Comparative analysis of the corporate hostile takeover regulations in different jurisdictions: lessons for Ukraine

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Abstract

The thesis addresses the theoretical and practical problems of hostile takeover regulations in four different jurisdictions, such as the United States, the European Union, Germany and Ukraine. After detailed analyses of theoretical approaches to the definition, meaning and typologies of hostile takeover in target jurisdictions. The paper proceeded with analyses of legal regulations of contested takeover phenomenon, their comparison and later on determination of best practices. It concludes with suggestions of policy changes in the Ukrainian takeover laws.

Introduction

Emerging economies' business environments are never static, some companies are growing, some shrinking, new ones are set up and others go out of business. Existing establishments continuously aim at growth and development of their business. Businesses determine their choice between internal or external grows, as well as vertical and horizontal integration or disintegration based on different factors, for example company's marker growth, cost and availability of managerial and financial resources, competitive forces etc. In order to pursue external business development, companies usually go to the merger and acquisition activities market (M&A's activities market). [1]

The Ukrainian M&A's activities market showed enviable grows in 2013 - the amount of declared and closed deals exceeded $8 billion.[2] Experts from 'Ernst & Young' (Ukraine) and 'Visum Capital' report that there were more than 100 M&A's transactions in 2013, which is four times higher compared to 2012, when the amount of domestic M&A's market barely reached $ 2 billion.[3]

Notwithstanding the recent successful development of M&A's activities in Ukraine, it is worth mentioning the overwhelming use of corporate acquisition rather than merger technics, 98 per cent of which is considered a "corporate raid."[4] Corporate raid in Ukraine is "a type of the unfriendly or hostile takeover that includes replacement of top executives, downsize of company operations and lately its liquidation."[5]

[1] See Alan Peacock and Graham Bannock, Corporate Takeover and the Public Interest, (Aberdeen, David Human Institute, 1991), 7
[2] Olena Snezhko, "Ukraina poka ne smogla vosstanovit' rynok M&A do dokrizisnogo urovnia", Forbse Ukraine, January 20, 2014 http://forbes.ua/news/1363636-ukraina-poka-ne-smogla-vosstanovit-rynok-manda-do-dokrizisnogo-urovnya (accessed March 8, 2014)
[3] Tatiana Ochymovska, "Zlyttia ta poglynania- 2013", Komentari, December 13, 2013, http://ua.comments.ua/money/216989-zlittya-ta-poglinannya-2013.html (accessed March 8, 2014)
[4] D.A. Gorovyi, "Rozvytok Rynku M&A v Ukraini", *Finansovo-kredytna Dialnist': Problemy Teorii ta Praktyky*, issue No1 (14) (2013): 184-190 http://fkd.org.ua/pdf%5C2013_1%5C26.pdf (accessed March 8, 2014)
[5] Anatolii Yefymenko, "Reiderstvo abo Rynok Kontrolu", *Jurydychnyi Jurnal*, 1 Lystopad, 2008, http://www.justinian.com.ua/article.php?id=3072 (accessed March 8, 2014)

Corporate raid imposes harmful influence on a foreign investments attractiveness of Ukraine and consequently on its economic growth. Therefore, it is important to determine possible modifications of the weak points of Ukraine's underdeveloped corporate takeover regulations that allow wide spread of raid practices in the country's M&A's activities market.

Consequently, the objective of this thesis is to provide recommendations for policy changes in Ukrainian takeover regulations that hinder (?) the use of unlawful hostile takeover tactics in Ukrainian M&A's activities market negatively influencing the country's economy.

The thesis examines major loopholes in the Ukrainian corporate governance legislations that allow corporate raid, analyses the provisions of the European Union's, American and German corporate governance approaches to corporate takeovers regulations; extracts best practices for corporate raid regulations in chosen jurisdictions and suggests policy changes in the Ukrainian corporate takeover regulations.

The thesis research was drawn from a wide range of fields, covering different disciplines including but not limited to corporate governance law as well as company law. Thus, the primary method used in the thesis is a comparative theoretical approach to the evaluation of different sources. The research includes a comparative study of legislative statutes, policies and guidelines from selected jurisdictions, along with articles and publications from contemporary scholars, mass-media sources, both official and independent, academic literature, publications and bulletins of independent international organisations.

The present thesis limits itself to examining takeover activities only among publicly held companies, primarily focusing on hostile takeovers.

The thesis is divided as follows: It begins with a comparative description of various definitions of hostile takeover followed by a presentation of main theories that explain the phenomenon of hostile takeover from legal and economic points of view. Secondly, it presents main scenarios of corporate takeover developed under different jurisdictions.

Chapter II is devoted to the analysis of the U.S. approach to unfriendly takeovers adopted on federal and states levels, as well as common law courts practises across the country. Chapter III studies provisions of the European Union's legislation regulating issues of unfriendly takeovers. The chapter analyses provisions of the EU takeover directive, as well as focuses on German law regulation on corporate takeovers, such as the German Takeover Guide, as well as the provisions of the federal government. Chapter IV examines the effectiveness of corporate takeover laws in Ukraine, explains the phenomenon of 'Ukrainian corporate raiding' and by comparing it to the takeover laws from other selected jurisdictions it provides respective recommendations on policy changes in the Ukrainian corporate law in order to ensure its efficient functioning.

Chapter 1- Theoretical overview of hostile takeover

The phenomenon of hostilely taking over a publicly held company is the subject of much debate among researchers and practitioners from legal and economic environments in the U.S., the EU and many other jurisdictions. Thus, there is a great number of different approaches, meanings and definitions regarding hostile takeover available to researchers interested in this topic. This chapter provides the conventional definition of hostile takeover, its typology from business and legal perspective, and illustrates possible anti-takeover tactics that are used in respective jurisdictions.

1.1 Definition and meaning

Hostile takeover - is an acquisition of control of target company by acquiring company through: a) direct purchase of shares from a target company stockholders without prior approval of the incumbent management board; and/or b) proxy fight over replacement of a target company incumbent management board in order to get approval of the hostile acquisition of a company control over which is acquired by hostile takeover.

Acquiring company is a company that is secures a control over target company through unfriendly takeover. *Target company* usually a publicly traded company, which shares are listed on a stock exchange.

Since acquiring company usually contesting with the target's company board to acquire the control it is also appropriate to use term 'contested takeover'.[6] Similarly, many scholars use term 'unfriendly takeovers' because frequently after acquisition of a company there is a replacement of incumbent management board members by incoming board members who are loyal to the acquirer.[7] Thus throughout the paper terms 'hostile takeover', 'contested takeover' and 'unfriendly takeover' are used interchangeably. It is also appropriate

6 Peacock and Bannock, supra note 1, 8
7 Ibid.

to use the term 'corporate raid' in some jurisdictions, like Ukraine or Russia, when talking about hostile takeovers[8].

Issue of contested takeover for a number of years was not covered by specific regulations in chosen jurisdictions. However, with the corporate takeover abuses during the 1960s in the United States and later on in the United Kingdom, mandatory rules on hostile takeover were introduced in these countries. Germany and Ukraine introduced their first mandatory regulations on unfriendly takeover only in the early 1990s[9].

One of the reasons for developed economies to specifically regulate this type of transactions is shareholder protection, since a purchase of shares from a target company stockholders are made to numerous shareholders, most of whom usually holding small quantity of shares and therefore have little bargaining power because of the limited information regarding the bidder and the offer[10]. Thus, acquiring company may abuse its position and provide shareholders with misleading or false information about the acquisition or securities used as a consideration that can lead to financial losses of the shareholders. In addition to this, takeover may entail the complexity of a public offering of the shares, since an offer for the stockholders can be paid not only with cash, but shares of acquiring company. Accordingly, a shareholder of a target company would need to identify a real value of both companies stock to determine a fair price of share-per-share exchange ratio.

Detailed analysis of a hostile takeover regulation in chosen countries will be covered in following chapters, however it is important to mention that hostile takeover regulations usually provide complete and correct rules regarding the information about the takeover deal,

8 See Jeff Madrick, Taking America: How We Got from the First Hostile Takeover to Megamergers, Corporate Raiding and Scandal (Toronto- New York: Beard Books, 2003), 215
9 See Andreas Cahn and David C. Donald, *Comparative company law, text and cases on the laws governing corporations in Germany, the UK and USA* (Cambridge: Cambridge University Press, 2010), 756
10 Bidder and bidder offer will be discussed in next chapter as one of the type of hostile takeovers.

give shareholders enough time to make up their minds whether or not to sell the shares and oblige acquiring company to purchase for the very same price from all sellers of shares.[11]

There is much debate among scholars generated by the phenomenon of hostile takeover raising several questions, for example whether contested takeovers are beneficial for companies involved in the process or for the entire economy, or what motivation the acquiring company may have to pay a premium over the market price of the target company shares etc.[12]

Some of the scholars who define contested takeovers as a beneficial device of corporate governance in a view that takeovers represent a market economy solution for 'inefficient or ineffectual management team' problem.[13] Saying that a trading market by use of available information is efficient in setting a price of company shares at a level that best represent the value of a particular business. Thus, it is logical to say that any failure of the incumbent board to maximize the value of a corporate stock on an efficient trading market will attract an acquiring company to offer a premium price to stockholders for a controlling interest in the business. Because, with such a control over the business an acquirer can operate a target company in more efficient way and thereby achieve benefits that exceed the paid premium.

At the same time, opponents of the hostile takeover argue that the 'efficient market' hypothesis stating that although it is true that market can be efficient in a daily price settle of small amount of shares, it does not reflect enterprise value as a going concern.[14] Furthermore, others argue around the statement that stockholders who agree to sell their shares because of the benefits they gain from sale, but emphasize that shareholders rather feel that they might

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[11] Andreas Cahn and David C. Donald, supra note 8, 757
[12] Arthur R. Pinto and Douglas M. Branson, *Understanding corporate law*, 1st ed. (New York: Matthew bender & Co. Inc., 1999)
[13] Jonathan R. Macey, "Market for Corporate Control", *The Concise Encyclopaedia of Economics,* *http://www.econlib.org/library/Enc/MarketforCorporateControl.html (accessed March 10, 2014)*
[14] See Louis Lowenstein, *Pruning Deadwood in Hostile Takeovers: A proposal for Legislation*, Columbia Law Review (1983): 249-334

risk to become a minority shareholder in otherwise wholly-owned company and being driven out on unfavourable terms.[15] Also, researchers raise a concern that contested takeovers are not aiming at acquisitions of inefficient companies, but rather, looking for well-run businesses.[16]

However, both parts could agree that takeovers results in business value maximizing efficiency from synergies gains or reduction of the agency problem that is beneficial for both target and acquitting companies.

1.2 Typology of hostile takeover technic

The battle over corporate control takes many forms and is a subject of research of many different disciplines. This section of the thesis analyse various technics and strategies of hostile takeovers from business and legal point of views.

1.2.1 Business prospective

In the context of business perspective, hostile takeovers can be classified in four different categories, such as horizontal, vertical, concentric and unrelated or conglomerate contested takeovers.[17]

Horizontal hostile takeover is an acquisition of one firm by another that occurs where the parties are engaged in the same sector of industry or commerce. One of the motives of this kind of hostile takeover is a possible increase in the market power of the company in a particular industry, as well as an effect of an economics of scale in production and distribution. [18] Such acquisitions usually take place between businesses that are actual or potential market competitors and thus are subject to the national antitrust regulations.

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[15] Markus Dollinger, *The Fair Squeeze-out Compensation* (Auflage: BoD–Books on Demand, 2008): 9

[16] Martin Lipton, *Corporate Governance in the Age of Finance Corporatism*, University of Pennsylvania Law Review (1987): 1-72

[17] Milton L. Rock, *The Mergers and Acquisition Handbook* (New York: McGraw-Hill, 1987): 5

[18] Ibid.

Vertical hostile takeover – is an acquisition that occurs between acquiring and target businesses with strong "supplier-buyer relationships."[19] Therefore it occurs between parties that are either a supplier or a customer of each other. An acquisition of the company that is a supplier of the acquiring company is known as "backward integration", whereas "forward integration" is a vertical acquisition of the company that is a customer of the acquiring company.[20] Such type of the hostile takeover is usually undertaken when there is an imperfection of an intermediate products market.

Concentric hostile takeovers – is an acquisition where the acquiring and target businesses are interconnected with each other through common market, production or technologies processes.[21] Thus, it is logical to say that one of the motives of such an acquisition is an extension of product lines, market participation etc. of the acquiring business through getting hold of target company.

Unrelated or conglomerate hostile takeover – is an acquisition between firms that are involved in totally unrelated business activities, with the aim to diversify and reduce risks exposure and stabilise business portfolio of the acquiring company.[22]

Also, unfriendly takeover can be classified according to the nationality or location of the acquiring or target companies. In this respect hostile takeover can be classified as *domestic* and *overseas* acquisitions.[23]

1.2.2 Legal prospective

From the legal prospective hostile takeovers can be classified in various ways depending on the jurisdiction, method of negotiation with shareholders etc. Generally there

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[19] Ibid.
[20] *Martin K. Perry, Handbook of Industrial Organization* (Amsterdam: North Holland, 1988): Chapter 4
[21] Milton L. Rock,supra note16, 5
[22] See Jay B. Barney and William S. Hesterly, *Strategic Management and Competitive Advantages*, 2nd ed. (Upper Saddle River, New Jersey: Pearson Prentice Hall, 2008): 313–314.
[23] Peacock and Bannock, supra note 1, 9

are two main types of contested takeovers through which acquiring company can achieves control over target company: *proxy contest* and/or *share purchases*.[24]

A proxy contest or *a proxy fight*, as described by one of the founders of the law and economics movement, professor Henry Manne is "[t]he most expensive, the most uncertain, and the least used of the various techniques"[25] for acquiring corporate control. This term is mainly used in the context of hostile takeovers as a mean for the acquiring company to change a target company management board. The acquiring company will persuade target company shareholders to use their proxy votes[26] to vote out a company's management board in order to make it easier to accomplish the contested takeover. Proxy fight to change the director is difficult to win. In this case an acquiring company must convince a target company shareholders to vote against an incumbent management board expecting that a new board will be more efficient. It is also important to mention that target company shareholders are neither offered, nor granted any increase in the value of their shares. Also, there are some substantial costs of the proxy contest that might not be reimbursed, however, it is safe to say that a costs of the hostile takeover pursued by share purchase are far greater that costs of a proxy contest.[27] Furthermore, proxy fights often fail because of the so-called 'collective action' problem, when passivity and an inability to network of target company shareholders leads to the failure of the proxy fights. Apart from hostile takeovers, proxy fight is also used as a mean to solve a set of other corporate governance problems, such as agency problem.[28]

[24] Stephen M. Bainbribge, *Corporation Law and Economics* (Eagan, Minnesota: Foundation press, 2002): 622
[25] Henry G. Manne, "Mergers and the Market for Corporate Control", *The Journal of Political Economy*, Issue No73 (1965), 110-120
[26] *Proxy voting* is a form of voting whereby some shareholder of a company may delegate his or her voting right to another shareholder or investment adviser to vote in one's behalf at company's shareholders meeting for defined in advance strategic decisions i.e. formation of the management board.
[27] Arthur R. Pinto and Douglas M. Branson, supra note 11, 98
[28] For detailed analyses of proxy fight phenomenon within the framework of Corporate Governance law please see Gilson, Ronald J. and Alan Schwartz, "Sales and Elections as Methods for Transferring Corporate Control," Working Paper No. 206, Stanford Law School (2001); Bebchuk, Lucian A., and M. Kahan , "A Framework for Analyzing Legal Policy Towards Proxy Contests," California Law Review, Vol. 78 (1990), 1071-1135

Share repurchase is an alternative way for acquiring company to obtain a control over the target company. As it is well known, ownership of 50.1 per cent of the outstanding voting shares endows its owner with the possibility to have a final say on any fateful decisions regarding the company. Thus, to acquire a control over a target business an acquirer can use such a legal mechanism through purchases of shares on an open market or privately negotiated block transactions. Scholars distinguish three major types of share repurchase: a) fixed price tender offer, b) corporate raiding, c) Dutch auction and e) open market repurchases.[29] Some scholars also conceders transferable put rights as a type of share repurchase that can be used to acquire control over target company during the hostile takeover, however, as it will be analysed later in this thesis, transferable put rights are more useful as a defence tactic from the hostile takeover rather than a method of a target company acquisition.[30]

Tender offer or *tender bid* – is a public offer to the shareholders of a target company in which prospective acquirer offers to purchase a target company assets at a specified price and upon specified terms.[31] Usually, tender offer is available during a fixed period of time for all or only a portion of a class or classes of securities of the target corporation. Shareholders that wish to accept such an offer "tender" their shares to the "bidder"- the acquiring company.

Tender offers emerged in the United States during the 1960s as an alternative to the proxy fight that was a subject to a number of regulations on a federal level imposing substantial disclosure obligations on the acquiring company and thus increasing the transaction costs of such an acquisition. Prior to the adoption of the Williams Act of 1968 tender offers have not been regulated on a federal level, accordingly acquirers misused the

[29] J.F. Weston, K.S. Chung, J.A. Siu, *Takeovers, Restructuring and Corporate Governance*, 2nd ed. (Upper Saddle River, New Jersey: Prentice Hall, 1997): 371
[30] Infra chapter 1, part 1.3
[31] Stephen M. Bainbridge, *Corporation Law and Economics* (New York: Foundation Press, 2002): 652

lack of such regulations and were able to reaped a non-pro rate share of the gains.[32] Moreover, tender offer enable the acquiring company to eliminate the obstacles caused by controlling the company with minority shareholders.[33]

The empirical studies regarding tender offers show that the size of the premium offered to the shareholders to sell their stock is about 20 per cent higher than the prevailing share price, they also prove that there is a permanent increase in the market price of the company's common stock as a result of the share purchase activities.[34]

One can define six hypotheses that explain the attractiveness of a purchase of common stock through tender offer: a) dividend or personal taxation; b) leverage hypothesis; c) information or signalling hypothesis; e) bondholder expropriation hypothesis; f) wealth transfers among shareholders and g) defence against outside takeovers hypothesis.[35]

It is also important to mention such specific time of tender offer as a *'debt tender offer'* that is one of the forms of *'leveraged buyout'*[36]. It is a tender offer conducted through use of leverage or borrowed funds. One of the tactics is to use high-yield debt as a form of borrowing funds to purchase target's company shares and then use the target's company cash flow to pay out the debt over time. High-yield debt also used in another form of hostile takeover that is *"corporate raiding"* discussed below.

Corporate raiding is one of the forms of contested takeovers that lead to change of acquired company management board for more loyal board members that will assist the acquirer to generate a huge portion of profit through the sale of the various assets of the

[32] For more detailed information regarding Williams Act please see chapter 2 of the paper.
[33] Randal J. Brotherhood, Rule 13e-3 and the Going Private Dilemma: The SEC's Quest for a Substantive Fairness Doctrine, *Wash. U. L. Q.*, Volume 58, Issue 14 (1980): 883
http://digitalcommons.law.wustl.edu/cgi/viewcontent.cgi?article=2437&context=lawreview
[34] Alan Peacock and Graham Bannock, supra note 1, 10
[35] J.Fread Weston, Kwang S. Siu, *Takeovers, Restructuring, and Corporate Governance,* 2nd. Ed. (New Jersey: Prentice Hall, 1998): 377
[36] J.Fread Weston, Kwang S. Siu, supra note 35, 379

company.[37] Sometimes such a takeover conducted by means of high-yield debt to finance the acquisition. The main aim of the corporate raiding is to gain a profit from the company within a short period of time. It is a negative phenomenon in business for a country's economy and its investment environment that was particularly common in the 1970s and 1980s in the America and currently in use in many developing economies for example Ukraine and Russia [38].

Dutch auction share repurchases – is one of the possible alternatives to the tender offer when accomplishing hostile takeover through a share repurchase. In Dutch auction an acquiring company announces the number of shares it would like to purchase during a certain period of time and the price range at which stockholders may offer to tender. One of the main differences between a tender offer and the Dutch auction is that tender offers are made for a fixes price, while in the Dutch auction a range of prices is available within which investors are to choose a price to tender their shares at. The Todd Shipyards Company first introduced Dutch auction in the U.S in 1981.[39]

Open market share repurchase – is one of the most common methods of share repurchase, however, it is very rarely used as a hostile takeover tactic.[40] To obtain a control over the target company the acquirer repurchases target company available shares on an open stock market. Generally in an open market repurchase it can take months or even years to obtain the control over the target company because of its significant disadvantages, such as a limited amount of the shares available at open stock market, share purchaser disclose regulations upon obtaining certain amount of shares (e.g. in the U.S. SEC regulations requires

[37] wiseGEEK - online dictionary, available at http://www.wisegeek.com/what-is-a-corporate-raider.htm (last accessed on March 23, 2014)
[38] Efymenko A., *Rejderstvo abo rynok kontrolu*, , Jurydychnyj jurnal vol.№11, 2008, available at http://www.justinian.com.ua/article.php?id=3072 (accessed March 23,2014)
[39] For detailed analyzes of the Dutch auction and Todd Shipyards company case see Bagwell Laurie Simon, "Dutch Auction Repurchases: An Analysis of Shareholder Heterogeneity", *Journal of Finance*, Vol. 47, No. 1(1992), 71–105. http://www.jstor.org/stable/2329091?seq=3
[40] Gustavo Grullon & David L. Ikenberry, What Do We Know About Stock Repurchase? , Applied Corp. Fin., Volume 31, Issue 33 (2000);

shareholder to disclose purchase of stock after obtaining 5 per cent of company's stock[41]). Such disclose regulations allowing a target company to implement hostile takeover defensive tactics upon a purchase of minimum amount of its shares by a third party making it very complicated for the acquirer to conduct a takeover. Also, leaking information about share repurchase typically drives up a share price, as well as attracts competitors, thus making it expensive for the acquirer to obtain the control over the target company.

One of the forms of open market share purchase created in the U.S. is a 'creeping tender offers'- " a situations in which an investor or group of investors seek to gradually acquire the shares of stock issued by a target company, while attempting to get around the core provisions of the Williams Act"[42]. The ultimate goal of the creeping tender offer is to obtain enough shares of the target company to create a voting block and thus acquire control over target company.

In sum it is correct to say that a tender offer and the Dutch auction are the most efficient tactics of the contested takeovers and thus are the one that proportionally to their use are regulate by states. It is also true that the vast majority of hostile takeover defence tactics are focused on these two unfriendly takeover strategies. Though, detailed analyses of state regulations and target's defences will be provided in following chapters according to the chosen jurisdictions.

1.3. Anti hostile takeover defences.

Publicly listed companies can never feel completely safe from possible hostile takeovers. Therefore it has become very common to implement various defence strategies against contested takeovers. Nowadays, target companies that face a threat of the contested takeover are not helpless, since target's management board implement certain anti takeover

[41] Randal J. Brotherhood, supra note 32
[42] wiseGEEK - online dictionary, available at http://www.wisegeek.com/what-is-a-creeping-tender-offer.htm (last accessed on March 23, 2014)

defences that aim at making the unfriendly takeover less profitable, complicated, time consuming and thereby not attractive for the acquiring company. Such strategies could be either proactive or reactive. *Proactive measures* are designed to decrease or prevent the possibility of a successful contested takeover, whereas *reactive measures* are usually employed only after a hostile takeover has been attempted. This section is dedicated to the brief description of existing anti takeover defences in target jurisdictions.

1.3.1 Proactive measures

Proactive measures are designed to prevent a threat of the hostile takeover, therefore such measures always implemented before ahead. One of the anti takeover defences that falls into category of proactive measures is *shark repellent*. Shark repellent is an amendment to the company's charter designed to persuade potential acquiring company to look elsewhere.[43] Broadly speaking, there are two principal types of shark repellents: charter provisions related to the replacement of the management board and charter requirements of the super majority voting on specific transactions.

Classified or staggered boards provisions of the company's charter are specially created to cause difficulties for the acquiring company to replace a target company management board. Classified board provisions divide a management board into three classes with only one class of board members being annually elected. Thus to obtain a majority in the management board the acquiring company has to win a proxy fight in at least two annul meeting cycles, for example. However, such a tactic is only suitable if the acquirer needs quick access to the control over the target company board. *Supermajority vote provisions* require shareholder approval by at least 75 per cent and sometime even 90 per cent of the voting stock for all transactions that involve change of control over the company.[44] It is

[43] Stephen M. Bainbridge, supra note 30, 677
[44] Stephen M. Bainbridge, supra note 30, 678

common to use both supermajority and classified board provisions to effectively protect a company from hostile takeover.

Another proactive anti takeover provision is a *"shareholder rights plan"* or *"poison pill provisions"*. Poison pill provisions represent a creation of special securities carrying rights that can be exercised upon a triggering event. A triggering event accrues upon either accumulation of a specified percentage of target company stock or the announcement of a tender offer.[45] There are many forms of poison pill provisions, however, all of them aim at making it more costly to gain control over the target company. Flip-over and flip-in plans are the most commonly used types of poison pill. As an oversimplification, it is correct to say that flip-over plans provide targeted company shareholders with the option to purchase acquiring company's stock at a steep discount to market, whereas flip-in plans give a current shareholders of a targeted company (except for hostile acquirer) rights to purchase additional shares only in the target company at a discount. Another types of poison pill provisions are back-end plans, voting plans, shadow pill, chewable pill and bank mail pill.[46]

One more type of the poison pill provisions is a *'poison debt'* that relies solely only on debt securities. The target company issues bonds which terms a specially designed to discourage hostile takeover, since indentures of such debt forbid the acquiring company from burdening a target company with further debt, as well as prohibits a sale of a target company assets.

1.3.2 Reactive measures

Reactive measures as it was mentioned above are mostly used after the target company have already been threatened with the hostile takeover. Among the many reactive measures it is important to mention a following: a) defensive acquisitions of the business by a

[45] John S. Strong and John R. Meyer, "An analysis of shareholder rights plans", *Managerial and Decision Economics*, Volume 11, Issue 2 (May 1990): 73–86
http://onlinelibrary.wiley.com/doi/10.1002/mde.4090110201/abstract (accessed 12 March, 2014)
[46] Ibid. 44

targeted company that create competition policy problems for the hostile acquirer; b) "white knight" tactics involve choosing of alternative to the hostile acquirer company with which the target company will be combined; c) "white squire" tactics are a modification of white knight tactics with the difference that in a white squire transaction the target company sells a block of its shares to a third party it considers to be friendly. However, such share's block does not provide its owner with the control over the target company, while in a white knight option two companies are fully combined obtaining a control over the business; d) "crown jewels" tactics aim at selling to a third party those target company assets that are the most attractive to the hostile acquirer and thereby making it unwilling to pursue with the unfriendly takeover; e) "tin parachutes" provisions provide large bonus payments to a management board upon a shift of the control over the target company; f) "pac-man" defence is an exotic tactical move that includes a respond to the hostile takeover with the counterbid for the acquirer.[47]

Forthcoming description and policy regulations of the mentioned anti takeover tactics is provided in chapters III, IV and V of the thesis dedicated to chosen jurisdictions.

[47] For more detailed catalog, see RJ Gilson and BS Black, *The Law and Finance of Corporate Acquisition,* 2d end (New York: Foundation Press, 1995) 734-773

Chapter 2 - The U.S. approach to hostile takeovers

Takeover regulations in the Unites States is considered being one of the most developed and together with the corporate governance and securities laws form a solid base for business growth nationwide and serve as model system of takeover regulations for many countries. Therefore, it is important to analyse the main points of such a model corporate takeover system to use its best practices for policy proposal changing provisions of Ukrainian takeover regulations.

Phenomenon of hostile takeovers in the U.S. is regulated by three sources of law: a) federal level regulations (e.g. Securities Exchange Act of 1934), b) state level takeover statutes (e.g. Delaware Antitakeover Statute) and c) case law provisions (e.g. Revlon case). Therefore, detailed analyses of mentioned layers of takeover provisions in the U.S. are covered in following chapter.

2.1. Federal level framework

While there are clearly no federal corporate laws, there are however areas in which the federal government has a strong interest, one of them being a corporate purchase of publicly traded securities, such as corporate shares.[48] The prime example of this interest can be seen in the regulations of proxy solicitations and tender offers. Rules of proxy solicitations are an important vehicle for monitoring shareholders' ownership increases in a company stock, since it signals a potential proxy fight and together with the tender offer are the main means of a contested takeover.[49]

One of the federal level regulations regarding proxy solicitation and tender offer that is of a particular interest is the Securities Exchange Act of 1934 (SEA)[50], which established

[48] Arthur R. Pinto and Douglas M. Branson, supra note 11, 328
[49] See section 1.1 of Chapter 1.
[50] 15 U.S. Code § 78a

the Securities and Exchange Commission (SEC) and provides the bases for the amendments that are applicable for the contested takeover activities.[51]

Section 14 of the SEA is especially dedicated to the regulation of a proxy solicitation. It asserts that prior to every shareholder meeting shareholders shall be furnished with a proxy statement containing the information specified, as well as provides procedural requirements for proxy contest. Under SEA rule 14a-8, any security holder may require management to include his or her proposal for action in the proxy statement. In a case when a management board opposes of the statement it is required to include in the proxy material a security holder statement in support of his or her proposal of not more than 200 words.[52]

Prior to the late 1960s mergers represented a majority of intercompany combinations that involved friendly negotiations between a target company management board and an acquirer, however, in a case when a target company management board is unwilling to negotiate a deal, the proxy fight could be used by a potential acquirer to replace the incumbent management board to proceed with a merger.[53] However, in the mid of 1960s, corporate lawyers discovered another way of a hostile takeover: a tender offer.

William J. Carney suggests several reasons for the rapid growth of the tender offer phenomenon in the U.S.:

> [1] Lack of extensive federal or state regulations of tender offer;
> [2] Quicker and more successful results when compered with respect to the takeover via proxy contest;
> [3] Psychology- the appeal to shareholders in straight dollars and cents language, eliminating the need, as in proxy contest, to convince the shareholders that insurgent can do a more efficient job;
> [4] Notwithstanding the actual capital investment, the reduced costs of affecting a tender offer when compared with a proxy contest;
> [5] A new 'respectability' for cash tender offer.[54]

[51] J.Fread Weston, Kwang S. Siu , supra note 35, 16
[52] William J. Carney, *Mergers and Acqusitions* (New York: Foundation press, 2000) 536
[53] J.Fread Weston, Kwang S. Siu, supra note 35,17
[54] William J. Carney, supra note 51, 11

While there was a growing recognition of the tender offer as an effective vehicle for removing an entrenched but ineffective management board of a firm, thus serving the best interest of the society, there was another view that clamed that the motives behind many tender offers did not reflect a desire to improve the management of the businesses, but were disguised forms of industrial sabotage.[55] The phenomenon of the "corporate raider" or "takeover pirate" in the late 1960s among U.S. businesses serves as a good example of such industrial sabotage.

There were a variety of hostile takeover strategies in the 1960s under the general name "Bear Hug". The strategy was seeking to hurry the target company management board to recommend to the shareholders to accept the tender offer in a very short period of time. One of the strategies was a surprise tender offer called "Saturday night special"[56], that involved its announcement over the weekend, therefore denying the incumbent board time to respond.

By forcing shareholders to make a decision regarding a tender of their shares during a limited amount of time and without a possibility to obtain adequate information to evaluate the offer, hostile takeover strategies frustrated the federal interests in informed investment decision-making. All this, together with the different kinds of corporate fraud accumulating a controlling block of shares due to the absence of necessary regulations of ownership disclosure, lead to the enactment of the amendments of the SEA of 1934 in the late 1960s.

On July 29, 1968 after the second effort of U.S. Senator Harrison Williams, Congress passed the Williams Act[57] in the form of numerous amendments of the sections 13 and 14 of

[55] Ibid.
[56] Ivan Follon and James Srodes, *Takeovers* (London: Hamish Hamilton Ltd, 1987) xii
[57] 15 U.S.C. § 78(a), 48 Stat. 881 (1995)

the SEA of 1934. According to Senator Williams the act's purpose was to "make the relevant facts known so that shareholders have a fair opportunity to make their decision."[58]

Broadly speaking it is correct to say that the Williams Act provides protection for a target company's shareholders by: a) generating information about the takeover attempt for the target's management board and shareholders, allowing them to evaluate outstanding offers; b) providing a minimum period of time during which a tender offer must be held open; and c) clearly permitting the target company to sue the bidding company.[59]

Section 13 (d) of the Williams Act provides the target's management board and shareholders with an early warning system of hostile takeovers, by requiring any person who had accumulated 5 per cent or more of the publicly held company's stock to file Schedule 13D with the SEC within the period of 10 days after reaching the 5 per cent threshold. Copies of such a form shall be sent to the company whose shares have been obtained as well as to the principal exchange on which the shares trade.[60] Schedule 13D provides a target company with the necessary information regarding a stock acquirer, i.e. by identifying the acquirer (occupation and associates), distinguishing sources of financing of the shares purchase and disclosing a purpose of a shares acquisition. If it turns out that purpose of the acquisition is to take control over the target company, the business plan of the acquiring company regarding the target company shall be revealed.[61]

If the equity securities were obtained by institutional investors they can choose to file Schedule 13G instead of 13D of the Section 13 (g) of the Williams Act. Section 13 (g) applies to all owners of 5 per cent of company shares, in spite of how the 5 per cent threshold was reached and requires filing Schedule 13G. Its main purpose is to alter a target company

[58] Guhan Subramanian, A New Takeover Defense Mechanism: Using an Equal Treatment Agreement an Alternative to the Poison Pill, *The Delaware Journal of Corporate Law, Issue #23 (1998); 375*
[59] J. Fred Weston, Kwang S. Chung, Juan A. Siu, *Takeover Restructuring and Corporate Governance, 2nd ed* (New Jersey: Prentice Hall, 1998); 18
[60] 15 U.S.C. §78 (d) (1982)
[61] 17 CFR 240.13d

to a creeping acquisition over time. In spite of this, the extensive amount of target's shares can still be accumulated over years without filing the Schedules 13D or 13G because filing obligations do not apply to the acquirers of less than 2 per cent company's shares within 12 months.

Section 14 of the Williams Act also specifically covers public tender offers.[62] Under this section any group of the investors that makes a solicitation or recommendation to a target company's shareholders resulting in ownership of more than 5 per cent of the securities registered under Section 12 of the SEA of 1934 is obliged to file Schedule 14D with the SEC. Thus, the acquiring company shall disclose a Tender Offer Statement, which is a Schedule 14d-1, including the acquiring company's intention and business plans regarding the target company, as well as any agreement or prior relationship between two companies.[63] Such a schedule shall be filed with the SEC "[A]s soon as practicable on the date of the commencement of the tender offer…" and copies of such a schedule shall be hand-delivered to a target company and a relevant competitive bidder, as well as mailing of the schedule to prospective stock exchanges shall be conducted followed by a telephone notification.[64]

Once the tender offer is made, it shall stay open for at least twenty business days that might be prolonged by the bidding company and will be automatically extended in case the bidding company will change its terms.[65] For sixty days after the bid commences or up to seven days after the close of the bid, accepting shareholders of a target company have a right to withdraw their acceptance, which enables them to tender into a competing bid.[66] In addition, Section 14 of the Williams Act provides the "all holders rule"[67], according to which tender offers shall be opened to all holders of the shares sought, this section also obliges an

[62] 17 CFR 240. 14d
[63] J.Fread Weston, Kwang S. Siu, supra note 35,19
[64] Section 14d-2, 15 U.S.C. § 17n(d)
[65] Section 14e-1, 15 U.S.C. §17n(d)
[66] 15 U.S.C §78n(d)(5)
[67] Rule 14d-10 of the SEC

acquiring company to purchase a target company shares on the pro-rata basis[68] in case more shares of the target company are tendered into the offer than an acquiring company wants to purchase. There is also the anti-fraud provision prohibiting misstatement, omissions, manipulations and fraudulent practices regarding any tender offers, which is Section 14 (e) of the Williams Act.[69] It is also vital to mention the provisions of the Williams Act concerning the increase of an offer price while a tender bid is open, providing that shareholders who already tendered into a bid before the offer price increase shall also receive the highest price for their shares.[70] The so called "highest price rule" also specifies that if more than one form of consideration is given, it is sufficiently fair if "[T]he highest consideration of each type paid to any security holder is paid to any other security holder receiving that type of consideration."[71]

As it was mentioned above, apart from the federal regulations covering issues of corporate takeovers, there are also state statutes on takeover activities in the U.S. Such state level regulations are interesting legal devices that supervise corporate takeovers in each particular state and therefore will be discussed in details in flowing section.

2.2. States level anti takeover statutes

In the U.S. the corporate activities are primary regulated by the states and thus the states define a company as a legal person subject to their laws, therefore the chartering of companies takes place in individual states.[72] Company charters obtained from states define a firm's powers, rights and obligations of its shareholder and management board. Hence, states have a power to issue corporate anti-takeover regulations, which nonetheless are not

[68] Section 14(d)(6) AND Rule 14d-8 of the SEC
[69] 15 U.S.C §78n(e)
[70] 17 USC § 78n(d)(7)
[71] Andreas Gohn and David C. Donold, *Comparative Company Law* (Cambridge: Cambridge Press, 2004): 774; 17 USC §78n(d)(7)
[72] J.Fread Weston, Kwang S. Siu , supra note 35, 26

authorized to be in a conflict with federal regulations to impose restrictions regarding interstate commerce.[73]

Until the 1970s state laws were characterized by their silence on corporate takeovers, providing only regulations regarding such fundamental business changes as mergers, consolidations or sale of assets. However, after the passing the Williams Act, states started issuing their own takeover statutes.[74] Such state statutes tend to be less fair-minded in its application by giving protection to the in-state companies from the out-of-state acquirers.[75] Generally scholars define three generations of state anti-takeover statutes.[76]

The first generation of state statutes were designed in a similar way as the Williams Act and attempt to regulate tender offers by empowering state administrators to review the adequacy of the disclosures. These statutes provided a target company with the legal possibility to directly thwart the tender offer and were also applicable to companies incorporated in other states.[77] The result of this legislative approach was that tender offers might be subject to several statutes of different states, which developed many conflicts among tender offer parties and generally were a burden on interstate commerce. As a consequence, the U.S. Supreme Court invalidated many elements of these takeover statutes under federal law. One example of this invalidation is the Illinois statute that was declared unconstitutional in the decisions on *Edgare v. MITE Corp.*[78]. The U.S. Supreme Court in this case limited the application of state statute to companies incorporated only in the state and not to companies from outside the state.

The second-generation statutes were mostly dedicated to disclosure-oriented protection and covered the following issues: voting rules of takeover mergers; voting powers

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73 Ibid.
74 William J. Carney, supra note 51, 13
75 See Alaska State §§ 45.57.010-45.57.120 (2000), Tennessee Code Annotated §§ 48-103-101-48-103-505 (2002)
76 William J. Carney, supra note 51, 14
77 Arthur R. Pinto and Douglas M. Branson, supra note 11, 332
78 457 U.S. 624 (1982)

of shareholders holding a big block of the target company shares and rights of minority shareholders to put their shares to a bidder who acquired control over the target company. These statutes required the management board to consider not only shareholders interests, but also the interests of employees and creditors when making a decision on a tender offer. One of the most effective of these statutes was the so-called "control share acquisition" statute adopted in Indiana and upheld by the U.S. Supreme Court in *CTS Corp. v. Dynamics Corp. of America.*[79] Under the Indiana control share acquisition statute it was obligatory for an acquiring company to obtain approval of the majority of the disinterested shareholders of a bid to acquire the corporation. Indiana's statute provided that unless the disinterested shareholders of the company authorize, during the shareholders meeting, the voting rights of the shareholders holding more than twenty per cent of outstanding stock of the company, these voting rights shall be denied.[80]

Another example of the second-generation statutes regarding takeovers in the U.S. are the so-called "faire price statutes" that require a supermajority voting procedure of takeover approval by the target company shareholders unless they each obtain the best-paid price by the acquirer.[81] Also, there were "stakeholders statutes", which pre-empted the management board of the target company to take into account the interests of its creditors and employees while considering a takeover bid.[82]

The third-generation statutes went even further in in-state target companies' protection. The so-called "freeze" statutes, like the one in New York or New Jersey, provide a five-year moratorium on a merger of a target company with a hostile acquirer (second-step

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[79] See 481 U.S. 69 (1987)
[80] See Michael W. miller, *How Indiana Shielded a Firm and Changed the Takeover Business*, Wall Street Journal, July 1, 1987, at.1, col. 6
[81] See Corporations and Associations Article of the Annotated Code of Maryland §§ 3-602, 3-603 (1999 & Supp. 2000)
[82] See Annotated Code of Indiana § 23-1-35-1 (Michie 1999 & Supp. 2000)

transaction) unless the target company management board approves the merger before the acquisition itself.[83]

Another state that followed the same approach to the anti-takeover statutes was Delaware. Provisions of Delaware takeover statute shall be regarded with great significance, since "[m]ore than 50 per cent of all publicly-traded companies in the United States including 60 per cent of the Fortune 500 have chosen Delaware as their legal home."[84] The Delaware moratorium on second-step transactions is three years and it does not apply if the hostile acquirer purchases virtually all the shares of the target corporation. The hostile acquirer may obtain the approval of a target company management board together with two-third votes of target company shareholders to proceed with the transaction. One peculiarity of the Delaware takeover statute is that a company incorporated in Delaware is allowed to vote to opt out of the statute within ninety days of its effective date.[85] Also, Delaware's takeover statute has provisions regarding a business combination rule[86] requiring approval of the management board of share purchases over a certain percentage.

2.3 State case law on hostile takeover activities

Apart from federal laws and state takeover statutes, hostile takeovers are also regulated by state case law. Case law on corporate takeovers in the U.S. is heavily influenced by Delaware case law, since more then 50 per cent of publicly-trade corporations in American are incorporated in the Delaware.[87] The experience and flexibility of the Delaware Court of Chancery and its rulings regarding hostile takeover activities carry influence beyond the state borders and have been cited favourably by 12 out of 13 circuit courts and 15 state

[83] New York Business Corporation Law § 912 (McKineey Supp. 2002)
[84] The State of Delaware, *About Agency, available at* http://www.corp.delaware.gov/aboutagency.shtml (assessed March 31, 2014)
[85] Delaware Code Annotate title 8 § 362(a) (West 2013)
[86] Delaware General Corporate Law § 203 (West 2013)
[87] Supra note 83

courts.[88] Therefore, cases discussed in this section will be dedicated to Delaware case law on corporate takeovers.

Throughout the 1980s Delaware courts developed so-called "intermediate standards" for management board actions review in the course of a hostile takeover, creating tests of adequacy for directors' actions within the scope of the business judgment rule and the intrinsic fairness test.[89] Hence, there are several court decisions that are very important for the purpose of this thesis that is described in the following section.

One of the landmark decisions of the Delaware Supreme Court regarding corporate defensive tactics against hostile takeovers is *Unocal v. Mesa Petroleum Co*.[90] In this decision the court recognizes the conflict of interest between the management board and the company's shareholders while making a decision regarding defensive tactics from a hostile takeover, since in case of successful hostile takeovers, management board members might lose their job. Thus, the court analyses the standard business judgment rule and its applicability to the management boards' actions during a contested takeover. The court conducted following analysis of the case:

> If a defensive measure is to come within the ambit of the business judgment rule, it must be reasonable to the threat posed. This entails an analysis by the directors of the nature of the takeover bid and its effect on the corporate enterprise. Examples of such concerns may include inadequacy of the prior offered, nature and timing of the offer, questions of illegality, the impact on "constituencies" other than shareholders (i.e. creditors, employees and perhaps even the community generally), the risk of no consumption, and the quality of securities being offered in the exchange.[91]

By concluding with an analysis of the standard business judgment rule created in *Cheff v. Mathes*[92] the court enacted a two-step test to determine whether the management

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[88] See Dana M. Muir & Cidny A. Schipany, *New Standards of Director Loyalty and Care in the Post-Enron Era: Are Some Shareholders More Equal then Others?*, 8 N.Y.U.J. Legis. & Pub. Poly 297, 354 (2005)
[89] See Ronald J. Gilson & Reinier Kraakman, *Delaware's Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?*, 44 BUS. LAW. 247(1989)
[90] 493 A.2d 946 (Del. 1985)
[91] Ibid.
[92] *199 A.2d 548 (Del. 1964)*

board can implement defensive tactics against hostile takeovers or not. Thus, when enacting a defensive tactic, the management board shall: a) prove that there are reasonable grounds to believe in the existence of danger to corporate policy and effectiveness and b) that the defensive tactic is a reasonable reaction to the posed threat of the hostile takeover. The court also declares that the presence of a decision supporting management board actions of the majority of independent directors materially unaffiliated with the target company enhanced the directors' proof.[93] The first step focuses on the management board acting in a good faith after a reasonable investigation of the hostile takeover attempt, while the second step of the Unocal test allows the court to analyse whether the management board's response to the threat of takeover was proportional or not. It is also important to mention that under the Unocal test the court accepted the legality of a poison pill defence in the *Moran v. Household Int'l, Inc.*[94] However, the court rejected the idea that the management board should be passive in the situation of a hostile takeover and as a result the Unocal test gives the management board substantial latitude by allowing some judicial scrutiny of the tactics.[95]

A year later, after the Unocal decision, the Delaware Supreme Court was faced with the application of Unocal's two-step test in *Revlon, Inc. v. MacAndrews & ForbesHoldings, Inc..*[96] In this case, Revlon's management board found the offer of the bidder inadequate and as a result implemented several anti-takeover tactics, such as a poison pill plan and self tender for 10 millions shares of Revlon in an effort to avoid the takeover. Implementation of these anti-takeover tactics had a positive affect on the tender offer bid and increased the cash price of the bid to the level that could not be considered as inadequate. However, the target company management board decided not to favour the initial bidder and found a white knight – Forsmann Little, which offered a competitive bid to the target company management board.

93 293 A 2d. 955
94 500 A 2d. 1346
95 Arthur R. Pinto and Douglas M. Branson, supra note 11, 320
96 500 A.2d 1346

Nonetheless, in return for such a bid,, the target company agreed to: a) sign "no shop provision" according to which Revlon would not look for another bidder; b) pay a $25 million cancellation fee in case of bid fail; and c) give Forsmann Little rights to buyout the most valuable divisions of Revlon at a discount price if the offer fail.[97] Approval of such transaction by the target company management board favoured Forsmann Little and thus effectively ended up trumping the initial bidder. Accordingly, the initial bidder sued Revlon's management board for breach of fiduciary duty. As a result of the litigation, the court held that Revlon's management board had breached their fiduciary duty, since once the company had been put up for a sale, the management board's duties switched from preservation of the target company to maximization of stock value to its holders. In other words, the target company management board becomes an "auctioneer" as soon as the sale of a company is in progress and so they have to seek for "[t]he highest price for the benefit of the stockholders."[98]

In a later decision of the Delaware Supreme Court in *Paramount Communications, Inc. v. Time, Inc.*[99] the court clarified circumstances in which the management board's obligations established by the Revlon case would apply. The court used the Unocal test to first look for a possible threat for the target company and found that an inadequate value and the coercive tactics used by the bidder were not the only threat faced by the target company. Then, court analysed the reasonableness of the target company's defences dependent on the threat. One of the main distinguishable differences between the Time and Revlon case according to court are that in Time's case there was not a planned breaks up of the target company. As a result, the court held that there are no general obligations on the management board to sell the company only because there is a premium offered to target company

[97] 506 A.2d 173, 182 (Del. 1986)
[98] Ibid.
[99] 571 A.2d 1140 (Del.1989)

stockholders, even at fair price, when such sale of the company would cause upset of company's business plan.[100] Thus, it means that a management board when facing a hostile takeover can consider other factors besides share value maximization while the tender offer is on the table, for example: a) the level of information available to the shareholders regarding the offer and b) the offer conditions and the timing of the offer.[101]

In the beginning of 1990's there were two more important decisions of the Delaware Supreme Court clarifying duties of a target company's management board during a hostile takeover procedure, as well as extending possible anti-takeover measures. One of them is the *Paramount Communications Inc. v. QVC Network, Inc.*[102] in which the court held that a management board must be able to justify a negotiated value during a tender offer and if there are few competitors simultaneously bidding, all of them shall be treated fairly, this is the so-called "arm length bargain".[103]

Unitrin, Inc. v. American General Corp.[104] is another leading case of the Delaware Supreme Court clarifying a target company's management board's capacity to use anti-takeover tactics such as poison pills or buyouts to thwart possible contested takeovers. The court ruled that anti-hostile takeover tactics shall be within the range of reasonableness and should not be draconian in order to be permissible[105].

The importance of the court decisions described above is widely recognised by a target companies' management boards as well as bidders in the takeover, since they determine a framework of possible actions of both parts of the takeovers and help to predict the outcome of court litigations. The cases provide a two-step test when determining appropriate measures against contested takeover (Unocal case); provide a management board

[100] See Arthur R. Pinto and Douglas M. Branson, supra note 11, 322
[101] 571 A.2d 1140, 1153 (Del. 1989)
[102] 673 A. 2d 34 (Del. 1994)
[103] For detailed analyzes of the Paramount Communications Inc. v. QVC Network, Inc. please see Arthur R. Pinto and Douglas M. Branson, supra note 11, 324
[104] 651 A.2d 1361 (Del. 1995)
[105] Ibid. 1387-1388

with the duty to act as auctioneers when considering the tender offer (Revlon case); clarify a management board's duties when fighting against a hostile takeover and broadening available anti-takeover tactics (QVS and Unitrin cases).

Chapter 3 – The European Union approach to hostile takeovers

In the European Union (EU) there are a number of jurisdictions in each of which approaches to takeover activities and consequently laws covering this issue can vary in a significant way. However, unlike the United States, the EU adopted a comprehensive takeover directive harmonizing takeover activities in 28 EU Member States (MS) to a certain extent and at the same time keeping an optimal balance of diversity and flexibility. At the same time, MS's takeover models are greatly influenced by the German approach to takeover activities due to its comprehensive development, constant updates and Germany's economic and political influence within the EU. Hence, the German approach has a great impact on the development of takeover regulations in other EU MSs. Thus, a detailed analysis of the EU takeover directive together with model takeover regulations developed by German legal system are especially important for the purpose of this thesis, since its final chapter provides policy proposals in Ukrainian takeover regulations. Particularly in light of a recently signed association agreement with the EU and Ukraine obliging associated countries of the EU to adapt its legal system to the EU standards. Therefore, the first part of this chapter provides an analysis of EU takeovers and its influence on the development of the takeover regulations among the MS, followed by the second section dedicated to the German approach to corporate takeover regulations.

3.1 European Union framework on hostile takeover

The European Union framework that regulates issues of a hostile takeover represented by the wide-ranging Directive on Takeover Bid[106] was adopted in 2004 after almost 30 years of political and judicial debates starting with the first report prepared by Professor Pennington in 1974.[107] The Directive initially was adopted to provide the takeover rules,

[106] Council directive 2004/25, On Takeover Bids, 2004 O.J. (L 142/12) (EC)
[107] John Armour and Joseph A. McCahery, infra note 15, 14

which regarded sustainable development of the EU internal market as a crucial element being one of the main benefits of the EU accorded to its MS.[108]

As it was stated by the head of the High Level Group of Experts appointed by the European Commission (EC) in 2011, Professor Jaap Winter's main objective in the takeover directive was to "[c]reate rules for takeover bids on listed companies, offering a mechanism for consolidating and integrating Europe's industry in order for European business to make optimal use of the EU's single market."[109] Also, the Preamble of the Directive states that its objectives are to provide common legal rules for takeovers especially protecting minority shareholders, as well as facilitating takeover rules to truly integrate the capital markets of the EU. [110]

It is interesting to see the Takeover Directive's approach to the definition of a takeover. As we can see from the first chapter of this thesis there are various techniques of the hostile takeover, one of which is a purchase of company's shares from its stockholder without prior consultation with the management board of target company. The Directive specifically choose this approach to the hostile takeovers using term "*takeover bid*" or in US terminology "tender offer" to describe takeover activities. Thus, Article 2(1)(a) defines "takeover bid" or "bid" as: ""…a public offer (other than by the offeree company itself) made to the holders of the securities of a company to acquire all or some of those securities, whether mandatory or voluntary, which follows or has as its objective the acquisition of control of the offeree company in accordance with national law…"[111] By defining takeover bid as a main form of takeover activities, the directive thus limits its applicability only to hostile takeovers conducted through direct purchase of stock from target company shareholders and not covering proxy fight as another tactic of a contested takeover. One of

[108] The Winter takeover report p.18, and the Commissioner's speech to the European Parliament: see F. Bolkestein "New proposal on takeover bid", European Parliament, 2 October, 2002 (SPEECH/02/449)
[109] The Winter "We all ant to go to heaven but nobody want die" [2004] European Company Law 4
[110] Directive on Takeover Bid, supra note 104, preamble
[111] ibid

the reasons for such limitation of the directive scope might be the directive's objective to facilitate cross-border takeover transactions, thus leaving further complications of takeover activities, such as a proxy fight, to the authorities of each MS independently.[112]

The scope of the directive defined in Article 1 states that the directive is meant to coordinate " … [l]aws, regulations, administrative provisions, codes of practices… [and] … arrangements established by organisations officially authorised to regulate the markets' that relate to takeover bids..."[113] Rules of the directive apply to takeover bids for shares of companies governed by the law of the EU MSs where all or some of the shares of the company are listed in one or several MSs, however the directive does not apply to a takeover bids on securities issued by companies, collective investment of capital provided by the public, as the main objective of their activities. The directive also does not apply to takeover bids on securities issued by the MSs central banks.[114]

Apart from definition of the takeover activities, the directive also provides other legal instruments, which are almost opposite to the American system of hostile takeovers and at some point controversial to each other. Such legal instruments are: a) board neutrality, b) a mandatory bid rule and c) a breakthrough rule. Description of such innovative legal devices of the EU takeover directive and their influence on takeover regulations will be discussed below.

3.1.1 Board neutrality

According to some scholars, debates in corporate governance theories over takeover phenomenon can be divided in two groups of thought: a) the management board defence approach and b) the shareholders choice perspective.[115] According to the board defence

[112] Beate Sjåfjell, *Towards a sustainable European company law: A normative analysis of the objectives of EU law, with the takeover directive as a test case,* Vol. 3. (Kluwer Law International, 2009), 299
[113] Directive on Takeover Bid, supra note 104, Art. 1
[114] Ibid
[115] John Armour and Joseph A. McCahery, After Enron: Improving Corporate Law and Modernising Securities Regulation in Europe and the US (`Oxford and Portland, Oregone: HART Publisher, 2006), 562

approach, due to the limited of expedience, coordinated problem etc. stockholders of a target company are unable to make an informed decision during the takeover attempt, thus the management board shall be the one in a better position to protect the company and be able to enact anti takeover techniques. On the contrary, according to the shareholders choice perspective, management boards are self-interested in their response to a takeover, since the new owner of the company might dismiss them from their position. Therefore, the management board shall not be allowed to independently create any defences. The EU takeover directive follows the second approach and thus requires the management board of the target company to stay neutral during a takeover attempt, as well as to refrain from "… taking any action…which may result in the frustration of the bid and in particular before issuing any shares which may result in a lasting impediment to the offeror's acquiring control of the offerree company."[116]However, a management board is allowed to seek alternative bids in order to ensure the highest possible price for the target company's shareholders.[117] The same article of the directive requires the management board to issue its opinion regarding a bid, as well as requires the consultation of the target company's employees.[118] Thereby, it is correct to say that the directive specifically allows usage of the so-called "white knight" anti-takeover defense and forbids usage of the "poison pill" plans, unlike the U.S. where "poison pill" plans are the most popular anti-takeover tactic. Nonetheless, the directive states that the management board will not have to stay neutral during the contested takeover attempt if they get a permission to implement antitakeover measures through a general shareholders meeting.[119]

[116] Directive on Takeover Bid, supra note 104, Art. 9(2)
[117] Ibid.
[118] Ibid.
[119] Ibid.

3.1.2 Mandatory bid rule

The EU takeover directive dedicates a significant part to the protection of the minority shareholders of a target company, thus Article 5 of the directive provides the "mandatory bid rule"[120]. The mandatory bid rule is the main obligatory rule of the directive that requires a bidder who exceeds a certain ownership threshold of a target company's shares that confirms his or her control over the company to purchase the rest of target company's shares. According to the directive, MSs are require to determine the percentage of voting rights that confirm control over the target company, as well as a method of its calculation.[121] The acquirer who exceeded the threshold shall purchase the remaining shares at an equitable price defined as "…[h]ighest price paid for the same securities by the offeror…" over a period of time that shall be determined by each MS, however such period "…[shall] be not less than six months and not more than 12 before the bid"[122]. The directive also provides requirements that ensure the purchase of a target company's shares at equitable price by stating that:

> If, after the bid has been made public and before the offer closes for acceptance, the offeror or any person acting in concert with him/her purchases securities at a price higher than the offer price, the offeror shall increase his/her offer so that it is not less than the highest price paid for the securities so acquired.[123]

The supervising authority of a MS in accordance with criteria declared in advance can adjust such an equitable price.[124] The rationale behind the mandatory bid rule, according to some scholars, is to provide an exit mechanism for target company stockholders who did not tender their shares in regard to the tender bid, since they hold shares without real control over the company and therefore can not effectively influence the company's development.[125]

[120] Directive on Takeover Bid, supra note 104, Art. 5
[121] Ibid. Art. 5(1), Art. 5(3)
[122] Ibid. Art. 5(4)
[123] Ibid.
[124] Ibid. Art. 5(5)
[125] John Armour and Joseph A. McCahery, supra note 113, 564

3.1.3 The breakthrough rule

In addition to the obligatory bid and board neutrality rules, the takeover directive provides another innovative tool to facilitate corporate takeover – the breakthrough rule.[126] The rule is designed in such a way that it eliminates a variety of hostile takeover defenses, which is considered as significant barrier to the development of an efficient cross-boarder market for corporate takeovers in the EU. According to article 11 of the directive, upon the acquisition of 75 per cent or any relevant threshold not more then 75 per cent enforced by the MS, the bidder has a right to convene a general meeting of the target company stockholders at two weeks notice according to the one-share-one-vote system.[127]

Thus, any anti-takeover measures based on a difference in voting powers of dual class shares could be "broken through," allowing the bidder to implement any changes in the target company's article of association and other constitutional documents, remove an incumbent management board and basically override any anti-takeover vehicles preventing him to take control of the target company. Also, the directive provide that any restrictions regarding the transfer of target company securities will not apply vis-à-vis the bidder during the period when the bid being open after public announcement of the bid.[128]

Article 11 (5) states that "…equitable compensation shall be provided for any loss suffered by [a bidder]. The terms for determining such compensation and the arrangements for its payment shall be set by Member States."[129]

En bloc provisions of the breakthrough rule make it difficult for a holder of the controlling shares block, as well as incumbent management board of a target company, to exercise any anti-takeover measures based on multiple voting rights.

[126] Directive on Takeover Bid, supra note 104, Art. 11
[127] Ibid, Art. 11 (4)
[128] Ibid. Art. 11(3)
[129] Ibid. Art. 11(5)

3.2 German legal system approach to hostile takeover

Modern German takeover law was adopted in the early 2000's after the conduction of the hostile takeover of Mannesmann AG by British Vodafone plc. in 1999-2000, which became the biggest German hostile takeover amounting to more than 150 billion Euros.[130] This hostile takeover sent a shockwaves around corporate Germany and made the German government start working on the takeover law. Thus, on January 1, 2002 the Act on the Acquisition of Securities and Takeovers (Wertpapiererwerbs- und Übernahmegesetz (WpÜG)[131] was enacted. Among other legislation acts that, to certain extent, regulate takeover activities in Germany, there are the Stock Corporation Act, the Reorganisation Act (Umwandlungsgesetz), the Securities Trading Act (Wertpapierhandelsgesetz), the Stock Exchange Act (Börsengesetz) and the Stock Exchange Ordinances (Börsenordnungen). However, for the purpose of this thesis only regulations provided by the WpÜG will be analysed.

The Act on the Acquisition of Securities and Takeovers applies to all publicly listed stock corporations (AG) and partnerships limited by shares (KGaA) in Germany at organised securities market that have company's registration office in Germany. The WpÜG is also applies to foreign businesses, which voting shares are exclusively listed in Germany, the act also applies to foreign businesses that are listed not only in Germany, but also in foreign stock market and are registered with the Federal Agency for Financial Services Supervision (Bundesanstalt für Finanzdienstleistungsaufsicht) - BaFin[132].

The WpÜG provides regulations that cover the procedure of company takeover, as well as regulations on possible anti takeover defence measures. According to WpÜG there

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[130] Baum, Harald. "Takeover Law in the EU and Germany: Comparative Analysis of a Regulatory Model." *University of Tokyo Journal of law and Politics* 3 (2006): 64

[131] Gesetz zur Regelung von öffentlichen Angeboten zum Erwerb von Wertpapieren und von Unternehmensübernahmen (WpÜG), Law of 20 December 2001, Federal Gazette I (2001) p. 3822; an English translation can be found with PELTZER / VOIGHT German Securities Acquisition and Takeover Act (Cologne 2002).

[132] Ibid. Section 1(2)

are three possibilities of a target company share repurchase through public offer: a) *an acquisition offer* (Erwerbsangebot) is a public purchase of target company shares without aim to acquire control over the company; b) *a takeover offer* (Übernahmeangebot), that is a hostile takeover bid aiming to acquire a control over a target company by purchasing more then 30 per cent a target company voting stock directly from its stockholders; and c) *a mandatory offer* (Pflichtangebot) that is a mandatory public purchase of target company stock with an intend to increase one's stake in the company by target company shareholder who already owns or controls 30 percent of target's voting stock[133]. For this thesis purpose only mandatory and takeover offers are discussed in the present section, because only these two offers lead to a shift of the control over the target company. The Mandatory Offer was implemented into the German takeover law together with European Breakthrough Rule[134] and several other provisions as a result of the enactment of the EU takeover directive in 2014, of which a detailed analysis can be found in previous section.

The main difference between a mandatory offer and a takeover offer is that in case of the former the acquirer has already exceeded 30 per cent threshold of voting stock of the target company, de facto obtaining control over the company and therefore is required to make a public bid to purchase rest of the outstanding stock, when in the latter case the acquirer only intends to obtain a control over the target company and thus at first makes a public offer to purchase all shares of the target company. The WpÜG's mandatory offer provision serves to protect rights of the target company minority shareholders by providing them with an opportunity to leave the company in return for compensation of their loss of the control over the target company.

The rules on the consideration to be presented in both kinds of offers are identical and provide "[f]orm of a cash payment in euro or liquid shares admitted to trading on an

[133] *Public mergers and acquisitions in Germany: overview*, available at http://uk.practicallaw.com/3-501-9658#null ()
[134] WpÜG, supra note 13, section 33b

organised market."[135] Such consideration shall be a "adequate consideration" and must take in to account: "[t]he average stock exchange price of the shares of the target company and acquisitions of shares of the target company by the offeror, persons acting in concert with him, or subsidiaries of the latter[.]"[136]

According to section 35 (1) of the WpÜG:

> Any person who gains control of a target company directly or indirectly must, without undue delay and within seven calendar days at the latest, publish that fact … stating the extent of his percentage of voting rights. The period shall commence at the time the offeror becomes aware, or ought to have become aware given the circumstances, that he has gained control of the target company.[137]

The same section of the WpÜG obliges the offeror of the mandatory offer to submit a need document to the BaFin within four weeks of publication of the attainment of control of a target company. However, upon written application the BaFin can exempt the offeror from the obligation of making a mandatory offer in case of narrowly defined exceptions provided by Section 37 of the WpÜG.[138]

Section 10 of the WpÜG provides rules regulating publication of the decision to make a takeover offer. According to this section offeror must publish its decision to make an offer without undue delay in the Internet and an electronic information dissemination system with a wide circulation among credit institutions, financial services institutions, enterprises etc. Such publication is triggered by the resolution of the "last" body of the offeror's company that decides on a takeover offer. However, prior to a publication an offeror must inform the BaFin about its decision to make a takeover offer to a target company. After publication of the intention of the offeror to make a takeover offer to a target company have been issued, the offeror shall notify the management board of a target company in writing about the decision to make an offer. After this process, the management board of a target company mast

135 WpÜG, supra note 13, section 31 (2)
136 Ibid, Section 31 (1)
137 Ibid, Section 35 (1)
138 Ibid, Section 37

immediately inform the employees' representatives body about the takeover offer notification.

Generally, Section 11 of the WpÜG requires the offeror after notification of the takeover offer to send necessary documents to the BaFin within a period of four weeks. If the offeror has an adoption of the document by the BaFin or if during 10 days after the submission of required document the BaFin has not prohibited the offer, the offeror shall without any undue delay publish the document. Upon the publication of the documents, the offeror shall immediately submit these documents to the managing board of the target company. Also, it is mandatory for the offeror and for the management board of a target company to foreword offer's document to their respective bodies representing interest of the employees.

The documentation must, inter alia, contain: a business name, the domicile and the legal form of the offeror; the name, domicile and legal form of the target company; the securities which are subject of the bid; the type and amount of the consideration offered for the securities of the target company; the conditions precedent (if any) of the bid; the start and end date of the acceptance period.[139] In addition, the offeror shall also provide in the documents some supplementary details regarding the future functioning of the target company, for example business plan of the target company etc.[140]

After the document is published the general acceptance period, of four weeks, commences however, the acceptance period cannot under any circumstances be longer then ten weeks.[141] After a public announcement of a takeover offer a management board of a target company cannot take any actions that could influence on the success of such an offer. However, there are certain exemptions to this rule provided by the Section 33 of the WpÜG excluding several actions of a target company management board to influence on the offer,

[139] Ibid, Section 11 (1)
[140] Ibid, Section 11 (2)
[141] Ibid, Section 16 (1)

such as: 1) actions which would have been taken by an orderly and diligent manager of a company which is not confronted with a takeover offer; 2) search for a competitive offer; 3) actions approved by the supervisory board; 4) actions that have been authorised by a target company general meeting of the shareholders that took place prior to the takeover offer.[142]

It is also important to say that after the EU Takeover Directive was transform into the German takeover law, German stock corporations permitted to opt out from above mentioned exemptions by providing corresponding provisions into company's articles of association. Thus, if a company is opted out from general exceptions of the Section 33 of the WpÜG, the management board together with a supervisory board of such a company permitted to conduct following anti takeover measures:

1) actions to which the board of management and the supervisory board have been authorised by the general meeting after publication of the decision to make an offer;
2) actions taken in the normal course of business;
3) actions taken outside the normal course of business, to the extent that they serve the realisation of decisions that were made and partially realised prior to the decision to make an offer;
4) and the search for competing offers.[143]

Usual anti takeover measures available for German companies are: a) the acquisition of it's own shares, b) the "Crown Jewel" defence, c) "Pac-man" defence, d) the "White Knight" defence and finally g) the "Golden Parachutes". However, the most used American defence tactic - " is not available in Germany, due to the principal of pre-emptive rights and non-discrimination against shareholders, prevailing in German company law, that differs German takeover law from the American or British regulations.[144] Thus, making German takeover laws an alternative model to follow while reforming country's takeover legislation.

The WpÜG also provides a specific squeeze-out procedure that follows a successful takeover offer. This procedure, together with general squeeze-out provisions of the German

[142] Ibid, Section 33
[143] Ibid, Section 33a (2)
[144] Jeffrey N. Gordon, and Mark J. Roe, Eds. *Convergence and persistence in corporate governance* (New York: Oxford University Press Inc., 2004): 541

Stock Corporate Act, as well as shareholder right to sell-out their shares after the conclusion of the takeover offer, strongly protects the rights of the target company's minority shareholders.

The threshold provided in the Section 39a for squeeze-out procedure upon successful takeover offer and Section 39c following a takeover bid or mandatory offers is at least 95 per cent of the outstanding company stock, that is in comparison with 90 per cent recruitment in the U.S. [145] is pretty high.

Generally speaking, implementation of the EU takeover directive into the German takeover laws together with the German codetermination corporate system involving employees in the supervisory board, as well as management board obligations to inform target company employees about any notification of the takeover offer, makes German takeover procedure unique. However, for some countries the adaptation of the similar system in their own jurisdiction would be a very hard and complex procedure.

Nevertheless, some separate provisions of the German takeover regulations can definitely be implemented in to the takeover legislations of many post-soviet countries, such as Ukraine, due to the convincing position of the employees during the M&A's activities inherited from soviet times. Thus, following chapter is dedicated to the analysis of governing hostile takeover activities in Germany and the U.S. that can be possible adopted by the Ukrainian legislator in order to modify Ukrainian takeover laws according to modern standards.

[145] Delaware Code Annotate title 8 § 253 (West 2013)

Chapter 4 - A comparison of the hostile takeover law effectiveness in the U.S., the EU and Ukraine

4.1 Introduction

Legislation framework regulating M&A's activities in the Ukraine starts its development in the beginning of the 1990's after the country became independent from Soviet Union and proceeded with development of market economy and thereby country's corporate, securities and other regulations governing purchase and sale of legal entities. Unfortunately, comprehensive corporate takeover act in Ukraine, such as German WpÜG or the Williams Act in the U.S, have not been adopted, since concept of corporate takeover is still undeveloped in country's legal system. Although, such phenomenon as a corporate takeovers, and especially, hostile takeovers or in the terminology of the Ukrainian legal theory, corporate raid is exists in Ukrainian business environment. For example, 60 per cent of Ukrainian M&A's deals within the joint stock companies are considered as a "corporate raid".[146]

Also, there is no legal definition of neither hostile takeover, nor corporate raid, provisions regulating these kinds of M&A's activities can be find in different state laws, such as The Civil Code of the Ukraine, the Commercial Code of 2004, the Law of Ukraine on Companies of 1991 (the "Companies Act"), The Law of Ukraine on Securities and Stock market of 2006 (the "Securities Act") etc. However, the most important regulation consisting norms on corporate takeovers is the Law of Ukraine on Joint Stock Companies (the JSC Law) analyses of which is provided in present chapter.

Starting with analyses of rules governing Ukrainian takeover activities provided by the JSC Law, present chapter proceeds with comparison of the hostile takeover laws

[146] D.A. Gorovyi, supra note 4, 184

effectiveness in the U.S., the EU and Ukraine and basing on these analyses provides possible policy changes in Ukrainian corporate law.

4.2 Comparison of the hostile takeover laws in Ukraine and other chosen jurisdictions

The Law of Ukraine on Joint Stock Companies (the JSC Law)[147] that entered into force on April 30, 2009 is the biggest achievement of Ukrainian corporate law. The JSC Law provides two-tier system of corporate governance in Ukrainian Joint Stock Companies (JSC), establishes the Supervisory Board (SB) and the Management Board (MB) of a Joint Stock Companies.[148] However, unlike German two-tier board, SB of a Ukrainian Joint Stock Companies consist exclusive of company's shareholders who are elected on the general shareholders meeting once in a three years.[149] The SB appoints the JSC's Management Board, which members can be any legal or natural person.[150] Within the framework of corporate takeover the SB of a Ukrainian JSC is endowed with a control over a company, however it position is weaker than of a SB of a German AG with regards to the approval of anti hostile takeover measures. Also, it is interesting that MB of a Ukrainian JSC does not have limitations of its membership, and depending on a company size, can consist only with one person who serves as a Director General of a company.[151]

The JSC Law, as it was already stated before, does not provide definition of a hostile takeover, however it does provide potential acquiring company with a possibility to obtain the control over a company by consolidating provisions of a target company shares repurchase. The JSC Law provides two types of shares repurchase by the acquirer, as well as disclosure and transparency rules of such shares repurchase: a) acquisition of a significant

[147] Zakon Ukrainy pro Akcionerni Tovarystva from 17.09.2008, № 514-VI (The Law of Ukraine on Joint Stock Companies), available at official web page of Ukrainian Parliament: http://zakon4.rada.gov.ua/laws/show/514-17
[148] Ibid, Articles 51, 58
[149] Ibid, Article 32(2)
[150] Ibid, Article 58 (2)
[151] Ibid, Article 58 (3)

block of company's shares[152] and b) acquisition of a controlling block of company's shares[153]. In case of former an acquirer intending to obtain ten and more per cent of a target company shares conceders as a potential holder of a significant block of shares and therefore "[s]hall be obliged not later than 30 days before the date of acquisition of a significant block of shares to present a written notice to the company of his/her intention and make it public."[154] Such an obligation to notify about one's intention to acquire significant percentage of a target company stock indicates to the SB of a target company an increase in shareholdings that might signal about possible proxy fight on the next shareholders meeting, since holders of a significant block of shares has a right to participate in a formulation of meeting's agenda and proxy nomination.[155]

An acquisition of a controlling block of company's shares, which according to article 1 (6) of the JSC Law is fifty plus one per cent of outstanding company's stock, leads to the acquisition of the control over a target company, according to the JSC Law.[156] The JSC Law does not distinguish any limitations on how controlling block of company shares shall be purchased i.e. through open market purchase or direct tender offer to company shareholders. Thus, unlike the U.S. or the EU regulations, the JSC law dose not obligate an acquirer to open a tender offer to a target company shareholder in order to acquire the control over a target company. The JSC Law does not differentiate direct or indirect control of the company, therefore it does not matter whenever the controlling shares block acquirer is a single person or it is persons acting jointly.

However, as a protection of minority shareholders of a target company, the article 65 (1) of the JSC law obligates the holder of a controlling block of shares to offer to all shareholders to acquire their shares of a target company within 20 days from the date of

[152] Ibid. Article 64 (1)
[153] Ibid, Article 65 (1)
[154] Ibid, Article 64 (1)
[155] Ibid. Article 40 (4)
[156] Ibid, Article 1 (6)(8)

acquisition of a significant block of shares. The same Article of the JSC Law governs that the shareholder has from 30 to 120 days to respond to the offer, as well as provides that the acquisition price of shares may not be less than their market price. Thus, the JSC Law does not provide the minority shareholder with the "fair price" rights, as for example, the U.S. case law or German WpÜG does, thus making it possible to pay to the minority shareholder different price per a share than the one paid to purchase controlling block of shares.

Also, the JSC Law in contradistinction to the U.S. Williams Act and the EU takeover directive does not provide the minority shareholders with the "put-in right" (rights to put on a table to a controlling block shareholder of a target company one's shares upon the excess of a specified threshold of controlling block shareholder percentage in company's ownership). Nevertheless, the article 68 of the JSC Law provides the mandatory redemption of shares by a joint stock company on demand of shareholders, stating that:

> Each shareholder – an owner of the company's common shares – shall have a right to demand mandatory redemption of his/her voting shares by the company if he/she has registered for participation in the company's general meeting and voted "against" approval of the decisions by the general meeting on:
> 1) company merger, takeover, division, transformation or spin-off;
> 2) execution of a major legal transaction by a company;
> 3) change in the amount of the statutory capital. [157]

Thought, the JSC law dose not define a hostile takeover, it is however, provides some kind of "board neutrality rule", governing that "[t]he company which significant block of shares is being acquired shall have no right to take measures to prevent such acquisition."[158], that means that the MB of a target company can not take any direct reactive measures to prevent an acquisition of a controlling block of target company shares upon a hostile acquirer e.g. the "Pac-man", the "white knight" or the "killer bees"[159] tactics. However, the JSC Law provides several options for proactive anti takeover measures that can be used by the SB of a

[157] Ibid, Article 68 (1)
[158] Ibid, Article 64 (2)
[159] An individual or firm that helps a company fend off a takeover attempt. A killer bee uses defensive strategies to keep an attempted hostile takeover from occurring.

target company to fend off a takeover attempt, such as a) issuance of the self tender offer[160] or b) sale of crown jewel[161]. The JSC law provides that issuance of the self tender offer or in language of the law, a joint stock company's redemption of securities placed by it, is only available upon the decision of the shareholders meeting, while the sale of crown jewel or a conduction of the major legal transaction can be introduced upon the decision of only a SB.

Although, the JSC law does not say anything about the usage of the "poison pill" defence tactic, it is correct to say that it is legal to implement such an anti takeover measure into the company's charter, since unlike German regulations of the takeover activities, Ukrainian JSC law states that the pre-emptive right provisions in JSC charter are optional and can be implemented only upon the decision of the shareholders meeting.[162]

Generally, it is correct to say that Ukrainian takeover regulations are undeveloped that leads to the wonky ownership position of a company shareholder and as a result, negatively impacting on growth of country's business attractiveness for foreign investors. There of course no universal solutions of this problem, however, there are some recommendations for policy change that can be considered by the Ukrainian government while reforming country's corporate law.

To start with, it is of course safe to recommend adoption of the comprehensive takeover act similar to the Williams Act in the U.S., the EU takeover directive or German WpÜG, in order to harmonize Ukrainian takeover regulations and provide valid source of the takeover activities.

Such wide-ranging takeover act shall define what is a corporate takeover within the Ukrainian legal system; describe types of corporate takeovers and possible legal methods to conduct them. One of the best ways to do so for Ukraine would be to follow the American and EU's approach to mandatory tender offer, as a possible option to obtain a control over a

[160] The JSC Law, supra note 147, Article 66 (1)
[161] Ibid, Article 70
[162] Ibid, Article 27

target company through share repurchase of a target company shares directly from its shareholders. As well as provide effective disclosure rules regarding share repurchase together with the fair price regulations. It is also recommended to adopt similar to WpÜG's provisions of possible management board actions upon a hostile takeover attempt, as well as to provide possible squeeze-out and put-in rules following the recommendation of the EU's takeover directive and the Williams Act accordingly.

Conclusions

This thesis has examined phenomenon of hostile takeovers and controversial issues of its regulations in the Unites States, the European Union, Germany and Ukraine. The paper addressed theoretical and practical problems of takeover regulations in chosen jurisdictions and examined possible solutions of these problems aiming at understanding phenomenon of contested takeovers, its main purpose, procedure and possible outcomes. The research analysed American, EU's and Ukrainian market for corporate control and identified main weak points of Ukrainian takeover legislation and using best practises from chosen jurisdiction on unfriendly takeover regulations suggested policy changes in Ukrainian takeover laws.

While one's can say that convergence is the right word of the day to describe corporate governance, it is noticeably inapplicable to takeover regulation. After the examination of them main development points of both, the U.S. and the EU frameworks on corporate takeover and hostile takeovers in particular, it is fair to say that these jurisdictions adopted intensely dissimilar regulations governing the process and substance of hostile takeover. It was also interesting to determined that although corporate takeovers takes a big part of Ukrainian market for M&A's activities, country's takeover laws is still badly developed and incomprehensive.

Furthermore, after studying approaches to corporate takeovers in chosen jurisdictions it was surprisingly to find out that Ukrainian takeover laws already include some good practices of corporate takeover regulations from both, the U.S. and the Germany. Ukraine for example already follows Germen model of tow-tier board structure, however uses American approach in prioritising shareholder as the main target of anti takeover protection.

In conclusion it is correct to say that in order to sustain a strong and efficient system of corporate takeover regulations Ukraine shall enact a comprehensive takeover act harmonizing takeover laws that will adopt best practices from the U.S., the EU and Germany.

Consequently, further research is required to find the best ways of composing modern takeover act in Ukraine that will best serve country's need in developing modern corporate law and will satisfy best practices on both sides of the Atlantic ocean.

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