

# PROBLEMS AND TASKS OF LEGAL REGULATION OF CORPORATE MANAGEMENT IN COMPANIES WITH STATE PARTICIPATION IN THE ENERGY SECTOR

DOI 10.18572/2410-4396-2020-1-58-63



**Victoriya V. Romanova**

LL.D.

Head of the Energy Law Department

of the Kutafin Moscow State Law University (MSAL)

Director of the Energy Law Center

of the Saint Petersburg State University of Economic (SPbSUE)

■ [energylawdep@msal.ru](mailto:energylawdep@msal.ru)

*There is still no single unified act at the federal law level regulating relations arising in corporate management of companies with state participation. Specific federal laws for example in energy sphere, contain specific provisions establishing, in particular, requirements for the number and procedure of sale of shares of the state as a shareholder, based on examples from the energy sector. Although many legal regulation problems of companies with state participation have been researched by legal scholars, issues relating to corporate management companies with state participation, forms and procedure of issue of shareholders' binding instructions, including those of the government, remain actual. Corporate management experts give their attention to these problems.*

*The conducted legal research revealed gaps and inconsistencies in legal regulation of corporate management in companies with state participation. Strategic value of many companies with state participation, social goals these companies are to achieve are dictated by the need for both state funding of their businesses and proper control over allocation of these funds.*

*However, there are still no systematized enactments regulating activities of companies with state participation, no unified principles of conducting their activities, no approaches to assessment of companies with state participation activities considering their industry-specific characteristics, including the for proper energy infrastructure components, upgrade, new facilities construction. The issue of the procedure and deadlines for issuing binding instructions of the government as a shareholder for voting by representatives in management bodies of joint-stock companies, responsibility of government representatives as shareholders in management bodies of joint-stock companies. The author proposes options for unification of provisions regulating activities of companies with state participation, ways to clarify the procedure for issue of binding instructions by the state as a shareholder during voting in management bodies, to delineate responsibilities of officials preparing binding instructions and representatives.*

**Keywords:** *energy law, energy legislation, special aspects of corporate management in the energy sector; concept of obligatory instructions for representative of a shareholder; responsibility of representatives of the state as a shareholder.*

The public sector retains a large share of the Russian economy, major companies with state participation exist in 9 spheres, most of them function in the oil or oil and gas industry (7), banking (5) and machine engineering (4). [1]

According to the National Report on Corporate Governance, companies with state participation have a significant influence on the country's economy, dictating the need to ensure an adequate level of corporate governance in them. [2]

Although many legal regulation problems of companies with state participation have been researched by legal scholars, explored in legal studies by such scholars as V.K. Andreyev, E.P. Gubin, V.V. Laptev, V.A. Laptev, O.A. Markarova, V.F. Popondopulo, I.S. Shitkina, etc., issues relating to corporate management in companies with state participation, forms and procedure of issue of shareholders' binding instructions, including those of the government, remain urgent. Corporate management experts give their attention to these problems. [3]

An expert panel held on January 29, 2019, in the Institute for Economics of the Russian Academy of Sciences revealed the following problems of corporate management of companies with state participation: (1) low economic effectiveness of companies with state participation; (2) risks of misuse and withdrawal of assets by the management and unscrupulous government representatives; (3) lack of insights into dynamics of companies with state participation' economic performance; (4) lack of insights into the impact of participation of independent professional directors on economic performance of companies with state participation. [4] The report of the National Association of Corporate Directors names the following corporate management problems: reduced scope of disclosed information; lack of understanding of the role of the board of directors as the main control mechanism, optionality of inspection committees in non-public joint-stock companies. [5]

The objectives of the Russian State Program for Federal Property Management [6] include the need to increase effectiveness and quality

of management of companies with state participation. This is planned to be achieved by implementing mechanisms to evaluate quality of corporate management of companies with state participation by the federal government agency in cooperation with professional public associations, implementing elements of leading-edge corporate legislation; improving quality of corporate management in companies with state participation according to international equivalents; optimization of the corporate structure; gradual transition from the institution of directives due to increased liability of directors for making decisions or failure to achieve the established performance, insurance coverage of their liability.

These issues became the subject of legal studies within scientific research assigned by Gazprom, PJSC, for the Energy Law Center of the Saint Petersburg State University of Economics, as well as the subject of discussion at the corresponding panels and seminars. [7]

Requirements for the number of state-owned shares in individual companies are established by federal laws, Decrees of the President of the Russian Federation.

Regulations on relations in corporate governance, including those in companies with state participation, are provided in the Civil Code of the Russian Federation, the Federal Law on Joint-Stock Companies, the Federal Law on Privatization of State and Municipal Property.

There is still no single, unified act at the federal law level regulating relations arising in corporate management of companies with state participation.

Industry-specific federal laws contain specific provisions establishing, in particular, requirements for the number of shares to be sold and procedure for the sale of shares of the state as a shareholder, based on examples from the energy sector.

According to Article 15 of the Federal Law on Gas Supply in the Russian Federation, the total equity share of the Unified Gas Supply System owner company owned by the Russian Federation and joint-stock companies more than 50% of shares of which are owned by the

Russian Federation cannot be less than 50% of the entire equity stock of the Unified Gas Supply System owner plus one share. Such equity shares can be sold or otherwise disposed of under the federal law. This requirement pertains to the Unified Gas Supply System owner.

As per Article 8 Clause 2 of the Federal Law on Electric Power Industry, the organization managing the unified national (Russian) electric power network is an open joint-stock company. Russia's share in the authorized capital of the organization managing the unified national (Russian) electric power network during reformation of Russian Open Joint-Stock Company for Power and Electrification Unified Energy System of Russia cannot be less than 52%. Upon completion of the reformation, Russia's control over the organization managing the unified national (Russian) electric power network is performed by direct or indirect ownership of at least 50% of shares in its authorized capital plus one voting share.

According to Article 12 Clause 3 of the Federal Law on Electric Power Industry, the system operator is an open joint-stock company. Russia's share in the authorized capital of the system operator during reformation of Russian Open Joint-Stock Company for Power and Electrification Unified Energy System of Russia cannot be less than 52%. Russia's share should be increased to 100% in the authorized capital of the system operator by means stipulated by the laws of the Russian Federation before the reformation is completed.

Specific legal regulation is in place for joint-stock companies in the nuclear power generation industry under the Federal Law on Aspects of Management and Allocation of Property and Shares of Companies Conducting Business in the Field of Nuclear Power Use, and on Amendments to Specific Laws of the Russian Federation. According to Article 3 Clause 13 of this law, the founder of the parent joint-stock company is the Russian Federation. According to Article 4 Clause 18 of this law, all shares of the parent joint-stock company are owned by the federal government or by Rosatom State Nuclear Energy Corporation. Selling or otherwise alienating, pledging or

otherwise disposing of shares of the parent joint-stock company owned by the federal government or by Rosatom State Nuclear Energy Corporation shall be performed on the basis of the federal law, except for transfer to Rosatom State Nuclear Energy Corporation as an asset contribution by the Russian Federation under a resolution of the President of the Russian Federation.

For some companies, provisions on the government's share are contained in Decrees of the President of the Russian Federation.

According to Clause 1 of Decree of the President of the Russian Federation No. 188 on Increasing the Authorized Capital of Public Joint-Stock Company Federal Hydroelectricity Company RusHydro dated May 3, 2018, Russia's share in the authorized capital of this joint-stock company should be at least 60.56%.

According to Clause 3 of Decree of the President of the Russian Federation No. 71 on Development of Public Joint-Stock Company Transneft dated February 18, 2017, Russia's share in its authorized capital should be not less than 75% plus one share with 100% of this joint-stock company's equity stock in federal ownership.

Specific legal regulation is in place for joint-stock companies in the nuclear industry under the Federal Law on Aspects of Management and Allocation of Property and Shares of Companies Conducting Business in the Field of Nuclear Power Use, and on Amendments to Specific Laws of the Russian Federation.

At the subordinate legislation level, regulations on the procedure for participation of the government in companies with state participation as a shareholder are provided in Decree of the Government of the Russian Federation No. 738 dated December 3, 2004, On Management of Federally Owned Shares of Joint-Stock Companies and Use of the Special Right of the Russian Federation to Participate in Management of Joint-Stock Companies ("Golden Share").

This regulation contains specific requirements for written directives according to which the government representative votes at the general meeting and the meeting of the board

of directors of these joint-stock companies. However, as representatives of energy companies point out, directives come accompanied by guidelines with unclear development and adoption procedures, and are insufficiently elaborated from the legal point of view.

Therefore, legal research on Legal Regulation of corporate management in predominantly companies with state participation seems well-timed and pertinent.

The conducted legal research revealed gaps and inconsistencies in legal regulation of corporate management in companies with state participation.

Strategic value of many companies with state participation, social goals these companies are to achieve are dictated by the need for both state funding of their businesses and proper control over allocation of these funds.

However, there are still no systematized enactments regulating activities of companies with state participation, no unified principles of conducting their activities, no approaches to assessment of companies with state participation` activities considering their industry-specific characteristics, including the need for proper energy infrastructure components, upgrade, new facilities construction.

General problems of legal regulation for both national and foreign legislation include uncertainty regarding the form of binding instructions of a shareholder, including the government, as well as issues of shareholder representative`s liability in case of presence of a binding instruction of the shareholder, including the government.

It seems reasonable to include provisions on the responsibility of government officials adopting directives, including that for timely publication of these directives, into legal acts. We should dwell on the issue of responsibility of representatives in joint-stock company management bodies. Closer attention should be paid to Article 71 Clause 6 of the Federal Law on Joint-Stock Companies: representatives of the state or a municipal entity in the board of directors (supervisory board) of the company are liable along with other members of the company`s board of directors

(supervisory board). However, it should be noted that the legislator does not distinguish between liability of representatives and that of officials adopting binding instructions for voting.

It appears that, if a member of the board of directors in fact only voices the shareholder`s instruction as stipulated by the power of attorney, the liability for damage to the population caused by such decisions should be borne by those who determine the position of the state as a shareholder.

Considering that the government includes gradual abolishment of the directives institution into corporate management improvement tasks, it also seems reasonable to raise the issue of delineation of liability for damage to the population and shareholders between state authorities, officials of state authorities until a decision is made to stop using the institution of directives for representatives.

Gaps in the current regulation also include inconsistencies in determination of dominant participation of a certain shareholder, including the government, in terms of the number of representatives of the government, other shareholders with dominant participation in companies of strategic importance.

When unification provisions on activities of companies with state participation at the national level, several options can be considered: (1) Unification of federal law provisions regulating the creation, activities, corporate management, termination of companies with state participation regardless of industrial profile; (2) Unification of federal law provisions regulating the creation, activities, corporate management, termination of companies with state participation in specific energy sectors. There are examples of unification of provisions for some energy sectors: for instance, Federal Law No. 256-Φ3 on Safety of Fuel and Energy Complex Facilities dated July 21, 2011; (3) Unification of federal law provisions regulating the creation, activities, corporate management, liquidation of companies with state participation in a specific energy sector.

However, considering an example of legal regulation of corporate management in the nuclear energy industry, sector-specific unification can be performed in specific industries by adding, when necessary, corresponding chapters of effective federal laws, for example, the Federal Law on Gas Supply in the Russian Federation.

At the international level, several options can also be recommended for unification of provisions on corporate governance in companies with state participation.

Unified provisions can be established in a multilateral international treaty, a bilateral international treaty, including during implementation of specific projects.

It should be noted that primary objectives of international legal defense of interests of Russian fuel and energy complex companies under the Energy Safety Doctrine of the Russian Federation include development of integration within the Eurasian Economic Union and the Commonwealth of Independent States, strengthening partnership in the energy sector under the programs of BRICS, Shanghai Cooperation Organization, promoting cooperation with foreign countries within the Gas Exporting Countries Forum, the Organization of the Petroleum Exporting Countries and other international organizations. The Energy Safety Doctrine of the Russian Federation also sets a task to improve foreign policy instruments and mechanisms of interaction with major industry specific international organizations and global energy markets players for ensuring stable functioning of these markets.

In this regard, it seems reasonable to raise the issue of unification of provisions on corporate management in companies with state participation within integration associations.

Such unification can be conducted by developing international treaties between member states of these international organizations, including under specific projects. Such treaties should establish a unified conceptual framework, procedures for disposition of shares, decision-making, including by governments as shareholders, provisions on liability of

authorized bodies and officials for losses or loss of profits incurred by the company. One example of an industry-specific intergovernmental agreement entered into for implementation of an international project and containing, among other things, provisions on corporate governance is the Agreement Between the Government of the Russian Federation and the Government of the Republic of Turkey on Cooperation in Construction and Operation of a Nuclear Power Plant at the Akkuyu Site in the Republic of Turkey. It was ratified by Federal Law No. 323-Φ3 dated November 29, 2010. Article 5 of the Agreement contains provisions on corporate management of the design company during nuclear power plant construction at the Akkuyu site responsible for risk insurance covering the investment and Project operation periods. It seems that such unification can be useful for implementation of other international energy projects.

We should also elaborate on the following issues that could be resolved at the level of subordinate laws, including, but not limited to issues relating to deadlines for submission of binding instructions from the shareholder, including the government, to the joint-stock company. Decree of the Government of the Russian Federation No. 738 dated December 3, 2004, does not state specific deadlines for submission of directives to the company. Therefore, it seems reasonable to include requirements for when directives should be received by the company.

We should also dwell on issues relating to the format of directives and allocation of powers of state bodies.

According to Clause 20(2) of the Regulation on Management of Federally Owned Shares of Joint-Stock Companies and Use of the Special Right of the Russian Federation to Participate in Management of Joint-Stock Companies (“Golden Share”), draft directives for the representatives of the Russian Federation in the board of directors prepared in accordance with Clauses 17 through 19 thereof are submitted by the Ministry of Economic Development of the Russian Federation to the Government of the

Russian Federation. Decree of the Government of the Russian Federation No. 1870-p dated August 30, 2017, establishes industry-specific ministries the approval of which the Federal Agency for State Property Management needs to exercise shareholder rights. Therefore, it seems reasonable to include provisions on

allocation of responsibilities between authorities and officials determining the stance of the state as a shareholder into federal laws.

The proposals provided herein can be further used in legislative activity for improvement of legal regulation of activities of state-owned energy companies. ■

#### References

1. Data of the Analytical Center of the Government of the Russian Federation. Public Sector in the Russian Economy // Bulletin on Competition Development. 2019. No. 25. URL: <http://ac.gov.ru/files/publication/a/21642.pdf>.
2. National Report on Corporate Governance. Issue X / Publishing editor S. Porshakov; The report was prepared by: A. Timoshenko, E. Chumakova. Moscow, 2018. URL: [http://www.interros.ru/upload/video/NSKU\\_2018.pdf](http://www.interros.ru/upload/video/NSKU_2018.pdf).
3. Materials for the Report at the I Expert Panel / Speaker A.A. Voronin. Moscow, 2019. URL: [https://inecon.org/docs/2019/Voronin\\_Presentation\\_29012019.pdf](https://inecon.org/docs/2019/Voronin_Presentation_29012019.pdf).
4. A.A. Gogol. Corporate Governance Trends 2018 / A.A. Gogol, N.V. Starchenko. Moscow : the Institute for Economics of the Russian Academy of Sciences, 2019. URL: [https://inecon.org/docs/2019/Starchenko\\_presentation\\_29012019.pdf](https://inecon.org/docs/2019/Starchenko_presentation_29012019.pdf).
5. A.A. Gogol. Corporate Governance Trends 2018 / A.A. Gogol, N.V. Starchenko. Moscow : the Institute for Economics of the Russian Academy of Sciences, 2019. URL: [https://inecon.org/docs/2019/Starchenko\\_presentation\\_29012019.pdf](https://inecon.org/docs/2019/Starchenko_presentation_29012019.pdf).
6. Decree of the Government of the Russian Federation No. 327 on Approval of the Russian State Federal Property Management Program dated April 15, 2014 (as amended by Decree of the Government of the Russian Federation No. 352-20 dated March 29, 2019 // Official Web Portal of Legal Information. URL: <http://www.pravo.gov.ru>.
7. ROSSETI. URL: [http://www.rosseti.ru/press/news/index.php?ELEMENT\\_ID=36566](http://www.rosseti.ru/press/news/index.php?ELEMENT_ID=36566); Series of International Events in the Energy Law Center. URL: <https://unecon.ru/info/cikl-mezhdunarodnyh-meropriyatij-v-centre-energeticheskogo-prava-0>