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HOSTILE TAKEOVERS AND SOME OF THE MOST EFFECTIVE DEFENCE TACTICS AGAINST THEM WITH EXAMPLES

This article is concerned with an area of international law of Mergers & Acquisitions (M&As). The goal of this article is to consider hostile takeover activity and provide examples of some of the most effective defence tactics employed by target companies' boards of directors against hostile takeover bids.
Key words: *takeover, hostile, bidder, target company, defence tactics, board of directors.*

Introduction

In the face of increased competition and globalisation M&As are essential. In his article in the magazine «Fortune» Jen Wieczner wrote: «In a record year for U.S. M&A, with $2.18 trillion in deals, according to Dealogic, hostile takeover bids have also surged, worth more than 14% of the total value of transactions. The number of unfriendly proposals has crept up slowly over the last few years, but the size of the offers has exploded, with about $309 billion in hostile bids so far in 2015, quadruple their value in all of 2013».[1] M&A is not a perfect science and there always be issues surrounding the deal: loss of jobs (both at the senior level and among the work force, particularly where one rival buys another and needs to achieve synergy savings, e. g. through closure of offices and operations), impact on customers and suppliers due to reduced competition and on local communities when entire factories are closed down. However, at the end of the day, the deal must work for the bidder and its shareholders and whilst there are increasing corporate responsibility considerations, «business is business» and there is limited scope for sentimentality (if any). Takeovers have evolved over the past hundred years and are a significant part of the global M&A practice. As they became hostile, defence tactics were invented to:

— Prevent companies from being easy targets in predator's eyes, and

— React efficiently to the hostile attack.

This article will be structured as follows: the first part of the article will provide a definition of the hostile takeover and outline various views regarding them. The second part will provide categorisation of the defence tactics, followed by the third part which will be focused on some of the key pre-bid and post-bid defence tactics. Finally, this article will include a conclusion.

[1] Jen Wieczner, «Hostile Takeover Battles Will Surge in 2016», (Dec 10, 2015) *Fortune*, <http://fortune.com/2015/12/10/hostile-takeover-battles-2016/> accessed 20 April 2016.

1. A hostile takeover and views regarding it

A hostile takeover is a takeover of one public company (the target company) by another company (the acquirer) not by way of an agreement with the target board of directors, but by referring directly to the target company's shareholders or by fighting to replace the target's board of directors in order for the deal to succeed.[1]

Franks and Mayer[2] gathered several opinions on the merits of takeovers. For example, Rappaport values takeovers as a good phenomenon and he characterises them as «breathing new life into the public corporation».[3] Grossman and Hart view takeovers as disciplinary actions for inefficient management. They believe that «there is no reason on efficiency grounds for society to restrict raids».[4] Carry insists on the use of takeovers as they weed out underperforming management stating that: «The raider may sometimes be a better manager than the raidee».[5]

On the other hand, Herzel and Shepro argue that takeovers are detrimental due to their extremely high costs.[6] Financial and legal advisors' fees are very expensive due to their specialist nature of their advice and its high risk. For example, Severn Trent in 2013 spent over J19 million on advisory services in order to protect the company from the possibility of being taken.[7] In 2011, Air Products & Chemicals Inc. («Air Products») spent circa $100 million on fees on its failed bid for Airgas Inc. («Airgas»).[8] Schleifer and Summers take the view that takeovers negatively influence target company's values[9] and this can be illustrated by a controversial takeover of a UK chocolate giant Cadbury by Kraft in 2010.

Hostile takeovers have been met by the evolution of numerous defences against such attacks and have been branded as: «antitakeover measures», «antitakeover devices», «defence techniques», «defence strategies» and «defence tactics». For the purpose of this article all defences are called «defence tactics».

2. Categorisation of the defence tactics

Amongst different classifications such as the requirement for shareholder approval,[10] defence tactics are also divided into: **preventative — pre-bid**, and **reactive — post-bid.**[11]

Preventative tactics are implemented by target company directors before the hostile bid and are usually designed to make targets less attractive to potential bidders. Such tactics include: **Staggered Board (Classified Board), Golden Parachutes, Poison Pills, Dual Class Recapitalisation, Employee Stock Ownership Plans** and many others.[12] Although being useful in the situation of the hostile attack, pre-bid defence tactics can be harmful in a case when the deal makes sense to proceed. Having made a target unattractive defence tactics serve as an obstacle on the way of a favoured deal. Pre-bid tactics are often considered as more effective than the reactive tactics

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1 Investopedia <http://www.investopedia.com/terms/h/hostiletakeover.asp> accessed 19 April 2016.

2 Julian Franks and Colin Mayer, «Hostile Takeovers and the correction of managerial failure» (1996) 40 *Journal of Financial Economics* p. 163.

3 Alfred Rappaport (1990) p.100 cited in Franks and Mayer, ibid., p. 163.

4 Grossman and Hart (1980) p.329 cited in Franks and Mayer, ibid., p. 163.

5 William L. Carry, «Federalism and Corporate Law: Reflections Upon Delaware» (March 1974) 83(4) *The Yale Law Journal* p.663 p.675.

6 Herzel and Shepro cited in Franks and Mayer, op. cit., p. 163.

7 Lucy Tobin, «Takeover defence drained J19 m out of Severn Trent» Evening Standard (London, Wed, 17 July 2013) p. 35.

8 Steven M. Davidoff, «Winners and Losers in the Airgas Poison Pill Case» *DealBook* (16 February, 2011) < http://dealbook.nytimes.com/2011/02/16/who-won-in-the-airgas-poison-pill-case/> accessed 11 April 2016.

9 Schleifer and Summers (1988), p.37 cited in Franks and others, op. cit., p. 163.

10 Gregg A. Jarrel, James A. Brikley, Jeffry M. Netter, «The Market for Corporate Control: The Empirical Evidence Since 1980» (1988) 2 (1) *Journal of Economic Perspectives*, p.49–68 p. 58.

11 Robert F. Bruner, *Applied Mergers & Acquisitions* (John Wiley & Son, Inc., 2004) p. 835.

12 Ibid., p. 835.

because they are already at place and perform their function when a hostile offer is still on the horizon.[1] At the same time it is very important for the target to be able to react efficiently in the moment of a hostile bid and prevent itself from the disadvantageous position.[2]

Reactive defence tactics are employed as a direct reaction to a hostile bid. They include: **Litigation, Selling the Crown Jewels, Pac-Man defence, White Knight and White Squire, Share Repurchase and Greenmail**. The main purpose of this group of the defence tactics is not only to make the target company unattractive to the hostile bidder but also to make the deal more expensive and more time consuming.[3]

We shall now consider some of the most effective pre-bid and post-bid defence tactics using real-life examples which illustrate how these tactics were employed.

3. Pre-bid and Post-bid defence tactics

3.1 Pre-bid defence tactic: Poison Pill (Shareholders Rights Plan)

Now 34 years old, the Poison Pill defence is still considered to be one of the greatest inventions against a hostile takeover. This defence tactic was used in General American Oil's response to El Paso Elektric's attack in 1982 and in 1983 in the battle of Brown Foreman and Lenox[4], where Lenox offered each shareholder a dividend of preferred shares that would be converted into 40 Brown Foreman shares if Brown Foreman proceeded with a takeover significantly diluting Brown's 60 % share ownership. This type of the Poison Pill is called the «Preferred Stock Plan».[5]

The Poison Pill has developed into the most commonly used type of the defence tactic due to its effectiveness of diluting the predator's ownership of the target, its lack of complexity and speed of implementation.[6] However, practical experience demonstrates that Poison Pills are not favoured in all jurisdictions: for example, in the UK, Rule 21.1 of the City Code on Takeovers and Mergers[7] prohibits them without shareholders' approval.

A relatively recent high profile Poison Pill defence was conducted by Potash Corporation of Saskatchewan Inc. against a hostile bid from BHP Billiton, a conglomerate listed in the UK and Australia (2010).[8] By way of background, Potash was significantly undervalued by BHP Billiton from the outset: the share price of Potash was over C$143 a share whereas BHP Billiton offered only C$130 a share.[9] Unsurprisingly, the bid was rejected by Potash which also launched a Poison Pill for duration of 180 days which allowed existing shareholders to buy an additional share if 20% of the company was acquired by any entity.[10] Potash argued that it must have sufficient amount of time to examine its future

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1 Katerina S. Kokot, «The Art of Takeover Defence», *The Ukrainian Journal of Business Law*, September (2006) p. 18–20, 19.

2 Ibid., p. 20.

3 Samin Zarin, Eric Yang, «Mergers and Acquistions: Hostile takeovers and defense strategies against them» (Bachelor thesis, School of Business, Economics and Law, University of Gothenburg, spring 2001) p. 13 <https://gupea.ub.gu.se/bitstream/2077/28242/1/gupea_2077_28242_1.pdf> accessed 12 February 2016.

4 Patrick Gaugham, *Mergers,Acquisitions,and Corporate Restructurings*, (fifth edition, John Wiley & Sons, Inc., 2011) p.186.

5 First generation of the Poison Pills which had certain disadvantages, namely : they could be only redeemed when a certain extended period of time passed (e. g., 10 years); negative impact on the balance sheet. Preferred Stock plan may be considered as a long-term debt, making a company heavily leveraged.

6 Jarrel and others op.cit., p. 63.

7 City Code on Takeovers and Mergers (1985) Rule 21.1 <http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/code.pdf> accessed 20 April 2016.

8 «Potash Corporation of Saskatchewan successfully defends historic $43.1 billion hostile takeover bid» (Jones Day, January 2011) <http://www.jonesday.com/potash-corporation-of-saskatchewan-successfully-defends-historic-431-billion-hostile-takeover-bid/> accessed 05 April 2016.

9 Ibid.

10 Jeff Gray, «Potash poison pill a placebo?» The Globe and Mail (31 August 2010) <http://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/potash-poison-pill-a-placebo/article1378823/ accessed 12 April 2016.

potential and strategy due to its significant size and complexity and also argued that because the market price was higher than the offer price, shareholders would not suffer any loss due to the delay. Use of the Poison Pill by Potash can be fully justified because the offer price clearly undervalued the current at that time market price of Potash.

On the other hand it could be argued that a Poison Pill is not necessary a major obstacle for an aggressive, determined bidder. This is illustrated by the hostile attack by Oracle Corp. on PeopleSoft Inc. in 2003. Oracle's bid was valued in $7.7 billion and was rejected by PeopleSoft and the ensuing battle for control lasted 18 months.[1] Amongst other defences which PeopleSoft launched was the Poison Pill which enabled existing shareholders to buy $380 worth of PeopleSoft's shares by paying just $190 cash to the company should Oracle acquire 20%.[2] If Oracle triggered the Poison Pill by acquiring 20% of PeopleSoft's share capital this would equate to 73.0 million at $18.54 per share[3] following which PeopleSoft's shareholders could have exercised their rights and if all did so, they «would have paid $55.5 billion in cash and received back 6.0 billion new PeopleSoft shares. The issuance of 6.0 billion new PeopleSoft's shares would dilute Oracle's previous 20% stake to 1.1%. The value of Oracle's stake would reduce from $1.35 billion to $715 million representing a $638 million loss for Oracle».[4] The battle between the two companies plummeted to a personal level with CEOs lodging suits against each other. January 2005 witnessed the victory of Oracle over the PeopleSoft and demonstrated that long-term determination together with the willingness to pay more can overcome the Poison Pill, it nevertheless, showed its effectiveness as PeopleSoft's shareholders collectively received $10.3 billion in 2005, some $3.3 billion more than the original offer.[5]

As Yablon opines, the primary goal of the Poison Pill is not necessarily to fully fend off a hostile predator, but to win extra time by postponing completion thus allowing the target the opportunity to successfully negotiate a higher price.[6] At the same time, Yablon argues that in the majority of cases where the target with the Poison Pill was eventually sold, it was not because of the lack of the Poison Pill's power, but because of its redemption by the target company directors. Directors have a right to redeem a Poison Pill for little or no cost at all and pursue a deal if it is favoured by the target company's shareholders.[7]

Although the Poison Pill can usefully buy extra time for the target and dilute the acquired ownership of the bidder if it triggers the Poison Pill, as practice has shown, it can be quite weak on its own. Bebchuk et al. believe that because target company directors can easily redeem the Poison Pill, its effectiveness can be greatly enhanced when combined with an Effective Staggered Board (ESB).[8] This view has been also supported by the

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1 Guhan Subramanian, «Bargaining in the Shadow of PeopleSoft's (Defensive) Poison Pill» NELLCO Legal Scholarship Repository, Harvard Law School Economics and Business Discussion Paper Series 12-5-2006 p. 2 <http://lsr.nellco.org/cgi/viewcontent.cgi?article=1356&context=harvard_olin&sei-redir=1&referer > accessed 04 April 2016.

2 Ibid.

3 Please see ibid., p.2: «PeopleSoft's average price for the 30 trading days prior to October 1, 2004 was $18.54».

4 Ibid.

5 Gaugham, op.cit. p.194.

6 Charles M. Yablon, «Poison Pills and Litigation Uncertainty», (1989) Vol 54 Duke Law Journal, p. 54 p. 56 <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3062&context=dlj&sei redir=1&referer> accessed 07 April 2016.

7 Jordan M. Barry and others, «Pills and Partisans: Understanding Takeover Defenses» (23 February 2011). University of Pennsylvania Law Review, Forthcoming; Stanford Law and Economics Olin Working Paper No. 407; Rock Center for Corporate Governance at Stanford University Working Paper No. 98. p. 9 <http://ssrn.com/abstract=1767683> accessed 20 April 2016.

8 Randall A. Heron, Eric Lie, «On the Use of Poison Pills and defensive Payouts by Takeover Targets» (2006) 79(4) Journal of Business p. 1783 p.

research of Barry and Hatfield who analysed three different models of defence tactics, namely: the target without a Poison Pill; the target with a Poison Pill but without an ESB and, the target with a Poison Pill and with an ESB.[1] Through mathematical formulas it was argued that the most effective model is the one where the target company has utilised both the Poison Pill and the ESB.[2]

3.2 Pre-bid defence tactic: Effective Staggered Board (Classified Board)

Staggered Board is a board of directors where usually only 1/3 of its directors are elected each year.[3] This makes it harder for the potential hostile bidder to obtain control over the board because it has to wait for the certain period of time for incumbent directors to expire in order to «occupy» the board and redeem the Poison Pill if there is one at a place. Bebchuk and others concluded that there are no examples which prove that a company with an ESB has been taken over by a hostile bidder through using the ballot box mechanism.[4]

The effectiveness of the ESB in a combination with a Poison Pill was demonstrated by Airgas Inc. in its defence against Air Products & Chemicals Inc. in 2011. In brief, Air Products announced its «best and final» offer at $70 per share, when shares of Airgas were publicly valued at $78 per share. The Airgas' board consisted of three classes of directors, whereby only one third of its nine directors could be re-elected at the meeting.[5] It appeared that Airgas' shareholders supported the takeover approach from Air Products, and Air Products gained approval of the majority of shareholders for «a new shareholder-adopted bylaw provision»[6], which basically would require the shareholders meeting to be held in January, 18, 2011. Airgas referred the matter to the Delaware Chancery Court so as to invalidate the bylaw based on it being «inconsistent with the classification of its board».[7] Although the Court ruled in favour of Air Products as it had approved the legality of such bylaw,[8] the Delaware Supreme Court Ruling (November 23, 2010) overturned the decision.[9] Following lengthy litigation which enabled Air products to nominate three directors to the Airgas board, Air Products eventually lost the battle in replacing the incumbent directors and removing the Poison Pill.[10] Airgas' defence tactics were justified by the Court as those which met Unocal test.[11]

On the other hand, following Union Pacific's hostile bid for Pennzoil, 1997, it can be argued that the ESB may have a detrimental effect on the eventual outcome for the target company's shareholders and the target company as a whole. In Pennzoil's charter, «Directors could be removed only with cause, and newly created directorships could only be filled with the remaining directors».[12]

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2 Barry, and Hatfield, John William, «Takeover Defenses and Adverse Selection» op. cit., p. 21.

2 Ibid., p. 31.

3 Ibid., p. 15.

4 Ibid., p. 15.

5 Alma Cohen, Charles C.Y.Wang «How Do Staggered Boards Affect Shareholder Value?Evidence from a Natural Experiment» (May 17, 2013) Harvard Business School, Working Paper 13-068 p. 8.

6 Ibid., p.9.

7 Lucian Bebchuk, John Coates, Alma Cohen and Guhan Subramanian, «The Airgas Case and Our Work on Staggered Boards», 02 November 2010 The Harvard Law School Forum on Corporate Governance and Financial Regulation <http://blogs.law.harvard.edu/corpgov/2010/11/02/the-airgas-case-and-our-work-on-staggered-boards/> accessed at 10 April 2016.

8 Cohen, Wang, op.cit., p. 11.

9 Ibid., p. 13.

10 Bebchuk, Coates, Cohen and Subramanian, op.cit., <http://blogs.law.harvard.edu/corpgov/2010/11/02/the-airgas-case-and-our-work-on-staggered-boards/> accessed at 02 April 2016.

11 Lloyd H. Spencer, «Delaware Court of Chancery upholds use of poison pill by Airgas board» (2 March 2011) <http://www.nixonpeabody.com/118635> accessed 04 April 2016.

12 Ibid., p. 893.

When in 1997 Pennzoil's shareholders received an offer to sell their shares for $84 per share, the shareholders were willing to sell but the directors of Pennzoil did not find the terms of the offer to be acceptable and rejected the offer. One of Pennzoil's shareholders argued that «How can the company say it is not for sale when 61% of us said we are for sale even before the offer became all-cash?»[1] Union Pacific subsequently withdrew its bid following which Pennzoil experienced some very challenging times including a merger with Quaker State, a sale to Devon Energy for just $18 per share, with the remaining shares in a Pennzoil-Quaker State sold to Shell Oil for just $22 per share.

[2]The shareholders of Pennzoil received $40 per share in October 2002 which was less than half of what could have been achieved if the company had been sold in 1997 to Union Pacific. As a result, $2.0 billion had been lost due to the use of the ESB by Pennzoil.[3] The question arises: did the Pennzoil Board aim for that? — How could it in reality? Independence may have been temporarily preserved but at what cost to shareholders and the business as a whole and even to the Directors stock options? This example proves that the ESB is an effective defence tactic in fending off hostile bidders but, at what cost and to whom? This particular case proved that whilst the defence was successful the outcome is not always right.

3.3 Post-bid defence tactic: the White Knight

The White Knight is a third party which agrees with the target company to the acquisition in order to rescue it from being taken over by the hostile bidder. The White Knight does not necessarily offer a better price however, it does offer better terms for the directors, such as remain incumbent directors on the board. It can be considered as the «strategic partner» of the target company. Speaking of which, it was well illustrated in one of the most interesting cases involving the White Knight, Gucci against LVMH Moet Hennessy Louis Vuitton in 2000.[4] Despite the Gucci's size which was 10 times smaller than its predator's and the strategy employed by LVMH, Gucci won the 2.5 year battle! Following extended litigation between the two fashion houses, Pinault — Printemps — Redoute (PPR), a French retailer, stepped into the case as a White Knight for Gucci. Prior to that, Gucci managed to dilute the share ownership of LVMH from 34.4% down to 25.6% by employing a Poison Pill via an issue of 37 million new shares to the created Employee trust through Employee Stock Ownership Plan. PPR was announced as Gucci's White Knight on 19th of March 2000 as PPR. It acquired 39 million new shares for $75 per share giving PPR, 40% ownership of Gucci and 4 out of the 9 seats on the Gucci's Board.[5] This led to further dilution of the LVMH share ownership in Gucci down to 21%. Although, Gucci's strategy had worked well, LVMH was however still a major shareholder.

The other defence which Gucci strategically employed against LVMH was Greenmail.[6] Greenmail is a defence tactic whereby a hostile bidder purchases a substantial amount of shares in the target company and threatens a tender offer.[7] Then directors of the target offer to buy out the shares owned by the acquirer at a high premium. In the Gucci case it helped to push LVMH out of Gucci. PPR acquired

[1] Ibid., p. 893.

[2] (Prepared) by Professors Michael H. Moffet and Kannan Ramaswamy, «Fashion Faux Pas: Gucci & LVMH» (2010) op. cit., p. 8.

[3] Ibid., p. 893.

[4] (Prepared) by Professors Michael H. Moffet and Kannan Ramaswamy, «Fashion Faux Pas: Gucci & LVMH» (2010) Thunderbird The American Graduate School of International Management, A06-02-0000 p. 1 <http://autodesarrollate.vitro.com/PORTAL/cdh/thunderbird/files/Gucci%20%20LVMH.pdf> accessed 04 April 2016.

[5] Ibid., p. 5.

[6] Ibid.

[7] Investopedia <http://www.investopedia.com/terms/g/greenmail.asp> accessed on 23 April 2016.

8.6 million Gucci shares from LVMH for $94 per share, leaving LVMH with only a 12% stake in Gucci. In March 2004, the 12% LVHM stake would be offered to PPR. In return, LVMH waived all legal suits against Gucci and PPR. As noted by Thunderbird, this represented a successful employment of the White Knight defence as part of the Gucci rescue strategy from a hostile approach.[1]

3.4. Post-bid defence tactic: Selling Crown Jewel(s)

Selling the Crown Jewel(s) belongs to the class of the «asset restructuring defences»[2] which is considered by many as a «drastic antitakeover defence[s]».[3] Little wonder, as during restructuring a company undergoes substantial changes and strain making this defence one of the most controversial defences as it often entails selling the most lucrative asset(s) of the target company in order to «escape» from a predator. The Crown Jewel may be high technology equipment, intellectual property, securities or even key personnel in service or high-tech business. Selling the Crown Jewels makes the target look significantly less attractive to the bidder, which is of course the main objective.[4]

It is often a difficult process to undertake, as firstly, directors have to convince their shareholders that a hostile takeover bid is not favourable and secondly, that only by selling the Crown Jewel(s) as a defence tactic will the company be saved. It will be a hard task for directors to justify this defence as it can deny shareholders a valuable exit from the company and also at the same time ruin the company due to Crown Jewel's divestment. Post the sale of the Crown Jewel(s) the company may be cash rich but weak and still be vulnerable to takeover from other predators.[5]

A prime example of selling Crown Jewel is demonstrated by ABM AMRO, then, the largest Dutch bank which tried to defend itself from a hostile predator — a large consortium led by the Royal Bank of Scotland (RBS).[6] The takeover battle began in October 2007 when Barclays — the third largest bank in the UK was about to sign a deal for Euro 63.74 billion with ABN AMRO to acquire it in a share-for-share-transaction. At this time, RBS expressed its interest in ABN AMRO for Euro 72.27 billion through a combination of cash and shares. ABN AMRO's directors preferred to stay with the Barclays' deal, and in order to prevent the hostile takeover from RBS, ABN AMRO decided to sell its Crown Jewel, i.e. its North American Subsidiary, LaSalle Bank Corporation.[7]

The purchaser — Bank of America had been assured by the directors of ABN AMRO that no prior shareholders' approval is required for the sale of the LaSalle bank. However, that appeared not to be the case, as the shareholders of ABN AMRO started immediately to express their opposition to such a significant deal.

ABN AMRO's shareholders filed a suit in Holland against the company's directors arguing that selling a North American division was cynical defence tactic against a possible deal with RBS and that the decision, to further proceed with Barclay's was purely in the interest of directors to entrench their own personal positions. The main argument, put forward from the shareholders was on the basis that the directors breached their

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1 Ibid., p. 8.

2 Dennis Block, Public Company M&&A: Recent Developments In Corporate Control, Protective Mechanisms And Other Deal protection Techniques (2006) p. 86.

3 Ibid., p. 235.

4 Gaugham, op. cit., p. 235.

5 J.D. Candidate, «Dutch Treat: Netherlands Judiciary Only Goes Halfway Towards Adopting Delaware Trilogy in Takeover Content» (May 2009) p.1213 <http://www.vanderbilt.edu/jotl/manage/wp-content/uploads/Quinn_final_7.pdf> accessed 12 April 2016.

6 Ibid., p. 1214.

7 Ibid., p. 1221.

fiduciary duties, as they were, acting in a «bad faith».[1]

Although shareholders of ABN AMRO obtained an injunction against the sale of the Crown Jewel, on appeal the Supreme Court overturned the decision. Nevertheless, the ABN AMRO share-holders obtained what they wanted with the RBS Consortium winning the bidding battle and acquiring ABN AMRO in October 2007. This case clearly demonstrates that selling the Crown Jewel(s) is both as serious and controversial step to take and, faced with a determined bidder may not be successful and will often result in litigation which is public, costly and will cause delay. In certain jurisdictions, litigation will be employed tactically which could easily lead to unintended consequences for the target e.g. a bid from an even more undesirable third-party. The defence absolutely requires the target company's shareholders and its directors to be firmly aligned otherwise they will start suing each other and expose the company to unwanted attraction. Selling the Crown Jewel(s) therefore requires the actions of the directors to be fully justified to, generally, both the company and its shareholders from a fiduciary duty pers-pective.

However a variety of tactics against hostile takeover are available to the target company's directors, in practice the scope of rights for using these strategies can be limited by laws of different jurisdictions. Speaking of which, the UK favours the open market and therefore — takeovers. According to the EU Directive on Takeover Bids, takeovers create corporate improvements and efficiency through combined synergies via cutting agency costs, and allow markets to grow stronger.[2] The Directive governs the takeover regime within the European Community and emphasises the equality of rights of shareholders and on that directors must not generally interfere with the rights of shareholders to decide on whether to accept or reject the bid.[3] It is not allowed to take such actions unless the shareholders' approval has been previously obtained. One leading City of London law firm comments that a Poison Pill must be disclosed to the shareholders in General Meeting, regardless it being put in place prior to or during the offer period.[4] Also details on the actual Poison Pill must be disclosed in a company's Annual Report and Accounts.[5] In contrast, the USA laws enabled target company's board of directors to employ various defence tactics against a hostile attack provided they pass the test on reasonableness[6] and are proved to be not coercive or preclusive[7] to the particular takeover threat.

Conclusion

There is a wide range of defence tactics which have been designed to fight off a hostile takeover. Amongst them, the most powerful in blocking a hostile takeover offer is a combination of the Poison Pill and the ESB defence tactics. However, choosing the right defence tactic depends on all the facts and circumstances, certainly a «one size fits all» approach cannot be adopted. It will depend upon the company's performance, its prospects, the views of shareholders and the determination of the directors to keep the company independent. It will also depend on the quality and approach of appointed advisers, which will be key in any takeover

1 Takeover Directive 2004/25/EC, op. cit.

2 Takeover Directive 2004/25/EC, op. cit.

3 Ibid.

4 «The European Takeovers Directive – an overview» by Slaughter and May (September 2006), p. 6 <http://www.slaughterandmay.com/what-we-do/publications-and-seminars/publications/client-publications-and-articles/t/the-european-takeovers-directive—-an-overview.aspx> accessed 02 April 2016.

5 Ibid., p. 6.

6 Arthur Fleischer Jr., Alexander R. Sussman, «Directors Fiduciary Duties in Takeover's & Mergers» PLI First Annual Director's Institute On Corporate Governance (September 22-23, 2003) p. 9 <http://friedfrank.com/siteFiles/ffFiles/sri_directors_duties.pdf> accessed 12 April 2016.

7 Ibid p.9.

situation. Of course, the approach, financial power and determination of the bidder are also of extreme relevance. The jurisdiction is also a key factor with regard to how the directors may behave.

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Журавель Мар'яна. Рейдерство та деякі з найефективніших захисних стратегій проти нього з прикладами.

Дана стаття пов'язана з гілкою міжнародного права злиття та поглинання компаній. Мета статті — розглянути рейдерську діяльність щодо компаній та на окремих прикладах надати аналіз деяких найбільш ефективних захисних стратегій, які можуть бути застосовані директорами об'єктів поглинання.

Ключові слова: *поглинання, ворожий, суб'єкт поглинання, об'єкт поглинання, захисні стратегії, рада директорів.*

Журавель Марьяна. Рейдерство и одни из некоторых наиболее эффективных защитных стратегий против него с примерами.
Данная статья касается темы в отрасли международного права слития и поглощения компаний. Цель статьи – рассмотреть рейдерскую деятельность касательно компаний и на отдельных примерах проанализировать одни из наиболее эффективных защитных стратегий, которые могут быть использованы директорами объектов поглощений.
Ключевые слова: *поглощение, враждебный, субъект поглощения, объект поглощения, защитные стратегии, совет директоров.*