corporate law practice

New rules for major transactions

On January 1, 2017, the law that introduces new rules for the so-called major transactions enters into force[1].

It should be recalled that generally a major transaction is a transaction with monetary value exceeding 25% of the company's assets (property).

Major transactions must be considered by certain governing bodies of a company – the Board of Directors or the General Meeting of Shareholders – depending on a particular situation, company's structure and specifics of the transaction itself.

What changes is the legislator going to introduce into the existing rules?

New definition

First of all, for transaction to be considered a major one, it should fall outside the scope of normal business operations. The latter is rather an elastic term that used to be included in the legislative documents, however the fact of falling outside the scope of normal business operations becomes the main feature of a major transaction, i.e. now the legislator considers that unless the company falls outside its normal business operations, a transaction may not be considered a major one.

Indeed, if any other more specific features show that a transaction is a major transaction, then people often reasonably prefer to simply conduct all procedures required for a major transaction, rather than to try to make sure whether the transaction falls outside the normal business operations or not. Thus, the fact that the criterion of falling outside the normal business operations of a company is now one of prime importance makes little difference in practical terms.

What figures should be chosen for analysis

The procedure for evaluating the transaction to see whether it may be considered a major one in monetary terms has changed. According to previous rules, it was required to take into account the cost of property to be alienated or the price of property to be purchased, depending on the purpose of transaction.

Currently, when alienating any property, the greatest value – the price of alienation or book value of the property – should be taken into account.

So, for example, when selling any property at a high price, assuming that the book value of such property is much lower, it will not be possible to avoid corporate procedures simply because of low book value of the property to be alienated – the transaction will still be considered as major. This rule may in some cases be useful and protect owners from withdrawal of assets from the company without their knowledge, e.g. at the discretion of an unfair director.

Upon conclusion of rental and licensing agreements, the book value of property to be rented or rights to be transferred under licensing agreements will have to be compared with the book value of the company's assets.

There is a special rule for joint-stock companies with a Board of Directors, and it remains in a somewhat altered form – the value of property of such companies will be determined subject to its market value.

The rules for property acquisitions remained practically the same: when assessing the monetary value of any transaction, the acquisition price should be used, with the exception of the purchase of shares or convertible securities of public joint-stock companies – in this case, the price of all securities that may be acquired as a result of transaction should be used.

For a transaction to be considered a major one, the indicator compared with the book value of the company's assets must be at least 25% of such value, i.e. apart of some methodological issues, this rule remains unchanged.

New rules for challenging transactions

The provisions for challenging major transactions due to violations of consent obtaining procedure have been updated – this right will be provided to the company itself, members of the Board of Directors, and persons who own at least 1% of the issued share capital. For some companies, the above changes will create a slightly more significant protection against unfriendly acts: from this time on, in order to challenge committed major transactions due to violations of consent obtaining procedure, it will not be enough to simply acquire a share in the capital, since the legislator has established a minimum amount of 1%. On the other hand, the legislator has removed a very important lever, which previously ensured protection against such lawsuits – according to the previous rules, if the plaintiff could not influence the results of the vote through his/her stock, then his/her chances of winning in court degraded sharply. Currently, this limiting mechanism is not available; moreover, the plaintiff will not have to prove the unprofitability of the

transaction.

What else should be taken into account

Under the new rules, major transactions may be concluded both before and after obtaining consent thereto; although it should be noted that previously major transactions were often carried out before their approval, because in many cases it was simply impossible to get the approval prior to the conclusion of the transaction, for example, if members of the Board of Directors or owners of the company were not able to sign the required documents.

The new law introduces a special document necessary for joint-stock companies for obtaining the consent of the General Meeting to a major transaction – a Major Transaction Certificate. Such certificate will be provided to shareholders in the course of preparing for a meeting, and must contain information on the estimated effects of the transaction for the company, as well as assessment of its expediency. This certificate will be approved by the Board of Directors, and in the absence thereof by the company's director.

It must be borne in mind that the law envisages a number of exceptions, when the consent to conduct major transactions is not required, e.g. if the company has one owner also acting as its director.

Anyway, when deciding whether to consider any transaction to be a major one, whether to carry out corporate procedures associated with a major transaction, we recommend that you review the company's Charter, and any other internal documents, since they often contain figures and rules for major transactions different from those stipulated in the law.

In general, the new rules do not fundamentally differ from the previous ones, however improve the existing controlling mechanism. Anyway, many companies will have to revise their current corporate procedures in order to bring them into compliance with the newly introduced amendments.

Moreover, the above changes affect interested party transactions as well, so we prepared a separate article in this relation, and recommend that you read it.

October 28, 2016

[1] Federal Law No 343-FZ "On Amendments to the Federal Law "On Joint Stock Companies" and Federal Law "On Limited Liability Companies" dated July 3, 2016 with regard to controlling major and interested party transactions".