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CEE LEGAL MATTERS COMPARATIVE LEGAL GUIDE: CORPORATE GOVERNANCE 2023 UKRAINE



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1. Corporate Structure Of The Companies

1.1. General Legal Framework

Ukrainian corporate governance rules vary depending on the organizational form of the company. There are clear legislative regulations for limited liability companies (LLCs) and joint stock companies (JSCs) in the respective since these types of companies are the most common.

Additionally, Ukrainian law contains general corporate governance provisions regarding entities established in other forms; however, in such cases, detailed provisions regarding corporate governance are expected to be included in the charter and other internal documents. Therefore, this will focus on LLCs and joint stock companies as well as exclude information on the state companies.

Ukrainian companies previously used to have only a classical two-tier corporate governance model with two mandatory bodies – a shareholders' meeting (or sole shareholder) as the highest body and an executive body (either collective or individual), as well as an optional supervisory board (public joint stock companies and joint stock companies with more than 10 shareholders).

The new *Law on JSCs* entered into force on January 1, 2023, changed this approach and allowed the companies to choose between the two-tier and one-tier model (with executive and non-executive directors on the board of directors). The law is intended to regulate JSCs, but provisions on the choice of the model apply to LLCs as well.

The said law also introduces several requirements for large companies (e.g., regarding the supervisory board committees). According to the accounting legislation, the company is deemed large if two of the three following criteria are met:

- assets value exceeds EUR 20 million,
- net revenue from sales exceeds EUR 40 million,
- the average number of employees is more than 250.

1.2. The Function of the Supervisory Board

The primary function of the supervisory board is to oversee the activity of the company's executive body. A one-tier model would vest these functions in the non-executive board members responsible for controlling executive members.

The *Law on JSCs* provides for a number of specific powers of the supervisory board (e.g., convening the shareholders' meeting, approval of the assets' market value, etc.). Alongside these powers, the charters may indicate additional matters within the competence of the supervisory board.

The shareholders of a public JSC may not be able to take over these functions – this is the only example of the limited

powers of the shareholders; in other cases, they can decide on all matters.

Comparatively, LLCs are subject to more discretionary provisions, i.e., there is no mandatory list of functions to be transferred to the supervisory board and shareholders can vote in all cases.

In terms of the supervisory board's liability, Ukrainian law provides that officials (including supervisory board members) must act in accordance with the laws and internal documents in order to protect the interests of the company and can be held liable for damages for their misconduct. There are also several specific obligations (e.g., confidentiality obligation or obligation to comply with rules regarding the related party transactions).

The new legislation also significantly improves the general concept of officials' fiduciary duties, for example, by stipulating that the officials must ensure the success of the company's activity to the maximum extent possible, act independently and with a reasonable degree of care and expertise, and provide explanations on the respective obligations.

1.3. The Function of the Executive Board

A company's executive body is responsible for managing all operational activities and controlling all matters outside of the shareholders' and supervisory board's competence. Within these limitations, the head of the executive body serves as the company's representative, concludes transactions, and issues internal orders. A company's documents may specify that other members of its executive body will be its representatives as well as the company's head.

As members of the executive body also are the company's officials, all general fiduciary duties indicated in Section 1.2. are relevant as well.

In addition, there are a few specific obligations that are applicable only to members of the executive body. As an example, it is a requirement to analyze the financial data and notify the shareholders of significant decreases in the value of the net assets (for example, when such value is less than 50% of the value of the net assets as of the previous financial period).

1.4. Conflicts of Interest and Related Party Transactions

The new *Law on JSCs* regulates conflicts of interest prevention (the previous wording was silent in this regard). A conflict of interest occurs when the official has a direct or indirect interest in using property, information, or opportunities of the company in conflict with the company's interests and may cause losses to the company. Such interests must be immediately reported by the company's officials to the respective managing body.

At that, the conflict of interest may be waived provided that the charter of the company allows (for public JSCs) or not forbids (for private JSCs) such a waiver and the procedure of granting the waiver is not violated (e.g., the person with conflict did not participate in the meetings of the body deciding on the waiver).

It is also prohibited to obtain remuneration from third parties for performing official duties.

The *Law on LLCs* also contains provisions regarding mandatory notifications of conflicts of interest and the prohibition to obtain remuneration from third persons. In addition, it clarifies that conflicts of interest may arise also in cases when a benefit is obtained by the affiliated person of the official. To this end, there is an obligation of the official to submit the list of their affiliated persons.

Related party transactions are not forbidden by Ukrainian legislation. Yet there is a specific procedure for their approval. For instance, related party transactions of the JSCs with a value from 1% to 10% of the value of the assets are to be approved by the supervisory board, with a value of 10% and up to be approved by the company's shareholders (lower thresholds may be indicated by the charter). Moreover, according to Ukrainian legislation, the supervisory board of a public JSC must involve an independent external auditor to check whether a related party transaction corresponds to normal market conditions.

For LLCs, the necessity to clear a related party transaction applies only if it is directly indicated in the charter. In practice, this mechanism is rarely used.

1.5. Legal Framework for Large Companies

According to the newly adopted *Law on JSCs*, there are special rules for large companies regarding the establishment of the supervisory board committees and mandatory appointment of the corporate secretary.

The special requirements also apply to public (listed) JSCs, banks, insurance companies, and capital markets institutions. These requirements mainly relate to:

- mandatory corporate bodies – the establishment of the supervisory board is necessary for all such companies,
- minimal number of the supervisory board and executive body members – for instance, the supervisory board of a bank should consist of no less than five members,
- independent directors – in banks one-third of the supervisory board but not less than three members must be independent,
- committees of the supervisory board and executive body – the supervisory board of an insurance company must have risk management, compliance, and internal audit committees; the

supervisory board of the capital market institutions – a risk management committee; the executive body of the bank has to establish such committees as a credit committee and an assets and liabilities management committee.

2. Corporate Governance Framework

2.1. Transparency and Public Disclosures

The requirements regarding public disclosure of regulated information are imposed on the JSCs and other types of companies issuing securities. Thus, these rules are not applicable to most LLCs.

The information is to be submitted to the National Securities and Stock Market Commission, indicated on the website, and provided to the authorized regulated information agency (SMIDA).

It is required to disclose, for example, the following information on corporate governance:

- Information on managing bodies, officials, and shareholders, management reports, including reports on corporate governance (i.e., additional requirements to the corporate governance specified at the company's level, information on the shareholders' meeting, supervisory board, executive body, powers of the company's officials), information on material, and related party transactions (for public JSCs) – annual information,
- Information on changes of officials – special information.

For public JSCs the disclosure requirements are more strict and, for instance, include mandatory disclosing on their websites the charter, regulations on the managing bodies, shareholders' resolutions, reports of the supervisory board, executive body, and other bodies. In other cases, such documents are not disclosed.

Additional management reports are also to be disclosed by all the large and medium enterprises (medium enterprises can indicate in such a report only financial information). This report can be drawn up in free form, but it is recommended to include corporate governance matters in such a report.

2.2. Public Authorities Responsible for Monitoring Corporate Governance

The main regulator authorized to monitor the fulfillment of obligations regarding corporate governance is the National Securities and Stock Market Commission. At that, its competence is limited to JSCs and other types of companies that have issued securities. LLCs have much more flexibility in terms of disclosing such information.

The activity of banks and insurance companies is overseen by the National Bank of Ukraine.

In 2020, the National Securities and Stock Market Commission

adopted the *Core Code of Corporate Governance: Requirements and Recommendations* – a set of recommended corporate governance practices. The guideline is mainly aimed at listed companies but also contains recommendations for unlisted companies.

2.3. ESG

There is a requirement to disclose information on corporate governance as specified in Section 2.1.

Apart from general rules regarding compliance with environmental protection and social policies, Ukrainian legislation does not contain any additional obligations regarding the social or environmental components of ESG.

There are several recommendations in the *Core Code of Corporate Governance* in this regard, e.g., to consider the possible contribution of the company in achieving the goals of sustainable development, develop a sustainable development policy, and report on the societal and environmental impact of the company on a regular basis.

It is also recommended to disclose information on the ecological (rational use of water, waste management, etc.) and social aspects (share of women in management positions, motivation of employees, equal employment opportunities, etc.) in the management report for large and medium enterprises.

2.4. Internal Controls and Fraud Measures

Legislation on internal audits is under development in Ukraine, and legal obligations are only set up for specific types of companies (e.g., banks).

It is also specified that the supervisory board of the JSC can appoint an internal auditor or establish the respective department. In case of such an appointment, the internal auditor reports to a member of the supervisory board – the chairman of the audit committee.

The novelties in the legislation on JSC slightly refine the competencies of the audit committee regarding the internal audit and specify that the function of this committee consists of monitoring the integrity of the financial information, analyzing accounting methods, evaluating internal audit efficiency at least annually, and recommending candidates for the positions of an internal auditor and head of the budget department to the supervisory board.

However, other details are to be regulated by the internal documents of the company.

3. Shareholder And Board Committees

3.1. What Committees Are Prescribed by Law?

According to the general rules, there are no requirements regarding the committees, and they are rarely established in practice. Exceptions are provided for public JSCs, large JSCs,

and specific types of companies.

3.2. What Committees Are Mandatory for Large Companies?

In public JSCs and large JSCs, it is required to establish audit, remuneration, and appointment committees (the last two can be combined). The independent directors must be committees' chairs and constitute the majority of their members.

There are also specific requirements for banks, insurance companies, and capital market institutions that are briefly described in Section 1.5.

3.3. Remuneration of Supervisory and Executive Board Members

Ukrainian legislation specifies the main principles regarding remuneration for JSCs, for instance:

- Remuneration may consist of fixed and variable parts,
- There should be limits for variable remuneration,
- Variable remuneration is based on clear criteria for efficiency assessment.

The exact amounts and payment procedure are governed by the agreement between the company's official and the company and by internal documents (charter, regulations on remuneration).

The *Core Code of Corporate Governance* specifies general recommendations to remuneration – transparent, fair, and sufficient to attract, motivate, and retain talent.

The members of the supervisory board in JSCs and LLCs and members of the executive board in LLCs can be appointed as contractors (not employees) based on a civil law agreement. That means that standard employment guarantees are not applicable and it is possible to conclude gratuitous contracts.

As was also stated above, remuneration from third parties is prohibited to prevent conflicts of interest.

As for disclosing information on remuneration, only information on remunerations and compensation to be paid in the case of dismissal is disclosed as part of the annual information of the public JSCs.



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