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THE CORPORATE VEIL IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Master thesis

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LIST OF ABBREVIATIONS

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

SC – Supreme Court

CC – Civil Code of Ukraine

NBU – National Bank of Ukraine

DGF – Deposit Guarantee Fund

INTRODUCTION

Modern corporate law in most countries of the world acknowledges that a company has a corporate personality that is distinct from its shareholders and they are not personally liable for the company's debts. There is a fictional corporate veil between the company and its members. While many countries are trying to comply with this doctrine, experience has shown that there is a practical need sometimes to identify the corporate person with the shareholders. The process of identification is named the "piercing" or "lifting" the corporate veil. Firstly, it happens when shareholders exploit the company form for purposes which is not correspond with the company's essential function. So, the purpose of veil-piercing in such situation is holding shareholders liable for matters that formally belongs to the company. The second variant of the piercing the corporate veil is granting the right to shareholders for possibility to apply to the court instead of the company.

The European Court of Human Rights (hereby - ECtHR) case law has shown that the Court follows the preservation of corporate veil doctrine as a starting point. Moreover, shareholders in principle cannot be identified with the company because of a lack of "victim" status[1]. However, the ECHR established some exceptions to this conception, when shareholders can file applications that concern their interests in the company (the veil-piercing in the ECtHR understanding took a reverse form in comparison with the conception of piercing in most countries of common-law and civil-law legal systems). Such exceptions were formulated in case *Agrotexim and Others v. Greece*[2], in 1995. Since then there have been set many other options for piercing the corporate veil. Furthermore, in 2018, there was a case[3] where the Court used veil-piercing not as a mechanism of protection of shareholders' interests, but as a tool of bringing shareholders to responsibility. Considering this situation, the following **problem** may be formulated:

Do we need to expand the possible grounds for piercing the corporate veil applied in the ECtHR case law?

Relevance of the master thesis is understanding of all possible situations in which the veil-piercing can be applied in practice of the ECtHR.

The aim of the master thesis is on the results of the comparative analysis of the ECHR case law to determine the reasons when the Court disregards the corporate veil.

To achieve such aim, the following **objectives** were formulated:

1. To formulate points why the corporate veil exists, what are its advantages;
2. To expand notion "exceptional circumstances" for the veil-piercing;

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[1]Marius Emberland, *The human rights of companies. Exploring the structure of ECHR protection, (*Oxford: Oxford University Press, 2006), 65-109.
[2] "Agrotexim and Others v. Greece," Application No. 14807/89, ECtHR, 24 October 1995.
[3] Lekic v. Slovenia," Application No. 36480/07, ECtHR, 11 December 2018.

3. To analyse the ECtHR impact and obstacles for implementation the piercing of corporate veil in Ukraine legal practice.

The scientific novelty of the master thesis is considering the possibility of imposing liability on the State as a shareholder or owner of a company.

The topic of the corporate veil is hotly discussed nowadays. **Karen Vandekerckhove**[4] examined corporate veil piercing in a number of legal systems, especially focused on a functional comparative analysis starting from four factual situations which typically lead to a piercing of the corporate veil: undercapitalization, transfer of assets, unduly continuing loss-making operations and identification. In my analysis, I will focus on some countries which are Member States of Council of Europe, because the jurisdiction of the ECtHR expands to these countries.

Marius Emberland[5] determined the perception of the corporate legal personality under the European Court of Human Rights, introduced "victim" requirements for shareholders' claims to the ECHR, examined the Court's justification for dismissing shareholder claims for identification with the corporate entity with reference to the corporate veil; outlined and systematized the exceptional circumstances for piercing the corporate veil. I will try to find and systematize new grounds for the piercing of the corporate veil.

Aleksandra Visekruna[6] analysed the protection of rights of companies in the ECtHR; expanded scope of the rights granted to companies. I will try to analyse how company's rights correspond to shareholders' one.

Sarah C. C. Tishler[7] determined the main disadvantages of *Agrotexim* approach to the corporate veil and its piercing, analysed the problems of current approach, defined the reasons of application formal approach to disregarding the company's separate personality. I, in turn, will try to find new reasons for the piercing of the corporate veil.

Thomas K. Cheng[8] **and Robert B. Thompson**[9] undertook a comparative study of corporate veil piercing doctrines under U.S. corporation and English company law; highlighted some fundamental differences between the doctrines in terms of jurisprudential approaches, treatment of specific case types, and other related issues.

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[4] Karen Vandekerckhove, "Piercing the Corporate veil," *European company law*, 4, 4 (2007): 191-200.
[5] Marius Emberland, *The human rights of companies. Exploring the structure of ECHR protection, (*Oxford: Oxford University Press, 2006), 65-109.
[6] Aleksandra Visekruna, "Protection of Rights of Companies Before the European Court of Human Rights," *EU and Comparative Law Issues and Challenges*: 1 (2017).
[7] Sarah C.C. Tishler "A New Approach to Shareholder Standing Before the European Court of Human Rights*," Duke Journal of Comparative & International Law* 25, 259 (2014): 267.
[8] Thomas K. Cheng, "The Corporate Veil Doctrine Revisited: A Comparative Study of the English and the U.S. Corporate Veil Doctrines," *Boston College International and comparative law Review* 34, 2 (2011): 329 -412.
[9] Robert B. Thompson, "Piercing the Corporate Veil: An Empirical Study," *Cornell Law Review* 76, 5 (1991): 1036 – 1074.

But **Stephen M. Bainbridge**[10] pointed out the main weaknesses of the veil-piercing and, moreover, he expressed the view on the prohibition of the doctrine in common-law countries.

The significance of the research is the following one: **for companies and shareholders** – legal certainty of practical possibility for companies to file suit on its own and systematized grounds for shareholders to bring claims directly to the Strasbourg court; **for national courts** – clarifying the possibility to apply veil-piercing doctrine as a mechanism for protection of shareholders or as a new type of shareholders' civil liability for fraud or abusing od rights.

To achieve the aim and answer on the research question of the master thesis the following **methods** were applied.

The historical method was used to discover the origin of "corporate veil" doctrine, the formation of the concept in countries, members of the Council of Europe (England, France, Germany etc.).

The comparative method was also used to find out differences, advantages, and drawbacks of applying the veil-piercing in European countries and the ECHR, reasons for disregarding legal personality.

The analysis method was applied to consider the ECHR case law concerning preservation legal personality and the exceptions to the main rule, analyse obstacles for the implementation of the doctrine in national legislation.

The master thesis is divided into 3 chapters: 1 – Basic of corporate veil doctrine; 2 – The piercing of corporate veil in the ECtHR; 3 – The veil-piercing as a mechanism for holding the company's shareholders/ owners liable.

In the 1st Chapter, then following aspects are described: the history of the origin, the formation of the corporate veil doctrine and its piercing; the attitude of the European Court of Human Rights to the corporate veil in making decisions and reasoning for application; the analysis of the approaches to the doctrine in the countries of the common-law (the United Kingdom) and civil law legal systems (France and Germany), which are members of the Council of Europe.

In the 2nd Chapter, two main situations of piercing the corporate veil used in ECtHR case law are analysed and systematized: disregarding of company's legal personality for protection of shareholders and as a tool of holding shareholders liable for the company's obligations. The notion of "exceptional circumstances" for piercing has also been broadened. The reasons on shareholders' liability in the context of piercing the corporate veil were analysed.

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[10] Stephen M. Bainbridge, "Abolishing Veil Piercing," *Journal of Corporation Law* 26, 3 (2001): 479-536.

The 3rd Chapter is dedicated for the impact of the ECtHR case law of veil-piercing on the Ukrainian legal system. Also, the Ukrainian legal mechanisms similar to piercing the corporate veil are outlined. Finally, the obstacles for the implementation of the doctrine in Ukrainian legislation are specified.

Defended statements:

- The ECtHR pierces the corporate veil not only for the protection of shareholders, but also to hold them accountable.
- Implementation of the veil-piercing in the Ukrainian legislation would contribute to protection of shareholders' and participants' rights in a company.

1. BASICS OF CORPORATE VEIL DOCTRINE

This chapter focuses on the emergence of the corporate veil doctrine in the ECtHR, the attitude of the Court to the separate legal personality of a company, interrelation of the corporate veil and granting rights to shareholders for protection own interests in a company. The second part of the Chapter analyses the understanding and approaches of some Member States of Council of Europe to corporate veil and its piercing.

1.1. Origins and Formation of the "Corporate Veil" doctrine in the ECHR

The corporate veil contains two basic ideas of the company law. Firstly, the company has a separate legal personality which is distinct from its shareholders. Secondly, the shareholders and directors are not liable for the company's debts[11]. To understand the separation of the company from the shareholders and scope of the company's rights, it is important to analyse the theories of the corporate personhood and specify a conception which is used by the European Court of Human Rights.

The most restrictive conception of the corporate personality is a *fiction* theory, which is also known as the *grant* or *concession* theory. In keeping with this model, the corporate entity is considered as a creature of the state which means that it can only act for the specific purposes for which it was designed[12]. The company has only those attributes of personhood (rights and duties) that the law chooses to grant to it. Critics of the fiction theory deem that the role of the government in the creation of company is too overstated and the conception places the corporate entity too far on the public side of the public-private divide[13]. So, the grant theory has not used since the beginning of the twentieth century and considered as outdated[14].

The *aggregative* theory considers a company as an association of individuals (most commonly, shareholders), that, like many other associations, can stand up for the rights against government regulation[15]. Among scholars of the company law, the theory manifests itself in the "nexus of contracts" view, on the application of which companies are "legal fictions which serve

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[11] Karen Vandekerckhove, "Piercing the Corporate veil," *European Company Law*, 4, 4 (2007): 191.
[12] Ronit Donyets-Kedar, "Challenging Corporate Personhood Theory: Reclaiming the Public," *Law & Ethics of Human Rights,* 11, 1 (2017): https://www.degruyter.com/view/journals/lehr/11/1/article-p61.xml.
[13] Turkuler Isiksel, "The Rights of Man and the Rights of the Man-Made: Corporations and Human Rights," *Human Rights Quarterly* 38, 2 (2016): 315, https://muse.jhu.edu/article/617742/pdf.
[14] Ibid.
[15] Stefan J. Paddfield, "Does Corporate Personhood Matter? A Review of, and Response to, Adam Winkler's We the Corporations, *Transactions: The Tennessee Journal of Business Law* 20 (2019): 1016.

as a nexus for a set of contracting relationships among individuals"[16]. It is recognized that companies deserve legal recognition as persons because they consist of and act on behalf of natural persons[17]. It creates some conceptual issues. For example, if a corporate veil is just a vehicle used by the natural persons to achieve desired aims, there is a problem with separation the company and its shareholders. Thus, in the cases of *Comingersoll S.A v. Portugal*[18] and *Centro Europe 7 SPL v. Italy*[19] the legal persons claimed for non-pecuniary losses as a result of violation of the right to a fair trial (what is very strangely for an inanimate creature). The ECtHR accepted the claim and granted companies right to monetary satisfaction for non-pecuniary damage, but these judgments caused dissention among judges and scholars, because they were contradictory with the principle of the separate legal personality[20].

Finally, the *real entity* theory is the conception where a company shares the legal attribute of personhood with individuals, so it is presumptively entitled to the same rights[21]. But it is almost impossible to put that theory into practice, just because some human rights are not applicable to corporate entities such as the right to marry, the right to bodily integrity etc. and vice versa (for instance, the individual cannot have right to perpetual succession).

In spite of the presence of three main theories of corporate personhood, the ECtHR does not try to identify the appropriate one and answer whether companies can be the bearers of human rights, but evaluates whether a standard codified by the ECHR has been breached by a State in its treatment of an applicant in a particular case[22].

It should be noted that European Convention on Human Rights[23] does not contain the term "company". Remarkably, that the first version of the ECHR made reference to "any natural or corporate person" as a possible claimant. That version was changed to term "corporate body", and finally the Convention defined the terminology "non-governmental organization"[24].

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[16] Turkuler Isiksel, "Corporate Human Rights Claims under the ECHR," *Georgetown Journal of Law & Public Policy* 17 (2019): 990.
[17] Turkuler Isiksel, "The Rights of Man and the Rights of the Man-Made: Corporations and Human Rights," *Human Rights Quarterly* 38, 2 (2016): 320, https://muse.jhu.edu/article/617742/pdf.
[18] "Comingersoll S.A v. Portugal," Application No. 35382/97, ECtHR, 06 April 2000.
[19] "Centro Europe 7 SPL v. Italy," Application No. 38433/09, ECtHR, 05 April 2017.
[20] Aleksandra Visekruna, "Protection of Rights of Companies Before the European Court of Human Rights," *EU and Comparative Law Issues and Challenges*: 1 (2017): 122.
[21] Turkuler Isiksel, "Corporate Human Rights Claims under the ECHR," *Georgetown Journal of Law & Public Policy* 17 (2019): 988.
[22] Ibid., 989.
[23] Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol Nos. 11 and 14, 4 November 1950, ETS 5.
[24] Winfried H.A.M. van den Muijsenbergh and San Rezai, "The corporations and the European Convention on Human Rights", *Pac. McGeorge Global Bus. & Dev.* 25 (2012): 48.

Due to the ECtHR interpretation of Article 34 which establishes that the Court receive applications "… from any person, non-governmental organization or group of individuals…"[25], companies are included within the scope of word "non-governmental organization"[26]. More than that, the ECtHR may rely on national law to define the attributes and facilities of a company and can handle an application without having to define the legal concept of personhood again[27].

Despite the lack of definition of a "company", the Strasbourg Court has never considered corporate claims with suspicion. The first case with a corporate applicant was review in 1978 between a private media corporation and the United Kingdom (*Sunday Times v. the United Kingdom*)[28].

Remarkably, the case of *OAO Neftyanaya Kompaniya Yukos v. Russia*[29] is a perfect instance why companies should be entitled to submit an application to the ECtHR for protection of own rights. The Russian government alleged that the Strasbourg Court had lost jurisdiction *ratione personae* to hear the case because Yukos, as the applicant company, ceased to exist following its bankruptcy and subsequent liquidation. But the Court refused the objection of the government and accepted the company's application. To hold otherwise would encourage governments to deprive corporate entities of the possibility to submit individual applications which was submitted at a time at which they enjoyed legal personality[30]. So, the European Court of Human Rights acts as independent international venue which protect companies from abusing of the State.

The applicable attitude of the ECtHR to construction of corporate veil was formed due to *Agrotexim and Others v. Greece*[31] case[32], although the application of the theory had also been observed in earlier cases as *X. v. Austria*[33], *Kaplan v. United Kingdom*[34].

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[25] Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol Nos. 11 and 14, 4 November 1950, ETS 5.
[26] Winfried H.A.M. van den Muijsenbergh and San Rezai, "The corporations and the European Convention on Human Rights", *Pac. McGeorge Global Bus. & Dev.* 25 (2012): 48.
[27] Turkuler Isiksel, "Corporate Human Rights Claims under the ECHR," *Georgetown Journal of Law & Public Policy* 17 (2019): 986-987.
[28] Winfried H.A.M. van den Muijsenbergh and San Rezai, "The corporations and the European Convention on Human Rights", *Pac. McGeorge Global Bus. & Dev.* 25 (2012): 49.
[29] "OAO Neftyanaya Kompaniya Yukos v. Russia," Application No. 14902/04, ECtHR, 20 September 2011.
[30] Ibid., 63.
[31] "Agrotexim and Others v. Greece," Application No. 14807/89, ECtHR, 24 October 1995.
[32] Marius Emberland, "The Corporate Veil in the Case Law of the European Court of Human Rights," *Max-Planck-Institut fur auslandisches offentliches Recht und Volkerrecht* 63 (2003): 947.
[33] "X. v. Austria," Application No. 1747/62, ECtHR, 13 December 1963.
[34] Roman Sabodash, " Проникнення під корпоративну вуаль" у практиці Європейського суду з прав людини" [The Piecing of Corporate Veil in Case Law of the European Court of Human Rights], *Corporate law of Ukraine and European Countries: Issues of Theory and Practice. Collection of Scientific Papers on the materials of the XV International Scientific and Practical Conference* (2017).

In *Agrotexim* case, six Greek limited liability companies (the applicants) were shareholders in Karolos Fix Brewery (Fix Brewery), holding 51.35% of its shares. Because of the falling-off of business and substantial debts with the National Bank of Greece (the main creditor of the company), the General Meeting of Fix Brewery decided to wind up the company and appointed two liquidators. But after a while the Minister for Economic Affairs directed that the company should be liquidated under the special procedure. The Athens Court of Appel appointed two liquidators, one representing the interests of the National Bank of Greece and another – the company itself. The applicants filed a complaint that the company went into liquidation not by its own fault, but because of de facto expropriation of the company's plants by Athens Municipal Council. The Government objected against the application claiming that shareholders lacked "victim" status. Having analysed the circumstances of the case, the European Commission of Human Rights noted that the Fix Brewery did not have the opportunity to file an application to protect oneself. This is because there was highly improbable that the state-liquidator appointed by the Athens Court of Appel would bring an action against municipal authorities in the interests of the company[35]. So, the European Commission concluded that the applicants' rights were indirectly effected and noted that "… there has been an interference with the company's property rights, this interference must be considered to extent to the applicants' property rights as well"[36]. In consonance with the report, the Commission considered applicants as victims of the violation taken against Fix Brewery and wanted to identify them with the company.

But the ECHR declined to follow the Commission view of the situation, because the limited liability company Fix Brewery has its own corporate personality and held possessions distinct from shareholders' ones. That is why the company did not directly affect the personal interests of shareholders and financial relationships with it was not sufficient for acquiring the status of "victim" under the Article 34 of the ECHR. Further still, the ECtHR pointed out that "differences of opinion among the shareholders regarding corporate policy is normal occurrence in the life of limited liability company" and following the European Commission would lead to "difficulties in determining who is entitled to apply to the Strasbourg Court"[37]. The Court stated that Fix Brewery "had not ceased to exist as a legal person" (despite the fact that management was no longer in control) and at least had theoretical "possibility" to apply through the liquidators against Athens Municipal Council.

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[35] Sarah C.C. Tishler "A New Approach to Shareholder Standing Before the European Court of Human Rights," *Duke Journal of Comparative & International Law* 25, 259 (2014): 267.
[36] "Agrotexim and Others v. Greece," Application No. 14807/89, ECtHR, 24 October 1995.
[37] "Agrotexim and Others v. Greece," Application No. 14807/89, ECtHR, 24 October 1995, §65.

Indeed, according to the Rules of Court, the companies (in text "non-governmental organizations") shall be represented by competent persons[38], in usual circumstances such power belongs to the managements of the company. As Fix Brewery was in process of liquidation, the application should be filled by two liquidators. But the appointment of the liquidators by the Athens Court of Greece was questionable because it was unlikely that they would act in good faith and adequately represents the company's interests and its shareholders[39]. Nevertheless, the ECtHR held that the shareholders was not entitled take legal recourse and found the application inadmissible[40].

The scholars called the ECtHR approach to corporate veil and shareholders' right to individual claim "formal", arguing that the Court did not evaluate the factor of control that the majority shareholders exercised or the amount of damages and harm that they suffered[41].

The reasons and principles that guided the Strasbourg Court were taken from the International Court of Justice (ICJ), principally from the *Barcelona Traction* case[42] (Paragraph 66 of *Agrotexim* case). In the particular case, the Belgian government instituted the proceeding against Spain on behalf of Belgian nationals owned 83.3 % of shares of Barcelona Traction and sought reparation for damage from Spain government because of the expropriation of the company after the 2nd World War[43]. As a result, the ICJ noted that the harm to the shareholder's interests as a result of the infringement of the company's rights was not sufficient to bring a claim[44].

The *Barcelona Traction* case regarded to separate corporate personality and protection of shareholders. It is noted that only company can appeal to the court for protection of own rights, but "[…] the independent existence of the legal entity cannot be treated as an absolute. […] the process of "lifting the corporate veil" or "disregarding the legal entity" has been found justified and equitable in certain circumstances of for certain purposes"[45]. The independent right of shareholders to file a claim could arise only in events of the legal demise[46].

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[38] Rules of Court, Accessed 03 May 2020, https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf.
[39] Sarah C.C. Tishler "A New Approach to Shareholder Standing Before the European Court of Human Rights," *Duke Journal of Comparative & International Law* 25, 259 (2014): 268.
[40] "Agrotexim and Others v. Greece," Application No. 14807/89, ECtHR, 24 October 1995.
[41] Sarah C.C. Tishler "A New Approach to Shareholder Standing Before the European Court of Human Rights," *Duke Journal of Comparative & International Law* 25, 259 (2014): 271 -272.
[42] "Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)," Application No. 1962, ICJ, 24 July 1964.
[43] Sarah C.C. Tishler "A New Approach to Shareholder Standing Before the European Court of Human Rights," *Duke Journal of Comparative & International Law* 25, 259 (2014): 271 -272.
[44] Siddharth Dalabehera, "Barcelona Traction Case (Belgium v. Spain), *Academike,* Accessed 26 April 2020, https://www.lawctopus.com/academike/barcelona-traction-case-belgium-v-spain/.
[45] "Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)", Application No. 1962, ICJ, 24 July 1964, §56.
[46] Ibid.

By virtue of *Barcelona Traction* case, in *Agrotexim and Others v. Greece* the ECHR distinguished between shareholders' rights and shareholders' interests (rights/interests dichotomy)[47]. This being said that rights belong to shareholders directly and they gave rise to an independent cause of action, including the right to dividends, voting rights and the right to a share in company's residual assets after liquidation. Interests of shareholders, at another point, would not enjoy protection and do not provide independent status of "victim", insofar as linked to the existence of the company[48].

In case of *Olczak v. Poland*[49] the Strasbourg Court elaborated the differentiation of shareholder rights and interests. The applicant, shareholder which acquired 40% of bank capital, brought an action that his shares were expropriated by the resolution of the Board of Receivers by cancelling 5040 shares owned by him. As a result, the applicant's shareholding reduced to 0.4 %. The ECtHR enounced that the particular case should be distinguished from *Agrotexim*, because of different reasons for expropriation proceedings. If in the *Agrotexim* case the measures directed to the detriment of the company (the expropriation in favour of municipal authorities), whereas in the present case their purpose was, on the contrary, to prevent the bank from becoming insolvent. Consequently, the bank was to benefit from them, whereas the applicant's interests suffered. The measures aimed directly at the applicant's rights as a shareholder. Accordingly, it should be the applicant's rights protected by Article 1 of Protocol 1 of the ECHR which were directly affected. Moreover, the ECtHR explained:

> "Only the company, endowed with legal personality, can take action in respect of corporate matters. A wrong done to the company can indirectly cause prejudice to its shareholders, but this does not imply that both are entitled to claim compensation. Whenever a shareholder's interests are harmed by a measure directed at the company, it is up to the latter to take appropriate action. An act infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected. Such responsibility arises only if the act complained of is aimed at the rights of the shareholder as such"[50].

So, the Court concluded that the applicant was considered as a victim, because his shareholder's rights, not interests were infringed (right to ownership of his shares and right to vote were seriously decreased).

Also, it is noteworthy to mention about the case of *Sovtransavto Holding v. Ukraine*[51]. The applicant company Sovtransavto held 49% of the shares in Sovtransavto-Lugansk, a Ukrainian

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[47] Marius Emberland "The Corporate Veil in the Jurisprudence of the Human Rights Committee and the Inter-American Court and Commission of Human Rights," *Human Rights Law Review* 4, 2 (2004): 263.
[48] Sarah C.C. Tishler "A New Approach to Shareholder Standing Before the European Court of Human Rights," *Duke Journal of Comparative & International Law* 25, 259 (2014): 272.
[49] "Olczak v. Poland," Application No. 30417/96, ECtHR, 07 November 2002.
[50] Ibid., 59.
[51] Sovtransavto Holding v. Ukraine," Application No. 48553/99, ECtHR, 25 July 2002.

public limited company which after the decision of the general meeting was converted into a private limited company. As a result of managing director's actions on increasing the company's share capital, the applicant shareholding fell from 49% to 20.7%. The ECtHR held that there was a violation of shareholder's corporate rights, specifically voting rights and the right to influence the company. So, the issue concerning the piercing the corporate veil did not arise, because it can be applied only in situation when shareholders protect their interests in the company[52].

It is important point that the ECtHR does not consider applications filled by the parent companies about infringements of their subsidiary companies. Such a rule was formulated in case of *Vatan v. Russia*[53] and concerned the political parties, but by the Strasbourg Court may be applied by analogy to parent and subsidiary companies[54]. The application was submitted by a political party People's Democratic Party Vatan on violation of its Branch's (the Regional Organisation) rights (freedom to hold opinions and to impart information and ideas, its freedom of association). The Court recognized that political party Vatan and Rehional Organization were two different legal entities and noticed that any statement that a political party embraces more than one legal person must be borne out by the statutes and structures of the political party. If Vatan constituted a form of "umbrella" including both Vatan itself and the Regional Organization as constituent part, "such an interpretation would require the Court to accept that the identity of a non-governmental organisation (within the meaning of Article 34) may extend beyond its own legal personality so as to comprise several legal persons"[55]. So, in the Court's analysis, the Regional Organization as the legal person directly affected by the domestic measure shall lodge an application with the Court by itself[56].

In spite of strict and formalistic approach to corporate veil, established in *Agrotexim and Other v. Greece,* the Strasbourg Court determines the possibility to disregard company's corporate personality. The process of disregarding is called a piercing or lifting of the corporate veil (identical notions)[57]. It means that the shareholder has an opportunity to pursue claims that concerns his or her interests in the company. As it was mentioned earlier, shareholders' rights

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[52] Ibid.
[53] "Vatan v. Russia," Application No. 47978/99, ECtHR, 07 October 2004.
[54] D. Afanasev, "Возможности защиты, предоставленные участникам и акционерам компании Европейским Судом по права человека," ["The Protection Granted to Company's Members and Shareholders by the European Court of human Rights"], *Economy and Law*, 1, 420 (2012): 52, https://elibrary.ru/item.asp?id=24278274.
[55] "Vatan v. Russia," Application No. 47978/99, ECtHR, 07 October 2004.
[56] "Vatan v. Russia," Application No. 47978/99, ECtHR, 07 October 2004.
[57] Roman Sabodash, " Проникнення під корпоративну вуаль" у практиці Європейського суду з прав людини" [The Piecing of Corporate Veil in Case Law of the European Court of Human Rights], *Corporate law of Ukraine and European Countries: Issues of Theory and Practice. Collection of Scientific Papers on the materials of the XV International Scientific and Practical Conference* (2017).

constitute the stand-alone subject of action[58]. The ECtHR referred to such shareholders' rights (which were determined in *Barcelona Traction* case): "… the right to any declared dividend, the right to attend and vote at general meetings, the rights to share in the residual assets of the company on liquidation".[59]

Talking about the disregarding of the corporate personality, the ECtHR acknowledged that:

> "piercing the "corporate veil" … will be justified will be justified only in exceptional circumstances, in particular where it is clearly established that it is impossible for the company to apply to the Convention institutions through the organs set up under its articles of incorporation or – in the event of liquidation - through its liquidators"[60].

So, in *Pokis v. Latvia* case[61] applicant (together with three other individuals and legal entity) set up a limited-liability company named SIA Latelektro-Gulbene, where he was the majority shareholder. After a while, the company was declared insolvent, the Regional Court placed it in the compulsory liquidation and appointed a liquidator. The applicant filed a lawsuit to the ECHR to declare all the decisions taken by the liquidator and the creditors null and void, to refuse to ratify the recovery plan adopted by the creditors' meeting and to dismiss the liquidator. The Court highlighted, however, that all these measures, which the applicant had wanted to appeal, directly concerned the capital of the company rather than the applicant's possessions. The ECHR acknowledged that the winding-up of the company undoubtedly affected the financial interests of the applicant as a member of the company, but too indirect and remote. The Court held the application inadmissible and noted that that the liquidation proceedings related only to the company as a legal person and not to the applicant in his personal capacity; the property interests of the applicant as a member of the company were affected only indirectly[62].

Such specific circumstances present a significant barrier for shareholders to obtain a status of a victim, according to the Article 34 of the Convention. When shareholders file an application for protection of their interests in a company, the separate corporate personality of the company constitutes an obstacle to the admissibility of the claim. Shareholders have a dual nature because the claimant is an individual, but the nature of the claim, since it concerns protection for measures taken against a corporate entity, has strong corporative elements[63].

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[58] Marius Emberland, *The human rights of companies. Exploring the structure of ECHR protection, (*Oxford: Oxford University Press, 2006), 74.
[59] "Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)", Application No. 1962, ICJ, 24 July 1964, §59.

[60] "Agrotexim and Others v. Greece," Application No. 14807/89, ECtHR, 24 October 1995, §66.
[61]"Pokis v Latvia," Application No. 528/02, ECtHR, 05 October 2006.
[62] Ibid.
[63] Marius Emberland "The Corporate Veil in the Jurisprudence of the Human Rights Committee and the Inter-American Court and Commission of Human Rights," *Human Rights Law Review* 4, 2 (2004): 264–265.

In accordance with the context of the Article 34 of the ECHR, the notion "victim" denotes the person or persons who directly or indirectly affected by alleged violation[64]. Consideration of a shareholder as a "victim" under the ECHR is possible due to an autonomous interpretation of the ECHR[65]. It is also important that the ECtHR is not bound to interpret the notion of victim related to its understanding in national law. Decisions taken in municipal law regarding the ability of shareholders to protest against measures that directly affect their company and not theirs, does not necessarily affect the Court's perception of "victims"[66]. On this basis, the ECtHR has even developed a doctrine of "indirect victimhood", which afford "victim" status to persons who have not themselves been interfered with, but are closely related to the person against whom the disputable measure was directed[67].

The victim status is closely linked to requirement to exhaustion of domestic remedies. But the ECtHR stressed that as shareholders are not entitled to apply to the domestic courts on behalf of their company, it is unreasonable to require to satisfy this rule[68]. So, if the direct victim has indeed exhausted all local remedies, the indirect victim is identified with direct one and does not to fulfil local remedies rule. Only in situations when the direct victim (the company) failed to exhaust domestic remedies, the indirect victim (the shareholder) may be obliged to exhaust them personally. The criterion should be applied with some degree of flexibility and without excessive formalism[69].

In case *of Gorraiz Lizarraga abd Others v. Spain*[70] the Court clearly explained its attitude to "victim" requirements for the shareholders of a company. The application was introduced by the association and five members. The Government alleged that the applicants could not be victims, because they failed to fulfil exhaust domestic remedies, because they did not participate in domestic proceedings. The Court noted that the question of victim status which was closely linked to the requirement of exhaustion of domestic remedies under the Article 35 should be applied "with some degree of flexibility and without excessive formalism"[71]. The ECtHR also

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[64] Practical Guide on Admissibility Criteria (Council of Europe/ European Court of Human Rights, 2019), https://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf.
[65] Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol Nos. 11 and 14, 4 November 1950, ETS 5.
[66] Marius Emberland, *The human rights of companies. Exploring the structure of ECHR protection, (*Oxford: Oxford University Press, 2006), 68.
[67] Ibid., 68-69.
[68] Marius Emberland "The Corporate Veil in the Jurisprudence of the Human Rights Committee and the Inter-American Court and Commission of Human Rights," *Human Rights Law Review* 4, 2 (2004): 960.
[69] Ibid., 961.
[70] "Gorraiz Lizarraga abd Others v. Spain," Application No. 62543/ 00, ECtHR, 27 April 2004.
[71] Ibid.

recognized that the rule of exhaustion of domestic remedies is neither absolute nor capable of being applied automatically. Hence, the Court granted victim status to the applicants[72].

To sum up, the ECHR is the most developed and successful international instrument for human rights protection which grant a huge scope of the rights to companies. The ECtHR's approach to the corporate veil is strict enough. The Court respects the separation of legal personality from its shareholders as a fundamental principle of modern corporate law. Even more, the ECtHR clearly differentiates the parent company from its subsidiary. According to the *Agrotexim* approach, the question of the piercing of corporate veil arises only in exceptional circumstances, especially when the company does not have the possibility to submit an application itself. In such cases the application can be introduced by its shareholders. To provide this opportunity, the ECtHR specifically developed a concept of indirect victimhood, when a shareholder applies to the Court because of violation of a company's rights indirectly effected his interests. The ECtHR stressed that as shareholders are not entitled to apply to the domestic courts on behalf of their company, it is unreasonable to require to satisfy the rule of exhaustion of domestic requirements.

1.2. Understanding of corporate veil and its piercing in Members State of the Council of Europe

In *Agrotexim* case, it was outlined that in the majority of national legal systems shareholders are generally not entitled to submit applications for acts or an omission that is prejudicial to "their" company and the granting rights to shareholders could lead to difficulties in determining who can apply to the Court[73]. Also, Marius Emberland stressed that the veil-piercing in the Strasbourg Court has a reverse form in comparison with the practice of the most countries around the world[74]. That is why I want to analyze what grounds of the piercing are used in Member States of the Council of Europe; compare differences in approach from the Strasbourg Court. Accordingly, in this Subchapter I will focus on attitude to corporate veil and possibility of its piercing in some countries subject to the jurisdiction of the ECtHR (Member States of the Council of Europe). I chose England for comparative analysis because it's a country where doctrine first emerged and began to develop, despite the infrequency of its application. Germany is one of the few Member

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[72] Ibid.
[73] "Agrotexim and Others v. Greece", Application No. 14807/89, ECtHR, 24 October 1995.
[74] Marius Emberland, *The human rights of companies. Exploring the structure of ECHR protection, (*Oxford: Oxford University Press, 2006), 74.

State of the Council of Europe where the concept of the veil-piercing was enshrined in legislation. France and the Netherlands are the counties where the disregarding of company's legal personality is most commonly used[75].

The doctrine of the corporate veil was first mentioned in England in the landmark decision of the House of Lords in *Salomon v. Salomon 1897.* The case established the fundamental principle of the corporate law that a company has a separate legal personality, commonly known as the corporate veil[76]. The merits of the case are that Mr. Salomon, a sole trader, sold his shoe manufacturing business to Salomon & Co. Ltd, to the company which he incorporated. He transferred six shares to his children and his wife (presumably in order to comply with the legal requirements on the minimum number of shareholders in the company). Later, the business failed, and the company went into liquidation. The liquidator declared that the company was sham and an agent of Mr. Salomon and sought to look past the separate personality of Salomon Ltd to hold the shareholder personally liable for the company's debts. Nevertheless, the House of Lords held that Salomon & Co. Ltd was not a sham, because the company was duly incorporated. Salomon Ltd was an independent person with its rights and liabilities, so the debts of the company were not Mr. Salomon ones and creditors of the company could not go behind the corporate veil to pursue the shareholders for liabilities of the company. Lord Halsbury held: "a legal incorporate company must be treated like any other independent person with its rights and liabilities appropriate to itself … whatever may have been the ideas or schemes of those who brought it into existence"[77].

The main merit of *Salomon v. Salomon* case is the establishment of the principle of separate corporate personality, which divides a corporate entity from its owners. Moreover, despite the fact that the English court took a pretty formal and uncompromising position, this decision is notable for the application of the term "piercing the corporate veil" and the case triggered the development of the concept of disregarding the companies' separate personality[78].

Throughout the history of the development of veil-piercing doctrine, it has been applied by English courts with either great enthusiasm or great reluctance[79]. Firstly, there was no common

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[75] E. Popova and E. Popov, "Корпоративная вуаль" [The Corporate Veil], *Коллегия* 6 (2002): http://www.lin.ru/document.htm?id=2225048262769727831.

[76] Aleka Mandaraka-Sheppard, "New Trends in Piercing the Corporate Veil: The Conservative versus the Liberal Approaches," *Business Law Review* 35, 1 (January/February 2014): 2, https://heinonline.org/HOL/P?h=hein.kluwer/blr0035&i=2.

[77] Salomon v A Salomon and Co Ltd [1897] AC 22 Case Summary," Accessed 28 April 2019, https://www.lawteacher.net/cases/salomon-v-salomon.php.

[78] Pavel Lobachev, "Практика применения докрины "снятие корпоративной вуали" в Великобритании [Practice of the Application of the Doctrine of the Piercing the Corporate Veil in the Great Britain], *Coloquium – Journal* 9,33 (2019): 6.

[79] V. Krylov, "Доктрина снятия корпоративной вуали в странах общего права: опыт Великобританиии и США" [The doctrine of the piercing of the corporate veil in countries of common-law legal system: the Great Britain and the

approach how to apply the doctrine. In the process of considering a dispute, a judge independently made a decision concerning the veil-piercing based on the specific circumstances of the case in question[80].

After the end of the World War II, the doctrine of piercing the corporate veil was dawned. One of the examples of applying the doctrine was case of *Jones v. Lipman*[81]. In consonance with circumstances of the case, Mr. Lipman should sell the land to Mr. Jones, but afterwards he changed his decision. Mr. Lipman established sham company, made himself a director and transferred the land to it. The English Court found that the company was established by the defendant as "a mask to avoid recognition by the eye of equity", Mr. Lipman had complete control over the company as a director and sole member of it. So, the English Court pierced the veil of the company and ordered that the disputed land should be handed over to Mr. Jones[82].

Another example of the piercing the corporate veil after World War II was the case of *Firestone Tyre and Rubber v. Lewellin*[83]. The point of this dispute was that a US company established a subsidiary in the UK to sell its products (tyres) in Europe. However, it was suspected that the subsidiary was established to avoid additional taxation, as all activities were conducted directly in England. During the hearing of this case, the judge pointed out the possibility of the disregarding of the company's separate personality in cases of tax evasion.

It should be noted that at that time in the United Kingdom there was no clear court practice on the grounds for the piercing the corporate veil. The courts continued to be guided by the specific circumstances of the case. The veil was pierced in cases when the actual management of the parent company was done by its subsidiary; where a legal entity was established only as a fiction for the purpose of unfair deals or for violation of the law[84].

The attitude to the doctrine of the veil-piercing have changed dramatically when the House of Lords ruled on the case of *Woolfson v. Strathclyde Regional Council*[85]. In this case, Lord Keith of Kinkel made clear that the doctrine can only be applied if there is evidence of the use of the company as a cover or facade to conceal real activities of its members (owners)[86].

USA experience], Wise Lawyer, Accessed 03 May 202, https://wiselawyer.ru/poleznoe/68763-doktrina-snyatiya-korporativnoj-vuali-stranakh-obshhego-prava.

[80] Ibid.

[81] "Jones v. Lipman", Law Teacher, Accessed 03 May 2020, https://www.lawteacher.net/cases/jones-v-lipman-1962.php

[82] E. Shushmaryva, "Доктрина снятия корпоративной вуали в зарубежных странах и в России" [The Doctrine of the Piercing of the Corporate veil in the Foreign Countries and Russia] (the master thesis, Siberian Federal University, 2019), 27.

[83] Ibid., 28.

[84] Idid., 28-29.

[85]"Lifting the Veil Separation of the Personality," Law Teacher, Accessed 03 May 2020, https://www.lawteacher.net/free-law-essays/company-law/lifting-the-veil-separation-of-the-personality-company-law-essay.php.

[86] Ibid.

A striking example of the decline of the doctrine's reputation is the case of *Adams v Cape Industries*[87]. The British company sold asbestos (in the period up to 1970s) through its affiliated corporations in the USA. The workers of the American factory to which the company sold asbestos, sued to a number of respondents, including the British company, for compensation of the damage caused to health of claimants at work with asbestos. The multimillion-dollar suit was granted by a Texas court. However, the English court refused to enforce this decision of the American court because the British company, which did not conduct business in the USA, did not fall under the jurisdiction of the US court, and there were no grounds for the piercing of the corporate veil. The Court of Appeals noted "a court cannot waive the principle of limited liability simply because the interests of justice require it"[88].

The particular case discussed the possibility of holding the parent company liable for the obligations of the subsidiary on the ground, when the subsidiary is recognized as an agent of the parent. Indeed, the principal should be liable for transactions made in his interest by an agent[89]. However, a de facto agency relationship should be proved, what was not done in this case. The control of one company over another did not mean that there was an agency relationship between them. It should be stressed that the court in particular case distinguished between the lifting of the corporate veil and imposing responsibility on the company that was the principal in the agency relationship. In the latter situation, there was no need to deprive the company of its separate legal personality, so the corporate veil should be remained[90].

In the case of *Antonio Gramsci v. Stepanovs*[91], the dispute arose from a fraudulent scheme of the charter company. The Latvian businessman Antonio Gramsci rented vessels. However, he did not carry out this activity directly, but through offshore companies managed by him. The Latvian Shipping Company applied to the court to pierce the veil to hold Mr. Gransci directly responsible for the actions of these companies and to recognize him as a party to the contract of affreightment. The Judge Burton concluded that it was possible to pierce the corporate veil in this case. In particular, the judge stated that that the corporate veil should be pierced to allow contractual claims to be brought against non-contracting parties. In situations where the contracting party was merely a "puppet" company, a victim could bring a contractual claim against

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[87] S. Budylin, "Снятие корпоративной вуали в Великобритании, или что скрывается за фасадом? [The Piercing of a corporate veil in the UK, or What's behind the facade?] Zakon.ru, Accessed 03 May 2020, https://zakon.ru/blog/2013/10/30/snyatie_korporativnoj_vuali_v_velikobritanii_ili_chto_skryvaetsya_za_fasadom.
[88] Ibid.
[89] Ibid.
[90] Ibid.
[91] Charles Pugh, "Piercing the Corporate Veil – Recent Developments," Mondaq, Accessed 03 May 2020, https://www.mondaq.com/uk/directors-and-officers/171488/piercing-the-corporate-veil-recent-developments.

both the "puppet" company and the non-contracting "puppeteer", who "all the time was pulling the strings"[92].

In modern British court practice, there are also situations when the corporate veil is pierced in cases of divorce. It can happen when one of the spouses is a member or a director of a company. In considering the divorce case between the spouses of Mubarak (*Mubarak v. Mubarak*), the English court concluded that it was possible to pierce the veil from the assets of the spouse belonging to a corporation controlled by him. In taking a decision, the judge Manby pointed out that the veil-piercing was possible not only in case of violation, but also when it was necessary to maintain justice[93].

In 2010, in *Kremen v. Agrest*[94], Judge Mostin disagreed with Judge Manby's approach. The judge took the position that in family disputes the wrongful or abusive use of a legal entity is not a mandatory criterion for piercing the corporate veil in order to transfer company property to one of the spouses during a divorce process[95].

In the case of *VTB v. Nutritek*[96], the bank applied to the court for the piercing of the corporate veil to hold the company Nutritex liable for debts, but a direct party to the loan agreement was company Russagroprom. The essence of the case was that the English bank VTB entered into a contract with the company Russagroprom. The latter entered into a loan agreement to buy dairy plants in Russia. VTB's claim was, originally, that the defendants had entered into a conspiracy to defraud VTB by falsely representing that Russagroprom was independent of Nutritek, whereas in truth both were controlled by Mr. Malofeev, a Russian resident. On this basis, the bank VTB demanded to pierce the corporate veil.

However, the English court stressed the principle of the private nature of the contract and drew attention to the impossibility of suppressing the principle by doctrine of veil-piercing[97].

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[92] Janine Perkins, "Piercing the Corporate Veil – How Far Can the Court Go?" *The London Disputes Newsletter*, October 2012, https://www.lw.com/thoughtLeadership/piercing-the-corporate-veil.
[93] E. Shushmaryva, "Доктрина снятия корпоративной вуали в зарубежных странах и в России" [The Doctrine of the Piercing of the Corporate veil in the Foreign Countries and Russia] (the master thesis, Siberian Federal University, 2019), 27.
[94] E. Shushmaryva, "Доктрина снятия корпоративной вуали в зарубежных странах и в России" [The Doctrine of the Piercing of the Corporate veil in the Foreign Countries and Russia] (the master thesis, Siberian Federal University, 2019), 27.
[95] Ibid., 34.
[96] "VTB Capital – Supreme Court Decision," Ogier, Accessed 04 May 2020, https://www.ogier.com/publications/vtb-capital-supreme-court-decision.
[97] E. Shushmaryva, "Доктрина снятия корпоративной вуали в зарубежных странах и в России" [The Doctrine of the Piercing of the Corporate veil in the Foreign Countries and Russia] (the master thesis, Siberian Federal University, 2019), 32.

It can be concluded that the English courts pre-eminently disregard the company's separate personality if the company is run by sole owner who covers up his or her illegal activities or tries to hide behind the company to avoid responsibility[98].

Modern British court practice also includes cases of piercing the corporate veil in cases of divorce between spouses in situations where one of them is a member or head of a legal entity. In 2013, in case of *Petrodel v. Prest*[99] English court held the unique opportunities to pierce the corporate veil, but in very limited circumstances. The facts of the case were that the wife Mrs. Prest sought payment from her ex-husband Mr. Prest regarding the divorce settlement. But Mr. Prest alleged that he did not have money and the residential homes were the property of various companies which he found for his oil business. In the first instant and in the Court of Appel the judges held that there was no power on the court entitling him to pierce the corporate veil, because there was no impropriety by Mr. Prest that would justify the disregarding of separate personalities of companies[100].

However, the Supreme Court ordered to transfer the properties to the wife Mrs. Prest on the basis of the husband's beneficial ownership. The main argument not to disregard the corporate personality of the company was that the Mr. Prest did not conceal or evade any legal obligations owed to his wife because the properties were vested in the companies long before the matrimonial suit. The Supreme Court stressed the possibility of applying the doctrine of the piercing the corporate veil only in exceptional situations. If it possible, other equitable remedies as an injunction or specific performance should be exhausted[101].

The case of *Petrodel v. Prest* highlighted two distinct principles concerning the veil-piercing: the "concealment principle" and the "evasion principle". The concealment principle does not involve piercing the corporate veil and relates to the interposition of a company or companies in order to conceal the identity of the real controllers. In those cases, the court looks behind the "façade" to discover the true position. The "evasion principle" is different and in those cases the court can disregard the principle of separate corporate personality. Cases in this latter category are limited to those where the corporate veil has been abused to evade or frustrate the law being enforced. It is relevant in these limited cases for the court to consider the purpose of the corporate

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[98] D. Bykanov, "Проникающая ответственность в зарубежном и российском корпоративном праве," [Penetrating Liability in Foreign and Russian Corporate Law] (doctoral dissertation, Federal State Research Institute "Institute of Legislation and Comparative Law Under the Government of the Russian Federation, 2018), 142.

[99] "Prest and Petrodel Resources LTD &O Others," Law Teacher, Accessed 13 May 2020, https://www.lawteacher.net/cases/prest-v-petrodel-resources.php.

[100] Aleka Mandaraka-Sheppard, "New Trends in Piercing the Corporate Veil: The Conservative versus the Liberal Approaches," *Business Law Review* 35, no. 1 (January/February 2014): 4.

[101] Ibid.

structure[102].

It is important to note that not only British courts not explicitly set out the criteria based on which the veil-piercing is possible, but the problem is also not given sufficient attention in theory. But it should be noted that the literature classifies the removal of the corporate veil depending on the objectives and consequences of piercing of the principle of limited liability[103].

However, English scholars tried to classify the veil-lifting in accordance with the purpose and consequences of "breaking" of the principle of a company's limited liability:

1. *Peeping behind the veil*. This type is used to get the information about the person who control the company, who are the shareholders, what is the proportion of their shareholding in the company and what is their inter-relationship regarding to the control of the company.
2. *Penetrating the veil* happens when it is necessary to hold the participants, managers of the company accountable.
3. *Extending the* veil is used to hold the group of companies accountable.
4. *Ignoring the veil.* The most extreme form of lifting the veil is when the courts ignore it completely. It means that the company was not founded for commercial or other sound grounds, but only as a means to defraud or defeat creditors or for avoidance of laws[104].

English scholars also attempted to define categories of cases in which the doctrine of veil-piercing is most commonly used. There are such grounds: existence of fraud, control of the company's founder, control by the parent company over the subsidiary, etc[105]. However, these classifications are conditional and often in practice courts refuse following them.

Thus, neither the theory nor the practice of the United Kingdom has provided clear grounds for the application of the doctrine. This is justified by the importance of the principle of limited liability established by *Salomon v. Salomon* case[106].

Principle of separate corporate personality also exists in German legislation. Furthermore,

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[102] Richard Obank and Jordan Frazer, "Corporate personality. International Perspectives. Part 1," *DLA*, (2018): 6, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwiS_Mai57XpAhWF6qYKHWiKDJUQFjAAegQIBhAB&url=https%3A%2F%2Fwww.dlapiper.com%2F~%2Fmedia%2Ffiles%2Finsights%2Fpublications%2F2018%2F10%2F3316259_corporate_veil_brochure_v18_highres_wocm-compressed.pdf&usg=AOvVaw3UZYfirXHbRRpS5HNUoVN1.

[103] E. Shushmaryva, "Доктрина снятия корпоративной вуали в зарубежных странах и в России" [The Doctrine of the Piercing of the Corporate veil in the Foreign Countries and Russia] (the master thesis, Siberian Federal University, 2019), 36.

[104] S. Ottolenghi, "From Peeping behind the Corporate Veil, to Ignoring it Completely," *Modern Law Review* 53, 3 (May 1990): 338-353.

[105] E. Shushmaryva, "Доктрина снятия корпоративной вуали в зарубежных странах и в России" [The Doctrine of the Piercing of the Corporate veil in the Foreign Countries and Russia] (the master thesis, Siberian Federal University, 2019), 37.

[106] Ibid., 38.

the laws of the Federal Republic of Germany contain direct references to cases (criteria) when the company's legal personality may be disregarded[107].

The first one is a *mixing of assets*. This basis of liability indicates that the members disrespect the interests of the company and its creditors. The mixing of assets between the company and its members (*Vermögensvermischung*) is often accompanied by the absence or distortion of accounting records which is a manifestation of this factor. That is to say, if the dominant participant allows to mix his property with the property of the company, he loses the right to invoke to the principle of separation of his assets from the companies one[108].

The confusion of spheres. According to this approach, mixing occurs when the company and the controlling shareholder are engaged in the same type of business, in other words, they become competitors, and the directors, employees, address and telephone number of the dependent legal entity and the controlling shareholder often coincide to such an extent that the difference between them is hardly noticeable to outsiders[109]. However, as some German scientists noted, no precedent is known in the court practice where the corporate veil is removed from a company only on that basis. So, its practical significance is extremely limited[110].

Undercapitalization. The undercapitalization (the lack of property) of a company cannot be confused with the notion of formal undercapitalization, which usually means the non-payment of the share capital of a company. In German case law, undercapitalization is considered as intentional and bad face conduct that does harms to the creditors of the company, especially it leads to a reduction in the share capital of the corporation[111]. German legal doctrine also emphasizes the concept of "initial undercapitalization". It is a situation when the founders at the time of establishment the company did not provide sufficient property. It differs from the "subsequent undercapitalization," which means the withdrawal of assets from the company, organized by its controlling members through unprofitable transactions, distribution of dividends, etc. In order to establish this factor, it is necessary not just to state that there is insufficient capitalization, but that the lack of funds deprives the company from the opportunity to carry out the business for which it was established[112].

Destruction of the company's existence. If a shareholder interferes with the activity of a

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[107] Ibid., 52.
[108] D. Bykanov, "Проникающая ответственность в зарубежном и российском корпоративном праве," [Penetrating Liability in Foreign and Russian Corporate Law] (doctoral dissertation, Federal State Research Institute "Institute of Legislation and Comparative Law Under the Government of the Russian Federation, 2018), 129.
[109] Ibid., 130.
[110] ibid., 131.
[111] Hanno Merkt and Gerald Spindler, "Direct Liabilty of Controlling Parties (Piercing the Corporate Veil) and Related Legal Constellations,"*Legal Capital in Europe* (2006): 173
[112] Ibid.

dependent company adversely affecting its "vitality" (the shareholder takes part in reducing the company's share capital while not adequately considering the company's ability to pay its debts and, thereby, triggering the company's insolvency), he or she holds liable for such actions[113].

Acting against the principles of good faith. According to the German case law, a limited liability company and its shareholders are to be regarded as a unit if that is deemed necessary to enable a third party (the creditor) to satisfy its claims consistent with the general principle of good faith[114].

The above mentioned categories may provide a basis for indicating in which cases the piercing of the corporate veil may occur. Nevertheless, German courts use the doctrine of the piercing of the corporate veil in enough limited (only as an exception) and take into account the circumstances of particular cases[115].

The liability of the members of a company for obligations resulting from the piercing of the corporate veil in German law includes 3 theories[116]:

1) *The theory of abuse* (Rolf Zerick). This theory is based on a certain concept of a legal entity: the author regards a legal entity as an independent entity recognized by the legislator, an underdeveloped legal entity which initially has certain limitations.

2) *Theory of Application of Legal Standards* (Müller-Freienfels). In contrast to the theory of abuse, the concept of law enforcement denies that the problem of removing the "corporate veil" is a problem of the institution of a legal entity, thus rejecting the thesis about the relative nature of the institution of a legal entity. In addition, the law enforcement doctrine allows the removal of the "corporate veil" and imposing liability on an unscrupulous debtor.

3) *The theory of differentiation of a legal entity from its participants* (Jan Wilhelm). According to this theory, in cases where there is a question of depriving participants of the legal person of protection in the form of the institute of limited liability, it is necessary to stop on concrete legal relations between them and the legal person, instead of concentrating attention on the principle of legal isolation[117].

The principle of separate corporate personality exists under French Law; however, this

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[113] Ibid., 174.

[114] Tobias Shulz, "Corporate personality. International Perspectives. Part 1," *DLA*, (2018): 21, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwiS_Mai57XpAhWF6qYKHWiKDJUQFjAAegQIBhAB&url=https%3A%2F%2Fwww.dlapiper.com%2F~%2Fmedia%2Ffiles%2Finsights%2Fpublications%2F2018%2F10%2F3316259_corporate_veil_brochure_v18_highres_wocm-compressed.pdf&usg=AOvVaw3UZYfirXHbRRpS5HNUoVN1.

[115] E. Shushmaryva, "Доктрина снятия корпоративной вуали в зарубежных странах и в России" [The Doctrine of the Piercing of the Corporate veil in the Foreign Countries and Russia] (the master thesis, Siberian Federal University, 2019), 63.

[116] O. Hashko, "Відповідальність засновників юридичної особи за борги підприємства," [Liability of the founders of the legal entity for the debts of the enterprise], *Femida.ua* 3,11 (2017): 24-25.

[117] Ibid., 25.

principle solely applies to limited liability companies. However, there are some situations/ grounds when the French courts can pierce the corporate veil and hold the shareholders or directors of the company accountable[118].

Dummy company. The court practice developed the following criteria, which allow to consider a company as a sham: dominant position of the participant of a company; failure to comply with corporate procedures, in particular, failure to hold the general meetings; lack of real company's business; mixing of company's property with property of its members; the existence of a kinship relationships between the controlling member and the other participants of a company[119].

Mixing of assets. Most often the decision of the confusion of assets in a company is made by the French courts when they establish an "inadequate movement of funds or "abnormal financial relationships", which means he movement of funds without consideration or without possibility of their return[120].

Visibility of creditworthiness[121]. The final ground for the veil-piercing is illusion of the fulfilment of obligations created by the dominant shareholder. This factor is a criterion for holding the controlling party directly liable for the debts of the controlled company under the tort liability model. This may happen, for example, when the parent company directly interacted with the subsidiary company's counterparty or controlled the subsidiary's contracts[122]. That approach was originally adopted by the Supreme Court of the Netherlands in the *Osby* case, where a creditor of an insolvent subsidiary successfully sued the parent company on the basis that the latter had acted unlawfully, creating the appearance of creditworthiness of its subsidiary[123].

The Dutch courts have two conditions in deciding whether to remove the corporate veil:

1. Violation of the principle of care (*voorzichtigheidsplicht*) with respect to the creditors of the company (the controlling party knew or should have known about the infliction of such damage);

2. Intervention by the controlling shareholder in the day-to-day management of the company, and such intervention must be sufficiently intensive and comparable with the actions of the director of the corporation. Creditors may bring direct claims against a director of the company

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[118] D. Bykanov, "Проникающая ответственность в зарубежном и российском корпоративном праве," [Penetrating Liability in Foreign and Russian Corporate Law] (doctoral dissertation, Federal State Research Institute "Institute of Legislation and Comparative Law Under the Government of the Russian Federation, 2018), 94.
[119] Ibid.
[120] Ibid.
[121] Ibid., 124.
[122] Ibid.
[123] E. Shushmaryva, "Доктрина снятия корпоративной вуали в зарубежных странах и в России" [The Doctrine of the Piercing of the Corporate veil in the Foreign Countries and Russia] (the master thesis, Siberian Federal University, 2019), 65.

(including the actual director, which may be the director of the controlling shareholder who is interfering too actively with the company) on the basis of his or her tort (illegal) conduct, covering cases ranging from the conclusion of a contract knowing that it is impossible to perform it, to the unequal treatment of creditors without legal grounds[124].

In contrast to *Agrotexim* approach, the Member States use the veil-piercing for holding shareholders or participants of a company liable for using it as a façade, covering up illegal activity, non-compliance with law etc. Although the concept has been developed a long time ago, it is not established in legislation of most countries (the United Kingdom, France) and is used in very few cases where other remedies do not help. The piercing of the corporate veil occurs only as an exception, the general rule of the separate legal personality from the shareholders remain. The main disadvantage is the fact that the application of veil-piercing in all legal systems is at the discretion of the court based on certain conditions and tests developed by the court practice. However, none of them do not have a defining character which does not allow shareholders to know for sure and precisely whether this principle can be applied in their case. The interesting fact is the absence in almost all legal systems of a legal stipulation of relations between affiliated companies; relations between the main and subsidiary companies, as well as within a legal or actual holding company, are almost always determined ad hoc.

[124] Ibid.

2. THE PIERCING OF CORPORATE VEIL IN THE ECtHR

In the 2nd Chapter I will focus on purposes of the piercing of the corporate veil applied in the ECtHR. In Subchapter 2.1. I will analyze all possible grounds and reasons when the Court disregards the company's corporate veil and gives the victim status to shareholders according to the Article 34 of the ECHR. The Subchapter 2.2. I will dedicate to the analysis of situations when the corporate can be pierced to hold shareholder accountable and possibility of responsibility of the State for violations committed by the companies.

2.1. The Piercing of Corporate Veil as a tool for Protection of Shareholders' Interest in the Company

As I mentioned in previous Chapter in *Agrotexim and Others v. Greece* the European Court of Human Rights had adopted a rigorous test which enables shareholders for protection from measures formally taken against their company: "[…] where it is clearly established that it is impossible for the company to apply to the Convention institutions through the organs set up under its articles of incorporation or – in the event of liquidation - through its liquidators"[125].

Abovementioned specific circumstances lead to the veil-piercing, the disregarding of company's legal personality in favour of shareholders' interests.

In line with this criterion, the "impossibility" means that the company cannot take legal action in the Court. Such "impossibility" must be "clearly established". Most commonly, it takes place when a company ceased its legal personality[126]. This means that a company terminated its legal capacity, but not just suspended its activity or cancelled (annulment) of the taxpayer's status or etc[127].

In view of this, in the case of *Jafarli and Others v. Azerbaijan* the Court observed that the company ceased its activity only as a taxpayer, which had not made an impact on its legal personality. Consequently, the Court found that the deregistration of the company as a taxpayer did not deprive it of its legal personality or of its capacity to submit an application to the Court[128].

Marius Emberland pointed out that "impossibility" rule did not always relate to corporate demise. Apparently, if the shareholders' complaint concerned with infringements perpetrated by

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[125] "Agrotexim and Others v. Greece," Application No. 14807/89, ECtHR, 24 October 1995, §66

[126] Marius Emberland, "The Corporate Veil in the Case Law of the European Court of Human Rights," *Max-Planck-Institut fur auslandisches offentliches Recht und Volkerrecht* 63 (2003): 952.

[127] N. Ye. Blazhivska, "Piercing the Corporate Veil under ECtHR Jurisprudence," *Eurasian Academic Research Journal 12, 18 (2017): 25.*

[128] "Jafarli and Others v. Azerbaijan," Application No. 36079/06, ECtHR, 29 July 2010, § 37.

the corporate organs themselves, it is obvious, that latter cannot initiate proceedings in the ECtHR regarding the matter[129].

As an example, would be *G.J. v. Luxembourg* case[130]. The application was introduced by the shareholder of the company where he owned 90% of the share capital (his wife had 10% of shares). The applicant complained of the "unreasonable time" of the liquidation procedure of the company because it lasted six years. The respondent Government insisted that the complainant was not entitled to appeal against the company's bankruptcy proceeding, because there was no dispute over the applicant's civil rights and proceeding did not affect him, but only the limited liability company. Furthermore, the Government argued the company could apply to the Court through its liquidator.

But the ECtHR noticed the applicant submitted an application to the Court related to the activities of the liquidator, who performed his duties improperly resulted in delaying of the liquidation proceeding. The Court reasoned that it was not possible for the company, as a legal personality to bring the case, as it is clear that the liquidator would not appeal against his own actions. Just as important, that the shareholder actually carried out his business through the company by reason of holding a substantial shareholding of 90% in the company. It indicated the applicant had a direct personal interest in the subject-matter of the complaint. Therefore, the Court found that the applicant might claim to be a victim of the violation affecting the rights of the limited liability company.[131]

In light of this, in the particular case ECtHR underlined two reasons, which allow to pierce the corporate veil: the direct interest of the majority shareholder and the liquidator's inappropriate acts in the company as a subject-matter of the claim.

In the *Credit and Industrial Bank v. The Czech Republic* case[132] the application was filled by the majority shareholder and the former chairman of the bank's Board of Directors related the compulsory administration on the grounds of unsatisfactory financial situation of the applicant bank. The Government insisted that bank had not ceased to exist as a legal person and should be represented by its compulsory administrator to defend the rights of the applicant bank.

But the ECHR observed that the compulsory administrator was appointed by the Czech National Bank and the applicant bank had no right to appeal against that decision. Therefore, the ECtHR remarked that "holding that the administrator alone was authorized to represent the bank in lodging an application with ECHR would be to render the right of individual petition theoretical

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[129] Marius Emberland, "The Corporate Veil in the Case Law of the European Court of Human Rights," *Max-Planck-Institut fur auslandisches offentliches Recht und Volkerrecht* 63 (2003): 952.
[130] "G.J. v. Luxembourg," Application No. 21156/93, ECtHR, 26 October 2000.
[131] Ibid., §22-25.
[132] "Credit and Industrial Bank v. The Czech Republic," Application No.29010/95, ECtHR, 21 October 2003.

and illusory"[133]. In recognition of abovementioned facts, the Court held there were exceptional circumstances which granted the right to majority shareholder of the bank to lodge a valid application on the bank's behalf[134].

It should be borne in mind that impossibility to appeal against the appointment of the liquidator / the compulsory administrator or other representative authorized to lodge an application on behalf of the company cause the conflict of interest between a representative party and shareholders. Respectively, it is considered as a ground for piercing the corporate veil.

The existence of competing interests plays an essential role for the Court in rendering of decision concerning the veil-piercing and affording right to claim to shareholders.

In *Khamidov v. Russia* case[135] the application was submitted by a co-owner of limited liability company Nedra (the bakery). Another co-owner was the applicant's brother, who did not participate in national court proceedings, but provided a general power of attorney for the complainant. In the words of the applicant, the bakery was a family business and the main source of income. The Government alleged that the applicant could not sue to the Court because he was not a sole owner of the company and might rely on Art. 1 of Pr. 1 of the ECHR only in so far as his own possessions are concerned.

The Court found that the applicant had a direct personal interest in the subject-matter of a complaint because he with his brother carried out their family business. Moreover, although the brother refused to participate in the proceedings, he authorized the applicant to represent his interests in the Court. As things stand, the applicant and his brother did not have competing interests, the Court reasoned that the applicant can claim to be a “victim”, according to Art. 34 of the ECHR[136].

For instance, in *Capital Bank AD v. Bulgaria* case[137] the applicant bank was liquidated as a legal entity after applying to the ECHR, but the Court considered his complaint. The application was filled by the chairman and the vice-chairman of the Board of Directors. The complaint concerned the procedure of revoking the bank's license by the Bulgarian National Bank and following compulsory liquidation. The Government requested the Court to strike the application out of its list on the ground that the applicant bank no longer existed as a legal person, as it had been struck off the register of companies after being liquidated. But the Court pointed out: "[…] striking the application out of the list under such circumstances would undermine the very essence of the right of individual applications by legal persons, as it would encourage governments to

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[133] Ibid., § 46-50.
[134] Ibid., § 52.
[135] "Khamidov v. Russia," Application No.72118/01, ECtHR, 15 November 2007.
[136] Ibid.
[137] "Capital Bank AD v. Bulgaria," Application No. 49429/99, ECtHR, 24 November 2005.

deprive such entities of the possibility to pursue an application lodged at a time when they enjoyed legal personality"[138].

Also, the ECHR noted that the claim was filled on behalf of the applicant bank by the chairman and the vice-chairman of its board, but should normally have been represented by the liquidators. But it was important that liquidators were accountable to the Bulgarian National Bank that revoked the applicant bank license, what can lead to the conflict of interest. So, the Court accepted such applicants and recalled the need to interpret Article 34 of the Convention as guaranteeing rights which are practical and effective[139].

In *Camberrow MM5 AD v. Bulgaria*[140] the application was introduced by the company which held 98% of the bank's share capital. The applicant appealed against the bank's bankruptcy proceeding. Although the special administrators were appointed to represent the bank's rights, the application concerned certainly to the complex of events leading to the appointment of the special administrators and the trustees and the actions of the trustees. In these circumstances, the Court considers that because of the conflict of interests between the bank and its special administrators and trustees it was not possible for the bank itself to bring the case before the Court. Moreover, the Court recalls that the applicant had a direct personal interest in the subject-matter of the application carrying out part of its business through the bank[141].

It is also necessary to mention the case of *Pine Valley Developments LTD and others v. Ireland*, where the Strasbourg Court defined the "mere vehicle" approach to disregard company's legal personality[142]. In that case, the first applicant (Pine Valley Developments LTD) was a wholly-owned subsidiary of the second applicant (Healy Holdings LTD), where the third applicant, Mr. Daniel Healy, is the managing director and the sole beneficial shareholder. The Court founded that Mr. Healy used Pine Valley Developments LND and Healy Holdings LTD as vehicles to make own business. In light of this, the ECtHR decided that drawing distinctions between the three applicants in context of victim status would be artificial[143].

In *Ankarcrona v. Sweden* case, the ECHR also recognized the right of the sole shareholder of company to file a complaint as victim about the violation of company's rights, because "there is

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[138] "Capital Bank AD v. Bulgaria," Application No. 49429/99, ECtHR, 24 November 2005, §80.
[139] Ibid., §117-118.
[140] "Camberrow MM5 AD v. Bulgaria," Application No. 50357/99, ECtHR, 01 April 2004.
[141] Ibid.
[142] Marius Emberland, *The human rights of companies. Exploring the structure of ECHR protection, (*Oxford: Oxford University Press, 2006), 99.
[143] "Pine Valley Developments LTD and others v. Ireland," Application No. 12742/87, ECtHR, 29 November 1991, §42-43.

no risk of differences of opinion among shareholders or between shareholders and a board of directors as to the reality of infringements of the rights"[144].

In *Nosov v. Russia* case the Strasbourg court confirmed the idea that in situation of a sole owner of the company there is no risk of differences of opinion among shareholders and the corporate veil can be pierced. But in this particular case the ECHR did not clearly identified the owner of the company in whose interests the complaint was filed, that is why the application was declared inadmissible[145].

Consequently, the ECtHR outlined that the corporate veil will be pierced if the company is used as a "vehicle" for the applicant shareholders' business ventures and when shareholder owns all shares, the indirect nature of claim is little more than a formality[146].

The Strasbourg Court acknowledged that the level of the shareholder's control over activity of the company might be a substantial ground for looking beyond the corporate person and granting victim status to the shareholder[147]. It means situations when the applicants are not the only participants of the company but exercise significant influence on its activities and acquire "direct personal interest in the subject matter of the application".

The ground of a shareholder control over a company for piercing the corporate veil was applied in the case *Eugenia Michaekidou Developments LTD and Michael Tymvios v. Turkey*[148]. The case was originated by two applicants, the company and its shareholder Mr. Tymvios, who was a director of a company and held 60% of share capital (remaining 40% belonged to his wife). Afterwards shares were distributed between the spouses in the ratio of 99% to 1%. The ECtHR held that: "In reality, the first applicant is the second applicant's company and the vehicle for his business projects. […] there being no doubt that he (the shareholder) can be considered as a victim…"[149].

In the case of *Kin-Stib and Majkic v. Serbia*[150] the shareholder who owned only 25% of the company's shares was found to be a victim according to the Article 34 of the ECHR. Notwithstanding, that the domestic courts delivered judgments in favour of the company only, the ECtHR held that "the applicants are so closely identified with each other that it would be artificial

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[144] "Ankarcrona v. Sweden," Application No. 35178/97, ECtHR, 27 June 2000.
[145] "Nosov v. Russia," Application No. 30877/02, ECtHR, 20 October 2005.
[146] Marius Emberland, *The human rights of companies. Exploring the structure of ECHR protection, (*Oxford: Oxford University Press, 2006), 103.
[147] N. Ye. Blazhivska, "Piercing the Corporate Veil under ECtHR Jurisprudence," *Eurasian Academic Research Journal* 12, 18 (2017): 26.
[148] "Eugenia Michaekidou Developments LTD and Michael Tymvios v. Turkey," Application No. 16163/90, ECtHR, 31 July 2003.
[149] "Eugenia Michaekidou Developments LTD and Michael Tymvios v. Turkey," Application No. 16163/90, ECtHR, 31 July 2003, §21.
[150] "Kin-Stib and Majkic v. Serbia," Application No.12312/05, ECtHR, 20 April 2010.

to distinguish between them"[151]. Furthermore, the Strasbourg Court found that the applicant had enjoyed total control over the limited liability company from the time it was founded (the applicant was indeed sole representative of it) and that the company had subsequently been placed at his full disposal[152].

Thus, the cornerstone for the Court is the absence of divergence of opinions of the company and its management with the opinion of shareholders, which can only be achieved if the shareholder has established full control over the legal entity. In such a case, the company and its shareholder are considered as a complete whole[153].

It is worthwhile noting that the Strasbourg Court did not allow to pierce the corporate veil in favour of the founder and director of the company in case of *Iza LND and Makrakhidze v. Georgia*[154]. The construction company as the first applicant and Mr. Nodar Makrakhidze as the second applicant filled a lawsuit based exclusively on the non-enforcement of the judgment given in favour of company. The company concluded a building repair contract with the State school which should be sponsored by the Ministry of Education. Importantly, that the director of the company represented it in contractual relationship and before the domestic courts. When the renovation work was completed, the Minister transferred only part of the amount. The District Court issued an order obliging the Ministry of Education to pay the applicant company, but it remained unexecuted. The ECtHR held that the applicant company entered the contractual relationship, despite the fact that the director represented the company in its relations with third parties and before the domestic courts. The second applicant did not allege concerning own rights as a director and his complaint was based exclusively on the non-enforcement of the judgment given in favour of his company[155].

It can be concluded that it is necessary to clearly indicate in an application which interests of the particular shareholder were violated – the link between violation of company's rights and its impact on shareholders' interests.

I would like to note that the ECHR could allow the piercing of the corporate veil, if the shareholder participated in national court proceedings regarding the company as a party of the case[156].

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[151] Ibid., §74.
[152] "Kin-Stib and Majkic v. Serbia," Application No.12312/05, ECtHR, 20 April 2010.
[153] Roman Sabodash, "Право акционеров (участников) компани на "непрямой" иск (в контексте практики Европейского суда по правам человека и Конституционного суда Украины)," [The Right of Shareholders (Participants) to Indirect Claim (in Practice of the European Court of Human Rights and the Constitutional Court of Ukraine], *Pravo, obchod, ekonomika* 3 (2012): 553, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2773547.
[154] "Iza LND and Makrakhidze v. Georgia," Application No. 28537/02, ECtHR, 27 September 2005.
[155] Ibid.
[156] D. Afanasyev, "The Protection Granted to Company's Members and Shareholders by the European Court of human Rights," *Economy and Law*, 1, 420 (2012): 56, https://elibrary.ru/item.asp?id=24278274.

In *Savenko v. Russia* case[157] the applicant (co-owner and the head of a private enterprise "Ekolog") complained about the excessive length of the proceedings regarding the private enterprise. The ECHR reiterated "that a person could not complain about a violation of his or her rights in the proceedings, to which he or she was not a party, despite the fact that she or he was a shareholder and/or executive director of the company which was the party to the proceedings"[158]. In this case the applicant acted in the capacity of a co-plaintiff in national court proceedings. Thus, Savenko's application was declared admissible[159].

In case *of J.W. v. Poland*[160] the claim was dismissed because the applicant, the executive director of the limited liability company. As understood by the ECtHR, such fact can be taken as evidence that the applicant had not considered himself directly affected by the violation, and, consequently, that he did not have to be regarded as immediately affected on the supranational plane either[161].

In the case of *Superwood Holdings PLC and Others v. Ireland* the ECtHR also outlined that the first applicant cannot be considered as a victim because he was not a party to the domestic proceedings[162].

It is important to stress that sometimes considering the shareholder as a legitimate plaintiff in the domestic courts does not endow him with the victim status under the Convention, if his/her interests are not direct enough to conclude that the proceedings in question affected him personally (*Roseltrans, Finlease and Myshkin v. Russia*)[163].

Turning to the facts of the present case the ECtHR noted that the applicant was one of the plaintiffs in the proceedings concerning the decision to liquidate the company which one could view as encroaching on the applicant power to manage the company and his interests as an employee. However, the Court found that such link between the decision to liquidate the company and the applicant interests was not direct enough to conclude that the proceedings in question had affected him personally[164].

The next reason that may affect the ECtHR decision on the veil-piercing is the severity of harm that the shareholders suffered because of the government's actions[165].

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[157] "Savenko v. Russia," Application No. 28639/03, ECtHR, 14 June 2007.
[158] Ibid., § 25.
[159] Ibid., § 26-27.
[160] "J.W. v. Poland," Application No. 27917/95, Commission (Plenary) Decision, 11 September 1997.
[161] Marius Emberland, *The human rights of companies. Exploring the structure of ECHR protection, (*Oxford: Oxford University Press, 2006), 107.
[162] "Superwood Holdings PLC and Others v. Ireland," Application No. 7812/04, ECtHR, 08 September 2011.
[163] "Roseltrans, Finlease and Myshkin v. Russia," Application No. 60974/00, ECtHR, 27 May 2004.
[164] Ibid.
[165] Sarah C. C. Tishler, "A New Approach to Shareholer Standing Before the European Court of Human Rights," *Duke Journal of Comparative &International Law* 25, 259 (2014): 285.

In the case of *OAO Neftyanaya Kompaniya Yukos v. Russia*[166] the shareholders claimed that the Russian governments illegally confiscated the assets of the company Yukos. The ECtHR remarked that the harm was severe because Yukos was the largest oil company in Russia at that time. So, the Court ordered Russia to pay €1.866 billion as just satisfaction to former shareholders of Yukos instead of the $38 billion they demanded. Even though the amount was significantly reduced, this compensation was the largest in the history of the Strasbourg Court[167].

However, it should also be remarked, that if the shareholder did not substantively suffer great financial harm or other prejudice to their rights, the ECtHR may have less reason to grant the right to shareholders to submit an application[168].

For instance, in the *Kustannus Oy Vapaa Ajattelija AB, Vapaa-Ajattelijian Liitto – Fritankarnas Forbund v. Finland* case[169] the application was introduced by limited liability company; the registered association; the manager of the company as well as member of one of the branches of the association. They appealed against the church tax. The Court held that the taxes at issue were levied exclusively on the applicant company and appeals against the taxation could only be brought by the applicant company itself. It was true that the applicant association is the company's majority shareholder. The ECtHR nevertheless found that neither the association, nor the manager had been decisively affected by the imposition of the taxes on the company, also having regard to the minor amounts at stake[170].

It is noteworthy that if the company itself submits an application through its organs, the simultaneous application of its shareholders will be deemed unacceptable[171]. It is connected to the fact that the reason for the veil-piercing does not exist.

For example, in the case of *Druzstevni Zalozna Pria and Others v. The Czech Republic*[172] the application was filled by the credit union and eight other applicants - members of the credit union and of its management and supervisory organs. The Court held that the applicants' claims are essentially the same as those raised by the applicant credit union and it, acting through the supervisory board, successfully raised claims declared by its members. In these circumstances the

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[166] "OAO Neftyanaya Kompaniya Yukos v. Russia," Application No. 14902/04, ECtHR, 31 July 2014.
[167] Sarah C. C. Tishler, "A New Approach to Shareholer Standing Before the European Court of Human Rights," *Duke Journal of Comparative &International Law* 25, 259 (2014): 285-286.
[168] Ibid., 286.
[169] "Kustannus Oy Vapaa Ajattelija AB, Vapaa-Ajattelijian Liitto – Fritankarnas Forbund v. Finland," Application No. 20471/92, Commission Decision, 15 April 1996.
[170] Ibid.
[171] N. Ye. Blazhivska, "Piercing the Corporate Veil under ECtHR Jurisprudence," *Eurasian Academic Research Journal* 12, 18 (2017): 25.
[172] [172] "Druzstevni Zalozna Pria and Others v. The Czech Republic," Application No. 72034/01, ECtHR, 31 July 2008.

eight applicants cannot be considered as victims under Article 34 of the Convention[173]. In the case of *Samardzic and AD Plastika v. Serbia* it was also determined that if the company itself applied to the Court through its manager, the latter cannot be regarded as being personally entitled to apply to the Court[174].

In the case of *Teliga and others v. Ukraine* the ECtHR made a point that minority shareholders cannot claim to be a victim as a result of actions aimed at the property of the company (in particular case the applicants had only 0,25% of share capital)[175].

I also want to draw attention that even if the applicants are majority shareholders and chairperson of management bodies at the same time, it does not give grounds to the Court to pierce the corporate veil. In the process of liquidation, the management of the company misses the power to sue to the Court, the company can protect their rights only through a liquidator.

In case of *Vesela and Loyka v. Slovakia*[176] the applicants set up a company where each owned 50% of the share capital and the first applicant was the chairperson of its board of directors and the second applicant was the chairperson of its supervisory board. In the particular case, the company entered into a private transaction concerning property (the peat plant) which was the subject of a legal dispute. The company asserted its rights in respect of the property in the administrative and court proceedings.

The Court recalled that, as a general rule, "shareholders of a company, including the majority shareholders, cannot claim to be victims of an alleged violation of the company's rights under the Convention". It is true that the company is wholly owned by the applicants and that they are members of its boards. However, at the time of filing a lawsuit the company was declared insolvent. Consequently, all powers to make dispositions in respect of the company's estate and operations were automatically transferred to the bankruptcy trustee. The ECtHR also pointed out that the present case does not concern the applicants' interests in the company as such. That is why applicants' complaint was declared inadmissible[177].

The ECtHR is more inclined to recognize the impact of violations of company rights on the interests of its shareholders. At the same time, this approach removes employees, executive directors, and ordinary shareholders from the possibility to protect their indirect interests because

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[173] "Druzstevni Zalozna Pria and Others v. The Czech Republic," Application No. 72034/01, ECtHR, 31 July 2008, § 99-101.
[174] "Samardzic and AD Plastika v. Serbia," Application No. 28443/05, ECtHR, 17 July 2007.
[175] "Teliga and others v. Ukraine," Application No. 72551/ 01, ECtHR, 21 December 2006.
[176] "Vesela and Loyka v. Slovakia," Application No. 54811/00, ECtHR, 13 December 2005.
[177] Ibid.

of violation of the company's rights. Notwithstanding, in certain cases some exceptions apply to this approach[178].

In the *Groppera Radio AG and Others v. Switzerland* case[179] the application was introduced by three applicants: limited liability company Groppera Radio AG; the statutory representative and the sole shareholder of the company; the journalist and employee of the Groppera Radio AG. They claimed that their right to freedom of expression was violated by the national court to broadcast. The ECtHR reasoned that there was not any sense to distinguish between the applicants despite obvious dissimilarities of the status and role, because each of them had a direct interest in continuing of transmission of programs. For the company and its sole shareholder, it was crucial to keep the station's audience and maintain its financing from advertising revenue; for the employees, it was a matter of their job security as journalists. Hence, the Court found that all three applicants can claim to be victims of the alleged violation[180].

To summarize this Subchapter, such conclusions can be drawn. First of all, besides *Agrotexim* approach of impossibility to submit the application by companies and the "mere vehicle" approach there are a lot of grounds when the company's corporate personality can be disregarded: the conflict of interests between the shareholders and the managements of the company; the degree of control which shareholders exercise over the company; the severity of harm that shareholders suffered because of government's actions; the level of impact of violations of company's rights on shareholders' interests; the level of dependency of a shareholder from the company (existence of other source of income).

2.2. The Veil-piercing as a Mechanism for Holding the Company's Shareholders/Owners Liable

Principally, the ECtHR applies the piercing of the corporate veil for possibility to protects interests of shareholders in a company. Nonetheless, the Court had attempts to disregard the company's legal personality for holding the responsibility.

For example, in *Khodorkovskiy and Lebedev v. Russia* case the ECtHR agreed that when "the company was used merely as a façade for fraudulent actions by its owners or managers, piercing of the corporate veil may be an appropriate solution for defending the rights of its creditors, including the State"[181]. The above notwithstanding, the decision to look beyond the

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[178] Onice Daneliia, "Legal Capacity of Legal Entity as a Subject of the European Court of Human Rights" (doctoral dissertation, Legislation Institute of the Verkhovna Rada of Ukraine, 2017), 35, http://instzak.rada.gov.ua/uploads/documents/31455.pdf.
[179] "Groppera Radio AG and Others v. Switzerland," Application No. 10890/84, ECtHR, 28 March 1990.
[180] Ibid.
[181] "Khodorkovskiy and Lebedev v. Russia," Application No. 11082/06 and 13772/05, ECtHR, 25 July 2013, §877.

corporate person cannot be taken without a fundamental legislative framework. At that point in time, neither Russian tax legislation, nor civil legislation allowed to recover the company unpaid taxes from its managers. Most importantly, the Court observed that the judgment of the national court did not refer to any provision of the domestic law on the imposition of civil liability for unpaid company taxes on that company's executives. Consequently, there was a violation of Art. 1 of Protocol 1 of the Convention[182] and national court judgment on the piercing of corporate veil for holding shareholders liable was declared inadmissible.

The first successful attempt to hold a shareholder accountable was in the case of *Lekic v. Slovenia*[183]. The facts of the case are that the applicant complained about the striking off from a limited liability company in which he was a minority member and his personal liability for a debt of that company. At first, he was a minority shareholder who owned 11.11% of the company's share capital. Over time, the applicant was appointed director and then became a managing director. In 1993 the company used the services of a carrier and owed approximately SIT 5,000,000 (Slovenian tolar). The applicant acted as the company's representative at all hearings held in that case except for the last hearing. By a judgment, the District Court of Ljubljana ordered the company to pay the carrier the sums claimed plus interest. A few days later, the national court, based on an application from the competent authority, decided to exclude the company from the register due to the failure to perform banking operations within the last 12 months. This decision was not appealed by the applicant or the company. In light of this, the carrier filed a separate claim for recovery of debt from the company's shareholders and the domestic court granted the claim. The applicant alleged that he was a "passive member" of a company which exempted him from liability for the company's debts and he did not know about the exclusion of the company from the Register. Also, as a manager the applicant should know about the consequences of such exclusion.

The ECtHR pointed out that the applicant's personal liability for a debt of company was based on the Financial Operations of Companies Act (FOCA). The Court noted that the FOCA provisions was accessible to the applicant and that the content of the Act was sufficiently clear to enable him to anticipate that his company had the risk of being ruled out from the court register and that he potentially had the risk of being held personally accountable for its debts. Moreover, the Court agreed with a distinction of the Constitutional Court of Slovenia between "active members" (shareholders, who can influence the operation of a company) and "passive members"; with a development of consistent domestic jurisprudence according to which the members of struck-off companies holding at least a 10% share were personally liable for the debts of the

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[182] Ibid., § 877- 885.
[183] "Lekic v. Slovenia," Application No. 36480/07, ECtHR, 11 December 2018.

companies and those holding less than a 10% share were, as a rule, not liable. This is due to the fact that 10% of share capital grants shareholders the right to information about company's activity, the right to access the company's documents, right to file a lawsuit for the request that the company be wound up etc. The ECtHR ultimately found that the shareholder was an active participant of a company and managed the company for a long time[184].

It is assumed that the active member of a company is not the one who tries to save the company from ruin, but the one who involves it in unjustified (unreasonable, dishonest) debts. And the one who concludes transactions and tries to save the company, simply bears the entrepreneurial risk and should not be responsible for its debts[185].

That is why the piercing of corporate veil for holding the shareholder accountable for the company's debts was lawful within the meaning of Article 1 of Protocol 1[186].

The ECtHR made a point *Agrotexim* approach could be applicable to resolve such type of the case, because in *Agrotexim* the purpose of the piercing was identification of the shareholders with the company to obtain "victim" status – the disregarding of the company's legal personality was "from within". In particular case, the lifting of the corporate veil concerned the interests of creditors (the carrier) was done "from without"[187].

Having analyzed the *Lekic v. Slovenia* case, some causes/ principles can be identified for applying the piercing of corporate veil as a tool to hold shareholders liable.

The first one is the legality and possibility to foresee the intervention. Turning to the circumstances of the present case, the ECtHR noted that the applicant's personal liability in respect of the company's debts was based on Slovenian legal provisions. The Court considered that the rules introduced by FOCA have been made available to the applicant and that the content of the law has been sufficiently clear to allow the shareholder to foresee that his company was at risk of being removed from the court register and he may be held personally liable for its debts[188]. Moreover, the applicant must have been aware of the likely consequences by being fully informed on the company's situation as an active member of a company and a former director[189].

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[184] Ibid.
[185] Dmitriy Dedov and Hahlar Gadzhiev, "The Review of Case Law of the Grand Chamber of the European Court of Human Rights (December 2018 – January 2019)," *Journal of Foreign Legislation and Comparative Law* 3 (2019):115.
[186] "Lekic v. Slovenia," Application No. 36480/07, ECtHR, 11 December 2018.
[187] Ibid., 111.
[188] "The Review of the ECtHR case law (the Compilation of the Most Interesting Cases Examined by the ECtHR During 2018)," Accessed 08 May 2020, http://european-court-help.ru/obzor-pretcedentnogo-prava-espch/8/.
[189] Ibid.

The second principle is fair balance between any competing public and private interests and efficiency of measures[190]. The purposes to enact the FOCA were to ensure stability in the commercial market and financial discipline. In situations such as the deterioration of the commercial market due to a high number of dormant and insolvent companies, there may be an urgent need for the State to act in such a way to "avoid irreparable harm to the economy and to enhance the legal security and confidence of participants in the market"[191].

This case has also been criticized by scholars and judges because of the exceptional nature of the measures and retrospective application of the Law. The criticism of the Court's position was voiced both by the majority of judges who voted for the absence of violation of the Convention and by the minority (only two out of 17). The former drew attention to one weak point in the decision, which is related to the exceptional circumstances in which a participant's liability for the company's debts comes into effect. Indeed, the Court has drawn attention to the exceptional nature of the circumstances of the case: a massive structural problem caused by the existence of 6,000 inactive companies, most of which have no assets and a total debt to creditors of hundreds of millions of tolars[192]. However, the Court does not explain why this mechanism had to be retrospectively brought down on participants in companies that did not have sufficient experience in conducting business activities. The Court does not adduce any evidence in the form of statistical indicators of the total damage to the economy and how the mistrust of markets is manifested. The ECtHR has simply confined itself to general statements that such economic situations do not occur frequently, although this does not mean that the measures taken can only occur in rare cases. Such a position is, to say the least, far from the ideal of the rule of law and due process[193].

To a large extent, the weakness of that position lies in the temporary nature of the measures taken. They were cancelled just when entrepreneurs became more experienced. It would therefore be more equitable to apply the Law for the future and then not to repeal it. The judges who disagreed with the majority's decision pointed to the retrospective nature of the measures taken[194].

The majority judges insist that there is nothing illegal about the fact that the State itself determines how to construct the form of a legal entity and how far it should be separated from its

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[190] Dmitriy Dedov and Hahlar Gadzhiev, "The Review of Case Law of the Grand Chamber of the European Court of Human Rights (December 2018 – January 2019)," *Journal of Foreign Legislation and Comparative Law* 3 (2019):116.
[191] "Lekic v. Slovenia," Application No. 36480/07, ECtHR, 11 December 2018, §119.
[192] Dmitriy Dedov and Hahlar Gadzhiev, "The Review of Case Law of the Grand Chamber of the European Court of Human Rights (December 2018 – January 2019)," *Journal of Foreign Legislation and Comparative Law* 3 (2019):118.
[193] ibid., 118 – 119.
[194] "The Review of the ECtHR case law (the Compilation of the Most Interesting Cases Examined by the ECtHR During 2018)," Accessed 08 May 2020, http://european-court-help.ru/obzor-pretcedentnogo-prava-espch/8/.

participants. This position goes too far, as it calls into question the general principle of corporate law that participants are not liable for the company's debts[195]. On the contrary, I would like to reiterate the fundamental nature of this principle. If a controlling person abuses the company's assets, it entails personal responsibility for its actions and not for those of the company. The ECtHR Resolution calls it "abuse of corporate form", in other words, hiding his personal interests behind the interests of the company. It is another case when such person miscalculates the risks that he knew or could have foreseen but did not take into account and they resulted in losses; in such case he will be obliged to compensate for those losses of the company but the company itself acted in such case; the determining criterion here is an honest vision (albeit incorrect) of economic sense in the nature and manner of doing business. It should also be remembered that this principle exempts small shareholders who are not involved in management and do not have complete information about the company's condition. For them, this principle is indeed fundamental[196].

The ECtHR draws attention to the fact that unlike the main body of corporate law, which provides for liability only in case of bad faith, the Law provides for an irrefutable presumption of liability of the participants for the debts of a no existing company liquidated in an administrative procedure, with the exception of passive participants only. The ECtHR noted the unsuccessful attempt of the applicant to initiate bankruptcy proceedings, which was unsuccessful due to the non-payment of the fee, i.e., through the fault of the company itself and indirectly through the fault of the applicant himself who failed to pay a very small fee[197].

Thus, the ECtHR distinguishes between the criterion of bad faith and the criterion of absence of assets and activities for the performance of monetary obligations to creditors. This position looks strange because the ECtHR does not go into the economic essence of the company's position and does not try to understand what has led to such a deplorable result. This can be understood due to the limited competence of the ECtHR, especially in economic policy matters. Here the national authorities play a big role, and the ECtHR itself cannot take over the functions of the fourth instance court. It can use only the facts, which are established or referred to by the parties to the process. However, it can use additional legal arguments based on the facts[198].

The reference of the ECtHR to a failed bankruptcy procedure is also interesting. Dissenting judges draw attention to the fact that the scope of a participant's liability is not limited

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[195] Dmitriy Dedov and Hahlar Gadzhiev, "The Review of Case Law of the Grand Chamber of the European Court of Human Rights (December 2018 – January 2019)," *Journal of Foreign Legislation and Comparative Law* 3 (2019):119.
[196] Ibid.
[197] Ibid., 120.
[198] Dmitriy Dedov and Hahlar Gadzhiev, "The Review of Case Law of the Grand Chamber of the European Court of Human Rights (December 2018 – January 2019)," *Journal of Foreign Legislation and Comparative Law* 3 (2019):119.

in any way, which indicates a disproportionate interference. Indeed, in bankruptcy proceedings there are certain restrictions for creditors: the order of creditors, partial satisfaction of claims, the possibility to return the funds paid to other creditors to form a competitive mass. And here full responsibility without exceptions. It seems that the above mentioned positive aspects of bankruptcy proceedings could have been used.

The next aspect that I would like to analyse in this Subchapter is possibility to pierce the corporate veil to bring the State in the person of public authority to responsibility as the beneficiary of a company or other legal entity[199].

By virtue of application of the veil-piercing doctrine, it is possible to rest responsibility for the obligations of a legal entity on its founder, preventing him from "hiding" behind his limited liability. As far as is known, the doctrine of the lifting the corporate veil applies to legal entities – companies in the ECtHR case law, however, in principle it can be applied to unitary enterprise in order to establish the person who is actually responsible for their actions (inaction), as he/she is the beneficiary of the legal entity[200].

Within the meaning of Article 34 of the ECHR, actions of private companies that constitute "non-governmental organizations" cannot be appealed, although these organizations may themselves lodge complaints to the Court[201].

For instance, in the *Tumilovich v. Russia*[202] case the applicant introduced a complaint against the joint-stock company. The ECtHR rejected it and recalled it may only deal with complaints concerning actions of the State itself or matters for which the State may be held responsible under the Convention. A person cannot complain of the actions of a private person or body as such[203].

A similar decision was taken in the case of *Sukhorubchenko v. Russia*[204]. The applicant deposited his savings in Russian investment company. When the applicant came to recover his deposit, he found the company's offices closed. He claimed that he had lost money because of the State. The Court found that in the present case the applicant's "possession was the amount which he had deposited with a private investment company. The ECtHR reminded that the State cannot be normally held responsible for acts or omissions of a private company. So, to substantiate his

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[199] Ibid.
[200] R. Sadrieva, "Issues of the Responsibility of Russian Federation for the debts of Unitary Enterprises in Case Law of the ECtHR," Accessed 08 May 2020, http://отрасли-права.рф/article/24714.
[201] Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol Nos. 11 and 14, 4 November 1950, ETS 5.
[202] "Tumilovich v. Russia", Application No. 47033/99, ECtHR, 22 June 1999.
[203] Ibid..
[204] "Sukhorubchenko v. Russia," Application No. 69315/01, ECtHR,10 February 2005.

property complaint the applicant has to prove that he has lost the chance of recovering his deposit or a certain part of it and that the loss of opportunity could be ascribed to a State act or omission[205].

The main problem of applicants who appeal against violations of their rights by a legal entity is a misunderstanding of the notion of a "governmental organization" used by the ECtHR. The term is often equated with the notion of state organization (state institution) in national law. Meanwhile, the content of these terms varies considerably. In particular, the notion of governmental organization does not mean only a state institution, the ECtHR uses it in a much broader sense. In the case of *Ayuntamiento de Mula v. Spain* the Court found that "the expression "governmental organizations" cannot be held to refer only to the Government or the central organs of the State. Where powers are distributed along decentralized lines, it refers to any national authority which exercises public functions"[206]. Furthermore, the ECtHR acknowledged local government bodies are governmental organizations in the sense that they are governed by public law and exercise public functions (*Yavorivskaya v. Russia*)[207].

So, in the Court's view, the term "governmental organization" included public and local self-governmental authorities and their legal entities. In connection with this fact, it is possible to appeal to the ECtHR not only against the actions of the authorities, but also against the activities of a legal entity, if the court considers it as a governmental organization[208].

It is noteworthy, the Court's qualification of a legal entity as a governmental or non-governmental organization does not directly depend on its status under domestic law[209]. For example, in *Mykhaylenky and Others v. Ukraine*[210] the government alleged that the debtor-company had a separate legal entity, that is why the State could not be held accountable for company's debts under the national law. Despite that, the ECtHR found that the government did not demonstrate the institutional and operational independence of the company-debtor from the State. Additionally, the company carried out the activity in the nuclear energy sphere and performed construction actions in the Chernobyl zone of compulsory evacuation, which is placed under strict governmental because of environmental and public-health issues. The government oversaw the terms of employment in the company, including the applicant's salaries. Moreover, the company was not enabled to dispose its property because of the prohibition of the State. The company was managed by the Ministry of Energy of Ukraine. So, under these circumstances, the

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[205] Ibid., §64.
[206] "Ayuntamiento de Mula v. Spain," Application No. 55346/00, ECtHR, 01 February 2001.
[207] "Yavorivskaya v. Russia," Application No. 34687/02, ECtHR, 21July 2005.
[208] D. Afanasiev, "Cases of the Liability of the State for the Activities of Private Companies and Other Legal Entities (Practice of the European Court of Human Right)," *Economy and Law* 12, 395 (2009): 18.
[209] Ibid.
[210] "Mykhaylenky and Others v. Ukraine," Application No. 35091/02, 35195/02, 35201/02, 35204/02, 35945/02, 35949/02, 35953/02, 36800/02, 38296/02, 42814/02, ECtHR, 30 November 2004.

ECtHR deemed that State liable for the company's debts, even though the company was a separate legal entity under the Ukrainian legislation[211].

Actually, the Court pierced the corporate veil of the company and the State was subject to responsibility because it did not justify the institutional and operational independence of the company.

The ECtHR considers that the State should be liable for the debts of the unitary enterprise if it approves all transactions with that property, controls the management of the enterprise and decides whether the enterprise should continue its activities or whether it should be liquidated (*Grigoryev and Kakaurova v. Russia*)[212]. The same decision was held in case of *Shafranov v. Russia.*[213]

In case of *Shlepkin v. Russia*[214] the applicant complained that the State enterprise did not enforce the judgement on the recovery of the unpaid amount of compensation for a work-related injury. The Government denied their responsibility referring to the fact that the State enterprise had been liquidated. The Court found that the Government had not demonstrated that the State enterprise enjoyed sufficient institutional and operational independence from the State. The Court emphasized that the public authority cannot invoke a lack of funds or other resources as justification for not enforcing a court decision. The Court therefore concluded that the State cannot justify its failure to enforce the judgment against the State enterprise by reference to the liquidation of the company[215].

The case of *Yershova v. Russia*[216] is an example where the ECtHR pierced the corporate veil and held the State responsible for the actions of the municipal enterprise. According to the Russian legislation municipal unitary enterprises cannot be qualified as state authorities, but they are founded by the public authorities, which oversee the use of property in complying with the purposes, receive part of the enterprise profit and are entitled to reorganize or liquidate the enterprise. However, the municipal unitary enterprises are considered as separate legal entities and the authorities are not responsible for its debts under domestic law. However, the Court found that the company's institutional ties with the public administration were specifically strengthened in the particular case due to special nature of its activity. The company was one of the main heating suppliers in the city. Moreover, the Town Municipal Administration decided to liquidate the company and transfer all assets to another enterprise. In light of this, the Court concluded that the

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[211] Ibid., § 45.
[212] "Grigoryev and Kakaurova v. Russia", Application No. 13820/04, ECtHR, 12 April 2007, §35.
[213] "Shafranov v. Russia," Application No. 24766/04, ECtHR, 25 September 2008, § 12.
[214] "Shlepkin v. Russia," Application No. 3046/03, ECtHR, 01 February 2007.
[215] Ibid, § 21-28.
[216] "Yershova v. Russia," Application No. 1387/04, ECtHR, 08 April 2010.

company did not enjoy sufficient institutional and operational independence from the municipal authority and the municipal authorities was held liable for the acts of the enterprise[217].

It should be noted that the piercing of corporate veil would not be carried out against the State if the company is recognized as "non-governmental". In the case of *Osterreichischer Rundfunk v. Austria*[218] the Court found that the legal entity (Austrian Broadcasting Corporation) was qualified as a "non-governmental organisation". Firstly, the ECtHR noted that the company did not hold a monopoly and operated in a sector open to competition. Its management was appointed and monitored by the public authority (the Foundation Council), however, Austrian legislation obliged the company to observe the requirements of objectivity and diversity of reporting and to preserve its independence inter alia from the State and the parties. Even where a public broadcaster was largely dependent on public resources for the financing of its activities this was not considered to be a decisive criterion.[219]

Having analyzed the circumstances of the *Radio France and Others v. France* case[220] the ECtHR concluded that the company also was "non-governmental organization". The company Radio France performed broadcasting as a public service in the general interest. All the capital of the company was held by State; the article of association was approved by the decree and financing was done by the State. This notwithstanding, French legislation guaranteed to preserve the independence and impartiality of the public broadcasting sector, only 4 out of 12 members in the Board of Directors represented the State. The company was not a monopoly and carried out the activity in a sector open to competition, what did not confer a dominant position to it[221].

Where the ECtHR finds that a legal person performs functions of public nature under the control of the State (e.g. the legal entity is a monopolist in the relevant field), it is considered as a "governmental organization", so the application would be admissible and the veil-piercing mechanism can be applied[222].

In case of *RENFE v. Spain*[223] the Court reasoned that the public corporation was "governmental". First, it ran the state rail network in Spain as an industrial company. Secondly, the Board of Directors of the legal entity was answerable to the Spain Government and all internal structure and ways of carrying out the business activity were regulated by the State decree[224].

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[217] Ibid., § 58 -62.
[218] "Osterreichischer Rundfunk v. Austria," Application No. 35841/02, ECtHR, 7 December 2006.
[219] Ibid.
[220] "Radio France and Others v. France," Application No. 52984/00, ECtHR, 30 March 2004.
[221] Ibid.
[222] R. Sadrieva, "Issues of the Responsibility of Russian Federation for the debts of Unitary Enterprises in Case Law of the ECtHR," Accessed 08 May 2020, http://отрасли-права.рф/article/24714.
[223] "RENFE v. Spain," Application No. 35216/97, ECtHR, 08 September 1997.
[224] Ibid.

Even if a legal entity is formally considered as private one in the national legislation (a private joint-stock company or a foundation), it does not mean that the ECtHR cannot declare it as "non-governmental". It can be possible in situation when it does not have enough the institutional and operational independence from the State[225]. Preeminently, it should be emphasized that the ECtHR does not consider this opportunity as a practice of wide application. On the contrary, it has been repeatedly stated that such cases are the exception. The exceptional character is that there are several factors that allow qualifying a violation committed by a non-governmental person as an action done by the state or its authorities[226].

In *Danilenkov and Others v. Russia*[227] the applicants lodged a complaint against the private company Kaliningrad Commercial Seaport Co. Ltd and the ECtHR deemed the company as "governmental" and granted the application. The Court justified it by the fact that the company was under effective control of the State, as 20% of the share capital was owned by Regional Development Fund established by the Resolution of the Governor and 35% of the shares managed by an official of the regional administrative authority[228]. The fact that the activities of a legal person in national legislation are governed by private law is not an obstacle for the Court to qualify it as a governmental organization. Therefore, the ECtHR does not bind itself to the status of a legal person under national law, although it can take it into account. In contrast, a legal entity may be recognized as "non-governmental" even if its activities are governed by public law under national law (The Holy Monasteries v. Greece)[229].

In the case of *Wos v. Poland* the applicant claimed against Polish-German Reconciliation Foundation which was established for the "assistance to the victims of National Socialist persecution[230]". The Court noted that the Foundation had operated under the private law, but the obligations of it was arisen out of the international agreements. Also the ECtHR found that the State's supervision was limited and did not involve any direct influence on decisions of the Foundation, but the Polish Government could appoint and dismiss the members of the management and supervisory boards, and to amend the Foundation's statute. So, despite the fact that the State did not have direct influence over the decisions taken by the Foundation, its role was crucial in establishing the overall framework in which the Foundation operated. The Foundation was

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[225] D. Afanasiev, "Cases of the Liability of the State for the Activities of Private Companies and Other Legal Entities (Practice of the European Court of Human Right)," *Economy and Law* 12, 395 (2009): 20.
[226] Valeriy Konov, "The Jurisdiction of the European Court of Human Rights on complaints about violations committed by non-governmental orhanizations," *Legal Sciences* 3 (2017): 40.
[227] "Danilenkov and Others v. Russia," Application No. 67336/01, ECtHR, 30 July 2009.
[228] Ibid.
[229] D. Afanasiev, "Cases of the Liability of the State for the Activities of Private Companies and Other Legal Entities (Practice of the European Court of Human Right)," *Economy and Law* 12, 395 (2009): 20 -21.
[230] "Wos v. Poland," Application No. 22860/02, ECtHR, 01 March 2005, §46.

considered as "governmental organization"[231].

Thus, the Court may hold the State responsible for the activities of the legal entity if it is vested with public powers that are exercised under the control of the State. In such circumstances we can say about the opportunity to pierce the corporate veil[232].

However, if the public authorities have a controlling interest in a legal entity, this fact alone does not hold the State responsible for the activity of the legal person. The ECtHR considers a combination of factors which indicate the lack or existence of sufficient institutional and operational independence from the State[233].

In the *Sergey Danilovich Anokhin v. Russia* case[234] the application was introduced against the joint-stock company OAO Rostovugol. where the federal and regional authorities owned 66.9 % and 20% of the share capital respectively. The applicant claimed that the State had failed to supervise the company's management properly and that it therefore should be held accountable for the company's debts. The Court noted that under national legislation the respondent company was incorporated as a joint-stock company with separate legal personality. Its assets were distinct from the property of its shareholders and the company had delegated management. In such a way, the State, as any other shareholders, could be held liable only for the company's debt in the amount invested in the share capital of the company. Moreover, the ECtHR found that there were not any justifications that "the company's financial difficulties resulted from poor management of the company rather than from the overall effect of unfavourable conditions in the coal-mining industry and the market". In light of this, the Court held that the respondent State did not fail in any of its obligations concerning the company's activity and could not hold accountable[235].

In *Alisic and Others. v. Bosnia and Herzegovina, Croatia, Aervia, Snovenia and the Former Yugodlav Republic of Macedonia* [236]the applicants complained concerning their inability to withdraw their foreign-currency savings from the bank accounts. The ECtHR found that the banks were Stated-owned and controlled by the Government Agency. Furthermore, the banks transferred most of the bank's assets to new banks and disposed assets as it saw it. So, the Court reasoned that there were sufficient grounds to consider the State responsible for debts to applicants.

Abovementioned case is remarkable because the ECtHR highlighted the main criteria to determine responsibility of the State: "the company's legal status (under public or private law);

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[231] Ibid., §46 – 54.
[232] D. Afanasiev, "Cases of the Liability of the State for the Activities of Private Companies and Other Legal Entities (Practice of the European Court of Human Right)," *Economy and Law* 12, 395 (2009): 21.
[233] Ibid.
[234] "Sergey Danilovich Anokhin v. Russia," Application No. 25867/02, ECtHR, 31 May 2007.
[235] Ibid.
[236] "Alisic and Others. v. Bosnia and Herzegovina, Croatia, Aervia, Snovenia and the Former Yugodlav Republic of Macedonia," Application No. 60642/06, ECtHR, 06 November 2012.

the nature of its activity (a public function or an ordinary commercial business); the context of its operation (such as a monopoly or heavily regulated business); its institutional independence (the extent of State ownership); and its operational independence (the extent of State supervision and control). Additional factors to be taken into consideration are whether the State was directly responsible for the company's financial difficulties, siphoned the corporate funds to the detriment of the company and its stakeholders, failed to keep an arm's-length relationship with the company or otherwise acted in abuse of the corporate form[237]".

To sum up, The ECtHR can apply the doctrine of the veil-piercing as a mechanism for holding shareholders/owners liable for the company's obligations. Application of such tool can be possible if several principles are followed: the legality and possibility for the shareholder to foresee the liability, maintaining the fair balance between any competing public and private interests and efficiency of measures The essence point is that the State as a shareholder or owner of the company can also be held liable. This possibility depends on identification of the company as a governmental or non-governmental organization and the level of independence of a company from the State.

[237] Ibid.

3. THE IMPACT OF THE ECTHR CASE LAW OF THE VEIL-PIERCING ON THE UKRAINIAN LEGISLATION AND COURT PRACTICE IN UKRAINE

As I have already analyzed in the 1st Chapter, doctrine of the piercing of the corporate veil has been widely disseminated in the Members State of Council of Europe, despite the fact that it is not everywhere enshrined in law. The veil-piercing is a very useful tool for protection of shareholders' interests in a company or as mechanism for holding the shareholder or the participant of company liable for company's obligations. I assume that the implementation of the veil-piercing mechanism in Ukrainian legislation will be very useful for protection shareholders and companies.

The Article 17 of the Law of Ukraine "On the Fulfillment of Decisions and Application of Practice of the European Court of Human Rights"[238] prescribes that national courts apply the European Convention on Human Rights and the practice of the European Court of Human Rights as a source of law when considering case. In view of this, I would like to review the extent to which the doctrine of the veil-piercing is applicable in Ukrainian court practice and how the ECtHR case law impact national court practice in this field.

The Article 96 (3) of the Civil Code of Ukraine[239] provides:

> "A shareholder (founder) of a legal entity shall not be liable for the obligations thereof, while a legal entity shall not be liable for the obligations of its shareholders (founders) unless otherwise provided by the articles of incorporations or by law".

Although Ukrainian legislation does not directly provide the doctrine of piercing the corporate veil, Ukrainian courts do pierce the corporate veil in some exceptional circumstances.

In keeping with the court practice of the Supreme Court (SC) the owner (participant, shareholder) of a legal entity may submit an application in the interests of the legal entity only in cases when such right is granted by law[240].

In the Resolution of the SC of 28 February 2019 in the case No. 904/4669/18[241] the applicant (the company) filed a lawsuit (in the interests of another company where the claimant owned 40% of the share capital) to the limited liability company for cancellation of the decision on state registration of the ownership right of the respondent. The claim is grounded on the fact that the registration of the ownership of the property by the respondent took place based on the

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[238] "Law of Ukraine "On the Fulfillment of Decisions and Application of Practice of the European Court of Human Rights," came into force on 23 February 2006, https://zakon.rada.gov.ua/laws/show/3477-15.

[239] "The Civil Code of Ukraine", came into force on 16 January 2003, https://zakon.rada.gov.ua/laws/show/435-15.

[240] O. Kvyat and B. Marchuk, " Нові підходи Верховного Суду до розгляду корпоративних спорів," [New approaches of the Supreme Court to corporate disputes], *Юридична Газета* 17-18 (2019): https://yur-gazeta.com/publications/practice/korporativne-pravo-ma/novi-pidhodi-verhovnogo-sudu-do-rozglyadu-korporativnih-sporiv-.html.

[241] "The Resolution of the Supreme Court of 28 February 2019 in the case No. 904/4669/18," http://reyestr.court.gov.ua/Review/80181036ю

decision of the general meeting of the company's members. But the applicant company noted that it did not participate in the general meeting and did not vote on the alienation of property and its contribution to the charter capital of the respondent. The applicant referred to the fact that the grounds for filing a lawsuit in this case are not only the need to restore its violated rights and legitimate interests, but also the violated rights and interests of the company itself[242].

However, the SC rejected the claimant's arguments and pointed out that the right to appeal to the court is not absolute and is limited by the requirements of the procedural law on the admissibility of the application. The SC drew attention to the fact that the legal regulation of Article 54 of the Civil Procedural Code of Ukraine applies to cases of filing a claim for compensation for losses caused to a legal entity by its official. According to this legal provision the owner (the participant, the shareholder) can take legal actions in interests of the legal entity with the specified claim. The owner (the participant or the shareholder) may address other claims in the interests of the legal entity only if there are grounds directly provided by the relevant legislative regulation[243].

Also, the Supreme Court found groundless the claimant's reference to the decision of the ECtHR in the case "*Feldman and Bank" Slavyansky against Ukraine*"[244], as legal relations in this case are not similar in this case. Thus, in this case there were no exceptional circumstances to entitle the shareholder to apply to the court[245].

As we can see, the position of the Supreme Court does not carry out a "revolution" in the issue of the possibility to use the doctrine of piercing the corporate veil in Ukraine and does not form a fundamentally new approach to solving a corporate dispute at the suit of the owner (participant, shareholder) of the legal entity in the interests of the latter. At the same time, the importance of the above conclusions of the court is to strengthen the rules and basic legal principles (in particular, the principle of independence and autonomy of the legal entity). At the same time, the SC does not deny the possibility of applying the practice of the ECtHR to grant the right to the owners of a company to appear in court in the interests of the latter[246].

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[242] Ibid.
[243] Ibid.
[244] "Feldman and Bank" Slavyansky against Ukraine," Application No. 76556/01 and 38779/04, ECtHR, 08 April 2010.
[245] ibid.
[246] O. Kvyat and B. Marchuk, " Нові підходи Верховного Суду до розгляду корпоративних спорів," [New Approaches of the Supreme Court to Corporate Disputes], *Юридична Газета* 17-18 (2019): https://yur-gazeta.com/publications/practice/korporativne-pravo-ma/novi-pidhodi-verhovnogo-sudu-do-rozglyadu-korporativnih-sporiv-.html

For a long time there have been the question whether shareholder is entitled to appeal the decision of the National Bank of Ukraine (NBU) on the liquidation of the bank which violated his or her rights[247].

Article 79 of the Law of Ukraine "On Banks and Banking Activity"[248] provides that the bank or other persons covered by the NBU's supervisory activities shall be entitled to appeal to court in accordance with the procedure established by law.

However, what shall be done when the NBU decision revoked the bank license and the bank is no longer the subject that can appeal against such decisions?

Of course, we can say that with the beginning of the liquidation procedure all the functions of the company management are assigned to the Fund for Guaranteeing Deposits of Individuals.

According to the article 36 (1) of the Law of Ukraine "On the system of guaranteeing natural person deposits":

> "…starting from the date of the commencement of the bank resolution procedure by the DGF, all powers of the bank's governing bodies (those of the general shareholders' meeting, supervisory board, and management board (board of directors)) and of its controlling bodies (the audit committee and the internal audit) shall be terminated. The DGF shall be vested with all powers of managing bodies of the bank and its control bodies from the date of commencement of the provisional administration until the termination thereof"[249].

Obviously, the representative of the DGF authorized for the temporary administration or liquidation of the bank, will not bring an action against the NBU on behalf of the bank, which indicates a conflict of interest between the DGF and shareholders of the bank[250].

According to the legal opinion of the Supreme Court of Ukraine, set out in the Resolution of 27 June 2017 (case No. 21-3739a16 – the access is limited), owners of qualifying shareholding shall be deemed to be subject to appeal against decisions of the NBU, if the decision violates rights and interests of such persons. The SCU also highlighted the criteria according to which a shareholder of a bank is entitled to appeal against actions or inaction of the NBU, namely, when such shareholder has a large (significant, substantial) shareholding which gives him or her a

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[247] Yaroslava Lagan, "Операція "Ліквідація," [Operation Liquidation], *Юридична Газета* 10, 612 (2018): https://yur-gazeta.com/publications/practice/bankivske-ta-finansove-pravo/operaciya-likvidaciya.html.

[248] "Law of Ukraine "On Banks and Banking Activity," came into force on 07 December 2000, https://zakon.rada.gov.ua/laws/show/2121-14.

[249] Law of Ukraine "On the system of guaranteeing natural person deposits,"came into force on 23 February 2012, https://zakon.rada.gov.ua/laws/show/4452-17.

[250] R. Antoniv, "Біс сумнівів" [Devil of doubt], Accessed 13 May 2020, http://dynasty.legal/ua/bes-somnenij/.

fundamental, decisive degree of influence on the bank's activity and/or when it is the sole owner of shares[251].

The main facts of case. In March 2016 Mr. Dyadechko owned 99,9% of the bank's share capital filed a lawsuit against the NBU and the Deposit Guarantee Fund (DGF) to declare illegal and cancel the resolution of the NBU "On Withdrawal of the Bank License and Liquidation of Public Joint Stock Company" Commercial Bank "Soyuz" and the decision of the DGF "On the beginning of the liquidation procedure of JSC" CB "Soyuz"[252].

In deciding the case, the SCU was guided by the ECtHR case law, as follows the case of *Camberrow MM5 AD against Bulgaria*[253] (Application No. 50357/99) and *G.J. v. Luxembourg* (Application No. 21156/93)[254].

In particular, the Court noted that the right to a fair hearing before a tribunal as guaranteed by Article 6 § 1 of the Convention must be interpreted in the light of the Preamble to the Convention, which declares, among other things, the rule of law to be part of the common heritage of the Contracting States (*Brumarescu v. Romania*[255]).

One of the main elements of the rule of law is the principle of legal certainty, which, inter alia, provides that laws must be clear and understandable, laws must not be contradictory, and if the rules of law are not clear or contradictory, they must be interpreted in favour of the authority of the subject[256].

Another important element of the rule of law is the guarantee of a fair trial. Thus, in the case of *Bellet v. France*, the Court noted that "Article 6 of the Convention contains guarantees of a fair trial, one aspect of which is access to a court. The level of access granted by national legislation must be sufficient to ensure the human right to a trial, bearing in mind the rule of law in a democratic society. For access to be effective, a person must have a clear and practical possibility to appeal against acts which constitute interference with her or his rights".

Furthermore, in *Camberrow MM5 AD against Bulgaria*[257], the Court noted: "Neglecting the legal personality of a company as to whether it is" a person ", which has been directly affected, will only be justified in exceptional cases, in particular when it is expressly established that it is impossible for a company to bring proceedings before the Court through bodies established by its

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[251] "Liquidation of the Bank Souz: the NBU won the case in the Supreme Court," *Економічна Правда, January 17, 2020,* https://www.epravda.com.ua/news/2020/01/17/655922/.
[252] "The Supreme Court overturned the decision of the courts of previous instances on the illegality of liquidation of Bank Soyuz," *The National Bank of Ukraine,* January 17, 2020, https://bank.gov.ua/news/all/verhovniy-sud-skasuvav-rishennya-sudiv-poperednih-instantsiy-schodo-nepravomirnosti-likvidatsiyi-banku-soyuz-77661.
[253] "Camberrow MM5 AD v. Bulgaria," Application No. 50357/99, ECtHR, 01 April 2004.
[254] "G.J. v. Luxembourg," Application No. 21156/93, ECtHR, 26 October 2000.
[255] "Brumarescu v. Romania," Application No. 28342/95, ECtHR, 28 October 1999.
[256] Ibid.
[257] "Camberrow MM5 AD v. Bulgaria," Application No. 50357/99, ECtHR, 01 April 2004.

articles of association, or in the event of liquidation or bankruptcy due to its liquidators or bankruptcy managers (*Agrotexim and Others v. Greece*). The Court decided that it was impossible for the bank itself to file a complaint with the Court. Moreover, the Court recalls that the applicant held a substantial 98% interest in the bank. He operated with part of his activities through a bank and thus had a direct personal interest in the subject matter of the application (*G.J. v. Luxembourg*). The Court thus found that, in the particular circumstances of the case, the applicant could claim to be a victim of the alleged violations of the Convention which violated the shareholder's rights[258].

So, the SCU reasoned that the claimant as a majority shareholder was entitled to file a lawsuit because of the interference of state authorities represented by the NBU and the DGF in his rights, in particular, the right of ownership stipulated in Article 1 of Protocol 1 to the ECHR[259]. Thus, a mandatory condition for the granting of legal protection by the court is the presence of a corresponding violation of the rights, freedoms or interests of the person by the public bodies at the time of appealing to the court. The violation must be real, concern (hurt) the rights or interests of the person alleged about the violation. So, the right to judicial protection guaranteed by article 55 of the Constitution of Ukraine and specified in the laws of Ukraine implies the possibility to apply to court for protection of the violated right, but requires that the asserted violation be justified. But what is interesting, on 15 January 2020 the case was referred to the court of the first instant for a new hearing[260].

The ECtHR case of *Feldman and Slovyanskyy Bank v. Ukraine*[261] (Application No. 42758/ 05) is also an interesting precedent for Ukraine to settle disputes between shareholders and the NBU and DGF at the supranational level and can be a prerequisite for appealing against a number of the Regulator's resolutions on liquidation of banks in the nearest future[262].

The application was introduced by the vice-president, founder and majority shareholder of the applicant bank. The applicant alleged that the shareholders and the executive bodies of the applicant bank had been deprived of their powers to administer the applicant bank's business because the bank was under the control of the liquidation commission. The ECtHR reasoned that there were exceptional circumstances which entitled the shareholder to bring an application on behalf of the applicant bank. The Court also pointed out that when the procedure established by the national legislation does not provide the possibility for shareholders to appeal against the

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[258] Ibid.
[259] "Liquidation of the Bank Souz: the NBU won the case in the Supreme Court," *Економічна Правда, January 17, 2020,* https://www.epravda.com.ua/news/2020/01/17/655922/.
[260] Yaroslava Lagan, "Операція "Ліквідація," [Operation Liquidation], *Юридична Газета* 10, 612 (2018): https://yur-gazeta.com/publications/practice/bankivske-ta-finansove-pravo/operaciya-likvidaciya.html.
[261] "Feldman and Bank" Slavyansky against Ukraine," Application No. 76556/01 and 38779/04, ECtHR, 08 April 2010.
[262] Ibid.

decisions of state bodies and the bank is actually under the control of the liquidation commission, there is a violation of the right of access to court, guaranteed by Article 6 of the ECHR[263].

In a recent case No. 320/4981/19[264] from 16 April 2020 the applicant was shareholder who owned 33% of the bank's share capital, the Chairman of Supervisory Board and final beneficiary of the bank Veles. The shareholder argued against the actions of the NBU concerning the liquidation procedure of the bank[265].

The SC pointed out that if the executive bodies of a bank were deprived of their powers, there are exceptional circumstances in virtue of which the controlling shareholder should be entitled to bring a claim in the interests of the bank[266].

Taking into account the gaps in the national legislation on the right of the shareholder to appeal against the decision of the Regulator on liquidation of the bank, the national judicial practice goes the way of recognition of such right for the owner of substantial (10% and more) shareholding in the authorized capital of the bank[267].

Of course, this position of the SC is a compromise: by allowing the bank's shareholder to defend its rights in court, the SC restricted the circle of plaintiffs to majority shareholders. This position of the SC contradicts the conclusion of the European Court of Human Rights, set out in the case of *Knik v. Turkey* (Application No. 53138/09)[268].

In particular case, the minority shareholder complained that he had been deprived of his shares in the bank as a result of the illegal actions of the State and that he had not been compensated for his loss. The Turkish Government argued that the applicant, as a minority shareholder, had not had any "possession" within the meaning of Article 1 of Protocol No. 1 of the ECtHR. Notwithstanding, the ECtHR particularly pointed out that:

> "[…] the decision to declare the takeover and sale of the bank unlawful had consequences for both the main shareholders and small shareholders, whether they were parties to the annulment proceedings or not. It is clear that the applicant suffered pecuniary loss, no matter how small the number of his shares"[269].

So, we can say that the national courts of Ukraine allow to pierce the corporate veil of the bank when it is impossible for the shareholders to protect their rights through the bank's management appealing against liquidation procedure.

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[263] Ibid.
[264] "The Resolution of the Supreme Court of 16 April 2020 in the case No. 320/4981/19," http://reyestr.court.gov.ua/Review/88814796.
[265] Ibid.
[266] Ibid.
[267] R. Antoniv, "Біс сумнівів" [Devil of doubt], Accessed 13 May 2020, http://dynasty.legal/ua/bes-somnenij/.
[268] "Knik v. Turkey," Application No. 53138/09, ECtHR, 07 June 2016.
[269] Ibid., §47.

Next point is that the national courts may entitle the majority shareholder to file a lawsuit for challenging an agreement executed by his/her company only if the shareholder proves that such agreement violates his or her corporate rights. In the Resolution of the SCU of 01 July 2015 in the case No. 3-327rc15[270] the shareholder introduced an application against limited liability company "Agrocom" and private enterprise "Beta Consulting" for invalidation of contracts. Taking into account that the applicant owns 70% of share capital in the company, it gives grounds to conclude that a shareholder (member) of the company may challenge an agreement made by a company if he/she justifies that the claim concerns infringed corporate rights.

Ukrainian lawyers are quite often faced with the fact that at the time of entry into force of the court decision to recover the debt from the debtor, the latter has already sold all his valuable property. However, as a general rule, a legal entity is liable for its obligations itself (Art. 96 (1) of the CC). That is why, to solve abovementioned problem Ukrainian scholars suggest to apply the veil-piecing doctrine, to hold the managements or shareholders liable for the company's debts[271].

For the first time the ECtHR held the member of the company liable for its debts to the creditor in the case of *Lekic v. Slovenia*[272], as he was involved in the management of the company and was considered an "active" participant.

In Ukraine, the doctrine of "piercing the corporate veil" is embodied in the tools provided by Art. 61 (2) and Art. 34 (6) of the Code of Ukraine on Bankruptcy Procedures (CBP) (came into force on 21 April 2019), namely, the "subsidiary" and "joint and several" responsibility of managers, founders (participants, shareholders) of the debtor[273].

As compared with the latest version of the Law of Ukraine "On restoring a debtor's solvency or recognizing it bankrupt" which was repealed, the CBP did not offer anything new in the legal regulation of subsidiary additional liability of founders (participants, shareholders), debtors' chief executives. But the CBP introduced a new mechanism of joint and several liability of the debtor's manager[274].

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[270] "The Resolution of the Supreme Court of Ukraine of 01 July 2015 in the case No. 3-327rc15," http://search.ligazakon.ua/l_doc2.nsf/link1/VS150527.html.

[271] N. Adamchuk, "Солідарна відповідальність керівника боржника. Механізм та його перспективи," [Solidarity responsibility of the debtor's manager. Mechanism and its prospects], *Юридична Газета* 7, 713 (2020): https://yur-gazeta.com/dumka-eksperta/solidarna-vidpovidalnist-kerivnika-borzhnika-mehanizm-ta-yogo-perspektivi.html.

[272] "Lekic v. Slovenia," Application No. 36480/07, ECtHR, 11 December 2018.

[273] "The Code of Ukraine on Bankruptcy Procedures," came into force on 18 October 2018, https://zakon.rada.gov.ua/laws/show/2597-19.

[274] [274] N. Adamchuk, "Солідарна відповідальність керівника боржника. Механізм та його перспективи," [Solidarity responsibility of the debtor's manager. Mechanism and its prospects], *Юридична Газета* 7, 713 (2020): https://yur-gazeta.com/dumka-eksperta/solidarna-vidpovidalnist-kerivnika-borzhnika-mehanizm-ta-yogo-perspektivi.html.

The joint and several liability of the debtor's manager means that the creditors of such a debtor have the right to demand the fulfillment of the dissatisfied claims in bankruptcy proceedings partially or in full directly from the manager. In other words, the chief executive of the debtor is obliged to pay the amount of the monetary obligation which could not be repaid in the bankruptcy proceedings.

The CBP imposes joint and several liability exclusively on the company executive and leaves the founders (participants, shareholders) of the debtor without consideration. Thus, the CBP allows "beneficiaries" of unfair behaviour of the debtor to avoid responsibility. This is despite the fact that the Article 34 (4) of the CBP obliges to include in the bankruptcy applications, which was filed by the debtor, the decision of the supreme managing body of the company[275].

In such a situation, there is a logical question whether the debtor's manager will bear joint and several liability if he informs the founders (participants, shareholders) of the threat of insolvency, but the supreme governing body of the company will not decide to apply to the court with an application for bankruptcy. On the one hand, the liability of the person occurs only if there is guilt in its actions. On the other hand, the Article 34 (6) of the CBP clearly indicates that the basis for the joint and several liability of the manager is solely the failure to comply with the obligation to file a petition in bankruptcy.

The joint and several liability of the director applies only to the debtor's monetary obligations. The liability to the debtor's manager will apply, if he/she does not file an application to the Economic Court within one month for the commencement of bankruptcy proceedings in the case of a threat of insolvency. Under the threat of insolvency, the legislator understands the situation when satisfaction of the claims of one or more creditors will lead to inability of a debtor to meet its monetary obligations to other creditors in full[276].

The Code does not regulate in detail the procedure for applying to the commercial court for bringing the debtor's manager to joint liability. However, it appears that a creditor may apply to the economic court with a corresponding application at any stage of bankruptcy proceedings, but not before the court recognizes the creditor's claims. In case of discovery of a violation that is the basis for bringing the debtor's manager to joint liability, the court indicates this in the determination, is the basis for the creditors' subsequent application to the said person.

It bears mentioning that corporate disputes mainly arise between a company itself and its participant (a shareholder) regarding the holding of a general meeting, payment of dividends, etc.

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[275] Ibid.
[276] R. Antoniv, "Біс сумнівів" [Devil of doubt], Accessed 13 May 2020, http://dynasty.legal/ua/bes-somnenij/.

and are exhausted by filing a lawsuit against the company by the participant (shareholder) for taking appropriate actions.

At the same time, corporate relationships are essentially much broader than the sphere of regulation of "participant – company". This is explained by the fact that the company realizing its legal capacity in the person of authorized bodies acquires civil rights and obligations and becomes a full participant of civil-law transactions[277].

Of course, in accordance with the legal provisions established in the Article 92 (3) of Civil Code of Ukraine, the body or person who acts on behalf of company is obliged to act in the interests of the legal person (in good faith and reasonably) and not to exceed their powers[278]. That is why the bodies of the legal person have the appropriate duties.

I would like to note that it is not always the management of companies that acts in good faith and in the interests of society. Sometimes there are cases when participants (shareholders) are abroad and cannot properly control the activities of the executive body. Of course, in the constituent documents shareholders (participants) stipulate the necessity to make a decision at the general meeting of shareholders (participants), in particular, to conclude a major transaction or approve such transaction by the company's Supervisory Board. However, the executive body of the company (director) sometimes by fraudulent means enters into agreements, the decision on the conclusion of which should be made at the general meeting of shareholders (participants) or approved by the Supervisory Board. In particular, by understating the value of property sold on behalf of the company (in this case, it receives a corresponding underestimate of the value of property required for the conclusion of the transaction). The director may also enter into several agreements with "related parties" so that such a transaction does not show signs of being significant[279].

Accordingly, it seems appropriate to give examples from court practice when shareholders (participants) in the interests of the company have brought suits against the company's management. Yes, such actions of the company's executive body through abuse of its powers cause losses to the company and, accordingly, violate the rights of shareholders' participants, in particular, to receive profits in the form of dividends.

A common situation is the abuse of authority by a director, the conclusion of agreements or other actions not for the benefit of the company, but in favour of the director or for the benefit

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[277] Ibid.
[278] "The Civil Code of Ukraine", came into force on 16 January 2003, https://zakon.rada.gov.ua/laws/show/435-15.
[279] I. Lavrinenko, "Похідний позов по-українськи," [The Derivative Claim in Ukraine], *Юридична Газета* 5, 503 (2016): https://yur-gazeta.com/publications/practice/korporativne-pravo-ma/pohidniy-pozov-poukrayinski.html.

of third parties. As a result, the company suffers losses in the form of loss of income, loss of profit, receipt of accounts payable, loss of assets and etc[280].

So, one would be logically presuppose that they should hold liable for damages caused to the company by their inappropriate acts. In this connection, the issue of bringing the bodies of a legal entity to justice for claims of owners of corporate rights acquires an outstanding practical relevance.

This way of protecting corporate interests was called a derivative claim. It means that a person (a shareholder or a participant of a company) filing a lawsuit has only corporate rights to companies which rights were violated by improper conduct of management bodies. The participant (the shareholder) who initiates the case is not the direct beneficiary of the dispute, such person is the company itself. However, the interests of the participant are protected by protecting the interests of the company[281].

As a piercing of the corporate veil in the ECHR, due to the derivative claim the shareholder can protect the rights of companies which indirectly effect his or her interests.

In light of this, the derivative complaint is a claim to indemnify for damages caused to a company (a joint-stock company, a limited liability company) by company's officers. Such claim is filed by shareholders (participants) in the interests of the company and on its behalf[282].

From May 1, 2016 due to the Law of Ukraine "On Amendments to Certain Legislative Acts on Protection of Investors' Rights" shareholders/participants of Ukrainian companies were able to apply to the court with derivative claims[283].

A shareholder (a participant) of a legal entity which owns 10 or more percent of the company's share capital may apply to court with a claim for compensation of damage to the company[284].

Such complaints may be filled against the following officials: director; members of the executive board, supervisory board, audit commission; and other officials determined by the company's charter. Such claims may be initiated, if an official: acted in excess of or abused his/her powers, acted in violation of the procedure for approving certain transactions, provided false information, which was necessary for approving the transaction by the shareholders' meeting or

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[280] Ibid.
[281] Ibid.
[282] Ruslan Redka, "Neutralization of Harm: How to Punish a Dishonest Director," Mind, Accessed 03 May 2020, https://mind.ua/openmind/20207634-nejtralizaciya-shkodi-yak-pokarati-nesumlinnogo-direktora .
[283] "Law of Ukraine "On Amendments to Certain Legislative Acts on Protection of Investors' Rights," Verhovna Rada of Ukraine, Accessed 03 May 2020, https://zakon.rada.gov.ua/laws/show/1255-18.
[284] Ruslan Redka, "Neutralization of Harm: How to Punish a Dishonest Director," Mind, Accessed 03 May 2020, https://mind.ua/openmind/20207634-nejtralizaciya-shkodi-yak-pokarati-nesumlinnogo-direktora.

the supervisory board, failed to take certain actions when such actions were required. This list is not exhaustive[285].

Between May 2016 and November 2019, more than 100 derivative claims were submitted to the courts, but most of them were denied. The fact is that for the successful consideration of the case on the derivative claims it is necessary to prove the presence of four elements at once: wrongfulness of actions of company official's; the presence of actual losses; a causal link between the actions of an official and losses; the fault of the company's official[286].

In case No. 914/1619/18[287] the founder of a company brought a lawsuit in the interests of the limited liability company against the director of a company for recovery of losses incurred by the latter in the amount of 1270893.00 UAH. The claim is motivated by the fact that the defendant by his inaction caused damage to the as he did not provide the availability of primary documents, as a result of which the company had a debt to the state in the form of non-payment of taxes. The SCU found that the amount of the claim consists solely of the tax obligations of the company, and any punitive and/or financial sanctions, which can be interpreted as losses, are not subject to recovery.

The amount of funds that the company as a taxpayer had to pay to the State budget was not a loss of the company, but it was a mandatory payment that each taxpayer must pay in accordance with the provisions of the Constitution of Ukraine and the Tax Code of Ukraine. The claimant did not provide any evidence of actual losses.

In such circumstances, the SC reasoned that the director should compensate the damages to the company.

In November 2019, the Supreme Court (Case No. 910/ 20261/16)[288] finally established a judicial precedent for derivative claims in favour of a company.

Limited Liability Company Gas resource appealed to the national court with a claim for recovery of UAH 4344 960.64 from the director of a company. The facts of case are that the director refused from the license issued to the limited liability company in favour of another company where he was the owner. Having analysed such circumstances, the SC noted that the director of the LLC Gas resource had acted not in the interests of this company, that is why he was ordered to recover the losses in the amount of the cost for obtaining the license from the director.

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[285] Ibid.
[286] Ibid.
[287] "The Resolution of the Supreme Court of 27 August 2018 in the case No. 914/1619/18," http://reyestr.court.gov.ua/Review/83876275.
[288] "The Resolution of the Supreme Court of 26 November 2019 in the case No. 910/20261/16," http://reyestr.court.gov.ua/Review/86333859.

The SC demonstrated the existence of all components of an economic offence to held the director liable: the illegal behavior of the director, in particular, he gave the consent for the reissuance of permission to another legal entity; the presence of losses in the amount of UAH 1509600; existence of a causal link between the illegal behaviour of the defendant and the losses; the guilt of the defendant as the company's official which is expressed in excess of power[289].

But in case No. 910/5100/19[290] the Supreme Court dismissed the member's complaint against actions of the director of the limited liability company.

The company "Teplobudinvest", as the founder (the participant) of the Limited Liability Company "South Ukrainian Soy Company" where it owned 90% of the share capital submitted an application against the director.

The claims are justified by the fact that the defendant, being the director of the Limited Liability Company during the period from 01.01.2017 to 29.08.2017, received cash from the current account of the company by means of a corporate payment card, but did not report on the use of funds, which, according to the plaintiff, indicates that the defendant received funds not for use in the economic activity of the company, but for its own needs, which caused damage to the company on the amount claimed for recovery. Reasons for the claim concerning losses as a result of the director's withdrawal of cash by means of a corporate bank card have been dismissed by the courts due to the lack of evidence of unlawfulness of the director's actions and lack of evidence of losses incurred by the company[291].

In the Resolution of the Grand Chamber of the Supreme Court of Ukraine from 08.10.2019 in case No. 916/2084/17 it was indicated that signing of the contacts by the body of executive power without the consent of the General Meeting of this company may violate the rights and interests of the company itself, rather than the corporate rights of the claimant, as the General Director acted on behalf of the company, not their participants. Under the contract concluded by the company, rights and obligations are acquired by such company as a party to the contract. At the same time, the legal position (scope of rights and obligations) of the company's direct participants does not change in any way[292].

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[289] Ibid.
[290] "The Resolution of the Supreme Court of 07 May 2020 in the case No. 910/5100/19," http://www.reyestr.court.gov.ua/Review/89109031.
[291] Ibid.
[292] "The Resolution of the Supreme Court of 08 October 2019 in the case No. 916/2084/17," http://www.reyestr.court.gov.ua/Review/84911545.

The authority to act on behalf of a legal entity is an opportunity to create, change, terminate civil rights and obligations of a legal entity[293]. Such authority is not included in the corporate rights of the participant of the legal entity.

That being said that the GCSC took into account the case law of the ECtHR, specifically the case of *Credit and Industrial Bank v. the Czech Republic,* Application No. 29010/95; case of Terem LTD, Chechetkin and Olius v. Ukraine, Application No. 70297/01; case of Feldman and Slovyanskyy Bank v. Ukraine, Application No. 42758/05.

In addition, in case No. 916/2084/17, the Supreme Court did not take into account and did not point out the exceptional circumstances in which a shareholder (participant) in a legal entity may sue in the interests of a legal entity.

The legal position of the European Court of Human Rights should be adequately supported at the level of national legislation and jurisprudence. The statement that the sole owner of the legal entity (including the state or other legal entity and individual), does not exercise any real influence on the activities of such legal entity and such legal entity is not an instrument of its owner to achieve the goals defined by it, should be considered illusory and such that does not reflect the real situation. The same statement should be applied in cases where there are several shareholders (participants), when one of them has a share in such legal entity allows him de facto to make all decisions in the company[294].

To sum up, Ukrainian courts try to implement the doctrine of the veil-piercing, using the case law of the European Court of Human Rights. First of all, the Supreme Court gave the opportunity to shareholders to submit an application in the interests of a company, but only in cases when such rights are granted by law. Very often the court grants the right to shareholders of the bank to appeal against the decision of NBU concerning the liquidation procedure. Some scholars emphasize that the joint and several liability provided in new Code of Ukraine on Bankruptcy Procedures allows to pierce the corporate veil to hold the company's officer liable if he does not file an application for commencement of insolvency proceedings against the company.

The Ukrainian legislation uses derivative claims, complaints which allow to indemnify for damages caused to a company by company's officers, but the process of proving the guilt of a latter is very complicated. That is why there are only one positive precedent. Such complaints are similar to mechanism of the veil-piercing, because in such way the shareholders have a possibility to protect their indirect interests which was violated because of infringements the company's rights.

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[293] "The Civil Code of Ukraine", came into force on 16 January 2003, https://zakon.rada.gov.ua/laws/show/435-15.
[294] Roman Sabodash, "Piercing the Corporate Veil in the Practice of the Ukrainian Supreme Court and the European Court of Human Rights (comparative analysis)," *Visegrad Journal on Human Rights.* 6, 3 (2019): 159.

CONCLUSIONS

1. The ECtHR used the piercing of the corporate veil in two ways. Firstly, the Court can disregard the company's corporate personality for granting the right to shareholders to submit an application for protection the indirect interests because of violation of company's rights. Secondly, the veil-piercing can be used as a mechanism for holding shareholders liable for company's obligations.

2. There is only one example in court practice of holding a shareholder liable (*Lekic v. Slovenia*). The use of this measure should be provided in national legislation and correspond to principles of efficiency of application and fair balance between private and public interests.

3. The shareholders have the possibility to protect their interests in the ECtHR due to the concept of "indirect victimhood", which afford "victim" status to persons who have not themselves been interfered with, but are closely related to the person against whom the disputable measure was directed.

4. There are a lot of grounds used in the ECtHR case law when the company's corporate personality can be disregarded for protection of shareholder's interests in a company: the conflict of interests between the shareholders and the managements of the company; the degree of control which shareholders exercise over the company; the severity of harm that shareholders suffered because of government's actions; the level of impact of violations of company's rights on shareholders' interests; the level of dependency of a shareholder from the company (existence of other source of income).

5. The main grounds for veil-piercing in the analysed states are undercapitalization, mixing of assets and spheres between the shareholders and the companies, illegal actions of company's participants etc. The piercing of the corporate veil occurs only as an exception, the general rule remains the principle of separation between shareholders and the company.

6. The State as a shareholder or owner of the company can be hold accountable for company's obligations. It can possible if the company will be considered as governmental organization by the ECtHR.

7. The ECtHR case law affects the decisions of Ukrainian courts regarding the application of the veil-piercing. The Ukrainian courts applied the veil-piercing, but in specific cases: when it is granted by the law; when shareholders appeal the decision of the NBU on liquidation procedure; when a shareholder owns the majority shareholding in a company. Ukrainian courts also use derivative claim to identify the company for damages caused by the

director of the company. I think it could be seen as an alternative to the veil-piercing to protect shareholder interests in the company.

RECOMMENDATIONS

1. Considering the fact that the doctrine of the piercing of the corporate veil is not applied in the Ukrainian legislation (only Ukrainian courts use this doctrine in exceptional circumstances based on the ECtHR case law) it is proposed to implement some provisions into the Civil Code of Ukraine, the Law of Ukraine "On Limited and Additional Liability Companies", the Law of Ukraine "On Joint Stock Companies" that would stipulate that in exceptional cases the liability of a legal entity may extend to its founders (shareholders), whose actions have resulted in negative consequences for the legal entity.

2. Amendments into the banking legislation, in particular to the Article 79 of the Law of Ukraine "On Banks and Banking", and expanding the circle of persons who may appeal against the NBU's decision, would be recommended, namely: "shareholders of the company with more than 10% of the share capital should be entitled to file a lawsuit in cases when the NBU's decision violates their rights and interests".

As for today, the article does not provide the possibility to appeal the decision of the NBU's regarding the liquidation procedure of the bank by its shareholders. The above-mentioned article of the Law of Ukraine "On Banks and Banking" provides the opportunity only for by the bank or persons covered by the supervisory activities to appeal the NBU decision which is not possible after the revocation of the license and the start of the liquidation procedure of the bank because after the revocation of the banking license such legal entity no longer has the status of a banking institution. At the same time, in accordance with the court practice of Ukraine (taking into account the case law of the ECtHR), the courts grant the right to shareholders who own 10 or more shares in the authorised capital of the company to submit an application against the NBU decisions.

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ABSTRACT

The master thesis is dedicated to the doctrine of corporate veil in case law of the European Court of Human Rights. It describes the history of origin and formation of the veil-piercing in the ECtHR, analyses the approaches to the doctrine in the Member States of the Council of Europe.

The master thesis reviews two main purposes of the veil-piercing: for protection of shareholders' interests in a company and for holding them liable. It considers the possibility to hold the State (as an owner or a majority shareholder) liable for the company's obligations.

The work analyses the impact of the ECtHR case law on the Ukrainian court practice.

Keywords: corporate veil, piercing of the corporate veil, shareholders' rights, shareholders' liability, ECtHR.

SUMMARY

The master thesis concerns the doctrine of corporate veil in the case law of the European Court of Human Rights. The work describes the history of the origin and the formation of the corporate veil doctrine and its piercing in the ECtHR; the attitude of the European Court of Human Rights to the corporate veil in making decisions and reasoning for application; the analysis of the approaches to the doctrine in the Member States of the Council of Europe.

The work describes main situations of the piercing the corporate veil used in ECtHR case law: for protection of shareholders' interests in a company and for holding them liable. It analyses and highlights possible reasons when shareholders can apply to the Court for protection their interests in the company, in particular: the conflict of interests between the shareholders and the managements of the company; the degree of control which shareholders exercise over the company; the severity of harm that shareholders suffered because of government's actions; the level of impact of violations of company's rights on shareholders' interests; the level of dependency of a shareholder from the company (existence of other source of income).

The master thesis analyses the first successful case when the shareholder was held liable for the company's debts to the creditor. This measure can be applied to shareholders if such conditions are followed: the legality of tool should be enshrined by national legislation; the shareholder has the opportunity to foresee the risk of a liability; the fair balance between private and public interests is maintained in applying such measure.

Also, the master thesis describes the grounds for holding State liable for company's obligations in the context of the veil-piercing. It can be possible if the Court indicates the lack of institutional and operational activity of a company from the State and the company is considered as a governmental organization under the Article 34 of the ECHR.

The works reviews the impact of the ECtHR case law on court practice in Ukraine, indicates possible situations to application of the veil-piercing doctrine, namely when shareholders appeal the decision of the NBU on liquidation procedure; when a shareholder owns the majority shareholding in a company.

HONESTY DECLARATION

15/05/2020

Vilnius/Kyiv

I, Tetiana Zavalko,

student of

(name, surname)

Mykolas Romeris University and Taras Shevchenko National University of Kyiv (hereinafter referred to University),

(Faculty /Institute, Programme title)

confirm that the Master thesis titled

"The Corporate Veil in the Case Law of the European Court of Human Rights"

:

1. Is carried out independently and honestly;
2. Was not presented and defended in another educational institution in Lithuania, Ukraine or abroad;
3. Was written in respect of the academic integrity and after becoming acquainted with methodological guidelines for thesis preparation.

I am informed of the fact that student can be expelled from the University for the breach of the fair competition principle, plagiarism, corresponding to the breach of the academic ethics.

(signature) *(name, surname)*