

## PROBLEMS OF NATIONAL PUBLIC AND PRIVATE LAW

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### PROBLEMATIC ISSUES OF EXERCISING AND PROTECTING THE SHAREHOLDER'S RIGHT TO MANDATORY REDEMPTION OF SHARES BY A STOCK COMPANY IN UKRAINE

After acquiring the status of a candidate for membership of the European Union Ukraine is working strenuously to harmonize its domestic law with the law of the EU. Special attention is paid to the legislation on stock companies since European investors can be interested in participating in the share capital on the territory of Ukraine. In exchange for investments, investors-shareholders acquire corporate rights, and the legislation of Ukraine should be aimed at their due protection. The study analyzes the peculiarities of realization and protection of one of the shareholder's corporate rights in Ukraine – the right to mandatory redemption of shares by a stock company. The grounds and the procedure for exercising this right, and the specifics of its protection in case of violation, are provided. It is argued that an appeal to the company with a demand for mandatory redemption of shares by it and refusal to fulfill this obligation by the company is the basis for the shareholder to appeal the decision of the general meeting which became the ground for such right to court. At the same time, if the decision on the same issues violates the corporate rights or interests of the shareholder, then the right to sue to court for its appeal is unconditional and does not require a prior appeal to the company with a demand for mandatory redemption of shares. Analysis of the current Law of Ukraine "On Stock Companies", adopted on July 27, 2022, allowed us to conclude that today, such an approach is not fixed in the legislation of Ukraine. Moreover, the procedure for protecting the shareholder's corporate rights by appealing the decision of the general meeting is too complicated. The new Law is mostly aimed at adapting the stock legislation to wartime conditions while leaving some legal problems unresolved. Therefore, in this study, there are proposed relevant amendments to the Law of Ukraine "On Stock Companies".

**Keywords:** stock company, protection of shareholder's corporate rights, mandatory share redemption, contract conclusion, appeal of the general meeting's decision, legislative amendments.

#### I. Introduction

Having acquired the status of a candidate for membership to the European Union, Ukraine faced the need to reform its domestic legislation. One of the first steps on this path was the adoption of the new Law of Ukraine "On Stock Companies" on July 27, 2022.<sup>1</sup> After its entry into force on January 01, 2023, the legal regulation of foundation and activity of stock companies, as well as the procedure for the exercise and protection of the rights of their participants, underwent further amendments, which were aimed at adapting to the conditions of wartime. Although the Law is aimed at improving the legal regulation of functioning of stock companies, certain legal problems remained unresolved. One of the important issues is the problem of protecting the rights of investors, in particular shareholders, in Ukraine. The current Law provides certain legal norms that complicate the procedure for protecting corporate rights of shareholders including appealing the decisions of the general meetings of the company. To our opinion, this procedure needs to be simplified and therefore amended.

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<sup>1</sup> Закон про акціонерні товариства, 2022 (Верховна Рада України). Офіційний сайт Верховної Ради України <<https://zakon.rada.gov.ua/laws/show/2465-20#n1181>> (2023, October, 24).

## II. Comparative analysis of the Laws of Ukraine "On Stock Companies" of 17.09.2008 and of 27.07.2022 on the mandatory redemption of shares by the company.

Until January 2023, the Law of Ukraine "On Stock Companies" dated September 17, 2008, had been in force in Ukraine.<sup>1</sup> The current Law introduced significant amendments in the regulation of functioning of stock companies but left certain aspects unchanged. Among other norms, the provisions regarding the right of a shareholder to demand the mandatory redemption of his shares by the company have also been updated. In particular, the list of grounds for such demand has been expanded. In accordance with part 1 of Art. 102 of the Law "every shareholder – the owner of common shares of the company has the right to demand the mandatory redemption by the company of common shares belonging to him, if he had registered to participate in the general meeting and voted against the adoption of a decision by the general meeting on:

- 1) merger, accession, division, transformation, separation, change of company type;
- 2) concluding significant contracts by the company;
- 3) providing prior consent for the private stock company to conclude significant contracts;
- 4) concluding by the company of a contract in which there is an interest;
- 5) change in the size of the authorized capital;
- 6) refusal to use the shareholder's preemptive right to purchase shares of the additional issue in the process of their placement;
- 7) issue of convertible bonds;
- 8) amending the statutory document of the stock company in the cases provided in Article 99 of this Law."<sup>2</sup>

Clarifications have been made regarding the procedure for the company to conclude significant contracts and contracts in which there is an interest. In addition, this list is supplemented by points 7 and 8.

As for the shareholders – the owners of preference shares, the grounds for demanding the mandatory redemption of their shares by the company have not undergone any changes. According to part 2 of Art. 102 of the Law, such ground is if the shareholder had registered to participate in the general meeting and voted against the adoption of a decision by the general meeting on:

- "1) making amendments to the statute of the stock company, which provide placement of preference shares of a new class, the owners of which will have priority in the order of receiving dividends or payments in case of liquidation of the company;
- 2) extension of the scope of rights of shareholders – owners of placed preference shares which have an advantage regarding the sequence of receiving dividends or payments in case of liquidation of the company;
- 3) refusal to use the shareholder's preemptive right to purchase shares of the additional issue in the process of their placement."<sup>3</sup>

The provision fixing that the stock company in the specified cases is obliged to repurchase shares belonging to the shareholder remains unamended, as well as the provision fixing that the list of shareholders who have the right to demand such redemption is compiled on the basis of the list of shareholders registered to participate in the general meeting at which the decision which became the basis for the demand of mandatory redemption of shares was made (parts 3, 4 of Article 102 of the Law).<sup>4</sup>

At the same time, the Law slightly amended the procedure for shareholders to exercise the right to demand the mandatory redemption of their shares by a company. Thus, the start of the countdown for the company to notify the shareholder of his right to demand and for the shareholder to submit this demand to the company is the date of publication of the minutes of the general meeting at which there was made the decision which became the ground for the demand for mandatory share redemption.<sup>5</sup> The Law of 2008 calculated these terms directly from the moment such a decision was made.<sup>6</sup>

<sup>1</sup> Закон про акціонерні товариства, 2008 (втрата чинності з 01.01.2023 р.) (Верховна Рада України). Офіційний сайт Верховної Ради України <[https://zakon.rada.gov.ua/laws/show/514-17?find=1&text=оскарження#w1\\_2](https://zakon.rada.gov.ua/laws/show/514-17?find=1&text=оскарження#w1_2)> (2023, October, 24).

<sup>2</sup> Закон про акціонерні товариства, 2022 (Верховна Рада України). Офіційний сайт Верховної Ради України <<https://zakon.rada.gov.ua/laws/show/2465-20#n1181>> (2023, October, 24).

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Закон про акціонерні товариства, 2008 (втрата чинності з 01.01.2023 р.) (Верховна Рада України). Офіційний сайт Верховної Ради України <[https://zakon.rada.gov.ua/laws/show/514-17?find=1&text=оскарження#w1\\_2](https://zakon.rada.gov.ua/laws/show/514-17?find=1&text=оскарження#w1_2)> (2023, October, 24).

In addition, the current Law specifies the moment at which the contract of purchase and sale of shares is considered concluded. Thus, paragraph 3 of part 1 of Art. 103 fixes the provision which stipulates that the contract between the stock company and the shareholder on the mandatory purchase by the company of the shares belonging to him is concluded at the moment of receiving of the shareholder's demand by the company.<sup>1</sup> Such a legislative conclusion is absolutely logical, considering the fact that in accordance with parts 2, 3 of Art. 103 of the current Law, the company sends to the shareholders who have the right to demand the mandatory redemption of shares a notification about this right which includes all the essential terms of the relevant contract, and the shareholder who intends to exercise the specified right submits a "written" demand to the company. According to point 20 of part 1 of Art. 2 of the Law of Ukraine "On Stock Companies" the company makes all notifications to the shareholders in writing.<sup>2</sup> In this way, the contract is considered concluded by exchanging documents, which is allowed by part 1 of Art. 207 of the Civil Code of Ukraine.<sup>3</sup>

The Law of 2008 provided only for the obligatory written form of such contract without specifying the moment when it is considered concluded. However, according to the content of its article 69, the procedure for exchanging a notification and a written demand could also be considered the conclusion of the contract. This is indicated by the Clarification of the State Commission for Securities and the Stock Market "On the procedure for applying Chapter XII of the Law of Ukraine "On Stock Companies" regarding mandatory redemption by a stock company of shares placed by it" dated August 10, 2010 No. 7, which remains valid. This is indicated in paragraph 8 of point 10 of the Clarification: "...The presence of two documents, namely the notice of the right to demand the mandatory redemption of shares belonging to the shareholder made in writing and sealed with the stamp of the stock company and the written demand of the shareholder for the mandatory redemption of shares executed properly is sufficient to consider that the stock company and the shareholder concluded a contract on the mandatory purchase by the company of shares belonging to him in written form. In such case, additional conclusion of a separate agreement on the mandatory redemption by the company of shares belonging to the shareholder is not obligatory ..."<sup>4</sup> Based on the above, the norm of paragraph 3 of part 1 of Article 103 of the current Law "On Stock Companies" cannot be considered the novelty. However, its enshrinement strengthens the arguments in favor of the position that the legal regulation of the protection of shareholders' rights in case of their violation by the company, including the right to demand the mandatory redemption of shares, is imperfect.

### III. Problems in current legal regulation of mandatory share redemption by the company.

Paragraph 1 of part 1 of Article 61 of the Law dated 27.07.2022 provides: "In case that the decision of the general meeting or the procedure for making such decision violates the requirements of this Law, other legal acts, the statutory document of the stock company or the regulations on general meetings, the shareholder who believes that his rights and interests protected by law are violated by such decision may appeal it to court within six months from the date of the decision."<sup>5</sup> According to the content of this norm, only the length of the limitation period has changed: from three months to six.<sup>6,7</sup> Part 3 of the same article establishes a special procedure for protection of the shareholder's rights in case the decision of the general meeting was made on issues that give the shareholder the right to demand the mandatory redemption by the company of common shares belonging to him: "A shareholder may appeal the decision of the general meeting

<sup>1</sup> Закон про акціонерні товариства, 2022 (Верховна Рада України). Офіційний сайт Верховної Ради України <<https://zakon.rada.gov.ua/laws/show/2465-20#n1181>> (2023, October, 24).

<sup>2</sup> Ibid.

<sup>3</sup> Цивільний кодекс України, 2003 (Верховна Рада України). Офіційний сайт Верховної Ради України <<https://zakon.rada.gov.ua/laws/show/435-15#Text>> (2023, , October, 24).

<sup>4</sup> Роз'яснення про порядок застосування розділу XII Закону України «Про акціонерні товариства» щодо здійснення обов'язкового викупу акціонерним товариством розміщених ним акцій, 2010 (Державна комісія з цінних паперів та фондового ринку). Офіційний сайт Верховної Ради України <<https://zakon.rada.gov.ua/rada/show/vr007312-10#top>> (2023, , October, 24).

<sup>5</sup> Закон про акціонерні товариства, 2022 (Верховна Рада України). Офіційний сайт Верховної Ради України <<https://zakon.rada.gov.ua/laws/show/2465-20#n1181>> (2023, , October, 24).

<sup>6</sup> Закон про акціонерні товариства, 2008 (втрата чинності з 01.01.2023 р.) (Верховна Рада України). Офіційний сайт Верховної Ради України <[https://zakon.rada.gov.ua/laws/show/514-17?find=1&text=оскарження#w1\\_2](https://zakon.rada.gov.ua/laws/show/514-17?find=1&text=оскарження#w1_2)> (2023, October, 24).

<sup>7</sup> Закон про акціонерні товариства, 2022 (Верховна Рада України). Офіційний сайт Верховної Ради України <<https://zakon.rada.gov.ua/laws/show/2465-20#n1181>> (2023, October, 24).

on the issues provided for in the first part of Article 102 of this Law only after receiving a written refusal to exercise the right to mandatory redemption of the voting shares belonging to him by the company or in case of not receiving an answer to his request within 30 days from the day of sending it to the address of the company in the manner prescribed by this Law.”<sup>1</sup> This norm, in comparison with its version in the Law of 17.09.2008, has not been amended at all<sup>2</sup>, although it still needs editing. There are several arguments for this. All of them are due to the fact that in case that the general meeting adopts a decision on the issues provided for by the first part of Article 102 of the Law "On Stock Companies", at least three situations are possible: 1) when the contract on the redemption of shares is concluded, but the company evades its performance; 2) when the company avoids concluding the relevant contract; 3) when the shareholder does not have the right to demand the mandatory redemption of shares by the company.

Firstly, according to paragraph 3 of part 1 of the Article 103 of the Law of Ukraine "On Stock Companies", the contract on the redemption of shares by the company is considered concluded at the moment the company receives the shareholder's demand. Therefore, in case that the shareholder receives the refusal from the company to fulfil the obligation to repurchase the voting shares belonging to him, as well as in case of failure to receive a response at his request (failure to take action on the payment of shares by the company) within a 30-day period, such method of protection as appealing the decision of the general meeting seems inappropriate because there is the violation of an obligation under the contract.<sup>3</sup> In this case, compulsory performance by the company of the contractual obligation to pay the value of the shares should be applied. Such obligation is enshrined in part 4 of Art. 103 of the Law of Ukraine "On Stock Companies": “Within 30 days after receiving the shareholder's demand for mandatory share redemption, the company shall pay the value of the shares at the redemption price specified in the notice on the right to demand mandatory redemption of shares owned by the shareholder...”<sup>4</sup>

Secondly, a situation is possible when the company violates not the contract, but the obligation to conclude such contract. In fact, part 2 of Art. 103 of the Law obliges the company itself to address the shareholder with an offer: “The stock company, within five working days from the date of publication of the minutes of the general meeting at which there was made the decision which became the basis for the requirement of mandatory share redemption, in accordance with the procedure established by the supervisory board or the board of directors sends to the shareholders who have the right to demand the mandatory share redemption a notification of this right in which it is specified: 1) share redemption price; 2) the number of shares redemption of which the shareholder has the right to demand; 3) the total value of shares in case of their redemption by the company; 4) the term of the contract conclusion by the company and the term of payment of the shares price (in case of receiving a shareholder's demand for the mandatory share redemption).”<sup>5</sup> At the same time, the Law does not prohibit the shareholder from initiating the conclusion of such contract. Thus, part 3 of Art. 103 of the Law counts the period for him to submit the relevant request from the date of publication of the minutes of the general meeting at which there was made the decision which became the basis for the demand for the mandatory redemption of shares, and not from the date of receiving the notice from the company.<sup>6</sup> In paragraph 5 of point 9 of the above-mentioned Clarification of the State Commission for Securities and the Stock Market, the relevant provision of the Law of 2008 is interpreted as follows: “...the submission of a written request to the company by a shareholder who has the right to demand the mandatory redemption of shares owned by him does not depend on the company's notification of the right to demand the mandatory redemption of shares owned by the shareholder.”<sup>7</sup> In such situation, the contract cannot be considered concluded at the moment

<sup>1</sup> Закон про акціонерні товариства, 2022 (Верховна Рада України). Офіційний сайт Верховної Ради України <<https://zakon.rada.gov.ua/laws/show/2465-20#n1181>> (2023, October, 24).

<sup>2</sup> Закон про акціонерні товариства, 2008 (втрата чинності з 01.01.2023 р.) (Верховна Рада України). Офіційний сайт Верховної Ради України <[https://zakon.rada.gov.ua/laws/show/514-17?find=1&text=оскарження#w1\\_2](https://zakon.rada.gov.ua/laws/show/514-17?find=1&text=оскарження#w1_2)> (2023, October, 24).

<sup>3</sup> Закон про акціонерні товариства, 2022 (Верховна Рада України). Офіційний сайт Верховної Ради України <<https://zakon.rada.gov.ua/laws/show/2465-20#n1181>> (2023, October, 24).

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> Роз'яснення про порядок застосування розділу XII Закону України «Про акціонерні товариства» щодо здійснення обов'язкового викупу акціонерним товариством розмічених ним акцій, 2010 (Державна комісія з цінних паперів та фондового ринку). Офіційний сайт Верховної Ради України <<https://zakon.rada.gov.ua/rada/show/vr007312-10#top>> (2023, October, 24).

the demand is submitted, since there is no manifestation of the will of the other party – the company, which can deny the shareholder's right to demand the redemption of shares for some reasons. According to the position of the Supreme Court, "the current legislation expressly provides that a shareholder who is denied the right to demand the mandatory redemption of voting shares belonging to him by the company has the right to protect his direct legal interests by appealing the decision of the general meeting."<sup>1</sup> To our mind, the norm of part 3 of Art. 61 of the Law of Ukraine "On Stock Companies" can be applied precisely in such situation. However, for such claim to be admissible, it is necessary to have violations of the legislation, the statute, or the regulations on general meetings in the decision itself or in the procedure of its adoption (paragraph 1 of part 1 of Article 61 of the Law "On Stock Companies"). It seems that, according to the logic of Ukrainian legislator, the refusal of the company to exercise the right of the shareholder to demand the mandatory redemption of the voting shares belonging to him or the failure of shareholder to receive a response to his demand within 30 days from the day of sending it to the company's address is interpreted as the violation of the procedure for making the relevant decision provided for by the Law. In this case, the norm of part 3 of Art. 61 of the Law "On Stock Companies" is aimed specifically at protecting the right to demand the mandatory redemption of shares, and therefore it should not be applied to all cases of decision-making on matters provided for in part 1 of Art. 102 of this Law. If other violations were committed during the adoption of such decisions by the company, then the right to appeal such decision of the general meeting should not be conditioned by the refusal to exercise the right to demand the mandatory redemption of shares by the company, because this decision violates corporate rights and legal interests of the shareholder, in particular the right to participate in company management. These two legal mechanisms have different legal purposes. The appeal of the decision of the general meeting is aimed at protecting violated corporate rights and interests (it is important that such decision or the procedure for its adoption violates the requirements of the Law "On Stock Companies", other legal acts, the statute of a stock company or regulations on general meetings). And the demand for mandatory redemption of shares exists for the protection of the property interests of the shareholder whose corporate rights have not been violated (such right of demand arises even in the absence of violations on the part of the company). The third argument partly follows from the above.

Thirdly, as discussed above, part 1 of Art. 102 of the Law "On Stock Companies" provides that each shareholder – the owner of common shares of the company has the right to demand the mandatory redemption by the company of common shares belonging to him, if he had registered to participate in the general meeting and voted against the adoption of a decision by the general meeting on the exhaustive list of issues.<sup>2</sup> Thus, a shareholder in some cases does not have the right to demand the mandatory redemption of common shares belonging to him by the company, including cases when he did not participate in voting on the relevant issues. At the same time, the Law stipulates in any case that a shareholder can sue to court for protection of his infringed right only after his application to the company with a demand for the mandatory redemption of shares and receiving a written refusal from the company to exercise this right or failure to receive an answer to such demand within 30 days.

This approach can be criticized for the reason that Art. 55 of the Constitution of Ukraine guarantees everyone judicial protection of rights and freedoms of a person and a citizen<sup>3</sup>, and part 1 of Art. 16 of the Civil Code of Ukraine provides every person with the right to apply to court for the protection of his personal non-property or property right and interest.<sup>4</sup> Article 8 of the Universal Declaration of Human Rights also states: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."<sup>5</sup> The legislation of Ukraine proceeds from

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<sup>1</sup> *Огляд правових позицій КГС ВС щодо застосування належних та ефективних способів захисту корпоративних прав, 2022* (Верховний Суд). *Єдиний державний реєстр судових рішень* <[https://supreme.court.gov.ua/userfiles/media/new\\_folder\\_for\\_uploads/supreme/ogliady/2022\\_08\\_09\\_KGS.pdf](https://supreme.court.gov.ua/userfiles/media/new_folder_for_uploads/supreme/ogliady/2022_08_09_KGS.pdf)> (2023, October, 24).

<sup>2</sup> *Закон про акціонерні товариства, 2022* (Верховна Рада України). *Офіційний сайт Верховної Ради України* <<https://zakon.rada.gov.ua/laws/show/2465-20#n1181>> (2023, October, 24).

<sup>3</sup> *Конституція України, 1996* (Верховна Рада України). *Офіційний сайт Верховної Ради України* <<https://zakon.rada.gov.ua/laws/show/254к/96-вр#top>> (2023, October, 24).

<sup>4</sup> *Цивільний кодекс України, 2003* (Верховна Рада України). *Офіційний сайт Верховної Ради України* <<https://zakon.rada.gov.ua/laws/show/435-15#Text>> (2023, October, 24).

<sup>5</sup> *Universal Declaration of Human Rights, 1948* (The United Nations General Assembly). *The United Nations* <<https://www.un.org/en/about-us/universal-declaration-of-human-rights>> (2023, October, 24).

the rule that the right to judicial protection is unconditional. However, the shareholder who voted against the relevant decision can exercise his right to defense only in compliance with the procedure currently provided by the Law, and for the shareholder who did not participate in the vote this opportunity is lost, based on the literal interpretation of Article 61 of the Law. For example, if he was deprived of the opportunity to take part in the vote due to violation of the order of convening and notification of holding of the general meeting, then his corporate right to participate in management was thus infringed. As a rule, he should have the opportunity to appeal the decisions made by such meetings. However, if the adopted decisions relate to the issues provided for in the first part of Article 102 of this Law, then the right to appeal to court does not arise, because the shareholder does not have the right to demand the mandatory redemption of shares. The only option for such shareholder is to apply to the stock company for the mandatory redemption of his shares, even though his demand cannot be satisfied. The sole purpose of such appeal is to receive a written refusal to exercise the right to mandatory redemption of voting shares belonging to him by the company or failure to receive an answer to the request within 30 days in order to apply to court after following this procedure. Such complication of the possibility of exercising the right to protection seems to be unreasonable.

“The current legislation expressly provides that a shareholder who is denied the right to mandatory redemption of voting shares belonging to him by the company has the right to protect his direct legal interests by appealing the decision of the general meeting. ... The fact that a shareholder has the right to mandatory redemption of the company’s shares does not in any way prevent the exercise of his right to appeal this decision”. This legal position is set out in paragraphs 4.12, 4.13 of the decision of the Supreme Court dated 21.08.2019 in case No. 925/1224/18.<sup>1</sup> However, it seems that lack of the shareholder’s right to mandatory redemption of company’s shares should not become such an obstacle either.

#### IV. Conclusion

Considering the above, the expediency of the provision enshrined in part 3 of Art. 61 of the Law of Ukraine "On Stock Companies" is questionable, since the right to appeal a decision of a general meeting that violates the rights and legally protected interests of a shareholder should be unconditional and not depend on the issues on which the disputed decision was made. Moreover, this provision is aimed only at protection of the right to demand the mandatory share redemption. In this regard, it should be included in the article that directly regulates the procedure for shareholders to exercise the right to demand the mandatory share redemption and provide for the consequences of the company not following the relevant procedure. At the same time, there is no reason to extend this procedure of appealing the decision of the general meeting to all cases when the decision is made on the issues provided for in part 1 of Art. 102 of the Law.

Summarizing the stated positions, it seems appropriate to exclude part 3 from Art. 61 of the Law of Ukraine "On Stock Companies." Instead, we suggest to supplement Article 103 on mandatory share redemption with part 5 of the following content: “In case the stock company does not comply with the requirements of part 2 of this Article and gives to the shareholder a written refusal to exercise the right to the mandatory redemption of the voting shares belonging to him, or in case that the shareholder does not receive an answer to his demand within 30 days from the day it is sent to the company’s address in accordance with the procedure provided for by this Law, a shareholder may appeal the decision of the general meeting, which became the basis for demanding the mandatory redemption by the company of the voting shares belonging to him.”

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3. *Tsyvilnyy kodeks, 2003* (Verkhovna Rada Ukrainy) [Civil Code 2003 (Verkhovna Rada of Ukraine)]. *Ofitsiyyny sayt Verkhovnoyi Rady Ukrainy* [The official website of the Verkhovna Rada of Ukraine]. <<https://zakon.rada.gov.ua/laws/show/435-15#Text>> (2023, October, 24). [in Ukrainian].

<sup>1</sup> *Постанова у справі № 925/1224/18, 2019* (Верховний Суд України). *Єдиний державний реєстр судових рішень* <<https://reyestr.court.gov.ua/Review/83822373>> (2023, October, 24).

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