape, but certain steps in this direction should be taken now. At the same time, applied problems of corporate law objectively require a new approach. By presenting the relationship of participants in civil turnover in the context of corporate law, we mean that they function mainly in an area not regulated by the regulatory framework of corporate law, but remain at the discretion of the parties. Balancing such interests with the interests of the regulator of corporate relations, when using economic analysis of law as a tool, should lead to the determination of the optimal ratio of permissible and accepted costs for all participants in civil turnover.

As one of the important topics for discussion, we would like to point to the hypothesis of effective capital markets. It is believed that the founder of this theory is Eugene Fama, who suggested that stock market prices should reflect the entirety of information (Fama, 1970). In order to properly regulate relations between owners, managers and creditors, the regulator should take into account the peculiarities of interaction between these persons in cases where they become players in the stock market. For the Kazakhstan stock market, this seems to be very important, especially in the part when securities do not reflect prices formed by the presence of a full amount of information, which allows

some players in the stock market to extract income due to the possession of information that is not disclosed to the market. The potential for regulation in this case is revealed through the normative obligation to disclose certain information. Thus, the information disclosed to players in the stock market will be more taken into account in prices, and the functioning of the capital involved in the stock market will be an order of magnitude more efficient.

Conclusion. Obviously, the issues considered are not exhaustive, but it makes it possible to determine the contours of theoretical discussions of legal and economic thought over the past decades. Based on fundamental tenets of microeconomic attitudes, the theory of rationality of choice is still based on imaginary models, while economic analysis of law does not sprout in the shadow of such modeling. We expect that in the near future, full-fledged models of such analysis will be developed and applied to various private institutions, including corporate law. Currently, regulatory competition in the rule-making process does not welcome experimentalism, which probably weakens the ability to maximize the usefulness and quality of norms adopted taking into account economic analysis.

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