International legal approaches in combatting raidership

Bauyrzhan N. Khamitov1 · Yerzhan S. Kemali2 · Sattar M. Rakhmetov3 · Assel M. Alibekova4

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Abstract
The presented article is relevant, as the dynamics of international legislative changes indicate the transformation of the legal regulation of approaches in combatting raidership. The purpose of this study was to perform an independent investigation of issues arising upon considering international legislative regulation of effective approaches in the field of combatting raidership. The methodological framework of this study comprised modern general and special methods of scientific cognition, namely logical, dialectical, historical, formal legal, comparative legal, system analysis, analogy, induction, deduction, synthesis, abstraction, generalisation, modelling, and other methods. Based on the results of the investigation, the study covered the main issues of the state of modern international legal regulation of methods for combatting raidership; analysed the leading mechanisms for improving international legal approaches regarding combatting raidership, and suggested new algorithms for further improving the practice of corresponding law enforcement.

Keywords Threat · Economic security · Business · Investment · Investor

Bauyrzhan N. Khamitov
ba.khamitov@gmail.com

1 Institute of Postgraduate Education, Law Enforcement Academy Under the Prosecutor General’s Office of the Republic of Kazakhstan, Kosshy, Republic of Kazakhstan
2 Center for the Study of Problems of Criminal Law Policy and Criminology, Law Enforcement Academy Under the Prosecutor General’s Office of the Republic of Kazakhstan, Kosshy, Republic of Kazakhstan
3 Department of Criminal, Criminal Procedure and Penal Enforcement Legislation, Institute of Legislation and Legal Information of the Republic of Kazakhstan of the Ministry of Justice of the Republic of Kazakhstan, Astana, Republic of Kazakhstan
4 Department of Special Legal Disciplines, Law Enforcement Academy Under the Prosecutor General’s Office of the Republic of Kazakhstan, Kosshy, Republic of Kazakhstan

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Introduction

One of the features of market relations is the presence of competition between business entities that sell goods and services, that is, competition for the best resources, sales markets, etc. Therewith, not only methods of fair, but also unfair competition are usually used. Cross-border acquisitions, especially as a result of hostile takeovers, represent one of the most dramatic consequences of growing economic integration in the world. Since the 2000s and up to the present, the term “raidership” has been widely used both in journalism and in scientific terminology but has not yet been defined in the current legislation of many states. In fact, according to Vinokur and Mugatarova (2015), raidership means actions aimed at acquiring property rights or control over a business entity by a certain person without the consent of the owner or an authorised person, which are performed as a result of a planned conflict per a certain scenario that has a legal justification and motivation.

Tarashchanska (2011) defined “raidership” as actions aimed at seizing some other people’s assets against the will of the owner with minimal costs through the use of illegal administrative, corrupt, and criminally punishable actions, followed by the legalisation of rights to the assets acquired in this way and reselling them at a market price to the commissioner of the seizure or a virtuous acquirer. The institutional approach, according to Saygitov and Musaev (2016), presents raiding as an informal economic institution, within the boundaries of which some business entities implement the introduction of other business entities into the organisational and economic activities (described by considerable local effectiveness combined with increased risks) with a gross violation of existing general and legal provisions, which negatively affects the economic situation in the country.

Unfortunately, for the countries of the post-Soviet space, raidership is the subsequent resale of enterprise assets, aimed primarily at the raiders’ enrichment (Hryshchenko 2019). The most common is the division of raidership into “white”, “grey” and “black”. To seize profitable property, “white” raiders take almost fantastic, but quite legitimate steps to undermine the economic situation of the enterprise and then take possession of it at rock-bottom prices. “Gray” raiders use dubious methods, balancing between crime and legality. “Black” raidership is the most dangerous type of raiding and is a typical criminal method of taking possession of the property. Thus, about 90% of raider attacks are completed successfully, and the reason for this is that the management of enterprises generally is not ready for such a scenario. Contrary to the popular opinion that raiders are mainly engaged in big business, small businesses are also subjected to corresponding attacks. The specifics of small companies are described by the fact that they are less protected from raiders since most small and medium-sized companies do not have security service and full-time lawyers who would help protect the organisation in the event of a hostile seizure (Kostruba 2018). Furthermore, small businesses are more vulnerable to raiders, since some of their sectors operate according to gray schemes. The main reasons for the emergence and growth of raiding include gaps in legislation; corruption in state authorities; unstable
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political situation (merging of business and government, active redistribution of property between financial and industrial groups), the economic situation in the country (underdevelopment of market relations, low level of management of enterprises and their economic security); illegal actions using state registers, etc. (Nipialidi 2019).

The purpose of this study was to perform an independent investigation of issues arising upon considering international legislative regulation of effective approaches in the field of combatting raidership, which is a threat to the economic security of states, to develop the conclusions and recommendations concerning the provision of sustainable and effective law enforcement practice in the post-Soviet countries. To achieve this purpose, the following tasks were defined:

- to consider the main points of the state of modern international legal regulation of combatting raidership;
- to analyse proposals concerning the implementation of international legislation in the field of combatting raidership in the legislative system of post-Soviet countries.

Literature review

The research of theoretical and practical aspects of raidership is reflected in the studies of the following scientists: Vasylchyshyn and Bilous (2020), Samant et al. (2020), Vyhaniailo (2018), Hryshchenko (2019), Majumder et al. (2020), Liekefett (2020), Lukianykhina (2018), Nipialidi (2019), and Shvedov (2018). The range of these studies is quite wide and covers the research of specialists in public administration, civil and criminal law, economists, sociologists, and political scientists, which indicates the interdisciplinary nature of this phenomenon. However, despite the polyvariance of scientific and legal concepts outlined by representatives of the doctrine and practice in papers and publications, no comprehensive studies of international legal approaches concerning combatting raidership have been conducted, which actualised the subject chosen for this study.

One of the functions of the state is to create a mechanism to ensure the conditions of fair competition and its protection in the country. Often, the volume of the function performed by the state in this area is insufficient, and recently it has been ineffective, leading to a rise in manifestations of property takeover by outsiders, monopolisation of markets, resulting in threats to economic security and a decrease in the investment attractiveness of countries and their reputation in the eyes of foreign partners (Kostruba 2020). Vasylchyshyn and Bilous (2020) noted that raidership is a sensitive issue both for businesses (from which corporate rights and assets are taken away) and for citizens (from whom real estate is taken away). Therefore, it is necessary to resist this phenomenon using all methods (legal, financial, and universal).

The coronavirus pandemic, which has almost brought economic activity to a halt in many countries, is pushing governments to take unprecedented actions. And as the pandemic spreads, it is creating a new tone of economic nationalism, as countries begin to realise that the virus and its consequences could put some of their most
valuable companies at risk. J. Hackenbroch, policy officer of the European Council on Foreign Relations on Economic State Management, stressed that “the coronavirus crisis seems to strengthen the propensity of state economic entities to strategic investments in the most important and future sectors of the European economy, now that everyone is fighting for external money, companies can be bought, and know-how and capacity in the most important industries of the future can be transferred from Europe to China, the United States of America (USA) or other countries” (Coronavirus: EU fears… 2020). Under such conditions, to develop and effectively operate the economic security system, it is necessary to fully utilise the resources of all structural divisions of the enterprise, as well as the capabilities of external organisations, namely state authorities and management bodies, subjects of the non-state security system, etc. The transformation of the mechanisms for the implementation of an illegal (unlawful) takeover of property (raiding) requires further research of this phenomenon and the search for mechanisms enabling the systematic prevention of this process in future business practice.

Materials and methods

The theoretical and methodological framework of this paper included the studies of leading researchers, economists, and lawyers, as well as legislative and regulatory acts concerning the improvement of the mechanism for ensuring the economic security of enterprises to combat raidership. In the course of this study, a set of general scientific, philosophical, and special methods of scientific cognition that correspond to the goals and objectives of the study were also used. The method of system analysis can be called the main one, the use of which allowed achieving the set goals and perform the outlined tasks of the study, as well as distinguish individual parts of the subject under study, in particular, during the justification of the attributes, properties, and features of the legal regulation of combating raidership. The historical method was used in the study of the establishment and development of legal regulation of combating raidership in various countries. It is impossible to conduct a historical legal analysis without considering the transformations that occurred not only with the object of study but also with all the processes and phenomena associated with it.

This, first of all, allowed identifying and considering all the factors and conditions that determined the evolution of raider attacks, because the historical legal method was used to determine the stages, analogues, and determinants of international cooperation in combating raidership; the problem-chronological method allowed structuring the text of the study, the empirical analysis contributed to the comparison of historical facts. The synthesis method was partially useful in constructing its definitions, namely upon defining such a concept as “raidership”. The following methods were also used in this study:

- abstract-logical analysis—for theoretical generalisation and justification of the aspects and results of the study;
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• dialectical, theoretical generalisation—to identify patterns in the interpretation of the basic concepts in the development of theoretical aspects of ensuring the economic security of enterprises to combat raidership;
• system and statistical analysis—for analysing and evaluating the activities of enterprises;
• the method of econometric modelling on panel data—for constructing correlation-regression econometric models for evaluating and predicting the development dynamics of the processes under study.

The dialectical method allowed demonstrating the interrelation and interdependence of subjects, objects, and other basic elements of the system of international legal regulation in the field of combatting raidership. The comparative legal method was used in the analysis of legal regulation on combatting raidership on the territory of the countries of the European Union (EU) and the Commonwealth of Independent States (CIS) both in statics and dynamics. This method was also used to learn the general and distinctive properties of the constituent elements of the legal provisions under study. Using the formal legal method, it was possible to identify and interpret the content of regulations and documents in the subject area under study. The functional method allowed describing the activities, tasks, and main prospects of interstate partnership in the context of transformations of corporate legal relations in the conditions of the COVID-19 pandemic. The modelling method was used in the search for a universal model of legal regulation of countering raiding, determining effective mechanisms of international interaction between the legal systems of states, and in the field of ensuring the protection of both individual enterprises and the economy of states in general. Using the dogmatic method, conclusions were formulated per the purpose of the study and the main outlined tasks.

Results

The raider’s work begins with the collection and analysis of information—primarily open, and freely available, including through the monitoring of the media. During the intelligence activities, the raiders gather and investigate information concerning the property, real estate, and vehicles registered for the enterprise; distribution of share capital, owners of large packages, their connections in power structures, opportunities to protect their rights; the management of the enterprise, the presence of compromising materials on it, problems of its private life; access to the register of shareholders of the enterprise; existing offences in the conduct of business activities; negatively minded employees of the enterprise (especially from among former employees and shareholders), who could be used during the raid; shareholders who could sell shares; financial, statistical, and tax reporting; information on export and import operations. Considering raidership from the standpoint of practical implementation, the following five stages can be conditionally distinguished as parts of a raider attack:

• analysis of the business processing of a possible takeover object;
• assessment of the capabilities of the enterprise owner to organise the protection of the business from takeover;
• selection of a scheme and development of an action plan for the enterprise takeover;
• organisation and support of the takeover; measures to ensure the legalisation of the takeover.

The purpose of such a detailed study is to find “weak points” in the company’s management structure, the main of which are the informal interests of managers and majority shareholders, relations between top managers and owners, the presence of informal leaders, and “cantankerous” staff members, the presence of conflicts, data on relations with creditors. Apart from gathering information, the following facts indicate the preparation for a raider attack:

• increased interest in registrars or other sources of information about shareholders (founders);
• minority shareholders (small founders of a private company) suddenly begin to show an unprovoked interest in the activities of the organisation and require the provision of copies of various documents;
• proposals are received by shareholders (participants of a private company) about the sale of a block of shares;
• the occurrence of unpredictable problems with counterparties and partners who unexpectedly refuse to work without prepayment and make various, often unfounded claims;
• representatives of various law enforcement and regulatory bodies who suddenly come to the organisation with inspections, expressing interest in the register of shareholders, constituent documents, basic business agreements, including credit agreements, and information about the main suppliers and buyers of products;
• criminal cases are initiated against the company’s management, its majority shareholders, and their family members on unverified facts with mandatory coverage of events in the media;
• creating “increased attention” to the company in the media by giving publicity to various “frauds” on the part of its management, violations of the rights of ordinary shareholders, tax offences that led to non-receipt of funds by the state and local budgets, made it impossible to implement important social programmes in the city or district;
• the emergence of an entity interested in acquiring the company’s debts.

Based on the information gathered, the raiders decide on the most effective method. The attack can occur through the authorised capital by depriving the company owner of all or part of their corporate rights through figureheads or co-owners; by purchasing accounts payable; by financial fraud and forgery of documents; by initiating bankruptcy proceedings; by creating artificial problems with regulatory authorities; by initiating criminal cases against the founders and managers. The anti-raiding mechanism covers a complex of strategic and modern operational measures aimed, on the one hand, at neutralising the causes that...
form the phenomenon under study, and, on the other hand, at reducing negative consequences and losses, the possibility of protecting legitimate interests and returning property to the victim in the shortest possible time on legal grounds.

In the European Union, takeover bids are governed by Directive 2004/25/EC of the European Parliament and of the Council “On takeover bids” (2004), which is designed to ensure that the companies involved disclose complete and up-to-date information to all market participants on a timely and fair basis. The two main mandatory documents in these cases are takeover documents (offers and protective documents) and information about the legal, financial, accounting, and other characteristics of the bidders or target companies.

International investment is an important source of growth and job creation for the economy of the European Union. As of 2017, the total volume of foreign direct investment (FDI) in the EU amounted to 6.3 trillion euros, with the leading investors being the USA (2.2 trillion euros) and Switzerland (800 billion euros) (Ensuring foreign direct... 2018). Foreign direct investment was particularly important for countries experiencing the latest financial crisis. Nevertheless, recent acquisitions of the most important energy and transport infrastructure facilities and high-tech companies in the EU by foreign state-owned companies have caused concern. In the complex modern realities, countries across Europe are taking new measures to block foreign acquisitions. Stock prices have plummeted due to the public healthcare crisis caused by COVID-19, which in turn attracts opportunistic corporate raiders. Asian firms and funds are particularly active at this time, ready to use the downturn in the market to get a financial boost as the healthcare crisis eases in Asia and spreads to Western markets. Regulators are concerned that investors from China, Saudi Arabia, and other countries will take advantage of the volatility and undervaluation of European companies in various industries. In response, European governments are preparing measures to protect their companies, which, despite financial difficulties, are also of strategic importance. Investors should know that countries are taking measures to protect national companies.

Some of the largest economies in Europe have announced their intention to protect national companies through more careful control over foreign investment. Such tactics, as a rule, involve stricter regulation at the level of transaction screening, including closer attention to industry transactions and a weakening of thresholds for completely blocking cross-border investments. Some measures were implemented in response to the COVID-19 pandemic, while others were the result of long-planned reforms. The EU leadership has issued Regulation (EU) 2019/452 of the European Parliament and of the Council “Establishing a framework for the screening of foreign direct investments into the Union” (2019) on the screening of foreign direct investments, which are fully applied in all member states from October 11, 2020. Regulation (EU) 2019/452 of the European Parliament and of the Council “Establishing a framework for the screening of foreign direct investments into the Union” (2019) gives the Member States the right to verify investments within their scope for security or public order reasons and take measures to eliminate particular risks. Regulation (EU) 2019/452 of the European Parliament and of the Council “Establishing a framework for the screening of foreign direct investments into the Union” (2019) applies to all sectors of the economy and is not subject to any restrictions.
Proceeding from the “increased risk of attempts to acquire the potential of healthcare (for example, for the production of medical or protective equipment) or related industries, such as research institutions (for example, vaccine development) through foreign direct investment”, the European Commission has requested Member States with existing FDI screening mechanisms (List of screening… 2021) to consider the risks to critical healthcare infrastructure, critical resource supplies, and other critical sectors, as stipulated by the EU legal framework. Meanwhile, these Member States are invited to consider other available options for handling cases where the acquisition by a foreign investor or control over a particular business, infrastructure, or technology may threaten security or public order in the EU. Options include introducing controls on capital flows and granting the government a “golden share” of the company. The use of both measures is usually limited to the EU.

Regulation (EU) 2019/452 of the European Parliament and of the Council “Establishing a framework for the screening of foreign direct investments into the Union” (2019) sets out an incomplete list of factors that may cause screening. “Critical infrastructure” includes energy, transportation, water, healthcare, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, and sensitive facilities, physical or virtual. “Critical resources” include energy, raw materials, and food security. Investors from non-EU countries should also consider that according to Article 7 of Regulation (EU) 2019/452 of the European Parliament and of the Council “Establishing a framework for the screening of foreign direct investments into the Union” (2019), even if foreign investments do not pass the national screening procedure, the Member States and the EU can provide comments and opinions within 15 months after the completion of foreign investment and, possibly, introduce mitigating measures. Article 7 applies to foreign direct investment completed on or after April 10, 2019. For example, foreign investments completed in March 2020 may be subject to ex-post comments from the Member States or the EU from October 11, 2020 [the entry into force of Regulation (EU) 2019/452 of the European Parliament and of the Council “Establishing a framework for the screening of foreign direct investments into the Union” (2019)], and until June 2021 (Samant et al. 2020).

The European Commission highlighted the issue of foreign direct investment screening as part of the EU’s overall response to COVID-19 and issued Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe’s strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation) (2020), calling on the Member States to protect assets from foreign takeover during the current public healthcare crisis, without undermining the overall openness of Europe to foreign investment. These measures are intended to complement, and not replace the Regulation on foreign investment screening of each state (Majumder et al. 2020). In issuing its Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe’s strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation) (2020), the Commission calls on the Member States that already have an existing screening mechanism to make full use of the tools available to them by EU and national legislation to prevent capital flows from non-EU countries that
can undermine the security or public order in Europe (Coronavirus: Commission issues… 2020). The Commission also encourages cooperation between Member States, as it deals with cases of FDI screening when foreign investment can affect the single EU market. Concerning capital flows, the Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe’s strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation) (2020) also specifies under what particular circumstances the free movement of capital, especially from third countries, relating to the acquisition of participation shares may be restricted. Some countries have reformed their foreign investment review frameworks over the past few years to give governments more leeway to block deals or impose conditions on their completion. The tendency to strengthen control over foreign investment was primarily focused on national security issues. However, many countries have currently introduced emergency legislation caused by COVID-19.

For example, Spain has approved a particularly strict new foreign investment screening regime for any investor outside the European Economic Area (EEA). Within the framework of this general approach adopted by European countries, Spain has adopted Real Decreto-ley 8/2020, de 17 de marzo, de medidas urgentes extraordinarias para hacer frente al impacto economico y social del Covid-19 (2020). The screening mechanism is justified in the preamble of Real Decreto-ley 8/2020 (2020) by the fact that the stock market collapse caused by COVID-19 poses a real threat to Spanish listed companies. The screening mechanism was designed to protect these public companies, as they have become a target for foreign investors. However, the scope of the screening mechanism is much broader, and it was introduced with the clear intention to remain in force after the lifting of the state of emergency related to the healthcare crisis. The screening mechanism fully complies with Regulation (EU) 2019/452 of the European Parliament and of the Council “Establishing a framework for the screening of foreign direct investments into the Union” (2019). It applies to direct investments, foreign investors, certain strategic sectors, or when a foreign investor meets certain subjective conditions.

In particular, any investment of 10 percent or more in a Spanish company engaged in technology, energy, transport, aerospace, defence industries, media or healthcare requires prior government approval. The foreign direct investment that meets the above criteria will require the prior approval of the Council of Ministers of Spain. The Council of Ministers of Spain has a legal period of six months to make its decision, although in some cases this period may be suspended, for example, if additional information about the transaction is required. However, Real Decreto-ley 8/2020 (2020) also makes provision for a simplified procedure, according to which the FDI authorities have 30 days to give their response on investments for which there was a binding agreement or a binding offer before March 17, 2020, and worth from 1 to 5 million euros. Investments under 1 million euros are not subject to screening. If the foreign investor does not receive a response within the specified time, the investment will be refused.

Italy has considerably expanded its “Golden Power” rules (Decreto-Legge No. 21… 2012) to counter hostile foreign takeovers. On April 8, 2020, in response to the emergency with COVID-19 and by the Guidance to the Member States concerning
foreign direct investment and free movement of capital from third countries, and the protection of Europe’s strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation) (2020), the Italian government issued Decree-Law No. 23 “Urgent measures on access to credit and tax compliance for companies, special powers in strategic sectors, as well as action on health and work matters, extension of administrative and procedural judicial deadlines” (2020), containing special measures to protect Italian assets. The Decree expands the strategic sectors governed by the so-called “Golden Power” Law (Decretto-Legge No. 21… 2012) on the screening of foreign investments in Italian assets. These measures will provide additional protection to some Italian companies that were not previously subject to the Italian Golden Power Law (Decretto-Legge No. 21… 2012) and could become the object of attention of foreign opportunistic investors at a time when their valuations reached a historical minimum. These changes allow the Italian government to intervene in transactions arising in a much wider range of industries, such as banking, insurance, healthcare, and energy. Furthermore, the authorities currently have the right to screen any non-Italian prospective investor—even within the European Union.

Germany has also introduced new restrictive screening rules. The German authorities can now prevent a deal that would lead to a “predictable deterioration” of German public security. The Ministry of Economy and Energy of Germany has published a draft law on the amendment of the Foreign Trade and Payments Act (2013). New business lines will be added to the list of sectors wherein acquisitions by foreign investors must pass security checks. The list will be expanded from 11 to 27 security areas. Then it will be necessary to notify the Ministry of Economy and Energy of Germany of foreign direct investment in these areas, and they cannot be implemented until the ministry completes the analysis (Germany strengthens foreign… 2021). The amendment also clarifies that whenever an investor acquires additional voting rights and thus exceeds the thresholds of 10% or 25% of voting rights, the purchase is subject to FDI screening. Accordingly, under certain circumstances, the Ministry of Economy and Energy of Germany will have to be notified even of a minor acquisition of shares. Apart from the purchase of voting rights, the acquisition of other control rights will also be governed by the new law: until now, the transaction was subject to FDI screening only in the case of the acquisition of voting rights. In the future, the acquisition of so-called “control and management rights” will also entail the obligation to notify the Ministry of Economy and Energy of Germany. Such an “atypical acquisition of control” may be, for example, a case where the buyer is granted a special right of veto or the right to information, or it can choose members of supervisory bodies. In these cases, the number of voting rights acquired does not matter.

The French government is reviewing its current protection policy, including the unique legislative powers to acquire control of a strategic company during a crisis. The French Government published Décret No. 2020b, a-892 “Relatif à l’abaissement temporaire du seuil de contrôle des investissements étrangers dans les sociétés françaises dont les actions sont admises aux négociations sur un marché réglementé” (2020) and Arrêté “Relatif à l’abaissement temporaire du seuil de contrôle des investissements étrangers dans les sociétés françaises dont les actions sont admises
aux négociations sur un marché réglementé” (2020) (together—Temporary Rules),
which lowered the applicable threshold triggering French foreign investment control
over investments by non-European investors in certain French corporations whose
shares are listed on the stock exchange. The temporary rules apply only to foreign
investors who are not part of the European Union or the European Economic Area
and will be extended until December 31, 2021, and they are also part of the French
government’s response to the economic consequences of the COVID-19 pandemic
for French strategic assets.

According to the French foreign investment rules, foreign investors must submit
a request and obtain permission from the Ministry of Education before making cer-
tain investments (covered investments) in commercial activities in France that are
considered confidential (covered activities). The pre-authorisation regime applies to
the following covered investments: acquisition of control over a French company;
acquisition, in whole or in part, of a branch of a French company; and for foreign
investors who are not part of the EU or EEA, acquisition of more than 25% of voting
rights (directly or indirectly) in a French company (threshold test). The provisional
rules apply the threshold test to any foreign investor who is not a member of the
EU or the EEA, who directly or indirectly, acting independently or jointly with any
other investor, transfers 10% of the voting rights in a French corporation taking part
in the covered activity and whose shares are admitted to trading on a regulated mar-
ket. The temporary rules do not apply to foreign investors from the EU or the EEA,
provided that the chain of control of the European foreign investor does not include
persons or organisations outside the EU or the EEA. Although France has not yet
nationalised any particular companies, it continues to monitor its current powers to
protect against foreign takeovers.

The UK continues to enforce its rules for the takeover by foreign companies and
anti-raidership, which were tightened several years ago in light of the increased
security risks associated with technological innovations. The National Security
and Investment Act was announced in Queen's Speech: background briefing notes
(2019). The proposed law follows the adoption of Regulation (EU) 2019/452 of the
European Parliament and of the Council “Establishing a framework for the screen-
ing of foreign direct investments into the Union” (2019) in the EU and will replace
the limited powers of the UK government to intervene in mergers and acquisitions
under the Enterprise Act (2002). The UK government will receive expanded pow-
ers to "thoroughly analyse investments and consider the risks that may arise from
the takeover by hostile parties or control over enterprises or other organisations and
assets with national security implications". The new opportunities apply to trans-
actions in any sector, regardless of the parties’ turnover or market share. The pro-
posed legislation includes three main elements: a notification system that allows
businesses to flag transactions with potential security problems for the government
for quick and effective verification; powers to reduce risks to national security—by
adding conditions to the transaction or blocking as a last resort, as well as sanctions
for non-compliance with the regime; a protection mechanism that allows parties to
appeal if necessary.

The Australian government has announced temporary changes to its foreign
investment review framework in light of the economic impact associated with
COVID-19. Since 29 March 2020, all proposed foreign investments in Australia subject to Foreign Acquisitions and Takeovers Act No. 92 (1975) will require the approval of the Foreign Investment Review Board (FIRB), regardless of the value or nature of the foreign investor (Changes to foreign… 2020). Under normal circumstances, a private foreign investor will only require approval if it plans to acquire a “significant stake” (20% or more) in an Australian corporation, where the goal is estimated above certain monetary thresholds. Foreign state investors already fall under the lower threshold of 0 Australian dollars for proposals to acquire all “direct interests” (10% or more) in an Australian enterprise or business or to create a new Australian business (Q&A—Temporary changes… 2020). The foreign investors’ acquisition of stakes in “critical infrastructure assets”, such as ports, electricity, water, and gas assets, is also subject to FIRB consideration. According to the Foreign Acquisitions and Takeovers Act No. 92 (1975), it is possible to block a proposal for foreign investment that is considered “contrary to the national interests of Australia”. Relevant factors include national security, competition, other Australian government policies (including taxes), the impact on the economy and society, and the nature of the investor. The temporary measures will remain in force for the duration of the “coronavirus crisis” and will apply to all new foreign investment proposals, as well as to those that are currently in the process. FIRB also increased the deadline for reviewing applications from 30 days to six months.

In the post-Soviet countries, the prerequisites for the redistribution of property and the formation of initial capital were developed during the transition from an administrative-command economy to market relations. The first wave of denationalisation and voucher privatisation opened up the possibility of illegal takeover and acquisition of property rights by third parties. The legal regulation of the activities of economic entities in the post-Soviet countries is ensured by the constitution of the state, fundamental laws on the foundations of national security, statutory and sectoral laws, sub-legislative regulations, as well as some political and legal documents of a declarative nature. Gaps in the legislation or the absence of such in terms of the protection of property rights, and ignorance of the population in these matters contributed to the implementation of various schemes for the transfer of assets to third parties and their illegal enrichment.

The development of market relations gradually contributed to the emergence of new, more advanced schemes of takeover and hostile acquisitions, which were well-organised and thought out by teams of specialists in corporate law, security, and other areas. The implementation of such projects became possible with the participation of representatives of state authorities—courts, representatives of legislative and executive authorities, law enforcement agencies, and others. At this stage, the economic interest of the raiders in enriching themselves by taking over the assets was reflected in the corrupt actions of government officials, who created the opportunity to implement such actions through personal economic interest, or for other reasons (blackmail, intimidation). That is, raiding in many cases would be impossible if such a phenomenon as corruption was not widespread in the countries. Moreover, it is this negative socio-economic phenomenon that creates the necessary prerequisites for the implementation of the illegal takeover of someone else’s property.
Notably, in the post-Soviet countries, raidership mainly lies in acquiring the temporary right to dispose of assets by dubious means and selling these assets to persons associated with the raider as soon as possible, with subsequent resales of the overtaken assets between related persons to exclude their return to their rightful owners. In this case, the main purpose of the raider is to make a profit. For example, the Commission for Consideration of Complaints in the Field of State Registration (2021) is operating in Ukraine, which in 2018 satisfied more than 400 complaints, cancelling the illegal registration of almost 6,000 hectares of land and more than 100,000 square metres of real estate, and in 2017—more than 600 complaints. At the same time, from numerous journalistic investigations, information can be gleaned about the cases of the commission’s lack of response to egregious and obvious cases of raidership, and the receipt of replies by complainants regarding “the absence of violations of the law in the actions of the state registrar”.

Raider takeovers in Ukraine include offences that pass under three articles of the Criminal Code of Ukraine (2001): Article 205-1—forger of documents provided for state registration of a legal entity and individual entrepreneurs; Article 206—countering legitimate economic activity, and Article 206-2—the illegal takeover of the property of an enterprise, institution, organisation. In modern realities, raiding negatively affects investment attractiveness and complicates the conduct of economic activities on the territory of Ukraine (Misiuk et al. 2020). It is possible to state the annual dynamics of an increase in the number of raider attacks on the territory of the country. However, less than 43% of the corresponding offences reach judicial consideration. According to the Prosecutor General’s Office of Ukraine, almost 1700 raider attacks have occurred on the territory of the state over the past five years, including more than 500 over the past two years. In January-December 2019 alone, 288 criminal offences were committed in this type. Entrepreneurs in Kyiv and the Kyivska Oblast suffer the most, where almost 400 raider attacks have been registered over the past five years. In second place—Dnipropetrovska and Lvivska Oblasts. More than 100 cases of raiding were recorded in each of them (Statistical information 2021).

In turn, over the past 5 years, according to the open data platform Opendatabot (Raiding in Ukraine 2020), the number of criminal proceedings concerning raidership has increased by 2.5 times: from 290 cases in 2015 to 849 in 2020, and the trend for an increase continues. Most often, cases of raiding related to Article 205 of the Criminal Code of Ukraine (2001) are considered in court, and out of 635 open proceedings in 2020, 381 cases were sent to the court, which is 60%. Cases related to Article 206 of the Criminal Code of Ukraine (2001) almost do not reach the court. Such data indicate the complete inefficiency of law enforcement agencies in the context of investigating crimes under Articles 205-1, 206, 206-2 of the Criminal Code of Ukraine (2001).

From 2017 to 2019, only 1 person was convicted under Article 249 “Raidership” of the Criminal Code of the Republic of Kazakhstan (Criminal Code of the Republic… 2014). Thus, in 2016, under the said Article, criminal cases were being conducted on 5 offences, 1 person was sent to court, 1 person was convicted. In 2017, there were 2 cases, 1 was brought to court, 0 were convicted. In 2019, there were 2 cases in proceedings, 0 were sent to court, 0 were convicted (How many people
were... 2020). As practice shows, the process of gathering evidence on the fact of possible raider takeovers is quite time-consuming, especially when the situation relates to crimes in civil law relations. There is also a problem of relations between the state and economic entities in the Republic of Kazakhstan, which is formed in connection with the corruption of officials and the lack of specificity in the legal regulation of the tasks of responding to the illegal takeovers of commercial property (Khanov and Bashirov 2020; Zhetpisbayev et al. 2017).

Thus, as a result of the above, it can be concluded that the analysis of the legislative acts of the countries combatting raidership, as well as the experience of the European Union, suggests that the legal acts of countries with developed economies do not allow the use of criminal methods in the process of mergers, acquisitions, thereby minimising the possibility of implementing raider schemes. A characteristic of modern times is the realisation that the coronavirus pandemic has weakened European economies and companies, as a result of which the governments of the European Union and most developed economies have expressed concern that foreign investors may take advantage of the crisis to acquire national companies that are considered strategic. These developments underline the need for investors to carefully consider the risks associated with foreign investment relating to transactions that are currently being carried out and those that are expected. As a result, it can also be concluded that the gaps in the legislation of the post-Soviet countries, and the lack of awareness of the population in these issues contributed to a rise in the implementation of various schemes for the transfer of assets to third parties and their illegal enrichment.

Discussion

It is also worth noting the various protection mechanisms against the implementation of raider scenarios, which were highlighted by representatives of the doctrine and served as the subject of active discussions. Thus, Puziak and Martyniuk (2012) pointed to the fact that in a situation where a company wants to engage in a hostile takeover, there are three possible scenarios. In the first case, the attacked company takes ineffective defensive actions, and the company is taken over. In the second scenario, the attacked and attacking companies merge. This situation occurs when the boards of directors of two companies decide to come to an agreement and create a vision of a new economic structure. The attacked company no longer defends itself, and their agreement leads to the merger of the two companies. In the latter scenario, the attacked company begins defensive activities that help avoid a hostile takeover by convincing current shareholders not to sell their shares. In the latter scenario, it is assumed that the attempts to restructure the board of directors were approved by shareholders who do not want to change the board by selling their shares. Researchers point to the fact that not all possible defensive strategies lead to the restructuring of the company and increase its efficiency. Nevertheless, before evaluating these strategies, it is necessary to determine the defensive resistance strategies of companies.
Methods of protection against a hostile takeover are divided into two main groups: preventive actions that deter potential buyers, and counteraction taken after receiving a takeover application. In both cases, the board of directors intends to convince the current shareholders to maintain the status quo, making the company more interesting for its current shareholders or increasing the cost of a potential takeover and making the company less attractive to attack companies. The most commonly used defensive strategies, according to M. Lewandowski (2001), include clauses in the charter, in force before the proposal on the acquisition of the required qualified majority of votes (majority over 50%) to confirm the absorption of another company; fair price—requires all companies engaged in the acquisition, to pay the shareholders of at least “a fair price” as defined previously, for example, the highest price paid by the investor for the shares purchased by the company for the last time. Counteraction measures taken during the merger: maintaining the current support of shareholders by sending special requests or organising meetings with the most important shareholders; organising a media campaign against a hostile takeover; repurchasing shares of the attacking company to gain control over it; greenmail-company defending itself from a hostile takeover buys its shares from the attacking company at a very high price with a bonus; asset restructuring, which includes the sale of the main assets of the company, the purchase of assets undesirable for the buying company, and the payment of additional dividends (Kostruba et al. 2020).

Over the past three decades, the means of protection against a hostile takeover have changed. The best example of such protection is the “pill poisoning” strategy. The “poison pill” strategy concerns actions leading to large debts when the company is under threat of a hostile takeover. This method appeared in the 1980s when the number of hostile takeovers in the market rapidly increased. The “poison pill” strategy includes actions such as creating large debts with a high-interest rate that must be paid immediately at the time of a takeover by another company or providing the company’s management board with high severance payments in the event of a hostile takeover and personal changes. This is the so-called “golden parachute” (Bruner 2004). Each public company, according to the opinion of K. Liekefett (2020), should have an updated, fully developed, and agreed “poison pill” on the shelf so that the board of directors can quickly react in the event of a hostile takeover announcement. If the company needs several days to take a “poisoned pill”, the bidder may well receive 20% or 25% of the shares during this time. The loss of control over the company may be the result of the belated administering of “poison pills”.

In the case of protection against a hostile takeover, there is another interesting strategy involving the intervention of the “white knight”, the first use of which was recorded in 1953, when one company—United Paramount Theatre—purchased a bankrupt television company—American Broadcasting Company (ABC). This incident marked the beginning of the actions of the “white knights” in the capital markets. A “white knight” is a company that helps a company that is the target of a takeover by buying its shares without any intention to act against the board of directors. The transaction for the purchase of shares is made with the consent of the management board of the acquired company on favourable terms. At the moment of gaining control of the controlling stake, the “white knight” makes a hostile takeover impossible. After taking control of the company, no personal changes occur, and the
current board retains its power and control over the company, as previously planned. The search for a “white knight” encourages friendly investors to buy shares, and most often friendly investors are companies of the same business. Such actions, according to Gaughan (2007), are considered a last resort for the attacked companies. In this context, Filimonova and Tarkhanov (2016) emphasised that the replacement of the legal form of the enterprise for the one resistant to hostile takeovers is achieved through reorganisation by merger, division, separation, transformation for risk diversification, moving debt to a newly created firm, a partnership with a “white knight”, finding and establishing relationships with major players in the market, which would protect from unlawful attacks.

In France and other countries of continental Europe, takeover proposals are still considered unique events that sometimes lead to the intervention of politicians and arouse the interest of the media. Gugler and Yurtoglu (2004) found that the negative impact of mergers and acquisitions on employment in Europe is stronger than the USA. According to these authors, since continental Europe has stricter labour markets and rules than in the USA, companies have incentives to use mergers and acquisitions to reduce the “excess” labour force. Hence, as emphasised by Negre et al. (2018), the announcement of a hostile takeover attracts the attention of several stakeholders who express numerous concerns: the shareholders of the target company want the offer to be attractive; the managers and employees of the target firm want to keep their jobs, and; politicians want to prevent French companies from falling into foreign hands. To solve these various problems and counter them, managers have incentives to use disclosure strategies to justify their opinion regarding the application.

Summarising the impact of hostile takeovers on the functioning of companies, according to Puziak and Martyniuk (2012), it should be recognised that they are an expensive operation for both the attacking and the resisting side. However, it can be assumed that high costs usually lead to higher future profits. In the event of the completion of a hostile takeover, the benefit of the attacking company constitutes the development of the entire company. So, it can be considered an investment. The takeover requires the restructuring of the new company. In addition, the company under threat must restructure. If the defensive changes from a hostile takeover are implemented effectively, this can save the company and allow it to develop. Otherwise, the hostile takeover is completed, and the restructuring is performed by the new owner. In both cases, the quality of the company’s management improves. Researchers emphasise that the process of hostile takeover can be perceived very positively. This usually gives the companies an impetus to make improvements, and the quality of companies in the market increases. Weak, inert, and poorly managed companies move to stronger companies, which leads to their further development. And from the standpoint of the entire capital market, hostile takeovers and their consequences should be evaluated positively.

As measures to combat raidership, Shvedov (2018) suggested developing a security service at the enterprise, building a balanced system and a strategy to protect against illegal acquisitions. Development of a constitutional and legal policy for the protection of economic security at the level of business entities. According to Vyhaniailo (2018), it should be actively accompanied by interested actors (enterprises,
institutions, organisations, etc.) and related civil society institutions (trade unions, parties, etc.), as well as directly by citizens. Therewith, it is important to have constant two-way communication with public authorities through such mechanisms as advisory services, advisory bodies, which would include representatives of trade union organisations, business, specialists in the economic sector and scientific consultants, specialists in the field of law, information technology, management. Various forms of public activity can also be used, such as public hearings, discussions of the most important issues of economic security.

In practice, as Nipialidi believes (2019), apart from the standard selection of a business with the use of measures of physical influence on the owner, more inconspicuous measures can be applied: with the help of a minority stake, a “dilution” of a controlling stake is carried out, which results in a court decision, according to which a bona fide shareholder is not a shareholder at all and is not authorised to make management decisions. Afterward, without the participation of such a shareholder, a decision is made to change the management system, withdraw property, etc.; buying up the company’s debts or initiating bankruptcy; buying up minority blocks of shares; obtaining court decisions declaring certain decisions of the general meeting invalid; blocking bank accounts; harming the reputation of the company or the reputation of its founders/managers; establishing contacts with the company’s employees or introducing certain persons to the team to obtain internal information. Considering the evolution of raiding techniques and technologies from power methods to intellectual ones, respectively, Melnichenko and Pushkarova (2015) recommend particular steps to reduce the manifestations of raiding:

- to delete the procedure of entering false data in the Unified Register of Legal Entities and Individuals-Entrepreneurs by prohibiting the submission of photocopies of documents in case of a change of directors or the composition of members;
- to use a digital signature as a method of protection against forgery of documents;
- to legislatively ensure the impossibility of the court to prevent the injured party from filing a lawsuit to amend the Unified State Register of Legal Entities and Individuals to restore justice;
- to strengthen the control and responsibility of the state registrars for illegal actions.

For business owners to prevent raider takeover, according to Nipialidi (2019), it is possible to propose compliance with the following rules: the owner of the company should actively take part in the company’s operations to have at his or her disposal sources of information free from top managers, to know the moods of the company’s employees, shareholders, as well as to evaluate the loyalty of each employee; the owner of the company should maintain friendly relations with representatives of the registrar and the tax inspectorate, who may warn about non-standard operations related to his or her shares and interest; prevent disclosure of information about his or her company, which can be used by raiders to conduct informational-psychological warfare against the objects of their attacks. The owner should try not to disclose information, except for cases when such disclosure to certain groups of
persons (shareholders, supervisory authorities, judicial authorities) is determined by the current legislation; to maintain the loyalty of staff, and to timely deal with labour disputes. During the period of confrontation, it is unacceptable to create a hotbed of internal discontent in the company; the owner should create a positive image of the company to withstand the information war at present.

According to the opinion of Vasylchyshyn and Bilous (2020), the main problem of countering raidership in Ukraine is the absence in Ukrainian legislation, namely in Criminal Code of Ukraine No. 2341-III (2001), of a provision that would stipulate responsibility for organising the takeover of someone else’s property (raidership). Considering that in Criminal Code of Ukraine No. 2341-III (2001), raider takeovers include offences that pass under two articles of Criminal Code of Ukraine No. 2341-III (2001), that is, raiding comprises different elements of crimes, therefore its criminal legal qualification is simply a complex of several components. Accordingly, to solve the problem of ineffective prosecution of raiders according to the totality of crimes, it is necessary to create a special methodology for investigating such cases, respectively, to train specialists. As a result of the discussion, it can be concluded that raiding as a type of threat allows considering the company’s security as a set of effective management decisions to reduce real and potential threats, which should be justified by an assessment of this threat, an analysis of crises and other factors that hinder the achievement of the company’s goals and create a danger for it.

Conclusions

As a result of this study, it can be stated that raiding constitutes a systemic phenomenon that negatively affects both the economic and social life of the country, creating threats to the economic security of the state; monopolisation of markets; decrease in the investment attractiveness of the country’s economy; increase in unemployment, social tension, migration of the able-bodied population abroad; decrease in confidence in the authorities, law enforcement agencies; the basis for the development of corruption; the spread of negative business practices in society. Methods of protection against a hostile takeover are divided into two main groups: preventive actions that deter potential buyers, and counteraction taken after receiving a takeover application. The use of preventive measures allows not only increasing the probability of maintaining a business, but also ensures an increase in the efficiency of its functioning, consolidation of the efforts of the owner, top management, all employees, business colleagues and society, without exception. The use of the “poison pill” strategy and the strategy involving the intervention of the “white knight” can become effective mechanisms for combatting raidership in post-Soviet countries. To solve the problem of ineffective prosecution of raiders according to the totality of crimes, it is necessary to create a special methodology for investigating such crimes, respectively, to train specialists.

The realities of doing business show that when building a security system at an enterprise, one should pay attention to the proper protection of the business owner from raider attacks. As a result of the discussion, it can be concluded that raiding as a type of threat allows considering the company’s security as a set of effective
management decisions to reduce real and potential threats, which should be justified by an assessment of this threat, an analysis of crisis situations and other factors that hinder the achievement of the company’s goals and create a danger for it.

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