

# A Preliminary Study on the Legislation-related Issues of Independent Directorship in Taiwan

Ernie Ko<sup>\*</sup>

## Abstract

Independent Directors is one of the key mechanisms for corporate governance, which dominates an enterprise's sustainable growth and public trust. Among many of the elements, policy-makers' professionalism constitutes an substantial part of corporate governance. There are quite a few intellectuals nowadays in Taiwan advocate foreign precedents and suggest the introduction of mandatory installation of independent directors in public listing companies by amending Company Law or Securities Exchange Law. They expect the independent directors not only possess professionalism to participate company's policy-makings but also carry out their duties "independently" so as to avoid becoming a rubber stamp on the one hand and protect massive small share-holders' rights on the other hand.

The introduction of independent directorship aims high hopes but its fate requires practice and long-term trial and errors. While many scholars and the government tend to welcome the legislation, the actual practice in Taiwan only takes place in less than two years. In this infantile stage, it takes all walks of life to think and criticize the new system. The author, as a faculty in law school, teaches ROC Securities Exchange Law and therefore devotes quite amount of time and energy in corporate governance. This paper is a presentation of the author's analysis on foreign precedents, current ROC securities laws, legal logics, and empirical experience.

From the perspectives of comparative legislation, most of the member countries of Organization of Economic Cooperation and Development (OECD) have adopted legislations to enact independent directors. As to Taiwan's Securities Exchange Law, there is no such provision. Instead, the government "encourages" Taiwan Stock Exchange Corporation (TSEC) and GreiTai Securities Market (GTSM) to add independent directorship clause to the criteria for review of securities listings. While the goal is lofty, the lack of legal mandate and

---

<sup>\*</sup> Ernie Ko is a Lecturer at the Department of Financial & Economic Law, Yu Da College of Business (Taiwan). He is currently attending the ph.D. program at Graduate Institute of Human Resource Management, National Central University (Taiwan). He can be reached by email: scholar@ms1.ydu.edu.tw

authorization is controversial. It contradicts the protection of equal rights clause and right to work clause in the constitution. It also circumvents the constitutional principle to reserve rights of limiting people's rights and imposing obligations to the parliamentary legislation. In terms of legal logics, creating independent directorship overlaps the existing auditor's provision in the Company Law. Lastly, empirical studies show that the pick and choose of independent directors and their salaries rest upon the discretion of either major shareholders or the chairman of the board. The practice tacitly builds a dependency relationship between Major shareholders and the independent directors.

Under the circumstances, it is doubtful to expect independent director function normally and professionally.

Due to the different regulations and social circumstances between Taiwan and the United States, with special emphasis of private investors as the vast majority in Taiwan stock market, the author suggests that borrowing US system will not perfectly fit in Taiwan's environment. A workable model should be to strengthen the existing role and function of auditors, raise the threshold of directors and auditors' obligations and responsibilities, and to enforce the law faithfully and thoroughly. In addition, it maybe worth encouraging Taiwan-based multinational corporations and large scale companies to replace auditors with independent directors so as to match their competitors practice in the international corporate community. For others, independent directorship is by no means the only avenue to successful corporate governance in Taiwan.

**Keywords: Independent Director, Outside Director, Corporate Governance, Securities Exchange Law, Legislation, and Independent Auditor.**

# 推動獨立董事法制化之問題初探

葛傳宇\*

## 摘要

健全的董事會為公司治理之重要機制之一，而獨立董事則被外界視為董事會健全運作的良帖妙方。蓋企業的永續經營繫於該公司決策階層之專業能力，國內不乏有識之士主張援引外國立法例，推動台灣也能修改公司法或證券交易法，強制規定大型或上市公司應該設置一定人數之獨立董事，該董事本身除了要具備參與公司決策之專業能力之外，更重要的是期待他能「獨立」行使職權，避免淪為大股東的橡皮圖章，以維護眾多小股東的合法權益。

設置獨立董事的理想性固然崇高，能否在本國實踐成功，尚須假以長時間的觀察。國內鼓吹獨立董事者眾，政府的立場也樂觀其成，然而引進獨立董事的歷史才一年，仍處於法制上的嬰兒期，尚賴各方面集思廣益。本文作者忝列法律系教席，教授證券交易法之餘，對於公司治理議題勤於關切，特從外國立法例、現行證交法與其子法相關規定、法律邏輯、以及實證經驗等四方面循序論述本文。

從比較立法的觀點而言，以 OECD（經濟合作發展組織）會員國為首的先進國家多已採取立法措施，或強制或自願地推動獨立董事。我國之證券交易法則無獨立董事規定，而是以「鼓勵」的心態，任由台灣證券交易所與中華民國櫃檯買賣中心，分別於上市與上櫃公司審查準則之中加以規範。政府推動公司治理的立意雖佳，手段卻值得商榷，蓋缺乏法律授權之審查準則，看似「創設」引進不具股東身分之專業人士進入董事會之制度，以促進決策效率與透明度，實則有違憲法第七條平等權、第十五條工作權之保障，以及逾越第二十三條之法律保留原則。從法律體系邏輯而言，我國公司法原本就明文規定公司應設制監察人以制衡董事會，如今另外創設獨立董事在董事會內監督決策，豈不是雙頭馬車？恐有疊床架屋的顧慮。最後就實踐的層面而言，國內已實行獨立董事之上市公司，該獨立董事的選任與酬勞多由大股東或佔股權優勢之董事長決定，自然而然形成大股東與獨立董事之間的依附關係，再加上如果給予相當誘人之報酬，獨立董事的獨立功能恐將落空。反過來說，國內設計之獨立董事乃兼職性質，此等人士之本業已屬忙碌，又如何期待其兼任獨立董事能撥冗發揮專業與良心？

---

\* 本文作者葛傳宇現任育達商業技術學院財經法律系專任講師兼公共事務中心主任，國立中央大學人力資源管理所博士班。本文之完成感謝許劍英教授之鞭策鼓勵、薛平山教授之斧正、以及易明秋教授之賜教。作者電子郵件 [scholar@ydu.edu.tw](mailto:scholar@ydu.edu.tw)

台灣的公司法有關監察人規定與美國不同，兩國國情也不同，尤其股市投資人以自然人佔絕大多數，迥異於美國的法人主導股市。就法律體系與實踐可能性而言，可行之道應為強化監察人之法定角色與功能，提高董監事之注意義務與違法之民刑事責任，更重要的是落實公權力的執法（law enforcement），唯有公正忠實的執行法律規定，才能杜絕僥倖，保障小股東權益與維持市場交易秩序。至於歐美國家流行之獨立董事，基於與國際接軌與增加企業知名度等考慮，似乎可以增訂鼓勵「跨國或大型企業」設置獨立董事條款，以取代強制立法規定上市上櫃公司全面設置獨立董事之芻議。

關鍵字：獨立董事、外部董事、公司治理、證券交易法、獨立監察人、法制