

IMPROVING LEGISLATION ON COUNTERACTION TO RAIDING AS A DIRECTION IN STRENGTHENING UKRAINE'S ECONOMIC SECURITY

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Abstract. The purpose of the paper is to analyze the current state of the legal framework for counteraction to raiding in Ukraine as the latter is a serious threat to national economy and also to detect the most problematic aspects in it. **Methodology.** This study has been carried out within the ontological framework of the postneoclassical science with application of monographic analysis method and the dialectical method. The use of these two methods allowed describing the current state of the legal framework for counteraction to raiding in Ukraine and to outline the most important directions in its further improvement. **Results** of the carried out research demonstrate that the legal framework that is supposed to complicate illegal and quasi legal takeovers of enterprises by raiders has been gradually improving in Ukraine. However, this improvement is fragmentary and not systemic, and this hinders planned and consistent activities of the state in the field of creation and development of the institutional economy. The current state of the legal framework for counteraction to raiding in Ukraine and the lack of uninterrupted systemic efforts on its improvement is the root cause why quasi raiding acts today are taking new shapes and forms. The most widely spread schemes of raiding takeovers of businesses and their assets in the recent years have been based on the unregulated intrusion in state registers and manipulations with the related records. Stronger protection of property rights against these manipulations with state register data should be based on application of the norms introduced by several Laws of Ukraine approved in the recent years. However, efficiency of these novelties in part of counteraction to raiding attacks would depend not that much on the official state of these changes but rather on their actual, practical implementation. **Practical implications.** Results of studying the state of legal framework for counteraction to raiding in Ukraine outline the directions for further improvement of the normative and legal basis for fighting raiding in Ukraine, in particular, for the prevention of strengthening quasi legal raiding and also for better systemicity of the related legal framework. **Value/originality.** Comprehensive analysis of the legal framework for counteraction to raiding in Ukraine, taking into account the latest raiding takeover schemes, has not been performed before, even though there have been studies dedicated to certain aspects of raiding (for example, violations of corporate rights). The obtained results do not only outline the directions for further improvement of the regulatory and legal basis for the fight against raiding in Ukraine but can also be applied in economic security studies of all levels (mega-, mezo- and microlevels namely).

Keywords: national economy; economic security; raiding; counteraction; legal framework; normative and legal documents; law; directions for improvement.

JEL Classification: G34, K11, P14.

1. Introduction

In Ukraine, raiding (which is usually understood as acquiring the ownership of the corporate rights of a legal body and/or its immovable property in an illegal way) is a complex, multifaceted phenomenon. Thus, fighting and counteracting it by no means can

be based on some narrow, simplified approaches. Raiding does not only cause significant damages to property owners but it also forces them to invest, with most seriousness, in the protection against possible raiding acts. Moreover, raiding damages the image of the economy overall and of the whole country. Situa-

tion around raiding in Ukraine has its negative impact on the international image of the country as it scares away potential investors. For this very reason, many Ukrainian and foreign investors do not even consider Ukraine as a potential destination of their investment flows. According to the International Property Rights Index (IPRI, by the Property Rights Alliance), in 2020 Ukraine was ranked 105th among 129 countries included in the overall ranking (back in 2019 it was 109th). And according to the Rule of Law Index 2020 (by the World Justice Project), the country was 72nd out of 128 countries on the list [1].

At the same time, Ukraine does not have any official statistical data on raiding acts as such. One can get a rough overview of the situation and the scale of this threat to national economy by looking at the numbers of registered criminal proceedings as per the "raiding" articles of the Criminal Code of Ukraine (articles 205-1, 206 and 206-2) in years and also the numbers of the related court cases. In 2019, Ukraine had 786 such criminal proceedings registered (back in 2018 there were 500 of those). As of August 2020 Ukraine already had 606 criminal cases registered. Looking at this data, we have all reasons to state that raiding takeovers in Ukraine are demonstrating quite an active dynamic of growth. At the same time, we need to keep in mind that this data is somewhat conditional since, as it was well noted in [2], first of all, not all pre-court investigations of the raiding takeovers are carried out mentioning the "raiding" articles of the Criminal Code. Quite often such investigations are taking place following the essential elements of the offences mentioned in other articles of the Criminal Code of Ukraine (for example, articles 187, 190, 191, 356, 357, 358, 365-2). Secondly, not all business persons contact law enforcement authorities when it comes to criminal acts since for some of them the top priority would be to make sure that the illegal registration act is cancelled. Still, even such adjusted and conditional data on the number of raiding takeovers in Ukraine is impressive.

As a rule, mass media sources tend to cover corporate takeovers in the context of law enforcement inefficiency in counteracting to raiding. In reality, the problem is much deeper and larger in scale. Improvements in corporate legislation should be only the first step in the fight against raiding. Only once true owners have an efficient legal mechanism at their disposal to protect themselves from raiding attacks, we can start talking about differentiating between "hostile acquisition" and "bandit takeover". Only then raiding can be "civilized" and legally enframed [3, p. 157].

Taking into account all the drawbacks of the national legislation, we still cannot say that Ukraine does not counteract to raiding. In the last 20 years we have witnessed certain attempts to fight hostile takeovers and mergers in the country, however, these attempts were not systemic at all and often poorly coordinated. This lack of systematicity and consistency in solving the problem which to date belongs to the most serious actual threats to the national economy, has led to the

situation when all legal means of protection against raiding are not really efficient, thus, their use does not deliver adequate results. At the same time, we need to note that improvement of legislation, in any area, is always a long-term process. Thus, it would be feasible to track the evolution of the national legislation on counteraction to raiding and to overview the results of this evolution, noting the key turning points that happened to become vector-defining.

2. Research methodology

This research study on the improvement of regulatory and legal provision for counteracting raiding in Ukraine has been carried out within the frameworks of the ontology of the postneoclassical science. The latter is characterized by the strengthened collective nature of the scientific cognitive activity, consensual scientific knowledge and methodological plurality. Fundamental grounds of ontology within postneoclassical science have predetermined the use of monographic and dialectical methods in this research.

The use of the monographic method has allowed us to perform the qualitative analysis of the provisions of law within the national legislation on counteraction to raiding and of their impact on the reduction of this phenomenon in scale as well as on legal enframing of the merger and acquisition processes.

Following the dialectical method, certain aspects of the national legislation on counteraction to raiding have been considered here in their interaction, interrelation and mutual development. Historical element of the dialectical method makes it possible to study the development of the national legislation on counteraction to raiding, while its logical element helps us understand the specificities in formation and functioning of the system of legal means for counteraction to raiding, its separate elements in their historical and contemporary dimensions.

3. Results

3.1. Historical aspect in the development of raiding counteraction legislation in Ukraine

Raiding is one of the most serious threats to economic security of Ukraine, thus counteraction to it must be organized strictly within the legal field which regulates economic relations between various subjects. The key aim of this counteraction is to "cut off" the most popular and widely used, and also seemingly legal, means of raiding takeovers.

Building of the legal system aimed to fight against raiding must stem from the legal definition of the very notion "raiding" since the latter is still absent in Ukraine's legislation. The notion "raiding" is being actively used in politics, and also by business representatives, journalists, researchers and practising lawyers in the situations concerning enterprise takeovers or their hostile acquisitions. However, when it comes to actually penalizing raiders, it turns out that there's nobody to penalize, as there are no such legally defined notions as "raiding" and "raider".

Interpretation of the notion "raiding" in Ukraine was first covered in the Declaration of the objectives and tasks of the state budget as of 2008, approved by the Decree of the Cabinet of Ministers of Ukraine as of 01.03.2007. In this document, raiding stands for alienation of state property outside the process of privatization; and also illegal takeover of an enterprise [4]. However, this definition is rather general, it does not fully reveal the essence of the phenomenon in question, either in its economic, or in its legal aspect. The state must fight against illegal takeovers of enterprises, but at the same time raiding can be often carried out using completely legal methods, even though the consequences would be equally negative as in the case with an illegal takeover.

Another attempt to define legally the notion "raiding" was related to the draft of the Law of Ukraine "On changes and amendments to several legal acts of Ukraine on the establishment of criminal responsibility for enterprises takeover (raiding)". It was registered in the Verkhovna Rada of Ukraine on March, 13, 2007 (registration number 3300). In this draft, raiding stands for ordering and/or organization of an attack on an enterprise, institution or organization with the aim of its takeover, thus causing disruptions in its regular functioning, and also attack on an enterprise, institution or organization with the aim of its takeover, carried out by an organized group (raiding) [5]. However, this draft remained only a draft as it was retracted on June, 15, 2007.

A certain signal regarding the development and attempts to take real actions on counteraction to raiding in Ukraine was sent by the then-President of Ukraine Leonid Kuchma. In one of his speeches back in 1996 he said that "the state is being robbed in accordance with the acting legislation".

The Civil Code of Ukraine, approved back in 2003, did not even have an article, similar to Article 49 of the Civil Code of the Ukrainian SSR (ceased to be in force on January, 01, 2004) [6]. This Article 49 used to allow invalidating the agreements that go against the interests of the state and the society. Instead, there emerged a legal norm which allows concluding agreements with certain "deviations from legislation" (Article 6 of the Civil Code of Ukraine) [7]. The Commercial Code of Ukraine does not allow though applying these norms while regulating commercial legal relationships.

Raiding has its supporters in the legislation circles, and these supporters are actively lobbying the application of the Civil Code provisions in such cases.

Against the decision of the Verkhovna Rada, which has excluded entrepreneurial relations from the scope of the Civil Code of Ukraine, further edits of the Code provided an opportunity to apply the provisions of this Code to certain commercial operations. And these provisions are now used when there is a necessity to legally ground the takeover of an enterprise targeted by a raiding attack. Since the Commercial Code of Ukraine still creates obstacles to raiding,

these legal obstacles are occasionally offered for removal, often under a rather demagogical pretext of "providing the freedom of agreement" [8].

New opportunities for takeover of state and collective property emerged once the Verkhovna Rada cancelled one of the first truly reforming laws – the Law of Ukraine "On property". Noteworthy, this cancellation passed without any discussions as such: a norm revoking this Law was simply added to another Law, amending several regulatory acts as per the Civil Code of Ukraine.

The beginning of the large-scale antiraiding campaign in Ukraine was linked to the Rada's approval of the Law of Ukraine "On introducing changes to several legal acts of Ukraine on counteraction to illegal acquisitions and takeovers of enterprises" as of November, 17, 2009, #1720-VI [9]. This Law became the first in the package of antiraiding normative and legal documents approved by the government.

New antiraiding rules, established by the Law #1720 which came in force on March, 16, 2010, introduced the following:

- litigations on the rights for securities must be heard in commercial courts as per emitent's place of registration;

- additional requirements are introduced to documentation to be presented at state register;

- ban on joining several cases in one hearing, if these cases belong to different jurisdictions, unless provisioned differently in legislation;

- changes in the records on legal persons available in the Joint State Registry;

- changes in the order of documents replacement concerning state registration of a legal person or that of sole proprietor in the cases when the initial documents were lost or damaged.

In order to prevent the use of the most widely spread schemes and methods of illegal acquisition and enterprise takeover the Law of Ukraine "On introduction of changes to several legal acts of Ukraine concerning counteraction to illegal acquisition and enterprise takeover" introduced changes to then-acting normative and legal documents (namely, the Commercial procedural code of Ukraine, the Civil Code of Ukraine, the Law of Ukraine "On restoration of debtor's payability or their bankruptcy acknowledgement" (became invalid as of October, 21, 2019), "On state regulation of the securities market in Ukraine"). At the same time, the final edition of the Law of Ukraine "On introducing changes to several legal acts of Ukraine concerning counteraction to illegal acquisition and enterprises takeover", signed by the President of Ukraine, does not actually contain provisions regarding criminal responsibility for forced takeover of enterprises. Lack of such responsibility the legislators explained in the following way: actions accompanying enterprise takeover are subject to other articles in the Criminal Code.

Indeed, the Criminal Code of Ukraine contains a sufficient number of articles according to which a

raider may be made criminally responsible, namely, for forced actions (banditism, infliction of bodily harm of various degrees, destruction of other's property or damages to it). But in the cases when an attacker cannot be charged by these articles, the case would be built on the basis of the article concerning hooliganism (disorderly conduct). In regards to public officers participating in enterprise takeover there are also several articles concerning malfeasance [10]. Thus, due to such legal dispersion across multiple articles on criminal responsibility, a raider cannot be charged for a raiding takeover as such or for preparatory actions leading to such a takeover, but only for separate actions. In some cases the targeted enterprise is so attractive for the raider (or the ordered takeover is highly important for a professional raider), that the latter is ready to take responsibility for these separate actions performed in the course of a raider attack and thus won't abandon the idea of enterprise takeover. Instead, the raider would only correct and adjust their actions [11].

In part of legal counteraction to raiding great expectations were articulated in relation to the Law of Ukraine "On joint stock companies" as of September, 17, 2008, # 514-VI [12], which came in force on April, 30, 2009. This law demonstrated an attempt to prevent raiding takeovers of enterprises that are legally organized as joint stock companies. Provisions under this law were expected to serve as a leverage in the situations with raiding attacks or when shares have been misappropriated in the course of their issuance (the latter, in the future, might lead to third-parties taking control over a joint stock company). This Law, *inter alia*, mentions that activities of a joint stock company must not be blocked when the decisions of its shareholders' general meeting are being disputed in court (a common practice frequently used by raiders).

In both legislation and court practice of Ukraine the issue of invalidating the shareholders' general meeting decisions as per the request of one shareholder is a rather confusing one. Overall, the court practice of the post-Soviet countries have two common approaches to such situations, and these approaches contradict one another:

in some countries, the courts consider the legal claims of individual shareholders, even if their participation in the charter capital is minimal. As a rule, such shareholders do not have influence on managerial decisions of a joint stock company, however, they may take action and file a claim, thus in fact blocking the activities of the whole company;

in other countries, the usual court practice is very different: before taking any legal actions on an individual claim, the court establishes whether the claimant had an opportunity to influence the decision approved without him/her or approved with violation of his/her rights. Once this is discovered, the court rules on the claim accordingly.

In Ukraine, before the Law of Ukraine "On joint stock companies" came in force, the court practice

was rather contradictory as the courts have been following both of these approaches.

The Law of Ukraine "On joint stock companies" did not provide the expected clarity on the situation with the claims filed by individual shareholders with minimal participation in the charter capital. According to the law, a shareholder has the right for such a claim only in situations when the decision approved by the general meeting of shareholders violates his/her rights. This provision was introduced with the expectation that it would decrease the number of such claims since in many cases individual shareholders were trying to dispute the decisions of the general meetings which did not violate their rights or legal interests by any means. According to the law in question, losses/damages to an individual shareholder must be proven and grounded, otherwise the shareholder loses the right to dispute the decision of the general meeting. As opposed to legislation of other countries, which contains specific definitions of the cases and grounds for invalidation of general meetings' decisions, the Law of Ukraine "On joint stock companies" does not have similar provisions as such.

Thus, the Law of Ukraine "On joint stock companies", on the one hand, has complicated raiding takeovers of enterprises with the use of ungrounded claims from minority shareholders, but on the other hand, it also narrowed the legal field for other individual shareholders, the actions of which are totally unrelated to preparation of a raiding act.

In the legislation of the USA, UK and also in the Directive 2004/25/EC concerning takeover bids the key element which serves to protect shareholders' interests during acquisitions and takeovers is the early warning system which is expected to timely reveal information in cases of expansion in the block of shares [13]. In the majority of countries the control threshold is established to be at 30% of the voting shares. Thus, the facts of acquiring 5%, 10%, 15%, 20% or 25% blocks of shares must become publicly known. Acquiring such blocks of shares must be carried out through bids, providing equal opportunities for all shareholders. Majority of countries are also applying the so-called mandatory bid rule — the person getting de-facto control is obliged to buy out stocks from other shareholders using the highest price of acquiring shares for the control block.

The Law of Ukraine "On joint stock companies" contains only partial requirements concerning the information that must become publicly known in cases of acquiring 10% blocks and also in part of the requirement about buying out shares of other shareholders once the control block is acquired. Establishing that the control block is formally equal to 50% does not solve the problem with de-facto control in cases when someone gets 30-35% blocks of shares which can lead to further misuse of control and transfer of assets in particular. Moreover, current provisions of this law even provoke misuse and mis-

appropriation. Absence of a requirement concerning bids simplifies the use of minor shareholders by the raiders planning enterprise takeover.

Here we should also mention the gaps in the Law of Ukraine "On joint stock companies" that can be used by raiders (and are actually used by them) for blocking the activities of joint stock companies aiming at further takeover. For example, the law mentions that general meetings of shareholders may include the following categories of participants: those listed as shareholders, those having the right to be shareholders and/or their representatives. Compiling the full list belongs to the competences of the supervisory board. If someone has some sort of influence on the latter, the list may actually limit some of the shareholders in their right for participation in general meetings.

3.2. Improvements of national legislation on counteraction to raiding during 2010-2020.

Responding to the improvements of antiraiding legislation in Ukraine, mechanisms of raiding attacks are also getting improved. Counteracting to such improvements thus predetermines new directions in improving the quality of regulatory and legal documents on counteraction to raiding takeovers.

In the recent years, the most widely used schemes of raiding takeovers of businesses and their assets have been based on illegal intrusion in state registers and manipulations with their records. This has been a clear proof for the emergence and wide spread of the so-called "registration raiding". Raiding takeovers of enterprises with paramilitary groups using force for enterprise seizing belong to the history already. Today the key mechanisms of raiding takeovers in relation to both movable and immovable property and also corporate rights include quasi official changes in the charter participants list and also re-registration of shares in the initial charter capital of an enterprise and enterprise property in favor of third parties. Raiders insert data on a "new owner" of corporate rights and/or immovable property to state registers on the basis of fabricated documents; or they are using the fact that the needed initial documents are missing in the database as such. Once they seize control over the assets, raiders usually alienate them through a dummy person to a "trustworthy" beneficiary or even using a chain of those [2]. As Olha Onishchuk, the Deputy Minister of Justice, once noted in her Facebook post, according to the official statistics, over 95% of all raiding takeovers which took place in 2016-2019 were performed involving state registers. For this very reason, in recent years, improvement of the antiraiding legislation in Ukraine has been directly aimed at preventing the involvement of public registrars in the chains of raiding acts (or quasi acts).

In order to strengthen the protection of property rights and reduce the risks of illegal property takeover, on October, 02, 2016, the Verkhovna Rada of Ukraine approved the Law "On introduction of changes to several legal acts of Ukraine concerning the

improvement of state registration of rights on immovable property and protection of property rights" (#1666-VIII) [14]. This law assumes changes to a significant number of acting normative and legal documents, including, for example, the Criminal Code of Ukraine, the Laws of Ukraine "On state registration of property rights on immovable property and their limitations", "On state registration of legal persons, sole proprietors and civil organizations", "On notary", "On electronic digital signature").

Provisions of the Law of Ukraine "On introduction of changes to several legal acts of Ukraine concerning the improvement of state registration of rights on immovable property and protection of property rights" deprived raiders of many legal opportunities used previously (see Figure 1).

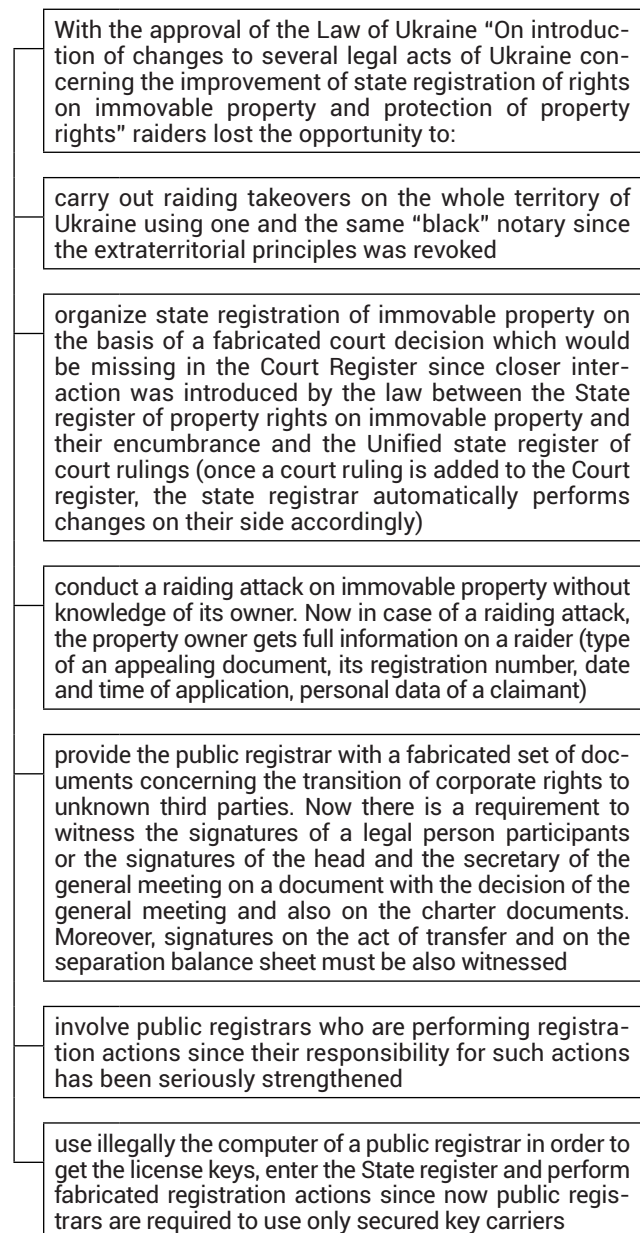


Figure 1. Opportunities lost by raiders due to the Law of Ukraine "On introduction of changes to several legal acts of Ukraine concerning the improvement of state registration of rights on immovable property and protection of property rights"

Analysis of changes under the Law of Ukraine “On introduction of changes to several legal acts of Ukraine concerning the improvement of state registration of rights on immovable property and protection of property rights”, the expected positive outcomes from it and the obvious limitations has been carried out in [15] with the following conclusions:

overall, key changes assumed by this law are targeting raiding takeovers of businesses and their immovable property;

efficiency of these novelties in counteraction to raiding attacks would depend not on these changes as such but on their practical application;

lack of efficiency in the introduction of these changes would lead to emergence of new raiding schemes that have been gradually improving throughout the whole period of market economy formation in Ukraine.

Once the analyzed Laws of Ukraine came in force, there was a several-years pause in further legal improvement of counteraction to raiding takeovers, and only on November, 02, 2019 another law came in force – the Law of Ukraine “On introduction of changes to several legal acts of Ukraine concerning the protection of property rights” (#159-IX) [159]. Provisions under this law assumed significant changes in the activities of public registrars (see Figure 2).

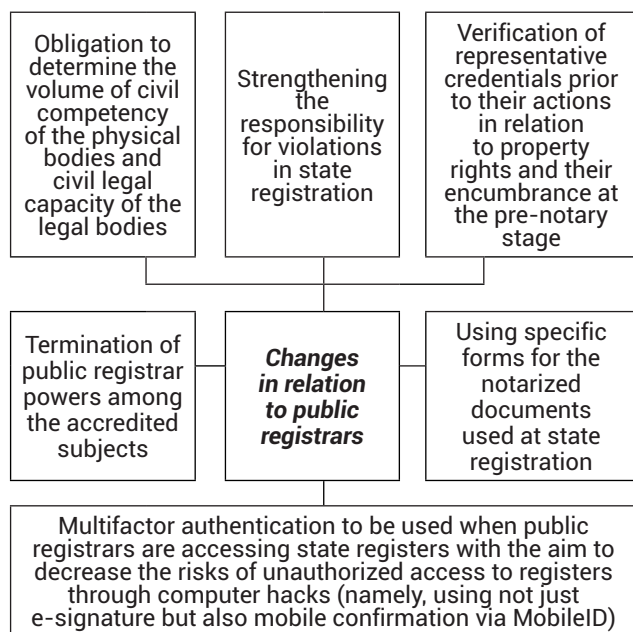


Figure 2. Changes in the activities of public registrars according to the Law of Ukraine “On introduction of changes to several legal acts of Ukraine concerning property rights protection”

On January, 16, 2020 another law came in force – the Law of Ukraine “On introduction of changes to several legal acts of Ukraine concerning counteraction to raiding” (#340-IX) [17]. This law became yet another step made by the state in the direction of creating a legal framework for counteraction to raiding takeovers. Provision of this law are aimed at pre-

ventive actions in relation to raiding in agriculture in particular [18], see Figure 3. Since in the last few year raiding takeovers have become more frequent in this sector, the new law targets the following areas: providing protection of property rights for the owners and users of lands plots; prevention of illegal takeovers acquisitions and enterprise takeovers in the agrarian sector; improving the procedure of state registration of land plots and property rights for them; better interaction between the State Land Cadaster and State register of property rights for the immovable property.

The Law of Ukraine “On introduction of changes to several legal acts of Ukraine concerning counteraction to raiding” assumes amendments to several legal acts, thus makes the following impossible:

illegal seizure of lands, including seizures through double registration of land lease agreements used by agrarian enterprises;

taking over the property of agrarian enterprises (including buildings and other constructs, agricultural equipment, crops, other tangible assets);

suspension of agrarian enterprise's activities due to ungrounded arrest of its property and other assets; forced counteraction to production activities; takeover of enterprises through illegal acquisition of corporate rights (or shares).

Some of the norms under the Law of Ukraine “On introduction of changes to several legal acts of Ukraine concerning counteraction to raiding” are actually present in other legal acts as well (for example, the norm concerning notary witnessing legal acts by agreement between parties (or at the request of one party); or the requirement of having a cadastral number for each plot of land prior to state registration of property rights on it). However, these double mentions are not a significant drawback of this law as the latter serves to create a general system of safeguards against raiding in the agrarian sector. Since the land market in Ukraine has been actively developing in recent years, raiders are paying a great deal of attention to this sector.

4. Conclusions

Approving the related law drafts and carrying out the court reform today become the only possible barrier that the state can and must create on the raiders' way.

The legal framework overall, the elements of which are expected to hinder illegal takeovers and quasi legal acquisitions of businesses and their assets by raiders, has been gradually improving in Ukraine. However, this improvement is fragmentary and un-systematic, and this hinders the consistency in state activities aimed at creation and development of an institutional economy. To some extent, imperfection of the legal framework in counteraction to raiding in Ukraine can be explained by terminological ambiguity when it comes to the legal aspect of defining what is “raiding”, “raider”, “raiding takeover” and “raiding attack”.

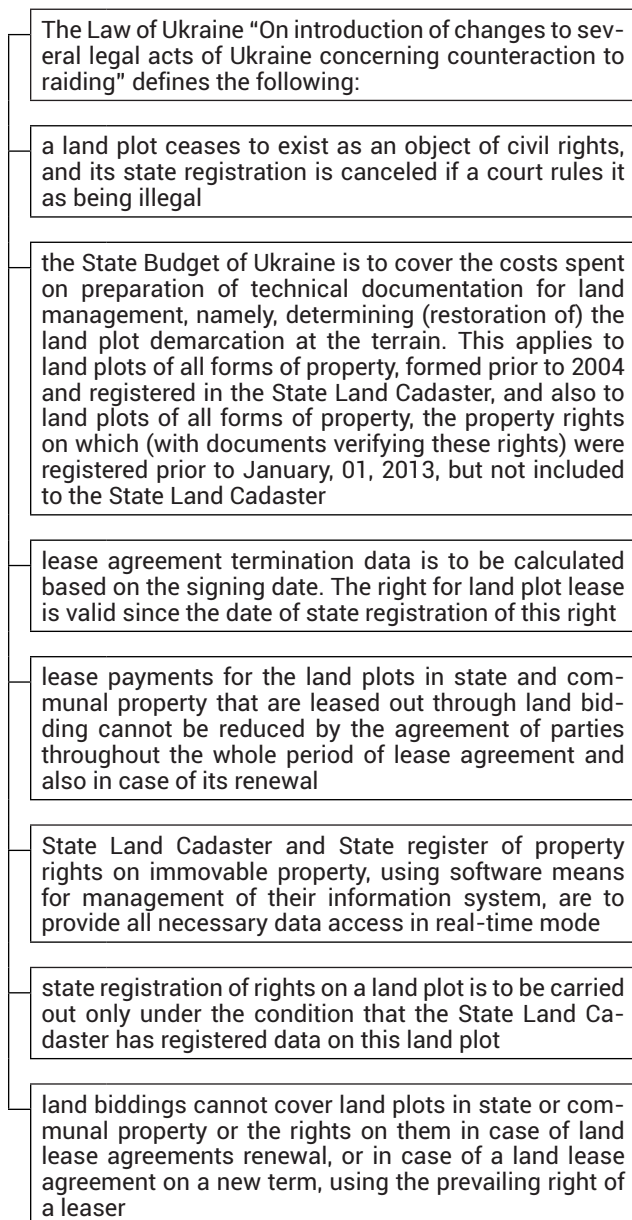


Figure 3. Opportunities lost by raiders due to the Law of Ukraine "On introduction of changes to several legal acts of Ukraine concerning the improvement in state registration of rights on immovable property and protection of property rights"

Unsystematic nature of the legal framework for counteraction to raiding in Ukraine is also predetermined by inconsistencies and even contradictions between a range of normative and legal documents, dispersion of responsibilities for enterprise takeover according to different normative and legal acts and also presence of serious gaps in legislation. The latter primarily have led to a current state in which raiding acts are predominantly becoming quasi legal by their form, and this complicates the fight against raiding in Ukraine even further. Acting Ukraine's legislation has numerous gaps and bottlenecks in it, thus allowing raiders to stay confident and be freely working at Ukrainian markets.

Raiding in Ukraine is a multifaceted phenomenon which has been existing for decades by now. Thus,

raiders' activities are gradually shifting into the completely legal field. Counteraction to raiding now requires significant reforms which would touch upon the very essence, the principles and mechanisms of state institutes functioning. It would be impossible to reduce the scale of raiding and its accompanying threats to national economy using only specific and simplified approaches which are now serving as the conceptual basis for numerous legal drafts "on the issues of counteraction to raiding", even provided administrative and criminal responsibility for raiding is introduced.

Improvement of legislation on counteraction to raiding acts must be systemic. For this, it must be oriented on the following top priorities:

providing data transparency when it comes to property structure, as this would help with determining the aims of all interested parties;

legal clarification of the notion "affiliated party", its distinctive features and criteria of affiliation between parties;

legal determination of the contents of the notions "corporate dispute" and "corporate conflict", their criteria for inclusion and differences between the two.

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