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Public Company: Corporate Governance in the Law of the Republic of Kazakhstan

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Abstract *.We consider the institution of a "public company", which existed in the legislation on joint-stock companies of the Republic of Kazakhstan from 2007 to mid-2018. A comparative legal analysis of the legislation and corporate practice of other countries in the article justifies the necessity of this legal institution for Kazakhstan. To justify maintaining the rules on public companies complying with the OECD principles is provided by the provisions of the Legal Policy Concept and the Address of the President of the Republic of Kazakhstan on strengthening the institution of "public corporations" and introducing the principles of corporate governance of the OECD. As a result of comparing the institution of public companies with other legal entities of public law in Kazakhstan, we come to the conclusion that the requirements for the latter are presented only in terms of observing the transparency of financial statements. Having considered by-laws of the Republic of Kazakhstan governing corporate relations in organizations with a predominant share of the state, it is concluded that the OECD principles are mandatory for all companies, regardless of ownership, and that the principles of corporate governance are not fixed at the level of by-laws, but at the level of laws.*

Keywords*: joint-stock company, public company, corporation, transparency, corporate governance, public interest organization*

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I. Introduction

On February 19, 2007, with a purpose to ensure transparency in the activities of joint-stock companies, the institution of a "public company" was introduced by article 4-1 of the Law of the Republic of Kazakhstan "On Joint-Stock Companies" No. 415-II (hereinafter referred to as the JSC Law). However, over the past 10 years, despite the approval of the State Standard describing the entire procedure, not a single public company has been registered. Not a single joint-stock company possessing all the features of a public company has applied to the authorized body for recognition of such; did not amend the Charter and didn't post it on the company's website, etc. And most importantly, there was no mass open stock for sale to anyone.

As a result, the aforementioned article was excluded from the JSC Law by the Law of the Republic of Kazakhstan dated July 02, 2018. Meanwhile, in developed jurisdictions public companies are one of the demanded institutions of the legal and economic structure both within states and at the international level because of their ability to attract investments to business.

For example, European company law already covers diverse company law matters including transparency, and it is still in the continuous process of harmonization that is driven by market forces (Hopt, 2019).

On the other side, as shown in the research of Dudycz (2019), a company that is becoming public during initial public offering (IPO) can influence investors' decision with extensive accounting information but after IPO only such information is not sufficient for investors to stay with the company, because pre-IPO financial results are not useful for forecasting future returns.

We can conclude that investors need more information about company to gain revenue on the stock market. Thereby company's transparency as the disclosure to all interested parties of the goals of an organization's activities, its bases, and fundamental decisions (Savchenko & Bukhtiarova, 2019) is crucial for development of investment activity. And this has to be reflected in the law since two main goals of public company law are the protection of persons, and the protection of the public interest (Hopt, 2019).

According to the OECD Principles of Corporate Governance (2015), relationships between all interested parties (stakeholders) are the subject of the corporate governance, the quality of which impacts the cost for corporations to access capital.

Meanwhile, the stock market of the Republic of Kazakhstan suffers from incomprehensible concepts and legal constructions that prevent attraction of savings of population (Kassenova, 2020). And there are still no desirable results (such as prosperous financial market and high flows of foreign investments) of the reforms in Kazakhstani corporate governance system (Temirbayev & Abakanov, 2019). As we will show later, requirements for public companies in Kazakhstan are presented only in terms of observing the transparency of financial statements, although, for example, the Shareholder Rights Directive (Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017) covers among other the identification of shareholders, the transparency of institutional shareholders, asset managers, and proxy advisors, transparency of related party transactions (Hopt, 2019).

The objective of our work is to consider issues of the concept and legal nature of public companies in order to determine how reasonable and relevant legal policies are the exclusion of public company rules from the legislation of the Republic of Kazakhstan.

II. Public nature of a joint stock company

Public companies, also called corporations, are the main subjects of corporate relations and corporate law as a branch of law and science. In Kazakhstan, corporate law has not been developed even as a branch of legislation. This explains the practical lack of scientific publications on public companies in domestic legal science, as well as a few works on corporate law in general. From the works of the last decade on general issues of corporate law, its subjects can be noted in the work of Suleimenov M. K. “Civil law and corporate relations: problems of theory and practice” (2013), Karagusova F. S. “Fundamentals of corporate law and corporate legislation of the Republic of Kazakhstan” (2011), Klimkina S. “Corporations and corporate law in Kazakhstan: what these concepts include” (2011), Isaykina D. “Corporate law: the scope of subjects” (2013) and some others. However, there are no publications on public corporations in Kazakhstan, except for articles

by Klimova (Klimova, 2019; One person company and public company, 2019).

The largest number of publications on corporate law in general and its individual institutes of the post-Soviet countries is available in the Russian Federation, where, since 2013, appropriate additions to civil law have been included and legal definitions have been introduced. But even here, fundamental research concerns mainly state-owned public corporations.

The etymological meaning of the concept "public" (lat. "publicus"), from which the word "public" came from, addressed to the multitude, to an unlimited circle of persons. In particular, definition of Ulpian on the signs of dividing the system of law into private and public is well-known (Sanfilippo, 2002).

In the 19th century, the term "public company" was enshrined in English law, which in the meaning of post-Soviet civil law refers to a joint-stock company, the main feature of which is the free movement of its shares on the stock market. Historically, the establishment of the first prototypes of joint-stock companies also belongs to the UK. The world famous British Crown "East India Company", founded in 1600 (Major, n.d.).

Following the example of England, neighboring European counties also created similar companies; they were not yet called a "public company", but they were crucial in strengthening the economic situation of Britain and contributed to its dominance in East Asia. At the same time, participants in trading companies, having invested heavily in long-distance and risky expeditions, in the event of a successful return, shared all the profits among themselves, leaving nothing for further expeditions. It was only in the second half of the XVII century that entrepreneurs, realizing the irrationality of such actions, began to distribute not all the income for one trip among themselves, but only a part of it. This achievement was, in our opinion, the prototype of modern dividends (Klimova, 2019).

We believe that the modern understanding of the openness of joint-stock companies as public companies has been officially fixed with the introduction of stock exchanges where shares are sold for an unlimited number of people. Based on the results of exchange trading, both buyers and sellers of shares can track the presence or absence of demand for shares in a particular company.

Thus, joint-stock companies are inherently designed “for the public”, i.e. are public organizations, since their authorized capital consists of contributions of the participants themselves, can be replenished only as a result of the issuance of new shares and their sale to as many people as possible. To keep the company active at the initial phase, contributions from participants may be sufficient. But for further successful activity and development and profit, it is the joint-stock company, by its legal nature, that can and must issue and sell shares in order to attract new funds. This property of joint-stock companies makes them public companies, in the sense of attracting a sufficiently large number of participants interested in the successful operation of the company.

The Public Limited Company (PLC), widespread in the UK and other countries, despite the obvious absence of the word “stock” in their name, are, in accordance with the laws of the member states of the Commonwealth of Independent States, including Kazakhstan, joint stock companies, since their authorized capital is divided into shares that are freely traded on the stock exchange. Companies Act (2006) in the United Kingdom further strengthened the requirements for public companies by incorporating European standards on the procedure for acquiring companies and ensuring transparency of their activities.

Kazakhstan historically was part of the Russian Empire since the 13th century. There from the second half of the 19th century analogues of joint-stock companies also began to be created, and they put shares into circulation. During the Soviet period, joint stock companies were not distributed as types of legal entities. The mass establishment of joint-stock companies, business partnerships in Kazakhstan, began only after the collapse of the USSR. The current JSC Law was adopted on May 13, 2003, and over the past period many amendments and additions have been made to it. One of these significant novelties was the introduction of the public company institution in 2007.

III. An impact of legal environment on public companies in the Republic of Kazakhstan

The basic principles of OECD corporate governance are transparency, publicity, openness, respect for the equality of shareholder rights, universal participation in decision-

making, control over governing bodies (OECD, 2015). In order to implement the above principles, Article 4-1 of the JSC Law enshrined the legal definition of a public company, which was constructed by indicating the following features:

1) placement of ordinary shares of the company in the unorganized and (or) organized securities markets, offering these shares to any interested person;

2) not less than 30% of the total number of placed ordinary shares of the company should belong to minority shareholders, each of them owning no more than 5% of ordinary shares of the company of the total number of placed ordinary shares of the company;

3) trading volume of ordinary shares of the company must comply with the requirements established by the National Bank of the Republic of Kazakhstan;

4) the company's shares should be on the list of the stock exchange operating in Kazakhstan, which has special (listing) requirements for securities and their issuers.

Moreover, the Charter of a public company should contain information on the existence of a corporate governance code; on the position of corporate secretary; on the availability of a corporate website; on the prohibition of the "golden share".

The procedure for obtaining the status of a public company was that the joint-stock company had to submit an application to the National Bank of the Republic of Kazakhstan in the form established by it, and the National Bank of the Republic of Kazakhstan had to make a decision on recognition of the company as a public company if there were grounds for it. However, a careful examination of the website of the National Bank of Kazakhstan itself (https://www.nationalbank.kz) did not reveal at least one case of submitting an application and issuing an act recognizing the applicant as a public company.

The legal policy of the Republic of Kazakhstan is aimed at achieving the goal of joining the top 50 or top 30 developed countries over the past decades. One of the tasks to achieve this goal has been repeatedly stated about the need to introduce transparency of business processes and the introduction of the institution of a public company was also aimed at achieving this goal. The Concept of the Legal Policy of the Republic of Kazakhstan states: "Issues of status of joint-stock companies require consideration, taking into account their legal nature and the complexity of the issues to be resolved, including in

the context of the so-called "public corporations" (Decree No. 858, 2009), therefore, the Concept for the Development of Corporate Legislation was developed (2011), a draft law was developed on introducing amendments and additions to some legislative acts of the Republic of Kazakhstan on corporate governance issues, which was never adopted.

The word "corporation" is completely absent in the JSC Law of the Republic of Kazakhstan, and one can come across the adjective "corporate" only a few times. This method of constructing the content of the JSC Law takes place in some other states, for example, in Russia, but there the law of a higher level, namely the Civil Code, contains many standards that regulate corporations and corporate relations in detail. The Civil Code of the Republic of Kazakhstan does not contain a single rule on corporations or corporate relations.

In Russia, public companies were introduced into the legislation only from January 09, 2014 (Federal Law No. 99-FZ, 2014). Despite this, almost all the relevant JSCs were officially re-registered there as public companies. Of the most well-known companies, on June 26, 2015, the Charter of the public joint-stock company "Gazprom" was published on the official website (Charter of the GAZPROM, 2015), and in 2018–"Lukoil" JSC (Charter and internal documents of PJSC LUKOIL, 2018) etc., and in Almaty, already in 2015, the Representative Office of "Zaporizhtransformator" Public JSC was opened (Charter and internal documents of Public Joint-Stock Company Zaporozhtransformator, n.d.).

In 2009, Standard & Poor's published an analysis of the "largest Kazakhstan public companies" (although, as we noted, not a single JSC was registered as a public company) and public interest organizations (Pastukhova et al., 2009). At the same time, the information transparency index of Kazakhstani companies amounted to 44%. This is an extremely low level in international comparison (in 2003 for the UK–71%, France–68%, Germany–56%, USA–70%, Japan–61%, Russia–40%, in 2008 for Russia–56%). Standard & Poor's explains the relatively low average transparency score in Kazakhstan companies mainly due to the lack of disclosure of information about operating activities, the rights of shareholders and shareholder procedures and the remuneration of members of senior management and boards of directors. When preparing annual reports, the audited companies indicated only the minimum information required by "public interest organizations" provided for by tax and financial laws. And in the "Samruk-Kazyna"

corporate group, the average indicator of information transparency was only 25%, which was due to lower disclosure requirements according to the legislation in force at that time (Pastukhova et al., 2009).

One of the shortcomings in 2009 was also a lack of transparency in the information on the remuneration of top managers. Inexperience and improper functioning of the boards of directors were also discussed in 2017 (Akhmetova, n.d.).

Despite the fact that not a single joint-stock company has been registered as a public company for 10 years, in fact, they have all the features of public companies and companies with state participation are subject to special legal regulation in order to comply with best corporate practices and create an attractive climate for investors. Consider the application in Kazakhstan of the OECD requirements for the placement of stocks of public companies among an unlimited range of persons.

So, in 2011, the so-called People's IPO Program was approved (Decree No. 1027, 2011)[3], aimed at offering citizens of the Republic of Kazakhstan shares companies' stocks whose activities are not very dependent on the situation on world commodity markets. The first state-owned company to issue common shares was Kaztransoil JSC in 2012, and then it was KEGOC JSC in 2014. Until recently, there was an announcement on the website of "Samruk-Kazyna" JSC on the presentation of five companies to the People's IPO in the period 2017-2019. However, in November 2015, this program was abolished, allegedly due to the creation of the Astana International Financial Center (Decree No. 395, 2016; Smayil, 2017).

The legislative improvement on legal entities that are subject to recognition by public companies was carried out mainly with respect to companies with state participation, and mainly at the by-law level. So, on May 17, 2007, the Model Code of Corporate Governance for JSCs with state participation (Order No. 86) was approved (valid as amended on November 1, 2016); on June 6, 2011, the Corporate Governance Assessment Rules for state-controlled JSCs were approved (Order No. 157); on November 5, 2012, the Corporate Governance Code of Samruk-Kazyna Sovereign Welfare Fund JSC was approved (Decree No. 1403); in 2013, the Comprehensive Work Plan for the

[3] It was repealed by: Decree of the Government of the Republic of Kazakhstan No. 395 (2016)

implementation of corporate governance standards of the OECD countries and further improvement of the investment business climate within the framework of the Customs Union was approved (Decree No. 643, 2013)[4].

The Comprehensive plan included amendments and addenda to the Model Code of Corporate Governance for JSCs with state participation; development of an order on the approval of the Rules for evaluating corporate governance in state-controlled JSCs; development of the Concept of the draft Law of the Republic of Kazakhstan "On Amendments and Additions to Some Legislative Acts of the Republic of Kazakhstan on Corporate Governance Issues", as well as annual monitoring of the implementation of corporate governance in JSCs with state participation in accordance with OECD standards.

However, these provisions were not implemented and on February 24, 2016, this plan was replaced by a Detailed Plan for Improving the Investment Climate in accordance with OECD Standards for 2016–2017 (Decree No. 103, 2016).

IV. Principles of corporate governance at the sub-legislative level

Despite the measures actively taken by the state to comply with OECD standards regarding the consolidation of the public nature of joint stock companies, the Law of July 07, 2018, article 4-1 of the JSC Law (on the institution of a "public company") was excluded (Law No. 166-VI ZRK, 2018).

Nevertheless, the key task is to make Kazakhstani companies attractive for large foreign investors–was to be implemented and on October 5, 2018 a new document was approved, which is the Model Corporate Governance Code in state-controlled JSCs, except of the Sovereing Welfare Fund (Order No. 21, 2018).

As an environment of trust, ethics, moral values and confidence, corporate governance offers a comprehensive approach to the management and control of companies, and the base of it consists of transparency, disclosure, accountability and integrity (Kinkhabwala & Gor, 2019). Gerasimov et al. (2018) notes that improvement of the existing mechanism of management is among top-priority factors of competitiveness of

[4] It ceased to be in force by: Decree of the Government of the Republic of Kazakhstan No. 103 (2016)

industrial companies.

The effect of creating such environment of trust with the help of corporate governance strengthening can be seen on the example of the Sovereign Wealth Fund "Samruk-Kazyna" JSC, the sole shareholder of which is the Government of the Republic of Kazakhstan. To attract investment, the Fund uses the placement of shares of its member companies on the stock exchange.

In October, 2014, the Board of Directors of "Samruk-Kazyna" JSC approved the transformation program one of the goals of which was to improve corporate code and introduce new modern standards of corporate governance, and one of the results of which was a steady growth of portfolio companies since 2016 (Zhussupova & El-Hodiri, 2018).

It should be recognized that the Model Corporate Governance Code (Order No. 21, 2018), as well as the Corporate governance code of the "Samruk-Kazyna" corporate group (hereinafter referred to as the Codes), do reflect some principles of corporate governance of the OECD.

However, we believe that such regulations should have been enshrined at the legislative, and not at the sub-legislative level, and not only for companies with state participation but also for all corporate organizations, regardless of ownership. Moreover, we agree with Mahmood & Alimanov (2018), that the existence of different business models requires different sets of corporate governance codes for different industries.

In the Codes, members of the board of directors are assigned such duties that are not included in the JSC Law: "to act in accordance with the requirements of the legislation of the Republic of Kazakhstan, the charter and internal documents of the company on the basis of awareness, *transparency, in the interests of the company and its shareholders"; "treat all shareholders fairly, make objective independent judgments on corporate matters"*; regulations and institutions such as the Ombudsman, fiduciary obligations, good faith and reasonableness have been introduced.

In Codes, unlike the Law, entire chapters are introduced entitled as "Principles of the Corporate Governance of the Company", then each of the principles is enshrined separately with a statement of its content. The basic principles of separation of powers are

enshrined; protecting the rights and interests of shareholders; effective management; principle of sustainable development; risk management principle, internal control and audit; the principle of regulation of corporate conflicts and conflicts of interests; the principle of transparency and objectivity of disclosing information on the activities of the Company; there is mandatory control of boards of directors over the implementation of the Codes, and monitoring is assigned to corporate secretaries, who must include reports on this in the annual report.

V. The specifics of the definition of a public interest organization the Republic of Kazakhstan

When discussing the reasons and consequences of the abolition of public companies in Kazakhstan, some experts explain that our legislation includes rules on public interest organizations and they are sufficient, because they also require transparency in doing business by compulsory provision of financial statements in accordance with international standards. Thus, the opinion about the synonymy of these concepts is quite widespread. In this regard, we consider the concept and content of the institution of "organization of public interest" and compare them with public companies.

The legal definition of the concept "public interest organization" is enshrined in subparagraph 7) of article 1 of the Law of the Republic of Kazakhstan "On Accounting and Financial Reporting" in the following way:

"Public interest organizations are financial organizations (except of legal entities whose sole activity is the organization of exchange operations with foreign currency), joint-stock companies (except of non-profit ones), subsoil user organizations (except organizations extracting common mineral resources), grain receiving enterprises and organizations in whose authorized capital there is a state share, as well as state enterprises based on the right of economic management" (Law No. 234, 2007).

Based on the legal definition of the concept "public interest organizations", we conclude that joint-stock companies are one of the types of public interest organizations, since most financial organizations, organizations of subsoil users and grain receiving

enterprises, in the authorized capital of which there is a state share, is created in the legal form of joint-stock companies. Moreover, the legislator classifies such organizations as state enterprises based on the right of economic management. Consequently, the subjective composition of public companies and organizations of public interest is completely not equivalent.

In paragraph 4 of Article 2 of the mentioned Law, we find the mandatory rule that public interest organizations are required to prepare financial statements in accordance with international standards. Among the other restrictions regarding public interest organizations, we will cite the following: transfer accounting and preparation of financial statements to an accounting or auditing organization or a professional accountant on an agreed basis; not allowed to conduct accounting in person (subparagraphs 3) and 4) of paragraph 2 of Article 8). The position of chief accountant of a public interest organization is assigned only to a professional accountant (Article 9); financial statements are signed by management and the chief accountant (Article 15), submitted to the depositary (clause 7 of Article 19), special forms of financial statements are approved for them (Law No. 143, 2015).

Thus, the main criterion for distinguishing public interest organizations in the legislation of Kazakhstan is the criterion of openness and compliance with international standards only of financial statements.

In the principles of corporate governance of the OECD, this criterion is only one of a set of other criteria for transparency/openness of business by companies. On this basis, we submit that public interest organizations are not the same as public companies in terms of compliance with OECD corporate governance principles.

Let us consider another concept containing the word “public” and referring to legal entities.

Thus, the concept “legal entities of public law” has been enshrined in the legal literature of the post-Soviet period, the contents of which are understood by different scholars in a different way (Barenboim et al., 2011; Karagussov, n.d.; Kurbatov, 2009; Vovk, 2010). In connection with the introduction of the concept “public company” into the legislation, some scholars suggested that the legal form of “public law company” should be meant as the “legal entity of public law”. We believe that the concept “legal entity of public

law" is specific; it is applicable to such organizations that perform public functions of the state and the whole society, for example, the National Bank of the Republic of Kazakhstan and similar organizations.

Georgia, being one of the post-Soviet republics, adopted the Law "On the Legal Entity of Public Law" on June 19, 2002, which states that such a person is an organization created on the basis of the relevant law, a decree of the president of the country or an administrative act of a government body, which independently carries out political, state, social, educational, cultural and other public activities under the state control (Khubua & Zarandia, n.d.).

A legal entity of public law may be vested with state-authority powers, has rights and obligations of a public nature. Moreover, the implementation of the relevant rights and obligations is mandatory; it is tightly controlled by the state and bears public responsibility. These are entities that exercise power; therefore joint stock companies cannot be equated with such organizations, since they do not have authority. In Kazakhstan, Sovereign Wealth Fund "Samruk-Kazyna" joint-stock company can be attributed to public legal entities, taking into account the peculiarities of its legal status as a national *managing* company.

Thus, the concepts "organization of public interest", "legal entity of public law" don't coincide in their content with the concept "public company".

The next aspect in solving problems to achieve the goal of the research is to consider the issue of whether the legal regulation of corporate organizations is consistent with the principles of corporate governance and best foreign practices only in relation to organizations with state participation.

Above, we have provided a rather large list of regulatory legal acts aimed at bringing the legislation in line with the principles of corporate governance of the OECD. However, as it was clearly stated, all these acts are aimed at legal regulation of corporate relations only in joint-stock companies with state participation. Meanwhile, Kazakhstan has a fairly large number of joint-stock companies without the state participation, namely private ones. So, if in 1999 in Kazakhstan 78 285 operating organizations with a private form of ownership were registered, then in 2018 there were already 243 475 companies (Ministry of National Economy of the RK, n.d.), among them the predominant number are

JSCs and LLP.

Analysis of the legislation of the European Union countries, Great Britain, and the USA shows that in these states the status of "public company" does not depend on membership in companies with state participation. The OECD Corporate Governance Principles also don't state that these principles apply only to companies with state participation. If this or that state sets the goal of attracting investors to invest in its economy, then the principles of transparency and financial reporting, accountability of top managers, equal rights of participants should apply to all corporations, and not just companies with state participation, as it is done in Kazakhstan.

It should be noted that in addition to the by-laws specified in the article, the requirement of information to be public is reflected in other legislative acts of the Republic of Kazakhstan. Thus, in Article 28 of the Entrepreneurial Code of the Republic of Kazakhstan "Protection of information constituting a commercial secret", it is provided that the list of information subject to mandatory publication or to mandatory notification to shareholders, participants in a business partnership, members of a production cooperative or other specific range of people is established by the laws of the Republic of Kazakhstan and the constituent documents of a business entity (paragraph 7) (Entrepreneurial Code, 2015). The disclosure requirements in Kazakhstan are also established by the legislative act on the securities market. But here again we are talking only about disclosing financial statement information.

VI. Conclusion

Thus, we believe that the exclusion of the institution of public companies from the joint stock legislation of the Republic of Kazakhstan is ahead of time and unreasonable. On the contrary, in order to comply with generally recognized international standards in the field of corporate relations and to create confidence among potential investors in case of investing in the economy of Kazakhstan, the institution of public companies should be strengthened; the authorized state body should really put into effect the requirements of the legislation on public companies.

Besides the requirements for the mandatory publication of annual financial statements, it should not only be introduced into the legislation but also in practice, require the publication of information about top managers, their income; introduce clear accountability and accountability of corporate governance bodies to corporate participants. Moreover, these requirements should be presented not only for companies with state participation but also for large private companies, especially those working in areas of social, strategic importance, etc. In addition, until now there are quite a lot of companies in Kazakhstan with state participation less than 50%, and they received the bulk of the authorized capital from the state almost free of charge.

So, not only public joint-stock companies but also all other corporations must comply with the principles of transparency in conducting business recognized in the international community, comply with the laws on the rights of minority shareholders and even debt holders, for which the legislator introduced the institutes of “major transactions” and transactions “with interest”; a different procedure for securing property rights, a different procedure for transactions, and different functions in protecting the rights of creditors and minority shareholders are enshrined.

The exclusion of the status of public companies for joint stock companies contradicts the legal policy of the Republic of Kazakhstan on the implementation of the principles of corporate governance of the OECD.

In this regard, it is necessary to improve the legislation governing the activities of not only joint-stock companies for the further successful development of the economy of our state, but also other corporations in terms of bringing domestic legislation in line with the principles and standards of corporate governance of the OECD. At the same time, the rules on the mandatory compliance with corporate governance principles should be enshrined not at the by-law, but at the legislative level.

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