
CORPORATE GOVERNANCE IN THE ENERGY SECTOR

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Original Article

**PRIORITIES FOR THE DEVELOPMENT OF CORPORATE GOVERNANCE
IN THE ENERGY INDUSTRY UNDER SANCTIONS****N.A. Akimov**Highland Legal Company, LLC, Moscow, Russian Federation
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Abstract. Currently, amid unprecedented economic sanctions imposed against Russian legal entities and individuals, the efficient corporate governance continues to be one of the most essential conditions for reducing social and economic risk and strengthening the overall level of business entities development across the various sectors of the domestic economy.

The economic sanctions involve the aggravation of corporate conflicts, the emergence of an economic imbalance of company members and a downgrade in the corporate governance quality.

The most acute consequences by imposing such measures may be suffered by companies dealing with international counterparties, as well as legal entities with foreign capital.

In such conditions, an appropriate level of corporate governance development is particularly important for ensuring the stable operation of companies in the energy industry and the development of the energy industry as a whole.

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The challenges of improving the corporate governance of companies in the energy industry are currently becoming more important for our state in the current geopolitical realities.

As rightly noted by I.I. Shuvalov, the Chairman of the State Development Corporation VEB.RF: “It is law, as the main regulator of social relations, that is designed to mitigate the impact of the detrimental consequences of the beginning crisis” [1].

Currently, the need for a legal study of the corporate governance of energy companies is extremely important, since the implementation of this institution ensures not only the sustainability of energy companies, but also promotes to the main operation objectives of such legal entities (key subjects of energy law, which, on their own, are solidly linked with common social interests and state objectives).

The research literature deservedly notes the corporate governance to be one of the key elements of economic efficiency, which includes comprehensive relations between a company’s management, its management board, shareholders, and other stakeholders [2].

In addition, please, note that legal relations in the energy industry are regulated, among other things, by implementing a special corporate regulation [3] suggesting to empower individual energy companies with special powers.

In the largest energy companies, corporate governance is most closely related to public administration, which, in itself, provides the peculiar legal status of such companies, as well as the need for additional protection of the interests of such companies and their members. [4]

The global changes faced by the economy of the Russian Federation at the beginning of 2022 create new environment significantly affecting the entire business and make us review a general approach to building the corporate governance in terms of the Russian companies.

All the above circumstances require immediate adoption of state measures to improve the legal regulation of corporate governance amid the current needs of the state and its economy. Such improvements will be efficiently able to achieve a favorable outcome in the corporation activities only if the interests of all parties to corporate legal relations are considered and if the balance

of interests between the state strategic objectives and the business entities' economic needs is taken into account.

As per the general analysis of the anti-crisis measures taken by the state aimed at protecting the rights of parties to corporate relations, it follows that the need for sustained support for the corporate governance institution is among the priorities of the state within the framework of its policy.

So, today a number of general legal measures have been adopted to support the development of corporate relations and parties to such legal relations, such as:

1. Federal Law No. 46-FZ, dated March 8, 2022, "On Amendments to Certain Legislative Acts of the Russian Federation" establishes a special rule, whereby a decrease in the net asset value of an LLC or JSC below the size of its authorized capital at the end of 2022 is not taken into account when making a decision on liquidation or reduction of the authorized capital of such a company.

2. The said Federal Law also establishes special conditions for the acquisition of its outstanding shares by a public joint-stock company.

As a general rule, such companies are entitled to acquire their outstanding shares up to and including August 31, 2022, if the following conditions are met in aggregate:

1) The acquired shares are admitted to on-exchange trading;

2) The shares are acquired during on-exchange trading on the basis of applications addressed to an unlimited number of trading participants;

3) The shares are acquired by a broker on behalf of a public joint-stock company; and

4) The Board of Directors (Supervisory Board) of a public joint-stock company has decided to acquire its outstanding shares in accordance with the requirements of this Article.

Information concerning the acquisition of its own shares by a public joint-stock company may not be disclosed in the form of a notice of a corporate event. After the acquisition of shares, it is sufficient to notify the Bank of Russia through the corresponding Personal Account.

3. Besides, this Federal Law has extended the period of Notice of the Annual General Shareholders' Meeting of a JSC in 2022, which is now at least 35 days before the date of the meeting specified therein.

At the same time, if, on the date of entry into force of the said Federal Law, the Board of Directors (Supervisory Board) of the company has already determined the date of the Annual General Meeting of Shareholders in 2022, which occurs within 35 days (excluding the

possibility of the company's compliance with the period set by Part 2 of Article 17 of Law No. 46-FZ in preparation for its holding), the requirements of Part 1(3) and Parts 2 to 5 of Article 17 of Law No. 46-FZ are not applicable to relations connected with the preparation for such an Annual General Meeting of Shareholders [4].

4. Federal Law No. 55-FZ, dated March 14, 2022, "On Amendments to Articles 6 and 7 of the Federal Law 'On Amendments to the Federal Law 'On the Central Bank of the Russian Federation (Bank of Russia)' and Certain Legislative Acts of the Russian Federation regarding the Specifics of Changing the Terms of a Credit Contract, Loan Agreement' and Article 21 of the Federal Law 'On Amendments to Certain Legislative Acts of the Russian Federation'" adopted a number of temporary measures aimed at protecting joint-stock companies from the risk of corporate conflicts in the current economic situation. The above measures tighten the requirements for the minimum number of shares required to perform certain actions within the framework of the implementation of corporate governance.

In particular, by the end of 2022, the minimum percentage of voting shares a shareholder or several shareholders may hold in order to be entitled to perform the following actions has been increased from 1% to 5%:

— Receive documents of the JSC;

— Challenge the transactions of the JSC in court, including transactions related to the violation of the extraordinary transaction settlement regime by the company's bodies;

— Apply to the court with a claim to the sole executive body for compensation for losses caused to the company; and

— Apply with a similar claim to a member of the board of directors, supervisory board, management board, directorate, management company or manager, i.e., to all persons who are part of the management body.

Those measures can be expected to effectively counteract certain ways of implementing the practice of corporate blackmail in the current economic situation.

5. In accordance with Article 2 of Federal Law No. 25-FZ dated February 25, 2022 "On Amendments to the Federal Law 'On Joint Stock Companies' and On the Suspension of Certain Provisions of Legislative Acts of the Russian Federation", any General Meeting of Members (Shareholders) can be held in absentia up to and including December 31, 2022.

The adoption of such a measure indicates the creation of temporary conditions for the implementation of corporate procedures and the exercise of corporate members' rights in a simplified mode.

6. Decree of the Russian Government No. 497 dated March 28, 2022 “On the Introduction of a Moratorium on Initiating Bankruptcy Cases on Applications Filed by Creditors” introduced a six-month moratorium on initiating bankruptcy cases on applications filed by creditors, with the exception of applications filed against developers under shared construction agreements, the objects of which are included in the list of problem objects.

It is obvious that the above measure is aimed at maintaining the economic stability of parties to the economic transaction, as well as not providing an additional period for fulfilling obligations to persons in financial difficulties, including as a result of the actions of unfriendly countries.

7. According to Clause 1 of Decree of the Russian Government No. 351 dated March 12, 2022 “On the 2022 Features of Disclosure and Provision of Information Subject to Disclosure and Provision in Accordance with the Requirements of the Federal Law ‘On Joint-Stock Companies’ and the Federal Law ‘On the Securities Market’, and On the Features of Disclosure of Insider Information in Accordance with the Requirements of the Federal Law ‘On Countering the Misuse of Insider Information and Market Manipulation’ and on Amendments to Certain Legislative Acts of the Russian Federation”, issuers of securities are entitled to disclose and/or provide information subject to disclosure (including prospectus) and/or provision in accordance with the requirements of the Federal Law “On Joint-Stock Companies” and the Federal Law “On the Securities Market” (regardless of the purposes and form of disclosure or provision of information), in a limited composition and/or volume, or refuse to disclose and/or provide the specified information if its disclosure and/or provision will lead, may lead, to the introduction of restrictive measures in relation to the issuer and/or other persons, including the introduction of new restrictive measures in relation to the person about whom the issuer discloses and/or provides information.

To specify those rights of issuers, the Bank of Russia issued Information Letter of the Bank of Russia No. IN-02-28/81 dated June 14, 2022 ‘On Limiting Disclosure of Information in the Securities Market’, [5] whereby issuers were recommended to use the granted right to restriction of disclosure and/or provision of information, taking into account the specific circumstances of the issuer’s activities, the possibility of negative consequences in connection with the restriction of information disclosure, in particular, the emergence of possible risks associated with the lack of information investors required for making their investment decisions.

8. The provisions of the law adopted by the State Duma of the Russian Federation “On Amendments to Certain Legislative Acts of the Russian Federation,

Recognizing Paragraph 6 of Part One of Article 7 of the Law of the Russian Federation “On State Secrets”, Suspension of Certain Provisions of Legislative Acts of the Russian Federation and Establishing the Features of Corporate Relations Regulation in 2022 and 2023” deserve special consideration. [5]

This Federal Law establishes the features of the legal regulation of corporate relations in 2022 and 2023. In particular:

1) The maximum period for holding the Annual General Meeting of Shareholders in 2022 has been increased by three months, until October, and the period for drawing up the minutes following the results of voting at the Annual General Meeting of Shareholders, as well as following the results of a meeting of the board of directors, has been increased from three to six business days;

2) Up to and including December 31, 2022, the possibility of operation of a truncated company’s Board of Directors is provided; i.e., it is allowed to exercise powers by a board of director whose strength is less than the one established by the corporate laws currently in force, the Articles of Association of the JSC or the Resolution of the General Meeting of Shareholders. However, the strength of this body, in any case, shall be at least three members.

This provision also allows to retain the powers of members of the Board of Directors until their re-election, even if more than half of the members have resigned from the specified body.

3) Up to and including December 31, 2023, a Board of Directors (Supervisory Board) of sanctioned business entities may not be formed, even if its formation is provided for by the laws of the Russian Federation or the constituent document of such a company. The functions of the Board of Directors (Supervisory Board) of a business entity, in this case, shall be performed by the collegial executive body of such a company (if any), and, in its absence, by the sole executive body of a business entity. However, not all the powers of the Board of Directors will be transferred to the specified persons. Issues related to the choice of priority areas of the company’s activity, increase in its authorized capital, and approval of the annual report, annual financial statements will be general meeting reserved matters.

If such a company requires any written directive of the Government of the Russian Federation or an authorized executive body of the Russian Federation, those directives shall also be sent to the collegial executive body of the JSC (if any) or the sole executive body of the JSC.

Considering the specifics of measures to support the development of corporate governance in the energy industry, the Anti-Crisis Plan for the Fuel and Energy Complex sent by the Ministry of Energy to the Russian Government in March 2022 shall be noted.

The corporate legal part of this plan suggests that the state-run companies in the energy industry, as a matter of priority, be allowed to direct profits for 2021 to the implementation of investment programs without paying dividends.

It should be especially noted that in order to ensure the energy security of the Russian Federation, a number of regulations have been adopted containing specific corporate governance rules for individual (newly incorporated) legal entities.

In particular, Executive Order of the President of the Russian Federation No. 416 dated June 30, 2022 "On the Application of Special Economic Measures in the Fuel and Energy Complex in Connection with the Unfriendly Actions of Certain Foreign States and International Organizations" incorporates a Russian limited liability company, to which, on the basis of this Executive Order, all rights and obligations of Sakhalin Energy Investment Company Ltd. shall be transferred.

The procedure for such a company incorporation shall be determined by the Government of the Russian Federation, and its authorized capital shall be distributed between Gazprom Sakhalin Holding LLC (in proportion to the number of shares it owns in the authorized capital of Sakhalin Energy Investment Company Ltd.) and the newly incorporated company (in proportion to the number of shares in the authorized capital of Sakhalin Energy Investment Company Ltd. owned by other shareholders).

The Russian Government shall approve the Articles of Association of the company, and also elect the current or last appointed head of the Russian branch of the Company as the manager of the company, who performs the functions of the sole executive body of the company from the date of the company's incorporation until the date the sole executive body of the company is elected.

Thus, it can be concluded that at present the state provides substantial support to ensure stable implementation of corporate relations in general and corporate governance in particular.

Despite the timeliness of the introduction of the above support measures, it seems appropriate to consider the creation of additional legal conditions to support the development of corporate governance in the energy industry.

Current economic conditions often require corporate managers to increase their overall level of initiative in their activities and to make decisions that involve an increased level of risk.

Under such circumstances, persons who are members of the governing bodies of the corporation must

be properly protected from threaten claims from interested parties, including claims related to losses arising from the commission of certain actions by managers that may be caused, among other things, by restrictive measures imposed on the company.

In order to ensure proper protection of the rights of persons who are members of the management bodies of energy companies, it is proposed to consider the issue of state support for the introduction into the activities of energy companies of the practice of directors' liability insurance (the so-called Director's and Officer's Liability, D&O insurance), which covers the expenses of directors and officers, as well as other losses arising in connection with erroneous actions of managers.

Such a measure can help stimulate the activities of key executives of energy companies in the exercise of their powers in the context of the global transformation of the domestic energy industry. Besides, the introduction of this practice may be especially relevant for energy companies that have fallen under sanctions.

Under the current conditions, the development of local regulation is also of particular importance for ensuring timely legal response of companies to emerging circumstances in the face of external pressure.

For example, in conditions of restrictions on the supply of imported technological equipment, the issue of unifying the requirements of local regulations of energy companies regulating legal relations in procurement also requires timely consideration.

Such unification will help simplify the mechanism for conducting competitive procedures and speed up market access for individual domestic suppliers.

The activities of energy companies, as a rule, have an impact on a fairly wide range of subjects, while a significant part of such companies form groups and holdings with numerous subsidiaries and dependent companies.

In order to optimize the activities of such structures, it is also advisable to consider the issue of clarifying the regulation of the procedure for approving transactions made within the same group of energy companies, as well as considering the issue of temporarily easing the requirements for making individual transactions by companies that fell under the sanctions of unfriendly states.

Summing up the results of this analysis, it should be noted that the development of effective corporate governance in the current conditions requires additional comprehensive legal and economic studies for timely response to external circumstances and the development of optimal mechanisms to reduce the level of adverse consequences for the domestic economy.

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