

UDC 330.8, K:330.161

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Studying transactions of economic agents in the situation of insolvency (neo-institutional approach): the cases of France and Russia

Abstract. Introduction. A large number of different forms of transactions between agents are used by economic actors when performing economic and other activities. The foundations of neo-institutional theory are based on studying economic rather than legal aspects of various contracts, content and characteristics of mutual economic ties of actors in various types of contractual relationships, as well as the role and level of influence of specific contracts on individuals when using such contracts in various types of economic activities. Together, this determines the significance of the level of transaction arrangements in the conditions of insolvency, which affects the effectiveness in resolving crisis situations in terms of maximisation of public welfare. When carrying out transactions, agents demonstrate opportunism, which leads to the need for its in-depth analysis. When crisis situations related to insolvency or having other causes emerge, an urgent scientific objective is to study opportunistic behaviour of economic actors and to form mechanisms of its neutralisation. **Methodology.** The research is based on the methodology of neo-institutionalism. Analytical and information reports of the *Coface Group, Paris Commercial Court*, commercial courts of the Russian Federation, as well as results of surveys were used to conduct the research. **The purpose** of the research is to analyse transactions between economic actors in crisis situations of insolvency applying methodological tools of neo-institutionalism. **Results.** The authors have substantiated the conditions for resolving mutual opportunism in interaction between top managers of organisations in crisis and creditors, identified unified forms of opportunism, developed their own approach to the neutralisation of mutual opportunism through a system of penal sanctions which can contribute to the implementation of the practices of containment and compensation, as well as to transferring the authority to take and implement managerial decisions from top managers of an enterprise which is in crisis situation to third parties determined by the court. **Conclusions.** The global nature of contractual relationships leads to the emergence of opportunistic behaviour of economic actors represented by both top managers of the organisation in crisis and investors, which significantly decreases chances to achieve positive results in resolving problems and facilitating recovery from the crisis. The latter determines the importance of developing the institution of bankruptcy taking into account the necessary regulations aimed at neutralising opportunism.

Keywords: Opportunistic Behaviour; Neo-institutionalism; Bankruptcy; Insolvency; Penalties; France; Russia

JEL Classification: D86; D81; D82

DOI: <https://doi.org/10.21003/ea.V166-13>

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Дослідження трансакцій економічних агентів у ситуації неплатоспроможності (неоінституціональний підхід): приклади Франції та Росії

Анотація. У статті відображено характер трансакцій господарюючих суб'єктів у системі банкрутства за двома факторами: наявністю актуальної інформації та орієнтацією на особисті цілі. Визначено форми опортуністичної поведінки керівництва організації-боржника та кредиторів. Розроблено авторський підхід до нейтралізації взаємного опортунізму через підвищення відповідальності керівництва підприємств-банкрутів, що реалізує завдання стримування і компенсації, а також передачі влади керівника організації-банкрута в частині прийняття управлінських рішень арбітражним керуючим.

Ключові слова: опортунізм; неоінституціоналізм; банкрутство; неплатоспроможність; штрафні санкції; Франція; Росія.

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Исследование трансакций экономических агентов в ситуации неплатежеспособности (неинституциональный подход): примеры Франции и России

Аннотация. Выявлен характер трансакций хозяйствующих субъектов в системе института банкротства, определяемый посредством двух факторов: наличия актуальной информации и ориентации на личные цели. Определены формы оппортунистического поведения руководства организации-должника и его кредиторов. Разработан авторский подход к нейтрализации взаимного оппортунизма с помощью повышения ответственности руководства предприятий-банкротов, реализующих задачи сдерживания и компенсации, а также передачи власти руководителя организации-банкрота в части принятия управленческих решений арбитражным управляющим.

Ключевые слова: оппортунизм; неинституционализм; банкротство; неплатежеспособность; штрафные санкции; Франция; Россия.

1. Introduction

In the process of interaction between economic actors, the agent has more information than the principal does. As a result of this asymmetric distribution of information, agents have an information advantage. It concerns the possibility to derogate from obligations under a contract, which forms opportunistic behaviour [13].

O. Williamson (1983) defines opportunism as «self-interests seeking with guile» in the case when other agents cannot identify or are unable to identify this. At the same time, the author pays attention to the fact that opportunism should be distinguished from ordinary egoistic behaviour: economic actors, complying with the terms of the contract, seek their own individual goals [20].

Thus, opportunistic behaviour is a category that is characterised by the following structural elements: different goals of the participants, imbalances in available information, different levels of income of the counterparty or disbenefit for one of them, i.e. the growth of utility for one of them at the expense of reducing utility for the other.

These peculiarities are typical for both creditors and insolvent enterprises. The importance of studying opportunistic behaviour is caused by the need to search for and develop tools for its neutralisation, which is possible due to forcing costs down and increasing functioning efficiency of the institution of bankruptcy.

2. Brief Literature Review

W. Meckling and M. Jensen (1976) were the first who studied the problems of the process of economic agents' contraction [10]. The authors defined a firm as a «network of contracts» where problems of various nature are formed. According to the authors, the challenge of a firm is to choose the most acceptable contracts that provide the most effective result and adaptability to the peculiarities of individual specific transactions.

In modern economy, the theoretical basis for studying the processes of bankruptcy was determined by P. Charlety, R. Blazy, J. Smombier (1993) [4]. The authors interpret the category of bankruptcy as a situation of economic «failure» of an enterprise, when for various reasons, an enterprise is in the conditions that do not allow repayment of their financial obligations in a timely manner. We believe that this is largely due to the level of the competence in terms of effective management of a firm. In the current conditions of the external and internal environment of a firm, the relationships between the top manager of a firm and the agents of various levels (shareholders, banks, employees, public authorities, suppliers, etc.) are characterised by a range of conflicts of interest. The process of their resolving by a firm does not always lead to positive results. In the situation of insolvency, conflicts of interest escalate and redistribution of powers among agents occurs. These processes were studied by C. Pochet (2001) [15], J.-F. Malécot (1991) [11], C. Rieg (2002) [17], Ch. Mouly (1987) [14].

Opportunism as an economic phenomenon characterizing contractual relations was introduced into economic theory by O. Williamson (1985) [20].

The main theoretical, methodological and practical aspects of bankruptcy of firms are disclosed in the works by the US scientists such as B. Hansen (2001) [25], C. Warren (1935) [24], D. Skeel (1998) [23], D. Moss, A. Gibbs (1999) [21], etc. The analysis of these works allowed expanding the scope of studying the behaviour of counterparties in bankruptcy procedure.

Research methodology.

The research is based on the methodology of neo-institutionalism. Analytical, empirical, statistical, scientific abstraction, synthesis and comparative analyses, as well as deduction, induction, expert assessment and questionnaire techniques, have been used in the course of the research. Analytical and information reports of the *Coface Groupe* (Coface Group), *Tribunal de Commerce de Paris* (Paris Commercial Court), commercial courts of the Russian Federation, as well as various online sources, including the results of statistical and sociological surveys of different organisations form the research database were used to conduct the research. Data from surveys, questionnaires, court decisions relating to 100 Russian and 71 Lyon (France) bankrupt organisations and firms are used in the study. The period of the study covers 2014-2016.

3. The purpose of the research is to analyse transactions between economic actors in crisis situations of insolvency using the methodological tools of neo-institutionalism.

4. Results

The results of the conducted research have led to the conclusion that the opportunistic behaviour of the management team of an insolvent enterprise is expressed in the following facts:

- 1) an official declaration of the company's inability to meet its obligations occurs well after the actual situation of insolvency incurrence;
- 2) the organisation prematurely sells part of its property in order to solve current problems, which leads to an increasing threat of loss of the borrowed funds.

The results of the analysis of the types of opportunistic behaviour based on the actual data of the operating bankrupt enterprises are given below.

The delay of insolvency announcement

Using the data provided by 71 French bankrupt organisations received from the Paris Commercial Court, the authors examined the characteristics of the opportunistic behaviour of insolvent organisations during the bankruptcy procedure (Figure 1).

The presented data show the existence of a significant time lag from the first signs of insolvency to the official adjudication of the case in order to prove the enterprise to be a bankrupt. The existing information asymmetry does not allow creditors to prevent the emergence of the crisis situation

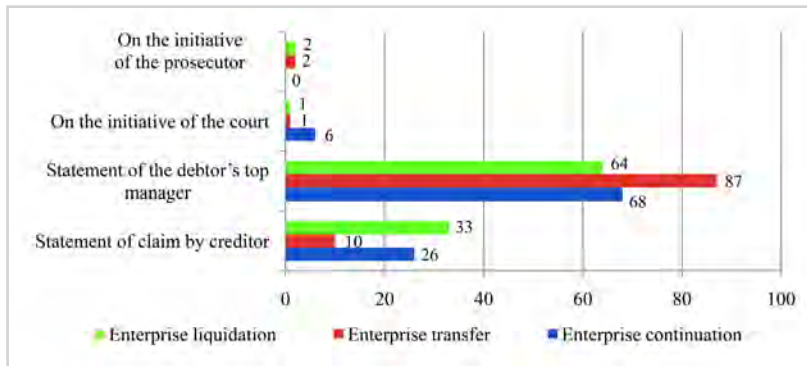


Fig. 1: Analysis of opportunistic behaviour of top managers in France when initiating the bankruptcy procedure, %

Source: Compiled by the authors based on [8]

until the time when the only way of its resolving is liquidation of the organisation.

The obtained results have made it possible to identify the following trends. Initiation of bankruptcy procedure by the creditor leads to enterprise liquidation in 33% of the cases studied. There is a possibility of an insolvent organisation continuation if the top managers declare its inability to meet obligations as early as possible.

The fact that the insolvency of the liquidated organisations had taken place much earlier than the bankruptcy procedure was initiated was confirmed by 27% of the cases analysed (Figure 2). For example, in Russia, the number of cases initiated by the bankrupt enterprises does not exceed 10% of the total number of bankruptcy cases.

Such a situation can be explained by the fear of top managers of enterprises to make a declaration of insolvency. There are a number of reasons for this. For example:

- 1) a threat of losing their business image and reputation in the sphere of organisation's activities;
- 2) a risk of losing control over enterprise management in the sphere of making managerial decisions as a result of transferring full or partial control over the organisation to the creditors.

Thus, delays in declaring insolvency of debtor enterprises result in significant losses when initiating bankruptcy procedures.

Premature sale of the organisation's property

Opportunistic behaviour presupposes that the pre-bankruptcy period involves a package of measures taken by the top management of the organisation. To study this process, we developed a questionnaire and conducted a survey of 100 Russian bankrupt organisations in 2017. Based on the results of the survey of the managers and specialists of Russian insolvent enterprises, we defined dominant decisions made by top management (Figure 3).

In socio-economic terms, sale of assets and reduction of employees are important and significant measures. Premature sale of property as a financial measure is related to the growth of accounts payable, the changes in company's strategy, the resolution of problems concerning information availability and management, the reduction in production and personnel, etc.

The implementation of this set of measures allows ensuring solvency only partially and for a short period of time, but it does not create the conditions to ensure sustainable operation of the enterprise in future.

The negative fact revealed due to the survey is insufficient attention of top management to the measures aimed at creating new development strategies, improvement of products, diversification of both production and counterparties, cost savings through improving the system management and production, and reduction of inventories. In fact, the results of the conducted research allow us to draw a conclusion about a low level of qualification of the management personnel and failure to use all modern achievements in the field of management, including contingency measures.

To solve the above-mentioned problems and mitigate negative consequences of management, legislations of

developed countries provides for penalties. The idea of applying fines and other forms of punishment in order to reduce negative consequences of management was proposed by G. Becker (1968) [1].

In his article «Crime and Punishment: An Economic Approach» [1], G. Becker proceeds from the assumption that violators are as rational as those who comply with laws, since both of them have the same motivation, that is the desire to maximise income in the conditions of resource shortage. The variance in attitudes toward risk makes the difference. Thus, neo-institutionalists conclude that any criminal activity in the economic sphere is a highly risky business since the violator is liable not only to partners, but also to the law. Net criminal income is calculated as follows:

$$R = (w_{crim} - w_{leg}) - p * D \tag{1}$$

where w_{crim} is the criminal income;
 w_{leg} is the potential legal income;
 R is the net criminal income;
 p is the degree of probability of the punishment of the violator;

D is the violator's losses as a result of the incurred punishment.

G. Becker's reasoning related to general losses of society suggests the following. These losses decrease to a minimum under the conditions when disclosure of violations and the level of punishment for wrongdoing are at the maximum level. These conditions will lead to the fact that only those who are most prone to risk become criminals. The above conditions assume that the net criminal income (R) should be less than zero:

$$p = D > w_{crim} - w_{leg} \tag{2}$$

Basically, potential losses from violations ($p * D$) should be higher than potential criminal income on the principle that violations should not be paid. The calculation method for this equation was developed by I. Ehrlich, a prominent American expert in the field of criminal economy. The Ehrlich (1973) equation is the basis in determining and developing economic policy in order to keep criminal activities at low level [5].

At the same time, there is an important element of economic research of the penal enforcement system in this process: development of the form of punishment.

According to G. Becker, the theory of human capital should form the basis of this study. Taking into account this assumption, criminals can be divided into two groups:

- persons with high potential and strategic thinking;
- individuals with a weak level of human capital development and the desire to obtain «fast incomes» with a high degree of risk.

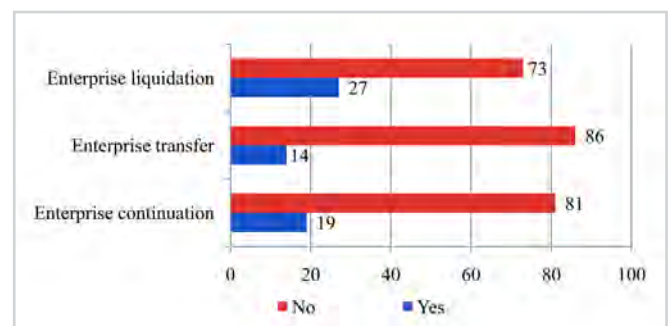


Fig. 2: Analysis of opportunistic behaviour of top managers in Russia when insolvency occurred before the official declaration, %

Source: Compiled by the authors based on [6]

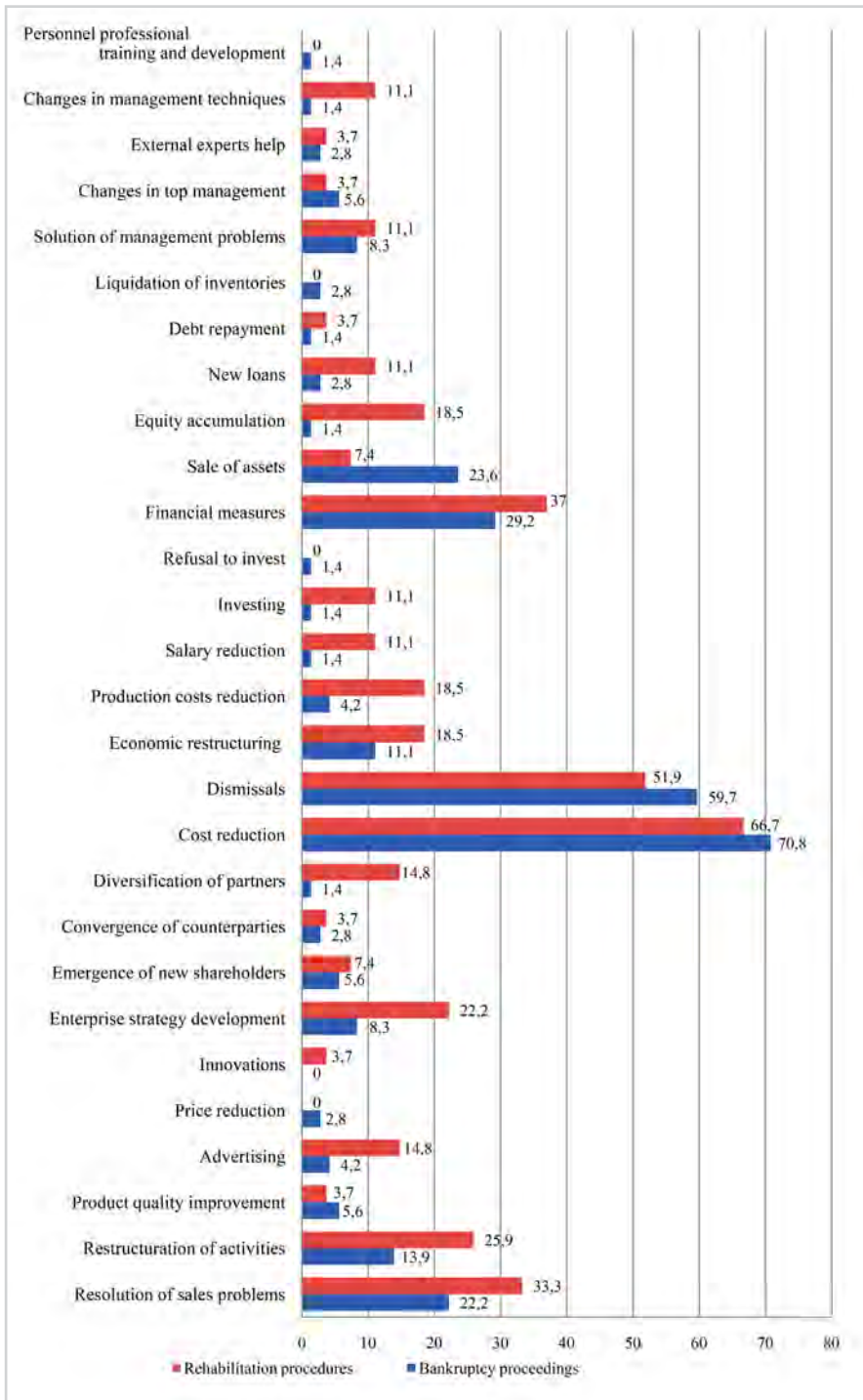


Fig. 2: Analysis of the survey of top management in Russia in terms of actions taken in the pre-bankrupt period in 2014-2016, %
 Source: Compiled by the authors based at own survey

In addition to the sanctions in the form of pecuniary penalties, confiscation of property and criminal liability, as well as the transfer of authority, are also possible. The transfer of authority is carried out by court decision in order to minimise losses from opportunistic behaviour of top managers of bankrupt companies. In France, in case of transferring the enterprise and its liquidation, top managers are always replaced by judicial managers (in 19% and 20% of the cases) [8].

In Russia, the practices of appointing trustee in bankruptcy at an enterprise in the course of the bankruptcy procedure indicate that a complete replacement of top management takes place in most cases (92.7%) [6].

The obtained results of the analysis show that the activities of trustees in bankruptcy cannot have a significant impact

on opportunistic behaviour of top managers; whereas they have a positive impact on the development of the institute of bankruptcy. This happens due to low professional qualifications of trustees in bankruptcy, which leads to complete liquidation of enterprises in most cases (Popov & Simonova, 2007) [16].

Opportunistic behaviour is inherent not only to debtors, but also to creditors, which is manifested in their desire to obtain the right of ownership of an enterprise or property at prices well below market prices.

The problem of the «free rider» forms the basis of the opportunistic behaviour of creditors. This kind of behaviour is a serious obstacle in the pre-trial settlement of disputes. The actions of creditors can be represented through the «prisoner's dilemma» developed by Merrill Flood and Melvin Dresher (1950).

If we assume that the costs of creditors of the bankrupt debtor enterprise are EUR 100, a rational creditor would agree to invest EUR 100 in the context of an amicable settlement. In case when all creditors choose a similar strategy with additional support from a debtor, then the funds received will be sufficient for the enterprise's recovery and it will be possible to cover the creditor's costs (Figure 4).

In our opinion, the problem of the «free rider» can be resolved by a system of sanctions imposed by the state, leading to an increase in the costs of economic actors who do not want to solve the problem and find a compromise jointly.

This system is widely spread in France, where the judge has power to deny a claim of creditors not participating in the joint disputes resolution and making amicable settlements. Suspension of claims of creditors not participating in the settlement agreement procedures can be for up to 2 years. In connection with this practice in France, the number of bankruptcies decreased by 2.1% in 2014-2015, and there was a forecast of decrease by 3.5% in 2016.

The implementation of foreign practices in the field of regulation of the institution of bankruptcy in Russia will help improve the efficiency of the national economy in the conditions of international sanctions, keep enterprises operating, reduce the risk of opportunistic behaviour of economic actors and increase the responsibility of all the participants in disputes.

5. Conclusions

Contractual relationships and the problem of opportunism cover all areas of economic actors' interaction and are the main form of interaction between insolvent enterprises and their creditors.

The actions of the opportunistic nature of top managers of insolvent enterprises are based on the lack of understanding of the causes of the current situation and on the lack of information. Top managers take critical decisions to sell part of the property in order to hide the plight, however, this only aggravates the situation leading to bankruptcy. In addition, the opportunistic actions of top managers are a threat to the interests of creditors and counterparties.

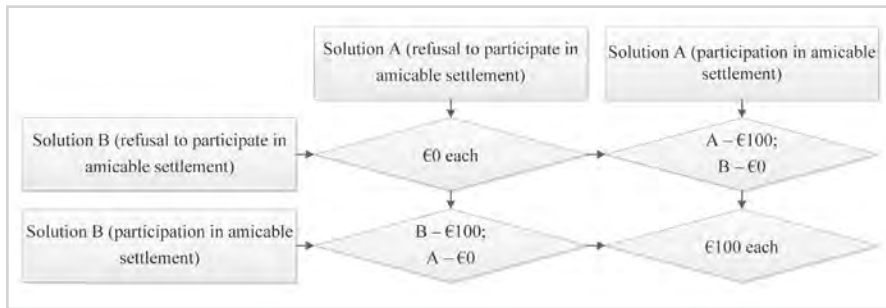


Fig. 4: Creditors' actions in accordance with the «prisoner's dilemma»
Source: Compiled by the authors based at the «prisoner's dilemma»
by M. Flood & M. Dresher (1950)

Opportunistic behaviour of creditors is caused by the problem of the «free rider». This behaviour leads to the unwillingness of the creditor to make amicable settlement. The reasons for their actions are getting property at

access to the necessary information, was confident in the law-abidingness of the counterparties and was wary of incurring significant costs in connection with sanctions for such behaviour.

a reduced price, unwillingness to additionally invest in the enterprise, lack of communication with other creditors, etc.

The problem of the «free rider» can be solved through established communication among creditors, availability of actual up-to-date information on the financial and economic state of an enterprise, as well as the influence of the state on persons trying to benefit and not participating in the settlement process.

The emergence of opportunistic behaviour would not be possible if every economic actor had

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Received 25.04.2017

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