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## **A Shareholder Activity: Types of Control, Gaining and Using it**

*The article analyzes control as a methodical mean of practical implementation of shareholder activism, the ways of obtaining it and forms of use in the corporate-legal dimension.*

*In corporate law, control is understood in several directions. Its corporate sense leads to the mutual separation of ownership and control, management and holding a controlling stake by a shareholder under the authority of the JSC.*

*The three-level classification of control is based on positive corporate law, which is developed by the best international practices of corporate management and the requirements of capital market law. The research thesis is centered on the legal, and in certain cases, economic categories of a shareholder controlling stake.*

*In the article, the term “control” is analyzed with regard to its accession and use by a person (a shareholder) inclined to take control over the main material and procedural transactions and the control premium. The method of comparative legal research, systematic and teleological definition of the norm makes it possible to cover the basic scientific range of control in the JSC.*

**Keywords:** *a shareholder activism, control, controlling stake, controlling premium, controlling shareholder, private benefit of control.*

### **1. Introduction**

A subjective characteristic element of corporate law is that it is always possible to make a change in the legal or financial functional aspect of a joint-stock company (and not only) – dismissing a head person from the position and replacing with another person, adjusting capital structure, altering the brand name and the subject of activity, making a decision to implement a fundamental corporate change, amending the statute, reorganizing or even abrogating, etc. According to the positive law, decisions related to the essential functionality of the JSC must be made by the shareholders, which is formally called a decision of the general meeting.<sup>1</sup> In the JSC the fundamental corporate change is based on the practically realized result of the control. In corporate law, control is perceived in several dimensions. The main vector of the corporate concept of control is directed towards the separation of ownership and control, management and possession of a controlling stake by a shareholder under the authority of the JSC.<sup>2</sup>

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<sup>1</sup> French D., Mayson S., Ryan C., *Company Law*, 26<sup>th</sup> ed., Oxford University Press, 2010, 376.

<sup>2</sup> The scientific analysis will mainly be devoted to the corporate content of the acquisition-use of the controlling stake.

With the three-level classification of control, positive corporate law is based on the best international practices of corporate governance and the law requirements of capital market. The research thesis is focused on the legal, economic, and in certain cases – financial categories of a shareholder’s controlling stake. In the article, the term “control” is analyzed with regard to its accession and use by a person (a shareholder) inclined to take control over the main material and procedural transactions and the premium of controlling stake. The method of comparative legal research, systematic and teleological definition of the norm makes it possible to cover the basic scientific range of control in the JSC. As a whole, the activism realized through the use of a shareholder ‘s controlling stake can contradict the concept of separation of ownership and control and the basic thesis<sup>3</sup> of making decision by the authorities, losing the demarcation line between the managerial control of the corporation and an investor’s ownership<sup>4</sup>, the characteristic of a public joint-stock company. A risk is always a threat to an investment, and shareholder activism is an immanent attribute of being a partner and controlling the JSC. The function of balancing the results of the practical implementation of investment risk and control is assigned to the corporate law within the scope of its positive legal manifestation or the principles of the best corporate management. Dogmatic-theoretical analysis is an appropriate method of forming research results.

## **2. The Definition of Corporate Control**

The basis of modern special private law is property and the private autonomy of the will<sup>5</sup>. In a private legal relationship, the result of free will “to dispose” property for the benefit of the entrepreneurial society is called an investment. The investment can be classified into direct and portfolio investments. In the national space of different countries, the so-called direct investment<sup>6</sup>, which has an advantage, is in fairly consistent with the concept of disposal of property in favor of the entrepreneurial society. The organized management of the entrepreneurial society in the legal form is a priority for an investor that creates many corporate mechanisms of control of the JSC’s capital, and considering the functionality and needs of the JSC, leads to their activation.<sup>7</sup>

The dilemma of taking control over the JSC capital is the result of realizing the issue with the same characteristic by two different bodies. The control mechanisms are differentiated according to the bodies of the JSC. Traditionally, the control is considered by the general assembly of shareholders and the governing body/management which means using some control mechanisms by shareholders, while the management ensures other forms of control.<sup>8</sup> As a result, a dual perception of control creates a dilemma over its concept.

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<sup>3</sup> *Bainbridge S.*, Shareholder Activism and Institutional Investors, Research Paper No. 05-20, 2005, 4-10.

<sup>4</sup> *Armour J., Hansmann H., Kraakman R., Pargendler M.*, What is Corporate Law? In the collection: The anatomy of corporate law: comparative and functional approach, translators: *Kochiashvili A., Maisuradze D.*, (ed.) *Gabelia T.*, 3<sup>rd</sup> ed., Tbilisi, 2019, 19-22 (in Georgian).

<sup>5</sup> *Chanturia L.*, Commentary on the Civil Code, Book I, *Chanturia L. (ed.)*, Tbilisi, 2017, first article, Rn. 5, 8, 21, 22 (in Georgian).

<sup>6</sup> OECD, International Investment Law: Understanding Concepts and Tracking Innovations, 2008, 46-48.

<sup>7</sup> *Fairfax M. L.*, Shareholder Democracy, Carolina Academic Press, 2011, 29-52.

<sup>8</sup> *Palmiter A. R.*, Corporations, Examples and Explanations, 5<sup>th</sup> ed., Aspen Publisher, 2006, 447.

Regulating control mechanisms at the normative level is a facilitator of a shareholder activism. The shareholder's desire and venture to gain and have a special functional and strategic role in the corporate management process of the JSC is called shareholder activism.<sup>9</sup> The controlling stake creates a corporate foundation for the full realization of a shareholder activism, which converts it into a source of generating private benefit (Private Benefit of Control)<sup>10</sup>. The practical modeling to separate control from ownership reveals how the managing authority of the invested property is given to a legal entity, the JSC, whose leading process creates the risk of opportunistic behavior of management.<sup>11</sup> The balancing function of the mentioned risk, in fact, is based on two standards of corporate legal behavior: fiduciary liability and the so-called strategic and exclusive authority and a form of general assembly.

To classify the forms of control, it is necessary to analyze the levers of investment supervision. There are direct and indirect forms of intra-organizational monitoring of JSC capital. The indirect mechanism is conceptually inevitable due to the centralized management<sup>12</sup> and combines the supervision and monitoring of the management activities and corporate management strategy. The beneficiary of both forms of the indirect mechanism is a shareholder: the shareholder receives the result of the management behavior in the JSC. On the other hand, the direct mechanism of capital supervision is within the competence of the general assembly. The strategic and exclusive competence of the superior body designs the decisive elements<sup>13</sup> of control taken by an investor. In other words, the term “control” is related to both the indirect control of the management and the strategic model of corporate governance of the JSC, and the direct control of an investment.<sup>14</sup>

The full realization of shareholder activism depends on the extent of the shareholder's right to control: if the JSC shareholder structure is fragmented, which means there is no a single shareholder or group of shareholders managing a controlling stake, then shareholder activism, as a rule, cannot be practically achieved. But if a shareholder or a group of shareholders acting on the basis of an agreement owns controlling stake, then their relationship with the JSC falls within the regulatory area of the fiduciary liability standard. The capacity of a shareholder to exercise direct control is balanced by the loyalty liability<sup>15</sup> just as the opportunistic action of management is “insured” by the fiduciary liability standard.<sup>16</sup>

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<sup>9</sup> *Fairfax M. L.*, *Shareholder Democracy*, 2011, 146-149.

<sup>10</sup> *Allen T. W., Kraakman R., Subramanian G.*, *Commentaries and Cases on the Law of Business Organization*, 4<sup>th</sup> ed., Wolter Kluwer Law & Business, 2012, 417.

<sup>11</sup> *Makharoblishvili G.*, *Implementation of Fundamental Changes in the Structure of Capital Companies Based on Corporate-legal Actions (acquisition-merger)*, Tbilisi, 2014, 72-75 (in Georgian).

<sup>12</sup> *Armour J., Hansmann H., Kraakman R., Pargendler M.*, *What is Corporate Equity? In the Collection: Anatomy of Corporate Law: Comparative and Functional Approach*, translators: *Kochiashvili A. Maisuradze D.* (ed.) *Gabelia T.*, 3<sup>rd</sup> ed., Tbilisi, 2019, 16-19 (in Georgian).

<sup>13</sup> *Hansmann H.*, *Ownership of the Firm*, in: *Corporate Law and Economic Analysis*, *Bebchuk A. L.*, (Edit.) Cambridge University Press, 1991, 290.

<sup>14</sup> *Schuster E. P.*, *Efficiency in Private Control Sales – The Case for Mandatory Bids*, Society and Economy Working Papers 08/2010, 2010, 2-3.

<sup>15</sup> *Cox J. D., Hazen T. L.*, *The Law of Corporations*, Vol. 2, 3<sup>rd</sup> ed., St. Paul, 2010, 332-339.

<sup>16</sup> *Palmiter A. R.*, *Corporations, Examples and Explanations*, 5<sup>th</sup> ed., Aspen Publisher, 2006, 289.

The right of a shareholder to control is diversified in different directions. The shareholder takes control over the charter of the JSC, which he can change. As a rule, the corporate power is divided and balanced between shareholders and management by the charter. Management is selected by a shareholder, and the scope of power is determined by the charter and the employment contract. A classic manifestation of formal shareholder control over management is the right to dismiss<sup>17</sup> them which is compounded by such a high level construct of control over management corporate behavior as the corporate control over market. The corporate logic limits any behavior of the management related to the JSC by the standard of fiduciary liability that requires optimally managing the JSC which ensures the welfare<sup>18</sup> of a shareholder and increases his economic or financial benefits<sup>19</sup> from the JSC. Beyond the scope of the shareholder's ability to keep control, it is important to clarify the authority for an approval of the transaction containing the conflict of interest<sup>20</sup> which can be considered as a type of control over the management.<sup>21</sup>

Analyzing control can result in turning out several interrelated issues that need to be clarified: a controlling shareholder, the method of acquiring controlling stake in a joint-stock company, specific transactions aimed at obtaining control (LBO/MBO), the benefit of private control, categorization of the forms to use it, selling control stock, purchasing premium control.

### **3. Controlling Shareholder**

The corporate foundation for realizing strategic direct control of JSC is created by the presence of controlling stake<sup>22</sup> in the possession of a shareholder or a group of shareholders. The terms control and controlling stake, under changes of actual circumstances, acquire a different meaning. A classic example of influencing the decision of the general meeting of shareholders is the De Jure control of an decision made by holding a controlling stake<sup>23</sup>, but there is also a hypothetical possibility of actual control, depending on the structure of the JSC shareholders: If the shareholder structure is fragmented/dispersed, even a significantly smaller share of ownership can provide taking control over

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<sup>17</sup> *Cox J. D., Hazen T. L.*, The Law of Corporations, Vol. 2, 3<sup>rd</sup> ed., St. Paul, 2010, 339-342. According to the legislation of Georgia, the general meeting of shareholders has the right to withdraw a member of the governing body before the deadline, without specifying the basis. see Law of Georgia “On Entrepreneurs”, Article 44, Clause 3, Article 184, Clause 1, Sub-Clause h), the Legislative Herald, 04/08/2021.

<sup>18</sup> The head should act for the benefit of the shareholder. see *Zahn v. Transamerica Corporation*, 162 F.2d 36 (3d Cir. 1947) (in Georgian).

<sup>19</sup> *Davies P.*, Introduction to Company Law, 2<sup>nd</sup> ed., Oxford University Press, 2010, 265.

<sup>20</sup> *Makharoblishvili G.*, Functionalization of the Conflict of Interest Construction in the Context of JSC Corporate Management, Journal of Law, No. 1, 2022, 78-86 (in Georgian).

<sup>21</sup> *Allen T. W., Kraakman R., Subramanian G.*, Commentaries and Cases on the Law of Business Organization, 4<sup>th</sup> ed., Wolter Kluwer Law & Business, 2012, 292-294. In turn, a controlling shareholder can appear to be in a conflict of interest when entering into an agreement with his own corporation, as the existence of minority shareholders requires that the transaction containing the conflict of interest meet the test of fairness. see *Sinclair Oil Corporation v. Levien*, 280 A.2d 717 (Del. 1971).

<sup>22</sup> *Pinto R.A.*, Understanding Corporate Law, 3<sup>rd</sup> ed., Lexisnexis, 2009, 277.

<sup>23</sup> In general, the controlling stake is equal to “50% of voting shares + 1 vote.”

the decision of the general meeting.<sup>24</sup> The concept of “locking minority” corresponds to the mentioned reality. Appropriately, a controlling shareholder exercises in two capacities. The first is the ownership of a controlling stake, which is directly related to the percentage rate, and the second is control<sup>25</sup> that depends on the actual state of the shareholder structure.<sup>26</sup> The controlling stake and the form of control over a controlling shareholder are not only distinguished by actual status and percentage amount, but they are also differentiated considering corporate benefits and value categories. Using the controlling stake or the actual control has its monetary and non-monetary<sup>27</sup> benefits that are immanent results of keeping control.<sup>28</sup> A controlling shareholder gains the capital arising in the way of taking control and it is generated by its premium value. In contrast, the share owned by the minority shareholder is actually subject to the same amount of discount which is the capital gain of the controlling shareholder in the context of the premium value of the share.<sup>29</sup> In other words, the private benefit of controlling shareholder and its volume which includes the premium value<sup>30</sup> of controlling stake, is formed at the cost of discounting minority shareholder’s share.<sup>31</sup>

An additional component of the deal is that control kept by a “locking minority”<sup>32</sup> or owning a controlling stake, has a control premium, which is calculated while determining its value in case of

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<sup>24</sup> For example, to decide who will be elected as a member of the governing body. See *Gevurtz F. A.*, Corporation Law, West Group, 2000, 630 (in Georgian).

<sup>25</sup> The definition of control is included in the legislation on securities of Georgia, according to which, “control (significant share) is a situation when a person or a group of related persons owns more than 10% of the company's votes or can otherwise control the company.” See Law of Georgia “On the Securities Market”, Article 2, Clause 20, Parliamentary Office 1(8), 24/12/1998. However, this definition of control serves the actual purpose of trading in the securities of an accountable enterprise and has little to do with the content of control in the corporate-legal category. Unlike Georgia, US Securities and Exchange Commission Rule 405 defines control without specifying the percentage of votes (in Georgian): “The term control (including the terms *controlling*, *controlled by* and *under common control with*) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.” ob. SEC Rule 501 (b), 17 C.F.R. §230.501(b), 2008. The concept of control defined by the legislative record of US securities trading is more factually consistent with the concept of “control” of the Georgian corporate law than the definition of control presented by the “Securities Trading” law of Georgia.

<sup>26</sup> *Cox J. D., Hazen T. L.*, The Law of Corporations, Vol. 2, 3<sup>rd</sup> ed., St. Paul, 2010, 326.

<sup>27</sup> *Schuster E. P.*, Efficiency in Private Control Sales – The Case for Mandatory Bids, Society and Economy Working Papers 08/2010, 2010, 15.

<sup>28</sup> *Sepe S.*, Private Sale of Control: Why the Europe mandatory Bid Rule is Inefficient, Arizona Legal Studies, Discussion Paper No.10-29, 2010, 8-13.

<sup>29</sup> The amount of the premium value of the control share is equal to the amount of the discounted value of the minority shareholder.

<sup>30</sup> Regarding the theoretical connection between the premium value and the private benefit of control, see *Dyck A., Zingales L.*, Private Benefits of Control: An International Comparison, The Journal of Finance, Vol. 59, No. 2, 2004, 543-544.

<sup>31</sup> *Sepe S.*, Private Sale of Control: Why the Europe mandatory Bid Rule is Inefficient, Arizona Legal Studies, Discussion Paper No.10-29, 2010, 6-10.

<sup>32</sup> *Gilson R.*, Controlling Shareholders and Corporate Governance: Complication the Comparative Taxonomy, Law Working Paper №49/2005, 2005, 6.

selling control stock.<sup>33</sup> But, there arises a question, if the controlling premium is equal to the amount of the discounted value of the minority shareholder's share, then how the share providing the actual control of the minority shareholder can have a control premium. The question is rhetorical and the answer can be furnished by analyzing the monetary and non-monetary private benefits provided by the control stock or the actual state.

The concept of a controlling shareholder determines the form and method of operating. Exercising control is ensured by positive law, which includes both making internal organizational decisions of the JSC (a change in the charter, approval of a transaction containing a conflict of interest, etc.), and external legal decisions (transaction with a holding company, sale of the JSC or purchase by the controlling shareholder<sup>34</sup>, etc.).

#### **4. Gaining Control and its Types**

Gaining De Facto control can be ensured through the majority of votes or in the following two main types of forms: purchasing outstanding shares and unifying votes by agreement of shareholders.<sup>35</sup> The formal way to gain control is making an agreement between shareholders. Its main characteristic is converting the interests of minority into a majority and zero economic value<sup>36</sup>: the formation of shareholders group does not require any payment<sup>37</sup>, however, shareholders can be charged of private monetary and non-monetary costs, as it is in case of owning controlling stake by one person. It is necessary to consider that by the shareholders' agreement the rights and liabilities are transferred to the purchaser.<sup>38</sup> Gaining control through the purchase of shares takes several distinct forms. The purchase of shares is a broad conceptual category and can be realized at the stage of setting up JSC with the premise of such a proportional distribution of shares that a controlling stake can be obtained while establishing JSC.

Gaining control in the process of functioning JSC is different from the stage of its establishment, which is derived from one of the characteristic elements of JSC, a free circulation of

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<sup>33</sup> Cf. *Kikvadze G.*, Mandatory Tender Offer, in the collection: Collection of Corporate Law, Book III, *Burduli I. (ed.)*, 2015, 69 (in Georgian).

<sup>34</sup> It means the institution of compulsory sale of shares and the expulsion of the minority shareholder based on it. For the example of Georgia, see Law of Georgia "On Entrepreneurs", Article 225, Legislative Gazette, 04/08/2021 (in Georgian).

<sup>35</sup> Law of Georgia "On Entrepreneurs", Article 177, Legislative Herald, 04/08/2021 (in Georgian).

<sup>36</sup> The mentioned circumstance follows an exception: gaining a control stock gives rise to a large shareholder. Increased volume of investment is less diversified that contributes to the growth of capital expenditure. see *Dyck A., Zingales L.*, Private Benefits of Control: An International Comparison, *The Journal of Finance*, Vol. 59, No. 2, 2004, 541.

<sup>37</sup> Unifying common interests of voting if we hypothetically assume that voting rights can be alienated in exchange for compensation, there will be a separation of ownership and control provided by the share, which would be contrary to public policy. See *Gevurtz F. A.*, Corporation Law, West Group, 2000, 486-488 (in Georgian).

<sup>38</sup> Law of Georgia "On Entrepreneurs", Paragraph 2 of Article 177, Legislative Gazette, 04/08/2021 (in Georgian).

shares.<sup>39</sup> The free circulation of shares is the main corporate mechanism for JSC functioning and capital raising. The share can be purchased either over private negotiation with a shareholder outside the stock exchange or through a tender offer.<sup>40</sup> The target of the last two forms of gaining control is a shareholder.<sup>41</sup>

Soliciting a tender offer<sup>42</sup> to shareholders is effective when the shareholder structure is fragmented, while private negotiation facilitates the acquiring of control in case of taking it by a single shareholder.<sup>43</sup> The mentioned forms of obtaining control have an economic value that determines its cost.

Gaining control by purchasing shares is also possible through specific corporate transactions. In a wide sense, while taking targeting audience, the focus is made on buying shares but in a classic perception, the merger is not considered as a form of purchase of shares.<sup>44</sup> The fundamental corporate combination process of the merger is initiated and carried out with the consent and involvement of the management of the JSC. The inclusion of the target audience is a type of a statutory reorganization, which is essentially different from the private negotiations or tender offers.<sup>45</sup> There are two fundamental differences between the merger acquisition of the target JSC and the purchase of shares: the realization of the merger requires the general involvement and consent of the JSC as a legal entity, and during the purchase of a share the trade transaction is made individually with a shareholder and not with a corporation, which does not require the consent of the board.<sup>46</sup>

A JSC, as a legal entity, owns assets, and it belongs to shareholders. A simple method of taking control over the property is to gain control by purchasing shares.<sup>47</sup>

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<sup>39</sup> *Armor J., Hansman H., Kraakman R., Pargendler M.*, What is Corporate Equity? In the selection: Anatomy of Corporate Law: Comparative and Functional Approach, (translators) *Kochiashvili A., Maisuradze D.* (ed.), *Gabelia T.*, 3<sup>rd</sup> ed., Tbilisi, 2019, 14-16 (in Georgian).

<sup>40</sup> *Schuster E. P.*, Efficiency in Private Control Sales – The Case for Mandatory Bids, Society and Economy Working Papers 08/2010, 2010, 3.

<sup>41</sup> A tender offer is a “public offer” made to shareholders to purchase all or nearly all of the securities with the goal of acquiring control of the target company. See *Cahn A., Donald D. C.*, Comparative Company Law, Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA, Cambridge University Press, 2011, 755-756.

<sup>42</sup> *Schuster E. P.*, Efficiency in Private Control Sales – The Case for Mandatory Bids, Society and Economy Working Papers 08/2010, 2010, 4-7. Cf. Law of Georgia “On the Securities Market”, Article 15, Parliamentary Office 1(8), 24/12/1998.

<sup>43</sup> *Sepe S.*, Private Sale of Control: Why the Europe Mandatory Bid Rule is Inefficient, Arizona Legal Studies, Discussion Paper No.10-29, 2010, 6-7.

<sup>44</sup> The so-called Acquisition is used in a broad sense and includes “share acquisition” and “asset acquisition”, which may include money (cash-for-asset-acquisition, cash-for-stock-acquisition) or shares (stock-for-asset-acquisition, stock-for-stock-acquisition). See *Makharoblishvili G.*, Implementation of Fundamental Changes in the Structure of Capital Companies Based on Corporate-legal Actions (acquisition-merger), Tbilisi, 2014, 115-128 (in Georgian).

<sup>45</sup> *Gevurtz F. A.*, Corporation Law, West Group, 2000, 671.

<sup>46</sup> It is logical that the issue concerns an “open”, “public” joint-stock company, whose shares are admitted to public trading on the secondary capital market and cannot be vinculated (in Georgian).

<sup>47</sup> *Cahn A., Donald D. C.*, Comparative Company Law, Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA, Cambridge University Press, 2011, 627.

The subjectively atypical types of share purchase transactions are the Leveraged Buy Out and buying back the shares by the management (Management Buy Out)<sup>48</sup>. Both forms of share purchase compound common strategic elements: a loan is a money source for share transaction. While making a “leveraged” acquisition, JSC is sold to a small group of investors<sup>49</sup> including the executive bodies of the company, as a rule. According to the main trade term, the capital required for financing the transaction is a minimum equity share of own capital, and a maximum amount of credit. The property of the target audience (LBO) is used to secure the loan taken from the borrower.<sup>50</sup>

A slightly modified version of a “leveraged” buyout is a management stock buyout (MBO).<sup>51</sup> Its activation drives the target JSC for a defense against a hostile takeover bid. A hostile takeover bid can also be presented through a “leveraged” cash offer.<sup>52</sup> While the management regains a company’s shares, the board performs the process of buying out<sup>53</sup> instead of investors. Atypical transactions designed for taking control through the purchase of the shares cause problems of representation<sup>54</sup>: there arises a conflict of interests between management and shareholders, and controlling persons impose additional credit obligations on the company, which poses a threat to creditors and employees.<sup>55</sup>

The purchase of shares is a simple method of taking control over a joint-stock company, which also considers specific cases in the sub-structural dimension. Their further detailed analysis is beyond the scope of the work.

## **5. The Use of Control in the Context of Decision Making**

The presence of a controlling shareholder or a group of shareholders in a JSC means taking De Jure control over the decisions of the general meeting of shareholders. The liability of loyalty protects shareholders against dishonest actions because they can use their power of control and the positions

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<sup>48</sup> *Makharoblishvili G.*, Implementation of Fundamental Changes in the Structure of Capital Companies Based on Corporate-legal Actions (acquisition-merger), Tbilisi, 2014, 141-151 (in Georgian).

<sup>49</sup> A group of investors usually creates a fictitious JSC, whose partnership structure may include members of the management of the target company.

<sup>50</sup> *Cahn A., Donald D. C.*, Comparative Company Law, Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA, Cambridge University Press, 2011, 844-876.

<sup>51</sup> *Haas J. J.*, Corporate Finance, 2<sup>nd</sup> ed., Thomson Reuters, 2011, 610.

<sup>52</sup> The so-called Hostile LBO-type cash-tender-offer. The line of demarcation between the sale of a JSC and a MBO transaction as a strategy to protect against a hostile takeover by management is often not clear. see *Allen T. W., Kraakman R., Subramanian G.*, Commentaries and Cases on the Law of Business Organization, 4<sup>th</sup> ed., Wolter Kluwer Law & Business, 2012, 545. Cf. *Bradley M.*, Interfirm Tender Offer and the Market for Corporate Control, The Journal of Business, Vol. 53, No. 4, 1980, 370-371.

<sup>53</sup> The offeror for the purchase of shares can be a JSC organized by the management of the target company, whose capital structure is essentially formed by the amount raised in the form of credit. See *Gevurtz F. A.*, Corporation Law, West Group, 2000, 678.

<sup>54</sup> Regarding control transactions, see *Davies P., Hopti K., Ringe V. G.*, Control Transactions, in the Collection: Anatomy of Corporate Law: Comparative and Functional Sproach, translators: *Kochiashvili A., Maisuradze D.*, (ed.) *Gabelia T.*, 3<sup>rd</sup> ed., 2019, 321- 383 (in Georgian).

<sup>55</sup> *Cahn A., Donald D. C.*, Comparative Company Law, Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA, Cambridge University Press, 2011, 844-846, 849.



for their own purposes<sup>56</sup> at the expense of interests<sup>57</sup> of the entrepreneurial community and minority shareholders. The springboard for the use of control is being a shareholder<sup>58</sup> at the general meeting of shareholders when it is possible to determine the main orientation of extrajudicial actions along with making usual business or strategic decisions of the internal organization<sup>59</sup>.

Whether at the internal or extrajudicial level, the control target corporate issues are explicated by positive law at the normative level, and it is, in fact, equal to the competence<sup>60</sup> of the general meeting and the rights derived from the rights<sup>61</sup> of the shareholder's member. The area of competences includes making fundamental corporate decisions (amendment of the charter, reorganization, dissolution), fixing the amount of invested capital and the number of the members of the governing body, their election, early withdrawal, selecting corporate management system, defining the amount and structure of remuneration, making an appointment of a special representative in court, purchasing, selling the property to provide a mean<sup>62</sup> of security, giving consent to transactions by the statute, establishing a subsidiary company and distributing dividends<sup>63</sup>. The owner of the controlling stake resolves all issues by the principle of the majority of votes in case of making a decision. His influence is essential even if the charter establishes a qualified majority of votes.<sup>64</sup> But when the decision is made by a qualified majority, the share of minority shareholders acquires an additional value, which is called quasi control in corporate law.<sup>65</sup>

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<sup>56</sup> *Pinto R.A.*, Understanding Corporate Law, 3rd ed., Lexisnexis, 2009, 278. According to Georgian legislation, the interest of the minority shareholder is protected not only by the actions of the controlling shareholder, but also with the consequences of abuse of the dominant position by the dominant shareholder. see Law of Georgia “On Entrepreneurs”, Article 176, Legislative Gazette, 04/08/2021. Regarding the dominant situation, see *Burduli I.*, Foundations of the Stock Law, Volume II, 2013, 166-187 (in Georgian).

<sup>57</sup> *Schuster E. P.*, Efficiency in Private Control Sales – The Case for Mandatory Bids, Society and Economy Working Papers 08/2010, 2010, 17.

<sup>58</sup> About the rights of an individual, a quota-dependent and an independent shareholder, see *Burduli I.*, Foundations of the Stock Law, Volume II, 2013, 41-87 (in Georgian).

<sup>59</sup> But, in some jurisdictions, the decision-making power of shareholders is limited as a result of the balanced regulation of the competences of the governing body (for example, in Delaware's corporate law). See *Bainbridge S.*, Shareholder Activism and Institutional Investors, Research Paper no. 05-20, 2005, 2-3.

<sup>60</sup> Except for the situation when the governing bodies apply to the general assembly with a request to resolve an issue within their competence. see Law of Georgia “On Entrepreneurs”, Article 184, Clause 3, Legislative Gazette, 04/08/2021.

<sup>61</sup> Such rights include special right of access to information, a special right to control, exercise of right through court, right to appeal, right to receive dividend and others. See *Burduli I., Makharoblishvili G., Tokhadze A., Zubitashvili N., Aladashvili G., Maghradze G., Egnatashvili D.*, Corporate Law, 2<sup>nd</sup> ed., Tbilisi, 2021, 574-595 (in Georgian).

<sup>62</sup> The transaction for alienation of JSC property by the controlling shareholder can be concluded with a condition tailored to the interests of the person exercising control and not giving a chance to consider another, alternative transaction, that is why the minority shareholder must either agree to the transaction or use the right to withdraw. See *Pinto R.A.*, Understanding Corporate Law, 3<sup>rd</sup> ed., Lexisnexis, 2009, 282-283 (in Georgian).

<sup>63</sup> See Law of Georgia “On Entrepreneurs”, first paragraph of Article 184, Legislative Gazette, 04/08/2021.

<sup>64</sup> See Law of Georgia “On Entrepreneurs”, first paragraph of Article 195, Legislative Gazette, 04/08/2021.

<sup>65</sup> *Booth A. R.*, Financing the Corporation, Thomson Reuters/West, 2010, 130.

The extent to use control is consistent with the principle of calculus but also demonstrates the possibility in an additional dimension of competence. In particular, the control owner can influence the agreement/approval<sup>66</sup> of a transaction containing a conflict of interest, or exercise control over a minority shareholder<sup>67</sup>, justify the synergistic effect<sup>68</sup> of buying out a share and expelling a minority shareholder<sup>69</sup>, support an agreement on a significant transaction<sup>70</sup> considering a relevant direct or indirect economic interest, and alienate the part of property (assets) ) that makes the main business line of JSC.

The legal and economic model results of using control are to be performed at the next stage of the analysis.

## **6. Sale of Control and its Premium Value**

The sale of corporate control is a private arrangement to transfer a controlling stake in a JSC. Unlike a hostile bid, control sale transaction is the result of a direct negotiation between a control owner and a potential buyer, so a privately negotiated sale of control is perceived<sup>71</sup> as a “friendly” takeover, but it is actually far from corporate-friendly. The acquisition of control through a tender offer and private negotiation differ both in terms of the negotiation process and cost. During the tender offer, the control premium is higher than the market value, it is publicly promulgated and at least, it applies to all shareholders depending on the target group of the offer. On contrast, when purchasing a controlling stake through private negotiation, the amount of the premium value, as a form of private benefit<sup>72</sup>, is stated after arranging with one person and is unknown until the deal is concluded, and most importantly, it belongs only to the controlling shareholder<sup>73</sup>.

A principle of corporate law is the principle of equal treatment. By law, shares of the same class must have equal gain in the valuation process. On the other hand, it is clear that the ownership of shares by different entities creates an imbalance of values. The minority shareholder is able to sell the share only at a discounted price, and the controlling shareholder at a premium price. Discounting is

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<sup>66</sup> *Cox J. D., Hazen T. L., The Law of Corporations, Vol. 2, 3<sup>rd</sup> ed., St. Paul, 2010, 188. See Law of Georgia “On Entrepreneurs”, Article 208, Legislative Gazette, 04/08/2021.*

<sup>67</sup> In order to accumulate the percentage required for the compulsory sale of the minority shareholder's shares, the controlling shareholder may, at the first stage, make a tender offer to the rest of the shareholders, receive the required number of votes, and then make a decision either to alienate the JSC's property, or to merge with another entrepreneurial society and then create a minority entity. A prerequisite for the redemption of the shareholder's shares by the JSC, or the grounds for the expulsion of the minority shareholder from the JSC. See *Pinto R.A., Understanding Corporate Law, 3rd ed., Lexisnexis, 2009, 297.*

<sup>68</sup> *Alchian A.A., Demsetz H., Production, Information Costs and Economic Organization, 62 Am.Econ.Rev., 1972, 783-785.*

<sup>69</sup> See Law of Georgia “On Entrepreneurs”, Article 225, Legislative Herald, 04/08/2021.

<sup>70</sup> See Law of Georgia “On Entrepreneurs”, Article 223, Legislative Herald, 04/08/2021.

<sup>71</sup> *Sepe S., Private Sale of Control: Why the Europe mandatory Bid Rule is Inefficient, Arizona Legal Studies, Discussion Paper No.10-29, 2010, 6.*

<sup>72</sup> *Dyck A., Zingales L., Private Benefits of Control: An International Comparison, The Journal of Finance, Vol. 59, No. 2, 2004, 537.*

<sup>73</sup> *Sepe S., Private Sale of Control: Why the Europe mandatory Bid Rule is Inefficient, Arizona Legal Studies, Discussion Paper No.10-29, 2010, 7.*

determined in relation to the value of each share when evaluating the JSC as an aggregate. Typically, the discount is defined as the market<sup>74</sup> turnover discount or the minority shareholder's discount. A variable discount range typically fluctuates from 20% to 25% of the pro rata value of each share. According to the theory, the share price does not proportionally reflect the value of the company. The minority shareholder's discount is the market value of a non-controlling stake that does not influence corporate governance and can be easily captured under competitive conditions. Based on the theory, the share price does not proportionally reflect the value of the company. The minority shareholder's discount is the market value of a non-controlling share as such type of share cannot influence corporate governance and can be easily captured under competitive conditions.<sup>75</sup> In order to calculate the premium paid for the controlling stake, two variables are required: the market value of the share and the premium amount, overpayment. The cost of control premium is a type of cash flow<sup>76</sup> from the acquirer's perspective, while the price premium for the controlling shareholder is generated according to the classification of private benefits. As a result of teleological analysis, a hypothetical assumption can be made that the control premium paid by an acquirer is equal to the private benefit of a controlling shareholder, from which the amount of private benefit can be equal to the minority shareholder's discount.<sup>77</sup> In this context, the controlling stake is followed by the monetary and non-monetary private benefits of control.<sup>78</sup> But there arises a question, if the control premium is detrimental<sup>79</sup> to the minority shareholder or it is a simply control advantage. Rhetorically, the answer to both parts of the question is more positive than negative.

The perspective of an acquirer is based on<sup>80</sup> the possibility of realizing a synergistic effect and considering its measurements, the target community is undervalued<sup>81</sup> and has the potential to function more effectively<sup>82</sup>. The hypothetical possibility for an acquirer to gain control is to pay the controller a higher value than the market price, and the control premium is only the cash flow of the controlling shareholder<sup>83</sup>, however, as a result of effective corporate management, the value of the target audience will increase (in case of actual growth), which will affect all shareholders, including minority ones.<sup>84</sup> The surplus value received from selling the controlling stake to the minority shareholder will not be

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<sup>74</sup> It means the secondary capital market.

<sup>75</sup> Booth A. R., *Financing the Corporation*, Thomson Reuters/West, 2010, 112-114.

<sup>76</sup> Dyck A., Zingales L., *Private Benefits of Control: An International Comparison*, *The Journal of Finance*, Vol. 59, No. 2, 2004, 538.

<sup>77</sup> *Prescott Group Small Cap, L.P. v. Coleman Co., Inc.*, 2004 WL 2059515 (Del. Ch. 2004).

<sup>78</sup> Sepe S., *Private Sale of Control: Why the Europe mandatory Bid Rule is Inefficient*, *Arizona Legal Studies*, Discussion Paper No.10-29, 2010, 10.

<sup>79</sup> Comp. Booth A. R., *Financing the Corporation*, Thomson Reuters/West, 2010, 119-120.

<sup>80</sup> Kode G., Ford J. C., Sutherland M. M., *A conceptual model for evaluation of synergies in mergers and acquisitions: A critical review of the literature*, *South African Journal of Business Management*, 34 (1), 2003, 27.

<sup>81</sup> So called „Undervaluation”.

<sup>82</sup> Haspeslagh P. C., Jemison D. B., *Managing Acquisitions: Creating Value through Corporate Renewal*, The Free Press, New York, 1991, 22.

<sup>83</sup> Cox J. D., Hazen T. L., *The Law of Corporations*, Vol. 2, 3<sup>rd</sup> ed., St. Paul, 2010, 330.

<sup>84</sup> Pinto R.A., *Understanding Corporate Law*, 3<sup>rd</sup> ed., Lexisnexis, 2009, 302-303.

shared<sup>85</sup>, because the premium value of the controlling stake is a private, personal benefit of the controlling shareholder, simultaneously the alienation does not give rise to the redemption of shares by the JSC.<sup>86</sup> An exception can be considered a mandatory tender offer, when the acquirer makes a tender offer<sup>87</sup> to the minority shareholders at that premium price he had to pay for obtaining control.<sup>88</sup>

The optimal theory to support the existence of premium value refers to the classification of types of private benefits. But the accepted theoretical view is that the creation of controlling stake is costly, therefore, the sale<sup>89</sup> of an already formed/gained controlling stake requires a higher premium price compared to the market price<sup>90</sup>. Selling a controlling stake at a premium price is reasonable. The controlling shareholder is not required to share<sup>91</sup> it with the minority and is free<sup>92</sup> to make a decision, as long as there is no reason to presume that the alienation of the controlling stake will harm the JSC or its shareholders, or prevent other (minority) shareholders from exercising the right to alienate<sup>93</sup>.

Naturally, sale of control is not a panacea, and it is applied by the constructions of corporate-legal restriction<sup>94</sup>. In particular, the alienation of control must not be performed dishonestly or in violation of loyalty liability to the detriment of the JSC. It should not lead to the appropriation of business opportunity of JSC, should not involve the alienation of an office<sup>95</sup> (Sale of Office)<sup>96</sup> and must not be aimed at appropriating the company's property or selling it to an appropriator.<sup>97</sup>

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<sup>85</sup> According to one of the US court decisions, a minority shareholder cannot enjoy the “right to equal share” in the premium value of the controlling stake, unless the controlling shareholder has abused the power, and further indicated that participation in the minority shareholder's control premium would be against the existing legal regulation and it is better to have such a radical The regulation should be written at the normative level. see *Zetlin v. Hanson Holding, INC.*, 397 N.E.2d 387 (N.Y. 1979).

<sup>86</sup> See Law of Georgia “On Entrepreneurs”, Article 179, Legislative Gazette, 04/08/2021.

<sup>87</sup> *Booth R. A.*, Financing the Corporation, Thomson Reuters/West, USA, 2010, 115. For another exception established by judicial law, see *Perlman v. Feldmann*, 219 F.2d 173 (2d Cir. 1955), cert. denied, 349 U.S. 952 (1955).

<sup>88</sup> See Law of Georgia “On the Stock Market”, Article 151, Parliamentary Office 1(8), 24/12/1998.

<sup>89</sup> Along with the sale of the controlling stake, due to the similarity, in the legal doctrine, the sale of the office is understood as the sale of control (Sale of Office, or Sale of Directorships). The acquisition of a controlling stake allows the member of the governing body to be immediately relieved of his position. Despite owning a small package of shares from the executive, these shares will be redeemed at a premium price, in exchange for which the executive pledges to resign as soon as the purchase agreement becomes effective. In doing so, he is selling the managerial control of the JSC, rather than the controlling stake held directly by the shareholder. It cannot, in the classical sense, qualify as a sale of control by a controlling shareholder. As a result, the premium received from the sale of the relatively small (the judgment below covers only 4% of the shares), non-controlling stake, must be returned to the company because the premium paid for the small stake is “against public policy and illegal.” see *Brecher v. Gregg*, 392 N.Y.S.2d 776 (1975).

<sup>90</sup> *Allen T. W., Kraakman R., Subramanian G.*, Commentaries and Cases on the Law of Business Organization, 4<sup>th</sup> ed., Wolter Kluwer Law & Business, 2012, 417.

<sup>91</sup> *Easterbrook H. F., Fischel R. D.*, Corporate Control Transactions, The Yale Law Journal, Vol. 91, No. 4, 1982, 715-719.

<sup>92</sup> *Zetlin v. Hanson Holding, INC.*, 397 N.E.2d 387 (N.Y. 1979).

<sup>93</sup> *Cox J. D., Hazen T. L.*, The Law of Corporations, Vol. 2, 3<sup>rd</sup> ed., St. Paul, 2010, 330-331.

<sup>94</sup> *Gevurtz F. A.*, Corporation Law, West Group, 2000, 631-639

<sup>95</sup> *Cox J. D., Hazen T. L.*, The Law of Corporations, Vol. 2, 3<sup>rd</sup> ed., St. Paul, 2010, 342-344.

The next stage of the deductive analysis includes the classification of the bases for generating the premium value of the controlling stake and their research.

## 7. Private Benefits of Control

A controlling stake is worth more than its fair market value<sup>98</sup> for the simple reason: the controlling shareholder has the power<sup>99</sup> to make strategic business changes. The potential buyer thinks that he will pay a premium amount for the controlling stake, gain control of the JSC, make strategic business decisions and increase income.<sup>100</sup> In other words, the premium value of control or controlling stake is based on a shareholder's individual private benefit of control and its two subcategories – monetary and non-monetary private benefit. There is a difference between “shared benefit of control”<sup>101</sup> and “private benefit of control”.<sup>102</sup> The first of them occurs when the overall value of the business community increases as a result of effective management monitoring and all categories shareholders can share it. The second is the benefit of control, which is attributable only to a controlling shareholder and may include “monetary private” or “non-monetary private benefits”.<sup>103</sup>

Control includes the legal or economic motive for paying a higher price, different from the market value that belongs to the classification of the types of private benefits. It is taken by the controlling shareholder at the expense of discounting the minority shareholder.<sup>104</sup> The private benefit of control is closely related to the synergy generated by corporate-legal combinations between companies. Joining two or more companies creates synergy, and synergy increases the equity value of a controlling shareholder, which is found an example of the private benefit of control.<sup>105</sup>

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<sup>96</sup> *Schuster E. P.*, Efficiency in Private Control Sales – The Case for Mandatory Bids, Society and Economy Working Papers 08/2010, 2010, 11.

<sup>97</sup> So called *Looting*. See *Harris v. Carter*, 582 A.2d 222 (Del. Ch. 1990).

<sup>98</sup> It is worth noting that the actual market value is allowed to be lower than the fair market value if there is a market discount, when the market does not show readiness/receptivity to the stock, or if there is a threat that the controlling shareholder will use the control right to receive more than the due value from the corporation (which minority shareholder will be equal to the discount). See *Booth A. R.*, Financing the Corporation, Thomson Reuters/West, 2010, 118. In the context of the use of the right of protest (withdrawal) of the shareholder in connection with the determination of the fair value of the share, See *Makharoblishvili G.*, Implementation of Fundamental Changes in the Structure of Capital Companies Based on Corporate-legal Actions (acquisition-merger), Tbilisi, 2014, 255-262 (in Georgian).

<sup>99</sup> *Schuster E. P.*, Efficiency in Private Control Sales – The Case for Mandatory Bids, Society and Economy Working Papers 08/2010, 2010, 14.

<sup>100</sup> *Booth A. R.*, Financing the Corporation, Thomson Reuters/West, 2010, 116.

<sup>101</sup> So called *Shared benefit of control*.

<sup>102</sup> So called *Private benefit of control*.

<sup>103</sup> So-called Non-dissipative private benefits and Dissipative private benefits. For the analysis of the Georgian-language matching, See *Kikvadze G.*, Mandatory tender offer, in the collection: Collection of Corporate Law III, *Burduli I. (ed.)*, Vol., 2015, 64. Add. *Schuster E. P.*, Efficiency in Private Control Sales – The Case for Mandatory Bids, Society and Economy Working Papers 08/2010, 2010, 14-19 (In Georgian).

<sup>104</sup> *Sepe S.*, Private Sale of Control: Why the Europe mandatory Bid Rule is Inefficient, Arizona Legal Studies, Discussion Paper No.10-29, 2010, 8.

<sup>105</sup> *Schuster E. P.*, Efficiency in Private Control Sales – The Case for Mandatory Bids, Society and Economy Working Papers 08/2010, 2010, 18.

The monetary private benefit of a controlling shareholder is manifested in receiving<sup>106</sup> additional income by appointing to an official position, in the possibility to use the business opportunity of the corporation for personal purposes, in getting financial benefits from a transaction containing a conflict of interest, in the unequal distribution of profits in the form of dividends, in gaining a premium amount in excess of the fair market value for the controlling stake, etc. It is related to the possibility of holding a preferred position in the liquidation dividend, etc. The controlling shareholder's monetary private benefit is the result of a different distribution of the JSC's cash flows. In the sale of control, a private monetary benefit is attached to the controlling stake. Accordingly, the increased value of the controlling stake consists of the expected increased value of the company under the buyer's managerial control and its monetary private benefits. As a result of incomplete bidding, the monetary private benefit is calculated in the same way as the premium value, so far as it is equal to the difference between the price paid for the share and the market value.<sup>107</sup> But, if the calculation of the controlling shareholder's private benefit were easy, the non-controlling shareholder would always prevent from receiving the benefit through the courts. However, the premium value generated by private benefits is high when the investor in the acquiring country takes advantage of weak corporate protection and expects to greatly increase the amount of monetary private benefits.<sup>108</sup> In any case, the monetary private benefit depends on having influence on the strategic and functional decisions of the JSC and transforming the obtained results into economic value. And this encourages a potential acquirer of the controlling stake to pay higher price than the fair market value, to gain control in the joint-stock company and to try to obtain private benefits at the expense of the entrepreneurial community and the minority shareholder. The value of private benefit of control is often considered the “psychological” cost<sup>109</sup> of being a controlling shareholder. It is also considered the pleasure of a “commandeer”, which means paying multi-million premium by the acquirer to the controlling shareholder.<sup>110</sup>

The non-monetary private benefit of the controlling shareholder has a specific meaning. A non-monetary private benefit is an advantage generated from the controlling shareholder's privileged reputation, fundamentally underpinned by the corporate power to exercise practical and substantive influence over the decisions of the JSC. If the monetary private benefit is manifested in financial right and possibility of differentiated distribution of the company's free cash (the so-called willful act), the non-monetary private benefit is a theoretical, an unrealized value of private benefit, not highly liquid and directly convertible<sup>111</sup> in the monetary category (for example, by selling, by exchange). If the

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<sup>106</sup> *Jensen C. M., Meckling H. W.*, The Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure, *Journal of Financial Economics*, 1976, Vol. 3, No. 4, 315-318.

<sup>107</sup> *Sepe S.*, Private Sale of Control: Why the Europe mandatory Bid Rule is Inefficient, *Arizona Legal Studies*, Discussion Paper No.10-29, 2010, 9-11.

<sup>108</sup> *Dyck A., Zingales L.*, Private Benefits of Control: An International Comparison, *The Journal of Finance*, Vol. 59, No. 2, 2004, 538.

<sup>109</sup> *Sepe S.*, Private Sale of Control: Why the Europe mandatory Bid Rule is Inefficient, *Arizona Legal Studies*, Discussion Paper No.10-29, 2010, 8.

<sup>110</sup> *Dyck A., Zingales L.*, Private Benefits of Control: An International Comparison, *The Journal of Finance*, Vol. 59, No. 2, 2004, 540.

<sup>111</sup> *Schuster E.P.*, Efficiency in Private Control Sales – The Case for Mandatiry Bids, *Society and Economy Working Papers 08/2010*, 2010, 16-18.

monetary private benefit is largely equal to the minority shareholder's discount and is achieved at his expense, the non-monetary private benefit is the result of the position in the shareholder structure that does not harm<sup>112</sup> the interests of the minority. Based on the results of the deductive analysis, an intermediate summary thesis can be formulated that means getting non-monetary private benefits dependent on the principle of competent enumerability of the general meeting of the controlling shareholder. That is why the non-monetary private benefit is an important, but not essential factor of paying premium value for purchasing a controlling stake by a buyer.

The decisions of the controlling shareholder, which are not directly related to his monetary private gain, are usually linked to the interests and wellbeing property of the JSC, which in the context of the theoretical economic value also applies to the minority shareholder as a lender of last resort.<sup>113</sup>

When defining the concept of the monetary and non-monetary private benefits of control, the authority to make a decision should be emphasized as a common characteristic element that leads<sup>114</sup> to determine the private benefit of control. Due to the mentioned fact, transforming the private benefits of control into two subcategories is considered an ineffective method<sup>115</sup> in transaction of selling control stake.

## 8. Conclusion

The article analyzed several fundamental dogmatic-theoretical aspects of control in the context of its acquisition and use, which can be summarized in several priority theses below.

A methodical mean of practical realization of shareholder activism is the acquisition and use of corporate control. Gaining control is possible in the way of using different forms. Basically, these forms are a purchase of shares and unification of votes by agreement of shareholders.

The use of a controlling stake or an actual control has its own, i.e., private benefit of control, which is an immanent outcome of the controlling stake and actual control. The controlling shareholder, an owner of the controlling stake benefits from the capital gained by the control. The control premium is a cash from the acquirer's perspective. The premium value of control or controlling stake is based on the shareholder's individual private benefit of control and its two subcategories – monetary and non-monetary private benefit.

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<sup>112</sup> It is possible to determine the efficiency of the private benefit generated by the sale of control using the Pareto ratio and the Kaldor-Hicks ratio. According to the Pareto efficiency test, a change is efficient if someone benefits from it without making anyone worse off. In contrast to Pareto efficiency, according to Kaldor-Hicks efficiency, a change is effective if as a result of it the union receives a benefit that is greater than the same union's loss. See *Schuster E. P.*, Efficiency in Private Control Sales – The Case for Mandatory Bids, Society and Economy Working Papers 08/2010, 2010, 21-22 (in Georgian).

<sup>113</sup> For example, when receiving a liquidation dividend in the form of participation in the asset (property) of the JSC in proportion to the share.

<sup>114</sup> Along with decision-making power, the controlling shareholder may be considered to have access to information that a minority shareholder may not have. See *Dyck A., Zingales L.*, Private Benefits of Control: An International Comparison, The Journal of Finance, Vol. 59, No. 2, 2004, 545-546 (in Georgian).

<sup>115</sup> *Schuster E. P.*, Efficiency in Private Control Sales – The Case for Mandatory Bids, Society and Economy Working Papers 08/2010, 2010, 21.

The vision of an acquirer of count on the possibility of realizing the synergistic effect as in his appraisal, the target community is undervalued and has the potential to function more effectively. The hypothetical eligibility for an acquirer to gain control is paying a controller higher price than the market value. Therefore, the control premium is only the controlling shareholder's cash flow.

As a result of the performed analysis, it is acceptable to conclude that control is the basis for realizing shareholder activism; the types of its acquisition and use are comprehended and classified, and the legal advantage of control can be transformed into corporate and economic benefits, which in turn, is called private benefit of control. In accordance to the analysis, it can also be mentioned that the demarcation of private benefits of control into monetary and non-monetary private benefits during a transaction selling of controlling stake or control does not justify the purpose of classification.

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