Ukrainian Corporate Law: Model for Others, or in Need of a Model?

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Urging company law reforms in these geopolitically turbulent and oftentimes humanitarian disastrous times may well appear quite as fiddling while Rome burns. Yet it is neither just author's own nor this Journal's inherent bias in favour of magnifying the significance of company law regardless of any existing circumstances. There are well-founded arguments to support the claim of the pivotal role of an efficient legal framework for business organizations. Not only do these arguments remain valid today, but also they actually gain in persuasiveness if seen from the angle of political economy and the history of Ukrainian socio-economic transformation, with all its ups and downs. It is hardly deniable that widespread phenomena such as uncontrolled corporate raiding, appropriation of business opportunities, large-scale extraction of private benefits of control, have all propelled the raise of mighty oligarchs while in turn the political influence of the new rich has repeatedly brought about stalemates to the law reform endeavours. The ill-advised mass privatization programme resulted in the emergence of a large population of dispersed, non-sophisticated shareholders, whereby the aggregated amount of assets exposed to the risk of illicit appropriation dramatically increased. The handful of cases that went up the European Court of Human Rights,[1] on counts of violation of property rights or access to justice, reveal just a tip of the iceberg. Consequently, many of the deficits that marked social, political and economic development of Ukraine over the last two and a half decades are at least partially attributable to the shortcomings of the legal and institutional framework for business associations, large and small alike.

Company law reform in a transitional economy has been a catchy and indeed quite a rewarding topic for scholars and policy makers, particularly those taking the western-angle approach. It nicely allows every accommodating and good-faithed expert to resort to some of the standby keywords. Among the evergreen phrases some enjoy particular ubiquity: the emphasis of pivotal role of organizational law for the economic development, the significance of corporate governance for the strengthening of capital markets, the efficiency of investor protection as a *sine qua non* for innovation and growth, and – last but not least – the essentiality of functioning law enforcement to sustain all the above phrases as valid concepts not just on books but also in the economic reality of the country. To make sure, there is nothing wrong with these emphases and they all seem to encounter broad acceptance. However, what causes some confusion is a striking discrepancy between the apparently unanimous conviction of the weight, necessity, and urgency of the reforms on the one hand, and the actual slow pace, if not reluctance towards the reform process on the other. Even against the background of peer jurisdictions assembled within the Commonwealth of Independent States, such as e.g., Russia, Armenia, Moldova or Kazakhstan, where comprehensive company law enhancements took place throughout the 1990s, Ukraine has long proved a straggler down the reform road. It wasn't until 2008 that Ukraine eventually caught up through the adoption of a modern legislation on joint-stock companies, with a comparable feat for private limited liability companies still outstanding, though long overdue. What is more, the notorious conflicts of ill-harmonized pieces of legislation, in particular the Civil Code and the Economic Code, both of 2004, but also the old Law on Commercial Companies of 1991, all covering some aspects of company law, lead to overlaps and ambiguities. These deficits continue to trouble the economy, in spite of a remarkable effort by international agencies such as the International Monetary Fund (IMF), Organisation for Economic Co-operation and Development (OECD), the World Bank, the European Bank for Reconstruction and Development (EBRD), as well as by foreign donors providing dedicated assistance programmes under the aegis of *inter alia* United States Agency for

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1 E.g., Judgment of the ECHR of 25 Jul. 2002 – '*Sovtransavto Holding v. Ukraine*', (Application No. 48553/99); Judgment of the ECHR of 14 Sep. 2009 – '*Kooperativ Kakhovskiy-5 v. Ukraine*' (Application No. 20728/04); Judgment of the ECHR of 8 Mar. 2012 – '*Agrokompleks v. Ukraine*', (Application No. 23465/03).

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International Development (USAID), Europe Aid, European Neighbourhood and Partnership Instrument (ENPI) and some others.

Political economists have attempted to explain patterns of regulatory change by the so-called 'veto player theory', developed as a general concept by George Tsebelis,[2] and specifically applied to the Ukrainian company law reform trajectory by Rilka Dragneva and Antoaneta Dimitrova.[3] The latter authors have convincingly demonstrated that in spite of a constant external input, the actual trigger of modernization effort has remained predominantly internal. It has been largely the interplay of political factors and shifting interests consequent upon power transfers that entailed changes in attitudes towards law reform, in particular with regard to the enhancement of investor protection.

To do justice to the state of affairs, it needs to be acknowledged that the aforementioned Law on Joint-Stock Companies of 2008 largely does implement the so-called 'self-enforcing paradigm',[4] that is particularly well suited to function under the conditions typical of a country whose institutions, specifically judiciary and regulators, are still in the process of development. In some instances the 2008 Act is ahead of the EU standards, e.g., with regard to the rules on related party transactions, already in place in Ukraine, but still subject to discussion at the EU level (cf. the proposed revisions to the SRD-Directive).

Now, with the signing of the Ukraine-EU Association Agreement (ratified on 16 September 2014), the strive for adoption of a modern company law framework in Ukraine has been backed by a legal obligation under the international law. According to Annexes XXXIV, XXXV and XXXVI of the AA, Ukraine is to undertake, with a specified timeframe, a gradual approximation of its legislation to the EU Acquis in the areas of company law, corporate governance, accounting and auditing. A set of recommendations for approximation measures has been elaborated under the aegis of the EU Delegation to Ukraine and presented in December 2014.[5] Ukrainian Bar Association along with industry organizations and research centres have played an active role in the development of policy guidelines, reform recommendations and draft acts. The alignment process seems to have been accelerated by these developments. Following a series of recent legislative amendments of various weight, briefly presented by Ivan Romashchenko elsewhere in this ECL Issue,[6] in April 2015 *Verkhovna Rada* adopted a new Law No. 289-VIII on Amendments to Some Legislative Acts of Ukraine relating to Investors' Rights Protection. Among other changes, the new law mandates the appointment of independent directors and further enhances the rules on related party transactions. It also introduces, along with a favourable cost rule, the long awaited derivative action to allow the minority shareholders to sue for damages in case of directors' or other parties' wrongdoing. Moreover, the reform envisages procedures to invalidate abusive transactions carried out by corporate officers and to claim back benefits accrued thereby.

Even though the legislator has a limited influence on the elimination of the bothering, yet still persisting gaps between the 'law on books' and 'law in action',[7] and the powerful, self-interested veto players on the political scene do not quite seem to be willing to entirely retire from their disruptive job, a fair deal of improvements in corporate legislation has been already accomplished. For future reforms, we recommend further adherence to the self-enforcing model of company law. Moreover, multiple listings of shares on foreign stock exchanges should be encouraged, as it statistically tends to improve the level of investor protection.[8] Along with continuous enhancement of judiciary, a reform and promotion of corporate arbitration merits attention and should be advanced without further delays. To mitigate the veto player effect, the external input should be better internalized through well-composed working groups bringing together local and foreign experts as well as stakeholders and political influencers. The work on model laws, as a broader, regional policy objective, and a promising assistance realm, should be reassumed[9] and further expanded.

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4 B. Black & R. Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 Harv. L. Rev., 1911 (1996).
5 A. Radwan, A. Nadzon & V. Zdiruk, *Assessment of Approximation Level of the Present Company, Corporate Governance, Accounting and Auditing Legislation and Existing Practices in Ukraine to EU Standards and Practices*, The European Union's ENPI for Ukraine (2014).
6 I. Romashchenko, *The Development of Company Law in the Ukraine: From Post-Soviet Past to European Future*, in this issue of ECL.
7 L. Antonenko, *The Myth of Transformation through EU Law: A Case-Study of the Company Law Reform in Ukraine*, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1485607> (2009).
8 S. Claessens, D. Klingebiel & S.L. Schmukler, *Explaining the Migration of Stocks from Exchanges in Emerging Economies to International Centers*. Discussion Paper No. 3301. World Bank, Washington, D.C. (2002); R. Cooter & H-B. Schäfer, *The Secret of Growth Is Financing Secrets: Corporate Law and Growth Economics*, J. L. & Econ., Vol. 54, 105, 118–119 (2011).
9 R. Dragneva, *CIS Model Legislation and its Contributions to Company-Law Reform and Harmonization*, [in:] R. Dragneva (Ed.), *Investor Protection in the CIS: Legal Reform and Voluntary Harmonization*, 1 (2007).