

*DRAFT as of January 17, 2019*

**Cabinet of Ministers of Ukraine lacks competence to appoint/elect or terminate offices of the chairperson and members of the executive board of Naftogaz of Ukraine**

Law of Ukraine "On Joint-Stock Companies"

According to subparagraphs 8 and 9 of paragraph 2 of Article 52 of the Law of Ukraine "On Joint-Stock Companies": (a) the election and termination of the powers of the chairman and members of the executive board, and (b) approval of the terms of contracts to be concluded with the members of the executive board and determining the size their remuneration falls under the exclusive competence of the supervisory board.

In addition, pursuant to Article 33 of the Law of Ukraine "On Joint-Stock Companies", the general shareholders meeting may decide on any issues of the joint-stock company's activities, **except for those assigned to the exclusive competence of the supervisory board** by law or by the charter.

The same Article provides that the charter of a **private joint-stock company** (except for companies where 50% or more belong to the State and joint-stock companies, where 50% and more percent of shares were invested into to the share capital of business entities 100% owned by the State) might establish a provision enabling the general shareholders meeting to decide on any matters, including those that fall under the exclusive competence of the supervisory board.

At the same time, the supervisory board has the right to include in the agenda of the general shareholders meeting any matter that is assigned to its exclusive competence by law or the charter, for the general shareholders meeting to adopt a decision.

Thus, from the analysis of the rules of the Law of Ukraine "On Joint-Stock Companies" it follows that:

- (1) The adoption of decisions (a) on the election and termination of the powers of the chairman and members of the executive board; and (b) on the approval of the terms of contracts to be concluded with the members of the executive board, the determination of the size of their remuneration falls under the exclusive competence of the supervisory board of the public joint-stock company;
- (2) The above matters might be submitted for consideration to the general shareholders meeting if the supervisory board decides to include these matters in the agenda of the general shareholders meeting.

Moreover, according to article 11-3 of the Law of Ukraine "On the Management of State Property Objects" (par 4) independent supervisory board members **independently decide how to vote** on the matters of the agenda of supervisory board meeting. Thus, the law does not envisage any instructions or recommendations to be provided to the independent supervisory board members from any state authorities.

Law of Ukraine "On the Management of State Property Objects"

The above-mentioned rules of the Law of Ukraine "On Joint-Stock Companies" are conflicting with the rules of subparagraph 6 of paragraph 2 of Article 5 of the Law of Ukraine "On the Management

of State Property Objects", according to which the Cabinet of Ministers of Ukraine **appoints and dismisses heads of economic entities in respect of which the Cabinet of Ministers of Ukraine exercises management functions**. At the same time, taking into account the fact that the provision set out in paragraph 1 of Article 33 of the Law of Ukraine "On Joint-Stock Companies" was adopted later than provision of subparagraph 6 of paragraph 2 of Article 5 of the Law of Ukraine "On the Management of State Property Objects" and the mentioned provisions of Law of Ukraine "On Joint-Stock Companies" specifically regulate governance in joint stock companies, the provision of paragraph 1 of Article 33 of the Law of Ukraine "On Joint-Stock Companies", which prohibits the general shareholders meeting to decide on matters falling under the exclusive competence of the supervisory board, shall prevail and be applicable.

#### The Charter

Besides the current Charter of Naftogaz of Ukraine is not compliant with the provisions of the Law of Ukraine "On Joint-Stock Companies" which regulate appointment and dismissal of a chairperson and members of the executive board of Naftogaz of Ukraine. According to the Charter the chairperson and members of the executive board are elected by the General shareholder meeting based on the submission of the Supervisory board.

#### Conclusion

Based on the analysis hereabove we believe that the provisions of the Charter of Naftogaz regarding an appointment and dismissal of the executive board of Naftogaz of Ukraine cannot be applicable as contradictory to the mandatory provisions of law (Law of Ukraine "On Joint-Stock companies" art. 33,52) and the Cabinet of Ministers of Ukraine had no legal ground to act on the basis of the Charter making the decision on termination of the office of the executive board members. Besides even if the argument that the Cabinet of Ministers of Ukraine is competent to elect and dismiss the executive board members of Naftogaz of Ukraine based on the Charter is valid such appointments/dismissals according to the Charter are to be made on the basis of the submissions by the Supervisory board.