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EQUAL TREATMENT OF SHAREHOLDERS AND GENERAL PRINCIPLES OF LAW

ABSTRACT

This paper examines whether the principle of equal treatment of shareholders can be considered a general principle of corporate law or if it is merely an application of broader legal standards, such as the duty to act in good faith. The author challenges the view that equality of shareholders is an independent general principle, arguing that shareholders should not be treated identically but rather in accordance with other general principles, particularly fairness and good faith. The paper distinguishes between the concepts of 'equality of shareholders' and 'equal treatment of shareholders,' clarifying that the latter is a procedural rule protecting shareholders from arbitrary discrimination. It also explores the relationship between equal treatment and constitutional principles of equal protection, EU law, and company law in various jurisdictions. The paper concludes that while the equal treatment of shareholders aligns with general principles like good faith, it is better understood as an example of their application rather than a standalone principle. The concept of "fair treatment" is proposed as a more accurate description of how shareholders should be treated in practice.

Keywords: *equal treatment of shareholders, equality, good faith, corporate law, principles of law*

1. INTRODUCTION

Equality of shareholders is frequently referred to as 'a rudimental principle of corporate law'¹ and a cornerstone of corporate governance.² Despite the widespread acceptance of its role, until recently comparative studies on this issue

¹ Michalski, M., *Kontrola kapitałowa nad spółką akcyjną*, Zakamycze, Kraków 2004, p. 346.

² Burckhardt, C., *Gleichbehandlung und Ungleichbehandlung im Aktienrecht* in: Hussmann L.; Nickerson N.; Bastian A. S.; Wujohktsang, Y. (ed.), *Unter Gleichen*, University of Zurich, Zürich 2021, p. 162; Jung P. in Jung P., Kunz P., Bärtschi H., *Gesellschaftsrecht*, Schulthess, Zürich 2021, p. 76.

were scarce.³ This situation is gradually changing⁴ but the discussion on the role of equality and equal treatment in corporate governance is far from complete. This paper aims to contribute to this discussion. The analysis of the theoretical framework of the principle of equal treatment of shareholders is material as it may contribute to the discussion on divergence from the proportional relationship between the level of the equity investment of the shareholder in the company and his corporate rights (e.g. through the creation of plural voting shares) as well as on admissibility of preferential treatment of long-term investors (e.g. with respect to the company related information).⁵

The aim of this paper is to analyze whether the principle of equal treatment of shareholders may be qualified as a general principle of corporate law or it is just an example of practical application of overarching standards, such as duty to act in good faith (*Treu und Glauben, buona fede, bonne foi*). The denial of the hypothesis that equality of shareholders is an independent general principle of law is important not only from a purely theoretical perspective. It can help ensure correct application of the law, as in the process of its application, one would not attempt to treat shareholders identically or to fully apply the general principle of equal treatment. Instead, shareholders should be treated equally to the extent required to comply with other general principles of law, i.e. the principle of good faith. It would lead to the fair treatment of shareholders, which does not necessarily mean identical treatment.

This paper is structured as follows. Part 2 explores the distinctions between the concepts of 'equality of shareholders' and 'equal treatment of shareholders.' In certain jurisdictions, these terms are used interchangeably; therefore, clarifying their meanings is essential to prevent confusion. For the purposes of this paper, the focus will be on the principle of equal treatment of shareholders, understood as a procedural rule that safeguards shareholders from arbitrary discrimination by both the company and fellow shareholders.

Part 3 examines the sources of the principle of equal treatment of shareholders. It analyses the relation between equal treatment of shareholders and constitutional principles of equal protection. It also examines the role of equality of shareholders

³ See in particular: Verse, D., *Der Gleichbehandlungsgrundsatz im Recht der Kapitalgesellschaften*, Mohr Siebeck, Tübingen 2006, p. 116.

⁴ See in particular: Jung P. (ed.), *Der Gleichbehandlungsgrundsatz im Gesellschaftsrecht*, Mohr Siebeck, Tübingen 2021, *passim*; Merkt, H., *Gleichbehandlung im Gesellschaftsrecht rechtsvergleichend* in Grundmann S., Merkt H.; Mülbert P. (ed.), *Festschrift für Klaus J Hopt zum 80. Geburtstag am 24. August 2020*, De Gruyter, Berlin 2020, pp. 775 – 805.

⁵ See for instance: Koch, J., *Das Gebot informationeller Gleichbehandlung* in: Grundmann S., *et al.*, *op. cit.* note 4, p. 525.

in the EU law, including the frequently quoted decision of the European Court of Justice in the case of *Audiolux*.⁶ Finally, it analyses the approach to equal treatment of shareholders in company law of selected jurisdictions.

The considerations in Part 4 aim to test the hypothesis if that equal treatment of shareholders constitutes, in itself, a general principle of law. To this end, it clarifies the distinction between principles and rules. Furthermore, it argues that inferring specific principles from general ones may lead to undesirable outcomes. This is because the persuasiveness of principles is often seen as sufficient justification for decisions made by those who apply them. Consequently, the continual creation of new principles may result in arbitrariness. The final section of Part 4 delves into the relation between equal treatment of shareholders and general principles of private law, such as an obligation to act in good faith and argues that obligation to treat shareholders equally overlaps with those general principles and demonstrates one of examples of their practical application. Therefore, the term "equal treatment" could effectively be replaced with "fair treatment" of shareholders. Part 5 concludes.

2. EQUALITY OR EQUAL TREATMENT OF SHAREHOLDERS

The starting point for further deliberations should be the determination of what is meant by equal treatment. In a comparative study this task is more complicated than it may seem at the first glance. This is because equality may be referred both to allocation of rights and obligations between the shareholders (*Gleichberechtigung*) and to the procedural fairness requiring that all corporate decisions apply in the same manner and to the same extent as to all shareholders unless there is valid justification for different treatment of selected investors (*Gleichbehandlung*).⁷

This distinction is not always clear and several comparative analyses of refer to both those aspects interchangeably.⁸ This is because in some jurisdictions the boundary between those concepts is blurred. For instance, Polish scholars tend to argue that provisions allowing issuance of preferred stock create exceptions to the

⁶ Judgment of the Court (Fourth Chamber) of 15 October 2009. *Audiolux SA e.a v Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG and Others*, ECLI:EU:C:2009:626.

⁷ Verse, D., *op. cit.* note 3, p. 6.

⁸ See for instance Jung P. (ed.), *op. cit.*, note 2, *passim* – in parts of the books devoted to various jurisdictions the authors either equality of right or equal treatment or both of those ideas interchangeably.

general rule of equal treatment of shareholders.⁹ This leads them to the conclusion that one should adopt a restrictive interpretation of norms governing preferred stock¹⁰ which limits flexibility of Polish corporate law. Also, the Polish case law invokes the principle of equal treatment of shareholders in the context of proportional relation between the number of shares held by the given shareholder and the scope of his corporate rights.¹¹ At the same time, some authors take a contrary approach and argue that the original wording of the articles of association may not infringe the principle of equal treatment of shareholders, as it is voluntarily agreed upon by all shareholders. They contend that there is no 'treatment' of shareholders by the company that could violate this principle.¹² Similar approach may be traced in Switzerland. Swiss Scholars point out that principle of equal treatment of shareholders is not absolute, but relative (*relative Gleichbehandlung*) and connected with the number of shares held by shareholders.¹³ In this sense the principle of equal treatment of shareholders is linked to the principle of proportionality (*Proportionalitätsprinzip*).¹⁴

In other jurisdictions the scholarly writing clearly distinguishes between both aspects of equality. For instance, in Germany¹⁵ equal and in Austria¹⁶ equal treatment is not applied to the original wording of articles of association and the allocation of rights between shareholders made thereby but only to the corporate decisions of the management board, supervisory board and of the general meeting in the course of the company's existence. The distinction between equal rights of shareholders (*parità di diritti*) and equal treatment of shareholders (*parità di trattamento*) has been also recognized in Italian literature.¹⁷

Thus, when discussing the principle of equal treatment of shareholders, it is easy to get lost in translation. In this paper I will refer to the principle of treatment of shareholders understood as a rule requiring procedural fairness and protecting against arbitrary discrimination against shareholders.

⁹ Popiołek, W., *Akcja – prawo podmiotowe*, C. H. Beck, Warszawa 2010, p. 51.

¹⁰ *Ibid.*

¹¹ See for instance the use of terms 'equality of shareholders' in the Polish case law – judgement of the Appellate Court in Katowice of 3.09.2021 r., V Aga 266/21, Legalis nr 2887446; judgment of the Polish Supreme Court of 30.09.2004 r., IV CK 713/03, OSNC 2005/9/160.

¹² Opalski, A. in Opalski, A. (red.), *Kodeks spółek handlowych Tom IA. Spółki osobowe, Komentarz*. Art. 1–36, C.H. Beck, Warszawa 2024, commentary to Article 20, para 16.

¹³ Kunz, P. Jung P, *Der Gleichbehandlungsgrundsatz im schweizerischen Gesellschaftsrecht* in Jung P, *op. cit.*, note 2, p. 84.

¹⁴ *Ibid.*

¹⁵ Verse, D., *op. cit.* note 3, p. 9.

¹⁶ Geist, R. in Jabornegg, P.; Strasser, R., *Kommentar zum Aktiengesetz*, Lexis Nexis, Wien 2021, p. 597.

¹⁷ Pasetti, G., *Parità di trattamento e autonomia privata*, Cedam, Padova 1970, p. 70.

3. SOURCES OF EQUAL TREATMENT

3.1. Constitutional origins

Equal treatment is a constitutional idea in several countries. One may invoke Art. 3 of the German Constitution, Article 3 of the Constitution of the Italian Republic, Article 35 of the of the Swiss Federal Constitution, Article 32 of the Constitution of the Republic of Poland or Article 29(1) of the Constitution of Republic of Lithuania. Thus, it can be argued that the duty to treat shareholders equally is rooted in constitutional principles. Such a conclusion would be, however, unjustified. First, it seems that in all those countries the constitutional requirement of equal treatment is addressed to public authorities and not to private individuals.¹⁸ Second, applying the constitutional idea of equal protection to shareholders would be difficult to reconcile with the contrarian nature of corporations, as well as with the principles of freedom of contract and private autonomy.¹⁹ Thus, duty to treat shareholders equally is not a constitutional principle at least in some of the counties whose constitution expressly involves equal protection. The same applies to England, whose unwritten constitution does not envisage the principle of equal treatment.²⁰ Therefore it seems fair to say that there are no direct constitutional origins of the principle to treat shareholders equally.²¹

3.2. EU law and its implications

A general obligation to treat shareholders equally may also not be derived from EU law. The equal treatment principle has not been included in the primary law of the EU. Whereas the Charter of Fundamental rights invokes a requirement of equal treatment in several contexts, it is only addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member

¹⁸ See with respect to Germany: Verse, D., *op. cit.* note 3, p. 120; with respect to Switzerland: Kunz, P.; Jung P., *op. cit.* note 13, p. 78; with respect to Italy: D'Attore, *Il principio di eguaglianza tra soci nelle società per azioni*, Giuffrè, Milano 2007, p. 86-96; with respect to Poland: Borysiak, W.; Bosek, L. in: Safjan, M.; Bosek L. (ed.), *Konstytucja RP. Tom I. Komentarz do art. 1-86*, C. H. Beck, Warszawa 2016 art. 32, para 100; with respect to Lithuania: Bitė, V., *Equal Treatment in Lithuanian Corporate Law*, in Jung, P., *op. cit.*, note 2, p. 54-55.

¹⁹ D'Attore, *op. cit.*, note 18.

²⁰ Hare, C., *Equal Treatment of Shareholders in English Law*, in Jung P, *op. cit.*, note 2, p. 3-4.

²¹ H. Grundmann, *Der Gleichbehandlungsgrundsatz im Gesellschaftsrecht – Generalbericht* in Jung P, *op. cit.*, note 2, p. 119.

States only when they are implementing Union law (Article 51). It therefore has no direct impact consequences for the relations between individuals.

Certain aspects of an obligation to treat shareholders equally have been, however, recognized in secondary law of the EU. According to Article 42 of the Directive 77/91/EEC²² shareholders Member States shall ensure equal treatment of all shareholders who are in the same position in connection with the matters governed by the Directive, i.e. amendments of the share capital. This obligation was extended to share buybacks by the Directive 2006/68/EC.²³ Currently those issues are addressed by Directive 2017/1132²⁴ but the scope of application of the requirement to treat shareholders equally did not change and it continues to be limited to amendments of the share capital (Article 85) and to the share buyback (Article 60). Certain aspects of equal treatment investors was also codified in the EU-securities law.²⁵

Despite those fragmentary regulations, EU law does not recognize a general principle of equal treatment of shareholders applicable to all aspects of operations of the company. As pointed out in the opinion of the Advocate General *Trestenjak* in the case *Audiolux* a general principle of this kind cannot be derived from written primary law itself in the absence of clear provisions in the founding treaties.²⁶ At the same time, due to the limited scope of application of the duty to treat shareholders equally stemming from Article 42 of the Directive 77/91/EEC it could also not be derived from that directive nor any other act of secondary law.²⁷ Thus, according to the Advocate General the recognition of a general principle of equal treatment of shareholders by the European Court of Justice would run the risk of ignoring the institutional balance and would be an intrusion

²² Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, Official Journal L 026, 31/01/1977 P. 0001 – 0013 (Directive 77/91/EEC of 13 December 1976).

²³ Directive 2006/68/EC of the European Parliament and of the Council of 6 September 2006 amending Council Directive 77/91/EEC as regards the formation of public limited liability companies and the maintenance and alteration of their capital (OJ L 264, 25.9.2006, p. 32–36).

²⁴ Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, OJ L 169, 30.6.2017, p. 46–127.

²⁵ See Mattig, D., *Gleichbehandlung im europäischen Kapitalmarktrecht*, Mohr Siebeck, Tübingen 2019, p. 19.

²⁶ Opinion of the Advocate General Trestenjak delivered on 30 June 2009, Case C-101/08 *Audiolux and Others*, ECLI:EU:C:2009:410, para 75.

²⁷ *Ibid*, para 82.

in the competences of the legislator.²⁸ This view was shared by the European Court of Justice who found that EU law does not recognize the general principle of equal treatment of shareholders.²⁹

3.3. Equal treatment of shareholders in selected jurisdictions

The preceding considerations lead to the conclusion that the obligation to treat shareholders equally is neither a constitutional requirement nor an underlying principle of EU law. At the same time some of its forms are present in multiple jurisdictions.

Several countries have enacted an express obligation requiring the company to treat shareholders equally under the same circumstances. Such solution was adopted in Germany (§ 53a of the German Joint Stock Companies Act), Austria (47a of the Austrian Joint Stock Companies Act) and in Poland (Article 20 of the Polish Commercial Companies Code). Relevant provisions in all those countries are nearly identical. There are also additional similarities. Germany³⁰ and Austria³¹ imposed a norm imposing an obligation of equal treatment of shareholders to transpose Article 42 of the Directive 77/91/EEC but both went further than required by the EU law and referred this obligation to all aspects of the company's operation and not just to the amendment of the share capital. Moreover, in both of those countries it is argued that the legislative change did not create a new obligation but merely confirmed what already derived from the general principles of law.³² In Poland with the sole difference, that it enacted a norm expressly requiring the company to treat shareholders equally in 2002 in connection with its planned accession to the EU.³³ Just like Germany and Austria it decided not to limit the scope of application of this obligation to the matters regulated by the EU law. Additionally, it was argued that the enactment of Article 20 of the Polish Commercial Companies Code only confirms what could be derived from the general principles of law.³⁴

²⁸ Ibid, para 105.

²⁹ Judgment of the Court (Fourth Chamber) of 15 October 2009. *Audiolux SA e.a v Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG and Others*, ECLI:EU:C:2009:626.

³⁰ Verse D., *op. cit.* note 3, p. 28.

³¹ Klass, S.; Burger, C.; Eckert, E., *Die Entwicklung des österreichischen Aktienrechts. Geschichte und Materialien*, Linde, Wien 2003, p. 362.

³² Ibid.

³³ Sójka, T., *Zasada równego traktowania akcjonariuszy w kodeksie spółek handlowych – zagadnienia podstawowe*, *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 4/2000, p. 37.

³⁴ Ibid.

In several jurisdictions, there are no equivalents to the above-described provisions. However, this does not mean that shareholders of companies organized under the laws of such countries can be treated unequally at the discretion of the company or the controlling shareholder. Protective measures in that respect differ and include ideas such as prohibition of abusing of dominant position by the controlling shareholder recognized by the French³⁵ and Italian law³⁶ (*abus de majorité, l'abuso di maggioranza*) or protection from unfairly prejudicial treatment conferred by section 994 of the English Companies Act 2006.³⁷ American law imposes fiduciary duties on directors and on the majority shareholders that require them in good faith and in the best interest corporation which restrict their discretionary power when entering self-dealing transactions.³⁸ It also imposes a stricter 'intrinsic fairness' standard of review on the actions of the company that do not affect all shareholders in the same manner³⁹ (compared to a more lenient business judgement test applied to other transactions).⁴⁰

In some jurisdictions the obligation to treat shareholders equally is rarely invoked yet at present. This group includes Lithuania where it has been analyzed only in a few decisions of the Supreme Court of Lithuania.⁴¹ Interestingly, just like Poland, Lithuania adjusted its company law to the requirements of the Directive 77/91/EEC at the turn of the 20th and 21st century by amending Article 3(2) of the Law on Companies.⁴² However, this provision expressly refers to allocation of rights and obligations between the shareholders, which should be equal under identical circumstances, which evokes associations with the 'equality of shareholders rather than with 'equal treatment of shareholders. In scarce court rulings, however, this provision refers to equal treatment of shareholders (e.g. in connection with the access to information on operations of the company).⁴³

³⁵ François, S., *L'unanimité exclut la caractérisation d'un abus de majorité*, *Revue des Sociétés* 4/2024, p. 246.

³⁶ D'Attore, *op. cit.*, note 18, p. 192

³⁷ Hare, C., *op. cit.*, note 20, p. 25.

³⁸ See: Cox, J. D., *Equal treatment for shareholders: an essay*. *Cardozo Law Review*, 19/1997, p. 615..

³⁹ The ruling of the Supreme Court of Delaware in the case of *Sinclair Oil Corp. v. Levien*, 80 A.2d 717.

⁴⁰ Allen, W., Kraakman R., *Commentaries and Cases on the Law of Business Organization*, Wolters Kluwer, New York 2016, p. 313.

⁴¹ Bitè, V, *op. cit.*, note 18, p. 54-55.

⁴² *Loc. cit.*, p. 51.

⁴³ *Ibid.*, p. 51.

4. IS EQUAL TREATMENT AS A STANDALONE GENERAL PRINCIPLE OF LAW?

4.1. Introduction

The analysis conducted thus far leads to the conclusion that the principle of equal treatment of shareholders is recognized across multiple jurisdictions. The subsequent sections of this paper will seek to either substantiate or challenge the hypothesis that it constitutes a standalone general principle of law. In order to achieve this, it is essential to clarify the precise meaning of this concept. Additionally, it is important to examine whether general principles of law can be freely inferred, or whether there are underlying reasons that necessitate caution in this regard.

4.2. General principles of law defined

As famously explained by Dworkin (1977)⁴⁴ one can distinguish between rules and principles. Both are sets of standards. However, their nature differs significantly. Whereas a rule applies ‘in an all-nothing fashion’ a principle ‘states a reason that argues in one direction but does not necessitate a particular decision’⁴⁵ and may be applied in full or in part.⁴⁶ The legal order may comprise principles and policies arguing in contradictory directions and the mere fact that one of them does not prevail in the case does not mean that it is not part of the legal system.⁴⁷ In case of intersection of principles, one who applies them ‘has to take into account the relative weight of each [of them]’.⁴⁸

Principles play an important role in interpretation of law and their own persuasiveness may be a sufficient justification of a decision of one that applies norms.⁴⁹ They are inferred from the legal system, including express statutory provisions as well as unwritten legal norms and concepts.⁵⁰ Principles understood in such a way serve as a bridge between the norms of positive law and the values

⁴⁴ Dworkin, R., *Taking Rights Seriously*, Harvard University Press, Cambridge 1977, p. 23.

⁴⁵ *Loc. cit.*, p. 26.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ Allen, W.; Kraakman R., *op. cit.*, note 40, p. 313.

⁴⁹ Möllers, T., *Working with Legal Principles – Demonstrated using Private Autonomy and Freedom of Contract as Examples*, European Review of Contract Law 14/2018, p. 105.

⁵⁰ *Loc. cit.*, p., 106.

and ideas accepted in a given society, which, through them, penetrate the legal system.⁵¹

Due to their generality, principles may not be directly applied but they require a substantiation.⁵² The process of substantiations aims to extract a specified standard of behavior from the generality of principle. However, there are also interim steps in this process (i.e. general principles may be standardized into more specific general standards that may derive rules that may be applied in an all-nothing fashion).⁵³

4.3. Risks connected to the inflation of principles

As pointed out by Möllers (2018) the invocation of general principles of law may in some instances be risky as it creates a temptation to replace an in-depth analysis of a specific case with an invocation of an alleged overarching standard. In some cases, distinctive traits of the individual case could provide arguments to deviate from the general principle.⁵⁴ Moreover, because most of the principles lack express statutory confirmation, there is a risk of inventing additional, not sufficiently precise legal principles.⁵⁵ The author argues that ‘without precise determination of their scope, particularly for unregulated legal problems, it opens the door to decisions lacking transparent justification, that is, ultimately, arbitrariness’.⁵⁶

Moreover, the inflation of legal principles may lead to devaluation of their position in legal systems.⁵⁷ Therefore, new legal principles should not be inferred too freely. According to Safjan (2018) handling too many principles becomes impractical and is susceptible to controversies over the question of whether a given principle exists. For this reason, it gives rise to a call for caution in creating new principles within a legal system or field of law.⁵⁸

⁵¹ Książek, D., *Zasady prawa*, Roczniki Prawa i Administracji, XXI/2021 (special edition), p. 200.

⁵² Möllers, T., *op. cit.*, note 49, p. 112

⁵³ *Ibid.* The author provides an example of this logic. He points out that the general principle of private autonomy includes freedom of contract, but also freedom of ownership (Section 903 BGB), freedom to marry (Section 1297 BGB) and testamentary freedom (Section 1937 BGB). Freedom of contract in turn includes freedom to conclude contracts, freedom to choose a contractual partner, freedom of content, freedom of form and freedom to amend and cancel the contract.

⁵⁴ *Loc. cit.*, p. 104.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ Safjan, M., *Zasady prawa prywatnego w: M. Safjan (red.), Prawo cywilne – część ogólna. System Prawa Prywatnego*, vol. 1, C.H. Beck, Warszawa 2012, p. 325.

⁵⁸ *Ibid.*

4.4. Duty to treat shareholders equally and the principle of good faith

In the light of the above one should consider if the principle of equal treatment of shareholders is a standalone principle of law or just a practical implication of general principles.

The principle of equal treatment of shareholders is almost universally derived from the general obligation to act in good faith.⁵⁹ This obligation is almost universally understood as a duty to act honestly, be faithful to the parties' agreed common purpose as derived from the agreement, not to use powers for an ulterior purpose, deal fairly and openly with the other party and have regard to the other party's interest.⁶⁰

In Germany,⁶¹ Austria⁶² and Switzerland⁶³ obligation to treat shareholders equally under the same circumstances is linked with the duty of loyalty (*Treuepflicht*) in relation between the company and shareholders and, in some cases, between shareholders. The corporate duty of loyalty is derived from the general obligation to act in good faith (*Treu und Glauben*).⁶⁴ Some argue that there is a *lex specialis* – *lex generalis* relationship between equal treatment and corporate duty of loyalty.⁶⁵ Any corporate action infringing an obligation to treat shareholders equally under the same circumstances constitutes a breach of a duty of loyalty, but arbitrary discrimination of shareholders is not the only way this duty may be breach.⁶⁶ similar approach can be observed in Poland, where some scholars identify direct links between the duty of loyalty in corporate relations, vested in the principles of social coexistence (*zasady współzycia społecznego*), and the obligations to treat shareholders equally.⁶⁷ Links between the duty to treat

⁵⁹ Merkt, H., *op cit*, note 4, p. 779.

⁶⁰ Perry Ch., *Good Faith in Contract Law*, Edward Elgar Publishing, Cheltenham 2024, p. 19.

⁶¹ Verse, D., *op. cit.* note 3, p. 87.

⁶² Doralt, P.; Winner, M. in: Doralt, P.; Nowotny, C.; Kalss, S. (ed.), *Aktiengesetz. Kommentar*, Wien 2021, p. 593.

⁶³ Kunz, P. Jung P, *op. cit.* note 13, p. 75.

⁶⁴ Götze, C. in: Goette, W.; Habersack, M.; Kalss, S. (ed.), *Münchener Kommentar zum Aktiengesetz*, München 2019, remarks before §53a, para 22.

⁶⁵ Verse, D., *op. cit.* note 3, p. 87.

⁶⁶ *Ibid.*

⁶⁷ A. Opalski, *Zasada jednakowego traktowania wspólników i akcjonariuszy*, Przegląd Prawa Handlowego 6/2012, p. 5.

shareholders equally and the general obligation to act in accordance with principles of good faith is also recognized in Lithuania,⁶⁸ France⁶⁹ and Italy.⁷⁰

Interestingly, sources of an obligation to treat shareholders equally are similar in common law jurisdictions, despite their traditionally more skeptical towards the implied principle of good faith.⁷¹ In the USA the functional equivalent of an obligation to treat shareholders equally may be traced in fiduciary obligations.⁷² The main fiduciary duty is a duty of loyalty that requires directors, officers and controlling shareholders to exercise their corporate power in good faith to advance the interests of the company.⁷³ Bad faith in the corporate context is explained as conscious disregard for the welfare of the firm or abandonment of office leading to a conscious disregard to corporate matters.⁷⁴

In English law the situation is not very different. According to section 172 (1) (f) of the Companies Act 2006 a director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard to the need to act fairly as between members of the company. This requirement expressly confirmed what had already derived from equitable principles developed first in the context of trusts and then applied by the case law to corporations.⁷⁵

4.5. Admissible deviations form the equal treatment of shareholders

The analysis thus leads to the conclusion that there are direct links between the principle of equal of good faith and the requirement to treat shareholders equally. This section intends to demonstrate that an obligation to treat shareholders equally is not absolute but allows deviations that are compliant with the general requirement to act in good faith.

Shareholders should not be treated identically but only equally under the same circumstances. This rule is statutorily confirmed for instance in Germany (§ 53a

⁶⁸ Bitè, V., *op. cit.*, note 18, p. 55.

⁶⁹ Sortais, J.-P., *Abus de majorité, minorité, égalité. Répertoire des sociétés*, Dalloz.fr 2024, para 4,

⁷⁰ Nicolini, S., *L'abuso del diritto e buona fede nei rapporti societari*, Università degli Studi di Macerata 2016, p. 30,

⁷¹ Perry, Ch., *Op. cit.*, note 62, p. 13.

⁷² Cox, J.D., *Equal Treatment in Corporate Law: The American Experience* in Jung P, *op. cit.*, note 2, p. 107..

⁷³ Allen, W.; Kraakman, R., *op. cit.*, note 40, p. 283.

⁷⁴ *Loc. cit.*, p. 313.

⁷⁵ Hare, C., *op. cit.*, note 20, p. 19.

of the German Joint Stock Companies Act), Austria (47a of the Austrian Joint Stock Companies Act) and in Poland (Article 20 of the Polish Commercial Companies Code).

Corporate law does not typically require equal treatment *per capita* but implements the principle of proportionality linking corporate power with the equity investment of the shareholder in the company. Moreover, most jurisdictions allow differential treatment of various shareholders, provided that such differentiation is not arbitrary.⁷⁶ For instance, in English law assumes that providing preferences to selected investors is not unfairly prejudicial if it is based on a bona fide decision for the benefit of the company as a whole.⁷⁷

Similarly, in the United States a good faith decision motivated by the interest of the company may pass the intrinsic fairness test even if it applies in different manner to various groups of shareholders.⁷⁸ The same approach may be observed in France⁷⁹ and, to some extent, in Lithuania.⁸⁰ German law allows for objectively justifiable deviations from the requirement of equal treatment (*sachlicher Grund*) if they pass the proportionality test, i.e. are reasonably required to achieve permissible goal.⁸¹

Those remarks lead to the conclusion that equal treatment of shareholders is not a standalone principle in corporate law but rather a practical application of the general principle of good faith. It should not be regarded as an overarching standard of corporate law but as a factor in interpreting the obligation to act fairly and in accordance with the duty of loyalty in corporate relations. Shareholders do not need to be treated equally and there is no requirement of corporate egalitarianism. Corporate law merely prevents arbitrary discrimination contrary to the requirements of good faith. Thus, the notion 'equal treatment of shareholders' could be well substituted with 'fair treatment of shareholders'.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ The ruling of the Supreme Court of Delaware in the case of *Nixon v. Blackwell*, 626 A.2d 1366.

⁷⁹ François, B., *The principle of Equal Treatment of in French Company Law*, in: Jung P, *op. cit.*, note 2, p. 46.

⁸⁰ Bitė, V., *op. cit.*, note 18, p. 64.

⁸¹ Verse, D., *op. cit.* note 3, p. 253.

5. CONCLUSION

Both common law and civil law jurisdictions recognize some form of an obligation to treat shareholders equally. This does not mean that equal treatment of shareholders is a general principle of corporate law. It is rather a standard of behavior extracted from the general principle of good faith. It is a duty to treat shareholders equally but needs to be applied in accordance with the overarching principle of good faith. Deviations from equal treatment based on objective criteria and not motivated by the self interest of the corporate decision maker are not typically deemed a breach of the duty to treat shareholders equally.

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COURT DECISIONS

1. Judgment of the Court (Fourth Chamber) of 15 October 2009. *Audiolux SA e.a v Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG and Others*, ECLI:EU:C:2009:626
2. The ruling of the Supreme Court of Delaware in the case of *Sinclair Oil Corp. v. Levien*, 80 A.2d 717

LEGAL ACTS

1. Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, *Official Journal L* 026, 31/01/1977 P. 0001 – 0013 (Directive 77/91/EEC of 13 December 1976).
2. Directive 2006/68/EC of the European Parliament and of the Council of 6 September 2006 amending Council Directive 77/91/EEC as regards the formation of public limited liability companies and the maintenance and alteration of their capital (*OJ L* 264, 25.9.2006, p. 32–36)
3. Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, *OJ L* 169, 30.6.2017.