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РАЗРЕШЕНИЕ КОНФЛИКТОВ КОРПОРАТИВНОГО УПРАВЛЕНИЯ В УСЛОВИЯХ ФИНАНСОВОГО КРИЗИСА

Аннотация. В статье рассмотрены причины возникновения конфликтов корпоративного управления в Украине. На основе анализа многообразия публикаций изучены цели, интересы, методы достижения и результаты конфликтов между менеджментом и акционерами. Предложено использование экономического и правового механизмов для разрешения корпоративных конфликтов. Представлены конкретные предложения для отделения регуляторов от менеджмента и собственников компании.

Ключевые слова: корпоративное управление, корпоративные конфликты, менеджмент, акционеры.

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ВИРІШЕННЯ КОНФЛІКТІВ КОРПОРАТИВНОГО УПРАВЛІННЯ В УМОВАХ ФІНАНСОВОЇ КРИЗИ

Анотація. У статті розглянуто причини конфліктів корпоративного управління в Україні. На основі аналізу різноманіття публікацій вивчені питання, включаючи цілі, інтереси, методи досягнення та результати конфліктів між менеджментом і акціонерами. Запропоновано використання економічного та правового механізмів для вирішення корпоративних конфліктів. Надані конкретні пропозиції щодо відділення регуляторів від менеджменту і власників компанії, акціонерів.

Ключові слова: корпоративне управління, корпоративні конфлікти, менеджмент, акціонери.

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CORPORATE GOVERNANCE CONFLICTS RESOLUTION IN FINANCIAL CRISIS

Abstract. The article examines the causes of corporate governance conflicts in Ukraine. The analysis of numerous studies helps to clarify the basic issues including objectives, interests, methods of achievement, and results of managerial and stockholder conflicts. The application of the economic and legal mechanisms for corporate conflicts elimination is proposed. Specific policy proposals designed to achieve the goal to separate regulators from company management and owners.

Keywords: corporate governance, corporate conflicts, management, stockholders.

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JEL Classification: G 30, G 34, G 38.

Introduction.

The global financial and economic crisis in Eastern Europe is resulting in some financial institutions bankruptcy, the bailout of banks by national governments, and downturns in stock markets around the world. The corporate governance analysis of various theories suggests two main approaches: the definition through the companies' governance

system, and the determination of the allocation of value added among stockholders. The rest includes the adoption of the international standards of corporate governance system all over the world.

Scientists focus their attention to shareholders (owners) and stockholders' interests, models of inside and outside board committee, and a relationship between governance practices, and corporate or organizational performance. Some authors emphasize the discussed issue which is related to the interdependence of global financial crisis and efficiency of corporate governance system. The basic approaches deal with an absence of correlation between corporate governance and financial crisis, an effective implementation of existing corporate governance arrangements and principles.

In a broad sense, "corporate governance system" refers to the whole set of regulatory, market stakeholder and internal governance. There has been estimated no significant correlation between corporate governance and financial infrastructure.

The spread of globalization raises the issue for good corporate governance performance. It set the number of questions towards global and country system of monitoring, accountability improvement, and new system establishment. Good corporate governance is associated with reduced risk for financial crises. The better quality of shareholder protection demonstrates the dependence with the large size of the country's stock market. The weak corporate governance leads to higher costs of capital. In case of better corporate governance there is higher returns on assets.

American corporate governance and in Western European systems create sound information and focus executive and managerial attention on corporate performance. After the high-profile collapse of a number of large corporations in the past two decades, several of which involved accounting fraud, there has been a renewed public interest in how modern corporations practice governance, particularly regarding accounting. The positive features of these models implementation to East European countries would reduce the insider effect and increase the fairness, transparency, accountability of value distribution, and raise corporate control in the company. The scientists propose to learn how to respect shareholders rights and exercise those rights in the corporation.

Literature Review.

The formation of corporate governance system is the crucial question for all governments in transition. The privatization of large and small enterprises was typical feature of command system transformation. The problem of redistribution of property rights between insiders and outsiders, and external investors' access to privatized company's shares is vital item of reforms. The chief goal of current corporate governance is to eliminate contradictions among shareholders and management.

One group of scientists emphasizes the regulatory role of corporations and governance system. R. Monks, N. Minow [1] define corporate governance system as the whole set of regulatory, market stakeholder and internal governance. Following this approach scientists Z. Bodie, A. Kane, A. Marcus [2] consider that the corporate governance is "the set of rules and procedures that ensure that managers do indeed employ the principles of value-based management, to make sure that the key shareholder objective (wealth maximization) is implemented." The agency cost approach refers to instances when an agent's behavior has deviated from principal's interest. There are various conflicts of interests that can impact manager's decision making process to act in shareholder's interests. Management can buy other companies to expand power. They can manipulate financial figures to optimize bonuses and stock-price-related options.

M. Ehrhardt and E. Brigham [3] point out the interdependence of the sub-prime mortgage market to the financial and global economic crisis, and analyze the effect of profit maximization mechanism for a firm's value. From the financial point of view the authors

point out the basic features of corporate governance that include the set of laws, rules, and procedures that influence a company's operations, and the decisions made by its managers. A. Carroll and A. Buchholtz [4] give the overview how effective business decision makers balance, and protect the interests of various stakeholders, including investors, employees, the community, and the environment - particularly as business recovers from a perilous financial period. They give a broad definition of corporate governance including "...the method by which a firm is being governed, directed, administered, or controlled ... is concerned with the relative roles, rights, and accountability of such stakeholder groups as owners, boards of directors, managers, employees, and other stakeholders." The authors prove content emphasizes the social, legal, political, and ethical responsibilities of a business to both external and internal stakeholder groups, and balance strong coverage of ethics and the stakeholder model with a new focus on one of business' most recent, urgent mandates: sustainability.

Another group of scientists studies the degree to which shareholders influence and share in short- and long-term corporate value creation, and defines the goal of economic reform in transition and, largely, its pace. Shareholder access to such created value is determined by the degree to which key corporate "insiders", especially executives and management, can claim a disproportionate share of corporate value (the "insider effect").

L. Bebchuk, A. Cohen & A. Ferrell [5, p.785] investigate which provisions, among a set of twenty-four governance provisions followed by the Investor Responsibility Research Center (IRRC), are correlated with firm value and stockholder returns. The authors put forward an entrenchment index based on six provisions - four constitutional provisions that prevent a majority of shareholders from having their way (staggered boards, limits to shareholder bylaw amendments, supermajority requirements for mergers, and supermajority requirements for charter amendments), and two takeover readiness provisions that boards put in place to be ready for a hostile takeover (poison pills and golden parachutes). Bebchuk, L., Cohen, A. & A. Ferrell find that increases in the level of this index are monotonically associated with economically significant reductions in firm valuation, as measured by Tobin's Q, and present suggestive evidence that the entrenching provisions cause lower firm valuation.

D. Lacoste, S. Lavigne, E. Rigamonti [6, p.350] consider the relationship between ownership structure and corporate diversification strategy. Their research shows an increase in managerial ownership, far from leading to alignment, leads to managerial behaviour that goes against the interests of shareholders and more precisely to unrelated diversification strategies.

The analysis of the publications confirms that the definition, value creation, and stock distribution create incentives for company development. It is important to point out the basic elements of corporate governance system which include Board of directors, charter provisions affecting takeovers, compensation plans, capital structure choices, and internal accounting control systems. The function of Board of Directors is directed to provide control of management.

Profit sharing is considered one of the important formal measure of income increase. The profit share is distributed to managers and employees which provide incentives to shareholders. In case of shares distribution within the company shareholders get benefits to ensure the company development. The forms of stock distribution and stock options could be applied for enhancing of profit increase. In case of using stock options shareholder can buy stocks in some day on specified date. Profitability increase is the key issue for shareholders. It makes it applicable for company workers interests. Stock value is connected with resources belonging to shareholders. The higher rate of return of the company is, the more it will have a stock. Empirical studies found that countries with controlling shareholder systems cause different levels of private benefit extraction. As instance, Mexican controlling shareholders

are said to expropriate more than a third of the value of the company, while expropriation by their Swedish counterparts is limited to 1 % of company value.

The managers and stockholders interests conflict is based on the differences of objectives, interests, methods of achievement, and benefits. Managers are concentrated on personal compensation, their own stability and stability of employment. They try to minimize their own risk, to expand their personal power, to receive potential and financial advancement, to compete between managers, and to separate between managers personal, professional. Stockholders are oriented on stable return, profit maximization, share price appreciation, and company stability. They wish to reduce risk, to provide consistency policy of the flow of benefits in the firm, to increase share appropriation and dividends. In order to minimize or to avoid the managers and shareholders interests conflict there is a need to create management criteria which effect stockholders.

The panel data model from 2003 to 2005 on ownership change and privatization for 27 Ukrainian regions, including 24 oblasts, the Autonomous Republic of Crimea and the two cities Kyiv and Sevastopol demonstrates that the pace of privatization in the industrial regions with high urbanization is higher in comparison to agrarian regions in Ukraine [7, p. 28]. For example, the share of privatized state property is correlated with the size of the regions, measured by urban population. Wages are estimated higher in regions where more public companies were privatized. It confirms that the privatization of public owned companies may have a positive effect on wages.

The definition of value added through the companies' governance system and allocation of value added among stockholders influence value creation within the company and their disposable. The lack of the formal institutions causes the appearance of the informal forms of relations among companies, banks, and representatives of the state authorities. The dissemination of the informal rules for companies' behavior results in the disclosures and frauds appearance in corporate sector in Ukraine. The absence of the long-term corporate control policy summons an ineffective system of corporate governance formation. The existence of weak-enforcement of company's law gives an opportunity for managers to manipulate the insider information for personal interests, and as a result of it to gain an additional profit. Managers block the access of domestic and foreign investors to companies' shareholding process. The weak enforcement mechanism in Ukraine enhances the legal use of corporate rules, and new laws on bankruptcy and foreign investment.

The motivation mechanism for shareholders dividends is not created in Ukraine. An absence of dividends return mechanism and an undeveloped stock market do not stimulate shareholders and managers interests for profit maximization. Managers do not have incentives to take care for the dispersed shareholders' interests. The significant role belongs to supervisors who set targets for the risk exposure of public funds, explain any deviations from the targets, and give a corrective actions plan.

The quality assessment of corporate management could be provided from the side of requirements and objectives for work of management institutions of the company, procedures of decision making or reporting system. The effective corporate management supposes instrument of trust creation. It helps company to get resources for successful strategy implementation, to provide a stable long-term business development, and reduce risks connected with conflicts of interests or external threats.

Conflict of managerial and stockholder interests in the Ukraine.

The corporate conflict of interest may take place between the company and its stockholder, between the stockholder and the hired management, or between the company's shareholders. The objective basis for conflicts are the contradiction of the definitions of ownership as the share, determining ownership of the company, and share, defining as document, settling of stockholder rights. The basic problem deals with contradiction of

ownership and management functions of the corporation. Passivity of shareholders supposes an absence of the management motivation which is explained by the high capital dispersion among the owners. There is low investment attractiveness for small investors. The contradiction among the different groups of investors, the executive and supervisory board hampers to improve an efficiency of corporate governance.

The concentration of ownership in the hands of financial industrial groups, diffusion of ownership among shareholders, the prevalence of closed joint-stock companies, and the removal of the company control to management are the distinctive features of the corporate governance model in Ukraine. The data from the table 1 prove the hypothesis for prevalence of closed joint-stock companies to opened joint-stock companies in Ukraine during the period from 2005 to 2013. There are registered 12965 joint stock companies of different forms of ownership in 2013 in Ukraine. They include 2366 opened joint stock companies, 5433 closed joint stock companies. There are 3067 joint stock companies which do not conclude the procedure of re-registering the ownership form after adoption the new Joint Stock Companies Law of 2008.

Table 1

The dynamics of joint-stock companies in the Ukraine

Types of joint -stock companies	2005	2006	2007	2008	2009	2010	2013
Joint-stock company	35 215	34 942	35 134	35 016	31100	30169	12965
Opened joint -stock company	12 045	12 089	12 171	12 137	10058	9769	2366
Closed joint- stock companies	22 228	22 100	22 255	22 194	20052	20400	5433

Source: Unified state register of enterprises and organizations of Ukraine: Statistical Bulletin. – K.: State Statistics Committee of Ukraine, 2013.

Shareholder interests are served when management is highly motivated to strive for higher productivity and better performance. It results in the company's value added increment. Conflicts between management and shareholders are arisen and resolved constantly in the company. The managers' withdrawal of a part of company's resources for own needs is considered one of the most important conflicts. It decreases significantly wealth of the company. Rydyk [7, p. 85] emphasizes, that «activity of corporation is the catalyst of agency conflicts. For example, as soon as in structure of the capital of corporation there is a debt loading then there is an agency conflict between shareholders and bond's holders». The managers' activity contains an opportunity of agency problems emergence. They are connected to a possibility of existence of majority unpredictable situations. Managers make smaller efforts for the company's management that explains their desire to reduce up to minimum a probability of adverse consequences losses due to uncertainty and unpredictability in the world financial markets. They are guided via a choice of smaller investment horizon of the company's development. It is dealt with the restriction of the long-term company's strategy development definition. Managers try to decrease a probability of some inefficient decision making process. Management activity is directed on reduction of probability risk takers strategy. The following policy is directed to avoid political, investment, financial, and also random factors. Managers are not interested in an effective utilization of the company's assets. An absence of personal managers' activity stimulus is a favorable basis for agency problems emergence. The management activity does not aspire to achieve profit maximization of decision-making process within the company. Jensen and Mecking [8, p. 90] conduct the analysis of the U.S. and UK corporate sector development. They argue that in case of ownership diffusion, as is typical for U.S. and UK corporations, agency problems stem from the conflicts of interests between outside shareholders and managers who own an insignificant

amount of equity in the firm. In case of one owner (or a few owners acting together) the problem of monitor and discipline management shifts to better company's performance under decreasing of information asymmetries.

The state does not play an important role in company's monitoring or bank's reorganization. Uncertainty and high investment risk demonstrate the choice of western companies to list their shares on a stock market with strict corporate governance rules. Legal definition, legality observances are considered to form a guarantee basis for the property rights protection, a financial transparency maintenance, stability, and economic development predictability in a society. The decrease managers' control in the company, shareholders' access to decision making process relate to an important issue in creating good corporate governance system.

Classification of conflicts by the objectives pursued by the attacker is divided on the following groups:

1. A controlling share of conflicting investor is obtained to form horizontally or vertically integrated holding company;
2. Consolidation of a large share made for the purpose of speculative sale of a controlling share to a strategic investor;
3. Investor takeover to take control of the company - the attack object;
4. The acquisition of a controlling stake to block a competitor [9, p. 331].

According to the criterion of object-conflict is divided into significant minority shareholders, the majority shareholder; shareholders against management; the conflict between the general meeting and the board of directors; contradiction between management and the workforce when the latter holds a significant share.

The concept of conflict of interest is given in Ukrainian legislation. It is incorporated into the laws "On the Procedure for Settlement of Collective Labor Disputes (Conflicts)" and "On the Procedure for Repayment of Taxpayer Liabilities to Budgets and State Target Funds"), and the State Commission for Securities and Stock Market in its Principles of Corporate Governance. In the Ukrainian Principles of Corporate Governance the conflict of interest is defined exactly as "the discrepancy between the personal interests of an officer or his/her connected persons and the professional duty to act in the best of interests of the company."

The distinctive features of corporate conflicts are their subjective components. It grounds for their appearance as specific settlement procedures. The corporate conflicts are the way to secure the operation of the company in the interests of all its owners (participants). The aim of corporate relations is to ensure a balance of interests. Different factors may serve ground for the corporate conflicts, but for convenience the factors in general can be divided into four groups: appearance of the interest groups of owners in the ownership structure of the company; related party transactions conducted by the company; presence of the persons aimed at using methods that are traditionally referred as "raiding" among the owners of the company; corporate restructuring or change of control structure in the company.

The current Ukrainian legislation specifies a number of legal mechanisms for corporate conflicts prevention, and their negative effects to minimization. In Ukrainian legislation on joint stock companies such mechanisms are summarized in the following: 1) internal corporate mechanisms for conflict resolution; 2) contract mechanisms; 3) judicial and non-judicial (alternative) mechanisms. The first group includes the codes of corporate governance, the internal conflict of interest policies and specific procedures stipulated by the Law of Ukraine "On Joint Stock Companies" in 2008. The Principles of Corporate Governance, approved by the decision No 571 of 11.12.2003 of the State Commission for Securities and Stock Market are the basis for its development. A new the JSC Law (The JSC Law) came into force in October 2008 and fully applies starting May 2011. The adoption of the JSC Law is a significant step towards the establishment of a comprehensive corporate

governance regime. Joint Stock Companies Act, 2008 Chapters VII-X define the feature of corporate governance in Ukraine. Section “General Meeting of JSC” defines the competence, procedure of general shareholder’s meeting, voting procedure, etc. The section Company’s Executive Body includes the basic principles of the executive body activities. Evolution from formal supervisory board in Ukraine to a new tool for internal management of the company. JSC Law enhances protection of rights and interests of shareholders, creating new impediments to raider attacks, and solving problems and curing irregularities arising in the corporate governance area upon implementation of the JSC Law. The Law “On Accounting and Financial Reporting in Ukraine” amended in 2011. Prevention of corporate conflicts is one of the objectives of such code. The code defines the internal procedures to identify corporate conflict, to inform the company about, and to resolve conflict. The law sets out special procedures designed to resolve the conflict of interest between shareholders.

The second group explains the difference of the buy-out agreement and shareholders’ agreement in the Ukrainian legislation. The main difference between these agreements is the narrow scope of regulation. The buy-out agreement indicates only the conditions and mechanisms of the shareholder’s withdrawal from the business or of a squeeze-out, determining voluntary or mandatory buy-out, as well as the existence of third parties rights in connection with the buy-out. The shareholders’ agreement regulates such issues as the nomination of candidates for management positions, the procedures for stock disposal and stock pledge, voting procedures, the procedures for dispute resolution and responsibility for infraction of obligations.

In fact, in spite of the prohibition of the Supreme Court of Ukraine and the Highest Commercial Court of Ukraine, the corporate relations in the Ukrainian companies are frequently regulated outside Ukraine. T. Bondaryev, M. Malskyy [10] support conclusions that the Highest Commercial Court of Ukraine has acted in unusual manner in some cases for courts in developed countries.

The third group provides mechanisms for arbitration within national or foreign (international) institutions at different levels and complexity. These include the mediation along with the procedures that are governed by internal conflict resolution policy of the company.

The legal mechanism for conflict resolution includes the following measures to be fulfilled. The responsibility of the board provides realization of structures for achievement of balance between the pressure of accountability and the requirement for noninterference in their activity. Institutions development provides financing, monitoring, and controlling procedures of corporate enterprises.

Conclusions.

The goal of corporate governance is to eliminate cases when stockholders have conflicts of interest with one another. The application of the legal mechanisms to prevent corporate conflicts and to minimize their negative effects will be directed to align of managers’ behavior with stockholders.

Adopt the principles of independence, responsibility, and transparency in corporate management, process and records. Transition to a new corporate governance system, inspired by the principles of FASB, IASB and the Sarbanes-Oxley Act, will force transparency and timely reporting of corporate business activities. In turn, these practices will enforce independence and accountability in decision making and strengthen investor confidence.

Separate regulators from company management and owners. Governance must clearly define the functions and relationships of the various parties, and separate oversight from operational and financial management.

The problem of institutional rights establishment relates to the crucial problem for investment decisions. Business environment improvement will stimulate institutional

development via credibility, transferability of shareholders rights, legal mechanisms for preventing corporate conflicts, and minimize their negative effects. Stock market and financial institutions development will stimulate foreign direct investment inflow into the countries.

The effective market economy development is influenced by how the industrial policy of the government will attract foreign investment into the country. The effectiveness of corporate governance system will depend on the formation of strong shareholders' interests in company's long-term value creation.

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