

ALERT: Ukrainian LLCs have to put their charters in compliance with the new Law on LLCs by 17 June 2019

According to the 2018 Law of Ukraine “On Limited Liability and Additional Liability Companies” (“the LLC Law”), the deadline for bringing the wording of Ukrainian LLC charters in compliance with the LLC Law will expire on 17 of June 2019. Failing to register the new wording of the charter will leave the charter largely contradicting the law and will expose it to conflicts of interpretations and possibly even to the risk of total invalidation by court.

Background

The 2018 LLC Law, the first Ukrainian law specifically dedicated to regulation of LLCs, introduced sweeping changes to the corporate governance and overall regulation of LLCs. It also established a one-year transitional period when existing companies could operate according to their old charters. The period expires on 17 of June 2019.

Many of Ukrainian LLCs have already updated their charters, but there is a substantial number of companies which operate under the pre-LLC Law charter versions.

What has changed?

The changes were chiefly aimed at simplification and liberalization of the governance of the LLC.

In particular, the list of obligatory provisions in the charter was shortened only to 3 obligatory points: 1) name of the company; 2) governing bodies and their authorities; 3) procedure on joining and exiting the company.

A great number of issues may be now established by the charter itself:

- procedure for execution of the pre-emptive right by a participant (shareholder) of the company or refusal of such right;
- the procedure of payment of dividends;
- restriction of payment of dividends under certain circumstances;
- establishment of ballot voting for certain decisions of the General Participants Meeting (GPM);
- an option to appoint a supervisory board;
- possibility of discretionary establishment of the quorum of votes required for the adoption of certain decisions, except for the decisions that have to be adopted unanimously in accordance with the Law.

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What happens if the charter doesn't comply with LLC Law?

Quite surprisingly, the LLC Law does not have a direct answer to this question. At the same time, it contains a rule allowing for non-compliance only during the transitional period. Therefore, it is rather clear that non-compliance would not be allowed after the expiration of that period.

It is obvious that the provisions of the LLC Law have priority over the provisions of a company's charter. Accordingly, after 17 June 2019, if not properly amended, the company's constituent document would contain a large part of provisions that would become obsolete and unenforceable. In practical terms, this would mean that each time a corporate governance decision is to be made, the company's officers and shareholders would have to compare both the text of the law and of the charter and find out which rule of the charter may be applied and which not. In the worst situation, a decision made in accordance with the law but contradicting the charter might give formal ground to challenge such decision in court.

On a more general level, there is court practice that suggests that an unamended charter may be challenged in a court and invalidated, in whole or in part.

Finally, the company's officers and shareholders would be simply deprived of various rights and options provided by the new law.

What has to be done?

To be sure that provisions of your charter reflect legislation currently in force, register the new version of the charter of the LLC by 17 June 2019.

To do it you should:

- (1) prepare a draft of the new charter;
- (2) convene and hold a general participants meeting approving the wording of the new charter;
- (3) register the new charter with the register of companies (EDR).

Additional option: a model charter

A Ukrainian LLC has opportunity to conduct business activity based on a model charter – a standard wording adopted by the government.

The model charter is quite convenient for LLCs with simple business activity and simple corporate governance structure. It is also easier to register a model charter with the state-run company register, as it is a prepared "ready-to-wear" charter and the company does not need to spend time and money on its drafting. The downside of using a model charter is that the shareholders cannot modify its typical provisions.

The new version of the model charter, adjusted to the LLC Law, was adopted by the decision of the Cabinet of Ministers of Ukraine on 28 February 2019. The text of the model charter, however, has not been officially published yet.

Conclusion

If you own a Ukrainian LLC, do check whether its charter has been updated in accordance with new LLC Law. If not, you are running a risk of not being able to act according to any outdated provisions of its charter and put your company at risk of a conflict of interpretation of corporate governance rules.

If your LLC is still using an old version of the charter, we advise you instruct your Ukrainian lawyer to update the charter accordingly by 17 June 2019.

It is also worth checking and discussing with your lawyer the options and opportunities that the LLC Law provides to shareholders and consider customizing your charter accordingly.

If you have any further questions on this article, please contact Taras Tertychnyi (tertychnyi@hillmont.com.ua) or Anastasiya Chernoshtan (chernoshtan@hillmont.com.ua) at our office.

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