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ADOPTION OF THE LAW OF UKRAINE “ON JOINT STOCK COMPANIES”

This NEWSLETTER has been issued to keep Vasil Kisil & Partners clients and other interested persons informed of the latest developments in the Ukrainian legislation and the firm news.

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On 22 October 2008 the President of Ukraine signed the Law “On Joint Stock Companies” (the “**JSC Law**”). The JSC Law was published in the official media on 29 October 2008 and will take effect upon six months as of the date of its publication (i.e. on **29 April 2009**), save for the provision related to the shares circulation in electronic form, which will become effective in 2 years.

The transitory provisions of the JSC Law require all joint stock companies (the “**JSCs**” and “**JSC**” respectively) established before the said Law became effective to revise their respective articles of association and by-laws in compliance with the Law’s requirements within 2 years. In case of JSC’s failure to do so, upon expiry of the said period any JSC shareholder will be entitled to file a suit for

conforming the JSC articles of association and by-laws (if any) to the JSC Law.

Moreover, if after the JSC Law became effective the shareholders meeting of a JSC resolved on changing the amount of the registered capital, denomination of shares or securities issue, such JSC shall bring its activities in compliance with the Law and revise the articles of association accordingly. If the shareholders’ meeting failed to approve such amendments, the State Securities and Stock Market Commission (the “**Commission**”) will be entitled to refuse the state registration of the shares issue of such JSC due to the reason that the JSC articles of association has not been amended as required.

Below please find a brief description of the most significant novelties of the JSC Law.



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Public and Private Joint Stock Companies

- JSC Law does not divide JSCs into two forms – closed and open JSCs, but provides for two types of JSCs – public and private. **A number of shareholders in private JSC** may not exceed **100 shareholders**.
- Public JSC shall obligatory go through the **listing procedure** and shall be kept with the register of at least one stock exchange. This requirement is not applicable to private JSCs, which shares may not be purchased / sold at stock exchange, save for sales through auctions at stock exchange.
- Public JSC may offer its shares either through public or private offering. Private JSC, in contrast, is permitted to allocate its shares solely through a private offering. If private JSC resolves to offer its shares through public offering, then its articles of association shall be amended as related to the type of such JSC. Conversion of private JSC into a public one will not be treated as transformation of a legal entity.
- JSC may be incorporated by one entity, notwithstanding the type of JSC. However, JSCs are expressly prohibited to be incorporated by one legal entity, which, in its turn, is incorporated by one or more entities having the same parent participant.

Shares and Shareholders' Preemptive Rights

- **Form of Share Issue.** All of JSC shares (notwithstanding the type of JSC) shall be issued as registered shares. Shares may exist in the **non-documentary (electronic) form** only (such requirement becomes effective in two years after the date official publication of JSC Law).
- **Preference Shares.** Preference shares are allowed to be issued in different classes. Any issues related to amount and precedence of dividends payable on preference shares, liquidation value of such shares, conversions of one class preference shares into another as well as into ordinary shares or other securities of such JSC shall be regulated by JSC articles of association.
- **Preemptive Rights.** The Law provides no preemptive right of shareholders in public JSC. **Preemptive right vested in shareholders of private JSC** and JSC itself to purchase the shares sold by other shareholders of such JSC **may be established by articles of association of private JSC, but it is not mandatory under the Law**. If such right is provided in the articles of association, then the procedure for its exercise as laid down in JSC Law shall be applied.

Share Offering

- **Initial Offer.** Shares of JSC, irrespective of its type, may be **initially offered** to a pre-defined group of persons, i.e. as **a private offering**.
- **Full Payment of JSC Shares.** One of the novelties of JSC Law is that the founders are required **to pay the nominal value of shares** acquired during establishment of JSC **in full before JSC foundation** meeting is held and results of such closed-type (private) offering are approved.
- **Value of Shares.** The **value of shares issued by JSC may not be lower than the market value** of such shares determined according to the rules set out by JSC Law, except for (i) initial offering, and (ii) share issue as a result of corporate merger, joining, spin-off and division of JSC. The same requirement shall be applicable to the sale of shares that have been redeemed by JSC.

Registered Capital of JSC

- **Registered Capital.** Requirements to the amount of JSC registered capital remained the same, i.e. **1250 minimum statutory monthly salary** applicable at the date of company's state registration¹. JSC Law makes no differences in requirements to the registered capital of public and private JSCs.

Shareholders Rights and Obligations (Shareholders Agreement)

- JSC articles of association may **provide for the option of entering into a shareholders agreement** which may stipulate for additional shareholders obligations and envisage liability for their non-performance. Please, note that the Law does not elaborate this provision and does not specify the procedure of conclusion of shareholders agreements as well as their matters of prevailing as to articles of association of JSC and the applicable laws of Ukraine.

¹ Minimum monthly salary set under the Ukrainian law is subject to periodical changes: (i) as from 1 April 2009 to 30 June 2009 – UAH 625 (approx. USD 81); (ii) as from 1 July 2009 to 30 September 2009 – UAH 630 (approx. USD 82); (iii) as from 1 October 2009 to 30 November 2009 – UAH 650 (approx. USD 84); (iv) as from 1 December 2009 – UAH 669 (approx. USD 87) (applicable UAH /USD exchange rate is UAH 7.7 per USD 1).

Shareholders' Meeting

- **Convening Shareholders' Meetings.** The new Law stipulates a shorter term for convening the shareholders' meetings which is now **30 calendar days**. The obligation to publish the notice of shareholders' meeting convocation in official media relates only to those JSCs, where the number of shareholders exceeds 1000 entities (i.e. holders of ordinary shares). Public JSC shall also notify the stock exchanges, where its shares are listed.
- **Quorum.** Under the new Law the quorum at shareholders' meeting is achieved when the holders of **no less than 60% of voting shares** registered to participate at the meeting (Law of Ukraine "On Business Companies" previously provided for the 60%+1 share principle of the quorum calculation).
- **Place of Meeting.** Shareholders' meeting shall be held in Ukraine **within the settlement (city, town, village) of JSC' registered address**.
- **Decision-Making at Shareholders Meeting.** Under the general rule, resolutions may be passed by a simple majority of voting shares held by shareholders registered to participate at shareholders meeting, except for some matters requiring **3/4 of all shareholders votes**.
- The Law stipulates that **private JSCs may change the decision-making procedure** in respect of certain matters: articles of association may provide for a greater number of votes required to pass a resolution as compared to the minimum number of votes set forth in JSC Law for such matters. The thresholds for making decisions in respect of some matters may not be changed (e.g. early revocation of company's officers, filing a claim against company's officers for indemnification of damages caused to the company, and filing a claim in case JSC Law requirements were not complied when entering into a material transaction).
- **Adjournment of shareholders meetings for a break.** JSC Law provides that **shareholders meetings may be adjourned for a break**. Such break may last till the following day. The total number of breaks for a meeting may not exceed three. The Law contains no requirement to perform new registration of shareholders thereafter.

Supervisory Board

- **Composition of Supervisory Board.** Under the new Law establishment of Supervisory Board is required for all JSCs where the number of **shareholders** (holders of ordinary shares) **equals to or exceeds 10**.
- JSC Law provides for a minimum number of Supervisory Board members depending on the number of JSC shareholders. For a JSC where the number of shareholders (holders of ordinary shares) equals to or exceeds 100, Supervisory Board shall be composed of not less than 5 persons, for a JSC where the number of shareholders



equals to or exceeds 1000 – not less than 7 persons, and where the number of shareholders equals to or exceeds 10 000 – not less than 9 persons.

- JSC Law contains no requirement for Supervisory Board members to be elected among JSC shareholders, as this has been earlier stipulated. However, the shareholders meeting are entitled to resolve that **Supervisory Board membership in private JSC may depend on the number of shares held by the shareholder**. In **public JSC** the Supervisory Board members shall be elected **by cumulative voting** only.
- Competence of Supervisory Board. **Supervisory Board** now has the **exclusive competence to elect and revoke the Chairman and members of JSC management**, as well as to suspend the Chairman from duty and to elect a acting Chairman. Also, quite the contrary to the previous requirements of law, election (replacement) of the registrar of shareholders and the depositary, as well as approval of contracts with the above entities now falls within the exclusive competence of Supervisory Board. The matters falling within the exclusive competence of Supervisory Board may be resolved at Shareholders Meeting, except otherwise expressly provided in JSC Law.

Protection of Minority Shareholders' Rights

- Proposing issues to the agenda of shareholders' meeting at the request of a minority shareholder. One or more shareholders in aggregate holding 5% or more of **ordinary shares** of JSC may propose **additional issues to be considered at the shareholders' meeting**.
- Notice of acquisition of a material stake in JSC. An entity intending to acquire a stake in JSC that taking into account JSC shares already held by such entity or its affiliates will constitute **10% of ordinary shares or more** should **deliver a 30 days notice to JSC** prior to the expected date of acquisition. The acquirer shall submit such information to the Commission and each stock exchange, where JSC shares are listed, as well as publish announcement in one of official media.
- Consequences of acquisition of a controlling stake in JSC. If the change of control over JSC occurred (when one or more affiliates acquired a stake in JSC of 50% and more), such entity **shall offer** to the remaining JSC shareholders **to sell their shares** (except where the said controlling stake is acquired in the course of privatization).
- **Mandatory buy-out of shares at the request of shareholders**. Any shareholder is entitled to demand a buy-out of its shares if such shareholder voted against the following matters considered at shareholders meeting:
 - (1) merger, joining, division, transformation, spin-off, change of JSC type from public into private;
 - (2) entry by JSC into a material transaction; and
 - (3) changing the amount of the registered capital of JSC.



- **Material transaction.** The Law introduces the concept of “**material transaction**”. A transaction is treated material if according to annual financial statements of JSC the **market value** of property or services, which are the **subject matter of the transaction, equals to or exceeds 10% of the JSC assets’ value**. Where the transaction value varies from 10% to 25%, JSC Supervisory Board may decide whether to proceed with such transaction or not. In case the transaction value exceeds 25% of the assets value of JSC, only Shareholders Meeting shall be entitled to make decision on the transaction (in the case of 25-50%, decision shall be made by simple majority of votes of shareholders present at the meeting; in the case of more than 50% - by an affirmative vote of $\frac{3}{4}$ of total number of shareholders).
- **Transaction with interested parties.** The Law also introduces the notion of “**transaction with interested parties**” and establishes criteria to an entity that may be treated as an interested party with respect to certain transaction executed by JSC. If a transaction falls within the established criteria, the preliminary approval of such transaction from JSC bodies shall be received under the procedure provided by Law. The key test for transaction with interested parties is the potential infringement of JSC interests. The failure to go through the approval procedure makes the interested party liable for indemnification of any damages caused to JSC. Furthermore, the transaction shall be voidable provided that the parties intentionally disregarded the need to obtain the said approval.
- **Market value.** In case of acquisition of controlling stake as well as in case of buy-out by JSC at the shareholder’s request, the purchase price for shares held by minority shareholders may not be lower than the market value determined according to the rules set out by JSC Law.

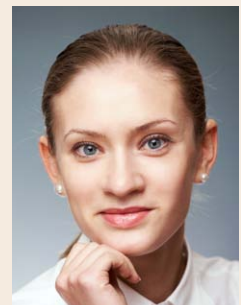
Please, do not hesitate to contact us for any further information on the topic of this Newsletter or to address your other legal service needs.



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Payment of Dividends

- According to the new Law, dividends of JSC (notwithstanding the type of JSC) can be paid **in cash only**. The Law also provides for instances where JSC may not resolve on pay out dividends and/or pay out dividends on either ordinary or preference shares of JSC.

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