Directors' Duties and Shareholders' Rights in the European Union: Mandatory and/or Default Rules?

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Abstract

Deciding between mandatory and/or default rules (or as they are also called: eligible law, enabling rules, optional rules, legal menus, rules allowing contracting around, fallback provisions, and dispositives Recht) is a fundamental choice for the law. To what degree do legislators, courts, academia and lawyers trust private ordering in stock corporation law or expect a strong benevolent state to regulate? The legislative models differ greatly. In the USA, freedom of contract is the general principle also in stock corporation law, while in Germany just the opposite is true, as laid down in the German Stock Corporation Act. Yet both jurisdictions are outliers. Most European countries have chosen a middle way between these two extremes. This article analyses the policy reasons given in the USA and in Europe and discusses the various models in the UK, Switzerland, Belgium, France, Italy, Spain, Austria and the Netherlands. In the European Union, corporate law and capital market law differ in this respect, but the free choice between more or less regulated corporate forms, the free movement of corporations within the EU and competition of legal orders give flexibility to the enterprises. Unfortunately this flexibility is diminishing as a consequence of paternalism and protectionism after the financial crisis.

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Abstract

Deciding between mandatory and/or default rules (or as they are also called: eligible law, enabling rules, optional rules, legal menus, rules allowing contracting around, fallback provisions, and *dispositives Recht*) is a fundamental choice for the law. To what degree do legislators, courts, academia and lawyers trust private ordering in stock corporation law or expect a strong benevolent state to regulate? The legislative models differ greatly. In the USA, freedom of contract is the general principle also in stock corporation law, while in Germany just the opposite is true, as laid down in the German Stock Corporation Act. Yet both jurisdictions are outliers. Most European countries have chosen a middle way between these two extremes. This article analyses the policy reasons given in the USA and in Europe and discusses the various models in the UK, Switzerland, Belgium, France, Italy, Spain, Austria and the Netherlands. In the European Union, corporate law and capital market law differ in this respect, but the free choice between more or less regulated corporate forms, the free movement of corporations within the EU and competition of legal orders give flexibility to the enterprises. Unfortunately this flexibility is diminishing as a consequence of paternalism and protectionism after the financial crisis.

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Survey

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Mandatory and/or default rules (or as they are also called: eligible law, enabling rules, optional rules, legal menus, rules allowing contracting around, fallback provisions or with the German term dispositives Recht; MÖSLEIN, 2011, 9 ss, ANATOMY OF CORPORATE LAW 2009, 20 ss), this is a very fundamental choice for the law which goes to the roots of private law. To what degree do the legislators, the courts, academia and lawyers trust private ordering (contractual freedom, Privatautonomie) or expect a strong benevolent state to regulate? Legal history teaches us that the pendulum swings over time from one to the other and back. This may be due to long-term political, economic and social factors, but it can also be more short-term in nature when, under the impression of crises and abuses, the pendulum swings to the side of more state intervention. Such short-time reactions are usually driven by a naïve belief that the state can do it better and the legislators react to this without hard proof and tend to overregulate, as we have seen after the financial crisis. So this topic is perfect for celebrating the 60th anniversary of the Rivista delle Società, which is well-known and even admired well beyond Italy by everybody who works in corporate law and which has gathered scholars from many countries to its reunions in 1966, 1981, 1995, 2005 and now again in 2015.

When we look more long-term, we can distinguish – together with the common opinion in comparative corporate law – two extreme examples as to mandatory and/or default rules for shareholders and directors: Germany and the United States. Indeed Germany stands for mandatory law, the so-called Satzungstrenge, as it is expressly mentioned in the German Stock Corporation Act of 1965. This is contrasted with the USA, which is traditionally inclined towards much more contractual freedom for corporate charters. The aim of this lecture is to explain that this is an image that is painted with two broad brushstrokes. Law and legal practice are considerably more nuanced, certainly within the European Union, but even in Germany.

The article will be structured as follows. In *part I* mandatory v. eligible rules for different forms of companies will be dealt with. We shall see that freedom of choice is the general principle for companies in Europe and the USA, with the consequence that everywhere shareholders can choose a company form with few mandatory requirements, certainly much less than for the stock corporation.

In *part II* the special case of stock corporations is presented with brief observations on 1. Germany, 2. the USA, 3. other European countries and 4. the European Union. This will help the reader to get an overall picture of the international landscape and of the main concepts used in the Old and the New World.

For stock corporations, it is true that the contrast between Germany and the USA is more marked, since, as already mentioned, in Germany the Stock Corporation Act is in principle mandatory. Yet in this respect Germany is an outlier, since the other continental European states are much more flexible as to mandatory or default corporate law. If one looks to European Union law and there to corporate and capital market law, one sees both mandatory and fallback rules, the latter particularly in the form of options, and this has of course consequences for all member states including Germany. Still in *part II*, after having looked at the various countries, examples of more or less freedom in the corporate law of various European legal orders are given: Directors, shareholders and actors in setting the agenda.

In *part III* a number of overall trends as to mandatory v. default rules in corporate law shall be identified.

But before we go into more detail, some other pairs of distinctions should be mentioned. Sometimes the pair "mandatory v. default rules" is paralleled or even identified with the pair "paternalistic v. enabling rules". Yet mandatory and paternalistic are not identical, and not all mandatory rules are paternalistic, at least as far as the relationship between directors' duties and shareholders' rights are concerned. There are for example the provisions in corporate law that protect other constituencies like labor and other creditors, sometimes also the state.

This article is not intended to give a final judgment on what is better: mandatory or default rules. While in principle the shareholders know better what is good for them and while this is a point for more innovation (PISTOR 2003), it is nevertheless evident that the legislator cannot do without mandatory rules, and we shall see what justifications have been brought forward for mandatory law. Similarly it cannot be said that the more flexible American law is inherently better than the stricter, more mandatory law of European countries. Such a comparative judgment which La Porta and his colleagues were bold enough to make would be bound to be too general and too superficial. What may be good for the United States is not necessarily good over here in Europe, its depending instead on many historical, political and social factors (DAMMANN 2014, 7, 56, 70).

I. Mandatory v. default rules for different forms of companies

1. Flexibility as the general principle for companies in most legal orders

As mentioned in the introduction, the alleged contrast between Germany and the United States as to mandatory v. default corporate law is misleading under various aspects. The most important aspect is the principle of freedom of choice among various company law forms. This principle exists in all Western corporate laws (MILLER 1997). As a result the shareholders have a broad choice between the stock corporation, other company forms with limited liability and in several states like France even quite a number of specific stock corporation forms for large and smaller companies (société par actions simplifiée with great flexibility, SAS, D. SCHMIDT 1998, 292 ss) and for sector-specific enterprises. Germany, too, allows for the free choice between a stock corporation (Aktiengesellschaft) and a limited liability company (GmbH). In the latter, a rule on "Satzungsstrenge" is not only lacking, but it is well established that the GmbH-Act is much more flexible than the Stock Corporation Act. The founders are more or less free to agree on the structure and organization of the company as well as on the duties of the manager and the rights of the shareholders. The shareholders are in the driver's seat (§ 45 GmbH-Act 1892 in reaction to the strict reform of the Stock Corporation Act in 1884); they cannot only hire and fire the managers (Geschäftsführer), but they may even give them orders on how to act in the daily management of the company. In particular, there is no mandatory supervisory board except for companies with labor codetermination. This high degree of flexibility for the GmbH is already apparent when one compares the sheer length of the two statutes, the Stock Corporation Act and the GmbH-Act. It is easily understandable that the more flexible form of the latter, with more than one million GmbH, is by far more common than the stock corporation (as of January 1st 2015 15,716 stock corporations, cf. KORNBLUM GmbHR 2015, 687 based on figures of the Landesjustizverwaltungen).

The German limited liability company was invented in 1892 as a reaction on the tightened Stock Corporation Act of 1884, and it became a real export article. It exists in most European states as well as in the USA in the form of the LLC. While the principle of offering the founders a very flexible form of company (with limited liability and the freedom for shareholders to decide on the rights and duties of the directors and the general assembly) is common, the details vary considerably from country to country. In the United States, the LLC has more recently gained considerable popularity on account of both its flexibility and other reasons, even though US stock corporation law is already very flexible (GOMTSIAN 2015). On the other hand, Switzerland has the legal form of a GmbH, but it has traditionally used the stock corporation form much more. It even has been said that the Swiss stock corporation is "la bonne à tout faire" (FORSTMOSER 1998, 255 ss), i.e. the maid who is in charge of everything, even for the bakery shop next door. The reason for this popularity of the stock corporation form is the fact that Swiss stock corporation law is much more flexible than German law. Nevertheless, in modern Swiss practice the limited liability company is also gaining ground. Swiss practitioners tell us that the reason are the increasing disclosure obligations for stock corporations.

2. Restrictions on the principle: insolvency, securities regulation and regulated industries

All principles have their exceptions, also the freedom of choice between flexible company forms and the ensuing realm of shareholder decision-making. This is true for all the countries previously mentioned, particularly in three fields: insolvency, securities regulation and regulated industries. These exceptions have obvious reasons.

If a company becomes insolvent or is in danger of becoming so, there is an acute need to protect the creditors. The delineation between directors' duties and shareholders' rights as set up in the law or as chosen by the shareholders does not hold any longer. Accordingly one could say that it is no longer the shareholders, but the creditors who are the masters – or in a functional sense even the "owners" – of the company. This is certainly so if the company is already in bankruptcy, but even before that point there are special mandatory duties for directors, for example to inform the shareholders about the grave loss of company capital or to inform the shareholders as far as credit to the company is concerned. In the UK there is the institute of wrongful trading, which as such is mandatory, but it gives the director of the failing company a choice of going on at his own risk or giving up. Similar liability systems for the directors and shareholders exist in Germany and other countries.

In securities regulation, too, the law is nearly totally of a mandatory nature (on the corporate law for listed companies RICHTER 2008, MOSSDORF 2010). There the aim of mandatory law is twofold: the protection of the investors and small shareholders who must not be misled and the protection of the capital markets in the interest of the economy as a whole. Since shareholder protection serves the development of the capital market and vice versa, this duality is like two sides of the same coin. But as we shall see later on under European securities regulation, there some options, though it is controversial whether these options should be given to the member states or to the companies and shareholders directly.

In regulated industries such as the banking, insurance and energy sectors as well as under antitrust law, regulation serves the public good, i.e. a relevant purpose. In these areas the free choice of company law forms is sometimes restricted to the stock corporation; sometimes there are even stiff provisions concerning the formation and organization of the board. The most recent example is banking law after the financial crisis and the "discovery" of systemically relevant banks with a host of new requirements (HOPT 2013, 224 SS; ENRIQUES ET AL. 2015). Let us turn now more specifically to the stock corporation.

II. Contrasting legislative models for the stock corporation: Germany v. the USA with Europe in the middle?

1. Germany: Strictly mandatory nature of the Stock Corporation Act

Germany with its strictly mandatory nature of the Stock Corporation Act, the so-called Satzungsstrenge, is an outlier (for details FLEISCHER 2015, IDEM 2004, 518 ss, on the history SPINDLER 2007), much like it is in quite a number of other path-dependent legal choices (HOPT 2015/16, 9 ss). § 23 para. 5 of the German Stock Corporation Act says: "The articles may contain different provisions from the provisions of this Act only if this Act explicitly so permits. The articles may contain additional provisions, except as to matters that are conclusively dealt with in this Act." § 23 para. 5 as such dates only from the Stock Corporation Act 1965, though it codifies more or less what was said before in the case law of the Reichsgericht and prevailing opinion (HIRTE 1998, 63, SPINDLER 2007, 1005 SS).

Interestingly enough, the reasons for this strict mandatory character were not fully clear (HOPT 1998, 126 ss, HIRTE 1998, 64 ss). The formal justification which is mentioned quite often, namely that the law prevails over the articles, is meaningless because it begs the question wheter a provision is mandatory or default. Other reasons given in the literature include the protection of shareholders from charters that may include unusual or surprising provisions. Still others maintain that the protection of future shareholders and creditors is the reason for the Satzungsstrenge. Also labor codetermination has been mentioned, though this reason would extend only to codetermination relevant provisions like provisions on the board and not to the rest of the Stock Corporation Act. More recently it has been brought forward that the reason lies outside corporate law, namely in the alleged standardization requirements of capital markets whereby corporate charters should be comparable for the sake of investors (BRUGGER 2014, 49 ss, HIRTE 1998).

In my view none of these alleged reasons hold (HOPT 1998, 126 ss, HIRTE 1998, 64 ss; after the completion of this article KUNTZ 2016): shareholder and investor protection as well as standardization for the sake of the capital market do not require that stock corporation law has a mandatory character to such a broad extent. If we look at the bond markets, we see that these markets can well do without much regulation and that they develop the necessary standardization by themselves. To the extent standardization would really be appropriate and market forces would not suffice, this can be left to securities regulation. These problems were discussed at length and contentiously at the 67th biannual meeting of the German Lawyers Association (Deutscher Juristentag) in Erfurt in 2008 (67th DEUTSCHER JURISTENTAG 2008). The expert (Gutachter) for the Deutscher Juristentag suggested to differentiate corporations with shares listed at the stock exchange (so-called stock exchange corporations, Börsengesellschaften) and pleaded for relaxing the Satzungsstrenge of § 23 section 5 for those corporations not having listed stock (BAYER 2008). Yet the majority was conservative and rejected a special status for stock exchange corporations, voting instead for fully retaining § 23 section 5 as it stands (67TH DEUTSCHER JURISTENTAG 2008, N 103 ss). What the prevailing opinion in Germany does not see is that “paradoxically, greater rigidity within any particular form may actually enhance overall freedom of contract in structuring private enterprise, as long as there is a sufficiently broad range of alternative forms to choose from.” (ANATOMY OF CORPORATE LAW 2009, 23).

2. USA: Freedom of contract, in principle also in stock corporation matters

The legal situation in the United States is indeed very different (SKEEL 2015, COX 2015; more generally COOLS 2005). In the USA corporate law is largely of an enabling nature, take for example the standard of the duty of care which in Delaware, but certainly not in Germany, can be relaxed by the shareholders to one of gross negligence. Nevada corporate law apparently even allows a controlling shareholder to contract over private benefits (GILSON/SCHWARTZ 2015). Another example that has been mentioned in US literature (DAMMANN 2014, 12 ss) is the broad discretion an American board has when it comes to defensive actions in case of a hostile takeover. But also in American corporate law quite a number of mandatory provisions exist (BEBCHUK 1989, 1850; GEVURTS 2014). Just consider the Revlon doctrine of the Delaware courts once the corporation is up for sale, or the court standards developed as to self-dealing, conflicts of interest and similar violations of the fiduciary duty of directors, notwithstanding that some of these mandatory norms may be trivial in the sense that they either do not affect important issues or they correspond to what the parties would have agreed upon in any case (BLACK 1990, cf. also the phenomenon of market-mimicking by legislators). This is of course different in securities regulation and banking law, just take Sarbanes Oxley or Dodd Frank (SKEEL 2015).

The problems were discussed at a conference at the Columbia Law School and the contributions were published in a symposium issue of the Columbia Law Review titled "The Debate on Contractual Freedom in Corporate Law". There was a vivid debate between the so-called contractarians (EASTERBROOK/FISCHEL 1989, WINTER 1989, MCCHESNEY 1989) and the so-called anticontractarians (BEBCHUK 1989, EISENBERG 1989, cf. also from economic theory KORNHAUSER 1989). Easterbrook and Fischel, the "Chicago boys", titled their contribution "The Corporate Contract" and held that, as a general rule, the internal structure of the corporation (and among it directors' duties and shareholders' rights) should best be left for private ordering. Gordon proposed that legislators or courts should "not permit opting out of fiduciary duties, retain some mandatory content in corporate law and draft enabling statutes in the form of opt-in rather than opt-out provisions." (cf. ROMANO 1989, 1616 on GORDON 1989 with criticism). But despite the differences of opinion between these authors, it is clear that the realm of mandatory provisions is by far not so large as under German law.

After having mentioned the reasons given in Germany for mandatory law, it makes sense to compare this briefly with the American side. As to the justifications brought forward for having such mandatory provisions in American corporate law, there are various answers, practically all of them based on some form of "contracting failure" (ANATOMY OF CORPORATE LAW 1989, 22). Three of them may be briefly mentioned (DAMMANN 2014, 24 ss): 1) imperfect pricing of charter terms, 2) midstream charter amendments and 3) externalities.

The first argument is the allegation that IPO markets price charter amendments imperfectly. This goes back to the debates over how efficient capital markets are. While the strong version of the efficient capital market hypothesis had to be given up, the semi-strong version is still widely accepted. Yet why IPO markets specifically should be considered imperfect seems odd. In the end this argument turns around empirical data that still seem to be inconclusive.

The second argument for mandatory law is the danger of opportunistic midstream charter amendments. This means that shareholders, who in the United States as a general rule are dispersed, face the risk that the managers or directors change the original charter during the course of the corporation to their own benefit. In countries where the shareholder structure is characterized by controlling shareholders, groups of companies and family owned corporations, a similar argument could be made. The problem with this argument is that charter amendments are subject to shareholder approval at a qualified majority – in most countries two-thirds or three-quarters – and this already gives a strong protection against opportunistic changes. If further protection is needed, it would be only as to specific issues without justifying a more general character of corporate law.

The third argument is the least far-reaching. Mandatory law is needed to avoid or make up for externalities where markets and shareholders resolutions cannot be trusted to lead to efficient results. This may be the case, for example, for tort creditors, more generally for involuntary and small creditors and, to give a German example, for labor codetermination.

This description of American corporate law as treating mandatory law as an exception that has to be justified seems to suggest that in the United States the shareholders are the real masters of the corporation. Yet this is true only in respect of the corporate charters. As to deciding about the course of the corporation, the United States is still a board-centered country (for slightly different tendencies see VENTORUZZO 2011). A most recent example is the amendment of the Delaware General Corporation Law of 2015 that authorizes forum-selection bylaws but prohibits charter or bylaw provisions that would shift to the plaintiff defense costs incurred in connection with unsuccessful shareholders suits, thereby changing the so-called American rule whereby litigants bear their own litigation costs and limiting private ordering to the advantage of the board (see the criticism by COX 2015). Under German law the shareholders have much more to say than in the United States, and the real masters in most corporations in Germany and many other states in continental Europe are the families and controlling shareholders, including corporate groups. Yet again this is no longer universally true, since both in the United States and in Germany the shareholder structures have somewhat changed: in the United States toward more controlling shareholders and groups and in Germany toward more dispersed shareholdings (HOLDERNESS 2009 for the USA, VAN DER ELST 2008 for five countries).

3. Other European countries: Trying to find a flexible middle way (UK, Switzerland, Belgium, France, Italy, Spain, Austria and the Netherlands)

As said in the beginning, the “Satzungsstrenge” in Germany is an outlier. The same has been said of American law (DAMMANN 2014, 1). European countries, on the contrary, are trying to find a pragmatic, flexible middle way between German rigorousness and American libertarianism. Let us quickly pass in review some of the countries, trying to rank them on a scale from more default to more mandatory. We will start with the UK as the nearest to the United States and finish with the Netherlands and Austria both of which seem to be nearest to Germany.

In the *UK* extended corporate choice exists (FERRAN 2015). Before the Company Act 2006, there was case law that could be interpreted as upholding the principle of the freedom of charter, and the conviction was that the company is best steered by the majority and that the courts should stay out except in cases of malicious intent or bad faith (RAJAK 1998, 191 ss, 210 ss). After the Company Act 2006 it is less clear whether the provisions of the Act in principle prevail. According to some there is now the presumption of these provisions being mandatory unless the provision allows explicitly divergent charter provisions, while on the other side an arbitration clause concerning the unfair prejudice remedy of section 994 has been held valid, yet probably only insofar as the exclusive competence of the arbitral tribunal is concerned and not as to the substance of the remedy to be applied also by the arbitral tribunal (SCHALL 2014 sec. 18-4, 18-5). The leading treatise on British company law is more explicit: “(T)he British approach can be said to represent the view that the shareholders constitute the ultimate source of managerial authority within the company and that the directors obtain their powers by a process of delegation from the shareholders, albeit a delegation of a formal type which, so long as it lasts, may make the directors the central decision-making body on behalf of the company.“ (GOWER/DAVIES 2012, 3-13). “Examples of important matters which are regulated mainly by the articles are the division of powers between the shareholders and the board of directors, and the composition, structure and operation of the board of directors.” (idem 3-2). “(M)any rules relating to the duties of directors may be disapplied by the shareholders, by majority vote, either before or after the breach of duty.” (idem 3-13). The charm of such default rules is that the directors are forced to disclose to the shareholders their actions. Shareholder agreements play a prominent role. If we look at hostile takeovers, UK law prominently defends the mandatory antifrustration rule as an antipode to US law where the board decides without having to ask the shareholders for consent (HOPT 2014, 254 ss: Delaware or London?). But mandatory law is on the rise, particularly under the influence of European law, and some UK companies try to avoid it by going to the Channel Islands of Jersey. As FERRAN 2015 reports, one of the main reasons to go to Jersey is mandatory say on pay.

Switzerland, too, has traditionally a very flexible stock corporation law and is proud of it (BÜHLER 2014). The rule is contractual freedom, and very large parts of commercial and company law are default rules. Of course there are also mandatory provisions, in particular concerning the basic structure of the organization of the corporation. Art 716a of the Swiss Law of Obligations contains an interesting catalogue of mandatory core competences of the board which cannot be delegated to committees or even single members of the board nor to the general assembly. Mandatory law exists also as to shareholders rights, minority protection, capital protection, annual reports and auditing. Yet there is no equivalent in Swiss corporate law to the German Satzungsstrenge. Quite on the contrary, in each single case a careful analysis is necessary whether a corporate rule is mandatory, and there is a presumption for corporate rules being merely default rules (BÜHLER 2014, 40). There are also a number of opting-up, opting-out and opting-in provisions, not only in takeover law but also in corporate law (BÜHLER 2014, 40 ss). But most recently there are tendencies towards more mandatory law, e.g. as a consequence of the citizens’ initiative “against ripping off” by board members in 2013.

Under *Belgium* stock corporation law the internal structure and organization of the corporation is open to change to a considerable degree (WYMEERSCH 1998, 180). In particular the competences of the various organs can be freely agreed upon in the charter, of course with provisions protecting bona fide outsiders. The charter may in particular increase the competences of the shareholders in the general assembly at the expense of the competences of the board (IDEM 176 ss). Yet this is restricted to certain areas of decision; it is not possible to give a general right of instruction to the general assembly vis-à-vis the board of directors like in the limited liability company. As to the revocation of board members by the general assembly, the Cour de cassation considers that revocation at any time without cause is mandatory. As to conflicts of interest of directors, there are only minimum provisions that can be widened by the charter. Shareholder agreements are legal, provided they are in the interest of the corporation and have a time limit.

French stock corporation law is stricter (DONDERO 2015, LE CANNU/DONDERO 2015, 631: "Un droit encore très réglementé"). But still there is leeway for charter provisions concerning the competences of the board and the general assembly (D. SCHMIDT 1998, GUYON 1998). In particular the charter may entrust certain management tasks that are normally in the competence of the board to the general assembly. Like in Belgium, the limit is that the board may not be deprived of its competences in a way that it would be reduced to just having to execute the resolutions of the general assembly; after all the management of the corporation is the task for the CEO and the board. On the other hand the charter may give the board more than the normal competences. The limit here is that supervisory competences of the general assembly must remain with the latter, as for example the modification of the charter, the approval of the annual financial statements by the shareholder meeting, the resolution on the appropriation of profits and the approval of contracts between the company and directors (related party transactions). In sum, the charter may only redistribute among corporate bodies powers that are left outside of the mandatory provisions of the law. Apart from the latter, there is a considerable leeway for shareholder agreements that are separate from the charter. Limits to these agreements are the interest of the company, fundamental principles of corporate law and, for example, the right to dismiss directors at any time and without cause. Agreements that make the dismissal more burdensome, such as provisions for exit payments, remain possible. Yet in principle such shareholder agreements may not be enforced. French observers remark that by allowing charter provisions and similar shareholder agreements that deviate from corporate law provisions, the result is considerable uncertainty in practice (GUYON 1998, 309).

As to *Italy* is has been said that in general the freedom for charter provisions are broader in Italy than in Germany, but that this freedom ends where mandatory provisions exist, where essential elements of the relevant type of company are touched upon or where the public order is concerned (SPADA 1998, 318 ss, 323 ss). In *Spain*, as in Italy, the typology doctrine is important, and so are the structural principles of the stock corporation (EMBID IRUJO/MARTÍNEZ SANZ 1998, ROJO 2015 as to the similarities and differences between Spain and Italy). As a consequence of the financial crisis, control over companies has been tightened (big wave of mandatory law for listed public corporations, ROJO 2015), yet this concerns mainly stock corporations (around two percent as compared with 98 percent limited liability companies).

In *Austrian* stock corporation law there is no explicit provision on the Satzungsstrenge as under the German Act, but traditionally the provisions of the Act have been considered to be mandatory. The reason for this is said to be that the Austrian stock corporation act is drafted on the model of the public corporation, with stock listed at the stock exchange. Like in Germany recently, there is a tendency in legal literature to loosen the Satzungsstrenge, for all corporations, but in particular for corporations with listed stock (KALSS/SCHAUER 2006, 33 ss, on options 39 ss, BRUGGER 2014, 147, cf. the list of the Austrian Supreme Court OGH in Die Aktiengesellschaft 2013, 716-717). As to the latter it is worth mentioning that under five percent of the Austrian stock corporations belong to the category of public corporation (Publikumsgesellschaft). This tendency of relaxing the Satzungsstrenge appears also in recent Austrian legislation and in particular in a landmark decision of the Austrian Supreme Court, the OGH, of 8 May 2013 (in Die Aktiengesellschaft 2013, 716, comments by KALSS/FLEISCHER 2013, KALSS 2014, 19 ss). According to the latter, the German view that deviations from the provisions of the act are only possible if expressly allowed by the provision is not a valid interpretation of Austrian corporate law (OGH section 3.1). The court mentions several groups of mandatory provisions: provisions concerning the essence of the stock corporation, creditor protection, shareholder protection such as the principle of equality of the shareholders and provisions for the "public good" (OGH section 3.2). The court furthermore stated that stock corporations that do not have listed stock should in principle have Satzungsautonomie (OGH section 3.3., 3.4). The reactions to this decision were mostly favorable (for details see BRUGGER 2014, 147 s).

A similar case is presented by the *Netherlands.* There the law actually contains a provision like the German § 23 section 5 stating that deviations from the provisions of the Act are allowed only insofar as this follows from the Act itself (Article 2:25 BW: "Van de bepalingen van dit boek kan slechts worden afgeweken, voor zover dat uit de wet blijkt."). In principle therefore all provisions of the Act are mandatory unless the contrary can be proven (TIMMERMAN 1998, 217 ss). Yet this provision is said to be one of the most controversial provisions in the Act and an authority on Dutch company law said: This Dutch provision leads to many uncertainties and might be misunderstood as saying that Dutch company law is to a large degree mandatory. Yet the contrary is true: Dutch company law is not widely mandatory (IDEM 218). There are obvious limits in particular for the so-called structured corporations, i.e. a corporation with mandatory labor codetermination. Yet even there the practice is less strict and there is the possibility of getting exemptions from the Ministry of Justice (IDEM 220 ss).

4. European Union: Corporate and capital market law, free movement, competition of legal orders

The *corporate law of the European Union* is only harmonized to a limited extent (as to the extent and relevance see the contrasting views by ENRIQUES 2015 and HOPT 2015, 147 ss). Yet as far as such harmonized corporate law exists, it is in principle mandatory, for example the rules on capital, mergers and in particular shareholders rights and minority protection (on the latter in *national laws* see HILL/THOMAS 2015, PERAKIS 2004, HOPT 2004, Miller 1997 and the standard corporate law treatises or commentaries, for example for France LE CANNU/DONDERO 2015, Germany RÖHRICHT/SCHALL 2015, Great Britain GOWER & DAVIES 2009, Switzerland BÖCKLI 2009). As a consequence of the global financial crisis, mandatory law on shareholder protection has grown, and "paternalistic tools have overtaken enabling tools of protection" (KATELOUZOU/SIEMS 2015, 127). But there are still a few important instances with more flexibility. One prominent example can be found in the European Company or Societas Europaea (FLEISCHER 2004, 518 ss, GÖSSL 2010, 201 ss), which at least in Germany has become very popular, even among large enterprises such as the fore-runner Allianz, the largest German insurance company (HEMELING 2010), BASF, Puma, Eon and others. There the founders have the choice between the one-tier and the two-tier systems and many of the – non-codetermined – European Companies have a unitary board. This choice exists also in many member states (DAVIES/HOPT 2013, 315 ss), and this was recommended also for Germany by the German Lawyers Association (Deutscher Juristentag) in Munich in 2012 (69th DEUTSCHER JURISTENTAG 2012, Resolution no. 19 of the Section Business Law). There have been recent empirical studies showing that giving this choice to the shareholders has clear economic benefits (BELOT ET AL. 2014). Nevertheless, German legislators still refuse to create this choice for a German stock corporation. One of the main reasons for this is labor codetermination in German supervisory boards.

Another example of flexibility is labor codetermination in a European Company (Council Directive 2001/86/EC of 8 October 2001, Art. 3 ss, Negotiating Procedure, OJEC L 2001 L 294/22). There the compromise with Germany was a bargaining model under which capital and labor can agree on more or less labor codetermination, though with the mandatory proviso that if no compromise is reached, the German labor codetermination rules function as a fallback rule. Other options exist under accounting law.

In economic literature there is a strong movement that argues for giving much more freedom to the shareholders, yet up to now without a positive reaction from European legislators (cf. HOPT 2015, 167 ss, 147 ss, FLEISCHER 2012).

Most of the European *securities regulation* is of course mandatory since there the rationale is the protection of the capital market together with investor protection, both being two sides of the same coin. A prominent example of mandatory European securities regulation is the mandatory bid rule under the 13th Directive on Takeovers. Though its mandatory character is contested, it is fully justified as an early exit rule for shareholders and a functional equivalent of mandatory law for groups of companies (HOPT 2014, 162 ss, 169 ss, FEDDERKE/VENTORUZZO 2016). More flexibility is given when options are allowed. This is for example the case under the Takeover Directive. Unfortunately these options are given to the member states, instead of passing this option through to the corporations and their shareholders, as outlined by recent contributions from the UK and from Germany (DAVIES ET AL. 2010, 158 ss, HOPT 2014, 279 ss). The member states decide whether the shareholders may opt out of the antifrustration and breakthrough rule or only opt in, which of course makes a huge difference. Similar provisions exist concerning the reciprocity rule.

But what is more important than these company and capital market provisions are the freedoms under primary European law as developed by the series of leading cases of the European Court of Justice. Under these freedoms regulatory competition within the European Union sharply increased (on regulatory competition VENTORUZZO 2015, ELDAR ET AL. 2015, RINGE 2016). German legislators have become subject to a harsh competition of legal orders, in particular – for example – as far as the much more flexible British public limited company is concerned. This competition not only led to more flexibility in a recent German reform of the GmbH but has also led to a good number of cases in which German stock corporations have changed over to the legal form of a British plc or a European Company, one of the main reasons for the latter being to avoid German labor codetermination. It is interesting to note that the traditional explanation for the more flexible nature of US corporate law is the regulatory competition in regard to which Delaware has to remain on the alert notwithstanding its already having prevailed (on the threats to Delaware SKEEL 2015).

5. Examples of more or less freedom in corporate law and securities: Directors, shareholders and actors in the agenda setting

Let us finish this second part of this piece by pointing out some examples from corporate law and securities regulation in many European countries, starting with the directors. The fiduciary duties of the directors, the rules on the composition of the board – in particular regarding gender and other diversity rules – and under German labor codetermination also the rules on the size of the board are clearly mandatory. In the light of a shareholder constituency which is dominated by controlling shareholders, such mandatory law may indeed make sense.

On the other hand freedom of choice exists for directors who can avail themselves of the business judgment rule (§ 93 para. 2 of the German Stock Corporation Act, HOPT/ROTH 2015 comments 61-131, also in many other countries either as codified or under case law, for example the US, Spain since 2014, Switzerland). This rule, whether codified or not, gives a safe haven to the directors within which they can make their business decisions on how to steer the company. One might also mention the corporate governance code movement which by the very fact that its rules are not binding opens a high degree of flexibility for the company, the management and the shareholders (HOPT 2013, 563 ss). More recently, even in Germany corporations have been encouraged to openly deviate from the code recommendations if they think that this is in the best interest of the corporation. This concerns in particular the rules on the board.

The same exercise could be undertaken regarding shareholder rights. Mandatory provisions concern, for example, the quorum on fundamental transactions, supermajority rules, majority of minority, fairness control on resolution, abuse of majority, abuse of minority, unfair prejudice and so on. Again such rules set limits on the supervisory power of controlling shareholders (DAMMANN 2014, 35 ss, 42).

On the other hand, an example of flexible decisions is the possibility of concluding shareholder contracts. This opens considerable room for flexible solutions in many European countries (for Germany HIRTE 1998, 69 ss; for the Netherlands TIMMERMAN 1998, 222 ss, for France GUYON 305 ss).

The actors in setting the agenda as to whether and how far mandatory rules should apply are mainly legislators and the courts (COFFEE 1989, MACEY 1989). Less mandatory law, for example as to the duty of loyalty or related party transactions, presupposes capable and honest courts (GILSON/SCHWARTZ 2015, 127). But in treating the topic one should also be keenly aware of other actors and what they require or simply recommend: the supervisors and other regulators as well as the stock exchanges and the corporate code commissions have an important role, not only for financial institutions and the capital markets, but also for corporations, corporate law and corporate governance (HOPT 2011, 61-79, IDEM 1998, 130 ss, TIMMERMAN 1998, 225). Competition among stock exchanges by standard setting may go both ways, leading to more flexibility and/or to more investor protection, in particular for the top tier premium listed companies (FERRAN 2015).

III. Overall trends

1. Deregulation and reregulation

General legal trends are important, but vary for reasons outside the legal order. Take for example the deregulation in the 1980s which became a real fashion, though with a more careful look already then it could have been seen that deregulation is always combined with reregulation for various reasons. One of these reasons is that deregulation on a primary level makes exceptions necessary on a lower level, and the relationship between the principle and the exceptions needs of course to be spelt out clearly for the sake of foreseeability and legal practice.

2. Paternalism and protectionism after the financial crisis

After the financial crisis a countermovement began. The legislators reacted to the failures and abuses and to the outcry of the general public and the taxpayers who had to pick up the bill. The result was that paternalism became more acceptable again, including mandatory rules for the protection of shareholders, investors and depositors. While this paternalism for the time being seems to be restricted to financial institutions, there is a clear danger that what may be good for banks and in particular systemic banks, may spill over to general corporate law where it is not justifiable. After all, good governance of banks is not the same as general good governance of corporations. As recent empirical literature has shown, bank governance is basically driven by creditor protection and not or not so much by shareholder protection (HOPT 2013, 239 ss).

3. Sectoral shifts to more regulation

The delineation between the sectors of the law where the provisions previously were in principle either more mandatory or more default in nature is not fixed and static but is dynamic. As we can observe in recent times, the trend goes in general more to the mandatory side. Three examples may illustrate this trend:

First, at least in German law, the law of the GmbH has adopted a number of mandatory rules like stock corporation law. Take for example the law of GmbH groups or the law on directors' duties.

Second, originally, at least in Europe insider law had its sources in corporate law and, at least in some countries like Germany and Switzerland, was rather flexible. It started off as mere voluntary guidelines undertaken by the corporations and stock exchanges themselves. But in the second half of the last century insider law moved over to securities regulation and became mandatory.

The third example is the just-mentioned law of corporate boards that tends to be influenced by banking law and the law of financial institutions and thereby may become more and more regulated by mandatory provisions (HOPT 2013, but also IDEM 1998, 132 ss; as to bankers' pay FERRARINI 2015).

4. Convergence and remaining path dependencies

At the end the question remains: how will it go on with convergence and path dependencies? As to boards in Europe, there is a fair amount of convergence though a number of path dependencies remain (DAVIES/HOPT 2013). Convergence on flexibility can be seen in many areas, as regarding German and English limited liability companies, for example, in the relaxation of minimum capital requirements. But there is also convergence towards more requirements, e.g. labor codetermination (though not German quasi-parity style, only third parity codetermination), gender provisions and, more generally, diversity rules, say on pay, the use of auditors and good practice. Let us see what the future brings. At the moment the pendulum is swinging more and possibly too much in the direction of mandatory law.

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