
THE CORPORATE GOVERNANCE REVIEW

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Chapter 25

UKRAINE

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I OVERVIEW OF GOVERNANCE REGIME

In Ukraine the primary law making body is the Ukrainian Parliament ('the Parliament'). The power to make laws may be delegated to lower governments or specific bodies of Ukraine but only for prescribed purposes.

The State Stock Market Securities Commission of Ukraine ('the SSMSC') is the regulator for the securities market. SSMSC was established in 1995 pursuant to the 1991 Law on Securities and Stock Exchange, which was replaced in 2006 by the Law on Securities and Stock Market.

According to the Law on the State Regulation of the Securities Market in Ukraine, the key tasks of the SSMSC include formation and insuring of unified state policy implementation concerning development and functioning of securities and the derivatives market in Ukraine, as well as coordination of state authorities' activities in the specified sphere. The SSMSC, which is financed from the state budget, licenses and regulates stock market participants and registers securities issues of domestic and foreign issuers.

An important aspect of implementation of state policy in the securities market is cooperation between the SSMSC and the Cabinet of Ministers of Ukraine and the Parliament.

Ukraine has recently made various efforts to improve its corporate governance environment in order to bring it into compliance with international standards and to overcome the existing shortcomings. In particular, these efforts included the introduction of a voluntary corporate governance code in 2003 and the passage of a new securities law in 2006. Most importantly, a new Law on Joint-stock companies ('the JSC Law') came into force in October 2008. The adoption of the JSC Law is a significant step towards the establishment of a comprehensive corporate governance regime.

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Currently, the legal framework regulating joint-stock companies (JSC) basically comprises the JSC Law, the Law on Business Associations, the Civil Code of Ukraine, the Commercial Code of Ukraine, the Law on Securities and Stock Market (the Securities Law), the Law on State Regulation of Securities Market in Ukraine, and the Law on the National Depository System.

By removing many gaps in current legislation regarding JSC activity, the JSC Law is a significant step forward for Ukraine in the protection of interests of both minority shareholders and major investors. Although not perfect, to this point it is the most comprehensive and well thought through piece of legislation in the sphere of corporate governance in Ukraine. The JSC Law represents a major improvement over the Law on Business Associations with regard to the protection of minority shareholders' rights. For example, cumulative voting became possible, minority shareholders were given the right to place items on the agenda of shareholder meetings and dissenting shareholders were given the right to demand that their shares be bought out if they disagreed with major corporate decisions. All of these were long-awaited steps towards a modern company law in Ukraine.

Further, in the first half of 2010 the SSMSC approved a number of clarifications of important provisions of the JSC Law. The main goal of such clarification is to iron out some drawbacks and inconsistencies in the new JSC Law by explaining how certain key norms can be applied in practice. All JSCs, both public and private, stand to benefit from these efforts to rationalise and simplify Ukrainian corporate law.

On 2 March 2011, the Law of Ukraine on Improving Regulation of Joint-stock companies was officially published and became effective (except for certain provisions that shall enter into force as of 1 January 2012). It makes significant amendments to the JSC Law and is ultimately aimed at further developing existing legislative provisions on JSCs, enhancing protection of rights and interests of shareholders, creating new impediments to raider attacks, and solving problems and curing irregularities arising in the corporate governance area upon implementation of the JSC Law.

II CORPORATE LEADERSHIP

i Board structure and practices

Generally, in Ukraine there is a two-tier board structure comprised of the management board ('the board') and the Supervisory Council ('the council'). Both shall exercise general governance over JSC's activities except for matters of exclusive competence of the general meeting of shareholders ('the general shareholders' meeting').

According to the JSC Law, the council is a body that defends shareholder's rights, and controls and regulates the activities of the board within the competence specified by the company's charter and the JSC Law.

In JSCs that have 10 or more shareholders, establishment of the council is obligatory. In JSCs with nine or less shareholders and in absence of a council, its powers shall be performed by the general shareholders' meeting. In such cases, the authorities of the council on preparing and holding the general shareholders' meeting envisaged by the JSC Law shall be performed by the board unless the company's charter stipulates otherwise.

The board manages day-to-day JSC activities. The competence of the board includes all matters of JSC operations, except for those within the exclusive competence of general shareholders' meeting and the council. The board can be collective or individual.

The council structure is very specific and determined by various factors, the most important of which are the ownership structure, the type of industry, the market position of the company and so on.

Members of the council are chosen from among individuals having full civil capacity or legal entities that are company shareholders. A corporate member of the council may have an unlimited number of representatives in the council.

Election of the council members of a public JSC shall be only through cumulative voting, of a private JSC – under the principle of prorated representation of shareholders in the council or through cumulative voting. The specific method of electing members of the council of a private JSC is defined by its charter.

The same person may be elected to the council for an unlimited number of times. A council member cannot be simultaneously a board member or a member of the audit committee (the Auditor) of the company, or both. This limits the possibility for abuse by the board members of their powers. The number of the council members shall be established by the general shareholders' meeting.

A council member shall exercise its powers in strict compliance with the terms of relevant contract with the JSC and its charter, and a council member who represents respective shareholders shall exercise its powers in accordance with the shareholder's instructions as well.

With regard to the composition of the board, the JSC Law stipulates that any person having full civil capacity, except the auditor, a member of the council or the audit committee of the company, may be elected to the board.

Rights and duties of the board members are determined by Ukrainian legislation, the charter or internal Board Regulation of the JSC, or both, and individual contracts between board members and the JSC.

Generally, a JSC is represented by the chairman of the board or a person who exercises the powers of the sole executive body (the sole director).

The chairman of the board is elected by the council, unless otherwise provided by the company's charter, in the order specified by the charter. The chairman organises the work of the board, convenes its meetings and maintains minutes thereof.

The chairman may act on behalf of the company without any power of attorney, simply according to resolutions of the board, *inter alia*, to negotiate, transact on behalf of the company, issue orders and give instructions binding for all employees of the JSC. Any other board member may also be vested with these powers, if specified by the charter.

The sole director has the right to act on behalf of the company without a power of attorney, *inter alia*, to negotiate, transact on behalf of the company, issue orders and give instructions binding on all employees.

In case of the inability of the sole director to perform, his or her duties shall be performed by a person appointed thereby unless the charter or the JSC Regulation on the Executive Body, if any, provides otherwise.

The chairman of the council is elected by and from among its members by simple majority vote unless the charter provides otherwise. The council may at any time re-elect its chairman.

The chairman of the council organises its work, convenes its meetings and presides at them, organises the election of the secretary of the meetings, unless otherwise stipulated by the charter, and has other authorities as provided by the charter and the JSC council Regulation, if any.

Should the chairman of the council be unable to perform his or her duties they shall be performed by a council member appointed by the council, unless the charter and the JSC Council Regulation, if any, stipulates otherwise.

For the first time the JSC Law introduced provisions regarding council committees. The council may form permanent or provisional committees from among its members to study and prepare matters within the council's competence. The JSC law provides for the right to establish an audit committee and an information policy committee. The committees shall be headed by council members offered by a shareholder who does not control the company's activities. The procedure of the committees' establishment and activity shall be specified by the charter or the JSC Council Regulation, if any.

Nevertheless, international board practice concerning establishing committees of a council or board, or both, is still not widely spread in Ukraine. The policy committee is the most popular committee in Ukrainian JSCs. A compensation committee is established only on the councils of some Ukrainian companies. Other committees, popular in common law countries, such as finance, administration, or shareholder are not developed in Ukraine.

ii Directors

Prior to adoption of the JSC Law, the involvement of outside directors was impossible in Ukraine. The Law on Business Associations stated that only persons who were JSC employees could act as the Head and members of the board.

Today, according to the JSC Law, any individual having full civil capacity, save for a member of the council or the audit committee, may act as a member of the board. Thus, outside directors may now be involved. However, such practice is still not widespread in Ukrainian JSCs.

All matters of day-to-day operations of a JSC, except for those delegated to another JSC body pursuant to law, the charter, a resolution of the general shareholders' meeting or a resolution of the council, shall fall under the competence of the sole director or members of the board (the directors). Generally, the following director duties are specified in a JSC charter:

- a* drawing up draft resolutions of the general shareholders' meeting;
- b* approval of a JSC schedule of personnel and salaries of the employees, JSC plans, estimates and budgets;
- c* approval of current plans and financial reports of JSC activity and measures that are required for their implementation;
- d* determination of remuneration of the employees and officials of JSC subsidiary enterprises, branches and representative offices; and
- e* submission of annual report and the balance sheet of a JSC for approval by the general shareholders' meeting, etc.

The directors shall act in the best JSC interests, in good faith, and reasonably, and shall not abuse his or her powers. Should the directors breach their representation obligations, they shall be jointly and severally liable for the damages thus inflicted on a JSC according to law.

The directors shall be separately or jointly elected or recalled by the council, or both.

Contracts with the directors shall be concluded in the manner established by applicable Ukrainian law and the JSC charter. The chairman of the council or a person authorised by the council shall sign such contracts on behalf of the JSC.

III DISCLOSURE

Corporate disclosure requirements in Ukraine are mainly focused on JSCs that contemplate public placement of shares or public JSCs that have conducted an initial private placement of shares.

The Securities Law and SSMSC regulations establish a detailed list of financial and corporate information to be disclosed by JSCs to the SSMSC and the general public both on a regular (quarterly and annually) and occasional basis. Notably, in 2008 the JSC Law established a general legal requirement for Ukrainian public JSCs to disclose all the information on their activities on the basis of the International Financial Reporting Standards (IFRS). Compliance of a JSC with the statutory disclosure requirements is controlled by the SSMSC and the failure to comply may entail imposition by the SSMSC of a fine upon the JSC.

Special information

Any JSC is obliged to disclose information on certain events that might affect its financial and business position and might result in a material change in the value of its shares, for example, buyback of shares, listing or delisting of the shares on a stock exchange, any change in the JSC officers, or a decrease of the authorised capital.

Regular information

The information disclosed quarterly consists mainly of general information on the company's corporate activity and quarterly financial reporting. The annually disclosed information must include more detailed data on the JSC's corporate activity, including name and location of the JSC, its management, business and financial activities, issued securities, annual financial reporting, auditor's report, etc.

It is important that the JSC's annual financial reporting is subject to mandatory verification by an independent auditor who has free access to all the JSC's documents necessary for conducting the audit.

Under Ukrainian law, the auditor shall observe general statutory rules of audit activity and professional qualifications. To guarantee the independence of the auditor, the Law strictly prohibits the auditor from being a company affiliated person, a person affiliated with the company's officer(s), or a person providing consultancy services to the company, or all of these.

In addition, an audit of the JSC's activities shall be carried out upon the demand of a shareholder(s) holding more than 10 per cent of the shares, but no more than twice

a year. Such an audit shall be performed at the shareholder's own expense, but may be reimbursed upon a general shareholders' meeting resolution.

IV CORPORATE RESPONSIBILITY

Following the economic downturn in 2008-2009, major Ukrainian private companies and institutions have established or improved systems of risk assessment, or both, by creating more risk officer positions and establishing risk management committees responsible for the organisation and support of risk management processes. Forced by economic recession and financial losses, corporations started to implement more efficient and comprehensive risk management strategies. In practice, major Ukrainian companies have actively integrated risk management as separate functional divisions. Usually, risk officers and risk committees are appointed by and subordinated to the board or CEO. Companies without special risk officers or bodies vest their executives with the respective functions.

Effective functioning of long-term risk management is based upon strong corporate and ethical standards and principles. In particular, in order to promote sound corporate governance and a risk management culture in a company, its directors must set the 'tone at the top'. The 'tone at the top' principle is usually emphasised within companies in Ukraine. Company leaders normally act as models of corporate behaviour and demand compliance by all the employees with risk and compliance policies introduced by the company. However, a better understanding and the best world experience of the 'tone at the top' are still necessary to help Ukrainian companies perceive long-term aims and mitigate corporate management risks.

Within recent years, Ukraine has been following ways to reach the best standards of the European business community and, in particular, its best developments of corporate responsibility. Many private sector companies try to show loyalty with respect to state standards and demands of Ukrainian society and manage corporate social responsibility in a systematic way as a part of their main activities. Nevertheless, most Ukrainian companies with a significant impact on the economy still show no signs of any tangible corporate social responsibility.

Mainly due to absence of relevant legislation, Ukraine has no general concept of compliance with corporate responsibility standards. The Parliament for more than a year has been discussing the idea of a legislative framework of corporate responsibility, but still has not implemented it into practice. The discussed matters involve compliance with the principles of international standard ISO 26 000 – Corporate Responsibility.

In the vacuum caused by the lack of legally binding and enforceable corporate social responsibility requirements, few major Ukrainian financial and industrial companies adopt internal codes of conduct, so-called 'corporate ethics codes', that might help them to maintain relationship between management, employees, stakeholders, society, and authorities. Many such companies periodically create and disclose non-financial reports related to working conditions, human capital development, environmental protection, local community engagement or product responsibility, or both. The best Ukrainian practice is shaped by the national leaders in corporate social responsibility such as System Capital Management, DTEK, Obolon, Metinvest, and ArcelorMittal.

Ukrainian authorities encourage companies to adopt internal corporate responsibility rules by endorsing the Corporate Governance Principles approved and recommended by the SSMSC. In addition, several principles of corporate governance and relationship between management and shareholders were recommended for practical application by the Methodological Recommendations for Improvement of Banks Corporate Management adopted by the National Bank of Ukraine. However, due to non-obligatory and out-of-date principles of these documents, Ukrainian JSCs selectively observe their provisions.

V SHAREHOLDERS

i Shareholder rights and powers

Under Ukrainian law, JSCs may issue shares of two types – common and preferred shares. While common shares are widely spread on the Ukrainian stock market, preferred shares are a quite unusual instrument.

Each common share confers upon its shareholder the same set of rights, in particular voting rights. Voting at the general shareholders' meeting is carried out on the 'one share – one vote' basis, except for cumulative voting. Preferred shares voting rights are based on the same equality principles. Nevertheless, preferred stock holders have the right to vote on a very limited scope of matters related to the rights granted by preferred shares, unless the JSC charter stipulates otherwise.

In Ukraine the most popular, expeditious and effective form of control over the board is exercised through the council that monitors the performance of the board, evaluates it, and exercises control over and regulates the activities of the latter on a regular basis in order to protect shareholders' rights and interests.

The council meets quite often and has considerable activity with regard to the board. In particular, the exclusive statutory competence of the council includes prior approval of terms and conditions of contracts with board members, determination of their remuneration; election and termination of powers of the chairman and members of the board; removal of them from execution of their powers, and election of a board interim chairman.

Generally, shareholders greatly elaborate powers of the council in the charter to have more ability to regulate the day-to-day activities of the board.

Another significant method of control over the board is the general shareholders' meeting. Since the general shareholders' meeting is the highest governing authority of a JSC, it has a statutory right to resolve any matters of JSC activities, including those within the authority of the council and the board. This makes the general shareholders' meeting a powerful instrument to control the board. Nevertheless, in many cases this type of corporate control may be less effective than the council due to its quite onerous and protracted procedure for convocation and holding. Therefore, in practice, most nonexclusive powers of the general shareholders' meeting are often delegated to the council.

Notably, the JSC Law does not specify cases where any board decisions shall be subject to approval by the general shareholders' meeting, and companies use best practice to include into the charter general shareholders' meetings or council powers

to approve significant board decisions, authorise their actions, and impose liability on board members.

Under the JSC Law, the general shareholders' meeting has exclusive competence to deal with corporate matters of highest importance that cannot be further delegated, for example:

- a* determination of main directions of JSC activity;
- b* introduction of amendments to the charter;
- c* change of the authorised capital;
- d* buy-back of shares;
- e* annulment of redeemed shares;
- f* changing the company's type;
- g* shares placement;
- h* election of council members, prior approval of terms and conditions of agreements with them, determination of their remuneration, and termination of their powers;
- i* decision on effecting a material transaction (if its value exceeds 25 per cent of the company's assets);
- j* decision on reports of the council, the board and the Auditing Commission (the auditor); or
- k* spin-off or termination of the JSC, election of a liquidation commission and approval of liquidation procedures, etc.

The shareholders may supplement exclusive authority of the general shareholders' meeting in the company's charter.

It should be noted that for the first time in Ukraine's corporate governance history the JSC Law introduced such a great novelty in the protection of interests of minority shareholders as the dissenters' rights concept.

Per the JSC Law, in some circumstances, including merger, take-over, demerger, transformation, spinoff of the JSC, or change of its type; effecting of a material transaction; or change of the JSC's authorised capital, dissenting holders of the common stock may demand that the JSC repurchase their shares. To benefit from such a right, a shareholder has to participate in the general shareholders' meeting resolution on such a matter and vote 'against' the proposed transaction. The shares repurchase price shall be of a market value and the payment for the shares shall be in cash, unless the JSC and a dissenting shareholder agree otherwise.

The same rights are granted to the holders of preferred stock with regard to preferred shares, if they vote 'against' the general shareholders' meeting's resolution on placement of a new class of preferred shares granting to their holders any preference in receiving dividends or payments on the liquidation of the JSC or extension of rights of preferred stock holders who have preferences in ranking for receiving dividends or payments on the liquidation of the JSC.

ii Shareholders' duties and responsibilities

Under Ukrainian law, all shareholders have equal duties regardless of their status and the number of shares held. Generally, shareholders shall abide by the charter and internal regulations of the JSC; carry out resolutions of the general shareholders' meeting and other bodies of the JSC; perform their obligations to the company, including those related to proprietary participation; pay for their shares; abstain from disclosing commercial secrets and confidential information about the company's activity; and perform other duties provided by applicable Ukrainian law and the charter.

Compared to all other shareholders, controlling ones have the only additional obligation – a person who has acquired more than 50 per cent of common stock must make an irrevocable offer to all remaining shareholders to purchase their common shares. The offer is made through the target company's council, while the SSMSC and the stock exchange where the shares are listed must be notified about the acquisition.

Shareholder's personal liability is generally limited to the value of the shares held in the JSC. The only exception is established by the Commercial Code of Ukraine. According to its rules, should a shareholder that is a public JSC controlling two or more companies cause the insolvency of a JSC as a result of the shareholder's wilful misconduct, such a shareholder shall bear subsidiary liability before the creditors of the insolvent JSC.

iii Shareholder activism

Shareholder activism has gained little popularity in Ukraine. Many forms of shareholder activism such as proxy battles, shareholder campaigns, negotiations with management, etc. are seldom exercised because of uncoordinated interests and actions of minority shareholders.

The main form of shareholder activism in Ukraine is commenced through litigation. Shareholders generally can only bring claims to courts in cases of direct violations of their rights and legitimate interests, and Ukrainian law does not stipulate derivative actions, namely, bringing claim(s) in the interests of the company.

According to the Resolution of the Plenum of the Supreme Court of Ukraine dated 24 October 2008 No. 13, the law does not stipulate the right of shareholders (participants) to apply to court for the protection of the rights or legally protected interests of the company beyond the representation relations. The Supreme Court recommended that commercial courts dismiss shareholders' (participants') cases related to the execution, amendment, cancellation or invalidation of contracts and other deals entered into by companies if there is no violation of shareholders' (participants') corporate rights.

In addition, please note that Ukraine does not have any special law on pay rules. The JSC Law protects the interests of the JSC from overpaying its directors by setting a default rule stipulating that the directors' remuneration is the exclusive competence of the council and to be set by this body. The law says that the pay issue cannot be delegated to other JSC officers or corporate bodies. The exception is the general shareholders' meeting that as the highest governing authority of a JSC can resolve any corporate matter.

iv Contact with shareholders

Historically, the level of disclosure of information by Ukrainian JSCs to its shareholders has been limited. Only a small number of controlling shareholders have real access to JSC information via the council or the board, or both.

The situation changed after the JSC Law came into force. It established a few mandatory levels of access to information and files on JSC activities.

Firstly, the council, the Auditing Commission (the auditor) and the board shall report to the shareholders at least once a year at the annual general shareholders' meeting.

Secondly, the JSC Law guarantees to all the shareholders free access to quite a broad statutory list of documents on JSC activity. Such documents must be provided by a JSC to a shareholder upon his, her or its written request.

Thirdly, a public JSC is obliged to have dedicated web-site where all the publicly disclosed and other required statutory information shall be placed.

Fourthly, the Securities Law and SSMSC regulations established specific disclosure requirements related to a JSCs' regular and special information.

It should be noted that there is no best practice on performing the disclosure obligations under the JSC Law yet. Considering past practices of non-transparency in corporate activities and non-disclosure of information even where specific disclosure requirements were set out by law, there is a reasonable possibility that some new disclosure provisions of the JSC Law and the Securities Law may be violated and lack enforcement in practice by majority shareholders and boards.

In addition, another very important source of information on the company's activities is its top-management. Even despite Ukrainian law that stipulates equality of shareholders' access to information and establishes liability for wrongful treatment of insider information, in practice controlling shareholders often organise unofficial meetings and communications with the company's management to get inside knowledge or to stay up to date on all the company's latest activities, or both.

The JSC Law clearly defines the terms of notice on holding the general shareholders' meeting and the scope of information to be included therein. The notice shall be sent to each shareholder or to a nominal holder (in case of registration of shares in its name) personally in written form not later than in 30 days prior to the day of holding a general shareholders' meeting and shall include the agenda thereof. Additionally, the JSC is obliged to publish in the SSMSC's official printed matter the notice on holding the general shareholders' meeting within the mentioned period. Any further changes in the agenda shall be brought to shareholders' notice. Starting from the day of sending the notice to shareholders, a JSC shall provide to them an opportunity to become acquainted with all the documents and information they may need in order to make decisions at the general shareholders' meeting.

Proxy solicitation is not typical for Ukraine and, therefore, there are no special rules regulating this procedure. In most cases, proxy solicitation is exercised by management of large public JSCs having thousands of shareholders who do not attend the general shareholders' meeting for purposes of voting.

VI OUTLOOK

Adoption of the JSC Law in 2008 became a significant step forward in bringing Ukrainian corporate governance up to best international practice standards. Nevertheless, 2009 and 2010 years of the JSC Law application show that it is not perfect and has a great number of gaps in regulating JSC activities. This caused the beginning of global legislative activity on improving the JSC Law.

A whole package of bills aimed to amend the JSC Law has been introduced in the Ukrainian Parliament and there are more still to come. The latest progressive change to the JSC Law – the Law of Ukraine on Improving Regulation of Joint-stock companies – was passed by the Parliament in February 2011 and became effective on 2 March 2011.

In addition, a number of clarifications were approved and are drafted by the SSMSC in pursuit of removal on the regulatory level of a number of deficiencies and contradictions in the JSC Law through interpretation of the methods of application of certain rules contained therein. Though SSMSC clarifications are of an advisory nature, usually they reflect quite a progressive official opinion on JSC issues and are highly anticipated by the stock exchange market players.

Appendix 1

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