Horyzonty Polityki
2016, Vol. 7, Nº 20

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DOI: 10.17399/HP.2016.072009

The Legal Structure of the Joint-stock Company as the Ultimate Source of Corporate Governance

Abstract

RESEARCH OBJECTIVE: The purpose of this paper is to verify the hypothesis according to which the principles of corporate governance constitute an effective complement to the legal norms pertaining to the supervision over the operation of joint-stock companies, thereby improving the quality and effectiveness of their operation.

THE RESEARCH PROBLEM AND METHODS: An analysis of the legal regulations governing joint-stock companies reveals that, while providing a potential for further development of this organisational and legal form, they also contain areas that are ambiguous or open to abuse. Therefore, steps should be taken to close the existing legal loopholes by providing governance guidelines that would have the desired effect without burdening enterprises with excessive bureaucracy. In their work, the authors have employed the hypothetico-deductive method.

THE PROCESS OF ARGUMENTATION: The present work consists of five parts. It begins with an analysis of the legal structure of joint-stock companies and the fundamental principles of their operation justifying the implementation and observance of good practices.

Sugerowane cytowanie: Wierzbicka, A., i Niklińska, N. (2016). The legal structure of the joint-stock company as the ultimate source of corporate governance. *Horyzonty Polityki*, *7 (20)*, 177-194. DOI: 10.17399/HP.2016.072009.

In the concluding part, we discuss the effects that can be achieved by companies with a higher level of corporate governance.

RESEARCH RESULTS: The prevailing level of corporate culture affects the ability of national economies to accumulate capital resources, use them efficiently, and successfully monitor their allocation. This corroborates the hypothesis put forward in the present work, according to which the rules of corporate governance constitute an effective complement to the legal norms pertaining to the supervision over the operation of joint-stock companies, thereby improving the quality and efficiency of their operation.

CONCLUSIONS, INNOVATIONS AND RECOMMENDATIONS: Solutions offered by corporate governance meet the market's need for an effective tool for managing investor expectations that would be based on the thought-out building of a stable market position for a given company rather than on dictates and prohibitions.

Keywords:

joint-stock company, corporate governance, stakeholders

PRAWNA KONSTRUKCJA SPÓŁKI AKCYJNEJ JAKO PRAPRZYCZYNA ŁADU KORPORACYJNEGO

Streszczenie

CEL NAUKOWY: Celem artykułu jest weryfikacja hipotezy, zgodnie z którą zasady *corporate governance* stanowią efektywne uzupełnienie norm prawnych w zakresie nadzoru funkcjonowania spółek akcyjnych, podnosząc tym samym jakość i efektywność ich działania.

PROBLEM I METODY BADAWCZE: Analiza przepisów prawnych obowiązujących spółki akcyjne ukazuje obok potencjału rozwojowego tej formy organizacyjno-prawnej również możliwe obszary nadużyć i niejasności. Dlatego zasadne jest podejmowania działań mających na celu uzupełnienie luk prawnych wytycznymi, które przyniosłyby zamierzony efekt i nie obciążałyby przedsiębiorstw nadmierną biurokracją. Artykuł został przygotowany w koncepcji hipotetyczno-dedukcyjnej.

PROCES WYWODU: Praca składa się z pięciu zasadniczych części. Eksplorację rozpoczyna analiza konstrukcji prawnej spółki akcyjnej wraz z fundamentalnymi zasadami jej działania stanowiącymi uzasadnienie do wdrażania i respektowania zasad dobrych praktyk. W konkluzji podjęto próbę oceny efektów, na jakie mogą liczyć spółki wykazujące wyższy poziom *corporate governance*.

WYNIKI ANALIZY NAUKOWEJ: Poziom kultury organizacyjnej wpływa na zdolność gospodarek do akumulacji środków kapitałowych, ich efektywnego wykorzystania, jak również skutecznego nadzorowania kierunków ich przeznaczenia, co pozwala na pozytywną weryfikację postawionej w pracy hipotezy, zgodnie z którą zasady *corporate governance* stanowią efektywne uzupełnienie norm prawnych w zakresie nadzoru funkcjonowania spółek akcyjnych, podnosząc tym samym jakość i efektywność ich funkcjonowania.

WNIOSKI, INNOWACJE, REKOMENDACJE: Rozwiązania zaproponowane przez *corporate governance* stanowią odpowiedź na oczekiwania rynku, w tym skuteczne narzędzie zarządzania oczekiwaniami inwestorów oparte nie na nakazach i zakazach, ale przemyślanym budowaniu stabilnej pozycji rynkowej przedsiębiorstwa.

Słowa kluczowe:

spółka akcyjna, *corporate governance*, interesariusze

INTRODUCTION

A study of interdependencies between the current legal regulations providing a normative framework for the operation of business entities confirms that they are closely interlinked. This also applies to the legislation governing the operation of joint-stock companies.

Any analysis of the macro environment of an enterprise should take into account those factors in its legal environment that have a significant and even decisive impact on the future line of its development. Unfortunately, the legal system is not free from loopholes and contradictions, which means that there is always a potential risk of abuse. That is why it is so important to develop corporate culture, to implement proper practices and encourage appropriate actions based on responsibility and reliability. On the other hand, one should keep in mind that law plays a subsidiary role with respect to economy. While establishing certain patterns and frameworks for action, the legal system should not seek to formalise, under the threat of legal penalty, every area of economic life and should instead give way to market mechanisms. Overregulation can paralyse business, depriving it of the freedom of action required for the creation of competitive advantage.

The aim of this paper is to verify the hypothesis according to which the rules of corporate governance constitute an effective complement to the legal norms pertaining to the supervision over the operation of joint-stock companies, thereby improving the quality and efficiency of their operation. In their work, the authors have employed the hypothetico-deductive method.

THE LEGAL STRUCTURE OF THE JOINT-STOCK COMPANY

The joint-stock company, as defined in Articles 301-490 of the Commercial Companies Code, is considered the most evolved form of incorporated business. This is due to the fact that, in the operation of a joint-stock company, capital is placed above any personal aspects, the latter being reduced to a minimum.[1] In principle, this particular type of a business entity is reserved for large enterprises with a significant accumulation of capital. For this reason, the characteristic features of a joint-stock company include the following (Kraakman et al., 2004):

- the corporate nature of a separate legal person;
- the corporate structure of governing bodies;
- the investment nature of shareholders' participation in the company;
- shareholders are not liable for the company's obligations;
- equity rights are highly liquid.

The existing legislation endows a joint-stock company with legal personality, which makes it a separate entity in legal, economic, organisational and property terms. As a consequence, it can freely enter into business transactions, which includes the right to independently acquire rights and incur liabilities.

1 In the literature, the view exists according to which 'recent changes in the Commercial Companies Code introduce some solutions (...) involving personal elements (e.g. Art. 354 §1 of the Code on rights granted on an individual basis; Art. 418 of the Code on the so called squeeze-out; Art. 428 of the Code on right to information). Personal elements can also be introduced into the company's articles of association' (Kidyba, 2010, p. 17).

Legal personality of a joint-stock company is directly related to its organisational structure, which includes the management board, the supervisory board, and the general meeting of shareholders. Each governing body is assigned a specific domain of rights and obligations. The management board is appointed to manage and represent the joint-stock company. All the facets of the company's activity are monitored by the supervisory board. The general meeting of shareholders is the supreme governing body of a company that takes decisions on the key issues relating to the activities and operation of the company. Among other things, the general meeting reviews and approves reports on the company's operation submitted by the management board, grants discharge to members of the management board for the performance of their duties, etc. Despite the fact that the configuration of the company's governing bodies has been modelled on Montesquieu's tripartite system of mutual control and discipline that is supposed to prevent abuse, imperfections in their functioning can be easily observed.[2]

The corporate nature of a joint-stock company

> (...) means that it is an association of persons (shareholders) united by a common goal, usually of an economic nature, namely, that the company makes a profit to be distributed among the shareholders (...) the basis of a shareholder's participation in the company is his or her equity interest, i.e. the acquisition of at least one share in exchange for a contribution to the company or by way of purchase in the secondary market from an existing shareholder (Oplustil, 2010, p. 130).

The legal structure of a joint-stock company exempts investors from any liability for the actions of the company, thus reducing their risks to the amount of their contribution to the company, made through the acquisition of its shares. This solution allows shareholders to limit their function to the role of a passive investor without having to get involved in the internal system of corporate governance and incurring any associated costs (Oplustil, 2010). At the same time, they can freely dispose of shares in a situation when they are not satisfied with the strategy pursued by the company or by its performance.

2 See https://www.knf.gov.pl/o_nas/ostrzezenia_publiczne/lista_ostrzezenia.html

Thanks to the high liquidity of equity rights, companies can easily attract capital in a bullish market but they can also just as quickly lose capital following an economic downturn. Independence from the shareholding structure often means that the company's finances are based on contributions from dispersed and anonymous shareholders that do not necessarily have strong links with the company.

An analysis of the corporate forms of business activity reveals the complexity and multifaceted character of their organisation, which carries a huge potential and offers great opportunities. However, besides the advantages, one can identify a number of issues that can lead to a structural crisis in the operation of incorporated businesses. One of such issues is the unlimited duration of their operation; as a consequence, joint-stock companies remain in operation longer than the time frame originally set for the achievement of their objective. The unlimited size of operation of incorporated businesses may result in their capital being increased to a level that exceeds the financing possibilities of a given company; coupled with inadequate management, this may undermine its solvency. The unlimited economic power of joint-stock companies may tempt them to gain profit by any means.

The legal mechanism that endows joint-stock companies with these attributes is not always able to effectively prevent such abuses and mitigate their consequences. Often, actions undertaken against specific groups of stakeholders are in full agreement with the letter of the law, even though serious doubts can be raised as to their compliance with the corporate code of ethics.

THE FUNDAMENTAL OPERATING PRINCIPLES OF JOINT-STOCK COMPANIES

The formal structure of the joint-stock company provides for a number of underlying principles of operation that, on the one hand, streamline its functioning but, on the other hand, may favour some stakeholders over others.

I. The principle of separation of ownership and management

The separation of capital providers from the management is a key principle underpinning the operation of the joint stock company. It allows capital providers to share in the financial profits gained by the company without getting directly involved in its management. One of the possible consequences of this principle is the hegemony of managers (Galbraith, 1967). In corporations, especially joint-stock companies, power can shift to the managers, since they are the ones in possession of the most extensive knowledge and information about the condition of the company and the opportunities and risks associated with its operation.

II. The principle of majority rule

Due to the corporate nature of the joint-stock company, decisions on fundamental issues are a prerogative of the individuals who have joined the company through the acquisition of its shares. The decisions are taken by majority vote, where the number of votes corresponds to equity ownership. Consequently, real power within a company may be exercised by the controlling shareholder(s).

III. The principle of equal treatment of shareholders

According to the provisions of Art. 20 of the Commercial Companies Code, shareholders of a company should be treated equally under equal circumstances. This precludes any discrimination of minority shareholders, guarantees their right to obtain reliable information and to participate in the general meeting of shareholders, including participation in the vote. In practice, however, this principle is not always respected, and the rights of minority shareholders are violated, e.g. through the suppression or delayed disclosure by the management of substantial information about the current situation of the company.

IV. The principle of proportionality of rights to shares

The principle of equal treatment of shareholders is juxtaposed to the principle of proportionality of rights to shares, which, as it were, entails inequality among shareholders. According to the principle of proportionality, the greater one's share in the capital, the larger the extent of rights he is entitled to (Lipińska-Długosz, 2006). Considering the capital nature of a joint-stock company, this solution seems to be justified. After all, an investor who contributes greater resources also takes a greater risk, and the fact that he is entitled to more rights can be seen as a partial compensation for the risk.

It becomes clear from the above outline of the fundamental principles underlying the operation of joint-stock companies that some of their consequences are rather mixed. Already at the outset, doubts can be raised concerning the objectives of a joint-stock company, the identity and hierarchy of interests of some groups that are in a privileged position with respect to the others. The law gives priority to the interests of the company itself, while vesting the decision-making power in shareholders with a majority of votes. On the one hand, it requires that all shareholders should be treated equally and that their rights be respected but, on the other hand, it enforces the principle of proportionality. The complexity and intricacy of the existing legal regulations highlight the need for rules that would help all interested parties to overcome the complexities.

STAKEHOLDERS IN A JOINT-STOCK COMPANY

Due to its complex organisational structure, a joint-stock company affects various groups of people who, in one way or another, have a stake in the company. Stakeholders are seen as a group of people or entities that have been affected '...to their advantage or disadvantage by a given enterprise, or whose rights may be infringed upon or should be respected by the enterprise' (Roszkowska, 2011, p. 51). Among various stakeholder groups, one should mention the owners, management, employees, customers, suppliers, financial institutions, local and central government agencies, NGOs, local community, competitors, etc.

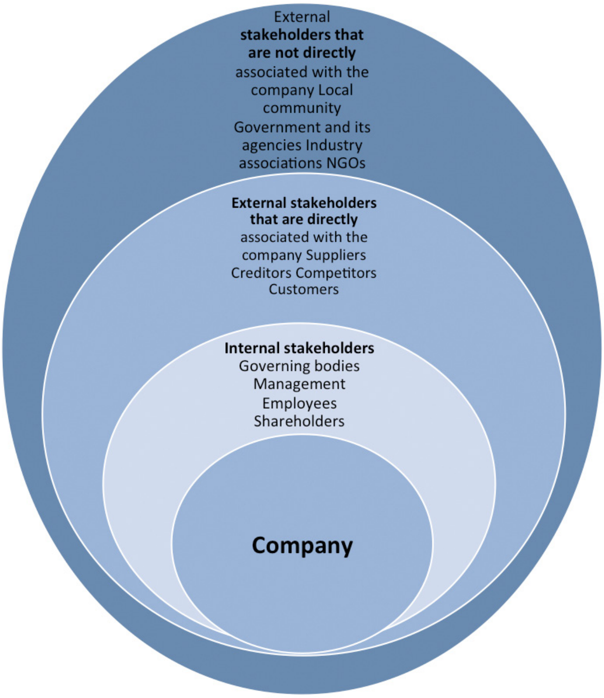

Figure 1. Stakeholders in a joint-stock company.
Based on: Roszkowska, 2011, pp. 51-53.

Each stakeholder group uses whatever power it can master to push through solutions to the benefit of this particular group but not necessarily for the others.

As clearly follows from the data presented below, majority shareholders and customers have the greatest influence on the operation of joint-stock companies. The interests of the company as an independent legal entity, established for a particular goal and endowed with legal personality, are taken into account when choosing the future line of its development. Next in line, come the interests of the state, employees, financial institutions, suppliers, board members, minority shareholders, and the local community (Jeżak, 2010).

Table 1
Influence of special interest groups on decisions taken by the management board of a company (on a scale from 1 to 5)

Interest group	Arithmetic mean	Standard deviation
Majority shareholders	4.55	0.90
Customers	3.81	1.08
The company as a business entity	3.76	1.24
The state	3.10	1.27
Employees	2.62	0.88
Lending banks	2.58	1.41
Suppliers	2.48	1.10
Members of the management board	2.24	1.05
Minority shareholders	2.03	1.05
Local community	1.90	0.90

Source: Jeżak, 2010, p. 231.

A detailed analysis of the needs, aspirations, and motivations for more effective action within a given company will inevitably reveal discrepancies between the expectations of particular units or individuals. The discrepancies often lead to internal conflicts, weakening the position of the company.

Due to the complex structure of joint-stock companies and to their considerable size and potential, they are open to all kinds of abuse, as demonstrated by the histories of Enron, Worldcom, Adelphia, Tyco (Kutera, 2016). However, it is unlikely that these issues can be resolved by any further elaboration of formal and legal requirements to the operation of companies. For this reason, more and more attention has been paid to the concept of corporate governance and its impact on the codes of good practice addressed at business entities that operate in the market.

THE NATURE OF CORPORATE GOVERNANCE

The term 'corporate governance' refers to a set of rules and recommendations aimed at ensuring that investors receive a return on invested capital (Shleifer & Vishny, 1997). Crucially, this should happen in such a way that wealth maximization would not encumber any third parties with undue costs (Monks & Minow, 1996). The primary objective of corporate governance is to ensure that the decision-making and supervisory powers are distributed in such a way that the bodies that have at their disposal the incentives and information required for taking key business decisions take responsibility for all the stakeholder groups. For this reason, OECD proposes that corporate governance should be construed as

> a set of relationships between a company's management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined (OECD, 2004, p. 11).

In Poland, the term 'corporate governance' has been variously rendered as *nadzór właścicielski* (lit., 'owner supervision'); *władztwo korporacyjne* (lit., 'corporate control') (Domański, 2000); *nadzór korporacyjny* (lit., 'corporate supervision') (Romanowska, Trocki & Wawrzyniak, 2000, p. 52); and ład *korporacyjny*[3] (lit., 'corporate order'). The latter term is perhaps the most appropriate one, as it implies the need for harmonising the expectations of all stakeholder groups. A similar point of view is expressed in the definition offered by K. Zalega, who sees corporate governance as

> ...a system that includes a number of legal and economic institutions, its objective being to ensure the congruency and balance between the interests of all stakeholders in a corporation in a manner that guarantees an increase in the company's value and secures its future development (Zalega, 2003, p. 9).

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3 See: Frydman, Rapaczyński & Earle, 1994; Komitet Dobrych Praktyk, 2005; Dobre Praktyki Spółek Notowanych na GPW, 2007; Jeżak, 2010; Mesjasz, 2011.

The nature of the rules of corporate governance is that of 'soft law' (Okolski, 2008, p. 232), which means that they have no legal power and, correspondingly, no sanctions can be applied for their violation. One might say that they are positioned in between legal regulations and market mechanisms. Corporate governance codes '...on the one hand, do not leave the formulation of best practices to the market and, on the other hand, are not legally binding, unlike provisions of law' (Cejmer, Napierała & Sójka, 2006, p. 45).

Table 2
The evolution of codes of good practice in Poland

Date of issue	Issuing organisation	Document title
2002	Research Institute for Market Economy	*White Paper on Corporate Governance*[4]
06.2002	Polish Corporate Governance Forum	*Code of Corporate Governance*[5]
07.2002	Polish Corporate Governance Forum	*Good practices in publicly traded companies 2002*[6]
10.2004	Polish Corporate Governance Forum	*Good practices in publicly traded companies 2005*[7]
07.2007	Warsaw Stock Exchange	Best Practice for WSE Listed Companies 2007[8]
05.2010	Warsaw Stock Exchange	Best Practice for WSE Listed Companies 2010[9]
11.2012	Warsaw Stock Exchange	Best Practice for WSE Listed Companies[10]

4 See http://www.nbportal.pl/library/pub_auto_B_0013/KAT_B4556.PDF

5 See http://www.nbportal.pl/library/pub_auto_B_0013/KAT_B4557.PDF

6 See http://www.ecgi.org/codes/documents/practices_2002.pdf

7 See http://www.corp-gov.gpw.pl/assets/library/polish/dp2005.pdf

8 See https://www.gpw.pl/pub/files/PDF/foldery/dobre_praktyki_GPW.pdf

9 See http://www.corp-gov.gpw.pl/assets/library/polish/publikacje/dpsn2010.pdf

10 See http://www.corp-gov.gpw.pl/assets/library/polish/regulacje/dobre_praktyki_19_10_2011_final.pdf

11.2013	Warsaw Stock Exchange	Best Practice for WSE Listed Companies[11]
01.2016	Warsaw Stock Exchange	Best Practice for WSE Listed Companies 2016[12]

Source: own research.

Guidelines contained in codes of good practice evolve along with the development of the capital market and the expectations of its participants (companies and investors); the position of other entities involved in the operation of the company is also taken into account.

Codes of good practice are based on the assumption that

> ...prices of financial instruments are influenced not only by the performance of the issuing companies, but also by their compliance with the high standards of internal organisation and handling of the market environment (Oplustil, 2010, p. 74).

From this it follows that the market, through the agency of conscious investors, is able to

> ...impose discipline on companies and motivate them to apply good practice through "rewarding" or "punishing" them by, respectively, higher or lower valuation of the financial instruments they issue – provided the market has access to information about the extent to which companies voluntarily adhere to the "soft" regulations recognised as the best practices of corporate governance (Oplustil, 2010, p. 74).

THE IMPORTANCE OF EXTRA-CODAL REGULATIONS FOR COMPANIES

Even an elaborate system of legal regulations, in spite of everything, cannot eliminate all potential areas of conflict and cover all the challenges faced by companies. In addition, overregulation of the operating environment of joint-stock companies, in a situation where

11 See http://www.corp-gov.gpw.pl/assets/library/polish/regulacje/dobre_praktyki_16_11_2012.pdf

12 See https://static.gpw.pl/pub/files/PDF/RG/DPSN2016__GPW.pdf

the pertinent legislation is already believed to be complicated and confusing, may result in an excessive bureaucratic burden and, as a consequence, in the withdrawal of companies from the public market. This, in turn, could lead to the collapse of the capital market (Fox & Sterniczuk, 2005).

Therefore, an institutional mechanism created to support the market constitutes the perfect complement to the legal mechanism. The author of the *Code of Best Practice for WSE Listed Companies 2016 – Manual* makes it clear that

> Good practices are not "a code," "soft law," "minor law," or "vice-law;" they are not law at all. They have to be applied rather than "complied with." They have no binding force, they do not impose any dictates or prohibitions, they are not enforced by the state, and their violation does not carry a penalty. Rather, they express values that are worthy of protection and promotion, values that have been developed with the participation of the market and that are recommended to the market by the stock exchange (Nartowski, 2016, p. 4).

The following key functions of corporate governance should be mentioned:

- improving the transparency of operation of joint-stock companies, especially those listed on the stock exchange;
- improving communication with investors;
- respecting the rights of shareholders, also in areas not covered by provisions of the law.

Although there is no universally applicable model of corporate governance, it has been proposed that any such model should make provisions for the following macroeconomic and microeconomic aspects (Jeżak, 2010):

1. Providing an adequate framework for corporate governance, including the promotion of markets that function in a predictable and transparent manner.
2. Protecting the basic rights of shareholders, including the right to register ownership, to transfer shares, to receive material information on the company on a regular and timely basis, to participate and vote in general shareholder meetings, to elect members of the governing bodies of the company; to share in the profits.

3. Equal treatment of all shareholders, including minority and foreign shareholders, who should be able to obtain redress for any violation of their rights.
4. Respecting the rights of members of different groups of stakeholders it terms of exercising their rights; promoting cooperation between them and the company in order to create economic value.
5. Ensuring overtness and transparency of information about the current situation of the company, so that it becomes more open for communication and cooperation with its customers and business partners.
6. Providing the company with a proper strategic direction; effective supervision over the management, which includes ensuring that the accounting and financial reporting systems are reliable and that an effective control of risk factors is in place.

On the international level, these recommendations are consistent with the guidelines issued by the OECD and the World Bank; on the national level, they can be taken into consideration for the preparation of national codes of good practice; on the institutional level, they are relevant to the bylaws of the stock exchange and to the codes of good practices adopted by individual companies (Pisz & Rojek-Nowosielska, 2008). Thanks to their general nature, the recommendations can be implemented in any business model, although, prior to that, they have to be adopted to the needs of individual economies – which explains the continual evolution of the Polish codes of good practice.

'Increasingly, the OECD and its member governments have recognized the synergy between macroeconomic and structural policies in achieving fundamental policy goals' (OECD, 2004). Businesses have also acknowledged benefits arising from compliance with the rules of corporate governance.

As far as investment activity is concerned, the criterion of compliance with the rules of corporate governance is important for 78% of investors from Western Europe, 78% of investors from Asia, 76% of investors from North America, 76% of investors from Latin America, 73% of investors from Eastern Europe, and 73% of investors from Africa. In addition, investors are willing to pay a substantial premium for a higher level of corporate culture, varying between 13% and 34% (McKinsey, 2002).

Studies conducted by J.L. Colley, J.L. Doyle, G.W. Logan, and W. Stettinius have shown that '(…) investors are willing to accept significantly higher premiums for companies that adhere to good practice; honest communication with the market and good investor relations are some of the main criteria for making investment decisions' (Colley, Doyle, Logan & Stettinius, 2005, p. 255). Similar results have been obtained by A. Aluchna, according to whom '…companies that abide by the recommendations on corporate governance were worth at least 5% more' (Aluchna, 2007, pp. 18-19).

Solutions offered by corporate governance meet the market's need for an effective tool for managing investor expectations that would be based on the thought-out building of a stable market position for a given company rather than on dictates and prohibitions.

CONCLUSION

An analysis of the legal regulations pertaining to the structure of the governing bodies and the operating mechanisms of joint-stock companies, reveals the great potential and development possibilities of this type of business entity. At the same time, it exposes a number of areas that are open to abuse, especially by a group of stakeholders who hold the advantage over the others in terms of capital share (e.g. controlling shareholders) or information (e.g. managerial staff).

Additional legal regulations would further complicate the principles of operation of such companies and would burden them with costs associated with the implementation of new regulations. By contrast, codes of good practice entrust the companies themselves with deciding whether to adhere to certain rules and principles in view of the benefits that can be achieved. What is more, the scope of changes that take place as a result of the adoption of good practices 'goes far beyond the interests of the shareholders of an individual company and reaches the economy as a whole' (Jeżak, 2010, p. 231).

The prevailing level of corporate culture affects the ability of economies to accumulate capital resources, use them efficiently, and successfully monitor their allocation. This corroborates the hypothesis put forward in the present work, according to which the rules of corporate governance constitute an effective complement to the legal norms pertaining to the supervision over the operation of joint-stock companies, thereby improving the quality and efficiency of their operation.

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