VILNIUS UNIVERSITY

Robertas Čiočys

PROBLEMS OF REGULATION OF CORPORATE GOVERNANCE IN LITHUANIA

Summary of doctoral dissertation

Social sciences, law (01 S)

Vilnius, 2013

Dissertation was prepared in 2007 – 2012 at the Faculty of Law, Vilnius University.

Scientific supervisor:
Doc. Dr. Andrius Smaliukas (Vilnius University, social sciences, law – 01 S)

Dissertation is defended at the Law Science Council of Vilnius University:
Chairman:
Prof. Dr. Vytautas Mizaras (Vilnius University, social sciences, law – 01 S)
Members:
Prof. Dr. Asta Dambrauskaitė (Mykolas Romeris University, social sciences, law – 01 S)
Prof. Dr. Valdonė Darškuvienė (Vytautas Magnus University, social sciences, economics – 04 S)
Prof. Dr. Rimvydas Norkus (Mykolas Romeris University, social sciences, law – 01 S)
Doc. Dr. Andrius Smaliukas (Vilnius University, social sciences, law – 01 S)
Opponents:
Prof. Dr. Egidijus Baranauskas (Mykolas Romeris University, social sciences, law – 01 S)
Doc. Dr. Skirgailė Žalimienė (Vilnius University, social sciences, law – 01 S)

The dissertation will be defended in the public session of the Law Science Council, 3 May, 2013, 13 p.m., at Vilnius University Law Faculty Jablonskis auditorium.
Address: Saulėtekio 9, LT-10222 Vilnius, Lithuania.
The summary of doctoral dissertation was distributed on 3 April, 2013.
The dissertation can be reviewed at the library of Vilnius University.

VILNIAUS UNIVERSITETAS

Robertas Čiočys

BENDROVIŲ VALDYMO REGLAMENTAVIMO LIETUVOJE PROBLEMOS

Daktaro disertacijos santrauka

Socialiniai mokslai, teisė (01 S)

Vilnius, 2013

Disertacija rengta 2007 – 2012 metais Vilniaus universiteto teisės fakultete.

Mokslinis vadovas:
Doc. dr. Andrius Smaliukas (Vilniaus universitetas, socialiniai mokslai, teisė – 01 S)

Disertacija ginama Vilniaus universiteto Teisės mokslo krypties taryboje:
Pirmininkas:
Prof. dr. Vytautas Mizaras (Vilniaus universitetas, socialiniai mokslai, teisė – 01 S)
Nariai:
Prof. dr. Asta Dambrauskaitė (Mykolo Romerio universitetas, socialiniai mokslai, teisė – 01 S)
Prof. dr. Valdonė Darškuvienė (Vytauto Didžiojo universitetas, socialiniai mokslai, ekonomika – 04 S)
Prof. dr. Rimvydas Norkus (Mykolo Romerio universitetas, socialiniai mokslai, teisė – 01 S)
Doc. dr. Andrius Smaliukas (Vilniaus universitetas, socialiniai mokslai, teisė – 01 S)
Oponentai:
Prof. dr. Egidijus Baranauskas (Mykolo Romerio universitetas, socialiniai mokslai, teisė – 01 S)
Doc. dr. Skirgailė Žalimienė (Vilniaus universitetas, socialiniai mokslai, teisė – 01 S)

Disertacija bus ginama viešame Teisės mokslo krypties tarybos posėdyje 2013 m. gegužės 3 d., 13 val. Vilniaus universiteto Teisės fakulteto Jablonskio auditorijoje.
Adresas: Saulėtekio al. 9, LT-10222 Vilnius, Lietuva.
Disertacijos santrauka išsiuntinėta 2013 m. balandžio 3 d.
Disertaciją galima peržiūrėti Vilniaus universiteto bibliotekoje.

CONTENT

INRODUCTION. THE TOPIC OF CORPORATE GOVERNANCE. The law of corporate governance aims at answering the question of how decisions are made in the companies and how they are run. Although the development of this branch of law is relatively short, it is agreed that its scope includes legal norms regulating questions of reporting of management bodies of the companies, formation of collegial bodies and rights of shareholders. In Lithuania this topic receives little attention (apart from the topic of civil liability of managers); commonly it is though that one-man companies such where the same person is a shareholder, a manager and a decision maker, dominate the economy. The fact that there a not many companies in the market with characteristics of corporate governance, both when the company has several shareholders and when it has a sole shareholder, but the management consists of several persons with decision-making authority, indicates that the economy is in the early stage of development, the State has few innovative and internationally developing companies.

This fact is illustrated by comparison of number of companies listed on the stock exchange (i.e. companies, shares of which are traded publicly):

State	**Number of Residents**	**Companies Listed on Exchange**
Denmark	5,7 million	>200
Israel	8 million	>500
Lithuania	**3 million**	**33**
Slovenia	2 million	62
Finland	5,4 million	>200

It is evident from the data that those States that have rather similar number of residents as Lithuania, but have a significantly higher number of companies listed on exchange, i. e. companies, which raise capital publicly, which have more diversified shareholder structure and which must be managed in accordance with the principles of corporate governance.

In foreign countries attitude towards corporate governance changed once every corporate scandal and collapse of a stock exchange listed company. In Lithuania, until

the administration of bank Snoras, its shares were traded on NASDAQ OMX Vilnius stock exchange, the bank also accepted deposits. When bank Snoras was declared bankrupt, a criminal investigation towards its biggest shareholder and manager was launched. Despite that, no discussions with respect to corporate governance were initiated, although the bank had not only the biggest shareholder and manager, but also the supervisory council and the board of directors.

The law of corporate governance is a system of principles (standards) and rules of how the companies operate and are controlled. Strict delimitation of this branch of law does not exist; commonly it is though that its scope includes formation of collegial bodies of companies, appointment of manager and collegial bodies, their functions, fiduciary duties, shareholder rights and other related questions. During the last several years corporate governance globally became a rather popular subject of debates. It increases the relevance of the subject, but also discourages jumping to conclusions, motivates to critically asses its value.

Several years ago Western sociologists turned attention to "silent takeover" – a situation when 51 of 100 biggest world economies were corporations and 49 of were States. Hence, global economy increasingly becomes a matter of private, not public, sector. Therefore, society becomes more interested in the way the companies, which gain more prominent role in the global economy than the States, are governed. The question of regulation of corporate governance and activities of companies posed in the past and poses now many problems: in the United States of America this branch of law was made more relevant by bankruptcies of *Enron* and *Worldcom*, in Europe – the bankruptcies of *Parmalat* and *Royal Ahold* (the questions raised were related to insufficient disclosure of information, assurance of control of independent auditors and management bodies). Attempt by the finance minister of Germany Oskar Lafointaine to increase tax rates several years ago caused big companies such as *Deutsche Bank*, *Dresdner Bank*, *Allianz*, *BMW*, *Daimler-Benz* and *RWE* to threaten to transfer their businesses to other countries if the state's adopted policy will be worse than the investment environment of other countries (the problem of "*Delaware* effect"). The finance minister Oskar Lafontaine had to resign and taxes were cut. Concern about the influence of major companies is noticeable in Lithuania as well: energy independency was a concern while privatising AB "Mažeikių nafta". Eventually, during the preparation of this dissertation the biggest

financial crisis since the great depression started, which resulted from excessive and unrecognized risk-taking by financial institutions and produced insolvency of largest and most economically important banks that later were nationalised, the biggest bankruptcy in the history of the United States of America (*Lehman Brothers*), State insolvency (Iceland). Therefore, it becomes evident that States meet new challenges in the area of corporate governance regulation.

The topic is relevant in Lithuania as well. Corporate governance is important to all companies listed in NASDAQ OMX Vilnius stock exchange (they aim at raising capital in the market), banks and other financial institutions, companies controlled by state and state companies, public service companies and other companies that are big and as a result are important to economy or intend to expand their businesses to foreign countries. Accordingly, corporate governance is relevant to no less than 200 companies in Lithuania. Also, those companies are the largest and most important companies to the economy, they play a significant role in creating Lithuania's gross domestic product, are the largest employers.

It is important to analyse the problems of corporate governance regulation in Lithuania. Frequently, it is asked or supposed that compliance which follow the principles of good corporate governance undoubtedly create higher financial returns to the companies. However, it is not totally clear, since empirical studies are not unanimous; also it is very difficult to measure exact financial benefit.

The conclusion of a study carried out by economists Paul Gomper, Joy Ishii and Andrew Metrick stated that investors, who during the time period of 1990-1999 invested in companies governed according to the principles of corporate governance (which gave the biggest protection to shareholder rights) and sold the shares of companies that were not compliant to such principles earned higher returns than the market average. Another study co-authored by one of the most famous professors of corporate governance law Lucian Bebchuk, which was prepared by using the same methodology but for the time period of 2000-2008, showed that during this time period the abovementioned investment strategy would not generate better results than the market average, however the connection between companies compliant with the principles of corporate governance and better indexes of other activities remains clear (Tobin Q, profitability).

As one of the explanations why this investment strategy would not work, the authors indicate that investors have already "punished" the poorly governed companies earlier, therefore the prices of shares of those companies did not suffer from negative changes once more. Essentially, analogous conclusions were made in dissertation of Dr. P. Vazniokas as well; the study carried out in the Baltic States showed that by estimating the results of companies according to the indexes of compliance with the principles of corporate governance only a relatively small connection (between better financial results and better corporate governance) was found and, excluding some separate aspects of corporate governance, only a medium connection can be seen[1].

However, there are unquestionable advantages. Compliance with the principles of corporate governance and corporate governance, which is characterised by collegial decision-making in actively and independently operating board, results in companies being more innovative, creation of new ideas, business expansion to other countries. Corporate governance promotes entrepreneurship. Meanwhile, in businesses where decisions are made by one person it is difficult to do because of lack of time and ideas.

Furthermore, compliance with the principles of corporate governance results in companies being more transparent. Currently, in Lithuania discussions on high level of corruption and shadow economy are taking place. During the crisis years businessmen confronted the solvency problems or in cases of conflicts between shareholders used various existing methods of tunnelling company's assets – entered into agreements for prices less than market average, transferred assets to other persons, diluted pledged share portfolios by issuing new shares to their partners or controlled offshore companies, separated their assets from liabilities into newly incorporated companies, forged documents, etc. All of that is easier to accomplish when all information is held and controlled by one person and *vice versa* more complicated when the company follows principles of corporate governance, collegial decision-making.

Ultimately, compliance with the principles of corporate governance enables to understand and manage risks better, also to avoid forgery of financial accounting (as in case of *Enron*) or activity with no understanding of related systemic risks (investments banks, *Lehman Brothers*, *Bear Sterns*, *Merrill Lynch*).

[1] VAZNIOKAS, P. „Listinguojamų įmonių korporatyvinio valdymo sistemos vertinimas Baltijos šalyse" (*"Evaluation of corporate governance of listed companies in the Baltic States"*).

THE CORPORATE GOVERNANCE CODE AND FIDUCIARY DUTIES. The law on board member duties forms a large block of corporate governance regulation alongside with the rules on the structure of a board and rights of shareholders to take managerial decisions. The duties of board members are enlisted in the statutory law – Civil Code (Art.2.87), however the case law remains important for the interpretation of the duties.

Phenomenon of the voluntary "best practice" corporate governance codes emerged in Europe almost two decades ago as a response to large scale corporate scandals. The codes across the Europe are enforced under "comply or explain" principle. In Lithuania the "best practice" corporate governance code is adopted by the stock exchange, and additionally approved by the Bank of Lithuania as the supervisory body. As elsewhere the code does not create new duties upon the management and it is not a primary purpose of code to comment on these duties.

The Corporate Governance Code recommends best practices which should make the companies less vulnerable to internal fraud and may have effect of overall better performance of the companies. For achieving this result the Corporate Governance Code defines the role and composition of the board, its separate committees, executive and non-executive directors. As a result the Corporate Governance Code affects interpretation of certain director duties, in particular duties to act with reasonable care, avoid conflicts of interests and be loyal to the company.

This dissertation tries to look to the "best practice" Corporate Governance Code from the different angle − not describing the practices it recommends, but analysing what effect the Code may have on the content and enforcement of fiduciary duties. The role of the Corporate Governance Code in interpreting director duties is important because the duties are formulated as principles, that need to be interpreted and adapted to particular situation to show their meaning, while the case law interpretation is not enough as the court practice is scarce, the courts are not well placed and don't have expertise to interpret the business management practices. While the corporate governance code preparatory committees included wide range of professionals, including board members themselves. The corporate governance practices change constantly and the corporate governance code drafters are better placed to react to this and give some real time guidance to the board members.

The Corporate Governance Code is of recommendatory character and the companies are free to deviate from it explaining in the annual report that they did so in the previous year. As the court practice of different jurisdiction shows, the shareholders are not in a position to judicially enforce the code either directly or through claims such as "legitimate expectations".

Breach of the code does not automatically mean that the board members are in breach of their duties. However the Corporate Governance Code does raise the general awareness of good governance practices. The company may feel the pressure from the institutional investors to comply, or otherwise it may face the rising costs of capital. Therefore the companies cannot ignore the Code. Even this is not the only effect of the Code. The corporate governance code has been used in different jurisdictions, to interpret governance practices. There were several cases in different jurisdictions referring to the "best practices" codes that allows, with certain reservation, to assess in what situations the code may be relied in judicial procedures. As we see the Code recommendations do not substitute existing tests that need to be satisfied before the court applies remedies, meaning that the breach of the Code does not constitute unfair prejudice against minority shareholders, neither it means that the director is unfit to take up such position (and needs to be disqualified), however the Code is used to interpret the existing rules and is assessed by the court in the light of all the facts. Furthermore the courts referred to the "best practices" Code when deciding whether directors where in breach of their duties as the codes elaborate on their role. Thus the courts used the codes as a kind of "expert opinion". In certain cases, where the judges refused to refer to the Code or found the company acting in line with it, they still argued on the merits of the corporate governance practices, criticising or approving practices based on whether they help the management to prudently perform their functions. The referral by the courts is important as it gives the "best practice" Codes indirect judicial enforcement. This is where business people reached consensus of what is good governance meets legal enforcement. At the same time this indirect enforcement is still cautious and does not deny the flexible nature of the code with its "one size does not fit all" approach.

The Corporate Governance Code affects the content of the director duties. In foreign jurisdictions the courts used and may use the Code as "an expert opinion" in revealing the content of director duties. The Corporate Governance Code may affect duties to act with due care, avoid conflict of interests and be loyal to the company. The tendency for standard for due care is to get higher since. The standard for due care will be more individualised among executive and non-executive members, chairman and other members also members of different board committees. As to the objective standard, the Code elaborates at on the internal controls, financial understanding and supervision. The Corporate Governance Code calls for the position of non-executive directors as supervisors rather than honourable spectators and requires them to put more inquiry into the company's matters. The directors are required to get both general business management training and training tailored to their role in the board, where this is followed, that means the subjective standard for the due care will increase.

As to the duties to avoid conflict of interest and be loyal, the Corporate Governance Code seems to recognise that it may be hard to expect the directors serving on several boards to perfectly balance their duties to all companies and nominee directors to completely ignore the interests of nominator. The Code then puts emphasis on the need to have a balanced board which had part of directors truly independent of the company and shareholders. Board members whom the company considers to be independent need to be disclosed in the annual report and they have specific supervisory role.

For Lithuania the role of the Corporate Governance Code is extremely important as the court practice defining the content of different fiduciary duties (e. g. duty of care and duty of loyalty) is scarce.

STATE OWNED ENTERPRISES. The State owned enterprises are one of the largest and most important for the State economy amongst all companies.

However they face specific problems. They do not have shareholders that seek for commercial profits and that are motivated to supervise management bodies so that the shareholder value is created. Further the State owned enterprises render certain non-commercial functions. Therefore the corporate governance of the State owned enterprises is regulated additionally, compared to general legal regime applicable to all other companies.

Running the State owned enterprises the State faces conflict of interest where the State (and even the same institution) performs the functions of the shareholder of the State owned enterprise and at the same time regulates the specific sector of the economy (e. g. transportation sector) where that particular company operates and even further implements public policy in the same area.

Lithuanian has adopted a political decision not to privatise control granting shareholdings in the companies that historically remained as the State owned. Therefore the efficiency of their activity and results may be improved only by improving corporate governance, so that they get closer to the efficiency of the private sector companies.

The reform of corporate governance of the State owned enterprises should be implemented following the problems that the State owned enterprises face. The material problems in Lithuania are undue influence of the politicians to the activities of the companies, non-separation of shareholder and regulatory activities and formation of

managing bodies from the public servants that do not have qualification and in their daily activities do not gain experience which is necessary for the members of the boards in the companies. These problems may be best solved by application of centralised shareholder model, where the functions of the State as the shareholder are performed by the separate company or institution. The centralised model is the best fitted for small jurisdiction where the small existing pool of the potential board members could be gathered.

However in Lithuania the shareholder functions in the State owned enterprises are performed by the branch ministries, i. e. Lithuania has adopted decentralised model of the implementation of the functions of the shareholder. The legal acts reforming the governance of the State owned enterprises indicate the dual model of the implementation of shareholder functions, however the de-centralised model stays in the practice. De-centralised model further means that the State owned enterprises do not have unanimous practice on formation of management bodies (as a general rule the Scandinavian or German model is followed) and the management bodies are passive in performing their functions.

The reform of the State owned enterprises based solely on the promotion of publicity of results of activities of the companies has only minor effect on the financial performance and improvement in corporate governance practices in Lithuania. For the reform to be more effective the OECD guidelines should be followed, that indicate that the State owned companies need not only transparency but also isolation from the undue political influence and further they need to have professional management bodies. The State should follow the centralised shareholder model of the State owned enterprises to reach this goal. Further following OECD guidelines the State owned enterprises should clearly separate commercial and non-commercial functions. This would allow the State as the shareholder of the companies control the financial results and activities of the companies and also protect minority shareholders in the State owned companies that are listed on the stock exchange. Lastly Art. 106 of the Treaty on Functioning of the European Union limits the application of the competition rules to the enterprises rendering activities of the general economic interest. Granting of special rights to the companies that render activities which in essence are of commercial nature would breach the indicated Article of the Treaty on Functioning of the European Union.

OECD Guidelines recommend that the State owned enterprises would promote the principles of the corporate social responsibility throughout the country. The promotion of such corporate social responsibility should be based on the shared value theory, that socially responsible projects promote the competitive advantage, innovation and create shared value both for the society and for the shareholders of the company.

MANAGERIAL PAY. The European Commission has passed three recommendations regulating remuneration of management bodies of the companies, that are based on the general idea that the form, structure and level of their remuneration is different from that of the other employees in the companies. Such differences arise both because the law indicates different functions and duties that need to be performed by the management bodies and other employees (the companies seek to encourage the management bodies to follow the fiduciary duties) and because the managerial pay is the outcome of agency cost. If compared to the other employees of the company, the level of remuneration of the management bodies is considerably higher, form is different as executive bodies are often granted shares as part of their remuneration, the structure is different because the remuneration is composed of smaller fixed portion and larger non-fixed portion.

The recommendations of the European Commission is the reaction to the existing problems related to the remuneration of management bodies. The practice has showed that in certain cases the structure of remuneration promoted excessive risk taking, also that the bonuses were paid even in cases where the management bodies failed to reach the results and also cases were remuneration was the outcome of mismanagement of conflicts of interest (agency costs). These examples serve as the justification for the State to additionally regulate this area, not leaving it purely for the contractual relations between the company and its managers.

Following the recommendations of the European Commission, several strategies should be adopted to regulate the remuneration of management bodies: non-fixed (bonus) portion of the remuneration should be limited, the payment of part of it should be deferred for the period of 3-5 years, where it occurs that the remuneration is paid based in the financial results that proved to be wrong, the company should claw-back remuneration, remuneration should be made public, shareholders should have at least recommendatory vote on the level of remuneration and the shares should be granted only

upon separate approval of the shareholders. The issues of remuneration should be resolved by the committee of the board formed from the independent members.

Lithuania does not have unanimous and clear board model. Because of this the shareholders meeting, the supervisory council, the board and the manager may have certain role in setting the remuneration of executive managers. We therefore see inconsistency, the remuneration is set by different bodies and the general meeting of the shareholders does not vote on the remuneration policy of all executive managers as recommended by the European Commission.

At the given moment only recommendation on transparency of the remuneration of the management bodies may be implemented in Lithuanian law, i. e. the annual report of the company is submitted to the general meeting of the shareholders with the report on management remuneration as integral part of it. This recommendation is included in the Principles 8.1-8.5 of the Corporate Governance Code of NASDAQ OMX Vilnius Stock Exchange.

The Law on Companies indicates that the members of the board may receive tantiemes, which depends of the profit of the company and dividends allocated. It is not clear whether this provision means that the companies that operate at loss or that do not allocate dividends (which may be for the sound reasons) may not pay remuneration to the board members at all. On the other hand this provision means that the remuneration is paid based on annual and not long-term results and also is dependent only upon profit level and dividend level and this is inconsistent with the recommendations of the European Commission. Further the position of the Law on Companies that the remuneration of the board members is part of company's profit and not ordinary expense of the activities of the company is erroneous.

The Civil Code and the Law on Companies of the Republic of Lithuania require the companies to indicate the concrete amount of the share capital in the articles of association. The decision of the general meeting of the shareholders to increase the share capital of the company and thus issue new shares must be implemented within the period of 6 months from the adoption. These provisions of law encumber the setting of remuneration to management bodies, based on the recommendations of the European Commission, as the Company, entering into agreement with the member of the management body, may not undertake to issue shares in the mid-term period (e. g. 3

years), as it is uncertain if the shareholders will adopt the resolution to increase share capital at this later date.

Lastly, the principle question arises if, based on the facts that the law stipulates different functions and duties to the management bodies of the company and other employees, the possibility of conflict of interest is considerably higher in case of the manager of the company and as a consequence the level of remuneration is considerably higher, the application of dual nature of legal relations (i. e. that both civil and labour law is applied) between the manager and the company is still justifiable.

SCIENTIFIC PROBLEMS ADRESSED. The dissertation analyses practice, doctrine and recommendations of the foreign States in the different areas of corporate governance law and seeks to explain how this experience could be used in small jurisdiction.

The scientific problems that are addressed in this work may be split in three categories.

First of all, Lithuania lacks court practice which would analyse the content of different fiduciary duties. Most often fiduciary duties are analysed as one general duty, for instance no difference is indicated in defining the duty to act with care and diligence and the duty of loyalty. Lithuania is a small jurisdiction and because of this it would take very long time to define the content of these duties in national court practice. The subjects regulated by law (in this case members of corporate management bodies) need to know the content of fiduciary duties *ex ante*. Therefore the author of this dissertation proposes to rely on the Corporate governance code as the secondary source of law and presents the case law of different states where this secondary source of law has been cited.

The corporate governance of the State owned enterprise is another area which is analysed. Several problems are discussed. The State is an important shareholder of the entities rendering commercial activities in Lithuania. The part of these companies are listed on the stock exchange, *i. e*. have minority shareholders and even companies with no minority shareholders have to be run efficiently. However the State servants that represent the State as the shareholder do not have direct financial motivation similar to that of the private sector shareholders. Further the State acts both as a regulator and as a shareholder seeking for financial results in regulated sectors (postal services, energy and

transportation). There is clear conflict of interests because of these two roles. Finally, part of the State owned enterprises render non-commercial functions, subsidised by the commercial functions (for instance passenger carriage by rail). Therefore the status of the State as the shareholder is regulated additionally. An on-going reform has been performed during the last several years in this area; therefore the dissertation aims to assess the reform.

The third field examined by the author is the regulation of managerial pay. Reacting to the global financial crisis the European Commission has adopted recommendations on managerial pay. Lithuania did not face problems that the managerial pay is excessive or risk promoting (which was the relevant issue for the European Commission). However Lithuania does not have any traditions on setting managerial pay and the problem is that the members of the board do not receive any salary (or receive only part of the salary) from the company but the salary is paid by the particular shareholder which nominates the board member. Because of this most board are not formed to perform real functions in the companies and the members of the boards are not motivated to act in the interest of the companies. At the given moment the recommendations of the European Commission may not be transferred to the Lithuanian law because of conflicting provisions of the Law on Companies of the Republic of Lithuania, regulating share issues (for instance decision to issue new shares must be registered in the Register of Legal Persons within the period of 6 months) and acquisition of treasury shares (the company has to offer the treasury shares for acquisition by the existing shareholders before allocation of the treasury shares to the board members).

OBJECTIVES OF THE DISSERTATION. The subject of the analysis of this dissertation is three relevant areas of regulation of corporate governance which (if reformed), in the opinion of the author, would have material positive impact on the formation of the tradition of corporate governance in Lithuania. The following topics are analysed in the dissertation:

1. The possibility and experience of the different foreign countries in using corporate governance codes as the secondary source of law in interpreting content of separate fiduciary duties with the particular focus on the duty of care and diligence;

2. The existing models of governance of the State owned enterprises, the reform of governance of the State owned enterprises and its assessment; and
3. The recommendations of the European Commission on managerial pay and conflicting provisions of the Lithuanian company law which prevent the transposition of the recommendations to the Lithuanian law.

ORIGINALITY. Dissertation analyses corporate governance issues in a small jurisdiction which is the case of Lithuania. Analysis of this question is challenging because European union legislation is orientated to the problems of big countries (Germany, France, the Great Britain). The regulation of corporate governance remains one of the key topics for the European Union both in short term and as a part of long term 2030 agenda[2]. The academia in other countries specialising in company, securities, financial corporate governance law is also mostly concerned about the issues relevant for big jurisdictions. The priority of the European Commission is promotion of shareholder activism in assessing the work of managing bodies, promotion of managerial pay structures that would not motivate excessive risk and in general promotion of sustainable development of the businesses[3]. However small jurisdictions face partly different issues: first of all the shareholder structure, the size of the companies are different, historically we do not have experience in corporate legislation, smaller amount of available case law and academic discussions, less professionals and smaller financing, because the work of Lithuanian academia is relevant for smaller number of companies that e. g. that of Spanish academia. On the other hand this does not mean that regulation in Lithuania may be primitive and less efficient. The goals of regulation are more difficult to achieve in small jurisdictions than in big ones which have more resources and further small jurisdictions face more specific issues. This particular aspect (focus on small jurisdiction issues) makes this dissertation different from the other works in this area.

Promotion of good corporate governance is relevant because of the several reasons. First of all it is a key for innovations, creation of new ideas, expansion of businesses.

[2] Project Europe 2030: challenges and opportunities. A report to the European Council by the Reflection Group on the future of the EU 2030, May 2010, p. 5; Feedback Statement. Summary of responses to the public consultation on the future of European company law. European Commission, July 2012, p. 5.
[3] CALVINO, N. *Corporate Governance – shareholders engagement*. [Žiūrėta 2012-11-28]. Prieiga per internetą: <http://www.ecgi.org/tcgd/2011/documents/calvino_speech_15dec2011.pdf>; Report of the Reflection Group On the Future of EU Company Law. European Commission, 5 April 2011, p. 10-13, p. 36-52.

Corporate governance also promotes entrepreneurship and transparency of the companies. Further adherence to the principles of corporate governance promotes effective allocation of capital, sustainability and long-termism, trust of investors[4]. However this topic is not thoroughly analysed in Lithuania, there is a lack in knowledge and professional corporate governance practices. The progress could be made by reception of recommendations of the European Commission and Organisation of the Economic Cooperation and Development. This dissertation analyses and provides recommendations how this could be achieved.

METHODOLOGY. The practical-ontological approach is used in the analysis of the subject of the dissertation. This means that the problems are analysed linking them to the practical situations. The scholar is following the practical-ontological state that law should provide answers and that analysis of law as objective phenomenon is insufficient. The answers derive form the case law, interpretation of legal acts and other sources of law and by providing analysis based on merits – what is fair and what is not fair.

The methods used in this work are dominated by the comparative method. The most emphasis is put on the English law. This is because the Lithuanian company law is mostly influenced by the law of the European Union and recommendations of the Organisation for Economic Cooperation and Development. However EU company law is not *sui generis* piece of legislation. The different areas of the EU company law are based on the national models of some Member State. For instance the regulation of reorganisation of legal persons is based on German model while the regulation of mergers and acquisitions also corporate governance is based on the English tradition. Therefore comparative method enables to show direction of possible further reception of the law of the foreign States.

Further, the problems of regulation of corporate governance are analysed through systematic method, since the legal norms of corporate governance in Lithuania is highly influenced by other areas, in particular by fiscal purpose (the tax law). It is therefore important to identify the problems that arise when corporate law is used as an instrument for other purposes. On the other hand, even the corporate law itself is not unified. Based

[4] OECD Principles of Corporate Governance (1999), 4-5 psl.

on the analysis performed we can notify the problems arising from the fact that one part of corporate law consists of the national legislation which transferred the norms of EU directives, and the other part of national legislation which did not transpose the provisions of EU directives. The incompatibility exists between these two categories when the directives are transferred by translating them but they are not incorporated systematically taking into account the legislation that already is applicable.

The historical method is also used since some practice is formed historically on the basis of inadequate regulation. The traditions are still developing in the jurisdiction where company law exists only for 20 years; therefore the company law is on the creation stage. Accordingly, the existing practice may be the consequence of inadequate regulation and for these reasons it has to be evaluated with critical approach and should not be accepted just as given.

In order to be able to identify the problematical issues of the subject and to provide the suggestions how to correct them, the author uses the analytical method. The analytical method is important since the company law should be analysed not only in the context of other countries, but also taking into account the fact that Lithuania is a small jurisdiction which has its peculiar problems: high level of shareholders' concentration in the companies, illiquidity of stock exchange, the lack of professional board members and etc. Therefore the use of only one systemic method should be incomplete and would not reveal the specifics of jurisdiction.

The results of the dissertation have been achieved through both theoretical and empirical research methods. In Lithuania it is difficult to perform the detailed empirical analysis because of the size of jurisdiction and the absence of traditions, although the author aims to illustrate and summarize the most typical practical examples.

STRUCTURE. In addition with introduction and conclusions, the dissertation consists and is divided into three main parts. Firstly, the author presents the Corporate governance code of NASDAQ OMX Vilnius, explains its influence and presents the recognition of similar codes as a secondary source of law in foreign countries. The influence of the Corporate governance code to the Lithuanian law with the emphasis of fiduciary duties is analysed. In the second part of this dissertation the state-controlled companies are examined, the nuances of the regulation of state companies are revealed

and the recommendations how this field of practice should be reformed are presented. The third part analyses the problematical issues of regulation and legal doctrine on the remuneration of the members of collegial company's bodies and the chief executive officer, as well as the recommendations and the problematical questions of Lithuanian legal acts are presented.

MAIN RESULTS AND CONCLUSIONS. While summarising the content of the dissertation, the following conclusions may be made. Within two decades due to the lack of time and for the cause of little market, the case law which should explain the fiduciary duties and applicable standards is still developing. The misunderstanding of fiduciary duties partly causes the absence of community of professional managing bodies of the companies and the lack of corporate governance traditions. As a result, the Lithuanian companies are not very innovative and only some of them become international companies.

The Corporate Governance Code, in which the OECD guidelines and the recommendations of European Commission were transferred, is a very important secondary source of Lithuanian law which explains the fiduciary duties. However, there are no individually created norms in the code which would reflect the actualities and peculiarities of Lithuania: the high concentration of shareholders, the activity of shareholders and its active control of collegial bodies. In this situation the most sensitive conflict of interests is between the majority and minority shareholders; the characteristic problem is inactivity of collegial bodies.

The Lithuanian courts did not find the difference between the duty of loyalty and duty to act in good faith and reasonably (duty of care). It is not clear whether in case of the breach of duty of care the business judgement rule should be applicable. Therefore the other source is necessary to reveal the content of these duties and to develop it. This could be the Corporate Governance Code.

The extension of implication of Corporate Governance Code should mean the regulation *ex ante* when the regulation is known in advance to the members of collegial bodies and chief executive officer and when the situations where the positive legal norms-principals are explained in court practice with the absence of previous experience would be avoided. "Soft law" has a tightening trend. Therefore the part of the provisions

(for example, disclosure of remuneration policy) will eventually become the part of positive law.

Another significant aspect is that the state does not have the single (unique) model of corporate governance of the companies controlled by the state. If the state as the owner and shareholder of its companies would start to form the uniform model of English or Scandinavian board, this would promote the development of traditions and formation of the managing bodies' practice. The implementation of the reform of the state-owned companies only by ensuring the disclosure of activity results of these companies has little effect on the companies' financial results, do not encourage them to form professional collegial bodies and do not have significant impact on the practice of corporate governance in Lithuania.

The declared model of implementation of the members' rights of the state-owned company is dualistic, but in practice – decentralised, causes the fact that the majority of collegial bodies of these companies are formed of state officers who do not have corporate governance practice. The efforts to reform the boards of the state-owned companies will affect only a very small part of companies and the efficiency of the work of independent board members will depend on the chairman, most of whom are state officers.

It is also important that it is impossible to change the corporate governance without the formation of professional collegial bodies. The necessary precondition for this is the adoption of the practice of remuneration of collegial bodies' members which is accepted in Western practice.

However, while transferring the recommendations of the European Commission, it should be taken into account that recommendations are focused on the disclosure of remuneration to the shareholders (transparency), greater shareholders' influence on the establishment of remuneration and on the solution of other problems which shareholders are diversified.

Lithuania should focus not only on the rules of remuneration transparency but also on the change of remuneration form and structure, as well as on the fact that the remuneration to the members of collegial bodies should be established by the company itself and not by the individual shareholders. The current wording of the Lithuanian company law discourages that.

The formation of professional collegial bodies, which would be active, autonomous and independent from one or more controlling shareholders, is impossible until the remuneration system equivalent to the practice of Western countries does not exist. As long as the state does not reform the state-owned companies, this is an example to private companies to act similarly when all the issues are dealt under the instructions of controlling shareholder and collegial bodies are not autonomous.

PUBLICATIONS

1. ČIOČYS R. Steigimosi laisvė po Cartesio bylos: ES inkorporavimo doktrinos trūkumas ir to padariniai (in English – *Freedom of Establishment after Cartesio: Absence of EC Incorporation Doctrine and Implications Thereof*). In *Teisė. Mokslo darbai*, 2010, No. 75, p. 143-158;

2. ČIOČYS R. Europos Komisijos rekomendacijų dėl bendrovių valdymo organų narių atlyginimų perkėlimo į Lietuvos teisę problemos (in English – *Problems of Transposing to Lithuanian Law the Recommendations of European Commission on Directors' Remuneration*). In *Teisė. Mokslo darbai*, 2012, No. 85, p. 130-147.

PERSONAL DETAILS

Robertas Čiočys was born in 1983 in Vilnius, Lithuania.

In 2007 R. Čiočys graduated from the Vilnius University Law Faculty (commercial law specialisation) and obtained the master of law degree. In the same year 2007 R. Čiočys was admitted to the doctoral studies at Vilnius University Law Faculty, Department of Civil Law and Civil Procedure (currently – the Department of Private Law of Vilnius University).

In 2009 he graduated from the London School of Economics and Political Science and obtained LLM degree in corporate law with merit.

Also R. Čiočys has taught seminars of Civil law at Vilnius University Law Faculty (2008, 2010) and since 2011 is a lecturer of Comparative Company Law at International Business School at Vilnius University.

Since the year 2004 R. Čiočys has been a practicing lawyer at the law firm "LAWIN Lideika, Petraukas, Valiūnas ir partneriai" in Vilnius where he specialises in the areas of Company Law. In 2007 he was entered into the List of Assistant Attorneys-at-Law of the Lithuanian Bar.

BENDROVIŲ VALDYMO REGLAMENTAVIMO LIETUVOJE PROBLEMOS (REZIUME)

DISERTACIJOS TEMOS PROBLEMATIKA. Darbe analizuojama užsienio valstybių praktika, doktrina ir rekomendacijos atskiromis bendrovių valdymo teisės temomis ir siekiama paaiškinti, kaip ši patirtis galėtų būti pritaikoma mažai jurisdikcijai.

Nagrinėjamą problematiką būtų galima apibrėžti pagal tris analizės sritis.

Visų pirma Lietuvoje yra sąlyginai nedaug teismų praktikos, kuri analizuotų atskirų fiduciarinių pareigų turinį. Fiduciarinės pareigos dažniausiai analizuojamos kaip viena bendra pareiga, pavyzdžiui, neatskleidžiant skirtumo tarp pareigos elgtis sąžiningai ir protingai ir lojalumo pareigos. Dėl to, kad Lietuva yra maža jurisdikcija, užtruktų labai ilgai, kol šių pareigų turinys būtų išaiškintas teismų praktikoje. Teisės reguliuojamiems subjektams (šiuo atveju bendrovių valdymo organų nariams) fiduciarinių pareigų turinys turi būti išaiškintas *ex ante*. Šiuo tikslu siūloma remtis Bendrovių valdymo kodeksu, kaip antriniu teisės šaltiniu, ir pristatoma kitų valstybių teismų praktika, kurioje buvo cituojamas būtent šis antrinis teisės šaltinis.

Kita analizuojama sritis yra valstybės valdomų bendrovių valdymo klausimai. Problematika yra keleriopa. Valstybė Lietuvoje yra svarbi (stambi) komercinę veiklą vykdančių bendrovių akcininkė. Dalis tų bendrovių yra listinguojama biržoje, t. y. turi smulkiųjų akcininkų, net ir įmonės, kuriose nėra smulkiųjų akcininkų, turi būti valdomos efektyviai, tačiau valstybės tarnautojai, kurie jai atstovauja, kaip akcininkei, neturi tiesioginės finansinės motyvacijos, kuri skatina privataus sektoriaus akcininkus. Galiausiai reguliuojamuose sektoriuose (pašto paslaugos, energetika, transportas) valstybė veikia tiek kaip sektoriaus reguliuotojas, tiek kaip finansinės naudos siekiantis akcininkas. Dėl šio dvigubo vaidmens kyla konfliktas. Galiausiai dalis valstybės valdomų bendrovių vykdo nekomercines funkcijas, subsidijuojamas iš komercinės veiklos (pavyzdžiui, keleivių vežimas traukiniais). Dėl šios priežasties valstybės, kaip bendrovių akcininkės, veikla yra papildomai reguliuojama. Keletą pastarųjų metų šią sritį bandoma reformuoti, todėl darbe siekiama įvertinti reformą.

Galiausiai darbe analizuojami bendrovių valdymo organų narių atlyginimo nustatymo klausimai. Reaguodama į pasaulinę finansų krizę Europos Komisija priėmė rekomendacijas dėl bendrovių valdymo organų narių atlyginimų. Lietuvoje nebuvo

problemos, kad valdymo organų narių atlyginimai yra pernelyg dideli ar skatinantys riziką (kas buvo aktualiausia Europos Komisijai). Tačiau Lietuvoje apskritai nėra jokių tradicijų ar praktikos skiriant atlyginimus ir problema yra ta, kad valdybos nariams atlyginimų bendrovės apskirtai nemoka (ar moka tik jo dalį), o atlyginimą moka konkretų valdybos narį paskyręs akcininkas. Dėl to ir nesusiformuoja realiai bendrovėse dirbančios valdybos, o valdybų nariai nėra skatinami veikti bendrovės interesais. Šiuo metu Europos Komisijos rekomendacijų į Lietuvos įmonių teisę perkelti negalima dėl nesuderinamumo su Lietuvos Respublikos akcinių bendrovių įstatymo nuostatomis, reguliuojančiomis akcijų išleidimą (pavyzdžiui, sprendimas išleisti naujų akcijų per 6 mėn. turi būti registruotas Juridinių asmenų registre) ir savų akcijų supirkimą (bendrovė privalo pasiūlyti savas akcijas įsigyti visiems akcininkams ir negali jų iškart suteikti valdybos nariams).

TEMOS AKTUALUMAS IR NAUJUMAS. Disertacijoje nagrinėjami bendrovių valdymo reguliavimo klausimai mažoje jurisdikcijoje, kokia yra Lietuva. Nagrinėti šią sritį yra nelengvas uždavinys, nes Europos Sąjungos teisėkūra yra orientuota į didžiųjų valstybių (Vokietijos, Prancūzijos, Didžiosios Britanijos) problemas. Europos Sąjungoje bendrovių valdymo reguliavimo modernizavimas išlieka tiek vienas iš trumpalaikių prioritetų, tiek ir ilgalaikės programos iki 2030 m. dalykas[5]. Užsienio valstybių akademinė bendruomenė, kuri specializuojasi bendrovių, vertybinių popierių, finansų, bendrovių valdymo teisėje, taip pat koncentruojasi į didžiosioms jurisdikcijoms būdingus klausimus. Europos Komisijos prioritetai yra skatinti akcininkų aktyvumą, vertinant valdymo organų darbą, skatinti tokias valdymo organų narių atlyginimų sistemas, kurios nemotyvuotų jų prisiimti nepagrįstos rizikos bei bendrai skatinti ilgalaikių tikslų siekimo[6]. Tuo tarpu mažoje jurisdikcijoje egzistuoja iš dalies skirtingos problemos: visų pirma skiriasi bendrovių akcininkų struktūra, bendrovių dydis, istoriškai neturime teisėkūros patirties, gerokai mažiau teismų praktikos bei akademinių diskusijų šia tema, galiausiai gerokai mažiau profesionalų ir jie menkiau finansuojami, juk Lietuvos

[5] Project Europe 2030: challenges and opportunities. A report to the European Council by the Reflection Group on the future of the EU 2030, May 2010, p. 5; Feedback Statement. Summary of responses to the public consultation on the future of European company law. European Commission, July 2012, p. 5.
[6] CALVINO, N. *Corporate Governance – shareholders engagement*. [Žiūrėta 2012-11-28]. Prieiga per internetą: <http://www.ecgi.org/tcgd/2011/documents/calvino_speech_15dec2011.pdf>; Report of the Reflection Group On the Future of EU Company Law. European Commission, 5 April 2011, p. 10-13, p. 36-52.

mokslininkų darbu naudojasi žymiai mažiau bendrovių, nei, tarkime, Ispanijos mokslininkų. Kita vertus, tai nereiškia, kad reguliavimas Lietuvoje gali būti primityvesnis ir mažiau efektyvus. Reguliavimo tikslus mažoje jurisdikcijoje pasiekti yra sunkiau, nei didelėje, kur yra daugiau resursų, o be to mažos jurisdikcijos susiduria su daugiau specifinių iššūkių. Būtent šis aspektas (pritaikymas mažai jurisdikcijai) ir išskiria šią disertaciją iš kitų darbų šia tema.

Geros bendrovių valdymo praktikos laikymasis yra aktualus dėl keleto priežasčių. Visų pirma jis lemia didesnį bendrovių inovatyvumą, naujų idėjų kūrimą, aktyvesnę verslo plėtrą. Korporatyvinis valdymas taip pat skatina verslumą bei lemia didesnį bendrovių skaidrumą. Taip pat gero bendrovių valdymo principų laikymasis skatina efektyvų kapitalo panaudojimą, ilgalaikių tikslų siekimą, investuotojų pasitikėjimą[7]. Tačiau Lietuvoje ši tema mažai nagrinėjama, trūksta žinių ir profesionalios bendrovių valdymo praktikos. Progresą šioje srityje galėtų lemti Europos Komisijos bei Ekonominio bendradarbiavimo ir plėtros organizacijos rekomendacijų recepcija. Šiame darbe yra analizuojama ir pateikiamos rekomendacijos, kaip tą būtų galima pasiekti.

MOKSLINIO TYRIMO OBJEKTAS. Mokslinio tyrimo objektas yra trys aktualios bendrovių valdymo reguliavimo sritys, kurios, autoriaus nuomone, reformos atveju turėtų esminę teigiamą reikšmę korporatyvinio valdymo tradicijos atsiradimui Lietuvoje. Darbe yra analizuojamos šios sritys:

1. galimybė ir užsienio šalių patirtis remtis bendrovių valdymo kodeksu, kaip antriniu teisės šaltiniu, aiškinant atskirų fiduciarinių pareigų turinį, didžiausią dėmesį skiriant pareigai elgtis sąžiningai ir protingai;
2. egzistuojantys valstybės kontroliuojamų įmonių valdymo modeliai, valstybės kontroliuojamų įmonių valdymo reforma Lietuvoje, jos įvertinimas; ir
3. Europos komisijos rekomendacijos dėl bendrovių valdymo organų narių atlyginimų ir Lietuvos Respublikos įmonių teisės nuostatos, trukdančios perkelti Europos Komisijos rekomendacijas į Lietuvos teisę.

Pažymėtina, kad darbe aptariami bendrovių valdymo reguliavimo klausimai. Šio mokslinio darbo objektas nėra kitų sričių reguliavimo klausimai (pavyzdžiui, pensijų

[7] OECD Principles of Corporate Governance (1999), 4-5 psl.

fondų investicijų krypčių reguliavimas), kurie galėtų teigiamai įtakoti bendrovių valdymo principų laikymąsi (pavyzdžiui, skatinat vertybinių popierių biržos likvidumą).

TIKSLAI IR UŽDAVINIAI. Šios disertacijos tikslas yra identifikuoti ir išanalizuoti tris bendrovių valdymo reglamentavimo sritis, kurių geresnis suvokimas ir reformavimas turėtų didžiausią poveikį didinat reglamentavimo efektyvumą ir bendrovių valdymo kultūrą apskritai, pateikiant konkrečius siūlymus. Mažoje jurisdikcijoje dėl ribotų resursų itin svarbu tinkamai pasirinkti prioritetus. Remiantis šiuo tikslu yra nustatyti disertacijos uždaviniai. Disertacijoje siekiama:

1. identifikuoti tris problemines sritis ir pristatyti, kodėl jų reformavimas turėtų svarbią reikšmę bendrovių valdymo reguliavimo efektyvumui;
2. lyginamuoju aspektu išanalizuoti bendrovių valdymo kodekso, kaip antrinio teisės šaltinio, naudojimą teismų praktikoje;
3. lyginamuoju aspektu išanalizuoti fiduciarinių pareigų turinį ir įvertinti jų aiškinimą Lietuvos Respublikos teismų praktikoje, bei galimybę remtis NASDAQ OMX Vilnius listinguojamų bendrovių valdymo kodeksu, kaip antriniu teisės šaltiniu, atskleidžiant konkrečių fiduciarinių pareigų turinį;
4. išanalizuoti ir įvertinti valstybės kontroliuojamų bendrovių valdymo reformą;
5. išanalizuoti Europos Komisijos rekomendacijas dėl valdymo organų narių atlyginimų ir įvertinti jų suderinamumą su Lietuvoje galiojančiais teisės aktais, reglamentuojančiais bendrovių veiklą;
6. pateikti išvadas ir konkrečius siūlymus, kaip minėtos sritys galėtų būti reformuojamos.

TYRIMO ŠALTINIAI. TYRIMŲ APŽVALGA. Bendrovių valdymo tema Lietuvoje yra nauja. Iš doktrinos, kurioje paliečiami bendrovių valdymo reguliavimo klausimai, galima paminėti A. Abramavičiaus ir V. Mikelėno veikalą „Įmonių vadovų teisinė atsakomybė“, G. Bartkaus parengtą Civilinio kodekso Antrosios knygos II dalies Juridiniai asmenys komentarą bei R. Greičiaus išleistą monografiją „Privataus juridinio asmens vadovo fiduciarinės pareigos“. Pirmajame iš minėtų veikalų aptariamos įmonių vadovų civilinės, administracinės ir baudžiamosios atsakomybės sąlygos. Civilio kodekso komentare svarbus yra CK 2.87 str. komentaras, kuris Lietuvoje yra vienas iš

labai nedaugelio doktrinos šaltinių, aiškinančių fiduciarinių pareigų turinį. Šiais darbais disertacijoje remiamasi.

Taip pat vertėtų paminėti ir parengtas disertacijas šioje srityje: P. Čerkos „Bendrovės organų atsakomybės ribos“ ir P. Vaznioko „Listinguojamų įmonių korporatyvinio valdymo sistemos vertinimas Baltijos šalyse“ (abi – Vytauto Didžiojo Universitete). Pirmasis darbas svarbus tuo, kad jame yra interpretuojamas fiduciarinių pareigų turinys, pristatoma autoriaus pozicija, kaip Lietuvoje turėtų būti taikoma verslo vertinimo taisyklė. Antroji disertacija skirta ekonometriniams tyrimams, nustatyti ryšį tarp bendrovės bendrovių valdymo principų laikymosi ir finansinių rodiklių.

Šio darbo naujumas yra tai, kad juo siekiama identifikuoti prioritetines bendrovių valdymo reguliavimo problemas ir analizuojama, kaip jas spręsti mažoje jurisdikcijoje. Atskiros fiduciarinės pareigos analizuojamos detaliau, nei minėtuose veikaluose. Taip pat minėtų darbų tyrimo objektas nėra bendrovių valdymo kodekso vaidmuo aiškinant fiduciarines pareigas, valstybės kontroliuojamų įmonių valdymo klausimas ir valdymo organų narių atlyginimo klausimas.

Iš užsienio mokslininkų veikalų daugiausia remiamasi P. L. Davies „Principles of Modern Company Law“ ir R. D. Kershaw „Company Law in Context: Text and Materials“, vadovaujamasi Europos Komisijos bei Ekonominio bendradarbiavimo ir plėtros organizacijos rekomendacijomis.

METODOLOGIJA. Darbe analizė atliekama remiantis praktiniu ontologiniu požiūriu. Tai reiškia, kad problemos analizuojamos siejant jas su praktinėmis situacijomis. Praktinio ontologinio požiūrio atstovai laikosi pozicijos, kad teisė turi pateikti atsakymus, o ne būti analizuojama vien tik kaip objektyvus reiškinys. Atsakymai randami remiantis teismų praktika, interpretuojant teisės aktus ir kitus teisės šaltinius bei atliekant vertybinę analizę – kas yra teisinga, o kas ne. Praktinio ontologinio metodo tikslas yra pateikti teisinę kvalifikaciją konkrečiam atvejui.

Tarp taikomų tyrimo metodų dominuoja lyginamasis metodas. Daugiausia dėmesio skiriama Anglijos teisei. Taip yra todėl, kad Lietuvoje bendrovių valdymo teisei didžiausią įtaką daro Europos Sąjungos teisėkūra bei Ekonominio bendradarbiavimo ir plėtros organizacijos (*Organisation for Economic Co-Operation and development – OECD*) rekomendacijos. Tačiau ES bendrovių teisė nėra *sui generis* kūrinys. Joje

atskirose srityse paprastai perimamas vienos valstybės modelis, pavyzdžiui, juridinių asmenų reorganizavimų ir kapitalo reguliavimas paremtas Vokietijos teise, tuo tarpu bendrovių įsigijimų bei bendrovių valdymo reglamentavimas paremtas Anglijos tradicija. Taigi lyginamasis metodas padeda parodyti, kokiomis kryptimis galėtų vykti teisės recepcija iš kitų valstybių.

Kitas taikomas metodas yra sisteminis, nes Lietuvoje bendrovių valdymo teisę veikia kitos sritys, visų pirma fiskaliniai tikslai (mokesčių įstatymai). Todėl svarbu identifikuoti tas problemas, kurios atsiranda, kuomet įmonių teisė yra panaudojama kaip instrumentas kitiems tikslams pasiekti. Kita vertus net ir pati įmonių teisė nėra vieninga. Analizuojant galime pastebėti problemų, kylančių dėl to, kad dalis įmonių teisės yra nacionaliniai teisės aktai, perkeliantys ES direktyvas, dalis yra nacionaliniai teisės aktai, kurie neperkelia direktyvų nuostatų. Tarp šių dviejų kategorijų kyla nesuderinamumų, kuomet direktyvos perkeliamas jas išverčiant, tačiau nėra inkorporuojamos sistemiškai, atsižvelgiant į jau galiojančius teisės aktus.

Remiamasi ir istoriniu metodu, nes kai kuri praktika susiformavusi dėl istoriškai buvusio netinkamo reguliavimo. Jurisdikcijoje, kurioje įmonių teisė gyvuoja tik 20 metų, dar tik formuojasi tradicijos, įmonių teisė kuriama neužpildytoje erdvėje. Todėl susiklosčiusi praktika gali būti kažkurio metu galiojusio netinkamo reguliavimo pasekmė, ją būtina kritiškai vertinti, o ne priimti kaip duotybę.

Taikomas ir analitinis metodas, tam kad būtų galima identifikuoti problemines sritis ir pateikti pasiūlymų, kaip jas koreguoti. Analitinis metodas yra būtinas todėl, kad įmonių teisę turime analizuoti ne tik kitų valstybių kontekste, tačiau atsižvelgdami į tai, kad Lietuva yra maža jurisdikcija, kuriai būdingas savitos problemos: didelė akcininkų koncentracija bendrovėse, vertybinių popierių biržos nelikvidumas, profesionalių valdybos narių bendruomenės nebuvimas ir pan. Todėl vien tik sisteminio metodo taikymas būtų neišsamus, nes neleistų atsižvelgti į jurisdikcijos specifiką.

Disertacijos tyrimo rezultatai buvo pasiekti naudojantis tiek teoriniais, tiek empiriniais mokslinio tyrimo metodais. Lietuvoje dėl jurisdikcijos dydžio ir tradicijos stokos sudėtinga atlikti išsamų empirinį tyrimą, tačiau disertacijoje siekiama parodyti ir apibendrinti labiausiai tipinius praktinius pavyzdžius.

DISERTACIJOS STRUKTŪRA, TURINIO SANTRAUKA IR SVARBIAUSI TYRIMO REZULTATAI. Disertaciją be įvadinės dalies ir išvadų sudaro trys dalys. Pirmojoje iš jų pristatomas NASDAQ OMX Vilnius listinguojamų bendrovių valdymo kodeksas, paaiškinama jo įtaka bei analogiškų kodeksų pripažinimas kaip antrinio teisės šaltinio užsienio valstybėse. Analizuojama Bendrovių valdymo kodekso įtaka Lietuvos teisei, svarbiausia suvokiant ir aiškinant fiduciarines pareigas. Antroje dalyje pristatomi valstybės kontroliuojamų bendrovių ir valstybės įmonių valdymo reglamentavimo niuansai ir kaip Lietuvoje galėtų būti reformuota ši sritis. Trečioje dalyje analizuojami kolegialių organų narių ir vadovo atlyginimo reguliavimo doktrinos bei rekomendacijos bei Lietuvos teisės aktų probleminės nuostatos.

Apibendrinant disertacijoje išdėstytą turinį, galima daryti tokias išvadas. Per du dešimtmečius dėl laiko stokos ir mažos rinkos dar nesusiformavo teismų praktika, kuri paaiškintų fiduciarines valdymo organų pareigas ir numatytų taikomus standartus. Fiduciarinų pareigų nesuvokimas iš dalies lemai tai, kad Lietuvoje nėra profesionalios bendrovių valdymo organų bendruomenės ir korporatyvinės bendrovių valdymo tradicijos. Dėl to Lietuvos bendrovės yra mažai inovatyvios ir nedaug Lietuvos bendrovių tampa tarptautinėmis.

Bendrovių valdymo kodeksas, kuriuo perkeliamos EBPO gairės ir Europos Komisijos rekomendacijos, Lietuvoje yra itin svarbus antrinis teisės šaltinis, kuris leidžia paaiškinti fiduciarines pareigas. Tačiau kodekse praktiškai nėra individualiai sukurtų normų, kurios atspindėtų mažos jurisdikcijos, kokia yra Lietuva, aktualijas: didelė akcininkų koncentracija, akcininkai yra aktyvūs ir aktyviai kontroliuoja kolegialius organus. Tokioje situacijoje jautriausias interesų konfliktas yra tarp daugumos ir mažumos akcininkų, būdinga problema yra kolegialių organų pasyvumas.

Teismų praktikoje nerandame atskyrimo tarp lojalumo pareigos ir pareigos elgtis sąžiningai ir protingai (rūpestingumo pareigos). Nėra aišku, ar nustatant rūpestingumo pareigos pažeidimą, taikoma verslo vertinimo taisyklės apsauga. Dėl to reikalingas kitas šaltinis šių pareigų turiniui atskleisti ir vystyti. Tai galėtų būti Bendrovių valdymo kodeksas.

Bendrovių valdymo kodekso reikšmės išplėtimas reikštų *ex ante* reguliavimą, kuomet kolegialių organų nariams ir vadovams reguliavimas yra žinomas iš anksto ir

išvengiama situacijų, kai pozityviosios teisės normos-principai išaiškinami teismų praktikoje neturint ankstesnės patirties.

„Minkštas“ įstatymas turi griežtėjimo tendenciją. Todėl dalis nuostatų (pavyzdžiui, atlyginimų politikos atskleidimas) ilgainiui taps pozityviosios teisės dalimi.

Kitas aktualus aspektas, kad šiuo metu valstybė neturi vieningo jos kontroliuojamų įmonių valdymo modelio. Jeigu valstybė, kaip įmonių savininkė ir akcininkė jos valdomose įmonėse pradėtų formuoti vieningo modelio anglišką arba skandinavišką valdybą, tai skatintų tradicijų atsiradimą ir valdymo organų veiklos praktikos formavimąsi.

Valstybės valdomų įmonių reformos įgyvendinimas vien tik užtikrinant šių įmonių veiklos rezultatų viešinimą turi nedidelį efektą šių įmonių finansiniams rezultatams, neskatina jų formuoti profesionalių kolegialių organų ir neturi reikšmingos įtakos bendrovių valdymo praktikai Lietuvoje.

Deklaruojamas dualistinis, o praktikoje egzistuojantis decentralizuotas valstybės valdomų įmonių dalyvio teisių įgyvendinimo modelis lemia tai, kad šių įmonių kolegialūs organai formuojami daugiausia iš bendrovių valdymo patirties neturinčių valstybės tarnautojų. Bandymas reformuoti valstybės valdomų įmonių valdybas palies tik labai nedidelę dalį įmonių, o nepriklausomų valdybos narių darbo efektyvumas priklausys nuo valdybų pirmininkų, kurių dauguma bus valstybės tarnautojai.

Taip pat svarbu, kad bendrovių valdymo pakeisti neįmanoma nesudarant profesionalių kolegialių organų. Būtina prielaida tam yra Vakarų praktikoje priimtos kolegialių organų narių atlyginimo praktikos perėmimas. Tačiau perkeliant Europos Komisijos rekomendacijas, reikėtų atsižvelgti į tai, kad jos orientuotos į atlyginimo atskleidimą akcininkams (skaidrumą), didesnę akcininkų įtaką nustatant atlyginimą ir kitų problemų, būdingų bendrovėms, kurių akcininkai diversifikuoti, sprendimą. Lietuvoje turėtų būti koncentruojamasi ne tik į atlygio skaidrumo taisykles, bet ir į atlyginimo formos ir struktūros keitimą bei tai, kad atlygį kolegialaus organo nariams turėtų skirti bendrovė, o ne atskiri akcininkai. Šiuo metu galiojantis Akcinių bendrovių įstatymas to neskatina.

Profesionalių kolegialių organų formavimas, kurie būtų aktyvūs, savarankiški ir nepriklausomi nuo vieno ar kelių kontroliuojančių akcininkų, neįmanomas, kol neegzistuoja Vakarų valstybių praktiką atitinkanti atlyginimo sistema.

Kol valstybė nereformuoja valstybės valdomų įmonių, tai rodo pavyzdį ir skatina privataus sektoriaus įmones veikti analogiškai, kuomet visi klausimai sprendžiami pagal kontroliuojančio akcininko instrukcijas, o kolegialūs organai yra nesavarankiški.

GINAMIEJI TEIGINIAI. Disertacijoje yra ginami šie teiginiai:

1. Bendrovių valdymo reguliavimo institutas Lietuvoje yra neišvystytas, todėl reikalinga sisteminė reforma, kuri lemtų gerosios Vakarų teisės tradicijos šalių praktikos recepciją Lietuvos teisėje, pritaikant ją mažai jurisdikcijai.
2. Sisteminė bendrovių valdymo reforma turėtų apimti šias sritis:
   a. bendrovių valdymo organų narių fiduciarinių pareigų turinio atskleidimą Bendrovių valdymo kodekse;
   b. EBPO Gairių taikymą valstybės valdomoms įmonėms;
   c. Europos komisijos rekomendacijų recepciją reglamentuojant bendrovių valdymo organų narių atlyginimus.