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**CORPORATE GOVERNANCE SYSTEMS: COMPARATIVE ASPECT****Oleksandr KOVALYSHYN,**

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**SUMMARY**

The models of corporate governance system are analyzed in the article. Particular attention is paid to the corporate governance system of the USA, Germany in the aspect of the proposed changes to the company law of Ukraine. The place of the supervisory board in the Ukrainian corporate governance system is clarified.

The author analyzes the advantages and disadvantages of a one-tier corporate governance system and concludes that the introduction of a one-tier corporate governance system will facilitate management flexibility and is in demand among foreign investors (primarily from the states of the Anglo-American law system). At the same time its implementation entails risks of oversight activities of management of the company. Therefore, the introduction of a one-tier system of governance in the corporate law of Ukraine requires further detailed scientific research.

**Key words:** legal transplant, corporate governance, one-tier system, two-tier system, executive directors, non-executive directors.

**СИСТЕМИ КОРПОРАТИВНОГО УПРАВЛІННЯ: ПОРІВНЯЛЬНО-ПРАВОВИЙ АСПЕКТ****Олександр КОВАЛИШИН,**

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**АНОТАЦІЯ**

У статті аналізуються моделі систем корпоративного управління. Особлива увага приділяється системі корпоративного управління США, Німеччини в аспекті пропонованих змін до акціонерного права України. З'ясовується місце наглядової ради в системі корпоративного управління України.

Автор аналізує переваги та недоліки однорівневої системи корпоративного управління й робить висновок, що запровадження однорівневої системи управління сприятиме гнучкості управління та затребуване серед закордонних інвесторів (насамперед із країн англо-американської системи права), але її функціонування пов'язане з ризиками стосовно нагляду за діяльністю менеджменту товариства. Тому впровадження однорівневої системи управління в умовах корпоративного права України потребує подальших детальних наукових досліджень.

**Ключові слова:** правове запозичення, корпоративне управління, однорівнева система, дворівнева система, виконавчі директори, невиконавчі директори.

**SISTEME DE GUVERNANȚĂ CORPORATIVĂ: ASPECT JURIDIC COMPARATIV****REZUMAT**

Articolul analizează modelele sistemelor de guvernare corporativă. O atenție deosebită se acordă sistemului de guvernare corporativă din SUA, Germania, sub aspectul modificărilor propuse în legea acționarilor din Ucraina. Locul consiliului de supraveghere în sistemul de guvernare corporativă din Ucraina este clarificat.

Autorul analizează avantajele și dezavantajele unui sistem de guvernare corporativă unic și conchide că introducerea unui sistem de management unic va facilita flexibilitatea de gestionare și este la cerere în rândul investitorilor străini (în primul rând din țările sistemului de drept anglo-american), dar funcționarea acestuia implică riscuri de supraveghere, activități de conducere a companiei. Prin urmare, introducerea unui sistem unic de guvernare în dreptul corporativ al Ucrainei necesită cercetări științifice detaliate.

**Cuvinte cheie:** împrumuturi legale, guvernare corporativă, sistem unic, sistem pe două niveluri, directori executivi, directori neexecutivi.

**Formulation of the problem.** The Verkhovna Rada of Ukraine has registered the Draft Law No. 2493 of 25.11.2019 [1] (hereinafter – the Draft) on amendments to the legal regulation of corporate governance relations in Ukraine. In fact, a new version of the Law of Ukraine “On Joint Stock Companies” has been proposed for consideration.

The bill proposes to allow the creation of governing bodies of two types – one-tier board system and two-tier board system – by giving companies the right to choose a specific

model of corporate governance and to introduce a proportional approach to corporate governance, which takes into account the size of the company, its social importance, type of business model, etc. [2].

The introduction of a two-member governance structure is a corporate legal borrowing from the Anglo-American legal system still unknown to the corporate law system of Ukraine. That is why it needs special attention given that such a bill proposes to amend the basics of corporate governance in Ukraine.

The introduction of a two-member governance structure is a legal transplant from the Anglo-American legal system and was unknown for the corporate governance system of Ukraine. That is why it needs special attention taking into account that such a bill proposes to change the grounds of corporate governance in Ukraine.

**Analysis of recent research and publications.** The problems of corporate governance have been the subject of research by a number of Ukrainian scientists, among which it is worth to mention A.A. Belyanovich, V.A. Vasilyeva, O.R. Kibenko, I.V. Lukach, A.V. Magky, I.V. Spasybo-Fateyeva, V. Scherbyna and others. But in the context of the proposed changes, it is worth analyzing the issues of corporate governance in a comparative way, taking into account the experience of foreign countries.

**The aim** of the article is to make a comparative analysis of world corporate governance systems in respect to the proposals for introducing a one-tier system of corporate governance in Ukraine.

**Presenting the research.** It is traditional a division of the corporate governance systems into Anglo-American (one-tier) and German (two-tier). Meanwhile, more detailed differentiation of corporate governance systems is also found in the legal literature. In particular, there are four groups of corporate governance systems among European countries. The countries of the first group are characterized by a two-tier (German) model of construction of company's bodies: general meeting, executive and supervisory bodies (Germany, Austria, Denmark). The countries of the second group have enshrined in the legislation a one-tier (British) model that envisages functioning in the company of a unitary governing body – the board of directors (Great Britain, Ireland, Belgium, Italy, Spain, Greece). An alternative model that enables companies to form a supervisory body in a company is enshrined in the legislation of France, Finland and Portugal [3, p. 143]. In France, shareholders have the opportunity to choose between one- or two-tier systems [4, p. 16]. A mixed model is introduced in the Netherlands and Sweden. It secures the unitary model but provides for the mandatory formation of a supervisory authority under certain conditions, [5, p. 72; 6, p. 248–249].

Typical of the American model is that the board of directors performs the both functions of management and supervision at the same time [7, p. 175]. Officials, usually headed by the president, are assigned to perform the current tasks. Thus, it is called as a monistic structure [8, p. 13] of the governing bodies in an US corporation [9, p. 251].

The American governance model is not without its disadvantages. The combination of supervisory and management functions at one time led to the bankruptcy of the *Enron* concern (in 2001) and several other companies in the US. Due to the combination of management and supervisory functions within one body, the management of the companies resorted to systematic abuse. These events led to a wide-ranging discussion of board of directors functions and the limitation of its impact in the context of a company supervision function. The result was the adoption of the *Sarbanes-Oxley Act*, which required the US companies to form an independent audit committee outside the board of directors, which was in fact the only governing and supervisory body until that time.

The German AG corporate governance system includes such bodies as the board of directors (*Vorstand*) and the supervisory board (*Aufsichtsrat*). In Germany, the members of the supervisory board are also elected by the general meeting (§ 101 I 1 AktG). The members of the board of directors are elected by the supervisory board (§ 84 I 1 AktG). But a peculiarity of German shareholder law is a clear division of responsibilities between the supervisory board and the board of directors, which distinguishes German AG from American JSC. Managing of

current affairs and supervising should not intersect. A member of the supervisory board may not simultaneously be a member of the board of directors (§ 105 AktG), and the latter's powers cannot be delegated to the supervisory board (§ 111 IV 1 AktG). Thus, the board of directors and the supervisory board are separated both in terms of their staff (§ 105 AktG) and in terms of their authority (§ 111 IV 1 AktG). Regarding the structure of governing bodies, it is a three-bodies structure of corporate governance [8, p. 14].

Eastern European countries have opted for one of the two systems mentioned above. For example, Polish corporate governance system is in fact a “duplicate” of the German two-tier corporate governance structure [10, p. 422]. It should be noted that at the stage of drafting of the Polish Commercial Code there was a discussion about the introduction of an alternative: a two-tier or one-tier structure of company management. But in view of the growing demands in the European Economic Community for the principle of codetermination (participation of employees in corporate governance), it was concluded that the “erosion” of the supervisory function would complicate employees' access to management. Therefore, the idea of borrowing the Anglo-American model was rejected [10, p. 428].

Corporate law of the Russian Federation was formed largely under the influence of the Anglo-American model of corporate governance. In accordance with Part 1 of Art. 64 of the Law of the Russian Federation “On Joint Stock Companies” the board of directors (supervisory board) of the company carries out the general management of the company's activities, except for resolving the issues referred by this Law to the competence of the general meeting of shareholders. That means, that a single body carries out both supervision and management of the most important spheres of activity of the company, and the definition refers to “general management” and does not mention supervision, although from the analysis of the following provisions follows its function.

From the very beginning, a two-tier structure of corporate governance was introduced in Ukraine: the executive body of the company and the supervisory board. Sometimes it is referred to as a three-member body system with consideration of the highest governing body (general meeting, supervisory board and executive body). The possibility of forming an audit committee was introduced, which does not belong to governing bodies, but performs the functions of audit, audit of financial and economic documentation.

In accordance with Part 1 of Art. 46 of the first wording of the Law of Ukraine “On Business Associations” (currently not effective concerning the joint stock company) a supervisory board may be established in the joint stock company, which oversees the activities of its executive body. Formation of a supervisory board was optional, which quite rightly aroused comments among scientists. I.V. Spasybo-Fateyeva notes some uncertainty and half-heartedness in the perception of American and continental corporate governance models, which is reflected in the fact that many issues of companies' business activities are concentrated in the hands of executive bodies with insufficient control by supervisory boards or their absence in many companies [11, c. 78].

Thus, at the initial stage of the development of Ukrainian corporate law, the supervisory board was entrusted exclusively with the function of controlling the activity of the executive body, a function that is inherent in the continental system of corporate law. This is explained by the fact that the German model of company law has been significantly influenced by the system of companies, which is the basis of the Law of Ukraine “On Business Associations”.

At the same time, a number of changes have taken place in the structure of organs in the corporate governance system in

recent years. With the adoption of the Law of Ukraine “On Joint Stock Companies” the functions of the Supervisory Board have changed. According to Part 1 of Art. 51 of the Law of Ukraine “On Joint Stock Companies” the Supervisory Board of the Joint Stock Company is a collegial body that protects the rights of shareholders of the company and within the competence defined by the articles of association and the Law, manages the joint stock company, as well as controls and regulates the activities of the executive body. That is, along with the main function of controlling the activity of the executive body of the company, the supervisory board is also authorized to manage the joint stock company. The Supervisory Board has obtained even the right to assume the functions of the executive body. Thus, there is no clear division of functional responsibilities between the executive and the supervisory body, which is inherent in the American corporate governance model.

In accordance with the Draft Law No. 2493 [1] it is proposed that the structure of corporate governance in a joint-stock company shall be one-tier and two-tier (Article 4 of the Draft). It is proposed that with a one – tier structure the joint – stock company governing bodies are the general meeting and the board of directors with the combination of functions of control and management over the activities of the company in a single collegial body – the board of directors.

However, the Draft proposes to leave the possibility of establishing a two-tier corporate governance structure with a clear division of functions from direct management of the current (operational) activities of a joint-stock company, for which the executive body is responsible, as well as the control function exercised by the Supervisory Board (Article 4 of the Project).

Of course, the introduction of a one-tier management system has several advantages:

First, a one-tier management system promotes speed and flexibility in decision-making by the company's executive body, as both executive and non-executive directors interact within the same body. The decision for its final adoption is considered by a single body. In this case, sometimes the lengthy decision-making process of the executive body is avoided.

Second, non-executive directors are better informed about the activities of the company and, therefore, are more prudent in exercising supervisory functions. It is believed that under such a management system, non-executive directors are better aware of the responsibility for the supervision role in a company.

Third, it is expected that the introduction of a one-tier system of governance will facilitate the inflow of foreign investment into the economy of Ukraine from those countries for which the one-tier corporate governance system is traditional. The similarity of the principles of company management is generally regarded by investors as an additional factor in favor of investing in a country's economy.

Meanwhile, the introduction of a one-tier management system entails certain risks.

First, the existence of non-executive directors within a single body means for them a risk of the same responsibility as that of executive directors. Therefore, the introduction of an appropriate management system can have the opposite effect when non-executive directors, instead of supervision, actually “cover” the activities of the management body in order to avoid the risk of joint and several liability (in particular, in the event of abuse or other fraudulent actions, in the event of bankruptcy of the company, etc.).

Second, the functioning of non-executive and executive directors within a single body – the board of directors – threatens to some extent the “independence” and objectivity of decision-making by non-executive directors relative to executive directors (for example, in the case of abuse by the latter).

Statistics show that in the countries where both two-tier and one-tier corporate governance systems have been introduced, registration of companies with a single governing body has not gained popularity. In particular, in Denmark, among the hundreds of thousands of registered legal entities, only 409 companies (LLC-354, JSC-49, SE-6) operate with a one-tier corporate governance system. It should be noted that the one-tier system was implemented in 31 of the 140 JSCs listed on the stock exchange [12]. In Germany, the possibility of forming companies with a one-tier system of governance emerged with the adoption of the EU Regulation on the Societas Europaea (SE). As of July 1, 2019, only 36% of European joint-stock companies operate with a one-tier governance system, with the remaining 64% implementing a two-tier management system [13]. Therefore, it seems that a one-tier system of governance has not become widespread in the continental Europe.

Draft Law No. 2493 proposes to impose restrictions: “A one-tier management structure may not be introduced in joint stock companies that are enterprises of public interest” (Part 5, Article 4 of the Project).

Such entities include securities issuers whose securities are admitted to trading on the stock exchanges or which are publicly offered securities, banks, insurers, non-governmental pension funds, other financial institutions (except for other financial institutions and non-governmental pension funds belonging to micro-enterprises and small enterprises) and enterprises that according to this Law belong to large enterprises (Article 1 of the Law of Ukraine “On Accounting and Financial Reporting in Ukraine”). This careful approach of the authors of the Draft seems to be welcomed. It is proposed to introduce a one-tier system for small and medium-sized enterprises, which is especially important at the stage of testing the model in conditions where the model was not previously known to the national law.

**Conclusions.** Introduction of a one-tier management system will promote management flexibility and is in demand among foreign investors (primarily from the countries of the Anglo-American system of law), but its operation is fraught with risks related to the oversight of the management of the company. Therefore, the introduction of a one-tier system of governance in the corporate law of Ukraine requires further detailed scientific research.

Erosion of the clear division of functions of supervision and management over the activities of the company threatens the interests and protection of the rights of minority shareholders and carries risks for the joint-stock company as a whole.

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