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Corporate governance and the financial crisis: did the theories stand the test?

Feature

Corporate Governance and the Financial Crisis

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Shuangge Wen and Jingchen Zhao assess how established theories on corporate governance have stood the test in the aftermath of the 2008 financial crisis.

KEY POINTS

- Three key theories -- the agency theory, stewardship theory and path dependence theory have served to explain the relationship between directors and shareholders in the field of corporate governance. However, none of the theories alone have stood the test of the global financial crisis.
- Given the multiplicity and complexity of directors' interests, directors in organisations are likely to have agency relationships with some managers and stewardship relationships with others.
- Path dependence theory indicates the prevalence of voluntary codes rather than mandatory instruments in the post-crisis context.
- In the authors' opinion, a combination of voluntary codes and mandatory instruments would be desirable.

INTRODUCTION

Following the bursting of the housing bubble in 2006, a dramatic rise in defaults on subprime mortgages in the financial market triggered a global credit crunch and the subsequent financial crisis. The world economy has been seriously damaged by the recent financial turmoil. Stock markets have crashed worldwide; retail

sales have suffered huge declines; banks and investment institutions have suffered billions in losses and faced risks of failure; and markets became dysfunctional.

A cyclical pattern of rises and declines in the business world has been perceived since the dawn of industrial capitalism,¹ and has created new demands for governance leading to according changes in governing rules and regulations. Although no consensus has so far been achieved as regards the implications of the 2008 crisis, the increasing significance of corporate governance practices has again been highlighted. Needs for improvement not only derive from failures of management, but from the incompetency of the boards and shareholders in ensuring corporate accountability.

'A *multi-theoretical* approach to corporate governance is essential for recognising the many mechanisms and structures that might reasonably enhance organisational functioning ...' (authors' emphasis added).² This article considers how established theories on corporate governance have stood the test in the recent turmoil with an analysis of the agency theory, stewardship theory and path dependence theory.

AGENCY THEORY

Originating in the 1970s in the field of finance and economics, agency theory has developed as a predominant theoretical support for shareholder value orientation. Agents (the directors) manage the business for the benefit of their principals (the shareholders) and ensure accountability through a single-purposed governance structure.³ As residual claimants, shareholders are regarded as principals and the most suitable candidates to monitor managerial performance in terms of assigned powers and duties.⁴ The traditional agency relationship was between shareholders and management, although a double agency relationship, ie, the relationship between shareholders and directors, and that between directors and management, is increasingly recognised.

Agency theory rests upon the separation of ownership and management, but whilst this has resulted in efficiency, it has also been largely blamed for the instability of the Anglo-American governance mechanism. On the one hand, the nature of separation enables corporations to acquire substantial amounts of capital from various sources; provides investors with direct and flexible exit choices from their investee companies; and it largely promotes market competition and development. On the other hand, it causes potential conflict between principals and agents. Directors are presumed under agency theory to be imperfect, self-interested agents. They are tempted to engage in opportunistic behaviour for their own personal benefit, rather than undertake proper risk management for the benefit of their principals, who prefer to maximise their returns through the taking of rational corporate risk, and focusing on high dividends and stock prices.

In practice shareholders' insufficient control over directors' performance is regarded as a significant element contributing to the divergence of interests between principals and agents. This problem is exacerbated when portfolios are diversified, which significantly reduces shareholders' incentives to supervise and arguably incentivises them to leave.⁵ Information asymmetry also restricts the shareholder group's ability to make qualified decisions in response to directors' decisions -- so that in practice directors are offered opportunities for diverging from shareholders' interests and pursuing their own objectives.

AGENCY PROBLEMS ARISING FROM THE CRISIS

With the plethora of economic declines triggered by the financial crisis, the limitations of agency theory -- a divergence of interests between agents and principals -- has again been manifest through both the unaccountability of the directors and insufficient control exerted by the shareholders. As recognised by Rose, the financial crisis is regarded in some respects as a failure of corporate governance mostly owing to managerial expropriation and high agency costs.⁶

DIRECTORS' LACK OF ACCOUNTABILITY

Premised on the belief that directors are self-interested and opportunistic, agency theory has focused on how shareholders can reduce the likelihood of directors misusing their power for pecuniary or other advantages.⁷ For Anglo-American corporations and institutions, the two key mechanisms for achieving this are account-

ability and risk management. Accordingly, the board of directors, defined as 'the link between the shareholders of the firm and the management entrusted with undertaking the day-to-day operations of the organisation',⁸ are expected to fulfil their basic fiduciary duty by quickly responding to evolving risks to the business,⁹ conducting effective risk management and 'supervising the management of the business and reporting to shareholders on their stewardship'.¹⁰

In the financial crisis, the lack of accountability within corporations and financial institutions and between directors and their principals was identified as a major failing in the realm of corporate governance.¹¹ It has been found that many directors of collapsed financial institutions failed to devote sufficient time or effort to risk management, or to fully understand the business and the product risks.¹² Instead of arranging loans and managing relevant risks themselves, these financial institutions (and their directors) played the role of 'originator and distributor',¹³ ie they sold their loan risks to other investors in the form of a bundle of credit products, on the grounds that risks associated with the loan debt would be fragmented and risk monitoring would not be necessary.¹⁴ Such actions also increased the intricacy of corporate disclosure, and further decreased accountability, both from directors to shareholders, and from managers to directors. In the case of Northern Rock, directors' insufficient risk monitoring of their invested products, and their behaviour in misleading small investors into buying shares while it was going into financial difficulty, are regarded as basic accountability failures. In the recent governance report produced by UBS, incomplete risk control methodologies were identified as the primary cause of Northern Rock's governance failure.

INSUFFICIENT SHAREHOLDER CONTROL

'The key question that shareholders and their agents needed to ask themselves was whether they were partly responsible for the banking crisis.'¹⁵ Though shareholder control is defined by agency theorists as an efficient way of eliminating the diversion of interests between shareholders and managers and managerial greed, in practice shareholders have played an inactive role and it is this inactivity in corporate control, particularly the inefficient role of institutional investors in restraining the reckless behaviour of boards, that has been identified as a key factor in contributing to the escalation of the crisis.

Much of the inactivity can be blamed on the dilution of share ownership -- a consequence, according to agency theory, of the separation of ownership and control in modern corporations. The largest individual share ownerships amount to just a minor percentage of the total shareholding, and it is therefore not possible for these shareholders to exercise direct control of corporate management.¹⁶ In the Northern Rock case, 144,000 of the 180,000 shareholders were found to be small investors who did not have sufficient information or influence to exercise due diligence in monitoring the board's performance.

This wide distribution of ownership has rendered Anglo-American shareholders, including institutional investors, passive in corporate governance. They prefer to exercise their powers via the 'exit' choice, and leave market forces eg the threat of hostile takeover, as the main driver for governing corporate management. In the case of Northern Rock, it was found that the company's reckless business model had been transparent to its shareholders in the market for a long time,¹⁷ but this was not challenged before the business went into difficulty.

STEWARDSHIP THEORY

Stewardship theory provides an alternative to agency theory in interpreting the principal-agent relationship. This model advocates the overriding status of shareholders whilst presuming that managers' interests align with those of their principals.¹⁸ Instead of being characterised as opportunists, as in agency theory, executive managers are described in stewardship theory as good stewards of the corporation, with enough self-motivation to attain high levels of corporate profit and returns for the shareholders.¹⁹ According to stewardship theory these returns for the shareholders are not achieved by placing management under greater control from shareowners, but by empowering managers to take autonomous executive action.²⁰

In contrast to agency theory, stewardship theory suggests that corporate practice should allow ultimate powers of decision to be delegated to the management.²¹ The responsibility of the board is not to directly control the corporation, but to supervise and assist the Chief Executive Officer ('CEO') and the management in ac-

complishing their tasks. However, the weakness of the theory is that there is no clear line between the board and the management responsibilities, and it is always difficult to hold the CEO (and not the board) accountable for the results of actions taken.

In the financial turmoil, the unaccountability of directors and managers indicates a lack of stewardship and further suggests the impracticability of offering directors/managers ultimate powers in corporate control. The lack of stewardship in governance practice was succinctly described by Greenspan: 'I made a mistake in presuming that the self-interest of organisations, specifically banks and others, was such that they were best capable of protecting their own shareholders.'²² A governance structure which is framed purely on the basis of stewardship is inapplicable in the aftermath of the crisis. Nevertheless, stewardship theory has not been completely written off in the post-crisis context, because it effectively complements agency theory. Given the multiplicity and complexity of principals' interests, principals in organisations are likely to have agency relationships with some managers and stewardship relationships with others.²³ Most importantly, the emphasis of stewardship theory offers a possible explanation for the agency dilemma of governance: although it is agreed that executives should remain subject to effective monitoring mechanisms in the aftermath of the financial crisis, they cannot submit every decision for the shareholders' consideration due to the nature of corporate governance.²⁴ The necessity of enhancing executive stewardship is therefore put forward as an important component in the post-crisis governance structure.

SHAREHOLDER VALUE CONTINUATION AND SELF-REGULATION: THE PATH DEPENDENCE PERSPECTIVE

A further question arises as to whether the UK's emphasis on shareholder value should transfer to stakeholders' interests generally (those of employees, creditors, customers, suppliers), to minimise the negative effects of short-termism in the financial crisis. Although the significance of stakeholder considerations in enhancing long-term corporate culture is increasingly acknowledged, the recent financial crisis suggests the impracticality of enforcing the stakeholder model in the UK. The idea that directors should be offered more autonomy to provide stakeholder enhancement has been seriously undermined by the fact that insufficient control over directors' performance was identified as a major factor contributing to the current crisis. 'When the crunch came, profits would come first.'²⁵ When many companies are fighting for survival during the financial crisis, the implementation of a stakeholder model seems more difficult within the Anglo-American context, because such practice by directors could leave them open to accusations of diluting the primary objective of companies, ie the maximisation of shareholders' interests. It seems that the interests of non-shareholder groups will be considered and pursued by directors purely for instrumental concerns, ie only when such stakeholder enhancement would directly and positively contribute to the competitiveness of the company and the maximisation of shareholder value.²⁶

The theory of path dependence offers a strong theoretical support for continuing shareholder value orientation in the UK post-crisis context. Path dependence, a comparatively new theory originating in the 1980s, means that an outcome or decision is shaped in specific and systematic ways by the historical path leading to it, as well as by other factors within the socio-economic context.²⁷ As part of the domestic legal and financial framework, a corporate governance system has significant sources of path dependence, which include historical accidents as well as economic and political particulars of the domestic system.²⁸ The persistence of these path dependence sources significantly contributes to the stability of the domestic corporate governance system in any local socio-economic environment.

Path dependence theory sheds an interesting light on the continuing persistence of the shareholder value orientation in the UK. Historically, shareholder value has been deeply embodied in the UK, both in theory and in common law practice.²⁹ The main configurations of the UK corporate governance system -- including dispersed ownership and ultimate shareholder decision rights, the one-tier board structure, the external monitoring system, the liquid market and active market activities -- are all determined by and further solidify the ultimate objective of shareholder value maximisation. In recent company law reforms the UK government has favoured the Enlightened Shareholder Value ('ESV') principle over the pluralist approach. The major feature of the ESV approach is its preservation of the long-established corporate objective of shareholder wealth maximisation: the stakeholder consideration required in provisions reflecting the ESV principle, such as s 172(1) and s 417 of the Companies Act 2006, is merely for the ultimate aim of shareholder benefit. This is

distinct from the pluralist approach, which rejects the superiority of shareholders' interests and advocates the pursuit of various stakeholder groups' interests. Given the increasing demands to restore investor confidence and revitalise the market economy, it is expected that shareholder value will continue to be honoured as the predominant goal, and it will clearly be for the ultimate benefit of company members.

Path dependence theory also indicates the prevalence of the self-regulatory approach after the crisis. Avoiding the rigidity of the American rule-based approach, the UK has long featured a flexible principles-based approach in its corporate governance reforms. Given the complex nature of governance practice, company law statutes in the UK, including the 701-page long Companies Act 2006, provide minimal regulation of corporate governance. Key governance issues, such as the powers and structure of the board, are mainly left to the discretions of corporations and influences of semi-autonomous bodies. 'Much of governance goes beyond legal framework ... Hence the development of the self-regulatory governance framework in the UK through various reports ... make boards of directors more accountable to shareholders.'³⁰ It is also argued that the flexibility of self-regulations could reflect businesses' urgent needs and avoid the high costs and countless administrative procedures by the amendment of existing mandatory laws, which is particularly favourable in the post-crisis period when there are increasing calls for reform. On the basis of path dependence theory, which argues continuing systematic persistence, it is anticipated that self-regulation is likely to continue to be favoured in the realm of UK post-crisis corporate governance.

POSSIBLE DEVELOPMENTS POST-CRISIS

ENHANCING DIRECTORS' ACCOUNTABILITY TO SHAREHOLDERS

The significance of internal governance over complex financial products has repeatedly been neglected in past practice. Over the last ten years the major thrust of corporate governance reform after corporate collapses has been the improvement of external monitoring mechanisms, including the increasing use of non-executive directors and stringent rules regarding auditing committees. However, the significance of internal control mechanisms, in particular, appropriate risk management performance and the enhancement of directors' accountability by boards of directors -- failed to be adequately appreciated. In light of recent financial turmoil, it seems necessary that the scope of the existing UK statutory standard for directors' reasonable care, skill and diligence -- s 174 of the Companies Act 2006 -- should be further extended to require directors to constantly acquire and update the necessary knowledge and skills, so that they can handle increasing and varying risks from the rapidly changing business reality.

Raising the standard of reasonable care and diligence required from directors in order to keep pace with the changing practice and expectations of the commercial community is a strategy that has recently been supported by a number of Commonwealth authorities. It was stated in the Australian case *Commonwealth Bank of Australia v Friedrich* that:³¹

'As the complexity of commerce has gradually intensified (for better or for worse) the community has of necessity come to expect more than formerly from directors whose task it is to govern the affairs of companies to which large sums of money are committed by way of equity capital or loan ... In particular, the stage has been reached when a director is expected to be capable of understanding his company's affairs to the extent of actually reaching a reasonably informed opinion of its financial capacity...'

A similar view can also be found in *Daniels t/a Deloitte Haskins & Sells v AWA Ltd*,³² in which the court emphasised that the standard used to judge directors' skills and experience should be raised accordingly as commercial situations became more and more complicated. This leads to the conclusion that in the recent Northern Rock crisis, the practice of some directors could be considered as a breach of their duty of reasonable care and diligence. 'A fundamental role of the board is to provide oversight, direction and control but also to challenge where necessary.'³³ Directors of Northern Rock failed to meet this basic standard with regard to providing sufficient monitoring of credit products. In addition, if it is proved, the claim made by the UK Shareholders' Association ('UKSA') that Northern Rock directors 'duped' investors into buying shares by failing to make clear that the company was in financial difficulty will be strong evidence that the directors failed in exercising their statutory duty. 'Companies have an obligation to announce significant price sensitive in-

formation as soon as possible and we believe the lack of any such announcements led to a false market in shares of the company.³⁴

The other potential method of enhancing directors' accountability is via the development of voluntary corporate governance codes and guidelines offering sufficient flexibility and space for improvement. It is suggested that further corporate governance guidance for directors should be developed to take account of rising risks, control malfunctions and market expectations exposed by the financial crisis. Significantly, based on the recognition that 'a company's system of internal control has a key role of the management of risks that are significant to the fulfilment of its business objectives ... and the safeguarding of (shareholders') assets',³⁵ further risk management and internal control standards are expected on the basis of the Turnbull Report,³⁶ to ensure that the risks emerging from the complicated financial environment will be adequately and effectively managed.

ENHANCING SHAREHOLDER CONTROL: THE ROLE OF INSTITUTIONAL INVESTORS

In the aftermath of the financial crisis, the role of shareholders in corporate control, and in particular the activism of long-term institutional investors, should be emphasised as a major crisis-avoidance tool. Currently in the UK there is no mandatory requirement for institutional investors to vote in corporate governance. Further regulations are expected in the post-crisis context, requiring institutions with holdings of shares above a certain (large) minimum value to vote on company business.³⁷ Meanwhile, the role of institutional investors in monitoring executive remuneration practice should be enhanced after the crisis, acting as an effective brake on executives' lack of accountability. As monitors of excessive and uncontrolled corporate powers, shareholders in UK-listed companies should be able to intervene in the company's executive compensation arrangements to a greater extent, thus to prevent the risk of executives exploiting principals' interests.³⁸ For instance, the practice of obtaining advisory votes from shareholders regarding remuneration schemes should be encouraged, to eliminate the risk of opportunism by management, and to ensure the effectiveness of shareholder involvement.³⁹

REMARKS

Three key theories -- the agency theory, stewardship theory and path dependence theory have served to explain the relationship between directors and shareholders in the field of corporate governance. Nevertheless, none of the theories alone seems to have stood the test of the global financial crisis. Though agency theory provides an effective explanation of relevant governance problems such as unaccountability of the directors and insufficient shareholder control, it fails to solve the governance dilemma, ie, directors cannot submit every decision for shareholders' consideration. A governance structure which is framed purely on the basis of stewardship has also proved to be inapplicable in the post-crisis context. A *multi-theoretical approach to corporate governance*, as advocated by Daily et al,⁴⁰ therefore is essential in considering and determining rules and regulations in the post-crisis context.

Since the onset of the crisis, most recommendations in the realm of UK corporate governance have been constituted in the form of voluntary codes and reports, including the publication of the independent review of corporate governance -- the Walker Review,⁴¹ updates to the Higgs Guidance and the revisions to the Code (now renamed the UK Corporate Governance Code). This indicates the strong impact of the UK historical self-regulatory framework, as indicated by path dependence theory. The choice of adopting those recommendations will be left to the decision of individual boards in the post-crisis context. But due to the lack of essential toughness, such a principles-based approach might not give rise to a substantial improvement in governance practice. In the authors' opinion, a combination of voluntary codes and mandatory instruments appears to be the best choice in restoring the market order and investors' confidence. The voluntary codes are playing the supporting role for the ultimate production of the regulation. In particular, it is necessary, via further judicial interpretations to s 174 and other related statutory provisions, to force directors to constantly upgrade necessary skills and knowledge to enable them to be more confident in dealing with more complicated financial and economic situations.

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