Research Institute of Private Law and Entrepreneurship named after Academician FG Burchak of the National Academy of Legal Sciences of Ukraine

Vasyl Stefanyk Precarpathian National University

CORPORATE LAW OF UKRAINE

Under the editorship of Professor V. A. Vasylyeva

Ivano-Frankivsk – 2019

UDC 347.7, 346.2

Recommended for publication by the Academic Council of the Research Institute of Private Law and Entrepreneurship named after Academician FG Burczak of the National Academy of Legal Sciences of Ukraine (Minutes No. 5 dated May 22, 2019) and by the Academic Council of the Educational and Scientific Law Institute of the Vasyl Stefanyk Precarpathian National University (Minutes No. 10 dated May 30, 2019).

Reviewers:

Borysova Valentyna Ivanivna - Corresponding Member of the National Academy of Legal Sciences of Ukraine, Honored Worker of Education of Ukraine, Professor, Candidate of Legal Sciences, Head of the Department of Civil Law No. 1 of Yaroslav Mudryi National Law University,

Kossak Volodymyr Mykhaylovych – Professor, LL.D., Head of the Civil Law and Civil Procedure Department of the Lviv National Ivan Franko University.

Maidanyk Roman Andriyovych - academician of the Academy of Legal Sciences of Ukraine, professor, LL.D., head of the Civil Law Department of the Faculty of Law of the Kyiv National Taras Shevchenko University.

Kharytonova Olena Ivanivna – Corresponding Member of the National Academy of Legal Sciences of Ukraine, Honored Worker of Science and Technology of Ukraine, Professor, LL.D., Head of the Department of Intellectual Property Law and Corporate Law of the National University "Odessa Law Academy".

Corporate Law of Ukraine: scientific and practical manual / *Vasylyeva VA, Zelisko AV, Syschuk L.V. [and others]; ed. prof. V. Vasylyeva***.** Ivano-Frankivsk, 2019. 258 p.

ISBN

The scientific and practical manual covers the most significant issues of corporate law of Ukraine, as well as other issues that are related to the conduct of entrepreneurial activity in the form of business companies (investment features, registration of entrepreneurial activities, etc.).

The publication is intended for lawyers, managers and participants of business companies, heads of enterprises engaged in foreign economic activity, investors, teachers, students, as well as those who are interested in problems of legal regulation of corporate relations.

Composite authors

Vasylyeva Valentyna Antonivna *– LL.D., Professor, Director of the Law Institute PNU named after V Stefanyk – subsection 1.2, 1.3, 1.4, 2.1;*

Vasylyeva Victoria Valentynivna *– PhD in Law, Researcher in NDI PrPP named after FG Burchak of NAPrNU – subsection 2.2-2.3, 2.7;*

Zelisko Alla Volodymyrivna *– PhD in Law, Associate Professor of Law Institute PNU named after V Stefanyk – subsection 1.1, 1.5-1.6, 2.5-2.6;*

Kalaur Ivan Romanovych *- LL.D., Associate Professor, Head of the Civil Law and Civil Procedure Department of the Faculty of Law THEY – coauthor subsection – 3.3-3.4;*

Kovalyshyn Oleksandr Romanovych *– PhD in Law of Law Institute PNU named after V Stefanyk – subsection 1.7, 2.4, 3.2, coauthor subsection 3.3-3.4;*

Sarakun Iryna Bogdanivna *– PhD in Law, Senior Researcher of NDI PrPP named after FG Burchak of NAPrNU – subsection 3.1;*

Sishchuk Liliana Vasylivna *– PhD in Law, Researcher of NDI PrPP named after FG Burchak of NAPrNU – subsection 4.1 - 4.2.*

CONTENTS

Chapter 1. Organizational and Legal Principles of Conducting Entrepreneurial Activity

1.1. General Principles of Investing and Conducting Economic Activity

Investments determine the level of socio-economic development of a state. Therefore, investment legal relations are characterized by the high level of governmental regulation. Investment activity is a type of business activity which, according to Art. 3 of the Commercial Code of Ukraine, is the activity of incorporated and unincorporated businesses in the field of social production aimed at manufacturing and marketing of products, performing works or rendering services on a commercial basis at a certain price. Incorporated and unincorporated businesses are recognized as the participants of commercial relations that conduct commercial activity exercising commercial capacity (a set of commercial rights and obligations), own solitary property and are liable for the full extent of its assets, unless otherwise provided by law.[1] The Commercial Code of Ukraine classifies two categories of businesses: 1) business entities – legal entities created according to the Civil Code of Ukraine, that is state, municipal and other types of enterprises created according to this Code, as well as other legal entities that conduct commercial activity and are registered according to the law; 2) citizens of Ukraine and noncitizens who conduct commercial activities and are registered as entrepreneurs according to the law.

The notion of "investments" is a central concept in the area of investment activity. Article 1 of the Law of Ukraine "On Investment Activity" defines *investments* as all the types of property and intellectual valuables that are invested in objects of the entrepreneurial or any other activity, resulting by profit (revenues) gained or social effect achieved.[2] Investments may take the form of funds, earmarked cash, shares, stocks

[1] Commercial Code of Ukraine: Law of Ukraine as of 16 January 2003 № 436-IV, 18, 19-20, 21-22 *Bulletin of the Verkhovna Rada of Ukraine 144 (2003), available at*: http://zakon2.rada.gov.ua/laws/show/436-15/page.

[2] On Investment Activity: Law of Ukraine as of 18 September 1991№ 1560-XII, 47 *Bulletin of the Verkhovna Rada of Ukraine 646 (1991), available at*: http://zakon2.rada.gov.ua/laws/show/1560-12/page2.

and other securities (excluding promissory notes); real and movable property (buildings, structures, equipment and other property valuables); intellectual property rights; a set of technical, technological, commercial and other knowledge in the form of technical documentation, skills and production experience necessary for organizing any type of production, but are not patented ("know-how"); rights to use land, water, resources, buildings, structures, equipment, as well as other property rights; other valuables.

The classification of investments is established by the Revenue Code of Ukraine stating that investment is a business transaction that provides for acquisition of fixed assets, intangibles, equity rights and securities in exchange for funds or property.[3] Under the provisions of the Revenue Code of Ukraine, investments can be divided into the following types:

- *fixed capital investment* – a business transaction that involves acquisition of buildings, structures, and other real property objects, other fixed assets and intangibles that are depreciable;
- *financial investment* – a business transaction that involves acquisition of equity rights, securities, derivatives and other financial instruments. Financial investments are divided into two subtypes: a) direct investment – involves a capital contribution of funds or property in exchange for equity rights issued by such a legal entity; b) portfolio investment – involves an acquisition of securities, derivatives and other financial assets for funds on the stock market;
- *reinvestment* – involves capital or financial investing covered by the profit from investment transactions.

The given classification of investments is commonly used in accounting, monetary and fiscal areas.

According to Article 5 of the Law of Ukraine "On Investment Activity", citizens of Ukraine, legal entities of Ukraine and foreign legal entities, as well as states themselves may be involved in investment activity as performers (investors and participants). The *investor* is a special performer of the investment activity, who makes investing decisions on contributing internal, loan or other external proprietary and intellectual funds to investment targets. Investors may act as contributors, creditors,

[3] Revenue Code of Ukraine: Law of Ukraine as of 2 December 2010 № 2755-VI, 13, 14-15, 16-17 *Bulletin of the Verkhovna Rada of Ukraine 112 (2010).*

purchasers, and perform functions of any other participants of investment activity. Current legislation of Ukraine provides that both a person who is planning to invest funds and a person who has already made an investment having acquired relevant rights and obligations may be considered as investor. Except for the investor, other participants of investment activities should be singled out such as: economic entities that conduct activities related to exercising of investments (construction, project organizations, etc.); financial structures; state investment regulation authorities (the National Securities and Stock Market Commission, the State Architectural and Construction Inspection, the Antimonopoly Committee, the Ministry of Economic Development and Trade, the National Bank of Ukraine, etc.); persons receiving investments directly, investment agents, and others.

Investment targets are objects of commercial or other types of activity invested in. Objects of investment include any property, also fixed assets and intangibles of any branch and sphere of the national economy, securities, earmarked cash, scientific and technical products, intellectual valuables, other property objects, and proprietary rights.

The law establishes right to free choice of the investment target as an inalienable right of an investor, except for cases when investing is prohibited or statute-restricted. These restrictions are aimed at defence and protection of public interests. Article 4 of the Law "On Investment Activity" establishes the following restrictions:

- it shall be prohibited to invest in objects, creation and use of which do not meet requirements of the sanitary, hygienic, radiation, ecological, architectural, and other statutory standards of Ukraine, as well as injure legitimate rights and interests of citizens, legal entities, and state;
- investing and financing of housing construction objects involving private funds of individuals and legal entities, including ones for management purposes, may be conducted exclusively through the construction financing funds, real estate funds, joint investment institutions, as well as by issuing target bonds of enterprises, fulfilment of obligations under which is performed by transferring the object (a part of the object) of housing construction.[4]

[4] On Investment Activity: Law of Ukraine as of 18 September 1991№ 1560-XII, 47 *Bulletin of the Verkhovna Rada of Ukraine 646 (1991), available at*: http://zakon2.rada.gov.ua/laws/show/1560-12/page2.

Analysis of the applicable law shows that other limitations and restrictions on the investment targets shall be possible. For example, individuals and legal entities can not use a corporate form of investment for state and municipal unitary enterprises that are nontargets of privatization. Investments by the entrepreneurs in the objects of state and municipal property rights may only take place under the conditions of the law (usually on a competitive basis) and without transfer of ownership through the conclusion of a contract (conclusion of concession contracts, etc.).

Current legislation of Ukraine provides that investment activities are ensured through the implementation of investment projects and the conduct of transactions with equity rights and other types of property and intellectual valuables. *The investment project* is a set of purposive procedural and institutional, administrative, analytical, financial, engineering and technical measures that shall be carried out by the performers of investment activity and are performed in the form of the planning-accounting documents necessary and sufficient for the justification, organization and management of work on the project implementation. The development of a project proposal (placement memorandum) may be the precursor of the development of an investment project. An investment project or a placement memorandum to gain government support shall be developed in accordance with the forms established by the Ministry of Economic Development Order dated 19.06.2012, No. 724.[5]

State support for the implementation of investment projects may possess following forms: co-financing of the implementation of investment projects at the expense of the state budget; provision of the state guarantees for the implementation of investment projects in order to

[5] On the approval of form of project (investment) proposal, on the basis of which an investment project is being developed, for the development of which state support may be provided, the Procedure for the development and form of the investment project, for the implementation of which state support may be provided: Order of the Ministry of Economic Development and Trade of Ukraine dated 19.06.2012 № 724, *available at*: http://zakon2.rada.gov.ua/laws/show/z1308-12. (application date dated 28.03.2018).

enforce the fulfillment of bond of debt obligations under borrowings of a business entity in accordance with the law; credit granting of business entities at the expense of the state budget for the implementation of investment projects; full or partial refund of interest on credit of business entities at the expense of the state budget for the implementation of investment projects; as well as other forms determined by the current legislation (Article 12-1 of the Law of Ukraine "On Investment Activity"). To be more specific, state support for the implementation of investment projects shall be provided in compliance with the requirements of the Law of Ukraine "On State Aid to Business Entities" dated July 1, 2014. The said Law defines the criteria for the admissibility of the state aid (Art. 4, 5, 6); the procedure for the notification of a new state aid (Art. 9) and decision making procedure on its provision (Art. 10).[6]

Investment projects claiming state support are undergoing state expertise conducted by central executive authorities that implement state policy in the field the investment project relates to or by the Council of Ministers of the Autonomous Republic of Crimea, regions, Kyiv and Sevastopol municipal governments if the investment project concerns the development of the respective region on grounds of a conclusion of the Ministry of Economic Development of Ukraine on the assessment of the cost-effectiveness analysis of the project within 40 days.[7] Expert findings extend for three years from the date of its submission. On grounds of the state expert appraisal, the project shall be entered in the Public Register of Investment Projects. The procedure for conducting such a register is established by the Decree of the Cabinet of Ministers of Ukraine dated December 17, 2017, No. 1062.[8]

[6] On State Aid to Business Entities: Law of Ukraine as of 1 July 2014 № 1555-VII. *Bulletin of the Verkhovna Rada of Ukraine* 2014. № 34. Art. 1173, *available at*: http://zakon5.rada.gov.ua/laws/show/1555-18. (application date dated 28.03.2018).

[7] The order of conducting state expertise of investment projects: Decree of the Cabinet of Ministers of Ukraine as of 9 June 2011 № 701, *available at*: http://zakon2.rada.gov.ua/laws/show/701-2011-%D0%BF. (application date dated 28.03.2018).

[8] On approval of Procedure of conducting Public register of investment projects: Decree of the Cabinet of Ministers of Ukraine as of 17 December

Project selection for the development of which state support shall be provided is carried out on a competitive basis on grounds of the data of the Public Register of projects as well as project proposals, and expert findings following the outcomes of the cost-effectiveness expert analysis of the projects.

1.2. Basic Notions

1. A *legal entity* is an organization that owns solitary property, may aquire property and personal nonproperty rights and be under obligation on its own behalf, capable of suing and being sued, also in the court of arbitration. A legal entity can be created by combining persons and (or) property. Legal entities, depending on the order of its creation, are divided into legal entities under private law and legal entities under public law. A legal entity under private law is created on the basis of constating documents (Articles 80-82 of the Civil Code of Ukraine).

Legal entities may be created in the form of companies, institutions and in other forms established by law. *A company* is an organization created by combining persons (members) who are eligible for affiliation with this company. A company may be created by a single person, unless otherwise provided by law. Companies are divided into for-profit and nonprofit companies. *An institution* is an organization created by one or several persons (founders) who do not take part in its management by combining (allotment) of their property to achieve the goal determined by the founders, on account of this property (Article 83 of the Civil Code of Ukraine).

2. According to Art. 84 of the Civil Code of Ukraine *business companies* are enterprises or other business entities created by legal entities and / or citizens by combining their property and participation in the entrepreneurial activity of the company for the purpose of making a profit. Company consisting of a sole member can engage in business activities.

2017 № 1062, *available at*: http://zakon3.rada.gov.ua/laws/show/1062-2017-%D0%BF. (application date dated 28.03.2018).

Business entities, consumers, public and local authorities, endowed with economic competence, as well as citizens, social and other organizations, as well as citizens non-entrepreneurs may be company founders and company members.

Business companies are legal entities. Business companies may engage in any business activities, except as otherwise provided by the law.

Business company's legal standing is regulated by the Commercial Code of Ukraine[9] (Articles 79-92), the Civil Code of Ukraine[10] (Articles 113-162), the Law of Ukraine "On Business Companies"[11],, the Law of Ukraine "On Joint Stock Companies"[12], the Law of Ukraine "On Limited Liability and Superadded Liability Companies"[13].

Characteristic features of a business company:

- corporate pattern of organization (normally, the existence of two or more founders – individuals and / or legal entities, as well as the divisibility of property into shares and corporate forms of business governing);
- the universality of this legal entity form: the possibility of its application to enterprises, other for-profit business entities of the lower echelon of economic structure (banks, insurance companies, investment funds, non-profit organizations (stock exchange markets, etc.), integrated companies (holding companies with a network of subsidiaries);
- corporate existence;

---

[9] Commercial Code of Ukraine: Law of Ukraine as of 16 January 2003. № 436-IV // *database "Legislation of Ukraine" / Verkhovna Rada of Ukraine, available at*: http://zakon.rada.gov.ua/laws/show/436-15

[10] Civil Code of Ukraine: Law of Ukraine as of 16 January 2003. № 435-IV // *database "Legislation of Ukraine" / Verkhovna Rada of Ukraine, available at*: http://zakon.rada.gov.ua/laws/show/435-15

[11] On Business Companies: Law of Ukraine as of 19.09.1991. № 1576-XII // *database "Legislation of Ukraine" / Verkhovna Rada of Ukraine, available at*: http://zakon.rada.gov.ua/laws/show/1576-12

[12] On Joint Stock Companies: Law of Ukraine as of 17.09.2008. № 514-VI. // *database "Legislation of Ukraine" / Verkhovna Rada of Ukraine, available at*: http://zakon.rada.gov.ua/laws/show/514-17

[13] On Limited Liability and Superadded Liability Companies: Law of Ukraine as of 06.02.2018. № 2275- VIII. // *database "Legislation of Ukraine" / Verkhovna Rada of Ukraine, available at*: http://zakon.rada.gov.ua/laws/show/2275-19

- the main valid title to the company's assets – right to ownership, the sources of which are: company founders' and company members' contributions; value of production; earned revenue; property acquisition agreements and other legal transations;

- corporate governance procedures carried out by the company members (in business partnerships) or the system of corporate bodies (in corporations);

- the divisibility of company's assets into shares, the size of which is determined by the constitating documents;

- an opportunity for the founders to choose the legal entity form provided for by law, such as: joint stock company, limited liability company, superadded liability company, general partnership, limited partnership, depending on their interests towards the corporate governance, the possibility of raising funds from other persons to the formation of the company's property, the degree of economic self-sufficiency of the company, the type of activity, etc.

- the existence of equity rights of the company members: the right to profit distribution, the right to corporate governance, the right to liquidation distribution.

3. The concept "enterprise" is used in Ukrainian legislation inconsistently. On the one hand, according to Art. 62 of the Commercial Code of Ukraine an *enterprise* is an independent business entity created by a competent public or local authorities or other persons to meet social and personal needs through the systematic carrying out of production, scientific-research, trading, other economic activities under the procedure prescribed by the laws. On the other hand, Art. 191 of the Civil Code of Ukraine defines an enterprise as an integrated property complex used for carrying out of business.

It should be assumed that it is not an enterprise which should be recognized as a holder of right, but a legal entity of a certain legal entity form. While an enterprise should be understood as the whole complex of property and proprietary rights that is owned by a person.

The legal status of an enterprise is regulated by the Article 62-72 of the Commercial Code of Ukraine.

An enterprise, unless otherwise provided by law, acts on the basis of the charter or model charter. An enterprise is a legal entity that owns

solitary property, has an independent balance sheet, banking accounts, a seal with its business name and business identifier code. An enterprise shall not have other legal entities in its structure.

Depending on the forms of ownership provided for by law, enterprises of the following types may function in Ukraine: a private enterprise, a communal enterprise, a municipal enterprise, a state-owned enterprise, an enterprise based on the merging of property of different forms of ownership, etc.

Depending on the way of creation (initiation) of an enterprise and the way of formation of the charter capital in Ukraine there are unitary and corporate enterprises.

A unitary enterprise is created by a sole founder who allocates the necessary property, forms the charter capital that is not divided into shares (stocks) in accordance with the laws, adopts the articles of association, allocates expenditures first-hand or through the manager appointed by him/her, manages the enterprise and forms its labor collective under the contract of employment, solves the issue on the reorganization and liquidation of the enterprise. Unitary enterprises can be state-owned, municipal, based on a property of associations of citizens or religious organizations or privately owned by the founder. As a general rule, corporate enterprise is created by two or more founders under their joint decision (agreement) and acts on the basis of merging of their property and / or entrepreneurial or labor activity of the founders (members), their joint corporate governance under the equity rights they have, as well as through the corporate bodies they create, and the participation of founders (members) in the profit distribution and risks probability distributions. Corporate enterprises can exist as cooperative enterprises, enterprises created in the form of a company, as well as other enterprises, including those based on the private property of two or more persons.

If an enterprise has a foreign investment of at least 10% in its charter capital, it shall be recognized as the foreign-invested enterprise. An enterprise with a foreign investment in a charter capital of one hundred percent shall be considered to be a foreign-owned enterprise.

If the dependence on another enterprise exists as it is provided for in Art. 126 of the Commercial Code of Ukraine, the enterprise shall be recognized as a subsidiary. Unlike the separate subdivisions of a legal

entity, the subsidiary is a legal entity, that is, an independent performer of entrepreneurial activities.

4. The simplest form of performing entrepreneurial activity is the form of *private entrepreneurship*, that is, without the creation of enterprises or other legal entities. The increase of number of individual entrepreneurs is conditioned by a simplified registration system, the possibility of conducting business without a registration of a legal entity, and the ability to choose the simplified income taxation system. The application of a harmonized tax while taxation of income of a private entrepreneur is regulated by the Revenue Code of Ukraine[14] (Chapter 1 of Section XIV). However, non-resident individuals and non-resident legal entities can not use the simplified taxation scheme.

Currently there is no separate regulatory legal act that would establish the legal status of a citizen entrepreneur. The relevant provisions on the right of an individual to engage in entrepreneurial activities can be found in Chap. 6 and Chap. 13 of the Commercial Code of Ukraine, Chap. 5 of the Civil Code of Ukraine and in the relevant sectoral documents regulating the respective activity.

An *entrepreneur* is an individual – a citizen of Ukraine, a foreign citizen, a stateless person who carries out entrepreneurial activity. Foreign citizens and stateless persons while engaging in business activities in Ukraine enjoy the same rights and have the same obligations as ones citizens of Ukraine possess, except as required by law.

An entrepreneur is an individual with a full civil legal capacity (Article 50 of the Civil Code of Ukraine). An entrepreneur is recognized as an economic agent if he/she carries out an entrepreneurial activity upon condition of the state registration of him/her as an individual entrepreneur without creating a separate legal entity (Article 128 of the Commercial Code of Ukraine). An individual entrepreneur is liable to the full extent of his/her assets while carrying out entrepreneurial activity, except for property, that cannot be seized and sold (Part 1 of Article 52 of the Civil Code of Ukraine). A citizen entrepreneur can engage in any legal type of business. He/she operates without constating documents, unlike legal

[14]Revenue Code of Ukraine: Law of Ukraine as of 02.12.2010. № 2755-VI. // *database "Legislation of Ukraine" / Verkhovna Rada of Ukraine, available at*:http://zakon.rada.gov.ua/laws/show/2755-17

entity acting within the scope of its' legal capacity and limited by the types of the activities established by the founders in the constating documents.

5. Citizens and legal entities of Ukraine and foreign states, as well as the states themselves may act as *investors*, making decisions on contributing internal, loan or other external proprietary and intellectual funds to investment targets. Investors may act as contributors, creditors, purchasers, as well as perform duties of any other participants of the investment activity (Article 5 of the Law of Ukraine "On Investment Activity"[15]).

Foreign investors are persons that carry out investment activities on the territory of Ukraine, namely: 1) legal entities created in accordance with the legislation other than the legislation of Ukraine; 2) non-resident aliens who are not legally incapacitated; 3) foreign states, international governmental and non-governmental organizations; 4) other foreign performers of investment activity, which are recognized as such in accordance with the legislation of Ukraine.

Foreign-invested enterprise is an enterprise (organization) of any legal entity form, created in accordance with the legislation of Ukraine, a foreign equity investment of which, if any, is at least 10 percent[16].

A unique feature of the regime of foreign investment is the obtaining of bonuses and guarantees provided in accordance with the legislation of Ukraine. Condition to the receipt of such bonuses and guarantees is a state registration of foreign investments.

1.3. Sources of Company Law

Company law, like any other, has its own forms of expression. First of all, these are regulatory legal acts, the set of which forms corporate legislation. Company law has integrated nature, since ties between parties of corporate relations in the execution of their equity rights are rather diverse – civil, administrative, financial, tax, family, etc. Therefore,

[15] On Investment Activity: Law of Ukraine as of September 18, 1991 № 1560-XII, 47 // *database "Legislation of Ukraine" / Verkhovna Rada of Ukraine, available at*: http://zakon.rada.gov.ua/laws/show/1560-12

[16] On the Regime of Foreign Investments: Law of Ukraine as of 19.03.1996 № 93/96-ВР // *database "Legislation of Ukraine" / Verkhovna Rada of Ukraine, available at*: http://zakon.rada.gov.ua/laws/show/93/96-%D0%B2%D1%80.

company law covers regulatory legal acts that contain norms of both private and public law, that is, of its various branches.

The fundamental legislative act of Ukraine is the Constitution of Ukraine[17] of June 28, 1996 which is superior comparing to other sources of domestic legislation of Ukraine.

The main source of company legislation is the Civil Code of Ukraine[18] of January 16, 2003. This particular act provides for the regulation of corporate relations both by laws and subordinate legislation and by local acts, determining the list of acts of civil legislation in Art. 4 of the Civil Code of Ukraine. Regulatory legal acts contain general requirements that not only leave open the possibility of, but to a certain extent, require the regulation of various displays and lines of corporate relations at the level of each particular corporation. As an initial matter it concerns joint stock companies, the structure of corporate ownership and corporate governance in which is complex and requires accessary individual regulatory acts.

Civil Code of Ukraine and Commercial Code of Ukraine[19] of January 16, 2003, regulatory scopes of which significantly overlap, simultaneously regulate the legal status of companies, and, in particular, the relations that are established in the process of its incorporations, activity and liquidations. The mentioned above issues are captured in the Civil Code of Ukraine in articles 84, 87-100, 104-162, and in the Commercial Code of Ukraine in articles 56-60, 64-66, 79-92 and some others.

The terminology related to the concept of corporation is not used in the Civil Code of Ukraine, and therefore no separate regulation of relations involving corporations (corporate relations) can be found as well. The Commercial Code of Ukraine uses the terminology of corporate law, in

[17] Constitution of Ukraine: Law of Ukraine as of 28.06.1996 № 254к/96-// *database "Legislation of Ukraine" / Verkhovna Rada of Ukraine, available at*: http://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80

[18] Civil Code of Ukraine: Law of Ukraine as of 16.01.2003 № 435-IV. // *database "Legislation of Ukraine" / Verkhovna Rada of Ukraine, available at*: http://zakon.rada.gov.ua/laws/show/435-15

[19] Commercial Code of Ukraine: Law of Ukraine as of 16 January 2003. № 436-IV // *database "Legislation of Ukraine" / Verkhovna Rada of Ukraine, available at*: http://zakon.rada.gov.ua/laws/show/436-15

particular Art. 167 of the Commercial Code of Ukraine provides for the definition of equity rights and corporate relations.

The existence of two codes, which to some extent compete for the regulation of the same relations, generates quite a number of misconceptions regarding not only the applicability of the Civil Code of Ukraine to the regulation of equity rights and corporate relations, but also the co-relation of such a regulation. However, taking into account a civil nature of corporate relations, regardless the deficiency of the "corporate" nomenclature in the Civil Code of Ukraine, corporate relations are primarily regulated by the Civil Code of Ukraine, this refers to the equity rights and the procedure for its execution. In the absence of a relevant regulation of such relations in the the Civil Code of Ukraine, it should be regulated by the Commercial Code of Ukraine, which contains the basic principles of economy management in Ukraine and regulates economic relations arising in the process of organization and conducting of business activity between incorporated and unincorporated businesses, as well as between these parties and other participants of the relations in the field of economy management.

Along with the Civil Code of Ukraine and the Commercial Code of Ukraine, corporate legislation includes laws and subordinate legislation: Decrees of the Cabinet of Ministers of Ukraine, as well as acts adopted by the National Commission on Securities and Stock Market, the State Property Fund of Ukraine, the Antimonopoly Committee of Ukraine and other agencies of state power.

The normative legal acts regulating legal status of the joint stock companies and its corporate governance procedures include the Law of Ukraine "On Business Companies"[20] of September 19, 1991 and the Law of Ukraine "On Joint Stock Companies"[21] of September 17, 2008, the Decree on the approval of the Procedure for the Registration of the Issue

[20] On Business Companies: Law of Ukraine as of 19.09.1991. № 1576-XII // *database "Legislation of Ukraine" / Verkhovna Rada of Ukraine, available at*: http://zakon.rada.gov.ua/laws/show/1576-12

[21] On Joint Stock Companies: Law of Ukraine as of 17.09.2008. № 514-VI. // *database "Legislation of Ukraine" / Verkhovna Rada of Ukraine, available at*: http://zakon.rada.gov.ua/laws/show/514-17

of Shares of Joint Stock Companies, created during privatization and corporatization[22] of February 26, 2013 and other subordinate legislation.

The Law "On Joint Stock Companies" determines the procedure for the joint stock companies' creation, activity, winding-up, spin-off, defines its' legal status as well as the rights and obligations of the shareholders. This Law fills numerous legal gaps, eliminates significant contradictions in the regulation of corporate relations that existed prior to its adoption, as well as introduces some fundamental changes in the legal status of joint stock companies and the procedure for implemention of equity rights, in particular.

The legal status of limited liability companies and superadded liability companies, its creation, activity and winding-up, as well as the rights and obligations of it's members is defined by the Law of Ukraine "On Limited Liability and Superadded Liability Companies" of 06.02.2018.

Certain business companies have their own peculiarities regarding the composition of founders and members, the types and procedures for making their contributions to the charter capital, the use of the capital, the sphere of business, etc. Specific legislation may provide for the specific aspects of the legal regulation of its legal status and the corporate relations itself. This is provided for by the following laws: the Law "On Banks and Banking"[23] of December 7, 2000, the Law "On the Privatization of State Property" [24] of March 4, 1992, the Law "On Insurance" [25] of March 7, 1996, and others.

---

[22] On the Approval of the Procedure for the Registration of the Issue of Shares of Joint Stock Companies, Created during Privatization and Corporatization: Decree of NCSSM as of 26.02.2013. № 248. // *database "Legislation of Ukraine" / Verkhovna Rada of Ukraine, available at*: http://zakon.rada.gov.ua/laws/show/z0461-13

[23] On Banks and Banking: Law of Ukraine as of 07.12.2000. № 2121-III. // *database "Legislation of Ukraine"* / *Verkhovna Rada of Ukraine, available at*: http://zakon.rada.gov.ua/laws/show/2121-14

[24] On the Privatization of State Property: Law of Ukraine as of 04.03.1992. № 2163-XII. // *database "Legislation of Ukraine"* / *Verkhovna Rada of Ukraine, available at*:http://zakon.rada.gov.ua/laws/show/2163-12

The legal basis for the state-owned property management is determined by the Law of Ukraine "On the Management of State Property Objects" [26] of September 21, 2006. It also mentions the equity rights of the state. The general principles of the functioning of holding companies in Ukraine, as well as the peculiarities of their formation, activity and liquidation, are defined in the Law of Ukraine "On Holding Companies in Ukraine" [27] of March 15, 2006.

All the others, namely: insurance corporations, moneyed corporations, other credit corporations, as well as those created in the process of privatization, depending on the legal entity form, are subjects to the Laws of Ukraine "On Business Companies" or "On Joint Stock Companies", including the rules on guarantees and methods of protection and defense of the rights of members (shareholders), the rules on the functioning of the highest governing body of the corporation – convocation and holding a general meeting, the formation of other corporate bodies.

The procedure for state registration of all the legal entities, regardless of the legal entity form, form of ownership and subordination, as well as individual entrepreneurs, is regulated by the Law of Ukraine "On State Registration of Legal Entities, Individual Entrepreneurs and Public Formations" [28] dated May 15, 2003.

Privatization legislation to some extent extends its regulation to corporate relations, since it regulates the legal status of joint stock companies created in the process of privatization and corporatization, the

---

[25] On Insurance: Law of Ukraine as of 07.03.1996. № 85/96-ВР. // *database "Legislation of Ukraine" / Verkhovna Rada of Ukraine, available at*: http://zakon.rada.gov.ua/laws/show/85/96-%D0%B2%D1%80

[26] On the Management of State Property Objects: Law of Ukraine as of 21.09.2006. № 185-V. // *database "Legislation of Ukraine" / Verkhovna Rada of Ukraine, available at*: http://zakon.rada.gov.ua/laws/show/185-16

[27] On Holding Companies in Ukraine: Law of Ukraine as of 15.03.2006. № 3528-XV. // *database "Legislation of Ukraine" / Verkhovna Rada of Ukraine, available at*: http://zakon.rada.gov.ua/laws/show/3528-15

[28] On State Registration of Legal Entities, Individual Entrepreneurs and Public Formations: Law of Ukraine as of 15.05.2003. № 755-XV // *database "Legislation of Ukraine" / Verkhovna Rada of Ukraine, available at*: http://zakon.rada.gov.ua/laws/show/755-15

formation of the corporate bodies and the procedure for the execution of its powers, the management of the state-owned block of shares, etc. The outlines of the legislation on privatization are contained in the first before written Law of Ukraine "On the Privatization of State Property", the Law of Ukraine "On Peculiarities of Property Privatization in the Agrondustrial Complex" [29] of July 10, 1996, the State Privatisation Programme for 2012-2014[30] dated January 13, 2012, others regulatory legal acts issued by the Cabinet of Ministers of Ukraine, the State Property Fund of Ukraine and the National Commission of Ukraine for Securities and Stock Market.

The legislation on securities and stock market participants is a separate set of regulatory legal acts, which are interrelated with corporate relations: it contains guarantees of shareholders rights, in particular those regarding the disclosure of information; it ensures transparency of the activity of the joint stock companies, determines the procedure for the functioning of the National Commission of Ukraine for Securities and Stock Market; regulates the relations of issue and turnover of shares, as well as the activities of professional securities market participants; provides the opportunity to use various financial instruments, for example, share purchase options as a means of stimulating members of joint-stock company's governing bodies, etc.

The laws regulating the activities of joint stock companies in the stock market include the following Laws: "On Securities and Stock Market"[31] of February 23, 2006, "On the State Regulation of the Securities Market in Ukraine"[32] of October 30, 1996, "On the Depository System of

[29] On Peculiarities of Property Privatization in the Agrondustrial Complex: Law of Ukraine as of 10.07.1996. №290/96-BP. // *database "Legislation of Ukraine"* / *Verkhovna Rada of Ukraine, available at*: http://zakon.rada.gov.ua/laws/show/290/96-%D0%B2%D1%80

[30] On the State Privatisation Programme: Law of Ukraine as of 13.01.2012. № 4335-VI. // *database "Legislation of Ukraine"* / *Verkhovna Rada of Ukraine, available at*: http://zakon.rada.gov.ua/laws/show/4335-17

[31] On Securities and Stock Market: Law of Ukraine as of 23.02.2006. № 3480-Iv // *database "Legislation of Ukraine"* / *Verkhovna Rada of Ukraine, available at*: http://zakon.rada.gov.ua/laws/show/3480-15

[32] On the State Regulation of the Securities Market in Ukraine: Law of Ukraine as of 30.10.1996. № 448/96-BP // *database "Legislation of Ukraine"* /

Ukraine" [33] of July 6, 2012, other ragulatory legal acts issued by the President of Ukraine, the Cabinet of Ministers of Ukraine, the National Securities and Stock Market Commission, the Antimonopoly Committee of Ukraine.

Legislation regulating investment activity includes the Law "On Investment Activity"[34] of September 18, 1991, the Law "On the Regime of Foreign Investment"[35] of March 19, 1996, the Law "On the Protection of Foreign Investments in Ukraine" [36] of September 10, 1991, the Law "On the General Principles of Creation and Functioning of Special (Free) Economic Zones" [37] of October 13, 1992. The attraction and effective allocation of the financial resources of investors can be done with the help of co-investing objects. The legal basis for the creation and activity of such objects is established by the Law of Ukraine "On the Collective Investment Schemes" [38] of July 5, 2012.

Verkhovna Rada of Ukraine, available at: http://zakon.rada.gov.ua/laws/show/448/96-%D0%B2%D1%80

[33] On the Depository System of Ukraine: Law of Ukraine as of 06.07.2012. «5178-VI. // *database "Legislation of Ukraine"* / *Verkhovna Rada of Ukraine, available at*: http://zakon.rada.gov.ua/laws/show/5178-17

[34] On Investment Activity: Law of Ukraine as of 18.09.1991. № 1560-XII. // *database "Legislation of Ukraine"* / *Verkhovna Rada of Ukraine, available at*: http://zakon.rada.gov.ua/laws/show/1560-12

[35] On the Regime of Foreign Investment: Law of Ukraine as of 19.03.1996. № 93/96-ВР // *database "Legislation of Ukraine"* / *Verkhovna Rada of Ukraine, available at*: http://zakon.rada.gov.ua/laws/show/93/96-%D0%B2%D1%80

[36] On the Protection of Foreign Investments in Ukraine: Law of Ukraine as of 10.09.1991 p. № 1540a-XII // *database "Legislation of Ukraine"* / *Verkhovna Rada of Ukraine, available at*: http://zakon.rada.gov.ua/laws/show/1540%D0%B0-12

[37] On the General Principles of Creation and Functioning of Special (Free) Economic Zones: Law of Ukraine as of 13.10.1992. № 2673-12. // *database "Legislation of Ukraine"* / *Verkhovna Rada of Ukraine, available at*: http://zakon.rada.gov.ua/laws/show/2673-12

[38] On the Collective Investment Schemes: Law of Ukraine as of 05.07.2012 p. № 5080-6. // *database "Legislation of Ukraine"* / *Verkhovna Rada of Ukraine, available at*: http://zakon.rada.gov.ua/laws/show/5080-17

Legislation on economic competition includes the Law of Ukraine "On Protection of Economic Competition"[39] of January 11, 2001, the Regulation on the Procedure for Filing Applications to the Antimonopoly Committee of Ukraine on the Prior Approval of the Permit for the Concentration of Business Entities[40] (Concentration Regulation), approved by the Antimonopoly Committee of Ukraine of February 19, 2002.

The norms of the legislation on economic competition spread on the scopes of corporate and investment regulation, and to a certain extent limit investing potential, followed by the affect on the investment portfolio set-up, on shaping equity shares, and therefore – on the corporate governance. These laws contain rules on the provision of information, and vice versa – on the prohibition of the confidential information usage and on the disclosure of confidential information due to the fraud; on the concentration of business entities; on the concerted actions; on the compulsory division of monopoly formations, which affects the legal status of the corporation and its members and the procedure of dealing with the termination of such monopolists; on control and on associated persons acting jointly and having an impact on certain aspects of the corporations activities, including decision-making by the corporate bodies, etc. Legislation on economic competition is intended not only to align the structure of market relations in general, but also to prevent the emergence of unjustified monopolistic formations and trends and to prevent the abuse of monopoly status. The mentioned legislation regulates the issues of the consolidation and merger by acquisition of joint stock companies, the

[39]On Protection of Economic Competition: Law of Ukraine as of 11.01.2001. № 2210-3 // *database "Legislation of Ukraine"* / *Verkhovna Rada of Ukraine, available at*: http://zakon2.rada.gov.ua/laws/show/2210-14

[40]On the Procedure for Filing Applications to the Antimonopoly Committee of Ukraine on the Prior Approval of the Permit for the Concentration of Business Entities (Concentration Regulation): Regulation Antimonopoly Committee of Ukraine as of 19.02.2002. № 33-p. // *database "Legislation of Ukraine"* / *Verkhovna Rada of Ukraine, available at*: http://zakon4.rada.gov.ua/laws/show/z0284-02

concentration of shareholdings, etc., which provides protection to the rights of shareholders[41].

The legislation on bankruptcy includes the Law of Ukraine "On Restoring a Debtor Solvency or Declaring a Debtor Bankrupt"[42] of May 14, 1992, which establishes the conditions and procedure for restoring the debtor's solvency or declaring it a bankrupt and initiating the liquidation procedure in order to satisfy all the creditor's claims fully or partially. This law influences, to a greater or lesser extent, the corporate governance, in particular, when resolving issues related to the reorganization of a joint stock company in respect of which a bankruptcy proceedings have been instituted, issues related to the introduction of management mechanisms, both for and on behalf of the joint stock company and external management – by the insolvency practitioner, issues related to the management of the company in rehabilitation, etc.

The revenue legislation mainly comprises the norms of the Revenue Code of Ukraine[43] dated December 2, 2010.

Speaking about offshore companies in Ukraine, there is a list of offshore zones, approved by the Order of Cabinet of Ministers of Ukraine "On the List of Offshore Zones"[44] of February 24, 2003, which contains 36 offshore jurisdictions. The Decree of the Cabinet of Ministers of Ukraine of July 18, 2005[45] approves measures to prevent the minimization of tax

---

[41] Company Law of Ukraine: Textbook / VV Lutz, VA Vasilieva, OR Kibenko, IV Tapa-Fateyev [and others]; according to the general edition of VV Luts. K .: Yurinkom Inter, 2010. 384 p. Pp. 45-46.

[42] On Restoring a Debtor Solvency or Declaring a Debtor Bankrupt: Law of Ukraine as of 14.05.1992. №2343-12. // *database "Legislation of Ukraine" / Verkhovna Rada of Ukraine, available at*: http://zakon.rada.gov.ua/laws/show/2343-12

[43] Revenue Code of Ukraine: Law of Ukraine as of 02.12.2010. № 2755-VI. // *database "Legislation of Ukraine" / Verkhovna Rada of Ukraine, available at*: http://zakon.rada.gov.ua/laws/show/2755-17

[44] On the List of Offshore Zones: The Decree of the Cabinet of Ministers of Ukraine as of February 23, 2011. № 143-p. // *database "Legislation of Ukraine" / Verkhovna Rada of Ukraine, available at*: http://zakon.rada.gov.ua/laws/show/143-2011-%D1%80

[45] On the Measures to Prevent the Minimization of Tax Liabilities, the Flight of Capital, and Money Laundering Through the Offshore Zones: The Order of the Cabinet of Ministers of Ukraine as of July18, 2005. № 271-p. // *database*

liabilities, the flight of capital, and money laundering through the offshore zones.

In addition to laws and subordinate legislation, company law sources also include internal, local acts containing corporate rules. The parties to corporate relations are given an opportunity to regulate relations between themselves, both through the conclusion of contracts, and through the creation of local regulations, for example, the charter. In such a case, the feature of local regulation is that it can be carried out on the basis of such national legal regulations as model acts, recommendations, etc., which have been adopted by the state centrally. Such acts shall be used when developing the charter of state-owned enterprises or joint stock companies, all the shares or a significant holding of which belongs to the state, that is, joint stock companies created due to the corporatization and privatization. An example is the Model Charter of a Limited Liability Company[46].

A feature of the model charter is that it being advisory in nature is not directly applicable and is not capable of creating legal rights and legal duties itself.

A peculiar source of the company law is the Principles of Corporate Governance47, approved by the State Securities and Stock Market Commission of December 1, 2003, No. 571. The Principles of Corporate Governance state that they are a kind of manual that answers the question of how Ukrainian corporations are to overcome the "crisis of confidence" of domestic and foreign investors and how to raise funds on domestic and international stock markets, as well as how to implement proper control of its effective use. These Principles relate to the procedure for the execution of vested powers by the joint stock companies' governing bodies, to the

---

"Legislation of Ukraine" / *Verkhovna Rada of Ukraine, available at*: http://zakon.rada.gov.ua/laws/show/271-2005-%D1%80

[46] On the Adoption of Model Charter of a Limited Liability Company: Decree of Cabinet of Ministers of Ukraine as of November 16, 2011. №1182. // *database "Legislation of Ukraine"* / *Verkhovna Rada of Ukraine, available at*: http://zakon4.rada.gov.ua/laws/show/1182-2011-%D0%BF

[47] On the Adoption of the Principles of Corporate Governance: Decision of the State Commission for Securities and Stock Market as of December 11, 2003. №571 // *database "Legislation of Ukraine"* / *Verkhovna Rada of Ukraine, available at*: http://www.bank.gov.ua/doccatalog/document?id=36988

control systems for companies' financial and economic activities, to the disclosure of an information, to the respect for shareholder rights, to the enforcement of their rights by the relevant mechanisms of the joint stock companies' governing bodies, etc.

Legal judgements are not able to be relied on when evaluating the reasonableness of the protective measure, in particular, when companies are taken over, or evaluating the good faith while contracting if the conflict of interest occurs. Therefore, a precedent is not a source of law in Ukraine. However, the advisory acts of the Supreme Court of Ukraine deserve attention, for example, the Resolution of the Plenum of the Supreme Court of Ukraine No. 13 dated October 24, 2004 "On the Court Practice on Consideration of Corporate Disputes", which provides explanations to the courts with the objective of ensuring the correct and uniform application of legislation regulating corporate relations, the formation of a unified court practice in this area, the adequate remedy for the rights and legitimate interests of individuals, legal entities and state related to the creation, activity, governance and cessation of the companies[48].

In addition to the internal regulatory legal acts and local corporate acts, properly ratified agreements with the participation of Ukraine are the sources of company law as well. The Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their member states, on the other hand, from 27.06.2014, is currently in force[49].

[48] On the Court Practice on Consideration of Corporate Disputes: the Resolution of the Plenum of the Supreme Court of Ukraine as of 24.10.2008. № 13 // *database "Legislation of Ukraine"* / *Verkhovna Rada of Ukraine, available at*: http://zakon.rada.gov.ua/laws/show/v0013700-08

[49] The Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their member states, on the other hand: Internationally Legally Binding Instrument as of June 27, 2014 // *database "Legislation of Ukraine"* / *Verkhovna Rada of Ukraine, available at*: http://zakon.rada.gov.ua/laws/show/984_011/page?text=%F2%EE%E2%E0%F0%E8%F1%F2%E2%EE

1.4. The Place of Company Law in the Law System of Ukraine

Corporate relationships are quite diverse in its legal nature, as they include a wide range of both private-law and public-law relations.

The subject of the company law regulation is the relations between the parties, the corporate bodies and the business entity itself regarding the establishment and operation of the company.

The method of company law regulation is the one based on the legal equality, autonomy of the will and property autonomy of the participants in the stream of commerce (dispositive method). However, to a number of corporate legal relations, the dispositive method shall not be applied (for example, to the relations between founders of a legal entity and competent government bodies regarding the state registration of a legal entity). The legal regulation of these relationships is carried out with the help of an imperative method based on the principle of power and subordination.

Outlining the current place of company law in the law system, it should be noted that Ukraine still has a tendency towards the separation of company law from the civil law as a separate branch of law. However, the deficiency of a distinctive separate subject and method of company law allows us to assert that company law can not be recognized as a separate branch or sub-branch of law. In Ukraine there is a discussion as to which branch of law the institution of company law belongs to – civil law or commercial law. The analysis of the relations, that make up the subject of a company law, allows us to assert that the company law should be considered as the legal integrated institution of the civil law, since the nature of the relations regulated by this law is civil.

In addition to the fact that company law refers to civil law as its institution, it is still linked to the following branches, sub-branches and institutions of law:

• Contractual Law. Relations for establishment of a legal entity arise from the founding agreement; moreover, the contract serves as a universal mean of formalization of the goods turnover and relations between a legal entity and third parties, between the members of a legal entity and others;

• Commercial Law. It contains a body of legal rules regulating the legal status, the procedure for the estbishment, reorganization, winding-up of entrepreneurial activity, as well as the procedure and rules for

transactions with shares in the charter capital of legal entities of different legal entity forms;

• Administrative Law. It regulates the public-law aspects of the functioning of legal entities, such as the procedure for state registration, market concentration and competition, registration of securities issue and securities market activity, liability of officials, etc.;

• Financial Law. It regulates the peculiarities of formation of the charter capital of a legal entity, accounting of its property and business accounting, taxation of shares transfer, etc.;

• Labor Law. It regulates the work of the company members, employment relationship between the company and chief executive officers appointed by the company, etc.;

• Law of Civil Procedure and Law of Commercial Procedure, the rules of which are applied under the procedure of jurisdictional protection of the legitimate rights and interests of legal entities and its members;

• Criminal Law. It establishes liability for crimes related to the legal entity activities, for example, for sham business; bankruptcy fraud; contentious insolvency; manipulations in the event of bankruptcy; violation of the procedure for securities issuing and trading; production, sale and usage of counterfeit non-state securities; illegal use of the trademark, trade name, indication of origin of goods.

1.5. General Principles of Investing and Launching Business

The general principles of investing in Ukraine are based on the guarantees for defence and protection of the rights of the entities involved in investment activities, as stipulated by applicable legislation. Investors, including foreign ones, are provided with an equal treatment that excludes the application of discriminatory measures to prevent investment management, investment utilization or investment liquidation. State guarantees for investment protection can not be canceled or narrowed regarding investments effectuated during the length of these guarantees.

Analysis of the Law of Ukraine "On Investment Activities"[50] of 1991, the Law of Ukraine "On the Regime of Foreign Investment"[51] of

[50] On Investment Activity: Law of Ukraine as of September 18, 1991№ 1560-XII, 47 *Bulletin of the Verkhovna Rada of Ukraine 646 (1991), available at*: http://zakon2.rada.gov.ua/laws/show/1560-12/page2 (application date dated 28.03.2018).

1996 allows us to single out groups of *guarantees for the investors' rights*. These groups include:

- *guarantees for the stability of the legislation.* These include: a) impossibility of cancellation and narrowing of guarantees during the period of investment. The special rule is enshrined in the Law of Ukraine "On the Regime of Foreign Investment" in relation to non-resident investors: if in future the specific legislation of Ukraine on foreign investment change the guarantees for protection of foreign investments, then within 10 years from the day on which such a law enters into force, state guarantees, defined in this act, are to be applied on the demand of a foreign investor.[52] However, these guarantees are not to be applied to the legislative changes related to defense, national security, public order, and environmental protection (Article 8 of the Law); b) the stability of the conditions of the concluded between the performers of investment activity contracts for the entire duration of such contracts. The terms of the contracts concluded between the performers of investment activity remain valid for the whole period of validity of such contracts and in cases when after its' conclusion the legislation (except tax, customs and monetary legislation, as well as legislation on licensing of certain types of business activities) establishes conditions that worsen the position of the parties or restrict their rights, if they have not agreed on changing the terms of the contract;
- *guarantees for the impossibility of forcible withdrawal of investments*. Investments can not be nationalized, confiscated and measures that are equal by consequences can not be taken towards them. Such measures may be applied only on the basis of the legislative acts of Ukraine with the full compensation for damages to the investor caused by the termination of investment activity. The procedure for compensation of losses to investor is determined in the said acts. Lodged or purchased earmarked cash, shares and other securities, payments for acquest or for leasehold interests by investors in case of withdrawal in accordance with

[51] On the Regime of Foreign Investment: Law of Ukraine as of March 19, 1996. *Bulletin of the Verkhovna Rada of Ukraine* 1996. № 19. Art. 80, *available at*: http://zakon4.rada.gov.ua/laws/show/93/96-%D0%B2%D1%80. (application date dated 28.03.2018).

[52] Ibid.

the laws of Ukraine are to be paid for to investors, except for amounts that were used or lost as a result of actions of investors themselves or actions committed by their participation. The public authorities shall not be entitled to confiscate foreign investments except in cases of taking emergency measures in the event of natural hazards, accidents, epidemics, epizootic diseases;

- *guarantees for the investor's right to free choice of investment target.* No one shall be entitled to restrict the rights of investors to the choice of investment targets, unless otherwise provided by Law;
- *guarantees against illegal actions of government bodies and public officials.* Government bodies and public officials shall not be entitled to interfere with inverstors activities, unless such interference is legally able and is carried out within the competence of these bodies and officials. If government or other bodies adopt acts violating the rights of investors or other participants of investment activity, the full compensation for losses to the investors and other participants of investment activity shall follow.

Foreign investors have the right to compensation for losses, including lost profits and non-pecuniary damage caused to them as a result of actions or the lack of action on the part of government bodies of Ukraine or its officials or as a result of misconduction of statutorily required duties by the mentioned authorities towards a foreign investor or foreign-invested enterprise. All expenses and losses incurred by the foreign investors caused by illegal actions must be reimbursed on the basis of current market value and / or sound estimate verified by the independent accountant or auditor. Reimbursement paid to a foreign investor must be fast, reasonable and effective. Reimbursement paid to a foreign investor shall be determined at the time of actual decision for compensation of losses. Quantum of damages shall be paid in the currency in which the investments were made or in any other currency to the satisfaction of the foreign investor in accordance with the legislation of Ukraine. Immediately upon the emergence of the right to compensation and until its payment the interest charges on the compensatory amount are to be calculated in accordance with the average interest rate at which London banks provide loans to prime banks on the Eurocurrency market;

- *guarantees in case of termination of investment activity.* In case of termination of investment activity, a foreign investor shall have the right to return, within six months from the date of termination, his/her investments

in specie or kind in the amount of the actual contribution (including potential decrease of the charter capital) without payment of the duty, as well as without paying an income from these investments in specie or kind at the fair market value as of the time of termination of investment activity, unless otherwise provided by law or international treaties of Ukraine.

According to the general principles of investing in Ukraine, *two main forms of starting investment activities* are distinguished:

- Investment related to the creation or membership in already created legal entity of any legal entity form. It is called *corporate investing*.

The procedure for *investing through the creation of a legal entity* is determined by the Law of Ukraine "On State Registration of Legal Entities, Individual Entrepreneurs and Public Formations", whereunder state registration of a legal entity shall be carried out within 24 hours after the receipt of documents submitted for state registration and conducting other registration actions, except weekends and holidays (Part 1, Article 26).[53]

Documents for the state registration can be delivered in paper or electronic form. In a paper format, documents shall be delivered personally by the applicant or sent by post. If the documents are delivered in person, the applicant submits Ukrainian citizen passport or an interim certificate of a citizen of Ukraine, or an alien's passport, or a stateless person certificate, or full-time residence permit or part-time residence permit. Documents shall be submitted electronically by the applicant through the portal for electronic services as determined by the Ministry of Justice of Ukraine in the Procedure for State Registration of Legal Entities, Individual Entrepreneurs and Unincorporated Public Formations. State registration authority, if no grounds for suspension of the scrutinizing of documents and state registration refusal, conducts registration by making a record in the Unified State Register. After conducting registration actions, the state registration authority forms and publishes the relevant extracts, the results

[53] On State Registration of Legal Entities, Individual Entrepreneurs and Public Formations: Law of Ukraine as of 15.05.2003. *Bulletin of the Verkhovna Rada of Ukraine* 2003. № 31 – 32. Art. 263, *available at*: http://zakon4.rada.gov.ua/laws/show/755-15. (application date dated 28.03.2018).

of the provision of administrative services for state registration and the constating documents of a legal entity on the portal for electronic services.

For an unimpaired operation, a legal entity must set up a bank account in accordance with the Instructions of the National Bank of Ukraine[54]. In certain cases, it is necessary to obtain a license for conducting certain types of business, the list of which is established by the Law of Ukraine "On Licensing Types of Business"[55]. Decision lead time for licensure is ten working days as of the day of receipt of the application for obtaining a license by the licensing authority. The licensing authority on following business day after the day a decision on licensure is taken conveys information on such a decision in electronic format to the Unified State Register of Legal Entities and Individual Entrepreneurs.

Current legislation establishes an extensive system of legal entity forms that can be used for investing. The Civil Code of Ukraine establishes the following types of entrepreneurial legal entities, which can be used for the implementation of investment activities: business companies and production cooperatives.[56] Joint-stock companies and limited liability companies are the most effective legal entity forms for conducting business activity. Its' adoption for the investment activity is conditioned by the belonging to the corporations. Other legal entity forms of for-profit organizations, in particular general and limited partnerships, production cooperatives, are not characterized by a high level of investment attractiveness, as they provide either the secondary liability of

[54]On Approval of the Instruction On the Procedure of Opening, Operating and Closing of Accounts in Native and Foreign Currency: Resolution of the Management Board of the National Bank of Ukraine as of 12.11.2003. N 492. *available at*: http://zakon4.rada.gov.ua/laws/show/z1172-03. (application date dated 28.03.2018).

[55] On Licensing Types of Business: Law of Ukraine as of 02.03.2015 № 222-VIII. *Bulletin of the Verkhovna Rada of Ukraine* 2015. №23. Art. 158. *available at*: http://zakon3.rada.gov.ua/laws/show/222-19. (application date dated 28.03.2018).

[56] Civil Code of Ukraine: Law of Ukraine as of January 16, 2003. № 435-IV. *Bulletin of the Verkhovna Rada of Ukraine* 2003. № 40 – 44. Art.356, *available at*: http://zakon4.rada.gov.ua/laws/show/435-15. (application date dated 28.03.2018).

the company members for the company's obligations or personal labour participation in the company's operations.

However, the Civil Code of Ukraine specifies that entrepreneurial legal entities may be created in other forms established by the specific legislation. Such a specific legislation includes the Commercial Code of Ukraine, which offers private enterprise (unitary and corporate) as the form of entrepreneurial legal entity[57] and other specific legislative acts that offer additional forms of entrepreneurial activity, such as the Law of Ukraine "On Farm Enterprises" [58], etc. From among the listed forms of legal entities, the investor is entitled to choose the one that most fully corresponds to his/her individual interests. Analysis of all legal entity forms established by the law suggests that joint stock companies, limited liability companies, and private enterprises are the most attractive ones for investing. However, it should be noted that the legislation restricts the ability of foreign individuals and companies to be founders of certain types of legal entities. For example, in accordance with Article 2 of the Law of Ukraine "On Insurance" non-resident insurers must not engage in insurance activities on the territory of Ukraine, except for certain types of insurance activities established by law[59].

Investing through membership in an already created legal entity is carried out by entering into the contract on share purchase, contract on purchase of a participatory interest in the charter capital, contract on purchase of a unit. The particularities of acquiring the right to participate

[57] Commercial Code of Ukraine: Law of Ukraine as of January 16, 2003. № 436-IV. *Bulletin of the Verkhovna Rada of Ukraine* 2003. № 18, № 19-20, № 21-22. Art.144, *available at*: http://zakon2.rada.gov.ua/laws/show/436-15/page. (application date dated 28.03.2018).

[58] On Farm Enterprises: Law of Ukraine as of 19.06.2003 № 973-IV. *Bulletin of the Verkhovna Rada of Ukraine* 2003. № 45. Ст. 363, *available at*: http://zakon4.rada.gov.ua/laws/show/973-15. (application date dated 28.03. 2018).

[59] On Insurance : Law of Ukraine as of March 7, 1996. № 85/96-BP. *Bulletin of the Verkhovna Rada of Ukraine* 1996. № 18. Ст.7, *available at*: http://zakon4.rada.gov.ua/laws/show/85/96-%D0%B2%D1%80. (application date dated 28.03.2018).

in a legal entity and the right to exercise acquired property and non-property rights are determined by the legal entity form.

- Investment is related to the conclusion of a contract or the so-called *contractual form of investment.* The main legal document regulating relationship between the entities involved in investment activities is an investment contract (Part 1 of Article 9 of the Law of Ukraine "On Investment Activity"). Documents confirming the form of investments are concession contracts, production-sharing contracts, joint investment contracts and some others.

According to Part 7 of Art. 179 of the Commercial Code of Ukraine, commercial contracts shall be concluded in accordance with the rules established by the Civil Code of Ukraine, by reference to specific features provided by the Commercial Code of Ukraine and other regulatory legal acts regarding certain types of contracts[60]. Thus, according to the Civil Code of Ukraine, the contract shall be concluded if the parties have duly reached an agreement on all its essential terms. The essence of the contract shall include terms on the subject of the contract, terms that are established essential by the law or necessary for the contracts of a specific type as well as all those terms, which should be agreed upon at the request of at least one of the parties. The contract shall be concluded by way of one party's proposal to conclude a contract (an offer) and the other party's acceptance of this proposal (an acceptance). The contract is concluded from the moment of receipt by the person who sent the proposal to conclude a contract, answers about acceptance of this proposal.

For the majority of investment contracts competitive procedure of contracting shall be required: the contract is concluded with the performer, who offers the best way of performance of the contract. Such a procedure is typical, for example, for concession contracts, production-sharing contracts, etc.

Legislation establishes mandatory public registration for certain types of investment contracts, namely: concession contracts (registration is

[60] Commercial Code of Ukraine: Law of Ukraine as of January 16, 2003. № 436-IV. *Bulletin of the Verkhovna Rada of Ukraine*. 2003. № 18, № 19-20, № 21-22. Art. 144, *available at*: http://zakon2.rada.gov.ua/laws/show/436-15/page. (application date dated 28.03.2018).

performed by the State Property Fund[61]), joint investment contracts with the participation of a foreign investor (registration is performed by the Ministry of Economic Development and Trade[62]).

1.6. Special Principles of Investing and Launching Business by Foreign Persons

The legal status of foreign investors in Ukraine determines the legal regime of their investment activity. Article 7 of the Law "On the Regime of Foreign Investments" establishes *the equality between aliens and nationals* while conducting investment activity, except as otherwise provided by the legislation of Ukraine or international treaties. Such a regime presumes foreign investors having the same scope of rights and obligations as domestic businesses. As to the exceptions provided by the legislation of Ukraine, the law may restrict or prohibit activity of foreign investors in certain territories in order to ensure national security. For example, according to Art. 394 of the Commercial Code of Ukraine, the law may restrict or prohibit the activity of foreign investors and foreign-invested enterprises in particular branches of economy or within certain territories of Ukraine, from the perspective of national security.[63]

Legislation may also establish other *restrictions for foreign individuals and legal entities*. For example, according to Art. 22 of the

[61]On Approval of the Regulations on Conducting a Concession Tender and Conclusion of Concession Contracts on Objects of State and Communal Property, Granted by Concession: Decree of the Cabinet of Ministers of Ukraine as of March 12, 2000. N 642, *available at*: http://zakon2.rada.gov.ua/laws/show/642-2000-%D0%BF. (application date dated 28.03.2018).

[62]On Approval of the Regulations on the Procedure for State Registration of Joint Investment Contracts (Ageements) With the Participation of a Foreign Investor: Decree of the Cabinet of Ministers of Ukraine as of January 30, 1997. N 112, *available at*: http://zakon2.rada.gov.ua/laws/show/112-97-%D0%BF. (application date dated 28.03.2018).

[63] Commercial Code of Ukraine: Law of Ukraine as of January 16, 2003. № 436-IV. *Bulletin of the Verkhovna Rada of Ukraine.* 2003. № 18, № 19-20, № 21-22. Art.144, *available at*: http://zakon2.rada.gov.ua/laws/show/436-15/page. (application date dated 28.03.2018 p.).

Land Code of Ukraine, foreign individuals and foreign legal entities shall not invest by purchasing agricultural lands.[64] If, however, such land plots are inherited by the aforementioned persons, they shall be subject to alienation within a year. Article 12 of the Law of Ukraine "On Television and Radio Broadcasting" prohibits investment through the establishment of broadcasting organizations that is carried out by foreign individuals, foreign legal entities or stateless persons registered in one of the offshore zones designated by the Cabinet of Ministers[65]. According to Article 2 of the Law of Ukraine "On Insurance", non-resident insurers shall not engage in insurance activities on the territory of Ukraine, save in respect of reinsurance, insurance broking, ancillary services in insurance, insurance against risks related to sea carriage, commercial aviation, space shots and freight (including satellite vehicles), etc[66]. All the restrictions established by the legislation of Ukraine for foreign individuals and legal entities are aimed at protecting state interests.

In addition, according to Article 29 of the Law "On Foreign Economic Activity", some negative means may be applied to the foreign investors in certain cases, in particular, when there is an information that some other states, customs unions or economic groups restrict the exercise of legitimate rights and interests of the entities engaged in foreign economic activities of Ukraine, bodies of state regulation of foreign economic activity, in accordance with their competence, may respond adequately to such actions[67]. If such actions cause damage or endanger

[64] Land Code of Ukraine: Law of Ukraine as of October 25, 2001. № 2768-III. *Bulletin of the Verkhovna Rada of Ukraine*. 2002. № 3 – 4. Art. 27, *available at*: http://zakon4.rada.gov.ua/laws/show/2768-14. (application date dated 28.03.2018 p.).

[65] On Television and Radio Broadcasting: Law of Ukraine as of December 21, 1993. № 3759-XII. *Bulletin of the Verkhovna Rada of Ukraine*. 1994. № 10. Art.43, *available at*: http://zakon3.rada.gov.ua/laws/show/3759-12. (application date dated 28.03.2018 p.).

[66] On Insurance: Law of Ukraine as of March 7, 1996. № 85/96-BP. *Bulletin of the Verkhovna Rada of Ukraine.* 1996. № 18. Art.78, *available at*: http://zakon4.rada.gov.ua/laws/show/85/96-%D0%B2%D1%80. (application date dated 28.03.2018 p.).

[67] On Foreign Economic Activity: Law of Ukraine as of April 16, 1991. № 959-XII. *Bulletin of the Verkhovna Rada of Ukraine.* 1991. № 29. Art. 377,

causing damage to the state and / or to the entities engaged in foreign economic activities, the said measures may include compensation for damage.

Within the most important for the satisfaction of social needs directions (social aspects, technical and technological rationalization of production, new job formation for citizens in need of social protection, introduction of inventions and innovations into the agro-industrial complex, carrying-out a programme on recovery from the Chernobyl accident, production of construction materials, education, culture, cultural heritage protection, environmental protection and public health) state may create some preferential treatment for foreign investors in accordance with Art. 11 of the Law "On Investment Activity". The preferential conditions may include: tax treatment of business entities implementing investment projects in priority sectors of the economy (defined by the Revenue Code of Ukraine); peculiarities of taxation of import duties of such business entities (determined by the Customs Code of Ukraine).[68]

While effectuation of certain types of investments, the legislation of Ukraine provides some other procedures for the application of certain preferential conditions to foreign investors, such as: *exemption from import / export duty*, expected when the property as a contribution to the charter capital of an foreign-invested enterprise is imported by a foreign investor into Ukraine for a period of not less than three years; contribution under the joint investment contracts with the participation of a foreign investor, concluded for a period of not less than three years (paragraph 87 of Part 2 of Article 287 of the Customs Code of Ukraine)[69]. Such a relief from duty shall be carried out by issuing of a bill to a foreign investor, if

available at: http://zakon2.rada.gov.ua/laws/show/959-12. (application date dated 28.03.2018 p.).

[68] On Stimulation of Investment Activity in Priority Sectors of the Economy for the Purpose of New Jobs Formation: Law of Ukraine as of 06.09.2012. № 5205-VI. *Bulletin of the Verkhovna Rada of Ukraine.* 2013. № 32. – Art.410.

[69] Customs Code of Ukraine: Law of Ukraine as of 13.03.2012 № 4495-VI. *Bulletin of the Verkhovna Rada of Ukraine.* 2012. № 44-45, № 46-47, № 48. Art.552, *available at*: http://zakon3.rada.gov.ua/laws/show/4495-17. (application date dated 28.03.2018).

all of the above-mentioned conditions are met. The bill shall be issued by a drawer in a foreign currency, recognized as a convertible one by the National Bank, to the amount of import duty on a deferred-payment basis for no more than 30 calendar days from the date of registration of the import cargo customs declaration. The import cargo customs declaration states that the property is imported for the purpose of contributing to the charter capital of a foreign-invested enterprise or for carrying out a joint investment activity on the basis of an agreement (contract) with a foreign investor.

In order to repay the bill, the bill holder shall apply in writing to the State Tax Administration (Inspection) with a request to make a corresponding mark on his/her copy of the bill. Repayment of the bill is carried out by the bill holder by placing on the front of the bill the inscription "Discharged" and the dates, which are affixed by the signature of the chief (deputy chief) and the seal of the customs authority. If the bill is not repaid within 30 calendar days from the date of the registration of the import customs declaration, the drawer shall be obliged to enter satisfaction for the bill within five calendar days.[70]

If a foreign investor violates the conditions for exemption from import duties, the law obliges investor to pay import duties. In particular, if within three years from the date of debiting foreign investment to the balance of a foreign-invested enterprise, property imported into Ukraine as a contribution of a foreign investor to the charter capital of the enterprise or to a separate balance sheet of the parties, conducting joint investment activity under agreements (contracts), is alienated, which includes termination of the drawer's operations, the latter pays the import duty no later than the day of the alienation.

For launching business by foreign investors, the current legislation, in particular, the Commercial Code of Ukraine offers *special types of legal entities*, such as: *foreign-invested enterprise* (Article 116), *foreign*

[70] The procedure for Issuing and Repayment of Bills Issued Upon the Importation of Property in Ukraine as a Contribution of a Foreign Investor to the Registered Capital of a Foreign-Invested Enterprise, as well as under the Joint Investment Contracts as well as Payment of Import Duties in Case of Alienation of Such Property: Decree of the Cabinet of Ministers of Ukraine as of 07.08.1996. № 937, available at: http://zakon4.rada.gov.ua/laws/show/937-96-%D0%BF. (application date dated 28.03.2018).

enterprise (Article 117)[71]. This is an additional classification of enterprises. The affiliation of a legal entity with such enterprises does not affect the choice of legal entity form; as such enterprises can be created in any of the forms.

Foreign-invested enterprise is an enterprise charter capital of which contains foreign investment for not less than ten percent. The following legal features are characteristics of a foreign-invested enterprise: 1) enterprise of a corporate type with the participation of domestic business entities (residents) and foreign investors, which may include: foreign citizens, stateless persons who do not have a permanent residence in Ukraine, legal entities established in accordance with the laws of another state, international organizations, other states; 2) foreign investment of not less than ten percent in the charter capital of the enterprise. The types and forms of such investments may include following: foreign currency recognized as convertible one by the National Bank of Ukraine; any real and personal property and proprietary rights related to it; other values (property) that may be recognized as foreign investments in accordance with the law; 3) the creation of such an enterprise takes place through the initial establishment (at least one of the founders must be a foreign investor), as well as debiting foreign investment to the already established enterprise. In this case, it should be pointed out that the acquisition of a legal position of a foreign-invested enterprise occurs at the moment the foreign investment is transferred to its balance sheet; 4) the constating documents of such enterprises are subject to special requirements, as it shall contain information on the state affiliation of the founders, information on the size of foreign investment both in foreign currency and in national currency, estimated by mutual consent of the founders based on the prices of international markets or Ukrainian market at the rate of the National Bank of Ukraine.

A *foreign enterprise* is a unitary or corporative enterprise created under the legislation of Ukraine, which operates solely on the basis of the ownership of foreigners or foreign legal entities, or an operating enterprise

[71] Commercial Code of Ukraine: Law of Ukraine as of January 16, 2003. № 436-IV. *Bulletin of the Verkhovna Rada of Ukraine*. 2003. № 18, № 19-20, № 21-22. Art.144, *available at*: http://zakon2.rada.gov.ua/laws/show/436-15/page. (application date dated 28.03.2018).

which was bought into acquisition by the said persons. A foreign enterprise, unlike a foreign-invested enterprise, may also be unitary. A unitary enterprise is created by sole founder who allocates the necessary property for carrying out business, forms the charter capital not divided into shares (units) in accordance with the law, adopts the charter, distributes revenues directly or through the manager appointed by him/her, runs the enterprise and forms its labor collective on the basis of employment, solves the issue of reorganization and liquidation of the enterprise.

Yet another of the separate forms of launching a business by the foreign investors is *the representative offices of foreign business entities in Ukraine*[72]. State registration of such kind of representations is carried out by the Ministry of Economic Development and Trade. The certificate of registration of the representative office shall be issued after the submission of the documents specified in the Regulations, but not later than 60 working days from the date of state fee payment. The representative office is not a legal entity and does not independently carry out business activities, it always acts in the name and on behalf of a foreign business entity indicated on the registration certificate and performs its functions in accordance with the legislation of Ukraine. Representative functions may be exercised only in the interests of the foreign business entity indicated on the registration certificate. The head of the representative office acts on by virtue of the power of attorney of a foreign business entity, which must be notarized at the place of issue, duly legalized in the consular institutions representing interests of Ukraine, unless otherwise provided by international treaties of Ukraine and accompanied by a translation into Ukrainian language, certified by the translator's seal.

1.7. Entrepreneurial Activity Registration Scheme

General provisions. As a way to be fully able to function as a business entity legal entity must be registered by the following government bodies:

[72] Instruction on the Procedure for Registration of Representative Offices of Foreign Business Entities in Ukraine: the Order of the Ministry of Foreign Economic Relations and Trade of Ukraine as of 18. 01. 96. № 30, *available at*: http://zakon4.rada.gov.ua/laws/show/z003496?test=XX7MfyrCSgkyBTWIZi2IuSEMHI4ZQs80msh8Ie6. (application date dated 28.03.2018).

1) the department of state registration of legal entities and individual entrepreneurs;
2) the department of statistics;
3) the territorial body of the state fiscal service;
4) the department of the Pension Fund of Ukraine.

State registration of legal entities of private law (limited liability companies, joint stock companies, etc.) is carried out in accordance with the requirements for registration of any legal entity. This procedure is regulated by the Law of Ukraine "On State Registration of Legal Entities, Individual Entrepreneurs and Public Formations" (hereinafter – the Law) No. 755-IV of May 15, 2003.

State registration of legal entities is carried out by *the bodies of the Ministry of Justice* and other state registration authorities the peculiarities of activities of which are regulated by official acts of *the Department of State Registration of the Ministry of Justice of Ukraine*.

The aforementioned departments perform the listing of legal entities in the Unified State Register of Legal Entities.

The Unified State Register of Legal Entities, Individual Entrepreneurs and Public Formations (hereinafter – the Unified State Register) is an integrated national information system that provides collection, accumulation, processing, protection, registration and delivery of information on legal entities, individual entrepreneurs and public formations with no separate legal identity (Article 1 of the Law).

The procedure for state registration and other registration actions is based on the documents submitted by the applicant for the state registration and includes following:

1) filling in the application form for the state registration – in case of submitting the documents personally by the applicant (at the request of the applicant);

2) reception of documents by the description – in case of submitting the documents in a paper format;

3) making copies of documents in electronic format – in case of submitting the documents in paper form;

4) entering copies of document in electronic format to the Unified State Register;

5) verification of documents for the grounds for discontinuance of submittal;

6) verification of documents for the grounds for refusal to state registration;

7) making a decision on the registration action – for public formations, making a decision on the symbols and averment of the existence of the all-Ukrainian public association standing;

8) carrying out the registration action (which includes silence procedure) in the absence of grounds for discontinuance of submittal and refusal to state registration by making an entry in the Unified State Register;

9) formation and publication of the extract on the results of the delivery of administrative services of the state registration and constating documents of a legal entity on the portal of electronic services.

Extract from the Unified State Register is a document in electronic form, which is formed and updated due to the outcomes of the registration actions and contains information about legal entity or its separate subdivision, about individual entrepreneur (including the registration in the state statistics and state fiscal service, issuance of a license and documents of a permissive character) or about public formation with no separate legal identity (Article 1 of the Law).

One of the first steps in registration is to come up with the business name. To make sure the company name is unique and unprecedented; one shall search the website of the Unified State Register of Ukraine[73].

The name of the legal entity may not contain a link to the legal entity form. The name of the legal entity may not be identical to the name of another legal entity. The name of the legal entity shall be given in the official language and (optionally) additionally in English.

Legal entities may use in its' names the names (aliases) of individuals, jubilee and holiday dates, names and dates of historical events.

When writing the name of a legal entity, the following characters shall be used:

1. letters of the Ukrainian alphabet when writing the name in Ukrainian.
2. letters of the Latin alphabet when writing the name in English.
3. punctuation marks and symbols: quotes (""), dot (.), comma (,), colon (:), brackets / () /, apostrophe ('), hyphen (-), dash (/), exclamation mark

[73] (http://irc.gov.ua)

(!), question mark (?), number (№), plus (+), equation sign (=), asterisk (*), eet sighn (@).

4. numbers: Arabic (1, 2, 3, 4, 5, 6, 7, 8, 9, 0) and Roman (I, II, III, IV, V, VI, VII, VIII, IX, X, L , C, D, M).

Usage of other symbols and punctuation marks in the name of a legal entity shall not be allowed[74].

Place of incorporation of a legal entity. State registration of legal entities shall be carried out by the state registrar at the location of a legal entity (Article 5 of the Law of Ukraine "On State Registration of Legal Entities, Individual Entrepreneurs and Public Formations"). The concept of place of incorporation of a legal entity is enshrined in the Civil Code of Ukraine. The *legal entity's location* is: 1) the actual place of business; or 2) office location whereof the daily business administration (mainly corporate management) is conducted, as well as the management and accounting (Article 93 of the Civil Code of Ukraine).

Thus, place of incorporation of a legal entity may be either the address of the office where the company's administrative staff is located, or the address of the complete facility or other premises where production is carried out or services rendered.

Documents confirming the future location of a legal entity include following: 1) commercial lease agreement; 2) residential or non-residential property ownership certificate of one of the founders; 3) a note in a passport or a certificate for a permanent (temporary) place of residence (applies to foreign nationals) of the founder on his registration for living in this premises.

Participation of foreign citizens in the corporate governance. If the company's chief executive is to be a foreign citizen, he/she shall secure a work permit. Employment authorization of the company's chief executive shall be issued in accordance with the Decree of the Cabinet of Ministers of Ukraine "On Approval of Applications to Secure a Work Permit for the Employment of Foreigners and Stateless Persons, Extension of the Period of Validity of the Work Permit for the Employment of Foreigners and

[74] On Approval of the Requirement to Write the Name of a Legal Entity or its Separate Subdivision: Order of the Ministry of Justice of Ukraine №368/5 as of 05.03.2012, *available at*: http://zakon4.rada.gov.ua/laws/show/z0367-12

Stateless Persons, amending the Work Permit for the Employment of Foreigners and Stateless Persons" dated November 15, 2017, No. 858.

The timeframe and documents submitted for the state registration of a legal entity.

The state registration of a legal entity or individual entrepreneur shall be carried out within 24 hours from the date of submission of documents (Article 26 of the Law).

For the state registration of a legal entity, the founder (founders) or person empowered to act for him/her (them) (representative) must personally submit to the state registrar (send by post with the description of the attachment or, in the case of submission of electronic documents, submit a description containing the information about the submitted electronic documents in electronic format) the following documents:

1) a completed registration card for the state registration of a legal entity;

2) original copy (photocopy, notarized copy) of the shareholders' or the duly authorised body's resolution on the incorporations;

3) two copies of the constating documents – the charter or the founding agreement (if submitting electronic documents – single copy).

For the state registration of a legal entity, if the founder (founders) being a foreign legal entity, besides the documents listed above, an endorsement of the registration of a foreign legal entity shall be additionally submitted in the country of its location, in particular an extract from the commercial, bank or court registry. The above-mentioned Extract must be legalized, translated into the state language with a certificate of fidelity of language translation or the signature of an interpreter (Article 15 of the Law).

If there is a foreign national among the founders of a legal entity, then he/she must have a passport of a citizen of the state. Besides, foreign national must appeal to the fiscal authorities for obtaining Tax Identification Number.

If formation of a legal entity, on the basis of the model charter, a corresponding mark with reference to the model constating document (Article 17 of the Law) shall be placed on the registration card for the state registration of a legal entity.

If required by law, in addition to the said documents, a copy of the decision of the Antimonopoly Committee of Ukraine or the Cabinet of

Ministers of Ukraine on granting permission for concerted actions or economic concentration shall be additionally filed (sent). This legislative provision does not apply to small and medium businesses.

The state registrar shall be prohibited from requiring additional documents for the state registration of a legal entity, if such are not provided for by the Law of Ukraine "On State Registration of Legal Entities, Individual Entrepreneurs and Public Formations".

If the documents for the state registration of a legal entity are filed:

1) by the founder of a legal entity, then the state registrar shall additionally require his/her passport of a citizen of Ukraine or an alien's passport.

2) by a representative of the founder of a legal entity, then the state registrar shall additionally require:

- passport of a citizen of Ukraine or alien's passport and
- document certifying his/her authority (as a rule, power of attorney).

Documents submitted for the state registration of a legal entity are accepted as a description. Its copy is immediately issued in person (or sent by post) to the founder or his representative with a note on the date of receipt of the documents.

Registration duty. For the state registration of a legal entity or individual entrepreneur no fee shall be charged. But for making amendments to the constating documents, the registration fee shall be collected. Its size is determined by Article 36 of the Law of Ukraine "On State Registration of Legal Entities, Individual Entrepreneurs and Public Formations".

Administrative charge and fee for providing information from the Unified State Register are collected at the sum equal to the minimum national living wage per month established by law as for January 1 of the calendar year in which the relevant documents for the registration action or the request to provide information from the Unified State Register are submitted, and rounded to the nearest 10 hryvnia.

The document confirming the payment of administrative charge is: 1) a copy of the receipt issued by bank, or 2) a copy of the payment order with the mark of the bank.

If submitting electronic documents, the confirmation of the payment of administrative charge is a copy of the electronic settlement document certified by an electronic digital signature.

Refusal to state registration. The state registrar refuses to register a legal entity if: 1) the documents are filed by an unduly authorized person; 2) the Unified State Register contains information on the holding of a court on the prohibition of registration; 3) the Unified State Register contains information on the holding of a court on the sequestration of equity rights – in the case of state registration of changes in the data on a legal entity contained in the Unified State Register due to changes in the founder's (member's) share in the charter (joint) capital (unit trust) of a legal entity; 4) the grounds of discontinuance of the consideration of documents within a fixed timeframe are not eliminated; 5) the documents contradict the requirements of the Constitution and laws of Ukraine; 6) the documents contradict the statute of a public formation; 7) the procedure for creation of a legal entity and public formations with no separate legal identity, is violated; 8) the non-conformity of the name of the legal entity with the requirement of laws; 9) regarding the founder (member) of a legal entity being created, a state registration of a decision to terminate a legal entity as a result of its liquidation has been carried out; 10) regarding the legal entity in respect of which an application for state registration of changes in the data on the change of the founders (members) of a legal entity in the Unified State Register has been filed, the state registration of a decision to terminate a legal entity as a result of its liquidation has been carried out.

The refusal to state registration shall be carried out within 24 hours after the receipt of documents submitted for state registration, except for holidays (Article 26 of the Law).

The refusal to register a legal entity does not prevent the founder or his/her representative from reapplying to the state registrar in the general order after eliminating the grounds that led to the abandonment of these documents without consideration.

1.8. Protection of equity rights of members in the legal entities of corporate type

The protection of equity rights shall be defined theoretically and applied practically only through the understanding of the notions "method"

and “form”. The first one answers the question: “how shall the protection be implemented?” And the other – “through what a procedure?”

A member of a company can protect his/her/its equity rights in the form of the self-help without reference to the competent bodies or indirectly through the National Securities and Stock Market Commission, the State Property Fund of Ukraine, the Incorporation Complaints Commission, Judiciary, etc.

The equity rights protection methods are the system of actions of the member of the corporation or the corporation itself and / or the competent authorities established by law, local act or contract which aim at restraint of violation, as well as the restoration of the violated, imperfect or contested equity rights and / or the compensatory damages.

The typical features of equity rights protection methods are the scope of its application, namely:

- in accordance with the law (the Commercial Code of Ukraine, the Civil Code of Ukraine, the Law of Ukraine “On Business Companies”, the Law of Ukraine “On Joint Stock Companies”, the Law of Ukraine “On Limited Liability and Superadded Liability Companies”, the Law of Ukraine “On Cooperation”, the Law of Ukraine “On Consumer Cooperation”, etc.), local act (charter, founders’ agreement) or contract (shareholders’ agreement / corporate agreement, etc.);
- as a system of actions of the members of corporation or the corporation itself (its duly authorized officer) and / or competent authorities (courts, the National Securities and Stock Market Commission, the State Property Fund of Ukraine, the Anti-Breeding Commission, etc.);
- immediately upon the violation of law, the contestation over an equity right or other jural facts provided by the hypothesis of the security norm;
- for restoration of the violated or contested equity right of a member of a corporation and / or its pecuniary scope; as well as elimination of the real threat of such violation;
- its non-jurisdictional form by special purpose tools for resolving corporate disputes (requirements for the provision of information by the company, conducting audits, Sell-out / Squeeze-out mechanisms, etc.); in the jurisdictional form – submission of a complaint to the Anti-Breeding Commission, appeal to the National Securities and Stock Market

Commission, through the judiciary – mainly by assertion of a claim within Art. 16 of the Civil Code of Ukraine.

By virtue of its legal nature, the corporate regulatory scope is directed at private-law regulation of relations between its participants, beyond the public enforcement machinery. Therefore, most conflicts shall be resolved at the stage of a justifiable threat of violation of rights by applying methods of non-jurisdictional form of protection.

In particular, the implementation of the stipulated by the Part 5 of Art. 75 of the Law of Ukraine "On Joint Stock Companies" possibility of carrying out an audit of a joint-stock company at the request of a shareholder (shareholders) who owns more than 10 percent of the voting shares of the company will allow these persons to determine the company's real financial standing and avoid losses. At the same time, the shareholder's right to require an audit in this case does not depend on the desire of the company itself or its officers, or the expediency of such an audit, while the obligation of the company to provide the auditor with the possibility of conducting the audit arises from the direct indication of the law[75].

Avoiding the loss of control over the company and the possibility of effective management is also ensured by the provisions of paragraph 4 of Part 1 of Art. 25 of the Law of Ukraine "On Joint Stock Companies", paragraph 2 of Part 1 of Art. 5 of the Law of Ukraine "On Limited Liability and Superadded Liability Companies" with regard to the assertion of a claim by the shareholder / member for the delivery of information on the company's business. Given the current practice, the lack of a specific method of providing information cannot be sufficient reason to refuse to provide information on its activities in the manner requested by the latter, since such a refusal of a company is in essence an unjustified restriction on the right of a person to choose a form of receiving information[76].

[75]Supreme Court Decree as of February 14, 2018p, court case № 910/783/17, *available at:* http://www.reyestr.court.gov.ua/Review/72253399 (application date dated 19.01.2019)

[76]Supreme Court Decree as of June 26, 2018, court case № 904/3679/17, *available at:* http://www.reyestr.court.gov.ua/Review/75024622 (application date dated: 19.01.2019)

The most advanced innovations in the field of out-of-court protection of equity rights include the possibility of:

- conclusion of agreement between the shareholders of the company, the corporate agreement;
- conclusion of agreements on the alienation of equity rights under the mechanisms of Sell-out and Squeeze-out.

As a general rule, the subject of a corporate agreement between the parties or shareholders is the procedure for exercising the rights granted to the members (founders) or shareholders and / or refraining from exercising such rights in the manner prescribed by the corporate agreement. In practice, it is about the following arrangements:

- *voting agreement* – coordination of voting; in a corporate agreement, the shareholders / members can detail the use of their votes, including the name of the specific shareholder at the meeting, the time frame, the nature of the voting on specific issues, etc.;
- *deadlock resolution* is an algorithm for exit from the dead-end situations; one of the mechanisms used for adjustment of disputes is the "*Russian Roulette*"*;*
- *lock-up period* is the time limit for which the parties to the corporate agreement have no right to alienate shares / stocks to the advantage of third parties and / or the list of persons to the advantage of which the alienation of shares / stocks is prohibited;
- *right of first offer*, *right of first refusal*, *tag along* and *drag along* as the mechanisms for protecting the interests of members / shareholders when the alienation of shares / stocks to the advantage of third parties;
- *involuntary transfer event* is a forced transfer of shares / stocks; occurs in the event of a material breach of the terms of such an agreement or the cessation of existence of the party to the agreement as a result of the initiated liquidation or bankruptcy procedure, etc.

Since a significant number of disputes arises due to the imbalance of "forces" of minority and majority members of the corporation, the legislator has tried to solve this problem by introducing the European mechanisms for the settlement of corporate disputes in the Law "On

Amendments to Certain Legislative Acts of Ukraine on Increasing the Level of Corporate Governance in Joint Stock Companies"[77].

Thus, acquiring controlling (50%) and significant controlling block of shares (75%) of the company, the majority owner must propose to all other shareholders to sell their unencumbered common shares. In this case they shall have the right to take advantage of this offer or to refuse it.

In accordance with Part 4 of Art. 65 of the Law of Ukraine "On Joint Stock Companies", this offer shall be sent to the company in the form of a public irrevocable offer for all the shareholders of the company on the acquisition of their shares[78].

The period during which shareholders can notify a person who has acquired a controlling or a significant controlling block of shares of the company or the responsible person about acceptance of the offer for the shares acquisition shall be from 10 to 50 business days from the date of receipt of the offer.

Within 30 days from the date of expiry of the offer, the person who acquired the controlling or significant controlling block of shares of the company, or the responsible person must pay to the shareholders who accepted the offer, the value of their shares based on the purchase price specified in the offer, and the shareholder who accepted the offer must take all actions necessary for the acquisition by the person who has acquired the controlling or significant controlling block of shares of the company or by the responsible person of the title to his/her/its shares. Therein, settlements and acquisition of title after such actions shall be carried out within one working day in the manner prescribed by the legislation on the depository system of Ukraine.

However, with the acquisition of a dominant controlling block of shares (95% or more) the owner who appeals to the minority shareholders,

[77] On Amendments to Certain Legislative Acts of Ukraine on Increasing the Level of Corporate Governance in Joint Stock Companies: Law of Ukraine as of 23.03.2017 № 1983-VIII. Date of update: 06.01.2018, *available at:* https://zakon.rada.gov.ua/laws/show/1983-19 (application date dated: 01.03.2018)

[78] On Joint Stock Companies: Law of Ukraine as of 17.09.2008 № 514-VI. Date of update: 01.10.2018, *available at:* https://zakon.rada.gov.ua/laws/show/514-17 (application date dated: 01.12.2018)

gets the Squeeze-out tool that is an offer that becomes irrevocable. In other words, a "dominant" shareholder may force the minority shareholders to sell their shares becoming the sole shareholder, even though the encumbrance. The public irrevocable demand for the acquisition of common shares by the applicant has a higher priority over all the restrictions (Article 65^2 of the Law of Ukraine "On Joint Stock Companies").

If the owner of the dominant controlling block of shares does not exercise his/her/its right to Squeeze-out, the shareholders with a minimum participation (less than 5 percent) may independently initiate such a reacquisition. Within the *Sell-out* procedure, the minority claim shall be binding (Article 65^3 of the Law of Ukraine "On Joint Stock Companies").

Settlements with minority shareholders take place by depositing funds on the contingent storage account (escrow) by the owners of the dominant controlling block of shares. This refers solely to operations involving the enrollment by the bank of funds received from the account holder and / or from third parties, which, upon the grounds set forth in the contract on the contingent storage account (escrow), are intended to be transferred to the beneficiary, as well as operations for transferring such funds to the beneficiary or returning it to the account holder in accordance with the terms of the contract on contingent storage account (escrow)[79]. Now therefore, shares shall be credited to the securities account of the acquirer without additional actions on the part of the minority shareholders, and the latter shall turn to the bank for funds on their own. Any costs shall be borne by the majority owner.

As the Kyiv City Commercial Court has determined in relation to the Squeeze-out procedure, the provisions of the law take into account the interests of the minorities, provide for disclosure of information on the implementation process; use of an escrow account to guarantee the payment of share price; sufficient time to receive cash; the possibility for shareholders absent on the list to be paid after confirmation of their status by a court decision; the right to apply for judicial protection of the rights at any of the stages of the implementation of a squeeze-out; the right of

[79] Civil Code of Ukraine as of January 16, 2003. *Bulletin of the Verkhovna Rada of Ukraine*. 2003. № 40. Art. 356.

minority shareholders to require a dominant majority shareholder to repurchase their shares (sell-out) has been established.

Such regulation does not violate the principle of "equilibrium (balance)" between the interests of the state (society) involved in interference with the right to property and the interests of a person suffering from such an interference in one way or another, since, in the light of the practice of the ECtHR, this principle shall not be understood as the necessity of obligatory achievement of "social justice" in each particular case[80].

For majority owners, the Squeeze-out mechanism is an effective preventive way of avoiding corporate blackmail and simplifying corporate governance. Whereby, the very feature of the procedure reduces the possibilities for its regulation by minority shareholders and is confined to jurisdictional protection by establishing the most favorable selling price for owners of a block of shares less than 5 percent. In particular, in case of disagreement with the definition of the method of valuation of shares, shareholders shall be entitled to apply to the National Securities and Stock Market Commission for checking the facts of breach of legislation: to review the report on the valuation of shares – to the State Property Fund of Ukraine or specialized self-regulatory organizations and / or resort to judicial authorities to protect own interests, including by filing a legal action for recovery of the difference between the price of shares, which, according to the plaintiff's opinion, is reasonable, and the price determined by the majority shareholder – the defendant.[6]

In the case No. 908/137/18, the minority shareholders filed a claim for invalidation of transactions regarding the obligation of shareholders to sell shares in accordance with a public irrevocable demand of shares acquisition of all the shareholders. As stated in the Decision of July 18, 2018, according to Part 1 of Art. 5 of the Commercial Procedural Code of Ukraine in administering justice, commercial court shall protect the rights and interests of individuals and legal entities, state and public interests in the manner prescribed by law or agreement. Herewith, the method of protection chosen by the plaintiffs – invalidation of transactions regarding the obligation of shareholders to sell shares in accordance with a public

[80] The decision of the Commercial Court of Kyiv as of 18.07.2018. court case № 908/137/18, *available at:* http://www.reyestr.court.gov.ua/Review/75475579 (application date dated: 12.01.2019)

irrevocable demand of acquisition of shares of all the shareholders is not specified by law, including the Civil Code or the Law "On Joint Stock Companies", which do not provide for the possibility of challenging a public irrevocable demand as a transaction in accordance with the provisions of Art. 203 of the Civil Code of Ukraine; such a method is not established by the contract between the parties in the absence of the requirements of the law on its conclusion with each shareholder in the procedure of mandatory redemption of shares. In turn, Part 2 of Art. 5 of the Commercial Procedural Code of Ukraine stipulates that in the event that the law or agreement does not determine an effective way of protecting the violated right or interest of the person who appealed to the court, the court, in accordance with the requirements set out in the claim, may, in its decision, determine a method of protection that does not contradict the law which obliges the court to examine the merits of the dispute, and in case of confirmation of the fact of the violated right, to make a decision that will guarantee the restoration of such a claimant's right.

Speaking about jurisdictional protection, the competence of the Ministry of Justice of Ukraine includes, among other things, the administration of complaints of: registration acts committed by the state registrar in the Unified State Register of Legal Entities, Individual Entrepreneurs and Public Associations; decisions, actions or inactions of the Main Territorial Departments of Justice of the Ministry of Justice of Ukraine (on the consideration of complaints that fall within its competence). The unconditional advantages of applying to the Commission on State Registration Complaints (the Anti-Breeding Commission) are simplified requirements for a complaint (in comparison with a statement of action); the speed of consideration of the latter (no more than forty-five days), as well as the operational efficiency of the compliance with decisions on cancellation of registration acts, state registration, correction of a clerical errors (not later than the next day).

The competence of the Commission is determined by the Law of Ukraine "On State Registration of Legal Entities, Individual Entrepreneurs and Public Formations", the Order of the Ministry of Justice of Ukraine dated January 12, 2016 No. 37/5 "On the Activity of the Commission on State Registration Complaints and the Accreditation Commission of the

Entities of State Registration and Monitoring Compliance of such Entities with the Accreditation Requirements", as well as the Procedure for Reviewing State Registration Complaints, approved by the Cabinet of Ministers of Ukraine dated 25.12.2015, No. 1,218[81].

In particular, unlike the competence of the Judiciary, the Anti-Breeding Commission does not resolve the issue of law, and only those registration actions committed with a technical infringement of the law shall be subject to appeal.

It should be noted that period for appeal against registration actions is sixty days from the date of adoption of the decision being appealed against or from the moment when the person has found out or could have found out about the violation of his/her right, and the presence of judicial proceedings on the same grounds makes it impossible to satisfy the complaint.

Choosing a certain protection method, including a pre-court dispute resolution, is a right, and not a duty of a person who uses it voluntarily, guided by self-interest.

The possibility of judicial protection can not be made by law or other regulatory legal acts dependent upon the use of other means of legal defense, including pre-court dispute resolution. Thus, the right to directly appeal to the court by persons involved in economic relations, regardless of the possibility of pre-court dispute resolution, is guaranteed by the Constitution of Ukraine.

---

[81] On State Registration of Legal Entities, Individual Entrepreneurs and Public Formations: Law of Ukraine as of 015.05.2003 № 755-IV. Date of update: 01.01.2019, *available at:* https://zakon.rada.gov.ua/laws/show/755-15 (application date dated: 20.01.2019)

On the Activity of the Commission on State Registration Complaints and the Accreditation Commission of the Entities of State Registration and Monitoring Compliance of such Entities with the Accreditation Requirements: Order of the Ministry of Justice of Ukraine as of 12.01.2016 № 37/5 Date of update: 04.04.2017, *available at:* https://zakon.rada.gov.ua/laws/show/z0042-16 (application date dated: 20.01.2019)

Procedure for Reviewing State Registration Complaints: з approved by the Decree of he Cabinet of Ministers of Ukraine as of 25.12.2015. №1128. Date of update: 26.04.2018, *available at:* https://zakon.rada.gov.ua/laws/show/1128-2015-%D0%BF (application date dated: 20.01.2019)

The most widespread category among corporate disputes is the invalidation of the decisions of the general meeting of legal entities.

Resolution of the Plenum of the Higher Commercial Court of Ukraine dated May 22, 2016 No. 4 put an end to the long discussion on possible parties to file a court action. In particular, the court of cassation has established that the right to file a court action shall be granted to the members of the company, which are the shareholders (participants, members) on the date of adoption of the decision being appealed against. Herewith, the interests of the new member of the company shall be taken into account in the value of the acquired block of shares (stakes, units)[82].

Such right to appeal shall be exercised in case if the members did not participate in the general meeting of the company or voted against the adoption of the decision. Since the fact of participation in the general meeting of the company shall be confirmed by registration before such a meeting, on a practical level abusive practice, that manifest itself in obstructing and / or blocking access of already registered participants to the hall are of frequent occurrence. The problem of another kind is due to the fact that the law deprives of the opportunity of challenging the decisions of the general meeting by those who abstained from voting. In this regard, some authors suggest establishing that the right to file a court action shall be granted to those who did not vote "for" the decision.

In relation to the grounds for invalidation of acts of a legal entity bodies, Art. 50 of the Law of Ukraine "On Joint Stock Companies" provides for the possibility of appeal, if a decision of the general meeting or the procedure of approving such a decision does not comply with the requirements of this Law, other legislative acts, the charter or by-law on a joint stock company general meeting.

In view of such a general statement, the Plenum of the Higher Commercial Court of Ukraine in its Resolution dated 22.05.2016 No. 4 established the following grounds for invalidating the decisions of the company general meeting of the participants (shareholders, members):

[82] On Some Issues of the Practice of Resolving Disputes Arising from Corporate Relations: Resolution of the Plenum of the Higher Commercial Court of Ukraine as of 14.07.2016. № 4. Date of update: 26.04.2018, *available at:* https://zakon.rada.gov.ua/laws/show/v0004600-16 (application date dated: 14.03.2018)

- discrepancy of the decisions of the general meeting with the statutes of the law;

- violation of the requirements of the law and / or the constating documents during the convening and holding of the company general meeting;

- depriving the participant (shareholder, member) of the company of the opportunity to participate in the general meeting.

In general, these violations are mainly procedural in nature and do not always justify the invalidation of decisions taken at the general meeting. For example, the lack of evidence of a participant's notice of convening a general meeting shall not be a ground for invalidating the decisions of such a general meeting if the attendance of the participant (his/her/its representative) at the disputed general meeting is established[83].

In addition, even if the member (shareholder) was present at the general meeting of a legal entity, but was not able to prepare in due time for consideration of the agenda, such a decision should be declared null and void[84]. Besides, in the case No. 907/167/17, the Supreme Court determines that the plaintiff's claims for the invalidation of the decisions of the general meeting shall not be dismissed only on grounds of insufficiency of his/her/its votes in order to change the voting results of the decisions adopted by the general meeting of participants (shareholders, members), as the influence of a participant (shareholder, member) on the adoption of a general meeting decisions shall not be limited to voting[85].

Considering the existing judicial practice, the unconditional ground for invalidating the decisions of the general meeting is:

- adoption by the general meeting of a decision in the absence of a quorum for holding a general meeting or making a decision, or in case of impossibility to establish a quorum;

---

[83] Supreme Court Decree as of March 28, 2018, court case № 910/22291/16, *available at:* http://www.reyestr.court.gov.ua/Review/73081560 (application date dated: 19.01.2019)

[84] Supreme Court Decree as of April 12, 2018, court case № 14/1968/16, *available at:* http://www.reyestr.court.gov.ua/Review/73410612 (application date dated: 19.01.2019)

[85] Supreme Court Decree as of March 06, 2018., court case № 907/167/17, *available at:* http://www.reyestr.court.gov.ua/Review/72645204 (application date dated: 19.01.2019)

- adoption by the general meeting of decisions on the issues not included in the general meeting agenda (except in the case if it was attended by all members of the company);

- absence of the minutes of the general meeting of LLC;

- absence of the minutes of the general meeting of JSC, signed by the chairman and secretary of the meeting.

In general, members of the corporation have a wide range of protection methods within each individual form. The absence of a universal algorithm for corporate dispute bailout plan or resolving litigation is due to the specificity of the violated, imperfect or contested right and the nature of the violation. A member whose equity rights and interests are violated (there is a threat of such a violation) can seize the opportunity to choose among several protection methods. Appropriate protection method, based on the application of a special rule of law, is meant to ensure the effective use of this rule in its practical application, in particular: in the non-jurisdictional form – to avoid / stop the violation of rights; in the jurisdictional form – to restore the violated right or to receive an appropriate reimbursement.

Chapter II. General Provisions on Company Law

2.1. Corporations as the Parties to Corporate Relations

Characterization of the corporation as a legal entity is rather important due to the fact that the institute of a legal entity itself institutionally was based on the autonomy of this collective formation and the impossibility of narrowing it down to a simple totality of participants or assets invested by such participants. In economic terms, a legal entity emerged as a form of satisfaction of the public interest in the mechanism of capital concentration. However, the categorical instrument of the theory of law can not be unchanged. Therefore, the concept itself as well as the classification of legal entities are constantly subject to change.

Reviewing of the parties to corporate relations requires an analysis of domestic legislation with its diversity of legal entity forms. Classification of legal entities provides for its' logically relevant division, in terms of which all types of legal entities would be involved. Classification is a complex task. And nowadays, this problem resides in the existence of two applicable one-line codified acts in Ukraine which yet more obscured already complicated systematization situation.

Consider it expedient to define the qualifying criteria and attributes of legal entities of corporate type. The solution to this task allows for the qualification of legal relationships as being corporate and for determining the subject of company law regulation without running to extremes, such as: to substitute company law for the equity rights or to reduce it to only two or three types of business companies.

First of all, parties to corporate relations are legal entities and founders (members) of economic organizations, which can be both individuals and legal entities. Secondly, the parties to corporate relations are not any economic organizations, but only those that are formed on a contractual basis through the exercising of the constituent rights by the persons subject to the civil law. The creation of such an organization results in the emergence of the equity rights of the founders. Therefore, when specifying corporate relations, it is necessary to provide insight on the legal entity in respect of which the emergence of the equity rights of the members happens. And, it appears to make sense to consider such a legal entity a corporate entity or corporation. It should be noted that the

Commercial Code defines the corporation as a form of a contractual association of enterprises. However, there is no clear definition of corporations in the legal literature and in the legislation. International practices clearly show that corporations are understood as legal entities created as a result of the pooling of capital, which are called companies or partnerships.

Analysis of modern scientific studies points to the fact that different meaning is being put across the construction of such a category as a corporation. Generally, the concept “corporation” is understood as business companies and covers all types of legal entities.

Corporations shall be analyzed due to the following characteristics.

First, the corporation is not a simple sum of individuals. It is an association, a union of persons, that is, an appropriately organized collective, whose will is determined by the collective interests of individuals affiliated with it, and which acts outwardly as a unit on its own behalf both institutionally and pecuniarily. But not every association is a corporation. For example, simple partnership can not be considered as one.

Second, the corporation is an association of not only people, but also of capitals (in non-profit corporations – contributions). The scope of persons contributing the capitals for corporation's activity arrangement, as well as the size of these capitals (contribution, equity unit, shares) can be strictly determined at any time of the corporation's existence. Above-noted types of capital form its financial capability. Capital, transferred by the founders or members of the corporation, may exist in any commodity form. But as a value proposition in the form of a specific property, capital shall fully be owned by the corporation as a whole. The members of the corporation remain the owners of the invested capital as a cost, and not as property.

Third, the corporation is a union of people performing any socially useful activity. Exactly what kind of activity it is, the law does not specify. Typically, only those types of activity that are recognized as harmful, dangerous to public safety and therefore that can be carried out in various areas of society are mentioned. Certainly, close attention is drawn to the sphere of production, where material goods are created. It is manufacturing corporations who set the tone and determine the capabilities of enterprises working in other areas such as: trade, service activities, health care service, culture, welfare, etc. However, financial corporations, which provide

"power" for the development of all the others, deserve special consideration. The capital, pooled within the corporation, shall function, that is it shall constantly "move", work towards the achievement of the goals the corporation faces.

Finally, the fourth point that has been consolidated within the meaning of the corporation resides in the fact that a collective entity, an organization becomes a corporation, if it obtains a corporate existence. This is evidenced by the fact of it's registration by a governmental body. State registration of a legal entity is a necessary rule originating from the Romano-German system of law not only for Ukraine but also for the majority of countries of the Continent Europe. In the continental law, the concept of corporation and legal entity predominantly coincide. A corporation is a collective entity, an organization recognized as a legal entity, based on the pooling of capital and that carries out certain socially useful activities.

Corporation as a catch-all category of a certain group of legal entities is a form of collective association of interests, efforts, individuals and capital, which are recognized as legal entities and carry out certain socially useful activities. Wide variety of criteria reflecting its' legal standing may be used when specifying the attributes of corporate entities.

Most of the domestic scientists state that enterprises with the following attributes should refer to the corporate entities:

- alliance of persons;
- existence of pooled capital;
- common purpose.

If the mentioned indicias in aggregate are considered necessary and sufficient for designation of a certain formation to a corporation, then under the current legislation all types of companies, cooperatives, farm enterprises, social organizations, etc. should be considered as such. It's undeniable and it catches one's eye immediately that for-profit and nonprofit legal entities turned to be on the same list, though on the other hand, such a legal entity form as a private enterprise was left out of the list. This situation forces us either to introduce additional criteria for delimitation of relations due to the characteristic of the parties, or somewhat to change the approach or even choose another one. The situation is complicated by the Commercial Code of Ukraine which classifies enterprises that are normally formed by more than one founder

under their joint decision (contract), that operate on the basis of the combining of property and / or entrepreneurial or labor activity of the founders (members), of the comanagement of business on the basis of equity rights, both directly or through the bodies of the corporate governance, of the participation of founders (members) in the allocation of profit and risks of the enterprise as corporate ones. Corporate ones are cooperative enterprises, which are created in the form of a business company, as well as other enterprises, including those based on the private property of two or more persons (Part 5 of Article 63 of the Commercial Code of Ukraine). It is absolutely correct that it is inappropriate to narrow down the scope of regulation of the company law by a specified list of legal entity forms, for example, business companies or corporations. Thus, essentially, nothing else than business companies are referred to corporations. And what about other legal entity forms? Do they possess any attributes corporations have?

According to Part 1 of Article 83 of the Civil Code of Ukraine, legal entities may be created in the form of companies, institutions and other forms established by the law. In its' turn, companies shall be divided into for-profit and nonprofit ones (paragraph 2, part 2 of article 83 of the Civil Code of Ukraine). However, this classification shall be applied only to companies and shall not in any way affect institutions or other types of legal entities. According to some scholars, institutions can not be divided into for-profit and nonprofit, since they exclusively function with no intent of making a profit. Still, there is no mandatory prohibition on profit making for the institution, which gives reasons to consider permission for the profitability of the institution to be acceptable.

Analysis of the business legal structure the institution has as a participant of civil-law relations allows us to distinguish following attributes of this type of legal entities. In particular, the specific feature of an institution is its' creation with no entrepreneurial purpose, and possibility of some income-generating activities only as ancillary one; founders of an institution shall not be entitled to participate in its management, nor can they profit from its activities; institutions meet public or private interests as well as needs of individuals who are not the members (the so-called distinators) who are in no relationship either with the institution, or with each other. An institution may be created on grounds of an individual or joint constating instrument – charter or statute

established by the founder (founders). Institutions may be created on the initiative of state bodies or may have a private nature. First of all, this refers to such sources of the formation of the assets as obtaining property from the founder while establishing an institution, and also as a result of financing by the founder during activities. Corporations serve the interests of its members, institutions serve the interests of users, and the difference between them involves the determinancy of the membership of the corporation and the indeterminacy of the users of the institution. The objects of the corporation's activities are determined by the mutual intention of the founders, and the objects of the institution is introduced from the outside and determined by administration.

The legal basis for the origin of legal entities is the founding declaration of intent in the form of either transaction or administrative act. Herewith, legal entities of a private nature are created on the basis of the transaction and so to speak “being for itself”, and legal entities under public law are created on the basis of an administrative act and so to speak “for comers and goers”. There is a view that institutions may only exist as a subtypes of legal entities under private law. Yet, one shall not be categoric in this statement. Institutions may be also created in the regulatory manner. In addition to the division of legal entities into public and private companies and institutions, the classification, depending on the purpose of its creation for for-profit and nonprofit, seems to be significant. As was mentioned above, institutions belong to nonprofit entities and as a consequence there is an incompetence of a member of the institution to profit by the company's activities. Non-profit organizations do not allot a profit among its members. These organizations include consumer cooperatives, associations of co-owners of housing, foundations, religious organizations and all types of non-governmental organizations that are created on the basis of the common interests of the founders (civic movements, political parties, foundations, creative unions, philanthropy organizations). Non-profit organizations are created as a result of exercising of the constituent right by the persons, and as a result they are related to such legal entities with the membership, but not equity rights.

Thus, corporate legal entities include all legal entity types created for the purpose of making a profit and its further allottment among the members and as a result of the creation of which the founders acquire an exclusive type of proprietary and personal rights, called equity right.

Regarding equity rights of the members, it should be recognized that they possess the following qualities, namely: to be freely transferable, that is to have a certain value, to be alienated as easy as possible, if appropriate, to be allocated as a share in the corporate property; to be transferred on grounds of universal legal succession. On this issue, the declaration of member's title to interests in the company's property is inadmissible, since any enterprise is an integral property complex, and, secondly, title to the property transferred to the pooled capital may not be simultaneously held by two persons – member and company itself.

The practices of civil circulation have long been de facto recognizing equity rights as separate pecuniary objects of civil rights, still the legislator's opinion on that score remains conservative, while the alienation of equity rights has a somewhat distorted nature so far, legally being fulfilled in the form of disaffiliation with the corporation or entry into it.

The existence of such a group of legal entities that do not have title to the property transferred to them and the property of which is subject to the proprietary right of the founders (unitary enterprises, state enterprises, municipal enterprises, subsidiaries), is coming from the transitional phase of economic development. State and municipal formations are entitled to create new entities-owners – corporate entities, both with the use of its own property or jointly with other entities. However, state formations themselves, as a rule, may not act as founders or members of corporations either on their own or on behalf of other public-law formations. On its behalf, founders may only be specially created institutions or foundations holding equity rights that belong to the state and govern them. Duly authorised representatives take part in the activities of such corporations on behalf of public-law formations in and under their instructions. Moreover, they can create corporations at their sole discretion with one hundred percent state-owned property (government owned corporations, single person partnerships).

Therefore, corporation serves as a cumulative legal structure of corporate relations within a certain organization. For this reason, it should not be identified only by the existence of pooled capital and the totality of members. From the perspective of property turnover, the corporation seeks to meet public interests acting through specific individuals (members) by centralization of capital and joining efforts.

2.2. Types of Legal Entities under the Law of Ukraine

The classification of legal entities under the law of Ukraine is a rather difficult task due to the existence of two interrelated but still different systems: the system of legal entities under the Civil Code of Ukraine and the system of business entities under the Commercial Code of Ukraine.

2.2.1. First of all, depending on the the procedure for the legal entities creating they are divided into *legal entities under public law* and *legal entities under private law* (Article 81 of the Civil Code of Ukraine). Legal entity under private law is created on the basis of constating documents. A legal entity under public law is created by an administrative act of public and local authorities.

2.2.2. Depending on the way of creation (establishment) and the way of formation of the charter capital there are *unitary* and *corporate enterprises* in Ukraine.

A unitary enterprise is created by single founder who allocates the necessary property for such a purpose, forms the charter capital in accordance with the law, that is not divided into shares (units), adopts the charter, allocates revenues directly or through the manager appointed by him/her, runs the business and forms its labor collective on the basis of employment, deals with the issue of reorganization or liquidation of the business. Unitary enterprises are state-owned, municipal enterprises, enterprises based on the property of associations of citizens, religious organizations or private property of the founder.

A corporate enterprise is created by two or more founders under their joint decision (agreement) and acts on the basis of merging of their property and / or entrepreneurial or labor activity of the founders (members), their joint corporate governance under the equity rights they have, as well as through the corporate bodies they create, and the participation of founders (members) in the profit distribution and risks probability distributions. Corporate ones are cooperative enterprises, enterprises created in the form of a business company, as well as other enterprises, including those based on the private property of two or more persons (Article 63 of the Commercial Code of Ukraine).

2.2.3. Legal entity forms: legal entities may be created in the form of *companies*, *institutions* and in other forms established by law (Article 83 of the Civil Code of Ukraine).

An institution is an organization created by one or several persons (founders) who do not take part in its management by combining (allotment) of their property to achieve the goal determined by the founders, on account of this property.

A company is an organization created by uniting persons (members) who are eligible for affiliation with this company.

Companies are divided into *for-profit* and *nonprofit*.

Nonprofit companies are companies that are not intended to receive profits for its subsequent distribution among the members (Article 85 of the Civil Code of Ukraine).

Companies engaged in entrepreneurial activity have two significant features:

1) entrepreneurial activity;

2) subsequent distribution of profits among the members.

According to Article 84 of the Civil Code of Ukraine, companies engaged in entrepreneurial activities can be created in the form of:

I. *Business companies*: general partnership, limited partnership, limited liability company, superadded liability company, joint stock company (joint stock company, in its turn, can be created in the form of a private joint-stock company or a publicly-owned joint stock company).

In scientific literature, business companies are divided into two groups – corporations and business partnerships, although Ukrainian legislation does not contain such a division. *Corporations include such types of legal entities as joint stock company, limited liability company, superadded liability company*. All the members of these companies make an in-kind contribution to the company, incur limited liability and may not take personal participation in the company's operations.

Business partnerships include general partnership and limited partnership. In these companies, members incur unlimited property liability for the obligations of the company. Personal involvement of members of such a company in the company's operations shall be obligatory.

II. *Production cooperative* is a voluntary association of citizens on the basis of membership for a joint industrial or other business activities, which is based on personal labour participation and the combining of its members' equity contributions.

2.2.4. Depending on the share of foreign capital in the property, on the basis of which the company operates, there is a *foreign-invested enterprise* and a *foreign enterprise*.

An enterprise charter capital of which contains foreign investment for not less than ten percent is called foreign-invested enterprise. Foreign-invested enterprises are eligible to be founders of subsidiaries, to create branches and representative offices on the territory of Ukraine and abroad, in compliance with the legislation of Ukrainian and legislation of the states concerned.

A foreign enterprise is an enterprise created under the legislation of Ukraine, which operates solely on the basis of the ownership of foreigners or foreign legal entities, or an active enterprise fully owned by these persons. Foreign enterprises can not be created in the industries which have a strategic impact on the state security and are defined by law. Activities of branches, representative offices and other separated divisions of enterprises formed under the laws of other states are carried out on the territory of Ukraine in accordance with the legislation of Ukraine.

The legal status, conditions and procedure for the creation, requirements for the organization and operation of foreign enterprises and foreign-invested enterprises are determined mainly by the Civil Code of Ukraine and the Law of Ukraine “On the Regime of Foreign Investment”.

2.2.5. According to Article 120 of the Civil Code of Ukraine enterprises as legal entities can voluntarily combine its production, scientific, commercial and other activities, if it is not in compliance with the competition legislation. Herewith enterprises as members of the association of enterprises maintain the status of a legal entity, irrespective of the legal structure of an association.

Thus, enterprises shall have a right to associate into:

• *Association* is a contractual combination created for the purpose of continuous management of business’s activities by single-sourcing one or more production and managerial functions, development of specialization and co-operation of production, organization of coproduction on the basis of combining financial and physical resources by the members, mainly, for meeting economic needs of the association members. The association's charter must state that association is a business entity. Association shall not interfere in the business’s activities of its members. On the resolution

of the members, association shall be authorized to represent their interests in relations with public authorities, other businesses and organizations.

• *Corporation* is a contractual combination created on the basis of combining industrial, scientific and business interests of united enterprises, delegating certain powers of centralized regulation of the activities of each of the member to the governing bodies of the corporation.

• *Consortium* is a temporary statutory business combination for the achievement of a certain common business purposes (implementation of target programme, research-engineering, construction projects, etc) by its members. Consortium applies funds provided by the members, the centralized resources allocated for funding the relevant program, as well as funds received from other sources, in accordance with the procedure established by its statute. In case of achievement of its purpose, the consortium ceases to exist.

• *Conglomerate* is a statutory combination of enterprises, as well as other organizations, based on their financial dependence on one or a group of members of the combination, with the integration of research-engineering and production development, investment, financial, external-economic and other activities. Members of the conglomerate vest part of their powers, including the power of representation of their interests in relations with public authorities, other enterprises and organizations to the conglomerate. Members of the conglomerate shall not simultaneously participate in another conglomerate.

State and municipal business unions are formed mainly in the shape of corporations or conglomerates however designated name of the combination (integrated plant, trust, etc.).

2.2.6. Associated enterprises and holding companies (Article 126 of the Commercial Code of Ukraine).

Associated enterprises are the group of undertakings – legal entities interconnected by economic and / or organizational relations in the form of equity holding and / or management. Dependency between associated enterprises can be simple and determinant. The existence of such dependency should be indicated in the information on the state registration of the associated (subsidiary) enterprise and published in accordance with the law.

Holding company is a public jointstock company that owns, uses, and disposes of holding corporate blocks of shares (stocks, units) of more than

one corporate enterprises (except for state-owned blocks of shares). The general principles of functioning of holding companies in Ukraine, the peculiarities of its formation, activities and liquidation are regulated by the Civil Code of Ukraine and the Law of Ukraine "On Holding Companies in Ukraine" [86].

2.2.7. It should be noted that the law provides for cases when individuals can act jointly to achieve a common goal without establishing a legal entity. Such a joint activity is carried out under an agreement on joint activity, combining participatory inputs (a *simple partnership*) or not combining participatory inputs (Article 1130-1143 of the Civil Code of Ukraine).

2.2.8. The attraction and effective allocation of financial resources of investors can be carried out with the help of *collective investment institutions*. The legal basis for the creation and operation of these entities is established by the Law of Ukraine "On Collective Investment Institutions" of July 5, 2012.

Classification of collective investment institutions is given in Article 7 of the Law of Ukraine "On Collective Investment Institutions".

Collective Investment Institutions include a corporate or mutual funds.

Corporate fund is a legal entity formed in the shape of a joint stock company and exclusively carries out activities on co-investing.

Mutual fund is a set of assets owned by members of such a fund in common, and which are under the management by the asset management company and are recognized separately from the results of its business activities. Mutual fund is not a legal entity and shall not have executives. Mutual fund is created by an asset management company (Article 41 of the Law).

Asset Management Company is a business company created in accordance with the legislation in the form of a joint stock company or a limited liability company, which carries out professional activity in asset management of the collective investment institution on the basis of a license (Article 63 of the Law).

[86] On Holding Companies in Ukraine: Law of Ukraine as of 15.03.2006. № 3528-XV. // *database "Legislation of Ukraine"* / *Verkhovna Rada of Ukraine*, *available at*: http://zakon.rada.gov.ua/laws/show/3528-15

2.3. Types of Corporate Entities

Thus, corporate entities include business legal structures endowed with the following features:

- separate legal identity;
- existence of the centralized contributed capital;
- receiving of profit as the purpose of bussiness activity;
- joining efforts and coordinated corporate governance by the corporate members;
- distribution of profits between the members.

Such characteristics are common for all types of business companies under Ukrainian law. According to Article 79 of the Commercial Code of Ukraine business companies are enterprises or other business entities created by legal entities and / or citizens by combining their property and participation in the entrepreneurial activity of the company for the purpose of making a profit. The Civil Code of Ukraine contains a slightly different definition of business companies. However, the classification of business companies in these two codified acts coincides. In general, the specifics of each type of business company are determined primarily by the membership, the charter capital and the scope of liability of the members.

1) General Partnership is a company, all members of which are engaged in joint entrepreneurial activity and are jointly liable under the company's obligations to the full extent of their assets (regulation is carried out in Articles 119-132 of the Civil Code of Ukraine, Articles 79-92 of the Commercial Code of Ukraine, Articles 66-74 of the Law Of Ukraine "On Business Companies");

2) Limited Partnership is a company in which, together with one or more members who are engaged in joint entrepreneurial activity on the company's behalf and are jointly liable under the company's obligations to the full extent of their assets, there is one or more members whose liability is limited to the contribution in the company's assets (dormant partners), and who are not party to the company's operations (regulation is carried out in Articles 133-139 of the Civil Code of Ukraine, Articles 75-83 of the Law of Ukraine "On Business Companies");

3) Limited Liability Company is a company with a charter capital, divided into shares, the size of which is determined by constating documents. The members of the company are liable within their contributions (regulation is carried out in the Law "On Limited Liability

and Superadded Liability Companies", Articles 140-150 of the Civil Code of Ukraine, Articles 79-92 of the Commercial Code of Ukraine, in Articles 50-64 of the Law of Ukraine "On Business Companies");

4) Superadded Liability Company is a company, the charter (contributed) capital of which is divided into shares the size of which is determined by the constating documents. Members in such a company are liable for it's debts within their contributions to the charter (contributed) capital, and in case of insufficiency of such amounts, they are additionally liable within their property equally for all members on a pro rata basis to the contribution of each member. The liability limit of the members is provided for in the constating documents (regulation is carried out in the Law "On Limited Liability and Superadded Liability Companies", Article 151 of the Civil Code of Ukraine, Articles 79-92 of the Commercial Code of Ukraine, Articles 52-65 of the Law of Ukraine "On Business Companies");

5) Joint Stock Company is a bussiness company, the charter capital of which is divided into a certain quantity of shares of the same denomination, equity rights upon which are certified by shares. The shareholders are not liable for the obligations of the company and bear the risk of loss related to company activity, only within their shares. Joint-stock companies by type are divided into publicly owned joint stock companies and private joint stock companies. The number of shareholders of a private joint stock company may not exceed 100 shareholders (regulation is carried out in the Law of Ukraine "On Joint Stock Companies" of September 17, 2008, Articles 24-49 of the Law of Ukraine "On Business Companies", Articles 152-162 of the Civil Code of Ukraine, Articles 79-92 of the Commercial Code of Ukraine).

2.4. Practical Application

2.4.1. Advantages and Disadvantages

As reflected by the analysis in previous sections, the registrability of various types of legal entities under private law has been established in Ukraine. It could not be denied that business companies are the most multifunctional form of conducting business.

A limited liability company is convenient in cases where the company does not plan to attract public equity. Most commonly the

number of members is not more than 10 participants. This is due to the fact that until May 12, 2011 the maximum number of members of the limited liability company was limited up to 10 participants.

There is no need for public disclosure of information on the company's operations in limited liability companies. In comparison with the joint stock company both advantage and disadvantage of the limited liability company is the regulation of its activities by the Law of Ukraine "On Limited Liability and Superadded Liability Companies", which, on the one hand, does not establish too strict requirements on the company's operations, but on the other hand when applied does not protect minority founders (members) as effectively as the Law of Ukraine "On Joint Stock Companies".

Business activities through joint stock company stands for selection in cases when the company plans to attract public equity and longs for having a higher status in the fund raising market and in customer service market. Besides that, the creation of a business entity in the form of a joint stock company may be mandatory for some sort of business activities.

Joint stock companies are also those created in the times of privatization (the privatization of the former communal ownership of the factories of the Ukrainian Soviet Socialist Republic (1918-1991)) and which according to the law can not be reorganized into another business legal structure.

In Ukraine, there is no integrated codified act that would establish conduct of a particular type of bussiness activity by a specific business legal structure. This peculiarity is determined by separate legal acts regulating corresponding business areas. For example, banks in Ukraine are created in the form of a publicly owned joint stock company or a cooperative bank (Article 6 of the Law of Ukraine "On Banks and Banking"). Insurers who are entitled to provide insurance activities on the territory of Ukraine are financial institutions created in the form of joint stock companies, general partnerships, limited partnerships or superadded liability companies (Article 2 of the Law of Ukraine "On Insurance"). That is, insurance companies can not act in the form of LLC.

Superadded liability companies, general partnerships and limited partnerships are used when such forms are explicitly provided by statutory requirements.

Thus, trust institutions operate exclusively in the form of a superadded liability company. Trust institution is a superadded liability company that carries out representative activities in accordance with an agreement entered into with the grantors of property in relation to the enforcement of their right to ownership (Article 1 of the Law of Ukraine "On Trusts")[87].

Commonly used business activities in the form of general partnership are activities of pawn broker's shops.

2.4.2. Statistics

According to statistics, as of January 1, 2018, in Ukraine, there were registered 14710 joint stock companies; 576 554 limited liability companies; 1 344 general partnerships; 377 limited partnerships. As a comparison, in 2014, there were 24 610 joint stock companies registered in Ukraine, among which the following types could be singled out: 15.5 thousand joint stock companies holding shares in circulation; only 8,000 joint stock companies reporting to the National Securities and Stock Market Commission. 520 228 Limited Liability Companies; 1,591 Superadded Liability Companies; 2 038 General Partnerships; 626 Limited Partnerships[88].

Due to the outlined above statistics, limited liability company is a completely dominant legal entity form in Ukraine. The number of other types of business companies has significantly decreased recently.

The most significant share of gross domestic product is taken by the joint stock companies. If to speak about the distribution of equity capital by sectors of the national economy, then it should be noted that the largest number of joint stock companies are involved in industry (31.5% of the total), distributive industries (21.2%), real estate activities (12.2%), construction (10.5%), agriculture, hunting and forestry (8.8%), transport and communications (8.6%).

[87] On Trusts: Decree of the Cabinet of Ministers of Ukraine №23-93 as of March 17, 1993, *available at*: http://zakon4.rada.gov.ua/laws/show/23-93

[88] Number of legal entities by forms of incorporation in 2014 and 2018, *available at*: http://www.ukrstat.gov.ua/

2.5. Companies vs Other Types of Corporations and Investment Vehicles

It is obvious that under free market conditions corporate form of conducting investment activities is the most optimal and effective and is realized through the creation of a legal entity or participation in the already established legal entity.

The analysis of the Civil and Commercial Codes of Ukraine shows that the legislator offers the following basic legal entity forms that are aimed at profit making and, accordingly, are suitable for investment: for-profit companies provided by the Civil Code of Ukraine (*joint stock companies, limited liability companies, superadded liability companies, general partnership, limited partnership*, *production cooperative*); *private enterprises* provided by the Commercial Code of Ukraine. Among the mentioned ones, the most expedite forms of conducting business are joint stock companies, limited liability companies and private enterprises.

What characteristics condition the difference between corporate and other legal entities? First of all, it is the focus on making a profit for its subsequent distribution among the members. Secondly, it is participation matters peculiar to such legal entities that are manifested in the fact that the founders (members) are involved in legal entity activities when paying the relevant in-kind contributions. They forfeit their right to ownership of such deposits, as they transfer it to the ownership of a legal entity, acquiring a set of equity rights instead. According to Article 167 of the Commercial Code of Ukraine, equity rights are the rights of a person whose share in the charter capital (property) of a bussiness organization is defined, including the power to participate in the corporate governance, obtaining a certain share of profit (dividends) of the organization and assets in the event of liquidation of the latter, according to law, as well as other powers provided for by law and incorporation and corporate governance documents[89]. The maintenance of such a legal property relationship between a legal entity and investors allows them not only to profit from the operation of a legal entity, on a ratio basis to the extent of

[89] Commercial Code of Ukraine: Law of Ukraine as of January 16, 2003. № 436-IV. *Bulletin of the Verkhovna Rada of Ukraine*. 2003. № 18, № 19-20, № 21-22. Art.144, *available at*: http://zakon2.rada.gov.ua/laws/show/436-15/page. (application date dated 28.03.2018).

their equity rights, but also to influence the formation of this profit through participation in corporate bodies and through exercising the right to receive information on corporate operations, etc.

Joint stock companies and limited liability companies are more convenient forms for investing in cases where the investor is not interested in personal participation in the activity of a legal entity. After all, *general and limited partnerships* provide for the personal participation of members in general partnerships and limited partnerships in the company's operations through co-management of business affairs and joint administration operation of a legal entity. It is necessary to take into consideration the fact that the current legislation of Ukraine (Part 7 of Article 81 of the Commercial Code of Ukraine) [90] provides for the registration of such participants as entrepreneurs in accordance with the procedure established by the Law of Ukraine "On State Registration of Legal Entities, Individual Entrepreneurs and Public Formations". Such a requirement creates unnecessary difficulties in investing in these types of legal entity. And if to add the fact that for the participants of general and limited partnerships superadded liability for the obligations of the legal entity to the full extent of their assets is provided, the investment attractiveness of general and limited partnerships becomes lowest.

The legislation of Ukraine offers another type of a legal entity to foreign investors named *cooperatives*. Its status is determined not only by the general provisions of Commercial Code and Civil Code of Ukraine, but also by the Law of Ukraine "On Cooperation"[91]. From among these cooperatives ones aimed at profit-making and attractive for investing are *production cooperatives*. What features distinguish production cooperatives from traditional companies that are corporations? First, it is an obligation of personal labour participation in the activities of the cooperative. Secondly, it is an availability of cooperative payments, the

[90]Commercial Code of Ukraine: Law of Ukraine as of January 16, 2003. № 436-IV. *Bulletin of the Verkhovna Rada of Ukraine*. 2003. № 18, № 19-20, № 21-22. Art.144, *available at*: http://zakon2.rada.gov.ua/laws/show/436-15/page. (application date dated 28.03.2018).

[91]On Cooperation: Law of Ukraine as of July 10, 2003 p. № 1087-IV. *Bulletin of the Verkhovna Rada of Ukraine*. 2004. № 5. Art.35, *available at*: http://zakon2.rada.gov.ua/laws/show/1087-15. (application date dated 28.03.2018).

size of which depends on the scope of labor distribution in the activities of the cooperative, in addition to payments per unit. Third, the size of the unit does not affect the investor's equity rights as a member of the cooperative and in any case will provide him with a single vote at the general meeting. It is beyond argument that these signs are not significant enough to determine investment attractiveness of production cooperatives for foreign investors.

The types of legal entities based on private ownership also include private enterprises, established under Art. 63 of the Commercial Code of Ukraine. They are considered to be unitary as they are created by a sole founder who allocates the necessary property for such a purpose, forms the charter capital in accordance with the law, that is not divided into shares (units), adopts the charter, allocates revenues directly or through the manager appointed by him/her, runs the business and forms its labor collective on the basis of employment, deals with the issue of reorganization or liquidation of business. Between the founder (sole member) and the unitary enterprise, there is also a legal pecuniary bond, but such a type of the company does not provide for the possibility of further increase in the number of members to attract additional investments otherwise will require a change of the legal entity form.

The stated facts once again emphasize that the most optimal and effective legal entity forms in terms of investment attractiveness are joint stock companies, limited liability companies and private enterprises.

For the professional implementation of investment activities, legislation of Ukraine offers special forms called *institutional investors* that are collective investment institutions (*mutual and corporate investment funds*), *insurance companies*, other *financial institutions* that carry out operations with financial assets for the benefit of other parties at its own expense or at the expense of these parties, and in cases stipulated by law, at the expense of financial assets borrowed from other persons for the purpose of profit-making or maintaining the real value of financial assets.

Among the mentioned investment schemes, the most popular ones are corporate and mutual investment funds provide for by Law of Ukraine "On Collective Investment Institutions"[92]. Assets of the collective

[92] On Collective Investment Institutions: Law of Ukraine as of 5.07.2012. № 5080-VI**.** *Bulletin of the Verkhovna Rada of Ukraine*. 2013 № 29. Art.337.

investment institution are formed at the expense of co-investing, aggregate property, equity rights, property rights and damages and other assets provided by laws and regulations of the National Securities and Stock Market Commission.

Corporate investment fund is a legal entity created in the form of a joint stock company and conducting activities on co-investing exclusively. It's a specific fact that the Law "On Joint Stock Companies" does not extend its effect to such funds. That is, despite the fact that corporate investment funds are created in the form of a joint stock company, its status is regulated exclusively by a special Law "On Collective Investment Institutions". Members of the corporate fund are not liable for the obligations of the corporate fund and bear the risk of losses coming from the activities of the corporate fund, only within the limits of their shares. Members of the corporate fund can not be subject to any sanctions that impose limitations on their rights in case corporate fund or other members of the corporate fund take any actions contrary to law. The lower limit of the charter capital of the corporate fund is 1250 minimum national living wages in the monthly amount established by law at the date of registration of the fund as a legal entity. The founders of the corporate fund must pay 100 percent of the amount of the initial charter capital when state registration of the corporate fund and its statute in the state registration bodies. The main constating document of a corporate investment fund is a charter and regulations, which the fund shall be required to register within six months from the date of its state registration as a legal entity. The management of assets of the corporate fund shall be carried out by the asset management company on a relevant contractual basis. The custody of assets of the corporate fund shall be carried out by the custodian of the assets of the corporate fund on a relevant contractual basis.

Unlike a corporate one, *mutual investment fund* is not a legal entity and is created by an asset management company. Mutual fund is a set of assets owned by members of such a fund in common, which are under the management by the asset management company and are recognized separately from the results of its business activities. The lower limit of the assets of the mutual fund is 1250 minimum national living wages in the monthly amount established by law at the date of registration of the fund

available at: http://zakon2.rada.gov.ua/laws/show/5080-17. (application date dated 28.03. 2108).

as a collective investment institution. If the participation in a corporate investment fund is confirmed by shares, the participation in a mutual investment fund is confirmed by an investment certificate (mutual fund share). Accordingly, a member of such a fund is a legal entity or individual who has become the owner of the mutual fund share.

As can be seen from the above, current Ukrainian legislation offers a sufficiently large list of corporate investment schemes for foreign investors, the advantages of which, in comparison with other investment vehicles, consist in separation of the founder's (member's) property from the legal entity property; in separation of the founders (members) from liability for obligations of the legal entity and vice versa; in the existence of a special legal bond between the founder (member) and the legal entity, which manifests itself in the emergence of equity rights of a proprietary and non-proprietary nature.

In addition to the corporate investment scheme, the investment vehicles that are characterized by the efficiency and the effective application include also the contractual form, in particular, agreements for joint investment activity with the involvement of a foreign investor. Following benefits are provided for the investors who are parties to such contracts: property imported into Ukraine by foreign investors for a period of less than 3 years for the purpose of investing on the basis of registered contracts, shall be excused from levying of duties. However, the profit derived from the joint activity under such contracts shall be subject to tax in accordance with the legislation of Ukraine, that is, per standard procedure. The state registration of such agreements is carried out by the Ministry of Economic Development and Trade in accordance with the Regulation on the procedure for state registration of agreements on joint investment activities involving a foreign investor, approved by the CMU Decree on 30.01.1997[93].

[93] On Approval of the Regulations on the Procedure for State Registration of Joint Investment Contracts (Ageements) With the Participation of a Foreign Investor: Decree of the Cabinet of Ministers of Ukraine as of January 30, 1997. N 112, *available at*: http://zakon2.rada.gov.ua/laws/show/112-97-%D0%BF. (application date dated 28.03.2018).

2.6. Companies and Capital Market

The pain point of the current legislation of Ukraine is the "immaturity" of the capital market infrastructure, which can be solved by confluence of the conclusion of contracts of purchase and sale of securities on stock exchange markets and other securities trading organizers, and the development of the National Depository System of Ukraine. The main legislative instruments regulating this scope of relations are as follows: Art. 163 - 172, Art. 256 - 361 of the Commercial Code of Ukraine of 2003, the Law of Ukraine "On Joint Stock Companies" of 2008, "On Securities and the Stock Market" of 2006, "On State Regulation of the Securities Market" of 1996, "On the Depository System of Ukraine" of 2012 and others.

According to Article 2 of the Law of Ukraine "On Securities and the Stock Market", the *securities market (stock market)* is the whole complex of stock market traders and legal relationship between them regarding the stock distribution, stock trading and stock accounting[94]. In order to ensure the functioning of the securities market, a stock exchange is formed. In accordance with the said Law *stock exchange* of Ukraine operates in the form of joint stock company or limited liability company and is not a for-profit legal entity, since the profit is directed to its own development and is not distributed between the founders (members). The legislation provides for special requirements for the founders (members) of the stock exchange, which may be not less than twenty securities traders who have a license for the right to conduct professional activities in the stock market. The size of the charter capital of the stock exchange should be not less than 15 million hryvnias, and the amount of charter capital of the stock exchange that conducts clearing and settlement should be not less than 25 million hryvnias.

Shares of all publicly owned joint stock companies can be purchased on the stock exchange (Article 24 of the Law "On Joint Stock

[94] On Securities and Stock Market: Law of Ukraine as of 23.02.2006. № 3480-Iv // *database "Legislation of Ukraine"* / *Verkhovna Rada of Ukraine.* 2006. № 31. Art. 268, *available at*: http://zakon4.rada.gov.ua/laws/show/3480-15. (application date dated 28.03.2018).

Companies") [95]. For this purpose, publicly owned joint stock companies are required to undergo the procedure for the listing of shares to at least one stock exchange list. *Listing* is a set of procedures for including securities into the stock exchange register and monitoring the compliance of securities and issuer with the conditions and requirements as specified in the stock exchange customs (Article 1 of the Law "On Securities and the Stock Market")[96]. The listing procedure is established by the stock exchange customs, which are approved by the exchange committee and registered by the National Securities and Stock Market Commission.

Since publicly owned joint stock companies are conducting securities trading in the stock market, the Law of Ukraine "On Joint Stock Companies" provides for the disclosure of the so-called public information. According to Part 3 of Article 77 of the Law "On Joint Stock Companies", a publicly owned joint stock company is required to have its own web-site on the Internet, which, in accordance with the procedure established by the National Securities and Stock Market Commission, should contain information that is subject to disclosure in accordance with the law. This is the so-called *continuous and sensitive data on the issuer* (Articles 40, 41 of the Law "On Securities and Stock Market"): a) continuous data on the issuer contains annual and quarterly reporting information on the financial and operating performance of the issuer which is disclosed in the stock market, and specifically by submitting the information to the National Securities and Stock Market Commission (information of this kind is published no later than April 30 of the year following the reporting); b) sensitive data on the issuer, such as decision for placement of securities in the amount of more then 25 percent of the charter capital; decision for the repurchase of own shares, except for shares of corporate investment funds of interval and open-end type; facts of

[95] On Joint Stock Companies: Law of Ukraine as of 17.09.2008. № 514-VI // *database "Legislation of Ukraine" / Verkhovna Rada of Ukraine* № 50 – 51. Art. 384, *available at*: http://zakon4.rada.gov.ua/laws/show/514-17/page?text=%EB%B3%F1%F2%E8%ED%E3. (application date dated 28.03.2018).

[96] On Securities and Stock Market: Law of Ukraine as of 23.02.2006. № 3480-Iv // *database "Legislation of Ukraine" / Verkhovna Rada of Ukraine.* 2006. № 31. Art. 268, *available at*: http://zakon4.rada.gov.ua/laws/show/3480-15. (application date dated 28.03.2018).

listing / delisting of securities in the stock exchange; raising of a loan or credit in the amount of more then 25 percent of the issuer's assets, etc. All this information shall be disclosed by placing in the public information database of the National Securities and Stock Market Commission on the securities market; by publication in one of the official printed editions of the Verkhovna Rada of Ukraine, the Cabinet of Ministers of Ukraine or the National Securities and Stock Market Commission; by placing on one's web site.

It should be noted that *professional securities trading* in the stock market is carried out by securities traders, which function in the form of a business company and for which such activity is exclusive, except as otherwise provided by law. Professional activities of such entities may take a form of brokerage activity, dealer activity, underwriting activity, asset management activitiy (Article 17 of the Law "On Securities and Stock Market"). In order to carry out some of these activities, the law provides for heightened requirements for the size of the charter capital of the stock exchange, such as: a securities trader can engage in dealer activity if he/she has a paid-in capital in the amount of not less than 500 thousand UAH, in brokerage activity - not less than 1 million UAH, in underwriting or securities management - not less than 7 million UAH. Restrictions on securities traders are foreseen by law in order to prevent the dependency relations between them. Such restrictions are manifested in the prohibition to have a shareholding in the charter capital of more than 10 percent. A securities trader must keep a record of securities or cash separately for each client. In addition, cash and securities of the clients, which are transferred to be managed by securities traders, can not be foreclosed for obligations of the securities trader, unrelated to the manager functions.

Professional stock market participants operate on the basis of a license issued by the National Securities and Stock Market Commission[97]. The license shall be issued within three months from the date of receipt of

[97] On the State Regulation of the Securities Market in Ukraine: Law of Ukraine as of 19.04.2014, 1170-18. *Bulletin of the Verkhovna Rada of Ukraine*. 1996. № 51. Art. 292, *available at*: http://zakon4.rada.gov.ua/laws/show/448/96-%D0%B2%D1%80. (application date dated 28.03.2018).

the relevant package of documents (Article 27-1 of the Law "On Securities and Stock Market").

Professional activity in the stock market must meet certain requirements that relate to securities transactions which must be committed with or through a securities trader. Exceptions shall be foreseen only in the following cases: placement by the issuer of its own securities; repurchase and sale by the issuer of its own securities; conducting settlements using non-issuable securities; entering of securities into the charter (contributed) capital of the legal entities; donation of securities; inheritance and succession of securities; making transactions related to execution of judgements; making transactions in the process of privatization (Article 17). In other cases, transactions concluded to the exclusion of the securities trader are void ab initio. Legislation unifies the effective time of contract of purchase and sale of securities in the stock exchange, which is bound with the time when the stock exchange fixes the existence of such a contract in accordance with its rules.

In addition to securities trading, other types of professional activities may be carried out in the stock exchange, some of which serve the functioning of the stock market. Such activities include depositary. In 2003 the Law "On the Depository System of Ukraine" made a significant transformation of the system which consisted in the fact that such participants of the depository system as custodians and registrars turned into a new type of market participants – *custodial institutions*. In addition, on the basis of the National Depository of Ukraine (NDU), the only *Central Securities Depository* in the state was created[98].

Depositary activity is the activity of professional participants of the depository system of Ukraine and the National Bank of Ukraine on delivery of services for custody and discount of securities, record keeping and servicing of the acquisition, termination and transfer of rights to securities and rights under securities as well as restrictions on rights to securities on depositary accounts of custodial institutions, issuers, correspondent depositories, persons conducting clearing activities, Clearing House for Contracts Traded on Financial Markets (hereinafter -

[98] On the Depository System of Ukraine: Law of Ukraine as of 06.07.2012 № 5178-VI. *Bulletin of the Verkhovna Rada of Ukraine*. 2013. № 39. Art. 517, *available at*: http://zakon2.rada.gov.ua/laws/show/5178-17. (application date dated 28.03.2018).

Clearing House), depositors, as well as delivery of other services, which professional participants of the depository system of Ukraine are entitled to provide.

Speaking about new participants of the depository system, namely custodial institutions, which is a legal entity created in the form of a joint stock company or limited liability company and which, in accordance with the established procedure, has received a license for the depository activity. Such an activity is exceptional for this institution. The custodial institution shall be entitled to provide services to the issuer of securities by virtue of the agreement for the providing a list of registered securities holders. The custodial institution is entitled to provide additional services to the depositor, in particular, services for the enforcement of the rights to securities.

In the depositary records system there is a fixation of the relevant fact of acquiring and termination of rights to securities and rights under securities. The securities account of the depositor shall be opened by the custodial institution on the basis of the agreement on servicing the securities account with the owner of the securities, co-owners of the securities or notary whose securities are deposited, as well as the custodial institution itself (on the basis of the order of the head of the custodial institution) or the National Bank of Ukraine. A securities account of a custodial institution, in which securities are kept and accounted for, shall be opened by the custodial institution with the Central Securities Depository or, in cases established by this Law, by the National Bank of Ukraine on the basis of a custodial agreement.

For insurance of possible investment risks, the legislation of Ukraine provides mechanisms for clearing activities (Article 19-1 - 19-5 of the Law "On Securities and Stock Market"). *Clearing activities* are activities on determination of obligations to be binding on parties under securities transactions and other transactions with financial instruments, preparation of documents (information) for settlements, as well as establishment of system of guarantees for fulfillment of obligations on securities transactions and other transactions with financial instruments. The persons who carry out clearing activities are clearing agencies and Clearing House for Contracts Traded on Financial Markets.

According to European standards, capital markets consist of not only the securities market, but also other financial instruments market, which

include, in particular, so-called derivatives. *Financial instruments* are the securities, fixed-term contracts (futures), forward rate contracts (forwards), derivative contracts for exchange (for a certain date in the future) in the case of price dependence on interest rate, exchange rate or stock index (interest-bearing, exchange rate or index-linked swaps), put/call options for any of these financial instruments, including cash-settled options (exchange rate and interest rate options)[99]. The most common type of such investment instruments in Ukraine is *derivatives*. Derivatives include *forward and futures contracts, stock and over-the-counter options, swaps.* Derivatives are quite easy to use, but investors need to be well-informed about the profitability of separate types. Since the derivatives pricing depends on change in price of assets which they are based upon. Typical forms of derivatives are approved by the Cabinet of Ministers of Ukraine[100]. According to clause 14.1.45 of the Revenue Code of Ukraine, a *derivative* is a standard document certifying the right and / or obligation to purchase or sell future securities, tangible or intangible assets, as well as funds on terms and conditions specified by it[101]. The Revenue Code also establishes main types of derivatives, such as: *swap* - a civil transaction on the exchange of payment flows (cash or non-cash) or other assets calculated as at the basis of the price (quoted price) of the underlying asset up to the amount specified by the contract for a specific payment date (date of performing calculations) within the period of validity of the agreement; *option* is a a civil transaction whereunder one party to the contract obtains the right to acquire (sell) the underlying asset and the

[99] On Securities and Stock Market: Law of Ukraine as of 23.02.2006. № 3480-Iv. *Bulletin of the Verkhovna Rada of Ukraine*. 2006. № 31. Art. 268, *available at*: http://zakon4.rada.gov.ua/laws/show/3480-15. (application date dated 28.03.2018).

[100] On Approval of the Regulation on Requirements for the Standard (Typical) Form of Derivatives: Decree of the Cabinet of Ministers of Ukraine as of March19, 1999. № 632, *available at*: http://zakon2.rada.gov.ua/laws/show/632-99-%D0%BF. (application date dated 28.03.2018).

[101] Revenue Code of Ukraine: Law of Ukraine as of 02.12.2010. № 2755-VI. *Bulletin of the Verkhovna Rada of Ukraine*. 2011. № 13 – 14, 15 - 16, 17. Art. 112 , *available at*: http://zakon.rada.gov.ua/laws/show/2755-17. (application date dated 28.03.2018).

other party assumes an unconditional obligation to sell (acquire) the underlying asset in the future during the period of validity of the option or on the fixed date (performance date) at the determined price of the underlying asset when concluding such a contract. Under the terms of the option, the buyer shall pay the seller the option premium; *forward contract* is a a civil transaction whereunder the seller undertakes to transfer the underlying asset to the buyer's property by the specified time in the future, and the buyer undertakes to accept the underlying asset by the specified time and pay for it the price specified in such agreement; *futures contract (futures)* is a standardized fixed-term contract whereunder the seller undertakes to transfer the underlying asset to the buyer's property by the specified time in the future (the date of fulfillment of obligations under a futures contract), under the terms specified in the specification, and the buyer undertakes to accept the underlying asset and pay for it the price specified in such agreement on the date of its conclusion.

2.7. Company's Legal Standing in the Private International Law of Ukraine

The peculiarities of the legal status of foreign legal entities in Ukraine are determined primarily by its jurisdictional affiliation, that is, the nationality of a legal entity. Nationality of a legal entity is understood both as a personal law of the legal entity or the state affiliation. Depending on such an affiliation, all legal entities carring out activities within the jurisdiction of a particular state shall be treated as domestic, which are subjected exclusively to its personal law, or foreign which are subjected to the influence of two legal systems – its personal law (the law of the state of nationality) and territorial law (the law of the state where the activity is carried out).

Determining the nationality of a legal entity is quite significant as it defines such issues as:

- the status of a certain formation as a legal entity;
- legal entity form;
- the procedure for the creation, reorganization and liquidation of a legal entity;
- succession of rights and obligations of a legal entity when termination of its activities;
- requirements for the name of the legal entity;

- the scope of corporate capacity, the moment of its occurrence and termination;
- requirements to the structure of corporate bodies, its competence and procedure for the execution of its powers;
- relations between legal entity and its founders and members, the procedure for acquiring and exercising of the rights and obligations by the members of a legal entity;
- the ability of a legal entity to be liable to the full extent of its property.

In Ukraine, the matter of the nationality of a legal entity is regulated by Art. 25 of the Law of Ukraine "On Private International Law"[102] of June 23, 2005 whereby lex societatis is the law of the state where the legal entity is located. The location of legal entity is the state where the legal entity is registered or otherwise created in accordance with the law of that state. In the absence of such conditions or if such conditions can not be established, the law of the state in which the executive body of the legal entity is located shall be applied.

It should be noted that according to Art. 93 of the Civil Code of Ukraine the location of a legal entity is the address of the body or person who, in accordance with the constating documents or the law, acts on its behalf. A similar rule is contained in Art. 1 of the Law of Ukraine "On Foreign Economic Activity"[103] of April 16, 1991, according to which foreign business entities are defined as market participants with a permanent location or a permanent residence outside of Ukraine. Herewith, the permanent location of the entity means the location of the registered office of the entity engaged in foreign economic activities.

According to Art. 27 of the Law of Ukraine "On Private International Law" personal law of a foreign organization which is not a legal entity in accordance with the law of the state where such an organization is established, shall be the law of such a state. If such an organization operates on the territory of Ukraine, the legislation of Ukraine regulating

[102] On Private International Law: Law of Ukraine as of 23.06.2005. № 2709-IV // *database "Legislation of Ukraine"* / *Verkhovna Rada of Ukraine, available at*: http://zakon.rada.gov.ua/laws/show/2709-15.

[103] On Foreign Economic Activity: Law of Ukraine as of 16.04.1991. № 959-XII // *database "Legislation of Ukraine"* / *Verkhovna Rada of Ukraine, available at*: http://zakon.rada.gov.ua/laws/show/959-12

the activities of legal entities shall be applied to its activities as well, unless the law or nature of legal relations require otherwise. In other words, if a certain organization that has the characteristics of a legal entity under the legislation of Ukraine is not considered to be one under the legislation of the country of its creation, if its activity is carried out on the territory of Ukraine, then the legislation of Ukraine on legal entities shall be applied to its activities, except as otherwise provided by laws or follows from nature of the legal relations.

Article 19 of the Law stipulates that the right of an individual to conduct business is determined by the law of the state in which the individual is registered as an entrepreneur. In the absence of requirements for mandatory registration in such a state, the law of the country of the main place of business shall be applicable.

Civil legal capacity and corporate capacity shall be determined by the personal law of a legal entity (Article 26 of the Law).

According to Article 29 of the Law, a national regime for the activities of foreign persons in Ukraine is established that is business and other activities of the foreign legal entities in Ukraine are subject to the law of Ukraine on legal entities, unless otherwise provided by law. A similar provision on the regime of foreign legal entities is contained in Part 1 of Article 7 of the Law of Ukraine "On the Regime of Foreign Investment".

The said law also contains a requirement regarding the applicable law when regulating founding agreement of a legal entity with a foreign participation and that is the law of the state where legal entity is established (Article 46 of the Law of Ukraine "On Private International Law").

It should be noted that the definition of applicable to the activities of foreign legal entities law is contained not only in the domestic legislation of Ukraine, but also in international treaties. According to Article 3 of the Law of Ukraine "On Private International Law", if the international treaty provides for other rules than those established by this Law, the rules of this international treaty shall be applied.

The nationality of the company is also determined by international and bilateral treaties between Ukraine and other countries. Thus, the Multilateral Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters of the Commonwealth of Independent States

of 22 January 1993[104] states that the legal capacity of foreign legal entities is determined by the law of the country where the legal entity is established (Article 23). Speaking about bilateral agreements, an Agreement between Ukraine and the Republic of Poland on Legal Assistance and Legal Relations in Civil and Criminal Matters of 1993[105] may be an example. The provisions of this agreement regarding the legal capacity of a legal entity are identical to the provisions of the domestic law of Ukraine. The legal capacity of a legal entity is determined by the legislation of the Contracting Party in whose territory it is based (Article 21, paragraph 2, of the Treaty).

[104] Multilateral Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters: International Document as of 22.01.1993 // *database "Legislation of Ukraine"* / *Verkhovna Rada of Ukraine, available at*: http://zakon.rada.gov.ua/laws/show/997_009

[105] Agreement between Ukraine and the Republic of Poland on Legal Assistance and Legal Relations in Civil and Criminal Matters: International Document as of 24.05.1993 // *database "Legislation of Ukraine"* / *Verkhovna Rada of Ukraine, available at*: http://zakon4.rada.gov.ua/laws/show/616_174

Chapter III. Legal Characteristics of Specific Types of Business Legal Structures

3.1. Joint Stock Company

3.1.1. Concept of a Joint Stock Company and its Characteristic Features. The Notion of a Shareholder

Joint Stock Company (hereinafter – JSC) is one of the most common types of business companies in Ukraine. This type of business legal structure is rather multifunctional and is suitable for corporate investment, creation of commercial banks, insurance companies, integrated companies of the type of holding companies; as well as for nonprofit organizations (in particular, the Central Securities Depository, self-regulatory organizations of professional stock market participants, etc. have been created and functioning in this form).

At the same time, corporate legislation in Ukraine develops quite dynamically, which does not always have a positive effect on the efficient operation of joint stock companies. It is significant that recently, due to the substantial legislative changes and the adoption of the Law of Ukraine "On Joint Stock Companies" (September 17, 2008)[106], the number of JSCs in Ukraine has decreased almost twice. A large number of JSCs have chosen another, simpler form for its activities (LLC, Superaded Liabiilty Company).

Legal status of JSC is defined in Art. 3 of the Law of Ukraine "On Joint Stock Companies". *Joint-stock company* is a business company, the charter capital of which is divided into a certain number of shares of the same par value, equity rights upon which are certified by shares.

Joint stock companies by type are divided into *publicly owned joint stock companies* (hereinafter - PJSC) and *private joint stock companies* (hereinafter - PrJSC). The type of a joint stock company is specified in the charter of a joint-stock company. The public offerring of treasury shares may be carried out exclusively by a publicly owned joint stock company.

[106] On Joint Stock Companies: Law of Ukraine as of 17.09.2008. № 514-VI // *database "Legislation of Ukraine" / Verkhovna Rada of Ukraine* № 50 – 51. Art. 384, *available at*: http://zakon5.rada.gov.ua/laws/show/514-17.

If a private joint stock company intends to make a public offerring of its treasury shares, the general meeting of such a company, together with the decision to make a public offerring of treasury shares, should decide to change the type of a company from private joint stock company to publicly own joint stock company. Changing the type of a company from private joint stock company to publicly own joint stock company or vice versa shall not be considered a transformation (Article 5 of the Law of Ukraine "On Joint Stock Companies").

The joint stock company is an autonomous legal entity under private law, and therefore the general requirements established by the Civil Code of Ukraine shall be applied to it. In particular, it is characterized by the following ***features***:

1. *Ringfenced assets* – the existence of the charter capital, the size of which can not be less than the statutory minimum (1250 minimum wages based on the minimum national living wage, as in effect when creating (registrating) joint stock company).
2. *The charter capital of JSC is divided into a certain number of shares* of the same nominal value, equity rights upon which are certified by shares.
3. Exclusive constating document of the JSC is the *charter*, which specifies the legislative provisions and establishes the rules defining an internal organization, structure of JSC, the procedure for the formation and competence of its bodies, shareholders rights, the procedure for termination of JSC and other issues.
4. The joint stock company acquires *legal status and capacity* as from the date of the state registration and since then may appear in civil circulation through the system of bodies established by it.
5. JSC as a legal entity acts in a *civil circulation* on its own behalf, has its own company name, legal address (location), trademark, which makes it possible to delimit goods (services) of certain entities from similar goods (services) of others, seals, current and other types of accounts in banking institutions, etc. That is, JSC is a specified participant of a civil circulation.
6. JSC is *fully liable for obligations to the extent of its entire assets*. Shareholders bear the risk of losing their contribution to the charter capital instead of the received share.

A joint stock company is a legal entity under private law regardless of the state's share in it. For example, even if the sole founder of a joint stock company is the state – SJSC[107], which forms the charter capital at the expense of the state funds (it owns 100% of shares of JSC), JSC remains the legal entity under private law, but not public law.

The notion of a shareholder. According to Art. 4 of the Law of Ukraine "On Joint Stock Companies", the *shareholders of joint stock company* are individuals or legal entities, as well as the state represented by the body authorized to manage state property, or a territorial community represented by the body authorized to manage municipal property who are shareowners.

A joint stock company can not have another business company as a sole member if the latter consists of one participant only. JSC can not have in its composition only shareholders which are legal entities, the sole member of which is the same person.

For a more complete understanding of the concept of "***shareholder***", first of all, the requirements of the Civil Code of Ukraine[108], which apply to the participant in civil-law relations, including the members of joint stock companies and other business companies shall be taken into account. According to Art. 2 of the Civil Code of Ukraine they are individuals and legal entities, the state Ukraine, the Autonomous Republic of Crimea, territorial communities, foreign states and other persons under public law. These persons must possess civil legal capacity.

The ability of an *individual* to be a member (founder) of an organization of a corporate type is determined by the extent of his/her *passive* and *active capacity* established by the Civil Code of Ukraine. It extends to the possibility of implementing his/her civil law rights, including equity rights.

Item 3 of Part 1 of Art. 32 of the Civil Code of Ukraine provides for the right of a minor (aged from 14 to 18 years) to be a member (founder) of legal entities, if it is not prohibited by law or constating instruments of a legal entity. A full civil capacity shall be granted to an individual who has reached the age of 16 and who wishes to engage in entrepreneurial activity, if prior written consent of his/her biological or adoptive parents,

[107] SJSC – state joint stock company.

[108] Civil Code of Ukraine as of № 435-IV 16.01.2003, *available at*: http://zakon5.rada.gov.ua/laws/show/435-15/page.

trustee or Child Protection Services. Full civil capacity granted to an individual extends to all civil rights and obligations (Part 3, 4, Article 35 of the Civil Code of Ukraine). Consequently, *minors* may be shareholders of the JSC, but they can not independently exercise their rights on the basis of the said grounds; their representatives are their biological or adoptive parents, guardians. The same rule applies to disabled and partially incapacitated persons.

The ability of a *foreign citizen* to acquire the status of a member of a bussiness company is determined by the lex personalis of such a citizen. In accordance with Part 1 of Art. 16 of the Law of Ukraine "On Private International Law"[109] the personal law of an individual is determined by his citizenship. The scope of equity rights is determined by the law of the country which the legal entity belongs to. In accordance with Part 1 of Art. 25 of the said Law the personal law of a legal entity is the law of the state of location of the legal entity.

Shareholders (members of JSC or other companies) may also be *legal entities* established and registered in accordance with the procedure established by law (Article 80 of the Civil Code of Ukraine). A legal entity is endowed with civil passive and active capacity, may sue and be sued in court. Participation of a legal entity in corporate relations is possible in double "capacities": first, as a party to relations with its own founders and members; and secondly, as a founder or a member of another corporate organization. In both cases, legal entity becomes a bearer of civil rights and obligations of pecuniary and non-pecuniary nature.

A discrete role in corporate relations is played by a *state* that acts in corporate legal relations both as an authority, agency or public officer and as a direct participant (shareholder) acting through dedicated government agencies and its officials. The management of equity rights of the state is carried out in the manner prescribed by law (in particular, the Law of

[109] On Private International Law: Law of Ukraine as of 23.06.2005. № 2709-IV // *database "Legislation of Ukraine"* / *Verkhovna Rada of Ukraine, available at*: http://zakon.rada.gov.ua/laws/show/2709-15.

Ukraine "On the Management of State Property Objects"[110], "On the State Property Fund of Ukraine"[111]).

If there are no testamentary or legal heirs, or if they are divested of the right to succession, in case of non-acceptance of inheritance, or refusal from acceptance, the court shall declare the inheritance escheat by application of the relevant local government at the place of opening of the inheritance. Inheritance declared escheat by the court shall be owned by the territorial community at the place of opening of the inheritance. Since the composition of the inheritance may include shares, then subject to the provisions set forth in Art. 1277 of the Civil Code of Ukraine, the new owner of the shares, and, accordingly, the shareholders of the JSC may become territorial communities.

3.1.2. The Procedure for Incorporation of a Joint Stock Company. The Capital of the Company

Incorporation of a joint stock company, as well as any legal entity, is a multi-stage process, which covers both the actual actions and the legal actions of the founders.

The general procedure for registration of JSC as a legal entity and requirements for processing documents submitted to the state registrar is contained in the Law of Ukraine "On State Registration of Legal Entities, Individual Entrepreneurs and Public Associations"[112].

The *main stages* of incorporation of JSC are detailed in Part 5 of Art. 9 of the Law of Ukraine "On Joint Stock Companies": 1) approval of a decision on incorporation of a joint stock company and on closed (private) placement of shares by a meeting of founders; 2) filing of an application and all required documents for registration of securities issue with

[110] On the Management of State Property Objects: Law of Ukraine as of 21. 09. 2006. № 185-V, *available at*: http://zakon0.rada.gov.ua/laws/show/185-16

[111] On the State Property Fund of Ukraine: Law of Ukraine as of 09. 12. 2011. № 4107-VI, *available at*: http://zakon5.rada.gov.ua/laws/show/4107-17

[112] On State Registration of Legal Entities, Individual Entrepreneurs and Public Formations: Law of Ukraine as of 15.05.2003. *Bulletin of the Verkhovna Rada of Ukraine* 2003. № 31 – 32, *available at*: http://zakon4.rada.gov.ua/laws/show/755-15. (application date dated 28.03.2018).

NSSMC; 3) registration of the securities issue and issuance of a temporary certificate of registration of securities issue by NSSMC; 4) assignment of the International Securities Identification Number (ISIN) to shares; 5) conclusion of an agreement on service of the securities issue with a Central Depository of Securities; 6) closed (private) placement of shares among founders of the company; 7) payment of the 100% share nominal value by founders; 8) approval of the results of closed (private) placement of shares among founders of the company by the company foundation meeting, approval of the company charter as well as approval of other decisions provided for by law by the foundation meeting; 9) registration of the charter by the state registration bodies; 10) filing a report on the results of closed (private) placement of shares with the National Securities and Stock Market Commission; 11) registration of the report on the results of closed (private) placement of shares by the National Securities and Stock Market Commission; 12) receipt of a certificate on state registration of the securities issue; 13) issuance of the documents proving shares ownership to founders of the company.

At the same time, actions violating the procedure for the incorporation of a joint stock company established by the said Law shall be grounds for the decision of the NSSMC to refuse to register the report on the results of the closed (private) placement of shares. In case of such a decision, the NSSMC shall apply to the court for the liquidation of the joint stock company.

Dwelling on certain aspects of the incorporation of JSCs, it should be noted that first of all, founders should hold a *closed (private) placement of its shares*.

According to Part 4 of Article 9 of the Law of Ukraine "On Joint Stock Companies" in the course of JSC incorporation, its shares shall be placed exclusively among the founders by the *private placement* method. *Public* placement of JSC shares shall be possible following the receipt of the shares' first issue registration certificate.

Stages of securities placement are defined by the Law of Ukraine "On Securities and the Stock Market"[113]. In particular, Art. 28 of the said

[113] On Securities and Stock Market: Law of Ukraine as of 23.02.2006. № 3480-Iv. *Bulletin of the Verkhovna Rada of Ukraine*. 2006. № 31. Art. 268, *available at*: http://zakon4.rada.gov.ua/laws/show/3480-15. (application date dated 28.03.2018).

Law establishes the requirements for private placement of shares. The conclusion of contracts with the first owners during the private placement of securities is carried out by the issuer independently or through the underwriter, who has concluded a contract on underwriting with the issuer. This agreement must conform to the requirements of the model agreement approved by the NSSMC.

During the private placement of securities, contracts with the first owners shall be concluded before the date specified in the prospectus of the issue of securities, but not later than two months from the date of commencement of placement of securities determined by the decision on the issue of such securities. The actual number of placed securities is indicated in the *report on the results of the private placement of securities*, which is approved by the issuing authority authorized to make such a decision, and submitted by the NSSMC. The number of placed securities can not exceed the number of securities specified in the prospectus of its issue, but may be less than the number of securities specified in the prospectus for its issue.

In the *case of the establishment of JSC by a sole incorporator* decisions that must be taken by the founders' meeting, are taken by this person at his/her sole discretion and are documented with a *memorandum of association of a company*. If the sole founder of the company is an individual, its signature on the decision to establish a company is subject to a notarial certification.

The founders' meeting of the joint stock company shall be held within three months of the date of full payment for the shares by its founders. At the meeting, a number of issues are resolved regarding the company incorporation, as well as the election of members (chairmen) of the bodies (collegial executive bodies) of the company. In particular, approval of valuation of the property contributed by the founders as payment for shares of the company; approval of the company's charter; formation of the company's management bodies; authorization of a representative(-s) to carry out further activities for the company incorporation; approval of the results of the share placement; electing members of an audit commission (auditor), etc.

The number of votes that a founder has at the foundation meeting shall be determined by the number of the company's shares allocated for purchase by the founder pursuant to the founders' agreement.

Failure to approve the charter of a joint stock company by the founders' meeting shall be considered a refusal by its founders to incorporate this company and the grounds for returning to the founders the contributions made them as payment of shares. The return of contributions is made within 20 working days from the date of the founders' meeting, in which no decision was taken on approval of the charter of a joint stock company (Article 10 of the Law of Ukraine "On Joint Stock Companies").

Payment of shares by founders of a joint stock company and their liability under the obligations that arose before the state registration of a company.

Payment of the shares placed during incorporation of a joint stock company may be made in cash or with property, property and non-property rights, securities (except for debt securities issued by the founder and promissory notes).

The market value of property performed under the Law of Ukraine "On Joint Stock Companies", other legislative acts or the company charter shall be determined through independent valuation to be performed in accordance with the Law of Ukraine "On Evaluation of Property, Property Rights and Professional Evaluation Activities"[114].

Every JSC founder shall pay his/her subscription in full prior to the date of approval of the result of the first share placement. Failure to pay the founders' subscription in full prior to the date of approval of the result of the first share placement shall be deemed as proof that the JSC has not been incorporated. JSC shall have no right to perform operations other than those related to its incorporation, until 50% of its statutory capital has been paid in.

Prior to the registration of the share placement report, the founder shall have all the rights assigned by his/her shares, except the right to sell or encumber them.The document certifying share ownership of a company founder shall be issued to him/her within 10 business days from the date of receipt by the company of a certificate of state registration of the securities issue.

It should be noted that the stage of registration of JSCs, or amendments to the charter of JSCs in state registration bodies, is more

[114]On Evaluation of Property, Property Rights and Professional Evaluation Activities: Law of Ukraine as of 12.07.2001. № 2658-III, *available at*: http://zakon5.rada.gov.ua/laws/show/2658-14

appropriate after the registration of the securities placement report by NSSMC; obtaining a certificate of state registration of the securities issue is to be a final stage. This would largely prevent the abuse of shareholder rights during the incorporation of the JSC.

The founders of the joint stock company bear *joint responsibility* under the obligations related to the company's incorporation that arose before its state registration. The general shareholder meeting which approves such obligations of the company founders shall be held within six months after state registration of the company. Information on such obligations of the company shall be reflected in the company charter.

In addition to civil liability, the founders may incur other types of liability at the stage of company's incorporation. In particular, the Criminal Code of Ukraine[115] provides for liability for the offense in the securities market: for the placement of securities without registration of its issue (Article 223 of the Criminal Code); forgery of documents submitted for registration of securities issue (Article 223-1 of the Criminal Code), etc.

The Company's Capital

1. Charter Capital	***2. Equity Capital***	***3. Reserve Capital***
Determines the minimal amount of company assets *guaranteeing the interests of its creditors*.	*Net assets value*	Formed to *cover unanticipated losses of the company* as well as to pay dividends under preferred shares. The Law may provide for other directions of using the company's reserve capital.
The minimal amount of a joint stock company's charter capital as of the date of its establishment (state registration) shall be	Is the *difference* between the total value of the assets of the company and the value	Formed in the amount of *not less than 15 percent of its charter capital* of the company at the expense of a retained income through annual deductions from the company's net profit. Until the amount of the reserve capital

[115] Bulletin of the Verkhovna Rada of Ukraine. 2001. N 25-26. Art.131.

1,250 minimal wages.	of its obligations to other persons.	established by the charter has been reached, the amount of annual deductions shall be not less than 5 percent of the amount of the company net profit, if available, for a year.
Formation of the charter capital is a *prerequisite* for the establishment of a company and its functioning. Reduction of the charter capital by a JSC below the amount established by law shall result in the company liquidation.	By availability	A joint stock company, which carries out the placement of common and preferred shares, is *required to form* a reserve capital. If placing only common shares, formation of reserve capital is the *right* of the company, but not its duty

3.1.3. Governing Bodies of the JSC and its Officers

Proceeding from the current regulatory enactments of Ukraine, it can be stated that there is a distinction between such concepts as *the bodies of the company* and *company's governing bodies*. First traditionally include *all the bodies* of a joint stock company: higher (general meeting), executive (director, director general, management board), and supervisory bodies (supervisory board, audit commission), etc. According to Article 97 of the Civil Code of Ukraine second group include the *general meeting* of its *members* and the *executive body*, unless otherwise provided by law.

The last citation may relate to the requirements of the special legislation regulating various areas of JSC activities. For example, the Law "On Collective Investment Institutions" (hereinafter - CII) provides for only such bodies[116] of a corporate investment fund as a general meeting and a supervisory board. The management of such a fund shall be carried

[116] which is created in the form of a joint stock company.

out by an asset management company, which is entrusted with certain functions of the executive body which is absent in the corporate fund.

General meeting shall be *the highest body* of a joint stock company. A joint stock company shall be liable to convene a general meeting annually (annual general meeting). An annual general meeting shall be held no later than on the 30th of April of the year following the reporting year. The charter may provide for more frequent convening and holding of the general meeting due to the complex company's operations. The powers to decide on matters within the exclusive competence of the general meeting shall not be delegated to other bodies of the company (Part 2 of Article 159 of the Civil Code of Ukraine). All other general meetings, other than an annual one, shall be deemed an *extraordinary* general meeting.

Activities of the convening and holding of the general meeting are carried out by the supervisory board of the JSC.

A general meeting shall be held at the expense of funds of the joint stock company. In case extraordinary general meeting is held on the initiative of shareholder (shareholders) the expenses related to organization, preparation and holding of such a general meeting may be reimbursed from the funds of such a shareholder (shareholders).

Depending on whether particular issues can fall within the exclusive competence of other bodies of the company, they are divided into two groups*: those that belong to the exclusive competence of the general meeting, and those that do not*. In particular, the first group according to Part 2 of Art. 159 of the Civil Code of Ukraine includes four matters: amendment of the company's charter, including changing of the amount of its statutory capital; election of members of the supervisory board, as well as creation and recall of the executive and other bodies of the company; approval of the annual financial accounts and distribution of the company's profits and losses; making a decision on the liquidation of the company.

According to Part 2 of Article 33 of the Law of Ukraine "On Joint Stock Companies" the following shall belong to the *exclusive competence of the general meeting*: 1) identification of the main areas of the joint stock company operations; 2) introduction of changes in the company's charter; 3) approval of a decision to cancel bought out shares; 4) approval of a decision to change the company type; 5) approval of a decision on

placement of shares; 6) approval of a decision on placement of securities that can be converted into shares; 7) approval of a decision to increase the company's statutory capital; 8) approval of a decision to decrease the company's statutory capital; 9) approval of a decision to split or consolidate shares; 10) approval of the by-laws on the company general meeting, its supervisory board, the executive body and the audit commission (auditor) of the company and also amending them; 11) approval of other company bylaws, unless specified otherwise by the company charter and others.

The general meeting creates the basic legal ground for the activities of other bodies of JSC, on the basis of which it should be managed by a specially created executive body. General meeting is the body created for expressing the common (united) will of the members (shareholders). All members of the JSC have the right to participate in the general meeting. Unlike other bodies, this one is not elective. It is participation in general meeting allows the company members or their representatives to exercise their participatory interests. The common will of the company members is expressed directly in the general meeting, comparing to other bodies of the company, where such a will finds expression through the positions the members gain[117].

The general meeting agenda (Article 37 of the Law of Ukraine "On Joint Stock Companies") shall be approved by the company supervisory board in advance, and in case of convening an extraordinary general meeting on the shareholders' demand in the cases envisaged by part 6 of Article 47 of this Law it shall be approved by the shareholders that demand it.

All shareholders (including the owners of preferred shares) have the right to participate in general meeting, regardless of the number and categories of shares they own. However, the judicial review of resolving corporate disputes shows that, on the one hand, courts consider it a violation if a notice of holding a general meeting is not sent to shareholders; on the other hand, the courts also take into account the fact that the presence of minority shareholders in the general meeting can not significantly affect the voting in the general meeting.

[117] Corporative management. Monograph under the general editorship of Professor I.V. Spasibo-Fateyeva. - Kharkiv: Law, 2007

Explanation of the voting procedure, vote counting and other issues associated with ensuring voting at a general meeting shall be given by the *tabulation commission* elected by the general shareholder meeting (constituent meeting). The authority of the tabulation commission may be delegated by agreement to the depository providing additional services to the joint stock company, in particular regarding the performance of the functions of the tabulation commission.

In the joint stock company with more than 100 shareholders the tabulation commission membership shall not consist of less than 3 persons. The persons who are members of or candidates to the company bodies shall not be included in the tabulation commission (Article 44 of the Law of Ukraine "On Joint Stock Companies").

All issues discussed at a general meeting, main points of speeches, voting results, decisions approved by general meeting shall be entered in the minutes of the general meeting and shall be signed by the chair and the secretary of the general meeting; when signed by the chair and the secretary of the general meeting, shall be filed, sealed with a company stamp and fixed with a signature of the chairman of the company executive body (in case of a collegial executive body) or with that of a single executive body. According to judicial review, the minutes is not a transcript, that is, verbatim fixation of all the speeches in it is inappropriate.

Instead, the minutes of the general meeting shall contain the following information provided by Art. 46 of the Law of Ukraine "On Joint Stock Companies": date, time and venue of holding the general meeting; date of compiling a list of the shareholders entitled to participate in the general meeting; total number of the persons put on the list of the shareholders entitled to participate in the general meeting; quorum of the general meeting; who spoke in the main report, its content; debates (discussion), questions and answers; voting results, decisions approved by the general meeting.The general meeting minutes and its annexes shall be drawn up within 10 days from the date of closing the general meeting.

Executive bodies of the JSC are the traditional bodies of the corporation, which represent the latter in civil legal relations and carry out the function of its direct management.

Executive body shall decide on all issues of activity of JSC except for the matters falling within the exclusive competence of the general

meeting and the supervisory board; shall be accountable to the general meeting and to the supervisory board and shall organize implementation of their decisions; shall act on behalf of the JSC within the limits established by the company's charter and the law.

Principles of Joint Stock Company Executive Body Operation are provided by Art. 58 of the Law of Ukraine "On Joint Stock Companies".

Part 2 of Article 165 of the Civil Code of Ukraine and the Law of Ukraine "On Joint Stock Companies" provides different models of the executive body of the JSC. It can be *collective* executive body (board of directors, directorate), or *sole* executive body (director, director general).

Any individual who has full legal capacity and is not a member of the supervisory board or the audit commission may be a member of the joint stock company executive body.

According to Art. 52 of the Law of Ukraine "On Joint Stock Companies", the formation of the executive body of JSC is attributed to the competence of the supervisory board. The current legislation of Ukraine does not stipulate requirements regarding the number and composition of the executive body of JSC. These issues should be specified in the statute or internal regulations on the executive body of the JSC.

The rights and duties of members of the joint stock company executive body shall be stipulated by the Law of Ukraine "On Joint Stock Companies", other legislative acts, the company charter or by-law on the executive body and also a labor contract concluded with each member of the executive body. On behalf of the company a labor contract shall be signed by the chairman of the supervisory board or the person authorized to do it by the supervisory board.

On demand of the company bodies and officers the executive body shall be obliged to afford an opportunity to review information on the company operations within the limits established by the law, the charter and by-laws of the company

The Law of Ukraine "On Joint Stock Companies" regulates the activity of *collegial* (Article 59) and *sole* (Article 60) executive body and the procedure for making decisions by those by separate provisions.

An important point is the delineation of the competence of the collegial executive body and its chairman. The chairman of the collegial executive body shall be elected by the company supervisory board unless

otherwise envisaged by the charter of the company, shall organize work of the collegial executive body, shall have the right to act on behalf of the company without a power of attorney in compliance with the decisions approved by the collegial executive body. Another member of the collegial executive body may be also granted with these powers in accordance with the procedure established by the legislation of Ukraine if this is specified by the company charter.

The person exercising the powers of the sole executive body shall be entitled to act without a power of attorney in the joint stock company's name, particularly to represent its interests, make legal transactions in the company's name, issue orders and give instructions mandatory for all company's employees.

If the person exercising the powers of the single executive body is unable to exercise his/her powers, these powers shall be exercised by the person appointed by him/her unless otherwise envisaged by the charter or by-law on the executive body. If to consider the head of the company as an employee, who must necessarily be concluded a labor contract (agreement) with, the issuance of a power of attorney to another person is not possible, since under a labor contract, the employee is required to personally perform his/her labor duties. However, this does not exclude the possibility of issuing a power of attorney to commit individual acts on behalf of a legal entity (for example, signing a contract). But if there is a transfer of powers in accordance with the order, there are no obvious restrictions for the head of the company – he may appoint an acting duty instead of himself, transfer most of his powers to his appointed deputies.

The powers of the chairman of the collegial executive body (the person exercising the powers of the sole executive body) shall be terminated by a decision of the supervisory board if this issue has not been pertained by the company charter to the competence of the general meeting (Article 61 of the Law of Ukraine “On Joint Stock Companies”). In accordance with the same procedure, the powers of a member of the executive body are terminated, but, in addition to the aforementioned, it is also established by an agreement with him/her.

Practically, there are various manifestations of abuses by officers of the executive body. They are particularly topical when a person acts in a way that is seriously prejudicial to the company interest causing serious damage to the company which can not always be recovered because

certain actions are committed as the law permits. For example, the following case described by the adviser of the Law Firm "Sayenko Kharenko" Leonid Antonenko shall be of a great interest. According to the case the director of one of the transport enterprises "X", without actually violating the law, has done definite actions, to his/her own advantage. Such actions eventually caused significant damage to the company. The enterprise was engaged in transportation services. The number by which one could order services was quite convenient for memorization. The company's officer created an alternative enterprise, for our purpose – "M", in the same area and gave it the mentioned number. It is clear that, along with this number, the newly created company "M" has acquired customers and reputation. Thus the director of the company has proved to be a "capable businessman", however, such actions can not be allowed when performing poewrs of the executive body of the company, since Part 3 of Art. 92 of the Civil Code of Ukraine establishes principles of good faith, reasonableness; as well as the moral principles of society, which no one canceled yet.

Unfortunately, until now, until today Ukraine, unlike England and Russia, has not introduced institute for the *disqualification of officers of the company*[118] which would allow to form the respective list of such (register accessible for public); apply appropriate sanctions for abuse and violation; deprive such persons of the opportunity to hold corresponding positions for a certain period of time. Such a need is long overdue; but to bring these individuals to responsibility, as indicated by judicial practice is rather difficult. Introduction of such an institute in Ukraine could become an efficient and effective step to prevent violations committed by officers of not only joint stock but also other business companies. The functions of creating a register of disqualified persons, in my opinion, could be put on the state registration body. Accordingly, for this purpose, it is necessary to enter the corresponding post, for a person who could control the introduction of amendments to such a register. The mechanism for

[118] This concept is differently defined in countries that have embraced this experience. In the Ukrainian interpretation, it, in particular, is defined as a punitive-preventive compensatory remedy applied through a court proceeding to a person duly authorized to commit certain organizational, economic or economic-property actions, which is to prohibit such person to occupy any positions for a specified period.

bringing an officer to responsibility for such actions and the kind of such a responsibility is particularly topical[119]. Therefore, first of all, to make such changes in the current legislation there should be the will of the legislator. Moreover, in the academic circles and among practicing lawyers[120], this issue has long been on the agenda.

The Joint Stock Company Supervisory Board. The supervisory board shall be a collegial body that provides protection of the interests of the company shareholders and controls and regulates operation of the executive body. It should be noted that the current legislation of Ukraine does not contain a unified definition of this body. Thus, according to the Constitution of Ukraine, the Civil Code of Ukraine and the Law of Ukraine "On Joint Stock Companies", this body is called the Supervisory Board, according to the Commercial Code it is called "Board of the Company (Supervisory Board)", according to the Law "On Banks and Banking" it is called the Supervisory Board, etc.

Part 2 of Article 52 of the Law of Ukraine "On Joint Stock Companies" provides for a rather broad list of powers that fall within its exclusive authority. In particular, it includes following issues: 1) approval of the provisions regulating the matters related to the company operations except those that are assigned to the exclusive authority of the general meeting, and those that were passed by the decision of the supervisory board for approval by the executive body; 2) preparation of an agenda of the general meeting, approval of a decision on the date of its holding and on including proposals in the agenda, except for convening an extraordinary general meeting by the shareholders; 3) approval of a decision on holding ordinary and extraordinary general meetings in accordance with the charter of the company; 4) approval of a decision on sale of the shares bought out earlier by the company; 5) approval of a decision on placement of other securities by the company other than shares; 6) approval of a decision on buy-out of the securities placed by the company other than shares; 7) approval of a market value of the property;

[119] According to the experience of the countries I have mentioned, it can be both administrative responsibility for certain actions, and civil or criminal - for more serious misconduct.

[120] See Concept of Development of Corporate Legislation of Ukraine. Approved by Decision 1 of the Council of the Corporate Law Committee 1 of the Ukrainian Bar Association as of 03. 10. 2007. // Official site - uba.ua

8) election and revocation of the powers of the chairman and members of the executive body; 9) approval of the terms of contracts which shall be concluded with members of the executive body, determination of the amount of their compensation and others.

In the publicly owned joint stock companies and banks the establishment of a supervisory board shall be mandatory. In the private joint stock companies having 10 or more shareholders all being affiliated with each other – establishment of a supervisory board shall not be mandatory. In the private joint stock company in the absence of a supervisory board its authorities shall be exercised by the general meetings (Article 51 of the Law of Ukraine "On Joint Stock Companies")

Law of Ukraine "On Joint Stock Companies" contains certain articles regulating authority of the chairman and members of the supervisory board; the procedure and manner of their election and termination (including early termination) powers; meeting of the supervisory board; as well as the possibility of establishing committees of the supervisory board and the introduction of the corporate secretary.

The operating procedure, payments of compensation and liabilities of members of the supervisory board shall be specified by this Law, the company charter, by-law on public company supervisory board and also by a contract concluded with a member of the supervisory board. Such a contract shall be signed on behalf of the company by the head of the executive body or another person authorized by the general meeting on the terms approved by the *general meeting*.

Unlike the *chairman of the supervisory board*, *elected by the members of the supervisory board*, *the supervisory board is elected by the general meeting* and is accountable to it. Members of the publicly owned company supervisory board shall be elected exclusively by cumulative vote.

On behalf of legal entities, the state, or a territorial community, there are certain individuals who are elected to the supervisory board.

By the decision of the NSSMC as of 01.06.2017 No. 402, the *Requirements for information on candidates for membership of the joint stock company* were approved. These requirements shall be applied to the members of the executive body of JSC as well[121].

[121] Official site of the NSSMC - nssmc.gov.ua

In accordance with clause 1 of the Requirements when electing the members of the joint stock company body by cumulative voting the following information for each candidate shall be contained in a ballot for cumulative voting.

1) As for candidates *individuals*: surname, name, patronymic (if any); year of birth; the person (persons) who submitted a proposal regarding the given candidate (for the election of members of the supervisory board - with the surname, name, patronymic (if any) / the name of the shareholder, the size of the block of shares that he/she owns); the number, type and / or class of shares of a joint stock company to the body of which he/she is elected belonging to a candidate; education (full name of the educational institution, year of graduation, specialty, qualification); place of work (full and / or part-time), positions held by a candidate in legal entities; information on the length of service during the last five years (period, place of employment, position held); presence (absence) of unpaid (not kept) conviction; presence (absence) of a prohibition to occupy certain positions and / or engage in certain activities; information on if the candidate is an affiliated person of a joint stock company to the body of which he/she is elected; following information: on the shareholders of the company - owners of 5 and more percent of ordinary shares (for publicly owned joint stock companies) or 10% or more of ordinary shares (for private joint stock companies) that are affiliated persons to the candidate, with the surname, name, and patronymic (if any) / the name of each shareholder, the size of the block of shares they possess; officers of the joint stock company, that are affiliated persons to the candidate, with the surname, name, and patronymic (if any), position of the officers of the joint stock company; information on whether a candidate for membership in a supervisory board is a shareholder, representative of a shareholder or a group of shareholders (with the surname, name, patronymic (if any) / the name of this shareholder or shareholders, the size of the block (s) of the shares that he/she owns or whether he/she is an independent director; the existence of a written application of the candidate for consent to be elected as a member of the joint stock company body.

2) As for candidates *legal entities*: full name; location; EDRPOU (Ukrainian “Unified Register of Businesses and Organizations”) code; person (persons) who submitted a proposal regarding the given candidate;

the number, type and / or class of shares of a joint stock company to the body of which it is elected belonging to a candidate; whether the candidate is an affiliated person of a joint stock company to the body of which it is elected; shareholders of the company that are affiliated persons to the candidate; information on the individual (individuals), which the candidate – legal entity intends to authorize to represent its interests in the body of the joint stock company; the presence of a written application of the candidate for consent to be elected as a member of the joint stock company body.

The legislator also imposes certain *restrictions on the members of the supervisory board*. They can not be civil servants, except when they perform the functions of management of equity rights of the state and represent the interests of the state or territorial community; persons who are forbidden to engage in certain activities by the court and persons with outstanding conviction for crimes against property, economic crimes or malfeasants; persons who are members of the executive body and / or members of the audit committee (auditor) of the company.

Along with the specified requirements for candidates, it should be noted that perhaps the biggest problem on a practical level is the possibility of ensuring the independence of the supervisory board from the executive body. As the researchers aptly note, in present-day conditions in Ukraine, the supervisory board can actually counteract the executive body in only two cases: if the company was created through the process of privatization (corporatization) and has a state stake in the charter fund (capital), or if the company has a certain parity of forces (there is no controlling shareholder or other person who can control the company). In these cases, independent persons may enter the supervisory board. However, in Ukraine, as well as in other countries of continental Europe, the tendency to concentrate control over a company is in the hands of a single person or group of related persons can be observed. Thus, a truly independent supervisory board does not become a reality in the presence of a controlling shareholder (group of shareholders) in the company[122].

At the same time, the legislator has taken certain steps in this direction. In accordance with Article 51 of appendix 1 of the Law of Ukraine “On Joint Stock Companies”, the supervisory board of a publicly

[122] Corporative management. Monograph under the general editorship of Professor I.V. Spasibo-Fateyeva. - Kharkiv: Law, 2007

owned joint stock company and the bank shall annually prepare a report on its work. The report of the supervisory board of the publicly owned joint stock company and the bank shall be a separate part of the annual report of the company and is subject to disclosure. The report shows the assessment of the supervisory board work. The report shall contain information on the internal structure of the supervisory board, the procedures used in its decisions, including the indication of how the activities of the supervisory board led to changes in the financial and economic activities of the company.

To ensure its activities, the JSC supervisory board may establish temporary *committees* from among its members to study and prepare the matters pertaining to the authority of the supervisory board, in particular, the *Committee of the Supervisory Board on issues of appointment in the company*. A procedure of establishment and operation of the committees shall be specified by the charter or by-law on the supervisory board of the company as well as by-law on the committees of the supervisory board, approved by the supervisory board of the company.

Supervisory board committees carry out its duties within its competence and report to the supervisory board on the results of its activities at least once a year in the manner determined by the supervisory board, except for the audit committee, which must report at least once every six months..

In order to ensure operation of the audit committee the supervisory board may approve a decision on introducing a position of an *internal auditor* (establishment of the service of internal audit) in the company; at the suggestion of the chairman of supervisory board – to elect a *corporate secretary* which shall be the person responsible for interaction of the joint stock company with the shareholders and/or investors. Therefore, it is necessary to briefly characterize the activities of these officers.

According to Art. 75 of the Law of Ukraine “On Joint Stock Companies”, annual financial reporting of a publicly owned joint stock company shall be subject to mandatory inspection by *independent auditors*. They bear the main burden of checking financial and economic activity.

They are in no legal relationship with the company (other than the audit contract), must comply with the requirements of the Law of Ukraine "On Audit of Financial Reporting and Auditing Activities"[123].

Officials of the company shall be obliged to provide an independent auditor with access to all documents required for an inspection of the results of the company financial and economic activity.

The following persons may not be independent auditors (audit firm):

1) affiliated persons of the company;

2) affiliated persons of a company's official;

3) the person who provides consultative services to the company.

In addition to the data envisaged by the legislation on audit activities the auditor's opinion shall contain information envisaged by part 2 of Article 74 of this Law and assessment of completeness and credibility of the reflection of financial and economic standing of the company in its financial statements.

Audit of the joint stock company operation also shall be conducted on demand of the shareholder(s) who are owner(s) of more than 10% of the company shares. In such a case a shareholder(s) shall conclude independently a contract with the auditor (audit firm) selected by him/her on auditing financial and economic operation of the company with the scope of the inspection indicated. Expenses related to the conduct of audit shall be placed on the shareholder(s) on whose demand the audit was conducted. The general shareholder meeting may approve a decision on compensation of the expenses of the shareholder(s) for such audit.

The company shall, within 10 days from the date when a shareholder's request for the audit is received, give the auditor an opportunity to hold such an audit. Within the above timelimit, the executive body shall give the shareholder(s) response with information on the audit start date.

An audit requested by a shareholder(s) owning over 10% of the company's shares may be conducted twice a year at the most.

In the event of auditing the company upon the shareholder(s) request who owns over 10% of the company's shares, the company's executive

[123] On Audit of Financial Reporting and Auditing Activities: Law of Ukraine as of 21.12.2017. № 2258-VIII, *available at*: http://zakon2.rada.gov.ua/laws/show/2258-19

body shall provide authorized copies of all documents requested, within five days from the date when the auditor's request is received.

An internal auditor (the service of internal audit) shall be appointed by the supervisory board and shall be subordinated and accountable directly to a member of the supervisory board – *the head of the audit committee* (paragraph 3 of part 1 of article 56 of the Law of Ukraine "On Joint Stock Companies")

An important step in ensuring the effective audit and transparency of information on publicly owned joint stock companies is the introduction of International Financial Reporting Standards (hereinafter - IFRS) in our country. In this regard, a Memorandum of Cooperation, Collaboration and Coordination on the Implementation of IFRS in Ukraine was concluded between the Ministry of Finance of Ukraine and the National Bank of Ukraine. This document was subsequently supported and signed by the USAID Financial Sector Development Project (FINREP) (hereinafter referred to as the FINREP project), the Federation of Professional Accountants and Auditors of Ukraine (FPBAA) and a number of other companies and educational institutions.

Support to the Ministry of Finance of Ukraine in the process of developing, launching and operating the relevant Internet resource has been provided by the FINREP Project, funded by the United States Agency for International Development (USAID) and implemented by Booz Allen Hamilton Inc. (Booz Allen Hamilton Inc.). One of the areas of FINREP's activities in the financial sector is to assist in the implementation of IFRS in Ukraine.

It should be noted that the Ministry of Finance of Ukraine has established the Council of International Standards, which transposes the IFRS developed by the London Committee, and which are in force since 01.01.13 in Ukraine. Our state is the 23rd country that adopted the IFRS, which, according to experts, should have a positive impact on its investment climate. Experts consider the example of China to be an exemplary one in this regard, as China successfully "passed the exams" according to international standards, and over a short period of time, 1,000 European innovation and investment projects have passed to China[124].

[124] On the basis of the materials of the reports of specialists and participation in the Regional Workshop "IFRS Reporting: Regulatory Requirements and Practical Aspects», held jointly by the National Securities and Stock Market

Obviously, in spite of the positive aspects this reporting assumes, such experience may also face some practical issues in Ukraine, which will be due, in particular, to the unnecessary expenses of the publicly owned joint stock company for auditors (both internal and external), which must confirm the issuer's reporting by their opinion.

Therefore, in our state, all publicly owned joint stock companies had to submit its financial statements for the first time by 30.04.2013 in accordance with international requirements - IFRS. The peculiarity of such reporting is that it must be confirmed by an auditor's report, both internal and external auditor. For failure to submit financial statements in accordance with new requirements, issuers are subject to penalties.

In addition to the independent audit performed by the auditor and other officials of the JSCs within its competence, the external control over the activities of the JSC is also carried out by the National Securities and Stock Market Commission. According to Article 7 of the Law “On State Regulation of the Securities Market in Ukraine”, the Commission carries out state regulation and control over the issue and circulation of securities and derivatives in the territory of Ukraine, as well as in the field of joint investment; is also intended to protect the rights of investors through the application of measures to prevent and terminate violations of the legislation on the securities market, the application of sanctions for violation of legislation within its competence. These tasks of the NSSMC may be carried out by monitoring the activity of the bodies of the JSC. According to Article 8 of the said Law, the NSSMC controls the authenticity and disclosure of information provided by the JSC; conducts inspections and audits of financial and economic activity of the JSC independently or together with other relevant bodies; sends them binding instructions for the removal of violations of the securities legislation and requires the submission of the necessary documents in accordance with the current legislation; sends materials to law enforcement agencies on the facts of offenses for which criminal and administrative liability is foreseen, in case if the NSSMC is not competent to impose administrative penalties for the relevant offenses, etc. Therefore, this incomplete list of NSSMC's

Commission, the Federation of Professional Accountants and Auditors, the Chamber of Auditors of Ukraine and the USAID Financial Sector Development Project (FINREP -II), Ivano-Frankivsk, April 1, 2013.

powers indicates that this state body is endowed with significant powers to control the activities of the JSC bodies.

To date, only a sinlge article (Article 56 of the Law of Ukraine "On Joint Stock Companies") regulates the activities of the *corporate secretary*. So, according to Part 4 of this Article the supervisory board at the suggestion of the chairman of supervisory board has the right to elect a corporate secretary. The corporate secretary is the person responsible for interaction of the JSC with the shareholders and/or investors. Hereon the legal regulation of activities of the corporate secretary in Ukraine is exhausted. Instead, the rest of its functions are prescribed in the Regulations on the Corporate Secretary adopted by the JSC at its own convenience. In practice, among its main sections, one can mention those that contain information on the order of his/her dismissal and appointment and the duration of his/her powers; early termination of his/her powers; competence and basic functions; his/her accountability and responsibility.

According to the foreign experience, the position of the corporate secretary is important for the effective functioning of the joint stock company. He/she is a key officer that facilitates the coordination of the work of all company's governing bodies, the exchange of information between these bodies and shareholders, prepares draft of corporate documents, and resolves other legal and organizational issues related to corporate governance in the company. So, in the United States and Canada, a lawyer who is also the chief legal adviser is quite often holding this position. Therefore, there is no doubt that legal knowledge and experience help the corporate secretary, who is obligated to advise managers and directors on various (including legal) issues of corporate governance.

In general, there are two institutions in international practices: *corporate secretary* (in the US and Canada) and *company secretary* (in the UK, Australia, Singapore, Hong Kong, Thailand) due to the specific nature of the traditions of business turnover and the models of corporate governance that have been developed in different countries. The main difference between the company secretary and the corporate secretary is that the functions and responsibilities of the first one are somewhat wider than the other[125].

[125] Corporate secretary: world practice // http://www.e-xecutive.ru/knowledge/announcement/340367/

So, of course, Ukrainian legislator should regulate the competence of the corporate secretary more detailed using positive foreign experience and outlining his/her functions not within one part, but preferably one section of the Law. When selecting him/her for the position one should be guided only by the above-mentioned Decision of the NSSMC, which sets requirements for officials who are elected to the bodies of JSC.

It is worth noting that on 18.06.2013 the Verkhovna Rada of Ukraine introduced a corresponding bill defining the legal status of the corporate secretary, but after the second reading (26.12.13), the comments from the Main Scientific and Expert Department of the Verkhovna Rada were again received on it, that is the Draft Law on Amendments to Certain Legislative Acts of Ukraine on Improving the Activities of Joint Stock Companies.

According to Article 73 of the Law of Ukraine "On Joint Stock Companies" an inspection of the financial and economic activity of a joint stock company shall be conducted by the *audit committee (auditor)*.

Private joint stock companies with up to 100 shareholders shall introduce the post of an auditor (or select an audit committee) and in the companies with over 100 shareholders must set up an audit committee.

The charter of the private joint stock company may contain requirements to election of an audit committee (auditor), the number of members of the committee, a procedure of its activities and the competence (powers) of the audit committee (auditor).

An audit committee (auditor) shall be elected to conduct special inspections of the company's financial and business operation or for a defined period. The duration of powers of members of the audit committee (auditor) shall be set up for a period up to the date of regular annual general meeting if the company charter, by-law on the audit committee or a decision of the general meeting of the joint stock company do not provide for a different duration, but not longer than 5 years.

The following persons may not be members of an audit committee (auditor):

1) a member of the supervisory board;
2) a member of the executive body;
3) a corporate secretary;
4) the persons who do not have full legal capacity;
5) members of other bodies of the company.

Members of the audit committee (auditor) may not be members of the tabulation committee of the company.

The rights and duties of members of the audit committee (auditor) shall be stipulated by the Law of Ukraine "On Joint Stock Companies", other legal acts, the charter and by-law on the audit committee as well as by a civil agreement concluded with each participant of the audit committee (auditor).

Thus, the audit committee (auditor) shall have the right to make proposals to the agenda of a general meeting and to demand convening an extraordinary general meeting. Members of the audit committee (auditor) shall have the right to be present at a general meeting and take part in consideration of the issues included in the agenda in a consultative capacity. Members of the audit committee (auditor) shall have the right to participate in meetings of the supervisory board and executive body in the cases envisaged by this Law, the charter or by-law of the company.

Based on the results of the inspection of the joint stock company's financial and economic activity based on the results of the fiscal year the audit committee (auditor) shall prepare an *opinion*, containing following information: verification and completeness of the data of financial reporting for the relevant period; the facts of law violation when engaging in financial and economic activities as well as violation of the established procedure for maintenance of bookkeeping accounts and filing reports (Part 2 of Article 74 of the Law of Ukraine "On Joint Stock Companies").

In case of detection of violations of legislation during the conduct of financial and economic activity of JSC such information should be brought to the notice of its shareholders at the general meeting. Accordingly, if an abuse of the officials of the JSC bodies occurs, then shareholders may raise the question of bringing them to justice in accordance with Art. 4 Art. 92 of the Civil Code of Ukraine and Art. 63 of the Law of Ukraine "On Joint Stock Companies".

Based on the provisions of the special law, the members of the Audit Commission (the Auditor) are relatively independent and have access to all necessary documents for inspection, provided by the executive body. However, this can not be the case when its members include shareholders of this joint stock company.

3.1.4. Shares of a Joint Stock Company

Item 1 of Part 5 of Art. 3 of the Law "On Securities and the Stock Market" defines *shares* as equity securities which testify to participation of their owners in the charter capital (except for investment certificates) that entitle their owners to participate in the issuer governance and receive a portion of profit in the form of dividends, and a portion of property in case of the issuer's liquidation[126]. The Law of Ukraine "On Joint Stock Companies" stipulates that all shares of JSC in Ukraine shall be *registered* and shall exist exclusively in *non-documentary form*.

1. Rights of Shareholders - Owners of Common Shares	***2. Rights of Shareholders - Owners of Preferred Shares***
- to participate in management of the joint stock company; - to collect dividends; - to receive a portion of the company's property in case of its liquidation; - to receive information on the bussiness activities.	*A joint stock company's charter shall establish the scope of rights given to a shareholder-owner of each class of preferred shares of the company including:* - amount and priority of dividend payments; - liquidation value and priority of payments in case of the company's liquidation; - cases and terms of conversion of preferred shares of this class into common shares or preferred shares of other classes; - receive of information.
Voting principle of "one share - one vote", except for the cases of a cumulative voting (when electing company's bodies if the total number of votes of the shareholder is multiplied by the number of members of the elected body of the	Shall have the *right to vote only in the cases envisaged by part 5 Article 26 of the Law of Ukraine "On Joint Stock Companies" or the company's charter.* The charter of the JSC may provide for *a special procedure* for counting votes – either together or

[126] On Securities and the Stock Market: Law of Ukraine as of 23.02.2006. 3480-IV, *available at*:http://zakon5.rada.gov.ua/laws/show/3480-15

JSC, and the shareholder has the right to cast all the votes thus calculated for one candidate or distribute them among several candidates).	separately from votes for common and / or other classes of preferred shares.
Obligations of the Shareholders:	
- comply with the charter and other company articles of incorporation; - carry out decision of general shareholder meetings and other company bodies; - perform their obligations to the company, including those relating to material participation; - pay shares in the amount and in the manner prescribed by the charter of a joint stock company; - keep commercial secrecy and refrain from disclosing confidential information about the company operations.	The list of the obligations is not exhaustive. The company charter may permit *compiling a shareholder agreement, imposing additional obligations on shareholders*, including the obligation to participate in general meetings, and providing responsibility for failure to comply. However, these obligations should not contradict the current legislation.

3.1.5. Contents of Equity Rights of the Shareholders

In addition to the rights of shareholders – owners of common and preferred shares, the Commercial Code of Ukraine in Part 1 of Art. 167 defines the content of equity rights and provides a unified *list* of the following: rights of the person having his/her share in the charter capital (property) of bussiness organization including power to participate in management of bussiness organization, receipt of certain portion of profit (dividends) of such an organization and assets in case of its liquidation pursuant to the law, and other powers provisioned by the law and statutory documents.

Similar rights are provided in Article 116 of the Civil Code of Ukraine for members of bussiness companies. However, at the level of legislation the unified list of such is not available, as more detailed equity

rights of the members are fixed at the level of the charter and other local acts of corporate entities.

Referring to the characterization of each of the shareholder's equity rights, the content and procedure for its implementation should be briefly described.

1) The right to participate in the management of a joint stock company.

The right of a shareholder to participate in the management of a company is the ability to exercise a number of rights that are not limited by the participation in general meetings only. It is also implemented through the exercise of rights to form company's governing bodies, the procedure for making its decisions, etc. The indicated powers of the member depend on the order of convening the meeting, the form of its holding, the voting procedure, the definition of the quorum, etc.

According to Article 32 of the Law of Ukraine "On Joint Stock Companies" a joint stock company shall be liable to convene a *general meeting annually (annual general meeting)* and to hold it no later than on the 30th of April of the year following the reporting year.

Persons who are recorded on the shareholders' list or their representatives are *entitled to participate* at the general meeting of JSCs (Part 1 of Article 34 of the Law of Ukraine "On Joint Stock Companies"). The only restriction may be related to the restriction of the voting rights of the owners of preferred shares, since the latter shall not be entitled to participate in the management of the JSC, unless otherwise provided by its charter. A representative of the independent auditor (audit firm) of the company and company officials, regardless of their ownership of the shares of this company, a representative of the body which, in accordance with the charter, represents the rights and interests of the labor collective may also be present at the general meeting at the invitation of the person who convenes it.

A written notice of holding a joint stock company general meeting and its agenda shall be sent to each shareholder recorded on the shareholders' list compiled pursuant to the legislation on the depository system of Ukraine as of the date fixed by the supervisory board earlier than in 30 days. Notice shall be sent by the person who convenes the general meeting or the person who keeps records of the company

ownership rights in case of convening a general meeting by the shareholders

Presence of a quorum of a general meeting shall be determined by a registration commission at the closing of registration of the shareholders for participation in the joint stock company general meeting. The general meeting shall have a quorum subject to the registration of the shareholders owning jointly more than 50 percent of the voting shares for participation in it.

Provisions of Part 1 of Article 34 of the Law of Ukraine "On Joint Stock Companies" stipulates the necessity of compiling a list of shareholders who are entitled to participate in general meetings by 24 hours within three working days prior to the day of such meetings in accordance with the procedure established by the legislation on the depository system. According to Part 2 of this Article it is not allowed to make changes to the shareholders' list entitled to participate in the general meeting of JSC, after it is made. Therefore, if there is a change in the shareholders' composition, in practice there may be an absurd situation when the new shareholder can't be fast enough to include himself/herself to the shareholders' list, although the time for such an action (3 business days) still remains.

A decision of the general meeting on the issue put to vote shall be approved by a simple majority of the votes of the shareholders who registered themselves for participation in the general meeting and are owners of the shares voting on this issue. The charter of a private joint stock company may establish a bigger number of the shareholders' votes required for approving decisions on the agenda issues except for the issues on: early termination of the powers of officers of the company bodies; bringing an action against officers of the company bodies regarding indemnity for the losses inflicted to the company; bringing an action in case of incompliance with requirements of the Law of Ukraine "On Joint Stock Companies" when making a significant transaction (Article 42 of the Law of Ukraine "On Joint Stock Companies").

Speaking about a method of voting on the general meeting the voting at a general meeting on the agenda issues may be organized only using voting ballots, except for voting on issues not included in the agenda; general meeting of shareholders by absentee voting (poll). Part 2 and 4 of

Article 43 of the Law of Ukraine "On Joint Stock Companies" establishes the form of the latter and cases of its invalidation.

The management of the company is prohibited from requesting shareholders information on how they voted or are going to vote. In this case, offenders may be deprived of property rights.

Explanation of the voting procedure, vote counting and other issues associated with ensuring voting at a general meeting shall be given by the tabulation commission elected by the general shareholder meeting. The report of the voting results shall be drawn up in accordance with the procedure stipulated in Article 45 of the Law of Ukraine "On Joint Stock Companies", and its form is defined in Article 46 of this Law. The voting results shall be announced at the general meeting during which the voting was organized. The voting results shall be reported to the shareholders after closing the general meeting within 10 business days in the way specified by the joint stock company charter. The Law of Ukraine "On Joint Stock Companies" obliges the tabulation commission of JSC (or the person delegated with the powers of the tabulation commission) to seal the voting ballots. They shall be kept with the company for the entire duration of its operation but not more than four years

General meeting may also be *extraordinary*. A demand to convene an extraordinary general meeting shall be filed in writing and submitted to the executive body at the address of the joint stock company with an indication of the body or the last names (titles) of the shareholders that demand convening the extraordinary general meeting.

An extraordinary company general meeting shall be convened by the supervisory board: 1) on its initiative; 2) on demand of the executive body – in case of initiating the company bankruptcy proceedings or, if necessary, making a significant legal transaction; 3) on demand of the audit commission (auditor); 4) on demand of the shareholders (shareholder) who jointly are owners of 10 percent and more of the company common shares on the date of filing the demand. The procedure for holding an extraordinary general meeting is more detailed regulated by Article 47 of the Law of Ukraine "On Joint Stock Companies".

General meeting of the company may also be held in the form of *voting by notice*. In the cases envisaged by the charter of the joint stock company having not more than 25 shareholders it is allowed to approve a decision by voting by notice. In such a case the draft decision or voting

issues shall be sent to the shareholders – owners of voting shares who shall inform of their opinion about this issue in writing. Within 10 days from the date of receipt of a notice from the last shareholder – owner of voting shares, all shareholders – the owners of voting shares shall be informed in writing on the decision approved by the meeting chair. A decision shall be deemed approved if all shareholders – owners of voting shares have voted for it (Article 48 of the Law of Ukraine "On Joint Stock Companies").

In case of a *general meeting, if a company consists of one person*, a decision of the shareholder on the issues pertaining to the competence of the general meeting shall be executed by him/her in writing (in the form of an order). Such a shareholder's decision has the status of the minutes of the general meeting of the joint stock company. And in the case of the election of a personal membership of the Supervisory Board, the Audit Commission (if created) is carried out without the use of cumulative voting.

Characteristics of enjoyment of the right to participate in corporate governance by proxy. The power of attorney as a form of representation in corporate relations must meet the general requirements provided for by civil law. In particular, according to Part 3 of Art. 159 of the Civil Code of Ukraine, a shareholder shall have the right to appoint his/her representative for participation in the meeting.

Shareholder's proxy at a general meeting of JSC may be a natural person or a duly authorized representative of a legal entity as well as a duly authorized representative of the state or a territorial community. This Article establishes the list of persons who can certify the power of attorney for the right to participate and vote at a general meeting. A power of attorney giving the right to participate and vote at a general meeting issued by an individual may be certified by a notary or other officials who performs notarial acts, as well as by depository in accordance with the procedure established by the National Securities and Stock Market Commission. A power of attorney for the right to participate and vote at a general meeting on behalf of a legal entity shall be issued by its body or another person authorized for it by its constating documents.

A power of attorney giving the right to participate and vote at a joint stock company general meeting may contain a voting instruction, i.e., a list of the issues included in the agenda of the general meeting with indicating how and for which (against which) decision the proxy shall vote. During

voting at the general meeting the proxy shall vote exactly in the way it is prescribed by his/her voting instruction. If the letter of authority does not contain a voting instruction, the proxy shall decide all issues regarding voting at the general meeting at his/her discretion (Article 39 of the Law of Ukraine "On Joint Stock Companies").

The shareholder has the right to give a power of attorney to participate and vote at a general meeting to its several proxies. If several proxies of the shareholder appeared for participation in the general meeting, the one whose power of attorney was issued at a later date shall be registered. If a share is owned jointly by several persons, the powers to vote at the general meeting shall be exercised with their consent by one of the co-owners or by their joint proxy (Part 2 of Article 40 of the Law of Ukraine "On Joint Stock Companies").

Giving a power of attorney to participate and vote at the general meeting does not rule out participation of the shareholder who issued the letter of authority at this general meeting instead of his/her proxy.

The shareholders (shareholder) who own jointly 10 percent or more of common shares may appoint their representatives to supervise registration of the shareholders, holding of the general meeting, voting and summing up of its results notifying the company in writing about the appointment of such before the beginning of registration of the shareholders. Officers of the company shall be obliged to provide free access for representatives of the shareholders (shareholder) and/or the National Securities and Stock Market Commission to supervise registration of the shareholders, to hold a general meeting, to vote and sum up its results (Part 4 of Article 40 of the Law of Ukraine "On Joint Stock Companies")[127].

A proxy of any shareholder (natural or legal person) acting on the power of attorney has the right to transfer powers under this power of attorney to another person which is called a reassignment (allowed only if such a right of the assignee is specified in the power of attorney issued by the shareholder). In this case proxy issued under the reassignment

[127]For more details see Sarakun I.B. Item 4.1. Role of State Bodies (Officials) in the Protection of Equity Rights / Protection of rights of parties to corporate relations: Monograph under the general editorship by Academician of the National Academy of Sciences of Ukraine V.V. Luts. P.126-167.

procedure shall be notarized (Part 2 of Article 245 of the Civil Code of Ukraine).

Concerning *the issue of a power of attorney by infant or minor*, according to Art. Art. 221, 222 of the Civil Code of Ukraine transactions carried out beyond their civil capacity can be subsequently approved by their parents. In case of absence of such approval, the transaction shall be void. Therefore, approval for the concluding of contracts by a minor must be obtained from parents (adoptive parents) or guardian and guardianship authorities.

The legal representative of a shareholder – a minor child (aged 14 to 18) is her/his parents. To confirm the authority of the representative following documents shall be provided to the registration commission: a birth certificate of a child and a passport from the parents representing the child. In accordance with clause 3 of Part 1 of Art. 32 of the Civil Code of Ukraine "An individual aged from 14 to 18 years (a minor) shall be entitled: ... to be a member (founder) of legal entities, unless it is prohibited by the law or constating documents of a legal entity ...". Such shareholder shall be entitled to issue a power of attorney for participation in a meeting to a third party. It is issued with the written consent of one of the parents (Part 2 of Article 32 of the Civil Code of Ukraine). Consent does not require a notarial certificate, but it should be indicated in the very text of the power of attorney.

Article 249 of the Civil Code of Ukraine provides for the possibility of the person who issued a power of attorney at any time revoke it. In this case, the representative must return the power of attorney (Part 3 of Article 248 of the Civil Code of Ukraine). According to Art. 248 of the Civil Code of Ukraine it terminates, in particular, in case of death of the person who issued the power of attorney. Consequences of termination of the power of attorney in case of death are the same as if it is canceled – its return, although who it should be returned to, the Civil Code of Ukraine does not regulate.

Concerning the issuing of *power of attorney* drawn up in accordance with the requirements of *foreign law*, notaries make identifying inscriptions in the form prescribed by foreign law, if this does not contradict the legislation of Ukraine (Part 2, Article 98 of the Law "On

Notary"[128]). Documents drawn up abroad with the participation of or by foreign authorities shall be accepted by notaries, provided that they are legalized by the authorities of the Ministry of Foreign Affairs of Ukraine. Without legalization such documents shall be accepted by notaries in cases where it is provided by the legislation of Ukraine, international treaties in which Ukraine participates (Article 100 of this Law).

The procedure for the communication of notaries with foreign bodies of justice is determined by the legislation of Ukraine, international treaties. According to Article 103 of the Law "On Notary", if the international treaty establishes other rules on notarial acts than those contained in the legislation of Ukraine, then the rules of an international treaties shall be applied when performing notarial acts. If an international treaty ascribes to the competence of notaries for notarial acts not provided for by the legislation of Ukraine, notaries perform this notarial act in the order established by the Ministry of Justice of Ukraine.

Since Poland and Ukraine are signatories to the Hague Convention, wishing to abolish the requirement of diplomatic or consular legalization of foreign official documents, the only formal procedure that may be required to certify the authenticity of the signature, the quality of the signature of the signatory, and in the case in question, the authenticity of the stamp or stamp imprint, which the document is attached with, is the placement of an *apostille* by the competent authority of the State in which the document was drawn up as prescribed by the Article 4 of this Convention (Article 3)[129].

When issuing a power of attorney *to a foreign person in Ukraine,* the notary establishes the person who applied for the commission of the notarial act on the basis of the documents provided for by the legislation of Ukraine[130]. In accordance with the Procedure for the performance of notarial acts by notaries of Ukraine, the validity of a notarized power of

[128] On Notary: Law of Ukraine as of 02.09.1993. № 3425-XII, *available at:* http://zakon3.rada.gov.ua/laws/show/3425-12

[129]Convention Abolishing the Requirement of Legalization of Foreign Official Documents - On accession to the Convention, see. Law N 2933-III (2933-14) as of 10.01.2002, BBP, 2002, N 23, Art.153.

[130]Procedure for the Performance of Notarial Acts by Notaries of Ukraine, registered at the Ministry of Justice of Ukraine as of 22.02.2012. № 282/20595, *available at:* http://zakon1.rada.gov.ua

attorney is verified by a notary public under the Single Authorization Register, with the exception of powers of attorney, which are certified or issued abroad by the competent authorities of foreign states, subject to their legalization by the authorized bodies. Without legalization, such power of attorney shall be adopted by notaries in cases where it is provided by the legislation of Ukraine, international treaties with the participation of Ukraine. By the results of the verification of the validity of the power of attorney (its duplicate) an extract from the Single Register of Power of Attorney shall be made and attached to the copy of the transaction remaining in the notary's archive (paragraph 4 of Chapter 4 of this Procedure).

2) The right to collect dividends of a joint stock company.

The term "dividend" comes from the Latin "*dividendus"* – that is subject to distribution. Part 1 of Art. 30 of the Law of Ukraine "On Joint Stock Companies" defines the term "dividend" as a share of a net profit of a joint stock company paid to a shareholder on the base of one share of a certain type or class belonging to him/her. The same amount of dividends shall be accrued on the shares of the same type and class.

Dividends shall be paid on the shares the report of the results of placement thereof is registered in accordance with the procedure established by the legislation.A *decision to pay dividends* and the amount of the dividends on common shares shall be approved by a general meeting of a joint stock company. The amount of dividends on preferred shares of all classes is determined in the charter of a joint stock company.

It should be noted that, in contrast to the Law of Ukraine "On Joint Stock Companies" (which indicates the need for a more complete regulation of this issue by internal documents), the provisions of the Commercial Code of Poland on the right to collect dividends, including preferred shares are rather detailed. In particular, it relates to the methods of distributing profits to pay dividends; the possibility of paying an advance on dividends; types of privileges regarding dividends granted to owners of preferred shares; ways of accrual of dividends and the possibility of its accumulation; shorter timelimit for dividend payment. At the same time, in my opinion, the debating points of this Code may include provisions for the calculation and amount of payment of accumulated dividends. Similar to the Ukrainian legislation, there are prescriptions

concerning the grounds for dividend payment and restrictions on its payment[131].

In accordance with Part 4 of Art. 30 of the Law of Ukraine "On Joint Stock Companies" for each payment of dividends the joint stock company supervisory board shall establish the date of making a *list of the persons* entitled to collect dividends, the procedure and timelimits of its payment. The date of making a list of the persons entitled to collect dividends on common shares shall be determined by the decision of the supervisory board, but not earlier than 10 working days after the day the decision was made. A list of the persons having the right to collect dividends on preferred shares shall be drawn up within one month after the end of the reporting year.

Within 10 days after approval of the decision to pay dividends the company shall notify the stock exchange at which its shares have been listed about the date, amount, procedure and timelimits of payment of dividends.

In case of the alienation of the shares owned by the shareholder after the date of drawing up the list of persons entitled to collect dividends, but before paying dividends, the right to receive dividends remains with the person indicated on such a list.

Part 1 of Article 30 of the Law of Ukraine "On Joint Stock Companies" contains provision, according to which dividends shall be paid by a company exclusively in cash. Payment of dividends shall be made from the net profit earned during a reporting year and / or retained profit on the basis of the decision of the general meeting of the joint stock company within the term not exceeding six months from the date of the general meeting's decision to pay dividends (Part 2 of Article 30 of the Law of Ukraine "On Joint Stock Companies").

In the event of absence or insufficiency of the net profit of the reporting year and/or the retained profit of the previous year, payment of dividends on preferred shares shall be made at the expense of the company reserve capital or a special fund to pay dividends for preferred shares.

[131] Sarakun I.B. The Content of the Right to Receive Dividends under the Legislation of Poland and Ukraine // Entrepreneurship, Economy and Law. Scientific and practical journal. - № 5, 2014.

By the decision of the general meeting, *dividends may be paid out through*: payment of cash through the depository system of Ukraine or directly to the shareholders.

Restrictions on the payment of dividends are stipulated in Article 31 of the Law of Ukraine "On Joint Stock Companies". Thus, a *joint stock company shall have no right to approve a decision on payment of dividends on common shares* if: 1) the placement report has not been registered as set forth by the legislation; 2) the company equity capital is less than the amount of its charter capital, reserve capital and the amount by which the liquidation value of preferred shares exceeds their nominal value. Also, a joint stock company shall not pay dividend on common shares if: 1) the company has an obligation to redeem shares in compliance with Article 68 of this Law; and 2) dividends on preferred shares have not been paid in full.

The requirement for proper securing of the right to collect dividends is contained in the *International Agreement between the Government of Ukraine and Poland on Mutual Promotion and Protection of Investments* of January 12, 1993, which remains in force today. Article 5 states that each of the contracting parties on the territory of the state of which investors of the state of the other contracting party have made investments, will provide these investors with an unobstructed transfer of payments related to these investments, which are enshrined in this Article. Including paragraph "a" refers to interests, dividends, incomes and other current profits.

It should be noted that the current legislation on the depository system is subject to constant changes, including, in particular, the methods of paying out the dividends.

So, after the adoption of the Law "On the Depository System of Ukraine" and the Regulations on the Depositary Activity, such payment should be made through a newly established Settlement Center for servicing agreements in financial markets.

The joint stock company has an obligation to pay dividends to the shareholder, and the shareholder has the right to receive it. Therefore, it should be borne in mind that the relations that arise between shareholder and the company are based on the right to demand execution by the debtor (company) of the obligation to pay dividends through the court. Both the debtors and creditors should take into account that, in the event of non-

payment of dividends declared by the company, the right to claim for their collection arises from the next day after the expiration of the term established for payment of dividends. The ground for filing a shareholder's claim shall be the rule of Art. 530 of the Civil Code of Ukraine, according to which the the obligation shall be fulfilled within the period (term) established therein.

3) *The right to receive information on the activities of a joint stock company* occupies a special place within the legal status of the member, since without precise information about the place and time of the convening of the general meeting (meeting of members), the procedure and conditions for payment of dividends, etc., he/she will not be able to realize his/her other rights.

The right to receive complete and reliable information on the activity of JSC is one of the factors that influence the formation of a favorable investment climate in the state. A potential investor, before making a purchase of shares of a JSC, usually conducts an investigation of the state of affairs in the company, in order to determine the degree of risk and the possibility of obtaining dividends from deposits in the future[132]. The provision of this right is supported by the requirement of Article 2 of the First Directive of the Council of the European Union[133].

The Company provides *each shareholder* with *access* to such information as: 1) the company's charter, amendments to the charter, the foundation agreement (or the constituent contract), certificate of state registration of the company; 2) by-laws on the company’s general meeting, supervisory board, executive body and audit committee (auditor), other by-laws that regulatre activities of the company’s bodies and

[132] Sarakun IB Insider Information as an Object of Corporate Legal Relations. Improvement of Legal Regulation of Corporate Relations in Modern Conditions. Materials of the All-Ukrainian Scientific and Practical Seminar. Ivano-Frankivsk: September 25 - 26, 2009. Pp. 164 - 169.

[133] First Council Directive as of 9 March 1968 on coordinating the guarantees required by the Member States from companies in the understanding of the second paragraph of Article 58 of the Treaty to protect the interests of Member States and other States for the purpose of achieving the only equivalence of such guarantees in all countries of the community // EU Directive on corporate law. Kiiv. 1998.

amendments to them; 3) by-laws on every branch and representative office of the company; 4) documents certifying the company's property rights; 5) principles (code) for corporate governance in the company; 6) minutes of general meetings; 7) materials which shareholders can (could) review when preparing for a general meeting; 8) minutes of meetings of the supervisory board and collegial executive body, orders and instructions of the chairman of the collegial and sole executive bodies; 9) minutes of meetings of the company's inspection commission, decisions of the company's inspector; 10) opinions of the company's audit committee (inspector) and auditor; 11) annual financial reporting; 12) accounting documents; 13) reporting documents filed with relevant government bodies; 14) issue prospectus and registration certificate of the issue of shares and other securities of the company; 15) special information on the company as required by law; 16) other documents envisaged by the legislation, the company charter, its by-laws, decisions of general meetings, the supervisory board or executive body.

According to Art. 77 of the Law of Ukraine "On Joint Stock Companies" these documents shall be kept at the location of the company or in another place known and accessible to/for shareholders. They shall be subject to safe keeping during the entire period of the company's operation; this does not cover accounting documents whose safekeeping timeframe is established by law.

Restrictions on receiving an information may occur, in particular, when it comes to *insider information*, that is, which applies to a particular circle of persons. It is defined as unpublished information about the issuer, its securities and derivatives traded on the stock exchange, or transactions relating to it, if disclosure of such information can have a significant effect on the value of securities and derivatives, and which is subject to disclosure in accordance with the Law (Part 1 of Article 44 of the Law "On Securities and the Stock Market"). Responsibility for its disclosure is provided, in particular, by the Criminal Code of Ukraine.

Within 10 days from the date of receipt of a *written demand of a shareholder*, corporate secretary or an executive body, if there is no corporate secretary shall provide the shareholder with certified copies of the documents specified by part 1, Article 77 of the Law of Ukraine "On Joint Stock Companies". A company may fix a payment for providing copies of documents the amount of which shall not exceed the cost of

expenditures for making copies of documents and the expenditures related to mailing the documents.

Any shareholder shall be entitled to examine the documents in the premises where the company is located during working hours, given that the executive body of the company is notified of such event at least five business days in advance.

Methods of receiving more detailed information may be contained in the internal documents of the JSC, in particular, in the Regulations on the procedure for providing information which, according to the judicial practice, shareholders do not always take into account. Thus, there is a recorded case where the specified local act clearly identified the days and hours for providing such information, and the shareholder referred to the JSC not in the allotted time. As a result, he/she did not have grounds to apply to the commercial court for the protection of his/her violated right.

A publicly owned joint stock company shall have its own web-page on the Internet, which, in accordance with the procedure established by the NSSMC, shall contain information that is subject to disclosure in accordance with the law. Such a requirement can be found in the Law of Ukraine "On Joint Stock Companies" and is a sufficiently convenient way of receiving information, especially for foreign investors.

According to the judicial practice of the resolution of corporate disputes of the Higher Commercial Court of Ukraine, a person who has not yet become a shareholder, has no right to demand the provision of relevant information from the company, since this is possible only after making the corresponding changes in the register. It should be noted that business company shall be obliged to provide the member with not all the information on the activities of the company, but only one determined by the law and internal documents of the company.

In addition to the information that is to be provided to the member in accordance with the Law of Ukraine "On Joint Stock Companies" when preparing for the general meeting of the company and public information subject to disclosure, the Law of Ukraine "On Securities and the Stock Market" allocates *certain types of information on the stock market,* such as: regular information on the issuer, special information on the issuer, information on the record of registered securities by members of the depositary system, information on professional stock market participants, insider information and advertising information in the stock market. This

information is provided by the joint stock companies themselves in accordance with the procedure established by this Law.

4) Right to receive a portion of the company's assets in case of the liquidation of a joint stock company.

JSC as a for-profit company and a legal entity terminates, in particular, as a result of its liquidation, that is, in the absence of a succession of its rights and obligations. In accordance with Part 1 of Art. 110 Civil Code of Ukraine legal entity shall be liquidated: 1) by the decision of its members or the legal entity's body empowered therewith by the constating documents including in connection with expiration of the company duration or achievement of the goal, for which this legal entity has been created, as well as in other cases provided by the constating documents; 2) under the court decision on the recognition of the legal entity state registration void due to the violations comitted during its creation, if the latter cannot be removed, as well in other cases provided by law.

It should also be noted that the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine on Improving the Legal Regulation of the Activity of Legal Entities and Individual Entrepreneurs" as of 02.02.2014 supplemented this part of the Civil Code of Ukraine with the following paragraphs: p.2 – under court decision on the liquidation of a legal entity due to the violations comitted during its creation, if the latter cannot be removed, by a claim of a member of a legal entity or competent state authority; p.3 – under court decision on the liquidation of a legal entity in other cases, established by law by the claim by the competent state authority[134].

Other laws regulating different spheres of the activity of JSCs may establish other grounds for the liquidation of JSC. Thus, according to Article 361 of the Commercial Code of Ukraine the grounds for termination of the stock exchange may also include the situation when the number of its members remains lower than the minimum set forth by the law. In accordance with the Law "On Securities and Stock Market", activity of the stock exchange shall be terminated by the NSSMC if the number of its members grew less than 20. If within six months the acceptance of new members has not taken place, the stock exchange activity is to be terminated.

[134] http://zakon4.rada.gov.ua

Liquidation of a company shall be carried out by the liquidation commission appointed by the company, and in case of termination of the company's activity under the court decision – the liquidation commission appointed by the court. Under the court decision obligations to carry out the legal entity liquidation may be imposed on the legal entity members or the body empowered by the constating documents to take decision on the legal entity liquidation (Paragraph 2 of Part 2 of Article 110 of the Civil Code of Ukraine). Article 88 of the Law of Ukraine "On Joint Stock Companies" empowers a general meeting of JSC with such authorities. From the date of creation of the liquidation commission the powers of the supervisory board and executive body shall be transferred to it. Liquidation balance sheet made up by the liquidation commission shall be subject to approval by the general meeting (Part 4 of Article 88).

A liquidation commission after the expiration of the deadline for creditors' claims (not less than two months from the date of publication of a notice on a legal entity termination - Part 4 of Article 105 of the Civil Code of Ukraine) shall make an *interim liquidation balance sheet*, which contains information on the composition of the property of the legal entity being liquidated, a list of creditors' claims, as well as the results of their consideration. The interim liquidation balance sheet shall be approved by the members of the legal entity or the body that made a decision on liquidation.

It is approved by the members or the body that has decided to liquidate a legal entity. The property of a legal entity remaining after the satisfaction of creditors' claims is transferred to its members, unless otherwise established by the constituent documents of a legal entity or by law.

In case of liquidation of a legal entity creditors' claims shall be met on a priority basis, as stipulated in Art. 112 of the Civil Code of Ukraine, in accordance with the interim liquidation balance sheet, from the day of its approval. Exceptions are the claims of the fourth priority basis ("all other requirements"), which shall be settled upon the expiration of one month from the day of approval of the interim liquidation balance sheet. If the funds of a legal entity being liquidated are insufficient to meet the creditors' claims, the liquidation commission sells the property of the legal entity.

In the event a solvent legal entity is liquidated, creditors' and shareholders' claims shall be settled due to the following *priority*: 1) claims to compensate damage resulting from handicap, other health damage or death, and creditors' claims backed by pledge or in any other way; 2) claims of employees related to labor relations, authors' claims of payment for the use of results of their intellectual or creative activities; 3) tax and levies (mandatory payments) claims; 4) all other creditors' claims; 5) payment of accrued dividends for preferred shares; 6) payments on preferred shares subject to redemption according to the Article 68 of the Law; 7) payment of liquidation value of preferred shares; 8) payments on common shares subject to redemption in line with Article 68 of the Law; 9) property distribution among shareholders who are owners of the company common shares, on a pro rata basis to the amount of shares they own (Part 1 of Article 89 of the Law of Ukraine "On Joint Stock Companies").

Property for every priority turn shall be distributed after total settlement of creditors' (shareholders') claims of the previous higher priority. Therefore, the owners of common shares of JSC, whose claims shall be satisfied in the last turn, have a small chance to return funds invested in shares.

If a company has placed several classes of preferred shares, the priority of distribution of the property among shareholders that own each class of preferred shares shall be stipulated by the company's charter.

If the property of the company being liquidated is insufficient for distribution among all shareholders of the relevant priority, the property shall be distributed among them pro-rata to the amounts of claims (shares they own) of every creditor (shareholder) on the priority basis.

Creditors' claims not approved by the liquidation commission shall be deemed satisfied if the creditor has not applied to the court within one month after receiving a notice on full or partial refusal to accept his/her/its claims, if the claims were not met due to the absence of a legal entity's property as well as claims, which were not met due to the absence of the property of the legal entity being under liquidation (Part 4 of Article 112 of the Civil Code of Ukraine).

In accordance with Part 1 of Art. 36 of the Law "On State Registration of Legal Entities, Individual Entrepreneurs and Public Formations", the head of the liquidation commission, the person

authorized by him/her or the official receiver on completing the liquidation proceedings, but no sooner than the expiration of the term for the creditors' claims shall submit (send a registered letter with contents inventoried) liquidation documentary supports to the state registrar for the state registration of the winding up of a legal entity as a result of its liquidation.

In the course of the state registration of winding up of a joint stock company, a copy of the decree on the cancellation of registration of the issue of shares, certified by the NSSMC and a certificate on the absence of unclaimed securities issues of this legal entity shall be submitted additionally.

The liquidation of the JSC is considered to be completed, and the company ceases to exist, from the date of the state registration of the termination of the company as a result of its liquidation in the Unified State Register.

3.1.6. Alienation of Shares

According to the provisions of Article 178 of the Civil Code of Ukraine all the objects of civil rights may be freely alienated or transferred from one person to another under the procedure of succession or inheritance, or by other means, unless they are withdrawn from circulation or restricted in circulation, or are inalienable from a natural or legal person. This provision applies to securities as the objects of civil rights as well.

Legal regulation of the alienation of shares in Ukraine today is characterized by a significant number of regulatory and internal acts, some of which are gradually losing force[135]; and others - coming into force[136]. Such a contour of things is driven by the dematerialization of shares; change of the depository legislation; the need for unification and harmonization of existing provisions of the current legislation conditioned by such changes; requirement for the availability of shares of publicly

[135] Law of Ukraine "On the National Depository System and Features of Electronic Circulation of Securities in Ukraine"; Regulation of the NSSMC On the Procedure for Keeping Registers of Registered Securities Holders, Regulations of the NSSMC On Depository Activities.

[136] Law of Ukraine "On the Depository System of Ukraine"; Regulation of the NSSMC on the conduct of depository activities.

owned joint stock companies on the stock exchange; the introduction of such a body as the Settlement Center (which was discussed earlier), etc.

Taking into account the above-mentioned problems and the chaotic state of legislation in this area of relations, it is difficult to predict how (how many changes of the current legislation) the new government of our state will react to the previous (not always logical) innovations, especially considering the conducting adaptation of the norms of the current corporate legislation of Ukraine to the EU legislation.

Therefore, focusing on the alienation of shares, attention should be paid to such key aspects as: *the moment of its acquisition; requirements for the application of the pre-emptive right to purchase it; title perfection, etc*.

All information on securities accounting in Ukraine is contained in the *system* of *depositary records*. It is a set of information, notes on issuing securities (kind with specification of type, nominal value and quantity, restriction of circulation, etc.) on the securities accounts of their owners.

Acquisition and termination of rights to securities and rights under securities is carried out by fixing the relevant fact in the system of depositary records. It also records restrictions on the rights to securities and restrictions on the rights under securities in cases and in manner established by the Commission.

In accordance with the requirements of the Law "On Depository System of Ukraine", the confirmation of the right to securities and rights under securities that exist in a non-documentary form, as well as restrictions on the rights to securities *at a certain point*, is an *accounting record* on the *securities account* of the depositor at the depositary institution.

Documentary confirmation of availability of the rights to securities and rights under the securities of the depositor at a certain point (if transfering securities to a deposit of a notary - the corresponding creditor) is an *extract from the securities account of the depositor* which is issued by the depositary institution at the request of the depositor or in other cases, established by the legislation and the agreement on servicing the securities account (Part 1 of Article 8 of the Law "On Depository System of Ukraine")[137].

[137] On Depository System of Ukraine: Law of Ukraine № 5178-VI as of 06. 07. 2012, *available at:* http://zakon5.rada.gov.ua/laws/show/5178-17

Securities contract concluded *on the stock exchange* is deemed to be concluded on the date of the fixation of its existence by the stock exchange in accordance with its rules. The maximum timelimits of execution of securities contracts are set by the NSSMC (Article 5-1 of the Law "On Securities and the Stock Market").

According to Art. 7 of the Law "On Joint Stock Companies" shareholders of a publicly owned joint stock company may sell their shares without consent of other shareholders and/or the company. Private JSC shareholders shall have *the pre-emptive right to buy shares of the other shareholders of the company*. Therefore, when concluding a contract of *purchase and sale* of shares first of all one should take into account the legislative requirements for the pre-emptive right to buy it, set forth in Art. 7 of the Law of Ukraine "On Joint Stock Companies".

Thus, Part 2 of Art. 7 of the Law of Ukraine "On Joint Stock Companies" states that charter of a private JSC may include the pre-emptive right of its shareholders to buy shares of the company offered to third parties by its shareholders. If the company charter includes the pre-emptive right provision, it shall be exercised in accordance with clauses 3-6 of this article. The procedure for enforcement of the pre-emptive right of shareholders to buy shares of the company offered to third parties by its shareholders (except sale), is established by the charter of such a company.

The legislator does not indicate whether the pre-emptive right of shareholders involves the cases of *share exchange agreement* and *transfer of shares by gift*. In practice, these contracts are often used to replace a share purchase agreement, which should necessary involve observance of the pre-emptive right of other shareholders. Under these circumstances, gift contract of a small number of shares is initially concluded, as a result of which the person becomes a shareholder and the specified pre-emptive right arises. In the future, by way of redemption of shares, he/she can get control over the company.

This, in turn, raises certain procedural problems connected with proving the fictitiousness of such an agreement, with choosing a way to protect the rights of other shareholders when concluding such an agreement; as well as with the very possibility of fixing the restriction in the charter on the transfer of shares by gift to third parties[138].

[138] Sarakun IB Proof of the Fictitiousness of a Transaction when Giving Shares to a Third Party of a Private Joint Stock Company // Actual legal and

It appears that if, at the time of the conclusion of the share exchange agreement, a pre-emptive right with certain conventions could be foreseen for other shareholders in the charter; it is impossible to speak about the inability of its distribution on cases of transfer of shares by gift, as it is anything but reasonable if to take into account the legal status of the donee.

Part 4 of Art. 7 of the Law of Ukraine "On Joint Stock Companies" regulates the procedure of alienation of shares of private joint stock companies (hereinafter - PrJSC) and also states that private JSC shareholder intending to sell his/her/its shares to a third person shall notify all the company shareholders and the company itself, indicating the price and other terms of sale. The shareholders shall be notified via the company. After receiving a written notice from the shareholder intending to sell his/her/its shares to a third person the company shall mail the notification copies to all other shareholders in writing within two business days of receipt. Unless otherwise specified by the company charter, the notification of company shareholders shall be *at the cost of the shareholder wishing to sell his/her/its shares*.

The same Part says that if the private JSC shareholders and/or the company fails to make use of their pre-emptive right to buy all the shares offered for sale, the shares may be sold to a third party within the timeline established by this law or by the company charter, at the price and on the terms as have been notified to the company and to its shareholders.

From the above provision it is not entirely clear why the shareholder-alienator, or the company itself, should initially bear the costs on the notice of all shareholders, and then sell the shares to a third person *at the price and on the terms as have been notified to the company and to its shareholders*. I believe that the above rule should abolish restrictions on the sale price of shares to a third party and provide for a rule that "if all shareholders of the company failed to enjoy their pre-emptive right, the shareholder may alienate shares to a third party" (is meant for the price

---

organizational problems of public administration and legal proceedings: Collection of scientific papers of the international scientific and practical conference (Kirovograd, April 12-13, 2013). P.112-177; Sarakun IB. Alienation of Shares under a Contract of Exchange (Barter) // Contractual regulation of social relations: Abstracts of the reports at the All-Ukrainian scientific and practical conference (Zaporizhzhya, April 19-20, 2013). P.69-71.

he/she/it has set). Therefore, from the last sentence of this paragraph, it would be expedient to exclude the phrase: "at the price and on the terms as have been notified to the shareholders of the company".

As for the alienation of shares on the basis of *security and pledge agreement*, according to Part 8 of Art. 7 of the Law of Ukraine "On Joint Stock Companies" in case of the emergence of the distraint right on shares that have been pledged, such shares shall be alienated *in compliance with the pre-emptive right of shareholders* thereto. The pre-emptive right of a joint stock company to buy shares of its own issue offered by the owner for the alienation to third parties shall not be allowed.

Resulting from the pledge over shares, an operation on the *blocking* of securities shall be carried out (the establishment of restrictions on circulation or placement) on the securities account of the depositor and / or the client for a specified period and / or before the occurrence of a particular event involving, in particular, burdening it with obligations, or an operation to unblock securities (withdrawal of restrictions) on the securities account of the depositor and / or the client.

These transfer operations *do not result in transfer of ownership of securities*. Upon its implementation, a certain number or all securities registered in the securities account of the depositor, the client are blocked / unblocked in the securities account of the depositor (client) by making corresponding accounting records (clause 18 of the NSSMC Regulation On the Conduct of Depositary Activity)[139].

In case of the establishment or removal of a restriction on a particular owner, the court or a competent state authority or its official shall be obliged to send a corresponding decision to the depositary institution in which the securities account was opened and the Central Depository or the National Bank of Ukraine, which, in accordance with the competence established by this Law shall record such securities.

The designated depository institution amends the depository record system to establish a limit on the securities of a particular owner *until the end of the working day, when a corresponding decision is received* (Part 2 of Article 7 of this Regulation).

The pledgor may alienate the pledged property only with the consent of the pledgeholder subject to the transition to a new pledgor of the main

[139] On the Conduct of Depositary Activity: Regulation of NSSMC № 735 as of 23. 04. 2013, *available at:* http://zakon5.rada.gov.ua/laws/show/z1084-13

debt secured by the pledge. In addition, according to Art. 18 of the Law of Ukraine "On Pledge"[140], the pledgor shall inform each pledgeholder of all previous pledges, as well as the nature and extent of the liabilities secured by these pledges. The pledgor shall compensate losses incurred by any of his/her pledgeholder as a result of non-fulfillment of this obligation. At the same time, the pledgeholder shall not dispose of the subject of a pledge, except in cases established by the Law of Ukraine "On Pledge", (the pledgeholder acquires right to levy execution on the the subject of a pledge unless, at the time of the maturity of an obligation secured by the pledge, it is not executed (Article 20).

The procedure for attachment shares and the execution upon it is also regulated by the Civil Code of Ukraine, the Laws of Ukraine "On Securing Creditors' Claims and Registration of Encumbrances" and "On Enforcement Proceedings".

Although the question of the alienation of shares does not include its *inheritance*, I believe it is advisable to dwell on the analysis of this procedure, as it is connected with the moment of the shares transition from one person – heir to another – the testator and is defined by the Civil Code of Ukraine. In this case heirs of the shareholder shall carry out the following actions:

1) to apply to the state notary office at the place of opening of inheritance with the application for acceptance of inheritance and (or) the issuance of the a certificate of heirship (if the heir has actually inherited the inheritance);

2) to re-register the ownership of the shares in the register holder (in the documentary form of issue of shares) or in the custodian, which the deceased shareholder opened securities account with (in the case of a non-documentary form of issue of shares) after obtaining a certificate of heirship.

According to Part 7 of Art. 7 of the Law "On Joint Stock Companies" the *pre-emptive right* of private JSC shareholders shall not apply to cases of transfer of ownership of this company's securities as a result of inheritance or legal succession.

[140] On Pledge: Law of Ukraine № 2654-XII as of 02. 10. 1992, *available at:* http://zakon3.rada.gov.ua/laws/show/2654-12.

The heir may apply for a certificate of the inheritance entitlement after the expiration of a six-month period. The inheritance entitlement emerges within a day of the opening of inheritance.

The issue of a certificate of heirship of the property to be registered shall be carried out by a notary after the submission of the legal documents on the ownership of the property by the testator and verification of the absence of a prohibition or the seizure of the property, including the availability or absence of a tax pledge and other pledges according to the data of the relevant registers.

To acquire ownership of the shares, the heir shall apply to the depositary institution for entering an information about himself/herself as of the new owner of securities. Part 2 of Art. 4 of the Law of Ukraine "On the Depository System of Ukraine" states that the acquisition and termination of rights to securities and rights under securities shall be carried out by fixing the relevant fact in the system of depositary accounting, which makes it possible to identify issuable securities and persons specified in this system as owners of securities and the rights that follows.

As previously stated, the introduction of such changes, including in the case of inheritance of shares, shall be carried out exclusively by the depositary institutions.

Problems of inheritance may arise if unavailability of legatees and abintestates, their elimination from the right to inheritance, their rejection of inheritance, and also refusal to accept inheritance. In such a case, the court holds the inheritance escheat upon the application of the relevant local government body at the place of opening of the inheritance (Article 1227 of the Civil Code of Ukraine). An application for recognition of the inheritance escheat shall be submitted at the end of one year from the time of the opening of the inheritance. In the absence of legatees and abintestates or in the case of the renunciation of inheritance the escheat property shall be transferred to the *territorial community* at the place of the opening of the inheritance.

Heirs shall be entitled to profit from a company if the general meeting of the company decides on its payment, and if at the time of its holding the heir was still alive, that is, he/she was a member of the company. In this case, the composition of the inheritance will also include monetary funds determined by the general meeting of the company which

shall be paid to the heirs in the form of not received by the deceased member of the company profit.

In addition to the features listed in this paragraph regarding the alienation of shares, it should be mentioned that this question cannot be limited to only a range of mentioned issues. The Law of Ukraine "On Joint Stock Companies" also regulates the issues of redemption of the placed securities by the JSC (Article 66); restriction on redemption of shares of JSC (Article 67); obligatory redemption of shares by the JSC at the request of shareholders (Article 68); the procedure for the exercising the shareholders' right to demand the mandatory redemption of shares by the JSC (Article 69). The features of the alienation of shares are conditioned by the size of the block of shares – significant shareholding, controlling shareholding, significant controlling shareholding or dominant controlling shareholding (Article 64, Article 65 of the Law), etc.

Thus, joint stock companies are one of the most common types of business companies in Ukraine, the legal status of which still needs to be properly regulated. This should be done by improving the provisions of the current legislation, especially the one aimed at preventing various offenses in the sphere of the JSC activities. The primary task of the legislator is to increase the efficiency and effectiveness of regulatory legal acts; to take into account take into account the gained experience (including foreign one); to take the necessary regulatory acts as soon as reasonably possible, etc. This largely depends on the state's strategic policy and the availability of the state's political will. It is precisely such a combination of all these components that can give a positive social result.

3.2. Limited Liability Company

3.2.1. Concept of LLC. Members

Concept of LLC. The legal status of a limited liability company, the rights and obligations of the members of the LLC, the competence of the company's governing bodies is regulated by the Law of Ukraine "On Limited Liability and Superadded Liability Companies" (*the author's note* hereafter - the Law) [141].

[141] On Limited Liability and Superadded Liability Companies: Law of Ukraine as of 06.02.2018. № 2275- VIII. *Bulletin of the Verkhovna Rada of*

Limited Liability Company (hereinafter referred to as LLC) is a company with a share capital divided into shares the size of which is determined by the constating documents, and whose members are not liable for the obligations of the company.

Concept of SLC. Superadded Liability Company (hereinafter referred to as SLC) is a company with a share capital divided into shares. The size of share is determined by the constating documents. The main difference between the SLC and the LLC is that the members of the SLC are liable for the debts of the company not only within their contribution to the charter capital, but also in case of insufficiency of these sums – additionally – within their own property equally in a multiple amount in accordance with the value of the contribution of each member. However, the liability of the members (unike the members of the general partnership) is not unlimited. The maximum extent of liability of the members is provided by the constating documents. In all other respects, the legal status of the SLC is similar to the legal status of LLC.

Due to the

1) superadded liability of the members of the SLC and

2) the lack of a requirement to register in the form of SLC for certain types of business (except for trust companies)

- the above mentioned legal entity form has not become widely used. In practice, it is rather rare.

An LLC can be created by a single person who becomes its sole member. The maximum number of members of LLC is not limited. Members of the company are liable within their contributions. Members of the company who have not fully paid their contributions are jointly and severally liable for the obligations of the company to the extent of the unpaid portion of the value of their contributions (Article 2 of the Law).

The ability of a foreign citizen to acquire the status of a member of a LLC is determined by the personal law of this citizen. In accordance with Part 1 of Art. 16 of the Law of Ukraine “On Private International Law” the personal law of an individual shall be determined by his/her citizenship. The content of equity rights is determined by the law of the country which the legal entity belongs to. The personal law of a legal entity is the law of the state of legal entity’s location.

Ukraine. 2018. № 13, Art. 69, *available at*: http://zakon2.rada.gov.ua/laws/show/2275-19?oprd=1

The name of the company shall contain information about its legal entity form (type of a company), the style. For example, Limited Liability Company “Exim”, Limited Liability Company “Logistics”. Accordingly, its shortened names will be LLC “Exim” and LLC “Logistic”. The name of the company shall be contained in the constating documents of the company (for example, the charter). The company may have a shortened name in Ukrainian, a full and abbreviated name in foreign languages.

The company’s location shall be Ukraine.

The founders (members) of the company shall be legal entities (enterprises, institutions, organizations) as well as individuals. The legislation of Ukraine does not impose any restrictions on the citizenship of the members. Foreign citizens, stateless persons, foreign legal entities, as well as international organizations may be founders and members of the LLC along with citizens and legal entities of Ukraine. That is, the founders (members) can be both citizens of Ukraine and citizens of a foreign state; both legal entities – residents (registered in Ukraine) and legal entities – non-residents (ie, registered in a foreign state).

The maximum age limit is not set. But there are certain limitations regarding the minimum age. Concerning the acquisition of a share of LLC, then:

1) in the case of the acquisition of a share as a result of inheritance – the age is unlimited (the person can become a member from birth);

2) in the case of the founding of a company (or accession to an existing one) – from the age of 14, if this is not prohibited by law or constating documents of a legal entity (Part 1 of Article 32 of the Civil Code of Ukraine).

Enterprises, institutions and organizations that set up a company shall not be liquidated as legal entities. They completely preserve its autonomy. If the company's constating documents do not specify the duration of the company, the company shall be deemed to have been created for an indefinite period. The company acquires the rights of a legal entity from the date of its state registration.

The company may create branches and representative offices in Ukraine and abroad, as well as subsidiaries in accordance with the current legislation of Ukraine.

The company may open current and deposit accounts with banks, as well as conclude contracts and other agreements only after its registration.

Contracts concluded on behalf of the company before the registration shall be recognized as concluded with the company, only if they are further approved by the company. Agreements concluded by the founders prior to the registration of the company and not further approved by the company, entail legal consequences only for the founders.

3.2.2. Procedure for Establishment of the Company. Constating Documents

Foundation (establishment) of the LLC. The procedure for registering a legal entity is disclosed in subsection 1.6 of this manual. Within this subsection, attention will be paid to the peculiarities of the establishment of the LLC.

For the purpose of establishing the LLC, the founders shall hold a founders' meeting. The decision of the founders' meeting, the content of which is set out in the relevant protocol, approves:

1) the charter (constating document);

2) the composition of the governing bodies (executive body, supervisory board, etc.).

If a company is created by few persons, such persons, if there is a need to determine the relationship between them in relation to the establishment of a company, may conclude a founders' agreement in writing. Founders' agreement may establish the procedure for the establishment of a company, conditions for carrying out joint activities for the establishment of a company, size of the charter capital, ownership interest of each member, the terms and procedure for deposits and other conditions. Founders' agreement is valid until the date of the state registration of the company, unless otherwise stipulated by the contract or provided by the essence of the obligation.

The founders may participate in the founders' meeting both personally or by proxy. There is no need to sign a founders' agreement (memorandum of association) although such a possibility is not excluded. LLC acquires the status of a legal entity from the moment of state registration in the Unified State Register of Legal Entities, Individual Entrepreneurs and Public Associations.

Charter is a constating document of the company. The first version of the company's charter shall be signed by all members of the company. The

authenticity of the members' signatures shall be certified by a notary (Article 11 of the Law).

The charter of LLC, as well as of any other bussiness company, must contain information about the type of company, the object and purpose of its activities, the composition of the founders and members, the name and location, the size and procedure for the formation of the charter capital, the procedure for the distribution of profits and losses, composition and competence the company's bodies and the procedure for adopting decisions by the bodies, including a list of issues requiring a qualified majority vote, the procedure for amending the charter and the procedure for liquidation and reorganization of the company. In addition, the charter of LLC shall contain information on: the size of the shares of each member; the size, composition and procedure for making contributions; the procedure for transfer of shares in the charter capital; the size and procedure for formation of the reserve fund. Other conditions that do not contradict the legislation of Ukraine may be included in the charter. The LLC can be created and operate under a model charter (Article 11 of the Law).

If LLC is created and operates under a model charter, the memorandum of association, which shall be signed by all the founders, shall contain an information about the type of the company, its name, location, the object and the purposes of its' activities, the composition of the founders and members, the size of the charter (contributed) capital, the size of the shares of each member, the procedure for for making contributions, as well as information on the conducting of activities under a model charter.

3.2.3. Charter Capital

The size of the charter capital of the company consists of the nominal value of the shares (contributions) of its members, expressed in the national currency of Ukraine. The share of a member of a company in the charter capital of a company may be determined additionally in percentage terms. The charter of the company may provide for restrictions on the reproportioning of the shares of a member. The relevant provisions may be incorporated into the charter, amended or excluded from it by unanimous decision of the general meeting, which was attended by all the company's members (Article 12 of the Law).

Contribution. Each member of a company shall be obliged to make his/her full contribution within six months from the time of the state registration of the company, unless otherwise provided by the charter. This legal norm is of a discretionary nature. The relevant provisions may be introduced into the charter, amended or excluded from it by unanimous decision of the general meeting, which was attended by all company's members.

The value of the contribution of each member of a company shall not be less than the nominal value of his/her shares.

If the member of a company has not made his/her contribution for the extinguishment of debt within the given supplementary period, the executive body of the company shall convene a general meeting of the members, which may take one of the following decisions: 1) the expulsion of a shareholder being in arrears with paying up of contribution; 2) charter capital reduction for the size of the unpaid part of the member's share; 3) redistribution of the unpaid share (part of the share) among other members of the company without changing the size of the charter capital of the company and cover of such an arreas by the relevant members; 4) the liquidation of the company (Article 15 of the Law). At the same time, the votes attributable to the share of a member who has a debt to the company are not taken into account when determining the results of voting for making the appropriate decision.

Change in the values of the contributed assets as well as any additional contributions of the members do not affect the size of their share in the charter capital indicated on the constating documents of the company, unless otherwise provided by constating documents. That is, assessment of contributions shall be conducted at the time the contribution is made. Once this is done the reassessment of the member's contribution shall be allowed only if indicated on the charter. The value of the assets that was the subject of the contribution may change, but this does not affect the contribution of the member in any way.

If one of the founders wishes to make a contribution and in such a manner to increase the size of his/her share in the company, then such actions must necessarily be accompanied by appropriate changes in the company's charter.

The procedure for assessing contributions is determined in the company's charter, unless otherwise provided by the legislation of

Ukraine. That is, this norm grants the right to determine the criteria for assessing their contributions (contract estimate) to the founders (members) of LLC themself. Assessment of the contribution by professional experts is obligatory if determining the value of contributions of members and founders of LLC: 1) if the property of the state-owned companies (the share of municipal property) is contributed, 2) in case of the withdrawal (expulsion) of the member from the company, when they can not agree the value of a contribution.

The contribution to the charter capital shall be, as a rule, in cash. Currency, real estate, movable property, property rights may also be a contribution to the charter capital of LLC.

Contributions in a non-cash form can be made from the current account of the founder, opened in the banking institutions, or through cash lodgements by cash receipt voucher (message), followed by the transfer of these funds on behalf of the payer to the payee's account to form the company's charter capital[142].

Contributions in a non-cash form shall have a monetary valuation approved by the unanimous decision of the general meeting, in which all the members of the company took part. When establishing a company, such an assessment shall be determined by the decision of the founders on the establishment of a company.

The transfer of immovable property to the charter capital shall be documented by the appraisal report and act of acceptance-transfer to the charter capital. At the same time, the founder of the LLC may form all 100% of the charter capital by immovable property[143].

The charter capital of the LLC may include the land use rights, water use rights, and other proprietary rights. Proprietary rights are an integral part of the property. Know-how may also be the contribution of the founder (member) of LLC to the charter capital. It is contributed in the form of the right to use the "know-how". It may be a report on appraisal of

[142] Regarding Replenishment of the Charter Capital of a Company Through a Bank: Letter of the National Bank of Ukraine № 11-113/1998 as of 18.11.2002, *available at*: http://zakon4.rada.gov.ua/laws/show/va998500-02

[143] On the Statutory Fund of a Limited Liability Company: Letter of the State Committee of Ukraine for Regulatory Policy and Entrepreneurship №6279 as of 14.09.2004, *available at*: http://zakon.nau.ua/doc/?uid=1158.1154.0

proprietary rights, a license agreement for the use of "know-how", a "know-how" purchase agreement.

It is prohibited to use budget funds; loan capital; funds received on pledge (part 3 of Article 86 of the Commercial Code of Ukraine); bills of exchange and promissory notes; personal actions (company registration, experience in a certain field of activity, consulting), work or services for the formation of the charter capital of LLC.

The release of a member of the LLC from the obligation to make an initial contribution to the charter capital of LLC that was declared at the moment of state registration of LLC shall not be allowed, including by listing requirements to LLC. This rule does not apply to the increase of the charter capital of LLC by making additional contributions by the members[144].

The size of the charter capital is an indicator which the LLC must annually verify the value of its net assets with. If at the end of each fiscal year the value of net assets turns to be lower than the charter capital, the LLC shall declare a reduction of its charter capital and register the relevant amendments to the charter. Reduction the charter capital in such a situation can be avoided if the members decide to increase the charter capital at the expense of additional contributions.

Changes to the charter related to changes in the size of the charter capital and / or changes in the composition of the members shall be subject to state registration. The deadline for registering the relevant changes shall be 1 day.

The body authorized to conduct registration of the legal entities in its Letter indicates that changes to the charter of a business company, which were adopted by the general meeting of this company, may be signed by the chairman of such general meeting, subject to the availability of the decision adopted by the general meeting on its approval, as well as on the condition for granting him/her, on behalf of the members of the company, of the right to sign amendment to the charter and the availability of a power of attorney, duly issued on the basis of the decision of the general

[144] On the Forms of Making an Additional Contribution by a Member to the Charter Capital of a Limited Liability Company: Letter of the State Committee of Ukraine for Regulatory Policy №1768 as of 18.03.2005, *available at*: http://www.uazakon.com/document/fpart50/idx50726.htm

meeting[145]. True, the Letter does not specify how the general meeting should issue a power of attorney. Therefore, the general rules of law shall be applied.

Increase of the charter capital. The increase of the charter capital of LLC shall be allowed after making of full contributions by all its members. Members of the company may increase the charter capital of the company without additional contributions due to the company's retained earnings. In the case of an increase of the charter capital due to the company's retained earnings, without the involvement of additional contributions, company membership and the ratio of the size of their shares in the charter capital does not change (Article 17).

Members of the company may increase the charter capital of the company due to additional contributions of members and / or third parties by the decision of the general meeting of members.

Each member has the pre-emptive right to make an additional contribution within the amount of the charter capital increase in proportion to his/her share in the charter capital. Third parties and members of the company may make additional contributions after each member exercises his/her pre-emptive right or refuses to exercise such a right within the difference between the amount of the increase of the charter capital and the amount of additional contributions made by the members, only if it is stipulated by the decision of the general meeting of members on attraction of additional contribution.

The decision of the general meeting of the company's members on attracting additional contributions determines the total amount of the increase of the company's charter capital, the ratio of the amount of increase to the size of each member's share in the charter capital and the planned amount of charter capital (Article 18 of the Law).

Members of the company may make additional contributions within the time established by the decision of the general meeting of members, but not more than within one year from the date of the decision to attract additional contributions.

[145] On Signing by the Founders of a New Version of the Charter of LLC: Letter from the State Committee of Ukraine on Regulatory Policy and Entrepreneurship №5131 as of 13.07.2007, *available at*: http://zakon.nau.ua/doc/?uid=1158.277.0

Third parties and company's members may make additional contributions within six months after the expiration of the term for additional contributions by members who intend to exercise their pre-emptive right if the decision of the general meeting of members to attract additional contributions does not set a shorter deadline.

The charter or unanimous decision of the general meeting, in which all the members of the company took part, may set other time limits for additional contributions, may set the possibility for the members to make additional contributions without observing the proportions of their shares in the charter capital or may establish the right of certain members to make additional contributions, as well the stage of making additional contributions by those members of a company that have a pre-emptive right may also be excluded.

A company's member and / or a third party may enter into a contract of making an additional contribution under wich such a member and / or a third party undertakes to make an additional contribution in cash or non-monetary form, and the company undertakes to increase his/her share in the charter capital or to grant him/her a membership with a corresponding share in the charter capital (Article 18).

Charter capital reduction. The company has the right to reduce its charter capital. There may be several legal consequences of reducing the charter capital of LLC: 1) change in the par value of the shares of members of the LLC; 2) change in the percentage value (size) of the member's share in case of disproportionate reduction of the charter capital; 3) withdrawal of a part of the company's property (reduction of the company's assets).

In the case of a decrease in the par value of the shares of all the company's members, the parity of the par value of their shares shall remain unchanged. After making a decision on the reduction of the company's charter capital, its executive body must notify each creditor whose claims to the company are not secured by a pledge, guarantee or surety of such a decision within 10 days in writing. Within 30 days of the receipt of the corresponding notice creditors may apply to the company with a written request for one of the following measures at the company's choice: 1) ensuring the enforcing of obligations by entering into a security agreement; 2) early termination or fulfillment of obligations to the creditor; 3) the conclusion of another agreement with the creditor.

Failing the aforementioned requirement by the specified time, creditors shall be entitled to sue for early termination or enforcing obligations by the company.

Assignment of a part of the company's property shall be possible if the value of the net assets of the company exceeds the size of the reduced charter capital. Assignment of property shall be possible at the amount of reduction of the charter capital and after the procedure of capital reduction, in particular, the settlement of creditors' claims.

3.2.4. Company's Governing Bodies

In order to manage the company's activity, the law provides for the establishment of such governing bodies: 1) the supreme governing body – the general meeting of members; 2) executive body – director (directorate); 3) the supervisory board (if the formation of such a body is provided by the charter) (Article 28 of the Law).

General meeting of members. The supreme body of LLC is the g*eneral meeting of the members*. It consists of members of the company or their appointed representatives.

General meeting of members shall be convened: 1) in cases specified by the Law; 2) in cases specified by the company's charter; 3) on the initiative of the executive body of the company; 4) upon request of the supervisory board of the company; 5) upon request of the member or members of the company, jointly possessing 10 or more percent of the charter capital of the company on the date of filing the claim.

Annual general meeting of members shall be convened within six months following the reporting year. The agenda of the annual general meeting of members necessarily introduces the question of the distribution of company's net profit, the payment of dividends and its amount.

The requirement to convene a general meeting of members shall be submitted to the executive body of the company in writing, indicating the proposed agenda. In the case of convening a general meeting of members on the initiative of the members of the company, such a requirement must contain information on the size of the shares in the charter capital of the company belonging to such members.

The executive body of the company shall be obligated to take all necessary actions for convening the general meeting of members within

the term not later than 20 days from the day of receipt of the requirement to hold such meetings (Part 8 of Article 31 of the Law).

If within 10 days from the day the company received or should have received the request to convene a general meeting, the members did not receive notification about the convening of the general meeting of members, if another term is not set by the charter, the persons who initiated its convening may convene a general meeting themself. In this case, the duties of convening and preparing for the general meeting of members, stipulated by Article 32 of this Law, shall be imposed on the members of the company who initiated the general meeting.

General meeting of members can make a decision on any issue without observing the requirements established by this Law and the company's charter regarding the order of convening of the general meeting of members and notice of holding a general meeting, if all company's members took part in such a general meeting and all of them agreed with consideration of such matters.

General meeting of members shall be convened by the executive body of the company. A charter of a company may determine another body authorized to convene a general meeting of members. The executive body of the company convenes a general meeting of members by sending a notice to each member of the company.

The executive body of the company shall inform the members of the company not less than 30 days before the scheduled date of the general meeting, unless another deadline is established by the company's charter.

Proposals of a member or members of a company jointly owning 10 or more percent of the charter capital of a company are subject to mandatory inclusion in the agenda of the general meeting. In such a case, such a question is considered automatically included in the agenda of the general meeting of the members.

The exclusive competence of the general meeting of LLC includes:

1) identification of the main areas of the company operations;

2) introduction of amendments to the company's charter, approval of a decision to conduct company's activities under the model charter;

3) approval of a decision to change the company's charter capital;

4) approval of the monetary valuation of the member's non-monetary contribution;

5) redistribution of shares between the members of the company in cases stipulated by this Law;

6) the election and termination of the powers of the supervisory board of the company or its members, setting the amount of remuneration to the members of supervisory board of the company;

7) the election of the sole executive body of the company or members of the collegial executive body (all of them or separately rom one or more of them), the establishment of the amount of remuneration to the members of the executive body of the company;

8) identification of forms of control and supervision of the activities of the executive body of the company;

9) creation of other bodies of the company, determination of the procedure of its activities;

10) making a decision on the acquisition of a share (part of share) of a member by a company;

11) approval of the results of the company's activities for a year or another period;

12) distribution of net profit of a company, the decision to pay dividends;

13) making decisions on the spin-off, consolidation, split-up, merger by acquisition, liquidation and transformation of a company, the election of a termination commission (liquidation commission), approval of the liquidation procedure of a company, the order of distribution of the property remaining after satisfaction of the claims of creditors among the members of the company in the event of its liquidation, approval of the liquidation balance sheet of the company;

14) adoption of other decisions assigned by this Law to the competence of the general meeting (Part 2 Article 30).

Decisions on the matters envisaged by paragraphs 2, 3, and 13 shall be taken by three-quarters of the votes of all members of the company who have the right to vote on the relevant matters (Part 2 of Article 34). The decision of the general meeting of the members on the matters envisaged by paragraphs 4, 5, 9, and 10 shall be taken unanimously by all the members of the company who have the right to vote on the relevant issues (Part 3 of Article 34).

The decision of the general meeting of members on all other issues shall be taken by the majority of votes of all members of the company who have the right to vote on the relevant issues.

The company's charter may establish a different number of votes of the company's members (but not less than the majority of votes) necessary for making decisions on the agenda of the general meeting of the members, except for decisions adopted in accordance with this Law by unanimous vote. The relevant provisions may be introduced into the charter, amended or excluded from it by unanimous decision of the general meeting of members, which was attended by all the members of the company.

Each member of the company has the right to attend the general meeting, to participate in the discussion of agenda items and vote on the agenda of the general meeting. Members shall have a number of votes proportional to their share in the charter capital of the company. However, the charter may provide for a different ratio of their votes.

Representatives of the members may be permanent or appointed for a certain period. The member shall have the right at any time to replace his/her representative in the general meeting, notifying other members about it. A member of the LLC shall have the right to transfer his/her powers at a meeting to another member or representative of another member of the company. Members have the number of votes proportional to their share in the charter capital.

A power of attorney issued to a representative may include a voting instruction, that is, a list of issues on the agenda with instructions for which decisions (against which decisions) a representative shall vote. The member has the right at any time to replace his/her representative in the general meeting, notifying other members about it.

It should be noted that the member of the company may take part in the general meeting of members by submitting his or her will to vote on the issues of the agenda in writing (absentee voting). The authenticity of the signature of the member of the company on such a document shall be certified notarially (Article 35 of the Law).

In addition, the possibility of making decisions through the survey shall be foreseen as well.

Decisions shall be documented by the minutes. The legislation does not define the requirements for the content of the minutes of the general

meeting of the company, since it is not a constating document. In accordance with the general requirements of record keeping the minutes shall mandatory specify: the date, time and place of the general meeting; the total number of persons included in the list of members who are entitled to participate in the general meeting; the number of members present (and the number of their votes); general meeting agenda; main points of the speeches; the voting procedure at the general meeting; voting results on each issue of the agenda of the general meeting and decisions made by the general meeting. The minutes shall be signed by the chairman of the general meeting of the members or another person authorized by the meeting. Each member of the company who participated in the general meeting of members may sign the protocol.

The minutes of the general meeting of members shall be organized by the chairman of the general meeting of the company. The LLC keeps a book of minutes, which shall be provided to the members of the company at any time. At the request of the members of the company, certified copies of the minutes may be issued as well.

Decisions on issues not included in the agenda of the general meeting of members are accepted only if the general meeting is attended by all the members of the company who unanimously agreed to consider such matters. The granting of such consent by the representative per power of attorney shall be specially stipulated by the power of attorney.

All expenses for the preparation and holding of the general meeting of members shall be borne by the company. If the general meeting of members is initiated by the member of the company, the expenses for preparation and holding of such general meeting of members shall be borne by the member of the company who initiates its conducting, unless otherwise decided by the general meeting of members.

The general meeting of members is held at the location of the company, unless otherwise provided by the charter of the company. Holding a general meeting outside the territory of Ukraine shall be allowed only by unanimous written consent of all members of the company.

Members of executive bodies who are not members of the company may participate in meeting with the right of an advisory vote. Participants attending the meeting shall be registered with the number of votes each member has. This list shall be signed by the chairman and secretary of the meeting. Form of the members' list is not foreseen. Therefore, it is

unspecified. Thus, the list of members who appeared at the meeting is a document of optional form in which it is expedient to indicate the name of the company, the date of the meeting, the surname, the name of the members, the number of votes belonging to them, their personal signature. This list shall be attached to the minutes of the meeting.

Executive body of the company. The LLC creates an executive body: a collegial – a directorate or a sole – the director (Article 39).

The name of the executive body is optional. As a rule, it is a director, but it can also be: president, chairman, etc. The directorate is headed by the director general. Members of the executive body may also be persons who are not members of the company.

The election of the members of the collegial executive body and its chair shall be conducted by voting on each candidate individually, unless the charter provides for the election of members of the executive body and its chairman by a list, cumulative voting or otherwise.

If the company's charter stipulates that its executive body is composed of several persons, then the head of such an executive body is not an independent governing body, therefore, he/she must bring relevant issues for consideration to the meeting of the board or general meeting of the company for the company to acquire civil rights and obligations on the basis of Part 2 of Art. 99 and Art. 145 of the Civil Code of Ukraine.

An individual who is a member of a collegial executive body of a company or acts as a sole executive body shall not be a member of the supervisory board of this company.

The sole executive body of the company or the chairman of the collegial executive body of the company may act on behalf of the company without power of attorney. The charter of the company may provide for the possibility for each or some certain members of the collegial executive body to act on behalf of the company without a power of attorney or the possibility for all or some members of the executive body to act on behalf of the company without a power of attorney exclusively jointly. If a member of an executive body has appointed a temporary executive at the time of his/her absence, such member of the executive body shall be jointly liable to the company together with the person appointed by him/her.

A member of the collegial executive body of the company shall not transfer his/her vote to other members of this executive body. An

agreement entered into with a member of the executive body of the company, on behalf of the company, shall be signed by a person authorized for such signing by the general meeting of members.

In order to make decisions on matters that fall within the competence of the executive body, but beyond the common daily activities of the company, the chairman of the collegial executive body shall convene a meeting of the executive body (Article 39 of the Law). The charter of the company may establish restrictions on the amount, type, subject of transactions, for deciding on which chairman of the collegial executive body must convene a meeting of the executive body of the company. Violation of these requirements by the chairman of the executive body is the ground for termination of a civil-law or employment agreement (contract) with him/her.

Decisions of the collegial executive body shall be taken by a majority of the votes of all its members. The charter of the company may contain a list of issues, the decision on which requires a greater number of votes.

Decisions of the executive body of the company, taken with excess of the competence, may be declared void in the suit of the members of the company in case of violation of rights of the members of the company by such a decision.

Legislation does not provide for the convening and holding of meetings of the collegial executive body of the company. Therefore, the relevant provisions should be stipulated in the company's charter, in particular, the mandatory notification of all members of the collegial executive body of the meeting, the provision of information on the agenda, authority, procedure for making a decision, etc.

A document confirming the fact of electing certain person as the director of LLC and acquiring a status of an official of the company by such a person is the minutes of the general meeting on the appointment of this person for such a position[146].

Thus, the person acquires the status of the chairman of the executive body (the sole executive body) on the basis of the decision of the general

[146] Regarding the Package of Documents to be Submitted to the State Registrar in Case of Changes in the Information About the Legal Entity Related to the Change of the Head: Letter of the State Committee of Ukraine for Regulatory Policy and Entrepreneurship № 6841 as of August 11, 2008, *available at*: http://dtkt.com.ua

meeting on the election (appointment) of the chairman of the executive body, which is drawn up by the relevant protocol (decision). At the same time, the acquiring of the status of the chairman of the executive body by the person, as an official, does not automatically create a liability of LLC to pay such a person any remuneration or indemnity. Such payments may be made only under the terms of an employment agreement (contract) or a civil-law agreement.

An employment agreement (contract) shall be signed with the director. It is impossible to establish restrictions on the competence of the director in comparison with the scope of competence specified in the charter.

From the point of view of the labor law the performance of the director's duties can only take place for a remuneration paid in the form of wages. Thus, the free fulfillment of the functions of the director by an individual is permissible only on condition of his/her participation in corporate relations (that is, when he/she belongs to the founders (members) of LLC). In this case, the acquiring of the status of a director by an individual will be made by the minutes of the general meeting or the decision of the sole founder, without the conclusion of an employment agreement (contract) and without drawing up an order on enrollment of an employee to work (for the admission to the position of director).

The director shall be elected by the general meeting of the company. The directorate (director) shall decide on all the matters of the company's activities, except those that fall within the exclusive competence of the general meeting of members. The general meeting of the members of the company may make a decision on the transfer of part of its competence to the directorate (director). Since his/her election, the director has all the powers that are provided for him/her in the chater (including concluding contracts). However, it should be noted that the invalidity of the decision of the general meeting on the election of the head of a business company shall not necessarily be a ground for invalidating the contracts made by this director on behalf of the company (Resolution of the Higher Commercial Court of Ukraine dated February 25, 2016, No. 4 “On some issues of dispute resolution practice, arising from corporate legal relations”)[147].

[147] On some issues of dispute resolution practice, arising from corporate legal relations: Resolution of the Higher Commercial Court of Ukraine as

The director may be dismissed in case of breach of his/her duties. In addition, Ukrainian legislation provides for a number of retaliatory measures (since, according to the labor law, the procedure for dismissal may be complicated, especially if the director takes exception against the dismissal) such as a temporary suspension (Article 99 of the Civil Code). At the same time, paragraph 13 of Article 39 of the Law stipulates that the powers of a sole executive body may be terminated or chairman of a collegial executive body may be suspended only by electing a new sole executive body or chairman of a collegial executive body or interim officers. In case of termination of the powers of the sole executive body or a member of the collegial executive body, the contract with this person is considered to be terminated. The charter of a company may provide for the election of new members or interim officers for all members of the collegial executive body.

Dismissal is an action of the general meeting of LLC, aimed at making it impossible for the chairman of the executive body to exercise his/her powers. The need for such a rule is conditioned by the need to react promptly to the actions of the person performing representative functions at any time.

The liability of the members of the executive body of the company to the company is solidary. Some limitations are imposed on the members of the executive body of the company. Without the consent of the general meeting of the members or the supervisory board of the company they shall not: 1) carry out economic activity as an individual entrepreneurs in the business area of the company; 2) be a member of a general partnership or a full member of a limited partnership that carries out activities in the business area of the company; 3) be a member of the executive body or supervisory board of another entity that carries out activities in the business area of the company (Article 40). Violations of the above obligations shall be grounds for the company to terminate an agreement (contract) with such a person without compensation.

Members of the executive body shall not disclose information that has become known to them in connection with the performance of their official duties and constitute a commercial secret of the company or is confidential, except when disclosure of such information is required by

of 25.02.2016 № 4, *available at*:
http://zakon2.rada.gov.ua/laws/show/v0004600-16

law. This prohibition shall also be valid for one year from the date of termination (dissolution) of the agreement between the official and the company, unless another timelimit is established by such agreement.

Supervisory Board. Supervision over the activities of the directorate (director) of the LLC shall be carried out by the *supervisory board* formed by the general meeting of the members of the company, in the number provided by the constating documents. Members of the directorate (directors) can not be members of the supervisory board.

The Supervisory Board controls and regulates the activities of the executive body of the company within the competence defined by the company's charter. In particular, the competence of the supervisory board may include the election of the sole executive body of the company or members of the collegial executive body of the company (all of them or separately one or few of them), the suspension and termination of their powers, the establishment of the amount of remuneration to the members of the executive body of the company (Part 2 of Art. 38 of the Law).

The order of its formation and activity is scarcely regulated in the mandatory form. Therefore, the order of the activity of the supervisory board, its competence, the number of members and the procedure for their election, including the independent members of the supervisory board, the size of the remuneration to the members of the supervisory board, as well as the procedure for the election and termination of their powers, shall be determined by the company's charter.

The supervisory board of the company may be delegated the powers of the general meeting of members, except for the exclusive competence of the general meeting of members. With each member of the supervisory board, a commercial contract or employment contract shall be concluded. A commercial contract may be on a paid-for basis or free. An agreement entered into with a member of the supervisory board on behalf of the company shall be signed by a person authorized by the general meeting of members to sign it.

By the decision of the general meeting of the members, the powers of the members of the supervisory board may be terminated at any time and for any reason, or the members of the supervisory board may be temporarily suspended. In case of termination of the powers of a member of the supervisory board, by the decision of the general meeting of

members, the relevant agreement with this person shall be considered to be automatically terminated (Part 6, Article 38 of the Law).

The supervisory board has the right to require the submission of all necessary materials, accounting or other documents and personal explanations from the officers of the company. The supervisory board reports the results of its audits to the supreme body of the company, that is, the general meeting of members.

The executive body of the company shall be accountable to the supervisory board of the company (in the case of formation) and organizes the execution of its decisions.

Members of the supervisory board of the company shall act in reasonable good faith in the interests of the company. They shall be liable to the company for the damage caused to the company by their wrongful acts or omissions. A member of the company's supervisory board shall not be held liable if he/she proves that the damage was caused without any default on his/her part. It should be noted that the Law establishes joint responsibility of members of the supervisory board of the company for the caused harm.

The supervisory board may engage an independent auditor to conduct an audit. Audit is also possible on the initiative of the member (members) of the company having a total of at least 10% of the company's votes.

In this case, the member (members) of the company independently conclude an agreement with the auditor (audit firm) appointed by them to conduct an audit of the financial statements of the company, specifying the scope of audit services.

Expenses related to the conduct of an audit of financial statements remain with the member (members), at the request of which such an audit is conducted, unless otherwise provided by the company's charter. The general meeting of the members of the company may decide on the reimbursement of the member's expenses for the conduct of an audit of the financial statements of the company.

The executive body of the company shall be obliged to provide the auditor with the possibility of carrying out the audit and provide copies of all documents certified by the signature of the authorized person of the company in accordance with the scope of audit services specified in the agreement within 10 days from the date of receipt of the request of the

member (members) about such audit and original copy of the agreement on conduct of an audit of the financial statements of the company.

3.2.5. Contents of Equity Rights and Obligations of the Members

Members of the company shall have the right to (equity rights)[148]:

1) participate in the company's management;

2) withdraw from the company[149];

3) receive information on the company's activities. At the request of the member, the company shall provide him/her with the annual balance sheets, reports of the company on its activities, minutes of the meeting;

4) carry out the alienation of shares in the charter capital of the company[150].

5) participate in the distribution of profits of a company and receive its share (dividends).

The right to a share of profits (dividends) in proportion to the share of each member belongs to the persons who are members of the company at the beginning of the date of profit payment. Distribution of dividends shall be made at the expense of the company's net income to persons who were members of the company on the day the decision to pay dividends is made, in proportion to the size of their shares.

The company pays dividends in cash, unless otherwise determined by unanimous decision of the general meeting of members, in which all the members of the company took part. Dividends may be paid out for any period that is a multiple of a quarter, unless otherwise provided by the charter.

Distribution of dividends shall be made within six months as from the date of the decision on its distribution, unless other timelimit is established by the charter of the company or by the decision of the general meeting of members.

The officials of the company, guilty of misleading the members of the company regarding company's financial status, in particular by submitting (including) doubtful information to the company's documents resulting in the performance of unlawful payments, bear joint and several

[148] refer to paragraph 3.2.3.

[149] refer to paragraph 3.2.5.

[150] refer to paragraph 3.2.5

liability for the obligation to repay the company together with the members.

The company shall have no right to take a decision on the distribution of dividends or to pay dividends if: 1) the company did not make payments to the members of the company subsequent to the termination of their corporate affiliation or with the successors of the company's members; 2) the company's assets are insufficient to satisfy the creditors' claims under mature obligations, or will be insufficient in the case of a decision to distribute dividends or make a payment. The charter of the company may additionally provide for other conditions forbidding general meeting of members to decide on the distribution of dividends or payment of dividends. The company shall not pay dividends to a member who has not contributed fully or partially.

Members may also have other rights provided by the law and the constating documents of the company.

Members of the company shall be obliged:

1) to observe the constating documents of the company and comply with the decisions of the general meeting and other company's governing bodies;

2) to fulfill their obligations to the company, including those related to the property participation, as well as to contribute;

3) not to disclose commercial secret and confidential information about the activities of the company;

4) to carry other obligations, if provided by other legislation of Ukraine and constating documents.

Rights to participate in management, to receive income and other equity rights may be exercised since the date of introduction of amendments to the company's charter.

Shareholders' agreement. A shareholders' agreement is an agreement between the shareholders whereby the shareholders undertake to carry out their rights in certain manner or refrain from carrying out them (Article 7 of the Law). The shareholders' agreement is free and must be in writing. A shareholders' agreement that does not meet these requirements is null and void. The date of conclusion and validity of the shareholders' agreement shall be specified in the contract.

A shareholders' agreement may provide conditions or a procedure for determining conditions on which the member shall be entitled or

obliged to buy or sell a share in the charter capital (part of a share), as well as may determine cases when such right or obligation arises. The contract, which sets the obligation of the members to ensure voting in accordance with the instructions of the company's governing bodies of the company, is null and void.

The content of the shareholders' agreement is not subject to disclosure and is confidential unless otherwise provided by law or agreement. A shareholders' agreement party to which is the state, the territorial community, state or communal enterprise or the legal entity in the charter capital of which 25 and more percent directly or indirectly belongs to a state or a territorial community shall be made public within 10 days from the moment of its conclusion by placing on the site of the competent central and local public authorities.

An agreement entered into by a party to a shareholders' agreement aimed at violating of such a shareholders' agreement shall be null and void if the other party to the contract knew or ought to know about such a violation (Part 6 of Article 7 of the Law).

If the power of attorney is issued for the purpose of fulfilling or ensuring the fulfillment of the obligations of the parties to the shareholders' agreement, the subject of which are the rights to a share in the charter capital or the powers of the members, the trustee may indicate in the power of attorney that before the expiration of its duration it can not be canceled without the consent of the representative or can be canceled only in cases provided for in the power of attorney (irrevocable power of attorney).

An irrevocable power of attorney shall be terminated in the event of termination of an obligation for which it was issued. In case of violations of the rights and interests of the trustee, the representative, at the request of the trustee, shall cease to use irrevocable power of attorney and to waive it. In case of a dispute, the irrevocable power of attorney may be canceled by the court. An irrevocable power of attorney is subject to a notarial certificate.

A person who has been issued an irrevocable power of attorney to can not re-assign the commission of the acts for which he/she was authorized to another person, unless otherwise provided for in a power of attorney.

3.2.6. Transition of Equity Rights (Share)

Alienation of a share. The member of the LLC shall have the right to sell or otherwise withdraw his/her share (its part) in the charter capital to one or few members of this company, to other persons in paid or non-paid form.

The charter of a company may stipulate that the alienation of a share (part of a share) as well as the trasnfer it into a pledge shall be allowed only with the consent of other members. The corresponding provision may be introduced into the charter or excluded from it by a unanimous decision of the general meeting of members, which was attended by all the members of the company (Part 1 of Article 21 of the Law).

The sale of equity rights (shares) takes place on the basis of an agreement. The current legislation does not contain special requirements to the content and forms of contracts on the alienation of equity rights (shares) of LLC. There are also no legal rules governing the entry of a person into a company as a result of a contract of sale. Therefore, in practice, the inclusion of a new member in the company (who acquired a share in the charter capital), as well as the termination of the participation in the company of the member (who has completed the alienation of the share in full), must additionally be confirmed by the relevant decision of the general meeting of the company.

The member independently determines the terms of sale of his/her share (its parts). The terms of sale also refer to the price of a share (including much higher or significantly lower than the real value of the share), which is alienated.

Other members of the LLC can not decide on the price of the share (its part) that is being sold by the member. They can only use or not use their pre-emptive right to purchase this share (its parts) on the terms and conditions offered by the member who sells the share (its part).

Alienation by a member of the LLC of his/her share (its part) to a third party shall be allowed, unless otherwise established by the charter of the company. Members of the company shall have the right to capture in the charter a prohibition on the alienation of a share to third parties.

Member of the company shall have a pre-emptive right to purchase a share (a part of a share) of another member of a company that is being sold to a third party (Article 20 of the Law). If several members of the company have expressed a desire to take advantage of their pre-emptive right, they

acquire a share (a part of the share) in proportion to the size of their share in the company's charter capital.

Member of the company who intends to sell his/her share (part of the share) to a third party shall be obliged to inform other members of the company about the price and size of the alienated share and other terms of such a sale in writing. If none of the members of the company who enjoys the pre-emptive right within 30 days from the date of receipt of the notice of the intention to sell the share (part of the share) did not notify the member offering share (part of the share) for sale about the intention to exercise the pre-emptive right, it should be considered that such a member has given his/her consent on the 31st day after the date of receipt of the notice, and such a share (part of the share) may be alienated to a third person on the terms as have been notified to the shareholders (Part 3 of Article 20 of the Law).

If a member of a company offering share (part of the share) for sale to a third party has received from another member a written declaration of intention to use his/her pre-emptive right, then such members shall be obliged to conclude a share (part of the share) purchase agreement within one month.

In the event of circumvention of: 1) the seller from the conclusion of the purchase agreement the buyer shall have the right to take legal action for the recognition of the share (part of the share) purchase agreement concluded on the terms as have been proposed by the seller; 2) the buyer from the conclusion of the the purchase agreement, the seller shall have the right to sell his/her share to a third party on the terms as have been notified to the shareholders (Article 20 of the Law).

With regard to the protection of violated pre-emptive rights, a special method of protection of equity rights shall be applied. A member whose pre-emptive rights are violated can not declare such a contract invalid. There is a special type of plaintiff's claim, namely a claim for the transfer of the rights and obligations of the buyer of the share (part of the share). The limitation period for such claims shall be one year.

It should be noted that the legal regulation of pre-emptive rights is characterized by broad discretion. The charter of a company may establish another procedure for the implementation of the pre-emptive right by the members of the company, the distribution of the alienated share (part of

the share) between other members of the company, the refusal to exercise the pre-emptive right by the members of the company.

Members of the company may agree on not having pre-emptive rights in the constating documents. The charter may also provide for the obligation of a company's member offering share (part of the share) for sale to a third party, to hold negotiations on its sale with other members of the company first. The relevant provisions may be incorporated into the charter, amended or excluded from it by unanimous decision of the general meeting of members, attended by all members of the company.

The rule on pre-emptive right of a company's member shall not be applied: 1) if it is stipulated by a shareholders' agreement, the party to which is such a member; 2) if the sale of share (part of the share) of the charter capital of the company is carried out at an auction (public auction) in accordance with the law (paragraphs 7-8 of Article 20 of the Law); 3) to the relationship of donation, other free-of-charge disposal of a share of the charter capital of LLC or SLC, as well as the exchange of this share (part of the share) for other property. That is, in the case of the alienation of the share under the contract of donation, the contract of exchange, other members of the company shall have no pre-emptive right to acquire a share. That is why, in practice, in order to circumvent the rule of law, the parties conclude a fictitious donation contract.

The share may also be redeemed by the company itself. The company shall have the right to acquire shares in its charter capital without reducing it for the size of such a share only on the condition that on the day of such acquisition the company will form a reserve capital in the amount of the purchase price of the share that can not be used to make payments to the members of such a company.

A commutative contract for the acquisition of a share by the company in its own charter capital shall be concluded only by unanimous decision of the general meeting of members, in which all the members of the company took part.

In case of acquiring a share (part of the share) of a member by the company itself, without reducing the charter capital of the company, the company shall be obliged to make the alienation of such a share on a paid-for basis no later than one year from the date of purchase of the share (part of the share).

Alienation of a share has its own peculiarities if the member is married. According to Art. 60 of the Family Code of Ukraine, the property acquired by spouses during the marriage belongs to the wife and the husband as joint matrimonial property, regardless of the fact that one of them did not have an independent earnings for a valid reason (education, household maintenance, child care, illness, etc.) (income). It is believed that every thing acquired during the marriage, apart from the things of individual use, shall be considered as the object of joint matrimonial property right of the spouses[151]. Thus, in case of alienation of a share in LLC, the member-alienator will need to obtain the consent of the other spouse. The mentioned consent shall have the form of a notarized statement.

Withdrawal from the company. The Law of Ukraine "On Limited Liability and Superadded Liability Companies" regulates in detail the procedure for exercising by the member of the right of withdrawal (Article 24 of the Law).

A member of a company whose share in the company's charter capital is less than 50 percent may withdraw from the company at any time without the consent of other members. And the withdrawal from the company of a member, whose share in the charter capital of the company is 50 percent or more, shall be possible only with the consent of other members. A decision to grant consent to a member of a company shall be taken within one month from the date of submission by the member of the notice, unless another term is stipulated by the charter.

The member's notice of the withdrawal may be of two forms: 1) statements of withdrawal from the company – for individuals; 2) the decision to withdraw from the founders (members) – for the legal entity.

A statement of an individual-member of the LLC on the withdrawal shall be certified by a notary (Part 5 of Article 17 of the Law of Ukraine "On State Registration of Legal Entities, Individual Entrepreneurs and Public Formations"). As for legal entities, it should be noted that the decision to withdraw is an internal document. Therefore, formally it should also be accompanied by a letter – a statement of the withdrawal, which shall be addressed to the company.

[151] Family Code of Ukraine № 2947-III as of January 10, 2002, *available at:* http://search.ligazakon.ua/l_doc2.nsf/link1/T022947.html

If for withdrawal of the member the consent of other members of the company is required, then such a member may withdraw from the company within one month from the date of receiving such consent by the last member, unless a shorter period is determined by such consent.

According to a prevailing judicial practice, there are no common lens on the moment of withdrawal of a member from the company. There are few points of view: 1) since the moment general meeting decides on the withdrawal on the basis of an statement of withdrawal[152]; 2) since the date of filing of the statement of withdrawal to the relevant official of the company or the submission of the statement to these persons by means of communication (paragraph 28 of the Resolution)[153]; 3) since the day of the state registration of the relevant changes to the charter[154].

Finally, the Law of Ukraine "On Limited Liability and Superadded Liability Companies" clearly states that the moment when a member withdraw from the company is the day of state registration of his/her withdrawal (Part 5 of Article 24 of the Law). Withdrawal of the member from the company, which results in the absence of any member in the company, shall be prohibited.

If the company does not take actions in connection with the submission of the statement of withdrawal by the member (the issue of amending the constating documents of the company, its state registration shall not being resolved), the member of the company shall have the right to bring a court action for the obligation of the company to carry out state

[152] On the practice of applying legislation in the consideration of cases arising from corporate relations: Recommendations of the Presidium of the Supreme Economic Court № 04-5/14 as of 28.12.2007, *available at:* http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi.

[153] On the practice of reviewing corporate disputes by the courts: Resolution of the Plenum of the Supreme Court of Ukraine № 13 as of 24.10.2008 // Herald of the Supreme Court of Ukraine. – 2008. – № 11.

[154] On providing explanations: Letter from the State Committee of Ukraine on Regulatory Policy and Entrepreneurship № 5114 as of 28.07.2004, *available at:* http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi

registration of changes in the constating documents of the company in connection with the change in the membership of the company[155].

Not later than 30 days from the day the company found out or was due to find out about the member's withdrawal, it shall be obliged to inform the former member of the value of his/her share, provide a justified estimation and copies of the documents necessary for the calculation. The value of a member's share shall be determined as of the day preceding the submission day of the respective application by the member.

The company shall, within one year from the day it found out or was due to find out about the withdrawal of a member, pay to such a former member the value of his/her share. The charter of a company as in effect when the withdrawal of a member may set another deadline for such a payment (Part 7 of Article 24 of the Law).

The value of a member's share shall be determined on the basis of the market value of the aggregate of all the shares of the company's members on a pro rata basis to the share size of such a member. An obligation to transfer monetary assets may be replaced by an obligation to transfer some other assets if it is agreed with the member of the company who resignes from membership and with the company itself. The company shall pay the member who resignes from the membership, the value of his/her share or transfers assets only on a pro rata basis to the size of the paid part of the share of such a member.

A member which resigns from membership shall have the right to request access to documents of financial statements, other documents necessary for determining the value of his/her share.

It should be noted that the above rules of settlement with the member, who resigns from membership, have a discretionary nature. The charter of the company may provide for another term, procedure, size and method of settlement with the member, who resigns from membership, as well as the procedure for selecting the estimator.

It should be noted that the introduction, the amendment or the exclusion of the relevant provisions from the charter shall be possible only with the unanimous decision of the general meeting of the members, which was attended by all the members of the company.

[155] On the practice of reviewing corporate disputes by the courts: Resolution of the Plenum of the Supreme Court of Ukraine № 13 as of 24.10.2008, *available at:* http://zakon4.rada.gov.ua/laws/show/v0013700-08

The withdrawal of the member is an action, as a result of which the charter capital shall be reduced. Accordingly, there is a need to inform the creditors. In order not to reduce the charter capital at the withdrawal of the member, other members of the company may: 1) decide to increase their shares by making additional contributions (so that the amount of capital remained the same as before the member's withdrawal); 2) decide on the purchase of the member's share by the LLC itself or its members (but in this case, the relations indicated cease to be governed by the rules of the law on the withdrawal of the member, and they are subject to rules on the transfer of the share).

Expulsion of member. In accordance with Part 2 of Art. 100 of the Civil Code of Ukraine, a member of the company may be expelled from the company in cases and according to the procedure specified by the law. But unlike the procedure for withdrawal, the procedure for the expulsion of a member from the LLC is not being regulated in detail by the Law of Ukraine "On Limited Liability and Superadded Liability Companies".

The Law only mentions the possibility of expelling a member of a company who is in arrears with his/her contribution (Part 2, Article 15). But from the analysis of the interpretation of ragulatory legal acts related to the said Law, one can conclude that the expulsion of member from the LLC shall also be possible if one of the following conditions is met:

1) repeated failure to perform duties (for example, failure to comply with the decisions of the bodies of LLC, default on obligations to the LLC for making contributions, etc.);

2) unduly performance of duties;

3) an obstacle to the achievement of the goals (purpose) of the company by their actions (for example, the disclosure of commercial secrets).

The question arises, what shall be understood under the notion of "repeated failure to perform duties"? The answer was given by the State Committee on Entrepreneurship, which stated that "an action is considered repeated if it is committed three or more times"[156]. Therefore, the member

[156] On consideration of the letter concerning the introduction amendments to the constating documents related to the change in the composition of the founders (members) of the business entity: Letter of the State Committee of Ukraine on Regulatory Policy and Entrepreneurship №2859 as of 12.05.2003, *available at:* http://zakon.nau.ua/doc/?uid=1158.1440.0

can be excluded only if it is proved that he/she has neglected his/her duties to the company 3 times or more.

Expulsion of member from LLC belongs to the exclusive competence of the general meeting of LLC. The court may not adopt a court decision on expulsion of the member. The court can only verify the validity and lawfulness of the decision to expell a member in the event of a claim for the recognition of such a decision invalid.

A decision to expell a member from a company shall not be taken by polling (Clause 6, Part 2, Article 36). Not later than 30 days from the day the general meeting of the members decided on the expulsion the company shall be obliged to inform the former member of the value of his/her share.

The value of the share of the member, who is being expelled, shall be determined on the basis of the market value of the aggregate of all the members' shares in proportion to the size of the share of such a member and as of the day preceding the day the general meeting of the members adopted the decision to expell the member from the company. With the consent of the expelled member and the company, an obligation to transfer monetary assets can be replaced by an obligation to transfer other property (Article 24 of the Law).

The company shall pay the expelled member the value of his/her share or transfer the property in proportion to the size of the paid part of the share of such a member.

In this case, company shall be obliged to provide the member with access to documents of financial statements, other documents necessary for determining the value of his/her share.

Inheritance of a share. In case of death or termination of a company's member, his/her/its share shall pass to his/her/its heir or successor without the consent of the company's members (Part 1 of Article 23 of the Law).

Upon the death, the declaration of a member – natural person as missing or deceased by the court or the termination of a member – legal entity whose share in the charter capital of the company is less than 50 percent, and if, within a year after the expiry of the term for the acceptance of an inheritance, the heirs (successors) of such a member did not file an application for membership in accordance with the law, the company may expell a member. Such a decision shall be taken without taking into account the votes of the member, who is being expelled. If the share of

such a member in the charter capital of a company is 50 percent or more, the company may take decisions related to the liquidation of the company, without taking into account the votes of such a member.

In the event of a refusal of the successor (heir) from entering the LLC the provisions of Art. 24 of the Law shall be applied to the settlement with the successors (heirs).

The pledge of equity rights (shares). Pledge is a way to secure obligations. By virtue of a pledge, a creditor (pledge holder) shall have the right, in the event of default of secured obligation by the debtor (pledgor) to obtain satisfaction from the value of the pledged property, prior over any other creditors.

The subject of the pledge may be any property (in particular, tangible assets, securities, property rights) that may be alienated by the pledgor and which may be subject to foreclosure. The subject of the pledge may include also equity rights (the share of a member in LLC). A pledge agreement shall be concluded in writing and does not require a notarial certificate. However, the conclusion of a pledge agreement in a notarial form shall be possible at the request of any party to the contract.

As a general rule, the consent of other members for the pledging of a member's share is not required but the charter of a company may stipulate that transfer of a share into pledge shall be allowed only with the consent of other members. The relevant provision may be entered into or withdrawn from the charter by a unanimous decision of the general meeting of the members, which was attended by all the members of the company (Part 2 of Article 21).

The pledgor retains the right to dispose of the pledged property, except as otherwise permitted by applicable law or contract. The pledgor may alienate the pledged property only with the consent of the pledge holder (Part 1 of Article 17 of the Law of Ukraine “On Pledge”).

Subsequent pledge of a share which is already pledged shall be allowed:

1) except as otherwise permitted by applicable law;

2) except as otherwise permitted by preliminary pledge agreements (Part 1 of Article 18 of the Law of Ukraine “On Pledge”).

The claims of the pledge holder, whose right of pledge has arisen later, shall be satisfied with the value of the pledge subject to complete satisfaction of the claims of previous pledge holders.

The highest risk of a creditor related to the pledge of equity rights of LLC (shares in the charter capital of LLC) is the impossibility of limiting the turnover of property of a business company. It leads to the potential opportunity of unethical practices of the LLC or its members, aimed at preserving property against collection, within the period after the pledge agreement. Such a feature makes a pledge of a share to be an insufficiently attractive way to secure creditors' claims.

Therefore, in order to more effectively protect their rights and interests, potential creditors are advised to stipulate the following terms in a pledge agreement: 1) mandatory agreement of the creditor on the alienation of equity rights (shares of LLC); 2) the pre-emptive right of the creditor to acquire equity rights (shares of LLC) in case of its alienation; to conclude pledge agreement on equity rights (shares of LLC) with the consent of other members of the company; 3) registration of the encumbrances over equity rights (shares of LLC) in the State Register of Encumbrances over Movable Property.

Levy execution upon equity rights (share). The share of the member of the LLC is part of his/her total assets. Therefore, in the case of impossibility for settlement of debts a share may be levied execution upon by the creditors.

The share of the member of the LLC shall be levied execution upon subject to the writ of execution on recovery of member's monetary assets or on the basis of the writ of execution on the recovery of the share of the property surety provider, which has been pledged to secure another person's obligation (Article 22).

The executor informs the company of the intention to levy execution upon the share of the member of the company (the debtor) and sends a share seizure order. The company must, within 30 days from the date of receipt of such a notification, provide the information necessary for the calculation of the value of the debtor's share in accordance with part four of this Article.

The executor invites other members of the company to purchase a share, taking into account the rules on the pre-emptive share acquisition. In this case, the buyer shall pay the cost of the share within 10 days from the date of the conclusion of the sales contract. The executor transfers the share to the buyer within 10 days from the date of receipt of the payment.

If a company fails to fulfill its obligations under part two or three of this article or the company members do not exercise their right to purchase a share, or if the sales contract is deemed to be terminated, the share shall be transferred to the auction per standard procedure.

The part of the property to be allocated or the amount of funds that make up the value thereof shall be established in accordance with the balance sheet, which shall be drawn up on the due date of the creditors' claims. The date for bringing claims by creditors is the day of receipt of a written request from the creditor on the allocation of the share of the debtor member or the corresponding appeal of the state executor.

Only creditors shall have the right to demand to levy execution upon a share. A creditor is a person who has property claims to the debtor. Such requirements shall be confirmed by relevant documents (for example, by a court decision, a writ of execution, an executive inscription by a notary, a claim recognized by the debtor).

Levy execution upon the entire share of the member in the charter capital of LLC discontinues his/her participation in the company. Levy execution upon the part of the member's property, proportional to his/her share, leads to a reduction of the charter capital of the company. However, in this case, in order to preserve the size of the charter capital, the company may: 1) make additional contributions in accordance with the established procedure and fill in the debtor's share; or 2) reduce the size of the charter capital.

3.3. General Partnership

3.3.1. The concept of GP. Members

A general partnership is one of the types of business companies that belongs to a subgroup of "business partnerships", since the conducting of a business by each of the members on behalf of the company and the nature of their responsibility for the obligations of the organization requires uberrima fides toward one another.

The legal concept of a general partnership is contained in Art. 66 of the Law of Ukraine "On Business Companies" (hereinafter referred to as the Law), in Art. 119 of the Civil Code of Ukraine and in Art. 80 of the Commercial Code of Ukraine. Due to the specified legal rules the company shall be recognized as the general partnership, if its members, in

accordance with the agreement entered into between them, carry out business on behalf of the partnership and jointly and severally bear the superadded (subsidiary) responsibility for company's obligations to the full extent of their property.

A general partnership acquires the rights of a legal entity from the date of its state registration, which shall be conducted in accordance with the procedure established by the Law of Ukraine "On State Registration of Legal Entities, Individual Entrepreneurs and Public Formations". The opening of current and deposit accounts in banks, the conclusion of contracts and other agreements by a general partnership as a fully valid legal entity, shall only be possible after its registration. All agreements concluded on behalf of the company before the registration shall be recognized as ones concluded with the company, only if they are further approved by the company, otherwise they will entail legal consequences only for the founders.

Members of a general partnership may be both legal and natural persons of a special legal status that is they shall be registered as entrepreneurs.

The legislator does not define the limits of the minimum and maximum number of members in this type of business company, but still establishes certain limitations. Thus, according to Part 2 of Art. 114 of the Civil Code of Ukraine, a general partnership shall not be created by one person, which becomes its sole member. A person may be a member of only one general partnership (Part 2 of Article 119 of the Civil Code of Ukraine, Article 66 of the Law of Ukraine "On Business Company"), which does not exclude the possibility of the same person to be a member of other types of business companies. The exception is an affiliation with limited partnerships, as a person can not be a member of a general partnership and a full member of a limited partnership at the same time. A member of a general partnership shall not be entitled to conclude contracts of the same type as those that belong to the business profile of the company without consent of other members. Under contracts of the same type in this context it is necessary to understand the contracts for the same kinds of activities, which are provided in the constating document of the company. This restriction shall not be applied to the contracts that are homogeneous on the subject, but are concluded for own needs.

The members in the general partnership jointly and severally bear the subsidiary responsibility for company's obligations to the full extent of their property. The above is a distinctive feature of this type of bussiness companies. This responsibility is mandatory and can not be changed by agreement between the members. The superadded responsibility of the members in the general partnership stipulates that in case of insufficiency of the property of the company to meet the claims of creditors in full, the latter may claim (in full or in part of the debt) both to all the members of the general partnership, and to each of them individually. Principles of subsidiarity of responsibility mean that the members of the general partnership bear responsibility in addition to the responsibility of the general partnership, which is the primary debtor, and creditors' claims to the members are to be brought in the case of impossibility such claims to be met by the company itself in the absence of its property. Therefore, execution upon property of the members may be carried out in the event of one of the following factors: actual non-creditworthiness of the company; declaration of bankruptcy; liquidation of the company. Direct execution upon property of the members without reference to the company shall not be valid.

In accordance with Art. 124 of the Civil Code of Ukraine one can distinguish a number of peculiarities of liability of the members of a general partnership, which include following:

а) liability of the member of a general partnership for the partnership's debts, irrespective of weather they occurred prior to or after his/her/its joining the partnership;

б) member of a general partnership that has withdrawn from the partnership shall be liable for the partnership's obligations, which occurred prior to the moment of his/her/its withdrawal, to the same extent as the remained members during three years from the day of the approval of the statement on the partnership activity for the year of his/her/its withdrawal from the partnership;

в) member of a general partnership, which has paid in full the partnership's debts, shall be entitled to apply with the recourse claim to the other members, which incur liability thereto pro rata to their shares in the contributed capital of the partnership.

3.3.2. Establishing a Partnership. Constating Documents

The constating document of a general partnership is a foundation agreement on a general partnership, which includes the obligation of the members to establish a partnership and the order of their joint activities for its creation, as well as information about:

- business profile and objects of the company;
- name and location of the company. The name of the general partnership shall contain the names of all its members, the words “general partnership” or the names of one or few members with the addition of the words “and the company”, as well as the words “general partnership” (Article 66);
- membership of the company;
- form of participation of the members in the operations of the partnership in relation to the management of the company's activities and the pursuit of entrepreneurial activity on its behalf;
- size, composition and deadlines of making contributions by the members and determination of their responsibility for late contributions;
- amount and composition of the company's contributed capital;
- size and procedure for changing the shares of each member in the contributed capital. The size of the shares shall be determined in proportion to the contribution of each member to the total value of the company's contributed capital and shall be expressed in fractional number or in percentage;
- the order of distribution of profits and losses of the company. The distribution of profits and losses of the company shall be made among the members either pro rata to their shares in the contributed capital of the company or taking into account the contribution of each member to the activity of the company or otherwise established by agreement between the members. The rule, according to which the deprivation of a member of a general partnership of eligibility for participation in the distribution of profits or losses shall be prohibited, is imperative, and therefore an agreement establishing otherwise shall be null and void. The profit of a general partnership shall be derived from the revenues from economic activity after covering the material and equivalent costs and expenses on labor remuneration. Interest on credits and on bonds shall be paid from the company's balance-sheet profit, as well as taxes and other assignment to

budget as provided for in the legislation of Ukraine shall be made. The net profit earned after these settlements and the payment of dividends remains in full possession of the company, which, in accordance with the constating documents, shall determine the directions of its use;

- the procedure for familiarizing the participants with all documentation related to the conducting of business and the responsibility for failure to provide this information;
- the procedure for amending the foundation agreement;
- the procedure for the liquidation and reorganization of the company (Article 67).

The foundation agreement shall be concluded in writing and shall be signed by all members of the company in accordance with the requirements of Part 1 of Art. 120 of the Civil Code of Ukraine.

It should be noted that regulatory legal acts do not establish requirements for the amount of contributed capital of a general partnership. The legislator does not determine either its minimum, or its maximum size. This is due, first of all, to the fact that the creditworthiness of the company is based not only on its property, but also on the amount of all the property belonging to each of the members of such a general partnership, taking into account the subsidiary liability of the members for the obligations of the company. At the same time, for the purpose of financing and operating activities of the company, in order to achieve the object of a company, the company needs a certain resource base, which appears to be the contributed capital formed from the contributions of company members. Contributions of members of a general partnership may be buildings, facilities, equipment and other material valuables, securities, rights to land, water and other natural resources, rights to use buildings, facilities, as well as other proprietary rights (including intellectual property rights), funds, including in foreign currency. All contributions of members shall be valued in hryvnias, which shall be executed in accordance with the procedure established by the foundation agreement on the basis of the Law of Ukraine “On Valuation of Property, Property Rights and Professional Appraisal Activity in Ukraine”.

Legislation prohibits the use of budgetary funds, loan funds and funds received on pledge, bills, property of state-owned public (municipal) enterprises, which according to the law (a decision of the local self-government body) shall not be subject to privatization, and property that is

under the ongoing management of state-financed institutions, unless otherwise provided by law for the formation of the general partnership's capital. The financial status of the members – legal entities regarding their ability to make appropriate contributions to the contributed capital of the general partnership in cases stipulated by law shall be verified by an independent auditor (audit organization) in accordance with the established procedure, while the property status of the members – citizens shall be confirmed by the certificate of the fiscal authorities on the submitted declaration of property status and income (tax declaration). Members of a general partnership may decide to change (increase or decrease) the amount of capital in order and with the obligatory introduction of amendments to the foundation agreement. This decision comes into force from the date of the amendments and its inclusion in the state register, which is carried out on the basis of the Law of Ukraine "On State Registration of Legal Entities, Individual Entrepreneurs and Public Formations".

3.3.3. General Partnership Governance

The uniqueness of the statutory concept of a general partnership shows itself through the absence of special company's governing bodies in it. All decisions related to company activity shall be issued with the common consent of all members, but the foundation agreement of the partnership may provide for cases when the decision shall be issued by a majority votes of the members. As a general rule, each member in the general partnership has one vote, but in the foundation agreement, members may also establish another method of calculating the number of votes depending on the size and form of contribution of each member. Since the legislator does not determine the decision making procedure by the members of the general partnership, there are good reasons to introduce it in the foundation agreement by convening all the members, conducting their polls or issuing ballots.

The current legislation, in particular, the Civil Code of Ukraine, distinguishes between such concepts as the general partnership governance and the conducting its bussiness.

General partnership governance shall be understood as a decision-making on top-of-mind issues of the company's activities, such as: prioritizing of the company's activity, acceptance or expulsion of the

member from the partnership, amendment of the foundation agreement, designation of the earned revenue by the company, company liquidation or reorganization, expediency of concluding specific agreements with business partners, solution of personnel issues. Determining the rule that the general partnership governance shall be carried out with the common consent of all the members, the legislator has established a discretionary rule on the possibility of foreseeing in the company's foundation agreement cases of decision-making by a majority votes of the members. This being stated, we believe it would be wiser to envisage a range of issues that do not require unanimity decisions, but may be taken by a simple or qualified majority of the votes of the members in the foundation agreement of a general partnership. Otherwise, failure to reach the unanimous consent of all members of a partnership on a particular issue of the company's activities may adversely affect the process of its functioning.

Conducting bussiness of a partnership should be understood as the pursuit of entrepreneurial activity on behalf of the partnership, that is, the representation of its interests in commercial circulation and exercising of legally binding actions on its behalf. In accordance with Part 1 of Art. 122 of the Civil Code of Ukraine, each member of a general partnership shall be entitled to act on behalf of the partnership unless joint running the partnership business by all its members or entrusting its separate members therewith specified by the foundation agreement.

Establishing the presumption of the conducting bussiness of a partnership by common agreement of all the members, the legislator determines the following ways of its implementation: either by all the members (in this case, for the conclusion of each agreement, consent of all the members of the partnership shall be required), or one or few of them acting on behalf of the partnership. In the latter case, the scope of the powers of the members shall be determined by the order, which shall be signed by remaining members of the partnership. In the foundation agreement of a partnership, several members who are authorized to conduct business of a partnership acting either independently or with the definition of appropriate actions that can only be carried out jointly by them may be identified (Article 68).

The legislator guarantees the inadmissibility of infringement of rights of third parties who have entered into a relationship with a general

partnership, due to any restrictions on the powers of the members of the partnership, except for the unfairness of this third person. The fact of unfairness of a third party shall be proved by the company, and up until that time it shall fulfill all obligations imposed on it under an agreement concluded by its member without proper authority. Thus, according to Paragraph 3 of Part 1 of Art. 122 of the Civil Code of Ukraine in relations with third parties a general partnership may not refer to the provisions of the foundation agreement, which restrict the powers of the general partnership to act on behalf of the partnership except as when it would be proved that the third party knew or could know about the member's having no right to act on behalf of the partnership at the moment of taking a legal action.

The members entrusted with the conduct of the bussiness of a general partnership shall be obliged to provide complete information about actions performed on behalf and in the interests of the partnership to the remaining members, at their request (Part 4 of Article 68). This right shall be applied to documentation regulating issues of both the internal and external sphere of the company's activities. The consolidation of such a right is an important guarantee of the protection of the rights of all members of a general partnership, since not all of them shall be authorized to run business, however, all of them shall bear full subsidiary responsibility to the creditors of the company. That is why the presence of any information in the partnership, access to which would be prohibited or limited to a member of the partnership shall not be allowed. Failure to provide documentation for inspection may result in the deprivation of the right to conduct business of the partnership.

The powers of a member to conduct business of a partnership shall be terminated in whole or in part with the termination of the partnership itself due to the refusal of the member from the order or the cancellation of the order at the request of at least one of the remaining members. In addition to the aforementioned, it may be terminated by a court at the request of one or more remaining members of the partnership if there are sufficient grounds for doing so. The legislator refers a flagrant violation by the member authorized to conduct business of a partnership, of his/her duties or revealing his/her inability to intelligently conduct business to such grounds. On the basis of a court decision, the necessary amendments shall be made to the foundation agreement of the partnership, which

become effective for third parties entering into a legal relationship with a general partnership from the moment of its state registration. Based on the above-noted, the partnership shall be considered to be obliged by the contract entered into by a member who on the basis of a court decision, has lost the authority to conduct business of the partnership, prior to registration of amendments to the foundation agreement, unless it is proved that a third party knew or could know about the member's having no right to act on behalf of the partnership at the moment of taking a legal action.

In case of making a transaction in the interests of the partnership by the member who did not have authority to conduct business of the partnership, approval of the remaining members of such actions means that the company assumes all rights and obligations under such an agreement. And in case of refusal of the partnership to approve the specified actions, the member is independently responsible for such acts (Part 6 Article 68). However, for such a member, the legislator establishes certain guarantees, providing that if he/she acted in joint interests but had no powers therefor, by other members, he/she/it shall be entitled to demand from the partnership to indemnify for the expenses incurred thereby if he/she/it proves that in connection with his/her actions the partnership has retained or acquired the property with value exceeding these expense.

3.3.4. Contents of the Equity Rights and Responsibilities of Members

Legal capacity and competence of the members of a general partnership is determined by their rights and responsibilities. Members of a general partnership shall have the right to:

a) participate in the general partnership governance and conduct its bussiness in accordance with the procedure specified in the foundation agreement;

b) take part in the distribution of the company's profit and receive its share. This right belongs to the person who is a member of the partnership at the beginning of the period of payment of shares in the profit;

c) withdraw from the company as applicable;

d) receive information on the company's activities. At the request of the member, the company shall be oblidged to provide him/her with annual balance sheets, reports on activities, and other documents;

e) carry out transactions on behalf of the partnership, if they are entrusted with the conduct of bussiness of the partnership;

e) carry out alienation of a share in the company's contributed capital;

g) other rights stipulated by the law and the foundation agreement of the partnership.

Members of a general partnership shall be oblidged:

a) to comply with the foundation agreement of the partnership;

b) to fulfill their obligations to the company, including those related to the property participation, as well as to make contributions in the amount, in accordance with the procedure and in the means provided by the foundation agreement;

c) not to disclose commercial secret and confidential information about the activities of the company;

d) to carry superadded (subsidiary) responsibility for the obligations of the partnership to the full extent of their assests;

e) to carry other responsibilities, if provided by the legislation of Ukraine and the company's foundation agreement.

3.3.5. Transfer of Equity Rights (Share). Termination

The legislator identifies three grounds for changes in the membership of a general partnership, in particular: 1) the withdrawal of a member of a general partnership on an individual initiative; 2) expulsion from the membership; or 3) retirement from the membership for reasons beyond the member’s will.

The right of a member of a general partnership to withdraw from the membership shall be guaranteed by law in a mandatory manner, and therefore any obstruction in its implementation shall be illegal, and the waiver of the right to exercise it is null and void. The procedure for the withdrawal of a member of a general partnership depends on the duration of the partnership (Article 71). Thus, if the general partnership was established for undetermined term, then its member may at any time withdraw from the partnership having informed about it not less 3 months before the actual retirement. The early withdrawal of a member of the general partnership that was established for a specified period shall be allowed only on presence of some valid reasons. The reasons that are considered venerable may be stated in the foundation agreement of the

partnership, and can be both subjective and objective. It is worth noting that the Civil Code of Ukraine does not contain any special requirements regarding the prior notification of the withdrawal of a member in the general partnership that was established for a specified period.Unlike the Civil Code of Ukraine, the special law regulating the procedure for the establishment and operation of business companies, the Law of Ukraine "On Business Companies" stipulates the obligation of such a member to notify the partnership not later than 6 months before the expected withdrawal (Part 2 of Article 71)

Expulsion of a member from a general partnership may take place in accordance with the procedure established by the foundation agreement, if he/he regularly doesn't fulfill or unduly fulfills obligations imposed thereon by the partnership or prevents by his/her actions (omission of actions) from the achievement of the partnership's goals. Such a decision of the members of a general partnership may be appealed to the court.

The consequences of the expulsion or withdrawal of a member from the general partnership are as follows. If the general partnership continues to operate after the withdrawal or expulsion of a member, then such a member shall be paid the value of his/her contribution in accordance with the balance drawn up on the day of the retirement. At the request of the member and with the consent of the partnership, the contribution may be returned in kind either in whole or in part. Property transferred to the members of the company for use only, shall be returned in kind without renumeration. The member who has retired shall be paid the due share of profits received by the company during the current year. The retirement of a member from the general partnership for reasons that do not depend on the member shall be exercised by the decision of the general partnership in the event of:

1) member's death or the recognition thereof as deceased if he/she/it has no inheritors;

2) the liquidation of a legal entity – a partnership member including in connection with the recognition thereof a bankrupt;

3) the recognition of a member as legally incapable, the restriction of his/her legal capability or the recognition thereof as missing;

4) the enforced reorganization of a legal entity by court decision, in particular, in connection with its insolvency;

5) imposing a levy on a part of a general partnership's property that corresponds to a member's share in the total capital of the general partnership.

In case of a member withdrawal from a general partnership the partnership may continue its activities unless otherwise established by the foundation agreement or arranged by the remaining members.

Decision on the recognition of a general partnership member as withdrawn from its membership may be appealed by the concerned persons in the court.

The legislation guarantees the right of each general partnership member to transfer his/her share (part of the share) in the contributed capital to other members of the partnership or third persons (Article 69). The exercising of this right may occur only when approved by the rest of the members. The acquirer of a share (part of the share) procures fully or in the corresponding part rights belonging to the member who has transferred his/her share (part of the share). A new member of the partnership shall be liable for its obligations, regardless of whether these debts have arisen before or after joining the partnership.

In the event of the transfer of the whole share by the member of the partnership to another person, the participation of this member in the general partnership shall be terminated and he/she shall be responsible for the obligations of the partnership that arose prior to his/her retirement, equally with the remaining members, within three years from the date of approval of the report on the company's activities for the year which he retire from the company in.

Under reorganization of the legal entity – member of a general partnership, or the death of the citizen – member of a general partnership, his/her/its successor (heir) may enjoy the pre-emptive right to join the partnership with the consent of the remaining members. The successor (heir) shall be liable for the debts of the member to the general company incurred during the company's activity, as well as for the debts of the company to third parties. In the event of a refusal of the successor (heir) from the accession to the general partnership or the refusal of the partnership from the acceptance of the successor (heir), he/she/it shall be paid the value of the share belonging to the reorganized legal entity (heir), the size of which is determined on the day of the reorganization (death) of the member. In these cases, the size of the company's property, indicated

on the foundation agreement, shall be reduced accordingly, and the state registration of amndments to the foundation agreement shall be carried out.

According to the general rule imposing a levy on a member's share in the contributed capital of a general partnership on his/her/its own obligations shall no be accepted (Part 1 of Article 73). However, the creditors of the member of the general partnership whose own property is insufficient for debt obligations may demand to withdraw a part of the general partnership's property pro rata to a share of a member-debtor in the contributed capital of the partnership according to the established procedure. A part of the general partnership's property pro rata to a share of a member-debtor in the contributed capital of the partnership shall be withdrawn in the monetary form or in kind according to the balance sheet made up as of the moment of the member withdrawal from the partnership.

A general partnership ceases its activities through reorganization or liquidation. Forms of reorganization of a general partnership are consolidation, merger by acquisition, split-up and transformation.

The general partnership shall be liquidated on the basis of:

1) decisions of its members, which includes the expiry of the duration of the general partnership, the achievement of the purpose for which it was created, as well as in other cases stipulated by the foundation agreement;

2) a court decision on the liquidation of a general partnership due to violations committed during its creation which can not be fixed, upon the claim of the member of the company or a competent state authority;

3) a court decision on the liquidation of a general partnership in other cases, established by law,– upon the claim of the competent state authority;

4) the fact that there was only one member left in the company. A general partnership by its very nature is a "union of persons", and therefore it can not consist of a sole member. That is why; the requirement of the legislator in the given situation is either the implementation by the remaining member of the liquidation of the general partnership or its transformation into another legal entity form within six months from the time when partnership was left with one member in its membership composition. At the same time, such a member continues to be liable for the obligations of the company for three years after its liquidation.

It should be noted that after changes in the membership of a general partnership due to the withdrawal of a member from a general partnership, the expulsion of one of its members, the death of a member of the partnership, the liquidation of a legal entity – member of the partnership or imposing a levy on a part of the property pro rata to a share of a member-debtor in the contributed capital of the partnership by the creditor of the one of the members the partnership may continue its activities, if it is provided by a foundation agreement or agreement between the remaining members. In the absence of the relevant provision in the foundation agreement or in the additional agreement of all remaining members, such a company shall be liquidated.

A general partnership as a separate entity may be recognized a bankrupt as and when it fails to satisfy creditors' claims and, as a consequence, the partnership ceases to exist. The grounds for the recognition of a general company a bankrupt, as well as the procedure for its liquidation on such a ground are determined by the Civil Code of Ukraine and the Law of Ukraine "On the Restoration of the Debtor's Solvency or Recognition It a Bankrupt".

A general partnership shall be deemed to have ceased to exist from the date of entry in the Unified State Register of Legal Entities and Individual Entrepreneurs of the record of its termination in accordance with the procedure established by the Law of Ukraine "On State Registration of Legal Entities, Individual Entrepreneurs and Public Formations". Members of a general partnership, a court or a body that has taken a decision to terminate a partnership must within three working days from the date of the decision to be notified in writing to the authority that carries out the state registration.

3.4. Limited Partnership

3.4.1. The Concept of Limited Partnership. Members

Limited partnership is one of the types of business companies which, like the general partnership, belongs to a subgroup of "business partnerships".

At the legislative level, a concept of limited partnership is given in Art. 75 of the Law of Ukraine "On Business Companies", Art. 133 of the Civil Code of Ukraine, Part 6 of Art. 80 of the Commercial Code of

Ukraine, and is mostly reduced to defining it as a partnership, which along with members carrying out the entrepreneurial activity on behalf of the partnership and jointly and severally bear superadded (subsidiary) liability on the partnership's obligations to the full extent of their assets (full members), includes one or a few members (contributors) who bear the loss risks connected with the partnership activity within amounts of their contributions and who do not participate in the partnership activity.

In accordance with Part 3 of Art. 133 of the Civil Code of Ukraine provisions on a general partnership shall be applied to a limited partnership unless otherwise established by this Code or any other law. It is worth noting that the essential difference between a limited partnership and a general partnership is determined by the personified membership. Thus, in a limited partnership, their maximum number at the legislative level is not defined, but at least two members with different legal status - contributors and full members shall be required. Full members of a limited partnership may be both legal and natural persons registered as entrepreneurs. They carry out entrepreneurial activities on behalf of the partnership jointly and severally bear superadded (subsidiary) liability on the partnership's obligations to the full extent of their assets. Moreover, if a limited partnership involves two or more members with full responsibility, they are jointly and severally liable for the debts of the partnership. By imposing superadded responsibility on the full member of the partnership, the legislator also imposes additional restrictions on this person. Thus, he/she can be a full member of one limited partnership only, and can not be a member of a general partnership or a contributor of the said limited partnership.

Contributors may be both legal and natural persons who do not participate in the company's activities and bear the risk of losses associated with the company's activities, within amounts of their contributions.

3.4.2. Establishing a Partnership. Constating Documents

The constating document of a limited partnership is a foundation agreement or a sole application (memorandum). The foundation agreement shall be signed by all full members, and shall include information on: the obligation of the members to create a limited partnership and the order of their joint activities for its creation; conditions for the transfer to the partnership of the property of full members, the size and composition of

the contributed capital of the company; the size and procedure for changing the shares of each of the full members in the contributed capital; the form of participation of full members in the company's activities; the aggregate amount of contributions by the contributors; the size, composition and procedure for paying up of contribution by the contributors (Part 1 of Article 76).

Sole application (memorandum) as a constating document of a limited partnership takes place in the event of the creation of a limited partnership by only one full member or re-execution of the foundation agreement as a result of remaining only one full member in the company after the withdrawal, expulsion or retirement of another full member (other full members). Sole application (memorandum) shall be signed by a full member of the limited partnership. The contents of this constating document include the same information as the foundation agreement of a limited partnership.

It should be noted that the foundation agreement or sole application (memorandum) shall be signed only by full member (full members). This circumstance is of a fundamental importance, since the withdrawal of the contributor from the company does not require the amendment of the constating document, which in turn does not create an additional obligation for its state registration.

The name of the limited partnership company shall contain the names of all full members, the word "limited partnership" or the name of at least one full member with adding of the words "and the company", as well as the word "limited partnership". If the name of the limited partnership includes the name of the contributor, such a contributor becomes a full member of the partnership (Part 5 of Article 75).

The legislation regulating the creation and operation of a limited partnership does not contain requirements for the size of the contributed capital of this type of business company. The legislator does not define either the minimum or maximum size of the contributed capital, which is formed from the contributions of its full members and contributors. Regarding the contributions of full members of a limited partnership, the legislator does not impose any restrictions, unlike the definition of contributors' contributions. These may include buildings, facilities, equipment and other tangible assets, securities, rights to land, water and other natural resources, buildings, facilities, as well as other proprietary

rights (including intellectual property rights), funds, including foreign currency. Contributors may enter into a limited partnership by making monetary or real contributions, where, the aggregate amount of contributions shall not exceed fifty percent of the contributed capital of the general partnership (Part 1 of Article 80). A contributor of a limited partnership who has not made a contribution provided for by the foundation agreement (memorandum) shall be liable to the company in accordance with the procedure established by the foundation agreement or a sole application (memorandum).

All the contributions of members shall be valued in hryvnias, which shall be executed in accordance with the procedure established by the foundation agreement on the basis of the Law of Ukraine "On Valuation of Property, Proprietary Rights and Professional Valuation Activity in Ukraine".

Legislation prohibits the use of budgetary funds, loan funds and funds received on pledge, bills, property of state-owned public (municipal) enterprises, which according to the law (a decision of the local self-government body) shall not be subject to privatization, and property that is under the ongoing management of state-financed institutions, unless otherwise provided by law for the formation of the limited partnership's capital.

The contributed capital shall be paid to the members of the limited partnership during the first year from the date of the state registration of the partnership. Members of a limited partnership may decide to change (increase or decrease) the size of contributed capital in the order with the obligatory introduction of amendments to the foundation agreement or sole application (memorandum). This decision shall come into force from the date of registration of the changes and its inclusion in the state register carried out on the basis of the Law of Ukraine "On State Registration of Legal Entities, Individual Entrepreneurs and Public Formations".

3.4.3. Limited Partnership Governance

Similar to the general partnership, limited partnership does not have specially created governing bodies. The management of activities shall be carried out by full members (full member) in the manner prescribed by the rules for a general partnership (Part 1 of Article 81). Taking into account above-noted, scope of rights and obligations of full members of a limited

partnership corresponds to the rights and obligations of the members of the general partnership.

As a general rule, contributors of a limited partnership shall not have the right to participate in the company's management, as well as to express any objections to the actions of full members related to company's management, that is, they shall not interfere in the process of making commercial and organizational decisions by full members, as well as in therelations of the partnership with third parties. Contributors also shall not have the right to appeal against the actions of full members, but it is subject only to actions directed to the management and conducting business. Actions of full members that violate current legislation and contradict the constating documents of the partnership may be appealed against by the contributors. Thus, if the partnership suffers losses due to the fault of full members endowed with the right to conduct business, the contributors shall have the right to come upon them for the compensation of losses to the company. At the same time, the legislator gives contributors the opportunity to act on behalf of the partnership on the basis of a power of attorney. The commission by a contributor of a limited partnership of a transaction on behalf of and in the interests of a company without the corresponding powers imposes on him/her third party liability for its commission to the full extent of the contributor's assets, that may be levied in accordance with the law, if his/her actions shall not be approved by the limited partnership.

3.4.4. Contents of the Rights and Responsibilities of Members

The peculiarity of the legal status of contributors of limited partnerships is predetermined by the legislative definition of the scope of their rights and responsibilities, which differ from the legal capacity and competence of the full members. The main responsibility of contributors is paying up of contribution to the capital, which is authenticated by the certificate of participation in a limited partnership, and the paying up of additional contributions in the amount, in ways and in accordance with the procedure provided for by the foundation agreement or sole application (memorandum) (Part 1 of Article 80). The rights of contributors of a limited partnership include following:

1) to receive a part of the partnership's profit according to his/her/its share in the partnership's contributed capital pursuant to the procedure

established by the foundation agreement or sole application (memorandum);

2) to act on behalf of the partnership in case of granting the power of attorney thereto and in accordance therewith;

3) to acquire the alienated share in the contributed capital (or its part) mostly with respect to third persons. If a few contributors wish to buy out a share (or its part), this share shall be distributed among them pro rata to their shares in the partnership's contributed capital;

4) to demand to pay back the contribution on a preferential basis in case of the partnership liquidation;

5) to familiarize with annual reports and balance sheets of the partnership;

6) to withdraw from the partnership and receive its contribution according to the procedure established by the foundation agreement or sole application (memorandum) upon closing the financial year.

7) to transfer his/her/its share in the contributed capital (or its part) to another contributor or third person having notified the partnership thereof. The transfer by a contributor of his/her/its share in full to the other person shall terminate his/her/its participation in a limited partnership.

8) other rights stipulated in the foundation agreement or sole application (memorandum) of a limited partnership.

3.4.5. Transfer of Equity Rights (Share). Termination

The limited partnership ceases its activities on the general grounds defined for all legal entities, as well as on the grounds provided for general partnership, in case of the retirement of all full members or contributors. However, unlike a general partnership, a limited partnership continues to exist, even if there is one full member in it, if at least one contributor is also in. A specific reason for the liquidation of a limited partnership is the retirement of all contributors, resulting in the loss of the personal membership of a limited partnership of its form. If full members wish to continue their activities, they shall transform limited partnership into a general partnership (Part 2 of Article 83).

Proceeding from the deficiency of the contributor's right to dispose of business affairs of the company, which confirms the fact that he /she entrusts his/her contribution to the full members, the legislator grants a contributor a particular advantage in the event of the liquidation of a

limited partnership. From the liquidation surplus of monetary funds, after settlement of the compensation of employees of the company and fulfilling their obligations to banks, the budget, other creditors, contributors shall return their contributions on a first-priority basis, and after that shall the members under full liability. In case of insufficient funds of the company for the full return of contributions, funds available shall be distributed among the contributors pro rata to their share in the company's assets.

The procedure for the distribution of property, which remains after satisfying the creditors' claims and paying out contributions to contributors, is defined in the foundation agreement or a sole application (memorandum).

The limited partnership shall be deemed to have ceased from the date of entry in the Unified State Register of Legal Entities, Individual Entrepreneurs and Public Formations of the record of its termination in accordance with the procedure established by the Law of Ukraine "On State Registration of Legal Entities, Individual Entrepreneurs and Public Formations".

Chapter IV. Reorganization and Insolvency of Business Companies

4.1. Company Reorganization

With the transition to the principles of a free market economy in Ukraine there have been substantive changes in the economic relations of property and its legal regulation. In particular, private property of the means of production as a form of property, which is equal to the state-owned property, has started to play an important part. This led to the incorporations, providing for the joining efforts of people and pooling of their capitals for joint participation in property relations. Herewith, a considerable quantity of legal entities started to exist both through the establishment of such entities for the first time or through capital transfer by legal entities that continue to operate or ceased to operate through the reorganization. Indeed, as noted by M.I. Kulagin, the reorganization of legal entities is among legal forms where the process of single sourcing and centralization of capital in the economic structure of the state takes place[157].

Meantime, the main regulatory legal acts defining the basic principles of the functioning of business companies in Ukraine are the Civil Code of Ukraine[158], the Commercial Code of Ukraine[159], as well as the Laws of Ukraine "On Business Companies" [160], "On Limited Liability and Superadded Liability Companies" [161], "On Joint Stock Companies" [162],

[157] Kulagin MI Selected Works on Joint Stock and Commercial Law. M.: Statut, 1997. P. 116.

[158] Civil Code of Ukraine as of № 435-IV 16.01.2003, *available at*: http://zakon5.rada.gov.ua/laws/show/435-15/page

[159] Commercial Code of Ukraine: Law of Ukraine as of 16 January 2003. № 436-IV, *available at*: http://zakon5.rada.gov.ua/laws/show/436-15

[160] On Business Companies: Law of Ukraine as of 19.09.1991. № 1576-XII, *available at*: http://zakon5.rada.gov.ua/laws/show/1576-12/page

[161] On Limited Liability and Superadded Liability Companies: Law of Ukraine as of 06.02.2018. № 2275- VIII, *available at*: http://zakon2.rada.gov.ua/laws/show/2275-19?oprd=1

[162] On Joint Stock Companies: Law of Ukraine as of 17.09.2008. № 514-VI , *available at*: http://zakon5.rada.gov.ua/laws/show/514-17/page

"On the State Registration of Legal Entities and Individual Entrepreneurs and Public Formations" [163] and certain other regulatory legal acts and subordinate legislation aimed at regulation of its creation, activities and termination, which includes reorganization as well.

One of the regulatory legal acts regulating the detailed procedure for the termination of business companies is the Law of Ukraine "On Joint Stock Companies", the adoption of which has become a driving force for improvement of corporate governance legislation. The aforementioned law contains rules aimed at the regulation of corporate relations in a joint stock company, namely, it establishes a number of provisions defining the procedure for convening and holding general meetings of a company that makes it impossible to falsify them, it more effectively regulates the powers of other bodies of the company, defines the terms and procedure for mandatory redemption of shares by the joint stock company at the request of shareholders, as well as structures the process of reorganization and liquidation of the company, etc. Thereafter, the Law of Ukraine "On Limited Liability and Superadded Liability Companies", containing the rules on the spin-off and winding up of the company, was adopted.

However, the above-mentioned laws do not resolve all issues arising from the reorganization of business companies. If we talk about such types of business companies as general and limited partnerships, then the current legislation, in addition to the general provisions on the procedure for the termination of legal entities contained in the Civil Code of Ukraine and the Law of Ukraine "On Business Companies", does not determine the peculiarities of their reorganization. In particular, important issues that need legal regulation during the reorganization shall be deciding of the following questions: which legal entity form to choose when reorganizing the company; what are the features of the procedure for reorganization of one or another legal entity form, etc.? After all, Part 1 of Art. 132 of the Civil Code of Ukraine states that the member of the general partnership shall be entitled to transform this partnership into a new business partnership within six months as from the moment of his/her/its becoming a sole member of the partnership. Other forms of reorganization, such as

[163] On State Registration of Legal Entities, Individual Entrepreneurs and Public Formations: Law of Ukraine as of 15.05.2003. № 755-IV, *available at*: http://zakon5.rada.gov.ua/laws/show/755-15

consolidation, merger, split-up, spin-off are left open by the legislator to a self-regulation by the members of the company.

This being stated, consideration should be given to the general provisions on dissolution of a legal entity, which are enshrined in the current legislation. In accordance with Part 1 of Art. 104 of the Civil Code of Ukraine states that a legal entity shall be dissolved as a result of reorganization (consolidation, merger, split-up, spin-off, transformation) or liquidation. In case of reorganization of legal entities, all its property and rights and obligations shall be transferred to its successors. At the same time, Art. 109 of the Civil Code of Ukraine distinguishes a one more legal form of reorganization of legal entities, namely, spin-off, which consists in the possibility of transferring a part of property, rights and obligations of a legal entity to one or few new legal entities being created. The difference between this legal form of reorganization resides in the fact that the legal entity spin-off does not result in the dissolution of the legal entity from which the carve-out of transferring a part of property, rights and obligations has been made. The result of the spin-off is the creation of one or few new legal entities.

Thus, the Civil Code of Ukraine envisages five legal forms of reorganization, namely consolidation, merger by acquisition, split-up, spin-off and transformation. Consolidation, merger by acquisition, split-up and spin-off require participation in the reorganization of at least two legal entities. Only one legal entity shall be involved in the transformation, which changes its legal entity form during the reorganization. In addition to the above, all forms of reorganization are characterized by the emergence of a universal legal succession, consisting in the transfer of rights and obligations from one legal entity to other legal entities – cessionaries, which is connected either with the combining of property complexes of several legal entities – the predecessors or with the division of one a property complex into several new ones, or with a change in the legal entity form, causing a change in the nature of a legal person.

The reorganization of business companies is a complex procedure that shall be carried out in several stages.

The *first stage* of the reorganization of business companies involves making decision on reorganization. The decision on reorganization may be taken *on a voluntary basis or in an enforcement procedure*. The reorganization shall be considered to be carried out *on a voluntary basis*, if

the decision is made at the general meeting of the business company in the manner prescribed by law. A *forced reorganization* shall be carried out by a court or the competent authorities[164].

According to Art. 105 of the Civil Code of Ukraine, legal entity members, the court or the body that has taken decision on a legal entity reorganization shall be obliged within three working days from the date of the decision to notify in writing thereof the body carrying out the state registration[165]. At the same time, the members of the company, the court, or the body that has taken decision on a legal entity reorganization, shall set up a commission on the reorganization and appoint a commission chair, which the management of business affairs of the company shall be transferred to. The functions of the commission on reorganization may be delegated to the company's governing bodies. The commission chair or its members represents the business company in relations with third parties and act in court on behalf of the company.

The next stage of the reorganization is the identification of creditors of a business company being reorganized. Members of a legal entity, court or body that has taken decision on legal entity reorganization, shall establish the procedure and time limit for the creditor's claim to the company being reorganized. Under these circumstances, the time limit for asserting reditor's claims to a company being reorganized shall not be *less than two and more than six months* from the day of the announcement of the decision on the company reorganization. Each asserted claim shall be

[164] For example, in the event of a breach of the legislation on the protection of economic competition, the Antimonopoly Committee of Ukraine may decide on the forced split-up of a business entity that holds a monopoly (dominant) position on the market. At the same time, decisions of the bodies of the Antimonopoly Committee of Ukraine on the forced split-up can not be canceled or changed and shall be executed by the specified time, which can not be less than six months. At the same time, Art. 53 of the Law of Ukraine "On Protection of Economic Competition" No. 2210-III dated January 11, 2001 states that the reorganization of a business entity subject to forced split-up shall be exercised at its discretion, upon condition of the removal of the monopoly (dominant) position of that entity on the market .

[165] See paragraph 14 of Art. 1 of the Law of Ukraine "On the State Registration of Legal Entities, Individual Entrepreneurs and Public Formations" No. 755-IV as of 05.15.05, *available at*: http://zakon5.rada.gov.ua/laws/show/755-15

discussed solely, whereupon a relevant decision shall be taken and sent to the creditor *no later than thirty days* from the date of receipt by the company being reorganized of the relevant creditor's claim.

At the same time, the Law of Ukraine "On Joint Stock Companies" contains certain time limits for notification of creditors on the reorganization of a joint stock company and the time limits for asserting creditor's claims. In particular, Art. 82 of said Law establishes the provision that within 30 days after the day the joint stock company approves a decision on reorganization, the joint stock company shall inform about it each of its creditors in writing and publish notification on the approved decision in official printed edition. The public company must also notify of such a decision every stock exchange where it is listed.

A creditor may apply with a written claim to the joint stock company terminated as a result of consolidation, merger by acquisition, split-up, or spin-off within *20 business days* after receipt of the notice of the company termination. In this case, only those creditor's claims that are not secured by a pledge or guarantee shall be subject to satisfaction. Such creditors shall have the right to demand to ensure meeting of liabilities by way of conclusion of pledge or guarantee agreements, early termination or fulfillment of obligations to the creditor if the legal transaction between the creditor and the company does not provide otherwise. If a creditor has not filed a claim to the company in writting within the deadline envisaged by the Law, it shall be understood as he/she does not insist on the company to carry out any additional actions regarding the obligations. A consolidation, merger, split-up, spin-off or transformation may not be completed before claims appealed by creditors are settled.

Similar provisions are contained in Art. 55 of the Law of Ukraine "On Limited Liability and Superadded Liability Companies". However, unlike joint stock companies, in limited liability companies, the creditor shall have the right to apply with a written claim to the company within 30 days from the date of the receipt of the notice, or from the date of publication of the notice on the decision on reorganization in the print agency, which publishes data on the state registration of legal entities.

The *final stage* of the reorganization involves drafting, signing and approval of the transfer act (in the case of consolidation, merger by acquisition or transformation) or of the divided balance sheet (in the case of a split-up, spin-off), which should contain provisions on the succession

in respect of all obligations of the company being reorganized to all its creditors and debtors, including obligations disputed by the parties. The transfer act / divided balance sheet shall be made up by a commission on reorganization, signed by the commission chair and submitted for approval to the members of the business company or to the body that adopted the decision on reorganization. As a result of the execution of all necessary actions and approval of all necessary documents, the state registration of the newly created business company (companies) shall be carried out or the relevant amendments to the constating documents of the cessionary in the event of merger and expulsion of the company – the predecessor from the Unified State Register shall be made.

Reorganization in the form of consolidation, merger by acquisition, split-up, spin-off and transformation has its own peculiarities, which will be in more detail addressed to in the following sections.

4.1.1. Consolidation and Merger by Acquisition of Business Companies

Consolidation and merger by acquisition of business companies are the legal forms of reorganization, which result in the creation of a legal entity that accesses new markets in order to generate significant profits. After all, consolidation and merger by acquisition can be justified only if results such as increased incomes, reduction of costs per unit of manufactured goods (or services rendered), increase of capital efficiency, etc. are achieved.

During *consolidation* of business companies, all property rights and obligations of each company shall be transferred to a business company that arose as a result of the consolidation. Two or more companies may participate in the consolidation, as a result of which one newly formed business company shall be created. During *merger by acquisition* the acquiring company obtains all property rights and obligations of the acquired company. Reorganization in the form of merger by acquisition may involve not only one but two or more acquired companies. Notice that the current legislation does not contain any restrictions on the choice of the legal entity form of business companies involved in consolidation (merger by acquisition).

For example, according to Art. Art. 49, 50 of the Law of Ukraine "On Limited Liability and Superadded Liability Companies", the consolidation is the creation of a new business company – the cessionary

with the transfer of all the property, all rights and obligations of several companies that cease to exist as a result of the consolidation, and merger by acquisition is the dissolution of one or several companies transferring all their property, all rights and obligations to another business company – the cessionary in accordance with the transfer act.

An exception to the general rule is the consolidation (merger by acquisition) of joint stock companies. According to Art. Art. 83, 84 of the Law of Ukraine "On Joint Stock Companies", a joint stock company may take part in a consolidation only with another joint stock company. During merger by acquisition, a joint stock company (several companies) shall transfer all property, rights and obligations to another joint stock company – the cessionary in accordance with the transfer act.

The peculiarity of consolidation and merger by acquisition of business companies is that the law may provide for the consent of the competent state authorities for consolidation and merger by acquisition. In particular, as to prevent monopolization of commodity markets, abuse of a monopoly (dominant) position, restriction of competition, the bodies of the Antimonopoly Committee of Ukraine carry out state control over the concentration of business entities, including consolidation (merger by acquisition) of business entities. In accordance with Part 1 of Art. 24 of the Law of Ukraine "On the Protection of Economic Competition" [166], the concentration can only be made subject to prior approval of the Antimonopoly Committee of Ukraine or the administrative board of the Antimonopoly Committee of Ukraine, if:

1) the aggregate value of the assets or the aggregate volume of sales of the goods of the participants in the concentration, taking into account the control relationships, for the last fiscal year, including abroad, exceeds the amount equivalent to 30 million euro, determined at the official exchange rate established by the National Bank of Ukraine, acting on the last day of the last fiscal year, while:

- the value (aggregate value) of the assets or the volume (aggregate volume) of the sales of goods in Ukraine, of not less than two participants in the concentration, taking into account the control relationships, exceeds the amount equivalent to 4 million euro, determined at the official

[166] On the Protection of Economic Competition: Law of Ukraine № 2210-III as of 11.01.2001, *available at:* http://zakon3.rada.gov.ua/laws/show/2210-14

exchange rate established by the National Bank of Ukraine acting on the last day of the fiscal year, in relation to each;

2) the aggregate value of assets or the aggregate volume of sales of goods in Ukraine of the controlled entity or entity, assets, shares (stocks, units) of which are being acquired or received into management and use, or at least one from the founders of the entity created, taking into account the control relationships, exceeds the amount equivalent to 8 million euro for the last fiscal year, determined at the official exchange rate established by the National Bank of Ukraine, acting on the last day of the fiscal year while:

- the volume of sales of at least one other participant in the concentration, taking into account the control relations, for the last fiscal year, including abroad, exceeds the amount equivalent to 150 million euro, determined at the official exchange rate established by the National Bank of Ukraine acting on the last fiscal year.

Depending on the legal entity form of the business company, the consolidation (merger by acquisition) shall be carried out by the decision of the members of the company or the body so authorized by the constating documents. According to Art. 121 and Art. 136 of the Civil Code of Ukraine, in general and limited partnerships, the decision on reorganization shall be taken by mutual consent of all the members. In accordance with Part 2 of Art. 48 of the Law of Ukraine "On Limited Liability and Superadded Liability Companies" and Paragraph 23 of Part 1 of Art. 33 of the Law of Ukraine "On Joint Stock Companies", in limited liability companies, superadded liability companies, joint stock companies, the decision on reorganization shall be made at the general meeting of the company by voting of the members (shareholders).

Also, the Law of Ukraine "On Joint Stock Companies" defines the rights of members who take part in the general meeting on reorganization. The direct materials which the member (shareholder) shall have the right to learn as part of preparation for the general meeting on reorganization, include: 1) draft agreement on consolidation (merger by acquisition); 2) explanation of the terms of the agreement on consolidation (merger by acquisition); 3) an opinion of an independent auditor on the terms of a consolidation (merger by acquisition); 4) annual financial reporting of other companies which have been taking part in a consolidation (merger by acquisition) over the last three years (Part 4, 5 of Article 81).

Consolidation and merger by acquisition of business companies are similar forms of reorganization by their very nature. The procedure for consolidation and merger by acquisition of business companies is most detailed in the law on joint stock companies and consists of several stages.

Stages of consolidation and merger by acquisition of joint stock companies:

1) initiation of the consolidation (merger by acquisition) and holding of the general meeting of joint stock companies, on consolidation (merger by acquisition), on the creation of a commission on the company reorganization, as well as on the election of the composition of the commission.

Identification and meeting creditors' claims, declared to each joint stock company involved in the consolidation (merger by acquisition), and the enjoyment by shareholders of each joint stock company involved in the consolidation (merger by acquisition) of the right to claim the mandatory redemption by a joint stock company of shares they hold. Shareholders – owners of the company's common shares – shall have such a right if he/she has registered for participation in the company's general meeting and voted "against" approval of the decisions on company reorganization. The price of shares redemption may not be lower than their market value and shall be calculated as of one day before publication in accordance with the established procedure for notifying of convening a general meeting at which a decision that became the reason to demand mandatory redemption of shares had been approved.Within 30 days after approval by the general meeting of the decision which became the reason for demanding mandatory redemption of shares, a shareholder intending to exercise the right stated shall file a written demand with the company. Within 30 days after receipt of a shareholder's demand of mandatory share redemption the company shall pay the cost of shares at the redemption price indicated in the notice on the right to demand mandatory redemption of the shares owned by the shareholder who has the right of mandatory redemption. Payment of shares shall be made in money terms if parties have not agreed on a different form of payment. The above provisions of Art. Art. 68, 69 of the Law of Ukraine "On Joint Stock Companies" are aimed at protecting the rights of a shareholder who, not intending to continue his/her activities in the process of reorganization and becoming a member of the successor company, may sell his/her shares on favorable terms, while not allowing

abuse by the company regarding the purchase of shares at an understated price, which would put the shareholder in an extremely disadvantaged position.

1) Collecting and harmonization of all documents necessary for the consolidation (merger by acquisition). According to Art. 81 of the Law of Ukraine "On Joint Stock Companies" the supervisory board of each of the joint stock companies participating in a consolidation (merger by acquisition) shall work out terms of an agreement on consolidation (merger by acquisition) which shall contain: 1) full titles and details of each joint stock companies participating in a consolidation (merger by acquisition); 2) the procedure and ratios used for conversion of shares and other securities as well as the amounts of possible cash payments to shareholders; 3) information on the rights to be given by the for-profit company – successor to owners of other securities, other than shares, of the joint stock company being terminated as a result of a consolidation (merger by acquisition); 4) information on nominated individuals who will become officials of the for-profit company – successor after completing consolidation (merger by acquisition); 5) the voting procedure at the general general meeting of the shareholders of the companies involved in the consolidation (merger by acquisition).

2) Adoption by the supervisory board of each of the joint stock companies participating in a consolidation (merger by acquisition) the decision on approval of the draft agreement on consolidation (merger by acquisition) of companies and explanation of the terms of the agreement on consolidation (merger by acquisition), the decision on of the transfer act prepared by the commission on reorganization, as well as on the approval of the procedure for conversion of shares of the company involved in the consolidation (merger by acquisition). In addition, the supervisory board decides on approval of the draft charter of a joint stock company created by consolidation or draft amendments to the charter of the acquiring company.

3) The convening of general meeting of each company involved in the consolidation (merger by acquisition) and the decision on the approval of the transfer act, approval of agreement on consolidation (merger by acquisition) of joint stock companies, approval of the charter of a joint stock company in the event of a consolidation (amendment of the charter of the acquiring company), as well as the election of duly authorized

persons of the joint stock company for further actions to terminate the joint stock company by consolidation (merger by acquisition). If the acquiring company as a resul of the merger owns more than 90 percent of the common shares of the acquired company, the decision on a merger by acquisition, the approval of the transfer act and the terms of the agreement on merger by acquisition may be taken by the supervisory board of the acquiring joint stock company.

4) Implementation of registration procedures, namely: issue and registration of the issue of shares of a joint stock company, created by consolidation or shares of the acquiring joint stock company and entering into the Unified State Register of Legal Entities, Individual Entrepreneurs and Public Formations, the record about the termination of a joint stock company and the registration of the company – successor.

Thus, the consolidation of companies is considered to be completed from the moment of entry into the Unified State Register of the record on the creation of a new joint stock company. Merger by acquisition of a joint stock company is considered to be completed from the date of entry into the Unified State Register of the record on the termination of acquired joint stock company.

4.1.2. Split-up and Spin-off of a Business Company

Split-up and spin-off is the forms of reorganization, which predetermine the creation of a few small ones instead of one large company. When *split-up*, two or more new business companies are created, and a reorganized business company ceases to exist. The *spin-off* is characterized by the fact that the business company continues to operate, but its structural subdivisions are separated and one or several new business companies are created on their basis.

Termination of a joint stock company by transferring all its assets, rights and obligations to more than one new joint stock company – successor in accordance with a division balance sheet shall be deemed to be a *split-up of a joint stock company* (Article 85 of the Law of Ukraine "On Joint Stock Companies"). Incorporation of one or several joint stock companies by transferring some part of the rights and obligations of a spinning-off joint stock company to it (them) in accordance with a division balance sheet without termination of the latter shall be deemed a *spin-off of a joint stock company* (Article 86 of the Law of Ukraine "On Joint Stock

Companies"). A joint stock company may be reorganized in the forms of the split-up and spinoff only within the legal entity form of a joint stock company.

The procedure for splitting-up (spinning-off) joint stock companies shall be carried out in the same manner as the one established in the case of consolidation (merger by acquisition) of joint stock companies, taking into account the features of split-up (spin-off), as legal forms of reorganization. In particular, the supervisory board of the joint stock company splitting-up (spinning-off) shall submit for approval by the general meeting the issue of split-up (spin-off), the procedure and terms of the split-up (spin-off), incorporation of successor companies and the procedure of converting the shares, approval of a division balance sheet. General shareholders' meeting of the splitting-up (spinning-off) company shall approve a decision on the issues submitted for consideration and shall adopt a decision on the approval of the charter and the formation of the bodies of the successor company.

It should be noted that during reorganization in the form of split-up (spin-off) several new successor companies shall be formed which the rights and obligations of the predecessor are transferred to in certain parts in accordance with the division balance sheet drawn up by the commission on reorganization. Taking into account the fact that in the order of succession newly formed business companies acquire not only the property and rights of a business company, but also its obligations, the questions arise related to the definition of the liability of newly formed business companies for the obligations of the predecessor.

According to Art. 107 of the Civil Code of Ukraine, a legal entity – the successor formed as a result of the split-up, has a subsidiary liability for the obligations of the dissolved legal entity, which, according to the division balance sheet, have been transferred to another legal entity – the successor. If there are more than two legal entities – the successors created as a result of split-up, they jointly and severally bear subsidiary responsibility. In case of impossibility to define the legal successor in relation to the specific obligations of the legal entity that has been terminated, legal entities – successors shall be jointly and severally liable to its creditors.

A span-off legal entity shall bear subsidiary liability under the obligations of the spinning-off company which have not transferred to a

span-off company in accordance to the division balance-sheet. A spinning-off company shall bear subsidiary liability under the obligations of the spun-off company. If there are two or more span-off companies, they shall jointly and severally bear subsidiary liability under the obligations together with the spinning-off joint stock company (Article 109 of the Civil Code of Ukraine).

In case of impossibility to precisely establish the duties of an entity under a certain obligation that legal entity had before spin-off procedure, then legal entity – the predecessor and the legal entity – the successor shall jointly and severally be liable to the creditor for such an obligation.

4.1.3. Transformation of a Business Company

Transformation is a change in the legal entity form of a business company. The peculiarity of transformation is that the party to reorganization shall always be a single company.

According to Art. 87 of the Law of Ukraine "On Joint Stock Companies", a change in the legal entity form of a joint stock company with termination of the joint stock company and a transfer of all rights and liabilities of the company to a corporate vehicle – successor in accordance with a transfer act shall be deemed *transformation of a joint stock company*. General shareholders' meeting of the company under transformation shall approve the decisions on the company transformation, transformation procedure and terms, procedure for changing shares of the company for shares (units) of a corporate vehicle – successor. Herewith, the distribution of shares (units) of a corporate vehicle – successor shall be done with preserving a proportion of shareholders' shares in the charter capital of the joint stock company under transformation.

The legislation also specifies the list of legal entity forms under the reorganization in the form of transformation. A joint stock company may be transformed only into another business company or production cooperative (Part 1 of Article 87 of the Law of Ukraine "On Joint Stock Companies").

At the same time, a limited liability company may be transformed only into another business company – the successor (Article 52 of the Law of Ukraine "On Limited Liability and Superadded Liability Companies"). It follows from the foregoing that limited liability company can not turn

into a production cooperative, which is one of the types of corporate vehicles.

In the case of a general partnership, in which a sole member remains, the latter shall have the right to transform this partnership into a new business company within *six months* as from the moment of his/her/its becoming a sole member of the partnership (Article 132 of the Civil Code of Ukraine). The rule indicates the possibility of liquidation of a general partnership with a single member or transformation of a partnership, but does not determine the list of legal entity forms which a general partnership may be transformed into with all the members of such a partnership in normal operation mode.

The same situation occurs under the transformation of limited partnerships. According to Art. 139 of the Civil Code of Ukraine, full members of limited partnership shall be entitled to transform the limited partnership into a general partnership in case of withdrawal of all its contributors. However, the law does not define the legal entity forms of corporate vehicles, which the limited partnership has the right to transform under ordinary conditions of company's operations.

From the above it may be concluded that general and limited partnerships may change the legal entity form by transforming into any other corporate vehicles, unless otherwise provided by the current legislation on certain types of legal entities.

Scientific works on understanding the nature of the transformation of a legal entity, as a legal form of reorganization, contain different approaches. Some scientists theoretically substantiate the position according to which the transformation differs from the reorganization on two grounds: 1) the parties remain unchanged; 2) there is no succession. Under the transformation, there is no substitution of one legal entity for another, and only the legal entity form is changed[167]. Herewith, there is no change in the volume of property and obligations of a legal entity, which distinguishes transformation from other legal forms of reorganization[168].

Other scientists consider transformation as one of the legal forms of reorganization that determines not only the change of legal entity form, but

[167] Korovayko AV Reorganization of Business Companies. Theory, Legislation, Practice: Manual. M .: Publishing house NORMA, 2001. P. 84.

[168] Emelyantsev VP Universal Succession in Civil Law: Diss. ... PhD: 12.00.03. M .: RGB, 2005. P. 133.

also the emergence of succession, namely, the change in the property status of a legal entity – the successor. The justification of the above position is due to the fact that it is unlikely that the same entity can be considered a limited liability company and a superadded liability company. According to Art. 90 of the Civil Code of Ukraine, a legal entity shall have its own name, containing information about its legal entity form. Therefore, assertion that the legal entity that made a decision on transformation and its successor is one and the same legal entity is a mistake[169].

In order to agree with one or another position as to how the transformation differs from other forms of reorganization and whether succession occurs under the process of transforming a business company from one legal entity form to another, it is necessary to highlight some peculiarities of the transformation inherent to it as a form of reorganization. For example, joint stock companies may be transformed into limited liability companies (LLC), superadded liability companies (SLC), general and limited partnerships (GP, LP), as well as production cooperatives.

Therefore, during a transformation, the high-priority issue which shall be solved is about the legal entity form that is to be chosen. In practice, joint stock companies are often transformed into LLC. This is due, in particular, to the fact that LLC, just like the JSC, shall be independently liable for its obligations with all its property, and the members of the LLC, just like the shareholders, bear the risk of losses related to the company activities within the value of their contributions. Another situation occurs when talking about the transformation of a joint stock company into a general or limited partnership. The following things are worthy of attention:

1) the transformation of JSC into GP or LP entails a change in the volume and nature of the liability of all (in GP) or part (in LP) of the members. In such companies, the members of the GP and the full members of the LP carry superadded (subsidiary) liability for the obligations of the partnership within the full extent of their assets (Part 1 of Article 119 and Part 1 of Article 133 of the Civil Code of Ukraine);

[169] Cherevko P.P. Creation of Legal Entities under Private Law: Diss. ... PhD: 12.00. 03. Kiev, 2008. P. 154.

2) when transforming JSC into a LP, it should be determined which shareholders as a result of such a transformation acquire the status of a full member, and which acquire the status of the contributor. This feature is important, as full members of the LP are entitled to conduct business of the partnership and bear the full responsibility for the obligations of the partnership within the full extent of their assets. As for contributors, according to Part 1 of Art. 133 of the Civil Code of Ukraine, they bear the risk of losses related to the company's activities, within the limits of their contributions and do not participate in the company's activities;

3) when transforming the members of the GP and full members of the LP can be only persons registered as entrepreneurs (Part 7 of Article 80 of the Commercial Code of Ukraine).

As can be seen from the above, when reorganizing JSC by way of transformation into GP or LP, the above-mentioned features should be taken into account, since for such companies (GPs and LPs), not just the input of property contributions, but also personal participation in the disposal of business affairs of the company is significant, in other words, such participation is of a personal fiduciary nature. Transformation entails not only a change in the legal status of a business company, but also a change in the scope of rights and obligations of the members of the company, which affects the nature of the relationship between the members, and may also relate to the rights and interests of third parties[170].

Thus, the change in the legal entity form of a business company may result in significant legal consequences for both third parties (for example, in the case of transformation of a general partnership into a limited liability company), and for the founders (members) of the company (since in the case of a transformation, first, the scope of third parties liability, and second, their quantitative composition may be subject to variation)[171]. Therefore, during the transformation, in the first place, the internal structure of the company changes: the charter capital, its size, the forms of participation, often the membership, which distinguishes one business company from another.

[170] Korovayko AV Reorganization of Business Companies. Theory, Legislation, Practice: Manual. M .: Publishing house NORMA, 2001. P. 84

[171] Yurkevich Y. Problems of Legal Regulation of the Transformation of Legal Entities. Visnyk of Lviv University. Issue 48. Lviv, 2009. P. 166.

O. R. Kibenko in this regard points out that the company law in foreign countries is sufficiently detailed in the regulation of various types of reorganization – especially when it comes to JSC (therefore, the process of reorganization of this company is connected with a complex procedure for the conversion or cancellation of shares). As a general rule, a transformed business company and a newly created legal entity shall be of a close legal entity form: for example, they must necessarily belong to a category of commercial entities, etc. In other cases, reorganization may be difficult or impossible either for objective reasons or because of lack of necessary legal procedures[172].

As consequence, the following conclusions can be drawn: when a reorganization by way of transformation the termination of a business company occurs; as a result of the transformation, a new business company emerges – the legal successor of different legal entity form; the succession of a new business company in relation to the reorganized company shall be separately documented by a transfer act, which is explicitly provided for by the current legislation.

4.1.4. Transfer of Equity Rights under Reorganization of Business Companies

Corporate succession is a criterion that delimits reorganization from other methods of succession[173]. Thus, when a majority share holding of a joint stock company is acquired by a person who has indicated the intention to purchase it, equity rights within the continuing company shall be transferred to such a person. In case of a decision by the company on the alienation of certain property (property complex), succession shall occur only in relation to the rights and obligations of such a property (for example, the conclusion of a significant transaction or interested-party transaction, etc.).

During reorganization there is a legal succession, both in respect of property, rights and obligations that pass from the business company – the predecessor to the business company – the successor on the divided balance sheet (transfer act), and in respect of the equity rights of the

[172] Kibenko ER Corporate Law: Tutorial. Kharkov: Espada, 1999. S. 197.

[173] Yudin DS Succession in Corporate Legal Relations at Reorganization of a Joint Stock Company. Russian justice. 2009. No. 9 (41). P. 39

members, which they acquire as a result of the conversion of shares (stakes (units) exchange) in the charter capital of the company.

Reorganization is a complicated procedure that begins its countdown from the moment the decision on reorganization is made at the general meeting of the company and ends with the inclusion to the register of the information about the business company – the successor. At the same time, all changes in the membership (founders, members, shareholders, etc.) must be made prior to the reorganization within the existing legal entity form, observing the established rules. Any reorganization procedure shall begin and end in the same number of members of the reorganized commercial organizations[174].

This raises the question of the procedure for the transfer of equity rights of members of the business company during reorganization, which requires the need to pay attention to *the conversion of shares* of the company being reorganized into shares of the company, the successor, as well as to the *exchange of shares (stakes, units)* of the members of the company – the predecessor to the shares (stakes, units) of the company – the successor. In accordance with *clause 14 of Part 3 of the Regulation on the Conduct of Depositary Activity, Approved by the Decision of the National Securities and Stock Market Commission No. 735 dated April 23, 2013,* the exchange of the securities of one issue into securities of another issue according to the terms of its issue shall be considered a conversion.

In particular, Art. 80 of the Law of Ukraine "On Joint Stock Companies" states that at a meeting of members of a successor corporate vehicle each member shall receive the number of votes which will be granted to him/her by the shares (stakes, units) of the successor corporate vehicle, the owner thereof he/she may become as a result of a consolidation, merger by acquisition, split-up, spin-off and transformation of the joint stock company. In this case, shares of a company that ceases to exist as a result of consolidation, merger by acquisition, split-up, spin-off and transformation shall be converted into shares (stakes, units) of the successor company.

To be noticed is that in joint stock companies, the conditions for the ratios and the procedure for the conversion of shares shall be determined in

[174] Stepanov DI Forms of Reorganization of Commercial Organizations: Issues of Legislative Reform. Economy and Law. 2001. №№ 3, 4, *available at:* http://www.lin.ru/document.htm?id=12497033463384276 98

the agreement on consolidation (merger by acquisition) or split-up (spin-off) plan, approved at the general meeting of the companies involved in the reorganization. Whereby, all essential terms of the agreement on consolidation (merger by acquisition), including the conditions for the conversion of shares, approved by the general meeting of each of these companies, must be identical.

At the same time, the procedure for the conversion of shares is regulated by the *Order of the Issue and Registration of Shares Issued by Joint Stock Companies, Created by Consolidation, Split-up, Spin-off or Transformation or to Which a Merger by Acquisition is Carried Out, pproved by the decision of the National Securities and Stock Market Commission No. 520 as of 09. 04. 2013* (hereinafter referred to as the Regulations). According to the Regulations, the registration of the issue of shares, registration of the report on the results of the placement (exchange) of shares, stopping the circulation of shares, resuming the circulation of shares, cancellation of registration of the issue of shares shall be carried out by the National Securities and Stock Market Commission.

The general principles for the conversion of shares, in accordance with these Regulations, are:

1) a joint stock company that has made a decision on consolidation, merger by acquisition, split-up, spin-off and transformation shall be obliged to make a purchase of common shares from shareholders requesting it, in the manner prescribed by the Law of Ukraine "On Joint Stock Companies";

2) the charter (contributed, share) capital of the joint stock company (corporate vehicle) on the date of the decision on consolidation, merger by acquisition, split-up, spin-off and transformation must be fully paid and distributed among its shareholders (participants, members);

3) shares placed by a joint stock company, which is terminated under consolidation, merger by acquisition, split-up or the spinning-off shall be converted into shares of the joint stock company (s) – the successor (s). In the case of transformation the shares of a joint stock company shall be converted into shares (units) of the successor company;

4) common shares can be converted into common shares and can not be converted into preferred shares, and preferred shares may be converted into preferred shares of either class or common shares;

5) the shares (units) of a corporate vehicle that is terminated under consolidation, merger by acquisition, split-up, transformation or from which the spin-off shall be carried out, shall be converted into common shares of the successor (s) joint stock company (s).

Consequently, the share is an issue-grade security. Since the transfer of rights certified by the share, in the order of succession, shall be possible only by transferring such rights from the registered shares of the reorganized company to the registered shares of its successor (s), then the conversion procedure is used as the main way of ensuring this right[175].

Particular attention shall be paid to the possibility of conversion of shares in the charter capital of a limited liability company. According to Art. 54 of the Law of Ukraine "On Limited Liability and Superadded Liability Companies", the conversion of members' shares in the charter capital of a company that ceases to exist as a result of the split-up into a share in the charter capital of the successor comanies shall be carried out with the preservation of the ratio between the shares of the members in the capital of the company and each successor company. The said rule also provides for the conversion of members' shares in the charter capital of a limited liability company that has ceased to exist as a result of spin-off, consolidation, merger by acquisition or transformation.

4.2. Company Insolvency and Insolvency Procedure

4.2.1. Legal and Regulatory Framework of Relationship Involving the Restoring a Debtor Solvency or Declaring a Debtor Bankrupt

The implementation of entrepreneurial activity necessitates the provision of effective legal and economic mechanisms for the functioning of business entities. Growth of profits, improving market competitiveness, expansion (development) of business requires flexible and efficient management of a legal entity. However, entrepreneurial activity is always connected with certain economic exposures. One of such economic exposures is the inability to fulfill the pecuniary obligations of a legal entity to creditors, as a result of which bankruptcy proceedings can be applied to business entities. At the same time, with the aim of protecting business interests of the debtor, the legislator provides for possible

[175] Bakulina EV Improvement of the Legal Regulation of the Reorganization of Business Companies: Diss. ... PhD: 12.00.03. M., 2004. p. 24.

applying to the insolvent person of a number of measures aimed at restoring the ability of the debtor to fulfill his/her/its liabilities to creditors following the due date without initiating procedure for liquidation.

Legal and regulatory framework of relations involving the restoring a debtor solvency or declaring a debtor bankrupt is carried out by a number of regulatory legal acts. At the level of codified acts, substantive rules and rules of procedure aimed at regulating the legal status of an insolvent debtor are contained, first of all, in the Commercial Code of Ukraine, the Commercial Procedural Code of Ukraine[176], the Civil Procedural Code of Ukraine, and the Revenue Code of Ukraine[177].

The Commercial Code of Ukraine contains Chapter 23 "Declaring a Business Entity Bankrupt" (Article 209 - 215), which defines the general principles of insolvency of a business entity. *First*, the norms of the Commercial Code of Ukraine determine the presence of certain scopes of the legal regulation, which include the issues of restoring a bankrupt debtor solvency and winding-up of bankrupts. *Second*, the substantive rules of the Commercial Code of Ukraine define the main procedures applicable to the insolvent debtor, namely: asset management, financial rehabilitation, settlement agreement, liquidation[178].

The norms of the Civil Code of Ukraine (Articles 104 – 105, 110 – 112) determine the procedure for the liquidation of solvent business entities and contain standard rules, according to which in case of absence of the corporate property sufficient for satisfaction of the creditors' claims, the legal entity carries out all the necessary actions, established by the law on restoring a debtor solvency or declaring a debtor bankrupt. Commercial disputes shall be considered by commercial courts on the basis of the norms of the Commercial Procedural Code of Ukraine.

The basic regulatory legal act that determines the conditions and procedure for the application of bankruptcy proceedings to insolvent

[176]Commercial Procedural Code of Ukraine № 1798-XII as of 06.11.1991, *available at:* http://zakon3.rada.gov.ua/laws/show/1798-12

[177] Revenue Code of Ukraine № 2755-VI as of 02.12.2010, *available at:* http://zakon2.rada.gov.ua/laws/show/2755-17

[178] Pryguza PD Review of Some Problems of the Application of Right to Bankruptcy in Ukraine – Need a Paradigm Break. Bulletin of commercial legal proceedings. 2011. Issue # 2. P.131 – 138, *available at:* http://ks.arbitr.gov.ua/sud5024/8/8/727/

business entities is the Law of Ukraine "On Restoring Debtor Solvency or Declaring a Debtor Bankrupt" [179], as in effect at the time of being redrafted by Law No. 4212-VI of December 22, 2011 (**hereinafter referred to as the Bancruptcy Act**).

The amended Bancruptcy Act is aimed at bringing the institution of restoration of solvency in line with modern conditions, at improving the regulatory environment of Ukraine and rating indicators in the research of the World Bank and the International Finance Corporation in relation on doing business[180]. It should be noted that the Bancruptcy Act of December 22, 2011 aims at improving bankruptcy proceedings, reducing its duration, improving of indexes of collection, reducing production costs in bankruptcy cases, as well as increasing the number of business entities that can obtain financial rehabilitation through the application of measures to prevent bankruptcy and restore solvency.

The feature of the Bancruptcy Act is that it contains substantive rules and rules of procedure aimed at regulation of the institute of bankruptcy. Herewith, the Bancruptcy Act is based on the following principles: subordination of the private interest to the majority, that is, the primacy of joint interest over the private one; replacement of ineffective owner on effective one; satisfaction of monetary creditors' claims exclusively through the bankruptcy proceedings, etc. The grounds of the initiation of the procedure for restoring the debtor's solvency or declaring it bankrupt shall be the state of insolvency of the debtor established by the court[181].

The Bancruptcy Act has a priority over other regulatory legal acts and contains special rules in relation to the general rules regulating the procedure for bankruptcy proceedings. If during the judicial trial it is established that the rules of certain regulatory legal acts regulate the

[179] On Restoring Debtor Solvency or Declaring a Debtor Bankrupt: Law of Ukraine № 2343-XII as of 14.05.1992, *available at:* http://zakon3.rada.gov.ua/laws/show/2343-12/page

[180] Titich V. Interim Results of the Competitive Process: Bankruptcy Cases Decreased, but Property Creditors' Claims Increased Significantly. Law and Business. 2013. №30 (1120), *available at:* http://zib.com.ua/ua/print/36422kilkist_sprav_pro_bankrutstvo_v_ukrainskih_sudah_zmenshilasy.html

[181] Kucheryava ZI Some Aspects of the Improvement of Bankruptcy Law, *available at:* http://www.minjust.gov.ua/33286

corresponding legal relationship in a different manner than the Bancruptcy Act, then the rules of the Bancruptcy Act shall be subject to application[182].

Exemption requirement is established, in particular, regarding bankruptcy of banks and issuers of mortgage bonds. In such cases, the Laws of Ukraine "On Banks and Banking"[183], "On Individuals' Deposits Guarantee System" [184], and "On Mortgage Bonds" [185] shall be followed. At the same time, the rules of number of laws contain provisions that do not contradict the Bancruptcy Act, but supplement it, in particular: Laws of Ukraine "On Enforcement Proceedings" [186], "On State Registration of Legal Entities, Individual Entrepreneurs and Public Formations" [187], "On Insurance"[188], "On Holding Companies in Ukraine"[189], "On National Security Information"[190], "On Securing the Creditors' Claims of and Registration of Encumbrances"[191], as well as other laws and subordinate legislation.

[182] Information Sheet of the Higher Commercial Court of Ukraine № 01-06/606/2013 as of 28.03.2013.

[183] On Banks and Banking: Law of Ukraine № 2121-III as of 07.12.2000, *available at:* http://zakon0.rada.gov.ua/laws/show/2121-14

[184] On Individuals' Deposits Guarantee System Law of Ukraine № 4452-VI as of 23.02.2012, *available at:* http://zakon4.rada.gov.ua/laws/show/4452-17

[185] On Mortgage Bonds: Law of Ukraine № 3273-IV as of 22.12.2005, *available at:* http://zakon5.rada.gov.ua/laws/show/3273-15

[186] On Enforcement Proceedings: Law of Ukraine № 606-XIV as of 21.04.1999, *available at:* http://zakon5.rada.gov.ua/laws/show/606-14

[187] On State Registration of Legal Entities, Individual Entrepreneurs and Public Formations: Law of Ukraine № 755-IV as of 15.05.2003, *available at:* http://zakon5.rada.gov.ua/laws/show/755-15

[188] On Insurance: Law of Ukraine № 85/96-BP as of 07.03.1996, *available at:* http://zakon0.rada.gov.ua/laws/show/85/96-%D0%B2%D1%80

[189] On Holding Companies in Ukraine: Law of Ukraine № 3528-IV as of 15.03.2006, *available at:* http://zakon0.rada.gov.ua/laws/show/3528-15

[190] On National Security Information: Law of Ukraine № 3855-XII as of 21.01.1994, *available at:* http://zakon0.rada.gov.ua/laws/show/3855-12

[191] On Securing the Creditors' Claims of and Registration of Encumbrances: Law of Ukraine № 1255-IV as of 18.11.2003, *available at:* http://zakon5.rada.gov.ua/laws/show/1255-15

4.2.2. Bankruptcy Participants

Bankruptcy participants are the parties, secured creditors, insolvency practitioner (asset manager, rehabilitation manager, official receiver), the debtor's property owner (court receiver), a state body on bankruptcy, The State Property Fund of Ukraine, a representative of the local self-government body, a representative of the debtor's employees, an authorized person of the debtor's founders (members, shareholders) as well as in cases envisaged by the Bankruptcy Act, other persons involved in the bankruptcy proceeding.

Parties to the bankruptcy proceedings are the pre-bankruptcy creditors (the representative of the creditors' committee), the debtor (bankrupt).

Creditor is a natural or legal person, as well as fiscal authorities and other state bodies, that have documented claims, confirmed through the established procedure, for debtor's monetary obligations. In case if two or more creditors have monetary claims to the same debtor at the same time, they shall create the creditors' meeting (creditors' committee) as required by law.

In bankruptcy proceedings, depending on the legal status of the creditor, following classes of creditors shall be distinguished: *pre-bankruptcy creditors* are the creditors having claims to the debtor that arose before the bankruptcy proceedings and whose claims are not secured by the pledge of property of the debtor; *post-bankruptcy creditors* are the creditors having claims to the debtor that arose after the bankruptcy proceedings; *secured creditors* are the creditors whose claims are secured by the pledge of the debtor's (property surety provider's) property.

Debtor is a a legal entity – performer of entrepreneurial activities or an individual in respect of the obligations arosing from an individual in connection with the conduct of his/her business, unable to fulfill his/her/its monetary obligations within three months of the maturity date, which are upheld by valid judgement, and the decision on the opening of enforcement proceedings, except as otherwise permitted by the Bancruptcy Act. The economically autonomous structural subdivisions of a legal entity (branches, representative offices, departments, etc.) may not be the debtor. As such, the institute of bankruptcy does not cover such legal entities as treasury enterprises.

Insolvency practitioner is an individual appointed by the commercial court in accordance with the applicable procedure in bankruptcy as an asset manager, rehabilitation manager or official receiver from among persons who have received the relevant certificate and entered into the Unified Register of Insolvency Practitioners of Ukraine. An insolvency practitioner is a performer of an independent professional activities. As from the date of rendering of decision (ruling) on the appointment of a person to the position of the insolvency practitioner and till the termination of powers, he/she shall be treated as the executive officer of the corporate debtor.

In accordance with the judicial procedures applicable to the debtor (debtor's assets management, financial rehabilitation, liquidation), insolvency practitioner is endowed with a certain competence, and his/her status is displayed in the title. Thus, within the procedure for the debtor's assets management, the insolvency practitioner shall be called the asset manager and shalln carry out the powers of supervision and control over the management and disposal of the debtor's property; within the procedure for the financial rehabilitation he/she shall be called the rehabilitation manager who organizes the implementation of the debtor's rehabilitation; within the liquidation procedure, he/she shall act as an official receiver, who, in accordance with the decision of the commercial court, organizes the procedure for liquidation of the debtor declared bankrupt, and ensures satisfaction of the court-recognized creditors' claims[192].

It should be noted that the Bancruptcy Act regulates the issues related to determining the legal status of the insolvency practitioner, increasing control over the activities of insolvency practitioners, and, consequently, raising the level of qualification and quality of services. Admission to the profession of insolvency practitioner shall be carried out through an independent automated testing system, which will ensure admission to the profession of specialists trained at the appropriate level[193]. Also, the impartiality of insolvency practitioners shall be guaranteed by an automated division of cases, carried out by the court independently with

[192] Kucheryava ZI Some Aspects of the Improvement of Bankruptcy Law, *available at:* http://www.minjust.gov.ua/33286

[193] Bodnarchuk S. Insolvent Practitioners must determine whether they are ready to work not when they wish. Legal newspaper. 2013. № 13. C. 31.

the application of a system from among persons entered into the Unified Register of Insolvency Practitioners of Ukraine.

The state body on bankruptcy is the body whose activities are aimed at organizing the system of preparation and issuance of the certificate on the right to exercise the activities of the insolvency practitioner, control over the activities of insolvency practitioners appointed by the commercial court, the preparation and approval of standard documents on the conduct of bankruptcy proceedings.

At the same time, the state body on bankruptcy has no right to interfere with the bankruptcy proceedings. Its functions are aimed at creating the necessary conditions for the activities of insolvency practitioners and other participants in bankruptcy, as well as controlling such a procedure, in particular, the bankruptcy proceedings of the state-owned enterprises and enterprises whose charter capital contains a share of the state property more than fifty percent[194].

The functions of the state body on bankruptcy are performed by the Ministry of Justice of Ukraine and its territorial departments in accordance with the Regulation on the Ministry of Justice, approved by the decree of the President of Ukraine as of 02.07.2014, No. 228, and the Regulation on the Main Department of Justice of the Ministry of Justice of Ukraine in the Autonomous Republic of Crimea, in regions, cities of Kyiv and Sevastopol, approved by the order of the Ministry of Justice of Ukraine No. 1707/5 dated 23.06.2011.

4.2.3. Precautions against Bankruptcy of the Debtor and Extrajudicial Proceedings

The current legislation provides for a number of measures aimed at improving the financial standing of legal entities. The purpose of such measures is to restore the debtor's solvency. In case of the signs of bankruptcy of the debtor, the founders (members, shareholders) of the debtor, the debtor’s property owner (court receiver), central government bodies, bodies of the Autonomous Republic of Crimea, and local self-government bodies shall be obliged to take all measures necessary to prevent bankruptcy of the debtor. The head of the debtor shall inform the

[194] Information Sheet of the Higher Commercial Court of Ukraine № 01-06/606/2013 as of 28.03.2013.

founders and the owner of the debtor's property about the available signs of bankruptcy. In particular, the head of the debtor shall be obliged to inform the founder or owner of the debtor's property about the impossibility of fulfilling the debtor's monetary obligations to the creditors. However, such notification shall be made if the creditor's monetary claims can not be satisfied by the debtor within three months after the due date.

Within measures to prevent a debtor's bankruptcy, one of the ways to overcome insolvency is to provide the debtor with *financial assistance* at a rate sufficient for meeting of debtors' liabilities, which includes:

1) obligatory payments – this is a liability for taxes and fees;

2) insurance premium payments for compulsory state pension and other social insurance.

Also, the Bancruptcy Act provides for the possibility of applying to the debtor a pre-trial financial rehabilitation. Pre-trial financial rehabilitation of the debtor is a new legal instrument aimed at rehabilitation of the legal and economic standing of a legal entity, based on the free exercise of choice by the participants of the pre-trial financial rehabilitation procedure. The positive aspect of such a procedure is the possibility of solution of an issue of the debtor's liabilities to the creditor on a voluntary basis without the use of bankruptcy proceedings. As V.V. Jun notes, the pre-trial financial rehabilitation of the debtor is a procedure which, although, being a legal formation adjacent to the insolvency law, however, is an autonomous institute of commercial law, the essence of which is not the restoration of solvency, but solving the problem of commercial viability (profitability) of the business entity[195].

The purpose of the pre-trial financial rehabilitation may be the willful extinguishment of debts between creditors and the debtor, between pre-bankrupcy creditors, as well as between secured and pre-bankrupcy creditors; achievement of parity conditions for debt settlement; providing additional guarantees to creditors in order to satisfy their monetary claims, etc.

[195] June V. Critical Review of Procedural Novels of the New Wording of the Law of Ukraine «On Restoring Debtor Solvency or Declaring a Debtor Bankrupt». 2013, *available at:* http://uaip.org.ua/v-dzhun-krytychnyj-ohlyad-protsesualnyh-novel-novoji-redaktsiji-zakonu-ukrajiny-pro-vidnovlennya-platospromozhnosti-borzhnyka-abo-vyznannya-joho-bankrutom/

By the content of Part 5 of Art. 5 of this Law, the *debtor's pre-trial financial rehabilitation* is a system of measures to restore the debtor's solvency, which may be performed by the debtor's founder (member, shareholder), the debtor's property owner (court receiver), the creditors of the debtor, other persons for the purpose of prevention bankruptcy of the debtor by taking organizational, economic, managerial, investment, technical, financial and economic, legal measures in accordance with the legislation until the opening of bankruptcy proceedings.

The debtor's pre-trial financial rehabilitation involves three stages. The *first stage* is characterized by the evolution of insolvency threat of the debtor, the adoption of a decision on pre-trial financial rehabilitation of the debtor and the approval of the plan of pre-trial financial rehabilitation at the general meeting of creditors. The *second stage* is determined by the adoption by the commercial court of the application for approval of the pre-trial financial rehabilitation plan and passing of the ruling, which shall be the groung for the procedure of pre-trial financial rehabilitation. The *third stage* consists in carrying out the procedure of pre-trial financial rehabilitation of the debtor which shall be done beyond the control of the court and reflects the specificity of restoring the debtor's solvency before the bankruptcy proceedings.

Thus, financial rehabilitation may be carried out through a pre-trial procedure for restoring the debtor's solvency. The initiators of pre-trial financial rehabilitation may be either debtor or creditor. At the same time, consent for pre-trial financial rehabilitation shall be reached both before and after the incurring of a debt. The necessity of applying the procedure of pre-trial financial rehabilitation prior to the incurring of debt may be stipulated in the transaction (agreement), on the basis of which there was a monetary obligation, provided that the insolvency of the debtor arises during the period of the conclusion (performance) of the transaction (agreement).

The procedure for the pre-trial financial rehabilitation begins and can be introduced if there is:

- the corresponding written consent of the o debtor's property owner (court receiver);

- an appropriate written consent of creditors, whose total amount of claims exceeds fifty percent of the debtor's accounts payable according to its accounting records;

- rehabilitation plan, which must be agreed in writing by all secured creditors and approved by the general meeting of debtors' creditors. The debtor's pre-trial financial rehabilitation plan shall be made in writing and shall include measures to restore the debtor's solvency, including the conditions for satisfying the claims of all the creditors who the debtor has outstanding monetary obligations to, as well as the terms of the financial rehabilitation plan and the settlement agreement provided for in Part 1, 2 of Art. 29 and Part 4 of Art. 79 of the Bankruptcy Act. Also, a pre-trial financial rehabilitation plan may provide for the division of creditors involved in the financial rehabilitation into classes, depending on which the priority of satisfaction of creditors' claims may be established. At the same time, the terms of satisfaction of creditors' claims contained in the financial rehabilitation plan should be equal for both creditors who took part in the general meeting of creditors and voted for the approval of the financial rehabilitation plan, as well as for the creditors who did not vote or voted against the approval of the financial rehabilitation plan. However, the Bankruptcy Act does not contain provisions regulating the procedure for collecting new monetary claims to the debtor from the post-bankrupcy creditors that arose after the approval of the financial rehabilitation plan.

Consequently, the debtor shall independently develop a financial rehabilitation plan as a system of measures for own business recovery, shall agree it with all secured creditors and receive a decision of the general meeting of creditors on its approval.

The procedure for holding general meeting of creditors is determined by the *Regulation on the procedure for carrying out the financial rehabilitation before the commencement of bankruptcy proceedings No. 15, approved by the resolution of the Plenum of the Higher Commercial Court of Ukraine of 17.12.2013*[196]. In accordance with this Regulation, the obligation to convene a general meeting of creditors shall be borne by the debtor according to the debtor's accounting records by sending a written notice to all the creditors and placing the announcement on the website of the Ministry of Justice of Ukraine (its territorial bodies on bankruptcy – Main departments of justice in the regions) and the Higher Commercial

[196] Regulation on the procedure for carrying out the financial rehabilitation before the commencement of bankruptcy proceedings No. 15, approved by the resolution of the Plenum of the Supreme Commercial Court of Ukraine of 17.12.2013, *available at:* http://zakon2.rada.gov.ua/laws/show/v0015600-13

Court of Ukraine. The general meeting of creditors shall be considered competent if the creditors having *at least two thirds of the votes* are present. At the general meeting, the creditors shall have a number of votes pro-rata the amount of creditors' claims according to the debtor's accounting records and a multiple of one thousand hryvnias. According to the results of voting, the general meeting of creditors shall make a decision, which is formalized by the minutes of the meeting and accompanied by written statements of creditors on the consent to conduct pre-trial financial rehabilitation of the debtor and approval of the pre-trial financial rehabilitation plan.

Within *five days* from the day of the approval of the pre-trial financial rehabilitation plan at the general meeting of creditors, the debtor or representative of the creditors must submit an application for approval of the debtor's pre-trial financial rehabilitation to the commercial court at the location of the debtor. For the submission of an application to court a court fee, which, according to *subparagraph 8 of clause 2 of part 2 of Art. 4 of the Law of Ukraine "On Court Fees"* [197], shall be paid in the amount of 2 subsistence minimums for able-bodied persons. Within *five days* from the receipt of the application, the commercial court makes a decision on the acceptance of the application for review, which specifies the time and place of the court session. A copy of the decision shall be sent to the debtor and to all the creditors indicated in the application.

The official announcement of the notice on the acceptance of the application for the approval of the pre-trial financial rehabilitation plan for consideration shall be published on the official website of the Higher Commercial Court of Ukraine on the Internet in the manner prescribed by the *Regulation on the procedure for official publication of information on the bankruptcy proceedings No. 16 approved by the decision of the Plenum of the Higher Commercial Court of Ukraine dated 17.12. 2013*[198].

The application for approval of the pre-trial financial rehabilitation plan of the debtor must be considered by the commercial court within *one*

[197] On Court Fees: Law of Ukraine № 3674-VI as of 08. 07. 2011, *available at:* http://zakon3.rada.gov.ua/laws/show/3674-17

[198] Regulation on the procedure for official publication of information on the bankruptcy proceedings No. 16 approved by the decision of the Plenum of the Higher Commercial Court of Ukraine dated 17.12. 2013, *available at:* http://zakon5.rada.gov.ua/laws/show/v0016600-13

month from the date of acceptance of the application for review. Approval of the pre-trial financial rehabilitation plan by commercial court takes place during a court session with participation of the debtor and the creditors specified in the application. The commercial court shall be obliged to hear everyone present at the meeting of the creditor who has objections to the pre-trial financial rehabilitation plan, even if at the general meeting of creditors such a creditor voted for the approval of this plan.

According to the results of consideration of the application, the commercial court may make a decision approving or refusing to approve the pre-trial financial rehabilitation plan of the debtor, which shall be sent to the participants of the pre-trial financial rehabilitation procedure, the body of the public enforcement service and fiscal body at the location of the debtor. The decision to approve the plan of pre-trial financial rehabilitation of the debtor is the ground for the initiation of a pre-trial financial rehabilitation procedure.

The debtor's pre-trial financial rehabilitation procedure shall be organized by the head of the debtor. The pre-trial financial rehabilitation may also be carried out with the assistance of a rehabilitation manager appointed from among persons, entered into the Unified Register of Insolvency Practitioners. Herewith, pre-trial financial rehabilitation is due to be conducted within the time-limit, not exceeding *twelve months* from the date of approval by the court of the rehabilitation plan. During this period, the conditions of the plan for pre-trial financial rehabilitation of the debtor shall become obligatory for all creditors, a moratorium on satisfaction of creditors' claims that arose prior to the court's approval of a pre-trial financial rehabilitation plan shall be introduced, as well as a prohibition on opening a debtor bankruptcy proceedings shall be established.

Cancellation of pre-trial financial rehabilitation before expiry occurs in case of:

- termination of a settlement agreement, the conditions of which are contained in the plan of pre-trial financial rehabilitation;
- invalidation of a settlement agreement, the conditions of which are contained in the plan of pre-trial financial rehabilitation;

- initiation of bankruptcy proceedings upon the application of the debtor or creditors based upon delinquency that arose after the court's approval of the pre-trial financial rehabilitation.

4.2.4. Bankruptcy Proceedings

In modern times of a market economy development there is a significant number of corporate vehicles determining the creation of a competitive environment at the market of goods and services. However, not always the entrepreneurial activities of the business entity leads to significant profits. Entrepreneurship is primarily a risky activity, which may also result in the financial inability of the business entity to fulfill its obligations to other business entities and persons. This may be manifested in the incurring of debt to the creditors, the impossibility of paying taxes and other mandatory payments, the accumulation of other debts, which is accompanied by non-fulfillment of obligations assumed.

The bankruptcy institute is the inalienable mechanism of a market economy aimed at taking measures to restore the solvency of the business entity and the possibility of continuation of functioning in the market of goods and services, and in case of impossibility to improve its financial standing, – liquidation, which provides for the protection of legitimate interests of creditors in relation to unfulfilled obligations of the debtor. At the same time, the statistics on recovery of the debtor's solvency are rather insignificant and, as a rule, most cases end up with liquidation. The practice of law enforcement indicates that the main problem in the bankruptcy procedure lies in the low economic efficiency of such a procedure for the creditor, which actually deprives the creditor of the possibility to repay his/her funds in full. Taking into account the above problems, new bankruptcy laws introduces new, more advanced means aimed at satisfying the creditors' claims for unfulfilled debtors' obligations.

In accordance with paragraph 2 of Part 1 of Art. 1 of Bankruptcy Act, bankruptcy is a recognized by the commercial court inability of a debtor to restore its paying capacity through the procedures of financial rehabilitation and settlement agreement and to satisfy creditors' claims, no other way than through the liquidation procedure. Bankruptcy proceedings are a special procedure aimed at satisfying the claims of all debtors' creditors. Case hearing in bankruptcy of legal entities and individual

entrepreneurs falls within the competence of commercial courts in accordance with the rules provided by the Commercial Procedural Code of Ukraine, taking into account the provisions of the Law. The purpose of the bankruptcy proceedings is to eliminate the occasional advantages of one creditor against others and to ensure the equal satisfaction of the claims of all debtors' creditors.

Depending on the category of the debtor, the type of his/her/its activities and the availability of him/her/its property, the commercial court applies a general, special or simplified procedure for conducting bankruptcy proceeding. The *general procedure* for conducting a bankruptcy proceeding involves the initiation of a procedure for debtor's assets management with the subsequent transition to the procedures for financial rehabilitation, liquidation or settlement agreement. The *special procedure* provides for bringing additional participants into the proceedings, extending the duration of financial rehabilitation, coincidence of procedures for the debtor's assets management and financial rehabilitation. The *simplified procedure* shall be applied during the liquidation of a bankrupt without the use of procedures for the debtor's assets management and financial rehabilitation.

Bankruptcy cases are considered by the commercial court at the location of the debtor – legal entity or at the place of residence of an individual. At the same time, if the debtor shifted his/her/its place of residence after the court has accepted the application on the initiation of bankruptcy proceedings for review, but before the bankruptcy proceedings were actually initiated, the case papers shall not be transferred to the commercial court at the new location of the debtor[199].

Bankruptcy cases can be considered by commercial courts upon the application of the debtor and his/her/its creditors, if the indisputable claims of the creditor (creditors) to the debtor jointly amount to not less than three hundred times state minimum earnings, which were not satisfied by the debtor within three months after the due date for its repayment. In accordance with the Bankruptcy Act, the *creditor's indisputable claims* shall be considered as monetary claims of creditors, which are confirmed by the valid judgement, and the decree on the opening of enforcement proceedings, under which debiting of debtor's accounts shall be carried

[199] Information Sheet of the Higher Commercial Court of Ukraine № 01-06/1862/2013 as of 26.12.2013.

out. These claims do not include damages (fine, penalty) and other financial sanctions. The above provisions indicate that a court decision in the absence of a writ of execution issued on its basis and a decision of the body of the State Bailiffs Service on the opening of enforcement proceedings can not be a confirmation of the indisputability of monetary claims.

At the same time, attention should be paid to the fact that bankruptcy proceeding may be instituted by a commercial court, provided that the indisputable claims of the creditor (creditors) to the debtor: 1) jointly amount to not less than three hundred times state minimum earnings; 2) such claims were not satisfied by the debtor within three months after the opening of enforcement proceedings. On the one hand, such conditions of the Bankruptcy Act are aimed at protecting business reputation and conducting of business by the debtor, which during the bankruptcy proceedings may result in a reduction in the entity's income on the market of goods and services. On the other hand, at the legislative level there are no rules for completing the procedure for debt collection on the claims of creditors, which are less than three hundred times state minimum earnings. If the creditor's claims are less than three hundred times state minimum earnings, such a creditor shall be obliged to attract other creditors with claims equal to three hundred times state minimum earnings, or to expect a debtor's application to a commercial court with a statement on the initiating the bankruptcy proceedings.

In accordance with the compulsory rules of Part 5 of Art. 11 of the Bankruptcy Act, the debtor shall be obliged to apply to the commercial court with an application for instituting bankruptcy proceedings in the event that:

- satisfaction of claims of one or more creditos will lead to the impossibility of fulfilling the debtor's monetary obligations in full to other creditors (the threat of insolvency);
- during the liquidation of the debtor in connection with a procedure other than a bankruptcy, the inability of the debtor to satisfy the creditors' claims in full is established.

Herewith, the debtor shall have the right to file an application to initiate a bankruptcy proceeding, regardless of the presence or absence of indisputable claims of the creditor. That is, the debtor is obliged to apply to the court in case of probable insolvency. A mandatory condition for the

debtor to apply to the court is the availability of sufficient property to cover legal expenses.

The creditor may apply to the commercial court with an application to initiate a bankruptcy proceeding only if there are indisputable claims to the debtor. In this case, the creditor's application must contain information on the size of the creditor's claims to the debtor, indicating separately the amount of the damages (penalty, fine) payable. If there are several creditors, they can apply to the commercial court with one joint application, combining their claims to the debtor. The application shall be signed by all the creditors indicated in the application. A document on the payment of a court fee, which is collected in the amount of *10 amounts of the subsistence minimum for able-bodied persons*, shall be attached to the application for instituting bankruptcy proceedings (subparagraph 9 of clause 2 of part 2 of Article 4 of the Law of Ukraine "On Court Fees").

When filing an application for instituting bankruptcy proceedings and accepting a decision by a judge on the availability of reasons for its adoption until the issuance of a respective resolution by a judge within 2 business days since the moment of the automated distribution of the application for initiating bankruptcy proceedings to the judge, he/she shall determine the type of economic activity of the debtor according to the KVED (Ukrainian Industry Classification System) and its business organizational and legal form for the KOPFG (Classifier of Business Organizational and Legal Forms) and perform other actions as provided in clause 4.2 of *Regulations on the automated system for the selection of candidates for the appointment of the insolvency practitioner in bankruptcy cases, approved by the decision of the Plenum of the Higher Commercial Court of Ukraine No. 8 of 14.07.2016*[200].

It should be noted that the adoption by the commercial court of an application to initiate a bankruptcy proceeding and the opening of proceedings (proceedings) in a bankruptcy case are procedural actions that are separated from each other. During the first one, the commercial court decides whether to accept the application for review or to refuse to accept it or to return the application, and during the second one – the issue of

[200] Regulations on the automated system for the selection of candidates for the appointment of the insolvency practitioner in bankruptcy cases, approved by the decision of the Plenum of the Higher Commercial Court of Ukraine No. 8 of 14.07.2016, *available at:* http://zakon5.rada.gov.ua/laws/show/v0008600-16

initiating a bankruptcy proceeding or refusing to initiate it[201]. In other words, when filing an application to initiate a bankruptcy proceeding, the applicant shall not obliged to prove the insolvency of the debtor, but shall only submit the necessary documents, which may indicate the probability of insolvency.

The commercial court shall, within *five days* from the date of receipt of the application for instituting bankruptcy, make a ruling to accept the application for review; to refuse or return the application. In the decision, the court has the right to decide on the obligation of the debtor and other persons to provide the court with additional information necessary to decide on the opening of bankruptcy proceedings as well as to take measures to secure creditors' claims.

In addition, when filing an application for instituting bankruptcy proceedings by a creditor, the commercial court shall require the debtor to give a statement of defense on the claim of the initiating creditor. The statement of defense shall contain insolvency information, as well as other information that may be the reason for refusal to open the bankruptcy proceedings, for example, evidence that the creditor's claims are fully secured by pledge of the debtor's property. However, failure to provide a statement of defense, including at the request of the court, shall not be an incumbrance for a preliminary case hearing.

The issue of opening of bankruptcy proceedings, shall be resolved exclusively during the *preliminary case hearing*, which the commercial court shall be obliged to hold within *fourteen days* from the date of the ruling to accept the application for consideration, and if there are valid reasons – not later than *thirty days*. The task of the preliminary case hearing of the commercial court in the bankruptcy case is to verify the credibility of the creditor's or debtor's claim for insolvency, as well as the threat of the insolvency – under the debtor's claim[202].

If the case is initiated by a creditor' (creditors') application, the commercial court shall verify the validity of his/her/its (their) claims, the indisputable nature of such claims, and measures for the enforcement of these claims on execution. Herewith, the commercial court takes into

[201] Item 10 of the Information Sheet of the Higher Commercial Court of Ukraine № 01-06/606/2013 as of 28.03.2013.

[202] Information Sheet of the Higher Commercial Court of Ukraine № 01-06/1862/2013 as of 26.12.2013.

account the debtor's statement of defense for the bankruptcy petition if the debtor filed a statement of defense before the date of the preliminary case hearing. The debtor's statement of defense shall contain the existing objections to the claims of the applicant (applicants), the total amount of the debtor's delinquency to the creditors for obligations that involve the disbursement of money, including the payment of taxes and levies (mandatory payments), payment of wages shall be indicated; information about the debtor's property, all payments through the banking institutions and other financial institutions and its invoice details; information about the accounts on which the debtor's securities are recorded; information about carrying out of activities related to state secrecy by the debtor. Also, a certificate of the privatization bodies regarding the presence / absence of a state-owned assets on the books of the enterprise, that did not enter into the debtor's charter capital during the privatization process, shall be added to the debtor's statement of defense.

However, if before the preliminary case hearing the creditor's (creditors') claims are satisfied by the debtor in part and the total amount of indisputable monetary claims is less than three hundred times the minimum wage, which was not satisfied by the debtor, the commercial court shall refuse to open the bankruptcy proceedings.

In case of appeal to the commercial court by the debtor, during the preliminary case hearing the signs of insolvency of the debtor or its threat shall be clarified. The commercial court shall verify the legal status of the debtor, since bankruptcy proceedings can be instituted only if there is enough property to cover the court costs. Such expenses shall include the payment of remuneration to the insolvency practitioner in the minimum amount of not less than for *twelve months* of his/her work, the reimbursement of expenses for the publication of ads in the case and court fees paid by creditors[203].

Thus, upon the results of the consideration of an application for instituting bankruptcy proceedings and the debtor's statement of defense, the commercial court shall make a ruling on:

- commencement of the bankruptcy proceedings which is valid from the moment of its issuance and may be contested on appeal or cassation;

[203] Information Sheet of the Higher Commercial Court of Ukraine № 01-06/1149/2013 as of 07.08.2013.

- refusal to open the bankruptcy proceedings. The refusal to open the bankruptcy proceedings does not prevent a repeated application to the court with a bankruptcy petition.

From the moment when ruling on commencement of the bankruptcy proceedings is made, the following actions shall be carried out:

1) a moratorium on satisfaction of creditors' claims is introduced, which consists in suspending the fulfillment by the debtor of monetary obligations and obligations to pay taxes and levies (mandatory payments), which reached the maturity before the day of the moratorium, and the cessation of measures aimed at ensuring the fulfillment of these obligations and obligations to pay taxes and levies (mandatory payments) applied before the moratorium's day[204];

2) the consideration of the claims of pre-bankrupcy and secured creditors within the framework of bankruptcy proceedings;

3) the seizure of the debtor's property or other restrictions on the disposal of the debtor's property within the framework of the bankruptcy proceeding may be applied;

4) restrictions on the implementation of equity rights of the debtor's founders (members, shareholders);

5) the prohibition on the debtor to take decisions on the liquidation, reorganization of the debtor, as well as the alienation of fixed assets and mortgages.

Following the ruling of the commercial court on the commencement of the bankruptcy proceedings, the official announcement of the notice shall be made on the official website of the High Commercial Court of Ukraine. The purpose of posting the notice on the Internet is to identify all

[204] The new version of the Bankruptcy Act contains a provision according to which a moratorium on satisfaction of claims of a creditor in a bankruptcy case has been postponed from the moment the application for initiating bankruptcy proceedings was filed to the commercial court to the time of commencement of the bankruptcy proceeding. Legislative innovation promotes repayment of monetary claims of the creditor, which reached the maturity before opening bankruptcy proceedings. Also, if at the preliminary case hearing the court determines the grounds for refusing to open bankruptcy proceedings, and thereby prevent the damage to the debtor in respect of which the bankruptcy case has been filed and creditors who may be harmed by an unreasonably imposed moratorium.

the creditors and persons who have indicated their intention to take part in the financial rehabilitation of the debtor in respect of which the bankruptcy proceedings has been instituted. Herewith, all monetary claims of creditors to the debtor must be expressed in the national currency of Ukraine. If the obligations of the debtor are expressed in foreign currency, the composition and the size of the monetary claims of creditors shall be determined in the national currency at the rate established by the National Bank of Ukraine on the date of submission by the creditor of an application with monetary claims to the debtor[205]. The notice must contain the full name of the debtor, its postal address, bank details, the name and address of the commercial court, the case number, information about the assets manager, the deadline for submission of application by the pre-bankrupcy creditors with claims to the debtor.

It should be noted that the notification to creditors about the commencement of bankruptcy proceedings through disclosure of information on the official website of the Higher Commercial Court of Ukraine on the Internet is an effective mechanism of notification of both domestic and foreign creditors who were in a binding relationship with the debtor. The previous wording of the Law contained a requirement for official announcement of such information in the official media mouthpiece, which provided an opportunity for unscrupulous debtors to evoid satisfaction of creditors' claims and to use this legal mechanism in own favor.

The rule regulating the consideration of pre-bankrupcy creditors' claims to the debtor is also considered to be positive for creditors. Under this procedure, before the official announcement on the commencement of the bankruptcy proceedings, courts shall accept and consider applications of pre-bankrupcy creditors on a general basis. However, after the official publication of such notice, the debtor's assets manager shall be obliged to inform the court that is considering the claims of the pre-bankrupcy creditors to the debtor about the commencement of bankruptcy proceedings.

After informing the court about the disclosure of such information on the Internet, this court shall suspend the proceedings and explain to the plaintiff his/her right of access to commercial court at the location of the

[205] Information Sheet of the Higher Commercial Court of Ukraine № 01-06/1862/2013 as of 26.12.2013.

debtor with an action for declaration of his/her monetary claims to the debtor in the bankruptcy proceedings. In addition, the court shall explain to the plaintiff that the persons whose claims are asserted upon the expiration of the deadline set for its submission or are not asserted at all shall not be considered to be pre-bankrupcy creditors, and their claims shall be compensated in a sixth-priority basis during the liquidation procedure.

As an exception to the general rule, the legislator states that the relevant rule shall not be applied to creditors' claims for payment of earnings, royalty fees, alimony, as well as claims for compensation for damages caused to the life and health of citizens, payment of insurance premiums to the obligatory state pension and other social insurance and the claim of the Naftogaz Ukrainy National Joint Stock Company and / or its subsidiary, which has supplied natural gas on the basis of a license, for covering of delinquency (including penalty, 3 percent annual and inflationary losses) for the delivered / consumed natural gas, formed as of May 1, 2015.

If the plaintiff fails to enjoy his/her/its right to apply to the commercial court within *thirty days* from the date of the official promulgation of the notice on the bankruptcy proceedings, the court seised of a statement of claim, upon the expiration of this deadline, resumes the action proceedings and dismisses a claim. However, if the bankruptcy proceedings were dismissed or terminated, the action proceedings shall be subject to renewal and the claim shall be heared on the merits.

However, it should be noted that, in practice, setting of the *30-day deadline* from the date of the official promulgation of the notice on the bankruptcy proceedings for filing the creditors' claims to the debtor is considered to be a disadvantage of the bankruptcy procedure. According to experts, such an approach to the identification of creditors is a good practice for an unscrupulous debtor to avoid fulfilling monetary claims to a creditor (creditors). After all, creditors who at the time of the declaration of the debtor bankrupt have been in contractual relations with him/her/it should declare their claims to the bankrupt in a very short time.

On the one hand, such a remark is of great practical consequence, since the bankruptcy procedure is a legal mechanism characterized by the complexity of conducting and long-term duration and impossibility to fulfill the creditors' claims by imposing a moratorium on satisfaction of

creditors' claims until the termination of bankruptcy proceedings. However, on the other hand, the placement of information about the bankruptcy proceedings on the Internet, as well as the notification through the court, where the claim is being heared on the merits, gives the creditor the right to independently decide on the procedure for repayment of such claims by the debtor. After all, an appeal to the commercial court with the monetary claims to the debtor in the case of bankruptcy is the right of the creditor and outside the will of the creditor court shall not include such requirements in the list of creditors' claims. Moreover, if earlier such a claim was not included in the list of creditors' claims and was considered to be repaid, now such creditors though do not acquire the legal status of pre-bankrupcy creditors, but have the right to repayment of monetary claims during the liquidation procedure on a sixth-priority basis. The above indicates that the purpose of the bankruptcy proceedings is not only to protect the rights of creditors, but also to restore and increase the debtor's financial standing through the application of court procedures provided for by law.

The next stage of the bankruptcy proceedings is the holding of a *preliminary hearing* of the commercial court. According to Art. 25 of the Bankruptcy Act, a preliminary hearing of the commercial court shall be held not later than *two months* and ten days, and in the case of a large number of creditors, not later than *three months* after the preparatory meeting of the court. The decision on whether there is a large number of lenders relies on a commercial court, taking into account the circumstances of a particular case. Moreover, not only the quantitative composition of creditors, but also the composition of monetary claims, the presence and content of objections of the insolvency practitioner, debtor or other creditors must be taken into account. When determining the size of the creditor's claims secured by the debtor's property, the commercial court must take into account the valuation of the property agreed by the parties in the relevant pledge agreement (mortgage agreement)[206].

At the preliminary hearing, the commercial court shall consider all the creditors' claims, including those which were denied by the debtor and which were not filed by the assets manager in the list of creditors' claims, as well as those recognized by the debtor and filed by the assets manager

[206] Information Sheet of the Higher Commercial Court of Ukraine № 01-06/1862/2013 as of 26.12.2013.

in the register of creditors' claims. The issue of the date of the general meeting of creditors and the committee of creditors, which will further represent the legitimate interests of creditors in court and will act as a party to the bankruptcy case, shall also be resolved.

As a result of consideration of creditors' claims, the commercial court makes a ruling, which resolves the issue of the date of the *final court hearing*, on which the ruling on the financial rehabilitation of the debtor or the decree on recognition of the debtor as a bankrupt and the opening of the liquidation procedure, or the decree on the dismissal of the bankruptcy proceedings or the ruling on the prolongation of the procedure for assets managment and adjournment of the final court hearing shall be made.

4.2.5. Judical Procedures in Bankruptcy (Debtor's Assets Management, Financial Rehabilitation, Settlement Agreement, Liquidation)

After the commencement of bankruptcy proceedings, depending on the procedure of the proceedings, following judical procedures may be applied to the debtor: debtor's assets management, financial rehabilitation, settlement agreement, liquidation.

Debtor's Assets Management Procedure

When initiating bankruptcy proceedings, the mandatory judicial procedure applicable in such proceedings is the procedure for debtor's assets management. The execution of this procedure consists in carrying out a set of procedural actions aimed at achieving a certain purpose and fixed by a separate court decision (ruling)[207]. At the commencement of bankruptcy proceedings, the procedure for debtor's assets management shall be carried out during the length of the period of *the preparatory case hearing, the preliminary case hearing and the final case hearing* of the commercial court.

In particular, at the *preparatory case hearing*, during which the court investigates the grounds for commencement of bankruptcy proceedings, the introduction of a procedure for the debtor's assets management, the appointment of the assets manager, the establishment of the amount of payment for his/her services as well as sources of payment shall be

[207] Minkovsky SV Proceedings and its Stages as a Peculiarity of the Execution of the Judicial Procedure for assets Managment. The forum of Law. 2013. № 1. P. 707, available at: http://archive.nbuv.gov.ua/e-journals/FP/2013-1/13mcvprm.pdf

decided. In addition, at the preparatory case hearing the date of making the list of creditors' claims by the assets manager and and the period for filing of information about the results of consideration of creditors' claims to the commercial court, which shall not exceed a *month and twenty days* after the date of the preparatory case hearing of the court, as well as a number of other actions provided for by law shall be determined.

During the *preliminary case hearing*, all creditors' claims to the debtor are to be considered, including those claims which were (or were not) included by the assets manager into the list of creditors' claims. During the preliminary case hearing, a ruling on the prolongation of the procedure for debtor's assets management and postponement of the final court hearing shall be made. It should also be noted that after considering all the creditors' claims at the preliminary case hearing, while the procedure for the debtor's assets management, the debtor has the right, based on the ruling of the commercial court, to satisfy all the pre-bankruptcy creditors' claims, provided that claims shall be satisfied simultaneously and in full in accordance with the register of creditors' claims.

During the *final case hearing* of the commercial court the transition to the next judicial procedure (financial rehabilitation, settlement agreement, and liquidation) shall be made or the proceedings shall be terminated. On the basis of a decision of the creditors' meeting and on the proposal of the assets manager, the commercial court shall take one of the following court decisions: the introduction of the financial rehabilitation procedure; recognition of a debtor bankrupt and open a liquidation procedure; make a ruling on the termination of the bankruptcy proceedings. However, the committee of creditors may decide to apply to the commercial court with a request for extension of the debtor's assets management.

At the same time, according to Part 2 of Art. 22 of the Bankruptcy Act, the procedure for debtor's assets management shall be introduced for a period of *one hundred and fifteen calendar days* and may be extended by a commercial court for *a maximum of two months*. The given rule makes positive changes in the bankruptcy proceedings. Unlike the previous wording of the Bankruptcy Act, in which the procedure for debtor's assets management lasted six months and could be continued by the court indefinitely, the new wording of the Bankruptcy Act clearly specifies the

duration of such a procedure. This reduces the duration and cost of the bankruptcy procedure.

After the expiry of the time limits specified by law, the powers of the debtor's assets manager cease. The procedure for the debtor's assets management is considered to be terminated from the date of recognition by the commercial court of the debtor bankrupt and the opening of the liquidation procedure or the introduction of a financial rehabilitation procedure or the approval of a settlement agreement. Herewith, the transition from the procedure for debtor's assets management to financial rehabilitation is possible only if there is a debtor's financial rehabilitation plan. In the absence of a financial rehabilitation plan, a bankruptcy liquidation procedure shall be introduced.

Thus, the *debtor's assets management* is a system of measures for supervision and control over the management and disposal of the debtor's property in order to ensure the safe, efficient use of the property assets of the debtor, to analyze its financial standing, as well as to determine the next optimal procedure (financial rehabilitation, settlement agreement or liquidation) to meet in full or in part the creditors' claims (Part 1, Article 22 of the Bankruptcy Act).

The execution of the procedure for the debtor's assets management shall be provided by the debtor's assets manager – an individual who is appointed in accordance with the commercial court decision. The duties of the debtor's assets manager include following: to handle applications of the creditors on monetary claims to the debtor; to keep a list of creditors' claims; to inform the creditors about the results of consideration of their claims; to take measures to protect the debtor's property; to convene a meeting of creditors and organize its holding; to identify (if any) the signs of bankruptcy fraud, contentious insolvency, concealment of persistent financial insolvency, unlawful actions in the event of bankruptcy, and so on.

Also, the new wording of the Law extends the powers of the debtor's assets manager, concerning, in particular, the inventory of the debtor's property, the development of a financial rehabilitation plan, bringing an action for annulment of transactions (agreements) concluded by the debtor, as well as bringing an action for the invalidation of acts adopted in the procedure for the debtor's assets management concerning the change in the

legal entity form of the debtor, regardless of which body has adopted the relevant act.

Taking into account tight time limits for the commission of procedural actions in the procedure for the debtor's assets management, the commercial court in case of non-execution or late execution by the debtor's assets manager of his/her duties (handling applications of the creditors on monetary claims to the debtor, carrying out inventory of the debtor's property and determination of the value of the debtor's property, etc.) must, upon the request of the creditors committee or upon its own initiative, terminate the powers of the debtor's assets manager and appoint a new one[208].

After the appointment of the debtor's assets manager but before the termination of the procedure for the debtor's assets management, the debtor's governing bodies shall have no right, without the consent of the debtor's assets manager, to make decisions on: reorganization (consolidation, merger by acquisition, split-up, spin-off and transformation) and liquidation of the debtor; creation of legal entities or participation in other legal entities; establishment of branches and representative offices; payment of dividends; carrying out the issuance of securities by the debtor; withdrawal from the membership of a debtor legal entity; acquisition of shareholders' shares previously issued by the debtor. At the same time, the commercial court, at the request of the debtor's assets manager, may withdraw an attachment on the debtor's property and other restrictions on the disposal of debtor's property, regardless of the person imposing it, if such attachment or other restrictions hinder the economic activity of the debtor or the restoration of his solvency.

Financial Rehabilitation

The next judicial procedure that can be applied in bankruptcy proceedings is the debtor's financial rehabilitation. *Financial rehabilitation* shall be understood as the system of measures taken in the course of bankruptcy proceedings in order to prevent the recognition of the debtor bankrupt and its liquidation, aimed at improving the financial and economic standing of the debtor, as well as satisfaction of the creditors' claims in full or in part by restructuring the company, debts and assets and / or changing the organizational and legal structure of the debtor.

[208] Information Sheet of the Higher Commercial Court of Ukraine № 01-06/1862/2013 as of 26.12.2013.

Measures aimed at restoring the debtor's solvency and meeting the creditors claims shall be determined in the financial rehabilitation plan and may include following:

1) restructuring of the company;

2) business process re-engineering;

3) the closure of unprofitable manufacturing departments;

4) payments by installments and / or deferment of payments or partial debt forgiveness (writing down of debt), what is the conclusion of the settlement agreement;

5) collection of receivables;

6) restructuring of the debtor's assets;

7) sale of part of the debtor's property;

8) fulfillment of the debtor's obligations by the owner of the debtor's property and his/her/its responsibility for non-fulfillment of obligations assumed by him/her/it;

9) alienation of property and repayment of obligations of the debtor by replacing assets;

10) dismissal of the debtor's employees who can not be involved in the process of carrying out the plan of rehabilitation;

11) obtaining a loan for the payment of service gratuity to the debtor's employees who are dismissed in accordance with the plan of rehabilitation, which shall be repaid in advance due to the sale of the debtor's property;

12) other ways to restore the debtor's solvency.

Thus, the abovementioned measures are aimed at restoring the debtor's solvency during the procedure of financial rehabilitation, which is introduced by the commercial court for a period of *six months*. At the same time, the duration of the financial rehabilitation may be extended at the request of the rehabilitation manager or committee of creditors for a period of *twelve months*. It should be noted that the Bankruptcy Act innovation is the establishment of a clearly defined time frame for the financial rehabilitation, whereas the previous wording of the Bankruptcy Act provided for a financial rehabilitation within twelve months with the subsequent possibility of its continuation each and every time for six months. Such a situation did not contribute to the achievement of the goal of the debtor's financial rehabilitation, and caused delays in the bankruptcy

proceedings, in the introduction of a liquidation procedure and the impossibility of meeting all the creditors' claims.

The debtor's financial rehabilitation shall be introduced at the request of the committee of creditors on the basis of the ruling of the commercial court, which is being officially announced on the official website of the Higher Commercial Court of Ukraine on the Internet. Together with the introduction of the financial rehabilitation procedure, the commercial court appoints the rehabilitation manager, who takes control over the management of the debtor. From this moment, the head of the debtor is to be dismissed, and the company governing bodies cease to manage and dispose of the debtor's property and transfer its powers to the rehabilitation manager. Also, the debtor's governing bodies *within three days* from the date of the decision on financial rehabilitation are obliged to transfer to the rehabilitation manager all the accounting and other documents of the debtor, its seals, stamps, material and other valuables. Since the introduction of the debtor's rehabilitation procedure, the rehabilitation manager shall have the right to dispose of the debtor's property in accordance with the plan of rehabilitation, as well as to conclude on the behalf of the debtor the settlement agreement, civil law, labor and other transactions (contracts) and file applications for rescission of transactions (agreements) concluded by the debtor, invalid.

One of the innovations of the Bankruptcy Act is the introduction of another participant in the bankruptcy case, an *investor*, upon wich the specific rights and obligations for participation in the financial rehabilitation procedure are imposed. The investor is the person who makes investing decisions on contributing internal, loan or other external proprietary and intellectual funds to investment targets and is liable for failing to fulfill his/her obligations. During the financial rehabilitation, the investor shall be entitled to participate in the discussion of the rehabilitation plan and to sign it; to participate in court hearings during the financial rehabilitation procedure; to get acquainted with the materials of the bankruptcy proceedings, accounting, statistical documents of the debtor; to appeal from a judgment taken during the financial rehabilitation procedure.

It should be noted that since the introduction of the debtor's financial rehabilitation, one of the main tasks of the rehabilitation manager is to submit a shaped plan of rehabilitation to the commercial court within *three*

months, on approval of which the commercial court shall make a ruling. The financial rehabilitation plan shall be approved by the creditors' committee and agreed by all secured creditors. The financial rehabilitation plan is considered to be approved by the creditors committee, if the members of the committee of creditors voted for it by the majority of votes. Herewith, the creditors have the number of votes, pro-rata the amount of creditors' claims according to the debtor's accounting records and a multiple of one thousand hryvnias.

Confirmation of the financial rehabilitation plan shall be carried out by all secured creditors within *seven days* from the date of the decision on its approval. However, if all or any of the secured creditors objects to the approval of the financial rehabilitation plan, the creditos may decide on the allocation of secured res from the debtor's property, its licitation and the satisfaction of the claims of such a creditor at the expense of the proceeds from the sale, or on the repayment of the debt in accordance with the creditor's registry information.

At the same time, the debtor's financial rehabilitation plan shall contain the terms specified by the Bankruptcy Act and meet the requirements for developing a debtor's financial rehabilitation plan provided for by the *Model form of the debtor's financial rehabilitation plan in the bankruptcy case, approved by the Ministry of Justice of Ukraine No. 1223/5 dated June 19, 2013*[209]. In accordance with Part 1 of Art. 29 of the Bankruptcy Act, the rehabilitation plan shall include measures to restore the debtor's solvency and the deadlines for its execution, and may also include conditions for the fulfillment of the debtor's obligations by third parties; satisfaction of creditors' claims by other means, not contradicting the legislation in force; reimbursement of funds spent on holding shareholders' meetings and (or) meetings of the debtor governing bodies. At the same time, the plan of rehabilitation must provide for the extinguishment of arrearage of salaries and repayment of creditors' claims, on a priority basis prescribed by law.

The rehabilitation manager reports to the committee of creditors and to the court about the implementation of the financial rehabilitation plan quarterly. If within six months from the date of the decision on the

[209] Model form of the debtor's financial rehabilitation plan in the bankruptcy case, approved by the Ministry of Justice of Ukraine No. 1223/5 as of 19.06.2013, available at: http://zakon0.rada.gov.ua/laws/show/z1064-13

financial rehabilitation the financial rehabilitation plan of the debtor hasn't been submitted to the court, the commercial court shall have the right to make a decision on the recognition of the debtor bankrupt and on the opening of the liquidation procedure.

The completion of the financial rehabilitation procedure within timelimits set by law or before expiry shall be carried out as a result of submission of a written report to the committee of creditors. The rehabilitation manager, *fifteen days* before the completion of the bankruptcy procedure, must notify the members of the committee of creditors of the time and place of holding creditors' committee meeting and submit a written report. The report on the rehabilitation shall be accompanied by evidence of satisfaction of the creditors' claims in accordance with the list of creditors' claims. The creditors' committee is obliged to review the report on the rehabilitation not later than *ten days* from the date of its receipt. As a result of consideration of the report, the creditors' committee decides to file an application with the commercial court for:

- termination of the financial rehabilitation in connection with implementation of the rehabilitation plan and restoration of the debtor's solvency;
- termination of the financial rehabilitation procedure, recognition of the debtor bankrupt and opening of a liquidation procedure;
- termination or continuation of the financial rehabilitation procedure and the conclusion of a settlement agreement.

The report of the rehabilitation manager, considered by the creditors committee, and the minutes of the meeting of the creditors committee shall be sent to the commercial court not later than *five days* after the date of holding of the meeting of the creditors committee. The report of the rehabilitation manager shall be accompanied by a list of creditors' claims, as well as complaints from creditors who voted against decisions taken by the creditors committee or did not vote at all. Based on the results of consideration of the submitted documents, the commercial court shall approve the report of the rehabilitation manager or refuse to approve the said report, which is the subject of a ruling. If the settlements with the creditors were not carried out within the deadlines provided for by the plan of rehabilitation, in the absence of a request from the creditors committee to extend the timelimits provided for by the plan of rehabilitation and

corresponding amendments to the financial rehabilitation plan, the commercial court shall declare the debtor bankrupt and open the liquidation procedure.

Settlement Agreement

The settlement agreement is one of the means of the business recovery, which can be applied at any stage of the bankruptcy proceedings. An exception to the general rule finds place in the procedure for the debtor's assets managment, since at this stage of the bankruptcy proceedings, a settlement agreement can be concluded only after the identification of all the creditors and the approval of the list of creditors' claims by the commercial court. The settlement agreement terminates the procedure for debtor's assets managment, financial rehabilitation or liquidation of the business entity, depending on the stage of the bankruptcy proceeding where a decision to conclude an agreement has been made.

The settlement agreement in bankruptcy is an agreement between the debtor and the creditors regarding the deferment and / or installment, as well as partial debt forgiveness (writing down of debt) by the creditors, executed by entering into an agreement between the parties.

From the moment of commencement of the bankruptcy proceedings, the conclusion of settlement agreement may be initiated by the parties to the bankruptcy case – *debtor and the creditors*. The decision on the conclusion of a settlement agreement on behalf of creditors shall be made by the creditors' committee by the majority of votes of the members of committee. On behalf of the creditors, a settlement agreement shall be signed by the chairman of the creditors' committee.

On behalf of the debtor, the decision to conclude a settlement agreement shall be taken by the debtor's chief executive or insolvency practitioner (rehabilitation manager, liquidator). An insolvency practitioner is obliged to tentatively agree a settlement agreement with a competent state property management body, in the case of state-owned enterprises or enterprises whose chater capital includes the share of state property not less then 50 per cent. This body is obliged *within ten days* to give its opinion on the approval or refusal to approve a settlement agreement.

A settlement agreement may be concluded by the parties to the bankruptcy proceeding *in accordance with the terms stipulated by law*, namely:

1) the settlement agreement shall be concluded in relation to the creditors' claims secured by the pledge, the creditors' claims of the second and subsequent priority basis, determined by the Bankruptcy Act;

2) the settlement agreement shall be concluded if all creditors whose claims are secured by the pledge of the debtor's property have expressed their written consent to the conclusion of a settlement agreement[210];

3) under the terms of the settlement agreement, which stipulate deferment or installment or partial debt forgiveness (writing down of debt), the enforcement body shall be obliged to concur in the partial satisfaction of the claims for taxes, levies (compulsory payments)[211].

In order to settle with the creditors and restore the debtor's solvency the parties to the bankruptcy proceeding when entering into a settlement agreement shall adhere to the basic requirements stipulated by *the Bankruptcy Act and the Standard Form of the Settlement Agreement in Bankruptcy and the Requirements for its Development, approved by the order of the Ministry of Justice of Ukraine No. 1223 / 5 of June 19, 2013*[212]. According to legislation, the main requirements for the delivery of a settlement agreement are following:

1) the conclusion of a settlement agreement in writing;

---

[210] In order to prevent violations of the rights of secured creditors, the settlement agreement must be approved by all secured creditors. However, if all or any of the secured creditors objects to the approval of the settlement agreement, other creditors may decide on the allocation of secured items of property from the debtor's property, its licitation and satisfaction of the claims of such a creditor at the expense of proceeds from the sale or debt repayment in accordance with the list of creditor's claims.

[211] The revenue debt that arose in the period preceding three full calendar years before the day the application for the bankruptcy proceedings was submitted to the commercial court shall be considered to be irrecoverable and shall be written off. If revenue liabilities or revenue debts have arisen within the last three calendar years prior to the filing date of the application for bankruptcy, such obligatory payments shall be deferred (postponed) or written off under the terms of the settlement agreement.

[212] Standard Form of the Settlement Agreement in Bankruptcy and the Requirements for its Development, approved by the order of the Ministry of Justice of Ukraine № 1223/5 as of 19.06.2013, *available at:* http://zakon0.rada.gov.ua/laws/show/z1065-13.

2) the provision of written consent of secured creditors for the conclusion of a settlement agreement;

3) the terms of the settlement agreement shall be considered at the meeting of the creditors' committee;

4) the settlement agreement shall be concluded by the decision of the creditors' committee, which the majority of creditors – members of the committee voted for and the debtor's chief executive or the insolvency practitioner.

In this case, the settlement agreement shall contain terms on the size, order and timing of the debtor's obligations fulfillment, as well as the deferment or installment, or partial debt forgiveness (writing down of debt). More specifically, the delivery of the settlement agreement is carried out in the form of a document containing the requisite details, namely: the date and number of the document, the number of the bankruptcy proceedings, the full name of the commercial court, the name of the debtor, as well as other requisites which are required by its content. Section II of the settlement agreement provides arrears in accordance with the list of creditors' claims, on a priority basis, taking into account the timelimits, schedules and amounts of satisfaction of accounts payable of the debtor. Section III shall contain the terms and conditions for fulfilling obligations of the debtor, namely deferment or / installment or partial debt forgiveness (writing down of debt). Section IV "Final Clauses" contains the terms of the procedure for the introduction of amendments, expansions, termination or invalidation of a settlement agreement. In addition, the documents supplementing, explaining and confirming the information contained in the settlement agreement shall be attached. Such documents shall be issued as attachments[213].

After coming to an agreement on the conclusion of a settlement agreement, any party to the bankruptcy proceeding must, within *five days*, submit to the commercial court a statement on its approval, which shall be accompanied by the text of the settlement agreement, the minutes of the meeting of the creditors committee, which made the decision to conclude a settlement agreement, a list of creditors, as well as other documents stipulated in Art. 81 of the Bankruptcy Act. The approval by the

[213] p. p. 3, 9 – 12 of Standard Form of the Settlement Agreement in Bankruptcy and the Requirements for its Development, approved by the order of the Ministry of Justice of Ukraine № 1223/5 as of 19.06.2013.

commercial court of a settlement agreement is the ground for repayment of creditors' claims and termination of bankruptcy proceedings.

If the rights and legitimate interests of the participants in the bankruptcy proceeding are violated by a settlement agreement, the ruling on the termination of the bankruptcy proceedings in connection with the approval of the settlement agreement may be appealed to the commercial court. In this case, only the pre-bankruptcy creditors have the right to file an application to the commercial court for declaration of invalidity of settlement agreement. At the same time, the settlement agreement may be terminated if the debtor has not fulfilled the term for not less than one third of the creditors' claims. Termination or invaliditation of a settlement agreement is the ground for the resumption of bankruptcy proceedings.

Procedure for Liquidation

Liquidation of a legal entity shall be used to terminate business entities declared bankrupt by the commercial court for satisfying creditors' claims. Liquidation of a business entity may be carried out in a general or simplified bankruptcy proceeding. The peculiarity of the simplified procedure consists in the liquidation of the business entity without the use of the procedure for debtor's assets management and financial rehabilitation. In both cases, the essence of the liquidation is the sale of property to meet the monetary claims of all creditors. At the same time, the recognition of the debtor bankrupt does not prevent the application of the subsequent procedures of the financial rehabilitation and the settlement agreement to the debtor, except for the simplified bankruptcy procedure, since the purpose of the latter is the termination (liquidation) of the business entity[214].

The procedure for liquidation is introduced for a period of twelve months without the possibility of its continuation. Taking into account the circumstances of a specific case and in order to ensure the effective operation of the official receiver, the liquidation procedure may be introduced for a period of less than 12 months[215]. It should be noted that the timelimits for the liquidation procedure are specific and can not be prolonged upon the application of the parties or other participants to the

[214] Paragraph 28 of the Information Sheet of the Higher Commercial Court of Ukraine № 01-06/1149/2013 as of 07.08.2013.

[215] Information Sheet of the Higher Commercial Court of Ukraine № 01-06/1862/2013 as of 26.12.2013.

bankruptcy proceeding. This eliminates the problem of the length of the application of the liquidation procedure, which previously took place in practice and resulted in additional costs for its implementation and did not promote the protection of the rights of creditors.

The opening of the liquidation procedure constitutes grounds for the abeyancy of the business's activities, termination of powers of the bankrupt's governing bodies regarding the management and disposal of property, dismissal of the bankrupt's chief executive, as well as the commission of other acts determined by law. Opening of a liquidation procedure and the recognition of a debtor bankrupt, shall be officially announced by a notice placed on the official web site of the Higher Commercial Court of Ukraine on the Internet.

Upon the disclosure of the notice on recognition of the debtor bankrupt, post-bankruptcy claims (monetary claims that have arisen during the bankruptcy proceedings) become pre-bankruptcy. Applications with such monetary claims shall be sent by creditors directly to the commercial court, which remands it for further proceedings. In accordance with the Law of Ukraine "On Court Fees", these applications shall be subject to court fees.

As a result of reviewing the creditors' claims, the commercial court re-approves the list of creditors' claims and obliges the official receiver to form delegate bodies of creditors (a meeting of creditors and a creditors committee). The deadline for filing applications of creditors whose monetary claims have arisen during the bankruptcy proceedings is limited to two months from the date of the official promulgation of the notice. Such monetary claims shall be included to the fourth-priority basis, with the exception of monetary claims, the priority basis of satisfaction of which is determined by the Law and monetary claims, which constitute penalties, which are subject to inclusion into the appropriate priority basis. Claims of creditors who did not apply to the commercial court within the established timelimit are to be compensated on a sixth-priority basis[216].

After the decree on recognition of the debtor bankrupt and opening of the liquidation procedure, the commercial court appoints an official receiver who fulfills his/her powers until the completion of the liquidation procedure. Also, at the request of the official receiver, agreed with the

[216] Information Sheet of the Higher Commercial Court of Ukraine № 01-06/1862/2013 as of 26.12.2013.

committee of creditors, the commercial court appoints members of the liquidation commission. The bankruptcy liquidation commission shall include representatives of creditors, persons entitled by the founders (members, shareholders) of the debtor, representatives of fiscal control bodies and labor unions, and, if necessary, also representatives of the specially authorized central executive body on insurance supervision matters, the Antimonopoly Committee of Ukraine, the state property management body, and a representative of local self-government bodies.

As from the date of the introduction of the liquidation procedure, the managerial powers proceed to the official receiver. Within *fifteen days* from the date of appointment of the official receiver, the relevant executive officers of the bankrupt are required to transfer accounting and other documentation of the bankrupt, seals and stamps, material and other values of the bankrupt to the official receiver. Also during the liquidation procedure, the official receiver is obliged to use only one debtor's account at the banking institution, which may include funds received during the liquidation procedure. Other accounts of the debtor are subject to closure.

The official receiver no less than *once a month* gives the committee of creditors a report on his/her activities, information about the financial standing and property of the debtor on the day the liquidation proceedings are opened, and during the liquidation procedure, use of the debtor's funds, as well as other information at the request of the creditors committee. Also, the commercial court may set a frequency (at least once a month) of submitting the report by the official receiver on his/her activities[217].

From the date of his/her appointment, the official receiver carries out the following powers: assumes the debtor's property in his/her charge, ensures its preservation; performs functions of managing and disposing of bankrupt property; draws up an inventory and conducts an assessment of the property of a bankrupt; analyzes the financial standing of the bankrupt; carries out the powers of the chief executive (governing bodies) of the bankrupt; heads the liquidation commission and forms a liquidation estate; carries out other powers stipulated by the Bankruptcy Act.

The liquidation estate of the bankrupt includes all types of property assets (property and proprietary rights) of a bankrupt, belonging to him/her/it on the basis of the right of ownership or economic management

[217] Information Sheet of the Higher Commercial Court of Ukraine № 01-06/1862/2013 as of 26.12.2013.

at the time of the opening of the liquidation procedure and revealed during the liquidation procedure. Funds with the banking account of conditional storage (escrow) of bankrupt, housing facilities, including municipal residential facilities, child care centres and communal infrastructure objects belonging to a bankrupt legal entity, which are transferred to the communal property of the respective territorial communities shall not be included in the liquidation estate. Also the liquidation estate does not include the bankrupt property that is the subject of collateral and is used to satisfy the creditor's claims under the obligations it secures and property which is devolved on.

In the process of forming the liquidation estate, the official receiver carries out an inventory and valuation of the property, whereupon conducts a sale of the bankruptcy estate. The disposition of property shall be carried out through an auction, except for the disposition of property marketable on the negotiated tenders or by sale directly to a legal or natural person. The choice of the method of alienation of property shall be carried out by the official receiver for the purpose of sale to the one who makes the highest offer. At the auction, among other things, fixed assets (real estate, construction in progress, vehicles); separate business unit of bankrupt as a part of the integral property complex; out of circulation assets of a bankrupt; receivables under the terms of the agreement on the cession of the right of claim of the bankrupt may be sold.

The Bankruptcy Act specifies in detail the procedure and features of the holding of an auction. It also provides for the possibility of holding of an auction in electronic form (e-auction).

When holding of an auction, the participants of the auction are the auction customer (official receiver), the auctioneer and the bidders. The auctioneer is an individual or legal entity identified by the auction customer that has a license for bidding and which the auction customer has entered into a contract for holding of an auction with. Participants of the auction may be citizens of Ukraine, foreigners and stateless persons, legal entities of Ukraine and foreign legal entities who submitted the necessary documents and passed the procedure for registration by the auctioneer.

The auctioneer publishes on the website of the state body on bankruptcy and the High Commercial Court of Ukraine the announcement of the auction, and also in writing informs the owner of the property, the auction customer and other persons specified by the auction customer

about the auction not later than *fifteen business days* before the auction day. Within *two months* from the day of conclusion of the contract for holding of an auction with the auction customer, the auctioneer is required to hold an auction.

The auction shall be hold directly by the leading auctioneer (litsitator), which before the auction begins shall inform on: the terms of the contract, which shall be concluded at the auction; the amount, by which the current high bid is raised each time someone places a higher bid (auction step), which can not exceed 10 percent of the initial value; a way to notify of the willingness to enter into a contract; initial cost. Disposition of property at the auction shall be executed by a buy and sell agreement, which shall be concluded by the owner of the property or the auction customer with the winning bidder.

If the auction is held in electronic form (e-auction), the terms of sale of the property shall be determined on the website of the auctioneer. E-auction shall last at least *fifteen days*. The admission of a bidder to e-auction shall be carried out by assigning a code number under which the bidder submits bids. The winner of e-auction shall be the person who offered the highest price during the e-auction. After the announcement of the winner or the end of the auction without defining the winner, the auction protocol shall be sent electronically to the winner and the customer.

If after the disposition of property the assets of the debtor remained unsold or at the time of expiration of the deadline for liquidation, the immediate disposition of property shall lead to a significant loss of its value, the official receiver transfers such assets under management of a legal entity designated by the commercial court. A legal entity shall be obliged to assume measures towards the continuation of redemption of indebtedness of debtor to the creditors at the expense of received assets. Such an application shall be submitted by the official receiver to the commercial court not later than *two months* before the completion of the liquidation procedure, which provides guarantees for the repayment of monetary claims of all creditors. At the same time, the bankruptcy laws do not specify the procedural consequences of such actions, in particular, who shall in the future decide on the liquidation of a bankrupt legal entity and approve the report of the official receiver, having verified the legality of the actions of the persons who sold the property and satisfied the creditors'

claims? Obviously, the above shows the need to improve the new wording of the Bankruptcy Act[218].

After the disposition of property of a bankrupt, the funds received shall be directed to satisfy the creditors' claims on the priority basis. According to Art. 45 of the Bankruptcy Act, repayment of monetary creditors' claims shall be carried out due to six priorities of debts in the following sequence:

1) *on the first priority basis* claims for payment of arrearage of salaries, pecuniary commutation of unused annual leave and additional leave to employees with children, other funds payable to employees due to compensated absence; creditor's claims under insurance contracts; expenses related to the bankruptcy proceedings in the commercial court and to the work of the liquidation commission and others shall be satisfied;

2) *on the second priority basis* claims under obligations arising as consequence of causing personal injury to citizens by capitalizing the corresponding payments in the liquidation procedure; obligations on payment of insurance premiums for obligatory state pension insurance and other social insurance shall be satisfied;

3) *on the third priority basis* claims for obligatory payments; claims of the central executive body, which manages the government reserve shall be satisfied;

4) *on the forth priority basis* creditors' claims not secured by pledge shall be satisfied;

5) *on the fifth priority basis* the claims for returning contributions of members of the labor collective to the charter capital of the enterprise; claims for the payment of additional monetary remuneration to the rehabilitation manager or the official receiver shall be satisfied;

6) *on the sixth priority basis* other claims shall be satisfied. Herewith, the requirements of each subsequent priority basis shall be satisfied with the receipt of funds from the bankrupt property disposition after the full satisfaction of the requirements of the previous priority basis.

Upon completion of all settlements with creditors, the official receiver submits to the commercial court a report and a liquidation balance sheet. After hearing the official receiver's report and the opinions of the

[218] Kamsha N. Protection of the Rights of Creditors in the New Wording of the Bankruptcy Act, *available at:* http://bankruptcy.com.ua/lang/ru/zaxist-prav-kreditoriv-u-novij-redakci%D1%97-zakonu-pro-bankrutstvo/

members of the creditors committee or individual creditors, the commercial court shall make a ruling on approving the official receiver's report and the liquidation balance sheet. If according to the results of the liquidation procedure after the satisfaction of the creditors' claims there is no property, the commercial court makes a ruling on the liquidation of a legal entity – the bankrupt. If the property of the bankrupt was sufficient to meet the creditors' claims in full, it is considered to be non-debt and can continue its business activities.

It should be noted that in the case of applying the liquidation procedure to a business entity, in addition to the Bankruptcy Act, it is necessary to take into account the norms of the Civil Code of Ukraine. According to Art. 110 of the Civil Code of Ukraine, the liquidation of a legal entity may be carried out *voluntary* by the decision of its members or the legal entity's body empowered therewith by the constating documents (for example, in connection with expiry of the legal entity or the achievement of the goal, for which this legal entity has been created), and *involuntary* by a court decision. The procedure for the liquidation of a legal entity shall be carried out in accordance with the provisions of Articles 104, 105, 110 - 112 of the Civil Code of Ukraine, under which liquidation shall be applied to a solvent legal entity.

However, according to Part 3 of Art. 110 of the Civil Code of Ukraine, if the value of the property of a legal entity is insufficient to satisfy the claims of creditors, the legal entity shall carry out all necessary actions, established by the law on restoration of solvency or recognition of bankruptcy. Concerning the termination of a business entity in accordance with the rules of the Law of Ukraine "On Restoring Debtor Solvency or Declaring a Debtor Bankrupt", liquidation of a legal entity shall be carried out in connection with insolvency of the debtor or the threat of insolvency, which makes it impossible to repay the monetary claims of all the creditors.

According to Art. 95 of the Bankruptcy Act, if the value of the property of the debtor legal entity in respect of which the liquidation decision has been taken is insufficient to satisfy the creditors' claims, such legal entity shall be liquidated in accordance with the procedure provided for by this Law. The above provisions indicate that the criterion of sufficiency of the value of the property of the business entity, being liquidated, for satisfying creditors' claims forms the basis of the

delimitation of the regulation of the liquidation of business entities, not related to bankruptcy, and liquidation of business entities within the institution of bankruptcy[219].

The legal relationship of insolvency arising from the legal fact of insufficiency of the debtor's property to satisfy the creditors' claims in the course of liquidation shall be subject to the provisions of the Bankruptcy Act and the institute of liquidation of the debtor established by the Law. For initiation of bankruptcy proceedings of such a debtor, the legal significance has the fact (confirmed by the data of accounting, inventory) of exceeding the accounts payable over the debtor's assets, without any other conditions[220].

Thus, in case of detecting the insufficiency of the debtor's property for satisfaction of creditors' claims, the official receiver (liquidation commission) shall be obliged to file an application to the commercial court on the initiation of bankruptcy proceedings towards such a legal entity. Herewith, the obligatory condition for filing an application to the commercial court on initiation of bankruptcy proceedings shall be the compliance by the debtor with the procedure for the liquidation of a legal entity in accordance with the legislation of Ukraine.

One of the problems of law enforcement today is that civil and commercial law does not set deadlines for the implementation of the liquidation procedure in the process of voluntary liquidation, and the liquidation procedure in such cases may last for years. In order to protect the interests of creditors against such actions of the liquidation commission, the Bankruptcy Act, as amended on June 30, 1999 (Part 5, Article 7), provides that the liquidation commission shall be obliged to file an application to the commercial court on the commencement of bankruptcy proceedings *within a month*, if determines that the debtor's assets are insufficient to meet the creditors' claims, – this is the moment of approval of the interim liquidation balance sheet. New wording of the

[219] Povar P.O. Topical Issues of Legal Regulation of Liquidation of Business Entities Related to the Updating of Bankruptcy Law. Bulletin of the High Council of Justice. 2012. № 2 (10). p.128.

[220] Pryguga P.D. Review of Some Problems of the Application of the Right to Bankruptcy in Ukraine - Need a Paradigm Break. Bulletin of commercial legal proceedings. 2011. Issue № 2. p.131 – 138, *available at:* http://ks.arbitr.gov.ua/sud5024/8/8/727/

Bankruptcy Act does not set such a deadline for the liquidation commission, which in future will inevitably lead to a violation of the rights of creditors[221].

It should also be noted that the new wording of the Bankruptcy Act contains a section regarding foreign bankruptcy procedure, that is, bankruptcy proceedings in a foreign state in accordance with its legislation[222]. In accordance with Part 2, 3 of Art. 119 of the Bankruptcy Act, the bankruptcy procedure related to foreign proceedings, as defined by this Law, shall be carried out on the basis of the *principle of reciprocity*. In this case, reciprocity is deemed to exist if it is established by the international treaty, the consent to which is given by the Verkhovna Rada of Ukraine, which provides for the possibility of such cooperation between a foreign state and Ukraine.

Summarizing all of the aforesaid, today the regulation of relations that arise in the event of recognition of the debtor bankrupt is carried out taking into account European standards of doing business, guaranteeing financial stability in the market of goods and services, as well as providing guarantees for the protection and defense of the creditors' rights. However, the introduction of a new bankruptcy law is only the first step towards establishing an effective democratic mechanism for restoring the debtor's solvency or recognizing it bankrupt, since any gaps in regulatory regulation are measured by the time frame for enforcement.

[221] Kamsha N. Protection of the Rights of Creditors in the New Wording of the Bankruptcy Act, *available at:* http://bankruptcy.com.ua/lang/ru/zaxist-prav-kreditoriv-u-novij-redakci%D1%97-zakonu-pro-bankrutstvo/

[222] Shen O. The New Bankruptcy Law: The First Look. Legal newspaper. 2013. № 13. С. 30 – 31.

LITERATURE

1. On Banks and Banking: Law of Ukraine № 2121-III as of 07.12.2000, *available at:* http://zakon0.rada.gov.ua/laws/show/2121-14
2. On Individuals' Deposits Guarantee System Law of Ukraine № 4452-VI as of 23.02.2012, *available at:* http://zakon4.rada.gov.ua/laws/show/4452-17
3. On Mortgage Bonds: Law of Ukraine № 3273-IV as of 22.12.2005, *available at:* http://zakon5.rada.gov.ua/laws/show/3273-15
4. On Enforcement Proceedings: Law of Ukraine № 606-XIV as of 21.04.1999, *available at:* http://zakon5.rada.gov.ua/laws/show/606-14
5. On State Registration of Legal Entities, Individual Entrepreneurs and Public Formations: Law of Ukraine № 755-IV as of 15.05.2003, *available at:* http://zakon5.rada.gov.ua/laws/show/755-15
6. On Insurance: Law of Ukraine № 85/96-BP as of 07.03.1996, *available at:* http://zakon0.rada.gov.ua/laws/show/85/96-%D0%B2%D1%80
7. On Holding Companies in Ukraine: Law of Ukraine № 3528-IV as of 15.03.2006, *available at:* http://zakon0.rada.gov.ua/laws/show/3528-15
8. On National Security Information: Law of Ukraine № 3855-XII as of 21.01.1994, *available at:* http://zakon0.rada.gov.ua/laws/show/3855-12
9. On Securing the Creditors' Claims of and Registration of Encumbrances: Law of Ukraine № 1255-IV as of 18.11.2003, *available at:* http://zakon5.rada.gov.ua/laws/show/1255-15
10. On Restoring Debtor Solvency or Declaring a Debtor Bankrupt: Law of Ukraine № 2343-XII as of 14.05.1992, *available at:* http://zakon3.rada.gov.ua/laws/show/2343-12/page
11. Commercial Procedural Code of Ukraine № 1798-XII as of 06.11.1991, *available at:* http://zakon3.rada.gov.ua/laws/show/1798-12
12. Revenue Code of Ukraine № 2755-VI as of 02.12.2010, *available at:* http://zakon2.rada.gov.ua/laws/show/2755-17

13. Civil Code of Ukraine as of № 435-IV 16.01.2003, *available at*: http://zakon5.rada.gov.ua/laws/show/435-15/page
14. Commercial Code of Ukraine: Law of Ukraine as of 16 January 2003. № 436-IV, *available at*: http://zakon5.rada.gov.ua/laws/show/436-15
15. On Business Companies: Law of Ukraine as of 19.09.1991. № 1576-XII, *available at*: http://zakon5.rada.gov.ua/laws/show/1576-12/page
16. On Limited Liability and Superadded Liability Companies: Law of Ukraine as of 06.02.2018. № 2275- VIII, *available at*: http://zakon2.rada.gov.ua/laws/show/2275-19?oprd=1
17. On Joint Stock Companies: Law of Ukraine as of 17.09.2008. № 514-VI , *available at*: http://zakon5.rada.gov.ua/laws/show/514-17/page
18. Shen O. The New Bankruptcy Law: The First Look. Legal newspaper. 2013. № 13. C. 30 – 31.
19. Povar P.O. Topical Issues of Legal Regulation of Liquidation of Business Entities Related to the Updating of Bankruptcy Law. Bulletin of the High Council of Justice. 2012. № 2 (10). p.128.
20. Pryguga P.D. Review of Some Problems of the Application of the Right to Bankruptcy in Ukraine - Need a Paradigm Break. Bulletin of commercial legal proceedings. 2011. Issue № 2. p.131 – 138, *available at:* http://ks.arbitr.gov.ua/sud5024/8/8/727/
21. Kamsha N. Protection of the Rights of Creditors in the New Wording of the Bankruptcy Act, *available at:* http://bankruptcy.com.ua/lang/ru/zaxist-prav-kreditoriv-u-novij-redakci%D1%97-zakonu-pro-bankrutstvo/
22. Minkovsky SV Proceedings and its Stages as a Peculiarity of the Execution of the Judicial Procedure for assets Managment. The forum of Law. 2013. № 1. P. 707, available at: http://archive.nbuv.gov.ua/e-journals/FP/2013-1/13mcvprm.pdf
23. June V. Critical Review of Procedural Novels of the New Wording of the Law of Ukraine «On Restoring Debtor Solvency or Declaring a Debtor Bankrupt». 2013, *available at:* http://uaip.org.ua/v-dzhun-krytychnyj-ohlyad-protsesualnyh-novel-novoji-redaktsiji-zakonu-ukrajiny-pro-vidnovlennya-platospromozhnosti-borzhnyka-abo-vyznannya-joho-bankrutom/

24. Bodnarchuk S. Insolvent Practitioners must determine whether they are ready to work not when they wish. Legal newspaper. 2013. № 13. C. 31.
25. Kucheryava ZI Some Aspects of the Improvement of Bankruptcy Law, *available at:* http://www.minjust.gov.ua/33286
26. Titich V. Interim Results of the Competitive Process: Bankruptcy Cases Decreased, but Property Creditors' Claims Increased Significantly. Law and Business. 2013. №30 (1120), *available at:* http://zib.com.ua/ua/print/36422kilkist_sprav_pro_bankrutstvo_v_ukrainskih_sudah_zmenshilasy.html
27. Bakulina EV Improvement of the Legal Regulation of the Reorganization of Business Companies: Diss. ... PhD: 12.00.03. M., 2004. p. 24.
28. Stepanov DI Forms of Reorganization of Commercial Organizations: Issues of Legislative Reform. Economy and Law. 2001. №№ 3, 4, *available at:* http://www.lin.ru/document.htm?id=12497033463384276 98
29. Yurkevich Y. Problems of Legal Regulation of the Transformation of Legal Entities. Visnyk of Lviv University. Issue 48. Lviv, 2009. P. 166.
30. Kibenko ER Corporate Law: Tutorial. Kharkov: Espada, 1999. S. 197.
31. Yudin DS Succession in Corporate Legal Relations at Reorganization of a Joint Stock Company. Russian justice. 2009. No. 9 (41). P. 39
32. Korovayko AV Reorganization of Business Companies. Theory, Legislation, Practice: Manual. M .: Publishing house NORMA, 2001. P. 84

Notes

Scientific edition

CORPORATE LAW OF UKRAINE

Monograph

Edited by Professor VA Vasilyeva

Subscribed to print 03.04.2019. 60x84 / 16 format. Offset paper. Times New Roman headset. Circulation 150. Substitute № 5.

Publisher