Corporate Governance 2019

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LEXOLOGY
Getting The Deal Through

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Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
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First published 2002
Eighteenth edition
ISBN 978-1-83862-119-3

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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Lexology Getting The Deal Through is delighted to publish the eighteenth edition of *Corporate Governance*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on China, Korea and the Netherlands.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Holly J Gregory, of Sidley Austin LLP, for her continued assistance with this volume.

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London
May 2019

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This article was first published in June 2019
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Vietnam

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Nishimura & Asahi

SOURCES OF CORPORATE GOVERNANCE RULES AND PRACTICES

Primary sources of law, regulation and practice

1 What are the primary sources of law, regulation and practice relating to corporate governance? Is it mandatory for listed companies to comply with listing rules or do they apply on a 'comply or explain' basis?

The Law on Enterprises (LOE), which took effect from 1 July 2015, is the primary source of corporate laws that encompass the establishment, governance and operation of companies in Vietnam. For public companies, which are those made public by the offer of shares, or having shares listed on the stock exchange or a securities trading centre, or having shares owned by at least 100 investors excluding professional securities investors and having paid-up charter capital of 10 billion dong or more, the Law on Securities (LOS) and the legal guiding documents thereof including Decree 71/2017/ND-CP and Circular 95/2017/TT-BTC provide further regulations on corporate governance as part of their public status. Additionally, for companies that are joint ventures between foreign investors and Vietnamese partners engaging in the services as committed to by Vietnam under the commitments on specific services in accession to the World Trade Organization (joint venture companies), Resolution No. 71/2006/NQ-QH11 still appears to function as another source of law relating to corporate governance of joint venture companies despite the fact that certain laws under this Resolution are amended, replaced or due to be replaced (eg, law on enterprises, law on promulgating legal normative documents).

As a matter of principle, listed companies shall comply with both listing rules and the relevant laws for matters that are not specifically regulated by listing rules. As such, it is mandatory for listed companies to comply with listing rules.

Responsible entities

2 What are the primary government agencies or other entities responsible for making such rules and enforcing them? Are there any well-known shareholder groups or proxy advisory firms whose views are often considered?

The Ministry of Planning and Investment mainly drafts bills for laws and governmental decrees on corporate regulations and issues its own guidance and clarification whenever necessary. Likewise, the State Securities Commission of Vietnam and its direct parent agency, which is the Ministry of Finance, are in charge of the sector of public companies, whether unlisted or listed. Enforcement of the laws and regulations is carried out by various competent authorities, including the Ministry of Planning and Investment, the local people's committees, the local authorities for planning and investment, or the State Securities Commission itself for the securities sector.

There are no well-known shareholder activist groups or proxy advisory firms in Vietnam that would have a material influence on companies' policies or corporate governance-related issues.

THE RIGHTS AND EQUITABLE TREATMENT OF SHAREHOLDERS

Shareholder powers

3 What powers do shareholders have to appoint or remove directors or require the board to pursue a particular course of action? What shareholder vote is required to elect or remove directors?

A shareholder or a group of shareholders in a joint-stock company may nominate candidates for the board if they have held at least 10 per cent of the total ordinary shares for a consecutive period of six months or more (major shareholders) unless a lower percentage is set forth in the company's charter (articles 114.2 and 114.4 of the LOE). Any share with a voting right can be counted in a vote at a shareholders' meeting, including a meeting for the election of directors. Cumulative voting is a compulsory measure for the election of directors whereby the total number of votes of each shareholder shall be equal to the total number of the shareholder's shares multiplied by the total number of vacant positions (although shares with preferential votes will be entitled to a greater number of votes in accordance with the company's charter) and each shareholder may exercise all of his or her votes in favour of a single candidate or a number of candidates (article 144.3 of the LOE). However, a different mechanism for the election of directors may be applied if so regulated under the company's charter (article 144.3 of the LOE).

Successful candidates will be selected from those with the highest number of votes to those with the lowest number of votes, in descending order, until the total number of vacant positions has been filled, and where there are two or more candidates receiving the same number of votes for the last vacant position, another vote taken on such candidates will be held, or the director shall be selected in accordance with the criteria set forth in the voting rules or the company's charter (article 144.3 of the LOE). The directors are elected at the shareholders' meeting (article 144.3 of the LOE) and may only be removed by a resolution passed by the shareholders' meeting (article 135.2(c) of the LOE). By the default in law, a resolution removing a director shall be passed if it is agreed by shareholders representing at least 51 per cent of the total number of voting slips of all attending shareholders. However, the law permits the charter of the company to provide for a higher specific percentage (article 144.1 and 144.2 of the LOE).

The shareholders' meeting, comprising shareholders with voting rights, is the highest decision-making body in the company. While the board should follow the resolution of the shareholders' meeting, a shareholder or a group of shareholders cannot, without resolution of the shareholders' meeting, impose obligations upon the board, except for the right to require the board to convene the general meeting of

shareholders (see question 7). However, a shareholder or a group of shareholders holding shares of the company for at least one year may require the board to stop the implementation of any decision or resolution that has been passed by the board contrary to the laws or the company's charter and which caused loss to the company (article 149.4 of the LOE). Additionally, a shareholder or a group of shareholders holding at least 1 per cent of the total ordinary shares for six consecutive months have the right to directly, or on behalf of the company, make a claim for civil liability against the concerned member of the board, director, or general director under certain circumstances (article 161 of the LOE).

Shareholder decisions

4 What decisions must be reserved to the shareholders? What matters are required to be subject to a non-binding shareholder vote?

The following decisions are subject to the authority of the shareholders' meeting:

- to adopt the development strategy of the company (article 135.2(a) of the LOE);
- to decide on the class and total amount of shares of each class that may be issued by the company, and the amount of dividend per share of each class on an annual basis (article 135.2(b) of the LOE);
- to elect, remove and dismiss directors of the board and members of the supervisory board (article 135.2(c) of the LOE);
- to decide on investment or approve the sale of 35 per cent or more of the total value of assets recorded in the company's latest financial statement, unless a different percentage is provided for in the company's charter (article 135.2(d) of the LOE);
- to approve contracts or transactions executed between the company and a related party, as defined under the laws, of 35 per cent or more of the total value of assets recorded in the company's latest financial statement unless a different percentage is provided for in the company's charter (article 162.3 of the LOE);
- to decide on amendment of or supplement to the company's charter (article 135.2(dd) of the LOE);
- to approve annual financial statements (article 135.2(e) of the LOE);
- to decide on redemption of more than 10 per cent of issued shares of each class (article 135.2(g) of the LOE);
- to consider and decide on breaches committed by the board of directors or the supervisory board that cause damage to the company and the shareholders (article 135.2(h) of the LOE);
- to decide on the restructuring or dissolution of the company (article 135.2(i) of the LOE); and
- other rights and duties as provided for in the laws and the company's charter (article 135.2(k) of the LOE).

Notwithstanding the foregoing, decisions that are subject to the authority of the shareholders' meeting of a joint venture company (defined in question 1) may be, subject to meeting statutory conditions (see Official Letter No. 771-BKH-TCT of the Ministry of Planning and Investment), regulated differently in the company's charter. Further, additional items that do not fall within the statutory authority of other statutory bodies of the company may be added to the charter subject to the resolution of the shareholders' meeting.

Disproportionate voting rights

5 To what extent are disproportionate voting rights or limits on the exercise of voting rights allowed?

In principle, each ordinary share of a joint-stock company is granted only one vote (article 114.1(a) of the LOE). However, the company is permitted to issue shares with preferential votes, which are granted a larger number of votes than that of ordinary shares, provided, however, that only founding shareholders or organisations as authorised by the government may hold shares with preferential votes and, even in such cases, such shares may be held by founding shareholders only for a period of three years after the company is established (articles 113.3 and 116 of the LOE). Additionally, the company may issue shares with preferential dividends or preferential redemption rights that have no voting rights (articles 117 and 118 of the LOE). The company may decide to issue other kinds of preferential shares in accordance with the company's charter (article 113.2(d) of the LOE).

Shareholders' meetings and voting

6 Are there any special requirements for shareholders to participate in general meetings of shareholders or to vote? Can shareholders act by written consent without a meeting? Are virtual meetings of shareholders permitted?

Based on the company's register of shareholders at the time of having a decision on convening the shareholders' meeting (article 137.1 of the LOE) or based on the cut-off date of the shareholders' list describing the shareholders entitled to attend the shareholders' meeting that is applied to a public company, any shareholder holding ordinary shares or shares with preferential votes may participate in the shareholders' meeting and exercise the voting rights associated with their respective shares, except for those shareholders holding preferential shares without voting rights (as discussed in question 5).

In cases of related-party transactions that require approval of the shareholders' meeting, the shareholders who have interests in such transactions may not vote on the approval (article 162.3 of the LOE). In a similar manner, a founding shareholder may not vote on the approval of his or her transfer of the shares within three years from the issuance date of the enterprise registration certificate of the company (article 119.3 of the LOE).

Besides physical meetings, it is worth noting that the shareholders may adopt resolutions via a process of collecting written opinions (article 145 of the LOE). In such a case, the minimum vote for adopting any resolution shall be 51 per cent of the total voting shares (article 144.4 of the LOE).

Virtual meetings of shareholders are permitted as long as the location of meetings (eg, the location of the chair if the meeting is carried out in multiple locations at once) is within the territory of Vietnam (article 136.1 of the LOE). Shareholders may attend and vote at meetings conducted via online conference (article 140.2(c) of the LOE).

Shareholders and the board

7 Are shareholders able to require meetings of shareholders to be convened, resolutions and director nominations to be put to a shareholder vote against the wishes of the board, or the board to circulate statements by dissident shareholders?

A shareholders' meeting may be convened by major shareholders (as defined in question 3) if either the board of directors or supervisory board fails to convene the meeting in accordance with the laws or the company's charter (article 136.6 of the LOE). Regardless of who convenes the meeting, the major shareholders can always propose matters to the meeting agenda for discussion unless the procedures or contents of such proposals are contrary to the laws or the company's charter (article 138.2 of the LOE). The meeting convenor is required to include the proposed matters in the draft programme and agenda for the meeting, except for those that fall under cases wherein the convenor may refuse the proposed matter. The draft programme and agenda are sent with the notice of invitation to all shareholders entitled to attend

the meeting (articles 138.4 and 139.3 of the LOE). The proposed matters are added officially to the programme and agenda if the shareholders' meeting so agrees (article 138.4 of the LOE). There is no requirement by the laws for the board of directors to circulate the statements or opinions of the dissident shareholders other than the requirement that the minutes of the vote-counting result and the minutes of the shareholders' meeting, which may contain a summary of the statements of the dissident shareholders, must be forwarded to the shareholders within a certain period of time (articles 145.6 and 146.3 of the LOE).

Controlling shareholders' duties

8 | Do controlling shareholders owe duties to the company or to non-controlling shareholders? If so, can an enforcement action be brought against controlling shareholders for breach of these duties?

Controlling shareholders of a public company (shareholders directly or indirectly holding at least 5 per cent of the total shares with voting rights of the company) are required not to take advantage of their influence to cause any damage to the rights and other benefits of the company and other shareholders (including non-controlling shareholders) (articles 6.9 and 29 of the LOS; article 5 of Decree 71/2017/ND-CP).

Transactions and contracts between the company and a shareholder holding more than 10 per cent of the total ordinary shares under the LOE (or their related person) must be approved by the board of directors or the shareholders' meeting, depending on the value of such transactions, otherwise it shall be void and invalid (article 162.1(a) of the LOE).

A corporate shareholder holding more than 50 per cent of the total ordinary shares, or capable of directly or indirectly appointing all or most of the board of directors, or otherwise capable of amending the company's charter shall be considered a 'parent company' (article 189.1 of the LOE) and be subject to the duties of a parent company under the laws, which include bearing liability for damages in cases of non-arm's-length transactions undertaken by the company as a result of the shareholder's intervention (article 190 of the LOE).

Failure to perform the duties that controlling shareholders owe to the company will result in such controlling shareholders being subject to liability for damage incurred and injunctions.

Shareholder responsibility

9 | Can shareholders ever be held responsible for the acts or omissions of the company?

If a 'parent company' shareholder (as defined in question 8) intervenes in the operation of the company beyond the normal authority of a shareholder and causes the company to undertake non-arm's-length transactions or otherwise non-profitable transactions without reasonable compensation, such a shareholder shall be liable for damage incurred by the company (article 190 of the LOE).

CORPORATE CONTROL

Anti-takeover devices

10 | Are anti-takeover devices permitted?

Anti-takeover devices are not expressly governed by Vietnamese laws. It is permissible to apply anti-takeover devices or customisation of the company's charter provided that no statutory rights of shareholders or the board or otherwise are expressly violated. For example, an anti-takeover device in the form of a preferential share plan is permitted under the laws as part of the rights of the company (article 113.2(d) of the LOE), but a super-voting preferential share plan, which is offered to shareholders other than founding shareholders or organisations as authorised by the government or offered to any entity that is not an organisation as authorised by the government after the period of three years from the date on which the company is issued with the enterprise registration certificate, may be held invalid as a breach of the legal provisions on shares with preferential voting power (article 113.3 of the LOE).

Issuance of new shares

11 | May the board be permitted to issue new shares without shareholder approval? Do shareholders have pre-emptive rights to acquire newly issued shares?

Issuance of new shares or a new class of shares must be approved by the shareholders' meeting (article 135.2(b) of the LOE), although the board of directors may decide on an offer of new shares within the authorised number of shares for each class as approved by the shareholders' meeting (article 149.2(c) of the LOE). Existing shareholders are granted pre-emptive rights to acquire newly issued shares in proportion to their shareholding ratio at the time of issuance (article 114.1(c) of the LOE). However, it appears from the LOS and the legal guiding documents thereof that the shareholders' meeting of a public company may waive such pre-emptive rights of the shareholders by a valid resolution (article 6.6 of the model charter issued together with Circular 95/2017/TT-BTC), though there is the possibility that the legal validity of such a resolution would be challenged in practice in the courts.

Restrictions on the transfer of fully paid shares

12 | Are restrictions on the transfer of fully paid shares permitted and, if so, what restrictions are commonly adopted?

Except for circumstances as provided for by law, and certain restrictions on the transferability of shares that may be set forth under the company's charter and the validity of which is enforced by way of stipulating the same on the respective share certificates (article 126.1 of the LOE), any shares are freely transferable (article 126.1 of the LOE). The securities laws also allow the same restrictions to be placed on the transfer of shares in accordance with the LOE (article 4.1(a) of Decree 71/2017/ND-CP).

A number of restrictions expressly provided by law include the case in which a founding shareholder transfers its shares to non-founding shareholders of the company within three years from the date of its establishment, which transfer will be subject to approval of the shareholders' meeting (article 119.3 of the LOE), or the case in which shareholders hold shares in a public company that were issued through a private placement where such shares are subject to transfer restrictions within the period of at least one year from the date of completion of the private placement (article 10a.2(b) of the amended LOS).

Compulsory repurchase rules

13 | Are compulsory share repurchases allowed? Can they be made mandatory in certain circumstances?

In relation to shareholders, acceptance of a share repurchase offer is not compulsory under the laws (article 130.3 of the LOE). The procedures and circumstances of share repurchase are expressly provided for in the laws, so it may be illegal to enforce repurchase of any shares without consent of the relevant shareholders. On the other hand, in relation to a company, share repurchase may become compulsory in certain circumstances. Specifically, the company may have to make a share repurchase at the request of shareholders who object to a decision on the reorganisation of the company or a change in the shareholders' rights and obligations in the charter (article 129.1 of the LOE), as explained in question 14.

Additionally, the company may make a share repurchase in respect of redemption preference shares whenever so requested by the shareholder holding such shares or pursuant to conditions stipulated in the respective share certificates of such shares (article 118 of the LOE).

On a related note, unless exempted by statute, a public company will be required to conduct a tender offer when it repurchases ordinary shares leading to the total amount of treasury shares being equivalent to 25 per cent or more of the total outstanding shares of the same class (article 37.1(dd) of Decree 58/2012/ND-CP, as amended); however, the shareholders' acceptance is not compulsory in this case either.

Dissenters' rights

14 | Do shareholders have appraisal rights?

Shareholders who object to the restructuring of the company or changes to the company's charter in respect of the shareholders' rights and obligations may request that the company buy back their shares at a fair value or a price regulated under the company's charter (articles 129.1 and 129.2 of the LOE). In case the company fails to reach an agreement on such transfer price, the company shall introduce at least three professional appraisal firms to enable the shareholders to select one firm and the price appraised by such selected firm shall be final and binding upon the parties (article 129.2 of the LOE). The current LOE (unlike its previous version) is silent on the possibility of the shareholders transferring such shares to other parties in this case.

THE RESPONSIBILITIES OF THE BOARD (SUPERVISORY)

Board structure

15 | Is the predominant board structure for listed companies best categorised as one-tier or two-tier?

The board structure for listed companies is categorised as two-tier including the board of directors (which assumes management functions as to the business operation of the company) and the supervisory board (which assumes supervisory functions as to the management and operation of the company by the board of directors and general director (or CEO)). With regard to the structure of the board of directors, it needs to maintain a balance between executive directors and non-executive directors, so that at least one-third of the directors must be non-executive directors (article 13.2 of Decree 71/2017/ND-CP). Additionally, the board of directors needs to be supplemented with specialist committees having special duties (eg, human resources, remuneration and bonuses) (article 17.1 of Decree 71/2017/ND-CP). If the company prefers not to establish such committees, independent directors must be assigned such special duties instead (article 17.2 of Decree 71/2017/ND-CP).

It should be noted that a company may choose not to establish a supervisory board even where it has 11 shareholders or more, or where the shareholders are organisations holding 50 per cent or more of the total shares; provided, however, that in such case at least 20 per cent of the directors are independent directors and there is an internal auditing board under the board of directors (article 134.1(b) of the LOE). Where a listed company and unlisted company choose a one-tier option, there must be a balance between executive directors and independent directors, so that, respectively, at least one-third and one-fifth of the directors must be independent directors (articles 13.4 and 13.5 of Decree 71/2017/ND-CP).

Board's legal responsibilities

16 | What are the board's primary legal responsibilities?

Except for the matters reserved for the shareholders' meeting as mentioned in question 4, the board of directors is primarily in charge of all other matters of the company (article 149.2 of the LOE), although certain day-to-day activities and lower level decisions are within the authority of the general director of the company (article 157 of the LOE). Meanwhile, the supervisory board is primarily in charge of supervising activities of the board of directors as well as the general director in management and operation of the company (article 165.1 of the LOE).

Board obligees

17 | Whom does the board represent and to whom does it owe legal duties?

The board of directors acts on behalf of the company to decide and exercise the rights and duties of the company (article 149.1 of the LOE) and owes legal duties to the company and the shareholders (article 160.1 of the LOE; article 15.1 of Decree 71/2017/ND-CP). The board is required to act in the interest of the company and shareholders (article 160.1(c) of the LOE). In addition, the board of directors of a public company must not only show impartial treatment to shareholders but also protect the interests of persons whose interests are related to the company (article 15.2 of Decree 71/2017/ND-CP).

In respect of the supervisory board, it is required to be loyal to the interests of the company and shareholders (article 168.3 of the LOE).

Enforcement action against directors

18 | Can an enforcement action against directors be brought by, or on behalf of, those to whom duties are owed?

Eligible shareholders may request suspension of decisions that have been passed by the board of directors contrary to the laws or the company's charter and that cause loss to the company (article 149.4 of the LOE). Such shareholders may directly make such a claim against the director without going through the supervisory board regardless of the fact that the company has a supervisory board under the LOE (article 161 of the LOE). When the case is brought to the court, temporary injunctive relief or enforcement, or both, may be taken by the courts in accordance with the rules of civil procedure. If a director is found by the supervisory board to have breached his or her duties, the supervisory board shall immediately notify the board of directors in writing about such breach and request that the relevant director cease the act constituting a breach and take proper measures to remedy the consequences (article 165.8 of the LOE). In addition, a shareholder or a group of shareholders holding 10 per cent or more of the total shares for at least six consecutive months, or a lower percentage as provided for in the company's charter, may also convene a shareholders' meeting when a director allegedly prejudices the rights of shareholders, violates its managerial duties or makes a decision exceeding his or her authority (article 114.3(a) of the LOE) to dismiss such director or take other appropriate action within the authority of the shareholders' meeting.

Similarly, where a member of the supervisory board is found by the board of directors to have breached the law, the board of directors shall immediately notify the supervisory board in writing about such breach and request that the relevant member cease the act constituting a breach as well as take proper measures to remedy the consequences (article 168.6 of the LOE).

Care and prudence

19 | Do the board's duties include a care or prudence element?

Yes, both the directors and members of the supervisory board must carry out their assigned duties with honesty, care and the best lawful interests of the company and the shareholders in mind (articles 160.1(b) and 168.2 of the LOE).

Board member duties

20 To what extent do the duties of individual members of the board differ?

All the directors on the board have the same duties under the laws and the members of the supervisory board are subject to the same duties, except for the chair of the board and head of the supervisory board, who are subject to further rights and duties. In addition, if the company is a listed company, certain directors may be assigned special duties according to the resolution of the shareholders' meeting (article 17.1 of Decree 71/2017/ND-CP).

The law requires that the directors must have professional expertise and experience in the business management of the company and not necessarily be company shareholders, unless otherwise stipulated in the company charter (article 151.1(b) of the LOE). The members of the supervisory board are not required to have any specific skills or experience unless otherwise regulated in the company's charter (article 164.1(d) of the LOE), except that the head of the supervisory board must be a professional accountant or auditor and must work full-time at the company (article 163.2 of the LOE and article 20.4 of Decree 71/2017/ND-CP), and for listed companies or public companies where the state holds more than 50 per cent of the charter capital, members of the supervisory board must be an accountant or auditor (article 20.3 of Decree 71/2017/ND-CP).

Delegation of board responsibilities

21 To what extent can the board delegate responsibilities to management, a board committee or board members, or other persons?

The board of directors cannot delegate a responsibility expressly and exclusively assigned to the board of directors to other internal bodies. Other than that, some of the duties or responsibilities of the board may be delegated to the general director in accordance with the company's charter and resolution of the board of directors (article 157.3(i) of the LOE) and the board committee or a dedicated director may be in charge of specific matters such as human resources, remuneration and bonuses (see question 25). However, the board of directors is still held liable for such duties assigned to other internal bodies.

Non-executive and independent directors

22 Is there a minimum number of 'non-executive' or 'independent' directors required by law, regulation or listing requirement? If so, what is the definition of 'non-executive' and 'independent' directors and how do their responsibilities differ from executive directors?

Non-public companies are not required to have non-executive or independent directors under law, whereas at least one-third of the total directors of the board of a public company must be non-executive directors (article 13.2 of Decree 71/2017/ND-CP) if the company goes with the two-tier management structure. A non-executive director is defined as a person who is not the general director, deputy general director, chief accountant or any other executive person as specified in the company's charter (article 2.6 of Decree 71/2017/ND-CP). Where a listed company and unlisted public company go with the one-tier management structure, respectively, at least one-third and one-fifth of the directors must be independent directors (articles 13.4 and 13.5 of Decree 71/2017/ND-CP) as mentioned in question 15. A director is considered independent if he or she satisfies the following statutory conditions (article 151.2 of the LOE; article 2.7 of Decree 71/2017/ND-CP):

- not a current employee of the company or its subsidiaries and not someone that used to work for the company or the company's subsidiaries in the previous three consecutive years (article 151.2(a) of the LOE);
- not someone receiving salary or wage from the company, except for the benefits to which members of the board of directors are entitled (article 151.2(b) of the LOE);
- not have a spouse, natural parent, adoptive parent, natural child, adopted child or sibling who is a major shareholder of the company, being a manager of the company or the company's subsidiary (article 151.2(c) of the LOE);
- not directly or indirectly holding at least 1 per cent of the company's voting shares (article 151.2(d) of the LOE); and
- not have held the position of member of the board of directors or the supervisory board for at least the previous five consecutive years (article 151.2(dd) of the LOE).

There appears to be no statutory difference between non-executive or independent directors and other directors in respect of responsibilities according to the laws except that if a board committee is not established within the board of directors of a listed company, the board of directors is required to appoint independent directors to be in charge of certain matters individually (article 17.2 of Decree 71/2017/ND-CP). Under the LOE, the appointment of independent directors is also required if the company is structured without having a supervisory board as discussed in question 15.

Board size and composition

23 How is the size of the board determined? Are there minimum and maximum numbers of seats on the board? Who is authorised to make appointments to fill vacancies on the board or newly created directorships? Are there criteria that individual directors or the board as a whole must fulfil? Are there any disclosure requirements relating to board composition?

The LOE sets forth criteria for board members including independent directors, as outlined below.

Criteria for board members

Board members must:

- have full civil capacity and not be prohibited from management of companies in general (article 151.1(a) of the LOE);
- have appropriate experience or professional knowledge in business administration (members of the board of directors are not necessarily shareholders of the company, unless otherwise prescribed by the company's charter (article 151.1(b) of the LOE));
- with regard to subsidiaries 50 per cent of whose charter capital is held by the state, members of the board of directors must not be spouses, natural parents, adoptive parents, natural children, adopted children, or siblings of the director or general director and other managers; and
- not be related persons of the manager and the person competent to designate the manager of the parent company (article 151.1(d) of the LOE).

From 1 August 2019, a board member of a public company shall be prohibited from concurrently holding the position of board member in more than five other public companies (articles 12.3 and 37.3 of Decree 71/2017/ND-CP).

Criteria for independent board members

Independent board members must possess the conditions enumerated in question 22.

Criteria for supervisory board members

Members of the supervisory board must:

- have full civil capacity (article 164.1(a) of the LOE);
- not be prohibited from establishment and management of a company (article 164.1(a) of the LOE);
- not be a spouse, natural parent, adoptive parent, natural child, adopted child or sibling of any member of the board of directors, director or general director, or any other managers (article 164.1(b) of the LOE). A member of the supervisory board is not permitted to hold a managerial position in the company and is not necessarily a shareholder or employee of the company, unless otherwise prescribed by the company's charter (article 164.1(c) of the LOE); and
- satisfy other standards and conditions of relevant regulations of law and the company's charter (article 164.1(d) of the LOE).

The LOE also requires that more than half of the members of the supervisory board permanently reside in Vietnam, and the head of the supervisory board must be a professional accountant or auditor and has to work full-time at the company, unless higher standards are prescribed by the company's charter (article 163.2 of the LOE).

Members of the supervisory board of a listed company and public company in which the state holds more than 50 per cent of the charter capital must meet additional criteria and qualifications, such as being an accountant or auditor (article 20.3 of Decree 71/2017/ND-CP). Similar to changes to the board of directors, a change in the supervisory board of a public company is subject to public disclosure obligation in accordance with law (article 9.1(n) of Circular 155/2015/TT-BTC).

Disclosure requirements

For public companies, any change of the board must be publicly disclosed in accordance with the securities laws (article 9.1(n) of Circular 155/2015/TT-BTC). A public company must disclose information on corporate governance at the annual general assembly of shareholders and in the company's annual report in compliance with the securities law on information disclosure (article 30.1 of Decree 71/2017/ND-CP). Under the LOE, certain information related to changes of the board shall be publicly disclosed (see question 36).

Minimum and maximum number of seats

The board of directors must comprise three to 11 directors, and the specific number of directors is stipulated in the company's charter (article 150.1 of the LOE; article 13.1 of Decree 71/2017.ND-CP).

The supervisory board must have three to five members (article 163.1 of the LOE; article 20.1 of Decree 71/2017/ND-CP).

Vacancy

In the case of vacancy, by default vacant positions will be filled by election during the shareholders' meeting (article 135.2(c) of the LOE).

Board leadership

24 | Is there any law, regulation, listing requirement or practice that requires the separation of the functions of board chair and CEO? If flexibility on board leadership is allowed, what is generally recognised as best practice and what is the common practice?

The chair of the board of directors and the general director are two separate positions with different powers under the laws, although a single person can simultaneously hold the two positions (article 152.1 of the LOE). It is common practice in non-public companies for a single person to act as both the chair and the general director at the same time.

In public companies and companies in which the state holds more than 50 per cent of voting shares, a single person is not permitted to simultaneously hold these two positions (article 12.2 of Decree 71/2017/ND-CP; article 152.2 of the LOE). However, for public companies, as this is a new regulation, the prohibition against one person holding these two positions shall only be effective as from 1 August 2020, and the existing companies must adjust these positions accordingly (article 37.2 of Decree 71/2017/ND-CP).

Under the LOE, a company may have one or multiple legal representatives (article 13.2 of the LOE). If there is only one legal representative, the chair of the board of directors or the general director or director shall be the legal representative; unless otherwise prescribed by the company's charter, the chair of the board of directors shall be the legal representative of the company. If there is more than one legal representative, both the chair of the board of directors and the general director or director shall be the legal representatives of the company (article 134.2 of the LOE).

Board committees

25 | What board committees are mandatory? What board committees are allowed? Are there mandatory requirements for committee composition?

Unlisted public companies are not required to have any board committee or dedicated director. For a listed company, as mentioned in question 15, board committees are merely optional. These companies may choose not to form board committees, provided that they have dedicated directors for specific matters instead. Default committees available under the laws include committees of development policy, human resources, remuneration and bonuses. Additional committees can be stipulated under the resolution of the shareholders' meeting. The heads of the committee of human resources and committee of remuneration and bonuses, or the two dedicated directors for these matters if no committee is formed, must be independent directors (article 17 of Decree 71/2017/ND-CP).

Under the LOE, as noted in question 15, where a company that has 11 shareholders or more, or where the shareholders are organisations holding 50 per cent or more of the total shares, decides not to set up a supervisory board it must establish an internal auditing board under the board of directors.

Board meetings

26 | Is a minimum or set number of board meetings per year required by law, regulation or listing requirement?

At least one regular board meeting must be held every quarter of a calendar year according to law (article 153.3 of the LOE), although the chair can convene a board meeting at any time.

In respect of the supervisory board, the law does not provide for a certain number of required meetings in a non-public company, although such meetings must be held at least twice a year in a public company (article 23.1 of Decree 71/2017/ND-CP).

Board practices

27 | Is disclosure of board practices required by law, regulation or listing requirement?

Under the LOE, certain information related to board practices is required to be disclosed (see question 36). For listed companies, the laws require them to make a disclosure of the company management, including members of the board, number of meetings, and adopted decisions, among others, twice a year (article 11.6 of Circular 155/2015/TT-BTC), and unlisted public companies are required to make disclosure of the company management once a year in their annual report (article 8.2 of Circular 155/2015/TT-BTC).

Remuneration of directors

28 How is remuneration of directors determined? Is there any law, regulation, listing requirement or practice that affects the remuneration of directors, the length of directors' service contracts, loans to directors or other transactions or compensatory arrangements between the company and any director?

Remuneration of directors is determined in accordance with the basis and method as provided for under the company's charter. If the charter does not specify, the directors by default shall be entitled to remuneration based on the total working days and pay rates per day, all of which shall be estimated by unanimous agreement of the board, provided that the total remuneration of the board does not exceed the amount as approved by the shareholders' meeting (article 28 of the model charter issued with Circular 95/2017/TT-BTC; article 158.2(a) of the LOE). There is no specific regulation for service contracts between the directors and the company, but the laws generally deem any transaction between the directors and the company as transactions with related parties, which must be approved by the board of directors or the shareholders' meeting, depending on the value of such transactions (article 162 of the LOE). For public companies, no loans may be granted to the directors by the company unless approved by the shareholders' meeting (article 26.4(a) of Decree 71/2017/ND-CP).

Under the LOE, members of the supervisory board may also receive salaries in accordance with a decision of the shareholders' meeting unless provided otherwise by the company's charter (article 167 of the LOE). For public companies, no loans may be granted to members of the supervisory board by the company unless approved by the general meeting of shareholders (article 26.4(a) of Decree 71/2017/ND-CP).

A director may also be held liable for compensation with respect to damage or loss incurred by the company in certain cases of violation of the laws in his or her role as a director (articles 136.4 and 162.4 of the LOE). It is optional for the companies to have compensatory arrangements with directors. The model charter for public companies provides for a standard clause that directors may be compensated or held harmless by the company in certain cases against damage, loss, claims, among others, in their role as directors as well as covered with directors' liability insurance policy (article 41 of the model charter issued with Circular 95/2017/TT-BTC).

Remuneration of senior management

29 How is the remuneration of the most senior management determined? Is there any law, regulation, listing requirement or practice that affects the remuneration of senior managers, loans to senior managers or other transactions or compensatory arrangements between the company and senior managers?

Aside from the board of directors and the supervisory board, the laws only govern remuneration and other benefits given to the general director and other managerial positions. Accordingly, the general director and other officers of the company are paid wages and bonuses as determined by the board of directors unless the company's charter requires otherwise (articles 158.2(c) and 149.2(i) of the LOE). Transactions between the company and the members of the board of directors including the general director must also be approved by the board of directors or shareholders' meeting in the same manner as in the directors' cases (article 162 of the LOE; article 26 of Decree 71/2017/ND-CP). There is neither special nor separate regulation on compensatory arrangements with senior management.

D&O liability insurance

30 Is directors' and officers' liability insurance permitted or common practice? Can the company pay the premiums?

For public companies, D&O liability insurance is expressly regulated under the laws, premiums of which can be paid by the company itself if so determined by the shareholders' meeting, provided that such a policy does not cover liability arising from breaches of laws or the company's charter (article 14.3 of Decree 71/2017/ND-CP). For non-public companies, D&O liability insurance is not regulated by the laws and it is not a very common practice that D&O liability insurance is purchased by the company for its directors.

Indemnification of directors and officers

31 Are there any constraints on the company indemnifying directors and officers in respect of liabilities incurred in their professional capacity? If not, are such indemnities common?

No comprehensive and unified legislation exists in respect of indemnities made by the company for the directors and officers for such liabilities. However, under article 41 of the model charter regulated in Circular 95/2017/TT-BTC as issued by the Ministry of Finance for public companies, the directors and other officers of the company shall be indemnified by the company in such circumstances only if they have not committed any breach of law or the company's charter or their duties and obligations.

Exculpation of directors and officers

32 To what extent may companies or shareholders preclude or limit the liability of directors and officers?

The laws by default hold the directors, general director and members of the supervisory board liable for certain acts or omissions, such as failure to comply with the law, charter or the resolutions of the shareholders' meeting. However, to the extent that such liability is civil in nature, it would be possible for the shareholders' meeting, as the highest authority in the company, to preclude, limit or waive such liability in relation to the company, although the courts might have different interpretations on this issue. The shareholders may, and cause the company to, provide for limit of liability and compensatory arrangements in the company's charter and directors' liability insurance policy, such as the sample clause in the model charter for public companies (article 41 of the model charter issued with Circular 95/2017/TT-BTC).

Employees

33 What role do employees have in corporate governance?

Employees are not generally involved in corporate governance unless otherwise regulated by the corporate documents of the company, such as the company's charter or policies. The labour laws in particular provide that employees are entitled to participate in management in accordance with the internal rules of the employer (article 5.1(c) of the Labour Code) and have the right to be consulted with respect to several employment policies, including the right to verify and inspect such (articles 5 and 7 of Decree 149/2018/ND-CP).

Board and director evaluations

34 Is there any law, regulation, listing requirement or practice that requires evaluation of the board, its committees or individual directors? How regularly are such evaluations conducted and by whom? What do companies disclose in relation to such evaluations?

As explained in question 15, a company may choose to establish a supervisory board (article 134.1(a) of the LOE) that supervises the management and operation of the company by the board of directors and general director (or CEO). The law does not prescribe how often such evaluations are conducted; however, the supervisory board is required to submit evaluation reports during the annual shareholders' meeting (article 165.3 of the LOE). The supervisory board may use an independent consultant or the internal audit department of the company to perform any of its assigned duties (article 165.10 of the LOE). The board of directors, members of the board of directors, the director or general director and other managers of the company are required to provide all information and documents relating to their management, administration and business operations upon demand of the supervisory board (article 166.5 of the LOE).

DISCLOSURE AND TRANSPARENCY

Corporate charter and by-laws

35 Are the corporate charter and by-laws of companies publicly available? If so, where?

A public company is required by law, within six months of becoming a public company, to have its charter, internal management rules (if any), and prospectus (if any), among others, disclosed on its official website in the shareholder relations section (articles 5.2(a) and (c) of Circular 155/2015/TT-BTC). The LOE requires the non-public company's charter to be published on the company's website (if any) (article 171.2(a) of the LOE) (see question 36).

Company information

36 What information must companies publicly disclose? How often must disclosure be made?

The laws provide for two kinds of disclosure for public companies, namely, regular and extraordinary disclosures. Regular disclosure includes the disclosure of audited annual financial statements, annual reports, contents of annual general meetings of shareholders, offering and report on use of funds, and foreign ownership ratio. Extraordinary disclosure includes the disclosure of any important event, including dissolution of the company, decisions of share buyback, new share issuance, dividend distributions or any change in executive officers, among others. In certain circumstances, such as any event that may have a material effect on the shareholders' benefits, public companies may be requested by the authorities to make disclosures (chapter II of Circular 155/2015/TT-BTC).

Under the LOE, after the enterprise registration certificate of a new company is issued, the company must make a public announcement regarding its business lines and list of founding shareholders and shareholders who are foreign investors through the National Business Registration Portal (the Portal) (article 33.1 of the LOE). Additionally, where there are changes to the enterprise registration contents, the company shall also make a public announcement on such changes through the Portal (article 33.2 of the LOE). Moreover, the company shall post the following information on its website (if any) (article 171.2 of the LOE):

- the company's charter;
- curricula vitae, qualifications, and professional experience of directors, members of the supervisory board, the general director or director of the company;
- annual financial statements ratified by the shareholders' meeting; and
- annual reports on evaluation of operational results made by the board of directors and the supervisory board.

HOT TOPICS

Say-on-pay

37 Do shareholders have an advisory or other vote regarding remuneration of directors and senior management? How frequently may they vote?

The shareholders' meeting only votes on the total amount and calculation method of executive remuneration and bonuses, which will be binding and valid (articles 158.2(a) and 167.1 of the LOE). The board of directors shall then make specific decisions of remuneration and bonuses according to such resolutions. The exact power may be customised in the company's charter. There is no say-on-pay vote in Vietnamese law, although it is not explicitly prohibited.

Shareholder-nominated directors

38 Do shareholders have the ability to nominate directors and have them included in shareholder meeting materials that are prepared and distributed at the company's expense?

A shareholder or a group of shareholders in a company may nominate directors for the board if they have held at least 10 per cent of the total ordinary shares for a consecutive period of six months or more (major shareholders) unless a lower percentage is set forth in the company's charter (articles 114.2 and 114.4 of the LOE). Therefore, unless a shareholder holds a minimum ratio of shareholding that provides the power to nominate directors, such a shareholder must solicit proxy voting in order to exercise such a right. The nomination of directors proposed by major shareholders shall be included in the agenda of the shareholders' meeting upon the written proposal of such major shareholders (article 138.2 of the LOE). Such a proposal must be sent to the company no later than three working days prior to the opening date of the shareholders' meeting (unless the company's charter provides for another time limit) (article 138.2 of the LOE). Of note, the proposal must specify the names of shareholders, the amount of each type of shares and the issues proposed to the agenda (eg, the nomination of the directors with details of the candidates) (articles 136.7(dd) and 138.2 of the LOE).

Shareholder engagement

39 Do companies engage with shareholders? If so, who typically participates in the company's engagement efforts and when does engagement typically occur?

Engagement or transaction between the company and its shareholders are allowed at any time, provided that such engagement or transaction shall comply with the conditions in law, such as conditions for related-party transactions and disclosure procedures, among others.

Typically, certain persons are designated as authorised representatives to communicate with the company on behalf of the shareholders, who shall concurrently participate in general meetings of shareholders (article 16 of the LOE). Also, for corporate shareholders, their legal representatives, who have the right to enter into and perform civil transactions on behalf of and in the interests of the shareholders under the law, may also engage or transact with the company on behalf of the shareholders (article 141.2 of the Civil Code).

The frequency of direct engagement between the shareholders and the company should vary case by case.

Sustainability disclosure

40 Are companies required to provide disclosure with respect to corporate social responsibility matters?

With respect to ordinary companies, the laws do not explicitly require disclosure with respect to corporate social responsibility matters. However, for internal disclosure, the company is required to publish regulations on employment policies (article 4 of Decree 149/2018/ND-CP, which took effect on 1 January 2019). Public companies are required to disclose corporate social responsibility matters if they, among other cases:

- have major impact on the production, business and administration of the company (article 9.1(s) of Circular 155/2015/TT-BTC);
- cause serious effects to the lawful interests of the investors or cause major effects to securities prices that needs to be verified (article 10 of Circular 155/2015/TT-BTC); or
- potentially affect share prices and decisions of the shareholders and investors (article 28.1 of Decree 71/2017/ND-CP).

In addition, annual reports of public companies also include information related to the impact and responsibilities of the company on the environment, society and community (eg, raw materials, energy consumption, water consumption, compliance with the law on environmental protection, community investments as well as other community development activities, and policies related to employees, among others (article 8.2 and annex 4 of Circular 155/2015/TT-BTC)).

CEO pay ratio disclosure

41 Are companies required to disclose the 'pay ratio' between the CEO's annual total compensation and the annual total compensation of other workers?

In general, the salary scale and salary table of all employees in the company must be published in the workplace before they are implemented. The salary scale and salary table of all employees in the company with ten employees or more must be notified to the competent authority (article 93 of the Labour Code; article 7.6 of Decree 49/2013/ND-CP, as amended). The salary scale and salary table include the ratio between the monthly salary for each position (and levels in each position) and the lowest monthly salary.

In addition, the laws require the company to disclose separately information regarding the remuneration and salary of the director (general director), members of the board of directors and other managers in the annual financial statement of the company (article 158.3 of the LOE; article 31 of Decree 71/2017/ND-CP). Further, the remuneration, operation expenses and other interests of the board of directors and each member thereof need to be recorded in the operation report of the board of directors, which has to be submitted during the annual shareholders' meeting (article 158.3 of the LOE; article 9.1 of Decree 71/2017/ND-CP) and in the annual reports of public companies (corporate governance section under annex 4 of Circular 155/2015/TT-BTC).

Gender pay gap disclosure

42 Are companies required to disclose 'gender pay gap' information? If so, how is the gender pay gap measured?

There is no specific requirement on companies to disclose gender pay gap information. However, the law requires that the salary scale and salary table be established on the principles of equality and non-discrimination based on gender, among others (article 7.4 of Decree 49/2013/ND-CP, as amended). Female employees who are pregnant or raising children under 12 months of age are entitled to certain favourable humanitarian conditions (eg, shortened working time with full pay (article 155 of the Labour Code)).

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UPDATE AND TRENDS

Recent developments

43 Identify any new developments in corporate governance over the past year. Identify any significant trends in the issues that have been the focus of shareholder interest or activism over the past year.

The latest version of the draft law on amending and supplementing the law on investment and the law on enterprises was issued on 2 April 2019 by the Ministry of Planning and Investment (the Draft) proposing to amend and supplement several important issues in relation to the operation and management of a joint-stock company.

With respect to the rights of shareholders, the Draft eliminates the statutory period of holding a minimum percentage of shares in the company to execute certain specific rights of shareholders (ie, right to nominate candidates for the board; right to require the board to cease the implementation of any decision or resolution that has been passed by the board contrary to law or the company's charter and that caused loss to the company; right to directly, or on behalf of the company, make a claim for civil liability against the director, manager or general director under certain circumstances) (article 2.10, article 2.13, article 2.14 of the Draft).

The Draft has also made clear the concept and content of the structure of the board if the company does not choose to establish a supervisory board. In particular, the term 'internal auditing board' has been replaced by 'audit committee'. The structure, function, duties and obligations of the audit committee shall be regulated under the company's charter or the operating rules of the audit committee (article 2.11 of the Draft).

In addition, owing to several obstacles in practice in relation to the interpretation and application of the requirement of working full time at the company applied to the head of the supervisory board as provided for under the LOE (article 105.1 of the LOE), the Draft has removed this requirement and instead regulates that the head of the supervisory board is not entitled to hold any other positions in the company (article 2.15 of the Draft).

The Draft is scheduled to be submitted to the National Assembly of Vietnam for approval in October 2019.

* *The authors wish to acknowledge the following for their support: Bui Thi Ha Nhi, Nguyen Bao Linh, Nguyen Thi Tuyet Diem, Tran Thi Minh Hang and Cao Tran Nghia.*

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ISBN 978-1-83862-119-3