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ANALYSIS OF LEGAL APPROACHES TO HOSTILE CORPORATE TAKEOVER IN THE EU WITH AN EMPHASIS ON GERMANY

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 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 MS. Thus, detailed analyses of the EU takeover directive together with model takeover regulations developed by German legal system are main goals of this paper. Such comparative analyses of the takeover regulations are especially important for the development of the Ukrainian takeover regulations. It is relevant in the light of a recently partly signed Association Agreement between the EU and Ukraine obliging to adapt its legal system to the EU standards.

Such topic in one way or another was already covered by the following

researches J. Armour, M. Hoepner, M. Hupner, G. Jackson, J. McCahery, M. Schulz, B. Sjefjell, N. Travlos, O. Wasmeier and others. In Ukrainian legal literature some problems of hostile corporate takeover in the European Union and our country have been an object of research of such scholars as P. Kharchenko, O. Kohut, V. Lukyanets, K. Smyrnova, G. Stakheiva, S. Valitov, U. Zhurik. However there are a lot of issues, which have not been examined yet due to genesis of the EU law and practice of its implementation in the MS.

The EU framework that regulates issues of hostile takeover activities represented by the wide-ranging Directive 2004/25/EC of the European Parliament and of the Council of 21.04.2004 on takeover bids [1]. It was adopted after almost 30 years of political and judicial debates starting with the first report of Professor Pennington in 1974 [2, p. 14]. The Directive initially was adopted to provide the takeover rules, 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 [3, p. 18]. As it was stated by the head of the High Level Group of Experts appointed by the European Commission (EC) in 2011, Professor Jaap Winters the main objective of 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» [4, p. 1].

It is interesting to observe the Directive's approach to the definition of a «takeover». 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 a 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...» [1, p. 14]. 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 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 the proxy fight, to the authorities of each MS independently [5, p. 299].

Rules of the directive apply to takeover bids for shares of companies governed by the law of the EU MS where all or some of the shares of the company are listed in one or several MS, 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, as well to takeover bids on securities issued by the MS's central banks [1, p. 14].

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: board neutrality rule, a mandatory bid rule and a breakthrough rule. Description of such innovative legal devices of the EU takeover directive and their influence on takeover regulations will be discussed below.

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 [2, p. 562]. The board defence approach, 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, the shareholders choice perspective stats that 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 second approach and thus requires in the Article 9 (2) the management board of the target company to stay neutral during a takeover attempt, unless they were authorised to do so by the general shareholders meeting. However, a management board is allowed to seek alternative bids in order to ensure the highest possible price for the target company's shareholders. Also the Directive specifically allows usage of the so-called «white knight» anti-takeover defence and forbids usage of the «poison pill» plans, unlike the U.S. where «poison pill» plans are the most popular anti-takeover tactic.

Article 5 of the EU takeover directive provides the «mandatory bid rule», as a protection of the minority shareholders of a target company. 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, MS are require to determine the percentage of voting rights that confirm control over the target company, as well as a method of its calculation. The acquirer who exceeded the threshold shall purchase the remaining shares at an equitable price defined in Article 5 (4) of the Directive.

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 cannot effectively influence the company's development [2, p. 564].

In addition to the obligatory bid and board neutrality rules, Article 11 of the takeover directive provides another innovative tool to facilitate corporate takeover – the breakthrough rule. The rule is designed in such a way that it eliminates a variety of hostile takeover defences, which is considered as significant barrier to the development of an efficient cross-boarder market for corporate takeovers in the EU. According to paragraph 4 of the 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'.

Thus, any anti-takeover measures based on a difference in voting powers of dual class shares could be «broken through», allowing the bidder 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-a-vis the bidder during the period when the bid being open after public announcement of the bid.

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 [6, p. 64]. 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 (WpÞG) [7, p. 3822] was enacted.

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 WpÞG 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 this state, but also in foreign stock market and are registered with the Federal Agency for Financial Services Supervision (BaFin).

The WpÞG provides regulations that cover the procedure of company takeover, as well as regulations on possible anti takeover defence measures. According to WpÞG there are three possibilities of a target company share repurchase through public offer: a) *an acquisition offer* (Erwerbsangebot); b) *a takeover offer* (Þbernahmeangebot; and c) *a mandatory offer* (Pflichtangebot) [8]. For this paper purpose only mandatory and takeover offers are discussed, 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 and several other provisions as a result of the enactment of the mentioned EU takeover Directive 2004.

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 WpÞG'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 in section 31 (2) of the WpÞG. Such consideration shall be a «adequate consideration». According to section 35 (1) of the WpÞG any person who gains control over a target company has to publish that fact within seven calendar daysThe same section of the WpÞG 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 WpÞG.

Section 10 of the WpÞG provides rules regulating publication of the decision to make a takeover offer. Section 11 of the WpÞG requires the offeror after notification of the takeover offer to send necessary documents to the BaFin within a period of four weeks. Also, Section 11 obligates the offeror and the management board of a target company to foreword offer's document to their respective bodies representing interest of the employees. According to Section 11 (1) of the WpÞG 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. In addition Section 11 (2) of the WpÞG states that the offeror shall also provide in the documents some supplementary details regarding the future functioning of the target company, for ex. business plan of the target company etc.

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 according to Section 16 (1) of the WpÞG. 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 WpÞG excluding several actions of a target company management board to influence on the offer, 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.

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 WpÞG, the management board together with a supervisory board of such a company permitted to conduct some anti takeover measures. 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 – «poison pill» 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 [9, p. 541]. Thus, making German takeover laws an alternative model to follow while reforming country's takeover legislation.

The WpÞG also provides a specific squeeze-out procedure that follows a successful takeover offer. This procedure, together with general squeeze-out provisions of the German 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. (Delaware Code Annotated 1995, title 8 § 253 [10]) 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, subsequent research shall be conducted in order to analyse the regulations governing hostile takeover activities in Germany and the EU that can be possible adopted by the Ukrainian legislator in order to modify Ukrainian takeover laws according to modern standards.

Key words: hostile takeover, a mandatory takeover offer, the board neutrality rule, the breakthrough rule, the mandatory bid rule.

У статті досліджуються особливості регулювання протиправного корпоративного поглинання у праві ЄС та Німеччини. Вивчаються інноваційні положення Директиви ЄС щодо злиття та поглинання компаній 2004 р., зокрема правило нейтралітету правління компанії, «прориву» та обов'язкових торгів, а також норми чинного законодавства Німеччини щодо поглинання компаній. Особлива увага приділяється специфіці імплементації положень цієї Директиви у Законі ФРН «Про придбання цінних паперів і поглинання» 2001 р.

В статье исследуются особенности регулирования противоправного корпоративного поглощения в праве ЕС и Германии. Изучаются инновационные положения Директивы ЕС по слиянию и поглощению компаний 2004 г., в частности, правило нейтралитета руководства компании, «прорыва» и обязательных торгов, а также нормы действующего законодательства Германии о поглощении компаний. Особое внимание уделено специфике имплементации положений этой Директивы в Законе ФРГ «О приобретении ценных бумаг и поглощении» 2001 г.

The article is dedicated to the analysis of legal approaches to the hostile corporate takeovers in the EU and Germany laws. The paper study such innovative provisions of the EU Takeover Directive of 2004, as the board neutrality rule, the breakthrough rule and the mandatory bid rule and its modern German law on takeover activities. Particular attention is drawn to the reflection of the Directive provisions on hostile takeovers in the Act on the Acquisition of Securities and Takeovers in Germany 2001.

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