Davit Maisuradze[*]

The Implementation of Additional Rights of Shareholders (Poison Pills) as Defensive Measures within the Scopes of the Best Interests of the Corporation

(Critical Analysis)

1. Introduction

In the modern corporate law, Public Joint Stock Companies,[1] which trade with securities on Stock Exchange Markets, actively use the corporate defensive measures.[2]

Public Joint Stock Companies (hereafter - JSC) can become the targets of the friendly and hostile acquisitions.[3] Implementation of corporate defensive measures is one of the ways of protecting the target corporation.

The main aim of the corporate legal defesinve measures is securing the target corporation from the possible hostile aqcuisitions, and also protecting the safe implementation of the transaction between the parties and preventing it from involvement of the third parties.

The court cases prove that these measures support the safety, free and strategic development of the corporations against any hostile offer. Furtheremore, these measures maintain and increase the price on shares.[4]

The court practice of USA confirms that the most important ground for implementing the corporate defensive measures are the protection of the best interests of the corporation. Management of the corporation has to act in accordance with the best interests of the corporation. Moreover, this court practice considers the Board of the Corporation as the actor responsible for implementation of the corporate defesinve measures.[5]

Among the corporate defensive measures one of the most popular and complex are the rights that can be granted to the shareholders of the target corporation.[6]

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[*] Doctor of Law, Associate Professor at Ilia State University, Visiting Lecturer at Ivane Javakhishvili Tbilisi State University Faculty of Law and International Black Sea University.

1 *Makharoblishvili G.,* Fundamental Structural Changes in Corporations on the Basis of Corporate And Legal Acts (Mergers & Acquisitions) Comparative-Legal Analysis), Tbilisi, 2014, 34-42.

2 For more information about corporate defensive measures, please, refer to *Maisuradze D.,* The Implementation of Defensive Measures during the Reorganization of Capital Entity (Comparative-Legal Study Predominantly on the Example of Delaware and Georgian Corporate Law), Tbilisi, 2015.

3 *Maisuradze D.,* The Implementation of Defensive Measures during the Reorganization of Capital Entity (Comparative-Legal Study Predominantly on the Example of Delaware and Georgian Corporate Law), Tbilisi, 2015, 26-30.

4 *Lipton M*., Pills, Polls, and Professors Redux, Corporate Governance, Law, Theory and Policy, Edited By *Joo W. T*., Carolina Academic Press, 2nd ed., Durham, 2010, 576-577.

5 *Paramount Communications v. Time*, Inc. Delaware Supreme Court, 1990, 571 A.2d 1140.

6 *Oesterle A.D*., The Law of Mergers and Acquisitions, Thomson/West, 3 rd ed., Ohio, 2005, 514.

Most importantly these rights are interesting within the context of the selective equal treatment[7] of the shareholders that is legitimated by the protection of the best interests of the corporation.

Among the corporate defensive measures, particularly important is Poison Pills, Shareholder Rights Plan, the implementation of which started from the 80-ies of the 20th century against hostile acquisitions.[8] Nowadays, Posion Pills are envisaged by more than 1000 USA Public JSCs and by more than a half of the 500 biggest corporations. This makes Poison Pills as one of the most widespread corporate defensive measures.[9]

It is acknowledged that the basement for implementation of the corporate defensive measures is the protection of the best interests of the corporation. Therefore, it is vital to discuss the Poison Pills within the scopes of the best interests of the corporation. Hence, it is important to define the best interests of the corporation and whether or not to consider the interests of the shareholders[10] and the stakeholders[11] for determining the concept of the best interests of the corporation. Moreover, it is crucial to specify which governing body has the athourity to make a decision in accordance to the best interests of the corporation and implement the defensive measures, respectively.

The aim of the article is to analyze the Poison Pills, determine the grounds for its implementation, define the creation and development of the Poison Pills and show the governing body responsible for the implementation of the Poison Pills in accordance to the best interests of the corporation.

The Article below is based on the comparative legal analysis of the Delaware and Georgian corporate law. Delaware is acknowledged to have as one of the most successful corporate law and court practice that supported the creation of the most important institutes of corporate law.[12]

Though the Law of Georgia "On Entrepreneurs" was under heavy influence of German Law that was also caused by the active participation of German scholars in the process of elaboration of the Law of Georgia "On Entrepreneurs", from 2008, after the enactment of various amendments, the mentioned law started to be more influenced by the Anglo-American legal institutes.[13] One of the aims of the given research is to analyze the possibilities of implementation of Poison Pills as American legal institute, in Georgian corporate law.

Shareholder rights plan is regulated based on the corporate law and bylaws of the corporations. Therefore, corporations can further envisage various models of implementation of Poison Pills. Hence, it

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7 *Maisuradze D.,* Implementation of Defensive Measures Based on "Selective Equal Treatment" of Shareholders (Comparative-Legal Study Predominantly on the Example of Delaware and Georgian Corporate Law), Journal of Law №1, Tbilisi, 2014, 139-142.

8 *Lipton M.,* Pills, Polls, and Professors Redux, Corporate Governance, Law, Theory and Policy, Edited By *Joo W.T.,* Carolina Academic Press, 2 nd ed., Durham, 2010, 573.

9 *Thompson O.,* Corporations and Other Business Associations, 5th ed., Aspen Publishers, N.Y., 2006, 779.

10 *Makharoblishvili G.,* General Review of Corporate Governance, Tbilisi, 2015, 315-317.

11 *Greenfield K.,* There's a Forest in Those Trees: Teaching About the Role of Corporations in Society, Corporate Governance, Law, Theory and Policy, Edited By Joo W. T., Carolina Academic Press, 2 nd ed., Durham, 2010, 12-17.

12 *Black S.L.Jr.,* Why Corporations Choose Delaware, Delaware Department of State, Del., 2007, <http://corp.delaware.gov/pdfs/whycorporations_english.pdf>.

13 *Burduli I.,* Foundations of Corporate Law, Vol.1, Tbilisi, 2010, 410.

is important to analyze the implementation of the Poison Pills base on the bylaws, most importantly whithin the broad autonomous model of bylaws that is offered by the law of Georgia "On Entrepreneurs".

2. Elucidation of the Poison Pills (Warrant Dividend Plan)

Poison Pills is the corporate defensive measure used by the target corporation wheareas the shareholders of the target corporation can acquire the newly issued shares with the better conditions including with the lower than market price.[14]

"Poison Pills" has a long history of development and its area of elucidation is very big. But still, its fundamentals were explained by the legal doctrine and court cases. It is *ex ante* method against hostile acquisition. The term Poison Pills refers the rights to the shareholders given by the board regarding the hostile transaction. Poison Pills strengthens the positions of the owners with creating adding the special economic value to the shares, thus it makes acquisition of target corporation much more expensive. The acquirer will be obliged to pay higher value for the shares to overcome the Poison Pills".[15]

Poison Pills, as takeover defensive measure was created in 1982. Lipton was the first lawyer who created and implemented the Poison Pills as defensive measure. But the original name of Poison Pills was different than the current name.[16]

First name of the Poison Pills was Warrant Divident Plan where Warrant was considered as a security that would have been issued by the Board of target corporation in order to increase the time period against the hostile acquisition. With using this method, Board of Directors would have more time to answer the hostile offer. The name Poison Pills was given by the investment banker who used this term during the interview with the Wall Street Journal. Beginning from that period Warrant Dividend Plan is colloquially known as Poison Pills.[17] Poison Pills can be also used with the term Shareholder rights plan.[18]

Beginning from the 1982 the Board of Directors of the Target Corporation started to use successfully various form of Warrant Dividend Plan.[19]

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14 *Bainbridge M.S.,* Mergers and Acquisitions, Foundation Press, 3rd ed., N.Y., 2012, 239.

15 *Makharoblishvili G.,* Fundamental Structural Changes in Corporations on the Basis of Corporate And Legal Acts (Mergers & Acquisitions) Comparative-Legal Analysis), Tbilisi, 2014, 161-162.

16 *Lipton M.,* Pills, Polls, and Professors Redux, Corporate Governance, Law, Theory and Policy, Edited By *Joo W. T.,* Carolina Academic Press, 2 nd ed., Durham, 2010, 573-576.

17 *Lipton M.,* Pills, Polls, and Professors Redux, Corporate Governance, Law, Theory and Policy, Edited By *Joo W. T.,* Carolina Academic Press, 2 nd ed., Durham, 2010, 576.

18 *Makharoblishvili G.,* Fundamental Structural Changes in Corporations on the Basis of Corporate And Legal Acts (Mergers & Acquisitions) Comparative-Legal Analysis), Tbilisi, 2014, 162-163.

19 *Bainbridge M.S.,* Mergers and Acquisitions, Foundation Press, 3rd ed., N.Y., 2012, 239.

2.1 Common Types of Additional Rights (Poison Pills)

There are two basic types of Poison Pills: flip-in and flip-over.[20]

Flip-in envisages the corporate defensive measure implemented within the target corporation, particularly, with issuing additional shares that can be obtained by the selected number of shareholders.[21] For instance, if A is a target corporation where B is an acquirer bought 10% of shares of the target corporation, Board of Directors of the A corporation have the right to issue additional shares that can be bought by the shareholders of target corporation and corporation B, as a shareholder of corporation A, is excluded to acquire newly issued shares. If corporation A has 1000 issued shares where corporation B holds 100 shares, corporaton A can issue additional 1000 shares and it will have totally 2000 shares where corporation B will still have 100 shares but this amount will be equal to 5% instead of 10% of shares.

Being acquired by the corporation B is the potential threat for corporation A but even with holding the 10% or 5% of shares, B corporation will have rights in corporation A that might be threat for the management and for the effective functioning of the corporation A. For example, according to the 3rd Article of the law of Georgia "On Entrepreneurs", the partners of the company have basic control and scrutiny rigths,[22] and the article 53 of the mentioned law,[23] also entitles shareholders who own separately or jointly 5% of shares, also holders of the 5% voting stock to execute such rights as assembling a special meeting, withdrawal of the copies of transaction material, special examination of the economic activities of the corporation, as well as requesting the dismissal of the directors. Based on the abovementioned, holding minimal amount of shares might be a threat for the target corporation as the acquiring corporation has the right to involve in the internal activities of the target corporation. Therefore, flip-in poison pills aims to neutralize that threat.[24]

Article 54 of the law of Georgia "On Entrepreneurs" envisages the opportunity for the implementation of Poison Pills through abolishing partially or fully the preemptive rights of the shareholders.[25] The preemptive rights stipulated in the mentioned article apply to the newly issued shares.

According to the section 4 and 5 of the article 59 of the law of Georgia "On Entrepreneurs", the Meeting of the Shareholders can entitle Director or Supervisory Council to issue the new shares within the scopes of the generally allowed shares.[26] Therefore, the Board of Directors of the Corporation can issue the new shares and Meeting of Shareholders can abolish the preemptive rights.

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20 *Maisuradze D.,* The Implementation of Defensive Measures during the Reorganization of Capital Entity (Comparative-Legal Study Predominantly on the Example of Delaware and Georgian Corporate Law), Tbilisi, 2015, 216-217.

21 *Thompson O.*, Corporations and Other Business Associations, 5th ed., Aspen Publishers, N.Y., 2006, 779.

22 Law of Georgia „On Entrepreneurs", 1994, Article 3.10.

23 Law of Georgia „On Entrepreneurs", 1994, Article 53.

24 *Ji L.X.,* A New Look at Dead Hand Provisions in Poison Pills: Are They Per Se Invalid After Toll Brothers and Quiturn? 44 Saint Louis University Law Journal 223, 2000, 3-4.

25 Law of Georgia „On Entrepreneurs", 1994, Article 54.6..

26 Law of Georgia „On Entrepreneurs", 1994, Article 59.

"The preemptive right is a lawful right of shareholders and deprive them of this right must be considered as the interference in their legal status. So depriving the shareholders of this right must be exceptional and only under certain conditions. Depriving or restricting the preemptive right is only admissible when otherwise is impossible to achieve the purpose without increasing the capital and the restriction of the shareholders' rights serves the interests of the corporation as a whole".[27]

It must be highlighted that the last sentence of the section 6 of the article 54 of the law of Georgia "On Entrepreneurs", entitles the corporation, with the consideration of the principle of autonomy of bylaws, to transfer the authority of depriving the preemptive rights from Meeting of Shareholders to the Directors and/or Supervisory Council.[28] As it was mentioned in the previous paragraph transfer the abolishment of the preemptive rights and depriving the preemptive rights from shareholders "must serve the interests of the corporation as a whole".

Thus, if it is proved based on the interests of the corporation, it is possible to grant Directors' the right for issuing the shares and depriving the preemptive rights from shareholders.

The implementation of flip-in Poison Pills is also accompanied with the material adverse economic affects to the acquiring corporation, particularly, with diminishing the percentage of shares. Because in case of the abovementioned example, after enacting the Additional Rights of shareholders, the percentage of shares will decrease from 10% to 1% or 2%. Still, even in such shareholding participation, the acquiring corporation will have the certain rights in target corporation, including the rights envisaged by the article 53 of the law of Georgia "On Entrepreneurs",[29] but as it is accompanied with the economic loss, the existence of "Poison Pills" is the incentive for the acquiring corporation to start negotiations with the management of the target corporation and restrain from the hostile offer.

According to the abovementioned, we can stipulate that it is possible to implement the Additional Rights of Shareholder (Poison Pills) in the corporate law of Georgia based on the increase of capital with issuing the additional shares and completely or partially depriving the shareholders of preemptive rights.

Flip-over Poison Pills is interesting corporate legal institute as well. In this case, the shareholders of the target corporation have the additional rights towards the shares of the acquiring corporation. This additional right can be envisaged in the bylaw of the target corporation. Particularly, if on the first phase of the transaction the acquiring corporation gets the amount of shares that are necessary to merge the target into the acquirer, the bylaws of the target corporation might envisage the additional rights to the shareholders of the target corporation and these rights will be triggered by the merger of the two mentioned corporations.[30] For example, if the acquirer decides to merge with the target corporation, the shareholders of the target corporation will have the rights to buy the newly issued shares of the acquiring corporation at a nominal and/or lower than market price.[31]

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27 *Chanturia L., Ninidze T.,* Commentary on the Law about Entrepreneurs, 3th ed., Tbilisi, 2002, 2002, 376.

28 Law of Georgia „On Entrepreneurs", 1994, Article 54.6.

29 Law of Georgia „On Entrepreneurs", 1994, Article 53.3[1].

30 *Bainbridge M.S.,* Mergers and Acquisitions, Foundation Press, 3rd ed., N.Y., 2012, 239.

31 *Makharoblishvili G.,* Fundamental Structural Changes in Corporations on the Basis of Corporate And Legal Acts (Mergers & Acquisitions) Comparative-Legal Analysis), Tbilisi, 2014, 165.

Moreover, target corporation can envisage in the bylaws that, in case of a merger, acquiring corporation should transfer certain percentage of its shares to the shareholders of the target corporation. This corporate defensive measure aims to prevent the merger between the acquirer and the target. If the acquirer overcomes the flip-in version of the Poison Pills, the flip-over version of the Poison Pills prevents the merger of the two corporations and supports the free development of the target corporation. Based on the autonomy of the principle of bylaws, the flip-over version of the Poison Pills can also be enacted in the corporate law of Georgia.

Additional Rights of shareholders are connected with the various institutes of corporate law such as functions and authority of the Board of Directors, the ways of adopting the decisions by the governing bodies, mergers and acquisitions, etc.

Furthermore, one of the main issue regarding the corporate defensive measures is the validity of their implementation within the context of the selective equal treatment of the shareholders.

2.2 The Validity of the Additional Rights and its Interrelationship with the "Selective Equal Treatment" of Shareholders

Law of Georgia "On Entrepreneurs" stipulates the principle of Equal Treatment of shareholders.[32] According to the section 9 of the 3rd Article of the mentioned law, "Partners of a general partnership, limited partnership, limited liability company, joint-stock company and cooperative shall have equal rights and obligations in equal circumstances, unless otherwise provided for in this Law or in the Charter. The Charter may define different rights and obligations irrespective of the contributions made by the partners".[33] "… Possession of any class of shares doesn't mean that holder of the preferred shares has a better legal position than the holder of the common shares. Both of these types of shares have positive and negative, priority and less privileged features. Thus, which shares are better to possess is a specific matter of opinion".[34]

Section 1st of the article 52 of the Law of Georgia "On Entrepreneurs" defines the possibility to stipulate the voting right and the right to receive the dividend differently in bylaws than it is in the mentioned law. But at the same time, the law designates that "All shares of the same class shall provide equal rights to their holders".[35] Therefore, Georgian corporate law determines the equal rights of the shareholders of the same class regarding the voting right and acceptance of the dividend.[36]

Pargraph 1^1 of the article 52 also defines the opportunity for the existence of other class of shares and designation their rights and obligations by the bylaws, though in this section it is not highlighted that the

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32 *Burduli I.,* Foundations of Corporate Law, Vol. 1, Tbilisi, 2010, 330-331.
33 Law of Georgia „On Entrepreneurs", 1994, Article 3.9.
34 *Burduli I.,* Foundations of Corporate Law, Vol. 1, Tbilisi, 2010, 331.
35 Law of Georgia „On Entrepreneurs", 1994, Article 52.1.
36 *Maisuradze D.,* Implementation of Defensive Measures Based on "Selective Equal Treatment" of Shareholders (Comparative-Legal Study Predominantly on the Example of Delaware and Georgian Corporate Law), Journal of Law №1, Tbilisi, 2014, 128.

owners of the same class of shares have the equal rights.[37] Therefore, law of Georgia "On Entrepreneurs" provides the principle of equal treatment regarding the voting rights and the right of accepting the dividend but in other circumstances applies the principle of selective equal treatment as gives the corporations opportunity to deprive completely or partially the shareholders of the preemptive rights.[38]

It must be also highlighted that the acquiring corporation, with starting the hostile acquisition, initiates the non-equal treatment towards the shareholders because it obliges them to sell shares.

The coercive treatment of shareholders is mostly visible during the two-tier tender offer when the aim of the offeror is to acquirer 51% of shares of the target corporation in the first phase of the transaction, and on the second stage of the acquisition, to acquire the rest of the shares.[39] This type of an acquisition illustrates the structural coercion.[40] During the two tier-tender offer the corporation can be sold even if the shareholders don't want to sell their shares. Because they don't know what decision will their colleagues make and they don't want to be among minority shareholders on the second stage of the acquisition. Therefore, they are trying to sell their shares on the first stage of the acquisition.[41]

The Introduction of the mandatory tender-offers, that is also envisaged by the law of Georgia "On Entrepreneurs",[42] weakened the coerciveness of the two-tier tender offer on the free will of shareholders but it is also stated that even in the case the acquirer offers to buy 100% of shares of target corporation during the initial phase of offer, it is still a threat for the shareholders because the tender-offers are not functional equivalents of the shareholders vote,[43] thus it doesn't contain the signs of a free will. But Delaware Court thinks that offering to buy 100% of shares on the first stage of the acquisition will not cause threat for shareholders.[44]

Therefore, there is a principle of equal treatment established among shareholders but it is only enacted regarding the voting right and the acceptance of the dividend. With regards to other issues the principle of selective equal treatment is implemented that is also proved by the Delware court practice.

The fundamental validity test of corporate defensive measures was elaborated in the decision of the court on the Unocal case where the court legitimated the corporate defensive measure of Board of Directors of Unocal to divide shareholders between target and acquiring shareholders.[45] Particularly,

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37 Law of Georgia „On Entrepreneurs", 1994, Article 52.1^1.

38 *Maisuradze D.,* Implementation of Defensive Measures Based on "Selective Equal Treatment" of Shareholders (Comparative-Legal Study Predominantly on the Example of Delaware and Georgian Corporate Law), Journal of Law №1, Tbilisi, 2014, 128-129.

39 *Cohen M.M.,* "Poison pills" as a negotiating tool: seeking a cease-fire in the corporate takeover wars, Columbia Business Law Review 459, 1987, 11.

40 Air Products and Chemicals, Inc. v. Airgas, Inc. 2011 WL 806417 (Del. Ch. 2011).

41 *Maisuradze D.,* The Implementation of Defensive Measures during the Reorganization of Capital Entity (Comparative-Legal Study Predominantly on the Example of Delaware and Georgian Corporate Law), Tbilisi, 2015, 208-209.

42 Law of Georgia „On Entrepreneurs", 1994, Article 53^2.

43 *Lipton M.,* Pills, Polls, and Professors Redux, Corporate Governance, Law, Theory and Policy, Edited By *Joo W. T.,* Carolina Academic Press, 2 nd ed., Durham, 2010, 575.

44 Air Products and Chemicals, Inc. v. Airgas, Inc. 2011 WL 806417 (Del. Ch. 2011).

45 Unocal Corp. v. Mesa Petroleum Co. Delaware Supreme Court, 1985, 493 A.2d 946.

Board of Unocal has implemented so called Selective Self-tender Offer and didn't offer to buy the shares from the acquiring corporation which was already holding part of the shares of the target. In result, the shareholders sold the shares to their own corporation and not to the acquiring one.

In Unocal, the court established two-prong validity test of corporate defensive measures. The Unocal test states that in order for the coporate defensive measures to be valid, the threat should be real for the shareholders of the target corporation, and the implemented defensive measures must be in accordance with the threat. Though the abovementioned defensive measure executed by the Board of Unocal, established the "discrimination" between the shareholders of the target corporation, the court still legalized the conduct of the Board.[46] Although the Selectivity of Tender-offer was prohibited by the Securities Exchange Act,[47] Unocal test still remains as the validity standard for corporate defensive measures.

Subsequent cases have refined the issue of selective equal treatment of shareholders. For example, in Unitrin, the target corporation implemented redemption as a corporate defensive measure.[48] Redemption is also envisaged by the law of Georgia "On Entrepreneurs".[49]

In Unitrin, the target corporation offered buying the shares from both the acquiring and indigineous shareholders of the target corporation as during the redemption the acquiring corporation was already a shareholder of the target. Aftermath, the target corporation became the owner of the stock of the short-term shareholders that were planning to sell the shares, and the long-term shareholders remained loyal to the target corporation as they weren't going to sell their shares at all. Therefore, based on the Unocal Test, the target corporation separated shareholders based on the short-term and long-term perspective. [50]

The principle of Selective Equal Treatment of shareholders can be established in the Georgian corporate law as well assuming the fact that the Georgian scientific doctrine is in accordance with the Unocal Test.[51] Specifically, the threat should exist against the corporation and the implemented corporate defensive measure should be in accordance with the posed threat. [52] Flip-in Poison Pills that is implemented in Georgian corporate law in the form of depriving from the preemptive rights, is based on the selective equal treatment of shareholders.

Based on the abovementioned, the author of the Poison Pills, the scientific doctrine and the court practice agree that the Poison Pills must not influence the voting right of the shareholder, otherwise it will be considered as unreasonable towards the existed threat,[53] and therefore, it won't be considered as valid.[54]

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46 *Velasco J.,* The Enduring Illegitimacy of the Poison Pill, 27 Iowa Journal of Corporation Law 381, 2002, 4.

47 Rules and Regulations under the Securities Exchange Act of 1934, rule 13e-4, 14d-10.

48 Unitrin, Inc. v. American General Corp., Supreme Court of Delaware, 1995, 651 A.2d 1361.

49 Law of Georgia „On Entrepreneurs", 1994, Article 53[1].

50 *Maisuradze D.,* The Implementation of Defensive Measures during the Reorganization of Capital Entity (Comparative-Legal Study Predominantly on the Example of Delaware and Georgian Corporate Law), Tbilisi, 2015, 276-280.

51 *Chanturia L., Ninidze T.,* Commentary on the Law about Entrepreneurs, 3th ed., Tbilisi, 2002, 376-377.

52 "…upon annulling the preemptive right when capital is growing, the interests of the corporate enterprise are the most important. So the legal ground for annulment of the preemptive right must serve (1) the purpose and welfare of the corporation and (2) the measure for achieving this purpose must be reasonable, necessary and proportional", *Burduli I.,* Foundations of Corporate Law, Vol.2, Tbilisi, 2013, 254.

53 *Henry L.G.,* Continuing Directors Provisions: These Next Generation Shareholder Rights Plans Are Fair and Reasoned Responses to Hostile Takeover Measures, 79 Boston Law Review 989, 1999, 7-8.

2.3 The Phases of Development of the Poison Pills

It is noteworthy that the Additional Rights of shareholders, Poison Pills, had interesting path of development.

First of all, as it was mentioned above, its creator and first implementator in practice is lawyer Martin Lipton. During the years 1988-1989, Poison Pills, as corporate defensive measures were implemented by more than half of the largest corporations of USA and by 2001 more than 2200 corporations have enacted Poison Pills.[55] The implementation of Poison Pills were further enhanced by the USA court practice. [56]

"The evolution of Poison Pills made it as the most widespread takeover defensive measure. Though other defensive measures might seem to be more effective against takeovers that is also strengthened by the court decisions, Poison Pills still remains as the valuable takeover defensive measure. It is the counter tactical move and offers various mechanisms for the Board of target corporation against takeovers. But at the same time it is not the absolute method for halting the takeover".[57]

First generation of Additional Rights are considered as weak defensive instruments. Furthermore, first generation Poison Pills didn't have the redemption feature. Thus, once they were triggered it would have been impossible to redeem them.[58]

Implementing the flip-over Poison Pills by Corporation Lenox in 1983, is the example of using the first generation Poison Pills. [59] The flip-over Poison Pills of Lenox where based on the preferred stock which rights were defined before their were issued without participation of shareholders. The flip-over Poison Pills of Lenox was issued as a special dividend that was consisted with a stock of non-voting preferred shares. Holders of the 40 common shares were receiving one special dividend.[60]

The defensive features of the Poison Pills of the corporation Lenox was illustrated in their convertible character. Particularly, if Lenox was merged into the acquiring corporation, preferred shares, have to be converted, below the market price, into the common shares of the acquiring corporation, and this would make the acquisition of Lenox more difficult.[61]

As it was mentioned above, the Lenox version of flip-over Poison Pills was the early model of the Additional Rights of the shareholders. Modern version of flip-over Poison Pills issue the Rights Plan

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54 *Maisuradze D.,* The Implementation of Defensive Measures during the Reorganization of Capital Entity (Comparative-Legal Study Predominantly on the Example of Delaware and Georgian Corporate Law), Tbilisi, 2015, 278.

55 See <https://www.sharkrepellent.net/request?an=dt.getPage&st=1&pg=/pub/rs_20100401.html&Specific_Purpose_Poison_Pills&rnd=372936>.

56 *Moran v.* Houshold International, Inc. Delaware Supreme Court, 1985, 500 A.2d 1346.

57 *Makharoblishvili G.,* Fundamental Structural Changes in Corporations on the Basis of Corporate And Legal Acts (Mergers & Acquisitions) Comparative-Legal Analysis), Tbilisi, 2014, 161.

58 *Bainbridge M.S.,* Mergers and Acquisitions, Foundation Press, 3rd ed., N.Y., 2012, 242-243.

59 *Bainbridge M.S.,* Mergers and Acquisitions, Foundation Press, 3rd ed., N.Y., 2012, 239-240.

60 *Bainbridge M.S.,* Mergers and Acquisitions, Foundation Press, 3rd ed., N.Y., 2012, 239.

61 *Bainbridge M.S.,* Mergers and Acquisitions, Foundation Press, 3rd ed., N.Y., 2012, 239.

instead of common shares and not the preferred stock. These Rights are not traded separately from the shares and gives the right to shareholders to acquire the shares in the acquiring corporation 50% below the market price.[62]

The flip-in version of Poison Pills represents the second generation of additional rights of shareholders. Flip-over version was not enough to protect the target from acquiring corporation. This was mostly evident during the acquisition of Crown Zellerbach by James Goldsmith. Crown Zellerbach had Poison Pills but they were activated on the second stage of acquisition, only in case of a merger of Crown Zellerbach into the acquiring corporation. Goldsmith bought the controlling amount of shares in Crown Zellerbach but decided not to merge the target in the acquiring corporation. Therefore, flip-over version of Poison Pills didn't stop the acquirer to buy the controlling part of shares in the target. Furthermore, James Goldsmith used the flip-over version of Poison Pills on his advantage as the Pills didn't have the redemption right, it precluded the Crown Zellerbach to start negotiations with other bidders, to potential White Knights on the better terms of the agreement.[63]

As the flip-over version of the Poison Pills was not effective enough to meet all the requirement of the target corporations against takeovers, lawyers have elaborated flip-in version of additional rights that was used within the corporation, and the Goldsmith tactics discussed above wouldn't have been the sufficient instrument for the acquiring corporation. With using the flip-in version of Poison Pills, the shareholders of the target corporation have the right to buy the additional shares of the target far below the market price. Therefore, flip-in version of the additional rights might cause material economic adverse affects to the acquirer.[64]

Though the Poison Pills are acknowledged as a strong defensive measures, with using the tender-offer and proxy fight, the acquiring corporation can oust the members of the corporation Board and the newly elected Board whose members support the tender-offer may redeem the additional rights of the shareholders. In order to reduce this possibility, the third generation versions of Poison Pills, such as Dead Hand Pill and No Hand Pill, offer the opportunity to redeem the Poison Pills only by the current members of the Board or by the newly elected Board members only in this case, the newly elected Board should be approved by the old members.[65]

"The tactics of Dead Hand Pill precludes the authority of the newly elected Board members to redeem already implemented rights plan". [66] In comparison to Dead Hand Pill, No Hand Pill is less effective.[67] No Hand Pill cannot be redeemed for six months after the acquisition of the controlling

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62 *Bainbridge M.S.,* Mergers and Acquisitions, Foundation Press, 3rd ed., N.Y., 2012, 240.

63 *Bainbridge M.S.,* Mergers and Acquisitions, Foundation Press, 3rd ed., N.Y., 2012, 241-242.

64 *Bainbridge M.S.,* Mergers and Acquisitions, Foundation Press, 3rd ed., N.Y., 2012, 242.

65 *Bainbridge M.S.,* Mergers and Acquisitions, Foundation Press, 3rd ed., N.Y., 2012, 245.

66 *Makharoblishvili G.,* Fundamental Structural Changes in Corporations on the Basis of Corporate And Legal Acts (Mergers & Acquisitions) Comparative-Legal Analysis), Tbilisi, 2014, 166.

67 For more information about „Dead Hand Pill" please, refer to *Maisuradze D.,* The Implementation of Defensive Measures during the Reorganization of Capital Entity (Comparative-Legal Study Predominantly on the Example of Delaware and Georgian Corporate Law), Tbilisi, 2015, 230-237.

shares of the target corporation. Thus, it only temporarily prevents the full disposal of the target corporation by the acquirer.[68]

It is noteworthy, that unlike other states, the court of State of Delaware, considered the implementation of No Hand Pill and Dead Hand Pill as an interference in the rights of shareholders and as an irrelevant defensive method to the posed threat for the corporation.[69]

3. Substantial Event for Triggering the Additional Rights

The triggering events for the Additional Rights can be defined by the bylaws of the corporation. The most widespread grounds for implementing the Additional Rights are the acquisition of 5%, 10%, 20% or more percentage of shares in the target corporation.[70] Thus,we can define in bylaws that one of the grounds for enacting the Poisong Pills will be the acquisition of certain percentage of shares in target corporation.

In Georgian corporate law, the acquisition of 5% of voting shares can be the substantial event for triggering the Poison Pills. We have mentioned above that the owners of the 5% of voting shares can have various rights according to the article 53 of the law of Georgia "On Entrepreneurs", for instance, including the convening of the special meeting and proposing the amendments to its Agenda, owners of the 5% of voting shares can demand the audit of the annual balance and the information regarding the future transactions.[71] Therefore, acquiring corporation will have the opportunity to actively execute its legally envisaged rights within the target corporation.

Another ground for triggering the Additional Rights can be the "significant acquisition" that is determined by the law of Georgia "On Securities Market" and estimates to more than 10% of voting shares.[72]

Substantial event for implementing the Poison Pills can be the issue of conflict of interests that is determined by article 16^1 of the law of Georgia "On Securities Market". Particularly the second section of this article envisages that one of the grounds for conflict of interests are holding at least 20% or more percent of voting shares on the both side of the transaction.[73] This last ground can be referred to the second stage of the acquisition when the acquiring corporation tries to merge with the target. Therefore, acquiring this amount of shares can be the grounds for implementing the flip-over version of Poison Pills, as well as to executing the flip-in model of Poison Pills.

Corporation can also determine the amount of controlling stake of shares in the corporation, and the change of ownership of controlling stake can trigger the enactement of Poison Pills.

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68 *Bainbridge M.S.,* Mergers and Acquisitions, Foundation Press, 3rd ed., N.Y., 2012, 245.

69 *Maisuradze D.,* The Implementation of Defensive Measures during the Reorganization of Capital Entity (Comparative-Legal Study Predominantly on the Example of Delaware and Georgian Corporate Law), Tbilisi, 2015, 230-237.

70 *Bainbridge M.S.,* Mergers and Acquisitions, Foundation Press, 3rd ed., N.Y., 2012, 242.

71 Law of Georgia „On Entrepreneurs", 1994, Article 53.

72 Law of Georgia "On Securities Market", 1998, Article 14.

73 Law of Georgia "On Securities Market", 1998, Article 16^1.

4. The Governing Bodies Entitled to Implement and Redempt the Additional Rights

While disscuing the issues of Poison Pills it is of utmost importance to highlight the governing body of the corporation which is entitled to implement the corporate defensive measures.[74]

Based on the Delaware corporate law[75] and court practice,[76] it can be underlined that the governing body which is empowered to execute corporate defensive measures based on the general fiduciary powers and within the best interests of the corporation, is Board of Directors.[77] Moreover, many researchers also agree with the court decisions.[78] But there are some scientists who think that as shareholders hold additional rights, thus, they should have the opportunity to implement Poison Pills and decide whether to agree or not to the proposition of the acquiring corporation.[79]

Unlike Anglo-American law where the corporate governance system is one-tiered and the executive and supervisory branches are combined in one body,[80] Georgian corporate law envisages the existence of a separate Supervisory Board.[81] After the amendments of the law of Georgia "On Entrepreneurs" in 2008, Directors can also be the members of the Supervisory Boards and according to the mentioned law and in certain circumstances, the number of such Directors mustn't be the majority in Supervisory Board.[82] Thus, which governing body is entitled to implement corporate defensive measures in Georgian corporate law?

First section of the 9th Article of the law of Georgia "On Entrepreneurs" grants the management responsibilities to the Directors,[83] but the 6th section of the same article attaches fiduciary duties to the members of the Supervisory Board as well.[84] As it was mentioned above, Directors are responsible for everyday functioning of the corporation and regarding the Supervisory Board, according to the section 5 of the article 55 of the law of Georgia "On Entrepreneurs" its meetings are held at least once in quarter of year.[85] At least one member of the Supervisory Board must be an independent person who is not

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74 *Henry L.G.,* Continuing Directors Provisions: These Next Generation Shareholder Rights Plans Are Fair and Reasoned Responses to Hostile Takeover Measures, 79 Boston Law Review 989, 1999, 2.

75 DGCL, §144.

76 *Maisuradze D.,* The Implementation of Defensive Measures during the Reorganization of Capital Entity (Comparative-Legal Study Predominantly on the Example of Delaware and Georgian Corporate Law), Tbilisi, 2015.

77 *Bainbridge M.S.,* Director Primacy in Corporate Takeovers: Preliminary Reflections, 55 Stanford Law Review 791, 2002, 4.

78 *Lipton M*., Pills, Polls, and Professors Redux, Corporate Governance, Law, Theory and Policy, Edited By *Joo W.T*., Carolina Academic Press, 2nd ed., Durham, 2010, 576-577.

79 *Bebchuk A.L*., The Case Against Board Veto in Corporate Takeover, Corporate Governance, Law, Theory and Policy, Edited By *Joo W.T*., Carolina Academic Press, 2nd ed., Durham, 2010, 562.

80 *Chanturia L*., Corporate Governance and Liability of Directors in Corporation Law, Tbilisi, 2006, 110-111.

81 *Makharoblishvili G.,* General Review of Corporate Governance, Tbilisi, 2015, 140.

82 Law of Georgia „On Entrepreneurs", 1994, Article 55.2.

83 Law of Georgia „On Entrepreneurs", 1994, Article 9.1.

84 Law of Georgia „On Entrepreneurs", 1994, Article 9.6.

85 Law of Georgia „On Entrepreneurs", 1994, Article 55.5.

involved in every day affairs of the corporation.[86] Therefore, as the executive management, Directors, are responsible for everyday functioning of the corporation, they should be also considered as the governing body responsible for the implementation of the corporate defensive measures.

In American court practice, in order to determine the legal authority of the corporate defensive measures, courts pay a lot of attention to the outside directors who are involved in the decision making process.[87] If the majority of the members of the Board are outside Directors and/or make decisions separately from the inside Directors, the courts consider such cases as examples as protecting the fiduciary duties and best interests of the corporation. Therefore, in the decision making process it is particulary important to define the role of the Supervisory Board because in two-tier corporate governance systems the major function of supervisory boards is the control of the executive branch. Thus, participation of the Supervisory Board in the implementation of the corporate defensive measures will strengthen the legal authority of the executed defensive measures.

In conclusion, in Georgian corporate law, decision of implementing the corporate defensive measures are done by Directors but the involvement of the Supervisory Board and sharing their recommendations is very important.

4.1 Interrelations of the Additional Rights and the Business Judgement Rule

Business Judgement Rule is the corporate legal institute evolved mainly based on the fiduciary duty of care.[88] Business Judgement Rule is a presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the corporation.[89]

The decision of the implementation of the defensive measures should comply with the requirements of the *Unocal Test*, and only after both standards of *Unocal Test* are met,[90] the Business Judgement Rule will apply to the decision of the Board.[91]

5. General Analysis of the Best Interests of the Corporation

One of the most interesting, and interrelated topics of corporate law, is the Best Interests of the Corporation. The execution of the corporate defensive measures, including Additional Rights, are based

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86 Law of Georgia „On Entrepreneurs", 1994, Article 55.2[1].

87 *Unocal Corp. v. Mesa Petroleum Co. Delaware Supreme Court*, 1985, 493 A.2d 946.

88 *Maisuradze D.,* Elucidation of the Business Judgement Rule, Journal of Law №1-2, Tbilisi, 2010 109-111.

89 *Hanewicz O.W.,* When Silence is Golden: Why the Business Judgment Rule Should Apply to No-Shops in Stock-for-Stock Merger Agreements, 28 Iowa Journal of Corporation Law 205, 2003, 5.

90 *Turner L.K.,* Settling the Debate: A Response to Professor Bebchuk's Proposed Reform of Hostile Takeover Defenses, 57 Alabama Law Review 907, 2006, 4.

91 *Maisuradze D.,* The Implementation of Defensive Measures during the Reorganization of Capital Entity (Comparative-Legal Study Predominantly on the Example of Delaware and Georgian Corporate Law), Tbilisi, 2015, 201-206.

on the protection of the best interests of the corporation.[92] Though the Georgian corporate law doesn't define the best interests of the corporation, based on the corporate law and scientific doctrine, it is possible to make an analysis of the best interests of the corporation.

According to the section 6 of the article 9 of the law of Georgia "On Entrepreneurs", the managers and the members of the Supervisory Board should act "in the belief that their action is most advantageous to the corporation".[93] Section 1 of the article 16 of the law of Georgia "On Securities Market" defines that the members of the governing bodies of the corporation "should act in the belief that their action is in accordance with the best for the corporation and its securities holders".[94] Therefore, the mentioned legal acts define the best interests of the corporation as a most advantageous for the corporation and as the best for the corporation and its securities holders.

Can the governing body implement such action that is in accordance with the best interests of the corporation but contradicts the interests of the shareholders?

It is acknowledged that the shareholders, employees, affiliated companies, the community where the corporation is functioning and other stakeholders are influenced by the development of the corporation.[95] At the same time, the interests of the mentioned parties can be different from each other and opposite as well.[96] The raise of the salary of the employee can affect the dividends of the shareholder; big corporations can be good for the employement and for the community but can harm the environment, etc.

Therefore, it is important to protect and balance the interests of the shareholders and all stakeholders. Such an approach can be one of the basements for defining the best interests of the corporation. But it also leads to the issues of corporate governance, where various theories determine the Board as the governing body empowered to protect the best interests of the shareholders[97] and/or balance the interests among all stakeholders. Board is obliged to act in accordance with the best interests of the shareholders and stakeholders, and based on the balance of their interests, the overall best interests of the corporation can be designated.

Moreover, the decision adopted by the ruling body in accordance with the best interest of the corporation might affect the interests of the shareholders. It is acknowledged in the corporate law that, with not including several exceptions, shareholders lack specific qualifications necessary to make

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92 *Maisuradze D.,* Implementation of Defensive Measures Based on "Selective Equal Treatment" of Shareholders (Comparative-Legal Study Predominantly on the Example of Delaware and Georgian Corporate Law), Journal of Law №1, Tbilisi, 2014, 123.

93 Law of Georgia „On Entrepreneurs", 1994, Article 9.6.

94 Law of Georgia "On Securities Market", 1998, Article 16.1.

95 *Greenfield K.,* There's a Forest in Those Trees: Teaching About the Role of Corporations in Society, Corporate Governance, Law, Theory and Policy, Edited By *Joo W.T.*, Carolina Academic Press, 2nd ed., Durham, 2010, 12-17.

96 *Makharoblishvili G.,* General Review of Corporate Governance, Tbilisi, 2015, 311-325.

97 *Pinto R.A.,* Corporate Governance: Monitoring the Board of Directors in American Corporations, 46 the American Journal of Comparative Law 317, 1998, 1.

decisions in accordance with their best interests.[98] Therefore, shareholders might agree on the offer that is not profitable in the long run.[99]

In the court case *Air Products and Chemicals, Inc. v. Airgas, Inc*.,[100] after the offer of *Air Products* raised market value for the shares of *Airgas* more than a half of the shares of the *Airgas* were bought by resellers who wanted to sell their shares to *Air Products* and didn't follow the recommendations of the Board which wanted to raise the selling price from the offeror on the shares of *Airgas*. Directors were not generally against selling the corporation but were against selling the shares on the low price because they were sure that the value of the corporation was higher than the offered price.

In the abovementioned example and based on the selective equal treatment of shareholders, the interests of the long-term shareholders are in accordance with the best interests of the corporation. Though the Directors were not considering the demands of the short-term shareholders doesn't mean that the Directors were not protecting the interests of such shareholders. But considering the interests of the short-term shareholders would have been a neglect of the strategic goals of the corporation that would have also affected the interests of the long-term shareholders and the stakeholders and lead to the violation of the fiduciary duties of the Directors.

Section 3^1 of the article 53 of the law of Georgia "On Entrepreneurs" is an interesting example for defining the best interests of the corporation. According to the mentioned article, if the shareholder requests the information from the governing body, such request may be rejected if it is in the substantial interests of the corporation.[101] Therefore, the request of the shareholder may contradict the best interests of the corporation. This issue can be also connected with the cancelling the preemptive rights to the shareholders that is based on the best interests of the corporation. "Depriving or restricting the preemptive right is only admissible when otherwise is impossible to achieve the purpose without increasing the capital and the restriction of the shareholders' rights serves the interests of the corporation as a whole".[102] The restriction of the shareholders rights for "the interests of the corporation as a whole" is connected with the aim and prosperity of the corporation. "…For annulling the preemptive right when capital is growing, the interests of the corporation are the most important. So the legal ground for annulment of the preemptive right must serve (1) the purpose and welfare of the corporation and (2) the measure for achieving this purpose must be reasonable, necessary and proportional".[103]

It must be also noted that the best interests of the corporation is not equal to the interests of the majority shareholders. The governing body is equally liable before the minority and majority shareholders. For the best interests of the corporation, the ruling body should support the adoption of

98 *Oesterle A.D.,* The Negotiation Model of Tender Offer Defenses and the Delaware Supreme Court, 72 Cornell Law Review 117, 1986, 3.

99 *Bainbridge M.S.,* Unocal at 20: Director Primacy in Corporate Takeovers, 31 Delaware Journal of Corporate Law 769, 2006, 5.

100 *Air Products and Chemicals, Inc. v. Airgas, Inc*. 2011 WL 806417 (Del. Ch. 2011).

101 Law of Georgia „On Entrepreneurs", 1994, Article 53.3^1.

102 *Chanturia L., Ninidze T.,* Commentary on the Law about Entrepreneurs, 3th ed, Tbilisi, 2002, 376.

103 *Burduli I.,* Foundations of Corporate Law, Vol. 2, Tbilisi, 2013, 254.

decisions by qualified majority, participation of the representatives of the minority shareholders in the meetings of the committees of the governing bodies and other meaningful measures that aim to protect the interests of the minority shareholders.

Based on the abovementioned, in Georgian corporate law, decisions adopted by the Directors of the corporation with participation of the Supervisory Board, based on the balance of interests of shareholders and stakeholders, in accordance with the welfare and strategy of the corporation as a whole, can be considered in compliance with the best interests of the corporation.

6. The Criticism of Poison Pills

It was mentioned in the second chapter of the Article, that the majority of the big corporations of USA have already implemented the Poion Pills. There are many court decisions regarding the Poison Pills that discussed the legal and factual grounds of the implementation of Poison Pills and supported designation of its grounds. Though Poison Pills are one of the basic antitakeover defensive measures, some experts criticize various aspects of its implementation.

First of all, experts criticize the authority of the board to implement the Additional Right and believe that such powers should be given to the general meeting of shareholders. Experts also think that the successful implementation of the Poison Pills is based on the economic capabalities of the corporation. Therefore, it will be impossible for the corporation which has weak financial portfolio to protect itself from the acquirer. It is also worth mentioning that the additional right, if it is used unproportional regarding the existing threat will be obstructing barrier for the free will of shareholders.

6.1 Governing Body Entitled to Implemented the Additional Righ in Accordance with the Best Interests of the Corporation

Significant number of scientists and the court cases acknowledge the Board as the governing body entitled to implement Poison Pills. Article 144 of the Delaware General Corporate Law broadly defines the authority of the Board[104] and includes the implementation of Poison Pills within the scopes of this authority that is also envisaged by the court practice.[105] Regarding the Georgian corporate law, it was mentioned above that the Directors are entitled to implement the corporate defensive measures but underlined the importance of Supervisory Board and outside Directors in execution of defensive measures. But there are also experts who think that the Directors don't have the right to deter the shareholders from selling the corporation and the impelemntation of the Additional Rights should be the authority of the general meeting of shareholders.[106]

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104 DGCL, §144.

105 *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc*. Delaware Supreme Court, 1986, 506 A.2d 173.

106 *Bebchuk A.L*., The Case Against Board Veto in Corporate Takeover, Corporate Governance, Law, Theory and Policy, Edited By *Joo W.T*., Carolina Academic Press, 2nd ed., Durham, 2010, 554-573.

According to this opinion, shareholders know better than Directors what is their best interest. Moreover, they have to decide without interference whether to sell or not their shares.[107] Board decision of implementation of Poison Pills, automatically means that the shareholders are forced to be in defencive position.

Furtheremore, experts question the Board's ability to protect the long-term strategy of the corporation in case when the shareholders want to sell their shares. At the same time, experts believe that the Board's decision to implement the defensive measures is not profitable for the shareholders.[108]

Studies suggest that (though this study is conducted on the examples of staggered board[109]) with the execution of the defensive measures and refusing to accept the offer both short-term and long-term shareholders are being financially affected. Long-term shareholders, whose corporations retained independence, got 54% less profit than corporations that were sold during acquisition.[110]

It is also highlighted that the management of the corporation is interested in personal profit and decides the fate of acquisitions based on good or bad relationship with the management[111] of the acquiring corporations.[112] Studies reveal that in case of a personal benefit, the managers of the target corporation are ready to accept the offer even it offers low price. [113] It should be also mentioned that the executive management is ready to accept the low price offer in return fot the high ranking positions in the post-transaction corporation.[114]

Therefore, based on the abovementioned studies, though Directors have relevant qualification, they do not have the enough motivation to act in accordance with the best interests of the corporation and shareholders.[115]

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107 *Gordon N.J.*, Mergers and Acquisitions: "Just say never?" Poison Pills, Deadhand Pills, and Share-holder adopted bylaws: and essay for Warren Buffet, 19 Cardozo Law Review 511, Yeshiva University, 1997, 3-4.

108 *Bebchuk A.L.*, The Case Against Board Veto in Corporate Takeover, Corporate Governance, Law, Theory and Policy, Edited By *Joo W.T.*, Carolina Academic Press, 2nd ed., Durham, 2010, 558.

109 *Maisuradze D.,* The Implementation of Defensive Measures during the Reorganization of Capital Entity (Comparative-Legal Study Predominantly on the Example of Delaware and Georgian Corporate Law), Tbilisi, 2015, 251-255.

110 *Bebchuk A.L., Coates C. J. IV., Subramanian G.,* The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy, 54 Stan. L. Rev. 2002, 935.

111 *Bebchuk A.L.*, The Case Against Board Veto in Corporate Takeover, Corporate Governance, Law, Theory and Policy, Edited By *Joo W. T.*, Carolina Academic Press, 2nd ed., Durham, 2010, 558.

112 Bad relationship between the target and acquiring corporations was one of the issues in *Revlon* case, *Thompson O.*, Corporations and Other Business Associations, 5th ed., Aspen Publishers, N.Y., 2006, 788-793.

113 *Hartzell C.J., Ofek E., Yermack D.,* What's In It For Me? CEOs Whose Firms Are Acquired, NYU Working Paper №FIN-01-049, 2001, 23-24, <https://papers.ssrn.com/sol3/papers. fm?abstract_id= 1294594>.

114 Wulf J., Do CEOs in Mergers Trade Power for Premium? Evidence from "Mergers of Equals", Journal of Law, Economics and Organization, 2004, 24-26. <https://papers.ssrn.com/sol3/papers.cfm?abstract_ id=469881>.

115 *Bebchuk A.L.*, The Case Against Board Veto in Corporate Takeover, Corporate Governance, Law, Theory and Policy, Edited By *Joo W.T.*, Carolina Academic Press, 2nd ed., Durham, 2010, 562-564.

It must be also mentioned that the implementation of the additional right is also based on the individual attitudes and beliefs. One of such example is the acquisition of Willammette by Weyerhaeuser. Corporation Willammette was trying to protect itself for 14 months. Particularly, Weyerhaeuser offered 48$ for shares of Willammette. In May, 2001, Weyerhaeuser increased its offer to 50$ and replaced 1/3 of the staggered board of Willammette. But the remaning part of the board was still against of selling the coporation. In January, 2002, Weyerhaeuser once again raised the price till 55$. The Board of Willammette, after the shareholders refused to sign the agreement with the third party, agreed to sell the shares per 55.50$. This price was 16% higher than the first offer. [116]

The abovementioned case is considered as an example of effectivnens of corporate defensive measures when the acquirer was obliged to buy the corporation 16% higher the offered price.[117] But those who criticize additional rights, highlight that though the price was 16% higher, it was achieved only after 14 months from the initial offer and during the final offer there were different conditions on the market. Moreover, if the Directors managed to have a better negotiations with the acquirer, the latter would have raised the price far earlier. Therefore, if the Board didn't implement the defensive measures, the shareholders would have been in a better condition.[118]

In order to thoroughly define the governing body entitled to implement the defensive measures, the broad context of management authorities and fiduciary duties should be analyzed. Single shareholders owe duty of loayalty to each other and to the corporation.[119] Majority or dominant shareholders have greater duty of loayalty to the corporation and other shareholders, than the minority shareholders.[120]

It must be also highlighted that the General Meeting of Shareholders has the authority to deprive the shareholder's preemptive rights[121] and as we mentioned above, it can be used as a flip-in version of Poison Pills in Georgian corporate law. But the law of Georgia "On Entrepreneurs" also envisages the opportunity to transfer this right to the Directors.[122] Also the right to issue additional shares as accompanying feature of the preemptive rights can be part either the General Meeting or Directors authority.[123]

Therefore, based on the autonomy of bylaws, Georgian corporate law grants the opportunity to the corporations to decide independently which will be the implementation body of additional rights.

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116 *Bebchuk A.L.*, The Case Against Board Veto in Corporate Takeover, Corporate Governance, Law, Theory and Policy, Edited By *Joo W.T.*, Carolina Academic Press, 2nd ed., Durham, 2010, 572.

117 *Lipton M.,* Pills, Polls, and Professors Redux, Corporate Governance, Law, Theory and Policy, Edited By *Joo W. T.,* Carolina Academic Press, 2 nd ed., Durham, 2010, 580.

118 *Bebchuk A.L.*, The Case Against Board Veto in Corporate Takeover, Corporate Governance, Law, Theory and Policy, Edited By *Joo W. T.*, Carolina Academic Press, 2nd ed., Durham, 2010, 572-573.

119 *Burduli I.,* Foundations of Corporate Law, Vol.2, Tbilisi, 2013, 165-166.

120 *Burduli I.,* Foundations of Corporate Law, Vol. 2, Tbilisi, 2013, 174-187.

121 Law of Georgia „On Entrepreneurs", 1994, Article 54.6.

122 Law of Georgia „On Entrepreneurs", 1994, Article 54.6.

123 Law of Georgia „On Entrepreneurs", 1994, Article 59.

6.2 Bypassing Poison Pills

Some scholars believe that though the Poison Pills are acknowledged as an effective antitakeover device, it is still possible to bypass it. One of the ways to avoid the implementation of Poison Pills is the replacement of the Board members.[124] In case the offer of the acquirer is profitable, the shareholders of the target corporation can replace the old composition of the Board and elect the new members who will start negotiations for selling the corporation without implementing the additional rights.[125]

Regarding this issue, those scientists who favor the implementation of the Poison Pills think that the Poison Pills is the instrument that makes the acquisition more profitable because the acquiring corporation is aware of potential economic losses if it won't suggest the price that is high enough to be accepted by shareholders.

6.3 Additional Rights as a Threat and as a Mechanism Protecting from Threat

Poison Pills as a corporate defensive measure should comply with the requirements of *Unocal*, thus there should be an existing threat for the corporation and the implemented corporate defensive measures should be in accordance with posed threat.

After *Unocal*, the court cases have developed the proportionality issue. Particularly, the corporate defensive measure will be unproportional to the existing threat if it is coercive and/or preclusive against the free will of shareholders.[126] Thus, though the corporation has implemented the corporate defensive measures, the shareholders should still have the opportunity to freely sell their shares. Additional rights is the defensive measure against the threat to corporation and it cannot be used to influence the shareholders voting rights.[127] These issues are subject of equal treatment.

7. Conclusion

Additional Right of shareholders is a complex and interrelated issue with many corporate legal institutes. It can be also regulated based on the autonomy of bylaws. The implementation of Poison Pills affects the interests of shareholders and stakehoders and aims to prevent acquiring corporation from buying the target.

The above article discusses the development of Poison Pills, its various models, implementation grounds and connected legal institutes.

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124 *Velasco J.,* The Enduring Illegitimacy of the Poison Pill, 27 Iowa Journal of Corporation Law 381, 2002, 2.

125 *Lipton M.,* Pills, Polls, and Professors Redux, Corporate Governance, Law, Theory and Policy, Edited By *Joo W.T.,* Carolina Academic Press, 2 nd ed., Durham, 2010, 579-580.

126 *Paramaunt Communications, Inc. v. QVC Network*, *Inc*. Delaware Supreme Court, 1994, 637 A.2d 34.

127 *Werkheiser. W.G.,* Defending the Corporate Bastion: Proportionality and the Treatment of Draconian Defenses from Unocal to Unitrin, 21 Delware Journal of Corporate Law 103, 1996, 7-8.

As it was mentioned, Poison Pills is the creature of the American corporate law, but above analysis shows that its reception and introduction is also possible in Georgian corporate law including the implementation of Poison Pills in the bylaws of Georgian public JSCs.

There is no common approach towards Poison Pills and to the governing bodies entitled to implement it. Some scientists cast doubt on effectiveness of this defensive measure and its appropriatness to the best interests of the corporation. However, Poison Pills still remains as one of the most popular and widely used antitakeover defensive measure.

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