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# Right to an Effective Remedy of Legal Protection: Practice of the European Court of Human Rights and the Norms of the National Legislation of Ukraine

Mykhailo Khomenko, Anatoliy Kostruba, Oleksii Kot

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Mykhailo Khomenko, Anatoliy Kostruba, Oleksii Kot. Right to an Effective Remedy of Legal Protection: Practice of the European Court of Human Rights and the Norms of the National Legislation of Ukraine. *Journal of Advanced Research in Law and Economics*, 2018, 9 (7(37)), pp.2335-2346. 10.14505/jarle.v9.7(37).17 . hal-02508814

**HAL Id: hal-02508814**

**<https://hal.science/hal-02508814>**

Submitted on 17 Mar 2020

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ASERS

# Journal of Advanced Research in Law and Economics

Quarterly

Volume IX  
Issue 7(37)  
Winter 2018

ISSN: 2068-696X

Journal's DOI: <https://doi.org/10.14505/jarle>

ASERS  
Publishing



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<http://journals.aserspublishing.eu>  
ISSN 2068-696X  
Journal DOI: <https://doi.org/10.14505/jarle>  
Journal's Issue DOI:  
[https://doi.org/10.14505/jarle.v9.7\(37\).00](https://doi.org/10.14505/jarle.v9.7(37).00)

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<http://journals.aserspublishing.eu>  
ISSN 2068-696X  
Journal DOI: <https://doi.org/10.14505/jarle>  
Journal's Issue DOI:  
[https://doi.org/10.14505/jarle.v9.7\(37\).00](https://doi.org/10.14505/jarle.v9.7(37).00)

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<http://journals.aserspublishing.eu>  
ISSN 2068-696X  
Journal DOI: <https://doi.org/10.14505/jarle>  
Journal's Issue DOI:  
[https://doi.org/10.14505/jarle.v9.7\(37\).00](https://doi.org/10.14505/jarle.v9.7(37).00)



DOI: [https://doi.org/10.14505/jarle.v9.7\(37\).17](https://doi.org/10.14505/jarle.v9.7(37).17)

## Right to an Effective Remedy of Legal Protection: Practice of the European Court of Human Rights and the Norms of the National Legislation of Ukraine

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### Suggested Citation:

Khomenko, Mykhailo M.; Kostruba, Anatoliy V.; and Kot, Oleksii O. 2018. Right to an Effective Remedy of Legal Protection: Practice of the European Court of Human Rights and the Norms of the National Legislation of Ukraine, *Journal of Advanced Research in Law and Economics*, Volume IX, Winter 7(37): 2335 – 2346. DOI: [10.14505/jarle.v9.7\(37\).17](https://doi.org/10.14505/jarle.v9.7(37).17). Available from: <http://journals.aserspublishing.eu/jarle/index>

### Article's History:

*Received* 7 September, 2018; *Received in revised form* 16 October, 2018; *Accepted* 25 November, 2018;

*Published* 31 December, 2018.

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### Abstract:

The article investigates right to effective remedy in the practice of European Court of Human Rights and national courts of Ukraine. The attention is paid to absence in the state of certain discretion which comes down to possibility of selection of remedy for performance of their obligation. Attention is paid to comparison of provisions of legal acts of Ukraine, which determine material and legal remedies of civil rights with Article 13 of Convention and practice of European court. Practice of application by national courts of Ukraine of unnamed remedies of protection of subjective rights and legally protected interests has been researched.

**Keywords:** convention for the protection of human rights and fundamental freedoms; effective remedy of legal protection; unnamed remedy of protection of right.

**JEL Classification:** K33; K38; K40.

### Introduction

In the conditions of European integration, it is particularly important to implement provisions worked out by European court of human rights (hereinafter – European court). One of the primary tasks in this direction is seen as implementation of effective mechanism of protection of rights and legal rights by way of guaranteeing a person a right to effective remedy.

Right as provided by Article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms (The Convention 2006) (hereinafter – Convention) is vitally important to ensure compliance and proper protection of human rights. Otherwise, pursuant to Article 13 of the Convention ('right to effective remedy') everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity. Despite laconic wording, Article 13 of Convention is one of the least formally defined provisions of Convention in

view of its abstractedness (Manukyan 2006). The research of the defined scientific problem has been paid attention by Butkevych, Dudash, Manukyan, Rabinovich, Shevchuk, Yarema and other researchers.

The aim of this article is comprehensive scientific research of right to effective remedy in the practice of the European court and national courts of Ukraine. In order to reach this aim author puts following tasks before himself: (1) to define notion of efficient remedy, its signs and particulars of legal nature; (2) to research content of the notion 'efficiency' in the practice of the European court and understanding of 'efficiency' by the national courts of Ukraine; (3) to determine ratio between norm of Article 13 of the Convention with other norms of Convention; (4) to research correlation between provisions of legal acts of Ukraine which define material and legal ways of protection of civil rights with Article 13 of Convention and practice of the European court; (5) to analyze practice of application by national courts of Ukraine of innominate ways of protecting subjective rights and interests safeguarded by the law.

Within the meaning of Convention remedies<sup>1</sup> should allow competent authorities to consider respective appeals on violation of Convention and provide respective assistance.

### **1. Analysis of Norm of Article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms as an Effective Way of Legal Protection**

Norm of Article 13 of the Convention provides for mandatory efficiency of procedural and processual remedies for appealing of human rights at the national level. In the scientific literature the components of the right to effective remedy shall be a right to appeal to national authority in case of violation by them of rights and freedoms as provided by Convention as well as consideration of such appeal on the merits (Dudach 2013).

Furthermore, availability of remedy within the meaning of Article 13 of Convention alongside with preservation of validity of requirements should provide for possibility of reimbursement of damage. It should be noted in this respect that all procedures should be considered both judicial and extrajudicial (Klass and Others v. Germany 1978; Silver and Others v. the United Kingdom, 1983). In compliance with part 1, Article 9 of the Constitution of Ukraine (The Constitution of Ukraine 1996) valid international agreements with consent to be bound provided by Verkhovna Rada of Ukraine are part of the national laws of Ukraine.

Law of Ukraine 'On International Agreements of Ukraine' (2004) in Article 19 specifies designated constitutional provision and contains right on primacy of norms of international law over national laws. In compliance with part 2, Article 19 of the law of Ukraine 'On International Agreements of Ukraine' if international agreement of Ukraine which came into force under established procedure specifies other rules than those provided in the respective act of the laws of Ukraine, then rules of international agreement shall apply.

In compliance with part 1, Article 17 of the Law of Ukraine 'On performance of decisions and application of practice of the European Court of Human Rights'(2006) courts when hearing cases apply the Convention and practice of Court as source of law. Therefore, provisions of Article 13 of the Convention and practice of European court are to be used by national courts as prevailing over laws and other normative and legal acts of Ukraine.

As it is reasonably stated by A.G. Yarema, problem of ensuring efficient protection of civil rights, freedoms and interests of the person is one of the main among the problems of real implementation into social relations of principle of supremacy of law as enshrined in part 1 of Article 8 of the Constitution of Ukraine (Yarema 2007). The nature of remedy required for compliance with Article 13 of the Convention depends on nature of possible violation. The 'efficient' shall mean such remedy which leads to needed results, consequences, gives the maximum effect. Therefore, efficient remedy must provide for renewal of violated law, and in case of impossibility of such renewal guarantee person possibility of receiving respective compensation.

By content, efficient remedy must comply with nature of violated law, nature of committed violation and consequences as caused by violation of the person's right. It is worth mentioning that Article 13 of the Convention does not provide for special form of legal protection: states have certain discretion which comes down to possibility of choosing a way of exercise of its obligation, however, nature of right under threat has importance for type of remedy which state must provide for.

Even if certain remedies do not comply in full extent to requirements of Article 13 of the Convention, the aggregate of remedies as specified by national laws may satisfy its requirements. Furthermore, in assessing efficiency it is necessary to take into account not only formal remedies but general legal and political context in which they act and personal circumstances of applicant. Alongside with that, remedy should not be extraordinary, therefore depend on discretion of respective authorities (Kudla v. Poland [GC] 2000).

Some scientists reasonably specify that despite that Article 13 of the Convention does not give clear idea on particulars of right as provided by named norm, however, it is its loose construction that has transformed into

<sup>1</sup> For the purposes of this research we deem it possible to identify the term 'remedy' as used in Article 13 of the Convention and term 'way' as used in the national laws of Ukraine.



one of the key subjective directions of development of precedent practice of European court (Sadovska 2013). Sadovska defines certain signs of efficient remedies: (1) preemptiveness; (2) practical and legal efficiency, direct accessibility; (3) flexibility; (4) independence from resultive determination; (5) potential sufficiency; (6) mono- or multicomponentness; (7) freedom of the form or acceptance of extrajudicial nature; (8) restrictiveness in compliance with situation; (9) complexity; (10) admissibility of exclusively compensation nature (Sadovska 2013).

In the context of the above-mentioned, attention is attracted to position of the Constitutional court of Ukraine which in the decision no.3-rp/2003 of January 30 (2003) has come to conclusion that justice by definition is determined as such only subject to conditions that it complies with requirements of justice and provides for efficient restoration in rights. In the Decree of November 11, 2014 in the case no.21-405a14 the Supreme Court of Ukraine has stated the remedy which could not be deemed efficient: action on annulment of act considered in the case cannot be upheld as its annulment does not generate consequences for plaintiff, the elected remedy does not provide for real protection of violated rights.

The European court defines criteria of efficiency (some scientists state that general notion of efficiency of remedies includes two main components: prognostic and real efficiency (Pashuk 2006) of remedy as sufficient legal certainty ('efficiency by law') and real possibility of protection of violated law ('efficiency in practice') (Miroshnichenko 2012). Quite relevant is issue of correlation of Article 13 with other norms of Convention.

In the opinion of Manukyan, complexity of interpretation of Article 13 of the Convention is conditioned by mixed, material and procedural nature of this norm (Manukyan 2006). T.M. Miroshnichenko specifies that right to effective remedy has procedural nature and is directed at ensurance of mechanism of action of material and legal norms of Convention. Therefore, developed position of European court is seen as grounded based on which notion of 'efficient remedy' includes, except for payment of compensation in cases where it is necessary, also detiled and efficient investigation and possibility of appeal of its procedure (Aksoy v. Turkey 1996). The set out above gives grounds to make conclusion on relationship between remedy and procedural component of Articles 2 and 3.

Other character has correlation of part 1 Article 6 and Article 13 of the Convention. Its speciality depends on which component of right to just judicial consideration was not complied with. Therefore, from one side, Court affirms that in case if right seeked to be protected by person specified by Constitution is a civil right as recognized within national right - such as, for example, as right of ownership, or applicant doubts adequacy of available appeal or cassation procedures then guarantees of part 1 of Article 6 are stricter than Article 13 and absorb the latter (Brualla Gomez de la Torre v. Spain 1997).

The need in creation of mechanism of proper protection is also defined in paragraph 4 of Article 5 of the Convention. As a rule, violation of part 4 of Article 5 is determined by court as such which absorbs violation of Article 13 of the Convention than only incompliance with Article 5 is to be stated (Kharchenko v. Ukraine 2011). In this relation Court has formed general rule pursuant to which there is no need to establish whether Article 13 is applied in the case only when there is violation of any other Article of Convention (De Wilde, Ooms and Versyp v. Belgium 1971).

Considering circumstances of case 'Ikcincsoy v. Turkey' (2004), the court has stated that affirmation of applicant on incapacity of state organs to conduct efficient investigation of circumstances of death is appeal to be considered in light of violation of Article 13 of Convention and not part 1 of Article 6 of Convention. In this case European court has specified that requirements of Article 13 are much wider than just obligation to conduct efficient investigation in the context of Articles 2, 3 of Convention.

However, there is no saying about any competition of norms when there is question of ensuring applicant's rights to hearing within reasonable term in establishing volume of its civil rights and obligations or substantiality of criminal charges against him as it is not identical to issue whether applicant within national right has possibility to use one of remedies for discussion of its appeal submitted on this basis. Then in determining right to consideration within reasonable term<sup>2</sup>, which has independent meaning incompliance with part 1, Article 6 and Article 13 of Convention is simultaneously recognized (Kudla v. Poland [GC] 2000).

The first state which at the level of national laws has enshrined right to just judicial hearing within reasonable term was Italy. In 2001 Law of Pinto has become effective in Italy which provided for right of person to reimbursement of damages as caused by excessive duration of judicial proceeding. This normative and legal act provided for possibility to submit application (respective application should be given to court of the next row) on reimbursement of damages for violation of reasonable term of judicial hearing which can be submitted whether

<sup>2</sup> It should be noted that some scientific sources state that excessively long consideration is reason for causing moral damage to person. This thesis has special meaning in case of excessive delay in execution of decision by state which was made not in its favour.

during proceeding held with violation or within six months of the day of coming into force of judicial decision in the respective case (Tsuvinia 2014).

Therefore, as reasonably argued by O.V. Sadovska, the right to an effective remedy occupies special place among other guaranteed rights and has universal conventional character that is why its narrowed associative comparison exclusively with provision of Article 13 (priority but not solely material) is not completely right (Sadovska 2013). In interpreting Article 13, the European Court proceeds from principle of subsidiarity which is defined as one of principles of law as enshrined in Articles 1, 13, 35 of the Convention. The latter exercises its function of inspection in compliance with principle of subsidiarity the main gist of which is that obligation to protect rights and freedoms of person, application of Convention guarantees remains, first of all, with state with application of own national legal system, before turning to European court.

In scientific literature it is specified that subsidiarity has two aspects: functional and substantive. Functional aspect consists in that before turning to conventional institutions, applicant must apply to domestic authorities which could provide efficient and adequate way of legal protection on the basis of merits of the case. The substantive aspect means that when there is application for conventional protection, conventional organs must make, to the maximum extent possible, proper conclusion on those legal and factual particulars which characterize life of society in respective state (Tsuvinia 2014).

Possibility of extending retroaction in time to the right is provided by Article 13 of the Convention. In particular, insurance of retroaction in time of the new remedies, specifically those designed for struggling with systematic or structural problems allows to reduce load on European court, allowing to resolve applications being under consideration of European court, at the national level.

Council of Europe has been concerned for a long time with implementation of efficient national remedies into national legal systems in case of violation of Convention. This issue has been considered for several times at the highest political level regarding future Court (Interlaken Declaration 2010; Declaration on the Future 2011; Declaration on the Future 2012).

Declaration approved at the Conference at Bryton, for instance, specifies for example about consideration by state-participants of possibility of introducing, if required, of the new internal remedies of special or general character, in case of violation of rights and freedoms in compliance with Convention. Committee of Ministers also considered right to effective remedy in Recommendations Rec (2004) 6 as to improvement of national remedies and Recommendations CM/Rec (2010) 3 regarding efficient remedies in case of excessive duration of court's consideration.

Significant meaning in the context of researched problematics is attached to violations related to failure to perform decisions of national courts against state. The specified violations, as a rule, are results of existence of systematic or structural problems of legal system of specific state. As a rule, the state is vested with function on insurance compliance of decisions obliging the state to reimburse damage as caused by state organs, their officials, employees, legal persons established by state. Such decisions must be performed in compliance with Convention. It should be noted that absence of funds is not a reason which may justify inactivity on the part of state. State is responsible to ensure compliance of final decisions if factors preventing its full and timely performance are within their control.

In some cases, European court does not recognize applicant's obligation to apply national remedies which are inadequate or inefficient. Moreover, in compliance with generally recognized norms of international law special circumstances may take place which release applicant from necessity to use national remedies when there is evidence of existence of administrative practice of constant violations, incompatible with provisions of Convention and state demonstrated tolerance to such violations which results in court becoming redundant and inefficient (Ireland v. the United Kingdom 1978).

It should be noted that burden of proving efficiency and accessibility of remedies is vested with government of the country (Akdivar and Others v. Turkey 1996). However, in the decision of Florentino Garcia against Switzerland (Florentino Garcia v. Switzerland 1985) the European court arrived at conclusion that even in case of doubts regarding efficiency of national legal means the attempt should be made to use them. Therefore, principle of necessity of domestic legal remedies is not absolute and cannot be used automatically.

## **2. Features of the Correlation of the Provisions of the Legal Acts of Ukraine with the Convention and the Practice of the European Court**

Quite important issue in the context of researched problematics is correlation of provisions of legal acts of Ukraine which determine material and legal remedies of protection of civil rights with Article 13 of the Convention and

practice of the European Court. One of the most important guarantees of efficiency of protection of civil rights is inexhaustibility of remedies. Thus, Civil Code of Ukraine (2003) (hereinafter CC of Ukraine) provides for possibility of determination by parties of remedy for protection of subjective civil rights and legally protected interests in the agreement.

In compliance with paragraph 2, Article 16 of the Civil Code of Ukraine, court may protect civil right or behalf in other way, which is established by agreement or law court in cases determined by law. It should be noted that the Commercial Code of Ukraine (hereinafter – ComC of Ukraine) does not provide parties with possibility to independently determine remedy for protection of rights in the agreement: part 2 of Article 20 of ComC of Ukraine provides for possibility of protection of rights and legal interests by other ways as provided by the law (The Commercial Code 2003).

We consider it necessary to agree with O.O. Kot who deems that development of laws in the researched area as well as development of judicial practice must be performed in the direction of expansion of remedies for protection of violated rights. The main purpose of legislator in this direction must be creation of respective mechanisms of protection rights of private and legal relations which, from one side, provide maximum possible number of instruments for protection of rights, and from the other side – to provide for efficient restrictions which would disable or materially minimize risks of abuse of right on the part of dishonest parties (Kot 2013).

Provision of CC regarding possibility of determination of remedy in the agreement has extraordinarily importance for law enforcement practice. This means possibility of developing fundamentally new and efficient mechanisms for protection of violated civil rights and interests protected by law. Method for protection of civil rights can be defined as material and legal measure of compulsory nature leading to restoration of violated rights. It should be added that by providing possibility of determining remedies for protection of civil rights by agreement, CC of Ukraine deprived the doctrinal discussion of relevance regarding the inexhaustibility of methods of protection and qualitatively departed from the provisions of CC of USSR (1963), which in Article 6 contained exhaustive list of protection methods.

In addition, any civil code of post-soviet countries has not provided participants of civil relations with possibility for protection of rights different from those specified by law. In particular, CC of Kazakhstan (Article 9) (1994), CC of the Russian Federation (Article 12) (1994), CC of the Republic of Belarus (Article 11) (1998), CC of the Republic of Moldova (Article 11) (2002), CC of the Republic of Azerbaijan (Article 18) (1999) provide for possibility of protection of violated right in other way specified by law (possibility of establishing remedy for protection is not provided by agreement). Considering inexhaustibility of remedies for protection of civil rights, one may come to conclusion that court is obliged to hear any action regardless of how plaintiff has formed petitioning part of statements of the case.

Establishing in Article 16 of CC of Ukraine of inexhaustibility of ways of protecting civil rights and legal interests is directed, first of all, at maximum renewal of violated right. This is the reason for provision parties with possibility, at their own discretion, determine remedy in the agreement different from list specified by Article 16 of the Civil Code of Ukraine. General law theory universally recognizes provision for possibility of each person to defense using all remedies not prohibited by law. Thus, in compliance to part 5 of Article 55 of the Constitution of Ukraine, each person has right to protect its rights and freedoms using all remedies not prohibited by law against violations and illegal infringements. Therefore, one may come to conclusion that Fundamental law restricts possibility of choosing remedy for protection of violated right subject to condition only that respective remedy for protection has been directly prohibited by law.

In the Decree (The Unified State Register 2014a) of December 24 in a case no. 910/287/14 Supreme Economic Court of Ukraine (here-in-after SECU) specified that legal restrictions of material and legal remedies for protection of civil right or interest are subject to use in compliance with provisions of Articles 55, 124 of the Constitution of Ukraine and Article 13 of the Convention based on which each person has a right to an effective remedy not prohibited by the law.

In our opinion, possibility of using unnamed remedies for protection of subjective civil rights and legally protected interests fully complies with provisions of Article 13 of the Convention. In very general terms the respective principle may come down to following provisions: (1) remedy for protection of violated right chosen by plaintiff must have real recovery of violated rights as a consequence; (2) selection of remedy must be performed considering nature and consequences of respective offence. Frequently, courts occupy conservative position and refuse in upholding a claim considering absence in the laws of remedy selected by plaintiff. For example, Decree of SECU of April 28 in the case No. 921/759/14-r/4 (The Unified State Register 2015b).

Classic example is refusal of court to uphold a claim regarding recognition of deed null and void. Legal position regarding recognition of deed as null and void in the system of protection of civil rights was set forth in particular in Decree of Plenum of Supreme Court of Ukraine of November 06, 2009 no. 9 'On judicial practice of

consideration of civil cases on recognition of deeds as null and void' (Decree of the Plenum 2009) (hereinafter Decree of Plenum of SCU) and Decree of Plenum of SECU of May 29, 2013 no.11 'On some issues of recognizing deeds (commercial agreements) null and void' (Decree of the Plenum... 2013) (hereinafter – Decree of Plenum of SECU).

In compliance with paragraph 8 of Clause 2.6 of Decree of Plenum of SECU the claim on recognition of deed as null and void does not comply with remedies for protection of civil rights and legally protected interests as provided by laws and, therefore, claim must be rejected; in such a case claims may be stated as provided by Chapter 83 of CC of Ukraine (respective legal position has been set forth also in paragraph 6 of Clause 8 of Decree of Plenum of SCU). As unnamed remedy for protection of civil rights one may consider also recognition of deed as valid in cases not provided by part 2, Article 218, part 2, Article 219, Part 2 Article 220, part 2, Article 220, part 2, Article 221, part 2, Article 224 and part 2 of Article 226 of the CC of Ukraine.

In compliance with paragraph 4 of item 13 of Decree of Plenum of SCU on grounds of incompliance with legal requirements of notarization of a deed, Agreement may be accepted as valid and binding only on basis as established by Articles 218, 220 of CC of Ukraine, other claims regarding acceptance of agreements as valid and binding, including those stated in counterclaim in the cases on annulment of agreements do not comply with possible remedies for protection of civil rights and interests. Such claims cannot be upheld (respective legal position is set forth also in paragraph 4, subparagraph 2.5.2. and paragraph 5 of Clause 3.2 of Decree of Plenum of SECU).

In particular, acceptance as valid and binding of a deed with immovable property subject to mandatory state registration should be regarded as unnamed remedy for protection of rights considering that norm of part 2 of Article 220 of CC does not apply to deeds subject to notarization and state registration, as the moment of performance of such deeds pursuant to Articles 210, 640 of CC is related to state registration that is why they are considered uncompleted and do not create rights and obligations for the parties (see, for example paragraph 2 of item 13 of Decree of Plenum of SCU).

Alongside with that, by applying norms of Chapter 83 of CC of Ukraine, court in the statement of reasons of judgement must make conclusion regarding absence of execution of specific deed and, therefore, confirm absence of contractual relation between parties. In such a case, fact of establishing by court of absence of conclusion of agreement in statement of reasons of judgement may be considered in the context of prejudicial circumstances and promote redress of infringed right. It should be specified that any remedy (including unnamed) should be provided a means for its enforcement. Therefore, in selecting appropriate remedy it is necessary to take into account provisions of the Law of Ukraine 'On Enforcement Proceedings' (1999), Law of Ukraine 'On guarantees of state regarding execution of judicial decisions' (2012), other acts of special legislation.

The issue regarding acceptability of remedy not provided by Article 16 of the CC of Ukraine and Article 20 of EC of Ukraine was resolved by economic courts in consideration of case No. 909/854/14. In particular, plaintiff has chosen as remedy obligation of defendant to perform separate provisions of decision of general meeting of shareholders (decision on payment of dividends to state). Courts of first and appeal instances rejected claim. In particular, decisions on rejection of claims the courts of first (The Unified State Register 2014b) and appeal (The Unified State Register 2015c) instances were based on assumption that plaintiff has chosen such remedy which was not provided by requirements of Articles 14, 16 of CC of Ukraine. In particular, the court of appeal in its decree stated that remedies as provided by part 2 of Article 16 of CC of Ukraine have universal nature and may apply to all or *majority* (italics are ours) of respective subjective rights.

The court of appeal referred to item 10 of Decree of Plenum of Supreme Court of Ukraine of October 24 No. 13 'On practice of consideration by courts of corporate disputes' (2008), which had a conclusion as to impossibility of application of remedies of rights and legal interests of persons not provided by applicable laws, in particular, Article 16 of CC and Article 20 of EC and which do not issue from laws in resolving by courts of corporate disputes.

Furthermore, courts of first and appeal instances came to conclusion that claim of plaintiff does not contain any obligation of defendant to perform any acts which could be enforced. Alongside with that SECU in the Decree (The Unified State Register 2015d) of June 10 stated that it deemed as erroneous referrals of economic courts to previous instances in decisions concerning choice by plaintiff of such remedy which was not provided by requirements of Articles 14, 16 of CC of Ukraine.

Thus, on the basis of part 2, Article 20 EC of Ukraine and paragraph 5 of part of Article 16 of Civil Code of Ukraine the specified normative and legal acts provide for such remedy for protection of civil rights and interests by awarding enforcement of obligation in kind. Therefore, plaintiff's requirement on execution of respective items of decision of general meeting which had to be executed by defendant in favor of plaintiff comply with requirements set forth by part 2 of Article 20 of EC of Ukraine and paragraph 5, part 2 of Article 16 of CC of Ukraine.

By the specified Decree of SECU the case in part of obligation to execute decision of general meeting of shareholders was sent to the new examination. In the new examination court of first instance has come to

conclusion on compliance of remedy chosen by plaintiff with applicable laws of Ukraine, having specified in such a case that proper remedy for protection in this case is not obligation to execute decision of general meeting of shareholders but charging of dividends from defendant (The Unified State Register 2015e). The Court of appeal in repeated consideration of case retained in force decision of the court of first instance (The Unified State Register 2015f).

In the context of the above-mentioned the consideration by economic courts of the case no. 922/2814/14 also attracts attention. In particular, plaintiff in this case chose two remedies – termination of action on prevention of installation of back-up unit for registration of natural gas and obligation of defendant to recognize unit for registration of natural gas as back-up unit by signing bilateral certificate of commissioning.

By decision of court of first instance (The Unified State Register) the claims were fully upheld. By the decree of court of appeal (The Unified State Register 2014c) the appeal was partially granted (rejected in upholding claims regarding obligation of defendant to recognize unit of registration of natural gas as back-up unit by way of signature of bilateral act of commissioning).

The court of appeal specified that such a remedy cannot be provided by law for several reasons: first of all, formation of will of a legal entity which consists in 'recognition of unit of registration as back-up is capacity of the legal person itself which cannot be impacted by methods of enforcement; secondly, decision in this part cannot have capacity for enforcement as procedure established by laws of Ukraine for compulsory execution of judicial decisions does not foresee neither for possibility for compulsory formation of will of a legal person nor forcing officials of legal person to certify with its signature any document.

Alongside with that, SECU in the Decree on this issue (The Unified State Register 2015g) specified that applicable laws as well as conditions of agreements executed between parties provided for obligation of defendant not to counteract plant if in exercise of measures on improvement of gas registration performed during gas supply for exactness of its measurement including regarding installation of back-up registration units. Therefore, absence of signed bilateral commissioning certificate leads to violation and impossibility of exercising plaintiff's rights, specifically: use of results of measurement of volumes of natural gas.

In view of the above-mentioned SECU has reached a conclusion that claim on defendant being binding to accept natural gas registration unit as back-up unit by way of signature of bilateral commissioning certificate is such which corresponds to remedies established by law for protection of rights and interests. At that, decision of court of appeal regarding impossibility of compulsory performance of judicial decision of non-property character which provides for obligation to sign certain act is erroneous as particulars of execution of decisions based on which debtor is obliged to perform certain actions personally or withhold from doing it are specified by Article 75 of the Law of Ukraine 'On Enforcement Proceedings'.

Alongside with that, in resolving other case the SECU reached contrary conclusion regarding possibility of compulsory performance of obligation to sign certificate. Thus, in the Decree (The Unified State Register 2014e) of July 17 in a case No. 910/1148/13 court has stated that decision regarding obligation to sign decision certificate cannot be performed in compulsory order as there is no mechanism for performance of such decision.

### **3. Application of Material and Legal Methods of Protecting to Objects**

Quite actual is seen response to question regarding possibility of application of material and legal ways of protecting to objects which are not choses in classical meaning. Let's consider this issue on example of application of vindication to share in charter capital of the limited liability company (hereinafter – LLC).

Traditionally, it is specified in the scientific literature that vindication is possible only in individually specified things. Share in the charter capital of LLC which certifies corporate rights of participant in respect of this company has no signs of individually specified thing. Moreover, vindication action traditionally does not apply to objects which cannot be physically owned.

Alongside with that, civil law does not express ideas regarding possibility of application of material and legal ways of protection regarding choses which are not individually defined (Stepanov 2004). Without objecting material and legal nature of vindication and impossibility of qualification of share in charter capital of LLC as individually defined thing we deem it necessary to consider reclamation of share in the charter capital of LLC from alien ownership through the prism of right to an effective remedy as specified by Article 13 of the Convention.

The judicial practice in resolving issue regarding impossibility of application of vindication to share in charter capital of LLC is quite single-type: this remedy is defined by courts as proper. Moreover, courts do not qualify this remedy of violated right as unnamed and apply provision of Article 387 of CC of Ukraine. In compliance with Article 387 of the CC of Ukraine owner has a right to reclaim its property from person which illegally without appropriate legal basis acquired it. It should be specified that application of vindication action to relations related to recovery of

illegally disposed shares allows to apply not only norm of Article 387 of CC of Ukraine to them but also norms of Article 388 of the CC which protect bona fide acquirer of share.

Usually, claim to recover share in charter capital of LLC is combined with other requirements, in particular, requirements to recognize illegal decision of General meeting of shareholders of LLC, recognition as null and void of sale and purchase (assignment), recognition as null and void amendments to founding documents of LLC (with specification of date of registration of respective changes and respective number of record in Unified State Register).

In our opinion, in applying vindication of share in charter capital of LLC such remedy as recognizing as null and void of state registration of amendments to founding documents by exclusion of respective record from Unified State Register loses signs of independent remedy: in case of combination with vindication claim it transforms into non-binding and is characterized by 'facticity' of registration's acts which is mediated by this remedy. As a counter to the latter, reclamation of share in charter capital of LLC from another's illegal ownership is aimed at real restoration of violated right.

Economic court of Kyiv in decision (The Unified State Register 2015h) of September 16 in case no. 910/13186/15 in resolving issue regarding stated claim on reclamation of share in charter capital of LLC paid attention to possibility of application of the latter only in case of presence between parties of executed agreement which is void was recognized as invalid. Further, court stated that in such a case property can be reclaimed from person which is not party to invalid contract by submission of vindication action, in particular, from bona fide acquirer – on the basis as specified by part 1 of Article 388 of the CC of Ukraine.

In particular, court paid attention to correctly chosen by plaintiff remedy and specified that unavailability of corporate right is definitive for right of ownership to share and, on the contrary, - right of ownership to share in charter capital of company evidences volume of corporate rights of person to whom this share belongs. Therefore, court reached conclusion that continuation of corporate rights as Company's participant, as owner of respective share in Company's charter capital must be performed by submission of claim on reclamation of share in the charter capital of LLC.

Compliance with requirements of law of this remedy of protection of corporate rights of person is also confirmed by the Decree (The Unified State Register 2014f) of the Supreme economic court of Ukraine of 11/12/2014 in the case no. 924/1050/14 and the Decree (The Unified State Register 2014g) of the Supreme economic court of Ukraine of 15/10/2014 in the case no. 910/15751/13. Conclusions specified in specified decisions of cassation instance evidence that such remedy of protection and recovery of corporate rights as reclamation of share in charter capital of the company from other's illegal ownership fully complies with requirements of legislation.

Therefore, despite absence of signs of individually defined thing in share, reclamation of such object of civil legal relations from other illegal ownership is deemed effective remedy in the meaning of Article 13 of the Convention. In compliance with part 1 of Article 275 of CC of Ukraine protection of personal non-property right is made by ways as established by chapter 3 of this Code. Part 2 of Article 275 of CC of Ukraine established that protection of personal non-property right can be exercised also by other remedy in compliance with content of this right, way of its violation and consequences caused by this violation.

In view of A.G. Yarema, the specified provision must be extended to all civil and other legal relations: violated right or interest must be protected by remedies as provided by law or agreement but such which comply with content of violated right, way of its violation and consequences caused by this violation (Yarema 2007). Therefore, provisions of Article 16 of the CC of Ukraine, Article 20 of EC of Ukraine are to be used considering Article 13 of the Convention. Court may protect right of person in a way as provided by law also in a way not provided by law but which is effective, therefore, such which is adequate to content of violated right, character of violation and consequences entailed by such violation.

In opinion of Yarema, it should be noted that judicial practice in economic and civil cases although corresponds to requirements of ComC of Ukraine, CC of Ukraine and Civil Procedural code of Ukraine but contradicts Article 13 of Convention regarding right of person to efficient remedy of protected right (Yarema 2007). By content of paragraph 4.3 of Decree of Plenum of SECU of December 26 (2011) No. 18 'On some issues of practice of application of economic and procedural code of Ukraine by courts of the first instance', economic court, having reached conclusion that subject of action did not comply with ways of protection of rights as specified by law or agreement, must reject a claim.

It is worth mentioning position of Gusak as set forth in separate opinion of March 05, 2013 in the case no. 21-417a12. Thus, Gusak states that considering a case all courts including Supreme court of Ukraine erroneously did not pay attention to inefficiency of justice in such a dispute, in achievement of proper legal consequences as a result of consideration of case because of inapplicability of violated, in his opinion right, and impossibility of its recovery. In the opinion of M.B. Gusak, under such circumstances, resolution of this dispute has no perspectives.

By commencement of proceeding at the claim of Prosecutor and having considered all claims stated by him, have not performed its main function – exercises of justice, and lost time and efforts for making decision which will not lead to efficient recovery of violated right. The aim of justice is assurance of efficient recovery of violated right. This purpose remained inachieved (Gusak 2013).

### Conclusions

So, summing up the mentioned, with regard to the effectiveness of legal protection can be identified as follows:

- clear, timely and settled procedural procedure for administrative, and then later, judicial appeal;
- limitation of the parties in the terms and forms of submission of evidence, which makes it impossible for each party to abide by the substantive issues of the dispute;
- clear and unequivocal judicial practice on the same legal issue.

Nevertheless, the right to an effective remedy can also be exercised by a court in another way that does not contradict the law and the court may go beyond the bounds of the lawsuit. That is, under the effective means (method) should be understood that leads to the desired results, consequences, gives the greatest effect.

Summarizing the above-mentioned it should be noted that norm of paragraph 2, part 2 of Article 16 of the CC of Ukraine allowed participants of contractual legal relationship at its discretion to determine remedies of rights and legal interests in case of their failure to recognize, challenge or violation. Possibility of determination in the agreement of remedy different from directly provided by the law is aimed at exercise of right to efficient way of legal protection as guaranteed by Convention for the protection of human rights and fundamental freedoms.

Further research in this direction, in our opinion, must be aimed at detailed research of unnamed remedies and scientific analysis of practice of European Court of Human Rights.

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