Adoption of Squeeze-Out and Sell-Out Rights of Shareholders in Ukraine on the Basis of a Comparison of EU, Germany and USA

by Anton Babak

LL.M. SHORT THESIS
COURSE: European Company Law
PROFESSOR: Peter Behrens, Dr. habil.
Central European University
1051 Budapest, Nador utca 9.
Hungary

ABSTRACT

Currently there are debates in Ukraine regarding implementation of squeeze-out and sell-out rights of shareholders. This paper thesis stands for granting these rights to shareholders in Ukraine. Firstly, the research compares EU, Germany and USA regulations of squeeze-out and sell-out rights focusing on regulatory framework, legal thresholds and fair price definition of squeeze-out or sell-out procedures. Based on the comparative research, this thesis elaborates a squeeze-out and sell-out model for its implementation in Ukraine. This model should adopt the takeover squeeze-out and sell-out rules from the EU Takeover Directive. At the same time, corporate squeeze-out and sell-out should be as well enabled mainly by borrowing provisions from the German legislation. The liberal provisions regarding the legal threshold should be adopted from the U.S.

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INTRODUCTION

Squeeze-out and sell-out rights of shareholders of a public company are among the most controversial rights of the participants of a company. The crucial interest invokes the fact that both types of rights are connected with the compulsion of shareholders to act without their consent. In case of applying squeeze-out right, major shareholder is entitled to compel minority shareholders to transfer their shares to him/her while providing fair compensation. Oppositely, in the case of sell-out right, minority shareholders are entitled to require the major shareholder to purchase their shares providing fair compensation.

With regards to Ukraine, squeeze-out and sell-out rights are not included *per se* in the country's legislation. However, in 2009 the Law of Ukraine "On Joint Stock Companies"[1] (hereinafter – "Law on JSC") came into force. This law envisages a modern approach to public companies and resembles such best practices as: only electronic form of shares is possible, a better protection of minority shareholders, protection of the company from hostile takeovers, cumulative voting etc. One of the innovations relevant for the topic of this research is the possibility of mandatory buy-out of shares from the shareholders of the company by the company itself[2]. Other meaningful innovations include the establishment of a mandatory bid rule[3] and provisions defining the market value of the shares[4]. But no squeeze-out and sell-out rights are established by the Law on JSC or by other legislative acts of Ukraine.

The described situation undoubtedly worsens the position of both minor and major shareholders. For example, there are many public companies in Ukraine that gained hundreds of shareholders during the privatization process. Usually, only few shareholders have more

[1] Закон України «Про акціонерні товариства» [Law of Ukraine "On Joint Stock Companies"], adopted 17.09.2008, No. 514-VI
[2] *Supra* note 1, article 68.
[3] *Supra* note 1, article 65.
[4] *Supra* note 1, article 8.

than 1% of shares. The rest of them have a really small stake, which does not allow managing the company. Without squeeze-out rights, the major shareholders cannot decrease the amount of minor shareholders – an action that would allow them to cut down expenses and/or to limit the distribution of insider information about the company's activity. Also, the inability to apply squeeze-out prevents the major shareholder from acquiring 100% in the company and to go private, in order to avoid the listing rules compliance requirements and, consequently, reduce expenses. Together with that, the absence of sell-out rights for minor shareholders fosters abuses from the side of the major shareholder that can appropriate all the dividends, control premium and infringe the interests of minor shareholders.

Currently there are vivid debates in Ukraine regarding the implementation of squeeze-out and sell-out rights of shareholders. In 2010 amendments that provided squeeze-out rights were suggested to the Law on JSC. However, the President vetoed these amendments on the unconstitutionality ground. This illustrates the fact that public polemic on this issue is active in Ukraine and underlines the relevance of this paper's topic. Also, there is hardly any research regarding squeeze-out and sell-out rights that consider Ukraine, since such rules have never existed in the Ukrainian legislation. Therefore, this thesis fulfills the important task of comparing the squeeze-out and sell-out provisions of the most peculiar jurisdictions and developing a squeeze-out and sell-out model for implementation in Ukraine.

The thesis examines and compares issues of regulatory framework, constitutionality, legal thresholds and fair price definition of squeeze-out or sell-out procedures of the jurisdictions mentioned below. On the ground of this comparison, a possible framework for squeeze-out and sell-out rights will be suggested for adoption in Ukraine.

The present research will focus on the squeeze-out and sell-out rights of the shareholders in the USA, European Union in general, and Germany in particular. The case of the United States legislation involves a general analysis of the Delaware Law, as the most popular state for corporate transactions[5]. Regarding legislation in the European Union, the analysis will be based on the European Union Directive on Takeover Bids (Takeover Directive, EU Takeover Directive)[6], adopted in 2004 and is still widely discussed. German law will be considered from the terms set by the German Stock Corporation Act (Aktiengesetz)[7], and the German Securities Acquisition and Takeover Act (WpÜG)[8]. The former encompasses the original German view on corporate squeeze-out provisions, adopted before the Directive on Takeover Bids. The latter will offer an understanding of the interpretation and implementation of the aforementioned EU Directive in Germany, as a particular Member State.

The methodology applied throughout this research comprises description and comparison. The descriptive method will be used to inform the readers about the peculiarities of each chosen jurisdiction. The comparative method will be used to weigh the results found in the respective jurisdictions and to suggest the best suitable solution for Ukraine.

The first chapter deals with the place of squeeze-out and sell-out rights within the system of shareholders' rights, as well as with the definitions of squeeze-out and sell-out rights. The second chapter will analyze the different constituents of squeeze-out and sell-out rights in each chosen jurisdiction, such as regulatory framework, legal thresholds and fair price definition of squeeze-out or sell-out procedures. The third chapter will be devoted to the

[5] *See infra* notes 37-39.
[6] Directive 2004/25/EC of 21.04.2004 on Takeover Bids
[7] Aktiengesetz [The German Stock Corporation Act], (BGBl. I p. 1089) FNA 4121-1, in force from September 6,1965.
[8] Wertpapiererwerbs- und Übernahmegesetz [The German Securities Acquisition and Takeover Act], (BGBl. I S. 3822), in force from January 1, 2002.

current situation in Ukraine. Arguments will be presented in order to support the idea of introducing squeeze-out and sell-out rights in the country. It will also lay out a possible framework for implementation of the squeeze-out and sell-out rights in Ukraine.

This thesis stands for granting these rights to shareholders in Ukraine. Ukraine should adopt the takeover squeeze-out and sell-out rules from the EU Takeover Directive. At the same time, corporate squeeze-out and sell-out should be as well enabled, mainly by borrowing provisions from German legislation. The liberal provisions regarding the legal threshold should be adopted from the U.S.

Chapter 1. The Notions of Squeeze-Out and Sell-Out Rights of Shareholders

1.1 The Place of Squeeze-Out and Sell-Out Within the System of Shareholders' Rights

According to Luca Enriques et al. one of the three main fundamental agency problems that corporate law must observe is the "conflict between controlling and minority shareholders"[9]. The system of corporate law is designed in such a way that it provides remedies for minority shareholders against the superior power of major shareholders. Corporate law tries to grant some decisive and controlling rights to minor shareholders and, at the same time, it constraints the broad rights of major shareholders. For instance, some of the most well-spread minority shareholders rights are the following[10]: reserving the seats in the board for minority directors; providing cumulative voting rules; providing voting caps that limit the power of major shareholders; imposing a majority-of-the-minority or supermajority approval requirement on fundamental transactions; creating voting trusts; providing a position of independent directors who should act impartially in respect to major and minor shareholders.

However, the rights of minor shareholders are often tied to exceeding a certain threshold, which activates these rights. For instance, the right to invoke a general meeting of shareholders, the right to suggest a question-item to the agenda of the general meeting, or the right to appoint an independent director, which depends on a cap that the minor shareholder's capital should reach, either separately or together with another minor shareholder. If the percentage of capital held by minor shareholders is not sufficient enough to overcome the cap,

[9] Luca Enriques et al. *The basic Governance Structure: The Interests of Shareholders as a Class, in* THE ANATOMY OF CORPORATE LAW (Kraakman et al., 2009) 55.
[10] *Ibid, see* chapter 4.

then minor shareholders simply cannot enjoy their rights. Protecting these rights is considered unimportant within the scale of the company's overall priorities and not significant enough to affect the company's profit. I will therefore argue that limiting the protection of minor shareholders is unavoidable for establishing a balance between major and minor shareholders' rights.

The other important provision that helps to balance the rights of major and minor shareholders is the squeeze-out right. Extrapolating the approach explained previously, when the possession of minority shareholders becomes less than 5 or 10 % of the company's capital (depending on jurisdictions), the protection of their property rights becomes unimportant and insignificant, compared to the benefit that can be obtained by a major shareholder getting 100% control over the company as a result of squeeze-out. In this case, the right of property is not absolute, thus minor shareholders can be legally deprived of their shares, and certainly provided with a fair compensation price.

In order to balance the existence of the squeeze-out right on the one hand, and the application of fair compensation price on the other, sell-out rights were proposed. At the same time, by its nature, it is one of the means for ensuring minority shareholders' protection.

To shortly conclude, the squeeze-out right is the tool, which helps balancing the interests of majority and minority shareholders. The squeeze-out right can be treated as an exception from the whole system of minority rights, acting for the benefit of major shareholders. Sell-out right is a corresponding right to the squeeze-out but in the "card batch" of minority shareholders.

Further, the definitions of squeeze-out and sell-out rights will be examined.

1.2 Squeeze-Out

Black's Law Dictionary defines squeeze-out as "[a]n action taken in an attempt to eliminate or reduce a minority interest in a corporation"[11]. The notion of 'squeeze-out' can be compared with the 'freeze-out"[12]; however, the latter has a slightly different meaning that will be discussed below. The squeeze-out right can be defined as the "right (under specified condition) of a majority shareholder to compel minority shareholders to sell their shares to him at an appropriate price'[13]. Therefore, squeeze-out is an action in corporate law that consists in reducing the share of the shareholders in the share capital of the company. More often, squeeze-out consists in the total exclusion of minority shareholders from the company. Thus, I would like to forward the idea that one of the most disputable features of squeeze-out is the compulsory depriving of minority shareholders of their shares, without their consent. This aspect became the ground for examining the lawfulness of squeeze-out by different state bodies in every country where squeeze-out provisions were or were going to be introduced.

Freeze-out, according to Black's Law Dictionary, is 'the process, usually in a closely held corporation, by which the majority shareholders or the board of directors oppresses minority shareholders in an effort to compel them to liquidate their investment on terms favorable to the controlling shareholders'[14]. Marco Ventoruzzo argues that '[t]he terms "freeze-out" and "squeeze-out" are used interchangeably, even if the latter should refer to techniques used by controlling shareholders and/or managers to extract benefits from the corporation and

[11] *Squeeze-out, in* Bryan A. Garner (editor in chief) *Black's Law Dictionary,* 9th ed, Thomson Reuters, 2009.
[12] *Ibid.*
[13] J. McCahery et al. in G. Ferrerini et al. (eds.), REFORMING COMPANY AND TAKEOVER LAW IN EUROPE, p. 635.
[14] *Freeze-out, in supra* note 11.

minimize the gains of minority shareholders while they remain members of the business organization'.[15] Comparing the definition of each term mentioned above and the last citation, we can formulate the conclusion that freeze-out always leads to the elimination of shareholders from the company. Accordingly, squeeze-out means that shareholders should not necessarily be excluded from the company and that they can just lose some part of their interest and/or some other gains. Nonetheless, I would tend to claim that these terms are synonyms and that they are interchangeable. According to my observations, the main difference between them is that "squeeze-out" is a term used in the European scientific doctrine, while "freeze-out" is used in the United States.[16] Further in this paper these terms will be used as synonyms, however it will try to keep the specific terminology of the scientific doctrine it will be referring to.

Two types of squeeze-out can be defined: corporate squeeze-out and takeover squeeze-out. The latter's main purpose is to gain the full control of the company. Usually takeover squeeze-out takes place after a mandatory bid. The former is the squeeze-out that is not aimed at takeover. It can result from a capital increase, a merger, or any other transactions with shares.

1.2.1. Reasons for Squeeze-out

As mentioned in the introduction, there is an ongoing discussion with regards to the necessity of the squeeze-out right. Before the implementation of the Takeover Directive in Europe there was a broad polemic around squeeze-out rights. Mike Burkhart and Fausto Panunzi[17] offered

[15] M. Ventoruzzo, *Freeze-outs: Transcontinental analysis and reform proposals,* Virginia Journal of International Law, 50 (2010), 843, *see* note 1.
[16] *Supra* note 15, *see* note 1.
[17] *Supra* note 13, M. Burkhart and F. Panunzi, 754.

certain arguments for squeeze-out rights, which were adduced by the Winter Group[18], working on the Draft Takeover Directive.

First of all, 'continued protection of the rights of a small minority imposes a disproportionally high cost on the majority owner'[19]. The major shareholder carries the cost of the infrastructural means for minority shareholders, such as sending them regular reports, organizing shareholders meetings and inviting minor shareholders there.

The second reason for implementing squeeze-out can be the necessity to disclose information about the company's activity to the minor shareholders, even when their share is very small and they cannot influence the decisions of the company.

Another, third reason for squeeze-out can be the misuse of their rights by the minor shareholders. They can 'use their rights to jeopardize the majority owner's plans with the sole purpose of extorting undue concession'[20]. In other words, squeeze-out can be used for resolving the free rider problem. Here, the free rider is the minor shareholder, who is abusing his rights, blocking the decisions of shareholders' meetings or creating other impediments to the activity of the company, in order to get some kind of undue benefit.

The next, no less important argument in favor of squeeze-out is that the major shareholder cannot fully 'exploit all synergies'[21], while not fully owning the company. The major shareholder is unable to fully dispose of the acquired company (for example, integrate it into his present business), without the minor shareholders' participation. For instance, 'an

[18] Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids in the European Union, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=315322&download=yes
[19] *Supra* note 17, 754.
[20] *Ibid.*
[21] *Ibid.*

acquiring firm with a controlling interest of less than 100% cannot transfer losses and profits between itself and the target firm to minimize the tax obligations'[22].

Generally, it seems to be more attractive to the bidder (acquirer) to be able to acquire 100% of the target company, rather than 90%. In case when the squeeze-out rule is absent, the price that the bidder would pay for the last 10% of shares could be much higher than the price of the rest of the shares.

1.3. Sell-Out

The sell-out right 'is *quid pro quo* for the minority shareholder of the squeeze-out right for the majority shareholder'[23]. Whenever the majority shareholder owns more than a certain amount of shares (for EU countries, the threshold can vary from 90% to 95%), the minority shareholders can compel the majority shareholder to buy out their shares. In case of takeover, the price for the mandatory buy-out will be established at the level of the price in the preceding takeover bid.

The reasons for implementing sell-out provisions are the reverse arguments for squeeze-out provisions. According to the Winter Group Report[24], there are few reasons for the implementation of sell-out rights.

First of all, the major shareholders can abuse their dominant position. When the stake of the minority shareholders is below the established threshold, they are unable to influence

[22] Bergstorm et al., *The Optimality of the Mandatory Bid Rule* (1994) Journal of Law, Economics and Organization, 433-451.
[23] *Supra* note 17, 756.
[24] *Supra* note 18, 62.

somehow the major shareholder and the corporate governance. This is the reason why major shareholder can derive profits solely for himself, notwithstanding minor shareholders.

Secondly, in case of an illiquid market, it can be very difficult for the minor shareholders to withdraw from the company and obtain sufficient remuneration for selling their stocks[25]. Therefore, fair price requirements for buying out shares by a major shareholder are favorable for minor shareholders.

Thirdly, the ‘sell-out right is an appropriate mechanism to counter the pressure on shareholders to tender in the takeover bid’[26]. Shareholders will be protected from getting stuck into the company and will not be forced to sell their shares immediately after getting a tender offer. Here, the sell-out rights are equal to ‘an extension of the offer period’[27].

Sell-out can be compared with the mandatory bid rule. However, ‘the mandatory bid rule enables all shareholders to sell their shares, while squeeze-out rights grant this option only if the majority shareholder owns 90 percent following a takeover’[28]. Also, the time of applying these two options is different. The sell-out right can be applied only when the takeover is completed, whereas the mandatory bid rule applies before the completion of takeover.

Further, the paper will resort to the country legislations regarding squeeze-out and sell-out rights, comparing the main features and showing different approaches.

[25] *Supra* note 23.
[26] *Ibid.*
[27] *Supra* note 13, at. 756 (Mike Burkhart and Fausto Panunzi “Mandatory Bids, Squeeze-Out, Sell-Out” in G. Ferrarini)
[28] Ibid (Burkhart).

Chapter 2. Squeeze-Out and Sell-Out Rights in the EU, Germany and the USA

2.1. Regulatory Framework

2.1.1. European Union

The history of squeeze-out and sell-out regulations at the level of the European Union is not that old. However, the path to adopting respective regulation was long and tortuous. The work started in 1974 with a first report prepared by Professor Pennington, who had been appointed by the Commission to create a draft Directive[29]. But the final adoption occurred only in 2004, when the Takeover Directive came into force.

An important remark should be made here. As it results from its name, the Takeover Directive concerns only takeover squeeze-outs and sell-outs. In other words, the Directive's Articles 15 and 16 regulate only squeeze-out and sell-out rights that arise upon a takeover of the company. 'The European Commission acknowledges the limited scope of the squeeze-out and sell-out arrangements, i.e. after a takeover offer, and permits national squeeze-out and sell-out procedures in other circumstances'[30], prescribes the text.

Therefore, at the level of the European Union, only takeover squeeze-out and sell-out rights are regulated. They are contained in Article 15 and Article 16 of the Directive 2004/25/EC of 21.04.2004 on Takeover Bids. Also, an important document is considered to be the High

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[29] BEATE SJÅFJELL ALPHEN AAN DEN RIJN, TOWARDS A SUSTAINABLE EUROPEAN COMPANY LAW : A NORMATIVE ANALYSIS OF THE OBJECTIVES OF EU LAW, WITH THE TAKEOVER DIRECTIVE AS A TEST CASE, Kluwer Law International Austin : Wolters Kluwer Law & Business, 296 (2009).

[30] Elst, Steen, *Balancing the Interests of Minority and Majority Shareholders: A Comparative Analysis of Squeeze-out and Sell-out Rights,* European Company & Financial Law Review; 393 (Dec2009, Vol. 6 Issue 4).

Level Group Report[31] on takeover bids (known as the Winter Group Report, named after its chairperson, Professor Jaap Winter), presented in January 2002. This Report suggested important innovations for the Draft of the Takeover Directive, one of which concerned squeeze-out and sell-out rights in takeover. The report provided the necessary framework for squeeze-out and sell-out rights, as well as justification for their adoption.

Further, the national regulation of Germany regarding squeeze-out and sell-out rights will be reviewed, from the viewpoint of one European Union Member State.

2.1.2. Germany

The general squeeze-out right for shareholders was provided in Germany earlier than the Takeover Directive was adopted. Article §327a – f of the Aktiengesetz came into force on the 1st of January 2002 and provided the squeeze-out right.

Later, in July 2006, the takeover squeeze-out and sell-out rights were presented by the German Takeover Directive Implementation Act (*Übernahmerichtlinie-Umsetzungsgesetz*) that added article § 39a to the WpÜG. Therefore, there is an option in Germany for major shareholders, in case they do not fulfill the conditions for the takeover squeeze-out, to resort to the corporate squeeze-out.

There are few cases in the German legal doctrine where the constitutionality of the squeeze-out procedure was challenged.

[31] S*upra* note 18.

The first one and the crucial decision of the German Federal Constitutional Court was the Feldmühle Fall decision[32], adopted back in 1962. In the decision, the Court claimed that the property right of a share represents not just the possession of an object, but rather the right to participate in managing the company. The Court enabled limitations on the property rights of minor shareholders, which could be imposed by major shareholders. It meant that squeeze-out of minor shareholders was possible, whenever approved by the majority of shareholders. This would allow achieving the balance between the majority and the minority shareholders, in order to avoid offering the minority shareholders too much protection, which could infringe the rights of the majority.[33]

The decision[34] of the Federal Constitutional Court regarding Moto-Meter Corporation relates to this issue. The former minor shareholders of the company claimed the squeeze-out unlawful, as in their opinion it breached Article 14 of the German Constitution concerning private property. Despite this fact, the Court concluded that 'the Moto-Meter minority shareholder could not […] claim the loss of his membership as the basis of an objection to the squeeze-out'[35]. The Court mentioned that Article 14 of the German Constitution 'does not protect against the loss of membership, which results from the exclusion from the corporation'[36]. The Court concluded that the majority's right to squeeze-out the minority is in compliance with the Article 14 of the German Constitution, as long as the protection of minority shareholders' interests is guaranteed. By-turns, these interests consist in granting fair price share during squeeze-out, but not in the protection of share ownership of the minority. In other words, 'the Court emphasized that the minority shareholders' interests should be

[32] BVerfGE, 14, 263, decided on August 7, 1962 [Decision by the German Constitutional Court].
[33] Nozadze Ani, *Comparative analysis of EU, German and Georgian regulations on squeeze-out*, Budapest : CEU, Budapest College, 2011.
[34] BVerfGE, 1 BvR 68/95, Moto-Meter, decided on August 23, 2000
[35] Peer Zumbansen, *German Corporate Law in Constitutional perspective: The Squeeze-out reviewed*, German Law Journal, Vol. 2 No. 2-1, February 2001, § 11
[36] *Ibid*, § 8

protected at the stage of evaluation of the fair price for their shares and that the ruling out of the minorities is constitutionally justified as long as they are compensated sufficiently'[37].

2.1.3. United States of America

For analyzing relevant legislation in the U.S., the thesis will concentrate on Delaware - 'by far the most important jurisdiction for the regulation of freeze-out transactions both quantitatively and qualitatively'[38]. It is well-known that Delaware is the main state for incorporation of listed corporations[39]. Robert Daines[40] found that 77% of the companies engaged in IPOs are incorporated under the Delaware Law. Another research states that 'over 320,000 corporations, sixty percent of Fortune 500 corporations, and more than one-half of the thirty companies listed in the Dow Jones Industrial Average, are incorporated in Delaware'[41].

Squeeze-out provisions in the U.S., which are cold freeze-out , have gone through a long way of development, as in a lot of other jurisdictions. Initially, minority shareholders could not be frozen-out from the company. The fact was that the decision of the general meeting was needed, where minority could have veto power. Later, legislatures and courts realized 'that in the modern business environment, the costs and dangers of minority dictatorship outweighed the risk of majority abuse, and they started amending the economic and legal structure of

[37] Newsletter Getsadze & Pateishvili LP, *The Squeeze-out rule in Georgia and Germany*, September 2009 #9, http://www.google.com.ua/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCgQFjAA&url=http%3A%2F%2Fwww.g-p.ge%2Ffiles%2Fupload-file%2Fpdf%2Fnewsletter-9.pdf&ei=Mqt1T4mvL8fDswaGl_XDAw&usg=AFQjCNFdx8pygAL-sq9Wo9eFasOSEuHmpg&sig2=sip3m_m-eJ2QrknlfGp3sg
[38] S*upra* 15, at 853.
[39] *Ibid*, note 31.
[40] Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U. L. REV. 1559, 1571 (2002)
[41] *See* Dale A. Oesterle, *The Law of Mergers, Acquisitions, and Reorganizations*, 41 (1991).

publicly held corporations'[42]. The minority was considered to be protected better by the appraisal rights that concerned the evaluation of their shares during freezing-out.

However, at first minority shareholders could not be given money remuneration for their shares. They were allowed only to change their shares for the shares of the acquiring company. Later, the legislatures allowed cash-out mergers, where the remuneration for shares could be cash.

Currently in Delaware there are two most widely used techniques to freeze-out minorities: the long-form merger ('one-step freeze-out') and the tender offer followed by a short form merger ('two-step freeze-out')[43]. In the long-form merger, major shareholders just approve a merger in which the consideration offered to minority shareholders is cash or other non-equity securities, rather than shares of the surviving entity. The tender offer/short-form merger consists of two steps: a voluntary tender offer on all the shares of the target company, aimed at acquiring at least 90% of the outstanding shares, which is then followed by a short-form, cash-out merger. According to the Delaware Law, when the acquiring company holds more than 90% of the outstanding shares of the target company, the decision to freeze-out the remaining shareholders is adopted by the board of directors of the acquiring company[44].

There are a lot of famous court cases within Delaware, which established the system of freeze-outs. For example *Weinberger v. UOP* case concerns the long-form cash-out merger. This case raises the issue of arm's length dealing during freeze-out transactions. The

[42] S*upra* 15, at 853; see Elliott J. Weiss, *The Law of Take Out Mergers: A Historical Perspective*, 56 N.Y.U. L.REV. 626 (1981).
[43] *See* Clark W. Furlow, *Back to Basics: Harmonizing Delaware's Law Governing Going Private Transactions*, 40 AKRON L. REV. 85 (2007) 85; *see* Michael J. McGuinness & Timo Rehbock, *Going-Private Transactions: A Practitioner's Guide*, 30 DEL. J. CORP. L. 437 (2005), 437−38.
[44] Section 253 of the Delaware Code, http://delcode.delaware.gov/

transactions that are not conducted at the arm's length should be the subject of the entire fairness standard of judicial review. The court decision argues that this standard includes 'fair dealing' and 'fair price' review. In case the arm's length dealing standard is unlikely to be met, the court suggested that the corporation should appoint a special committee of independent directors, entrusted with the task of negotiating the merger at arm's length[45].

The other prominent Delaware case that facilitated two-step freeze-outs is *In re Siliconix Inc. Shareholders Litigation*[46]. In this case, the court showed an example of a different treatment of the mergers and tender offers. In mergers that lead to a freeze-out, the board of directors is as well involved in negotiations, making the arm's length standard harder to achieve. It can be a conflict of interests between the managers of the corporation that were elected by the major shareholder and minority shareholders. On the other hand, in a two-step freeze-out that begins with tender offer, the bidder and the minority shareholders are on equal positions. The minority shareholders can easily decline the offer if the conditions are unsatisfactory for them. On this basis, the court decided that the bidder, who voluntarily launches the tender offer followed by a short-form merger is not obliged to offer a fair price and is not the subject to the entire fairness test. Therefore, after the *In re Siliconix* decision, they started to consider tender offers as more attractive and a less painful way to eliminate minority shareholders from the company, compared to the long-form mergers.

The next case to continue the logic of the *In re Siliconix,* is *In re Pure Resources, Inc., Shareholders Litigation*[47] case. It established more definite standards of protection of the minority shareholders in two-step freeze-outs. In this case, the court as well distinguished between long-form mergers that should be the subject to the entire fairness review standard

[45] Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983).
[46] In re Siliconix Inc. Shareholders Litigation No. CV-A-18700, 2001 WL 716787 (Del. Ch. June 19, 2001)
[47] In re Pure Resources, Inc., Shareholders Litigation 808 A.2d 421 (Del. Ch. 2002).

and short-form merger, where the fairness review in not needed due to the bigger freedom of minority shareholders to accept or decline the tender offer. Furthermore, the court established three conditions of compliance, which would definitely exclude the application of the fairness review standard in short-form mergers. These conditions are the following: (1) the offer must be subject to a non-waivable condition of approval (expressed through tendering) by the majority of the minority; (2) the bidder must guarantee to promptly consummate a short-form merger at the same conditions of the tender offer in terms of price and/or exchange ratio; and (3) the bidder can make no retributive threats in dealing with the target's directors.[48]

2.1.4. Conclusion

From the analysis of the regulatory framework, we can conclude that the provisions of the European Takeover Directive regarding squeeze-out and sell-out rights are comparably new. The regulations regarding squeeze-out and sell-out rights in the Member States, such as Germany, were developed and confirmed by the Constitutional Court much earlier. This can be explained by the necessity of the businesses and the shareholders to apply these rights. Therefore, the Takeover Directive has just confirmed the set up that took shape in some of the countries of the European Union. At the same time, it should be noted that the Takeover Directive concerns only takeover squeeze-out and sell-out rights, giving Member States the discretion to introduce corporate squeeze-out and sell-out rights independently.

With regards to the United States, the system of freeze-out rights corresponds to the overall system of the U.S. law. The most important changes to the system were operated by the courts in the framework of case law. The two systems of freeze-out were developed in the U.S.: the

[48] *Ibid*, at 445.

long-form merger (‘one-step freeze-out’) and the tender offer followed by a short form merger (‘two-step freeze-out’). This division is not that important in Germany. As it was illustrated above, Delaware is the most prominent corporate jurisdiction in the U.S., where most of the freeze-outs occurred. This is why Delaware Law should be chosen for comparison.

Further, other criteria for comparison between the European Union, Germany and the United States will be reviewed.

2.2. Legal Threshold

Article 15 of the Takeover Directive suggests the availability of squeeze-out and sell-out rights when, as a result of the bid made to all the shareholders of the target company for all their shares that carry voting rights, one of the two following conditions is met:
(a) when the offeror holds securities representing not less than 90 % of the capital carrying voting rights and 90 % of the voting rights in the offering company; or
(b) where, following acceptance of the bid, the offeror has acquired, or has firmly contracted to acquire, securities representing not less than 90 % of the offering company’s capital carrying voting rights and 90 % of the voting rights comprised in the bid.

Condition (a) considers the situation when the offeror already holds the part of the capital carrying voting rights and the voting rights. In this case, the Member State can set a higher threshold that must not exceed 95% of the capital carrying voting rights and 95% of the voting rights. So here, establishing the gap between 90 and 95%, the Takeover Directive attempts to balance between the property rights of minority shareholders and the rights of majority shareholders. Also, the Takeover Directive gives some discretion to the Member

States in defining the threshold issue. Condition (b) considers the number of minor shareholders who accepted the bid, but does not take into account the general share capital of the offeror.

The two scenarios are similar when the offeror does not hold a large block of shares before the takeover is launched[49]. Condition (b) can be difficult to achieve for a major shareholder, who made a voluntary bid while already owning a significant part in the company's shares. If a major shareholder already owns 70% of the shares, he needs the acquisition of not less than 27% of the rest of the shares from the minor shareholders. So, this condition can cause complications for a major shareholder, who owns a significant part in the company, to launch squeeze-out.

Professor Ventoruzzo suggests calling condition (a) as the 'single threshold' freeze-out and condition (b) – the majority of the minority freeze-out procedures, because it requires acceptance of the tender offer by the majority (90%) of the minority shareholders[50]. These two conditions represent the two approaches that were used in Europe before the adoption of the Takeover Directive. For example, the majority of the minority freeze-out procedures were adopted from the United Kingdom. This approach is used in Delaware, as well, and was confirmed in the *In re Pure*[51] case[52]. A Member State can choose one of these approaches.

In addition, the Takeover Directive provides the division of the classes of shares and makes it possible to perform squeeze-out only with the class of share where the major shareholder has

[49] *Supra* note 30, at 407.
[50] S*upra* note 15, at 888-889.
[51] S*upra* note 46.
[52] S*upra* note 15, at 888-889.

reached the necessary threshold by virtue of a bid[53]. 'This allows for a proportional application of the squeeze-out right, in the interest of both the majority shareholder (who need not reach the threshold for all shares to be able to squeeze-out the minority shareholders in one class) and the minority shareholders (who cannot be squeezed out from one class if the threshold is not reached in that particular class)'[54]. On the other hand, if the major shareholder wishes to fully eliminate the minority shareholders from the company, the division of squeeze-out by class can make the whole procedure more costly and onerous for him.

The Takeover Directive, in Article 16 (2) regarding sell-out, refers to the same thresholds as in Article 15 (2). This means that the minor shareholders can require the offeror to buy their shares from them at a fair price under the same circumstances, as provided for in Article 15 (2) and described above.

In the German law, while performing corporate squeeze-out, the offeror should have at least 90% of the share capital. At the same time, the decision of the general shareholders meeting is also required to allow corporate squeeze-out[55].

With the takeover squeeze-out, the German legislators chose the most conservative position and established the threshold at the level of the 95% for the share capital carrying voting rights[56]. 'This means that preference shares without voting rights are not targeted. In practice, the threshold for a squeeze-out is rarely reached due to the activities of hedge funds – unless the bidder already held a substantial number of shares close to the ninety-five per cent

[53] Article 15 of the Takeover Directive.
[54] S*upra* note 30, at 408.
[55] *See* § 327a of Aktiengezetzt.
[56] *See* § 39a of WpÜG.

threshold'[57]. This also means that Germany chose for implementation condition (a) from Article 15 (2) of the Takeover Directive, opposing the 'majority of the minority freeze-out procedure' approach adopted in the United Kingdom, which is also used in Delaware.

Regarding takeover sell-out rights, article § 39c of WpÜG provides that these rights can be invoked when the offeror is entitled to squeeze-out under the provisions of article § 39a of WpÜG, in other words, when the offeror acquires 95 % of the share capital.

As for the Delaware regulations, the European single-threshold freeze-out (when the offeror already holds from 90% to 95% of securities of one class in the company) can be compared with the Delaware two-step freeze-out. Marco Ventoruzzo remarks[58] that the European law is more flexible because after the freeze-out the merger is not obligatory in Europe. At the same time, in Delaware, the corporation cannot survive with one single shareholder. On the other hand, regarding the threshold, the European law is more firm than Delaware. The majority of the countries adopting the single-threshold freeze-out in Europe opt for a 95% threshold[59], whereas in Delaware this threshold is at a level of 90% [60]. After achieving this threshold, the major shareholders can initiate the freeze-out procedure. If compared to the two-step freeze-out, the majority of the minority freeze-out (provided by Article 15 (2b) of the Takeover Directive), the position of the acquirer is even worse, because to freeze-out minority is even harder. Below there is an example of thresholds taken from Ventoruzzo's work:

> 'A very simple example can clarify this point. A controlling shareholder holds 60% of the common stock of a corporation that has only issued one class of equity securities.

[57] S*upra* note 30, at 413.
[58] *Supra* note 15, at 905.
[59] *Ibid*.
[60] *See* Section 253 Delaware Code, http://delcode.delaware.gov/

If he wants to freeze out minorities in the United States, he can opt for a cash-out long-form merger or launch a tender offer followed by a short-form merger. In this second case, he would have to acquire an additional 30% of the outstanding common stock. On the contrary, in Germany—a country adopting the single-threshold freeze-out—the bidder would have to purchase at least 35% of the remaining shares. In the United Kingdom, according to the majority of the minority freeze-out, he would have to acquire 90% of the remaining 40% (i.e., 36% of the outstanding shares in absolute terms). Other things being equal, it is more expensive in Europe than in the United States to achieve a position in which one can actually cash out minorities.' [61]

To conclude upon all the above, the European threshold is both too high and burdensome for the acquirers. It can impose a lot of expenses on the offerors to achieve the necessary percentage of shares in order to initiate the squeeze-out. At the same time, the solution suggested in *In re Pures*[62] case, where the simple majority of the minority approval is needed, seems to be very easy to reach especially in comparison with the Article 15 (2b) of the Takeover Directive, where a 90% minority approval is needed.

There are beliefs that a higher threshold would benefit minority shareholders, since requiring a greater majority-of-the-minority threshold for approval tends to encourage the controlling shareholders to offer better conditions and higher price, both in the front-end offer and in the following freeze-out procedure[63]. Therefore, I argue that a reasonable balance between the interests of minority and majority shareholders should be found: in Europe the threshold should be made lower, and in Delaware - higher.

[61] *Supra* note 15, at 905.
[62] *Supra* note 46.
[63] *Supra* note 15, at 913.

Further, the issue of possible types of consideration to the minority shareholders while being squeezed-out will be reviewed.

2.3. Valuation

Fair price value is one of the most important issues of squeeze-out and sell-out procedures. The acceptance and social justice of squeeze-out and sell-out between shareholders depends on a fair and clear definition of consideration for their shares. We should not forget the fact that shares are compulsory taken away from the minority shareholders (in case of squeeze-out) and are compulsory granted to major shareholders (in case of sell-out). Therefore, in order not to give a handle for the claims of the abused shareholders, the remuneration for the shares should be decent and the rules defining this remuneration should be clear.

Article 15(5) of the Takeover Directive establishes the requirement for a fair price in squeeze-out and sell-out procedures. There are two main aspects regarding the fair price: the type of consideration, and the amount of consideration offered.

With regards to the type of consideration, the Takeover Directive providers that it should be in the same form as the consideration offered in the preceding takeover bid. But cash must be suggested at least as alternative.

Regarding the amount of the consideration offered the Directive brings in the division depending on the type of the takeover bid: voluntary or mandatory. In case of a voluntary bid, the consideration offered in the bid shall be presumed to be fair when, through acceptance of the bid, the offeror has acquired securities representing not less than 90 % of the capital carrying voting rights comprised in the bid. It means that there is no minimum price required by the Directive. The majority of the minority test is applied here with the threshold of 90% of minor shareholders acceptance.

In case of a mandatory bid, the price cannot be freely defined by the offeror. Article 5(4) of the Takeover Directive defines that the offer shall be launched at a price not lower than the highest price paid by the bidder in a period, set by the single Member State, between six and twelve months preceding the acquisition of control.

In all the other situations (i.e. where the 90% acceptance rate is not reached, when no mandatory offer has been made, or when the time limit has expired), the Higher Level Group of the Company Law Experts recommended that the consideration to be offered is determined by an expert or experts appointed by a Court or the authority supervising the takeover bid[64]. An example from Ventoruzzo proves the necessity of an expert's participation:

> '[…] in a country providing for the single threshold freeze-out, the controlling shareholder holding 70% of the shares might launch a voluntary bid and obtain a little bit more than two thirds of the outstanding shares. This would grant her more than 90% of all shares, and therefore the right to cash out minorities. Nevertheless, no fair price presumption applies because her offer did not reach 90% of the shares included in the offer'. [65]

Regarding Germany, the methods of fair price valuation are rather complicated. In corporate squeeze-out the major shareholder establishes the price. However, this price considered fair

[64] *Supra* 18, at 66.
[65] *Supra* note 15, at 892.

subject to the external expert evaluation. This expert should be appointed by the court under the request of the major shareholder, who established the price[66]. There exists as well the minimum price rule that states: the consideration must exceed the weighted average stock price during the three months preceding the offer announcement and any price the bidder has paid for the targeted shares in the three months before the bid[67]. Finally, the price of the corporate squeeze-out should be adopted at the general meeting basing on the expert's report.

In order to initiate a takeover squeeze-out, according to the § 39a(6) of WpÜG, the offeror is required to file the request on squeeze-out to the special institution – Regional Court of Frankfurt am Main. This institution adopts the respective decision and in case of approval facilitates the whole squeeze-out procedure. In Germany applies the same standard of defining the fairness of the price as designated by the Takeover Directive. This helps to avoid the complex evaluation methods. So, the price is considered to be fair if it is as high as the consideration paid in the preceding takeover. Moreover, the acceptance of the offer in the preceding takeover should exceed 90% of the capital of the offer. Notwithstanding that according to the Takeover Directive the majority of the minority acceptance rule applies only to the voluntary bid, in Germany this rule applies to the mandatory bid as well[68]. "If the consideration is considered 'fair', the Court is required to issue an order pursuant to which the shares held by the minority shareholders will automatically be transferred by operation of law to the majority shareholder"[69].

In the United States appraisal rights that help to establish the fair value for freeze-out transactions are as well considered one of the most important protections of shareholders. It

[66] *See* §327c of AktG.
[67] Federal Supreme Court, BVerFGE 100, 289, 309, 'DAT/Altana', *see supra* note 30, at 430.
[68] *See* § 39a(3) of WpÜG.
[69] *Supra* note 30, at 433.

should be mentioned here about the difference between European and U.S. law doctrines. It is much more common in the U.S. to resort to the judicial protection immediately after having your rights breached. The main regulations are in the statutes but the courts in the U.S. are entitled to establish the detailed remedies. In Europe, the statues are principal. And the system of law in continental Europe is designed to foresee all the possible situations and to give solutions to them. Therefore, filing a suit to the court is considered an extreme measure. These deliberations are called to explain the application of fair price value in the U.S. The fair price value in the U.S. is mostly protected by the ability of minority shareholders to "challenge a merger on the basis of some illegality, in particular for breach of directors' fiduciary duties or disclosure violations of federal securities laws"[70]. Delaware courts frequently decide minority shareholders' claims of breach of fiduciary duties, or other illegalities, in connection with freeze-out transactions. In deciding these disputes, Delaware courts have attempted to balance the power of the directors and the majority shareholders on one hand with the protection of minority shareholders on the other[71].

By the Delaware case law the two approaches regarding appraisal rights and procedure of establishing of the fair value were elaborated. They depend on the type of merger. In case of the long-form merger when the minor shareholders are challenging the valuation of the shares, the entire fairness standard of review should be applied by the court. And as a general rule, the burden of proof of the entire fairness (that includes fair price) is on the defendant. If the case was initiated by the minor shareholders, the defendant should be the major shareholders. However, due to the case practice, for instance the *Weinberger v. UOP* case that was described above, there were certain exceptions provided. The burden can be moved to the plaintiffs (minor shareholders), if an independent special committee of the target company is

[70] *Supra* note 15, at 859.
[71] *Ibid.*

empowered to negotiate the deal, or if a majority of the minority unaffiliated shareholders of the target company approve the merger. In case of the short-form merger the entire fairness review applies only if the three conditions (established by the In re Pures[72]) are not met. Otherwise, business judgment rule is used[73].

If compare European and Delaware approaches to the determination of the fair price, there can be found some similarities. For example, both Delaware case law (In re Pures) and article 15 (5) of the Takeover Directive require the majority of the minority acceptance of the tender offer, in order to presume the fairness of the price offered[74]. But in the U.S. the simple majority (50 %) is enough, when in Europe 90% acceptance of the offer is required. This example shows the difference between the two systems and reveals the harder possibility to perform squeeze-out in Europe. At the same time, 90% threshold in Europe means that the minor shareholders are given significant veto power to suspend squeeze-out.

[72] *See* subchapter 2.1.3.
[73] *Supra* note 15, at 871.
[74] *Supra* note 15, at 905-906.

Chapter 3. Inclusion of Squeeze-Out and Sell-Out Rights into Ukrainian Legislation

Ukraine is a country with young business traditions and market economy. It gained independence only in 1991 with the dissolution of the USSR. From that time, Ukrainian government tried to rebuild the country, set it up at the business market policy. Therefore, significant changes in legislation and economics were initiated such as: adoption of the laws that guaranteed private property, creating legal framework for establishment of different types of business entities, opening of the stock market, privatization of the state-owned enterprises etc. Now in Ukraine rather big stock market operates, thousands of stock companies were created. In 2011 the total trade volume at the stock market of Ukraine constituted 29.48 billion of USD that was twice as much as in 2010[75].

3.1. Legal Background for Implementation of Squeeze-Out and Sell-Out Rights

In 2009 the Law of Ukraine On Joint Stock Companies was adopted. This law was designated to introduce in Ukraine the best world practices of stock company regulation. Law on JSC includes modern approach to the public companies and resembles the best practices such as: implementing only electronic form of shares, better protection of minority shareholders, protection of the company from hostile takeovers, cumulative voting rights etc. The Law as well has the provisions that can be the basis for the squeeze-out and sell-out rights such as: mandatory bid rule[76], definition of market value of the shares[77], mandatory buy-out of the

[75] http://proua.info/index.php/2010-12-27-19-22-18/item/393-fondovuy-rinok2011
[76] *Supra* note 1, article 65.
[77] *Supra* note 1, article 8.

shares from the shareholders of the company by the company itself[78]. However, squeeze-out and sell-out rights of shareholders are not established by Law on JSC and other legislative acts of Ukraine.

Article 65 of the Law on JSC introduced mandatory bid rule. According to this rule, the shareholder who obtained the controlling block of common shares is obliged to suggest to all other holders of common shares to buy out their shares at a price that should not be lower than the market price defined by the article 8 of the Law on JSC. Market price of the share is defined as the amount of money that can be obtained from the selling of the share at the active market. Here Ukrainian legislation follows the continental European conception of law. The provision on the mandatory bid rule does not differ significantly from those one provided by the Takeover Directive and implemented in Germany[79]. At the same time it should be mentioned that there is no mandatory bid rule provisions in the USA[80].

Mandatory bid rule is a crucial pre-condition for a squeeze-out. It is one of the key provisions introduced by the Takeover Directive. Mandatory bid rule can cause the mandatory bid in the result of which the major shareholder will achieve the certain threshold and will be entitled to squeeze-out the minority shareholders. Existence of such a precondition as a mandatory bid rule in the Ukrainian legislation makes the implementation of squeeze-out and sell-out rights easier and more logical.

Mandatory buy-out of the shares from the shareholders of the company by the company itself is provided by the article 68 of the Law on JSC. According to this provision every shareholder can compel the company to buy-out his shares at not less than market price in case he

[78] *Supra* note 1, article 68.
[79] *See* WpÜG.
[80] *Supra* note 15, at 887.

disagreed and voted against the following questions at the general meeting of shareholders: a) merger, acquisition, division of the company; b) entering of the company into the significant transaction; c) change of the amount of the charter capital of the company. To my mind, mandatory buy-out of the shares by the company itself is similar with sell-out provision. Both of the provisions are aimed at the protection of minor shareholders, whose shareholding does not allow them to participate in managing the company. Both provisions include the right of the minor shareholders to compel the counterpart to buy-out their shares at a fair price. Thereby, introduction of the sell-out right into the Ukrainian legislation would not be so unusual and hostile to the Ukrainian system of law.

3.2. Previous Suggestions to Implement Squeeze-Out in Ukraine

Currently there are debates in Ukraine regarding the implementation of squeeze-out and sell-out rights of shareholders. Moreover, in 2010 there were introduced draft amendments to the Law on JSC that provided squeeze-out right[81]. However, President of Ukraine vetoed these amendments on the unconstitutionality ground.

The draft amendments provided single threshold squeeze-out with the threshold of 95%. Though, the provisions are pretty similar to the Article 15 (2a) of the Takeover Directive, the suggested squeeze-out could be initiated not only in the result of takeover but by any shareholder who reached the threshold. So, this type of squeeze-out rights could be qualified as corporate squeeze-out right. The price paid to the minor shareholders could not be less than market value price of the shares defined in the Article 8 of the Law on JSC. Moreover, the independent expert should be appointed for the price evaluation by the supervisory board of

[81] Проект Закону України Про внесення змін до Закону України "Про акціонерні товариства" [Draft Law of Ukraine ‘On Amendments to the Law of Ukraine on Joint Stock Companies] dated 19.03.2010, No 6216.

the company or by the stock market administration. And finally, no consent of the general meeting of the shareholders of the target company would be needed.

This suggested squeeze-out provision was vetoed[82] by the President of Ukraine and his veto was not overcome by the Parliament. The reason for veto was the violation of the Article 41(4) and 41(5) of the Constitution of Ukraine[83].

> Article 41
>
> ……..
>
> 4) No one shall be unlawfully deprived of the right of property. The right of private property is inviolable.
>
> 5) The expropriation of objects of the right of private property may be applied only as an exception for reasons of social necessity, on the grounds of and by the procedure established by law, and on the condition of advance and complete compensation of their value. The expropriation of such objects with subsequent complete compensation of their value is permitted only under conditions of martial law or a state of emergency.

The President pointed out the suggested squeeze-out provision significantly narrowed the existed rights of shareholders and violated Constitution of Ukraine.

However, the next subchapter will argue for the implementation of squeeze-out and sell-out rights and show their importance.

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[82] Пропозиції Президента до Закону України "Про внесення змін до Закону України "Про акціонерні товариства" від 19.03.2010 [Suggestions of the President of Ukraine to the Law of Ukraine 'On Amendments to the Law of Ukraine on Joint Stock Companies dated 19.03.2010]

[83] Конституція України [Constitution of Ukraine] dated 28.06.1996, No 254к/96-ВР.

3.3. Reasons for Implementation of Squeeze-Out and Sell-Out Rights

As it was mentioned before – Ukraine is a young country and its economy is still in transition period. A lot of state enterprises were privatized between their workers at the beginning of 1990s. It turned out that there became the thousands of stockholders of the ex-state enterprises. Later, the most of the shares were bought out from the ex-workers and the big majority shareholders appeared. However, still the significant part of shares is in the ownership of ex-workers. They can have only few shares and can be not willing to take part in managing of the company or even forget that they are the shareholders. They can not receiving any dividends. There are few possible reasons for this. The first is that the company is not making profit that is a common situation for the emerging economy. The second is that the major shareholders found another ways how to take out the profit from the company without favoring minor shareholders. But at the same time, the management of the company is obliged to annually send reports to all the shareholders and to invite every shareholder to annual general meeting of shareholders.

The situation described above is really common for Ukraine. And there can be seen several reasons for implementation of squeeze-out and sell-out rights. First of all, it is the additional cost imposed on the company to duly notify all the shareholders before the general meeting. The company can send thousands of letters to trying to reach all the shareholders. But there is no guarantee that the final recipient will be reached, that he did not move, that he is interested in participating the company etc.

Second reason is the inability for the company to go private. After the adoption of the Law on JSC in 2009, the new requirements regarding change of all the shares into electronic form were introduced together with the new listing requirements. They imposed significant costs on the public companies. In this case a reasonable decision for the management of the public companies was to go private or even change the organizational form of the company to the limited liability company. It was a very hard task for the companies that had a lot of minority shareholders who were lost and could not be contacted. Squeeze-out rights would be very helpful in this case.

From the side of minority shareholders, sell-out right would be of high importance for them, especially for those minority shareholders who are not getting any dividends and suffer other abuses from the side of major shareholders. In case of sell-out rules existence, minority shareholders could get the real market price for the shares.

Further, the possible legal framework for the implementation of the squeeze-out and sell-out rules will be suggested.

3.4. Suggestion of Amendments into Ukrainian Legislation

On the ground of the previous research in this thesis, the following provisions are suggested for the implementation in Ukraine.

The corporate and takeover squeeze-out rights should be implemented into the Law on JSC and exist together in the legislative system as well as in Germany. To my mind the existence of only takeover squeeze-out rights are not justified. Because the shareholders should have chance to apply squeeze-out even if the takeover squeeze-out was not successful (for instance when the threshold was not reached during the term of the takeover bid).

Sell-out rights should be implemented into the Law on JSC. These rights reflect the squeeze-out rights. At the same time, they are called to protect the interests of minority shareholders and to keep the balance between the majority and minority shareholders.

The single threshold squeeze-out conception should be adopted in Ukraine notably established by the Article 15 (2a) of the Takeover Directive and adopted in Germany. Although, the threshold should be chosen at the level of 90%, but not 95%. To my mind, too high threshold will make it harder for major shareholder to invoke squeeze-out.

The majority of the minority acceptance of the fair price looks suitable for Ukraine. However, the double check of the established price by the independent expert would decrease the possibility of abuses from the side of major shareholders. So, the both standards for definition of the fair price should be implemented. At the same time the 90% threshold for minority acceptance (at it is in Germany and Takeover Directive) seems to be unjustifiably high. It grants minority the veto right as well. Therefore, I would suggest the simple majority of the minority acceptance (50%) of the fair price (as it is Delaware) but subject to the independent expert revision.

To conclude, it is necessary to say, that Ukraine is the civil law country as Germany. Therefore, generally German provisions are more suitable for implementation in Ukraine in comparison to the U.S. provisions. Together with this, Ukraine is striving to become the member of the European Union that is why the provisions of the Takeover Directive should be as well considered. But U.S. suggests more liberal approach, for example regarding the thresholds. This liberalization can foster the implementation of the squeeze-out and sell-out rules in Ukraine, therefore the U.S. thresholds provisions should be as well accepted in Ukraine.

CONCLUSION

The thesis examined the issue of squeeze-out and sell-out rights of shareholders. The following jurisdictions were taken for examination and comparison: the European Union, Germany, and the USA. The main criteria for examination were regulatory framework, threshold for application of squeeze-out and sell-out right, and method of definition of fair value during squeeze-out and sell-out procedures. Accordingly, the statutory law and case law from the mentioned jurisdiction were compared and analyzed.

Subsequently, Ukrainian situation regarding squeeze-out and sell-out rights was described. The necessity of implementation of squeeze-out and sell-out rights was proved. On the basis of comparison of the abovementioned jurisdictions, there was suggested legal framework for its adoption into Ukrainian legislation.

It was concluded that Ukraine should adopt the takeover squeeze-out and sell-out rules from Takeover Directive. At the same time, corporate squeeze-out and sell-out should be as well enabled mainly by borrowing provisions from German legislation. The liberal provisions regarding the threshold should be adopted from the Delaware legislation.

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