PROTECTION OF MINORITY SHAREHOLDERS' VOTING RIGHTS IN STOCK COMPANIES: COMPARATIVE STUDIES BETWEEN GERMANY AND UKRAINE

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Abstract

The paper presents the main legislative devices provided for protection of minority shareholders' voting rights in German and Ukrainian legislation. Starting with general overview of different techniques for such protection the thesis focuses on the concrete legislative norms of German Stock Corporations Act and Ukrainian law On business associations which are regulating the control relationships within the company.

In the light of the latest amendments Germany enjoy the highest level of minority shareholders' protection whereas the provisions of Ukrainian legislative acts related to the issue are often unclear, too vague and does not comply with the requirement of the European Union. The comparison of German and Ukrainian legislation helped to find defects in Ukrainian regulation and make certain proposals for its improving.

Introduction

Nowadays investments in Ukrainian economics are required for a development of the country. Stock company is one of the most popular forms of business associations used to acquire capital. For making investors more interested in buying shares of Ukrainian stock companies it is necessary to increase the level of trust in its stock market. One way to deal with it is to guarantee a high level of protection for small investors[1]. Attention should be paid to the protection of shareholders' voting rights which give them a possibility to control the affairs of the company, shares of which they hold. Thus, this paper will focus on the ways of protection of minority shareholders' voting rights in stock companies.

At the same time, one of current priorities in Ukrainian politics is becoming a member state of the European Union. According to Agreement about partnership and co-operation between Ukraine and the EU and its members – states[2] the first one owes a duty to harmonize its legislation with the legislation of the European Union, particularly – in corporate sphere related to protection of minority shareholders' voting rights.

Currently three legislative acts regulate process of doing business within Ukrainian stock companies. Those are: Civil and Commercial Codes and Law On business associations. Their provisions are often vague, unclear and do not comply with each other. Adoption of a special law that would regulate stock companies' activities is necessary. The project of Law On stock companies is being discussed in Verhovna Rada of Ukraine (state legislative body) but many of its provisions are criticized as "copied" from American system of corporate law. Critics assume that simple copying of legal norms from the legislative acts of another country will not solve the problem. For achieving a successful result comparative studies with

[1] Daniel Szentkuti: Minority shareholder protection rules in Germany, France and the United Kindom, CEU Legal Studies IBL L.L.M. short thesis, Central European University, March 2007

[2] Law of Ukraine On ratification of the agreement about partnership and co-operation between Ukraine and the EU and its members – states
Ileana Mihaela Smeureanu: Protection of minority shareholders in case of mergers and acquisitions: an analysis of the German, UK and Romanian legislation, CEU Legal Studies IBL L.L.M. short thesis, Central European University, March 2004

developed European countries should be made in order to find an appropriate solution for Ukrainian modifications of the corporate law.

Germany, in its turn, is within the European Union and its legislation has already been harmonized in such way that nowadays it complies with the main requirements of the Community. Moreover, many authors have claimed that Germany has unique, highly developed system of minority shareholders' protection. So, comparative studies between German corporate legislation related to minority protection rules with Ukrainian legislation will help to find defects in Ukrainian regulation and improve its domestic law.

The paper will be divided into four chapters. For better understanding the topic the first chapter will briefly describe rights of minorities, its classifications, different techniques of protection of owners with small percentage of shares, explain importance of voting rights for shareholders and necessity of its protection. The second and third chapters will scrutinize Ukrainian and German legislation in order to identify the mechanisms of minority shareholders' voting rights protection and determine its effectiveness on practice. Finally, the most important findings from the second and third chapters will be proposed as a basis for amendments of the existing Ukrainian legislation.

Chapter 1 - Brief survey on minority shareholders' rights and techniques of its protection

1.1. Rights of shareholders and their classification

Due to Art.10 of the Law of Ukraine On business associations all shareholders of Ukrainian stock companies obtain following rights related to the corporation: 1) to participate in managing of company's affairs; 2)to take part in division of company's profit and obtain part of it (dividends); 3) to withdraw; 4) to information about company's activities.

This list of rights is non-exhaustive. Members of company can also have other rights provided by law or Articles of Association. Examples of such "additional" rights can be pre-emptive right of shareholders or their litigation right – to apply to court for protection in case if their corporative rights are violated.

In comparison with Ukrainian legislation German Stock Companies Act does not include in itself one separate paragraph where main rights of shareholders are listed, although different paragraphs of the Act provide descriptions of shareholders' rights. Those are right to participate in managing of company (§ 134), to information about its activities (§ 131), to withdraw from the company, to apply to court for protection of its violated rights (§ 132section 2, § 131, § 326, § 243, 245, §§ 241, 24, § 98 section 2 No. 3, § 104 section 1, § 304 sections 4 and 3)[3].

Preliminary survey of Ukrainian and German legislative acts provide basically the same rights for shareholders of its stock companies. At the same time, on practice many obstacles occur for effective realization of its rights by minority shareholders.

There are several classifications of shareholders' rights proposed by different authors and scholars. We will focus only on some of them.

[3] Gerhard Wegen: Shareholders′ Rights in Europe – Work in Progress, American Bar Association, Business Law Section, Corporate Committee, European Subcommittee, Boston, April 6, 2002

Ukrainian legislator distinguishes between rights of shareholder "on share" itself and corporate rights (so-called rights "from share"). The first one is rights on share as on object: shareholder is an owner of this particular object; so, he can possess, use it and make decisions concerning its future. The most comprehensible example of such right is a right of shareholder to sell shares that he holds to company, other stockholders or persons outside the company. In particular circumstances such right can be limited but the consent of involved shareholder is necessary for such limitation[4]. Corporate rights of shareholders occur as a consequence of holding shares of company by shareholder. These rights are related to company shares' of which is owned by stockholder. Corporate rights in its turn are divided on to main groups: proprietary and managing (non-proprietary[5]) rights concerning legal person mentioned above[6]. Example of proprietary corporate rights – right on dividends, managing one – to participate in general meetings of company's shareholders.

Angel R. Oquendo distinguishes between substantive and procedural rights of shareholders. The first group of rights refers to the voting rights, right on information and so on, the second one includes rights to bring direct or derivative suits against the company or its members.[7]

Julian Velasco in a draft of his article "The Fundamental Rights of the Shareholder" proposes to divide main rights of shareholders to four categories: control rights, economic rights, information rights, and litigation rights. Fundamental control rights of every shareholder are her voting rights. Two main economic rights here are right to participate in distribution of profits and get its part as dividends and right to sell shares. Information rights provide the possibility to obtain essential information related to company's affairs and

[4] The Decision of the Constitutional Court of Ukraine in Vinnik case (case about rights of shareholders closely held stock company)
[5] Frank H. Easterbrook, Daniel R. Fischel, The economic structure of corporate law, Harvard University Press, 1991
[6] Commercial code of Ukraine
[7] Angel R. Oquendo: Breaking on through to the other side: understanding continental European corporate governance, University of Pennsylvania Journal of International Economic Law, Winter, 2001

litigation rights – "the ability to seek judicial enforcement of their other rights under certain circumstances"[8].

Shareholder pays a particular price for a share of a company (either in cash or in kind or in services etc.). The amount which the shareholder paid became a property of the company, and the shareholder (as a consideration) obtains certain level of control on the company's affairs. The shareholder controls the company through the voting mechanism. In order to effectively maintain the control over the company the shareholder has to be properly informed about its affairs. In case of the shareholder's inability to affect the results of general meeting by personal voting she can apply for help to the court. So, basically, the shareholders' rights to information and litigation are ancillary to her central fundamental right – right to vote.

According to the wording of the Constitutional Court of Ukraine in case on the interest that is protected by law minority shareholders in Ukraine do not have effective mechanisms that can give them any (even slight) possibility to realize their right to vote on practice. At the same time Germany is considered to be the European country with one of the highest level of protection of minority shareholders. So, in the next chapter of this paper we will compare methods of protection of the voting rights of the minority shareholders in these two countries and will decide whether the level of minority shareholders' voting rights is higher in Germany than in Ukraine. Moreover, on the basis of the comparison will be decided the question what provisions of German legislation can be used in Ukrainian one with target of harmonization of Ukrainian corporate legislation to the legislation of the EU, particularly – with increasing of the level of protection minority shareholders' right to vote. In some points we also will turn to provisions of the corporate law of the USA due to the fact that majority of provisions of the Project of the Law On stock companies were "borrowed" from American

[8] Julian Velasco: The Fundamental Rights of the Shareholder, Notre Dame Law School, Legal Studies Research Paper No. 05-16

legislation despite the suggestions of the authors not to copy models of other countries but to create your own that would be the most suitable to economical, legal and cultural peculiarities of the country.

1.2. The definition of "minority shareholder"

The expressed answer for the question "who is a minority shareholder in a stock company?" cannot be found neither in German nor Ukrainian legislation because of the absence of legislative definition of "minority shareholder" in these countries. The only one quasi-legislative (judicial) document that somehow deals with determining of criteria for minority shareholders is Decision of the Constitutional Court of Ukraine On interest that is protected by law[9]. According to the logic of the Constitutional Court minority shareholder is an owner of such a few number of shares of a stock company that she "in fact, cannot influence affairs of the company", particularly – through its decision-making process. This definition is almost identical to the one which is given by authors of Black's Law dictionary: minority (from English word "minor" - of little significance or importance) shareholders are those "who hold so few shares in relation to the total outstanding that they are unable to control the management of the corporation or to elect directors"[10].

However, both definitions are not comprehensible enough. Thus, the main question is remained open: what the exact amount of shares (percentage of the amount of the capital of the company) owner of which has the status of minority shareholder?

According to different scholars' studies concerning this topic the only one right answer about precise amount of shares (or its value) cannot be found, particularly because of different degree of concentration of shares within the members of different stock companies[11]:

[9] The Decision of the Constitutional Court of Ukraine in case On interest protected by law
[10] A.Garner (editor in chief), Black's Law Dictionary, 7th edition, St.Paul, Minn., 1999
[11] T. Naumova: Let's protect minority shareholders' rights (Захистимо права міноритарних акціонерів), Business adviser, 2005

for instance, in company where a majority of shareholders own 1% of shares each, owner of 13% of shares cannot be called 'minority'.

At the same time, shareholders who own less then control package of shares (e.g. – 49% of shares of the company) are not minority as well: without their presence on the general meeting there will be no quorum and as the consequence – no meeting can be held.

Shareholder with 25% of shares can block decision – making process on the most important matters, such as – increasing or decreasing of the company's capital, thus, such shareholder also cannot be named minority.

Ukrainian legislator distinguishes two main categories of shareholders according to their factual possibility to participate in managing of the corporation: shareholders – owners of less then or exactly 10 % of company's shares; shareholders – owners of more then 10 % of company's shares. The latter has much broader complex of rights related to managing of company's matters. Thus, according to provisions of Law of Ukraine On Business Associations (hereinafter – the Law) shareholder who is an owner of more then 10% company's shares has following rights:1) to appoint her representatives for controlling process of registration of shareholders for taking part in general meeting (Art.41 of the Law); 2) to make proposals concerning agenda of the general meeting which are mandatory for discussing during the meeting (Art.43 of the Law); 3) to demand calling of a general meeting at any time and because of any reason, if during 20 days the board of directors haven't executed this demand – to call the meeting independently (Art.45 of the Law)[12].

Shareholder which owns less then 10% of company's shares has no rights that were mentioned above. Thus, owner of less then 10% of shares has no independent right to manage affairs of the company on practice. So, such shareholder is minority shareholder

[12] The Law of Ukraine On Business Associations

according to the logic of the Constitutional Court's decision On Interest that is protected by law.

In German Stock Companies Act (hereinafter – the Act)[13] there is also division of all shareholders on groups due to the size of its shares' package and, accordingly - their rights towards the corporation: shareholders who owns 1/12 or more of the share capital; 1/100 or more of the share capital; less than 1/100 of the share capital. Representatives of the first group have rights to demand calling of shareholders' meeting and publication of its agenda (paragraph 122 of the Act). Those who are in second group can apply to court with motion to appoint person for assertion the claim for damages on behalf of the corporation. Representatives of the third group do not have rights that were mentioned above.

Anyway, there are two possible explanations for the definition "minority shareholder". First one is a broad one. According to it – all shareholders who own less then control package of the stock company are minority stockholders (comparing to the owner of the control package). Second definition is narrower. According to it, minority shareholder is the owner of a few shares of the stock company which, in fact, cannot participate in managing affairs of the company. Thus, due to the narrow definition, in Germany minority shareholders are those who hold less then 1% of shares of the company, in Ukraine – less then 10%.

In this paper we will deal with protection of minority shareholders (using this term in its broadest sense) with focus on rights of minorities who own less then 1% of the share capital in German Stock Corporation and 10% of the shares in Ukrainian one due to absence in latter group mechanisms that would give them opportunity to participate effectively in running of company's business.

[13] The German Stock Corporation Act

1.3. General provisions of protection of minority shareholders' rights in Ukraine and Germany

1.3.1. Basic principles of minority shareholders' protection in Ukrainian and German legislation

As a general rule, the first stage of decision-making process in stock company consists from shareholders' voting: the resolution is adopted if a simple majority 50% of shares + 1 share) votes for it (on the most important matters this amount increases to 2/3 of votes). Thus, the voting power of shareholder depends on the amount of shares that she owns. This is so called "majority rule" to which each shareholder submits herself when entering the corporation. Anyway, there are some limitations of the majority rule: all decisions adopted in such way cannot not be against the law, the Articles of Association and the well-being of the company. It also should try to satisfy the interests of all shareholders. So, basically, the majority decisions should guarantee a compromise between all parties of the decision process.

Minority shareholders should be protected from violation of their right by majority shareholders and management of the company. Two main elements of corporate law provide grounds for such protection: principle of equal treatment and duty of loyalty.

The principle of equal treatment is contained in paragraph 53a of German Stock Corporation Act. It says that "shareholders should be treated equally under equivalent circumstances". In comparison with German legislation Ukrainian one does not expressly provide principle of equal treatment for shareholders of the stock company although someone can argue that implied provision concerning theoretical equality of shareholders can be found in Art.11 and 12 of the Law On Business Association. Art.11 and 12 deal with rights and duties of members of companies, particularly – shareholders in stock companies. There are no distinction between shareholders' rights and duties that depend on quantity of shares that they hold. Therefore, the following conclusion can be made: Ukrainian legislator assumes that shareholders with different amount of shares have equal rights and duties relating to the company, as a consequence – they should by treated equally by its management and other

shareholders. Anyway, there is no expressly stated principle of equal treatment of shareholders in Ukrainian Law On Business Associations.

The duty of loyalty is the second important element that ensures protection of minorities in stock companies. Criteria for complying with loyalty's duty were developed by the Federal Supreme Court of Germany[14]. According to its logic a decision of the company which were passed against the will of minority shareholders and reduced their rights should have justified objectives and serve for the interest of the company.

If one of the conditions is not satisfied (either there are no justified objectives for such decision or it does not work for interest of company) the act is voidable, as consequence it can be declared invalid by court's decision.

It is worth mentioning that the court should take into consideration both interests of the company and shareholders and by comparing make a conclusion which one is more important in each particular case due to the principle of proportionality.

The Federal Supreme Court of Germany expressly stated that not only member of supervisory board and directors own duty of loyalty towards shareholders of stock company but "a legal duty of loyalty also exists between the shareholders of a stock corporation"[15].

Therefore, all shareholders of the company, its managers and members of a supervisory board have duty to act in best interests of company, taking into account interests of shareholders as well. Due to the duty of loyalty even majority shareholder during participation in managing of company's affairs should take into consideration interests of minority shareholders.

Prescriptions concerning duty of loyalty to the members of the board of directors and the supervisory board towards all shareholders and to majority shareholders toward minority owners of the company's stock are absent in the Law of Ukraine On business

[14] Kali & Salz (1978) 71 BGHZ 40
[15] Holzmann (1982) 83 BGHZ 319

Associations. Although it is implied that the company's bodies should act in the interests of the company and its shareholders and latter should not violate rights of each other, absence of expressly stated duty of loyalty in legislative acts is an obstacle for exercising by aggrieved party her right to apply to the court to stop violation (breach of duty of loyalty would be appropriate basis for such suit).

Therefore, it is proposed to modify the Law of Ukraine On business Associations with such innovations as duty of loyalty and principle of equal treatment. Those principles, expressly stated in law, would become an important tool for protection of shareholders' rights.

1.3.2. Techniques of protection of minority shareholders

Detlef Kleindiek in his article "Protection of minority shareholders under German law states following three main instruments as the most important for protection of minority shareholders [16] : rules restricting the powers of the governing majority; individual rights; and minority rights.

Minority protection through rules restricting the powers of the governing majority includes in itself formal restrictions, special rules requiring an enhanced majority vote and substantive restrictions.

Formal restrictions are those provisions of German corporate law that require giving to all shareholders notice about place and time of general meeting, passing resolution of stockholders related to particular affairs of the company by specified amount of votes and contain prohibition of direct instructions concerning managing of the company by shareholders to its managers.

Special rules requiring an enhanced majority vote apply during decision-making process that involves shareholders voting, particularly –on such important matters as

[16] Detlef Kleindiek: Protection of minority shareholders under German law, International Company and Commercial Law Review, 1993

reorganization or liquidation of the company, increasing or decreasing of the company's capital. For passing resolution related to these question law require holders of 2/3 shares to vote for it (in comparison usually simple majority of votes is enough). Moreover, in case if additional duties could be imposed, consent of all shareholders has to be provided.

Substantive restrictions demand compliance of shareholders' resolutions and management's decision with law, Articles of Association and fundamental principles of corporate law (such as the principle of equal treatment and the duty of loyalty that were discussed before).

Minority protection through individual rights basically ensures that all shareholders (including minority ones) has some equal rights, occurrence of which does not depend on ownership of certain percentage of shares. Individual rights of shareholders are those to information, voting rights and some litigation rights.

Minority rights in the meaning of the classification are those that are given to the group of minority shareholders. Example of such right is the right to demand calling of shareholders' meeting: it cannot be exercised individually by minority shareholders who own 5% of shares each, although they can unite into group and exercise their right as owners of 10% of company's capital. Minority protection through minority rights is the weakest one due to absence of activism of small stockholders. According to statistics only 1% of small shareholders unite into groups for exercising its minority rights[17].

Henry Hansmann and Reinier Kraakman in a book "The anatomy of corporate law"[18] argue about the existence of three main strategies for protection of minority shareholders. Those are: the appointment rights strategy, trusteeship strategy and the reward strategy. Two possible techniques of the appointment rights strategy are either to reserve seats

[17] Douglas G. Smith: A comparative analysis of the proxy machinery in Germany, Japan and the United States: implications for the political theory of American corporate finance, University of Pittsburgh Law Review, Fall, 1996

[18] Reinier Kraakman, Paul Davies, Henry Hansmann, Gerard Hertig, Klaus Hopt, Hideki Kanda, Edward Rock, The anatomy of corporate law: a comparative and functional approach, Chapter 2, Oxford University Press, 2004

on the board of directors for minority shareholders (for instance, by providing of a cumulative voting rule) or to limit the voting rights of large shareholders. The content of the trusteeship strategy is following: directors of the company should be independent from its controlling shareholders. Three techniques exist to achieve the result: 1) to weaken the rights of shareholders' meeting to appoint the directors (e.g. in Germany the board of directors is elected by the supervisory board); 2) to require board approval of the most important decisions; 3) to disrupt financial ties between the directors and controlling shareholders. Examples of the reward strategy are right to sell the shares of the company to the corporation itself and right to get dividends.

There are a lot of different classifications of the tools that are used for minority shareholders' protection, particularly – protection their voting rights. In this paper we will discuss the most important of them by dividing them into two main groups: tools that are used for protection of the voting rights during the decision-making process (on the general meeting) and after decision-making process (after the general meeting).

Chapter 2 -Protection of minority shareholders' voting rights in Ukraine

2.1. Protection of minority shareholders' voting rights during the general meeting (during the decision-making process)

2.1. 1.Matters on which shareholders (or their representatives) can vote

The main fundamental right of shareholders of the stock company that does not depend on the number of shares owned by her is a right to vote on the general meeting. So, the general rule is that all shareholders have right to vote on the meeting of shareholders of the company. However, there is an exception from the general rule. The limitation concerns the owners of preferred shares. Due to the provisions of Ukrainian legislation the owners of preferred shares do not have right to vote but they obtain right to dividends before the owners of the common stock instead. This exception does not violate rights of such shareholders according to the principle of the freedom of the contract: shareholders who buy preferred shares agree on the issue that they will have no right to vote.

However, the general rule is following: all shareholders have a right to vote. So, we will focus only on the realization of that right which is established according to the general rule.

Art.41 of the law On Business Associations contains a list of matters that has to be decided on the general shareholders' meeting. Those are defining of the main approaches of stock company's activities and approval of its plans and reports concerning its execution; amending of the Articles of Association, particularly – related to the amount of the registered capital; election and removal of the members of the supervisory board; election and removal of the members of the board of directors; approval of the annual balance sheets, order of distribution of the surplus and order of paying of the dividends and liabilities; establishment, reorganization and liquidation of subsidiaries, approval of their Articles of Assocations; making decision about applying to the court for resolving the cases related to liability of the members of the company's bodies; approval internal documents of the company; and so on.

Shareholders cannot delegate decision of the most important matters (examples of those are changing the amount of the registered capital, reorganization and liquidation of the company to the other bodies). The list of the matters which have to be decided by shareholders is non – exhaustive: the Articles of Association can provide additional questions that should be decided on the general meeting. Decisions of the most important matters related to the company's affairs by shareholders prove status of the general meeting as the highest body of the company.

2.1.2 Methods of voting

Due to the Art.41 of the law On Business Associations shareholders of the company may realize their right to vote by two main ways. The first one is a direct voting and the second – voting through its representative (hereinafter – indirect voting or voting by proxy). Let's discuss them in details.

2.1.2.1. Direct voting

Despite the fact that the general meeting is the highest body of the company and it is responsible for the decision of the most important questions vote of the minority shareholder in a majority of cases will decide nothing. Understanding of this fact is a main reason of the absence of shareholders' activity.

For instance, the directors of the company are elected by a majority of votes on the general meeting. Principle of such voting – "one share – one vote" (straight voting), so, usually the directors factually elected by the majority shareholders and controlled by them. This fact is known by the minority shareholders. So, they usually stay reluctant during the election of the directors because of awareness that their votes will not change anything. Probable solution for the problem provided in the Project of the Law On stock companies. Art.41 of the Project proposes to use two methods of decision-making process. The first one is "an old one" based on the principle "one hare-one vote"; the second one is innovative for

Ukrainian legislation – making decisions with the help of cumulative voting. Art.1.8 of the Project provide the definition for the cumulative voting: it is "voting during the election of the bodies of the association, when the whole amount of the shareholder's votes multiplies on the number of the member of the company's body that are electing and the shareholder has a right to give all votes to a particular candidate or to divide them between several candidates". Let's see how the cumulative voting works on the particular example. Let's assume that in the stock company "Sunrise" there are two shareholders A and B; A own 26 shares and B 74 shares of the company; they appoint the board of directors of "Sunrise" that consists from three members. If only the straight voting is permitted B will give 74 votes for every candidate and A – 26. So, as a consequence, candidates for whom B was voting will become the directors of the company. The situation will changed if the directors should be appointed by cumulative voting. In this case A is entitled to cast 78 votes (26 x 3) and B – 222 votes (74 x 3). If A will give all her votes for one candidate B will have no possibility to preclude his/her election due to the fact that it is impossible to divide the B's votes between the three candidates for each of them to get 79 or more votes. So, in cumulative voting minority shareholders have a chance to get their representatives in the management and in the supervisory board[19]. Understanding of the minorities that they will obtain certain level of control in the company due to new election process will increase minority shareholders' activity in taking part in the decision – making process.

At the same time the Project does not propose any effective mechanism for consolidation of the shareholders' votes during the election of the directors. For comparison, American legislation *provides* for shareholders possibility of conclusion of so-called "pooling agreement" (voting agreement) - a contract among the shareholders, or some of them, to vote

[19] Robert W. Hamilton, The law of corporations in a nutshell, 4th edition, St.Paul, Minn., 1996

their shares in a specified manner on certain matters[20]. There are different ways of the enforcement of such agreement proposed by American courts. Among them are decreeing specific performance, providing remedy according to which shares that are voted in contravention with the instruction does not count during making a decision, authorizing irrevocable proxy appointment in connection with pooling agreement. Provision of a possibility to conclude such agreement and special ways of its enforcement are also important for effective protection of right of minority shareholder to voote.

One may argue that the main principle of Ukrainian legislation is formulated in such way that "everything that is not expressly prohibited are allowed", thus, nobody prohibits shareholders to conclude voting agreements. But it is true also that a majority of shareholders are just not aware about such possibility and provision in the law is the best methods of information about the existence of pooling agreements.

2.1.2.2. Proxy voting

Art.41 of the Law On business Association established the rule according to which the shareholder of the company can realize his right to vote on the general meeting by two main ways: to vote personally on the general meeting (so-called "direct voting") or by appointing the representative who will vote on the general meeting instead of the shareholder (so-called "proxy voting"). Art.44 of the Law On Business Associations distinguishes types of such representatives: those appointed on indefinite term (permanent representatives) or on certain term (temporary representatives). The shareholder can appoint as a representative any person and change her/him anytime. The document that proves rights of the representative is a proxy. There are no norms concerning the instructions how to vote to the representative by the shareholder in the Law On business associations. It is not clear whether such instructions should be given to the representative or he should vote "in best interest of the shareholder".

[20] Stephen M. Bainbridge: The case for limited shareholder voting rights, UCLA School of Law, Law & Economics Research Paper Series, Research Paper No. 06-07

Art.38 of the Project of the Law On Stock Companies does not provide any answers for the questions mentioned above, furthermore, it is just a paraphrased copy of the Art.44 of the Law On business Associations. It seems more likely that in the proxy the shareholder just authorizes the right of the representative to vote on its behalf and the representative has to vote in best interests of the shareholder.

2.2. Protection of minority shareholders' voting rights after the general meeting (after the decision-making process)

2.2.1. Right to withdraw

Art.10 of the Law of Ukraine on Business Associations contains in itself a non-exhaustive list of shareholders' rights, among which – right to withdrawal (to exit from the company) in the order that provided by law. That is the only one provision concerning the right to exit the company that can be found in the Law. Other legislative acts are also silent on the issue. Just Principles of the corporate governance expressly states that the shareholders of the company have a right to sell their shares to the company in case if they disagree with a decision of the general meeting[21]. But the latter document is not mandatory for execution – it is just recommendation. So, basically modern Ukrainian legislation provides the right to withdraw from the company for the shareholders, although there is no detailed determination of the ways how she can do that. Moreover, in current legislation of Ukraine lacks norms which provide the aggrieved shareholder with the right to sell her shares to the company – issuer (so-called "buyout" remedy).

Art.66 of the Project of Law of Ukraine On business Associations contains in itself a list of situations when the company owes a duty to purchase the shares of the shareholder who has voted against a decision of the general meeting about reorganization of the company, changing of the amount of the registered capital or other important issues. The price of the shares has to be determined on the basis of its market value according to the criteria that are

[21] Principles of Corporate Governance (2003)

given in Art.7 of the Project. In case if the shareholder is dissatisfied by the result of such evaluation she can appeal to the court.

Although at the first sight the provisions of the Project solve the problem, many questions still remain open. It is not understandable who will make such evaluation – a supervisory board or a professional valuer. It is said that, as a rule, the evaluation of items within the stock company should be made by the supervisory board. At the same time, a professional valuer can be appointed by the supervisory board for determining the price of the shares. However, a list of situation in which such appointment is obligatory is missing. So, we can presuppose that the supervisory board will do such evaluation by itself for the target of economy of corporate budget (not paying for services to the professional valuer). At the same time, evaluation of the minority shareholders' shares by the members of the supervisory board who are dependent on the will of majority shareholders will most probably be unsatisfactory for the minority. Thus, the latter will apply to court, as a result of which, one more question arises. The Project does not give the direct answer on the question what the court should do in such case: should it appoint a valuer or determine the price by itself? This issues should be solved for providing an effective mechanism of the minority shareholders' voting rights protection.

2.2.2. Direct and indirect suits

Art.55 of Constitution of Ukraine[22] expressly states that every person has a right to apply to a court for judicial protection of his/her rights. Art. 17 (1) of Civil Code of Ukraine particularly allows to apply for a judicial protection of civil rights and lawful interests[23].

Constitutional Court of Ukraine in its Decision in case On the interest protected by the law (s.2) emphasizes a possibility of every shareholder to protect his rights and interests by bringing motions to the court in case if they were violated, disputed or unrecognized by the

[22] The Constitution of Ukraine (1996)
[23] The Civil Code of Ukraine (2003)

company itself, its bodies or other shareholders of the corporation. In other words, s.2 of the Decision allows to every shareholder bring the direct suit to the court. So, in case of violation of the corporate rights of the shareholder (in our case the voting rights) the shareholder can apply to the court for the protection.

The situation is different with derivative suits. The main issue in the Decision was whether the shareholder can bring to the court indirect action on the behalf of the corporation shares of which she owns if as a result of the violation of the corporation's rights, interests of the shareholder were violated as well.

Section 4.1. of the Decision pays attention on the fact that the legitimate interest of the corporation is not a simple sum of legitimate shareholders' interests: interests of a majority shareholder, minorities and of the company itself cannot always be identical. According to Section 4.3. of the Decision Ukrainian legislator realizes a priority of a majority of the voting shares owners of which can be several or even one majority shareholder (s) upon a minority of the voting shares that are owned by a majority of stockholders – minority shareholders. Thus, the Constitutional Court factually states that the interest of the company is identical to the interest of the holder of the "control package" of shares; the individual interest of a minority shareholder in its tern cannot be deemed the interest of the whole company. So, as a rule, minority shareholders in Ukrainian stock companies cannot apply to the court with indirect suit on the behalf of the company. The Constitutional Court provides some exceptions from the general rule: minority shareholders can bring the derivative suit if they are authorized to do it by the company.

Thus, the minority shareholders do not have the right to bring the indirect (derivative) suits on the behalf of the company. For providing an effective mechanism of protection of the voting eights of the minority shareholders it is necessary to modify Ukrainian legislation with

such innovation as “derivative suit”. This tool will protect minorities from a majority shareholder and from violations of the company’s bodies.

Chapter 3 - Protection of minority shareholders' voting rights in Germany

3.1. Protection of minority shareholders' voting rights during the general meeting (during the decision-making process)

3.1. 1.Matters on which shareholders (or their representatives) can vote

The main legislative document, that regulates establishment and activities of the stock companies in Germany and provides lists of rights, duties and methods of protection of its shareholders, is the Stock Corporation Act (Aktiengesetz/ hereinafter - AktG or the "Act).

According to the provisions of the Act every shareholder of the company has a right to vote on the general meeting. This right does not depend on the amount and price of the shares which the shareholder owns. Multiple voting rights are prohibited under the Act, so, just rule "one share – one vote" applies in Germany.

Although the general rule is that every shareholder is enabled to vote in the Articles of Association can be provisions that limit voting rights of shareholders, for instance, they can provide "for a maximum number of votes, that any one shareholder may have regardless of his actual shareholding, or otherwise limit voting rights by graduation"[24]. As recently made researches show a majority of German stock companies do have such limitation in their Articles. It is important to know that the limitation of the voting rights does not apply to the bank who acts as custodian for the shareholders of the company. As a rule, such bank is also the shareholder of the same company and he can use those votes given to him by the shareholders in his interests. So, providing of limitation of the voting rights for shareholders (which at the first sight seems to be an effective tool for protection of minority shareholders) on practice works as a tool for control the company by bank. In articles of association – 20% maximum (for instance) but does not apply to banks who act like custodians. It is also worth mentioning that the shareholders who own preferred shares without voting rights cannot vote on the general meeting, although they still have right to

[24] Ruster, Bernd (Ed.), Business transactions in Germany, Looseleaf, Matthew Bender, New York, first published 1983

participate in it. The same rules apply to the shareholders who haven't paid contributions for their shares. One more exception from the general rule "all shareholders have a right to vote" is provided in § 136 of the Stock Corporations Act. Due to this statutory provision a person cannot exercise voting rights on issues related to ratification of his acts, enforcement by the company suit against him or his discharge from the liability (so-called "exclusion of voting rights"). Thus, there are three exceptions from the general rule that gives to every shareholder right to vote in German legislation: owning preferred stocks without voting rights, exclusion of voting rights and its limitation in the Articles of Association. However, further in the work we will focus on the situations where shareholder has a right to vote without paying attention to the exceptions mentioned before.

List of matters that are decided by the shareholders through voting process on the general meeting is provided in § 119 of the Act. Among such issues are those related to election of the members of the supervisory board, auditors, ratification of the acts of the board of directors and the supervisory board, amendments of the Articles of the Association, dissolution of the company and changes in the registered capital (its increasing or decreasing). The general meeting can decide on other matters (not included in the list – § 119 (1)) just in case if the management of the company required so. From the information mentioned above we can make a conclusion that although the most important decisions has to be made by the general meeting through the shareholders' voting, the board of directors is the main body that manages company.

The board of directors of German stock company is not appointed by the shareholders of the company. The members of the company in Germany appoint half of the members of the supervisory board (other half is appointed by employees of the company according to the Act of Co-determination[25]) which in its turn elects members of the

[25] The Co-Determination Act (Mitbestimmungsgesetz) (1976)

management. Such structure of the corporate governance in Germany caused a lot of debates concerning its efficiency[26]. The authors often compare German and American models of the corporate governance (as representatives of three and two-tier systems correspondently) with a target to decide which one protects shareholders more.

Advocates of the German model emphasize an issue of independence of the board of directors from majority shareholders: the members of management are appointed by the supervisory board but not by the shareholders. So, the board of directors of German stock companies does not depend from the will of majority shareholders and think about the interests of the company and, as a consequence, - about the interests of all shareholders (that includes interests of minority shareholders as well). Thus, advocates of German model assume that a level of protection of minority shareholders in German stock companies is higher than in American corporation due to the fact that in the first example directors are independent from the controlling majority[27].

Opponents of the advocates of German model state that the directors who controlled by a majority shareholder tend to be more interested in the managing of the company accordingly to the interests of the controlling shareholder. As a rule, the interest of the shareholder in its turn is identical to the interest of the company. So, the directors who act with accordance to the shareholder's interests factually act in the best interests of the whole company. As a consequence, not only the value of the company but also the value of the shareholders (among which are minority shareholders as well) increases. So, directors of the company who depend on the will of the controlling majority tend to perform its duties better than independent members of the supervisory board[28].

[26] Bernd Singhof, Oliver Seiler: Shareholder participation in corporate decisionmaking under German law: a comparative analysis, Brooklyn Journal of International Law, 1998
[27] Marco Becht, Ekkehart Boehmer: Voting control in German corporations, International Review of Law and Economics, March, 2003
[28] l Susan-Jacqueline Butler: Models of modern corporations: a comparative analysis of German and U.S. corporate structures, Arizona Journal of International and Comparative Law, Fall, 2000

Moreover, supervisory board in Germany is an ineffective body due to its big size and infrequent meetings. Presence in the supervisory board of an equal number of shareholders' and employees' representatives frequently causes an occurrence of the conflicts between these two groups. Although the representative of the shareholders (the chairman of the supervisory board) has the cast vote in the decision of the conflict situation, different interests of the employees and the shareholders is a great obstacle for effective work of the supervisory board. The solution of the problem would be changing from German to American model which basically means the end of existence for such body of the stock company as the supervisory board. Such amendments will certainly increase the level of shareholders' protection.

3.1.2. Methods of voting

3.1.2.1. Direct voting

Shareholders of German stock companies can vote either personally (direct voting) or through their representatives (voting by proxy). The stock corporation act does not expressly provide for the shareholders possibility to vote with help of new technologies (such as, for instance, internet). So, for direct voting the shareholder has to be personally presented on the general meeting. Traveling to the place of the general meeting takes time and money. Personal presence on the general meeting for exercising direct voting right is the one of the reasons for the absence of minority shareholders' activism. Probable solution of the problem can be providing in the Act possibility to vote through the Internet for the shareholders of the company. This solution has been already mentioned in German Corporate Governance Code. [29]But this act contains just recommendations that are not obligatory for the execution. Thus, the expressly stated rule in the Stock Corporation Act seems to be more effective.

[29] German Corporate Governance Code (2002)

Providing possibility to vote through the Internet will not solve the problem of the absence of shareholders' activism by itself. Principle "one share – one vote" factually means that vote of minority shareholder will not decide anything. Understanding of the helpless in this situation makes the shareholder unwilling to vote. Provision in the Act about possibility of cumulative voting could solve the problem and increase shareholders' activity.

3.1.2.2. Proxy voting

Shareholders also can enable proxy to vote on their behalf. As a rule, proxies are banks that are creditors of the company. Instructions how to vote has to be given to the proxies by the shareholders. In case if the bank ignored the instructions and voted in other way the shareholder can apply to the court for bank to pay damages to the member of the company. Anyway, the decision that was made with use of such proxy cannot be invalidated because of the violation of the bank. Moreover, it is almost impossible to check how bank voted for each shareholder, because he holds a lot of proxies of the different shareholders at the same time.

However, usually minority shareholders are passive, so, they give no instructions to the bank. In this case the bank should vote "in the interests of the shareholder". Many authors emphasize that the definition of the best interest of the shareholder is absent in German legislative and judicial practice and there is no one criteria to distinguish what is the interests of the shareholder. For example, T. Baums and E. Wymeersch in their work "Shareholder voting rights and practices in Europe and the United States" expressly state following: "The provision that the proxies should be exercised according to the interests of the shareholders is too broad and allows almost any interpretation"[30]. So, basically, banks in Germany can use their proxies to vote in the way that is the most suitable for them as for creditors. Here one more problem occurs. Creditors tend to choose safer way to manage the

[30] T.Baums and E.Wymeersch (editors), Shareholder voting rights and practices in Europe and the United States, Kluwer Law International, 1999"

company (a risk-adverse investment strategy) than that one which maximizes shareholders' value.

The best solution of the problem is providing in the law mandatory instructions from the shareholders to the banks and way how to prove that bank were voting according to the instructions. Moreover, it would be better if the shareholders could elect as a proxies persons who have similar interests with shareholders or independent persons.

3.2. Protection of minority shareholders' voting rights after its exercising (after decision-making process) in Germany

Sometimes minority shareholder in German stock company cannot effectively exercise his right to vote. It happens because the stockholder does not agree with particular decision of the general meeting but owns not enough shares to influence the decision-making process or due to the facts of violations of her rights by the company, company's bodies, proxies, *etc*. In such cases the aggrieved shareholder can use one of the forms of protection of her voting rights, particularly – right "to exit" (to withdraw from the company by selling her shares to other person or to the company itself), or right on the judicial protection (i.e. to bring a direct or derivative action to the court). Let's discuss all probable possibilities of the minority shareholders' protection that were mentioned above.

3.2.1. Right to exit

In case if the minority shareholder does not agree with the politics of the company shares of which he holds the best and the simplest way to solve the problem is to sell the shares and cease to be the shareholder of the company. The stockholder can sell her shares to other persons without limitations in terms, prices and other provisions of the contract due to the principle of freedom of the contractual relationships that is a basis of civil law, particularly – in Germany which is the representative of the countries of the civil law system. Much more problems occur in case of selling the shares to the company that issued them – so-

called “buyout” right of the shareholder (which at the same time is a remedy for the company).

The Stock Corporation Act has determined in details the whole process of purchasing the shares by the company. First of all, it is important to remember that the shareholder obtains a right to sell the shares to the corporation in a limited number of situations, among them are conclusion of a control agreement or profit transfer agreement, decision about the integration of the company into another stock company or increasing of the registered capital. These decisions have to be approved by qualified majority of company’s shares on the general meeting. Even if the minority shareholder does not agree with increasing of the capital or transfer of control he has not enough votes to influence the decision. That is why if she did not give consent on the actions mentioned above the shareholder has right to sell her shares to the company. Particularly, in case of conclusion of domination and profit and lose agreement between the company shares of which the shareholder owns and the dominant company without the consent of such shareholder she has the right to leave the company and claim a lump sum compensation payment. This payment should be determined in contractual clause of the domination ad profit and lose agreement and paid by the dominant company either by its shares or in cash. If the minority shareholder assumes that the payment is not appropriate she can apply to the court which should determine the amount of the compensation. German Federal Constitutional Court[31] has established criteria for determining shares’ price in case of buying them by the company-issuer. The Constitutional Court stated that a share is a property within the meaning of Art.14 of German Constitution and a “full compensation” for it has to be provided to the shareholder. The term “full compensation” “reflects the “true” or “real” value of the share in the dominated company, including the hidden reserves and the inner

[31] Maximilian Grub: A trend towards more shareholder value in Germany: recent developments in German Stock Corporation Law, International Company and Commercial Law Review, 1999

value of the company"[32].On practice the discounted earning analysis is the most successful method for determining the value of the share. The Constitutional Court just mentioned several factors that should be taken into consideration during such evaluation; the most important from them is marketability. At the same time the Court emphasized that it is not the only one measurement, moreover, the compensation below the market rate is possible as an exception. An example of such situation is following: 95 percents (or more) of the shares of the company are not for sale, so, the minority shareholder cannot be able to sell her shares on the stock market rate. In any case, the company which obliged to pay the compensation has the opportunity to prove that the stock market rate does not reflect the fair market value of the share. Detailed procedure of determining the price of the shares in case of selling them to the company-issuer is an effective mechanism of protection of minority shareholders.

3.2.2. Direct action and derivative suit

If the voting rights of the minority shareholder are violated she can apply to the court for the judicial protection by bringing of direct or indirect (derivative) actions.

Direct action "is a suit by the shareholder in his own right to redress an injury sustained directly by him for which he is entitled to personal relief"[33]. The simplest example of the basis for the direct suit can be the following case: the shareholder A was not given a notice about the general meeting of the company's shareholders. As a consequence of the infringement of her right on information the shareholder has not exercised her voting rights. So, he applied to the court to invalidate the decisions that were made on the general meeting due to holding the meeting in contrary with provisions of law. Such action is a direct action. In case if the shareholder got damages as a result of the violation they are recovered directly

[32] Government Statement of Reasons, Federal Council Publications 892/97, p. 150.

[33] Rogers v. American Tobacco Co., 143 Misc. 306, 257 N.Y. Supp. 321 (Sup. Ct.), aff'd mem., 233 App. Div. 708, 249 N.Y. Supp. 993 (1931).
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to her. Every shareholder can fill in the direct suit against the company (or its bodies, or members of its bodies) in case of violation by it her rights. The right to bring the direct action does not depend on the amount of shares that the shareholder owns.

In contrary, derivative suit is the one that is brought by the shareholder on the behalf of the corporation. For instance, if the board of directors converted the corporate assets, the company was injured directly (decreasing of the price of the company's assets) and the shareholder – indirectly (decreasing of the shareholder's value). If the shareholder brings a derivative suit on behalf of the corporation, as a result of it, the corporation will be recovered from damages and the shareholder will be benefited (the shareholder's value will increase again)[34] § 147 of the Stock Corporation Act gives a right to the general meeting to make a decision about bringing the derivative action against the corporation upon the ordinary resolution. On the same meeting the shareholders can appoint the representative who will present their interests (in this case – interests of the company) in the court.

Additional protection provided also for the minority shareholders (§ 147 – 148 of the Act). According to these norms shareholders whose aggregate holdings equal to or exceed 1/10 of the share capital (or the par value of 1 million euro) can bring to the court a motion about the appointment as a representative other person that was elected by the general meeting. Even holders of shares of at least 1 per cent of the share capital or of the share that worth 100.000 euro can apply to the court to authorize an action for damages on its own behalf (§148 of the Act). So, the minority shareholder can file a derivative action against the company's bodies on behalf of the company, without the appointment of the special representative by the court[35].

In any case the action requires the court's permission which will be given just in case if the shareholders are able to prove that: 1) they have bought the shares before the

[34] Distinguishing between direct and derivative shareholder suits, University of Pennsylvania Law Review, Note, June, 1962

[35] Peter Gottwald: On the extension of collective legal protection in Germany, Civil Justice Quarterly, 2007

infringement; 2) they unsuccessfully asked the company to file the suit; 3) facts of company's damages because of dishonesty or fierce infringement of law or the Articles of Association; 4) company's well-being does not depend on the enforcement of the liability of its executive bodies[36].

Anyway, the right of the minority shareholders to bring the derivative actions on behalf of the corporation is not effectively viable on practice. The rules concerning the attorneys fees are the greatest obstacle here: German principle "the loser pays" "places a significant financial risk upon the complaining shareholder, who, after all, personally recovers nothing if the action on the behalf of the corporation succeeds, but stands to reimburse the defendants' attorneys' fees….if the defendant prevail" [37].The prohibition of the contingent fee arrangements (when attorney gets nothing if the case is lost and larger sum of money if it is won) in German law makes the situation even more difficult.

Thus, the bringing of the derivative suits by the minority shareholders on the behalf of the corporation is allowed by German law but is not viable on practice due to the prohibition of the contingent fee arrangements and the principle "loser pays". For the effective realization the right on practice it is necessary to modify German system of paying the attorneys' fees.

[36] Anabel Edwards, Harald Gesell: Compensation for minority shareholders in a German stock corporation – stock market rate to be considered, International Company and Commercial Law Review, 2000
[37] Franklin A. Gevurtz: Disney in a comparative light, American Journal of Comparative Law, Summer 2007

Chapter 4 - Comparison of the methods of protection of minority shareholders' voting rights in Germany and Ukraine

4.1. Protection of minority shareholders' voting rights during the general meeting (during the decision-making process)

German and Ukrainian legislations related to protection of voting rights of minority shareholders have much in common. Both of them give a right to vote on the general meeting to all shareholders, although there are some exceptions from the general rule. Preferred stock without voting rights is an example of such exception. Absence of the voting rights is not a violation due to the principle of freedom of the contract: the owner of the preferred stock, when were buying the share, concluded the contract with the company and, subsequently, agreed to all issues in this contract, particularly – to the point that his share will not give him right to vote (but instead this right the shareholder got other privileges, for instance, right to get dividends before the owners of common shares).

The second exception from the general rule that all shareholders have a right to vote is limitation of voting rights in German stock companies. According to § 134 (1) of the Stock Corporations Act there can be limitation of the voting rights of shareholders "by setting a maximum par value or a sliding scale" in the Articles of Association. Nowadays a majority of German stock companies has the limitation of all votes of one shareholder to certain amount of shares (most popular figure – 20 percents of the company's shares). The authors criticize the provision of the act saying that it is used more for controlling the company by banks (because such limitation does not deal with the banks – custodians) than for the shareholders' protection. The opponents of critics emphasize the fact that § 134 (1) also contains provisions that states according to which the Articles of Association "may also provide that shares held by any other person on behalf of a shareholder shall be deemed to be shares held by such shareholder". But still the latter norm is not obligatory, so, in the Articles we can often meet a norm which says that such limitation applies only to shareholders of the

company (but not to the banks – custodians). For modifying limitation of the voting rights from the tool of control of the company by banks to the effective mechanism of protection of minority shareholders it is necessary to provide the following amendments to German legislation: in case if the Articles of Association limit voting rights of its shareholders it should also limit their voting rights held by their proxies.

However, in further research the author of the work focused only on the owners of the common shares that give to the shareholders the voting rights toward the company. Right of every shareholder to vote which does not depend on amount of the shares she holds is a basis for protection of voting rights of minority shareholders according to which even the small owner (for example, holder of 1 percent of the shares of the company) has right to take part in managing the company through the exercising of the voting mechanism of the general meeting.

The main voting principle in German and Ukrainian stock companies is formulated as following: "one share – one vote". Legislation of these countries expressly prohibited issuance of multiple voting shares. Using of the principle "one share-one vote" is also important for the protection of the minority shareholders[38] but it is also the one of the main reasons of minority shareholders' passiveness in exercising of their voting rights: they are aware the fact that their votes will not decide anything. Possible solution of the problem could be providing a possibility of cumulative voting, particularly – for making decisions about election of the members of the company's bodies (in Ukraine – appointment of the members of the board of directors and the supervisory board; in Germany – the latter). In such case the minority shareholders would have a possibility to have their representatives in the supervisory board and (or) the board of directors whom the shareholders can influence during the process of the managing of the company. In such way the minority shareholders will be effectively

[38] Colleen A. Dunlavy: Social conceptions of the corporation: insights from the history of shareholder voting rights, Washington and Lee Law Review, Fall, 2006

involved in the process of the company's management. Indeed, such legislative changes will cause shareholders' activism in decision-making process.

German and Ukrainian legislation contain norms that allow shareholders to exercise their voting rights in two possible ways: direct voting and voting by proxy. Nevertheless, both ways are not good enough for effective protection of minority shareholders' rights.

Basically, direct voting presupposes the fact that the shareholder should be personally present on the general meeting. As a rule, those meetings should be held in the domicile of the company. If the minority shareholder lives in another city or (which is even worse - in another country, getting to the place of the general meeting will take time and cause financial problems. Thus, in a majority of cases the shareholder made a decision that attendance of such meeting was not worth it. So, personal presence on the general meeting became one more reason of the absence of the shareholders' activity in the stock companies.

Earlier German legislation had no solution for the problem. But nowadays the situation has changed. § 134 (4) of the Stock Corporation Act states that "the method of exercising of voting rights should be determined by the articles". This provision, among the other things, means that the Articles of Association might contain a possibility for the shareholders to vote directly without presence on the general meeting, for instance, by mail or through the internet. The similar provision can be found in German Corporate Governance Code which says that "the company should make it possible for shareholders to follow the General Meeting using modern communication media (e.g. Internet)". Although this document is not mandatory for the execution, it is important act in business area. So, compliance with its provisions makes higher prestige of the stock company on the market and, as a consequence, increases its value and value of its shareholders. Thus, the partial solution of the problem is founded: the Articles of Association of some stock companies

contain provisions which allow shareholders to vote through mails, internet or other modern communication systems. But more effective solution is to expressly prescribe the changes directly in the Stock Corporation Act. Then the direct voting without presence on the general meeting will become a real possibility for shareholders of every German company. Economy of money and time will undoubtedly increase the level of the minority shareholders' activity in the direct voting process.

In comparison, Ukrainian legislation, particularly – the Law On business association, still has in usage "old scheme" of direct voting without any alternatives: the shareholder should be personally present on the general meeting for been able to exercise her voting rights. The new project of the law On stock companies does not provide any changes concerning the question. Solution of the problem for Ukrainian minority shareholders can be found in German legislation. Using of the Internet and other modern communication system will give to the minority shareholders a possibility to vote without expenses.

However, every shareholder in both Ukrainian and German stock companies can appoint a proxy holder for the latter to vote on her behalf. But if the shareholder of Ukrainian stock company can appoint any person she wishes as a proxy, a majority of proxies in German stock companies are banks custodians which at the same time are creditors of the corporation. In any case exercising of the voting rights by proxy holder on behalf of shareholders often causes violations of the voting rights of latter group.

In Ukraine the shareholder can appoint any person as a proxy holder. Thus, the stockholder will not elect the representative whose interest are (or can be) in contrary with her position. Moreover, often proxy holders are persons who are close to the shareholder and have target similar to her. Examples of such representatives can be wife/husband or other relatives of the owner of shares. Thus, as a rule, the proxy will vote according to the interests of the shareholders.

German legislation is different in comparison with Ukrainian one, particularly – related to the question of the appointment of the proxy holder. If the shareholder of Ukrainian stock company can appoint as her proxy holder basically any person, there are limited numbers of persons who can be proxies I German stock companies. In majority of cases they are banks – creditors of the company. Conflict of interests can arise between shareholders and creditors of the company. For instance, banks-creditors would prefer safer policy that will save assets of the company (for paying debts to the creditors from the company's assets), shareholders, in contrary, would prefer risky activities that would seriously influence (decrease) the amount of the corporate assets but will increase the shareholder's value in the future. Undoubtedly, that the banks as creditors will vote in its interests even if it violates interests of shareholders that were provided to them by proxies. In such case, for protection of the minority shareholders, it is better to amend legislative acts with target to allow the shareholders to appoint as a proxy holder a person who has similar interests with the shareholder (for instance, relatives) or an independent person (e.g. an auditor). In any case corporate legislation should provide an effective mechanism of protection of the minority shareholders' voting rights when the representative votes on behalf of the stockholder.

§ 128 of the Stock Corporation Act provides detailed scheme of communication between banks – proxies and shareholders. According to it bank should send to the holders of bearer shares (or make it accessible for the holders of the registered shares) "its own proposals for the exercising the voting rights for each item on the agenda". The holders of the shares, in its turn, should give instructions on how to vote to the proxy holder. In case if such instructions will not be given within particular period of time the bank should vote according to its proposals which are deemed to be in the interests of the shareholder. Many authors criticize the definition "in the interests of the shareholder" as too broad that can be used, basically, for making any decision. The bank can also exercise vote in different way than that

one in proposals just in case if "the bank may assume in view of the circumstances prevailing, that the shareholder would, if he had knowledge of the facts, approve a different exercise of the voting rights".

The situation looks ideal in the light of the legislative provisions. But it is different on practice. First of all, in a majority of cases no instructions are given to the bank. Even if such instructions were given it is almost impossible to check whether the bank violated them or not: the bank is a proxy holder of many shareholders and it does not vote for each of them – it votes by the whole amount of shares. Moreover, if bank violated instructions and shareholder became aware of this fact and apply to the court the latter cannot impair the validity of such votes but only to deem the bank liable for damages. For instance, if the shareholder A instruct the bank B to vote for C as a member of the supervisory board and B voted for D court cannot invalidate decision according to which D was appointed as a member of the supervisory board even if votes of A would change the situation.

At the same time, Ukrainian law On business associations say a little about communication between the shareholder and the proxy holder. There is no rule which states that the instructions how to vote have to be given to the proxy holder and no remedies for the proxy holder in case If such instructions are violated. Moreover, even if instructions are not given, the law does not provide any criteria that should be used by the proxy holder during exercising the shareholder's voting rights. Thus, according to information above the proxy holder can vote even in contrary with interests of the shareholder and cannot be deemed liable for that. Such gaps in law cause an absence of protection for the minority shareholders' voting rights in case of voting by proxy.

Due to all information mentioned above, we can make a conclusion that both legislative systems failed to provide effective mechanism of protection of the voting rights of minority shareholders in case of voting by proxy.

For solution of the problem in Germany it is proposed: 1) to allow to the shareholders to elect as a proxy holder a person whose interests are similar (and cannot be in a contrary) with stockholder's ones; 2) to determine a definition "interest of shareholder" on the legislative level; 3) to provide way how to check whether a proxy holder has complied with the instructions of the shareholder; 4) to invalidate the results of the voting process during which a proxy holder violated instructions of the shareholder and (or) in contrary with her interests (if her votes could change the result of the voting) by the court's decision. Similar approach should be taken by Ukrainian legislators for achieving the target to provide effective mechanism of protection of the minority shareholders in case of the proxy voting.

4.2. Protection of minority shareholders' voting rights after the general meeting (after the decision-making process)

Ukrainian and German legislations related to the protection of the minority shareholders' voting rights has a lot in common. In both jurisdiction every shareholder has a right to withdraw from the company by selling its shares to any person (s) she wishes. Moreover, direct suits against the company or its members can be brought to the court by any shareholder of the corporation and this right does not depend on the number of shares owner of which such shareholder is.

However, German law is more developed than Ukrainian one, particularly – in questions concerning so-called "buyout" remedy and mechanism of the minority shareholders' applying to the court for protection of the company's interests. Ukrainian legislation does not provide for a shareholder a possibility to sell her shares to the company in case if such shareholder disagrees with the decision on the important issues related to the corporation's affairs. In contrary, German legislative and judicial practices have worked out effective detailed mechanism for protection of the minority shareholder in case of selling her shares to the company. Due to this mechanism, the company is the first one who evaluates the shares and just in case if the shareholder is not satisfied with the result she can apply to the

court in whose discretion is to determine the value of the shares in accordance with criteria established by the Constitutional Court of Germany. The best way to solve the problem in Ukraine is to use the provisions of German law as a model for creating its own mechanism of shareholders' protection.

The situation is completely different in the area of bringing the derivative actions. Ukrainian judicial practice prohibits minority shareholders to bring a derivative suit on the behalf of the corporation. German legislation in its turn expressly states that even the holder of 1 percent of the company's shares can apply to the court for the protection of the corporation's interests. For the effective protection of the minority shareholders' interests in Ukraine it is important to give them an allowance to bring a derivative action on the behalf of the company. At the same time, for preventing occurrence of oppressive behavior of the minority shareholders toward the company it is still necessary to provide in law minimum amount of shares the owner of which has a right to bring the derivative suit (for instance, 1 percent of shares analogically to German legislative practice).

Anyway, Ukraine and Germany are representatives of the civil law system countries where works the rule "loser pays" and the contingent fee arrangements are expressly prohibited. Under such circumstances, it is highly unlikely that the minority shareholders will use their right on derivative suits. So, for exercising such right by the minorities on practice it is important to modify the whole system of judicial payments, particularly – in corporate relationships concerning the indirect suits.

Conclusion

The paper divided all mechanisms of minority shareholders' voting rights protection into two groups: protection during the general meeting and after decision-making process. The first group includes the right of every shareholder to vote in person (direct voting) or with help of a representative (voting by proxy). Exercising of the right are ensured by mandatory principle "one share – one vote" and clear provisions concerning the exceptions from the rule (preferred stocks without voting rights, limitation and exclusion of the voting rights (last one does not take place in Ukraine)), expressly stated prohibition of the multiple voting rights, legislative list of matters that should be decided on the general meeting.

As a rule, minority shareholders are passive in exercising of the voting rights (direct voting) due to understanding of the fact that their votes will not decide anything. The solution of the problem – to provide possibility of cumulative voting during the election of the members of the supervisory board and (or) the board of directors. It will give to minorities chance to elect the person who will represent their interests in the company's bodies and, as a consequence, will make shareholders more active in exercising of their voting rights. Moreover, in Ukraine there is no possibility to vote by the Internet or mail: for direct voting the shareholder has to be personally presented on the general meeting. Providing a possibility to vote with help of modern methods of communication will make minority shareholders active. They will be able to vote and save both money and time whereas now the minorities should spend them to get to the place of the general meeting. The solution of the problem was found in provisions of German corporate law.

Voting by proxy causes a lot of problems both in Germany and Ukraine. However, German process of voting by proxy is described in details in the Stock Corporation Act, whereas in Ukrainian Law On business associations the description of the process is absent completely. To solve the problem it is necessary to provide in the law minimum requirements

according to which the proxy should vote in the way he has informed the shareholder before, or if the instructions were given by the shareholder – according to them. However, the proxy holder should vote in the best interests of the shareholder.

The second group of mechanisms related to the protection of minority shareholders' voting rights is its protection after the general meeting: right to withdraw from the company and to bring direct or indirect (derivative) suits. In contrary with German legislation, Ukrainian legislative acts prohibit the minorities from bringing the derivative suit on the behalf of the company. Permission for the shareholders who are owners of at least 1 percent of shares to bring indirect suits to the court will protect them and the company from abuses of the majority. At the same time, limitation according to which owners of less than 1 percent of shares are prohibited from such actions will protect the company from the occurrence of the oppressive behavior of the minorities.

Thus, in this paper the mechanisms of protection of minority shareholders' voting rights in Germany and Ukraine were compared. On the basis of such comparison were proposed amendments to Ukrainian legislation that will harmonize its provisions with those of the EU, making the level of protection of minorities higher and attracting new investments into development of the country.

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