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## **Пояснювальна записка**

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Юридичні норми в корпоративному праві: строгий патерналізм проти повної автономії

(Legal Rules in Corporate Law: Stringent Paternalism vs Total Autonomy)

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4. Зміст розрахунково-пояснювальної записки (перелік питань, які потрібно розробити) історія становлення корпоративного права у світі (функціональний аспект), сучасні підходи до визначення корпоративного права (функціональний аспект), застосування сучасних підходів та інструментів, розроблених міжнародними науковцями у сфері корпоративного права, до української підгалузі корпоративного права, визначення приблизного числа імперативних та диспозитивних норм, які застосовуються для встановлення основних ознак юридичних осіб щодо товариств з обмеженою відповідальністю та акціонерних товариств в Україні, та врегулювання конфліктів інтересів між учасниками (акціонерами) та менеджментом компанії.

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## INTRODUCTION

What is a firm? It is a longstanding question that has no absolute answer. The suggestions will vary depending on who is asked (lawyer, economist, historian), where the respondent is from (e.g. lawyer from Civil or from Anglo-Saxon law tradition) and in what period the inquiry is made.

At the same time, it raises a whole range of concerns when designing a legal framework governing the operation of firms in a given jurisdiction. The issue whether a state should deploy a rather paternalistic approach and employ “one size fits all”<sup>1</sup> rule or to leave the matter of a firm's internal governance to the sole autonomy of the interested parties is one of the most famous among all.

Today's Ukrainian legal scholarship is largely obsessed with developing our own and distinct understanding of already existent and well-researched legal concepts using formal logic and discussing the works of other colleagues that are based on the same approach. Russian legal scholars had the same problems according to Sukhanov E.A.<sup>2</sup>

For instance, it is nowadays rarely mentioned that Ukraine is an heir of the Roman tradition of law. In cases when it is indeed mentioned in the works of the Ukrainian scholars it is not used as a sort of a starting point of the logical chain of thoughts but rather as a beautiful phrase that sets the scene. Bearing in mind the above premise would give rise to a fertile soil for legal research to Ukrainian scholars, an opportunity to structure the Ukrainian legal system in a much more comprehensible fashion, and a chance to compare legal regimes of related jurisdictions like Austria, Germany and France.

In addition, the comparative legal studies are a reach source of legal insights. Comparative studies show that various jurisdictions often face same set of legal problems, and corporate law is not an exception. Therefore, it is an extremely effective approach to analyse how a particular problem viewed by legal scholars with contrasting

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<sup>1</sup> Legal literature devoted to corporate law usually uses the concept “one size fits all” to refer to rigid and inflexible corporate law regimes.

<sup>2</sup> E.A., Sukhanov. Comparative corporate law. Moscow: Statut, 2014, p.5

backgrounds.

### **Relevance of the topic**

From the theoretical standpoint nobody previously applied the functional method to study the Ukrainian corporate legal framework.

From the practical standpoint, although a general perception about the overall "mandatory-ness" of the Ukrainian corporate legal framework exists, nobody conducted a quantitative analysis of legal strategies deployed by Ukrainian corporate law to tackle legal problems that arise in corporate relations. Such research would give an empirical evidence regarding the *status quo* of Ukrainian corporate law – whether a paternalistic approach is in place or private parties are more autonomous than they think. It is especially important since the Ukrainian corporate legal framework has been subjected to significant reforms over the last few years.

This matter has been previously partially studied by the following authors: Kibenko O.R., Pohribnyi D.I., Kozachenko H.V. and others.

### **Aim of this paper**

To investigate Ukrainian corporate legal framework in respect of the Limited Liability Companies (hereinafter LLCs) and Joint Stock Companies (hereinafter JSCs) using the tools developed by the international corporate law scholars in order to conduct a quantitative analysis of the legal rules deployed to define the core characteristics of legal entities in LLCs and JSCs and tackle conflicts of interests between participants/shareholders and management inside the LLCs and JSCs.

### **Research target**

- To explore the effect of the conflict of interests concept onto the corporate law throughout the history of the corporate law formation;
- To explore the universal vocabulary and tools of the contemporary corporate law doctrine developed by international corporate law scholars;
- To apply the universal vocabulary and tools of the contemporary corporate law doctrine to Ukrainian corporate legal framework in respect of the core characteristics of legal entities and tackling the conflicts of interests between participants/shareholders and management of the LLCs and JSCs

- To measure the “rigidity-ness” of the Ukrainian corporate legal framework by presenting an approximate number of mandatory and default rules deployed by Ukrainian law to govern the core characteristics of legal entities and tackle conflicts of interests between participants/shareholders and management of the LLCs and JSCs.

### **Object and subject of research**

Ukrainian corporate legal framework.

Legal strategies deployed by Ukrainian law to regulate the operation of and tackle conflict of interests within “plain vanilla” Limited Liability Companies and “plain vanilla” Joint Stock Companies.

### **Method**

In this paper I have undertaken the following methods in the course of my research: historical, dialectical, analysis, synthesis, induction, deduction and analogy, description.

Special method: functional, A little of law and economics Functional method is applied in respect of the structure I am presenting the researched material. The best is described in the below paragraph:

We need simply note that the exigencies of commercial activity and organization present practical problems that are roughly similar in market economies throughout the world. Our analysis is “functional” in the sense that we organize discussion around the ways in which corporate laws respond to these problems (...).<sup>3</sup>

### **Sources**

This paper is greatly influenced by the ideas developed by John Armour, Luca Enriques et al. in the book “*The Anatomy of Corporate Law: A Comparative and Functional Approach*. 3rd.”.

The history of corporate law I studied by investigating the Samuel Williston’s paper “History of the Law of Business Corporations before 1800.” I and II editions and Katharina Pistor, Yoram Keinan, Jan Kleinheisterkamp & Mark D. West’s paper “The

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<sup>3</sup> John Armour, Luca Enriques et al. *The Anatomy of Corporate Law: A Comparative and Functional Approach*. 3rd. Oxford University Press, 2017, p.4



Evolution of Corporate Law. A Crosscountry Comparison."

In Ian Ayres' "Regulating Opt-Out: An Economic Theory of Altering Rules." I found a more detailed approach to categorizing the legal rules.

Chapter II and Chapter III are based on the legal sources, among which are: the Civil Code of Ukraine, the Commercial Code of Ukraine, the Law on LLCs, the Law on JSCs, etc.

### **Structure of the paper**

In Chapter I am intending to investigate and compare the Ukrainian and international approaches to defining the concepts of "legal rules" and "body of corporate law". Outlining these concepts is necessary when trying to illustrate how international community looks at and assesses the Ukrainian corporate legal framework.

In Subchapter 1.1 of Chapter I I will try to explore the the core concept that shapes corporate law in principle, namely the concept of "conflict of interests". I will give a brief outline of how this concept was formed from historical perspective, and how it affects corporate legal body now.

In Subchapter 1.2 of Chapter I I will deal with "legal rules in corporate law". Firstly, I will present the approaches to define a "legal rule" concept in general and adapt it to Ukrainian jurisprudence. Secondly, I will try to categorize legal rules using tools developed by international comparative corporate law scholars.

In Subchapter 1.3 of Chapter I I will define the concept of "corporate law body" from the international doctrine standpoint, compare the latter with Ukrainian approach and extrapolate the most suitable doctrinal definition onto the Ukrainian corporate legal philosophy.

In Chapter II and Chapter III I am intending to combine the above approaches by extrapolating the advanced scholarship onto the Ukrainian corporate law scholarship and practice bearing in mind the limits of the Ukrainian legal philosophy. Such approach will help to finally present the ultimate vocabulary to be used when assessing plain vanilla Ukrainian LLCs in Chapter II and plain vanilla JSCs in Chapter III. I will demonstrate how the above advanced scholarship may be applied and thereby

approximately quantify based on categories outlined in the Subchapter 1.2 of Chapter I the legal rules in Ukrainian corporate legal framework. The structure of Chapter II and Chapter III will be based on the functional definition of corporate law suggested by John Armour, Luca Enriques et al. in the book “*The Anatomy of Corporate Law: A Comparative and Functional Approach*. 3rd.”. More specifically, Chapter II and Chapter III will be structured in the following way:

The Subchapter 2.1 of Chapter II and Subchapter 3.1 of Chapter III will be devoted to Legal rules governing the establishment of the structure of the corporate form of the plain vanilla LLC and JSC accordingly:

1. Legal personality:
  - 1.1. Entity shielding - Priority rule;
  - 1.2. Entity shielding - Liquidation protection;
  - 1.3. Authority;
  - 1.4. Procedure.
2. Limited liability;
3. Transferable shares;
4. Delegated management;
5. Investor ownership:
  - 5.1. Right to control the firm;
  - 5.2. Right to receive the firm’s net profits.

The **Error! Reference source not found.** Chapter II and Subchapter 3.2 of Chapter III will be devoted to Legal rules governing the conflicts of interests between shareholders and management of the plain vanilla LLC and JSC accordingly:

1. Appointment and removal rights;
2. Decision rights;
3. Shareholder coordination;
4. The trusteeship and reward strategy;
5. Legal constraints and affiliation rights
6. Disclosure rules.

# CHAPTER I. IDENTIFYING THE LANGUAGE AND TOOLS OF CORPORATE LAW

## Subchapter 1.1. Outward and inward forces that shape corporate law

Ukraine being a transplant country<sup>4</sup> in terms of corporate legal framework may not demonstrate a long history of corporate law doctrine. However, the core ideas behind the corporate laws of the "transplantees" should have been reviewed, analyzed and debated by the Ukrainian "transplantologists" prior to being incorporated into the Ukrainian corporate legal framework. Therefore, Ukrainian tradition of corporate law must have inherited some, if not all, basic concepts of the developed jurisdictions.

That is why I find it essential to briefly outline the history of the development of corporate law and explore forces that shaped it. As it will be shown, at the end of the day the processes of corporate law formation in all more or less economically developed jurisdictions – and I would like to stress on the word "*all*" – resulted in the manifestation of the common denominator in corporate law globally. And this common denominator, in my opinion, is encapsulated in the core of every more or less economically developed jurisdiction's corporate law doctrine.

### a. The history of common denominator in corporate laws

Regardless of what a company is called – a nexus *of* contracts<sup>5</sup>, a nexus *for* contracts<sup>6</sup>, a *persona ficta*<sup>7</sup>, or even a creature of "intersubjective reality"<sup>8</sup> – everybody may agree that a company quite (more or less depending on jurisdiction) successfully performs its role – a role of a vehicle for business activities. However, it has not always been the case.

Indeed, when the sprouts of the firms appeared for the first time, naturally, they were incomparable to the contemporary samples. The concept of a modern firm is a

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<sup>4</sup> Such concepts like squeeze-out, sell-out, shareholders' agreement and more have been transplanted into Ukrainian corporate legal framework.

<sup>5</sup> Michael C. JENSEN, William H. MECKLING. "Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure." *Journal of Financial Economics* (1976): 305-360.

<sup>6</sup> John Armour, et al. *The Anatomy of Corporate Law: A Comparative and Functional Approach* p.5

<sup>7</sup> Koessler, Maximilian. "The Person in Imagination or Persona Ficta of the Corporation." *Louisiana Law Review* 9.4 (1949): 445-449. LSU Law Digital Commons. <<https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=1615&context=lalrev>>.

<sup>8</sup> Harari, Yuval Noah. *Homo Deus: a Brief History of Tomorrow*. HarperCollins, 2016

result of continual changes that were forged through centuries of legal history.

The feature which appears to be the first to manifest itself in the history of corporate law is “legal personality”. More specifically the treatment of the group of people as a single unit, and the ability of such unit to sue and be sued in courts.

It is considered that the history of legal personality reaches even further than the ancient Rome ages. However, we may find a great deal of ancient and middle ages sources which imply that Roman Empire had been the pioneers of the legal personality. Sir William Blackstone in his "Commentaries on the Laws of England" reads that Numa Pompilius, the second king of Rome<sup>9</sup>, was the very first inventor of the notion of legal personality<sup>10</sup>. When reading the Roman Digests we may come across the passages associated with the notion of legal personality. For instance, Ulpian reads:

If the members of a municipality or if any corporation appoint an actor to take legal proceedings, we must not say that this officer is to be treated as though he were appointed by a number of individuals ; he appears on behalf of the civic community or the corporation, not on behalf of the constituent members separately considered.<sup>11</sup>

Notably, many scholars agree that the earliest documented "embryo" of legal entities are guilds and boroughs<sup>12</sup>. Both had little differences as opposed to modern examples of municipalities and business corporations<sup>13</sup>. It is argued that two tendencies played a decisive role in establishment of legal personality, in particular the proximity of residency (which resulted in municipal corporations) and similarity of crafts (guilds)<sup>14</sup>. Guilds, in turn, enjoyed exclusive rights to undertake certain craft in a given city and many cities were requiring its citizens to enter guilds in order to be involved in trade<sup>15</sup>.

At that time, we may observe one of the first instance of conflicts of interests

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<sup>9</sup> Numa Pompilius lived in 753–673 BC and reigned 715–673 BC. Source: [Wikipedia webpage](#)

<sup>10</sup> William Blackstone, et al. Commentaries on the laws of England. West Publishing Co., 1897., p.172

<sup>11</sup> Charles Henry Monro, Buckland William Warwick, Justinian I Emperor of the East. The Digest of Justinian. Cambridge: The University Press, 1904-1909. Internet Archive, p.173

<sup>12</sup> Williston, Samuel. “History of the Law of Business Corporations before 1800. I.” Harvard Law Review 2.3 (1888): 105-124. JSTOR. <<https://www.jstor.org/stable/1322201>>.

<sup>13</sup> Ibid. p.105

<sup>14</sup> Ibid. p.108

<sup>15</sup> Mitchell, William. An essay on the early history of the Law Merchant. Cambridge: Cambridge, Univ. Press, 1904. Internet Archive, p.81

at the roots of corporate law. Namely, the medieval ages were primarily associated with feudal systems. Tribal leaders, lords, kings, barons or whatever this class is called were always concerned with keeping the power within their control. The above is famously regarded as a clash between the lordship and fellowship where the former being much more powerful at that time<sup>16</sup>. We may not effectively argue that the first guilds enjoyed legal personality *per se*. However, "the guild usually enjoyed legal recognition and social permanence"<sup>17</sup> as Joseph Strayer in his Dictionary of Middle Ages writes. Yet the idea of group of persons' autonomy whereby the members may build up the representative machinery was often regarded as threat to the feuds. Georg Unwin writes "the legal forms of feudalism came to dominate society in almost every aspect, constitutional, religious, and economic"<sup>18</sup> and realising that some part of economic life is outside of the feuds' control was defiant. At the same time, it was observed that the formation of the guilds was a natural process which was coming from below – a fellowship force<sup>19</sup>. Therefore, many expressly prohibited the activities of the guilds like Charlemagne in 799 ruled "that no one shall presume to bind himself by mutual oaths in a gild"<sup>20</sup> or the 884 express instruction to Franc villeins<sup>21</sup> to refer to local bishop instead of forming a guilds in cases when they suffer from Norsemen's raids<sup>22</sup>.

The latter being the instance when the frith guild was formed by a group of people. The source named "The gilds and companies of London" outlines the following paragraph:

The indisputable facts about the later London "Frith Gild" cover much more ground than this. An organization had been set up, including London and the district around it, with the main object of putting down theft. Its members were distributed in groups of ten, each with a leader of its own, and ten of these groups constituted a larger unit, of which the ten leaders, presided over by a *hyndenman*, composed the executive who received the contributions of the members and administered the common fund. The executive met for business every month and feasted together, giving the

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<sup>16</sup> Unwin, George. The gilds and companies of London. Methuen & Co., 1908, p.16

<sup>17</sup> Strayer, Joseph. Dictionary of the Middle Ages. Vol. 6. New York: Charles Scribner's Sons, 1985.

<sup>18</sup> Unwin, George. The gilds and companies of London, p.16

<sup>19</sup> Ibid., p.17

<sup>20</sup> Ibid., p.17

<sup>21</sup> Villein is a serf tied to the land in the feudal system. Source: [Wikipedia web-page](#).

<sup>22</sup> Unwin, George. The gilds and companies of London, p.17

remains to the poor.<sup>23</sup>

The above passage depicts what is considered to be the first corporal associations in England, namely the "peace guilds"<sup>24</sup>, which were established to fight crime and defend its members.

Later the traces of "legal personality" were observed in canonical works as again evidenced by Sir William Blackstone<sup>25</sup>. Historians of corporate law attribute a great deal of progress to Pope Innocent IV<sup>26</sup> who in 1243 BC wrote that "*um collegium in causa universitatis fingatur una persona*"<sup>27</sup>. It is argued that at that time ecclesiastical scholars conferred legal personality onto the group of people to tackle problems that had a "high actuality"<sup>28</sup>. Legal entities emerged as a convenient tool to deal with concrete cases the church was facing<sup>29</sup>.

As the fellowship forces grew stronger the practical issues faced by ecclesiastical institutions at that time were encountered by merchants as well: "[g]roups of merchants desired authority to govern themselves. . . . they wanted the power to meet, to elect their own officers, and to make rules to bind one another, to assess for common expenses and to settle their own disputes"<sup>30</sup>. To have a chance to tackle these practical problems first candidates for legal personality were required to obtain the "royal charter", the latter being an instance where the lordship loosened the grip over the fellowship forces. It should be noted that such approach laid the foundation of the next almost millennia concept of chartered corporations or concession theory whereby the group of people is an entity only upon the royal assent.

The reason why the state opposed to the idea of separate legal personality and wanted to control this phenomenon is twofold. First, legal entities were a useful tool to

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<sup>23</sup> Unwin, George. The guilds and companies of London. p.18-19

<sup>24</sup> Williston, Samuel. "History of the Law of Business Corporations before 1800. I.", p.107

<sup>25</sup> William Blackstone, et al. Commentaries on the laws of England, p.172

<sup>26</sup> Pope Innocent IV was Pope of the Catholic Church from 25 June 1243 to his death in 1254, Source: [Wikipedia web-page](#)

<sup>27</sup> Richard Scholar, Professor Alexis Tadié. Fiction and the Frontiers of Knowledge in Europe, 1500–1800. Ashgate Publishing, Ltd., 2013, p.80

<sup>28</sup> Koessler, Maximilian. "The Person in Imagination or Persona Ficta of the Corporation.". p.435

<sup>29</sup> Ibid.

<sup>30</sup> Society, Selden and Cecil T. (Cecil Thomas), Sir, b. 1878 Carr. *Select charters of trading companies, A.D. 1530-1707*. London : B. Quaritch, 1913. The Internet Archive, p.xv

grow in power and turn the forces in the desired direction. As John Dewey puts it: "[concession theory] is essentially a product of the rise of the national state, with its centralizing tendencies and its objection to imperia in imperio."<sup>31</sup> Second, "[t]he state's concern lay with the fact that feudal fees on land were levied upon death of the owner and transfer to an heir. Since a corporate body never died, these taxes were never collected. The statutes attempted to both limit land holdings by the church and prohibit the use of corporate forms to avoid tax."<sup>32</sup> Therefore, "the shortest cut to making good its claims was to treat all minor organizations as 'conjurations' and conspiracies, except as they derived all their powers from an express grant of a supreme power, the State."<sup>33</sup> Everybody else were not recognized by law. Effectively, the state was holding a power to veto the incorporation.

It should be noted, however, that in England the matter of separate legal personality was the matter of evolution and first royal charters were lacking express wording indicating the "corporateness" of the entity in question<sup>34</sup>, but "that was in substance what was done"<sup>35</sup>. Primarily, first charters contained express wording awarding certain privileges. For instance, the privilege to pay no higher duty than 1 percent<sup>36</sup>, an exclusive right to undertake trade in a certain area or privilege to have an absolute monopoly to trade with chosen states<sup>37</sup>. Only later, when legal personality became more and more wanted, we may see that legal personality in express wording was granted to cities, universities and religious communities, and companies<sup>38</sup>.

At the same time, the state agreed to loosen its grip in exchange for the benefits. And hereby a status quo was temporarily fixed. On the one hand nobility were granted

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<sup>31</sup> Dewey, John. "The Historic Background of Corporate Legal Personality." Yale Law Journal XXXV.6 (1926): 655-673. Hein Online. <[http://rci.rutgers.edu/~tripmcc/phil/dewey-historic\\_background\\_of\\_corporate\\_legal\\_personality.pdf](http://rci.rutgers.edu/~tripmcc/phil/dewey-historic_background_of_corporate_legal_personality.pdf)>., p.666

<sup>32</sup> Fallis, Alexander. Evolution of British Business Forms: A Historical Perspective. n.d. ICAEW MARKET FOUNDATIONS. <<https://www.icaew.com/-/media/corporate/files/technical/ethics/evolution-of-british-business-forms.ashx>>.

<sup>33</sup> Dewey, John. "The Historic Background of Corporate Legal Personality.", p.666

<sup>34</sup> Society, Selden and Cecil T. (Cecil Thomas), Sir, b. 1878 Carr. *Select charters of trading companies*, p.xii

<sup>35</sup> Holdsworth, Sir William Searle. A history of English law. Vol. VIII. Methuen & Company, Limited, 1932. Internet Archive. <https://archive.org/details/historyofenglish08holduoft/page/192>, p.200

<sup>36</sup> George Cawston, Keane A. H. (Augustus Henry). The early chartered companies (A.D. 1296-1858). London ; New York : E. Arnold, 1896. Archive.org. <https://archive.org/details/earlycharteredco00cawsrich>, p.6

<sup>37</sup> Williston, Samuel. "History of the Law of Business Corporations before 1800. I.", p.6

<sup>38</sup> John Micklethwait, Adrian Wooldridge. The company: a short history of a revolutionary idea. Modern Library, 2005.

useful tool for their own – as John Micklethwait and Adrian Wooldridge lay it: "the state offered security, and the promise of a guaranteed market was as alluring to groups of medieval merchants as it is to defense contractors nowadays"<sup>39</sup> and the crown in exchange for such benefits was requiring the respective companies to help out in wars<sup>40</sup>. Still preserving the veto right was a kind of instrument to ensure that all future merchants will have to propose something in exchange to obtain the royal charter or later the parliamentary charter.

As it may be seen, predominantly it was debated during the above depicted period *what is* a legal entity, *what is* its nature and *has it right to exist* in a first place. In England, for instance, the matter was finally resolved in 1612 in Case of Sutton's Hospital where the court ruled that a duly created entity may hold estate (property) in ownership<sup>41</sup>.

Approximately in the XIIIth century more and more actors became interested in the transferability of shares and limited liability features. For illustration, "regulated companies" were common to the England's market in XIIIth century which are regarded as a logical evolution of guilds<sup>42</sup>: "in a regulated company each member conducted his own trade with his own stock, subject to the rules and regulations of the company"<sup>43</sup>. It is argued, however, that the regulated companies were the "compan[ies] formed primarily to see that the trade with which it was concerned was conducted in accordance with the commercial policy of the state"<sup>44</sup>. At the same time, in regulated companies it was impossible to transfer the interest to a new member without authorisation of the whole association<sup>45</sup>.

At that time the fellowship forces of the free trade emancipated and gained the right to undertake trade otherwise rather than entering into the guilds<sup>46</sup>. This enabled the medieval Europe merchants that were somewhat restricted to the benefits of the

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<sup>39</sup> Ibid. p.14

<sup>40</sup> Ibid.

<sup>41</sup> Sutton's Hospital Case. No. 10 ER 22. 1612

<sup>42</sup> George Cawston, Keane A. H. (Augustus Henry). The early chartered companies (A.D. 1296-1858), p.10

<sup>43</sup> Holdsworth, Sir William Searle. A history of English law. Vol. VIII., p.206

<sup>44</sup> Ibid. p.206

<sup>45</sup> George Cawston, Keane A. H. (Augustus Henry). The early chartered companies (A.D. 1296-1858), p.12

<sup>46</sup> Mitchell, William. An essay on the early history of the Law Merchant, p.80



royal charters due to their much lower scale to employ contracts to undertake common trade. Namely, commercial partnership emerged in the form of “*commenda*” and “*societas*”<sup>47</sup>.

A *commenda* was “in substance an arrangement by which a merchant who stayed at home – the *commendator* – lent capital to a partner – the *commendatarius* – to employ in trade”<sup>48</sup>. Interestingly, the *commendas* had the feature of limited liability at that time<sup>49</sup>.

Whereas *commenda* was established for particular transaction, a *societas* was intended to have a more permanent character<sup>50</sup>. Research shows that merchants were trading the shares in *societas*<sup>51</sup>. It is argued that the later law of partnerships in England has been largely based on the developments the *societas* gained<sup>52</sup>. Partnerships were regarded as a contractual arrangement between two or more people acting together for the common aim. The members of the partnership were considered partners and agents of each other. Sir William Searle Holdsworth suggests that “[f]rom early times partnerships owned shares in a ship. The shares were transferable, and liability upon them was limited to the value of the ship”<sup>53</sup>.

At the same time for the large scale merchant businesses that required large capital and more flexibility it was not enough. As a result, the next milestone emerged in the medieval Europe. Namely, the concept of Joint Stock Company was established. It is argued that the first Joint Stock Companies appeared in medieval Italy. “States as well as kings found it necessary to borrow in the Middle Ages; [...] so the Italian cities borrowed from their citizens”<sup>54</sup>:

The loans were divided into shares (*luoghi*), and the names of the owners were registered in special books. The shares not only passed to the heirs in case of the owner's death, but could be freely

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<sup>47</sup> Holdsworth, Sir William Searle. A history of English law. Vol. VIII., p.195

<sup>48</sup> Ibid.

<sup>49</sup> Ibid. p.197

<sup>50</sup> Ibid.

<sup>51</sup> Ibid. p.207

<sup>52</sup> Ibid. p.199

<sup>53</sup> Ibid. p.207

<sup>54</sup> Ibid. p.207-208

bought and sold.<sup>55</sup>

As research shows that the above raise of capital from creditors through joint stock vehicle had an intention to finance a particular ventures, like: “salt mining, coal, and mercury importation, and, most spectacularly, the conquest of two Mediterranean islands”<sup>56</sup>:

But to attract the borrower the state found itself obliged to give some form of security for the capital and interest. Thus, in 1346, Genoa raised a loan for the conquest of Chios and Phocaea, and gave the shareholders the dominium utile of the lands conquered. It is obvious that the shareholders were in effect a large partnership interested in the exploitation of these lands; and it was inevitable that they should assume a corporate form. Thus arose a joint stock company, consisting of creditors of the state, interested in exploiting a conquered colony<sup>57</sup>

At the same time, the XIII-XVIth century England was far from being the financial and trade capital of the world. As a result, the law related to the business vehicles was not so developed as compared to the Italy at that time. England adopted the joint stock principle much later and the adoption was undertaken in the form of gradual evolution of the regulated companies<sup>58</sup>, which was an “[adaptation] to a company formed for the strictly commercial object of making money for its members”<sup>59</sup>. More specifically, one of the first instances of joint stock companies in England were the incorporated in 1568 the Society of the Mines Royal and the Mineral and Battery Works<sup>60</sup>.

The benefits of the Joint Stock Companies were evident. Yet again the incorporation required the royal charter. The fellowship forces came up with another invention – the Unincorporated Joint Stock Company. The Unincorporated Joint Stock

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<sup>55</sup> Mitchell, William. An essay on the early history of the Law Merchant., p.138

<sup>56</sup> Henry Hansmann, Reinier Kraakman, Richard Squire. "Law and the Rise of the Firm." Harvard Law Review 119.5 (2006): 1335-1403. HeinOnline. <[https://heinonline.org/HOL/Page?public=true&handle=hein.journals/hlr119&div=76&start\\_page=1335&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults](https://heinonline.org/HOL/Page?public=true&handle=hein.journals/hlr119&div=76&start_page=1335&collection=journals&set_as_cursor=0&men_tab=srchresults)>. p.1376

<sup>57</sup> Holdsworth, Sir William Searle. A history of English law. Vol. VIII., p.208

<sup>58</sup> Ibid. p.207

<sup>59</sup> Ibid. p.207-208

<sup>60</sup> Ibid. p.208

Company “was a business form improvised to mimic the chartered company during a time when parliamentary obduracy and demand for the company form had combined to create a charter shortage”<sup>61</sup>. Basically, the former was a combination of a partnership and trust. The trust element was utilized with the following purpose:

The convenience of the trust form resulted from two important common law developments during the 1600s. The first was that a trustee’s personal creditors could not levy trust assets held in the trustee’s name for the benefit of others. The second development was the ruling that a trust beneficiary’s creditors could only seize trust assets up to the amount of the beneficiary’s share of income distribution. The entity was shielded from outside creditors, allowing it greater ability to obtain credit on its own account.<sup>62</sup>

We may observe an outward force that impacted the corporate law at that time. More specifically, entrepreneurs were seeking for liquidity of the capital, limited liability and transferability of shares and the state was opposing it protecting its privileges by granting them to a limited number of applicants.

However, the economic boom that followed the invention of the Joint Stock Companies and Unincorporated Joint Stock Companies in XVII-XVIIIth centuries resulted in the first instance of conflict of interests with another constituency – the public. Namely, “it had [...] also become clear that [joint stock companies] could be used to perpetrate gross frauds upon the public, and to encourage wild speculation and gambling in stock and shares”<sup>63</sup>. “The speculation in shares had been too great and the expectations of profit too extravagant not to cause a correspondingly great distrust in corporate enterprises when the bubble burst, and the profits realized were found to be small and extremely variable”<sup>64</sup>. The liberalization resulted in unexpected outcomes: “[a] special class of dealers in these shares had arisen; and also a special class who made it their business to promote their formation. Both the arts of these promoters, and the modern phenomena of speculation, were known to the world of commerce”<sup>65</sup>. To illustrate, a trade of moribund companies charters resulted in these fraudulent

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<sup>61</sup> Henry Hansmann, Reinier Kraakman, Richard Squire. "Law and the Rise of the Firm.", p.1383

<sup>62</sup> Fallis, Alexander. Evolution of British Business Forms: A Historical Perspective., p.9

<sup>63</sup> Holdsworth, Sir William Searle. A history of English law. Vol. VIII., p.213

<sup>64</sup> Williston, Samuel. “History of the Law of Business Corporations before 1800. I.”, p.112

<sup>65</sup> Holdsworth, Sir William Searle. A history of English law. Vol. VIII., p.193

speculations<sup>66</sup>.

As a result, the state reverted with action, which by the way had dubious character<sup>67</sup>, aimed to regulate these market forces: “[the promoters and speculation] had begun to attract the attention of the government”<sup>68</sup>. More specifically, England enacted the Royal Exchange and London Assurance Corporation Act 1719 (also known as the Bubble Act 1720) which expressly prohibited the unincorporated joint stock companies. It was well until the 1825 the Bubble Act 1720 was repealed<sup>69</sup>.

It is the XIXth century when the legislators in Europe and America initiated a rapid production of laws regulating the operation of companies. Mainly due to the liberal forces that were shaking Europe at that time. For instance, France in 1791 introduced “free registration of all private companies”<sup>70</sup>. It should be noted, however, that in France was several times repealing and again enacting the above rule. In England the Joint Stock Companies Act was enacted in 1844<sup>71</sup>.

"Until well into the 19th century, the allocation of control rights among the shareholders of the corporation was secondary to the reservation of control rights by the state."<sup>72</sup> The free incorporation principle captured the continent opening the market to wide competition.

As long as the state – be it the legislature or bureaucracy – could verify the content of the charter of any corporation that wished to enter the market, there was little need to design a general governance structure. The focus of legislatures shifted to the conditions for incorporation<sup>73</sup>.

As the state began to play a role of the observer of the corporate relations and more and more rarely as a direct participant, the matter of conflict of interests shifted to newly established constituencies. This period of conflict of interests has become

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<sup>66</sup> Katharina Pistor, Yoram Keinan, Jan Kleinheisterkamp & Mark D. West. “The Evolution of Corporate Law. A Crosscountry Comparison.” *Journal of International Economic Law* 23.4 (2003): 791-871. SSRN. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=419881](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=419881), p.806

<sup>67</sup> Holdsworth, Sir William Searle. *A history of English law*. Vol. VIII., p.213

<sup>68</sup> *Ibid.* p.193

<sup>69</sup> Katharina Pistor, Yoram Keinan, Jan Kleinheisterkamp & Mark D. West. "The Evolution of Corporate Law. A Crosscountry Comparison.", p.807

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.* p.810

<sup>73</sup> *Ibid.*

more subtle and less evident.

It is in the XXth century when the global attention was shifted to the final feature of the companies – separation of the ownership and control<sup>74</sup>.

As we may see, the conflict of interests concept contributed significantly to how the contemporary corporate law is shaped.

### **b. Contemporary corporate legal doctrine**

But what is the shape of the corporate law today?

As we have seen above, conflict of interests concept was the very driver that gave the momentum to the corporate law. It gradually pushed the state to play the role it is now in charge of – the rule maker and the watch dog on the one hand; and, on the other, the relatively<sup>75</sup> equal actor in commercial relations. The corporate law was predominantly shaped by constant battle between, on the one hand, the constituency promoting its opportunistic interest in a given *status quo*, and, on the other, a constituency seeking to sway the *status quo* in order to establish a new order which would fit better into the updated legal, economical and philosophical environment.

Current legal, economical and philosophical environment dictates that shareholders, management and third-party creditors<sup>76</sup> are three core constituencies whose interests clash in a life of any firm<sup>77</sup>. These conflicts of interests were boiling between the listed constituencies in a course of the XXth century and the beginning of the XXIst century and shaped the corporate law as we may see it now.

The essence of conflicts of interests between the core constituencies is as follows. Such constituencies as management and majority shareholder often hold informational or power leverage which incentivises to act in expense of the less informed (shareholders as compared to the management) or less powered (minority shareholders as compared to majority shareholder) party, or both.

Speaking in terms of functional understanding, an agency problem takes place. John Armour, Henry Hansmann, and Reinier Kraakman elaborate that:

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<sup>74</sup> Ibid. p.814

<sup>75</sup> The state still preserves such privileges. To illustrate, Ukraine as a state has a significant control in energy markets, markets related to natural monopolies, *etc.*

<sup>76</sup> Investors which supply debt financing, employees, contractors, *etc.*

<sup>77</sup> John Armour, et al. *The Anatomy of Corporate Law: A Comparative and Functional Approach*. p.29-30

an “agency problem”— in the most general sense of the term— arises whenever one party, termed the “principal,” relies upon actions taken by another party, termed the “agent,” which will affect the principal’s welfare. The problem lies in motivating the agent to act in the principal’s interest rather than simply in the agent’s own interest.<sup>78</sup>

The corporate law, being the branch of the private law<sup>79,80</sup>, presumes that in many cases these conflicts of interests may be mitigated with private party agreement (shareholders’ agreement or charter<sup>81</sup>). In other words, a private party planning for future may reasonably assume that its counteragent which holds a bigger stake in a firm or reserves a right to appoint the internal management may act in opportunistic manner and cause loss by abusing the available leverages.

The question is, what is the role of the state if corporate law is a part of private law and the conflict of interests may be easily mitigated by private parties? It appears that there are a few arguments that support the idea that state’s supply of legal rules in corporate law is crucial.

Firstly, conflict of interests in the corporate relations that may not be mitigated by private parties and is often abused by the constituencies, a state is under the duty to react in an appropriate fashion.

Secondly, a state may significantly simplify the conduct of business if it deploys legal rules that are “‘majoritarian’ in content – that is, if they reflect the terms that the majority of well-informed parties would themselves most commonly choose”<sup>82</sup>.

As a result, an understanding evolved that a state when designing the corporate law framework may impose a mandatory regulation. However, the state should have a very strong argument to support the idea of intervening into the boundaries of private autonomy. As it was framed "the function of corporate law is much more complex, involving a trade-off between agency problems and flexibility"<sup>83</sup>. The logical question

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<sup>78</sup> John Armour, et al. *The Anatomy of Corporate Law: A Comparative and Functional Approach*. p.29

<sup>79</sup> E.A., Sukhanov. *Comparative corporate law.*, p.23, p.25

<sup>80</sup> O.V. Harahonych, S.M. Hrudnytska, L.M. Doroshenko, et.al. *Corporate Law*. Kyiv: ArtEk, 2018, p.22

<sup>81</sup> Although in strict legal sense in Ukraine the charter is an act, it is still a product of agreement between the shareholders.

<sup>82</sup> John Armour, et al. *The Anatomy of Corporate Law: A Comparative and Functional Approach*. p.18

<sup>83</sup> Katharina Pistor, Yoram Keinan, Jan Kleinheisterkamp & Mark D. West. “The Evolution of Corporate Law. A Crosscountry Comparison.”, p.796

is what is the right balance between the invasion of the state into the private law and protecting the rights of the weaker constituencies?

To address the above question corporate law theorists noticed certain tendencies in formation of the principles of striking the right balance between the state paternalism and private party autonomy. Below I will try to elaborate on these principles in a few words.

### ***Shareholder centric theory***

In essence, this theory puts the relationship between shareholders and management as most important one. It states that when a manager – agent – faces a decision his primal instinct should be advancing the interest of shareholders – principal.

The reason for that is that shareholders delegate powers to operate their venture to third parties – management. In such cases separation of ownership and control appears. It is proved "that separation of ownership and control mainly exists in the common law countries and the continental Europe is dominated by the controlling shareholders who concentrate voting power in their hands"<sup>84</sup>. Even though *de facto* in 53% of cases in Ukraine shareholders are firm`s management<sup>85</sup>, *de jure* in Ukraine ownership and management is separated. Therefore, in cases when stockholders delegate certain powers to management it still raises issues. Plus, the remaining 47% still needs a more effective corporate governance rules.

Thus, a need to prevent an illegal business practice in which “high-level company insider directs company assets or future business to themselves for personal gain. Actions such as excessive executive compensation, dilutive share measures, asset sales and personal loan guarantees can all be considered tunnelling”<sup>86</sup>.

The shareholder centric theory is of great relevance to the private companies, i.e. companies which involve relatively few constituencies. Though, this theory breaks down when business grows in scale. This is when the firm becomes so big that the interest of other constituencies is simply impossible to ignore (large loan was granted

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<sup>84</sup> Miliauskas, Paulius. "Shareholders' Agreement as a Tool to Mitigate Corporate Conflicts of Interests." *International Journal of Private Law* 6.2 (2013): 109-131. SSRN. <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2380629](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2380629)>.

<sup>85</sup> Opendatabot. "Immaturity Marker: in 53% of the cases the founder of the company is its director." 25 September 2017. Opendatabot. <<https://opendatabot.ua/blog/75-founders-ceo>>.

<sup>86</sup> Xu, Lilai. *China's economy in the post-WTO environment*. Cheltenham: Edward Elgar, 2011, p.41

to a firm, financial\banking sector of conducting business, or state owned enterprises are under consideration). And this is where stakeholder theory helps out.

### *Stakeholder theory*

In the middle of the XXth century it was suggested by McDonald, Denys, and Anthony G. Puxty that the "time has come to recognize companies not as a mere profit making tool in the hands of stockholders, but as an agent who owes duties to the society"<sup>87</sup>.

Indeed, as a firm grows more people appear that have an interest in its performance. For example, the more employees are hired by a company the more families it effectively supplies with means for life. When the company borrows money from the bank or enters debt securities market its creditors and contributors are also willing to take the investment back in time with as highest return as possible. The same situation when we speak about financial sector or state owned enterprises. Such company becomes so intertwined with a great number of constituencies and exploits resources of such a great number of individuals and entities that it becomes tangent to large groups of stakeholders. And as we have learned often their interests collide.

It is shown by Rodriguez, M. A., Ricart, J. E., & Sánchez, P the following stakeholder types could be noticed: consubstantial, contractual and contextual stakeholders<sup>88</sup>. Consubstantial include shareholders and investors, strategic partners, employees. Contractual stakeholders, as their name indicates, have some kind of a formal contract with the business (financial institutions, suppliers and subcontractors, customers). Contextual stakeholders are representatives of the social and natural systems in which the business operates and play a fundamental role in obtaining business credibility and, ultimately, the acceptance of their activities (public administration, local communities, countries and societies, knowledge and opinion makers)<sup>89</sup>.

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<sup>87</sup> McDonald, Denys, and Anthony G. Puxty. "An inducement-contribution approach to corporate financial reporting." *Accounting, Organizations and Society* 4.1.2 (1979): 53-65.

<sup>88</sup> Rodriguez, Miguel A., Joan E. Ricart, and Pablo Sanchez. "Sustainable development and the sustainability of competitive advantage: A dynamic and sustainable view of the firm." *Creativity and Innovation Management* 11.3 (2002): 135-146.

<sup>89</sup> Rodriguez, Miguel A., Joan E. Ricart, and Pablo Sanchez. "Sustainable development and the sustainability of competitive advantage: A dynamic and sustainable view of the firm." *Creativity and Innovation Management* 11.3



A certain pattern could be traced across jurisdictions. Namely, two factors effect corporate governance regulation i.e. the riskiness of the contemplated business and the number of involved constituencies. Either the more risky the venture, or the more interested parties involved, or the more of both the toughest mechanism of checks and balances should be imposed.

In some cases, stakeholders might obtain certain controlling rights. In some cases this is the requirement of the legislation (Germany and employees` representation in the board). However, in other instances softer motivation might compel controlling constituency dispose of some part of its control to the matured stakeholder (prerequisite for a loan, M&A preparation).

As for employees, employee share schemes are popular worldwide. In order to incentivise its workers a firm might deposit repurchased stocks to a predetermined fund sole purpose of which is to share with its employees with a part of the business. Again, rational behind this is to align interests of the workers with the firm`s priorities. The better they perform at work the higher value they bring to its net-worth which is represented with a share.

Also workers' representative might get a sit in the supervisory tier. Hence they are awarded with a better disclosure as far as the firm's performance is considered.

However, the most interesting relations appear when a firm fights for additional financing. If it comes to debt securities than the whole regulatory machine of securities market kicks in. In such case before underwriting the firm is compelled to comply with all requirements as for enlisting on a particular stock exchange, apart from mandatory rule of the contemplated jurisdiction.

Loans, on the other hand, bare more private character. And the requirements that the firms face are brought up during negotiations. If a grand creditor appears one of the requirements would be to establish a supervisory tier with a representative from the creditor. This helps to circumvent the problem of access to information.

On this instance I would like to share my experience of the process of negotiation of a loan from European Bank of reconstruction and Development. Before

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(2002): 135-146.

the actual sum of money was effectuated on to the client`s account a number of steps had been undertaken by the firm with regard to its internal corporate governance procedures.

Firstly, amendments to the charter were adopted. Since the firm exists in the form of PE corporate governance procedures are often compared to those in LLCs in Ukraine. Recently such approach has been confirmed by the Supreme Court Case No. 911/1630/17 dated 17.05.2018. As a result, the supervisory tier was established with a representative from EBRD.

Secondly, a lot of veto rights were allocated to the supervisory tier. In addition, disclosure and notification rules were prescribed to the very details.

And finally, the executive's list of constrains was enlarged. It included the prohibition of assets disposing with a capped sum without prior consent of EBRD. Interestingly, this provision was incorporated into the loan agreement and was not reflected in any statutory document or bylaws. Simple penalty was provided, and non-current assets were secured. Any decision that could potentially infringe any of creditor`s rights would result in one of the type of contractually listed defaults. The consequences of such decision for the company would be critical.

The institute of independent directors is another clear manifestation of stakeholder theory. Interestingly, research shows that financial rewards are not of paramount importance for non-executives and supervisory officers across jurisdictions. They tend to care more about its reputation and ethics. Thus, the prestige of the company may serve a good reason to act faithfully<sup>90</sup>. A very good example of utilising the idea of independent directors' involvement appeared in the US in 2012, when Google adopted a controversial recapitalization plan that allowed it to issue a new class of nonvoting stock. This plan enabled Google to continue raising capital without weakening its founders' control over the company. To address the concern that the plan would benefit the company's controlling shareholders at the expense of its public investors, Google formed a special committee of independent directors to negotiate and

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<sup>90</sup> Masulis, Ronald W., and Shawn Mobbs. "Independent director incentives: Where do talented directors spend their limited time and energy?" *Journal of Financial Economics* 111.2 (2014): 406-429

approve the terms of the recapitalization. Furthermore, in the settlement of the litigation over the recapitalization, Google's independent directors were assigned an important ongoing role to enforce certain restrictions on the company's founders<sup>91</sup>.

Above all, it is hard to overestimate the role of independent directors in financial institutions. It is not surprising in such case that from 1950s until 2005 the number of independent directors in corporate boards of large public corporations in the US increased from 20% to 75%<sup>92</sup>.

### *Stewardship doctrine*

On the verge of the first decade of XXIst century global crisis shook the world. Having its origin from the USA various causes and implications of this horrible disaster in the financial world have been provided: "from global trade imbalances, to financial market innovation"<sup>93</sup>. Zhong Xing Tan put forward another powerful statement: "maybe the macro scale crisis was caused by big number of micro scale failures, namely – 'failure of corporate governance'"<sup>94</sup>?

One should not seek distant and relatively remote event. Case of neglectful management that resulted in horrible consequences is present in Ukraine as well. In particular, case of "PrivatBank" nationalization.

According to the sources 97% of assets were loaned to the related parties using fraudulent schemes<sup>95</sup>. Considering the fact that 20mln individuals were using services of this bank and due to high risks of default nationalisation of "PrivatBank" was of "systematic importance" for International Monetary Fund.

Zhong Xing Tan suggests that another actor exists within the net of agent-

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<sup>91</sup> Lee, Paul. "Protecting Public Shareholders: The Case of Google's Recapitalization." *Harvard Business Law Review* 5.2 (2015): 281-300. HeinOnline.

<sup>92</sup> Gordon, Jeffrey N. "The rise of independent directors in the United States, 1950-2005: Of shareholder value and stock market prices." *Stanford Law Review* 59.6 (2007): 1465-1568. HeinOnline. <[https://heinonline.org/HOL/Page?public=true&handle=hein.journals/stflr59&div=46&start\\_page=1465&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults](https://heinonline.org/HOL/Page?public=true&handle=hein.journals/stflr59&div=46&start_page=1465&collection=journals&set_as_cursor=0&men_tab=srchresults)>.

<sup>93</sup> Tan, Zhong Xing. "Stewardship in the Interests of Systemic Stakeholders: Re-Conceptualizing the Means and Ends of Anglo-American Corporate Governance in the Wake of the Global Financial Crisis." *Journal of Business & Technology Law* 9.2 (2014): 169-212. HeinOnline. [https://heinonline.org/HOL/Page?public=true&handle=hein.journals/jobtela9&div=14&start\\_page=169&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults](https://heinonline.org/HOL/Page?public=true&handle=hein.journals/jobtela9&div=14&start_page=169&collection=journals&set_as_cursor=0&men_tab=srchresults), p.169

<sup>94</sup> Ibid.

<sup>95</sup> "Ukraine's biggest lender PrivatBank nationalised." *Ukraine's biggest lender PrivatBank nationalised*. 19 December 2016. BBC News. <<https://www.bbc.com/news/business-38365579>>.

principal relations – "Systemic stakeholder". Resembling the notion of "Contextual stakeholder" developed by Rodriguez, M. A., Ricart, J. E., & Sánchez, P<sup>96</sup>, Xing Tan identifies it as follows:

Systemic stakeholder is a socio-economic actor who may not be immediately connected to the company through its usual nexus of contracts (for example, employees, suppliers and customers); but who nonetheless has extended connections to the company<sup>97</sup>

Here is the main difference between Stakeholder theory and Stewardship doctrine. While Stakeholder theory indeed addresses agent problematique in public companies, Stewardship doctrine firstly shifts the emphasise towards riskiness of the contemplated business which in turn compels to consider interests of a much wider constituency – the community – much more diligently. As Zhong Xing Tan puts it: "corporate governance mechanisms must go beyond only maximizing shareholder value to also minimizing systemic risk"<sup>98</sup>.

I see wide application of this theory in Ukraine. Not only should this theory be understood as oriented towards financial institution, but also it should be considered to be applicable in other industries. Especially it is relevant in state-owned enterprises.

## **Subchapter 1.2. Legal rule as the constituent element of corporate law.**

### **a. Definition of the legal rule concept**

The definition of the "legal rule" *per se* is probably the first legal concept introduced to each and every Ukrainian law student at the very beginning of his or her study.

Legal rule is often defined by Ukrainian scholars as a most fundamental elementary particle of the legal system – a "single cell"<sup>99</sup>. Indeed, the legal framework of any state is comprised of rules which are enforced by that state.

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<sup>96</sup> Rodriguez, Miguel A., Joan E. Ricart, and Pablo Sanchez. "Sustainable development and the sustainability of competitive advantage: A dynamic and sustainable view of the firm." *Creativity and Innovation Management* 11.3 (2002): 135-146

<sup>97</sup> Tan, Zhong Xing. "Stewardship in the Interests of Systemic Stakeholders: Re-Conceptualizing the Means and Ends of Anglo-American Corporate Governance in the Wake of the Global Financial Crisis.", p.171

<sup>98</sup> Ibid.

<sup>99</sup> L.V., Mohilevskiy. "The essence of the concept of "rule of law"." *Prykarpatskyi yurychnyi visnyk* (n.d.): 14-18. <[http://www.pjv.nuoua.od.ua/v1\\_2016/5.pdf](http://www.pjv.nuoua.od.ua/v1_2016/5.pdf)>.

Ukrainian scholarship suggests the following approach to define the concept of legal rule:

The legal rule is a mandatory, formally-determined rule of conduct (standard), established or authorized by the state as a regulator of public relations, which officially sets the measure of freedom and justice in accordance with social, group and individual interests (will) of the population of the country, and is enforced by state, including by coercion.<sup>100</sup>

It is undisputable that the legal rules are contained in the legal normative acts – legal sources. In this paper I will examine the following legal sources when investigating the Ukrainian corporate legal framework:

1. Ukrainian laws;
2. Ukrainian by-laws (acts of National Commission on Securities and Capital Markets, acts of National Commission on Financial Services);
3. Legal opinions of the Supreme Court of Ukraine and Supreme Court.

**b. Approaches to categorization of legal rules**

When categorizing the legal rules within a given legal system one may apply various criteria. For instance, legal rules may be categorized based on the authority who issues legal rules under consideration, on temporal, personal and territorial basis<sup>101</sup>, *etc.*

Professor Rabinovych P.M. mentions that one of the criteria to differentiate among the legal rules is by nature of description of the rule<sup>102</sup>. Professor Rabinovych P.M. outlines two types of legal rules when applying this criterion – imperative and dispositive legal rules. In imperative rules, according to Professor Rabinovych, are established by the state in an obligatory nature, whereas dispositive rule is an “reserve” rule set by the state which in parallel leaves an option to regulate the relations between the parties as they deem appropriate<sup>103</sup>.

Extrapolating this piece of knowledge onto the corporate body of law we may come to the conclusion that within the corporate law we should come across the two

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<sup>100</sup> O.F., Skakun. *Theory of Law and State*. Kharkiv: Konsum, 2000, p.275

<sup>101</sup> Moieseiovyh, Rabinovych Petro. *Essentials of the General Theory of Law and State*. Lviv: Krai, 2007, p.131

<sup>102</sup> *Ibid.* p.131-132

<sup>103</sup> *Ibid.*

types of legal rules – imperative and dispositive. Such approach generally corresponds to the western developments in the corporate law of the late 1980<sup>th104,105</sup>. For instance, Lucian Arye Bebchuk wrote that “Corporate law has always included a substantial body of mandatory rules. To be sure, as state corporate law has increasingly taken an “enabling” approach, the set of issues with respect to which opting out is possible (...)”<sup>106</sup>. Quite similarly, Melvin Aron Eisenberg suggested three categories of legal rules in corporate law, namely: default rules, mandatory rules and enabling rules<sup>107</sup>.

The contemporary western corporate law scholarship, however, has gone further and argues that default/mandatory dichotomy is, on the one hand, insufficient to present a comprehensive view of the given corporate legal framework and, on the other, limits the regulators with respect to the tools with which a corporate legal system may be shaped<sup>108</sup>.

The mandatory rules are legal rules which are imperatively imposed by the state or relevant regulator that require a strict observation of the provided rule with no alternatives.

The rationale for mandatory terms of these types is usually based on some form of “contracting failure”: some parties might otherwise be exploited because they are not well informed; the interests of third parties might be affected; or collective action problems might otherwise lead to contractual provisions that are inefficient or unfair.<sup>109</sup>

The default rule is the legal rule that is provided by the state or relevant regulator which is at the same time possible to be contracted/opted out or more precisely – displaced<sup>110</sup>. As to the default rules, a deeper two-fold nature is revealed

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<sup>104</sup> It should be noted that at that time the USA’s and UK’s corporate law scholarship was built on a predominant view of the firm as a “nexus of contracts” implying that any firm may be created with a sole instrument – contract. Bearing in mind the premise that the contract is a core of any firm scholars were arguing about which proportion of legal rules that may be “contracted out” should be implemented in a given jurisdiction.

<sup>105</sup> It should be noted that the understanding was developed earlier. However, the presented vocabulary became common in use only at that time.

<sup>106</sup> L., Bebchuk. "Foreword: The debate on contractual freedom in corporate law." *Columbia Law Review* 89.7 (1989): 1395-1415. HeinOnline. <https://heinonline.org/HOL/P?h=hein.journals/clr89&i=1413>, p.1396

<sup>107</sup> Eisenberg, Melvin Aron. "The Structure of Corporation Law." *Columbia Law Review* 89.7 (1989): 1461-1525. HeinOnline. <<https://heinonline.org/HOL/P?h=hein.journals/clr89&i=1479>>. p.1461

<sup>108</sup> Close Ayres, Ian. "Menus Matter." *University of Chicago Law Review* 73.1 (2006): 3-16. HeinOnline. <<https://heinonline.org/HOL/P?h=hein.journals/uclr73&i=13>>.

<sup>109</sup> John Armour, et al. *The Anatomy of Corporate Law: A Comparative and Functional Approach*. p.19

<sup>110</sup> Ayres, Ian. "Regulating Opt-Out: An Economic Theory of Altering Rules." *Yale Law Journal* 121.8 (2012): 2032-

when categorizing them.

First, the default rules are categorized by the level of their “defaultness”. For instance, John Armour, Henry Hansmann, Reinier Kraakman, and Mariana Pargendler in their introductory chapter of the corporate law genius “The Anatomy of the Corporate Law” identify 3 types of default rules based on the above criterion:

1. “a statutory provision that will govern unless the parties explicitly provide an alternative”<sup>111</sup> (hereinafter Open default);
2. “the rule that will govern if the default provision is not chosen – an “either-or” provision”<sup>112</sup> (hereinafter Either-or default);
3. “an extension of the binary two-alternative-provisions approach (...) to provide corporations with a choice among a “menu” of more than two specified rules”<sup>113</sup> (hereinafter Menu default);

Second, a distinct dimension of a default rule is essential to fully describe the latter. Namely, the attention was drawn to the fact that some default rules were easier to opt out of than others. Ian Ayres in his essay emphasized that “[t]he question of whether to specify a menu of alternatives is analytically distinct from specifying the means of opting for those rules”<sup>114</sup>. This phenomenon was named “sticky defaults”<sup>115</sup> or by some authors quasi-mandatory rules<sup>116</sup>. It was argued that the level of stickiness of the given default rule may be measured by the so called “altering rule” which is logically connected with the relevant default rule and constitute one integral normative unit – “legal strategy”<sup>117</sup>. The role of the altering rule is to outline the requirements that should be satisfied prior to displacing the default rule. For instance, a default rule that is possible to opt out of by simply entering into an agreement provides much weaker protection than the default rule which should be first voted by the supermajority in the highest corporate body of the company.

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2117. HeinOnline. <https://heinonline.org/HOL/P?h=hein.journals/ylr121&i=2041>, p.2032

<sup>111</sup> John Armour, et al. *The Anatomy of Corporate Law: A Comparative and Functional Approach*. p.18

<sup>112</sup> *Ibid.* p.18

<sup>113</sup> *Ibid.* p.18

<sup>114</sup> Close Ayres, Ian. "Menus Matter.", p.6

<sup>115</sup> Eisenberg, Melvin Aron. "The Structure of Corporation Law.", p.384

<sup>116</sup> Ayres, Ian. "Regulating Opt-Out: An Economic Theory of Altering Rules.", p 2087

<sup>117</sup> John Armour, et al. *The Anatomy of Corporate Law: A Comparative and Functional Approach*. p.18

Combining the above, Ian Ayres provided for a set of three questions that should be addressed when drafting a particular legal rule:

- 1) Should a particular rule be mandatory or contractible?
- 2) If contractible, what should the default be? And finally,
- 3) If contractible, how should contractors be able to contract around the default?<sup>118</sup>

For the purposes of this paper I will implement the approach suggested by Ian Ayres. It is useful to imagine the following matrix when dealing with categorization of the default rules:

	Default	Sticky default
Open	OD type	OSD type
Menu	MD type	MSD type
Either-or	EOD type	EOSD type

As a result, taking into account the range of approaches of designing the legal rules (from paternalistic to autonomic) we may categorize the above rules in the following way:

1. Mandatory rules;
2. EOSD type default rule;
3. EOD type default rule;
4. MSD type default rule;
5. MD type default rule;
6. OSD type default rule;
7. OD type default rule;

Lastly, whereas identifying mandatory is quite straightforward, categorising the default rules, especially considering the stickiness dimension, requires some effort.

As it was discussed above, altering rules help to distinct between various types of default rules. Below I pinpoint types of altering rules which are employed within Ukrainian corporate law framework in general and categorise the outlined altering rules

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<sup>118</sup> Ibid.



based on the criteria of their stickiness. In Ukrainian companies a given default rule may be displaced by:

1. implicative conduct;
2. written agreement;
3. passing the resolution of management tier;
4. passing the resolution of supervisory tier;
5. passing the resolution of general meeting;
6. passing the resolution of general meeting with supermajority;
7. passing the resolution of general meeting with unanimity;
8. amending the charter with supermajority;
9. amending the charter with unanimity.

Drawing a line between the sticky default rule and non-sticky default rule is not an easy task. For the sake of this research in respect of LLCs it is suggested to regard all altering rules starting from "passing the resolution of general meeting with supermajority" and below as sticky default rules as they require a greater effort compared to the one that are placed above them.

### **Subchapter 1.3. Corporate law as a set of legal rules**

#### **a. General definition.**

Having identified the variety of legal rules corporate law equipped with we will move forward to define the contours of corporate law itself. Namely, I will try to present various approaches of defining the scope of relations which corporate law governs. In doing so I will also set the boundaries of my research in Chapter II and Chapter III.

I would like to stress that the aim of this Subchapter is not to argue whether a corporate law is a separate body of law, sub-body of either commercial or civil law, or any combination thereof. Hereinafter corporate law will be regarded as a certain set of legal rules that possess features outlined in the Subchapter 1.2. Identification of relations that may or may not fall within the scope of Ukrainian corporate law is the first and main aim of this Subchapter.

The most logical way to start is to find the definition of the “corporate law” by

approaching sources of Ukrainian law. Although such definition is absent there, the theory assumes that corporate law regulates corporate relations. According to the article 167.3 of the Commercial Code of Ukraine No. 436-IV dated 16.01.2003 (as amended) (hereinafter Commercial Code of Ukraine) “the corporate relations are the relations that emerge, transform and terminate in respect of corporate rights”. Further article 167.1 the Commercial Code of Ukraine elaborates that “corporate rights are the rights of an entity (either physical or legal) which holds a share in the charter capital (property) of the commercial entity, and are comprised of the rights to participation in the governance of such commercial entity, to receiving return (dividends) from the given commercial entity, to obtaining certain share of assets in case of liquidation of the latter and other rights prescribed by law or charter documents”. However, employing the approach viewed by the Ukrainian law significantly limits the scope of this research. As I will show below theory argues that the corporate law, in fact, includes a wider scope of relations.

Harahonych O.V. suggests the following definition of the corporate legal framework: “Corporate law is a sub-body of the commercial law that is comprised of the legal rules aimed at regulation of the corporate relations which emerge in connection with the establishment, operation, governance and termination of the corporate entities”<sup>119</sup>. In my opinion, such definition ignores the fact that some stages of the corporate entities’ existence are governed by other law bodies as well (e.g. administrative). This view is also supported by Russian scholars<sup>120</sup>.

At the same time, Russian scholarship suggests a more advanced view in this respect. For instance, T.V. Kashanina suggests that “corporate law governs various relations within corporation as a single unit which aggregates the interests of such diverse constituencies like the owners, management and employees”<sup>121</sup>.

Sukhanov E.A. adds, that corporate law encompasses the following relations:

1. internal (membership) relations of the shareholders with each other and with the

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<sup>119</sup> O.V. Harahonych, S.M. Hrudnytska, L.M. Doroshenko, et.al. Corporate Law. 2018., p.3

<sup>120</sup> E.A., Sukhanov. Comparative corporate law., p.24

<sup>121</sup> Kashanina, T.V. Corporate law. Moscow: Norma-Infra-M, 1999, p.39

corporation as a whole;

2. external private law relations of corporations which formalize their legal status for third parties – representation and other cases of acting on behalf of corporations, as well as corporations' relationship with corporate creditors (e.g. bankruptcy liability);

3. the relationship of commercial corporations in the form of associations of capital, which are parent, subsidiary and other interrelated enterprises that make up concerns and / or holdings<sup>122</sup>.

Works of the western contemporary comparative scholars contour the boundaries of corporate law in an even wider manner. Namely, they derived the following definition of the corporate law from the functional perspective:

corporate law performs two general functions: first, it establishes the structure of the corporate form as well as ancillary housekeeping rules necessary to support this structure; second, it attempts to control conflicts of interest among corporate constituencies, including those between corporate “insiders,” such as controlling shareholders and top managers, and “outsiders,” such as minority shareholders or creditors.<sup>123</sup>

In this paper I would like to harbour the above definition and try to break Ukrainian corporate legal framework down into pieces using the tools outlined above. The eligibility of such approach may be proven with two arguments.

Firstly, even according to the Kraakman himself they intended to create “*a common language and a general analytic framework with which to understand the purposes that can potentially be served by corporate law, and with which to compare and evaluate the efficacy of different legal regimes in serving those purposes*”<sup>124</sup>. The authors argue that “the exigencies of commercial activity and organization present practical problems that are roughly similar in market economies throughout the world”<sup>125</sup>. Moreover, they suggest that “Business corporations have a fundamentally similar set of legal characteristics – and face a fundamentally similar set of legal problems – in all jurisdictions”<sup>126</sup>. As a result, according to the authors of the above definition, it was their intention to provide for a universal tool that

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<sup>122</sup> E.A., Sukhanov. Comparative corporate law., p.24

<sup>123</sup> John Armour, et al. The Anatomy of Corporate Law: A Comparative and Functional Approach. p.29

<sup>124</sup> Ibid. p.4

<sup>125</sup> Ibid.

<sup>126</sup> Ibid. p.1

helps to analyse any corporate law regime and it would be useful to explore Ukrainian corporate law tradition through the lenses these scholars conveniently provided for us with their collective mind.

Secondly, even though their language operates the terms which are more compatible with common law system Russian scholars agreed that “it may be concluded that the scope of relations governed by the continental Europe and Anglo-American corporate laws significantly overlap with each other”<sup>127</sup>.

#### **b. Contouring the Ukrainian corporate legal framework**

Having identified a comprehensive approach to defining the corporate law scope it is important to elaborate the contours of the Ukrainian corporate law “on site”. More specifically, it is necessary to cut a clear distinction between administrative, labour and other fields which are closely intertwined with corporate law. Such problem is mainly caused with the fact that corporate law legal sources may contain legal rules that govern administrative/labour/other relations and vica versa – legal source that governs administrative/labour/other relations contains legal rules which belong to corporate law body. For instance, the LLC formation procedure is governed with articles 9-11 of the Law on LLCs from the corporate perspective. Simultaneously, from the administrative perspective for a LLC to come to existence an appropriate entry into the Unified State Register of the Legal Entities, Private Entrepreneurs and Non-Governmental Organizations should be recorded<sup>128</sup> (hereinafter **the Unified Register of Legal Entities**). The formalities associated with recording the formation of legal entities with the Unified Register of Legal Entities are governed with article 17.1 of the Law on Registration which should not be regarded as a part of corporate law. The examples of such duality are numerous.

Speaking of rules governing the corporate form, legal rules that establish the structure of the corporate form may be further broken down into the rules that establish 5 core characteristics of the legal entities<sup>129</sup>, *i.e.* "(1) legal personality, (2) limited liability, (3) transferable shares, (4) delegated management under a board structure,

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<sup>127</sup> E.A., Sukhanov. Comparative corporate law., 2014., p.24

<sup>128</sup> art.87.4 of the Civil Code of Ukraine

<sup>129</sup> John Armour, et al. The Anatomy of Corporate Law: A Comparative and Functional Approach., p.1

and (5) shared ownership by contributors of equity capital"<sup>130</sup>. The exact locations of these legal rules within Ukrainian law regarding LLCs and JSCs are explored in detail in section **Error! Reference source not found.** of **Error! Reference source not found.** of Chapter II and section Subchapter 3.1 of **Error! Reference source not found.** of Chapter II.

As far as the legal rules governing the conflicts of interests are concerned, the legal rules that manage (1) shareholders vs. management conflicts of interests, (2) majority shareholders vs. minority shareholders conflicts of interests and (3) shareholders vs. creditors conflicts of interests comprise the former. Bearing in mind the fact that whole realm of legal rules that govern all of conflict of interests is quite substantial it is suggested to take the most widespread example – shareholders vs. management conflicts of interests.

As to the shareholders vs. management conflicts of interests John Armour identifies that the following strategies are employed to tackle them.

The first thing worth mentioning is the composition of the executive body. It is generally accepted that two types of boards exist, namely one-tier board and two-tier board. It is often said that the difference is blurry in various firms<sup>131</sup>. However, the distinct feature behind this is that the idea of supervisory agents injected into the management. These agents look after and scrutinize the activities on the matter of compliance with standards and rules set by shareholders and law. In one- tier board this function is performed by non-executive directors who sit with executive ones by the same table. In two-tier board, on the other hands, supervisory tier is established and supervisory officers are hired by shareholders. The rationale behind this is to distinct those who manage and those who monitor the management. In addition, apart from monitoring supervisory tier may also undertake strategic planning function. Regarding Ukraine is considered to be a jurisdiction with a continental type of corporate governance whereby a two tier structure may be implemented.

Appointment and removal rights. Fundamentally “the shareholders retain

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<sup>130</sup> Ibid.

<sup>131</sup> Ibid. p.51

powers to appoint (and remove) members of the board of directors”<sup>132</sup>. It includes the right to choose a person, put it into the ballots, and cast a vote for a particular individual. However, in jurisdictions where dispersed ownership is common it is not so easy to coordinate such intentions of multiple minor stockholders. To resolve the issue it was adopted that the candidates are selected by non-executives or supervising director. This illustrates how corporate law incorporates the needs of the market and comes up with creative decisions.

Removal right are considered even more effective in battling shareholders-management agent problem<sup>133</sup>. This right varies across jurisdictions. In Ukraine, in most cases, it is an exclusive right of the shareholders. In Delaware on the other hand, it could be waved.

Decision rights. This strategy involves allocation of functions between shareholders and executives. It should be noted that in some jurisdictions law permits to separate functions, unlike in Ukraine where shareholders have ultimate power even to reverse the decision of the corporate bodies in most cases. For instance, when designing a company shareholders in Delaware may opt out from default rule that allows them intervention. Usually only substantial changes require ratification by the shareholders (charter amendment, merger).

Shareholder coordination. It is evident that the more dispersed ownership of the company the more difficult it is for the shareholders to coordinate with each other. Alternatively, the number of the shareholders may be not so significant, however the requirement to be present in person every time the shareholders’ meeting is convened would impose an unnecessary burden onto the shareholders who, for instance, are involved in a great deal of ventures. Therefore, such instruments like “voting by mail (or “distance voting”), (...) proxy voting through custodial institutions or other intermediaries, and participation in an electronic meeting”<sup>134</sup> were invented.

The trusteeship and reward strategies. Regarding the trusteeship strategy, as the company becomes more and more intertwined with other stakeholders the need for

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<sup>132</sup> Ibid.

<sup>133</sup> Ibid. p.55

<sup>134</sup> Ibid. p.59

independent opinion arises. Sometimes the law requires to appoint non-executives (common law) or supervisory tier directors which are “motivated principally by ethical and reputational concerns”<sup>135</sup> – independent directors. In Ukraine the Law on JSCs, for instance, simply lists the criteria under which any person may not be considered as independent.

Under the reward strategy agent incentives as a corporate governance tactics can be utilized. A practice to grant to the executives a share in the company is widely used. Equity based compensation include “stock options, restricted stock, and stock appreciation rights”<sup>136</sup>.

The constraints strategy involves various standards and rules related to the requirements the officers should meet. Another legal strategy employed to protect participants/shareholders or other constituencies is requirements to the procedure – due process type rules.

As a result I came up with the following structure of corporate law which I am intending to employ in Chapter II to explore the Ukrainian corporate legal framework:

I. Legal rules governing the establishment of the structure of the corporate form:

1. Legal personality:
  - 1.1. Entity shielding - Priority rule;
  - 1.2. Entity shielding - Liquidation protection;
  - 1.3. Authority;
  - 1.4. Procedure.
2. Limited liability;
3. Transferable shares;
4. Delegated management;
5. Investor ownership:
  - 5.1. Right to control the firm;
  - 5.2. Right to receive the firm’s net profits.

II. Legal rules governing the conflicts of interests between shareholders and

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<sup>135</sup> Ibid. p.62

<sup>136</sup> Ibid. p.66

management:

1. Appointment and removal rights;
2. Decision rights;
3. Shareholder coordination;
4. The trusteeship and reward strategy;
5. Legal constraints and affiliation rights;
6. Disclosure rules.

### **Conclusions to the Chapter I**

1. The concept of conflict of interests contributed significantly to the development of corporate laws throughout the world. At the very beginning of the history of the corporate law the state had an absolute power over the incorporation of the firms. Then the state under the pressure of the fellowship forces gave up and agreed that privileged forms of incorporation should be available to ordinary businesses as well. At this moment the state changed its role to a watchdog who set the main rules and simply observes that actors involved did not brake these rules.

2. At the verge of the XXth century the battlefield of conflict of interests shifted to the ground of the private parties and involved the development of the legal doctrine under which main constituencies that comprise the company are its shareholders, management and third party creditors whose interest often do not align. As a result, the agency theory was applied to the corporate law.

3. The more private company is the more flexible corporate law should be: “at its core the law governing structural and distributional rules in closely held corporations should be enabling and suppletory, rather than mandatory”<sup>137</sup>; However, if the company grows and the number of constituencies interested in its performance increases the corporate legal framework should governing the operation of such companies should be more stringent;

4. The flexibility/stringiness of a given corporate legal framework may be assessed by counting the legal rules which belong to either default or mandatory

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<sup>137</sup> Eisenberg, Melvin Aron. "The Structure of Corporation Law.", p.1463



category. More specifically, if the corporate legal framework contains default type rules – it is more flexible. Alternatively, if the corporate legal framework contains mandatory type rules – it is more stringent;

5. Whereas the mandatory rules are self-evident and do not require elaborate categorization it appears that similar approach may not be applied to the default rule. As a result, a default/mandatory legal rule dichotomy is insufficient to give a comprehensive look at the corporate legal system;

6. Default rules should have two dimensions of assessment: (i) option dimension and (ii) “stickiness” dimension. Option dimension suggests that default rules may be of three types: Open default rule, Either-or default rule and “Menus” default rule; Stickiness dimension represents the ease with which a given default rule may be displaced: “[t]he question of whether to specify a menu of alternatives is analytically distinct from specifying the means of opting for those rules”<sup>138</sup>. Applying such approach would give a deeper understanding of a given corporate legal framework;

7. When analysing corporate law from functional standpoint it is become evident that all more or less economically developed jurisdictions bear common features. More specifically, corporate laws across more or less economically developed jurisdictions performs common functions – they establish the general structure of corporate vehicles providing for five (5) core characteristics of legal entities and provide general rules aimed at mitigation of conflict of interests between three (3) core constituencies that are intertwined within the corporate vehicles.

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<sup>138</sup> Close Ayres, Ian. "Menus Matter.", p.6

## CHAPTER II. DESCRIBING THE PLAIN VANILLA LLC REGULATION BASED ON THE FINDINGS OUTLINED IN THE CHAPTER I

### Subchapter 2.1. Establishing the corporate form

#### a. Legal personality

LLCs in Ukraine are legal entities. Under the article 80 of the Civil Code of Ukraine No.435-IV dated 16 January 2003 legal entities are awarded with legal capacity as well as with transactional capacity (same as physical individuals)<sup>139</sup>. As a result, LLCs under the mandatory rule enjoy the full set of proprietary rights as if it is a physical person and a limited set of non-proprietary rights.

*Entity shielding - Priority rule.* The LLC's creditors may enjoy the mandatory rule under which a LLC is not liable for the debts of its participants<sup>140</sup>.

*Entity shielding - Liquidation protection.* The main aim of this rule is to protect the firm from partial or full liquidation for the interest of the LLC's creditors which occurs in cases when the shareholder wills to withdraw a part of its share from the LLC's pool of assets<sup>141</sup>. In this respect we may find that Ukraine has implemented a partial deviation from this rule in the case of LLCs. Namely, under the mandatory rule in the article 24 of the Ukrainian Law "On Limited Liability and Additional Liability Companies" No.2275-VIII dated 6 February 2018 (hereinafter the **Law on LLCs**) the participant which owns less than 50% of the participatory interest may exit the LLC without the consent of other participants; the participant which owns more than 50% of the participatory interest may exit the LLC only upon the consent of other participants; and only the participant that owns 100% of the participatory interest is barred from exiting the LLC. What is more, there is no place in the Law on LLC which requires the LLC to notify the creditors of the LLC that a participant is contemplating withdrawing the part of the LLC's assets. In my opinion, such legal construction abuses the creditor's position whereby the latter lacks information regarding any significant changes in the asset composition of the LLC it contracts with.

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<sup>139</sup> art.80 of the Civil Code of Ukraine

<sup>140</sup> art.3.2 of the Law on LLCs

<sup>141</sup> John Armour, et al. The Anatomy of Corporate Law: A Comparative and Functional Approach. p.6

**Authority.** Mandatory rule under the article 28.1 of the Law on LLCs implies that any LLC has the management tier. In turn, under the mandatory rule management tier conducts day-to-day business operation of such LLC<sup>142</sup> and is entitled to act on behalf of the LLC without the power of attorney<sup>143</sup> subject to limitation. Under the mandatory rule the invalidation of any transactions entered by the management tier on behalf of the LLC is impossible unless such third parties knew or should have known that the management tier acts outside its capacity granted by law and charter documents of the LLC in question<sup>144</sup>.

A more detailed overview of the variations that are possible to implement in respect of management tiers in LLCs is covered in section “delegated management”.

**Procedure.** Under the mandatory rule LLCs as legal entities may file suits and act in their own capacity as a defendant in courts<sup>145</sup>.

As a result, we may observe that the Ukrainian law deployed at least in total 7 legal strategies to regulate legal personality feature of LLCs, among which:

1. 7 Mandatory rules;

- b. Limited liability**

The Commercial Code of Ukraine stipulates a mandatory rule that the liability of the participants of the LLC is limited with the amount of their contribution<sup>146</sup>. Further the mandatory rule exists under the article 3.1 of the Law on LLCs whereby the participants which have not fully made their contributions bear joint with the LLC liability for the LLC’s debts within the amount of the not fully made contribution.

We may see that the Law on LLCs is silent on the matter whether the liability of the participants may be somehow unlimited. The Civil Code of Ukraine stipulates a conflicting EOSD type rule in the article 96.3 whereby the participant is liable for the legal entity’s debts unless otherwise stated in law or charter documents of the legal entity<sup>147</sup>.

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<sup>142</sup> art.39.1 of the Law on LLCs

<sup>143</sup> art.39.10 of the Law on LLCs

<sup>144</sup> art. 92.3 of the Civil Code of Ukraine.

<sup>145</sup> art.80.1(2) of the Civil Code of Ukraine

<sup>146</sup> art.80.3 of the Commercial Code of Ukraine

<sup>147</sup> art.96.3 of the Civil Code of Ukraine

As a result, we may observe that the Ukrainian law deployed at least in total 2 legal strategies to regulate limited liability feature in LLCs, among which:

1. 2 Mandatory rules;
2. 1 EOSD type rule.

**c. Transferable shares**

Under the EOSD type rule the participatory interest is transferrable which is implied under the article 21 of the Law on LLCs<sup>148</sup>. In addition, it is a well-established practice for the investors to enter into sale and purchase agreement of the participatory interest. The participants are free to include into the charter provision which would require the willing to sell its participatory interest participant to get a consent from other participants prior to sell<sup>149</sup>.

Separately, there are few points that should be considered when discussing the transferability of participatory interest in the LLCs.

First, it should be noted that the participatory interest in LLC is not considered to be a security under the definition of the Ukrainian Law “On Securities and Securities Market” No.3480-IV dated 23 February 2006<sup>150</sup>. A whole range of regulatory mass which is applicable to transferability of securities (as in JSC) is hereby curved out. However, under the article 4.1(1) of the Ukrainian Law “On State Registration of the Legal Entities, Private Entrepreneurs and Non-Governmental Organizations” No. 755-IV dated 15 May 2003 the owner of the participatory interest should be duly registered in the Unified State Register of the Legal Entities, Private Entrepreneurs and Non-Governmental Organizations<sup>151</sup>. Under the mandatory rule the registration is performed with a transfer instrument<sup>152</sup> which may be filed by the new owner<sup>153</sup>.

Second, the transferability of the participatory interest is affected with the existence of the EOSD type pre-emptive right rule of “right of first refusal”. Namely, under the article 20 of the Law on LLCs the participant willing to sell its participatory

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<sup>148</sup> art 21.1 of the Law on LLCs

<sup>149</sup> art 21.2 of the Law on LLCs

<sup>150</sup> art.3.5 of the Law on Securities

<sup>151</sup> art.4.1(1) of the Law on Registration

<sup>152</sup> art.17.5(1.3.g) of the Law on Registration

<sup>153</sup> art.17.5(6.4) of the Law on Registration

interest should first offer the proposed by the third party price to the other participants<sup>154</sup>. After refusal the participant is free to sell the participatory interest to the third party<sup>155</sup>. Two altering rules exist governing the stickiness of this rule. The rule may be displaced in the shareholders' agreement between the parties of such agreement<sup>156</sup>. It should be noted, however, that currently the Ukrainian parliament has a registered draft law under which such provision in the shareholders' agreement would be inferior to the provisions of the charter<sup>157</sup>. As a result the above pre-emptive right may be displaced in the charter provided that all participants voted for such decision<sup>158</sup>.

As a result, we may observe that the Ukrainian law deployed at least in total 3 legal strategies to regulate transferable shares feature in LLCs, among which:

1. 1 Mandatory rule;
2. 2 EOSD type default rules;

**d. Delegated management**

As far as the board structure is concerned, under the OSD type default rule any given LLC is comprised of a management tier which conducts day-to-day business operations of such LLC<sup>159</sup>. Supervisory tier may be established, provided that all participants vote for inclusion of such provision into the charter<sup>160</sup>. The Law on LLCs Under the OSD type rule restricts the operation of supervisory tiers to monitoring and ratification functions (scope of which is defined by the participants in the charter)<sup>161</sup> whereas the management tier undertakes day-to-day business operations and has wide initiation and execution powers<sup>162</sup>. Interestingly, it appears that under the article 30.2(9) of the Law on LLCs OSD rule exists which enables the participants to establish any number of other bodies (tiers) with any structure of checks and balances, if all participant vote for inclusion of such provision into the charter<sup>163</sup>.

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<sup>154</sup> art 20 of the Law on LLCs

<sup>155</sup> art.20.3 of the Law on LLCs

<sup>156</sup> art.20.8 of the Law on LLCs

<sup>157</sup> The draft law is located under the following link: [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=65035](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=65035)

<sup>158</sup> art.20.6 of the Law on LLCs

<sup>159</sup> art.39.1 in conjunction with art.38.1 of the Law on LLCs

<sup>160</sup> art.38.1 of the Law on LLCs

<sup>161</sup> art.38.2 of the Law on LLCs

<sup>162</sup> art.39.1 of the Law on LLCs

<sup>163</sup> art.30.2(9) of the Law on LLCs

As to the composition of the boards themselves, the following rules apply. Regarding the supervisory tier, the Law on LLCs does not even provide for default rule leaving the matter to the total discretion of the participants<sup>164</sup>. If established, the supervisory tier may be of any composition the shareholders have chosen (either sole or collegial)<sup>165</sup>. Regarding the management tier<sup>166</sup>, the Law on LLCs stipulate the OSD type default rule provide for a sole management tier – director. The participants are free to opt out to a collegial management tier – management board – with any composition they deem appropriate<sup>167</sup>.

As a result, we may observe that the Ukrainian law deployed at least in total 4 legal strategies to regulate delegated management feature in LLCs, among which:

1. 4 OSD type default rules;

**e. Investor ownership**

***The right to control the firm.*** The Law on LLCs supplies a OSD type rule which states that the number of votes a participant has is proportional to his or her participatory interest. Effectively the participants may derive from this approach in the charter<sup>168</sup>.

***The right to receive the firms net profits.*** Under the mandatory rule the amount of the LLC's net profits paid to a given participant should be proportional to his or her participatory interest<sup>169</sup>.

As a result, we may observe that the Ukrainian law deployed at least in total 2 legal strategies to regulate investor ownership feature in LLCs, among which:

1. 1 Mandatory rule;
2. 1 OSD type default rule;

**Subchapter 2.2. Addressing the agency problems related to conflicts of interests between participants and management of the plain vanilla LLC**

**a. Appointment and removal rights**

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<sup>164</sup> art.38.3 of the Law on LLCs

<sup>165</sup> art.38.3 of the Law on LLCs

<sup>166</sup> Hereinafter I will refer to management tier as to the both the sole director as well as to the collegial management board

<sup>167</sup> Hereinafter the collegial management tier is to be called a management board and sole management tier is to be called a director.

<sup>168</sup> art.29.3 of the Law on LLCs

<sup>169</sup> art.26.1 of the Law on LLCs

In whole, general meeting of the participants under the Law on LLCs holds a tight grip in respect of the appointment and removal rights. These rights are to some point affected by the structure implemented in a given LLC. Therefore, it is suggested to analyse two major structures – one tier and two tier – in turn.

Speaking of the one-tier structure, the management tier is under full control of the shareholder. Namely, the mandatory rule entitles the shareholder's meeting to “elect a sole director or members of the management board (...), and decide on the amount of their compensation thereto<sup>170</sup>”. This power may not be delegated<sup>171</sup> since the supervisory tier is absent. MD type rule that expressly stipulate removal trigger events may be observed in few cases:

1. the management board chair may be removed when he fails to convene the management board session in cases he was obliged to do so;
  2. management tier member breaches non-compete duty,
  3. management tier member breaches duty to disclose conflict of interests,
- or
4. management tier member breaches duty to keep LLC's affairs confidential.

As a matter of fact, the practice of entering into the labour contracts<sup>172</sup> established a well-rooted approach whereby the management tier members' labour relation is dependent upon existence of the corporate relation. Since the grounds to break corporate relations are not limited, the general meeting effectively may remove the members of the management tier at will<sup>173,174</sup>.

As to the two tier board structure, the Law on LLCs does not provide any rules regarding the procedure of election of the supervisory tier members leaving the matter open for stipulation in the charter. We observe a mandatory type of rule.

Regarding the management tiers in two tier structures, the shareholders face a MSD type default rule whereby the power to elect management tier is vested with the

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<sup>170</sup> art.30.2(7) of the Law on LLCs

<sup>171</sup> art.30.3 of the Law on LLCs

<sup>172</sup> Special type of labor agreement

<sup>173</sup> CCU Case No.1-pи/2010 dated 12.01.2010

<sup>174</sup> SCU Case No.6-156uc12 dated 26.12.2012

participants meeting in full;. Other options are as follows:

1. the power to elect management tier is delegated to the supervisory tier in full;
2. the power to elect management tier is delegated to the supervisory tier in part reserving the right to elect certain number of members by the shareholders' meeting<sup>175</sup>.

At the same time, under the mandatory rule in the article 29.1 of the Law on LLCs the shareholders' are effectively entitled to overrule any decision of the subordinate bodies reserving a great deal of control in the matters associated with election and removal of the management tier<sup>176</sup>.

As a result, we may observe that the Ukrainian law deployed at least in total 5 legal strategies to regulate appointment and removal rights of the participants in LLCs, among which:

1. 3 Mandatory rules;
2. 1 MSD type default rule;
3. 1 MD type default rule;

**b. Decision rights**

Under the mandatory rule the participants' meeting has exclusive competence<sup>177</sup> on matters listed in the article 30.2 of the Law on LLCs and other places in the Law on LLCs where expressly stated so<sup>178</sup>. The list includes fundamental matters like the right to amend the charter<sup>179</sup>, change the amount of charter capital<sup>180</sup>, establish the new body<sup>181,182</sup>, distribute the dividends<sup>183</sup>, merge or otherwise reorganise the LLC<sup>184</sup>, vote on significant transaction<sup>185</sup> that bears the features outlined in the article 44.2 of the Law on LLCs. Under the mandatory rule the participants have a right to

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<sup>175</sup> art.30.2(7) of the Law on LLCs

<sup>176</sup> art.30.1 of the Law on LLCs

<sup>177</sup> Meaning that no other body of any LLC may consider the listed matters

<sup>178</sup> art.30.3 of the Law on LLCs

<sup>179</sup> art.30.2(2) of the Law on LLCs

<sup>180</sup> art.30.2(3) of the Law on LLCs

<sup>181</sup> In the strict sense of this concept. Departments and other units within the LLC may be reorganized by other bodies.

<sup>182</sup> art.30.2(9) of the Law on LLCs

<sup>183</sup> art.30.2(12) of the Law on LLCs

<sup>184</sup> art.30.2(13) of the Law on LLCs

<sup>185</sup> art.44.2 of the Law on LLCs



include other matters into the charter which belong to the exclusive competence of the participants' meeting<sup>186</sup>. It is stressed under the mandatory rule that the matters reserved for the exclusive competence may not be delegated to any other body of the LLC, unless otherwise expressly stated by the Law on LLCs<sup>187</sup>. To illustrate, the election and removal of the management tier is also included into the above list<sup>188</sup>, however, under the EOSD type rule contained in the article 30.3 of the Law on LLCs this power may be delegated to the supervisory tier<sup>189</sup>. The participants may add other matters to their exclusive competence in the charter<sup>190</sup>.

As for the competence of a supervisory tier the Law on LLCs does not expressly lists their decision rights. Under mandatory rule of general nature outlined in the article 38.2 supervisory tier performs "controlling functions and regulates the operation of the management tier"<sup>191</sup>. As it was mentioned above the EOSD type rule entitles the participants meeting to appoint management tier with the possibility to delegate this power to the supervisory tier<sup>192</sup>. The EOSD type rules of similar nature may be found in few other places in the Law on LLCs, namely the possibility to entitle supervisory tier to undertake procedural matters when convening the participants meetings instead of management tier<sup>193</sup>, to grant consent to the management tier member regarding the possibility to compete with the LLC instead of participants meeting<sup>194</sup>.

The management tier, on the other hand, under the mandatory rule conducts day-to-day business of the LLC<sup>195</sup>. Under the mandatory rule stipulated in the article 39.2 of the Law on LLCs the management tier should manage all current affairs of the LLC except for the matters reserved for exclusive competence of the supervisory tier or participants meeting<sup>196</sup>. Additionally, the management tier is responsible for

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<sup>186</sup> art.30.4 of the Law on LLCs

<sup>187</sup> art.30.3 of the Law on LLCs

<sup>188</sup> art.30.2(7) of the Law on LLCs

<sup>189</sup> art.30.3 of the Law on LLCs

<sup>190</sup> art.30.4 of the Law on LLCs

<sup>191</sup> art.38.2 of the Law on LLCs

<sup>192</sup> art.30.3 of the Law on LLCs

<sup>193</sup> art.32.1 of the Law on LLCs

<sup>194</sup> art.40.5 of the Law on LLCs

<sup>195</sup> art.39.1 of the Law on LLCs

<sup>196</sup> art.39.2 of the Law on LLCs

implementing resolutions of the participants' meeting and supervisory tier<sup>197</sup>. Under the mandatory rule the director has the authority to represent the LLC in relations with the third parties without the power of attorney and may sign contracts on behalf of the LLC<sup>198</sup>. In the event a collegial management board is in place, the MSD type rule vests the above power with the chair of the management board. The alternatives may be as follows:

1. all members of the management board should sign exclusively together,
2. particular members should sign or
3. any number of whichever members should sign<sup>199</sup>.

At the same time, although the delegated management characteristics imply separation of powers and delegation of decision rights, in Ukraine under mandatory rule participants meeting preserve ultimate control of the LLC on all matters<sup>200</sup> which greatly enhances the participants monitoring abilities. Therefore, formal delegation of certain powers to the subordinate bodies may effectively be neglected by the participants, especially in cases when control is concentrated. As a result, even day-to-day business activity may effectively also be controlled by the participants meeting.

Therefore, it may undeniably be constituted that Ukraine is a "shareholders friendly" jurisdiction in terms of participants control in LLCs.

As a result, we may observe that the Ukrainian law deployed at least in total 12 legal strategies to regulate decision rights allocation between the participants and internal management in LLCs, among which:

1. 8 Mandatory rules;
2. 3 EOSD type default rules;
3. 1 MSD type default rules;

**c. Due process type**

The due process component of the supervisory tier sessions as well as the procedure for the convening of the supervisory tier are governed by the mandatory type

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<sup>197</sup> art.39.3 of the Law on LLCs

<sup>198</sup> art.39.10 of the Law on LLCs

<sup>199</sup> art.39.10 of the Law on LLCs

<sup>200</sup> art.30.1 of the Law on LLCs

rules which entitle the participants to design the appropriate structure of supervisory tier<sup>201</sup>.

The due process component of the management board sessions is governed with a medium of default rules unlike to the supervisory tier sessions. Particularly, if a collegial management board is implemented in a given LLC, the Law on LLCs provides for a mandatory rule that requires to convene management board session to consider matter that is unlike/unusual to the everyday business affairs of the LLC<sup>202</sup>. Additionally, the EOSD type rule enables the participants to require the chair of the management board to convene management board session if the LLC faces a transaction with a specified subject matter (*e.g.* particular asset of the LLC), exceeds a capped amount of consideration or simply belongs to a particular type of the transaction (*e.g.* mortgage, loan, etc.)<sup>203</sup>. At the same time the procedure for convening the management board is subjected to the participants' discretion under the mandatory rule.

As a result, we may observe that the Ukrainian law deployed at least in total 4 legal strategies to ensure due process of boards' sessions in LLCs, among which:

1. 3 Mandatory rules;
2. 1 EOSD type default rules;

**d. Shareholder coordination**

Under the EOD type rule the participants may exert influence by voting on resolutions on the participants' meeting – the highest body of a LLC<sup>204</sup>. The alternative is that any participant may initiate voting by poll<sup>205</sup>. Under the EOSD type rule the voting by poll may be displaced in the charter.

Where the LLC has two or more participants, the participants face a meeting should be convened which is more associated with mitigation of the conflict of interest between the minority and majority shareholders and therefore will be discussed in section **Error! Reference source not found.** of the **Error! Reference source not found.** of the Chapter II. It should be noted, however, that under the EOSD type rule

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<sup>201</sup> art.38.3 of the Law on LLCs

<sup>202</sup> art.39.7 of the Law on LLCs

<sup>203</sup> art.39.7 of the Law on LLCs

<sup>204</sup> art.29.1 of the Law on LLCs

<sup>205</sup> art.29.1 of the Law on LLCs

the shareholders may simply ignore the procedural requirements – contained both in the Law on LLCs and in the charter – as to the convening the participants meeting provided that all shareholders holding participatory interest in a given LLC are present and consented to hold a participants meeting<sup>206</sup>.

Under the mandatory rule the participants meeting may be held the participants meeting via the videoconference provided that no visual and vocal obstacles in communication are in place<sup>207</sup>.

Under the EOD rule the absent participant may appoint a proxy under the general representation rules by issuing the valid power of attorney. The alternative is that the absentee may issue an official document expressly evidencing his or her will with notarised signature<sup>208</sup> – absentee voting.

To prevent abuse of rights during voting by polling, the latter has few regulatory peculiarities. First, under the OSD type rule the right to initiate the voting by polling is vested with all participants and management tier<sup>209</sup>. It appears that the participants may restrict or, to the contrary, entitle other constituencies to initiate the voting by polling<sup>210</sup>. Second, under the mandatory rule certain decisions may not be taken by polling, like: appointment and removal of the members of supervisory and management tier<sup>211</sup>, amending the charter<sup>212</sup>, expulsion of the participant<sup>213</sup>, and others. Under the OSD the participants may stipulate additional types of decisions that may not be voted by polling<sup>214</sup>. Third, under the OSD type rule the initiator should send via post to every participant a notification with the draft of the resolution on the proposed in the agenda items and indicate the address to which the answers should be submitted and deadline for submission<sup>215</sup>. Alternatively, the participants are may indicate any way of notification by electronic means in the charter<sup>216</sup>. Fourth, under the OSD rule the

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<sup>206</sup> art.31.10 of the Law on LLCs

<sup>207</sup> art.33.3 of the Law on LLCs

<sup>208</sup> art.35.1 of the Law on LLCs

<sup>209</sup> art.36.4 of the Law on LLCs

<sup>210</sup> art.36.4 of the Law on LLCs

<sup>211</sup> art.36.2(1) of the Law on LLCs

<sup>212</sup> art.36.2(2) of the Law on LLCs

<sup>213</sup> art.36.2(6) of the Law on LLCs

<sup>214</sup> art.36.3 of the Law on LLCs

<sup>215</sup> art.36.5 of the Law on LLCs

<sup>216</sup> art.36.5 of the Law on LLCs

voting should be manifested with a signed draft resolution which was attached to the notification by sending it via post to the indicated in the notification address<sup>217</sup>. Alternatively, the participant may indicate in the charter that such signature should be notarised<sup>218</sup> or that the vote may be manifested by electronic means of any type<sup>219</sup>. Fifth, under the mandatory rule the resolution is passed only if **all** participants voted for it<sup>220</sup>. Sixth, under another mandatory rule all resolution that were obtained after the deadline or resolution which do not expressly indicate the will of the participant are not taken onto consideration<sup>221</sup>.

Under the mandatory rule, the sole participant simply passes written resolutions which are regarded as legitimate decisions of the participants meeting<sup>222</sup>.

As a result, we may observe that the Ukrainian law deployed at least in total 13 legal strategies to regulate shareholder coordination feature in LLCs, among which:

1. 5 Mandatory rules;
2. 2 EOSD type default rules;
3. 2 EOD type default rules;
4. 4 OSD type default rules;

**e. Trusteeship and Agent incentives**

Neither of the listed is applicable to the LLCs in Ukraine. However, under the mandatory rule contained in the article 11.6 the participants may indicate in the charter whatever trusteeship or incentive strategy they deem appropriate<sup>223</sup>.

As a result, we may observe that the Ukrainian law deployed at least in total 1 legal strategy to regulate Trusteeship and Agent incentives feature in LLCs, namely 1 Mandatory rule.

**f. Legal constraints and affiliation rights**

Under the mandatory rule officers are required to keep the LLC's affairs

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<sup>217</sup> art.36.6 of the Law on LLCs

<sup>218</sup> art.36.7 of the Law on LLCs

<sup>219</sup> art.36.6 of the Law on LLCs

<sup>220</sup> art.36.10 of the Law on LLCs

<sup>221</sup> art.36.9 of the Law on LLCs

<sup>222</sup> art.37.1 of the Law on LLCs

<sup>223</sup> art.11.6 of the Law on LLCs

confidential unless such disclosure is required by law<sup>224</sup>.

As for the standards, few apply to the members of the supervisory and management tier of the plain vanilla LLC. Namely, under the mandatory rule both first and second tier should act faithfully and reasonably for the interests of the LLC<sup>225</sup>. Provided that act or omission of any of the above members resulted in a loss the such member should reimburse the damages<sup>226</sup>. Interestingly, under the mandatory rule it is the officer who is in charge of proving it is not at fault of the loss, and upon such proof it is released from any reimbursement<sup>227</sup>. On separate note, it should be stressed that the members of the supervisory tier as well as the management tier under the mandatory rule are regarded as the officers of the LLC<sup>228</sup>. This status imposes a set of requirements which are applicable to the officers alone.

As to the rules, the Law on LLCs contains few examples of prescriptive and requiring rules deployed to mitigate the managerial opportunism at the expense of the participants. Naturally, almost in all cases both types are presented in mandatory nature leaving no option to private parties but to comply with them.

For instance, under the mandatory rule the member of the management tier may not start work for the LLC while effectively competing with the LLC without the supervisory tier's (if not established the participants' meeting is in charge) consent and the member of the supervisory tier may not without the participants' meeting consent<sup>229</sup>.

Additionally, before appointment the candidate officer has to disclose all affiliates<sup>230</sup> and afterwards keep the LLC updated on all changes thereto<sup>231</sup>. The officer has to notify the management tier and supervisory tier (if established) on conflict of interests in case of detection<sup>232</sup>. All of the above are mandatory rules and may not be

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<sup>224</sup> art.42.7 of the Law on LLCs

<sup>225</sup> art.40.1 of the Law on LLCs

<sup>226</sup> art.40.2 of the Law on LLCs

<sup>227</sup> art.40.3 and 40.4 of the Law on LLCs

<sup>228</sup> art.42.1 of the Law on LLCs

<sup>229</sup> art.40.5 of the Law on LLCs

<sup>230</sup> For the exact definition of the term "affiliate" art.42.9 of the Law on LLCs refers to the Law on JSCs which is analyzed in more detail below.

<sup>231</sup> art.42.4 of the Law on LLCs

<sup>232</sup> art.42.6 of the Law on LLCs

displaced.

As to the management tier, under the mandatory rule it owes a duty to the participants to notify them when any officer brings information on conflict of interest<sup>233</sup>.

Under the mandatory rule the management tier is required to keep all the records of the LLC<sup>234</sup>. Any participant enjoys the effect of the mandatory rule which requires the management tier to provide access to the LLC's records if any participant wills to examine them<sup>235</sup>.

Interestingly, the Law on LLCs even sets a mandatory rule in respect of significant transaction. Namely, under the article 44.2 of the Law on LLCs if the transaction equals to 50% of the LLC's net assets or more the participants meeting should consider such matter<sup>236</sup>. Such approach is questionable since creates a potential to introduce legal loopholes and is indeed characterized with unnecessary rigidity. Even now Ukrainian practitioners intuitively understand that this rule may create a lot of questions in future and contemplate lobbying of its amendment.

Lastly, under the mandatory rule participants are free to indicate more rules and standards in the charter<sup>237</sup>.

As a result, we may observe that the Ukrainian law deployed at least in total 12 legal strategies to regulate Legal constraints and affiliation rights feature in LLCs, among which:

1. 12 Mandatory rules;

**g. Disclosure rules**

Under the mandatory rule contained in the article 5.1(2) of the Law on LLCs the participants have a general right to access information that relates to the activities of the LLC<sup>238</sup>. Ukrainian courts highly respect this right and interpret it in quite wide manner. For instance, Supreme Court Case No. 904/3679/17 dated 26.06.2018

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<sup>233</sup> art.42.6 of the Law on LLCs

<sup>234</sup> art.43.2 of the Law on LLCs

<sup>235</sup> art.43.4 of the Law on LLCs

<sup>236</sup> art.44.2 of the Law on LLCs

<sup>237</sup> art.30.4 of the Law on LLCs

<sup>238</sup> art.5.1(2) of the Law on LLCs

protected the participant’s right to information by ruling that the LLC may not refuse the participant to examine the internal documents even if the charter does not provide for the procedure of accessing it.

Under the mandatory rule the officers are liable for intentionally recording to the LLC’s documents inaccurate information which resulted in loss<sup>239</sup>.

If the participant(s) holding 10% of the participatory interest or more initiate(s) audit the management tier under the mandatory rule is required to secure to the auditor the access to all documents which are in scope of the given audit<sup>240</sup>.

On a separate note, Ukrainian Law “On Accounting and Financial Reporting in Ukraine” No.996-XIV dated 16 July 1999 (hereinafter the **Law on Accounting**) under the mandatory rule requires all medium<sup>241</sup> and big<sup>242</sup> enterprises regardless of its form to disclose on their web-site their audited financials<sup>243</sup> and report on corporate governance. Under EOD type rule medium enterprises may omit non-financial information in the report on corporate governance<sup>244</sup>.

As a result, we may observe that the Ukrainian law deployed at least in total 5 legal strategies to regulate disclosure rules in LLCs, among which:

1. 4 Mandatory rules;
2. 1 EOD type default rule;

### **Conclusions to the Chapter II**

1. Please see below a matrix representing legal strategies that govern the operation of plain vanilla LLCs in Ukraine:

	Mandatory	EOSD	EOD	MSD	MD	OSD	OD	Total
Establishing the corporate form								
Legal personality	7	0	0	0	0	0	0	7
Limited liability	2	1	0	0	0	0	0	3

<sup>239</sup> art.26.5 of the Law on LLCs

<sup>240</sup> art.41.1 in conjunction with art.41.4 of the Law on LLCs

<sup>241</sup> Under the art.2.2 of the Law on Accounting enterprises are considered medium if at least two conditions are satisfied: assets book value exceeds EUR 4 mln., net sales exceed EUR 8 mln. or the enterprise employs more than 50 individuals

<sup>242</sup> Under the art.2.2 of the Law on Accounting enterprises are considered big if at least two conditions are satisfied: assets book value exceeds EUR 20 mln., net sales exceed EUR 40 mln. or the enterprise employs more than 250 individuals

<sup>243</sup> para 2 art.14.3 of the Law on Accounting

<sup>244</sup> art.10.7 of the Law on Accounting



Transferable shares	1	2	0	0	0	0	0	3
Delegated management	0	0	0	0	0	4	0	4
Investor ownership	1	0	0	0	0	1	0	2
Addressing the agency problems related to conflicts of interests between shareholders and management								
Appointment and removal rights	3	0	0	1	1	0	0	5
Decision rights	8	3	0	1	0	0	0	12
Due process type	3	1	0	0	0	0	0	4
Shareholder coordination	5	2	2	0	0	4	0	13
Trusteeship and Agent incentives	1	0	0	0	0	0	0	1
Legal constraints and affiliation rights	12	0	0	0	0	0	0	12
Disclosure rules	4	0	1	0	0	0	0	5
<b>Total</b>	47	9	3	2	1	9	0	71

## CHAPTER III. DESCRIBING THE PLAIN VANILLA JSC REGULATION BASED ON THE FINDINGS OUTLINED IN THE CHAPTER I

### Subchapter 3.1. Establishing the corporate form

#### a. Legal personality

JSC in Ukraine are legal entities and on par with LLCs and are awarded with legal capacity as well as with transactional capacity<sup>245</sup>.

**Entity shielding - Priority rule.** Under the mandatory rule stipulated in the article 3.2 of the Ukrainian Law “On Joint Stock Companies” No.514-VI dated 17 September 2008 Creditors of a JSC’s shareholders may not claim the debts of the latter from the JSC<sup>246</sup>.

**Entity shielding - Liquidation protection.** The Law on JSC does not provide for possibility to withdraw the shareholder’s share at his will unlike to LLCs, except for few cases which are more concerned with the protection of the minority shareholder and are more discussed in detail below. As a general mandatory rule, the shareholder may effectively stop being shareholder only upon the disposal of its shares to other purchaser.

**Authority.** The Law on JSCs implies that any JSC has the management tier. It is partially may be derived from the fact that a lot of functions of the supervisory tier are of mandatory nature. At the same time the supervisory tier may be absent in a JSC under special conditions (please see section “delegated management” below for more details). In such case the management tier performs the functions of the supervisory tier<sup>247</sup>. Therefore, we may assume that the establishment of the management tier is mandatory.

In turn, under the mandatory rule management tier conducts day-to-day business operation of such JSC<sup>248</sup> and is entitled to act on behalf of the JSC without the power of attorney<sup>249</sup>. Under the mandatory rule the invalidation of any transactions

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<sup>245</sup> art.80 of the Civil Code of Ukraine

<sup>246</sup> art.3.2(1) of the Law on JSCs

<sup>247</sup> art.65.2(3), 65<sup>1</sup>.2(3), etc of the Law on JSCs

<sup>248</sup> art.58.1 of the Law on JSCs

<sup>249</sup> art.59.5(3) and 60.2 of the Law on JSCs

entered by the management tier on behalf of the JSCs is impossible unless such third parties knew or should have known that the management tier acts outside its capacity granted by law and charter documents of the JSC in question<sup>250</sup>.

A more detailed overview of the variations that are possible to implement in respect of management tiers in JSCs is covered in section “delegated management”.

**Procedure.** Under the mandatory rule JSCs as legal entities may file suits and act in their own capacity as a defendant in courts<sup>251</sup>.

As a result, we may observe that the Ukrainian law deployed at least in total 7 legal strategies to regulate legal personality feature in JSCs, among which:

1. 7 Mandatory rules;

**b. Limited liability**

Unlike to LLCs, the Law on JSCs expressly stipulates a mandatory rule in the article 3.2(2) that “the shareholders of the JSCs shall not bear liability for the JSC’s debts”<sup>252</sup>. At the same time, the Law on JSCs contains a similar mandatory rule under which the shareholders which have not fully paid their shares bear liability for the LLC’s debts within the amount of the not fully paid shares<sup>253</sup>. The mandatory nature of corresponding article 3.2(3) of the Law on JSCs requires the shareholders to outline in the charter the events which would trigger the above liability of the shareholders.

As a result, we may observe that the Ukrainian law deployed at least in total 3 legal strategies to regulate limited liability feature in JSCs, among which:

1. 3 Mandatory rules;

**c. Transferable shares**

The shareholders may dispose of their shares without any consent from other shareholders<sup>254</sup>. However, the ease with which share may be transferred is affected with the following nuances.

Firstly, the shares of the JSC are securities<sup>255</sup>. The fact that the shares are

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<sup>250</sup> art. 92.3 of the Civil Code of Ukraine.

<sup>251</sup> art.80.1(2) of the Civil Code of Ukraine

<sup>252</sup> art.3.2(2) of the Law on JSCs

<sup>253</sup> art.3.2(3) of the Law on JSCs

<sup>254</sup> art.7.1 of the Law on JSCs

<sup>255</sup> art.3.5(1.a) of the Law on Securities

considered issue-based securities triggers the application of the Ukrainian Law “On depositary system of Ukraine” No.5178-VI dated 6 July 2012. Since the Law on Depositary System generally comprised of legal rules of mandatory nature, the process of transferring shares is filled with formalities.

Secondly, the EOD type default rule under the article 7.2 of the Law on JSCs rejects the idea of affecting the transferability of the JSC's shares with any type of the pre-emptive right. The same EOD type default rule provide for the possibility to insert into the charter the “right of first refusal” type preemptive right of the shareholders to claim a pro-rata part of the share in case the shareholder is contemplating the sale of the share to the third parties<sup>256</sup>.

Under the EOD type default rule the shareholders may also stipulate in the charter the procedure of pre-emptive right realization in cases when the share is being disposed otherwise rather than sold.

As a result, we may observe that the Ukrainian law deployed at least in total 3 legal strategies to regulate transferable shares feature in JSCs, among which:

1. 1 Mandatory rule;
2. 2 EOD type default rules;

**d. Delegated management**

The requirement to the internal structure of the JSCs is much more stringent than to the LLCs’ structure. Several rules may apply depending on circumstances.

When speaking about private JSC, an OSD type default rule stipulates that the former is comprised of management tier. Alternatively, the shareholders may establish a supervisory tier and set up a two tier structure<sup>257</sup>. Further, if a "plain vanilla" private JSC has 10 or more unaffiliated shareholders, it falls under the mandatory rule that requires the establishment of the supervisory tier<sup>258</sup>. Similarly to the LLCs, the shareholders of the JSC are enabled to establish any number of other bodies (tiers) with any structure of checks and balances, if majority of shareholders vote for inclusion of

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<sup>256</sup> art.7.1 of the Law on JSCs

<sup>257</sup> para 3 art.51.2 of the Law on JSCs

<sup>258</sup> para 2 art.51.2 of the Law on JSCs

such provision into the charter at the moment of establishment of the JSC<sup>259</sup>.

As for public JSCs, a mandatory rule instructs for the establishment of the supervisory tier<sup>260</sup>. Moreover, the Law on JSCs goes further and puts several requirements of mandatory nature to the internal structure of the supervisory tier of public JSCs. Namely, the supervisory tier should additionally be divided into 3 committees: audit committee, compensation committee and election committee<sup>261</sup>. Under the EOD type default rule the last two may be combined into a single committee<sup>262</sup>.

It should be noted that the Law on JSCs provides for a quasi-body. More specifically, under a combined EOSD and EOD types rules private JSCs has no revision quasi-body. At the same time, shareholders meeting may set up an ad-hoc revision quasi-body, or provide for the revision quasi-body in the charter<sup>263</sup>.

Under the mandatory rule, the supervisory tier is a collegial body<sup>264</sup> implying that the supervisory tier of the private JSC should be comprised of at least 2 members. Under another mandatory rule the supervisory tier of the public JSCs should be comprised of at least 5 members<sup>265</sup>.

The composition of the management tier is governed with EOSD type rule whereby the charter may stipulate whether a given JSC has a collegial or sole management tier<sup>266</sup>. If shareholders agree on a collegial management tier the exact number is subject to OSD type rule.

When the committees are set up, under the mandatory rule they should be composed of at least 3 members of the supervisory tier<sup>267</sup>.

As to the revision quasi-body, under combined EOSD and EOD types rules private JSCs may set up a collegial revision commission or appoint the sole revisor. Under the mandatory rule, private JSCs should only set up a collegial revision

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<sup>259</sup> art.10.2(4) of the Law on JSCs

<sup>260</sup> para 1 art.51.2 of the Law on JSCs

<sup>261</sup> para 2 art.56.1 of the Law on JSCs

<sup>262</sup> para 2 art.56.1 of the Law on JSCs

<sup>263</sup> art.73.1 of the Law on JSCs

<sup>264</sup> art.51.1 of the Law on JSCs

<sup>265</sup> art.53.11 of the Law on JSCs

<sup>266</sup> art.53.11 of the Law on JSCs

<sup>267</sup> art.56.4 in conjunction with art.56.1 of the Law on JSCs

commission.

As a result, we may observe that the Ukrainian law deployed at least in total 15 legal strategies to regulate delegated management feature in JSCs, among which:

1. 7 Mandatory rules;
2. 3 EOSD type default rules;
3. 3 EOD type default rules;
4. 2 OSD type default rules;
- e. Investor ownership.**

***The right to control the firm.*** Under, the OSD type rule a JSC issues ordinary shares<sup>268</sup> which grant to the shareholder the amount of votes equal to the amount of his or her shares<sup>269</sup>. Alternatively, the shareholders' meeting may issue privileged shares that in total should not exceed 25% of the whole charter capital<sup>270</sup>. Under the OSD type rule the owners of the privileged shares may only vote on matters listed in the Law on JSCs<sup>271</sup>, for instance winding up of the JSC with conversion of the privileged shares into less privileged or ordinary shares or other type securities<sup>272</sup>, amending the charter by limiting the rights of the privileged shares holders<sup>273</sup>, and amending the charter by issuing new class of a more privileged shares<sup>274</sup>. The shareholders may provide in charter that the holders of the privileged shares may vote on other matters<sup>275</sup>.

***The right to receive the firms net profits.*** Under, the OSD type rule a JSC issues ordinary shares<sup>276</sup> which grant to the shareholder the amount of dividends proportional to the amount of his or her shares<sup>277</sup>. Provided that the JSC issues privileged shares under the mandatory the shareholders of the JSC may define the amount of obligatory dividends attached to each privileged share<sup>278</sup>.

As a result, we may observe that the Ukrainian law deployed at least in total 4

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<sup>268</sup> art.20.3 of the Law on JSCs

<sup>269</sup> art.25.1(1) of the Law on JSCs

<sup>270</sup> art.22.5 of the Law on JSCs

<sup>271</sup> art.26.4 of the Law on JSCs

<sup>272</sup> art.26.5(1) of the Law on JSCs

<sup>273</sup> art.26.5(2) of the Law on JSCs

<sup>274</sup> art.26.5(3) of the Law on JSCs

<sup>275</sup> para 2 of the art.26.5 of the Law on JSCs

<sup>276</sup> art.20.3 of the Law on JSCs

<sup>277</sup> para 2 art.30.1 of the Law on JSCs

<sup>278</sup> art.26.2(1) of the Law on JSCs

legal strategies to regulate investor ownership feature in JSCs, among which:

1. 1 Mandatory rule;
2. 3 OSD type default rules;

### **Subchapter 3.2. Addressing the agency problems related to conflicts of interests between shareholders and management of the plain vanilla JSC**

#### **a. Appointment and removal rights.**

These rights are to some point affected by the structure implemented in a given JSC. Therefore, it is suggested to analyse two major structures – one tier and two tier – in turn.

As to the one-tier structure (which is only possible in private JSCs<sup>279</sup>), under the three (3) separate mandatory rules the shareholders' meeting entitled to appoint the members of the management tier<sup>280</sup>, decide on terms of their labor contracts including management tier members' compensation<sup>281</sup>, and remove them with simultaneous appointment of the acting member of the management tier<sup>282</sup>. Alike to LLCs the practice of entering into the labour contracts established a well-rooted approach whereby the management tier members' labour relation is dependent upon existence of the corporate relation. Since the grounds to break corporate relations are directly linked to the charter and terms of the labor contract<sup>283</sup>, the general meeting effectively may remove the members of the management tier at will<sup>284,285</sup>.

As to the two-tier board structure, the Law on JSCs under the mandatory rule vests the shareholders' with meeting the power to appoint, decide on terms of their labor contracts including supervisory tier members' compensation<sup>286</sup>, and remove<sup>287</sup> them. Where the member of the supervisory tier is a representative of the particular shareholder or group of shareholders under the mandatory rule the former may be

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<sup>279</sup> para 1 art.51.2 of the Law on JSCs

<sup>280</sup> art.52.2(8) in conjunction with para 4 art.51.2 of the Law on JSCs

<sup>281</sup> art.52.2(9) in conjunction with para 4 art.51.2 of the Law on JSCs

<sup>282</sup> art.52.2(11) in conjunction with para 4 art.51.2 of the Law on JSCs

<sup>283</sup> para 3 art.61.1 of the Law on JSCs

<sup>284</sup> CCU Case No.1-pn/2010 dated 12.01.2010

<sup>285</sup> SCU Case No.6-156uc12 dated 26.12.2012

<sup>286</sup> art.33.2(17) of the Law on JSCs

<sup>287</sup> art.33.2(18) of the Law on JSCs

replaced by such shareholder or group of shareholders' at will<sup>288</sup>. However, the procedure of such replacement is governed with a set of two (2) separate mandatory rules which set the moment such replacement is effective<sup>289</sup> and requirements to the content of notification to the JSC<sup>290</sup>.

As far as the management tier is concerned, the three (3) separate EOSD rules vests the supervisory tier with the exclusive powers to appoint the members of the management tier<sup>291</sup>, decide on terms of their labor contracts including management tier members' compensation<sup>292</sup>, and remove them with simultaneous appointment of the acting member of the management tier<sup>293</sup>. For public JSCs under the mandatory rule the above is reserved as an exclusive competence of the JSCs' supervisory tiers meaning that no other body including the shareholders' meetings may not decide on these matters<sup>294</sup>. Whereas in private JSCs the shareholders may displace this provision in the charter and enable the shareholders' meeting vote on all or matters related to the management tier regardless of whose competence it belongs to<sup>295</sup>. Where the powers related to management tier reserved for consideration by the supervisory tier, the latter under the EOD rule may delegate the above matters to the shareholders' meeting<sup>296</sup>. Separately from the exclusive competence under the OSD type rule the supervisory tier also elects the chair of the collegial management tier<sup>297</sup>.

Additionally, where the powers related to management tier reserved for consideration by the shareholders' meeting, under the mandatory rule the supervisory tier may still dismiss the member of the management tier if the latter violates the rights of the JSC or the shareholders<sup>298</sup>.

As to the revision quasi-body, the shareholders' meeting has exclusive competence regarding the appointment and removal of the members of revision quasi-

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<sup>288</sup> para 2 art.53.6 of the Law on JSCs

<sup>289</sup> para 1 art.53.7 of the Law on JSCs

<sup>290</sup> para 2 art.53.7 of the Law on JSCs

<sup>291</sup> art.52.2(8) of the Law on JSCs

<sup>292</sup> art.52.2(9) of the Law on JSCs

<sup>293</sup> art.52.2(11) of the Law on JSCs

<sup>294</sup> art.33.1 of the Law on JSCs

<sup>295</sup> para 2 art.33.1 of the Law on JSCs

<sup>296</sup> para 3 art.33.1 of the Law on JSCs

<sup>297</sup> art.59.5 of the Law on JSCs

<sup>298</sup> para 1 art.61.1 of the Law on JSCs



body<sup>299</sup>.

On a separate note, the Law on JSCs supplies a number of rules governing the ways of delegating of the JSCs' officials' powers ensuring a swift reaction when the latter are unable to take decisions. Namely, under the EOSD type rule the sole director may appoint an acting sole director if the former is unable to perform its functions<sup>300</sup>. Similarly, under the EOSD type rule the collegial management tier may decide to appoint an acting chair of the collegial management board who will temporarily undertake the functions of the chair<sup>301</sup>.

As a result, we may observe that the Ukrainian law deployed at least in total 11 legal strategies to regulate appointment and removal rights of the shareholders in JSCs, among which:

1. 6 Mandatory rules;
2. 3 EOSD type default rules;
3. 1 EOD type default rule;
4. 1 OSD type default rule;

**b. Decision rights.**

Under the general mandatory rule, the shareholder's meeting in JSCs may decide on any matter except for the matters reserved for the exclusive competence of the supervisory tier<sup>302</sup> which leaves no option to the public JSCs but to comply with this requirement. However, the shareholders' meeting of the private JSCs may either preserve ultimate control alike to LLCs or have limited powers. More precisely, under the EOSD type rule the above is applicable to the private JSCs as well<sup>303</sup>. The shareholders may displace this provision in the charter and enable the shareholders' meeting vote on any matter regardless of whose competence it belongs to<sup>304</sup>. It should be noted that the matters reserved for consideration by the supervisory tier, the latter under the EOD rule may delegate the above matters to the shareholders' meeting<sup>305</sup>.

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<sup>299</sup> art.33.2(19) of the Law on JSCs

<sup>300</sup> art.60.3 of the Law on JSCs

<sup>301</sup> art.59.6 of the Law on JSCs

<sup>302</sup> para 1 art.33.1 of the Law on JSCs

<sup>303</sup> para 1 art.33.1 of the Law on JSCs

<sup>304</sup> para 2 art.33.1 of the Law on JSCs

<sup>305</sup> para 3 art.33.1 of the Law on JSCs

The mandatory rule contained in the article 33.2 of the Law on JSCs stipulates the exhaustive list of matters reserved for the exclusive competence of the shareholders' meeting<sup>306</sup>. The list includes fundamental matters like the right to amend the charter<sup>307</sup>, change the amount of charter capital<sup>308</sup>, distribute the dividends<sup>309</sup>, merge or otherwise reorganise the JSC<sup>310</sup>, vote on significant transaction<sup>311</sup> that bears the features outlined in the article 70 of the Law on JSCs. Under the enabled mandatory other matters may be included into the charter which belong to the exclusive competence of the shareholders' meeting<sup>312</sup>. It is stressed under the mandatory rule that the matters reserved for the exclusive competence may not be delegated to any other body of the JSC with no exceptions<sup>313</sup>.

As a result, we may observe that the competence of shareholders' meeting in the JSCs is limited as compared to the competence of the participants' meeting in the LLCs.

As opposed to the LLCs, the Law on JSCs expressly lists matters which are under the exclusive competence of the supervisory tier. Under the mandatory rule contained in the article 52.2 supervisory tier is empowered to approve internal by-laws except for those that are allocated to the consideration of the shareholders' meeting<sup>314</sup>, approving the by-law on management tier's compensation and report on management tier's compensation<sup>315</sup>, deciding on convening annual and extraordinary shareholders' meetings<sup>316</sup>, approval of the market value of the JSC's property in cases provided by the Law on JSCs, approval significant and related party transactions<sup>317</sup> and many others. Finally, under the mandatory rule contained in the para 4 of the article 51.2 in conjunction with para 5 of the article 51.2 of the Law on JSCs the supervisory tier is

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<sup>306</sup> art.33.2 of the Law on JSCs

<sup>307</sup> art.33.2(2) of the Law on JSCs

<sup>308</sup> art.33.2(6) and 33.2(7) of the Law on JSCs

<sup>309</sup> art.33.2(12) of the Law on JSCs

<sup>310</sup> art.33.2(23) of the Law on JSCs

<sup>311</sup> art.33.2(22) of the Law on JSCs

<sup>312</sup> art.33.2(27) of the Law on JSCs

<sup>313</sup> art.33.3 of the Law on JSCs

<sup>314</sup> art.53.2(1) of the Law on JSCs

<sup>315</sup> art.53.2(1<sup>1</sup>) and art.53.2(1<sup>2</sup>) of the Law on JSCs

<sup>316</sup> art.53.2(3) of the Law on JSCs

<sup>317</sup> art.53.2(18) of the Law on JSCs

entitled to handle all procedural matters associated with the holding of the shareholders' meeting<sup>318</sup>. Under the mandatory rule other matters may be included into the charter which belong to the exclusive competence of the supervisory tier<sup>319</sup>.

The management tier, on the other hand, under the mandatory rule conducts day-to-day business of the JSC<sup>320</sup>. Under the mandatory rule the management tier should manage all current affairs of the JSC except for the matters reserved for exclusive competence of the supervisory tier or shareholders' meeting<sup>321</sup>. The management tier is responsible for implementing the resolutions of the supervisory tier or shareholders' meeting<sup>322</sup>.

Under the mandatory rule the director has the authority to represent the JSC in relations with the third parties without the power of attorney and may sign contracts on behalf of the JSC<sup>323</sup>. In the event a collegial management board is in place, the EOSD type rule vests the above power with the chair of the management board. The alternative is that other member or members of the collegial management board may separately represent the JSC in relations with the third parties without the power of attorney and may sign contracts on behalf of the JSC<sup>324</sup>. The Law on JSCs does not provide for the possibility to require the collegial signature.

Finally, under the OSD type rule in one-tier structures management tier is in charge of all procedural matters related to the holding of the shareholders' meeting<sup>325</sup>.

Regarding the revision quasi-body, under the OSD type rule it performs the auditing of the financials of the JSCs. Under the mandatory rule, the revision quasi-body is also entitled to convene the extraordinary shareholders' meeting.

As a result, we may observe that the Ukrainian law deployed at least in total 14 legal strategies to regulate decision rights allocation between the shareholders and internal management in JSCs, among which:

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<sup>318</sup> para 4 art.51.1 conjunction with para 5 art.51.1 of the Law on JSCs

<sup>319</sup> art.52.2(23) of the Law on JSCs

<sup>320</sup> para 1 art.58.1 of the Law on JSCs

<sup>321</sup> para 2 art.58.1 of the Law on JSCs

<sup>322</sup> art.58.2 of the Law on JSCs

<sup>323</sup> art.60.2 of the Law on JSCs

<sup>324</sup> para 3 art.59.5 of the Law on JSCs

<sup>325</sup> para 5 art.51.2 of the Law on JSCs

1. 11 Mandatory rules;
2. 1 EOSD type default rule;
3. 2 OSD type default rules;

**c. Due process type.**

The due process type rules are of significant importance under the Law on JSCs. In my opinion the intention was to protect shareholders to the most extent by detailing the process of passing resolution. It would put the potential unfaithful agents at risk to make as much mistakes as possible which would result in vivid red flags and make the process of challenging wrongful resolutions and actions more clear.

Since the Law on JSCs indeed elaborates to a great detail the due process type rules I would give a brief general sketch how the process is designed and management and supervisory tier and give the exact number of rules I have identified in the process of my analysis.

As far as the supervisory tier is concerned, under the Law on JSCs the operation of the former is framed into the form of sessions which clearly consist of three (3) stages, namely the convening, holding, and passing the resolutions. Based on undertaken analysis I have identified the following number of legal rules categorized in accordance with suggested above approach:

1. 32 Mandatory rules;
2. 6 EOSD type default rules;
3. 4 EOD type default rules;
4. 2 OSD type default rules;
5. 1 OD type default rule;

Regarding the management tier, the due process rules are less detailed. Namely, as to the sole director management tier, the procedure of passing resolution is governed by OSD type rule whereby the sole director simply passes resolutions, instructions which are obligatory for implementations for all JSC's workers<sup>326</sup>. Alternatively, the shareholders may define the procedure in the charter<sup>327</sup>.

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<sup>326</sup> art.60.2 of the Law on JSCs

<sup>327</sup> art.60.1 of the Law on JSCs

As for the collegial management tier, the process of convening and holding of the collegial management tier sessions may be detailed in the management tier by-law under the mandatory rule<sup>328</sup>. Only few requirements are put forward by the Law on JSCs. Namely, under the mandatory rule each member has a right to require the convening of the session and suggest the matters to be reviewed thereon<sup>329</sup>. Under the mandatory rule the supervisory tier members may attend such meetings<sup>330</sup>. Under the mandatory rule the shareholders may list other persons that may attend such meetings<sup>331</sup>. Additionally, under the mandatory rule collegial management tier is supposed to keep minutes<sup>332</sup>.

As a result, we may observe that the Ukrainian law deployed at least in total 51 legal strategies to ensure due process of boards' sessions in JSCs, among which:

1. 37 Mandatory rules;
2. 6 EOSD type default rules;
3. 4 EOD type rules;
4. 3 OSD type default rules;
5. 1 OD type default rules;

**d. Shareholder coordination**

Under the EOSD type rule the shareholders may exert influence by voting on resolutions on the shareholders' meeting – the highest body of a JSC<sup>333</sup>. The alternative is that strictly in the events provided in the charter the initiator (supervisory tier, management tier where the supervisory tier is not in place, or shareholder) may undertake voting by poll<sup>334</sup>. The Law on JSCs does not provide for the possibility to hold the shareholders' meeting via the videoconference. As a result, effectively most of the shareholders' meeting are held in the form of meeting *per se*.

Absentee voting is not provided as well. Therefore, under the EOD type rule the shareholders' should attend the shareholders' meeting in person. Alternatively, they

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<sup>328</sup> art.59.1 of the Law on JSCs

<sup>329</sup> art.59.2 of the Law on JSCs

<sup>330</sup> art.59.3 of the Law on JSCs

<sup>331</sup> art.59.3 of the Law on JSCs

<sup>332</sup> art.59.4 of the Law on JSCs

<sup>333</sup> art.32.1 of the Law on JSCs

<sup>334</sup> art.48.1 of the Law on JSCs

are free to appoint the representative by issuing a valid power of attorney<sup>335</sup>. The Law on JSCs stipulates a set of requirements to the validity of the above power of attorney which consists of nine (9) mandatory rules, three (3) EOD type rules.

As a result, we may observe that the Ukrainian law deployed at least in total 14 legal strategies to regulate shareholder coordination feature in JSCs, among which:

1. 9 Mandatory rules;
  2. 1 EOSD type default rule;
  3. 4 EOD type default rules;
- e. Trusteeship and Agent incentives.**

The Law on JSCs under the mandatory rule stipulates that the supervisory may be composed of three types of constituencies, namely the shareholders, the shareholders' representatives and independent directors<sup>336</sup>. Under the mandatory rule the supervisory tier of the public JSC should be composed of at least of 1/3 of the independent directors but not less than 2 individuals. Moreover, under the mandatory rule the compensation committee and election committee of the supervisory tier should be chaired by the independent directors and under another mandatory rule the said committees should be comprised of the majority of independent directors as well.

As opposed to the Law on LLCs, the Law on JSCs have an elaborated set of standards with respect to incentives of the management tier and supervisory tier members. In both cases the Law on JSCs under two (2) mandatory rules requires that the compensation of the management tier and supervisory tier members should comply with National Securities and Stock Market Commission Regulation “On approval of Requirements to the compensation and compensation report of the members of the supervisory tier and management tier of the joint stock company” No.579 dated 3 August 2018<sup>337</sup>.

As a result, we may observe that the Ukrainian law deployed at least in total 6 legal strategies to regulate Trusteeship and Agent incentives feature in JSCs, among which:

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<sup>335</sup> art.34.1 of the Law on JSCs

<sup>336</sup> art.53.3 of the Law on JSCs

<sup>337</sup> art.33.2(9<sup>1</sup>) and art.52.2(1<sup>1</sup>) of the Law on JSCs

1. 6 Mandatory rules;

**f. Legal constraints and affiliation rights.**

First of all, under the mandatory rule the officers<sup>338</sup> of the JSCs should act in the interests of the JSC and follow the requirements of the law, charter and other documents of the JSC<sup>339</sup>. Under another mandatory rule they should keep the affairs of the JSC confidential<sup>340</sup>.

With respect to responsibility the Law on JSCs sets the following. Under the mandatory rule the officers of the JSC are prohibited from requiring the shareholders to disclose their vote or intention to vote on shareholders' meeting<sup>341</sup>,

Under another mandatory rule if an act or an omission of officer resulted in a loss such officer should reimburse the damages<sup>342</sup>.

Under the mandatory rule the member of the supervisory tier should be a physical person<sup>343</sup>. Under the mandatory rule the above may not simultaneously hold the position of the member of the management tier of the revision quasi-body<sup>344</sup>. Similarly, the member of the management tier should be a physical person with full legal capacity and not a member of the supervisory tier of the revision quasi-body<sup>345</sup>.

Under the mandatory rule the individual may not be an officer of the JSC if he or she is a public official (unless he or she represents the state or the municipality)<sup>346</sup>. Also under the mandatory rule individuals who are barred from being officials of the JSCs if the court prohibited them undertaking the activities such JSC undertakes<sup>347</sup>. Similarly, if an individual has outstanding conviction records related to the property crimes, commercial crimes they may not be officials of the JSCs either<sup>348</sup>.

As to the revision quasi-body, under the mandatory rule individuals that are

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<sup>338</sup> Under the definition contained in the art.2.1(15) the officers of the JSC include the chair and members of the supervisory and management tier, revision quasi-body, as well as the chair and members of other bodies which are established under the provisions of a given JSC's charter.

<sup>339</sup> art.63.1 of the Law on JSCs

<sup>340</sup> art.62.2 of the Law on JSCs

<sup>341</sup> para 1 art.28.1 of the Law on JSCs

<sup>342</sup> art.63.3 of the Law on JSCs

<sup>343</sup> art.53.2 of the Law on JSCs

<sup>344</sup> art.53.2 of the Law on JSCs

<sup>345</sup> art.58.4 of the Law on JSCs

<sup>346</sup> para 1 art.62.1 of the Law on JSCs

<sup>347</sup> para 2 art.62.1 of the Law on JSCs

<sup>348</sup> para 2 art.62.1 of the Law on JSCs

members of the supervisory tier or management tier, or corporate secretary, or other official may not hold the position at the revision quasi-body<sup>349</sup>.

Under EOD type rule the corporate secretary of the JSC is not appointed. However, the matter may be initiated by the chair of the supervisory tier and put under the consideration of the supervisory tier itself<sup>350</sup>.

As a result, we may observe that the Ukrainian law deployed at least in total 10 legal strategies to regulate Legal constraints and affiliation rights feature in JSCs, among which:

1. 9 Mandatory rules;
2. 1 EOD type default rule;

**g. Disclosure rules**

JSCs face a very elaborated set of legal rules which relate to disclosure requirements.

Again, similar to LLCs the shareholders of the JSCs enjoy a mandatory rule which entitles them to the right to access the information on commercial activities of the JSC in question<sup>351</sup>. Under the mandatory rule the charter of the JSC should provide for the procedure of accessing such information<sup>352</sup>. At the same time the Law on JSCs differentiate two various levels of access. Namely, under the mandatory rule every shareholder may access all financials and reports on corporate governance<sup>353</sup>. At the same time under mandatory rule only shareholders who hold 5% and bigger stake may access information regarding the documents evidencing the JSC's rights to its property of list of the JSC's affiliates<sup>354</sup>.

As was stated above the shares in the JSCs are regarded as securities under the Law on Securities. As a result, under the mandatory rule JSCs are required to publicly disclose information<sup>355,356</sup> related to its activities. More specifically, the Law on

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<sup>349</sup> art.73.2 of the Law on JSCs

<sup>350</sup> art.56.7 of the Law on JSCs

<sup>351</sup> art.25.1(4) of the Law on JSCs

<sup>352</sup> art.26.2(4) of the Law on JSCs

<sup>353</sup> art.78.1 of the Law on JSCs

<sup>354</sup> art.78.1 in conjunction with art.1.1(5) of the Law on JSCs

<sup>355</sup> art.78.5 of the Law on JSCs

<sup>356</sup> para 2 art.39.1 of the Law on Securities



Securities introduces the concept of regulated information which includes the regular information, special information, information on the holders of number of shares in accordance with established thresholds<sup>357</sup>. In turn, regular information includes all financials, information on all type of business undertaken by such JSC, its officials, its subsidiaries, *etc.*

As to the supervisory tier, under the mandatory rule it is expressly stated that in public JSCs the supervisory tier should annually issue a report ensuring its transparency<sup>358</sup>. Under the mandatory rule, the report should cover the structure of the supervisory tier and assessment of various aspects of its operation<sup>359</sup>. Under EOD type rule the supervisory tiers of the private JSCs do not prepare such reports unless provided otherwise.

On a separate note, the Law on Accounting under the mandatory rule requires all medium<sup>360</sup> and big<sup>361</sup> enterprises regardless of its form to disclose on their web-site their audited financials<sup>362</sup> and report on corporate governance. Under EOD type rule medium enterprises may omit non-financial information in the report on corporate governance<sup>363</sup>.

As a result, we may observe that the Ukrainian law deployed at least in total 10 legal strategies to regulate disclosure rules in JSCs, among which:

1. 8 Mandatory rules;
2. 2 EOD type default rules;

### **Conclusions to the Chapter III**

1. Please see below a matrix representing legal strategies that govern the operation of plain vanilla JSCs in Ukraine:

	Mandatory	EOSD	EOD	MSD	MD	OSD	OD	Total
Establishing the corporate form								

<sup>357</sup> art.1.1(16<sup>1</sup>) of the Law on Securities

<sup>358</sup> para 1 art.51<sup>1</sup>.1 of the Law on JSCs

<sup>359</sup> para 2 art.51<sup>1</sup>.1 of the Law on JSCs

<sup>360</sup> Under the art.2.2 of the Law on Accounting enterprises are considered medium if at least two conditions are satisfied: assets book value exceeds EUR 4 mln., net sales exceed EUR 8 mln. or the enterprise employs more than 50 individuals

<sup>361</sup> Under the art.2.2 of the Law on Accounting enterprises are considered big if at least two conditions are satisfied: assets book value exceeds EUR 20 mln., net sales exceed EUR 40 mln. or the enterprise employs more than 250 individuals

<sup>362</sup> para 2 art.14.3 of the Law on Accounting

<sup>363</sup> art.10.7 of the Law on Accounting

Legal personality	7	0	0	0	0	0	0	7
Limited liability	3	0	0	0	0	0	0	3
Transferable shares	1	0	2	0	0	0	0	3
Delegated management	7	3	3	0	0	2	0	15
Investor ownership	1	0	0	0	0	3	0	4
Addressing the agency problems related to conflicts of interests between shareholders and management								
Appointment and removal rights	6	3	1	0	0	1	0	11
Decision rights	11	1	0	0	0	2	0	14
Due process type	32	6	4	0	0	3	1	46
Shareholder coordination	9	1	4	0	0	0	0	14
Trusteeship and Agent incentives	6	0	0	0	0	0	0	6
Legal constraints and affiliation rights	9	0	1	0	0	0	0	10
Disclosure rules	8	0	2	0	0	0	0	10
<b>Total</b>	100	14	17	0	0	11	1	143

## CONCLUSIONS

Indeed, corporate law has a long history. It has been shown that corporate law has been largely shaped by constant conflicts of interests between various constituencies. For instance, whereas up to the XIXth century the state played a central role in corporate law enjoying all sorts of privileges (veto on incorporation, prohibition to trade shares, monopoly to raise capital from the public, *etc.*), now the corporate law shifted to a more private realm whereby three (3) core actors are present: shareholders, management and third-party creditors.

Applying the functional method, it was shown that contemporary approach to define the contours of the corporate law amounts to two core functions:

1. Establishing of corporate form by supplying five (5) core features of the firm; and
2. Tackling conflict of interests that arise between three (3) core constituencies.

Categorization of legal rules based on “by nature of description of the rule” criterion plays essential role for corporate law from the functional standpoint. While Ukrainian scholarship suggests that there are only two types of legal rules based on the above criterion, the western scholars argue that imperative/dispositive dichotomy is insufficient to describe a given legal regime in a comprehensive manner. As a result, I found that one (1) type of mandatory rules exists and at least six (6) types of default rule.

I applied the above tools to the Ukrainian corporate legal framework and conducted functional analysis of the legal rules deployed by Ukrainian law to govern the core characteristics of legal entities and tackle conflicts of interests between participants/shareholders and management of the LLCs and JSCs and found the following.

In respect of LLCs Ukrainian law deployed at least the following number of legal rules:

1. 47 Mandatory rules;

2. 9 EOSD type default rules;
3. 3 EOD type default rules;
4. 2 MSD type default rules;
5. 1 MD type default rules;
6. 9 OSD type default rules;

In respect of JSCs Ukrainian law deployed at least the following number of legal rules:

7. 100 Mandatory rules;
8. 14 EOSD type default rules;
9. 17 EOD type default rules;
10. 11 OSD type default rules;
11. 1 OD type default rules;

Based on the conducted functional analysis I observed that, first, mandatory rules indeed prevail in Ukrainian corporate legal framework. To illustrate, as to LLCs the ratio of the number of mandatory legal rules to the number of default legal rules is approximately 1.96. In the case of JSCs, the ratio is 2.33. As a result, it appears that when designing the Ukrainian corporate legal framework, the Ukrainian legislators indeed prefer to undertake the more paternalistic approach rather than give some credit to private party autonomy.

Second, that the legal strategies aimed at governing the operation of the LLCs conveyed in a more structured manner as compared to the same legal strategies aimed at governing the operation of JSC. To illustrate, in the case of LLCs, altering rule usually followed the main rule at the end of the article. Whereas in the case of JSCs the altering rule may be located in a completely different place than the article. I suppose

Third, the operation of JSCs is more micro scaled. More specifically, the Law on JSCs and related legal acts elaborate in a much greater detail leaving practically no space for private party autonomy. This is related to useful when contemplating the corporate law reform. Namely, when reforming corporate law a much wider approach should be implemented in order to succeed with the contemplated changes.

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**ЗАЯВА**  
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**про оригінальність академічної роботи та самостійність її виконання**

Декларуючи свою відданість засадам академічної доброчесності й християнської етики праці, та відповідно до діючого «Положення про запобігання плагіату й коректне застосування цитат у навчальному процесі Українського Католицького Університету», цим посвідчую, що підготовлена мною на кафедрі теорії права та прав людини академічна робота “Юридичні норми в корпоративному праві: строгий патерналізм проти повної автономії (Legal Rules in Corporate Law: Stringent Paternalism vs Total Autonomy)” є **самостійним дослідженням і не містить елементів плагіату**. Зокрема, всі письмові запозичення з друкованих та електронних публікацій у підготовленій мною академічній роботі оформлені та мають відповідні покликання.

Водночас заявляю, що я ознайомлений/а з визначеною в діючому «Положенні про запобігання плагіату й коректне застосування цитат у навчальному процесі Українського Католицького Університету» дефініцією поняття «*плагіат*» як «оприлюднення, повністю або частково, чужого твору науки, літератури, мистецтва (ідеї, результатів дослідження, відкриття, раціоналізаторської пропозиції) під своїм іменем, а також відтворення у своїй самостійній письмовій роботі чи науковому дослідженні текстів інших авторів, що опубліковані в паперовому чи електронному вигляді, без відповідного покликання на їхнє джерело».

Я також усвідомлюю, що несу повну відповідальність за присутність в академічній роботі плагіату, і розумію всі негативні наслідки для власної репутації та репутації Університету в разі порушення мною норм академічної доброчесності. Я також визнаю слушність політики УКУ, яка передбачає, що виявлення плагіату в моїй академічній роботі може бути підставою для відрахування з числа студентів Університету.

*Дата* 16.12.2018

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