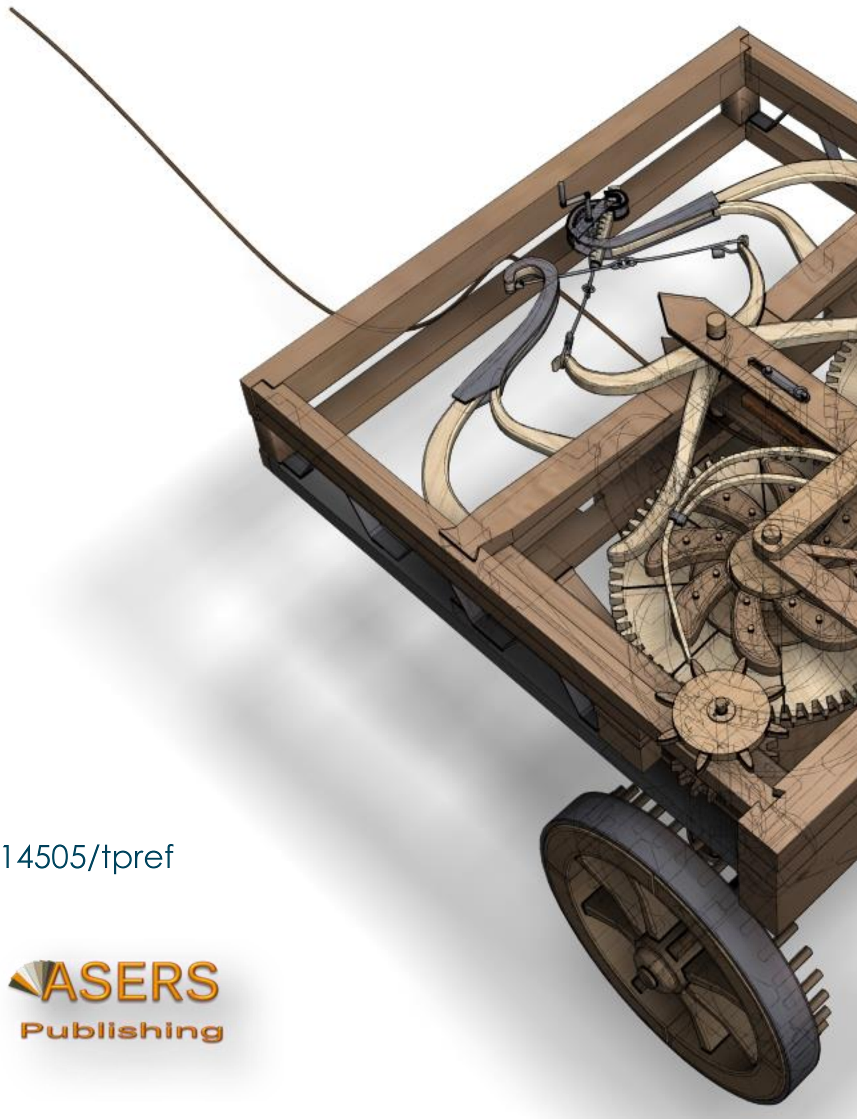
Theoretical and Practical Research in Economic Fields

Special Issue



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This Special Issue was created at the request of a group of researchers from Ukraine. It is a response to the challenging situation of Ukrainian scholars due to the Russian invasion as well as the growing demand for knowledge on Ukrainian issues.

We would like to express our endless thank to our colleagues, scholars from Ukraine who are working amid the war on topics that are important for all. Also, we thank all our international authors for their valuable contributions to this Issue.

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Comparative Analysis of the Squeeze-Out Procedure in Ukraine and the EU

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Abstract: The introduction of the squeeze-out procedure into Ukrainian law took place several years ago. It was due to the implementation of Directive 2004/25/EC of the European Parliament and of the Council of April 21, 2004 on takeover bids as part of the implementation of the Association Agreement between Ukraine and the European Union. However, the resonance of this institution in Ukrainian legislation has not only continued to grow but is also gaining momentum. The purpose of squeeze-out is to balance the interests of majority and minority shareholders. However, there are ongoing discussions in the legal profession regarding the possibility of a possible violation of the subjective rights of minority shareholders in the event of forced deprivation of their ownership of shares, the setting of the share price, and the compliance of the procedure for the compulsory sale of minority shareholders' shares with the principle of inviolability of property rights. The institute of compulsory redemption of minority shareholders' securities at the request of a person (group of persons) holding a dominant controlling stake is new to the theory and practice of domestic corporate law. In the legislation of other countries and legal doctrine, the institute of public offer is a mechanism that guarantees shareholders' rights in the process of redistribution of corporate control and takeovers and ensures a balance of private and public interests in a joint-stock company. It is characteristic of a public company's exit from the public securities market. Given the relative novelty of the relevant procedure in Ukraine, as well as its controversy, it is advisable to study it in more detail. In particular, the author believes that it is advisable to consider the squeeze-out procedure in Ukraine in comparison with the EU for a deeper study. The purpose of the article is to analyze the history of the emergence and development of the squeeze-out institute in selected countries of the world, the mechanism of its implementation in national legislation, law enforcement practice, and to identify proposals for improving legal regulation and implementation. The leading scientific method used by the author in this study is the comparative method. The main objective of the article is to compare squeeze-outs in the EU and Ukraine. The author used the comparative method to obtain the results disclosed in the article and its conclusions. It was the application of the comparative method that made it possible to identify common and distinctive features in Ukrainian and European legislation, as well as to identify differences in the implementation of forced buyouts in EU member states.

Keywords: squeeze-out; corporate law; share redemption; joint stock companies.

JEL Classification: O57; P51; K33; A12.

Introduction

The conflict between the interests of minority and majority shareholders is one of the main elements that constitute the core of the problems studied by corporate law theory. Compulsory buyout of shares at the request of a shareholder is a classic example of such a conflict. It should be noted that the bulk of the discussions traditionally held around the institution under study, both in the legal literature and when discussing political and legal issues in higher courts or when considering the next legislative amendments, are limited to the economic justification of the compulsory buyout of shares, and it seems appropriate to start the study of the compulsory buyout of shares with this.

In general, the interests of minority and majority shareholders may differ significantly. The divergence of interests is one of the main reasons why corporate conflicts occur. Despite the fact that majority shareholders have more rights, this does not in any way limit minority shareholders. They can significantly influence the company's management. Under conditions of high corporate control, situations arise when major shareholders have virtually no chance of buying out all shares even if they are offered a favorable price. On the other hand, small shareholders are practically unable to sell their shares on the public market at favorable prices. It is worth noting that this problem can be typical for any country. However, most European countries have faced this problem before and have developed effective mechanisms to address such situations. One of these measures is the forced buyout of shares. In Europe, attempts to harmonize the squeeze-out procedure began in the 1970s. In the United States, it was introduced even earlier – in the 1920s.

For Ukraine, the relevance of this issue is extremely high. Unlike European countries, where the relevant procedure has been in place for a long time, Ukraine has only recently begun discussing it. To be more precise, in 2017, the Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine on Improving Corporate Governance in Joint Stock Companies' was adopted. It proposed to amend another national legal act - the Law of Ukraine 'On Joint Stock Companies' (new version adopted in 2023) (Law of Ukraine, № 1983-VIII, 2017). At the time of its adoption, Ukraine completely lacked regulation of the right to squeeze-out, as well as mechanisms for its application. The authors of the draft law considered its provisions to be relevant in the context of Ukraine's European integration and approximation of legislation to EU standards. The need to implement the requirement for the existence of a squeeze-out right in Ukrainian legislation as provided for in Directive 2004/25/EC of the European Parliament and of the Council on takeover bids is related, in particular, to the need to implement the EU-Ukraine Association Agreement (Explanatory Note to the Draft Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine on Improving Corporate Governance in Joint Stock Companies', 2015).

The introduction into the national legislation of the institution of a public offer in the course of a takeover of a joint-stock company through the use of the squeeze-out procedure at the request of the owner(s) of the dominant controlling stake, their affiliate, or an authorized person of a group of persons acting jointly with a view to acquiring, directly or indirectly, ownership of 100% of shares, and the problematic aspects of the practice of applying this procedure, requires the creation of an effective mechanism for legal regulation of such relations which ensures a balance of private and public interests (Kolohoida and Stafiichuk 2018).

Squeeze-out is actively used in international corporate law practice. Moreover, this procedure has long been known in the world. However, in Ukraine, there are both supporters of the procedure and those who criticize it. Among the advantages of squeeze-out are the economic feasibility of the buyout procedure and the possibility of preventing corporate conflicts. The disadvantages are usually identified as violations of minority shareholders' ownership of shares, based on the lack of state control over this procedure and effective judicial protection of shareholders' rights (Doroshenko and Pylyavets 2020).

It is worth noting that there are also scholars among American researchers who criticize the procedure of forced buyout of shares. According to V. Khanna and U. Varottil, squeeze-out is a visible and tangible manifestation of the controlling shareholder's brute force in the corporate mechanism. This is manifested in the ability to openly force minority shareholders to leave the company by agreeing to a certain price for their shares. At the same time, a squeeze-out can help to increase the value of a company due to the advantages that the controller has in being able to acquire the entire company. Perhaps because of this rather controversial and dramatic background, squeeze-out regulation takes on different shades in different jurisdictions (Khanna and Varottil 2015).

Scholars from Singapore C. Chen, W. Zhang, W. Wan also emphasize that squeeze-out is a controversial phenomenon. This controversy stems from the fact that majority shareholders can force minority shareholders to sell their shares against their will. In addition, the purchase price may seem unfair and too low. In addition, the shares of the company on the stock exchange may have a higher value and generate more profit than the price at which they were purchased from the minority shareholders (Chen *et al.* 2018).

Nevertheless, the use of squeeze-outs in many countries shows that it has found many supporters. Moreover, it is regulated at the level of EU law. Taking into account the approximation of Ukrainian legislation to the EU, we believe it is advisable to consider the specifics of squeeze-out in Ukraine and selected EU member states in order to understand the advantages and disadvantages of different regulation of the same procedure and to determine in which direction Ukraine should move in order to achieve European standards in corporate law.

1. Methodological Framework

Given the novelty and insufficient level of development of squeeze-out issues in the national legal doctrine, the authors of the study have chosen simple but clear methods of scientific research of the issue. The main method used for the study is the comparative method. With its help, the author was able to explore the common and distinctive features of the squeeze-out procedure in Spain, Germany, Poland and Ukraine. The author concludes that the procedures are very similar, which is due to the common legal framework that has been incorporated into the legislation of the countries. The author also emphasized certain peculiarities inherent in the legislation of each of the countries under consideration.

The author also actively used the formal legal method. This method is used to study legal texts and circumstances, as well as to interpret the relevant texts in their logical sequence using special legal terminology and legal constructions. The use of the formal legal method made it possible to analyze legal texts. In particular, the author has studied Directive 2004/25/EC of the European Parliament and of the Council of April 21, 2004 on takeover bids and the provisions governing squeeze-outs. In addition, the formal legal method was used to analyze the legislation of selected EU member states that have implemented the relevant Directive and the specifics of squeeze-outs under their laws. This method was applied to the analysis of Spanish, German and Polish legislation. This method was also used to analyze Ukrainian legislation on compulsory buyout of shares, in particular, current laws and draft laws in this area, in particular, the Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine on Improving Corporate Governance in Joint Stock Companies', the Law of Ukraine 'On Joint Stock Companies', etc.

In studying the formation of squeeze-out, the author used the historical method. Its peculiarity lies in the study of the chronology of the emergence and development of the objects of research. In this article, the author applies the historical method to study the development of squeeze-out in the world and Europe from its inception to the current state. Thus, squeeze-out first appeared in the USA and the UK and was later adopted by other countries. Squeeze-out was introduced into the law of many EU member states after the implementation of Directive 2004/25/EC. In Ukraine, the squeeze-out procedure has also been influenced by European norms, namely as a result of the implementation of the aforementioned Directive 2004/25/EC.

The author draws conclusions regarding the problems existing in the Ukrainian squeeze-out procedure and the ways to overcome them using the method of analysis and synthesis. Analysis is a method of cognition, the content of which is to dismember the subject of research into its constituent parts for the purpose of their detailed and comprehensive study. The constituent parts of an integral object are its sides, features, properties, relations, etc. Synthesis is a method of cognition opposite to analysis, the content of which is to combine previously dismembered parts of the subject into a single whole. Analysis and synthesis mutually presuppose and condition each other. The results achieved by the author using this method are widely reflected in the conclusions to the article.

The author used the systematic approach to systematize the information obtained. Its use is extremely important in identifying the signs of compulsory buyout of shares in the individual countries considered in the article.

2. Results

2.1. General Characteristics of the Squeeze-Out Procedure

First of all, let's find out what this procedure is. Squeeze-out is aimed at exercising the legal right of the owner of a controlling shareholding to compulsorily buy out shares from minority shareholders. To do so, the former must send a special request to the company concerned. As noted by the American researcher F. Hodge O'Neal, squeeze-out means the use of a strategic position, management powers, or legal device by some owners in a business enterprise to eliminate other owners (Hodge O'Neal 1961).

As noted by Ukrainian scholars O. Kolohoida and V. Stafiichuk, squeeze-out is a mechanism for the mandatory sale of ordinary shares by minority shareholders on the basis of an impersonal public irrevocable demand of a person (persons acting jointly) who owns a dominant controlling stake (Kolohoida and Stafiichuk 2018).

Instead, L. Martin, a researcher from Spain, emphasizes that squeeze-out is a forced sale and purchase of one's share in the share capital of companies to make takeovers more transparent (Martin 2018).

Thus, the author of the article proposes to define squeeze-out as a procedure regulated by law, which consists in the mandatory sale of securities (or redemption of shares) at the request of the owner of a shareholding that is dominant in comparison with others. It should be noted that a dominant shareholding is a shareholding that is equal to or exceeds 90% of the total amount of ordinary shares. This percentage may differ from country to country.

The squeeze-out procedure has a number of significant advantages. For example, majority shareholders who own a dominant shareholding have the opportunity to facilitate easier and more efficient management of the company and improve the liquidity of shares. They have the right to initiate a compulsory buyout of shares and legally exclude shareholders who do not participate in management and do not influence the state of affairs in the company. In addition, many of them may have already changed their place of residence, inherited their rights, or even lost the documents confirming their share ownership. On the other hand, minority shareholders can expect to be reimbursed for their assets in the amount corresponding to the market value (Le Bars and Guyon 1998).

Historically, the procedure of mandatory takeover bids was first introduced in Europe after the Second World War in the United Kingdom. However, even before the formalization of takeover rules governing public offerings, market participants adhered to certain business standards and guidelines developed by them, which created the preconditions for the emergence of the public offer institution. In particular, the acquirer of a controlling stake was required to send an offer to other shareholders of the target company to purchase shares on the same terms (Carney 2000).

Dispersed share capital began to prevail in the UK at the beginning of the XX century, which necessitated the introduction of a special legal regime for the acquisition of significant blocks of shares. The adoption of public takeover rules in the 50s and 60s in this country, which contained rules on the mandatory submission of a public offer for the sale of all shares of the target company and disclosure of information on the public offer, taking into account the rule on a mandatory offer to buy back shares. The adoption of these acts was aimed at overcoming the conflict of interest between the owners of significant blocks of shares and minority shareholders, as well as protecting the rights and legitimate interests of the latter (Franks *et al.* 2005).

In 1972, the City Code on Takeovers and Mergers was adopted, which set out six fundamental principles of proper behavior of an acquirer when making a buyout offer: the principle of equal treatment of all shareholders:

1. equal conditions and a fair price for the shares;
2. providing the necessary time (not less than two and not more than 10 weeks) and information to make an informed decision;
3. the rule of non-interference of the company's board of directors in the decision-making of shareholders;
4. prevention of artificial underestimation or overestimation of the value of shares;
5. making a public offer only if the acquirer is confident in its ability to pay for the shares to be acquired;
6. prohibition of restrictions on the target company's activities beyond what is necessary in connection with the public offer (The City Code on Takeovers and Mergers, 1970).

With the adoption of Directive 2004/25/EC, 2004, its provisions were incorporated into the Companies Act, 2006, and the rules set out in The Panel on Takeovers and Mergers on takeovers and mergers became law (Companies Act, 2006). Next, we will consider the specifics of squeeze-outs in the EU.

2.2. Conducting a Squeeze-Out Procedure under the Laws of Selected EU Countries

First of all, it should be noted that the issue of squeeze-out is raised at the EU level in Directive 2004/25/EC of the European Parliament and of the Council of April 21, 2004, on takeover bids, 2004. In this document, the concept of squeeze-out is regulated by Article 15. Member States shall ensure that the offeror can require all holders of the remaining shares to sell those securities to him/her at a fair price. Member States shall introduce this right in one of the following situations: if the shareholder holds securities representing at least 90% of the voting capital and 90% of the voting rights in the company receiving the offer or if, after acceptance of the offer, he/she has acquired or entered into an agreement to acquire securities representing at least 90% of the voting capital of the company receiving the offer and 90% of the voting rights contained in the offer. In addition, the Directive states that Member States may set a higher threshold, which, however, may not exceed 95% of the capital and 95% of the voting rights. If the offeror wishes to exercise the squeeze-out right, it must do so within three months after the expiration of the time allowed for acceptance of the bid (Directive 2004/25/EC, 2004).

All developed corporate legal orders eventually came to the need for legislative regulation of the procedure for buying out shares from minority shareholders in case of concentration of a shareholding by one person, which usually exceeds 90%. EU legislation has two approaches to determining the size of the shareholding that triggers the acquirer's obligation to make an offer: 1) linking it to control over the company or 2) fixing it at the level of a blocking minority. For example, in Austria, Poland, Hungary, the Czech Republic, Slovenia, Spain, the threshold for squeeze-outs and sellouts is 90% of the company's voting shares, and in Germany, France, Bulgaria, Romania, Croatia, Italy and Slovakia, it is 95% of the company's voting shares (Kolohoida and Stafiichuk 2018).

Displacement and redemption of shares at the request of the remaining shareholders are possible only if a voluntary offer to acquire all shares of the company (offer) has been previously made to the joint-stock company or if a mandatory offer (demand) has been made and the acquirer, as a result of acquiring securities on the basis of such an offer, has exceeded the threshold value indicating the concentration of the absolute majority of corporate control rights.

Let's take a closer look at several EU countries. For example, in Spain, squeeze-outs were actively regulated in 2007. At that time, the legislator implemented Directive 2004/25/EC into its own law. Royal Decree 1066/2007 of July 27, 2007 was adopted on the rules governing takeover bids for securities. It is important to note certain key provisions contained in this Decree. Pursuant to Article 47 of the Decree, any person who has made a public offer in respect of all securities may, upon completion of the offer, require the remaining holders of shares or other securities affected by the offer to sell them at a fair price. Similarly, any of the holders may require the offeror to purchase all of its securities at a specified price. The above rights will be subject to the following two circumstances occurring as of the date of settlement of the offer: that the offeror holds securities representing at least 90 percent of the voting capital of the target company; and that the previous public offer was accepted by holders of securities representing at least 90 percent of the voting rights of the target company. A fair price will be deemed to be a price that is consistent with the consideration of the public offer.

It also provides for a squeeze-out procedure. The maximum period for demanding a compulsory sale or redemption will be three months from the date of the end of the acceptance period. The explanatory brochure of the offer will indicate whether the offeror intends to demand a compulsory sale if the conditions specified in Article 47.

The offeror shall notify the National Securities Commission within three business days after publication of the results of the offer if the conditions specified in Article 47 are met. The offeror shall notify the National Securities Commission whether it requests a compulsory sale as soon as the decision is made, but no longer within the period specified in Section 1. If he does so, he must set the date of the transaction between 15 and 20 business days after the notification of his decision to the National Securities Market Commission, which will be published. The offeror's decision will be irrevocable.

Prior to the date of the transaction, the offeror must prove to the National Securities Commission the availability of guarantees ensuring the fulfillment of obligations arising from the exercise of the right of compulsory sale. The transaction will be liquidated within the same period set forth in the explanatory brochure of the offer, counted from the date of the transaction.

The offeror will publicly and generally disseminate the characteristics of the compulsory sale by the means provided for in Article 22 within a maximum of 5 business days after the date of publication by the National Securities Market Commission.

The holders of the securities affected by the compulsory sale will notify the offeror through the depository institutions of their securities before the date of the transaction of the nature of the remuneration they have chosen, if possible. In the absence of communication and when such an alternative exists, it will be understood that they choose to pay in cash.

Requests for compulsory purchase received by the offeror will be settled within the same timeframe as that set out in the explanatory brochure for settlement of the offer, counting from the receipt of each request.

The guarantee may be withdrawn after the liquidation of the operation is accredited by the National Securities Market Commission. The completion of the forced sale transaction will determine the exclusion of the affected securities from trading. This exclusion will take effect from the moment the transaction is settled. If, as a result of the compulsory purchase transaction, the offeror becomes the owner of all securities, they will also be excluded from trading after the settlement of the last transaction, if the National Securities and Stock Market Commission, at the request of the non-offeror, provides it with one month to restore compliance with the distribution and liquidity requirements of the relevant security. Upon expiration of the specified period, without such restoration, the securities will be automatically excluded from trading (Royal Decree 1066/2007 on the regime for public takeover bids for securities, 2007).

Thus, having analyzed the squeeze-out in Spain, we can distinguish three main elements that characterize it:

1.the shareholder must hold a stake equal to or greater than 90 %;

2.no more than three months have passed since the expiration of the deadline for acceptance of the takeover offer (squeeze-out in the case of an acquisition);

3.the party offering the takeover must pay a fair price to minority shareholders.

Let's look at another example - Germany. Under German law, the squeeze-out procedure is triggered when the threshold of 95% of shares is reached. German law provides for three different squeeze-out procedures, namely: under the Takeover Act, 2001, the Stock Corporation Act, 1965 and under the Transformation Act, 1994 (a so-called merger squeeze-out) (Securities Acquisition and Takeover Act, 2001; Stock Corporation Act, 1965; Transformation Act, 1994).

An independent appraiser is commissioned by the majority shareholder to evaluate the buyout. After that, the issue of compulsory repurchase of shares is submitted to the general meeting of shareholders, which is a formality in the case of consolidation of the dominant controlling stake. The share buyback price cannot be lower than the market value for the last three months. However, this rule does not ensure adequate protection of minority shareholders' rights, as the share price of a joint-stock company is significantly reduced during the takeover. The share buyback price may be appealed to the court, which may appoint another appraiser to determine the reliability of the appraisal (Binder and Riehmer 2020).

If, as a result of a takeover bid, a participant (together with persons with whom it acts jointly) holds at least 95% of all voting rights, it may initiate a squeeze-out procedure under the Takeover Act. The key advantage of a squeeze-out under the law stems from the ability to pay minority shareholders a value equal to the offer price (Securities Acquisition and Takeover Act, 2001).

A squeeze-out under the Stock Corporation Act is a more complicated procedure than under the Takeover Act. First of all, under this law, the majority shareholder must prepare a special report for the general shareholders' meeting. The price and 'fairness' of the compensation must be verified by an auditor appointed by an authorized court. If minority shareholders do not agree, they can block the squeeze-out through a lawsuit and demand payment of a larger amount of compensation (Stock Corporation Act, 1965).

A squeeze-out under the Transformation Act has its advantages. First of all, a majority shareholder can carry out a squeeze-out by holding only 90% or more of the authorized capital. According to the Transformation Act, a squeeze-out is permitted provided that it is carried out in connection with a merger between the majority shareholder and the target. The relevant decision must be made within three months from the date of signing the merger agreement (Transformation Act, 1994).

It is worth noting that German researcher F. Follert, there are some drawbacks in the German squeeze-out practice. First of all, he mentions the procedure for valuation of the company's shares/ In Germany, the concept of the relevant standard (standard 1) 'Institut der Wirtschaftsprüfer in Deutschland IDW', which contains guidelines for company valuation, dominates. It proposes a valuation model for squeeze-out cases that can be compared to the 'equity approach' of discounted cash flow methods. In particular, the equilibrium capital asset pricing model based on finance theory is regularly used to determine the risk premium as part of the present value calculation. Numerous studies have shown the incompatibility of the concept of objective cash flow calculation proposed by IDW S 1 and the financial-theoretical CAPM with minority shareholder protection. The main issue concerns the definition of full value. Despite this incompatibility, these models are becoming increasingly popular in court practice in Germany (Follert 2020).

Thus, despite certain drawbacks emphasized by F. Follert emphasizes, the squeeze-out procedure has been effective and has long been in place in Germany.

For example, let's also consider the legislation of Poland. This country borders Ukraine and has many common economic, cultural and political ties. Accordingly, its experience will be particularly interesting for Ukraine. Squeeze-out in Poland is regulated by the Commercial Companies Code, 2000. The essence of this institution is that the majority shareholder, being the owner of the part of the authorized capital of a joint-stock company provided for by the Code, may demand that minority shareholders sell their shares in the company. In general, the main objective of many provisions of the Commercial Companies Code is to protect the rights of minority shareholders in a joint-stock company. However, it should be emphasized that the provisions of Art. 418 introduce a relatively new solution aimed at eliminating minority shareholders from the company (Żaba 2020).

Under the Commercial Companies Code, if a shareholder of a public company holds 90% of the total voting rights in the company, it may compulsorily purchase the shares of minority shareholders at a price set in accordance with the rules applicable to the establishment of a minimum price in a tender offer. The compulsory buyout procedure may be initiated within three months after the 90% threshold is reached, which in the case of a takeover bid means three months after the completion of the takeover bid (Commercial Companies Code, 2000).

The procedure for the compulsory redemption of shares in private joint stock companies requires the simultaneous consideration of many preconditions. In the Polish doctrine, such preconditions are divided into general preconditions (defining the scope of the compulsory buyout by specifying the shares that may be bought out, *i.e.* shares in private joint stock companies) and special preconditions (referring to the conditions for the buyout of only those shares that are subject to the decision on compulsory buyout). The general prerequisites relate primarily to the provision of Article 418 § 4 of the Commercial Companies Code, which does not allow for the buyback of shares in public joint stock companies. In addition, the compulsory buyout provision does not apply to shares of the State Treasury of Poland in companies that were created through commercialization. The Polish representatives of the doctrine also emphasize that it is not possible to compulsorily buy out shares of those shareholders who have so-called personal rights in the company. These rights are related to the shareholder's personality, not to his or her shares. An example of this right is the right to appoint members of the management or supervisory board.

The redemption procedure is initiated by a resolution on compulsory redemption, which must be adopted subject to the conditions of majority and voting method. In addition, the resolution must set the buyout price. Polish law stipulates that minority shareholders selling their shares must submit the share documents or other documents on their ownership to the company within 1 month of the announcement of the decision to buy back the shares. After that, the company is obliged to buy back the shares at the expense of the majority shareholders. The company's management is obliged to repurchase the shares for up to 1 month from the expiration of the deadline for drawing up the documents for the shares. In addition, Polish regulation provides that the above period may not expire earlier than after the payment of the entire amount by the majority shareholders (Rodzynkiewic 2012).

The peculiarities of legal regulation of the squeeze-out procedure under Polish law are:

1) inability to apply in public joint stock companies;

2) the basis for the general meeting's decision to compulsorily redeem shares is the need to protect the company's interests from abuses and actions of minority shareholders that make it impossible for the company to function properly;

3) squeeze-out may be initiated by no more than five persons who jointly own at least 90% of the authorized capital;

4) 90% of the shareholders' votes are required to pass a resolution on the compulsory redemption of shares;

5) the decision may apply to shareholders holding less than 5% of the authorized capital;

6) the share repurchase price determined by the appraiser is the minimum price at which the shares should be repurchased;

7) the appraiser is independent of both the company and the shareholders;

8) the law provides for the right of a minority shareholder to appeal against the redemption price to the corporate court (sąd rejestrowy);

9) the law provides for the right of a minority shareholder to appeal to the court against the decision of the general meeting on the compulsory redemption of shares (squeeze-out) on the grounds provided for by law for such an appeal (Kolohoida $ Stafiichuk 2018).

2.3. Practice of Courts of European Countries on Squeeze-Out Procedure

It should be noted that, given the controversy of the squeeze out procedure and the sharply opposite attitude to it among scholars and society, it is not surprising to see court practice in courts of different countries on the relevant issue. First of all, let's pay attention to the German court proceedings. Thus, in its judgment of January 12, 2016 (case No. II ZB 25/14), the German Federal Court of Justice commented on the expediency of a monetary settlement in a squeeze out case. In its commentary, the court referred to the decision of the Federal Constitutional Court of Germany (Bundesverfassungsgericht). According to this case law, in the event of a squeeze-out, a minority shareholder must receive full compensation for the loss of its participation in the company. Such compensation should reflect the *real* and *true* value of the property expressed in the form of shares. This raises a reasonable question: is the value of shares limited to dividends and does this valuation really reflect the *real* price? (Cash settlement in case of squeeze-out, 2016).

The decision states that compensation payments are only temporary fixed compensation for dividends otherwise received. If the dependent (and transferring) company develops positively after the profit and loss transfer agreement is entered into and if the dividends are higher than the compensation under such an agreement after the internal agreement is terminated, the (outside) shareholder may benefit from the decision to remain in the company after the compensation is paid. This decision is beneficial for minority shareholders, because until now the Federal Court has only ruled that the stock exchange price is the lower limit of the monetary settlement when calculating the market value (company valuation). Now, the valuation based on compensation for loss of profit and the transfer agreement provides another lower limit (Case law, BGH, 12.01.2016 - II ZB 25/14, 2016).

In addition, after analyzing other decisions of German courts, in particular, Feldmühle case, 1962 (Case law, BVerfG, 07.08.1962 - 1 BvL 16/60, 1962) and Moto Meter AG, 2000 (Case law, BVerfG, 23.08.2000 - 1 BvR 68/95, 1 BvR 147/97, 2000), the following defining ideas regarding the exclusion of minority shareholders can be distinguished: the law governing the squeeze out procedure itself does not provide for the deprivation of minority shareholders of their property, and the legislator himself did not in any way imply a hidden intention to disadvantage the minority shareholders. Moreover, as stated in Moto Meter AG 2000, compensation to minority shareholders must be full and fair. The respective squeeze-out process should be very clearly and understandably regulated and based on the constitutional principles of justice, equality, freedom and the rule of law. Thus, it can be stated that the German case law supports squeeze outs, emphasizing the benefits of the procedure for minority shareholders. In addition, it emphasizes the importance of respecting the constitutional rights and freedoms of such persons in the process of compensating them for the value of their shares.

The practice of the Polish court should also be taken into account. For instance, in its judgment in case 65/6/A/2005, the Polish Constitutional Court came to a number of conclusions. First of all, squeeze out is not expropriation in the literal sense. It only has consequences similar to this phenomenon. This is due to the fact that the process of deprivation of property itself should lead to compensation, regardless of its form. The squeeze out procedure creates a situation with the transfer of property between private entities against the will of the owner, which should result in certain compensation from the acquirer. The court also defined what can be considered 'adequate compensation'. According to its decision, adequate compensation is compensation that allows the owner to reproduce the lost thing or restore the property status that existed before the deprivation of property. In relation to minority shareholders subjected to squeeze out procedure, compensation that reflects the fair and real market value of their shares can be considered as appropriate (Court sentence, №65/6/A/2005, 2005).

Thus, similarly to the German proceedings, the Polish court recognizes squeeze out as a legitimate procedure if the process of proper valuation of shares is followed, which it also regulates in its decision.

2.4. The Use of Squeeze-Out in Ukraine

The use of the squeeze-out mechanism in Ukraine, even after the change in legislation in this area, can be characterized as extremely cautious. According to the statistics as of 2022, the practice of applying the squeeze-out procedure in Ukraine was isolated. Thus, since the introduction in 2017 of the procedure for mandatory redemption of shares at the request of a person holding a dominant controlling stake of 95%, only 417 joint-stock companies have gone through this procedure (National Depository of Ukraine, 2023).

On June 4, 2017, the Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine on Improving Corporate Governance in Joint Stock Companies' came into force, which regulated two methods of consolidation by a majority shareholder owning more than 95% of shares, all shares of such a company - the institution of mandatory acquisition of shares by the majority shareholder at the request of a minority shareholder (sell-out procedure) and the institution of a public request by the majority shareholder to sell minority shares to him (squeeze-out procedure) by amending the Law of Ukraine 'On Joint Stock Companies' (Law of Ukraine, № 2465-IX, 2023).

The Law grants a person who owns a dominant controlling stake (95% or more of the ordinary shares of a joint-stock company), or any affiliate or authorized person of a group of persons acting jointly, the right to send to the company a public irrevocable request to purchase shares from all holders of the company's shares together with a certified copy of the escrow account agreement. In case of submission of a public irrevocable demand to the company, all shareholders of the company, except for persons acting jointly with such person and its affiliates, and the company itself are obliged to unconditionally sell their shares in the company to the claimant.

The Law of Ukraine 'On Joint Stock Companies' defines squeeze-out as a competitive offer as a tool for balancing the positions of the parties in the course of a mandatory share buyback at the request of a majority shareholder (group of shareholders). Pursuant to Article 96 of the Law, if the majority shareholder initiates the process of compulsory redemption of shares, the minority shareholder (shareholders) is entitled to submit a competitive demand for redemption of shares from all other shareholders in response to the public irrevocable demand of the majority shareholder. The main conditions for the latter are:

1. the applicant shareholder must send a notice to the company and the National Securities and Stock Market Commission of its intention to exercise this right within 20 business days after receiving the public irrevocable demand;
2. within 5 business days from the date of notification, submit to the company an irrevocable competitive demand for the mandatory sale of shares;
3. the price of the mandatory sale of shares is at least 5 percent higher than the price in the public irrevocable request of the majority shareholder;
4. the fulfillment of obligations under the competitive bid must be secured by a bank guarantee;
5. any other shareholder (not only the owner of the dominant controlling stake) has the right to submit another competitive bid also at a rate at least 5% higher than the previous competitive bid (Law of Ukraine, № 2465-IX, 2023). This method is a worthy legal tool for overcoming the price set in the public irrevocable demand at the minority shareholder's request, as it will reduce the chances of manipulation of the price by the majority shareholder (towards lowering it), since the buyout may result in the loss of the entire shareholding (Polosenko, 2022).

If we compare squeeze-out procedures in the EU and Ukraine, we can note that they are generally quite similar. It should be borne in mind that there are certain differences even among EU countries. The key differences include the following. In EU countries, the public offer procedure is used as a mechanism for a public company to exit the public market. In Ukraine, the squeeze-out procedure can be applied to both public and private joint stock companies. In this case, the Charter of a private joint-stock company upon its establishment, as well as the decision of the general meeting of shareholders of a private joint-stock company to amend the company's charter adopted by more than ¾ of the votes of shareholders who have registered for participation in the general meeting, may provide that the requirements of the articles of the Law do not apply to such a company or apply with exceptions or peculiarities to be determined by the company's charter.

3. Discussion

In general, it can be stated that the issue of squeeze-out is not well researched in Ukraine, especially in the context of comparison with a similar procedure in the EU. Nevertheless, there are certain scientific works that have analyzed the procedure of forced buyout of shares. Among these works, it is worth noting the article by Ukrainian authors O. Kolohoida and V. Stafiichuk. In their work, the authors analyze the procedure of compulsory redemption of shares under Ukrainian law, comparing it with the European one. The authors confirm that the Ukrainian model of legal regulation of the forced sale of shares is based on the British squeeze-out model. They also consider some retrospectives of the development of squeeze-out in Europe and Ukraine. Among other things, O. Kolohoida and V. Stafiichuk also note that the Ukrainian model of compulsory redemption of shares needs to be improved (Kolohoida and Stafiichuk 2018).

The author of the article also referred to the work of Polish scholar M. Żaba, who described in detail the procedure of forced buyout of shares in Polish practice. He notes that squeeze-out is a relatively new institution of Polish law. It is regulated by the EU Directive, and its basis in Polish law is regulated by the Commercial Companies Code. Special attention is paid to the peculiarities and essence of squeeze-out. M. Żaba provides a detailed description of the squeeze-out procedure with its advantages and disadvantages and emphasizes that the possibility of buying out shares by majority shareholders from minority shareholders at a price determined in accordance with the provisions of the Polish Commercial Companies Code is provided for by Polish law (Żaba 2020).

Despite the fact that squeeze-out has been known in many countries for quite some time, it is a relatively new concept for some EU countries. Accordingly, it is quite new for Ukraine as well. In addition, despite the existence of some works on squeeze-outs, we still believe that there are not enough scientific sources on this topic. This is especially noticeable in those countries where this procedure has appeared quite recently. Ukraine also does not yet have a large number of scientific studies on the relevant procedure. With this in mind, the author of this article identifies several areas for improvement of Ukrainian legislation in the squeeze-out procedure. The conclusions in this regard are based on the information analyzed above, as well as on a comparison of the Ukrainian squeeze-out and similar procedures in certain EU member states. First of all, it should be noted that in Ukrainian realities, there may be situations when a squeeze-out is difficult to perform. For example, a problem may arise when the remaining 5% of the shares subject to redemption may be distributed among a large number of shareholders. It should also be borne in mind that many joint-stock companies in Ukraine were created under the influence of privatization of state-owned enterprises during the years of independence, where a large number of ordinary citizens became shareholders. Therefore, it is possible that this tool will remain unused for objective reasons. In our opinion, in order to avoid such situations, the state has yet to develop effective mechanisms for the practical application of squeeze-out or to develop appropriate court practice on this issue over time.

In addition, another relevant question arises. If we take into account the requirements stipulated in the Law of Ukraine 'On Joint Stock Companies' (any shareholder who does not agree with the price of a public irrevocable claim may submit a competitive claim), how to regulate the issue if several counter-competitive proposals are submitted simultaneously by shareholders who do not act in concert, whether based on priority, price or other criteria. This issue should also be regulated.

In addition, one of the key points is the amount to be paid to the minority shareholder, which should correspond to the price for 95% or more of the shares and an additional 5% of the price for each share. Then there is the question of whether the minority shareholder will be able to pay such an amount at all, since in any case the majority shareholder is the financially stronger party. Even if one considers the possibility of finding a financial partner, such as a competitor, 20 business days seems to the author to be an insufficient period.

It is also worth noting that certain provisions of the Law on compulsory buyout of shares are somewhat retrospective, in particular in terms of their application to legal relations that arose before the Law came into force, in terms of granting the right to shareholders who acquired a dominant controlling stake before the Law came into force. This approach is contrary to Article 58 of the 1996 Constitution of Ukraine, which states that laws and other regulatory legal acts shall not have retroactive effect, except in cases where they mitigate or cancel the liability of a person (Constitution of Ukraine, 1996). To address this gap, we suggest that the Law provide that the provisions do not apply to persons (groups of persons) who directly or indirectly acquired ownership of a dominant controlling stake before the law came into force, in particular, in the course of privatization.

In terms of determining the share buyback price, the Law does not specify any special requirements for appraisers or the mechanism (method and method) for assessing the market value of a share. We believe that for the purpose of buyout, the market value should be assessed by a separate group of qualified appraisers and based on the value of one ordinary registered share in a 100% shareholding.

To ensure transparency, the financial and business status of the target company and information on the buyout procedure, the grounds and procedure for determining the price should be made public. The right to apply the squeeze-out procedure by non-public companies – PrJSCs – causes difficulties for shareholders in obtaining information about the company.

Conclusion

Thus, a squeeze-out is a procedure regulated by law, which consists in the mandatory sale of securities (or redemption of shares) at the request of the owner of a shareholding that is dominant in comparison to others. It should be noted that a dominant shareholding is a shareholding that is equal to or exceeds 90% of the total amount of ordinary shares.

The author has established that in Europe, the squeeze-out procedure first appeared in the UK in the middle of the last century and spread to other European countries. In the Member States, the basic provisions for the compulsory purchase of shares are established by Directive 2004/25/EC, which is why the procedure contains many similarities in the EU member states. The procedure has a lot in common in Ukraine and the EU, as the squeeze-out provisions were incorporated from the Directive. At the same time, all countries have their own peculiarities, which are allowed by the Directive. They reflect the peculiarities of each country related to its corporate law, economic and historical characteristics.

Based on the results of the study, it can be concluded that the Ukrainian legislator has proposed a progressive tool, given its successful application in European countries that can be used by a minority shareholder as opposed to the forced redemption of its shares

by the majority. Since squeeze-out always means depriving a shareholder of his shares against his will, it is one of the ways to defend his rights to shares during such a procedure. At the same time, the regulation of the application of a competitive squeeze-out requires improvement and clarification, which can be done both by the legislator and through the development of judicial practice. In particular, this applies to: overcoming the situation of simultaneous submission of several competitive demands; extending the time limits for providing notice and submitting a competitive demand; ensuring the availability of sources for payment of the share price by a minority shareholder. All of this will help the competitive demand not to remain an abstract possibility but to become a real tool in the hands of minority shareholders.

In order to ensure a mechanism for establishing a fair market redemption price and avoid abuse, we propose to provide for provisions in the Law that would provide for the following in the event of a public irrevocable demand the right of a minority shareholder or any investor, including the state, to redeem the shares owned by the claimant and all its affiliates (persons acting jointly) at the price specified in the public offer the right of a minority shareholder or any investor, including the state, to initiate an open auction for the entire minority stake with a 10% discount to the redemption price; in case of a minority shareholder's written disagreement solely with the assessment of the market value of shares determined by the Public Request, the redemption price should be determined by a commission consisting of a representative of the dominant owner, the minority shareholder and the State Property Fund of Ukraine.

Declaration of Competing Interest

The author declares that he has no known competing financial interests or personal relationships that could have appeared to influence the work reported in this paper.

Declaration of Use of Generative AI and AI-assisted Technologies

The author declares that he has not used generative AI and AI-assisted technologies during the preparation of this work.

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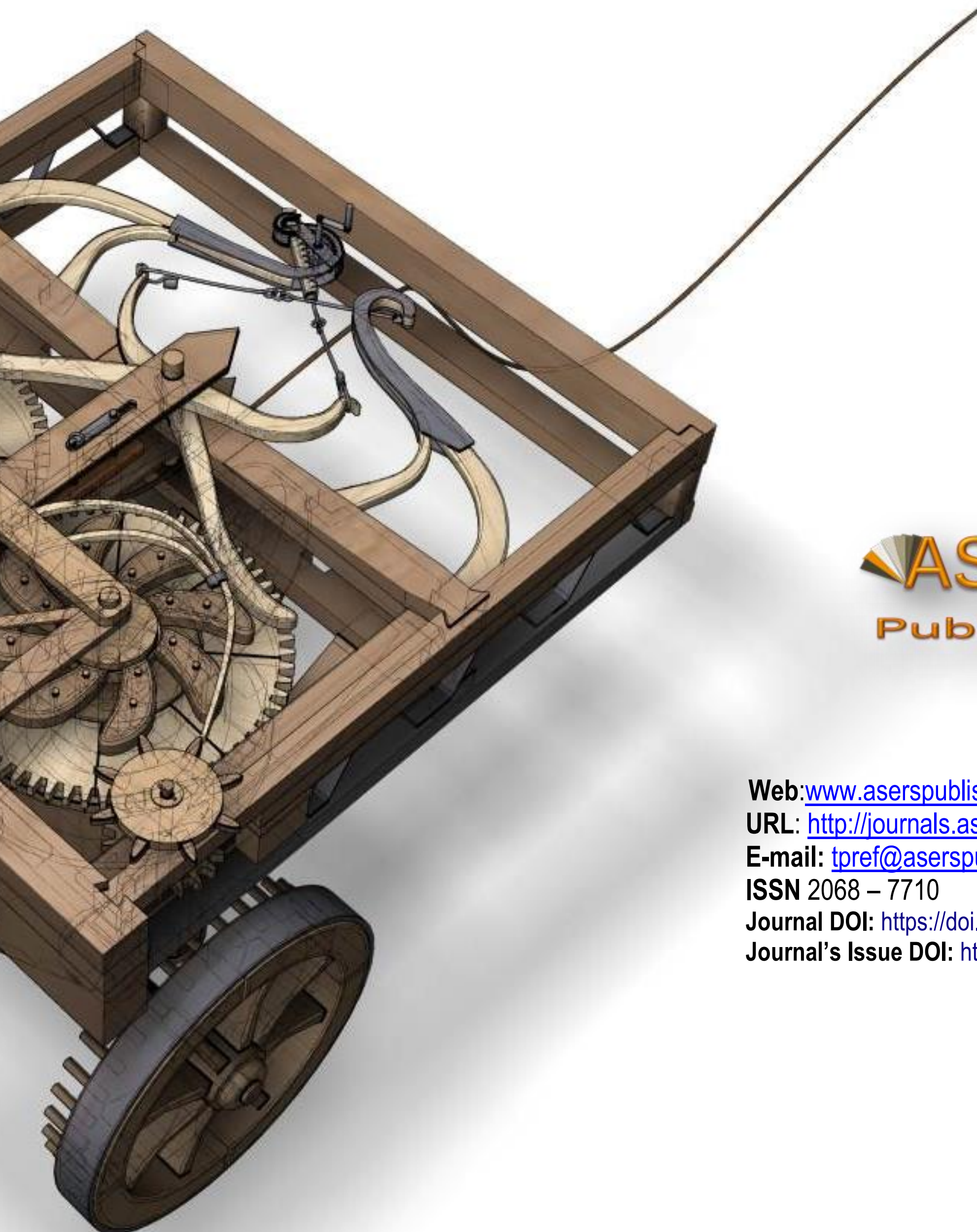

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