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ABOUT RAISING THE QUESTION OF CHOOSING AN EFFECTIVE METHOD OF PROTECTING CORPORATE RIGHTS IN AN LLC AS A NECESSARY CONDITION FOR RESOLVING A DISPUTE IN COURT

Abstract. The research relevance determines the fact that the term 'effective remedy' appeared in Ukrainian legislation at the end of 2017. The jurisprudence of its application is currently being formed, scientific research on an effective method of protecting corporate rights is mostly carried out in the context of analyzing civil rights' protection as a whole and does not provide thorough and comprehensive answers regarding the characteristics of such a method of protection.

The purpose of the article is to examine the essence of the concept of 'an effective method of protecting corporate rights', its criteria and characteristics, as well as the substantiation of the positive impact of the implementation of the provisions regarding the effectiveness of the protection method into Ukrainian legislation. **Research methods.** During the research, dialectical, formal-logical, comparative-legal and logical-legal methods of cognition were used. **Results.** The article presents a scientific and practical analysis of the interpretation and application by the European Court of Human Rights of the provisions of Art. 13 of the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, which establish that everyone whose rights and freedoms have been violated has the right to an effective method of legal protection at a national competent legal authority, as well as provisions of national statutory regulation and judicial practice in the application of an effective way of protecting corporate rights in a limited liability company. The author analyzed scientific research devoted to the protection of civil rights, the provisions of the substantive and procedural legislation of Ukraine, and legal conclusions set forth in the decisions of the European Court of Human Rights and the Supreme Court.

Conclusions. Based on the analysis of doctrinal approaches, provisions of legislation, and the practice of the European Court of Human Rights and the Supreme Court, the characteristics of an effective method of protecting corporate rights are formulated. Using the case of current judicial practice, the author substantiated that the establishment of requirements for the effectiveness of the protection method in national legislation contributes to the protection of the violated corporate rights of the participants of limited liability companies within the limits of one legal process.

Key words: protection of corporate rights, effective method of protection of corporate rights, criteria of effectiveness of protection of corporate rights, method of protection of corporate rights, judicial form of protection of corporate rights.

1. Introduction. Any kind of right, including corporate, has value and significance for its carrier exclusively when it can be protected by the actions of the person and authorized state bodies. Standard civil circulation involves not only the recognition of the subject's civil rights but also ensuring their proper and effective legal protection. The term 'effective remedy' appeared in Ukrainian legislation only at the end of 2017. The judicial practice of its application is currently being formed, and scientific research on an effective way to protect corporate rights is conducted mainly in the context of studying the protection of civil rights in general and hence, there are no well-grounded and comprehensive answers regarding the char-

acteristics of such a remedy, which determines the **relevance of the research topic under consideration**.

Recent research and publications. Both in practice and doctrine, the protection of corporate rights is of considerable interest. At the same time, given changes in statutory regulation and the development of corporate relations in Ukraine, research in the relevant area does not solve all applied problems.

Issues related to protecting corporate rights in a limited liability company have become an object of academic regard within the study of the problems of corporate legal relations of such Ukrainian scientists as O. A. Belianevych, O. V. Bihniak, V. A. Vasylieva, O. M. Vinnyk, N. D. Vintoniak, O. V. Harahonych, N. S. Hlus, O. V. Dzera, A. S. Dovhert, Yu. M. Zhornokui, A. V. Zelisko, I. R. Kalaur, O. R. Kibenko, O. R. Kovalyshyn, O. V. Kolohoida, V. M. Kossak, A. V. Kostruba, O. O. Kot, O. V. Kokhanovska, N. S. Kuznietsova, S. S. Kravchenko, V. M. Kravchuk, I. V. Lukach, V. V. Luts, R. A. Maidanyk, V. M. Makhinchuk, V. S. Milash, M. D. Pleniuk, I. B. Sarakun, A. V. Smitiukh, I. V. Spasybo-Fatieieva, P. O. Stefanchuk, Ya. M. Shevchenko, R. B. Shyshka, V. S. Shcherbyna, O. S. Yavorska, and others.

The purpose of the article is to examine the essence of the concept of 'effective remedy for corporate rights', its criteria, and characteristics and prove the positive impact of implementing the provisions on effective remedies in Ukrainian legislation. To achieve the goal, the author analyzes research papers on the protection of civil rights, substantive and procedural legislation of Ukraine, and legal conclusions outlined in the decisions of the European Court of Human Rights and the Supreme Court. **Research methods.** In the article, the author applies dialectical, formal-logical, comparative-legal, and logical-legal methods of cognition.

Based on the analysis of doctrinal approaches, legislative provisions, and practice of the European Court of Human Rights and the Supreme Court, the characteristics of an effective remedy for corporate rights are formulated. By relying on the current judicial practice, the author substantiates that the consolidation of the requirements for effective remedies in national legislation contributes to the redress of violated corporate rights of participants of limited liability companies within the framework of one trial.

2. General provisions on the forms and methods of protecting corporate rights in a limited liability company. The classification of protection forms of civil rights and legally protected interests into jurisdictional and non-jurisdictional has become generally accepted in civil law doctrine, legislation, and law enforcement. Such terminological gradation of protection forms is conditional, but it is quite convenient for their differentiation in practice.

In the present article, the jurisdictional form of protection of corporate rights is of interest. The jurisdictional form of protection of corporate rights is interpreted as the activities of authorized bodies to protect violated or disputed subjective rights. The essence of the mentioned form is that a person who believes that their rights and legitimate interests have been violated by unlawful actions of other persons or bodies appeals to state or other competent authorities (court, higher instance of state authority and governance, etc.), which are authorized to take the necessary measures to restore the violated right and desist the offense (Belianevych, 2007, p. 65; Kot, 2017, pp. 242–245; Lukach, 2015, pp. 249–250).

As for the ways to protect the violated rights, in the scientific literature, they are usually understood as legally enshrined substantive measures of a coercive nature, which contribute to the restoration (recognition) of violated, disputed, or unrecognized rights, restoration of the victim's property status and influence on the offender (Kot, 2017, p. 257; Spasibo-Fateeva, 2014, p. 57).

The definition of legal remedies for corporate rights proposed by the doctrine has quite a close meaning. For example, Yu. M. Zhornokui considers legal remedies for corporate rights as '... a procedure defined by law for ensuring the restoration (recognition) of violated rights, and at the same time, legal influence on the offender to restore the violated property and non-property aspects' (Zhornokui, 2016, p. 243). O. V. Zudikhin defines legal remedies for the corporate rights of participants in business companies as 'a law enforcement tool enshrined in or authorized by law which conducts a warning and/or renewal, recognition of violated (not recognized, disputed) corporate right, as well as compensation for losses ensuing from such a violation' (Zudikhin, 2011, p. 11). According to N. A. Slipenchuk, legal remedies for corporate rights are 'a system of actions of the participant of the corporation or the corporation itself and/or jurisdictional bodies established by law, a local act, or agreement through which the violations are terminated, and the violated, unrecognized or disputed subjective corporate right and/or compensation for the damage caused are restored' (Slipenchuk, 2014, p. 88).

The doctrine of civil and commercial law contains a variety of criteria for classifying remedies for civil and, in particular, corporate rights. Thus, there is the division of remedies for civil rights into restrictive, restorative, and penal (Spasibo-Fateeva, 2014, p. 72). The criteria for classifying remedies for corporate rights have close meaning. Considering the performance criterion (purpose), there is an independent system of remedies for corporate rights, the application of which allows confirming or satisfying the protected right, changing(terminating) the obligation; remedies, the application of which makes it possible to prevent or enjoin from violating corporate rights; remedies, the application of which pursues the goal of restoring the shareholder's violated right and providing them with compensation for the losses incurred (Luts, 2007, p. 248; Slipenchuk, 2014, p. 103; Zudikhin, 2011, p. 11).

I. V. Lukach classifies remedies for corporate rights into general and corporate (Lukach, 2015, pp. 285–289).

Remedies for corporate rights are also classified into contentious and non-contentious methods according to the criterion of the protection method (Hulyk, 2006, p. 221).

In the context of the problem stated in the article title, the classification proposed by V. I. Tsikalo is further used. The scientist divides remedies for corporate rights depending on the legal certainty and content of the violated corporate rights into effective ways to protect corporate rights and appropriate ways to protect corporate rights (Tsikalo, 2022, p. 422).

3. The concept of 'effective remedy'. The concept of appropriate remedies for corporate rights is quite intelligible and familiar to both doctrine and law enforcement practice. The legislative term 'effective remedy' amidst judicial protection of corporate rights appeared in the legal realm of Ukraine with the adoption of the Law of Ukraine 'On Amendments to the Commercial Procedure Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Procedure of Ukraine and other legislative acts' No. 2147-VIII, which entered into force on 15.12.2017 (Verkhovna Rada of Ukraine, 2017). Thus, the updated version of the Commercial Procedure Code of Ukraine includes a provision that if the law or the contract does not determine a remedy for the plaintiff's violated right or interest, the court, following the claim of such a person, may determine in its decision a protection method that does not contradict the law (Art. 5). The updated terminology of procedural legislation also meets the standards of European legislation. After all, a similar concept is available in the Convention for the Protection of Human Rights and Fundamental Freedoms: Article 13 of establishes that everyone whose rights and freedoms are violated shall have an effective remedy before a national authority. The essence of the concept of 'effective remedy' and its criteria are elucidated in the practice of the European Court of Human Rights.

Thus, in paragraph 145 of the judgment as of 15.11.1996 in the case of Chahal v. the United Kingdom, the European Court of Human Rights noted that the mentioned norm guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order (Chahal v. the United Kingdom, 1996).

Article 13 of the Convention guarantees the availability of an effective remedy before a national authority to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. Hence, art. 13 requires that the rules of national remedy relate to the substance of the 'arguable claim' under the Convention and provide appropriate redress, although States Parties have some discretion as to the manner how they fulfil their obligations under the mentioned provision of the Convention. The essence of obligations under Art. 13 also depends on the nature of the applicant's complaint under the Convention. However, the remedy required by Art. 13 should be 'effective' both in law and in practice, so that its use is not impeded by the acts or omissions of the authorities of the State concerned (Aydin v. Turkey, judgment as of 22 September 1997, Reports 1997-VI, p. 1895-96, paragraph 103, and Kaya v. Turkey as of 19 February 1998, Reports 1998-I, pp. 329-30, paragraph 106). The Court also recalls that when a person makes a well-founded allegation that he has been tortured or materially ill-treated by the State, the concept of an 'effective remedy' implies, among other things, a thorough and effective investigation which can result in the identification and punishment of those responsible and include the complainant's effective access to the investigation procedure (see Tekin v. Turkey, judgment as of 9 July 1998, Reports 1998-IV, p. 1517, paragraph 53) (Afanasyev v. Ukraine, 2005).

In addition, the European Court of Human Rights emphasized that the initiation of court proceedings per se does not meet all the requirements of para. 1 of Art. 6 of the Convention (Right to a fair trial). The purpose of the Convention is to guarantee rights that are practical and effective, not theoretical or illusory. The right of access to a court includes not only the right to initiate proceedings but also

the right to obtain a 'resolution' of the dispute in court. It would be illusory if the national legal system of a Contracting State allowed a person to bring a civil action before a court without guaranteeing that the case would be settled by a final decision in judicial proceedings. For para. 1 of Art. 6 of the Convention, it would be impossible to specify the procedural guarantees afforded to the parties in proceedings, which are fair, public and expeditious, without guaranteeing the parties that their civil disputes will be finally resolved (Multiplex v. Croatia, 2003; Kutic v. Croatia, 2002).

Analyzing national systems of legal remedy in the observance of the right to the effectiveness of domestic mechanisms in terms of ensuring the guarantees specified in Art. 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Human Rights has repeatedly stated in its decisions that to be effective, a remedy shall be independent of any action taken by state bodies, be directly accessible to those concerned (see the judgment as of 06.09.2005 in the case of Gurepka v. Ukraine (Gurepka v. Ukraine), application No.61406/00, para. 59); capable of preventing the occurrence or continuation of the alleged violation or providing adequate compensation for any violation that has already occurred (see the judgment as of 26.10.2000 in the case of Kudla v. Poland, application No.30210/96, para. 158) (para. 29 of the judgment as of 16.08.2013 in the case of Garnaga v. Ukraine, application No.20390/07).

In order to encourage and facilitate the fulfilment of their obligations under the European Convention on Human Rights, the Member States of the Council of Europe have adopted a Guide to Good Practice in Respect of Domestic Remedies which, inter alia, emphasizes that: 'A remedy is effective only if it is available and sufficient. It must be sufficiently certain not only in theory but also in practice, and must be effective in practice as well as in law, having regard to the individual circumstances of the case. Its effectiveness does not, however, depend on the certainty of a favourable outcome for the applicant' (Council of Europe, 2013).

Considering the above-mentioned practice of the European Court of Human Rights, it can be concluded that the effectiveness of remedies for an individual is determined following two criteria: availability and sufficiency. We support V. I. Tsikalo's position that the criteria of 'availability' and 'sufficiency' should be used not only to characterize the effectiveness of the protection of the convention rights of an individual but also to protect corporate rights. 'Availability' in the protection of corporate rights should be understood as the objective possibility of applying appropriate remedies, provided that they do not contradict the law or the contract. In other words, effective remedies to protect corporate rights, although not directly established by law or contract, do not contradict them. 'Sufficiency' for protection of corporate rights means the ability to achieve the result that the participant (shareholder) expects. 'Sufficiency' is the ability to get rid of the right's violation, that is, to remove obstacles to its implementation (Tsikalo, 2022, p. 423).

4. Application of the effectiveness criterion for the protection of corporate rights in national judicial practice. The Grand Chamber of the Supreme Court also formulated the criteria for effective remedies for corporate rights. Thus, the Court repeatedly drew attention to the fact that resorting to a particular remedy for civil rights depends on the content of the right or interest for the protection of which the person applied and on the nature of its violation, non-recognition, or challenge. Such a right or interest must be protected by the court effectively, that is, following the essence of the relevant right or interest, the nature of its violation, non-recognition, or challenge and the consequences caused by these actions (Supreme Court, 2018; Supreme Court, 2019).

Turning to the implementation of the concept of 'effective remedy' in the Ukrainian procedural legislation, it should be noted that it corresponds to the provisions of para. 12, Part 2 of Art. 16 of the Civil Code of Ukraine as amended by the Law No. 2147-VIII, which stipulates that the court has the right to protect a civil right or interest in another way established not only by the contract or the law but also by the court in cases specified by law.

In fact, the new version of the Commercial Procedure Code of Ukraine and the amendments introduced to para. 12, Part 2 of Art. 16 of the Civil Code of Ukraine expanded the list of judicial remedies provided for by Art. 16 of the Civil Code of Ukraine and Art. |20 of the Civil Code of Ukraine by allowing to protect rights not only in the manner prescribed by law, contract but also by the court and such that effectively protects the right.

The author believes that introducing the remedy standard into procedural legislation and allowing the court to determine an effective remedy contributes to the actual protection of corporate rights in an LLC and shift away from formalism in court decisions when the court can refuse the claim's satisfaction due to the inappropriate remedy. At first glance, it may seem that a lack of well-formulated criteria for court determination of the effectiveness of a remedy not established by law or contract provides an avenue for too subjective assess-

ment of the court and may lead to a violation of the principles of proportionality, reasonableness, adequacy and equality of the parties. At the same time, given the mentioned principles, the lack of well-formulated criteria will facilitate protecting violated corporate rights within one appeal to the court. Moreover, Part 2 of Art. 5 of the Commercial Procedure Code of Ukraine enshrines reliable protection against court arbitrariness when choosing an effective remedy. After all, the legislator made it clear that in choosing an effective remedy, the court is guided not by its discretion but by the content of claims of the person whose corporate rights are violated.

Such a statement can be supported by a case from judicial practice. Thus, the established standpoint is that neither civil nor economic legislation enshrines such a remedy as the cancellation and/or invalidation of the business entity's minutes of a general meeting. Under the established judicial practice, the decision of the general meeting of participants (shareholders, members, or founders) of a legal entity, not the general meeting minute, can be invalidated in court since the minute is a document that only fixes the fact of rendering a decision at the general meeting and is not an act within the meaning of Art. 20 of the Commercial Code of Ukraine (Supreme Court, 2021). However, in case No. 914/921/18, the Commercial Court of Cassation within the Supreme Court supported the position of the courts below regarding the remedy chosen by the plaintiff, which requested to cancel the minutes of the general meeting of the LLC participants, referring to the provisions of para. 12, Part 2 of Art. 16 of the Civil Code of Ukraine, Art. 5 of the CPC of Ukraine and the principles provided for in Art. 3 of the Civil Code of Ukraine. In particular, the Court of Cassation emphasized that the commercial courts considered the purpose of the plaintiff's appeal and proved violation of his rights by the decisions of the extraordinary general meeting under Art. 74 of the CPC of Ukraine, correctly protected the violated rights of the plaintiff by invalidating the decision of the extraordinary general meeting of the LLC participants, which is an effective remedy, to ensure the restoration of the plaintiff's violated right following Art. 5 of the CPC of Ukraine as well as those provided for in Art. 3 of the Civil Code of Ukraine, the principles of fairness, good faith, reasonableness (Supreme Court, 2019).

5. Conclusions. A remedy contributing to an actual restoration of violated corporate rights, which leads to the desired results for the subject and is adequate to the circumstances upon which the violation of corporate rights occurred, is considered effective. Introducing the effective remedy standard into the procedural legislation and allowing the court to determine an effective remedy assists in the actual protection of corporate rights in an LLC and shifting away from formalism in court decisions when the court can refuse claim satisfaction due to the improper remedy.

Taking into account the above scientific conclusions, legislative provisions, and the practice of the European Court of Human Rights and the Supreme Court, the following characteristics of an effective remedy for corporate rights can be formulated:

1) it may be directly provided by the law or the contract, or not provided by them;

2) it does not contradict the law or the contract;

3) it corresponds to the content of claims of the person whose corporate rights have been violated, the nature of the violation of corporate rights, and the consequences caused by such violation;

4) it is available and sufficient for the person who applied for the protection of the violated corporate right.

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ДО ПОСТАНОВКИ ПИТАННЯ ВИБОРУ ЕФЕКТИВНОГО СПОСОБУ ЗАХИСТУ КОРПОРАТИВНИХ ПРАВ У ТОВ ЯК НЕОБХІДНОЇ УМОВИ ВИРІШЕННЯ СПОРУ У СУДОВОМУ ПОРЯДКУ

Анотація. Актуальність обраної теми дослідження зумовлює те, що термін «ефективний спосіб захисту» з'явився в українському законодавстві наприкінці 2017 року. Судова практика його застосування на сьогодні лише формується, наукові дослідження щодо ефективного способу захисту корпоративних прав здійснюються здебільшого у контексті дослідження питань в цілому захисту цивільних прав та не дає ґрунтовних і вичерпних відповідей щодо характеристик такого способу захисту.

Метою статті є дослідження сутності поняття «ефективного способу захисту корпоративних прав», його критеріїв та характеристик. А також обґрунтування позитивного впливу імплементації

до українського законодавства положень щодо ефективності способу захисту. ***Методи дослідження.*** У дослідженні застосовано діалектичний, формально-логічний, порівняльно-правовий та логіко-юридичний методи пізнання. ***Результати.*** У статті подано науково-практичний аналіз трактування та застосування Європейським судом з прав людини положень ст. 13 Конвенції Ради Європи «Про захист прав людини та основоположних свобод», які встановлюють, що кожен, чиї права та свободи було порушено, має право на ефективний спосіб юридичного захисту в національному органі. А також положень національного нормативно-правового регулювання та судової практики у сфері застосування ефективного способу захисту корпоративних прав у товаристві з обмеженою відповідальністю. Автором здійснено аналіз наукових досліджень, присвячених питанням захисту цивільних прав, положень матеріального і процесуального законодавства України та правових висновків, викладених у рішеннях Європейського суду з прав людини і Верховного Суду.

Висновки. На підставі аналізу доктринальних підходів, положень законодавства та практики Європейського суду з прав людини і Верховного Суду сформульовано характеристики ефективного способу захисту корпоративних прав. Автором на прикладі актуальної судової практики обґрунтовано, що закріплення на рівні національного законодавства вимоги до ефективності способу захисту сприяє захисту порушених корпоративних прав учасників товариств з обмеженою відповідальністю у межах одного судового процесу.

Ключові слова: захист корпоративних прав, ефективний спосіб захисту корпоративних прав, критерії ефективності захисту корпоративних прав, спосіб захисту корпоративних прав, судова форма захисту корпоративних прав.

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