

# SHAREHOLDERS RIGHTS AND REMEDIES (COMPARATIVE LAW PERSPECTIVE)

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## Abstract

The main aim is to discuss shareholder rights protection in Ukraine and Germany, which have the same Civil law legal system. Our contribution outlines, systemizes and accesses approaches how critical and weak issues in the area of shareholder protection are resolved in both countries using the mechanisms of corporate governance. Using Germany as a benchmark, the paper identifies that the most important and efficient mechanisms of shareholders rights protection, which can be implemented in Ukrainian companies are the following: principle of equal treatment and duty of loyalty which should be fixed in the legislation; enhancing the role of the National Securities and Stock Market Commission; introduction of the derivative suit system.

**Keywords:** Shareholders, Shareholders Rights Protection, Corporate Law, Ukraine, Germany

## 1. INTRODUCTION

Under reforming of the economic system in the early 90<sup>th</sup> of XX century in Ukraine corporate sector, represented primarily by joint stock companies, had started its evolutionary way. According to the statistics approximately 24610 joint-stock companies were registered in Ukraine in 2014<sup>1</sup>. These companies mainly were formed as a result of privatization of state-owned industrial enterprises. Nowadays Ukrainian legislation contains the legal collisions and controversy due to mismatch of corporate control and ownership issues in various legal acts. Due to that fact there are too many joint stock companies in Ukraine, which are not adjusted properly to the legislative requirements. The necessity to improve corporate governance in the joint stock companies in Ukraine based on providing an effective system of shareholders' rights protection arose simultaneously with the processes mentioned above. However, the problem is so important that today it can be considered as fundamental for the future of the whole corporate sector in Ukraine.

Thereby, in 2014, the Department of investor protection and local offices of the National Securities and Stock Market Commission (NSSMC) has received for consideration 3425 written requests from individual shareholders concerning violations of their rights on the stock market. The number of written requests to NSSMC increased dramatically for 40 per cent from 2013 to 2014<sup>2</sup>. More than 50 percent of those appeals related to the complaints of minority shareholders concerning the activity of joint stock

companies: failure to notify shareholders about annual general meeting (AGM); changes in place and dates of the AGM; weaknesses in registration procedures and quorum calculation at AGM; changes in agenda of AGM during the assembly; absence of shareholders who bought shares of a company in the secondary market; rights violations of shareholders during additional issue of shares. Thus, the protection of shareholders rights, especially minority shareholders, is one of the essential issues of corporate governance from the legal context as it dramatically affects the investors' confidence in companies' management and companies' performance.

Abnormally high number of cases of the shareholders' complains come not only to NSSMC, but also to law enforcement bodies, People's Deputies (members of the parliament of Ukraine) and the President of Ukraine, that fact indicates the low level of shareholders trust to the shareholder rights protection system, the lack of quick and fair treatment<sup>3</sup>.

Meanwhile, shareholder rights protection has to be advanced in the line to one of the current priorities for Ukraine which is a membership in the European Union under the "Action Plan Ukraine-EU" (March, 2005)<sup>4</sup>. According to "Ukraine-European Union Association Agreement" (March, June, 2014)<sup>5</sup>, Ukraine is obliged to adapt its legislation into compliance with EU legislation; particularly corporate law. The above concerns minority shareholders right protection too.

Shareholders' rights currently described in Article 116 of the Civil Code of Ukraine, Article 88 of

<sup>1</sup> Statistics about state registration companies and individual entrepreneurs. The State Registration Service in Ukraine - <http://www.drsv.gov.ua/show/13948>

<sup>2</sup> Government Portal. Web-portal of Ukrainian Government. Official Report of the National Securities and Stock Market Commission, 2014- [http://www.kmu.gov.ua/control/uk/publish/article?art\\_id=247042350&cat\\_id=244276429](http://www.kmu.gov.ua/control/uk/publish/article?art_id=247042350&cat_id=244276429)

<sup>3</sup> On Practice of Applying laws in consideration of corporate relations: Recommendations of the Supreme Commercial Court of Ukraine, December 28, 2007 № 04-5 / 14 // Business Accounting law. Taxes. Consultations from

11.02.2008 - 2008., № 6, p 25

<sup>4</sup> EU-Ukraine Action Plan. Publication date: 2005 - <http://www.enpi-info.eu/library/content/eu-ukraine-action-plan-0>

<sup>5</sup> Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part. Council of the European Union. Retrieved 2014-07-04. - <http://www.consilium.europa.eu/en/documents-publications/agreements-conventions/agreement/?aid=2014045>

the Economic Code of Ukraine, Articles 10, 21, 38, 39 of the Law of Ukraine on Business Associations (1991)<sup>6</sup>, Article 6 of the Law Of Ukraine on Financial Services and State Regulation of Financial Markets (2002)<sup>7</sup>, Article 5 of the Law Ukraine on the National Depository System (2013)<sup>8</sup> and other legislative acts.

Nowadays, one of the basic legal acts, which describe the shareholder rights protection in Ukraine, is the Law of Ukraine on Joint Stock Companies (2008)<sup>9</sup>, but many of its provisions are the subject of criticism for been "copied" from the various corporate law systems that makes the system of corporate law in Ukraine entirely disordered. In order to achieve successful perspective progress of the shareholders rights protection in Ukraine a very deep cross-country comparative study of shareholder rights protection systems should be undertaken first. Only in this case it is possible to find an appropriate solution for modifying Ukrainian corporate law system and secure at legislative level the effective shareholders rights protection remedies.

This paper attempts to investigate the German shareholder rights protection system and conclude on what remedies should be applied in Ukraine to make the system of shareholder rights protection in Ukraine well-ordered, i.e. entirely corresponding the requests of the Civil law. Civil law in Germany is taken as a benchmark to build a well-ordered whole system of corporate law. In addition, Ukraine aspires to belong to the Civil Law system and continental (European) model of corporate governance. These facts facilitate further analysis of legal rules in these countries. Moreover, according to "The Global Competitiveness Report 2013-2014"<sup>10</sup> indicator of protection of minority shareholders' interests in Ukraine got the 117 place (value 3,5 from maximum 5) from 148 countries compared to 29 (value 4,8 from maximum 5) in Germany. Thus, a comparative study of German and Ukrainian corporate law related to shareholders protection issues helps to find weak points in Ukrainian corporate law system to make it well-ordered through meeting the fundamental requests of the traditional civil law system.

This paper attempts to investigate shareholders rights and remedies issue and to find critical and challenging points under the same legal system in Ukraine and Germany. The paper proceeds as follows. The paper begins with a brief overview of historical origins and early researches on the subject; summarizes on the quality of shareholders rights protection in Ukraine and defines its weakness and the limits of their study for the purposes of this paper.

Chapter I defines peculiarities and differences of the German and Ukrainian corporate governance framework concerning shareholder rights. The chapter - including a cross country analysis - seeks to introduce the main types of violations of shareholder rights and describe the origin of conflict of interests and its influence on the shareholder rights infringement.

Chapter II illustrates approaches for shareholders' rights protection in German and

Ukrainian companies. The chapter starts with the critical overview of the information disclosure as a part of shareholder right protection; conducts a comparative exercise between mechanisms to appeal for shareholders to protect their rights in Ukraine and Germany; it further outlines the role of the state in shareholder rights protection.

The conclusion summarizes the results of the analysis and comparative study of the two countries. The conclusion supports the authors' hypothesis.

## 2.LITERATURE REVIEW: OUTLINING THE FUNDAMENTAL AND CHALLENGING ISSUES IN PREVIOUS RESEARCH

The main issue of corporate governance - necessity of separation of ownership and control - was firstly staged and considered in fundamental work of Adolph Berle and Gardiner Means [1932], who presented the manuscript "The Modern Corporation and Private Property". The authors argued that the management of corporation should work for shareholders wealth and protect their interests but practically interests of management and shareholders differ as a result of separation of ownership and control.

The future development of corporate governance research, engaged in numerous followers of ideas Berle&Means, particularly R. Coase [1937] who explored the nature of the firm and introduced the principle of residual control; a significant contribution to the development of the modern theory of corporate governance made R. La Porta, F. Lopez-de-Silanes, A. Shleifer, R. Vishny [1999], who explored the differences of shareholders and creditors rights protection by law from expropriation by the managers and majority shareholders of the company. Among Ukrainian scientists such as Olexander Kostyuk [2008], Igor Ivasiv [2012] investigated the same issues in corporate governance and law and followed the same conclusions.

A lot of scientific papers and books have been written about shareholders rights protection in Ukraine by Ukrainian and foreign scholars and practitioners. One paper which should be also mentioned is "Policy Brief on Corporate Governance in Ukraine" by Vitaliy Zheka [2006]. His work emphasizes that it is urgent for Ukrainian companies to implement CG rules, which will provide high quality of minority shareholders protection and argues about the role of independent directors concerning investigated issue.

Leonid Antonenko [2009] in his paper devotes to the problems of transformation through EU Law and efficiency of the companies, which operate in Ukraine, in part of shareholders' majority rights, distributions through dividends and transfer pricing, companies' financial information disclosure. His findings showed a very low success of law mechanisms in Ukrainian firms concerning minority shareholders rights.

<sup>6</sup> LAW OF UKRAINE On Business Associations, N 1577-XII ( 1577-12) from 19.09.91, BBP, 1991, N 49, cr.683 -

<http://zakon4.rada.gov.ua/laws/show/1577-12>

<sup>7</sup> LAW OF UKRAINE on Financial Services and State Regulation of Financial Markets, № 2664-III - <http://zakon4.rada.gov.ua/laws/show/2664-14>

<sup>8</sup> LAW OF UKRAINE On the National Depository System, 2013, 5178-17 -

<http://zakon1.rada.gov.ua/laws/show/5178-17>

<sup>9</sup> LAW OF UKRAINE "On Joint Stock Companies", 17.09.2008 № 514-VI -

<http://zakon3.rada.gov.ua/laws/show/514-17>

<sup>10</sup> Klaus Schwab, World Economic Forum - [http://www3.weforum.org/docs/WEF\\_GlobalCompetitivenessReport\\_2013-14.pdf](http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2013-14.pdf)

Robert W. McGee [2010] addresses some of the same issues as the previous scientists, especially, notices that the key aim of corporate governance in emerging markets at current stage of development is to ensure equal treatment of all shareholders, including minority and foreign shareholders in Ukrainian practice, and emphasizes the necessity of improving regulatory framework in order of implementation the EU standards (the European Union Takeover Directive).

Thomas W. Hall and Fredrik Jörgensen [2012] published the findings of "Ownership and Performance in Europe" and discussed the relationship between performance and ownership concentration in European countries including Ukrainian experience. The authors confirmed their hypothesis about less protection of small shareholders and underlined that ownership concentration of a single blockholder is negatively related to company performance.

Studies in recent scientific publications highlight a discussion between experts in corporate governance about the introduction of provisions for balancing interests between shareholders with implementation mechanisms of minority shareholders displacement, existing in the most EU countries. Thus, in 2004 the European Union adopted a Directive to solve the problem by using the takeover mechanism. The right of minority shareholders displacement (squeeze out) allows to force the majority shareholder repurchase of shares at fair market value (sell out). Detailed analysis of this very procedure mentioned in numerous experts' research of Ukrainian scholars and practitioners. The Supreme Council of Ukraine registered corresponding draft of Law of Ukraine "On Amendments to several Ukrainian legislative acts to improve corporate governance in joint stock companies" №3441, 2013, which is stipulated to regulate this issue.

Due to the fact that total disregard for the rights of shareholders became a common feature of corporate relations in Ukraine, in this respect the policy for their protection is an important component of efficient corporate governance. While acknowledging the scientific achievements of Ukrainian and foreign scholars on the issue of shareholders rights protection, we note that there is a necessity of additional investigation based on comprehensive economic and legal analysis and scientific comparison.

In the written papers of Ukrainian practice concerning shareholders rights protection, the authors haven't focused in the previous research on the comparative study of minority shareholders rights protection practices in Ukraine and in developed European countries, so, there is a lack of analysis, which gives the opportunity to identify the stage of corporate governance development, particular investors protection issue in such

emerging economics as Ukrainian one, this paper is devoted to make analysis and compare these practices in Ukraine and Germany.

### 3.SHAREHOLDER RIGHTS VIOLATION: UKRAINIAN VS. GERMAN CORPORATE GOVERNANCE SYSTEMS

According to Chapter V (Article 25) of Law of Ukraine "On Joint Stock Companies"<sup>11</sup>, the major shareholders' rights are the following:

- to take part in governance of the joint stock company;
- to receive dividends;
- to receipt assets or the value of the company's property in case of company liquidation;
- to have information about business activities.

In comparison with Ukrainian legislation German Stock Corporation Act (AktG) does not include a separate paragraph, which presents the fundamental shareholders rights, although description of shareholders rights are shown in different Articles of the Act. Such as the right of taking part in company governance (§ 134), getting transparent information about company (§ 131), having right to secede from the company, applying to court to protect their rights (§ 132, section 2, § 131, § 326, § 243, 245, § 241, 24, § 98, p. 2, № 3, § 104, p. 1, § 304, p. 4 and 3)<sup>12</sup>.

Carrying out a preliminary overview of Ukrainian and German law, two countries declare basically the same legal rights of shareholders. However, in practice there are many barriers in the process of efficient implementation of minority shareholders rights protection in the Ukraine.

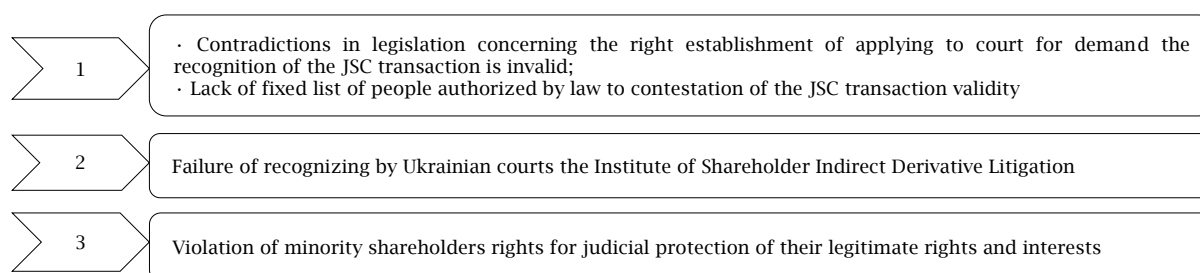
The scheme of Joint Stock Companies (JSC) provides the main principal of shareholder priority, because shareholders determine the key directions of the company development using the mechanisms of adoption of the act by which corporate governance is realized, by election of governing bodies, which control the partnership activity. But modern practice presents not a few cases where company brings forth terms to shareholders, which often raise corporate conflicts, and provoke violations of shareholders rights. The typical violations include (Scheme 1), for example, non-payment or late payment of dividends to shareholders by shares, failure to notify shareholders about the time and place of the General meeting, about amendments to the agenda of the General meeting during its implementation, not providing shareholders an opportunity to overview the company's charter and other internal company acts, limit access for shareholders upon their request to annual reports, reports on financial and business activity of the company, shareholders rights violation during additional share issue, cases of double sales of the same shares and others<sup>13</sup>.

<sup>11</sup> LAW OF UKRAINE "On Joint Stock Companies", 17.09.2008 № 514-VI – <http://zakon3.rada.gov.ua/laws/show/514-17>

<sup>12</sup> German Stock Corporation Act (the Aktiengesetz) - [http://www.nortonrose.com/files/german-stock-corporation-act-2010-english-](http://www.nortonrose.com/files/german-stock-corporation-act-2010-english-translation-pdf-59656.pdf)

[translation-pdf-59656.pdf](http://www.nortonrose.com/files/german-stock-corporation-act-2010-english-translation-pdf-59656.pdf)

<sup>13</sup> Letter of the Supreme Court of Ukraine and Higher Arbitration Court of Ukraine "On the determination of jurisdiction civil matters and commercial disputes" on 07.20.95 № 01-8 / 518th.

**Figure 1.** The problems of shareholders rights protection by the government and current judicial practice of Ukrainian courts

According to wording of the Constitutional Court of Ukraine in part of shareholders protection by law "... shareholders who have negligible block of shares don't have influence on company activity, their votes are not captured in effect at the General meeting during decision-making"<sup>14</sup>, that lawmakers consciously allow an absolute priority of majority shareholders, which usually are several people or even one shareholder over the minority shareholders, who are overwhelming majority of companies shareholders - minorities". It is obvious the minority shareholders in Ukraine have no efficient mechanisms that can give them any (even insignificant) possibility to vote in practice. At the same time Germany is considered as European country with a high level of minority shareholders protection.

The term "minority shareholder" is absent in the Ukrainian legislation. There is only the judgment of the Constitutional Court of Ukraine in case about "interest protected by law". According to the logic of the Court minority shareholders are the owners of such small number of shares that they "did not affect the company's business". A variety of researchers on this issue cannot found unequivocal answer about particular quantity of shares (or its value) because of the different degree in shares concentration between shareholders in different companies.

Generally, the first stage of decision-making in Joint Stock Company consists of shareholder vote, the decision is considered as accepted if the simple majority of 50% + 1 share of votes pro (the most important issues need 2/3 of votes)<sup>15</sup>. Thus, the voting right of shareholder depends on the number of shares it owns. This is known "Tyranny of the Majority"<sup>16</sup>.

Minority shareholders should be protected from violation of their rights by the majority shareholders and company management. There are two main instruments of corporate law that give grounds for such protection: the principle of equal treatment<sup>17</sup> and the duty of loyalty<sup>18</sup>.

1. The principle of equal treatment contained in paragraph 53 AktG outlines that "shareholder rights should be the same in equivalent conditions." In comparison with German law, the Ukraine doesn't directly provide the principle of equal treatment of shareholders of the company, although Article 25 of

the Law of Ukraine "On Joint Stock Companies" states: "Each owner of ordinary share in Joint Stock Company is granted the same set of rights". However, this statement does not provide equal rights in company governance.

2. The duty of loyalty is the second major element that provides protection of minority shareholders in JSCs. The criteria for compliance with duties of loyalty were developed by the Federal Supreme Court of Germany. Logically, the company management decisions that have been adopted against the will of the minority shareholders and reducing their rights must be justified by goals and are committed in the interest of the company. Nevertheless, the provisions relating to the the Supervisory Board in practice are realized only by independent directors predominance. Therefore the importance independent directors in the Supervisory Board should be stressed.

The Ukrainian legislation implies that the bodies of the partnership should act in interests of the JSC and its shareholders, and the last ones should not violate the rights of each other. But there is no obligation "duty of loyalty" in legislation, that's why it is an obstacle for treatment of the injured party to the court to stop the violations (violation of "duty of loyalty" would be a reason for such a claim).

The analysis of Ukrainian and German legislation in the sphere of shareholders protection shows that Ukrainian law has enough weaknesses in comparison to the German one in this field. This is why the suggestions of updating the corporate regulations in the Ukraine is urgent and will be discovered in the next section.

#### 4. APPROACHES FOR SHAREHOLDERS' RIGHTS VIOLATION PREVENTION AND PROTECTION: UKRAINIAN VS. GERMAN CORPORATE GOVERNANCE SYSTEMS

Shareholders rights remedies can be classified according to various criteria. Usually, the remedies are divided into two main types: legal and non-legal.

The first one includes judicial protection:

- court decisions concerning certain corporate conflicts;

<sup>14</sup> The decision of the Constitutional Court of Ukraine of 01.12.2004 № 18-rp / 2004: <http://rada.gov.ua>

<sup>15</sup> Martin Schulz, Oliver Wasmeier. The Law of Business Organizations: A Concise Overview of German Corporate Law. 2012 – Springer

<sup>16</sup> Karen Martyn. Corporate Governance: A Practical Handbook. 2012 – New Zealand

<sup>17</sup> Federico M. Mucciarelli. Equal treatment of shareholders and. European Union law. Case note on the Decision "Audiolux" of the European Court of

Justice. 2010 - [http://www.academia.edu/350672/Equal\\_treatment\\_of\\_shareholders\\_and\\_European\\_Union\\_Law](http://www.academia.edu/350672/Equal_treatment_of_shareholders_and_European_Union_Law)

<sup>18</sup> Sorensen, Karsten Engsig. Duty of Loyalty of Shareholders - A Possible Remedy for Conflicts in SMEs? (January 1, 2010). COMPANY LAW AND SMEs, Mette Neville & Karsten Engsig Sorensen, eds., Thomson Reuters, 2010; Nordic & European Company Law Working Paper No. 10-01. Available at SSRN: <http://ssrn.com/abstract=1709944> or <http://dx.doi.org/10.2139/ssrn.1709944>

- administrative protection (treatment of shareholders with statements about violations of their rights to the SSMSC - Securities and Stock Market State Commission<sup>19</sup>, to the law enforcement agencies and the authorities, which control business activity - if there were violations of commercial legislation);
- corporate protection (protection of the rights of shareholders by corporate governance mechanisms).
- To non-legal remedies of shareholders rights protection we can include economic mechanisms such as:
  - sale of shares

- issue of attorney for participation in the General meetings
  - signing the agreement on asset management services
  - PR-action (publication in the press, conferences, etc.)
  - the impact of self-regulatory organizations (drawing up ratings of JSC including information disclosure about shareholders rights violations, setting behavior principals and rules in the stock market for all members).
- There are many different classifications of the remedies used to protect minority shareholders. In this paper we analyze the most valuable (see table. 1).

**Table 1.** Remedies for minority shareholders rights protection: Ukraine and Germany comparison

<i>Minority shareholders protection remedies</i>	<i>Ukraine</i>	<i>Germany</i>
1. Minority shareholder feature	Not more than 10% shares	Not more than 5% shares
2. The principle of equal treatment	Not legally fixed	Secured by law
3. Members of the Supervisory Board independence from majority shareholders	Mainly dependent	Mostly independent
4. Elections of the Supervisory Board members	100% shareholders	> 50% shareholders, up to 50% labor collective (one third/one half regime)
5. Duty of loyalty	Not expressly provided by law	Directly prescribed by law
6. Voting procedures at the general shareholders meeting	"One share - one vote"	Generally "One share - one vote", but deviations possible (preferential shares)
7. Voting by post	Not prescribed by law	Allowed
8. Shareholder derivative litigation and the preclusion	Not provided	The requirement to have 1% of shares or shares value of 100 000 euro

Shareholder claims serve as an instrument to control the management.<sup>20</sup> Single shareholders can take legal measures either due to the derived right in the name of the corporation (derivative suit) or from her own rights, if her rights are directly infringed upon (direct suit). Class suits should also be mentioned, where a single shareholder brings a claim acting for a group of persons whose rights have been impinged. The derivative suit in particular is tied to several requisites which aggravate a claim. First, the shareholder has to call upon the board to lodge a claim. According to the business judgement rule the claim is normally settled if the board disapproves the decision. The business judgement rule therefore limits the application of derivative suits.

As noted above shareholder has the right to obtain information about the company. Within 10 days of it becomes available corporate secretary, and in his absence - the executive body of the JSC must provide the copies of necessary documents to the shareholder.

If shareholder rights are violated, he/she has the right to apply for judicial protection. In addition the National Securities and Stock Market Commission in certain cases is also supervisory authority.

The decision of the General meeting concerning merger, acquisition, division, transformation, spin-off of the company, changes in the company type - from public to private, commit a significant transaction and change of share capital may be appealed by shareholder only after getting the written refusal to the mandatory redemption of shares or in case, when company hasn't provided the response within 30

days from the date of sending petition to the Company<sup>21</sup>.

In order to balance the interests of all stakeholders and to comply with Directive 2004/25 / European Commission<sup>22</sup>, we consider it appropriate insert in the Law of Ukraine "On Joint Stock Companies" the following statement "implemmentation mechanism of minority shareholder right to require upon reaching package of 95% of the controlling shareholder to repurchase of shares at a fair price (sell-out)."

Despite the fact that the Court in Ukraine is the most authoritative remedial authority on the way of shareholder rights protection, it is not always the most effective in this case. And considering protracted nature (and sometimes even a few years) of legal proceedings for disputes on corporate governance, this remedy may be for shareholder irrelevant and therefore inappropriate. By contrast, the administrative remedy for shareholder rights protection is more efficient and has several advantages over the judicial. This protection within its powers is carried by the National Securities and Stock Market Commission<sup>23</sup>. According to current legislation the tasks belonging to the Securities Commission, including, protecting investors through the application of measures to prevent and suppress violations of the law on the securities market, imposition of sanctions for violations of law within its powers.

The positive side of this way of shareholders' rights are obvious: efficiency, accessibility complaints and statements to the SEC, high professional level members of the SEC and giving them broad authority

<sup>19</sup> Securities and Stock Market State Commission - <http://www.nssmc.gov.ua/>

<sup>20</sup> Becker 1997, Verwaltungskontrolle durch Gesellschafterrechte: eine vergleichende Studie nach deutschem Verbandsrecht und dem amerikanischen Recht der Corporation, 113.

<sup>21</sup> Bulletin of the the Commercial Law Center, 2013, № 43 - [http://commerciallaw.com.ua/attachments/article/317/Visnyk-2013-43\\_04\\_Screen.pdf](http://commerciallaw.com.ua/attachments/article/317/Visnyk-2013-43_04_Screen.pdf)

<sup>22</sup> Report from the commission to the European parliament, the council, the European economic and social committee and the committee of the regions application of directive 2004/25/EC on takeover bids - [http://ec.europa.eu/internal\\_market/company/docs/takeoverbids/COM2012\\_347\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/takeoverbids/COM2012_347_en.pdf)

<sup>23</sup> N 3480-IV, 23.02.2006, Law, Supreme Council of Ukraine On Securities and Stock Market - <http://zakon.nau.ua/eng/doc/?code=3480-15>

to establish that a violation of shareholder and on his recovery and application of appropriate sanctions against perpetrators violation of this law. In order to protect the shareholder rights the National Securities and Stock Market Commission may implement the following rules:

- to apply any obligatory norms of adequacy and other indicators and requirements that limit the risks of securities transactions;
- to monitor the reliability and information disclosure, which provided by issuers and its compliance with the established requirements;
- to conduct its own or common with other relevant agencies inspections and audits of financial and economic activities of issuers and withdraw during such audits documents, which confirm violations of legislation on securities;
- to send issuers binding instructions to eliminate violations of the securities legislation and require submission the necessary documents under applicable law;
- to send materials to law enforcement authorities regarding facts of the offenses for which administrative and criminal liability are provided;
- to impose administrative fines, penalties and other sanctions for violation of current legislation to legal entities and their employees, until the revocation of licenses for professional activity in the securities market.

To sum up, violation or non-infringement of shareholders rights depends on the efficiency of various protection remedies. Legal protection remedies require more expenditure of time, but they are more reliable with respect to other. At the same time, using them, shareholders are better chances to resume their violated rights. Meanwhile, ways to protect the violated rights may not necessarily be entirely legal. So called non-legal ways to protect shareholder rights (e.g, publication in media about JSC, where violation of the shareholders rights are appeared, sale of shares) must not be ignored, because in some cases they may act not less effectively than the resolving the problem in the court, and mostly important - much more promptly.

The main steps of solving protection of shareholder rights problems and ensure equal treatments are the following:

1. Improvement of legislation, which regulate the activity of joint stock companies. Experience shows that developing countries should address the most of the problems of unequal treatment of shareholders protection and the violation of their rights to the legislative level.
2. Combining of rules, which ensure equal shareholder rights and guarantee their protection with the charters and internal documents.
3. Joint efforts of professional stock market participants and other stakeholders for improvement of corporate governance framework in Ukrainian JSC are extremely important. The special working group on corporate governance and shareholder rights protection were formed to solve the problems in the corporate sector of Ukraine in April 1998<sup>24</sup>. The group includes the Central executive authorities, international representatives and individual stock market members in Ukraine. This working group has

prepared draft of the regulations and interpretations of the National Securities and Stock Market Commission, aimed the improving of corporate governance standards in Ukraine especially in terms of minority shareholders right protection. Many of these projects have been accepted by National Securities and Stock Market Commission. The group took an active part in the drafting of the Law "On Joint Stock Companies".

4. Improving the corporate culture as the basic guidance for joint stock companies and its shareholders; training of supervisory boards' members of JSC; promotion of the best practices of corporate governance using the experience of developed countries.

Recently, on the 2<sup>nd</sup> of March, 2015 the Verkhovna Rada of Ukraine adopted draft law that expands rights of minority shareholders concerning their rights protection. Among others draft law "On Amendments into some legislative Acts of Ukraine regarding the protection of investors' rights"<sup>25</sup> introduces to Ukrainian legislation "derivative suit" mechanism, and establishes the responsibility of directors of business entities in case of company losses by their illegal actions. The adoption of such amendment enhances the protection of minority shareholders and significantly influence on bringing Ukrainian legislation closer to fulfill the requirements of the Association Agreement with the EU. We can identify several effective rules, which take place in this legislative act:

- the Act introduces a separate category of disputes in the economic process - on Compensation for Losses caused by directors to the company;

- it is also proposed to exclude from the Commercial Code the Article 225 whereby the parties can set in advance the amount of losses, which should be compensated. Annual information of the issuer shall include statements about the deal of significant transactions. This is a new term according to which such transactions are more than 100 times the minimum wage;

- the Act provides significant number of changes to the rules for convening and holding general meetings of shareholders, as well as counting. Such changes increase transparency of decision-making process;

- current legislation provides an opportunity for shareholder to require the its shares redemption in case the company entering into significant transactions. Now that right can be realized during preliminary consent to enter into significant transactions;

- it is also proposed to introduce the practice of independent directors who will represent the interests of minority shareholders in public joint stock companies.

It should be emphasised that effectiveness of the shareholders rights protection depends primarily from the shareholder, its activity and efficiency. The most important steps are timeliness and consistency of action to defend their rights at all, and, particularly, having high judicial enlightenment.

Of course, nothing can guarantee the absence of problems and violations, but wrestle with any violation of corporate law in Ukraine is the only way

<sup>24</sup> Rules of the Special Working Group on corporate governance and shareholder rights - [http://www.uaib.com.ua/about\\_uaib/vectors/sectionse/section\\_2002/section\\_4/spec\\_rab\\_group/16986.html](http://www.uaib.com.ua/about_uaib/vectors/sectionse/section_2002/section_4/spec_rab_group/16986.html)

<sup>25</sup> LAW OF UKRAINE of 07.04.2015 N 2259 On Amendments to Certain Legislative Acts of Ukraine regarding investor protection

to find the remedies of shareholders rights protection.

## 5.CONCLUSIONS

On the legislative level, both the Ukraine and Germany have enough mechanisms for minority shareholders rights protection, but at the same time, in practice there are many barriers in the process of their effective implementation.

The idea outlined in LaPorta et. al that Common Law countries offer better shareholder protection than Civil Law countries is shortsighted.<sup>26</sup> Different ownership structures (dispersed vs concentrated ownership, different allocation of power within corporations). In the UK and the United States the board of directors and the executives are in power, whereas in Germany and the Ukraine (larger) shareholders possess more influence. This can be traced back to the mandatory character of the Company Law.

It is proposed to supplement the Law of Ukraine "On Joint Stock Companies" with such principles, which work in German case, as the principle of equal treatment and the duty of loyalty.

It is important to provide shareholders in Ukraine the opportunity to appeal to the court by means of the derivative suit.

Enhancing the role of the National Securities and Stock Market Commission in part of shareholders rights protection is also the aim of Ukrainian government. It is advisable that the Commission has the right to apply to the court to protect the rights and interests of investors, especially small ones.

Without entering the subtleties of legal nuances, it should be noted that the Law of Ukraine concerning the protection of investors' rights in Ukraine provides efficient mechanisms for the protection of minority shareholders' rights and represents an important step towards creating a real stock market and improves investment climate in Ukraine.

## REFERENCES

1. Antonenko, L. (2009). The Myth of Transformation through EU Law: A Case-Study of the Company Law Reform in Ukraine.
2. Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part. Council of the European Union. Retrieved 2014-07-04. - <http://www.consilium.europa.eu/en/documents-publications/agreements-conventions/agreement/?aid=2014045>.
3. Becker, (1997). Verwaltungskontrolle durch Gesellschafterrechte: eine vergleichende Studie nach deutschem Verbandsrecht und dem amerikanischen Recht der Corporation, 113.
4. Berle, A. (1932). The Modern Corporation and Private Property / A. Berle, G. Means. - N. Y.: MacMillan.
5. Braendle, U. 2006. Shareholder Protection in the USA and Germany - "Law and Finance" Revisited, German Law Journal, Vol 7 (3), 257-278.
6. Bulletin of the Commercial Law Center, (2013), № 43 - [http://commerciallaw.com.ua/attachments/article/317/Visnyk-2013-43\\_04\\_Screen.pdf](http://commerciallaw.com.ua/attachments/article/317/Visnyk-2013-43_04_Screen.pdf).
7. Coase, R. (1937). The Nature of the Firm. *Economica*, New Series, Vol. 4, No. 16. pp. 386-405.
8. COMPANY LAW AND SMEs, Mette Neville & Karsten Engsig Sørensen, eds., Thomson Reuters, (2010); Nordic & European Company Law Working Paper No. 10-01. Available at SSRN: <http://ssrn.com/abstract=1709944> or <http://dx.doi.org/10.2139/ssrn.1709944>.
9. EU-Ukraine Action Plan. Publication date: (2005) - <http://www.enpi-info.eu/library/content/eu-ukraine-action-plan-0>.
10. German Stock Corporation Act (the Aktiengesetz) - <http://www.nortonrose.com/files/german-stock-corporation-act-2010-english-translation-pdf-59656.pdf>.
11. Hall, T., Jörgensen, F. (2012). Ownership and Performance in Europe.
12. Ivasiv, I. (2011). Corporate governance in financial institutions in the structure of global financial regulation - *Sumy*. - Vol. 31 - P. 277-287.
13. Kostyuk, A. (2005). Business innovations and structure of corporate ownership in Ukraine. *Corporate Governance*.
14. Kostyuk, A.N. (2005). The Kostyuk report: Corporate board practices in Ukraine. *Corporate Board: Role, Duties and Composition*.
15. Kostyuk, A.N., Koverga, V., Kostyuk, H.V. (2006). Board size and composition: The main tradeoffs. *Corporate Board: Role, Duties and Composition*.
16. Kostyuk, H., Kostyuk, A., Mozghovyi, Y. (2014). European banks in Ukraine: Modelling risks, rewards and making forecasts. *Risk Governance and Control: Financial Markets and Institutions*.
17. Kostyuk A., Kostyuk H., Mozghovyi Ya., Kravchenko, Y. (2013) Corporate social responsibility index for Ukrainian banks: the essentials for implementation // *Corporate Ownership and Control*. vol. 10, is. 4, continued - 4, pp. 424-435.
18. Kostyuk, O. (2005). Board committee practices in Ukraine. *Virtus Interpress*. 164 pages.
19. Kostyuk, A. (2014). Corporate governance in Ukraine: major standards and emerging trends / A. Kostyuk, M. Stiglbauer, P. Velte, Yu. Lapina, D. Riabichenko / *Corporate governance in emerging markets: theories, practices and cases* / edited by S. Boubaker, D. Nguyen. - Berlin: Springer. - 269-288 pp. - ISBN 798-3-642-44954-3.
20. La Porta, R., Lopez-de-Silanes, F., Shleifer, A., Vishny, R., (1999). "Investor Protection and Corporate Valuation," Harvard Institute of Economic Research Working Papers 1882, Harvard - Institute of Economic Research.
21. Lapina Yu. (2014) Investment banks efficiency and corporate governance framework: finding unique peculiarities? // *Corporate Ownership & Control*. - Volume 11, Issue 2, 2014, Continued - 7 pp. 685-693.
22. Lapina Yu., Scherbina T., et al., (2013) Risk management, corporate governance and investment banking: the role of Chief Risk Officer // *Corporate Ownership & Control*. - Volume 10, Issue 3, 2013, Continued - 2 - pp. 313-330.
23. Law of Ukraine "On Joint Stock Companies", (17.09.2008) № 514-VI - <http://zakon3.rada.gov.ua/laws/show/514-17>.
24. Law of Ukraine of 07.04.2015 N 2259 On Amendments to Certain Legislative Acts of Ukraine regarding investor protection.
25. Law of Ukraine On Business Associations, N 1577-XII ( 1577-12 ) from 19.09.91, BBP, 1991, N 49, cr.683. <http://zakon4.rada.gov.ua/laws/>

<sup>26</sup> Braendle (2006), Shareholder Protection in the USA and Germany - "Law and Finance" Revisited, German Law Journal, Vol 7 (3), 257-278

- show/1577-12
26. Law of Ukraine On Financial Services and State Regulation of Financial Markets, № 2664-III - <http://zakon4.rada.gov.ua/laws/show/2664-14>.
  27. Law of Ukraine On the National Depository System, (2013), 5178-17 - <http://zakon1.rada.gov.ua/laws/show/5178-17>.
  28. Letter of the Supreme Court of Ukraine and Higher Arbitration Court of Ukraine "On the determination of jurisdiction civil matters and commercial disputes" on 07.20.95 № 01-8 / 518th.
  29. Martyn, K. (2012). Corporate Governance: A Practical Handbook. - New Zealand.
  30. McGee, R. W. (2010). Corporate Governance in Transition and Developing Economies: A Case Study of Slovakia (August 24).
  31. Mucciarelli, F. (2010). Equal treatment of shareholders and European Union law. Case note on the Decision "Audiolux" of the European Court of Justice. - <http://www.academia.edu/350672/>
  32. Equal\_treatment\_of\_shareholders\_and\_European\_Union\_Law.
  33. Official Report of the National Securities and Stock Market Commission, (2014) - [http://www.kmu.gov.ua/control/uk/publish/article?art\\_id=247042350&cat\\_id=244276429](http://www.kmu.gov.ua/control/uk/publish/article?art_id=247042350&cat_id=244276429).
  34. Raja, K., Kostyuk, A. (2015). Perspectives and obstacles of the shareholder activism implementation: A comparative analysis of civil and common law systems. Corporate Ownership and Control.
  35. Recommendations of the Supreme Commercial Court of Ukraine, December 28, (2007). № 04-5 / 14 // Business Accounting law. Taxes. Consultations from 11.02.2008 - 2008., № 6, p 25.
  36. Report from the commission to the European parliament, the council, the European economic and social committee and the committee of the regions application of directive 2004/25/EC on takeover bids - [http://ec.europa.eu/internal\\_market/company/docs/takeoverbids/COM2012\\_347\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/takeoverbids/COM2012_347_en.pdf).
  37. Rules of the Special Working Group on corporate governance and shareholder rights - [http://www.uaib.com.ua/about\\_uaib/vectors/section/section\\_2002/section\\_4/spec\\_rab\\_group/16986.html](http://www.uaib.com.ua/about_uaib/vectors/section/section_2002/section_4/spec_rab_group/16986.html).
  38. Schulz, M., Wasmeier, O. (2012). The Law of Business Organizations: A Concise Overview of German Corporate Law. Springer.
  39. Securities and Stock Market State Commission - <http://www.nssmc.gov.ua/>.
  40. Sørensen, K. E. (2010). Duty of Loyalty of Shareholders - A Possible Remedy for Conflicts in SMEs? (January 1).
  41. Statistics about state registration companies and individual entrepreneurs. The State Registration Service in Ukraine - <http://www.drsvu.gov.ua/show/13948>
  42. The decision of the Constitutional Court of Ukraine of 01.12.2004 № 18-rp / 2004: <http://rada.gov.ua>.
  43. Zheka, V. 2006. Policy Brief on Corporate Governance in Ukraine (August).