PROBLEMS OF NATIONAL PUBLIC AND PRIVATE LAW

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PROTECTION OF MINORITY SHAREHOLDERS' RIGHTS

The article defines the concept of minority shareholders, conducts the analysis of their principal rights within the meaning of current legislation, discusses the ways of protection of minority shareholders' rights and evaluates the effectiveness and adequacy of protection methods. During the last years, Ukrainian corporate legislation was developed and improved partly due to the world standards. However, the protection of rights of minority shareholders remains the issue that needs to be rethinked. The issue of protection of rights of minority shareholders correlates with the concept of corporate control and search for balance between the effective management of the corporation and interests of minor group of stakeholders. Therefore, the author proposed to define the minority shareholder as a "small shareholder" who has an insignificant number of shares and who does not participate in the day-to-day life of a joint-stock company, but simply receives income in the form of dividends and has other derivative rights. However, minority shareholders can combine their "powers" with other shareholders and thus can influence decision making in the joint-stock company. The author also states the question of what mechanisms exist to protect the rights of minority shareholders. There is no separate law to protect the rights of minority shareholders, but at the same time, Ukrainian legislation provides for various types of protection for both individual shareholder categories and any shareholder. These are intra-corporate (extra-judicial), administrative (for securities market offenses) and judicial methods to protect the rights of minority shareholders. That is why it is proposed to develop the corporate law in terms of the rights of minority shareholders, taking into account the experience of foreign countries.

Keywords: joint-stock company (JSC); minority shareholder; share; rights; protection methods.

Introduction.

Shareholders are a key element when creating a company, since it is they who form the authorized capital of the joint-stock company. Observation of the rights of shareholders allows them to fully participate in the life of the company, influencing its future actions and development strategy. Today it's hard enough to meet a company all shares of which belong to one person or are distributed only between majority shareholders.

Almost each company has minority shareholders, especially if the company is public and its shares are traded on the stock exchange. Since the possibilities for influencing the management of the company by the majority shareholders and minority shareholders are very different, the rights of the latter may be easily infringed.

The topic of protecting the minority shareholders' rights, that is shareholders owning a minority stake, remains relevant today in almost all countries of the world not only for business development, but also for providing shareholders with flexibility in conflict resolution, providing guarantees and tools to protect their rights, all this having a positive impact on the country's image on the international arena and contributing to attracting foreign investment.

As regards Ukraine, at the constitutional level Ukraine is proclaimed a democratic, social and rule-of-law state. Article 3 of the Constitution stipulates that human rights and freedoms and their guarantees determine the content and orientation of the activity of the state and the assertion and protection of human rights and freedoms is the main duty of the state[1].

[1] *Конституція України, 1996* (Верховна Рада України). *Офіційний сайт Верховної Ради України* https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80> (2021, January, 21).

The most important function of the state is to protect human rights and freedoms. But just securing it at the legislative level is not enough to really call it one. For this, the state should ensure the implementation of the principles of a democratic, social and rule of law in the realities of the day-to-day life of its citizens.

Although protection of minority shareholders' rights has always been a motto of corporate law, the violation of shareholders' rights in general, the neglect of minority shareholders' rights by majority shareholders and misunderstandings between these groups of stakeholders often take place in most of the countries of the world.

The processes taking place in Ukraine today influence the improvement of legal regulation of both interests of the society as a whole and of its individual members. Over the last few years, corporate governance legislation, including minority shareholders' rights, has been rapidly evolving and modernizing. The reform of the legal system and changes in legislation are in some way related to the political realities in Ukraine, which has turned its vector towards European integration. Recent changes to the Ukrainian corporate legislation have enriched the sphere of corporate relations by the legal institutes of squeeze-out and sell-out, the terms of the shareholders agreement, escrow account, etc.

This article examines and compares issues of regulatory framework, constitutionality, definition of the concept of minority shareholders in a number of jurisdictions, in particular in Ukraine, post-soviet countries and USA. However, the case of Ukrainian legislation will be paid most attention in the course of analysis.

The aim of the article. The objectives are to understand the definition of minority shareholders, existing rights of the minority shareholders and to analyse the current situation of the minority shareholders' rights in Ukraine as well as in other countries.

Research analysis. Recently, a lot of scientific research has been devoted to the issue of protection of the rights and interests of company's shareholders. However, their subject matter is protection of the rights of all company's shareholders, regardless of the amount of their shares in the company (i.e., they do not fully take into account the specifics of protecting the rights and interests of minority shareholders) , or scientists restrict themselves to considering only one legal form – a joint-stock company or a limited liability company, without analysing the division of business companies into public and non-public and not reflecting the particularities of their legal nature, but affecting legal regulation, which in general can be explained by the relative novelty of this distinction for Ukrainian law.

The work of Faleev V.V. is devoted directly to issues of the legal status of minority shareholders, is limited by joint-stock companies, and issues of protecting the rights of minority shareholders are touched upon in only one chapter. In the study Zabitov K.S. analyses protection of rights and interests minority shareholders in the context of a special institution – squeeze out (i.e. a compulsory buy out of minority shares upon request of a majority shareholder in case of acquisition of more than 95% of the company's shares).

Contemporary researches on corporate governance indicate on a number of unresolved issues in the field of protection of minority shareholders rights, which was the topic of study of both national (post-soviet) and foreign researches. The issue of protection of minority shareholders' rights was also the research topic in the following studies: Daniel Szentkuti, Minority shareholder protection rules in Germany, France and in the United Kingdom: A comparative overview; Paul Davies. Introduction to Company Law; F. Hodge O'Neal, Oppression of Minority Shareholders: Protecting Minority Rights; Julian Javier Garza, Rethinking Corporate Governance: The Role of Minority Shareholders – A Comparative Study; Zohar Goshen and Assaf Hamdani, Corporate Control and Idiosyncratic Vision; Doorman, A. and Timmerman, L., Rights of minority shareholders in the Netherland and others.

In the post-soviet science the issue of protection of minority shareholders' rights was studied by such scientists as Zhornokuy Y., Some Issues of Protection of the Right to Participate in the Management of the Business Entity; Kibenko O., Mechanism of the Forced Sale of Shares – Squeeze out: EU Experience and Prospects of Implementation in the Legislation of Ukraine; Spasibo-Fateeva I., Realization of Corporate Rights of Minority Sharehoders and others.

In 2018 the European Commission published its Study on minority shareholders protection. The task of the study was designed to assist the European Commission DG Justice and Consumers in assessing the European Union's (hereinafter – the EU) approach to and policy on minority shareholder protection. The study includes a thorough analysis and assessment of every EU member state's legal framework as it relates to minority shareholder protection, and it focuses on all the main categories of minority shareholder rights, namely economic, control (decision making), information, litigation, and equal treatment rights. It strives to enable policymakers to obtain a clearer picture of the EU member states' hard laws (such as laws, regulations, other legal acts, and listing rules), soft laws (such as corporate governance codes) and established case law

with respect to minority shareholder protection. It identifies any gaps, inconsistencies and incompatibilities in the legal frameworks of all the EU member states, especially ones that may influence cross-border investment and the further development of the single market. It also provides input for the European Commission's ongoing work on monitoring corporate governance developments in the EU.

Results and discussion. The day-to-day activity of the company requires a decision making with respect to the company's management and usually such decisions are made by the majority of shareholders (participants). In decision making process one can identify occasional instances where they find that the majority interests are in conflict with the minority interests. In case, if the decisions made are not in the best interests of the company but only meet the interests let's say of majority shareholders, interests of minority shareholders may have been violated and such minority group of shareholders shall have the right to argue against the decision made.

It must be noted that in a joint-stock company the corporate control over it is not separated from the property, i.e. it belongs directly to the shareholders but not its management. Therefore, the concept of corporate control shall be defined.

The logical prerequisite for the emergence of corporate control in the company is the majority principle, without which it would be difficult to imagine the normal functioning of companies and the development of corporate relations in general. The requirement of unanimity in making each decision would inevitably lead to endless deadlocks and conflicts between members of the company. Therefore, the principle of decision-making by a majority of votes can be called the cornerstone of corporate law. However, it is noteworthy that the principle of majority – in the sense in which it is understood now, i.e. like the majority, determined on the basis of "one share – one vote", did not always prevailed in corporate law. The history of corporate law indicates the existence of other approaches to decision-making within the company, namely the principle of majority, determined through the formula "one person – one vote", as well as the principle of unanimity[1]. Tarasov I.T., describing in his monograph the foreign legislation of the end of the 19th century, notes that "recognition of the right to vote belonging not only to each shareholder, but also to each share ... turned out to be positively impossible in practice ... Therefore, the law decides, on the one hand, that the number of votes does not increase evenly with the number of shares, but only in a certain proportion ... on the other hand, the legislation establishes a known maximum number of votes, more than which one person cannot have, no matter how great is the number of his shares"[2].

In the famous work of Berle and Means, corporate control is understood as a real opportunity to form a board of directors (or its majority) either by direct possession of a majority of votes or by using various legal means to exert influence or even pressure on the decision of the majority[3].

Protection of minority shareholders' rights is in fact one of the most difficult problems which the contemporary corporate law faces. The key concept lying behind this is to strike a balance between the effective control over the company given the interests of minor group of stakeholders. Ukrainian law as well as the laws of a number of countries does not provide for the definition of minority shareholder. However it entitles the shareholders holding a particular percentage of the company's shares to certain rights which may be considered as methods of protection of minority shareholders' rights.

In order to analyse current legal regulators in the field of protection of minority shareholders' rights, it is necessary first of all to define the concept of minority shareholders. Ukrainian Civil and corporate law does not know such a definition as a minority shareholder, it has not been well studied in doctrine. The most accurate definition can be found in works of Western scholars.

In American literature, a minority shareholder is understood as "a shareholder who owns less than a half the total shares outstanding and thus cannot control the corporation's management or singlehandedly elect directors"[4]. Given the two-tier structure of the corporation's management bodies that has developed in the United States[5], the activities of the board of directors, the body that manages the corporation and controls its business, may be under the control of shareholders.

[1] Степанов, Д. И. (2009). Феномен корпоративного контроля. *Вестник гражданского права*. Москва: В. Ема, *9, 3*, 167-171.

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[5] Васильев, Е. А. (ред.) (1993). Гражданское и торговое право капиталистических государств. Москва: Международные отношения, 153.

Merriam-Webster Legal Dictionary defines a minority shareholder as "a shareholder whose proportion of shares is too small to confer any power to exert control or influence over corporate action"[1].

Paul Davies, British professor, defines minority shareholders as "shareholders who do not hold sufficient shares to enable independent decision-making"[2].

Ukrainian state bodies define a minority shareholder as "a shareholder who does not have the corporate rights entitling to the majority of votes in the highest governing body of the company"[3].

Some post-soviet authors understand a minority shareholder as a shareholder who owns a smaller stake than a controlling stake[4]. Alternatively, a minority shareholder will be deemed as such due to having insufficient shares to block certain decisions and, therefore, exercise significant influence over the fate of the joint-stock company[5].

However, in our opinion, it would be legally reasonable to recognize a minority shareholder as one who owns at least one share of the company. This is obvious, since such a shareholder already owns binding rights with the company.

In other words, a minority shareholder is a "small shareholder" who has an insignificant number of shares and who does not participate in the day-to-day life of a joint-stock company, but simply receives income in the form of dividends and has other derivative rights.

The question that has to be answered is: what small, insufficient number of shares a shareholder needs to have in order to be able to be recognized as a minority shareholder?

The Law of Ukraine "On Joint Stock Companies" dated 17 September 2008 No. 514-VI, as amended (hereinafter – the JSC Law) does not answer this question[6].

Analysis of the Law on Joint Stock Companies allows us to determine to what rights a shareholder owning a certain number of shares is entitled. Thus, each share of a joint stock company entitles its shareholder to the same set of rights, including the right to: (i) participate in the management of a joint stock company; (ii) receive dividends; (iii) in the event of the liquidation of a company, obtain part of its property or the value of part of the property of the company; (iv) obtain information about the business activity of a joint stock company[7].

The above general list of corporate rights granted by shares is not exhaustive. The JSC Law also provides that shareholders – owners of ordinary shares of the company may have other rights stipulated by acts of legislation and the charter of a joint stock company[8].

A joint stock company is a legal entity, and therefore it is an organization with governing bodies. It is the governing bodies that must ensure the balance of interests of all shareholders (participants) of the company, including minority shareholders.

The highest governing body of a joint-stock company is the general meeting of shareholders, who make all important decisions in the activities of the joint-stock company. The notice of the general shareholders' meeting and the draft agenda shall be sent to the shareholders not later than 30 days before the date of their holding. This means that the JSC Law provides for a guarantee of participation in the general meeting for all shareholders, and therefore for minority shareholders.

All decisions at the general meeting of shareholders are adopted by voting. However, the problem of minority shareholders is that due to lack of votes, they cannot influence the result of voting. However, the JSC Law provides for the possibility of entering into an agreement between shareholders of the company, which may provide for the obligation of its parties to vote in a certain way at the general meeting of shareholders, to agree on the option of voting with other shareholders. In this way, minority shareholders, by combining their "powers", can influence decision making at the general shareholders meeting.

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[1] Merriam-Webster (2020). *Legal Dictionary* <https://www.merriam-webster.com/legal/minority%20shareholder> (2021, January, 21).

[2] Davies, P. (2010). *Introduction to Company Law*. Oxford, 216.

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[6] *Закон України про акціонерні товариства, 2008* (Верховна Рада України). *Офіційний сайт Верховної Ради України* <https://zakon.rada.gov.ua/laws/show/514-17> (2021, January, 21).

[7] Ibid, 25.

[8] Ibid.

Speaking of methods to protect the rights of minority shareholders, the scientific literature identifies three methods of resolving a dispute between a shareholder whose rights have been violated and a joint stock company: intra-corporate (extra-judicial), administrative (for securities market offenses) and judicial[1].

Intra-corporate means the negotiation of the parties, establishment of conciliation commissions. In practice, implementation of this method is possible in the presence in the company of an appropriate agreement between the shareholders, the provisions of which would protect the rights of minority shareholders and regulate the procedure of such processes, or by direct consolidation in the charter of the company.

Dolinskaya V.V. identifies two sub-types of intra-corporate method of protecting rights:

the procedure for protection of rights by the independent actions of an authorized person (for example, the sell-out right provided for by Article 653 of the JSC Law);

a conciliation method, in which the settlement of the conflict is carried out mainly by reconciling the conflicting parties with their interests (for example, conciliation procedures)[2].

However, nowadays, in Ukraine, intra-corporate dispute resolution is a rare occurrence, since corporate relationships are a young institution that has not developed as well as in Western countries, so when discussing ways to protect shareholders' rights, it is necessary to note the special role of the court.

Legal protection of rights of all shareholders is regulated in detail at the legislative level. The Commercial Procedural Code of Ukraine (hereinafter – the CPC) contains provisions under which disputes arising from corporate relations, including disputes between participants (founders, shareholders, members) of a legal entity or between a legal entity and its participant (founder, shareholder, member), including the disposing party, related to the creation, operation, management or termination of such legal entity, other than labour disputes, as well as disputes arising from corporate (other than shares) transactions in a legal entity shall be considered by the commercial court at the location of a legal entity Commercial Procedural Code of Ukraine dated 6 November 1991.

Analysis of the CPC and the JSC Law reveals the main cases of a shareholder's application to the court for protection of violated rights related to participation in a company.

In particular, the CPC provides for the possibility of filing a claim by a shareholder owning 10 or more percent of the company's shares for damages caused to the joint-stock company as a result of the actions of its official. At the same time, the CPC grants other shareholders owning 10 or more percent of the company's shares the right to join the lawsuit by filing a relevant application to the court[3].

In case of violation of the right to purchase the shares provided for by Article 7 of the JSC Law, any shareholder of a company is entitled within three months from the day on which he learned or should have learned of such violation, to request in court the transfer to him/ her of the rights and obligations of the securities purchaser.

The parties to the shareholders agreement may apply to the court for protection of their rights based on such agreement, including the right to demand compensation for damages caused as a result of breach of the contract, recovery of a penalty (fine), payment of compensation (fixed amount of money or amount under determination in the manner stipulated by the shareholders agreement), the application of other measures of liability in connection with the breach of the shareholders agreement[4].

A shareholder whose rights and interests protected by the law are violated by a decision of the general meeting or if the procedure for making such a decision violates the requirements of the JSC Law, other acts of legislation, charter or regulation on the general meeting of a joint-stock company, may appeal to the court such decision within three months from the date its adoption[5].

Any shareholder has the right to apply for the protection of their rights to the commercial court at the location of the company in case of violation of the provisions of the law on acquisition of shares of a public joint-stock company due to the consequences of acquisition of a controlling stake or a significant controlling stake in the company[6].

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[1] Носов, С. И. (2001). О защите прав акционеров. *Законодательство, 1*, 21; Долинская, В. В. (2006). *Акционерное право: основные положения и тенденции*. Москва: Wolters Kluwer, 736.

[2] Долинская, В. В. (2010). Понятие корпоративных конфликтов. *Законы России: опыт, анализ, практика, 6*, 8.

[3] *Господарський процесуальний кодекс України, 1991* (Верховна Рада України). *Офіційний сайт Верховної Ради України* <https://zakon.rada.gov.ua/laws/show/1798-12> (2021, January, 21).

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[5] Ibid, 501.

[6] Ibid, 651.

A shareholder is also entitled to file a claim to the court on invalidation of a related party transaction concluded on the terms which, according to the opinion of an independent auditor involved, a valuation entity or another person with appropriate qualifications, constitute for the company less well than normal market conditions[1].

Another noteworthy provision of the JSC Law is according to which any shareholder who considers that an independent director (meaning an independent member of the supervisory board) does not meet the requirements set for independent directors, may apply to the court with a claim for recognising a person as such who cannot be considered an independent director[2].

A minority shareholder also has the right to file a lawsuit with the court to declare a significant transaction invalid if the order of its approval was violated. At the same time, for the minority, the possibility of satisfying such a claim is practically reduced to zero, given that the number of voting shares he/ she has is insufficient to make another decision.

In United States of America law entitles the minority shareholders to special rights in case of takeovers. The most significant is the shareholder's right to demand the determination of the "fair value" of the shares owned by such shareholder by assessing their value and then redeeming the shares at such an "appraisal price" (also known as appraisal right)[3]. The said right allows a minority shareholder, who disagrees with the majority decision on significant changes in the structure and activities of the corporation and is unable to influence the content of such a decision, to leave the corporation and receive a fair reimbursement of the value of its shares[4].

The laws of certain states provide for various reasons for shareholders to have the right to demand the evaluation and repurchase of shares. Thus, § 262 of the Delaware General Corporation Law provides a shareholder with such right in the event of a corporation reorganization by merger or acquisition, if the shareholder did not vote in favor of the reorganization decision or did not express his consent in writing to the reorganization[5].

While clearly regulating the procedure for exercising the right of shareholders to demand the valuation and redemption of shares, state laws usually do not provide for a well-developed method for estimating the value of shares of a corporation's shareholder that does not agree with its decision on the relevant issue. In many states, the price of shares to be repurchased is defined as their market price, while in the state of Delaware, for example, the court evaluates not only the value of the shares themselves, but also the size of possible income to be obtained due to owning such shares[6].

A special right that serves to protect the interests of minority shareholders is the right of a shareholder to appeal to the court with a derivative suit (action) in defence of the interests of the corporation to persons who caused losses by the actions of the corporation and indirectly to small shareholders. Derivative claims are used not only in the USA[7], but also in other countries of the Anglo-Saxon legal system, for example, in the UK and Canada[8]. Indirect claims are also known to Ukrainian law. Typically, such lawsuits are brought against managers in cases of abuse of their authority, in violation of the "fiduciary duties" of the corporation and shareholders assigned to them[9].

Conclusions.

Analysis of the sources operating with the concept of minority shareholder showed that minority shareholders are considered as "small shareholders", holders of "small shareholdings" or as "owners of non-controlling interest". At the same time, such shareholders are a "weak party in the corporate relations system"; protection of their rights shall be prioritized. Minority stakes are interpreted as an ineffective means of

[1] Ibid, 71.
[2] Ibid, 531.
[3] Pepin, M. (1992). *Exclusivity of Appraisal – the Possibility of Extinguishing Shareholder Claims, 42 Case W. Res. L. Rev*. 955, 960.
[4] Barry, M. W. (1998). *The Purpose of the Shareholders' Appraisal Remedy*. Tenn. L.: Rev, 65, 661, 666.
[5] Delaware General Corporation Law (1996). *Delaware Laws (Annotated)*. USA: Prentice Hall.
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managing and exercising a shareholder's influence on the management of the financial and economic activities of specific joint stock companies; a low-income asset. The fundamental feature of a minority stake is not its numerical indicator, but also a real opportunity to influence the management and control of a particular joint stock company that a minority shareholder gives to its shareholder. The characterisation of the shareholder as a minority depends on both the size of the block of his shares and the "distribution of forces" in the joint stock company. An analysis of the legal status of the owners of the respective blocks of shares showed that the owners of the blocks of shares of 50 percent and more have an undeniable real opportunity to exercise control and management over the company, to resolve current issues of its economic and management activities. The legal status of shareholders-holders of shares in up to 10 percent is characterized by the inability to really influence the control and management of the company.

Thus, to date, Ukrainian corporate law does not explicitly enshrine rules related to the protection of minority shareholder rights, but at the same time provides for various types of protection for both individual shareholder categories and any shareholder. Due to the lack of legal regulation, case law is not always designed in such a way that it is possible to answer all the available questions in this field.

Certainly, the legal field needs considerable refinement, taking into account the experience of foreign countries, where the corporation institute is more developed. However, it should be noted that in the event of a dispute between a joint-stock company and a minority shareholder, the latter has the opportunity to refuse to participate in the joint-stock company and enjoy his/ her sell-out right.

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