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PROBLEMATIC ISSUES IN THE PROTECTION OF THE RIGHTS OF EUROPEAN INVESTORS IN CORPORATE RELATIONSHIPS IN UKRAINE

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ABSTRACT

An unfavorable investment climate, especially in the sphere of corporate relationships, necessitates the revision of investment and corporate legislation in Ukraine. The purposes of this study are to reveal the particular legislative defects and the practical problems caused by these defects that European investors may face during the realization of their corporate rights in Ukraine and to evaluate how Ukrainian investment law, particularly legal norms aimed at protection of investors' rights, corresponds to international (European) standards. This research identifies gaps and contradictions in Ukrainian legislation in the sphere of corporate investment that cause difficulties in practical applications and attempts to find ways to solve these problems. This paper argues that most problems caused by legislative contradictions

can be solved by using the rule of the correlation of general and special normative legal acts, unlike legislative gaps, which must be eliminated by appropriate legislative amendments.

KEYWORDS

Corporate legal entity, the protection of investors' rights, state guarantees of investors' rights, civil law means of protecting corporate rights

INTRODUCTION

Considering the current economic and political situation in Ukraine, the investment climate is extremely unfavorable to foreign investors, particularly European ones. Imperfections in Ukrainian legislation cause additional difficulties. The investment rate in the sphere of corporate relationships is especially low.

Today Ukraine is in the process of harmonizing its legislation with EU law. In turn, the EU is harmonizing its internal corporate legislation: "During the period of EU institutions, harmonization has eliminated differences on important issues, and equal safeguards have been granted in the area of the protection of the rights of the participants (founders) of a company and those of third persons".[1] However, approximation of the legislative framework does not relieve companies that are functioning in accordance with the norms of the different legal systems of EU Member States of the need to choose an organizational form existing exclusively within national law.[2]

In most European states, only stockholders, who are the owners of securities, are considered subjects of investment activities in the corporate sphere. By contrast, according to the Ukrainian Law, "On the Regime of Foreign Investments", investors may be the stockholders or participants (founders) of legal entities with other organizational-legal forms than the stock company.[3]

Ukrainian company legislation is imperfect and allows for the existence of many forms of legal entities. However, neither the legislation itself nor the relevant legal scholars have given a definite answer to the question of in which forms of legal entities corporate legal relationships exist. This question has considerable meaning because an investor may only obtain dividends through such legal entities. The answer to this question may allow investors to choose the forms of investment that are most favorable to obtaining profits.

Despite the long-standing interest of researchers in the legal nature of corporate entities, this issue continues to be discussed. There are different and sometimes completely contrasting approaches to this issue. According to these approaches, this group of legal entities includes the following:

1) only stock companies;[4]

2) entrepreneurial partnerships that exist only as stock companies, limited liability partnerships (LLPs), or additional liability partnerships (ALPs);[5]

[1] Oleksandr Vyshniakov, *Law of the European Union* (Odesa: Fenix, 2013), 173.
[2] Alain Viandier, "Free Movement and Mobility of Companies, "*European Business Law Review* 9 (1998).
[3] *Law of Ukraine on the Regime of Foreign Investments*, The News of the Supreme Council of Ukraine (1996, no. 19), art. 80.
[4] Olena Shcherbyna, *Legal Status of Stockholders According to the Legislation of Ukraine* (Kyiv: Yurinkom Inter, 2001), 7.

3) economic partnerships, manufacturing cooperatives, private enterprises with two or more founders who are natural persons, agrarian households with two or more founders, or consumer cooperatives with two or more founders that are legal entities;[6]

4) non-commercial and commercial organizations;[7] and

5) any legal entity.[8]

Some clarity was provided by the amendments made to the Commercial and Procedural Code of Ukraine on October 03, 2017.[9] Based on these changes, the corporate legal entities in which investments can be made with the aim of acquiring corporate rights in Ukraine are 1) stock companies, 2) LLPs, 3) ALPs, 4) general partnerships, 5) limited partnerships, 6) manufacturing cooperatives, 7) private enterprises, and 8) agrarian households. The same position has been taken by the Supreme Economic Court of Ukraine (SECU).[10] Therefore, Ukraine guarantees that the protection of the rights of foreign investors includes the participants (founders) of such companies.

The remaining imperfections in the legal regulations regarding investment relationships in this area are obvious. The needs of participants in social relationships for the effective realization of investments aimed at the acquisition of corporate rights require improvements in legislative regulations to realize investors' rights to protection.

Ukraine has concluded agreements on the promotion and mutual protection of investments with the United Kingdom, Lithuania, Poland, Germany, Denmark, France, Czech Republic, Italy, Netherlands, and other states. These agreements are pegged to the nationality of one of the parties when choosing the law through which to regulate particular investment relationships. Therefore, a significant role is assigned to national legislation. The Charter of Economic Rights and Duties of States adopted in 1974 by the General Assembly of the United Nations also emphasizes the decisive place of national legislation in the regulation of foreign

[5] Yurii Zhornokui, "Problematic Issues of Defining the Concept of a Category 'Corporation' and Its Features," *Entrepreneurship, Economy and Law* 8 (2009): 32; Vasilii Gushchin, Yuliia Poroshkina, and Elena Serdiuk*, Corporate Law* (Moskow: Eksmo, 2006), 141; Serhii Kravchenko, "Right to Participate, Corporate Rights and Entrepreneurial Activity of Partners," *Law of Ukraine* 2 (2007): 68.
[6] Volodymyr Tsikalo, "A Corporate Partnership: The Concept, the Features, the Organizational-Legal Forms," *Law of Ukraine* 6 (2006): 50.
[7] Irina Shytkina, *Corporate Law* (Moskow: Wolters Kluwer, 2007), 12.
[8] Volodymyr Kravchuk, *Corporate Law. Scientific-Practical Commentary on Legislation and Judicial Practices* (Kyiv: Istyna, 2005), 12.
[9] *Commercial and Procedural Code of Ukraine*, The News of the Supreme Council of Ukraine (2017, no. 48), art. 436.
[10] *Regulation of the Plenum of the Supreme Economic Court of Ukraine on Particular Issues of Practices in Solving Disputes Arising from Corporate Relationships* // http://zakon3.rada.gov.ua/laws/show/v0004600-16.

investment.[11] That is why national regulation should be harmonized with the appropriate international – in particular European – law.

The purposes of this paper are to reveal the imperfections in the corporate and investment legislation of Ukraine and to evaluate how Ukrainian law corresponds to international (European) standards. We demonstrate the particular problems caused by the imperfect legislation that European investors face during the realization of their corporate rights in Ukraine and suggest ways to solve these issues.

To achieve these aims, a set of scientific methods is used in this article. An analysis of current Ukrainian legislation is presented to reveal legislative gaps in the regulation of corporate investments in Ukraine. An analysis of judicial practice reveals ambiguous applications of corporate and investment legislation in Ukraine by the courts. A comparative method is used to analyze the provisions of legislative acts that regulate investments in Ukraine, to detect existing legislative contradictions and to evaluate how Ukrainian law corresponds to international (European) standards. A literature review considers the positions of researchers on these questions.

To achieve the aims of this research, the article covers two main categories of protection for the rights of European investors in corporate relationships in Ukraine: state guarantees of protection and civil law means of protection.

1. STATE GUARANTEES OF PROTECTION FOR INVESTORS' CORPORATE RIGHTS

Two main normative legal acts (the laws) regulate investment relationships in Ukraine and declare state guarantees of investors' rights: "On Investment Activity" and "On the Regime of Foreign Investments". European investors may face contradictions between these acts and legislative gaps in realizing their rights in Ukraine. To avoid the particular problems that are caused by the absence of appropriate regulations for investment relationships, investors should consider the correlation between the law "On Investment Activity" and the law "On the Regime of Foreign Investments". The former is a general act; it affects the legal relationships with foreign and national investors. The latter is a special act that regulates investment relationships only with foreign (including European) investors, and its application to such legal relationships supersedes the law "On Investment Activity".

[11] *Charter of Economic Rights and Duties of States* // http://www.un-documents.net/a29r3281.htm.

The legal literature identifies certain state guarantees of investors' rights in Ukraine. These include guarantees from legislative amendments, protection from compulsory withdrawals and illegal actions of state bodies and their officials, compensation and payment of damages to an investor, guarantees in cases of the cessation of investing activities, and guarantees in the cross-border transmission of profits and other funds that are obtained because of investment.[12] This classification is based on the provisions of Chapter II of the Ukrainian law, "On the Regime of Foreign Investments".[13]

Guarantees from legislative amendments establish the stability of: 1) the conditions for holding investing activities, especially of the protection of investments, and 2) the terms of the contracts that are concluded between parties to an investment during the entire period during which these contracts are in effect.[14] Such guarantees follow from a general rule on the effect of the law in time, which is applied in world legal practice: the law has no retroactive effect in time, except in cases stipulated by law. As a rule, these are cases in which amendments improve the status of a person. These guarantees are exclusively declarative for national investors and cannot be practically applied because the law does not provide a mechanism for its realization, which has been repeatedly mentioned in the literature.[15] However, for a foreign investor, the Law of Ukraine "On the Regime of Foreign Investments" provides such a mechanism. If current legislation that guarantees foreign investment protection is changed while an investor is conducting investment activities in Ukraine, the investor may demand the application of the guarantees that were in force when he started his activities. This right can be exercised for ten years (p. 1 of Art. 8).[16] A foreign investor has the right to directly file an appropriate suit in court. This right is also a type of guarantee for European investors because judicial protection is becoming more effective in Ukraine.

Protection from compulsory withdrawals is addressed in Art. 19 of the law "On Investment Activity" and in Art. 9 of the law "On the Regime of Foreign Investments". Investments cannot be gratuitously nationalized or requisitioned, and measures with identical consequences cannot be applied to them. In Ukraine, such

[12] Volodymyr Kossak and Mariia Mykhailiv, *Legal Regulation of Foreign Investment and International Technical Aid in Ukraine* (Kyiv: Alerta, 2009): 100; Oksana Vinnyk, *Investment Law* (Kyiv: Yurydychna Dumka, 2005), 81–82.
[13] *Law of Ukraine on the Regime of Foreign Investments*, *supra* note 3, art. 80.
[14] *Law of Ukraine on Investment Activity*, The News of the Supreme Council of Ukraine (1991, no. 47), art. 646.
[15] Anna Vinogradova, "Problems of Realization of Guarantees for Foreign Investors in the Case of Amendment of the Legislation of Ukraine," *Entrepreneurship, Economy and Law* 2 (2001): 16; Hryhorii Hryshchenko, "Legislative Guarantees of the Protection of Foreign Investments," *Law of Ukraine* 7 (1996): 27; Elena Zeldina, "Legal Opportunities of Protection of Rights of Investors According to the Economic Code of Ukraine," *Entrepreneurship, Economy and Law* 12 (2008): 61.
[16] *Law of Ukraine on the Regime of Foreign Investments*, *supra* note 3, art. 80.

measures can be applied only through the legislative acts that provide compensation for the damages that the investor suffers because of the cessation of investing activities.[17] This approach completely corresponds with international law, particularly the Charter of Economic Rights and Duties of States adopted in 1974 by the General Assembly of the United Nations according to which "each State has the right to nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures…"[18] The Charter allows for extractions subject to conditions that are established by the states' relevant laws and regulations and all circumstances that the state considers pertinent (Art. 2).[19] Following this provision of the Charter, Ukrainian civil legislation provides the only possibility for the requisition of property from its owner – to meet a public need, provided that there is total compensation of its cost.[20] Nationalization can be a compensatory or gratuitous withdrawal of property and the transfer of ownership to the state.[21] The Law of Ukraine "On the Regime of Foreign Investments" prohibits the nationalization of foreign investments,[22] whereas the Law "On Investment Activity" prohibits gratuitous nationalization but allows for compensatory nationalization.[23] Although the national investment regime includes foreign investors in Ukraine, in this part, the Law of Ukraine "On Investment Activity" cannot be applied to European investors because it contradicts the provisions of the special law "On the Regime of Foreign Investments". Therefore, foreign investments cannot be nationalized in Ukraine in any case. Thus, legislation establishes preferential treatment for foreign investments in Ukraine. The amendment of the law "On the Regime of Foreign Investments" to permit compensatory nationalization of foreign investments has been repeatedly suggested in the academic literature.[24] International law protects the right of a sovereign state to nationalize foreign property on its territory. Thus, nationalization is fixed in the Resolution of the Council of the Organization for Economic Co-operation and Development on the Draft Convention on the Protection of Foreign Property (Art. 3).[25] It is impossible to deny the existence of such a right today, since it would interfere in the internal affairs of the state. In addition, according to the Charter of Economic Rights and Duties of States adopted in 1974

[17] *Law of Ukraine on Investment Activity*, *supra* note 14, art. 646.
[18] *Charter of Economic Rights and Duties of States*, *supra* note 11.
[19] *Ibid*.
[20] *Civil Code of Ukraine*, The News of the Supreme Council of Ukraine (2003, no. 40-44), art. 356.
[21] Volodymyr Kossak, and Mariia Mykhailiv, *supra* note 12, 105.
[22] *Law of Ukraine on the Regime of Foreign Investments*, *supra* note 3, art. 80.
[23] *Law of Ukraine on Investment Act*ivity, *supra* note 14, art. 646.
[24] Volodymyr Kossak, and Mariia Mykhailiv, *supra* note 12, 105; Mark Boguslavskii, *International Private Law*, 3rd ed. (Moskow: Yurist, 1999), 168.
[25] *Resolution of the Council of the Organization for Economic Co-operation and Development on the Draft Convention on the Protection of Foreign Property* // https://legalinstruments.oecd.org/en/instruments/242.

by the General Assembly of the United Nations (Art. 2), no state shall be compelled to grant preferential treatment to foreign investment.[26] However, it seems that Ukraine has reasonably refused the nationalization of foreign investments because in order to promote a more favorable investment climate.

The Law of Ukraine "On Investment Activity" prohibits state bodies and their officials from intervening in investing activities that are beyond their competence. Vinnyk O. M. finds this intervention to be subject to protections against the illegal actions of state bodies and their officials.[27] The law "On the Regime of Foreign Investments" does not currently include an appropriate norm, and such a legislative gap is definitely in conflict with international standards. Any intervention in investment activities infringes on the principle of the inviolability of property, which is protected in the Constitution of Ukraine (Art. 41)[28] and in the basic laws of other countries. For example, Art. 42 of the Constitution of the Italian Republic states that private property is recognized and guaranteed by the law.[29] The Basic Law for the Federal Republic of Germany holds that property shall be guaranteed (Art. 14).[30] According to the Constitution of Greece, property is under the protection of the state (Art. 17).[31] The Constitution of the Republic of Lithuania states that property shall be inviolable (Art. 23).[32] The same fundamental principle is stated in the constitutions of other European states. For this reason, it is necessary to amend the Law of Ukraine "On the Regime of Foreign Investments" to include an appropriate guarantee. However, current problems in practice can be solved by the law "On Investment Activity", which prohibits such intervention and includes relationships with foreign investors, including European ones, as a general act. Therefore, European investors are protected from the intervention of state bodies and their officials in Ukraine based on the provisions of the general act.

Regarding the payment of damages to an investor, another contradiction between two main investment acts of Ukraine has been discovered. The law "On the Regime of Foreign Investments" grants foreign investors the right be reimbursed for damages caused by the action, inaction, or inappropriate fulfillment of state bodies' or their officials' obligations concerning a foreign investor or a company with foreign investments that comply with Ukrainian legislation.[33] Unlike the law "On the Regime of Foreign Investments", the law "On Investment Activity" states that

[26] *Charter of Economic Rights and Duties of States*, *supra* note 11.
[27] Oksana Vinnyk, *supra* note 12, 82.
[28] *Constitution of Ukraine* // https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80.
[29] *Constitution of the Italian Republic* // https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf.
[30] *Basic Law for the Federal Republic of Germany* // https://www.btg-bestellservice.de/pdf/80201000.pdf.
[31] *Constitution of Greece* // https://www.wipo.int/edocs/lexdocs/laws/en/gr/gr220en.pdf.
[32] *Constitution of the Republic of Lithuania* // http://www3.lrs.lt/home/Konstitucija/Constitution.htm.
[33] *Law of Ukraine on the Regime of Foreign Investments*, *supra* note 3, art. 80.

damages should be paid when they are caused not only by state bodies or their officials but also by other bodies. The special act contradicts the general act on this issue. According to the rules on the application of acts that contradict one another, "On the Regime of Foreign Investments", the special act, must be applied to these legal relationships rather than the general law, "On Investment Activity". Problems arise in cases of damages to foreign investors caused by self-governing bodies and the bodies of the Autonomous Republic of Crimea because the law "On the Regime of Foreign Investments" does not include guarantees for the payment of damages that are caused by these bodies. Such a situation is unacceptable because it is contrary to the essence of law. Damages caused by self-governing bodies and the bodies of the Autonomous Republic of Crimea should also be reimbursed. To resolve this problem and to protect investor rights, a European investor should pay attention to the reimbursement of damages to foreign investors because torts are regulated according to the fundamentals of civil liability, which has also been stated by V. Kossak.[34] For this reason, an investor may substantiate his claim not using investment legislation, but the Civil Code (CC) of Ukraine (Art. 1173), which extends the obligation to reimburse damages that are caused to a natural person or a legal entity by all state bodies, the bodies of the Autonomous Republic of Crimea, and self-governing bodies.[35]

In a case in which the investor attracted an investment firm to invest in securities, he is subject to Directive 97/9/EC of the European Parliament and of the Council from 3 March 1997 on investor-compensation schemes. According to this act, each Member State shall ensure that within its territory one or more investor-compensation schemes is introduced and officially recognized.[36]

Today such schemes are absent in Ukraine. It is definitely important to elaborate effective investor-compensation schemes that protect the rights and interests of investors and that have been used in EU countries for a long time. Taking into account that Ukraine has obliged itself to bring national legislation into conformity with EU law, the academic literature suggests that it "create a double compensation system, including the State Investment Guarantee Fund in the financial services market and the Solidarity Guarantee Fund of Investments".[37] Unfortunately, only one mechanism currently exists to protect the interests of investors – insurance against risks that may arise in the financial services market.

[34] Volodymyr Kossak, and Mariia Mykhailiv, *supra* note 12, 108.
[35] *Civil Code of Ukraine*, *supra* note 20, art. 356.
[36] *Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes* // https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=celex:31997L0009.
[37] Serhii Glibko and Hanna Shovkoplias, "Compensation schemes of investors' rights protection in the EU and their implementation in Ukraine" // http://dspace.nlu.edu.ua/bitstream/123456789/10294/1/Glibko_SHovkoplys.pdf.

Guarantees in cases of the cessation of investing activities assure the appropriate conditions for cessation. These conditions include the right to make a decision regarding cessation and the prohibition of the compulsory cessation of investment, except where a decision about cessation is passed by the empowered state body on at least one of the grounds established in the law "On Investment Activity".[38] The admissibility of compulsory cessation of investing activities is based on the fact that property rights are always limited. Cessation is possible in cases of going beyond the limits. The limits of property rights are fixed in the legislation of all European countries. For instance, the Constitution of the Italian Republic cautions that private economic enterprise may not be carried out against the common good or in such a manner that could damage safety, liberty and human dignity (Art. 41).[39] The Basic Law for the Federal Republic of Germany states that property entails obligations, and its use shall also serve the public good (Art. 14).[40] Indications of the social functions of property are contained in the constitutions of Greece[41] and Spain[42], among others. In some cases and in orders prescribed by legislative acts of Ukraine, an owner's activity may be restricted or terminated.

Article 11 of the law "On the Regime of Foreign Investments" assures the right of a foreign investor to recover his investments in their natural form or in currency in the sum of their actual contribution (considering possible decreases in statute capital) without paying customs fees. This article also assures the recovery of profits for the real market value of investments in monetary or commodity form from the moment of cessation to no later than six months after cessation, except where established by the legislation or international treaties of Ukraine.[43] A foreign investor has the right to recover his investments in both cases of cessation, including by the investor's initiative and by the empowered state bodies' decision. However, corporate forms of investment have specific mechanisms for the cessation of the investment by the investor. In particular, an investor may sell his shares or interest in the statute capital (assets) of a corporate legal entity or renounce the legal entity. When selling shares, an investor receives payment for those shares (interest) from a purchaser. When renouncing the legal entity (renunciation), an investor receives an appropriate payment from the legal entity. Obviously, in both cases there is no need for the state to guarantee the recovery of these investments, and the guarantee does not include such investor decisions.

[38] *Law of Ukraine on Investment Activity*, *supra* note 14, art. 646.
[39] *Constitution of the Italian Republic*, *supra* note 29.
[40] *Basic Law for the Federal Republic of Germany*, *supra* note 30.
[41] *Constitution of Greece*, *supra* note 31.
[42] *Constitution of Spain* // http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf.
[43] *Law of Ukraine on the Regime of Foreign Investments*, *supra* note 3, art. 80.

This guarantee is effective only in cases of the compulsory cessation of corporate investment activities based on state bodies' decisions.

Guarantees regarding the cross-border transmission of profits and other funds that are obtained through investments are addressed in the law "On the Regime of Foreign Investments" for foreign investors who engage in investment activities in Ukraine (Art. 12). According to this article, the unobstructed and immediate cross-border transmission of profits and other funds that are obtained legally through investments is guaranteed to foreign investors after they pay taxes, charges, and other obligatory payments.[44] On February 07, 2019, the law "On Currency and Currency Transactions" entered into force in Ukraine. It has simplified currency circulation in Ukraine, which contributes to improving the investment climate.[45] An important condition for the application of this guarantee is that the transmissible funds were obtained legally. Thus, if a court invalidates a decision regarding the payment of dividends, guaranteed cross-border transmission of dividends does not apply.

As a result of this analysis, we reach the conclusion that state guarantees of investors' rights are not elaborated perfectly in Ukraine; some formally correspond to international standards, whereas others need considerable amendments. Currently, guarantees are not appropriately and practically realized, which is why they have been subject to criticism in the legal literature. As Stoyka V. suggests, "to draw investments into the economy of Ukraine, it is necessary to elaborate the real mechanism of the practical realization of the means of investors' rights protection set by the state, to provide the practical enforcement of court decisions, and to endow an investor with real and not declarative guarantees of his rights and legal interests".[46] The achievement of this aim is impossible without improving investment legislation.

In accordance with the Draft Convention on the Protection of Foreign Property adopted by the OECD Council on October 12, 1967, each state shall accord within its territory the most constant protection and security to foreign investors' property. Any breach of this rule shall entail the obligation of the state responsible therefore to make full reparation according to Art. 5.[47] Unfortunately, the investment legislation of Ukraine is not currently able to ensure proper application of this international standard.

[44] *Ibid*.
[45] *Law of Ukraine on Currency and Currency Transactions*, The News of the Supreme Council of Ukraine (2018, no. 30), art. 239.
[46] Vasyl Stoyka, "Legal Issues of the Protection of Rights of Investors," *Entrepreneurship, Economy and Law* 3 (2002): 7.
[47] *Draft Convention on the Protection of Foreign Property* // https://investmentpolicyhub.unctad.org/Download/TreatyFile/2812.

2. PARTICULAR ISSUES IN CIVIL LAW MEANS OF PROTECTION OF INVESTORS' CORPORATE RIGHTS

As addressed above, the national investment regime includes foreign investors in Ukraine. This undoubtedly corresponds to international, and in particular European, standards. Thus, in the sphere of corporate investment it is worth mentioning the Treaty on the Functioning of the EU, which holds that Member States shall accord nationals of the other Member States the same treatment as their own nationals as regards participation in the capital of companies or firms.[48] The legal status of non-resident participants in companies' capital in Ukraine is determined mainly by national legislation, which is the main source of law for Ukrainian courts. Judicial protection is, in general, more effective than the application of state guarantees of investors' rights in Ukraine. However, in the sphere of corporate relationships, there are some problems concerning the realization and protection of investor rights.

One of the most problematic means of corporate rights protection is the recognition of decisions passed by the bodies of corporate legal entities, for example, general meetings of participants, as invalid. An investor may demand that a partnership consider a decision of a general meeting invalid on the grounds of the infringement of his corporate rights by such a decision, in particular, his right to participate in the meeting. The application of this means of protection by the courts is not unified in Ukraine. Thus, the Plenum of the Supreme Court of Ukraine (the SCU) states: "while resolving disputes about the recognition of decisions of general meetings of an economic partnership as invalid on the grounds of the prevention of the stockholders (participants) of the partnership from participation in them, courts should determine if their absence or presence could sufficiently influence the passing of a disputable decision considering the number of votes" (p. 21 of the Regulation, dated October 24, 2008, No. 13).[49] However, the opposite position was taken in the Regulation of the Presidium of the SCU dated March 03, 2004, No. 15. This regulation states that the "influence of the passing of a decision is not limited only to participation in voting".[50] This position is supported by the Plenum of the SECU (the Regulation, dated February 25, 2016 No. 4).[51] The reason for such

[48] *Treaty on the Functioning of the European Union* // https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT.
[49] *Regulation of the Plenum of the Supreme Court of Ukraine on Practices of Disposal of Corporate Disputes by Courts* // http://zakon2.rada.gov.ua/laws/show/v0013700-08.
[50] *Regulation of the Presidium of the Supreme Court of Ukraine on Solving Disputes Arising in the Sphere of Regulation of Stock Companies Activities* // http://zakon2.rada.gov.ua/laws/show/va015700-04.
[51] *Regulation of the Plenum of the Supreme Economic Court of Ukraine on Particular Issues of Practices in Solving Disputes Arising from Corporate Relationships* // http://zakon3.rada.gov.ua/laws/show/v0004600-16.

different interpretations is that corporate legislation does not answer this question directly.

The second approach seems to be better substantiated because the presence of an investor at a general meeting provides an opportunity to vote on a particular question and to express an opinion on the reasonability of passing an appropriate decision, which could influence the positions of other participants in the partnership. Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies regulates in detail the procedure for realizing the investors' rights to participate in general meetings, particularly the order of notification about holding.[52] The 2008 law, "On Joint Stock Companies," corresponds to European standards regulating these relationships in detail. To our mind, breaking the set order may not be left out of court attention even if the number of the stockholder's votes is insignificant. The same approach should be applied to LLPs and ALPs.

The Regulation of the Plenum of the SCU (p. 18)[53] and the Regulation of the Plenum of the SECU (p. 2.13)[54] state that the unconditional grounds upon which a decision of a general meeting is invalid is if the decision is passed without a quorum for holding meetings or passing decisions. Particular problems concerning this action arise in practice.

There are great many disputes based on legislative provisions that lapsed in 2018 but are fixed in statutes of partnerships. Thus, the CC of Ukraine and the Law of Ukraine "On Business Associations" used to establish that the statute of a partnership might require the consent of the other participants in the partnership (i.e., a general meeting) to accept a person who inherited a share in the statute capital or the successor of a legal entity as a participant.[55] A new law, "On Limited Liability and Additional Liability Partnerships," also permits such provisions in the statute. According to this law, a general meeting of the participants in an LLP can pass decisions by more than 50% of the existing votes.[56] Therefore, if an ancestor owned an interest of at least 50%, then the meeting cannot be authorized, which provides unconditional grounds for recognizing all decisions that were passed at

[52] *Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies //* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32007L0036.
[53] *Regulation of the Plenum of the Supreme Court of Ukraine on Practices of Disposal of Corporate Disputes by Courts*, *supra* note 49.
[54] *Regulation of the Plenum of the Supreme Economic Court of Ukraine on Particular Issues of Practices in Solving Disputes Arising from Corporate Relationships*, *supra* note 51.
[55] *Civil Code of Ukraine*, *supra* note 20, art. 356; *Law of Ukraine on Business Associations*, The News of the Supreme Council of Ukraine (1991, no. 49), art. 682.
[56] *Law of Ukraine on Limited Liability and Additional Liability Partnerships*, The News of the Supreme Council of Ukraine (2018, no. 13), art. 69.

such a meeting as invalid according to p. 18 of the Regulation of the Plenum of the SCU.[57]

To resolve this problem, the Plenum of the SECU stated, "while determining the legitimacy of the general meeting of the participants in an LLP (ALP) and a quorum for holding the meeting, the votes of the other participants are to be considered without the votes that belonged to the dead (reorganized) participant. Such votes total 100% (p. 4.8. of the Regulation, dated February 25, 2016, No. 4)".[58]

At first sight, this approach resolves the problem. However, it causes several issues: 1) this approach does not comply with current legislation, which does not present such special norms as applicable to regulations regarding voting procedures in these cases; 2) there is doubt regarding the fairness of not considering the interests of the missing participant if his share forms the prevailing majority of votes. Thus, for example, in the case of the death of a participant whose interest is 90%, the decision to accept or not accept the heir into the partnership would be made by participants who together own only 10% of the votes. Such a position seems unjustified.

An approach that is suggested by the new law, "On Limited Liability and Additional Liability Partnerships," does not resolve this problem. It seems reasonable that if the interest of a participant in the statute capital of a partnership was more than 50%, then the heir (successor) should enter the partnership without the consent of the other participants, except where different measures are foreseen by the statute.

If the interest of an ancestor is 50% or less, it should not be considered during voting and determination of a quorum because the absence of this participant could lead to the inability to render a decision.

There is no unified Ukrainian judicial practice concerning the application by an investor (a founder, a participant) of such a means of protection as the recognition of a contract that is concluded by a corporate legal entity as invalid. It has been repeatedly mentioned in the legal literature that the interests of a participant (founder) of a corporate legal entity can be directly realized by filing a direct suit and can be indirectly realized for the benefit of the partnership by filing a derivative

[57] *Regulation of the Plenum of the Supreme Court of Ukraine on Practices of Disposal of Corporate Disputes by Courts*, *supra* note 49.
[58] *Regulation of the Plenum of the Supreme Economic Court of Ukraine on Particular Issues of Practices in Solving Disputes Arising from Corporate Relationships*, *supra* note 51.

suit if the partnership itself does not file such suits.[59] These so-called derivative actions are common in countries with case law systems.[60]

As for Ukraine, the Plenum of the SECU emphasizes that the "law does not foresee the right of a participant of a legal entity to apply to a court for the protection of rights or legal interests of that entity beyond the agency relationships. However, if a participant of a legal entity substantiates his claim with infringement of his corporate rights, he has the right to file an appropriate suit (p. 2.2. of the Regulation of the Plenum of the SECU)".[61] The same conclusion is reached in the Regulation of the Plenum of the SCU[62] but it is not clearly reflected in legislation.

Thus, we suggest that a suit for the recognition of a contract that is concluded by a legal entity as invalid may also be filed by an investor on the grounds of the infringement of his corporate rights by the conclusion of such a contract. For example, the Law of Ukraine "On Joint Stock Companies" states: "where the market value of the assets or services that make a subject of a major contract is over 25% of the value of the assets according to the data of the last annual financial report of a stock company, a decision regarding giving consent to the conclusion of such a contract is to be passed by the general meeting after communication to the supervisory board (par. 1 of p. 2 of Art. 70)".[63] However, the law does not provide any legal consequences for the violation of the set procedures in the conclusion of a contract, such as when a decision by the executive body or the supervisory board is passed ultra vires. Research on this issue has been conducted[64] but it remains open in legal theory and in practice.

According to the CC of Ukraine, "in relationships with third parties the limitation of the powers of the representation of a legal entity is not effective, except where the legal entity proves that the third party was aware or, under the circumstances, could not be unaware of those limitations (p. 3 of Art. 92)".[65] On the contrary, where the third party was aware of the limitations of the powers of the representative (e.g. the executive body) to conclude the contract and the contract was still concluded, the limitations of the powers of the representative

[59] Volodymyr Luts, *Realization and Protection of Corporate Rights in Ukraine (Civil Law Aspects)* (Ternopil: Pidruchnyky i Posibnyky, 2007), 269.
[60] Arthur Pinto and Douglas Branson, *Understanding Corporate Law* (New York: Matthew Bender & Company. Incorporated, 1999), 388.
[61] *Regulation of the Plenum of the Supreme Court of Ukraine on Practices of Disposal of Corporate Disputes by Courts*, *supra* note 49.
[62] *Ibid*.
[63] *Law of Ukraine on Joint Stock Companies*, The News of the Supreme Council of Ukraine (2008, no. 50-51), art. 384.
[64] Serhii Tomchyshen, "Legal Consequences of Concluding Contracts Ultra Vires by a Body of an Economic Partnership and/or Its Representative (Issues of Theory and Practice)," *Actual Issues of Civil and Business Law* 5 (2010): 23; Serhii Tomchyshen, "Problematic Issues of Choosing the Means of Protection in the Case of Concluding a Contract Ultra Vires by a Body of a Legal Entity," *Actual Issues of Civil and Business Law* 6 (2010): 11.
[65] *Civil Code of Ukraine*, *supra* note 20, art. 356.

becomes effective for the third party. This norm should be unambiguously interpreted. A contract that is knowingly concluded ultra vires by the representative of a legal entity for his counterparty may be recognized as invalid. It follows from the CC of Ukraine that such a suit can be filed only by the legal entity whose representative exceeded his powers.

However, the provided norm does not concern the protection and restoration of the infringed corporate rights of a stockholder, such as the right to participate in the management of the company (in particular, passing a decision about concluding a major contract).

Considering and supporting the position of the SCU and SECU that is outlined above, we suggest that a stockholder may file a suit against a company and a third party concerning the recognition of a contract that is concluded on behalf of the company as invalid and as infringing on his corporate rights. Furthermore, we find that it is reasonable to establish an appropriate norm in legislation.

However, to restore his rights, an investor should file for the recognition of the major contract and the decision of the body of the company concerning its conclusion as invalid on the grounds that the corporate rights of the investor in the management of the company were infringed upon by this decision. Only by discharging both of these claims together can the investor's rights be fully restored, and he can be provided with an opportunity to participate in passing a new decision concerning the conclusion of a contract.

The right to participate in the management of another corporate legal entity (not a stock company) may be protected in a similar way if the statute of this entity establishes similar limitations on the powers for its representation.

The rights of an investor to participate in the management of a partnership remain unprotected in cases in which a contract is concluded ultra vires with a third party who was not aware and could not be aware of the limitations on the powers of the representative of a legal entity. According to the CC of Ukraine, in this case there are no grounds on which to recognize the contract as invalid. However, this provision guarantees the stability of the process of property circulation and is conventional in world practice, particularly according to the First Council Directive dated March 09, 1968, No. 68/151/EEC[66], which was in force when the Ukrainian CC was adopted. Currently, Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law

[66] *First Council Directive on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community* (No longer in force) // http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:31968L0151.

preserves this standard.[67] Therefore, a legislative approach to resolving these situations that is different from the current approach would be unreasonable.

Yet, in Ukrainian legislation there are imperfections in the regulation of this issue. Directive (EU) 2017/1132 provides for compulsory disclosure by companies of the appointment, termination of office and particulars of the persons who either as a body constituted pursuant to law or as members of any such body are authorized to represent the company in dealings with third parties (Art. 14).[68] However, Ukrainian legislation does not require the disclosure of such information. The law of Ukraine "On State Registration of Legal Entities, Natural Persons-Entrepreneurs, and Public Formations" requires the publication (submission to the Unified State Register) of only information about the head of a legal entity.[69] Information about other persons empowered to take action on behalf of the legal entity can be disclosed only on the initiative of a legal entity. Judicial practice in such cases comes from the presumption of third parties' awareness of the limitations on the powers of representation a company, since such representatives act on the basis of the statute that includes the relevant information. However, the Directive provides that the disclosure of the statutes shall not of itself be sufficient proof thereof.[70] That is why the Ukrainian approach to this issue does not correspond with EU standards.

CONCLUSIONS

Based on the results of this research, we can conclude that the realization of foreign investments that are made to acquire corporate rights is often inefficient in Ukraine because of imperfections in legal regulations regarding the appropriate relationships. To resolve these problems, the investment and corporate legislation of Ukraine should be amended.

First, it is necessary to define clearly at the legislative level the corporate legal entities in which investments lead to the acquisition of corporate rights. In Ukraine, they are 1) stock companies, 2) LLPs, 3) ALPs, 4) general partnerships, 5) limited partnerships, 6) manufacturing cooperatives, 7) private enterprises, and 8) agrarian households. Legislative regulations for these forms of legal entities are most detailed in Ukraine, and they are endowed with all the features of corporate legal entities; thus, foreign investors should choose to invest in these entities to

[67] *Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law* // https://eur-lex.europa.eu/eli/dir/2017/1132/oj.
[68] *Ibid*.
[69] *Law of Ukraine on State Registration of Legal Entities, Natural Persons-Entrepreneurs, and Public Formations*, The News of the Supreme Council of Ukraine (2003, no. 31), art. 263.
[70] *Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law*, *supra* note 67.

lessen their risks.

Second, state guarantees concerning the protection of foreign investors' rights are more declarative in Ukraine. These guarantees are not realized in practice because of imperfections in legislation. Some guarantees do not correspond to international standards. To resolve the problems that arise from legislative contradictions and gaps, European investors should know that investment relationships are regulated by two laws in Ukraine, "On Investment Activity" (a general act) and "On the Regime of Foreign Investments" (a special act). As the law "On Investment Activity" is a general act, it applies to cases in which some issue is not covered by the second act, which is a special act. In particular, unlike the law "On the Regime of Foreign Investments", the law "On Investment Activity" prohibits state bodies and their officials from intervening in foreign investment activities, and this norm includes European investors. When these acts contradict one another, the law "On the Regime of Foreign Investments" is applied. In particular, unlike the law "On Investment Activity", the law "On the Regime of Foreign Investments" prohibits the nationalization of foreign property. Problems arise in cases involving the payment of damages to foreign investors by self-governing bodies or bodies of the Autonomous Republic of Crimea. The special act contradicts the general act on this issue because it states that damages must be paid only for the actions and inactions of the state bodies of Ukraine or their officials but not for those of other bodies. To resolve this problem, European investors should note that the payment of damages caused to foreign investors because of torts should be regulated by the fundamentals of civil liability. Therefore, these investors should apply the CC of Ukraine, which includes obligations regarding the payment of damages caused by all state bodies, as well as the bodies of the Autonomous Republic of Crimea and self-governing bodies.

Third, the judicial protection of the rights of foreign investors in Ukraine is complicated by legislative gaps and ambiguous judicial practices. Thus, Ukrainian legislation does not permit an investor to file so-called derivative suits. Moreover, higher courts emphasize that in the case that a participant in a legal entity substantiates a claim regarding the infringement of corporate rights, he has the right to file an appropriate suit. Because judicial precedent is not the official source of law in Ukraine, there is a need for legislation to permit an investor to file a suit to recognize a contract as invalid if it is concluded knowingly with third parties on behalf of a partnership using excessive power in representation of the legal entity and the corporate rights of the investor are infringed.

Practical problems may arise in cases in which the heir of a natural person or the successor of a legal entity (a participant in an LLP) requires consent for

acceptance into the partnership via a general meeting. Such meetings are authorized if more than 50% of the owned votes are present. If an ancestor owned an interest of at least 50%, then the meeting cannot be authorized, which provides unconditional grounds for considering all decisions that are passed at such a meeting invalid. There is a legislative gap regarding this issue. Therefore, it is necessary to amend the law "On Limited Liability and Additional Liability Partnerships" by adding the following provision: if the interest of a participant in the statute capital of a partnership is more than 50%, the heir (successor) may enter the partnership without the consent of the other participants, except where differently foreseen by the statute. If the interest of an ancestor is 50% or less, it is not to be considered during voting and determination of a quorum. Without these suggested amendments, there is no effective mechanism for a European investor to solve such problems in practice.

If these and other provisions of current legislation are amended and if their practical realization is provided for, then Ukraine will improve its investment climate in the corporate sphere.

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