Related party transactions and corporate groups : when Eastern Europe meets the West

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1. INTRODUCTION

1.1. THEORETICAL BACKGROUND

The importance of legislative provisions that introduce substantive and procedural safeguards for RPTs derives from the fact that management and majority shareholders are likely to abuse their rights and harm minority shareholders or institutional investors through 'tunnelling'.[1] Creditors, employees and other stakeholders also feel the detrimental effects of a transaction that is used to extract assets from the company.[2]

Despite some obvious possible negative consequences of RPTs (i.e. that the company could be stripped of its assets, leaving minority shareholders with less likelihood of receiving dividends), types of RPTs might exist that, due to the transaction costs, could prove more beneficial for the company than other available transactions. Situations where RPTs become routine and are characterized as standard practice have been sufficiently demonstrated by Luca Enriques, using an example of an imaginary state called Tunelland:[3] a developing economy with a high risk of corruption and a poorly managed tax system, which is somehow reminiscent of Ukraine. As the author notes, once a corporate group is in place, it is harder to find RPTs suspicious, especially if corporate groups are a common organizational form for businesses within the economy.[4] Therefore, an outright prohibition on RPTs or fixing ceilings does not offer a proper solution to the shareholders' problems: this approach is too inflexible and sometimes runs contrary to the shareholders' interests.[5] It therefore remains to be investigated whether RPTs within corporate groups should receive special treatment relative to transactions outside groups.

Nevertheless, it would be a mistake to position RPTs as completely safe instruments of corporate governance. As Martin Gelter argues, the underlying concern is that, if left unconstrained, directors and officers will on the one hand squander the firm's assets or shift them into their own pockets through self-dealing transactions, and on the other frequently fail to work hard enough to achieve the best possible results for the shareholders.[6] That is why imperative limitations and requirements must be established that oblige a company's officers, shareholders and other potential related parties to follow certain rules whenever they wish to enter into an RPT.

[1] 'Tunnelling is considered to be the diversion of corporate resources from the corporation (or its minority shareholders) to the controlling shareholder,' as suggested in Johnson S and others, 'Tunnelling' (2000) 90 AEA Papers and Proceedings 22, 26.
[2] Antonenko L, 'The Myth of Transformation Through EU Law: A Case-Study of the Company Law Reform in Ukraine'. Available at SSRN: https://ssrncom/abstract=1485607, accessed on 18 November 2018, 9.
[3] Enriques L, 'Related Party Transactions: Policy Options and Real-World Challenges (with a Critique of the European Commission Proposal)' (2015) 16 European Business Organisation Law Review 1, 1-37.
[4] Ibid, 5.
[5] Hopt KJ, 'Groups of Companies-A Comparative Study on the Economics, Law and Regulation of Corporate Groups' Law Working Paper N° 286/2015, available at: http://ssrncom/abstract=2560935, accessed on 5 December 2018, 15.
[6] Gelter M, 'Taming or Protecting the Modern Corporation? Shareholder-Stakeholder Debates in a Comparative Light' (2011) 7 New York University Journal of Law and Business 641, 657.

1.2. GENERAL HISTORICAL, ECONOMIC AND LEGAL BACKGROUND TO RPTs AND CORPORATE GROUPS IN UKRAINE

1.2.1. Introduction

This section contains a description and analysis of the general background to RPTs and corporate groups in Ukraine. It provides a brief explanation of Ukrainian corporate reality, including the existing data on corporate ownership. While the next subchapter emphasizes the statutory rules regulating RPTs of JSCs (public companies) and LLCs (private companies), the purpose of this section is to present Ukrainian corporate law and governance as a whole, and the problems it currently faces regarding RPTs.

1.2.2. Privatization and corporate ownership in Ukraine

Corporate law was not on the agenda in the Soviet Union. The landscape of economic relations was populated by State enterprises, which exercised property rights through rights of operative management and control, leaving the State to fulfil the role of owner. For individuals, private property was also limited and extended to a small number of objects only. This started to change in the late 1980s, giving birth to new economic operators and leading to the collapse of the entire existing system of legal relationships.

Emerging as the successor to the Ukrainian Soviet Socialist Republic, Ukraine has existed as an independent and democratic state since 24 August 1991.[7] The year 1991 marked a time when many important laws were introduced, including the Laws of Ukraine 'On Property' and 'On Economic Companies'.[8] The latter, while being recognized as progressive at the time, was in place for a few years only before revealing its evident shortcomings in protecting various stakeholders in companies, lacking mechanisms for market control and providing management with excessively broad powers.[9] The act was short (83 articles covering the creation and functioning of LLCs, ALCs, JSCs and partnerships) and abstract (allowing for different interpretations) for the emerging market economy.[10]

Privatization began in 1992. The Laws of Ukraine 'On Privatization of Property of State Enterprises' and 'On Privatization of Property of Non-Large Enterprises (Small Privatization)', both repealed on 18 January 2018,[11] described the mechanisms for privatizing State enterprises. The preferred method of privatizing large enterprises was mass privatization, through the issuance

[7] Resolution of the Verkhovna Rada of Ukrainian Soviet Socialist Republic 'On Declaration of Independence of Ukraine' [Постанова Верховної Ради Української Радянської Соціалістичної Республіки "Про проголошення незалежності України"] of 24 August 1991, available at: http://zakon.rada.gov.ua/laws/show/1427-12, accessed on 31 December 2018.

[8] The Law of Ukraine 'On Property' has already been repealed, while the Law of Ukraine 'On Economic Companies' has lost most of its regulatory effect due to the adoption of the JSC Law of Ukraine and LLC Law of Ukraine, which now regulate those business forms.

[9] Yefymenko AP, 'Corporate Governance under Ukraine's New Joint Stock Company Law'. Available at SSRN: http://ssrncom/abstract=1387360, accessed on 7 December 2018, 4.

[10] Antonenko L, 22.

[11] Law of Ukraine 'On Privatization of State and Municipal Property' [Закон України 'Про приватизацію державного та комунального майна'], as of 18 January 2018, published in Vidomosti Verkhovnoyi Rady Ukrayiny, 2018, No. 12, st. 68.

of privatization certificates to employees.[12] Those certificates gave employees a preferential right to acquire securities.[13] Every citizen of Ukraine gained an entitlement to State property through the privatization certificates acquired in this manner.[14]

Mass privatization neither brought much income to the State budget, nor led to improved corporate governance of the enterprises.[15] Managers and individuals close to the political elite used deficiencies in the legislation to obtain control of privatized enterprises through stock dilution or non-transparent buyout schemes, often buying shares from members of the public at prices far below market value.[16] As a result, privatized companies were initially increasingly dispersed but soon became extremely concentrated. Those minority shareholders who did not sell their shares held insufficient stock to influence company affairs. However, they remained high in number, reaching 13-15 million, depending on the source.[17] To this day, extremely dispersed ownership of small stakes in share capital continues,[18] for instance with Public JSC 'Zaporizhskiy metalurhiynyi kombinat 'Zaporizhstal'. This producer of steel and rolled iron is one of the largest Ukrainian enterprises privatized during mass privatization (revenue amounting to UAH 33.16 billion in 2016) and reportedly owned by the 'Metinvest' group, Rinat Akhmetov and Vadim Novinskiy.[19] While those individuals may be the ultimate beneficial owners, in 2018 the company officially had 5 shareholders[20] with stakes exceeding 5 per cent, together holding 98.0724 per cent of the share capital. The remaining securities, numbering more than 50 million, were dispersed among shareholders holding less than 2 per cent of the share capital.[21]

Where the privatization process in Poland has been described as slow,[22] that qualification certainly holds true for Ukraine. More than 800 legal entities, including many State enterprises, public and private companies, still await privatization.[23] Ukraine failed to comply with the key conditions for successful privatization: speed, social purpose, effective control and access to foreign capital.[24] The only successful case of privatization of a large enterprise was the purchase of 'Kryvorizhstal' by Indian investor Arcelor Mittal in 2005: the transaction price was 4.8 million USD, which corresponds to 44 per cent of all privatization income since 1992.[25] In 2016, calculated by revenue, Private JSC 'Arcelor Mittal Kryvyi Rih' (the name was changed after the

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[12] Law of Ukraine 'On Privatization of Property of State Enterprise'' [Закон України 'Про приватизацію майна державних підприємств'] of 4 March 1992, published in Vidomosti Verkhovnoyi Rady Ukrayiny, 1992, No. 24, St. 348, Art. 22.
[13] Ibid, Art. 25.
[14] Ibid, Art. 24.
[15] Фролов П, 'Приватизація в Україні: ретроспективи та перспективи' *Дзеркало тижня* (No. 10 (17 March-23 March)) https://dt.ua/macrolevel/privatizaciya-v-ukrayini-retrospektivi-ta-perspektivi-272273_.html, accessed on 7 December 2018.
[16] Yefymenko AP, 2.
[17] Ibid, 7.
[18] This could change soon, due to the extensive use of squeeze-out procedures.
[19] Головньов С and Віннічук Ю, '200 найбільших компаній України 2016 року' (*Бизнес Цензор (10 October 2017)*, 2017) https://biz.censor.net.ua/resonance/3033764/200_nayiblshih_kompanyi_ukrani_2016_roku, accessed on 31 December 2018.
[20] Companies established in Ukraine, the UK and Cyprus.
[21] '00191230 - Публічне акціонерне товариство "Запорізький металургійний комбінат "Запоріжсталь"' (2019) <https://smida.gov.ua/db/participant/00191230>, accessed on 2 September 2019.
[22] Boeri T and Perasso G, 'Privatization and Corporate Governance: Some Lessons for the Experience of Transitional Economies' in Balling M (ed), *Corporate Governance, Financial Markets and Global Convergence* (Springer 1998), 83.
[23] 'ПЕРЕЛІК об'єктів державної власності, що підлягають приватизації у 2017 – 2020 роках, у тому числі тих, що можуть бути приватизовані після внесення змін до актів законодавства/передачі в комунальну власність [List of objects of state property subject to privatization in 2017-2020, including privatized ones after statutory changes/transfer to municipal property]' (2017) http://me.gov.ua/Documents/Download?id=edfd2801-0e66-40bf-9e7d-7ab6f60ad15c, accessed on 2 September 2019.
[24] Фролов П.
[25] Ibid.

privatization) was recognized as the 4th most profitable company in Ukraine.[26] Other large State enterprises mostly fell into the hands of insiders, who preserved their controlling influence using connections with government officials and exerting influence over Parliament's legislative endeavours. One notable example of an oligarch is Rinat Akhmetov, who monopolized various spheres of the Ukrainian economy by holding shares in big companies. In 2016, he owned, either directly or indirectly, 28 of the 200 most profitable companies.[27] In 2017, he held shares in 303 legal entities in Ukraine, followed by Petro Poroshenko (76 legal entities), Dmytro Firtash (72 legal entities) and Ihor Kolomoyskiy (45).[28] All in all, predictably,[29] privatization brought little in the way of public benefits and largely frustrated the public's expectations.

1.2.3. Adoption of the JSC Law of Ukraine, corporate raiding and derivative suits

By April 2009, when the JSC Law of Ukraine took effect, the aggressive concentration of corporate ownership through privatization was already reality. The 2003 CCU, which brought some changes in the area of corporate law, was not sufficient to prevent fraudulent business practices. Tunnelling through self-dealing became widespread.[30] Employees with increasingly dispersed minority shareholdings had no means to influence the decisions of the controlling shareholders. The agency conflict between managers and controlling shareholders was reduced to a minimum, with blockholders either threatening managers with dismissal or else 'scratching each other's backs'. Instead of being gatekeepers for the shareholders' wealth, executives became little more than servants of the blockholders.

At that point, the provisions of the JSC Law containing approval safeguards for transactions with interest, including RPTs (Article 71), were insufficient to protect minority shareholders as was their intention. Even with the system of cumulative voting to elect members of supervisory boards that was then introduced (Article 53), the small volumes of their shareholdings and the abuse of rights by blockholders meant that minority shareholders were often unable to have their interests duly represented on their supervisory boards. Compared with the current regulation, as far as RPTs are concerned, the situation with the interests of minority shareholders was aggravated by various shortcomings, including the following.

Appraisal rights were missing for dissenting shareholders opposing transactions with interest (Article 68). Where a majority of the supervisory board had an interest in a transaction, instead of placing the decision-making authority with the minority of disinterested members, the JSC Law required a vote among shareholders (Article 71(2)). No majority-of-the minority rule for transactions with interest existed, i.e. in a majority-controlled company with a shareholder as a related party, transactions with interest could be easily approved by the general meeting of shareholders.

In one important respect minority shareholders had better protection 'on paper' than they now do. Article 72(2) of the JSC Law provided standing for shareholders to claim invalidation of transactions with interest that were incompatible with proper procedure, to claim damages and moral harm. The academic interpretation of this article confirmed the right of shareholders to use those remedies.[31] Unfortunately, however good the legislators' intentions were when they drafted

[26] Головньов С and Віннічук Ю.
[27] Ibid.
[28] 'В Opendatabot з'явився пошук по власникам компаній' (2017) <https://opendatabot.ua/blog/71-founders>, accessed on 29 September 2018.
[29] Black B and Kraakman R, 'A Self-Enforcing Model of Corporate Law' (1996) 109 Harvard Law Review 1911, 1925.
[30] Antonenko L, 4; Yefymenko AP, 4.
[31] Боднар Т, 'Правочини акціонерних товариств, щодо вчинення яких є заінтересованість' [2009] Юридична Україна 36, 40.

this provision, the outcome was frustrating. Even before the enactment of the JSC Law, courts in Ukraine, faced with numerous claims of abuse from minority shareholders, rejected the possibility of derivative claims by shareholders, and in 2003-2004 established that the company itself had to claim nullification of a transaction to which it was a party.[32] This controversy was ultimately resolved by the Constitutional Court of Ukraine, which interpreted a company's interests as being separate from the interests of its shareholders.[33]

The approach posited by the Constitutional Court of Ukraine and the general courts in 2003-2004 was aimed at combatting corporate raiding, most often carried out through illegal seizure of corporate assets.[34] The various court decisions had a two-fold outcome. On the one hand, minority shareholders were barred from instituting manifestly baseless suits. On the other, they became less protected in their efforts to oppose the controlling shareholders' misdeeds.[35] Against this background, when Ukraine adopted the JSC Law, in practice Article 72(2) did not lead to new derivative suits. That same Article 72(2) was also criticized for being too abstract, as it allowed moral harm too. The commentators could not perceive how moral harm could result from transactions with interest and suggested remedies for deficient transactions with interest to be confined to invalidating such transactions and awarding damages.[36]

Instead of improving the provision in question, in 2011 the legislature slammed the door suddenly and decisively on derivative suits for shareholders, by changing the wording of the provision and removing the shareholders' standing even 'on paper'.[37] This solution was too inflexible to strike a balance between the interests of the various stakeholders. Instances of abuse by controlling shareholders were reported more often, and required the introduction of a specific enforcement tool.[38]

1.2.4. Amendments of 7 April 2015 and 16 November 2017

A new legislative trend for transactions with interest, including RPTs, and their enforcement emerged in 2015, when the Law of Ukraine 'On Amending Certain Legislative Acts of Ukraine on Protection of Investors' was adopted.[39] This act took effect on 1 May 2016 and formally allowed derivative suits for shareholders with holdings of 10 per cent or greater in a company's share capital.[40] For derivative suits, the changes meant only one remedy: damages for loss inflicted by company officers. The act also makes no mention of loss or damage inflicted by other related parties. However, no other category of stakeholders besides minority shareholders would be more interested in claiming invalidation of transactions with interest or compensation of damages caused to the company by controlling shareholders or affiliated persons. So far, claiming damages against

[32] Борцевич П, 'Проблеми укладання значних правочинів та правочинів, щодо яких є заінтересованість' [2014] Держава і право 159, 163.
[33] *Decision of 1 December 2004 No. 18-pn/2004 (case about legitimate interest)* Case No 1-10/2004, Ofitsiynyi visnyk Ukrayiny of 31 December 2004, No 50, page 67, st 3288 (Constitutional Court of Ukraine).
[34] Radwan A, Nadzon A and Zdiruk V, Assessment of Approximation Level of the Present Company, Corporate Governance, Accounting and Auditing Legislation and Existing Practices in Ukraine to EU Standards and Practices (Contract N°2013/328606/2 Available at SSRN: https://ssrncom/abstract=3090335 or http://dxdoiorg/102139/ssrn3090335, 2014), 22.
[35] Shareholders have retained the right to claim invalidation of decisions of corporate bodies.
[36] Карчевський К, 'Наслідки недотримання порядку вчинення правочину акціонерного товариства, щодо вчинення якого існує заінтересованість (порівняльно-правовий аналіз)' [2012] Право і Безпека 281, 285.
[37] Law of Ukraine 'On Amendmends to the Law of Ukraine "On Joint-Stock Companies" regarding the Improvement of Functioning of Joint-Stock Companies' [Закон України 'Про внесення змін до Закон України "Про акціонерні товариства" щодо вдосконалення механізму діяльності акціонерних товариств'].
[38] Єфіменко А, 'Правочини із заінтересованістю' [2014] Вісник Центру комерційного права 2, 4.
[39] Law of Ukraine 'On Amending Certain Legislative Acts on the Protection of Investors' [Закон України 'Про внесення змін до деяких законодавчих актів щодо захисту прав інвесторів'].
[40] The changes were introduced in the Economic Procedural Code of Ukraine.

company officers has not become a popular tool for shareholders to protect their rights, as the statistics on the Supreme Court's website evidence: since 1 May 2016 only 45 cases have been initiated.[41]

Besides introducing derivative suits, as of 7 April 2015 the Law tightened the regulation of transactions with interest by adding other important new elements: the concept of an interested person, disclosure and procedural safeguards. Also, the rules on mandatory buyouts (appraisal rights) were supplemented to include additional grounds. Shareholders in JSCs were given the right to demand buyout of their shares if they voted against transactions with interest at the company's general meeting of shareholders.[42] However, the application of these provisions is not without problems. Firstly, abuse is possible in the determination of the shares' market value.[43] The problems associated with the market value of shares are not unique to Ukraine: even developed countries experience them.[44] Secondly, situations may arise where a supervisory board approves a transaction with interest, despite a dissenting opinion of the supervisory board member representing the shareholder. In this case, the shareholder would not be able to demand a buyout, in spite of the fact that his or her supervisory board member voted against it.

The rules on mandatory disclosure, which were introduced by the Law of Ukraine of 7 April 2015 and became effective on 1 May 2016,[45] clearly show that transactions with interest have not been uncommon for JSCs. In 2017, JSCs in Ukraine made 603 announcements regarding approved transactions with interest. The 219 JSCs that disclosed approved transactions with interest included 116 public JSCs, 103 private JSCs, 23 banks and 5 insurance companies. Some companies disclosed multiple transactions with interest (for instance, Ukrsotsbank disclosed 25) while others disclosed only one in 2017 (for example, Naftogaz Ukrayiny).[46] Although the proportion of JSCs that disclosed decisions approving transactions with interest in 2017 was not overwhelming (219 disclosers out of more than 15 thousand existing JSCs[47]), the figures nonetheless prove that transactions with interest, including RPTs, are an issue for many companies. Another fundamental change introduced by the Law of 7 April 2015 was a new concept of public JSC. Until 1 May 2016, one of the differences between public and private JSCs lay in the number of shareholders. If that number exceeded 100, private JSCs were required to convert into public JSCs. With the lifting of that requirement, many public JSCs that had been privatized in the 1990s and that had thousands of shareholders used this chance to transform into private JSCs, to be released from their 'public cage'.[48] Their main reason for transforming was that the requirements for public JSCs were stricter. Essentially, this showed that the number of shareholders was not an accurate criterion for distinguishing between public and private JSCs. It was the first step towards aligning the concept of public JSC to the concept of listed company used in EU law.

Despite the legislative efforts to bring the differences between private and public JSCs closer to how listed public companies differ from non-listed public companies in EU law, where only those public companies are listed whose shares are admitted to trading on a regulated

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[41] 'Оприлюднення оголошень у справах про відшкодування збитків, завданих господарському товариству його посадовою особою [Publication of announcements in cases on compensation for loss or damage caused to an economic company by its officers]' (2018) https://supreme.court.gov.ua/supreme/pro_sud/opr_vid/, accessed on 2 September 2019.

[42] JSC Law of Ukraine, Article 68(1).

[43] Ibid, Articles 8, 69.

[44] Black B and Kraakman R, 1957.

[45] Not to be confused with the disclosure of RPTs through financial reports, which has existed for a long time.

[46] Analysis of the data from the website of the Stock Market Infrastructure Development Agency of Ukraine (SMIDA)' https://smida.gov.ua/, accessed on 30 September 2018.

[47] 'Quantity of legal entities by organizational form, as of 1 August 2016 [Кількість юридичних осіб за організаційними формами, станом на 1 серпня 2016 року]' (*State Service of Statistics of Ukraine [Державна служба статистики України]*) http://www.ukrstat.gov.ua/edrpoy/ukr/EDRPU_2016/ks_opfg/ks_opfg_0816.htm, accessed on 15 August 2016.

[48] Ткачук Д, 'Публічні та приватні акціонерні товариства: про зміщення меж' Юрист & Закон (February 2018) Available at: http://uzligazakonua/ua/magazine_article/EA011255, accessed on 3 September 2019.

market,[49] by 2017 many public JSCs had neither gained public listings nor succeeded in transforming into private JSCs. According to one source, in October 2017 only 6 JSCs were listed (out of more than 2000 public JSCs).[50] Open data from the Stock Market Infrastructure Development Agency of Ukraine (SMIDA) also show numerous cases where shares in JSCs were delisted in 2015-2016.[51]

On 16 November 2017, the Law of Ukraine 'On Amending Certain Legislative Acts on the Simplification of Business and Attraction of Investments by the Issuers of Securities' was adopted to simplify and to speed up the transformation process.[52] Under this act, most of which entered into effect on 6 January 2018, JSCs are regarded as public if they have made a public offering of their shares. The Law of 16 November 2017 also allows private JSCs to have their shares traded on stock exchanges. Before 6 January 2018, ownership of shares in private JSCs was transferred through traders outside stock exchanges. JSCs whose shares were listed on the day that the law took effect were presumed to have made a public offering of their shares. For JSCs whose shares were traded on a stock exchange, but that did not manage to become listed by 6 January 2018, the Law allowed them to officially inform the NSSMC by 31 December 2018 that they wished to be treated as if they had made a public offering of their shares, in accordance with a special procedure.[53] All other public JSCs would be treated as private JSCs. All in all, only 14 notifications were submitted by JSCs requesting treatment as public (or listed) JSCs.[54]

As a result, taking into account how few JSCs were listed on 6 January 2018 and the unwillingness among JSCs to be made subject to the strict requirements for public JSCs, today most JSCs fall under the requirements for private JSCs. Taking into account the changes described above, it is now fair to refer to public JSCs in Ukraine as listed companies. JSCs as essentially public companies may, thus, be listed or non-listed. In turn, LLCs in Ukraine may be referred to as private companies. Table 1 illustrates the evolution of the concepts of private and public JSCs in Ukrainian law.

Before 1 May 2016	Only public JSCs may have their shares traded on a stock exchange and may have more than 100 shareholders. If a private JSC wishes to have more than 100 shareholders and/or to have its shares traded on a stock exchange, it must be converted into a public JSC.
From 1 May 2016 to 6 January 2018	Both public and private JSCs may have more than 100 shareholders. Only public JSCs may have their shares traded on a stock exchange. By 1 January 2018, all public JSCs were expected to become listed.

[49] See, e.g., Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies [2007] OJ L 184, 14.7.2007, Article 1.
[50] Ibid.
[51] https://smida.gov.ua/.
[52] Law of Ukraine 'On Amending Certain Legislative Acts on the Simplification of Business and Attraction of Investments by the Issuers of Securities' [Закон України 'Про внесення змін до деяких законодавчих актів України щодо спрощення ведення бізнесу та залучення інвестицій емітентами цінних паперів'] of 16 November 2017, available at: http://zakon2.rada.gov.ua/laws/show/2210-viii.
[53] The Decision of the National Securities and Stock Market Commission "On Approval of the Order for the Disclosure of Notification by Issuers of Securities that They Have Made a Public Offering of Securities" [Рішення Національної комісії з цінних паперів та фондового ринку "Про затвердження Порядку оприлюднення повідомлення емітентами цінних паперів про те, що вони вважаються такими, що здійснювали публічну пропозицію цінних паперів"], No. 75, of 13 February 2018, published in Ofitsiynyi visnyk Ukrayiny, 2018, No. 27, St. 994.
[54] According to public information of the Stock Market Infrastructure Development Agency of Ukraine (SMIDA), at: https://smida.gov.ua/.

After 6 January 2018	Both public and private JSCs may have more than 100 shareholders and may have their shares traded on a stock exchange. Public JSCs are JSCs that have made or are presumed to have made the public offering of their shares. Their characteristics are such that they may also be referred to as listed companies.

Table 1. Evolution of the differences between public and private JSCs in Ukrainian law.

1.3. REGULATION OF RPTs IN PUBLIC AND PRIVATE COMPANIES IN UKRAINE

1.3.1. Regulation of RPTs in public companies in Ukraine from a historical and comparative perspective

1.3.1.1. *Introduction*

In a market environment where the economic actors conduct themselves as diligent and conscientious managers, the regulation of RPTs would be largely irrelevant. Affiliated persons would enter into transactions with each other on the same terms as with strangers. There would be no need for sophisticated rules to determine market prices in corporate transactions: the price would not depend on who the parties were and whether they were somehow related. Unfortunately, corporate reality is far from an ideal world that is innocent of market abuse and corporate fraud. The infamous corporate scandals of Enron and Parmalat showcase how managers and blockholding shareholders can misuse their power. That is why it is still necessary to protect minority shareholders from the wrongdoings of majority shareholders, and to protect all shareholders from opportunistic managerial behaviour. Ukraine is no exception to this rule, and needs properly balanced rules to safeguard the interests of weaker parties in corporate relationships, without becoming too detrimental and burdensome to the company's functioning.

The regulation of RPTs in Ukraine has changed several times and is not safeguarded from further legislative amendments in the immediate future. JSCs (public companies) have been affected most by the legislative changes, while LLCs (private companies), though more heavily represented on the market (see Figure 1), have only recently become subject to extensive legislative intervention. The main difference between regulation of RPTs in public and private companies is that public companies have a mandatory and quite detailed procedure for approval of RPTs. If the RPT represents less than 10 per cent of the company's assets, the supervisory board becomes involved in this procedure.[55] For private companies, the shareholders must reach a unanimous decision to introduce an approval procedure in the company's articles of association.[56] Even if the shareholders agree, it is not necessarily the role of a supervisory board to approve or block RPTs, given that a supervisory board is optional for private companies.[57]

[55] JSC Law of Ukraine, Art. 71(7).
[56] LLC Law of Ukraine, Article 45.
[57] Ibid, Article 38.

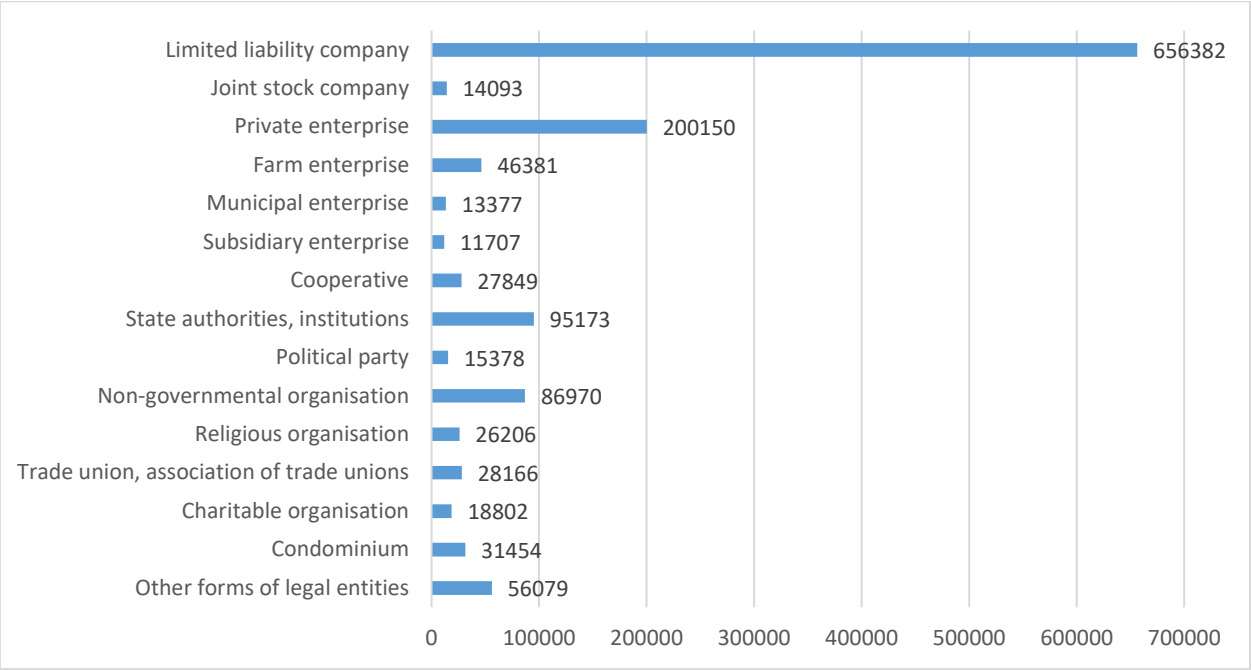

Figure 1. Numbers of legal entities in Ukraine by business form, as of 1 August 2019, n=1,328,167.

Source: public information taken from the website of the State Service of Statistics of Ukraine: http://www.ukrstat.gov.ua/. The list of business forms shown in this diagram is incomplete: only business forms used by more than 10,000 legal entities are included.

To simplify the evolution of legislation governing relationships involving RPTs in Ukrainian public companies, it can be divided into a number of time periods following the declaration of independence and emergence of Ukraine as an independent state: (a) regulation before the enactment of the JSC Law of Ukraine (before 29 April 2009); (b) regulation after the enactment of the JSC Law of Ukraine but before the enactment of the 2015 amendments (29 April 2009–30 April 2016); and (c) regulation after the enactment of the 2015 amendments (after 1 May 2016).

1.3.1.2. Regulation before the enactment of the JSC Law of Ukraine – before 29 April 2009

The principal event during the first period was the adoption of basic legislation governing corporate relationships. Before the CCU and the Economic Code of Ukraine (both adopted on 16 January 2003[58]) took effect on 1 January 2004, the main act in company law had been the Law of Ukraine 'On Economic Companies', adopted on 19 September 1991.[59] That law has laid the foundations for modern company law in Ukraine, by introducing the main business forms of legal entities, including JSCs and LLCs, and creating conditions for their further formation and functioning. Hundreds of LLCs have been formed under the 1991 law, making this legal business form the most popular choice for establishing a company in the country. Today, Ukraine has more

[58] Civil Code of Ukraine [Цивільний кодекс України] of 16 January 2003, published in Vidomosti Verkhovnoyi Rady Ukrayiny, 2003, No.No. 40-44, St. 352; Economic Code of Ukraine [Господарський кодекс України] of 16 January 2003, published in Vidomosti Verkhovnoyi Rady Ukrayiny, 2003, No. 18, No. 19-20, No. 21-22, St. 144.

[59] Law of Ukraine 'On Economic Companies' [Закон України 'Про господарські товариства'] of 19 September 1991, published in Vidomosti Verkhovnoyi Rady Ukrayiny, 1991, No. 49, St. 682.

than 600,000 LLCs, against 14,000+ JSCs out of more than 1.3 million officially registered legal entities.[60]

Although the implications of the Law of Ukraine 'On Economic Companies' for the economy and legal practice should not be underestimated, as it was certainly not a 'dead law', the provisions of its 83 articles in total later came to be regarded as lacking sufficient detail for some major business forms, i.e. JSCs and LLCs in the first place, in that they lacked specific rules for market valuation of shares and detailed rules on conflicts of interest.

The Codes, adopted in 2003 and enacted in 2004, introduced further regulation to the area of company law. The CCU replaced the 1963 Soviet Civil Code, introducing the modern concept of legal entity to Ukrainian law and providing some basic rules on legal entities, their types and their main features. Among other provisions, Article 92 of the CCU specified the duty of management to act in the legal entity's best interests, fairly and reasonably, and not to exceed its powers.[61] Although rather abstract in nature, and subject to interpretation and debate,[62] the mere indication of this duty was a step forward in regulating corporate relationships in Ukraine. Additionally, the CCU deprived shareholders of the right to vote at the general meeting of shareholders when deciding on issues of transactions involving those same shareholders.[63] This was another step forward in dealing with RPTs, and interestingly the provisions of Article 98(3) of the CCU make no distinction between majority and minority shareholders: they cover even shareholders with insignificant percentages of the share capital. It is doubtful whether the scope of Article 98(3) needed to be so broad, given that minority shareholders are rarely able to influence the company's functioning to the same extent as majority shareholders and managers. However, the clause's broad scope has been undermined by the ease with which it can be circumvented, as Article 98 makes no mention of any other related parties besides the shareholders, rendering this rule inapplicable on matters of, for instance, transactions between a company and a shareholder's relatives.

The only exception to the broad application of this rule took effect on 17 June 2018, when the article was declared inapplicable to companies with a sole shareholder.[64] The reasons for this amendment are clear: it would be unreasonable to prohibit the absolute owner of a company to vote in corporate bodies. This might have caused unnecessary obstacles in the functioning of those bodies.

1.3.1.3. Regulation after the enactment of the JSC Law of Ukraine but before the enactment of the 2015 amendments (29 April 2009–30 April 2016)

Unlike the Law of Ukraine 'On Economic Companies', the JSC Law of Ukraine, adopted in 2008 and enacted on 29 April 2009, provided more detailed rules on the formation and functioning of JSCs (both private and public[65]), including a definition of an interested person and procedures for

[60] See Figure 1.
[61] CCU, Art. 92(2).
[62] Пойзнер A and Михальчук I, 'Правочини, в яких присутня заінтересованість' *Юридична газета* (17 August 2010).
[63] CCU, Art. 98(3).
[64] Law of Ukraine 'On Limited and Additional Liability Companies' [Закон України 'Про товариства з обмеженою та додатковою відповідальністю'] of 6 February 2018, published in Vidomosti Verkhovnoyi Rady Ukrayiny, 2018, No. 13, St. 69, Chapter VIII, paragraph 6, subparagraph 2.
[65] When the JSC Law of Ukraine was adopted, the understanding of private and public JSCs was based on formalistic criteria, which differed slightly from the criteria used to differentiate between listed and non-listed companies in EU law. Since the Law of Ukraine 'On Amending Certain Legislative Acts on the Simplification of Business and Attraction of Investments by the Issuers of Securities' [Закон України 'Про внесення змін до деяких законодавчих актів України щодо спрощення ведення бізнесу та залучення інвестицій емітентами

monitoring RPTs within a broader category of transactions with interest.[66] An RPT can be explained as a transaction between a company and a related party, whereas transactions with interest do not always involve an interested person. In order to be regarded as a transaction with interest, the transaction must involve an interested person in one of the following positions: (a) a party to the contract or a controller of a legal entity that is party to the contract; (b) a party receiving benefits from the transaction (beneficiary); (c) a party buying property as a result of a transaction;[67] (d) a party entering into the transaction as a representative or broker.

The existence of transactions with interest triggered the necessity to comply with the following procedure. First, the interested person was required to notify the company about the interest within three working days from the moment that the interest arose. Next, it was the management board's duty to inform the supervisory board (or the shareholders, if the company did not have a supervisory board) within five working days from the moment of receiving the information. The supervisory board then had to either approve the transaction (if it aligned with the company's interests) or prohibit it, or, alternatively, refer the issue to the general meeting of shareholders. This decision also rested with the general meeting if the company did not have a supervisory board, if a majority of the members of the supervisory board were biased or if the supervisory board failed to react in time.

Where this procedure was not followed, the transaction could be declared null and void, and the interested person could be held liable for any harm inflicted by the transaction.[68]

During this period, the concept of a transaction with interest was changed: the Law of Ukraine of 3 February 2011 exempted some categories of affiliated persons from regulation, including legal entities controlled by shareholders or controlling them, while preserving the existing system of safeguards.[69] After the 2011 amendments took effect, three categories of interested persons remained: (a) company officers, and their family members; (b) shareholders holding 25 per cent or more of the share capital, and their family members; (c) legal entities where company officers or their family members owned 25 per cent or more of the company's share capital.

The JSC Law of Ukraine also clarified who were classified as company officers and their family members. The former comprised four categories of persons: (a) the chair and members of the board of directors; (b) the chair and members of the supervisory board; (c) the head and members of the audit committee; and (d) the head and members of other company bodies.[70] The latter group were defined as the interested person's spouse, parents (guardians), and their brothers, sisters, children and their spouses.[71]Although these provisions were perceived as improvements helping to protect shareholders' rights,[72] they also received some criticism from practitioners and scholars. For instance, it was noted that neither the JSC Law of Ukraine nor the CCU explained under what circumstances the supervisory board was entitled to prohibit a transaction as being incompatible with the company's interests.[73] The meaning of 'incompatible with company's

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цінних паперів'] took effect as of 16 November 2017, the difference between private and public JSCs in Ukraine has aligned more closely to the understanding of listed and non-listed companies in EU law.

[66] Law of Ukraine 'On Joint Stock Companies' [Закон України 'Про акціонерні товариства'] of 17 September 2008, published in Vidomosti Verkhovnoyi Rady Ukrayiny, 2008, No. 50-51, St. 384, Art. 71.

[67] The interpretation of the Ukrainian spelling (Ukr. – '*придбає*') used in this sentence can potentially cause a misunderstanding, meaning either 'buy', or 'acquire'.

[68] Ibid, Article 72.

[69] Law of Ukraine 'On Amendmends to the Law of Ukraine "On Joint-Stock Companies" regarding the Improvement of Functioning of Joint-Stock Companies' [Закон України 'Про внесення змін до Закон України "Про акціонерні товариства' щодо вдосконалення механізму діяльності акціонерних товариств'] of 3 February 2011, published in Vidomosti Verkhovnoyi Rady Ukrayiny, 2011, No. 35, St. 344.

[70] JSC Law of Ukraine, Article 1(15).

[71] Ibid, Article 71.

[72] Yefymenko AP, 11.

[73] Боднар Т, 38.

interest' was considered even more ambiguous given that no legal definition was given of the company's interest, which could be freely construed.

One flaw spotted by several authors was the necessity to exclude some transactions from the scope of the law, i.e. transactions between a company and its sole shareholder if that shareholder was also the only board member.[74] The reasoning behind those critical comments, backed up by references to similar rules for public companies in some foreign jurisdictions, was that transactions where the company's sole shareholder was also its only director did not create any risks for minority shareholders: even if the company went bankrupt, that same shareholder would also be the main victim of the unsuccessful policy. Essentially, the whole company depended on a single person who combined both ownership and control, and who presumably had the greatest interest in the company's long-term sustainable operation. It was also common practice for many states to select '*a more lenient approach towards shareholders, rather than managers, in regulating RPTs*', which can be explained by the fact that the former group tend to have an economic interest in the enterprise and would be less likely to have a detrimental influence on the company's functioning.[75] This flaw was subsequently removed, as the legislature seems to have taken these comments on board in the 2015 amendments (effective since 1 May 2016).

Despite this criticism about the lack of rules for transactions between a legal entity and its sole shareholder, it should be noted that the overall control of a single shareholder and the risk of mixing assets do in fact pose a threat to the interests of creditors. In the EU, these risks are addressed by Directive 2009/102/EC, which provides procedural safeguards for single-member companies.[76] Additionally, many jurisdictions, including Ukraine, use insolvency and special liability rules (e.g. veil piercing) to protect creditors' rights.

1.3.1.4. Regulation after the enactment of the 2015 amendments (from 1 May 2016 onwards)

The draft law regarding the protection of investors was published on the NSSMC's website in 2014.[77] It was further amended following input from representatives of the Ukrainian Bar Association, submitted to the Parliament of Ukraine, adopted on 7 April 2015 and enacted on 1 May 2016.[78]

The amendments established a series of additional conditions for applying the rules on transactions with interest contained in the JSC Law of Ukraine. In order to be covered by those rules, the value of the transaction had to exceed 100 times the minimum wage, which was around EUR 5,000 in 2016 (the minimum wage is established annually by the Law of Ukraine on the Budget[79]). The logic for the changes had derived from the necessity to exclude ordinary everyday transactions from burdensome requirements, ensuring that the procedure is not '*over-inclusive and*

[74] Пойзнер А and Михальчук І, 20; Штим Т, 'Акціонерні угоди, правочини із заінтересованістю та значні правочини в акціонерних товариствах' (DPhil thesis, Taras Shevchenko National University of Kyiv 2014), 180; Боднар Т, 39-40.
[75] Kraakman R and others, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (2nd edn, Oxford University Press 2009), 179.
[76] Directive 2009/102/EC of the European Parliament and of the Council of 16 September 2009 in the area of company law on single-member private limited liability companies [2009] OJ L 258, 1.10.2009, Articles 2-5.
[77] Draft Law of Ukraine 'On Amending Certain Legislative Acts regarding the Protection of Rights of Investors' [Проект Закону України 'Про внесення змін до деяких законодавчих актів щодо захисту прав інвесторів'], available at: http://www.nssmc.gov.ua/law/19018, accessed on 15 April 2015.
[78] Law of Ukraine 'On Amending Certain Legislative Acts on the Protection of Investors' [Закон України 'Про внесення змін до деяких законодавчих актів щодо захисту прав інвесторів'] of 7 April 2015, published in Vidomosti Verkhovnoyi Rady Ukrayiny, 2015, No. 25, St. 188.
[79] Budgetary Code of Ukraine [Бюджетний кодекс України] of 8 July 2010, published in Vidomosti Verkhovnoyi Rady Ukrayiny, 2010, No.No. 50-51, St. 572, Article 40.

therefore burdensome'.[80] This minimum threshold for triggering the approval requirements for transactions with interest in JSCs was subsequently relaxed in 2017: according to the new amendments, approval is required only for transactions with interest representing more than 1 per cent of the company's assets based on its annual report.[81]

The rules identifying interested persons were also changed, as explained in Table 2.

[80] Enriques L, 'Related Party Transactions: Policy Options and Real-World Challenges (with a Critique of the European Commission Proposal)', 13.

[81] Law of Ukraine 'On Amending Certain Legislative Acts on the Improvement of Corporate Governance in Joint Stock Companies' [Закон України 'Про внесення змін до деяких законодавчих актів щодо підвищення рівня корпоративного управління в акціонерних товариствах'] of 23 March 2017, published in Vidomosti Verkhovnoyi Rady Ukrayiny, 2017, No. 25, St. 289.

Interested persons	Category 1	Category 2	Category 3	Category 4
Before 1 May 2016	company officers and their family members	shareholders with 25%> share capital and their family members	legal entity that is owned 25%> by company officers and/or their family members	no regulation
After 1 May 2016	company officers and *affiliated persons*, who besides family members now also include legal entities controlled by company officers and/or their family members	shareholders with 25%> share capital and *affiliated persons*, who besides family members also include: (1) legal entities controlled by shareholders and/or their family members, and (2) where the shareholder is a legal entity: affiliated persons also include: (a) a legal entity controlling the shareholder; (b) a legal entity under control of a third-party legal entity that also controls the shareholder[82]	legal entity *where persons in Category 1 or Category 2 are company officers*	*persons identified as such in the company's articles of association*[83]

Table 2. Categories of interested persons before and after the enactment of the 2015 amendments to the JSC Law of Ukraine.

As Table 2 shows, the list of interested persons has mostly been extended, except in Category 3, which has been narrowed. Before the amendments, this category included legal entities where 25 per cent or more of the shares were held by company officers and/or their family members. Now this category is not determined by ownership, but rather by control, as

[82] One exception, as mentioned previously, is that a shareholder that holds 100 per cent of a company's share capital is not regarded as an interested person relative to that company for the purposes of the provisions on transactions with interest.

[83] This new element introduced in the 2015 amendments offers greater flexibility to participants in legal relationships.

differentiated by Berle and Means:[84] legal entities are regarded as interested persons if any of their company officers fall under Categories 1 and/or 2. However, legal entities in which company officers and/or their relatives own shares have not completely disappeared from the text of the law, and now fall under Category 1, under the umbrella of persons affiliated to company officers and/or their family members, i.e. legal entities controlled by them.[85] Taking into account the definition of controlling block of securities as used in the JSC Law of Ukraine, it can unequivocally be stated that the JSC Law of Ukraine interprets control foremost through ownership of an entity's share capital.[86] Therefore, a legal entity in which a company officer is a shareholder will inevitably be regarded as an interested person if the shareholder owns more than 50 per cent of the share capital[87] or exercises control in another manner, e.g. through controlling agreements, as opposed to the previous regulation, where the deciding factor was ownership of 25 per cent of the company's share capital.

The new amendments preserve the conditions that interested persons had to meet for transitions to be qualified as transactions with interest and the approval procedure for such transactions. The principal differences between the earlier regulation and the new one are: (a) previously, an interested person was required to notify the company about the transaction within three days after the interest arose, whereas now the specific deadline for notification has been replaced by a duty to notify the interest 'in advance'; (b) previously, no rules existed establishing what information had to be disclosed to management, whereas now the law dictates that the interested person must inform management of the interest and submit the draft agreement; (c) a new element in the law is the requirement of an independent evaluation of the transaction, with the help of an independent valuer; (d) most importantly, under the present rules, if the general meeting of shareholders decides on whether or not to approve a transaction with interest, the issue is decided by a majority of the non-interested shareholders, whereas the previous regulation referred to the general procedure of voting under which resolutions were considered to have been adopted if supported by a majority of the shareholders present at the meeting (including both interested and non-interested shareholders). However, the rule described at (d) was relaxed slightly in 2017, allowing non-listed JSCs to abandon the requirement.[88]

The consequences of non-compliance with the procedure have also been modified slightly. As already noted above, transactions with interest that did not comply with the procedural requirements could be invalidated in the old situation. Under the current version of the law, a transaction is regarded as valid only if the procedure has been followed. This raises the question of whether invalidation may be sought if the procedure is not followed. This issue is discussed in Chapter 5.

While the right of shareholders to challenge transactions with interest, including RPTs, that are not compliant with the procedure is studied in Chapter 5, the amendments are clear about additional appraisal rights of shareholders. They grant shareholders the right to demand that the company repurchase their shares if they vote against a transaction with interest at the general

[84] This distinction between ownership and control was famously made by Berle and Means, who were among the first to notice the separation between owners, who are interested in successful management of the company, and the persons who have power over an enterprise (Berle A and Means G, *The Modern Corporation and Private Property* (McMillian, New York 1932)).
[85] JSC Law of Ukraine, Articles 1(1), 71(2).
[86] Ibid, Article 1(6), 1(7).
[87] In some cases a shareholder may hold fewer shares, but for economic and psychological reasons exercise actual control over the enterprise (Economic dictionary [Экономический словарь], available at: http://abc.informbureau.com/html/eiiodieuiue_iaeao_aeoee.html <http://abc.informbureau.com/html/eiiodieuiue_iaeao_aeoee.html>, accessed on 11 August 2016).
[88] Law of Ukraine 'On Amending Certain Legislative Acts on the Improvement of Corporate Governance in Joint Stock Companies' [Закон України 'Про внесення змін до деяких законодавчих актів щодо підвищення рівня корпоративного управління в акціонерних товариствах'].

meeting of shareholders.[89] Although shareholders will sometimes use this right when the company is in distress, and so make the situation worse, abuse comes more frequently from the company in trying to set the price of repurchase as low as possible.

Some critical comments have been expressed with regard to the transition provisions for the 2015 amendments to the JSC Law of Ukraine. The amendments make little mention of the validity of transactions with interest that were approved before the amendments were enacted. While the most recent amendments similarly make no provision for the fate of transactions with interest that had been given supervisory board approval, as fundamental transactions (between 10 and 25 per cent of the company's assets), before the enactment of the 2015 amendments,[90] arguably these are also subject to approval by the general meeting of shareholders under the new rules.[91]

In addition to the procedural requirements laid down in the JSC Law of Ukraine and the negative legal consequences resulting from non-compliance with the established procedure, the ex post disclosure obligations for public JSCs have also been changed to oblige public JSCs to inform the NSSMC about all approved transactions with interest on a quarterly and annual basis.[92] The company's notifications must include, among other details, the following information: the date of the decision approving the transaction, the material terms of the transaction, the subject of the contract, the market value of the contracted goods, the correlation between the market value and the company's assets, and the voting results, with an indication of how many votes were cast 'for' and 'against'.[93] A company has a duty to disclose as soon as the company, represented by the supervisory body or the general meeting of shareholders, decides on whether or not to approve a transaction with interest, but no earlier.

The most recent amendments to Article 71 of the JSC Law of Ukraine were adopted by the Parliament of Ukraine on 20 September 2019.[94] The amendments changed the definition of a transaction with interest. Previously, a transaction with interest arose if an interested person was a company officer in a legal entity that was party to a transaction. Although the definition of an interested person has not changed, and Category 3 of interested persons remains in place, as discussed above, the amendments mean that a transaction with interest now occurs if an interested person controls a legal entity that enters into a transaction with the company.

Furthermore, these changes give greater power to the general meeting of shareholders for approving transactions with interest. The general meeting will have the authority to approve transactions representing 10 per cent or more of the company's assets, instead of 'more than 10 per cent of the company assets'. Additionally, the Law grants minority shareholders the power to initiate invalidation of transactions with interest formed on non-market terms, even if the approval procedure has been followed, and introduces joint liability of the interested person and the person who violated the requirements. One goal of these new changes is to improve Ukraine's Doing Business rating.

[89] JSC Law of Ukraine, Article 68(1).
[90] Ibid, Article 71(11).
[91] Ibid, Article 71(7).
[92] Regulation on Disclosure of Information by Emitents of Securities, approved by the decision of the National Securities and Stock Market Commission of Ukraine, No. 2826, of 3 December 2013 [Положення про розкриття інформації емітентами цінних паперів, затверджене рішенням Національної комісії з цінних паперів та фондового ринку № 2826 від 3 грудня 2013 року], published in Ofitsiynyi visnyk Ukrayiny, 2013, No. 100, St. 3699, para. 1, s. 3, chapter III, para. 1, s. 4, ch. III.
[93] Ibid, para. 5, s. 1, ch. III.
[94] Law of Ukraine 'On Amending Certain Legislative Acts of Ukraine regarding the Stimulation of Investment Activity in Ukraine' [Закон України 'Про внесення змін до деяких законодавчих актів України щодо стимулювання інвестиційної діяльності в Україні'] of 20 September 2019, published in Golos Ukrayiny, 2019, No. 197.

1.3.2. Regulation of RPTs in private companies in Ukraine

Before the adoption of the JSC Law of Ukraine, the formation and functioning of JSCs was regulated similarly to LLCs, with the Law of Ukraine 'On Economic Companies' serving as the principal instrument governing corporate relationships involving economic companies. Similarly to JSCs, RPTs in LLCs are also subject to regulation by the general provisions of the 2003 CCU on legal entities that deprive shareholders of the right to vote on whether or not to approve transactions between a shareholder and the company at the general meeting of shareholders.[95] However, unlike JSCs, which in 2008 received their own separate legislation, LLCs remained within the scope of the Law of Ukraine 'On Economic Companies' until the enactment of the LLC Law of Ukraine.[96]

LLCs had not been the focus of the legislature's attention for many years. Whatever steps the Ukrainian Parliament had taken with regard to LLCs were mostly concerned with such areas as minimum share capital for companies (changing gradually from one hundred times the minimum wage, to one minimum wage, followed lastly by the abolition of all requirements for the amount of share capital, allowing creation of 'one-UAH' companies[97]) and the maximum number of shareholders (from 10 to 100 persons[98]). However, comprehensive regulation remained lacking, as evidenced by the example of JSCs. Still, several legislative attempts were made to introduce more detailed rules for such companies, including special provisions on RPTs.

The Draft LLC Law of Ukraine had been before Ukraine's Parliament since 13 May 2016. At first it contained rules for RPTs or, to use the Draft Law's terminology, 'transactions with interest'. Provisions in the Draft Law equated transactions with interest and RPTs as being based on the same idea: transactions with interest are formed between a company and an interested person.[99] The JSC Law of Ukraine uses a broader definition for transactions with interest than for RPTs: an interested person can either be a party to the transaction, or act in a different capacity, for instance as a representative or a broker for the party in the transaction, or benefit from the transaction. The later version of the Draft LLC Law removed the detailed provisions for transactions with interest. In the finalized LLC Law of Ukraine of 6 February 2018, the provisions on transactions with interest are entirely optional.[100]

By nature, LLCs are private companies, usually owned by one or several shareholders and with a minimum amount of share capital, as opposed to JSCs, especially listed ones, which might have hundreds of minority shareholders.[101] JSCs therefore play a more public role than LLCs, as evidenced, for example, by the difference in share capital requirements: forming a JSC requires a share capital corresponding to 1250 times the minimum wage,[102] whereas (as explained above) no requirements currently exist for the amount of share capital in LLCs, as long as the company has share capital, even UAH 1. Due to the said difference, within this work JSCs are often referred to as public companies, while the concept 'private company' is used to mean LLCs. The danger accompanying the functioning of listed public companies derives from the fact that their shares can be acquired by the public more easily than shares in private companies, and so outside

[95] CCU, Article 98(3).
[96] LLC Law of Ukraine.
[97] Law of Ukraine 'On Economic Companies' [Закон України 'Про господарські товариства'], Article 52.
[98] Ibid, Article 50(2).
[99] Draft Law of Ukraine 'On Limited and Additional Liability Companies' [Проект Закону України 'Про товариства з обмеженою та додатковою відповідальністю'], available at: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=59093, accessed on 27 December 2018, Article 46(1).
[100] LLC Law of Ukraine, Article 45(2).
[101] The JSC 'Ukrayinskyi Naftogazovyi Instytut' is an example of a company with numerous minority shareholders, numbering 1740 in total: natural persons, according to the company's disclosure in 2017 (publicly available at http://smida.gov.ua/db/emitent/year/xml/showform/117368/130/templ, accessed on 2 September 2019).
[102] JSC Law of Ukraine, Article 14(1).

investors buying small numbers of shares in listed companies and expecting future income in the form of dividends could suffer as a result of wrongdoings by blockholders or controlling shareholders.[103] While this also makes sense for large private companies with transferable shares, in which outside shareholders can also participate, the question remains whether private companies should be subject to the same strict rules as listed public companies. Introducing margins of regulation serving as thresholds or triggers for rules on transactions with interest would, therefore, be a plausible solution for purely private entities. This is what was done with the 2015 amendments to the JSC Law of Ukraine, when transactions with interest representing less than 100 times the minimum wage (subsequently changed to 1 per cent of the company's assets) were excluded from the regulation. This provision was also included in an earlier version of the Draft LLC Law of Ukraine, though with higher margins. As the authors of the Draft LLC Law of Ukraine had originally suggested, transactions with interest should not be subject to the rules on such transactions either if they involve amounts of less than 200 times the minimum wage, provided that this is also less than 10 per cent of the company's assets, or if they exceed 10 per cent of the company's assets but represent less than 50 times the minimum wage.[104] In addition, an earlier Draft LLC Law of Ukraine expanded the rules on transactions with interest to include all transactions regardless of the amount if they constituted a loan, financial support, pledge or surety to a company officer or affiliated person.[105] The legislators wished to concentrate the rules on transactions with interest on the types of contracts that pose the greatest risk. Ultimately, as can been seen from the Law currently in force, all these margins were abandoned and the rules on transactions with interest were made entirely optional, subject to regulation by each company's own articles of association.[106]

While some procedural safeguards, as described above, may seem useful for private companies with freely transferable shares and minority shareholders, whose rights could be violated by blockholders or management, introducing disclosure requirements for private companies in the same way as for public companies seems a bridge too far.[107] While public companies regularly report to the NSSMC, it seems unnatural for private companies, a more flexible form of business organisation, to be subject to the same level of disclosure. This strategy-related issue is discussed in more detail in Chapter 5 in this thesis.

Last but not least, the Law of Ukraine 'On Economic Companies', which came in for criticism for not imposing sufficient regulation on private companies, did in fact provide a remedy for minority shareholders who disagreed with their company's policy on RPTs. This remedy was the right to exit, which, if exercised, triggered the company's duty to pay out assets proportionately to the exiting shareholder's share after the financial statements were approved, but within twelve months after the exit date.[108] This right was attacked heavily in Ukraine's academic circles, especially for its unconditional nature.[109] The LLC Law of Ukraine then modified the marginalism of the right to exit by allowing unconditional exit only for shareholders holding less than 50 per cent of the company's share capital.[110]

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[103] Hopt KJ, 'Comparative Corporate Governance: the State of Art and International Regulation' in Fleckner AM and Hopt KJ (eds), *Comparative Corporate Governance: A Functional and International Analysis* (Cambridge University Press 2013), 64.
[104] Draft Law of Ukraine 'On Limited and Additional Liability Companies' [Проект Закону України 'Про товариства з обмеженою та додатковою відповідальністю'], Article 46(3).
[105] Ibid, Article 46(3).
[106] LLC Law of Ukraine, Article 45(2, 3).
[107] Bartman SM, 'Of Groups and Ostriches' (2007) 4 European Company Law 190, 190.
[108] Law of Ukraine 'On Economic Companies' [Закон України 'Про господарські товариства'], Article 54.
[109] Кібенко О and Залеська А, 'Вихід учасника із товариства з обмеженою відповідальністю: проблемні питання та практичні рекомендації' [2012] Українське комерційне право 20, 29.
[110] LLC Law of Ukraine, Article 24(2).

1.4. RESEARCH QUESTIONS AND METHODOLOGY

Company law in Ukraine already features rules governing RPTs in JSCs (public companies) and optional regulation for LLCs (private companies). Despite the availability of procedural safeguards in those legal entities, minority shareholders and creditors are far from being regarded as sufficiently protected from the wrongdoings of blockholders and managers. Section 1.2 showed that ownership in companies in Ukraine is concentrated, and the risk of abuse of rights by private blockholders or by the state is real. At the same time, in the past Ukrainian companies faced the possibility of corporate raiding and abusive suits by minority shareholders. It is vital to take these circumstances into account when designing the most appropriate strategy for Ukrainian corporate law as it transitions to implementing EU law. The clearest recent example of the problems with RPTs in Ukraine is the case of Privatbank JSC, one of Ukraine's systemically important banks.[111] Privatbank was nationalized by the state in December 2016. Soon afterwards, the state capitalized the bank with UAH 116.8 billion, followed by an additional UAH 38.6 billion. Overall, the state was required to infuse the bank with more than UAH 155 billion (more than EUR 5 billion) after the change of ownership.[112] The reason for the nationalization and for the subsequent capital infusions was the preceding withdrawal of funds en masse through loan agreements to the companies indirectly controlled by the bank's former shareholders, Ihor Kolomoiskiy and Hennadiy Boholiubov. Before its nationalization, Privatbank restructured its loan portfolio by identifying 30 debtor companies that owed the bank more than UAH 110 billion; however, journalists were unsuccessful in uncovering the shareholders of the companies and their executives.[113] According to an independent investigation by the OCCPR, the scheme was centered around a series of insider loans to companies controlled by Kolomoiskiy and Boholiubov. The researchers alleged that '*in most instances, financial records show that Ukrainian shell companies borrowed money from Privatbank in Ukraine, transferred it to Cyprus branch accounts held by offshore businesses, many of which were registered in the British Virgin Islands (BVI)*'.[114] This case is an example of how blockholders are able to tunnel resources from their companies at the expense of other stakeholders.

A similar case of large-scale tunnelling occurred at VAB Bank JSC. That bank was declared insolvent by the National Bank of Ukraine in November 2014, and its licence was revoked in March 2015.[115] In the criminal proceedings concerning theft and corporate abuse, it was established, among other findings, that on 14 November 2014 the bank had repaid UAH 110

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[111] 'The National Bank of Ukraine Designates 14 Banks as Systemically Important [Національний банк визначив 14 банків системно важливими]', website of the National Bank of Ukraine: https://bankgovua/news/all/natsionalniy-bank-viznachiv-14-bankiv-sistemno-vajlivimi, accessed on 4 September 2019.

[112] Зануда А, 'How Privatbank Became the Theme of the Elections and What Will happen Afterwards [Як ПриватБанк став темою виборів і що буде після них]' BBC Ukraine (16 April 2019): https://wwwbbccom/ukrainian/features-47913100, accessed on 4 September 2019.

[113] 'Before the Nationalization billions of hryvnias were withdrawn from Privatbank - "Schemes". VIDEO [Перед націоналізацією з "Приватбанку" вивели десятки мільярдів гривень, - "Схеми". ВІДЕО]' CensorNET (12 May 2017): https://censornetua/ua/video_news/439605/pered_natsionalizatsiyeyu_z_pryvatbanku_vyvely_desyatky_milyardiv_gryven_shemy_video, accessed on 4 September 2019.

[114] Stack G, 'Oligarchs Weaponized Cyprus Branch of Ukraine's Largest Bank to Send $5.5 Billion Abroad' OCCPR [19 April 2019): https://wwwoccrporg/en/investigations/oligarchs-weaponized-cyprus-eranch-of-ukraines-largest-bank-to-send-5-billion-abroad, accessed on 4 September 2019.

[115] 'The National Bank Greets the Strengthening of Work of Law Enforcement Authorities about Making the Bank's Owners and Top-managers Liable [Національний банк вітає посилення роботи правоохоронних органів щодо притягнення до відповідальності власників та топ-менеджерів банків]' Web-site of the National Bank of Ukraine (12122016): https://bankgovua/control/uk/publish/article?art_id=40777652&cat_id=55838, accessed on 14 September 2019.

million to JSC 'Trostianetskiy miasokombinat' and UAH 266,455,000 to JSC 'ShP 'Svitanok' as advance payments on deposit sums, despite being prohibited at the time by the National Bank from paying advances on repayments to related parties.[116] While VAB Bank was not as large as Privatbank, these malpractices still led to violations against the bank's clients and investors.

The achievements of theoretical company law, the practice of company law and governance from the jurisdictions in the research focus and the current economic situation in Ukraine serve as important benchmarks for the present research. The inter-jurisdictional comparison of the doctrines, strategies, statutory and judicial approaches that exist in the studied jurisdictions will allow a better understanding of Ukrainian laws and lead to suggested solutions that, if implemented properly, could be useful in balancing the interests of the various groups of stakeholders as far as RPTs are concerned. The solutions will be designed with a view to making regulation more efficient from a cost-benefit perspective. The study will also examine whether different rules should be adopted for RPTs within and outside corporate groups. If RPTs require special treatment in corporate groups, proper rules should be designed in accordance with the requirements of the EU-Ukraine Association Agreement and relevant European standards, and should be made separately for corporate groups and companies that do not have the characteristics of a group. Therefore, the following research question follows from the foregoing:

What solutions can the laws of Germany, Poland, the Netherlands and the EU offer to help overcome the problems of RPTs within and outside corporate groups in Ukraine and make the current regulation in Ukraine more efficient?

Besides EU law and the company laws of Ukraine, Poland, Germany and the Netherlands, this research also examines a variety of articles, expert reports and proposals. The existing legislation of Ukraine, new legislative proposals and draft laws put forward by government authorities, the people's representatives and non-governmental organizations are analyzed to identify how they correspond to European standards and best practices. The economic and social risks accompanying the introduction of new rules for non-listed and/or listed companies are also examined, as is the background to corporate enforcement in Ukraine.

One of the challenges that this research faces is that Ukrainian company law is now in a state of flux. In 2017, two bills implementing EU Directives were adopted: namely the bill on squeeze-out and sell-out procedures (implementing the Takeover Directive)[117] and the bill introducing new disclosure requirements (implementing, among others, the Transparency Directive).[118] On 6 January 2018 the LLC Law of Ukraine was adopted and subsequently enacted on 17 June 2018. The most recent amendments concerning RPTs in public companies were adopted on 20 September 2019. Further changes are expected to follow in the very near future.

Based on the key research question as outlined above, the scope of this research also includes the following secondary research questions:

What is the meaning of RPTs and how do RPTs relate to other associated terms?

What standards are used in Poland, Germany and the Netherlands to tackle the problems of RPTs? Which of those standards should be borrowed by Ukraine?

How are corporate groups regulated in Poland, Germany and the Netherlands?

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[116] *Decision of 15 August 2018* Case No 760/21074/18 (Solomianskiy District Court of Kyiv).

[117] Law of Ukraine 'On Amending Certain Legislative Acts on the Improvement of Corporate Governance in Joint Stock Companies' [Закон України 'Про внесення змін до деяких законодавчих актів щодо підвищення рівня корпоративного управління в акціонерних товариствах'].

[118] Law of Ukraine 'On Amending Certain Legislative Acts on the Simplification of Business and Attraction of Investments by the Issuers of Securities' [Закон України 'Про внесення змін до деяких законодавчих актів України щодо спрощення ведення бізнесу та залучення інвестицій емітентами цінних паперів'] of 16 November 2017, available at: http://zakon2.rada.gov.ua/laws/show/2210-viii, accessed on 27 December 2018.

Under what circumstances could the German, Polish and Dutch strategies for dealing with RPTs be successfully applied in Ukraine?

Do any non-classical strategies exist that fall outside the groups of strategies for dealing with RPTs that are described in literature, and that would be useful to borrow for Ukrainian company law?

Should regulation be provided not only for RPTs, but also for broader 'conflicted' transactions between actors surrounding companies (for example transactions between a company's subsidiary and third parties)?

What should be the scope of the rules for RPTs in Ukraine: (1) all companies limited by shares (public and private companies), (2) only public companies, (3) only listed public companies, or even (4) large companies and large groups even though they are not listed, given that their business endeavours also have a major societal impact ('national champions')?[119]

The study was mostly conducted in Ukraine, for the examination of literature, legislation and law-enforcement materials, and in the Netherlands as part of an external PhD thesis. However, the fine details of Polish, German, and Dutch company laws, relevant scientific materials and other sources on the topic were studied at the Max Planck Institute for Comparative and International Private Law, where the research goals defined were also achieved.

In addition, the results of a specifically designed Google Forms survey among legal experts and practitioners enriched the research with opinions on how to improve the regulation of RPTs and corporate groups in Ukraine. Respondents were selected according to public information about top corporate law firms. Overall, 112 requests to complete the survey were sent from iromashchenko@gmail.com to email addresses found in different Internet sources, and 19 recipients completed the survey anonymously. The questions and answers are given in the appendix to this thesis. The questionnaire placed less emphasis on data and facts, and was instead an opinion poll. Its design was modelled after public consultations as frequently conducted by the European Commission on various aspects of company law reform in recent years. The EU has a long record of similar actions. The questionnaire, therefore, served as a means to seek opinions and as an auxiliary tool to better understand the existing issues of RPTs and corporate groups in Ukraine.

1.5. NATIONAL JURISDICTIONS IN FOCUS

1.5.1. Introduction

Although Ukraine possesses a legislative framework specifically designed to deal with transactions with interest, including RPTs, in public companies, this does not mean that it is unnecessary to: (i) critically assess the current legislative provisions on RPTs and provide suggestions for improvement; (ii) develop alternative RPT-related strategies that are not clearly articulated in Ukrainian legislation; (iii) borrow effective techniques from the laws of other states. Considering that Ukraine is seeking integration into the EU, it seems more practical to look at the experiences of the relevant EU Member States rather than copying legal rules from other

[119] Cofferati Report of the Committee of Legal Affairs, 12 May 2015, accepted by the Legal Affairs Committee on 7 May 2015, described in Hopt KJ, 'Corporate Governance in Europe: A Critical Review of the European Commission's Initiatives on Corporate Law and Corporate Governance' European Corporate Governance Institute (ECGI) - Law Working Paper No 296/2015. Available at SSRN: https://ssrncom/abstract=2644156 or http://dxdoiorg/102139/ssrn2644156, accessed on 5 December 2018, 14.

jurisdictions. Instead of taking one country as an example for legal transplantation, it would seem wiser to adopt specific models from several countries on a case-by-case basis.[120] The Member States that have been chosen for detailed study are Poland, Germany, and the Netherlands. The following section discusses corporate ownership as one of the major factors influencing any decision to transplant models from those jurisdictions.

1.5.2. Background to corporate ownership in Germany, Poland and the Netherlands

It is important to be aware from the outset that each of the jurisdictions studied developed in unique circumstances, and that those circumstances shaped their respective legal systems and economic situations. As a result, although all three countries belong to the civil-law tradition of Continental Europe, some of the features of their corporate governance systems are different. The focus here is on the data that is held to be of significance for regulation of RPTs and corporate groups.

The economies of Continental Europe are characterized by increasingly concentrated blockholdings.[121] Moreover, research by Rafael La Porta and others shows that ownership concentration is not confined to Europe and rich countries, but is also pronounced in developing countries with poor protection of minority shareholders.[122] Of the countries in focus for the present research, Germany was reported to have the highest levels of ownership concentration in listed companies, with the average shareholding of the largest blockholder at 57 per cent.[123] Although this figure dates from 2001, the tendency towards large blockholders in big companies emerged much earlier.

Tracking the origins of corporate governance in Germany requires a brief excursion to the beginning of the 20th century. According to Caroline Fohlin, the country had more than 5,000 stock companies (AGs) before World War I (as of 1902), including some important enterprises with dispersed managerial ownership.[124] After the war, AGs underwent a process of expansion, which, however, did not stop the emergence of more than new 19,000 AGs between 1919 and 1923.[125] Meanwhile, small enterprises also grew in number: by 1925 they constituted 90 per cent of companies.[126] The concentration processes continued until the mid-1930s, when the Nazi regime heavily centralized governance mechanisms. As a result, stock companies converted en masse into private companies, returning to similar numbers as before World War I.[127] The decline of stock companies ended after World War II, and by 1957 the 100 largest enterprises included 87 public companies (AGs) and 9 private companies (GmbHs).[128] In 2002, the 100 largest enterprises comprised 74 AGs and 7 GmbHs.[129] However, the role of listed AGs is not as large as it might initially seem: in 1997 the capitalization of the German stock market constituted 31.4 per cent of

[120] Radwan A, Nadzon A and Zdiruk V, 19-24.
[121] Becht M and Röell A, 'Blockholdings in Europe: An International Comparison' (1999) 43 European Economic Review 1049, 1055.
[122] La Porta R, Lopez-de-Silanes F and Shleifer A, 'Corporate Ownership around the World' (1999) 54 The Journal of Finance 471, 511.
[123] Tamowicz P, 'Corporate Governance in Poland' in Mallin CA (ed), *Handbook on International Corporate Governance: Country Analyses* (Edward Elgar Publishing 2011), 95.
[124] Fohlin C, 'The History of Corporate Ownership and Control in Germany' in Morck RK (ed), *A History of Corporate Governance around the World: Family Business Groups to Professional Managers* (University of Chicago Press 2007), 227-228.
[125] Ibid, 229.
[126] Ibid, 229.
[127] Ibid, 230.
[128] Ibid, 231.
[129] Von Werder A and Talaulicar T, 'Corporate Governance Developments in Germany' in Mallin CA (ed), *Handbook on International Corporate Governance: Country Analyses* (Edward Elgar Publishing 2011), 30.

the country's gross domestic product.[130] This means that the balance of the national income was produced by non-listed AGs, GmbHs and individuals.

On the subject of dominant ownership holders, banks have always been viewed as exercising significant influence on German companies.[131] This is a fair statement from a comparative perspective. For instance, compared with the Netherlands, where in 1995 banks were reported to hold 2 per cent of all shares, in Germany at that same time banks were among the most influential institutional investors, owning around 10 per cent of the total share capital in companies.[132] Yet it is also apparent that a share ownership of 10 per cent is not crucial in terms of corporate decision-making. Historically, German banks have avoided acquiring large shareholdings in stock companies.[133] In the 1980s and 1990s, equity stakes in excess of 5 per cent were held by banks and insurance companies only in companies without a majority shareholder.[134] Banks traditionally exercised control over companies through other means, namely proxy voting at general meetings, membership of supervisory boards and cross-shareholdings.[135]

However, despite the prevailing impression of the banks' power, a noticeable trend in equity ownership and participation in corporate bodies by banks has emerged since the beginning of the 1990s. Their equity ownership in listed companies went down from 12-13 per cent to 9 per cent in 2003,[136] and their representation on the supervisory boards of forty large companies declined from 44 to 23 per cent during 1992-1999.[137] In reaction to these developments, Tobias Tröger warned that by leaving their positions, banks were causing an unprecedented void due to the lack of firm-specific oversight that they had carried out previously.[138] At the same time, however, it is important not to overstate the positive effect of oversight by banks, considering the possibility of misgoverned banks and their ability to lend money without proper economic reasoning.[139]

While the banks' power seems to be in decline, other types of shareholders have been shown to hold significant stakes in German companies. According to data from 2001, non-financial firms were the largest shareholders in all types of companies (with the average share block in German companies amounting to 60.25 per cent).[140] The median stakes of other shareholders (financial enterprises, individuals, the state and non-German shareholders) are much smaller: foreign shareholders for example were said to hold on average 9.61 per cent, whereas the balance of the share ownership was largely dispersed (averaging 20.65 per cent).[141] Earlier

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[130] Jurgens U, Naumann K and Rupp J, 'Shareholder Value in an Adverse Environment: the German Case' in Clarke T (ed), *Corporate Governance: Critical Perspectives on Business and Management* (Routledge 2005), 143.
[131] Ibid, 141; Morck RK and Steier L, 'The Global History of Corporate Governance: An Introduction' in Morck RK (ed), *A History of Corporate Governance around the World: Family Business Groups to Professional Managers* (University of Chicago Press 2007), 30.
[132] Bolt W and Peeters M, 'Corporate governance in the Netherlands' in Balling M, Hennessy E and O'Brien R (eds), *Corporate Governance, Financial Markets and Global Convergence* (Springer 1998), 95.
[133] Fohlin C, 239.
[134] Ibid, 244.
[135] Ibid, 271; Becht M and Böhmer E, 'Ownership and Voting Power in Germany' in Barca F and Becht M (eds), *The Control of Corporate Europe* (Oxford University Press 2001), 142.
[136] Ringe W-G, 'Changing Law and Ownership Patterns in Germany: Corporate Governance and the Erosion of Deutschland AG' in Hill JG and Thomas RS (eds), *Research Handbook on Shareholder Power* (Edward Elgar Publishing 2015), 428.
[137] Beyer J and Hassel A, 'The Effects of Convergence: Internationalization and the Changing Distribution of Net Value Added in Large German Firms' in Clarke T (ed), *Corporate Governance: Critical Perspectives on Business and Management* (Routledge 2005), 179.
[138] Tröger T, 'Germany's Reluctance to Regulate Related Party Transactions: An Industrial Organization Perspective' SAFE Working Paper No 202 Available at SSRN: https://ssrncom/abstract=3129300, accessed on 7 December 2018, 22-23.
[139] Morck RK and Steier L, 6.
[140] Fohlin C, 245.
[141] Ibid, 245.

evidence from 1996[142] and 1998[143] also confirms the dominance of non-financial enterprises. At the same time, the importance of families as shareholders remains undisputed.[144] In a sample of 275 companies with shares admitted to trade on regulated markets, in the period from 1998 to 2004, family-owned companies amounted to 37.5 per cent of the total.[145] The best performances were recorded where families exercised control through supervisory boards or acted as managers.[146] For non-listed companies, in a sample of 500 firms in 1997, families were identified as blockholders in 90.6 per cent of the cases.[147] Although these data might have been changed since when they were collected, the status of families as influential shareholders has continued throughout the years.

Like Germany, the Netherlands has a long stock market tradition.[148] It is the country where stock market development first originated, with the first public company ever established in 1602 and remaining in operation until approximately 1799 (Vereenigde Oostindische Compagnie, the Dutch East India Company).[149] In the 1990s the numbers of public companies in these two jurisdictions were comparable (2,164 in Germany in 1994 and 2,042 in the Netherlands in 1991).[150] However, despite the similarities, including the use of co-determination models to protect employees, the Dutch stock market has some unique features that are rarely found in other countries.

Historically, the public company (NV) was the first business form for companies in the Netherlands, and for a long time it was the only form available. In 1971, the private company (BV) was introduced, following the adoption of the EEC's First Company Law Directive in 1968; it led to the conversion of 90 per cent of existing NVs (nearly 50,000) into private companies.[151] In 2001, the Netherlands had around 2,000 NVs and more than 150,000 BVs.[152] Despite the large number of private firms, both listed and non-listed companies have had a considerable impact on the national economy, with a major role reserved for a list of large and dominant companies:[153] in 1993 three quarters of the 100 largest Dutch companies were listed, while the remainder were not, including some major agricultural firms.[154]

While a concentration of capital can be observed in the Netherlands, it is not as strong as in Germany. In 1995, institutional investors possessed, on average, 24 per cent of companies' shares (22 per cent of shares belonging to pension funds and insurance companies and 2 per cent belonging to banks), while foreign shareholders owned 37 per cent.[155] Statistical evidence from Germany from the same year suggests that banks held higher stakes in companies (around 10 per

[142] Prigge S, 'A Survey of German Corporate Governance' in Hopt K (ed), *Comparative Corporate Governance: The State of the Art and Emerging Research* (Oxford University Press 1998), 968.
[143] Jurgens U, Naumann K and Rupp J, 144.
[144] Ringe W-G, 407.
[145] Andres C, 'Large Shareholders and Firm Performance - An Empirical Examination of Founding-Family Ownership' (2008) 14 Journal of Corporate Finance 431, 431.
[146] Ibid, 444.
[147] Faccio M and Lang LH, 'The Ultimate Ownership of Western European Corporations' (2002) 65 Journal of Financial Economics 365, 374.
[148] Morck RK and Steier L, 38.
[149] De Jong A and Roell A, 'Financing and Control in the Netherlands: A Historical Perspective' in Morck RK (ed), *A History of Corporate Governance around the World: Family Business Groups to Professional Managers* (University of Chicago Press 2007), 468.
[150] Wymeersch E, 'A Status Report on Corporate Governance Rules and Practices in Some Continental European States' in Hopt K (ed), *Comparative Corporate Governance: The State of the Art and Emerging Research* (Oxford University Press 1998), 1049.
[151] De Jong A and others, 'Ownership and Control in the Netherlands' in Barca F and Becht M (eds), *The Control of Corporate Europe* (Oxford University Press 2001), 189.
[152] Ibid, 188.
[153] Ibid, 190.
[154] De Jong A and Roell A, 480.
[155] Bolt W and Peeters M, 95.

cent), yet foreign shareholders owned less capital (around 14 per cent). In addition, private companies in Germany held twice as much stock as in the Netherlands.[156]

Although the percentage of share capital owned by foreign investors in 1995 was already rather high in the Netherlands, testifying to the openness of the Dutch securities market and its internationalization, foreign ownership increased even further during the 1995-2005 period, reaching as high as 75 per cent, with most investors being US-based.[157] This trend was coupled with increasing dispersion at some listed companies.[158] Yet capital concentration has remained a feature of the Dutch capital market: in 2017, 18 out of 50 listed firms had majority shareholders.[159] The trend towards increased concentration also extended to shareholders owning between 10 and 30 per cent of all shares in 2005, reaching 19 and 36 per cent, respectively, in 2015.[160]

Poland is another jurisdiction with concentrated corporate ownership.[161] As a country with Germanic origins, Poland has a two-tier board system of corporate governance. Unlike Germany and the Netherlands, however, it does not have any co-determination laws.[162] The average size of shareholdings in listed companies in 2015, according to a number of sources, varied between 42 and 46 per cent, potentially exceeding 50 per cent with unveiled indirect ownership.[163] In various studies into listed companies during that period, scholars identified the following groups as the largest shareholders: members of companies' authorities, strategic investors, the state, individuals and financial institutions.[164]

More than in Germany and the Netherlands, in Poland the state has been one of the key market players since the end of Communist rule. Privatization processes in the 1990s led to the transfer of public wealth into private hands, and the state has gradually been losing its position as a key shareholder. Privatization moved in several directions: capital privatization (selling large blocks of shares to strategic investors), mass privatization (among the general public) and insider privatization (among managers and employees of enterprises).[165] By 1995, outside shareholders increased their shareholdings considerably, and in a sample of 38 companies at least 20 per cent of shares belonged to outside shareholders.[166] During the period between 1996 and 2000, the largest shareholders gradually acquired shares to obtain full control of their enterprises.[167] The privatization form that generated the most income was capital privatization, which concerned large units of stock, while SMEs were privatized mostly through insider schemes.[168] Although slow, capital privatization was not free of the same transparency issues and poor investor protection that also characterized mass privatization.[169] While direct sales of companies to investors were governed by legislation, the laws on mass privatization left many questions unanswered regarding the management of privatized companies.[170] As a result, companies formed under the latter procedure became concentrated without safeguarding investors' rights and maintaining

[156] Ibid, 95.
[157] Hermes N and Van Veen K, 'Corporate Governance in the Netherlands: Trends, Challenges and Opportunities (2008-2016)' in Kostyuk AN, Braendle U and Capizzi V (eds), *Corporate Governance: New Challenges and Opportunities* (Virtus Interpress 2017), 142.
[158] Ibid, 142.
[159] Ibid, 146.
[160] Ibid, 149.
[161] Bohdanowicz L, 'Corporate Governance in Poland' in Kostyuk AN, Braendle U and Capizzi V (eds), *Corporate Governance: New Challenges and Opportunities* (Virtus Interpress 2017), 250.
[162] Ibid, 260.
[163] Ibid, 250.
[164] Ibid, 250.
[165] Boeri T and Perasso G, 75.
[166] Tamowicz P, 93.
[167] Ibid, 93.
[168] Boeri T and Perasso G, 79, 83.
[169] Ibid, 83.
[170] Buxbaum RM and others, *European Economic and Business Law: Legal and Economic Analyses on Integration and Harmonization* (Walter de Gruyter 1996), 144.

transparency. In 2002 the average largest blockholding in Polish listed companies was 39-45 per cent.[171] Although the corresponding figures in Germany and the Netherlands at that time were higher (see Figure 2), as already discussed above, those markets became more dispersed soon afterwards due to a variety of factors, including internalization processes and changes in equity policies of institutional investors, including banks.

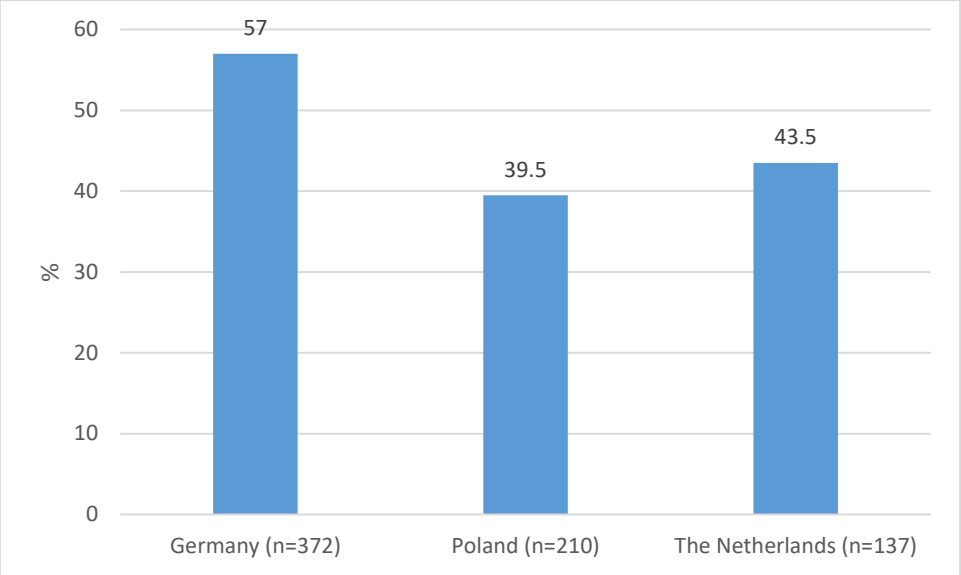

Figure 2. 1st largest blockholder in listed companies in Germany, Poland and the Netherlands (median in %).

Source: Tamowicz P, 'Corporate Governance in Poland' in Mallin CA (ed), Handbook on International Corporate Governance: Country Analyses (Edward Elgar Publishing 2011), 95.

The figures about the largest blockholders in Germany, Poland and the Netherlands described above primarily concern listed companies. In the case of Ukraine, corporate ownership in listed companies can be characterized only to a limited extent, due to the transition processes described in section 1.2 above.

Despite the differences in the development of the capital markets, corporate ownership in both Ukraine and the other jurisdictions discussed here is concentrated. As shown above, slow, non-transparent and destructive privatization processes led to an extremely high concentration of share capital in the largest Ukrainian companies. These processes influenced the development of market institutions and deterred foreign investors. Besides private entities and individuals that used various schemes and political influence to become controlling shareholders, the state has preserved its role as a major shareholder: in 2016, 19 of the 200 most profitable companies were state-owned.[172] Numerous state enterprises and state-owned shares in companies are still awaiting privatization. These characteristics of the Ukrainian economy must be considered in any analysis of the possibility for legal transplants from the other jurisdictions described.

1.5.3. Reasons for legal transplants from Germany, Poland, the Netherlands and the EU

The reason to analyse the laws and practices of Germany, Poland and the Netherlands centres not only on the fact that these countries belong to the tradition of civil law (as opposed to common

[171] Tamowicz P, 94-95.
[172] Головньов С and Віннічук Ю.

law countries, including the US and the UK) and the prevalence of concentrated ownership there, but also on their historical and geographical closeness, and their successes in creating market conditions and harmonizing national law with the requirements of EU law. The example of Poland is especially bright for Ukraine: in the 1990s Poland managed to introduce reforms and build a strong institutional framework for company law.[173] Researching the company laws of other countries does not mean that all their provisions are transplantable, however. As Kahn-Freund so accurately noted, any attempt to use a pattern of law outside the environment of its origin will always entail the risk of rejection.[174] Kahn-Freund saw this finding as an acknowledgment and restatement in modern terms of Montesquieu's warning: '*Les lois politiques et civiles de chaque nation … doivent etre tellement propres au peuple pour lequel elles sont faites, que c'est un grand hazard si celles d'une nation peuvent convenir a un autre*'.[175] Unlike Montesquieu, Berkowitz, Pistor & Richard base their theory not on conditions such as geography, culture or political regime, but rather on the notion that the law is a cognitive institution, meaning that transplants will work if they are adapted or if the population is familiar with the basic principles.[176] This means that, for borrowed company laws to be implemented, Ukrainian society must first be informed and properly prepared.

As Walton admitted with regard to German law, '*there was also the great body of law – the so-called modern Roman law, or Pandektenlehre, of which certainly it could not be said that it grew out of German consciousness or that it reflected national mind and character*'.[177] The authors of laws that are not directly related to the country's geography, history or culture are 'professional jurists': they possess the freedom to search for the most suitable law-making options and borrow them, and so adapt the country's legal system to the new circumstances. This is why it is true that borrowing plays a central part in the legal development and the adoption of rules, and although Ukraine has its own historical origins, its laws are not closely and intrinsically linked to its society.[178]

Before Socialism, the legal systems of Central and Eastern Europe were deeply influenced by Roman-Germanic law.[179] During the Socialist era, despite the declamations on the 'originality of socialist law', Western models were borrowed.[180] After a complete emancipation from the previous ideology, some authors automatically concluded that post-socialist law would return to the Roman-Germanic legal tradition from where it had originated.[181] It is logical, therefore, that Ukraine's efforts to align its legal system more closely to German and Dutch laws should reflect the essence of its legal tradition. In addition, some attempts were already made by Ukrainian scholars to incorporate the civil law rules on legal entities from German and Dutch law while they were drafting the CCU.[182] The CCU, despite its faults and the need for improvements, has been characterized as a useful document that has considerable potential for supporting Ukraine's market economy, making investment in Ukraine more attractive and allowing business to be conducted

[173] Dabrowski M, Gomulka S and Rostowski J, 'Whence Reform? A Critique of the Stiglitz Perspective' (2001) 4 The Journal of Policy Reform 291, 298.
[174] Kahn-Freund O, 'On Uses and Misuses of Comparative Law' (1974) 37 The Modern Law Review 1, 27.
[175] Freedland M, 'Otto Kahn-Freund (1900-1979)' in Beatson J and Zimmermann R (eds), *Jurists Uprooted German-speaking Émigré Lawyers in Twentieth-century Britain* (Oxford University Press 2004), 311-12.
[176] Berkowitz D, Pistor K and Richard J-F, 'The Transplant Effect' (2003) 51 The American Journal of Comparative Law 163, 189.
[177] Walton FP, 'The Historical School of Jurisprudence and Transplantations of Law' (1927) 9 Journal of Comparative Legislation and International Law 183, 183-184.
[178] Cairns JW, 'Watson, Walton, and the History of Legal Transplants' (2012) 41 Georgia Journal of International and Comparative Law 637, 695.
[179] Ajani G, 'By Chance and Prestige: Legal Transplants in Russia and Eastern Europe' (1995) 43 The American Journal of Comparative Law 93, 94.
[180] Ibid, 94.
[181] Zlatescu VD and Moroianu-ZIatescu I, 'Le Droit Roumain dans le Système Romano-Germanique' (1991) 43 Revue Internationale de Droit Comparé 829, 833.
[182] Єфименко А, 'Юридичні особи за проектом Цивільного кодексу України' [2002] Юридичний журнал 53.

with greater freedom.[183] In addition, the German and Dutch legal systems contain detailed rules on groups of companies, where RPTs are very common. The experiences of the selected countries are therefore worth investigating.

Besides the national jurisdictions named above, the study also investigates EU law from an evolutionary perspective. It looks closely at the recent amendments to the Shareholders' Rights Directive 2007/36/EC (SRD I) regarding RPTs[184] and the drafting process that led to that Directive in its current form. The relevance for Ukraine lies primarily in the fact that Ukraine's government needs to implement SRD I in line with the EU-Ukraine Association Agreement. Therefore, it is essential to understand the substance and the goals of the regulation underlying the Shareholders' Rights Directive 2017/828 (SRD II) in order to plan its further implementation in Ukraine.

1.6. RESEARCH OUTLINE

This thesis follows a structure where general issues are studied first, after which the focus gradually shifts to more specific topics. Chapter 1 is an introduction, outlining the background, the research question and the methodology. Chapters 2-4 contain explanations and discussions of relevant terminology, key terms and sources on the topic. Chapters 5-6 focus more on the existing strategies for RPTs, and in particular with a view to choosing the proper strategy for Ukraine. Chapter 7, lastly, defines the main research conclusions and recommendations.

This first chapter contains a brief overview of the research, presenting the main research ideas, questions and methods used. The theoretical, economic, historical and legislative backgrounds given here provide a brief overview of the existing problems, academic discussion and sources in focus. It also helps the reader to become acquainted with the thesis structure.

Chapter 2 discusses what constitutes a conflict of interest and what types of such conflicts occur. The chapter consists of three sections. It starts with an introduction to the theory of conflicts of interest and outlines the main areas where conflicts of interest may occur. The conflicts that have the greatest bearing on the present research are primarily those that relate to corporate law and governance, originating in ownership and control. The second section addresses conflicts of interest and fiduciary duties, discussing the essence of fiduciary duties, with a focus on managerial duties. It also touches on the shareholder duties that some of the jurisdictions covered by this study do not accept. The final section of this chapter highlights the types of conflicts of interest, including conflicts of interest in RPTs. The ways of distinguishing types of conflicts are found in EU law, national hard and soft laws, and in the court practices of some states. For instance, conflicts of interest are divided into direct and indirect conflicts, based on enforcement practice.

Whereas Chapter 2 focuses on the more general issues of conflicts of interest, Chapter 3 looks more specifically at RPTs, their main features and their regulation. Given that a proper understanding of RPTs in each of the studied jurisdictions hinges on the meaning of a related party, the first three sections discuss statutes, CGCs and other sources at length to explore the notion of a related party and how that notion is construed in various sources. Special emphasis is given to IAS 24, as a point of departure for analyzing the concept of a related party. Section 3.3 looks at Ukrainian statutes in more detail, for a complete picture of the regulation of RPTs in Ukraine. Section 3.4 moves away from the subjective element and shifts to the more substantive component of RPTs, by explaining the terms of RPTs. Section 3.5 elaborates on other constructions that may

[183] OECD, *Legal Issues with Regard to Business Operations and Investment in Ukraine* (OECD Publishing, 2004), 15.
[184] Directive 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement [2017] OJ L 132/1, 20.5.2017.

appear similar to RPTs, but nevertheless have features that prevent them from being equated with RPTs, require special regulation and are not covered by the scope of this study.

Chapter 4 considers the features of corporate groups to understand what constitutes a group, examining the legal and economic understanding of groups, how national and regional (i.e. EU law) statutes approach this topic, what challenges affiliation poses and what reasons exist to create corporate groups. After an analysis of how group issues are regulated in the various legal systems and whether group interest is recognized in the jurisdictions in focus, the study proceeds with the types and peculiarities of RPTs within corporate groups, i.e. intra-group transactions. Although some attention is given to the various types of intra-group transactions, this section elaborates more extensively on intra-group loans and cash pooling arrangements, as opposed to loans viewed as RPTs that have no group element. Intra-group transactions under Ukrainian law are analyzed relative to the German, Dutch and Polish legal systems.

Chapter 5 takes a closer look at trends sparked by a well-known handbook,[185] primarily discussing the need to develop strategies. As previously noted, RPTs are not always regarded as perfectly safe market instruments. The need for RPT-related strategies stems from the risks that are associated with RPTs and the accompanying opportunistic practices. This chapter considers the following main strategies: procedural safeguards for RPTs; information rights and disclosure of RPTs; standard strategies for RPTs. These strategies are studied by considering the particular aspects of the existence of corporate groups and highlighting experiences in Germany, Poland and the Netherlands. Ukrainian law is described and discussed with a view to identifying the strategies that it uses to tackle RPTs and analyzing whether any further change is needed. This chapter also explores other possible strategies that are not gathered under the umbrella of traditional strategies. Lastly, it examines the most recent amendments to EU law regarding RPTs, to give an understanding of how the draft of SRD II has evolved to reach its current form.

While Chapter 5 gives an overview of the strategies used in the EU, the national jurisdictions in focus and recognized more generally in corporate law theory, Chapter 6 is concerned with selecting the appropriate strategy or strategies for Ukraine. Section 6.1 explains what factors should be taken into account when selecting a strategy for RPTs, and Section 6.2 describes the implementation of RPT-related strategies in Ukraine. Section 6.3 then provides a selection of legal strategies for RPTs in Ukraine, taking into account the strategies discussed in the previous chapter, the factors that need to be considered for choosing a strategy and the relevant historical, economic and legal backgrounds in Ukraine and how they influence the choice of strategy.

Chapter 7 presents the research conclusions and recommendations, seeking to strike a balance between transaction freedom and overregulation for the protection of the various groups of stakeholders in Ukraine.

[185] Kraakman R and others, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd edn, Oxford University Press 2017), 145-169.