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Abstract

The purpose of this paper consists of giving an overview of the way company laws in some European states have been dealing with the dividing line between closely held companies limited by shares, and those that have gone public or widely distributed shares. It analyses whether a case can be made for regrouping the rules relating to "public" companies in a single body of law, a discussion that is going on in Germany.

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Comparative study of the Company Types in Selected EU States

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The present study aims at inviting the reader to reflect about the present subdivision of the companies limited by shares in listed, unlisted and closely held companies, and whether there might be good reasons for introducing on the one hand a company form especially addressed to listed companies, on the other a company addressed to the closely held ones. Indirectly this question also deals with deregulation of company law. The analysis is conducted on the basis of a comparative "legal fact finding" on the basis of the company laws of a number of selected jurisdictions, viz. Belgium, France, Germany, Italy, Netherlands, Spain, and Switzerland. As the UK system is based on different assumptions, it has not been included.

The study has been preparatory work for a Report presented to the Deutscher Juristentag 2008, where Prof. Walter Bayer presented an extensive and very well document report on this subject and related issues[1].

PART I. COMPARATIVE OVERVIEW

Paragraph 1. The use of the corporate form

Before going into the details of the legal analysis, it seems useful to put the present analysis in the context of the factual situation about the use of the different company forms, to measure what is the relative importance of the different types, and to what extent companies with securities on the exchange (or "regulated market") constitute a significant part of the population.

The following table attempts to give an overview of the use of the main types, being the AG (or NV, or SA[2]) and the GmbH (or BV, BVBA, Sarl). In all jurisdictions compared the SA form represents about 5 to 7% % of the population, except in Belgium and Luxembourg where it amounts about 50% of the group, with a certain overweight for the Sarl. This difference indicates that the practical use of the SA is quite different in the last two mentioned jurisdictions what might be related to tax considerations. In France, the SAS (société simplifiée par actions) and the Société civile are widely used. All other company forms[3] are rarely used, with a limited exception for the cooperative society.

The number of stock exchange listed companies is in most states small to very small and rarely exceeds 2 %. The situation is different in Germany, due to the restrictive attitude Germany has developed toward the use of the AG form.

[1] W. BAYER, *Empfehlen sich besondere Regeln für börsennotierte and für geschlossene Gesellschaften*? Gutachten E, 67th Deutscher Juristentag, Beck München 2008.

[2] For purposes of the present paper, the AG, SA, Spa, NV forms have been considered equivalent and are referred to under one or the other acronym. The same applies to the Sarl,GmbH,Sprl, bv acronym. "Listed companies" has been used brevitatis causa, and refers to companies admitted to trading on a "regulated market" as defined in Mifid.

[3] Such as the SNC or OHG, the SCS or KG, the Soc. Coop or Genossenschaft.

	1 AG- SA- NV	2 GmbH-Sprl - Bvba	SA/total	3 Other types	4 Listed	5 % of 1
Belgium	64456	80594	44,44	9952	126	0,1955
France	133158	1550637	7,91	1559166	740	0,5557
Italy	60631	1129003	5,10	na	290	0,4783
Luxembourg	8392	10804	43,72	297	36	0,4290
Netherlands	7782	884103	0,87	244451		
Spain	115580	1078614	9,68	289451	3378	2,9227
Germany	15242	990000	1,52		656	4,3039
UK	2546200				3256	
Swiss	83006	44957	64,87	25977	257	0,3096

These figures relate to the traditional domestic exchange listed companies, and do not include shares in listed investment funds, bonds, a.o.[4]

Paragraph 2. The company law models

In this section a short overview is given of the way the rules applicable to the different company types are structured in the national legal systems.

2.1. The structure of Belgian company law

Belgian company law is contained in the Companies Code, re-enacting and coordinating previously existing company law provisions in a law of 7 May 1999.
The basic regime applicable to all companies limited refers to general principles of the company code, provisions that previously were part of the civil code. In a further section, the code contains a series of rules applicable to all legal persons: these are rules on conflicts of law, on the creation of the legal person, on the obligation to draw up and publish annual accounts, rules on shareholders' investigation rights. The rules on mergers and divisions would equally apply to all company types. Each of the different company types has in addition its own regulation, although several of these present significant similarities for the NV and BVBA types, and to a certain extent to the cooperative societies as well. One will recognise the influence of the First and Second Company law directives, as the Belgian legislator decided to apply some of the provisions of these directives to all companies and even non-profit associations, and as far as the second directive is concerned, to the BVBA[5] as well as to the NV.

The main differences between the SA and Sprl regimes concern their internal organisation i.e. the governance[6], the position of the shareholders, the transfer of their

[4] The present figures are not entirely comparable, as referring to different dates, and taken from different national sources. There is no all encompassing statistic of the use of company types in the Europe. The figures of the Federation of European Stock Exchanges do relate to all issuers, including investment funds, etc.
[5] Although sometimes in a modified version.
[6] Board of directors v. single director.

shares (restricted for the BV, optional for the NV) and the functioning of the shareholder meetings.

The choice between the SA and the Sprl depends exclusively on the preference of the founders[7]. The requirement set forth by the law are more burdensome for the SA: the board of directors has to be composed of three persons, there where the management of the Sprl can be exercised by one person, who may moreover be the sole owner of the shares. The shares of an SA are presumed to be freely transferable, and the effect of restrictions, although allowed, is limited by the law[8]. The transfer of shares in the Sprl can be more easily controlled, and is subject to the approval of the other shareholders. The minimum capital requirement is higher for the SA (€61.500) than for the Sprl or for the cooperative (€18.550).

The governance of the SA is more elaborate than that of the Sprl: while the latter can be governed by a single person, a board of at least 3 persons is mandatory for the NV with possibility to delegate further to a management committee. The SA. has the right to issue several types of securities, and this in a public offering; there where the Sprl has only one class, that can not be offered to the public. As according to a recent law[9] bearer shares will be phased out, this practically important feature will become irrelevant what will make the SA less attractive. Belgian company law is based on different layers of regulation: at least three layers apply to the SA type: closely held, widely held, publicly traded SAs. Within the last group there is further differentiation depending on the market segment on which the securities are traded.

In addition to the company law rules, there is an increasing number of provisions, stemming from securities laws, applicable to listed companies. One should distinguish between listed companies, and those whose securities are merely traded on a second tier, or ”organised” market. The rules flowing from securities regulation are applicable to listed companies and directly affect company life. These concerns the accounting framework (IFRS for listed consolidating companies, while Belgian GAAP continues to be followed on a company only basis, and for taxation purposes), the rules on financial disclosure (annual reports, six-monthly statements and three-monthly updates), the transparency rules (disclosure of significant shareholdings) and the market abuse rules (disclosure of director’s dealings, insider lists, obligation to disclose – and right not to publish - price sensitive information).

With respect to companies whose shares are traded on regulated markets there are two additional non statutory layers of rules that should be mentioned. First, there is the corporate governance code, a self-regulatory instrument, voluntarily applied by most listed companies[10]. In addition, there are some recommendations of the CBFA, the market supervisor. These are to be considered interpretations of the legal provisions, including company law provisions[11]. Although the practice dates back several decennia, the CBFA has seen most of its recommendations introduced in the law (e.g. on mandatory bids, or on

[7] Specific law contain almost no cases where one form would be mandatory rather than the other: see however, t he banking act 1993, stating that a bank cannot be run under the sprl- bvba form with one shareholder: art. 15 L. 22 March 2002.

[8] Art. 510, transfer restrictions have to be limited in time.

[9] L. 14 December 2005.

[10] The use of the code will become mandatory due to the implementation of the directive 2006/46 introducing art. 46 a in the Fourth Company law directive.

[11] See on share buy backs, recommendation CBFA, d.d. 14 April 2005, Circ.FMI 2005-01.

share buy backs), while the judiciary has reduced the CBFA's scope of action to substantially disclosure matters[12].

For specific business activities, especially in the financial sector (banks, insurance companies, investment firms, asset management firms, pension funds) additional requirements apply with respect to these firms' own funds, their governance and their internal organisation (rules on audit committees, internal audit, compliance, organisation, risk management, etc.). Finally, investment funds are subject to a specific regime, implementing the EU Ucits directive.

Belgian Company law does not recognise nor use the concept of the 'stock exchange company[13]" or "public company", although some legal writers have summarized the applicable rules under that heading[14].

Among the publicly traded companies there are different groups. A first group are those companies whose shares are not regularly traded: shareholders trade whether through a bank or a broker who acts as a middlemen. Shares of any company can also be offered on public auctions, organised monthly by the stock exchange: trading is very irregular and is based on advertising the securities on offer like in any other public auction. This form of trading is used for selling securities of infants or of bankrupt estates, in both cases under the authority of the tribunal. The trading on the public auction does not trigger any specific company, accounting or securities law rule.

Some of these companies have issued securities publicly in the past: according to the companies act, these are designated "companies that have made to the public an offer of securities or are making such a public offer"[15]. Companies that qualify under this definition are held by a certain number of additional legal obligations or may prevail themselves of certain privileges (esp. the right to pursue a squeeze-out of minority shareholders). This regime, laid down in the companies act, applies only to companies that have themselves actively pursued the distribution of their securities (shares, bonds, and other securities) including by a stock exchange listing. It is not applicable to companies whose securities have been spontaneously distributed among shareholders, e.g. as a consequence of transfers among shareholders, without the intervention of the issuer. The list of these companies is published by the CBFA with whom they have to register[16]. The list contains not only companies that have once in the past issued securities publicly, but also a large number of investment funds, or similar structures (SPVs e.g.).

The next class are the companies whose shares are traded on public or "regulated" markets. According to the definitions used in the EU directives, Belgium has several regulated markets for shares, but these are not all subject to the same rules[17]. Companies listed on the first market are subject to the full regime of listed company. The shares subject to other markets are held by less strict rules: Alternext differs from the regulated market in that the IFRS rules are not applicable to these companies. The "Free market" is

[12] See Brussels, 10 February 2006, *Bank Fin. R.* 2006, 224.

[13] This expression would be misleading as the stock exchange is organised as a private company of the SA type. Therefore the law designates this firm as the "market enterprise".

[14] D. NAPOLITANO, *The publieke vennootschap*, Larcier, 2003.

[15] Art. 413 Companies Code.

[16] This list is due to be abolished: art. 438, al. 4. Irrespective of this registration, a certain number of company law provisions will continue to apply.

[17] According to the ministerial decree of 29 October 2007, the regulated markets are: the first market, the second market, the new market, the "trading facility" and the derivatives market of Euronext Brussels. The secondary market in state bonds, although an interbank market, is also qualified as a regulated market.

not a regulated but an organised market and is subject to a lighter regime in terms of disclosure (only prospectus disclosure, but ongoing disclosure is governed by the general company law rules) and in terms of market abuse (only the criminal law provisions apply, not the administrative prohibition and hence the administrative surveillance and sanctioning). These markets, along with the public auctions and the Trading facility qualify as MTFs by law[18]. MTS Belgium, an investment firm, is also an MTF for government bonds[19]. There are about 126 companies listed on the main market, 8 on Alternext and 22 on the "free market".

3. THE FRENCH COMPANY LAW MODEL

The French company law is also based on different layers of regulation: the fundamental rules of common company law are laid down in the civil code, applicable to all civil and commercial companies[20]: the company has to be set up in the common interest of the shareholders, prohibition of the clausula leonina, participation of all members in common decision making, rights of shareholders proportional to their contribution to the capital for companies limited. But specific laws will often derogate.

The code de commerce distinguishes between companies that are closely held and those whose securities are held by a wider public. The first group is composed of the private companies limited (sàrl) and the société par actions simplifiée or SAS. In addition several other company forms are used for closely held purposes such as the Société en Nom Collectif and the Société en Commandite Simple, and numerous other company forms for specific business activities (agriculture, liberal professions, …). None of these are entitled to issue securities to the public[21].

The Sarl and especially the SA are extensively regulated in the French companies act[22] and in its implementing decree. The Sàrl has been conceived as a private company, with limited liability for its members. Hence the personal relationship among members is still predominant: no public issue of securities would be allowed. The SARL is a quite strictly regulated form: transfer of shares only among members or with the authorisation of members[23], maximum number of shareholders (100), management by one or several physical persons appointed for the whole term of the company unless the charter provides for a shorter term[24] while the power of directors may be determined in the articles[25] ; continuation of the company as a one-member entity (EURL) in case one shareholder acquires all shares. Recently, the law was changed providing that the minimum capital of a newly established Sarl would be determined by the charter, what effectively amounts to a capital of 1 euro.

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[18] On the basis of art. 44, L. 6 april 1995; the list is published on the CBFA website.

[19] Based on the list published on the CBFA website.

[20] Art. 1832 to 1873, C. Civ. With several additional articles. Some contain general principles, such as the prohibition of the clausula leonina, art. 32 Companies Code.

[21] See art. 1841 Code Civ. Limiting the right to issue securities publicly to those company forms that have been allowed to do so.

[22] Art. L. 210 of the French Code de commerce. Although there is no litteral reference to the civil code, or the other provisions of the code de commerce, for certain matters these will have an effect on the application of the principles on company y matters.

[23] by 50%+ of the members holding at least 50% of the shares.

[24] L. 223-18

[25] But restrictions in their competences cannot be opposed to third parties; art. 223-18.

The Société par actions simplifiée is also a closely held company form. The SAS is to some extent an alternative to the SA, and can be constituted by any person, whether legal or physical person, and even by a single shareholder. It cannot issue shares to the public[26] and this is considered an essential differentiating factor. The organisation of the SAS presents common features with the SA – SA law is designated as the default rule, e.g. on minimum capital of €37000 - except that a large degree of "intuitu personae" differentiates the SAS from the SA: especially the internal governance (board, shareholder rights, restrictions relating to the transfer of shares to be imposed by the charter[27], organisation of the shareholder meeting) is organised according to the company's charter. External company life - e.g. the rule that limitations to the power of representation of the president cannot be invoked against third parties[28] - are directly copied from he SA rules.

The law on the "modernisation of the economy"[29] contains several specific measures aimed at facilitating the use of the Sarl and the SAS by smaller firms: simplification of the disclosure rules, or of the accounting documents, while for the SAS the minimum capital will be abolished, a simpler regime for contributions in kind, or for the appointment of the auditor will be applicable.

The "société anonyme" is the major scheme for the organisation of French public companies. Public securities issues may only take place by an SA, by a Société en commandite par actions or by a Sociéte civile immobilière the latter reserved for real estate activities[30]. Most public issues of securities take place by SA and a few by S.C.p.A (Michelin e.g.).

A French SA should be formed by at least 7 members, and a minimum capital of €37.000, or € 225.000 for companies that issue securities to the public. A French SA can choose between a one and a two tier board structure[31], the latter becoming in fact necessary when labour representatives are elected to the board. Both types are regulated in largely similar terms. The companies act determines not the number of members of the board, but the number of mandates a member can take up. It also provides that the CEO – in France the P.D-G - has very extensive powers and has to be engaged full time in the firm as he can not take up any other board membership[32].

The company scheme is supplemented by significant regulation flowing essentially from the transposition of the EU securities directives in the French legal order. The rules are not part of company law but have been coordinated in the Code monétaire et financier, with respect e.g. to the public issuance of shares. Further detailed rules are found in the Règlement général de l'Autorité des marchés financiers, the market supervisor[33]. These rules are drawn up by the AMF, and homologated by the minister[34]. The AMF has

[26] L. 227-2 and 244-3
[27] L. 227-14
[28] L. 227-6, the origin of the rule is the First Company law directive.
[29] L. 2008-776 of 4 August.
http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=?cidTexte=JORFTEXT0000192830502008.
[30] Art. 214-50 Code monétaire et financier, for the "sociétés civiles de placement immobilier".
[31] The choice has to be made by the charter; art. 225-57.
[32] See L. 225-54-1; but as chairman of the board, he can chair the board of two listed companies.
[33] See art. 412-1 of the Code monétaire et financier.
[34] The minister can approve or refuse to homologate, but not substitute other rules, or abrogate them.

rulemaking power in specific fields relating to corporate governance and risk control. [35] It also gives authoritative interpretations on issues relating to companies under its supervision. These interpretations published in its annual report, carry great weight with market participants, although they are not legally binding.

French companies law also recognises the notion of companies that have issued securities to the public and formulates specific requirement applicable to them.

The law on the "modernisation of the economy" contains very broad powers for the government to enact rules relating to the functioning of the financial markets in France, and among other to the notion of "public offer of securities"[36].

Corporate governance recommendations are in force since 1995[37] and are widely followed by French companies[38]. They are of a self-regulatory nature.

It would seem that overall French company law is more directional than that of the other compared systems.

Of the 730 cotées French companies listed on Eurolist by Euronext, most are organised as SA, and some as Société en commandite par actions. 107 companies are traded on French Alternext, and 260 on the Marché libre[39].

4. The Dutch Company Law Model

Dutch Company law is part of the Dutch Civil Code Book 2 on" Legal persons" [40], dealing with the different legal persons under Dutch law (including: public law entities, the foundations, and the not for profit organisations). The company types that do not enjoy legal personality (such as the Vennootschap onder firma, or the commanditaire vennootschap) are dealt with in the Civil Code's chapter on contracts.

The law on the NV and on the BV – both defined as "legal persons" and not as "contracts"- is composed of general principles on legal persons[41] and specific provisions dealing with each of these company types. These provisions stand on their own and do not refer to the rules on companies as contracts. Special mention deserves the core provision of art. 2:8 according to which the legal person and the persons involved in its organisation have to act "in a reasonable and equitable way" against each other. "An agreement, charter provision, regulation or decision will not be held binding if, taking into account the concrete circumstances, this would be unacceptable in the light of said principles". Common provisions applicable to all legal persons are the rules on mergers and divisions[42] and to a more limited extent the rules on the mandatory transfer of shares in

[35] For further details see: AMF, Rapport 2007 sur le gouvernement d'entreprise et le contrôle interne, 22 January 2007, http://www.amf-france.org/documents/general/7593_1.pdf.
[36] See art. 152 of the L., nt. 29.
[37] Viénot report 1, see for the text http://www.ecgi.org/codes/all_codes.php; later recommendations association française de gestion financière (AFG) 2004 and Medef-Association française des enterprises privées(AFEP), 2003.
[38] Rapport 2007 de l'AMF sur le gouvernement d'entreprise et le contrôle interne, 24 January 2008: http://www.amf-france.org/documents/general/8137_1.pdf.
[39] http://www.euronext.com/editorial/wide/editorial-4697-EN.html.
[40] As opposed to book 1 entitled "physical persons and family law".
[41] Among which the non profit associations, the cooperative associations and the mutual guarantee associations
[42] Title 7, art. 309 e.v.Dutch Civil Code.

case of conflict among the shareholders as well as the rules on shareholders' investigation right (enquêterecht), a very powerful legal instrument allowing the Enterprise Chamber to order an investigation in the affair of all legal persons[43] and if necessary decide about the transfer of the shares for administration purposes, the suspension or dismissal of board members or even the dissolution of the company.[44] This provision is the source of an important part of Dutch company law and practice.

The specific rules relating to the NV and the BV[45], the two sole company types standing for the open and the close company form, are largely parallel, many provisions being drafted in exactly the same wording. The provisions that stem from the EU directives, especially the 1st and 2nd directive were introduced for the NV, and although in some cases to more limited extent, copied for the BV a well, e.g. the issue of additional shares can be decided by a body other than the general meeting (art 2:96,1 to be compared with 2:206,L).

The main differences between the two legal forms relate to the governance and to the shares that these companies can issue: free transferability for the NV, restricted for the BV. There is also a difference with respect to the minimum capital (€45.000 v. €18.000).

According to Dutch company law, the governance for both nv and bv is differentiated according to the legal dimension of the company: large companies are defined on the basis of the capital and reserves[46], or more than 100 employees[47]. In "small" companies the two tier board is not mandatory: the charter can provide in the designation of a supervisory board, and how it will be appointed, as a rule by the general meeting, or if the charter provides, by a third party. The company will then be run by one of several managers, appointed by the supervisory board. Large companies are obliged to have a two tier board. Members of the supervisory board are appointed by cooptation, and for 1/3rd by the shareholders. The supervisory board appoints the members of the management committee. However, in practice many top holding companies of Dutch group do not have a two tier board as the requirement can be waived whether by decision of the Minister, or for holding and financing companies, when the majority of their employees is located outside the Netherlands. A simplified regime applies to Dutch companies owned by a subsidiary company the majority of its employees and those of the group being employed outside the Netherlands[48].

The formation of an nv. or bv. requires a preventive investigation resulting in a declaration of no-objection on the part of the ministry of justice. Before the 1990s this declaration has served to verify that the company's charter was not in conflict with the law or the public order, and lead to the adoption by the ministry of "guidelines" or standard instructions that were an important source of guidance for drawing up the charter. This type of external control has been replaced by a more limited one, whereby the ministry

[43] Being a chamber of the Amsterdam Court of Appeal. The right to apply for an investigation belongs to the holders of 10% of the shares, or with a nominal value of € 225.000, or any lower amount mentioned in the charter.

[44] Art. 2: 356, Dutch Civil Code.

[45] The full title being "besloten vennootschap met beperkte aanprakelijkheid". The BV was introduced in 1971, see further VAN SCHILFGAARDE and WINTER, *Van de BV en de NV*, 14th ed., 22.

[46] Large meaning exceeding 16 million €.

[47] Art. 2: 153(263), NBW. But the definition does not apply to holding or financial companies the employees of which are majority located outside the Netherlands.

[48] For further details see: VAN SCHILFGAARDE and WINTER, nt. 45 nr. 146 e.s.

checks whether the promoters have not been declared insolvent, or have been convicted for certain crimes[49].

The corporate governance code or "Tabaksblatt code" has served as an increasingly important source of guidance for Dutch listed companies. Compliance with the code is monitored by a corporate governance commission that published detailed analyses[50]. It carries great authority. The code is legally mandatory for Dutch companies, under a "comply and explain" regime.

The financial regulation is laid down in several special laws as administered by the market supervisor, Autoriteit Financiële Markten (or: AFM). The main act coordinating all previous securities laws is the Wet financieel toezicht of 28 September 2006, [51] and its numerous implementing decrees, such as the decree dealing with shareholding transparency [52] market abuse[53] or takeover bids [54]. In additional the AFM is also in charge of monitoring of financial disclosure (annual report and annual accounts) by listed companies[55] and of the organisations of accountants[56].

The creation of a public company or the stock exchange company ("beursvennootschap") has been discussed in Dutch law, but the idea considered non conclusive[57].

5. THE LUXEMBOURG COMPANY LAW MODEL

All company types are regulated in the law of 1913, as repeatedly amended and supplemented.

The structure of company law is by and large parallel to the Belgian, or the French scheme: there are general contracts rules applicable to all companies, and more specific rules applicable to the different company types. Apart from the SNC and the SCS, that can only be used for closed firms, the sarl and the sa are differentiated along the lines of the minimum capital, the governance structure – the sa may opt for a one or a two tier board – and the freedom to issue securities (both can issue bonds) but only the SA can issue publicly different classes of shares the characteristic of which are determined in the charter. The sarl should not have more than 25 shareholders.

Strikingly the Luxembourg companies act contains only a few references to the listing of securities on an exchange or market[58] and these have no organisational impact. Also there are no specific company law rules dealing with companies that have issued securities to

[49] Art. 68 and 179, § 2 NBW.

[50] http://www.commissiecorporategovernance.nl/page/downloads/MC_Nalevingsrapport_2007_.pdf

[51] http://www.afm.nl/marktpartijen/default.ashx?folderid=1098&downloadid=8979

[52] http://www.afm.nl/marktpartijen/default.ashx?folderid=1098&downloadid=10418

[53] http://www.afm.nl/marktpartijen/default.ashx?folderid=1098&downloadid=10416

[54] http://www.afm.nl/marktpartijen/default.ashx?folderid=1098&downloadid=10419

[55] Wet Toezicht financiële verslaggeving, 28 September 2006, http://www.minfin.nl/binaries/minfin/assets/pdf/actueel/nieuwsberichten/2006/11/stb569.pdf

[56] Wet toezicht accountantorganisaties of 19 January 2006.

[57] J.M. WINTER, "De bijzondere positie van de beursvennootschap in de systematiek van het Nederlandse vennootschapsrecht", in: *De beursvennootschap*, Instituut Ondernemingsrecht Groningen, Kluwer, 2001, 4-8.

[58] Evaluation for contributions in kind 2006 amendment to second directive art 16 -2. Post-formation acquisition of assets: not applicable to acquisitions of listed assets: Art 26-3

No short form prospects for offering companies on the exchange: art. 36 for equity and art. 83 for bonds. No application of the buy back rules for acquisitions by trading members of the exchange: art. 49 bis § 3. Acquisition on the exchange as a form of liquidation: art. 148. No exemption from obligation to consolidate accounts for exchange listed companies: art. 313.

the public: this activity would entirely be subject to the securities rules (e.g. prospectus). Luxembourg has implemented the different securities directives in specific laws dealing with the prospectuses to be published on the public issue or admission to a regulated market of securities[59], the rules on market abuse[60], on transparency[61]and on takeover bids[62]. These rules are administered by the financial supervisor, the Commission pour le contrôle des services financiers (CSSF). Luxembourg has adopted a corporate governance code in 2006[63].

According to a 2008 proposed series of amendments to the companies act[64] Luxembourg law will become largely enabling, leaving wide freedom of contract to the parties. "The absence of a reliable legal framework is described as a limitation on the parties contractual freedom". In addition the reforms are inspired by the desire to protect the reputation of the Luxembourg financial market[65]. The purpose of this law is therefore clearly to attract foreign operators in support of the position of Luxembourg as a financial centre and to that end, to be as flexible as possible. The approach is found in many provisions of the statute: the number of clauses allowing for contractual freedom has been increased considerably in the 2008 reform, mainly by providing default clauses.

The Luxembourg listed market stands for 36 domestic shares, 6887 domestic Ucits and 28626 bonds (domestic and foreign).

6. The Italian company law model

Italian company law is laid down in the Codice Civile, art. 2247 e.s. where the company is defined as a "contract". The different company types are regulated in the code[66]. For both spa, scpa and srl, the law allows a wide freedom of contract[67]. The rules relating to the spa, scpa, and the srl have been substantially modified by a decree of 17 January 2003[68]. There are few common rules, except the provisions on changing the legal form, mergers and divisions, and rules on groups of companies and of firms[69].

According to this new formulation of the civil code's companies provisions, the general provisions relating to the creation and the functioning of the company are mandatory. However, as the new law has covered many more aspects than the previous one, it has become considerably more directional. In additional, one finds numerous provisions that are applicable only to companies with securities traded on a regulated market[70].

The new law has also modified the rules for the srl, which is more aligned on the muster of the spa on several points. So e.g. can the charter provide for a single manager, or for a

[59] L. 10 July 2005 en Grand-ducal decree of 3 august 2005.
[60] L. 9 July 2006.
[61] L. 11 January 2008 and Grand-ducal Decree of 11 January 2008.
[62] L. 19 May 2006.
[63] See for the text of the Code, European Corporate Governance Institute, http://www.ecgi.org/codes/all_codes.php.
[64] See Document parlementaire n° 5730 relatif au projet de loi portant modernisation de la loi modifiée du 10 août 1915 concernant les sociétés commerciales (Chambre des députés, session 2006-2007).
[65] See Exposé des motifs to the proposal 5730.
[66] Società semplice, Società in nome collettivo, società in accomandita semplice, società per azioni società, società in accomandità per azioni, società a responsabilità limitata,cooperative art. 2511.
[67] Art. 2328 and 2475, Codice civile.
[68] DLgs. 17 January 2003, n. 6. all references to the C.Civ. relate to the new version.
[69] Art. 2497 e.s. Codice civile.
[70] Defined in art 2325 bis "mercato del capitale di rischio" being the companies with shares listed on regulated markets, or the shares of which are distributed among the public in a relevant degree.

board of directors and even for a collegio sindacale[71]. The shares of an srl may not be represented by securities, but are also freely transferable, except if the charter provides otherwise. The difference between spa and srl remain however important e.g. with respect to the minimum capital (€10.000 v. €120.000), subordination of members' loans[72], single member company).

293 Italian companies have their shares traded on the Stock Exchange and a further 30 on the alternative market. For these companies, the Exchange has developed an elaborate corporate governance code which is monitored by the association of listed companies. [73]

7. Spanish company law model

The Spanish company law is based on two laws, one of the SA type of companies[74] the other on the Sarl companies. The SA corresponds to the scheme found in other Latin states and is applicable to both listed and closely companies. To be mentioned is the constitution by public subscriptions, with the intervention of the CNMV, the Spanish securities regulator, for the approval of the documentation[75] (

The law allows several of classes of shares to be issued, and within the same class the shares have to have the same nominal value[76] 49 Preference shares can also be issued, but these can not derogate from proportionality between nominal capital and voting rights. Non voting shares are provided in the law, and subject to certain privileges and restrictions[77]Transfer of the shares can be restricted for 12 months at most, but only if the causes for refusal are mentioned in the charter[78]

The charter can fix a maximum number of votes that can be exercised by one shareholder, in instruments which is frequently used for establishing control[79].
The company is managed by a number of administrators, and they will form a board if more than 2 have been appointed. The Corporate Governance Code contains recommendations as to the composition of the board: the board of large companies should be composed of three groups of members, some executives[80], the non-executives among which the independent directors and the proprietary directors, representatives of the owners[81].

The srl type of company is governed by a different law of [82]. This closely held type of company mainly addresses the needs of smaller firms, often family held. Shares cannot be freely transferred: only specified parties, family members, or those that have been

[71] Art. 2477, Codice civile.
[72] Art. 2467, Codice civile.
[73] Assonime and Enti Emitenti spa, see: Assonime Analisi dello stato di attuazione del Codice di Autodisciplina delle società quotate (Anno 2007)
http://www.assonime.it/AssonimeWEB/public/initAction.do;jsessionid=C76DBD50BB352C1A0D9983B98A13C3F6.worker1_ssl
[74] Decree-Law 1564/1989, of 22 december 1989 on the "Sociedades Anónimas".
[75] Art. 21, Decree-Law 1564/1989.
[76] Art. 49, Decree-Law 1564/1989.
[77] Art. 91, Decree-Law 1564/1989.
[78] Art. 63, Decree-Law 1564/1989.
[79] Art. 105, Decree-Law 1564/1989.
[80] A minimum number taking into account the business and its importance, states the code.
[81] http://www.cnmv.es/index.htm
[82] L 2/1995 of 23rd March 1995 on the "de Sociedades de Responsabilidad Limitada.

admitted by the shareholders can acquire shares[83]. The company is managed by whether one person, several persons, or by a board[84]. The general meetings decide by majority but one third of the shares have to be present or represented[85]

8. SWISS COMPANY LAW MODEL

The Swiss rules on companies are part of the Swiss Civil Code "code des obligations", that contain provisions with respect to the main company models. The SA form is by far the most important, as the Sarl form, although introduced in 1936, has only received more attention since the changes to the law of 1991. Other company forms stand for less than 5%. The number of SA (83.000) is about twice as much as that of the Sarl (45.000). Of these 257 SA are traded on the stock exchange in Zürich

The SA. has been conceived as a closely held company. The regulation is quite sober, and does contain ample flexibility. Therefore most of the regulation applicable to Swiss listed companies is based on some type of selfregulation, under the general guidance of the Swiss federal banking Commission[86].

9. THE GERMAN COMPANY LAW MODEL

The German legislation on companies is structured on the basis of two independent acts for both the AG and the GmbH. The former has been the subject of a very thorough re-regulation in 1965, and has since then remained largely unchanged. The AG is conceived as the legal form for the large company, based on the use of large amounts of capital, whether exchange listed or not. The latter is still based on the original act of 1892, with later changes and was destined for the small and medium size firms. The law allows significant flexibilities for the GmbH, which are largely excluded for the AG. The German AG, although a company (§1AktG) is considered a legal entity on its own, entirely regulated by the companies act, which is supposed to cover all aspects. These laws should be read in conjunction with other essential bodies of law such as the codetermination laws and the Code of commerce, containing especially the accounting provisions. Other company types are regulated in the Code of Commerce[87] or in special laws[88]. The strict regulation of the AG has led to the creation of mixed forms, whereby e.g. the Limited partnership (KG)- is combined with a GmbH, to form the hybrid GmbH &C°, KG[89]. Other hybrid forms are used in practice, such as "Publikumgesellschaften". being KG that attract investors essentially for tax reasons by issuing shares publicly. Due to the high access requirements the number of AG has always been quite limited in Germany (15.242), while the most frequently used form is the GmbH (ca 990.000)[90]. Rather a small percentage of companies is listed on of the German exchanges(656 or 4,3 of all AG).

Since 2002, Germany has adopted a corporate governance code, made mandatory by law for all listed companies, but on a comply or explain basis.

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[83] Art 28, L 2/1995.
[84] Art 57, L 2/1995.
[85] Art 53, L 2/1995.
[86] See on this subject: L'autorégulation dans le secteur financier suisse, Rapport de la CFB sur l'autorégulation» July 2007, http://www.ebk.admin.ch/f/publik/medienmit/20070704/20070704_02_f.pdf
[87] This applies to the OHG (Offene handelsgesellschaft) and the KG (Kommanditgesellschaft).
[88] See L. on Cooperatives or Genossenschaften: Gesetz betreffend die Erwerbs- und Wirtschaftsgenossenschaften (GenG).
[89] One could argue that the development of these hybrid form in part are due to the strictness of German AG law.
[90] According to Bayer, DJT, 2008.

Paragraph 3. Mandatory law v. enabling law v. freedom of contract

In this paragraph, we will attempt to determine to which extent the different laws are mandatory or leave parties freedom to determine the rules applicable to their company[91]. This analysis does not relate to the part of the system designated as securities regulation, as most of this is mandatory due to its origin in the European directives. These directives may allow a choice at the level of the national legislator, who may allow the choice to be made by the local companies subject to his jurisdiction.

As far as company law provisions are concerned, the different laws compared do not always contain clear statements as to their mandatory character[92]. Mostly one has to infer the mandatory character from the formulation, or from the nature of the provisions itself. Indirectly this may appear from the sanction: when the law states that contrary clauses will be held for null and void, or considered “unwritten”, it means that parties cannot derogate. This would also be the case if the law contains criminal sanctions applicable in case of violation. Default provisions can be more easily recognised, as they usually state that the charter may decide to diverge from the provision of the law[93]. As to subjects not covered by mandatory or default provisions, it will be more difficult to determine the extent to which in the absence of a clear provision, a certain subject is left to the freedom of the parties. Some matters may be considered unlawful on the basis of general provisions of the law, including general private law concepts[94]. Case law may have clarified some of these points.

1. Mandatory provisions in Belgian company law

In general one can state that Belgian law contains a mix of mandatory rules, of default rules and subjects that are left to the free choice of the parties. This freedom is predominant in the “lower ” classes of companies (Vof, comm.v.) more than in the SA or SPRL types.

According to the Belgian companies code, a company is created by “contract” which is governed by the agreement of the parties, by the civil law and for commercial companies, by the commercial law. Certain general provisions of the company code are applicable to all companies, unless to the extent that specific provisions of the code provide differently[95]. Although most of these general provisions are set aside by the specific rules relating to the nv or the bvba, - such as the rules applicable to the company’s representation – some still deserve some practicable importance, even in today’s practice. A example is the prohibition of the “clausula leonina” considered applicable even to the

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[91] The subject has raised considerable comparative interest: see Richard M. BUXBAUM, *Facilitative and Mandatory Rules in the Corporation Law(s) of the United States*, The American Journal of Comparative Law, Vol. 50, Supplement: American Law in a Time of Global Interdependence: U.S. National Reports to the 16th International Congress of Comparative Law (Autumn, 2002), pp. 249-262; John C. COFFEE, Jr., The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role, Columbia Law Review, Vol. 89, No. 7, Contractual Freedom in Corporate Law (Nov., 1989), pp. 1618; Quid verslagen van dit congres in andere landen Ian Ramsay, Models of Corporate Regulation: in C. RICKETT and R. GRANTHAM, eds., *The Mandatory/Enabling Debate, Corporate Personality in the 20th Century*, Hart Publishing, Oxford, 1998; Ari HYYTINEN and Tuomas TAKALO, *Corporate Law and Small Business Finance: Mandatory v. Enabling Rules*, European Business Organization Review, 2005, 449-466.

[92] Only the Dutch law provides so, but in fact the statement is largely contradicted in the individual provisions.

[93] For instance, frequently use in the changes to the Luxembourg law.

[94] See the provisions on the clausula leonina, a subject dealt with in almost all analysed laws.

[95] Art. 18 Belgian Companies Code.

nv or bvba[96]. That part of the companies code contains a list of common rules applicable to all legal persons: the rules on conflicts of laws, acting for a company in formation, representation of a legal person appointed as director, the name of the company, creating the company and publishing its articles.

Outside the boundaries of these general principles, one has to analyse in the detailed provisions governing each company type to what extent the latter's rules will be mandatory[97]. Very often even for the nv, these rules leave some freedom of choice to the parties. Most mandatory issues however have been dealt with in the black letter law: mandatory are the rules about the formation of the company, the contributions to its capital and the liabilities of the promoters. However, the law often allows derogations, or limit the ambit of the rule: so e.g. with respect to the liability of the founder of a company, some of the parties that have subscribed shares at the company's formation may stipulate that they will not be liable, provided that they contributed in cash, did not acquire more than 1/3rd of the shares and did not obtain any advantage granted to the promoters[98]

Another field where substantial flexibility is allowed concerns the issue of securities. Companies may issue any debt securities they want, according to the principle of freedom of contract. With respect to equity, Belgian law adopts a "one share, one vote" rule for SA shares that contributed to the capital[99]. Shares not representing the capital[100] may be issued and their rights will entirely be defined by the charter[101]. In order to avoid these shares to overvote the "capital shares", the law limits their voting rights to 50% of all voting rights of all shares, or to maximum to 2/3rds of the voting rights of the shares[102].

Flexibility also exists with respect to governance structures. Belgian companies do not have the option to install a two tier board. The unitary board of directors must be composed of at least three members, usually physical persons, or legal persons as represented by a permanent representative. The board has plenary powers, but these can be restricted in the charter, deciding that certain matters have to be submitted to the general meeting. The board may also decide to delegate certain types of decisions to one of its members, to a non-member, usually a high-ranking employee, or to a committee. The organisation of these committees has been left to the charter, except that if a "comité de direction" is instituted it has to be organised in conformity with the law[103]. The latter form is met in the largest companies. It also allows for quite some flexibility.

Agreements among shareholders are largely but not entirely left to freedom of contract: voting agreements are valid but only if they are in the" interest of the company" and limited in time[104]. Agreements with respect to the transfer of shares are valid but restricted in time and in case of a takeover, it will not be allowed to block the transfer unless a third party takes over the blocked shares[105].

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[96] Art. 32 Belgian Companies Code; for a recent case, see Brussels, 29 may 2006, Rechtskundig Weekblad, 2007-2008, 1594 "(is a put ad call option contrary to the clausula leonina prohibition?").

[97] Many mandatory rules protect the interest of parties, and allow the level of protection to be increased: See K. GEENS, K. and M. Wyckaert, *Les espaces de liberté contractuelle dans le droit des sociétés à reponsabilité limitée: entre rapprochement et palliation*, CDVA, 2008, 139.

[98] Art. 450, al. 2 Belgian Companies Code.

[99] Art. 541 Belgian Companies Code.

[100] Called "winstbewijzen" or "parts bénéficiaires", art. 542 Belgian Companies Code.

[101] Art. 483 Belgian Companies Code.

[102] Art. 542 Belgian Companies Code.

[103] Art. 524 bis Belgian Companies Code.

[104] Art. 580 Belgian Companies Code.

[105] Art. 510 e.s. Belgian Companies Code.

2. Mandatory Provisions in French law

The companies act indicates when parties may derogate from its provisions, but without indicating what additional elements parties are entitled to introduce into the articles. On the basis of an analysis of the companies act, one could summarize by stating that although mostly mandatory, the parties are entitled to make some fundamental choices. Like in other jurisdictions, the two main elements of choice relate to the governance and to the securities to be issued. As to governance, French companies have the choice between a unitary board (conseil d'administration) and a two tier system with a supervisory council and a management board or "directoire". In both cases French law accepts a very strong concentration of power in the hand of the CEO, being whether the president-directeur general of the unitary board, or the chair of the directoire.

The other element of choice relates to the securities to be issued: apart from shares representing the capital or bonds issued in large series of identical units[106], French companies by shares (SA and SAS) are entitled to issue preference shares (actions de préference) with or without voting rights and with such other rights as the charter may provide[107]. These preference shares may be temporary, or perennial. They are planned to replace over time all other forms of securities[108]. In fact these preference shares are a catch all class standing for securities with whatever "special rights"[109]. The public issue of these securities is in any case reserved to the SA, while the SAS may issue these securities, but only privately.

French company law regulates in detail the SA and apart from the abovementioned elements of choice, most of these rules leave little leeway for companies. On a certain number of specific, but not so fundamental issues however, the law allows the charter to derogate from the legal provision. To name of few examples: the age limit for the chairman of the board[110], the number of deputy directors general[111], choice between the pdg system – according to which chairman of the board and chief executive are one person- and the split between chairman and director general[112], or reduction of the voting rights of shareholders[113], designation who exercises voting rights relating to shares in usufruct[114].

3. Mandatory provisions in Dutch company law

The law states explicitly that the rules of Book 2 are mandatory except when otherwise provided. [115] However, analysing the substantive provisions relating to the SA and the BV, many of these allow the promoters to derogate.

[106] See the definition of "valeurs mobilières", L. 228-2 referring to 211-2 of the Code monétaire et financier.
[107] L. 228-11; all former types of securities will have to be exchanged against these preference shares: e.g. "actions à dividende prioritaire sans droit de vote, certificats d'investissement, actions de priorité".
[108] Such as the certificats d'investissement, art. L228-30 e.s. representing the cash flows as opposed to the certificates de droit de vote.
[109] COZIAN, VIANDIER and DEBOISSY, *Droit des sociétés*, 2007, 933.
[110] Art. 225-48; 65 according to the law as a default rule.
[111] Art. 225-53, decided by the board of directors.
[112] Art. 225-51-1, choice to be made by the charter.
[113] Art. 225-125 however, the voting cap will not be applicable in case of a takeover bid whereby a breakthrough rule would apply at a 2/3rd level.
[114] Art. 225-110.
[115] Boek 2:25; see further L. TIMMERMAN, "Waarom hebben wij dwingend vennootschapsrecht?", in: *Ondernemingsrechtelijke Contracten*, Instituut voor Ondernemingsrecht deel 14, Deventer 1991, p. 1 e.s who

The promoters of a Dutch company, both nv or bv, have to make the choice about the company's governance, and more specifically whether the company will be directed by a unitary board, or by a two tier board. For large boards, due to codetermination rules, only the two-tier board is allowed and its composition regulated. With respect to international groups, there is an effective choice between the two governance systems[116]. The same regime is applicable to the large BV[117] As far as the securities are concerned, there is a fundamental difference between nv and bv, as the former is entitled to freely issue negotiable bearer shares, while in the BV. the transfer of the shares is necessarily restricted[118]. However, in the nv the transfer can be restricted as well[119].

In general Dutch company law contains a considerable number of default provisions. A few examples to illustrate this proposition: The charter can indicate who will be entitled to exercise voting rights relating to securities in usufruct or used as collateral[120]. In certain cases the shareholders have no preferential subscription right[121]. The shareholders are entitled to the company's profit, unless the charter determines otherwise[122]. With respect to the position of the general meeting several articles allow the charter to derogate: the remit of the general meeting[123], the right to call a meeting[124], restrictions with respect to voting rights, quorum and majority in case such as changes to the charter. These and many other rules can be adapted to the needs of the shareholders.

4. Mandatory provisions in Luxembourg law

The present Luxembourg system is by and large similar to the Belgian one as far as mandatory provisions are concerned. As mentioned above, the law provides for a one or a two tier board, upon the choice of the company. The governance at the level of day-to day management can be organised according to different formulae, among which the creation of a "management committee", whose legal position is largely determined in the charter.

However, the changes planned in the bill mentioned above would very substantially change this balance. Once these amendments will be adopted, the number of non mandatory provisions in Luxembourg laws would increase substantially. Except for the formation of the company, and the rules that have to be mandatory in order to implement the European directives, almost all provisions that could be rendered non mandatory have been modified in enabling clauses.

5. Mandatory provisions in Italian law

The 2003 changes to the Italian companies law have introduced a more detailed regulation for many aspects touching on the Spa. However, many of these provisions

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considered that Dutch company law was increasingly mandatory; M. MEINEMA, *Mandatory and Non-mandatory rules in Dutch Corporate Governance*, Nederlandse vereniging voor Rechtsvergelijking, EJCL, http://www.ejcl.org/64/art64-10.html, 3.

[116] See art. 265 for the specific conditions. Also the Minister can exempt from the codetermination provisions. Art 266.

[117] See supra § 2, 3.

[118] Art. 2:195, NBW.

[119] Art. 2:87, NBW.

[120] Art.2:88 and 89, NBW.

[121] Art. 2: 96 a, §2, NBW.

[122] Art. 2:105, NBW.

[123] Art. 2:107, NBW.

[124] Art. 2:109 and 113, NBW.

leave room for the charter to adopt a different solution. Only a few examples can be mentioned here.

The main fields of choice under Italian company law relate to the securities that companies can issue, and to the governance provisions

As to securities, companies may issue different classes of shares and determine in the charter the rights attached to those both in terms of voting rights and of financial rights, including tracking shares[125]. Transfer of nominative shares can be restricted or forbidden, for a maximum of 5 years. If the transfer is subject to a decision of the board, the company or the other shareholders have to provide for an exit, if needed by partial liquidation of the company. The Srl can only issue one class of shares, and these do not qualify for the status of securities, a notion applicable only to Spa shares.

With respect to governance of the Spa, the law offers a threefold choice: unitary board, management board with 'collegio sindacale", and management board with supervisory council. The unitary board can delegate matters to an executive committee, composed of at least one director, along with non-directors, if this has been provided in the charter. If the second formula is chosen, a separate college, of which at least one member should be an auditor[126], is put in charge of inspection and control of the activities of the board of directors, the supervision of the management in terms of correct administration, sufficient organization, administration and accounting. [127] The members of this college are obliged to attend the meetings of the board and of the executive committee. The two-tier formula is based on the presence of a management board[128] and of a supervisory council[129], the latter being in charge of the appointment of the managers, the approval of the annual accounts and the supervision of the management.[130]

Many other provisions of the Italian law allow the charter to derogate from its legal requirements that hence serve as default rules. By way of example: the organization of the general meeting, its frequency[131] location[132], notice to shareholders[133], period of time for depositing questions to the general meeting[134]; use of ICT for voting at a general meeting[135], right to appoint a proxy in closely held companies[136]. In privately held companies, the accounts can be controlled by the collegio sindacale, without recourse to an external professional auditor. For members of the supervisory council the charter may provide specific conditions as to honorability, professionalism and independence[137]. In case the council has not approved the annual accounts, one third of its members may require the accounts to be submitted to the general meeting [138]

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[125] Art. 2348 and 2350, C. Civ.
[126] Of among the ordinary university professors ("professori di ruolo") or other professions listed in a decree of the minister of justice.
[127] Art. 2403, C. Civ.
[128] Consiglio di gestione: art. 2409 Novies, C. Civ.
[129] Consiglio di sorveglianza: art 2409 duodecies, C. Civ.
[130] Art. 2403, C. Civ.
[131] Art. 2364 fixing the delay between the end of the fiscal year and the meeting.
[132] At the company seat, unless otherwise provided: art. 236.
[133] Art. 2366 except for company that have issues securities publicly.
[134] Art. 2370, C. Civ.
[135] Art. 2370, C. Civ.
[136] Art. 2372, C. Civ.
[137] Art. 2409, duodecies, C. Civ.
[138] Art. 2409 terdecies, C. Civ.

6. The **Spanish companies** act on the "Sociedades anonimas"[139] contains an express reference to the contractual freedom of the members: it states that the members are entitled to include in the charter all agreements and clauses that seem fit to them, provided they are not contrary to the law nor to the basic principles of this company type. Among the latter ones, can probably mention the proportionality of voting rights to capital [140], or the limitation of founder privileges to 10%[141]

The law further contains a certain number of provisions according to which the parties have expressly been authorized to derogate from the rule of the law. These relate to issues such as the rules attached to usufruct of shares[142], which rights will pertain to the shareholder in case the pledge[143], the quorum for participation in the general meeting in charge of the election of the board[144], minimum ownership requirement for the exercise of voting rights[145].

Equally interesting are the provisions that attribute a role to the securities regulator, the CNMV, in the companies act itself: in case the company is formed by public subscriptions, the draft charter containing elements as specified in the law has to be communicated to the CNMV. The business plan upon formation, including a technical note about the viability of the company, will be filed with the CNMV, along with an information notice established according to the rules of the securities market. The CNMV is in charge of the identification, investigation and imposition of sanctions that are the result of violations of certain provisions of the companies act[146].

6. Swiss law

Whether several types of SA should not be introduced in the law was discussed in Switzerland, but was obviously refused[147]. The provisions of the Swiss Code on Obligations dealing with the SA are apparently largely mandatory. However the law often leaves ample room for adapting the organisation to the specific requirements of the shareholders, whether by allowing adaptations in the charter[148], or by recognising the validity of agreements among shareholders. The latter are binding only on their signatories, but may substantially influence he functioning of the company[149]. Therefore if the SA form appears to be based on a single concept, ultimately referring to the open, listed company, its application are very varied, implying in practice a large flexibility.

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[139] Real decreto Legislativo 1564/1989, de 22 December 1989 "Texto Refundido de la Ley de Sociedades Anónimas", art. 10.
[140] In terms of nominal value: art. 49.
[141] Art. 11.
[142] Art. 67.
[143] Art. 72.1.
[144] Art. 102 and 103.
[145] Art. 105.
[146] Art. 89 (5). But the banking or insurance supervisors will have to be informed if the investigations concern an institution subject to the banking or insurance supervision.
[147] J.N. DRUEY in Th. GUHL, *Das Scheizerische Obligationrecht*, nr. 42 without further references.
[148] On the basis e.g. of art. 627.
[149] In this sense: J.N. DRUEY in Th. GUHL, *Das Scheizerische Obligationrecht*, § 60, nr. 26

Swiss SA can issue shares with or without voting rights[150], with or without privileges[151] contributing to the capital or not (bons de jouissance)[152] Special characteristics e.g. on transfer can be agreed in the charter[153], or in agreements among shareholders.

As to the governance structure, Swiss company law only allows for a unitary board, directors being elected by the general meeting. The charter can provide for special representation of certain classes of shareholders, or introduce other minority protection instruments[154].

7. Mandatory German company law

The charter provisions of a German AG have to conform to the rule of strictness of the charter ("Satzungsstrenge"). Art.23 § 5 states that "the charter may not derogate from the provisions of this law, except when this has been expressly permitted. It is allowed to adopt complementary provisions, except when this law contains a comprehensive regulation". This rule has been read by the legal doctrine as imposing a strict mandatory regime, allowing for very little, if any contractual freedom. However the last aspect is sometimes contested.

The rule has according to the prevailing opinion[155], been adopted for several reasons: one is enterprise stability, another transparency of the market in the companies shares and hence investor protection, or will to avoid market failure and race to the bottom. The more recent literature seems to be less convinced about these reasons, at least as far as the non-listed companies are concerned[156].

Flexibility has been introduced with respect to the types of securities that can be issued by AG: different classes of shares may be issued, but shares with the same rights belong to the same class. Non voting shares are allowed, but shares with multiple votes have been forbidden[157]. There is little to no flexibility with respect to the structure of the company organs: all AG must have a management board and a supervisory board, the latter also serving as the anchor point of the Co-determination.

For further analysis, reference is to be made to the report by professor Walter Bayer, for the 67th German Lawyers' Day.

8. Mandatory European law

The question whether the European directives on company law are mandatory is per hypothesis a different one, as it belongs to the member states to transpose the directive. Most provisions are mandatory in that sense, although in some instances members states

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150 Shares without voting rights are called "bons de participation". They are also used as control enhancing mechanism.
151 Art. 656.
152 Bons de jouissance art. 657.
153 Art. 685.
154 Art. 709.
155 See for an overview BAYER, DJT, nt. 1.
156 H. HIRTE, *Die Aktienrechtliche Satzungsstrenge: Kapitalmarkt und sonstige Legitimationen versus Gestaltungsfreiheit*, in: LUTTER and WIEDEMANN (eds.), "Gestaltungsfreiheit im Gesellschaftsrecht", *ZGR*, Sonderheft 13 (1998).
157 See §§ 11 and 12.

have the right to opt out[158], or to adopt alternative solutions[159] The implementation in the national law is not necessarily mandatory as – in principle - several ways could be chosen to achieve the directive's objective. De facto however, the directive provisions are often copied, whether with or without small amendments.

Paragraph 3. Companies with securities issued to the public

In this section, one will regroup the rules that are applicable to companies that have issued securities to the public, *without* being listed on a stock exchange or other regulated market. A further refinement would relate to whether the securities so issued are equity or non-equity securities. Only a few states have explicit provisions on this type of companies.

The definition of "companies with securities issued to the public" are defined in the law that are using this criterion. They usually include securities that have been listed on an exchange, so that these rules are also applicable to exchange listed companies, but not vice-versa. Moreover, only if the securities have been issued at the request of the issuing company will they normally be subject to these additional rules. Excluded are therefore the cases in which the securities were distributed among many investors as a consequence of trading among shareholders, transfer mortis causa, or similar forms of distribution outside the intervention of the company.

The rules that are regrouped under this heading can be identified as a basic regime of shareholder protection. Indeed it is practically exclusively related to investor protection considerations.

Only a few jurisdictions use this criterion in their companies act: it is found in Belgian, French and Italian company law, but not in Luxembourg, Dutch or Spanish company law.

1. Belgian law

The Belgian companies code declares a certain number of its provisions applicable only to companies that have issued securities to the public ("openbaar beroep op het spaarwezen - appel public à l'épargne"). The admission of the securities to trading on a "regulated market" as defined pursuant to the MiFid directive is assimilated[160]. The Companies act contains moreover a definition of "listed company" referring to the admission of its securities to a regulated market as defined in the financial regulation[161]. It even uses the notion of "securities that are admitted to the daily trading on a non regulated market as organized by a market organizer", in fact referring to the Alternext and Free Market segments[162].

[158] See the well known provisions of the takeover directive, artt. 9 to 12.
[159] Alternative solutions.
[160] The companies act still uses predominantly the older expression of 'listed company" ('société cotée, genoteerde vennootschap').
[161] Art 4, Belgian Companies Code.
[162] Art. 620 § 1, Belgian Companies Code.

The securities have been defined in wide terms and concern both shares, bonds, as well as securities that confer title to the subscription or acquisition of said securities or to the conversion into said securities (convertibles, warrants issued by the company).[163]

The most important consequences of being a company that has issued securities to the public relate to these company's access to the squeeze out procedure,[164] the strengthened conflicts of interest procedure in the board[165], the limitation of the authorized capital to the amount of the existing capital[166], the CBFA's approval for issuing convertible bonds[167]. Other points are of less importance, such as the still existing requirement to notify to the CBFA that then lists the company in a publicly disclosed list[168].

2. French law

The Code monétaire et financier in France defines the "public call on the savings market" ("appel public à l'épargne") as: (a) the admission to trading on a regulated market; (b) the issuance or the transfer to the public by calling on whether publicity, canvassing, or on banks or brokers.[169]

The rule not only concerns securities but all financial instruments as have been defined in the European directives[170].

French company law makes use of the criterion of "appel public" in the company law, along with the criterion of companies whose shares are traded on a regulated market. The latter stand for additional requirements applicable only on listed companies.[171]

Although French law has maintained the old and not frequently used provisions dealing with the formation of the company by public subscriptions[172], an important reference to the public issue as a criterion is found in the recent provision – significant in terms of liability - relating to the obligation of the chairman of the board to report i.a. on the organisation of the activities of the board and on the internal controls within the company[173] [174]. In companies that have issued securities to the public, the appointment of the statutory auditor takes place by the board, deciding in the absence of the director general or his deputy in case these are also board members [175].

The law uses in some cases the negative version of the criterion, i.e. referring to companies that have not issued securities to the public[176]. So e.g. can the charter for some decisions require a higher quorum for companies that do not have issued securities to the public[177].

[163] Art. 438, 1, Belgian Companies Code.
[164] Art. 513, Belgian Companies Code.
[165] Art. 523 and 524ter, Belgian Companies Code.
[166] Art. 603, Belgian Companies Code; but art. 509 declares shares not representing the legal capital (parts bénéficiaires, winstbewijzen) negotiable upon issue in these companies.
[167] Art. 583, Belgian Companies Code.
[168] The list is due to be abolished: hence the proof that the company is subject to the said rules will have to be administered by any other means.
[169] Art. 411-1, Code monétaire et financier.
[170] Art. 211-1, Code monétaire et financier for the French definition.
[171] More recent provisions of the law refer to "regulated market", while the older ones still refer to "bourse"
[172] Art. 225-2, French Code de Commerce.
[173] Art. 225-37, French Code de Commerce.
[174] Art. 225-96 and 98, French Code de Commerce.
[175] Art. 225-228, French Code de Commerce.
[176] See e.g. art. 225-21, see also for the non-publication of remunerations art. 225-101-1.

The number of cases in which for detailed questions, e.g. for fixing delays, a different regime has been introduced for these companies v.à.v. the common regime are quite numerous. In general, and over time, the differentiation with the general company law regime seems to be increasing.

3. Italian law

The Italian law use the expression of "companies that have recourse to the risk capital market" and defines these as the companies that have issued shares that are listed on regulated markets or that have been dispersed among the investing public on a relevant scale"[178]. A significant number of provisions of the company law as modified in 2003 contain special provisions for the case the company has had "recourse to the risk capital market". These provisions all tend towards a stronger protection of the minority shareholders. A few examples can illustrate this new tendency of Italian company law:

- disclosure of agreements among shareholders (art. 2341 ter)
- no multiple voting rights and designation of independent directors (art. 2351)
- better functioning of the AGM: simplified convocation (art. 2366), simplified quorum (art. 2368) and majority (art. 2369), rules on registration of shares (art. 2370), rules on proxies (art. 2372)
- strengthening the position of shareholders in liability (2393 and 2393 bis) and annulment (2377) law suits
- related party transactions rules: substantive and disclosure rules (2391bis)
- obligation of the Collegio sindacale to investigate complaint of any shareholder (2408)
- Audit committee (2409 Octiesdecies)

4. Swiss law

The Swiss companies law contains a provision mandating the appointment of a statutory auditor for all companies open to the public"(sociétés ouvertes au public"[179] These are companies with shares listed on an exchange, or which has issued bonds – to the public or not – or which hold 20% of their assets in any of the foregoing[180]. There seem to be no other references to this notion of open companies.

In practice there a quite a substantial number of companies that, without being listed on an exchange, are held by a relatively large number of shareholders. Trading takes place with and among regional banks, who also disclose prices on a regular basis.

5. German law

The AG – and its fellow Kommanditgesellschaft auf Aktien – are conceived for issuing securities to the public and having their shares listed. But many of these companies are closely held. There is however no prohibition for other company forms to issue shares to a large number of persons. This aspects has given rise to the success of so-called "public companies" ("Publikumgesellschaftten") being companies usually organised as Kommanditgesellschaften, whereby the shares of the silent partners are offered for

[177] Art. 225-98 and 99, French Code de Commerce.
[178] Art. 2325 bis.
[179] Art. 727.
[180] More precisely "dont les actifs ou le chiffre d'affaires représentent 20 % au moins *des* actifs ou du chiffre d'affaires *des* comptes de groupe d'une société au sens "of the previous two classes".

investment to private investors. Originally, these formulae were used for tax reasons. The case law has detailed the rules applicable to these public issues, by applying principles that are inspired on the public issue with prospectus by regular AG.[181]. These issues and similar transactions are often described as the "grey market" ("grauer Markt") and often of doubtful qualify.

German law does not contain provisions on this type of companies that have issued securities that remained unlisted. There is however an active market in these securities ("Freiverkehr").Prices on these market segments are published in the price list of the stock exchange[182]. To allow a security to be traded on this market segment, an intermediary must introduce a request to a designated body, organised at each of the stock exchanges[183] Among the banks, a free market takes place, governed by mere contractual clauses whether in listed or unlisted, German or foreign securities. ("Telefonverkehr").

6. European directives

The European directives contain no reference to the sole criterion of a company that has issued securities without having these listed on a market.

Paragraph 4. Companies with listed securities

In this section the analysis will focus on the additional rules that are imposed on companies as a consequence of their listing on a stock exchange. Usually these rules are limited to listing on an exchange or a regulated market, although increasingly admission to trading on a Multilateral Trading Facility (or MTF) may be included.

1. Belgian law

The company law rules that differentiate according to the status of listed company, of company whose securities are listed on a regulated market reinforce the provisions that are applicable to companies that have issued securities to the public. Therefore, their number is relatively small.

These companies can buy back their shares on the market and resell them without restrictions[184], are bound to strict conflicts of interest rules, both at the solo and in a group context[185]. Several of these measures are directly related to control transactions. So should additional securities not be issued without preferential rights under the market price: this would avoid at least financial dilution[186]

[181] See BAUMBACH/HOPT, Handelsgesetzbuch, 33; Ed., H.D ASSMAN and R.A SCHÜTZE, Handbuch des Kapitalanlagerecht, § 3, 105 e.s.
[182] § 48, Börsengesetz; See BAUMBACH/HOPT, Handelsgesetzbuch, 33; Ed., Handbuch des Kapitalanlagerecht, Börsengesetz, § 48.
[183] This is the "Ausschuß für Geschäfte in amtlich nicht notierten Werten".
[184] Art. 620 Belgian Companies Code.
[185] Art. 523 and 524 Belgian Companies Code on conflict on interest. Art.523 applies to conflicts in the board for all compagnies that have issued securities to the public, art. 524 relates to conflict with a listed company within a group context.
[186] Art. 598.

Important shareholders should notify their holding to the company at least 20 days before the General meeting: if not they risk being excluded from voting [187]

2. French law

As the French Code monétaire et financier includes in its definition of “companies that have publicly issued securities to the market”, the admission to trading on a regulated market, the question remain which rules are specifically addressing the case of listed companies. It is unclear in which cases one or the other criterion is being used.

The Companies act contains some rather recent provisions referring to the status of the company with securities admitted to trading on a regulated market. These concern issues such as the remuneration of directors (including their golden parachutes[188]), the rules on conflicts of interest[189], the rights of associations for the defense of minority shareholders[190] or the priority rights in case of the issuance of new shares[191]. More ample information must be given by listed companies to the general meeting, especially relating to non financial key performance indicators, dealing i.a. with human resources and environmental matters. [192]

Others originate from EU directives: the special disclosure in case of a takeover bid[193], the ineffectiveness of clauses relating to the suspension of the voting right[194] as well as special rules for the increase of the capital within 2 years from the formation of the company[195] can be mentioned in this context. The rules on the share buy-backs would also belong to this group[196]

It is not clear whether the ambit of the rules has been determined on the basis of a specific concept of “listed company”, or rather on the basis of a political need to target the listed companies and specific classes of stakeholders.

3. Netherlands law

There are quite numerous provisions of the Dutch Companies Act that refer to trading on a regulated market or on a multilateral trading facility[197], concepts that have been defined in the financial regulation implementing EU directives[198].

The application for admission of securities (shares and debt securities[199]) to a regulated market or to an MTF is subject to the approval of the Supervisory board. Special rules apply for the delivery of nominative shares of a listed company[200] Companies with securities (shares, bonds, or certificates) traded on the exchange must publish six- and

[187] Art. 545.
[188] Art. 225-22-1.
[189] Art. 225-90-1.
[190] Art. 225-120 and 23.
[191] Art. 225-135.
[192] Art. T 225-100, §3, to be read in conjunction with art 225-100-1 where unlisted companies are, under certain conditions exempted.
[193] Art 225-100-3, implementing art. 10 of the takeover directive.
[194] Art. 225 -125.
[195] Art. 225-131.
[196] Art. 225-209.
[197] Obviously not necessarily the Dutch Stock exchange.
[198] See art 1.1 of the W. Financieel Toezicht.
[199] Art. 63 j and 164.
[200] Art. 86 c.

three-monthly figures[201]. Contributions in kind of listed securities enjoy a simplified valuation and contribution regime[202]. And holders of 1% of the shares or standing for a value of $ 50 million have the right to have the proposed items discussed at the general meeting [203]. The holder of certificates representing shares can exercise the voting rights relating to the underlying shares[204]. Companies have to disclose the remuneration of their board members[205]. Are exempted, those NVs whose charter provides only for nominative shares that are not freely transferable, and do not allow for the issue of bearer certificates representing these shares. This negative definition of a company that is not necessarily a listed company, but may be any company except if closely held, comes close to the notion of “companies that have issued securities to the public”.

Other differences are in line with what is found in other jurisdictions. There will no exemption from the obligation to consolidate accounts if one of the firms to be consolidated is listed on an exchange[206]. Share buy-backs for covering a share option plan for employees do not require special approval by the general meeting of shareholders[207]. The exchange rate at which a cash contribution in a foreign currency may be claimed by the company can be determined at the rate of the last day after the two months contribution period, provided the shares will immediately thereafter be admitted to trading on a foreign exchange[208]. These provisions take into account the existence of a public market, but do not modify the legal status of the company or the position of the shareholder on that basis.

4. Luxembourg Law

Luxembourg company law contains almost no references to trading on a stock exchange: the few exceptions relate to the lapse of the exemption for not publishing consolidated accounts, in case one of the firms to be consolidated is listed[209]. Further a rule about the obligation to sell non exercised preferential subscription rights on the Luxembourg exchange[210] or the use of the exchange price for valuation of post-formation acquisitions[211]. A law of 4 December 1992 imposes the publication of certain information upon the acquisition or sale of a significant participation in a listed company.

These examples illustrate that the junction between company law and securities regulation does take place outside company law, at the level of financial regulation and depending on certain transactions being entered into.

5. Spanish law

The Spanish companies act contains only a few references to the status of listed company: for contributions in kind, the valuation will be that of the price realised on the exchange or on the public auction market. The rules of the market will also govern the way nominative

[201] Art. 103.
[202] Art. 94 b(5) and 204 b comp. art. 325 and 334.
[203] Art. 114 a.
[204] Art. 118 a.
[205] Art. 383.
[206] Art. 407.
[207] Art. 98.
[208] Art. 80 a: in this case a foreign exchange is meant.
[209] Art. 313.
[210] Art. 32-2.
[211] Nachgründung: art. 26.2.

shares will have to be treated[212]. And a participation in a listed company will be deemed to exist if the shareholder owns 3% or more[213]

6. Swiss law

The Swiss companies act contains almost no reference to the listing of securities on a stock exchange or regulated market: the only exceptions relate to certain disclosures e.g. of the board remuneration, the declaration of 5% holdings and the valuation in the annual account of listed securities[214][215].

The rules applicable to listed companies have in part been enacted in the Stock Exchange Act: these concern the rules on disclosure of significant holdings, and the rules on takeover bids[216]. The Federal banking Commission is in charge of their application. Most requirements applicable to listed companies have been laid down by the Instance d'admission of the Exchange, in its listing regulation. This Instance is a selfregulatory body composed of representatives of the Swiss industry and of the exchange. This regulation contain rules with respect to prospectuses, to annual accounts, ad hoc information. Detailed "comments" are published by the same body, e.g. on the notion of price sensitive information. Enforcement takes place by the exchange.

7. German law

In principle the companies act applies uniformly to all AGs. However the act differentiates on the basis of the status of listed company. The listed company has been defined in accordance with the EU provisions of the Directive on markets for financial instruments[217].

The companies act contains a significant number of provisions that are directly linked to the status of the company as listed company, or as the rule is formulated in other cases, where the rule is declared inapplicable to non-listed companies. These provisions invariably flow from specific characteristics due to the status of listed company, but do not amount to a coherent concept of a company with shares listed on a regulated market.

In a first series of cases, the law refers to the listing as a way of determining the price of the securities[218], e.g. allowing securities to be placed at or slightly below market without preference rights[219].

In a second group, as the listing results in wide dispersion of ownership, specific rules will apply e.g. with respect to proof of ownership[220], rules on calling the meeting[221] the

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[212] Art. 60.
[213] Art. 185 (2).
[214] Art. 663, 665 e.s. and 685 (transfer restrictions for unlisted shares) of the Code des obligations.
[215] Some provisions refer to the accounting treatment (on accounting for listed securities - art 665 e.s.) on the disclosure of directors' remuneration (art. 663) or the declaration of significant holding (art. 663) There is also a stricter auditing requirement for companies that "open to the public" (art 727).
[216] Artt. 20 and 22 of the Stock Exchange Act of 24 March 1995.
[217] § 3(2) "Börsennotiert im Sinne dieses Gesetzes sind Gesellschaften, deren Aktien zu einem Markt zugelassen sind, der von staatlich anerkannten Stellen geregelt und überwacht wird, regelmäßig stattfindet und für das Publikum mittelbar oder unmittelbar zugänglich ist."
[218] See §§ 65 and 52(9), AktG; 71 §1(8) for share buybacks.
[219] 186, AktG.

exercise of voting rights[222], registration of the minutes[223], or no voting rights for cross holdings[224].

But more recently corporate governance considerations have crept into the companies act: listed companies have to publish adherence to the corporate governance code[225], they have to publish the organisation of internal committees and the number of their meetings[226], or the directorships held by their directors in other companies[227]. The confidentiality duty of directors and auditors is protected by criminal sanctions[228].

Certain events with potentially significant influence on the price have to be published or notified to the securities supervisor, the Bafin: this applies to lawsuit aiming at annulling decisions of the company[229], liability suits[230], request for the designation of an expert[231], and similar actions.

8. European directives

The older European company law directives contain a limited number of references to companies whose securities are admitted to a regulated market. These references are increasingly frequent in the more recent directives, culminating in the shareholder rights directive that applies only to shareholders in these companies. In the other directives one finds the following references:

- Second directive: The recently modified provisions[232] on contributions in kind for securities traded on a regulated market do not require an expert opinion under certain conditions[233]. Post formation acquisition of assets from a founding shareholder are not subject[234]
- Fourth directive: The requirement to publish a corporate governance statement is imposed only on companies whose securities are admitted to trading on a regulated market. May be exempted by the member state, the companies that have only other securities than shares traded, unless these are traded on an MTF[235]. The disclosure of the risk control instruments remains in any case mandatory. Certain exemptions from the directive rules may not be granted by the member states: these concern the right of inspecting company books, the waiver of approval of a 90% parent-subsidiary merger[236]

[220] 123, AktG.
[221] § 122 and 175, AktG (special information).
[222]: § 134, AktG, allowing derogation for unlisted companies. Comp. the rules for the agm of listed companies: 122, AktG.
[223] By notary public in listed companies:§ 130, AktG.
[224] § 328, AktG.
[225] § 161, AktG.
[226] § 171, AktG.
[227] § 125(1), AktG.
[228] § 404, AktG.
[229] § 248(a) and 256, AktG.
[230] § 149, AktG.
[231] § 142, AktG.
[232] Directive 2006 art. 10 a and b introduced by directive 2006/68.
[233] Art. 10 a of the Second directive, as modified by directive 2006/68.
[234] Art. 11 was not modified by directive 2006/68.
[235] Art. 46 a, Fourth directive.
[236] Art. 53 a, Fourth directive.

- The seventh directive: The limits for certain exemptions for small groups of for parent-subsidiary undertaking do not apply if these are listed[237]. The consolidated annual report shall for listed companies shall contain a description of the main features of the group's internal control and risk management systems in relation to the process for preparing consolidated accounts.

The shareholder rights' directive applies exclusively to companies whose shares are listed on regulated markets[238]In this case the EU has adopted a radically different approach although some of the rules of that directive may also be useful in unlisted companies.

PART II. COMPARATIVE FINDINGS

1. Company law: open or closed system

The use of the different company forms leads to a clear observation: only the AG and the GmbH, and to much lesser extent, the cooperative society, occupy significant places in the company law practice in different states reviewed. There is a general preference for the GmbH, except in Luxembourg, Belgium where both types are used on a more or less equal footing, and Switzerland where the AG, for historical reasons is till predominant. The AG is less frequently used, but its importance lies in the fact that these companies are the largest, and often have their shares traded on the public markets. Further research would probably reveal that many of these AG are in fact subsidiaries of other AG, or are companies for which the public issue of securities is not envisaged.

The extent to which company law is to be considered part of a larger and usually overarching body of law differs considerably: in some states, company law is part of the civil code in general (N, I,CH) while in others it belongs to the commercial code (F) or to a separate law or code that contains the rules applicable to all companies (B,Sp, P). In several states, a specific act deals with the AG company type (Sp, P), comparable with the German or Austrian companies acts, that as separate acts, contain all the rules applicable to that company type. The Netherlands have in fact adopted a comparable approach: the Dutch nv and bv are to be sure regulated in the Civil Code, but are treated as species of the genus "legal persons", separately from the other provisions relating to the company as a contract.

In most of the compared states, the bodies of law applicable to these companies have to be supplemented by whether rules of a general nature (e.g. on legal personality, representation, liability, or even general contract law), whether or not laid down in the general civil law codes, or by the common principles contained in the companies act (B, Fr., Ch, Sp, P).

All systems compared contain provisions that are mandatory while allowing for a certain flexibility in the organisation of the company.
There are however significant differences in the proportion of mandatory rules versus enabling rules versus contractual freedom. The latter matters are quite difficult to determine. Although no system is entirely mandatory, none can be considered as being essentially a default system either, although the future Luxembourg companies act will

[237] Art. 6 and 7, Seventh Directive.
[238] Shareholder rights directive 2007/36 of 11 July 2007, art. 1.

come closest to a default regulation, except for the main structural characteristics of the SA[239].

It is generally considered that the German AktG is the least flexible. This is however quite difficult to determine: the AktG contains a number of matters – however, mostly of a secondary nature[240] – that are open to shareholders' choice. On other matters, the law is considered binding[241]. But French law on SA is also considered largely mandatory[242]. This question than becomes what is "mandatory" and what is the relative importance of the rules that are not mandatory. Unnecessary to add that answering this question is extremely difficult, if not impossible, as the mandatory character of many provisions will depend not on the wording of the provisions, but on an analysis of their function within the company law system.

In more recent legislations, one notices a tendency to call less on mandatory provisions. Although old mandatory provisions are not easily abandoned[243], in new fields default rules are often preferred. The choice for the approach often corresponds to the legislator's will to make one's own legal system more attractive for firms created by non-residents[244]. The relative value of this argument should be put into perspective: it is unclear to what extent the choice for a location is determined by the choice for a specific legal company law regime[245], there is some evidence that in some cases at least, the flexibility of the legal system, and especially certain features (anti-takeover protections being best known) have played a significant role in determining the location[246]. Company law is obviously used frequently as an ancillary instrument for economic competition.

The SA and the Sarl may be considered largely alternative choices in some states, leading to their comparable use in statistical terms (B, LUX, N, CH). The Sarl -GmbH muster is usually less elaborate that the AG muster, and usually is more stringent, although recently legislators tend to become more flexible in this respect. In other jurisdictions they are clearly mutually exclusive, serving distinctly different purposes, the SA regime being considerably more stringent (D, F).

France and Luxembourg have successfully introduced the SAS, a form combining the advantages of the SA, but avoiding the restrictions applicable to it, therefore also avoiding some of the restrictions of EU company law. By presenting different company forms on offer, legislators increasingly follow a reasoning of competition between systems, both on a domestic and on a cross border basis.

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239 At the moment of introducing the SE statute, Luxembourg extended the two tier regime to all SAs.

240 Such as the right to convert bearer shares in nominative shares (§24) of special rights (§26) or duties (§55) of shareholders; the duration of the company, or the time period for using the authorised capital (§39)

241 See the Report by W. BAYER, nt. 1. This opinion is widely shared in German company law analysis. There are about 60 cases where parties can derogate from the strict provisions of the AktG.

242 See Y. GUYON, *Zur Gestaltungsfreiheit im französchien Gesellschaftsrecht*, in LUTTER and WIEDEMANN, nt. at 297, for both SA and Sarl; but pointing to the unregulated fields where contractual freedom can come into play ("what is not forbidden, is allowed"), at 301.

243 See the intervention of VANDER GRINTEN in the debate on Ondernemingsrechtelijke contracten, Instituut Ondernemingsrecht Groningen, 1991, 109.

244 As mentioned, this motive was argued explicitly in the Luxembourg proposal, nt. 64, and in the French law introducing the SE.

245 Usually taxes, labor law, etc. will play a greater role.

246 The location of Gucci in the Netherlands is often cited as the choice was made on the basis of the availability of strong take-over defences, what later turned out to be a crucial factor in the battle of LVMH for Gucci. See the Dutch case law in: Ondernemingskamer 27 May 1999, Nederlandse Jurisprudentie 1999, 487. Hoge Raad 27 September 2000, Nederlandse Jurisprudentie 2000, 653. Ondernemingskamer 8 March 2001, Nederlandse Jurisprudentie 2001, 224.

There are two fields where the SA company laws generally leave more freedom: governance and securities.

With respect to governance in the SA, different models are on offer: mainly the unitary board (B, Lux, Sp, N, CH) versus the two-tier board (D, N, Fr), with sometimes more flexibility with respect to the effective management (B, Lux, Fr.). Italy offers three models, introducing competition between models[247]. Parties can choose among these models (Fr, Lux, N) and, to a lesser extent, adapt them to their needs. In all jurisdictions the competences of the board can be modified by charter, while – in conformity with the 1st EU directive – these modifications cannot be invoked against third parties. A number of provisions is substantially the same whether they apply to the supervisory board, or to the unitary board of directors (N, Fr).

With respect to securities, there is a widespread freedom to issue different types of debt securities, as opposed to shares. The characteristics of the latter are often restricted by the law, especially as far as common shares representing the capital are concerned. But indirectly the freedom to issue other types of securities, whether with or without voting rights is quite large (B, Fr, Ch, D). There are quite important differences here, e.g. on limiting voting rights some allowing voting caps (according to the charter in Spain, a strong anti take-over instrument[248], but none in D e.g.), or restricting proxies to shareholders[249].

By way of an overall assessment, one could state that German and French company laws are more mandatory than the other systems: in German AG law, the charter cannot derogate from the muster of the law, and even additional features cannot be added. None of the compared systems contains a explicit principle comparable to § 23, Abs.3 AktG on the so-called "Satzungsstrenge", as interpreted in the prevailing legal writing. Less strict is French law: the law contains quite detailed regulations about the conduct to be followed and less frequent default rules, leaving only minor questions to contractual freedom, “governance” and “securities” excluded. This lack of flexibility has lead to a flight to other company types, in France essentially to the SAS and, the activity of the firm allowing, to the "Société civile"[250]. The Sàrl has from the outset been restricted in its use, both by company law rules and by tax provisions[251]. Recently however, some deregulation of the French Sàrl has taken place (no maximum number of members, no formal minimum legal capital). One can expect some new competition between company types to take develop[252].

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[247] G. FERRARINI, *Corporate Governance Changes in the 20th Century: A View from Italy*, ECGN, Working paper series 029/2005.

[248] See in: Institutional Shareholder Services, Report on the Proportionality in the European Union, 7 April 2007. http://www.ecgi.org/publications/documents/report_en.pdf.

[249] For an overview of these Control Enhancing Mechanisms, see Report on the proportionality principle in the European Union, http://ec.europa.eu/internal_market/company/shareholders/indexb_en.htm

[250] Only “civil activities can be undertaken in the société civile; agriculture, liberal professions, ownership of real estate.

[251] See GUYON, *Droit des affaires*, vol. 1, 8th Ed. nr. 472, 499 Luxembourg has also introduced the SAS along similar lines as the French law.

[252] See the success of the SAS similar examples can be witnessed in other jurisdictions, although these did not concern the whole regulatory scheme applicable to one definite type.

The other systems leave more freedom to the parties: Belgian, Italian, Spanish, Luxembourg, Dutch law contain numerous enabling provisions without being it possible to present a classification between these jurisdictions. Apart from a declaration of principle in the Spanish act with respect to contractual freedom, the Luxembourg projected law is probably the most flexible among these.

Generally speaking, if certain provisions have been made specifically applicable to listed companies, these tend to be more stringent, due to their protective purpose. Several of these protections attempt to roll back the predominant position of the controlling shareholders: rules on conflict of interest, on subscribing to new shares, on anti-takeover devices. In some cases, trading of the shares on the market allows for more flexibility, e.g. for valuation of assets, share buy-backs where a mere reference to the market price suffices.

The reasons for having mandatory company law are manifold and have been analysed in legal writing: protection of stakeholders, efficient contracting, delimitating incomplete contracts[253]. For the present purposes two arguments deserve analysis: one is the need to offer a clear and transparent structure to the securities market, the other the need to the properly identify the AG as a separate institution[254]. Both these arguments have a certain value. One could argue that if radically different structures were used for offering securities to the public, the markets would be confused, and hence the financing of the firm would suffer. The argument has however limited value: the markets value securities on the basis of many factors mainly in function of the economic realities, (e.g. future or discounted cash flows), and legal features play only a limited role, except if they are likely to influence these economic realities (e.g. control positions, leading to a fear for private benefits). Moreover markets today value and compare securities of a very different nature, issued by companies and forms located all over the world and functioning under radically different political or social conditions.

The institutional argument, viz. the need to differentiate the AG v.à.v. other company types, is more theoretical : why should parties not be able to adapt the charter to their needs? At present some of the objectives have to reached outside the charter, in contractual arrangements of by setting sup separate legal entities, creating opacity and enforcement uncertainty.

2. Company law – securities regulation

In all jurisdictions compared, securities regulation becomes relevant only for SAs and, more rarely, for the Sociétés en Commandite par Actions as these are the only companies that may issue equity securities to the wider public[255]. In all jurisdictions analysed, the

[253] See on these points, although from another perspective: G. HERTIG and J. MCCAHERY, *Optional rather than mandatory EU Company Law: Framework and Specific Proposals*, ssrn 9778487. Other arguments have been mentioned by W. BAYER (nt.1): Reputation and seriousness, Clarity and legal security, delineation v.a.v. other company types.

[254] Als referred to as "Institutionenschutz" in German legal writing.

[255] But the way the prohibition has been framed differs: express prohibition in French law, application of rules on public issues of securities in others, or a mix of both. On the other hand, the takeover bid regulation may also address cooperative companies as in some jurisdictions share transfers among shareholders is free, a bidder who has acquired a some shares may also acquire shares from the other shareholders. There have a certain number of takeovers on cooperative companies e.g. in Belgium. The german system is an outlier, as securities rules are applicable to the public issue of shares in Kommanditgesellschaften.

basic legal regime applicable to these companies has to be supplemented with two additional layers of regulation. On the one hand there are specific provisions in the companies act the application of which depends on the public "trading" of their securities. On the other, these companies will have to abide by the numerous provisions stemming from financial or securities regulation. Although the first layer technically belongs to company law in some jurisdictions (Fr, B, I,D but almost none in the other states), the second is clearly superimposed once certain transactions trigger their application. This phenomenon has lead, according to some legal scholars, to the fear of a takeover of company law by securities regulation[256]

The junction between the securities law rules and company law is very different from state to state. One could investigate this question by identifying the cases in which the companies act refers to listed companies: there are no references to listed companies in the Luxembourg, in Swiss companies act, few in Dutch and Spanish law, and more numerous ones in French, German, Belgian and Italian law. These do not however amount to a special legal status for listed companies: it is rather by add-ons to the basic rules that these companies are subject to additional regulation related to their status as listed companies. Most of the time, they consist of specific applications of the general rule to cases of companies whose securities have been publicly issued, and often deal with matters related to governance and to shareholder protection.

The criterion triggering the application of these additional layers of regulation are different: with respect to the company law rules, the trigger most of the time is a status (listed company, company with widely distributed securities having issued securities to the public), for the securities rules, a transaction (a public offering, a takeover, a listing leading to the status of listed company). These layers also correspond to a different intensity of protection, leading to more stringent rules that generally are mandatory. But the phenomenon sometimes also works in the opposite direction: some rules are simplified for listed companies, especially when a reference is made to a price which, per hypothesis, is readily available on the market[257]. In these cases no expert valuation or special reporting is required[258]. Achieving equal treatment may thus also be facilitated in the case of market transactions, e.g. for share buy back transactions.

The dividing line is usually formulated in terms of listing on a "stock exchange", since the introduction of the Mifid, the admission to trading on a "regulated market" or on a Multilateral Trading Facility (MTF). Hence these securities are subject to the most severe, most developed regime, as on the one hand their investors deserve special protection, and as on the other financial stability may be influenced by occurrences in these often very large companies[259]. As these rules are aimed at protecting public confidence, they are mandatory, and – at least in some jurisdictions - administered by state appointed securities supervisors.

Except on the basis of its scope of application, the dividing line between company law and securities regulation is often difficult to trace, and hence somewhat artificial. A patchwork

[256] K. GEENS, *Hoe het vennootschapsrecht zich met een reverse takeover verweert tegen een overnamepoging door het "beginsel van de juiste prijs*, in: "Liber Amicorum A. Bruyneel", 2008, Bruylant Brussel.
[257] See the amendments to the Second company law directive: directive 2006/68.
[258] See art. 10, Second directive.
[259] In a recent case, rumours about he solvency of a bank lead to a fall of the price of certain bank shares what might have trigger the collapse of the bank, clearly a systemic issue.

of specific provisions, with often detailed exceptions result. The rules on takeover bids – part of securities regulation under the present directive[260] - are a good example: they have been enacted as being applicable essentially – but not exclusively - to listed companies, and are not incorporated into company law, although its most crucial – and controversial - articles relate to company law[261] [262]. In the conflict of laws provisions of the directive, both regimes – that of the market, and that of the company – are combined in a compromise that is not entirely clear[263]. Some national legislators have implemented the company law provisions in their companies acts, other in the separate takeover law[264]. Similar observations apply to the disclosure regime, imposing obligations to issuers on top of the company law requirements[265]. The IFRS rules probably do not - yet - belong to company law, at least at the EU level[266]. This lack of clarity may have consequences: sanctions e.g. in terms of liability of directors or auditors, are different depending on whether the rule belongs to one rather than to the other body of law. Administrative sanctioning by the securities supervisor normally only extends to the securities law violations, and does not support enforcement of company law provisions. Interpretation of company law is reserved to the judiciary, and is not within the ambit of the administrative agencies[267], although the latter sometimes publish statements when securities laws are involved as well.

In some jurisdictions, an intermediate regime has been introduced in the companies act aimed at protecting those investors that have been publicly solicited by the company: these are the companies that have issued securities to the public ("appel public à l'épargne"). One should notice that in any case an act by the issuer is needed, and that spontaneous distribution of the securities does not trigger this regime. Moreover, the definition includes "admission" to a regulated market, listed companies are also subject to these rules. This regime is only partial: less comprehensive than that of listed companies – to which it is also applicable - it aims mainly at the protection of minority shareholders with respect to specific issues. This regime mainly exists in France and in Belgium, although the securities laws in other jurisdictions may contains additional obligations for non-listed companies that have issued securities to the public[268]. From a systematic point

[260] The Commission has rightly dropped the reference to a 13th company law directive, as it contains numerous provisions of securities regulation.
[261] On the distinction between the two series of provisions of the take-over directive, see E. WYMEERSCH, *The takeover bid directive, Light and darkness*, in: "Atti del Convegno di studio. Courmayeur, 28-29 september 2001", Giuffrè 2008.
[262] On the state of implementation of this directive, illustrating the lack of enthousiasm of the member states for adopting the company law provisions of the directive, see Commission staff paper, see "Commission Report on the Implementation of the directive on takeovers bids", Sec(2007/268) 22 February 2007.
[263] See art. 4 referring to whether company law and market law in case of diversity as referred to in art. 4(2)(e).
[264] See e.g. Belgian law art.45 and 46 of the L. 1 April 2007; French law implemented in part in the Code monétaire et financier, in part in the Règlement général de l'Autorité des marches financiers.
[265] The transparency regime in Belgium is partly laid down in the companies code (art. partly in a transparency law (L. 2 May 2007 op de openbaarmaking van belangrijke deelnemingen in emittenten waarvan aandelen zijn toegelaten tot de verhandeling op een gereglementeerde markt en houdende diverse bepalingen, *B.S.,* 12 June 2007, 31588; the Royal Decree of 21 August 2008 houdende nadere regels voor bepaalde multilateral handelsfaciliteiten, *B.S.*, 1 September 2008, 44601; the Royal Decree of 14 February 2008 op de openbaarmaking van belangrijke deelnemingen, *B.S.*, 1 September 2008, 13036; the Royal Decree of 14 November 2007 betreffende de verplichtingen van emittenten van financiële instrumenten die zijn toegelaten tot de verhandeling op een gereglementeerde markt, *B.S.*, 3 December 2007, 59762).
[266] Being applicable at present only to the consolidated accounts of listed companies. The extension to other accounts is a matter of national law: art. 5 of Regulation 1606/2002 of 19 July 2002.
[267] With the exceptions of the German and Spanish acts.
[268] Public issue would fall under the provisions of the Issue prospectus.

of view, this sub regime has developed over time in a more or less haphazard way, and without creating a coherent minority protection regime. The recognition of a separate regime has been advocated by the European Company Law Experts Committee. As these rules deal with specific cases of minority protection, it would be feasible to merely integrate them in the general provisions of the companies act. Some of them might be extended to companies whose shares are widely dispersed. Incentives for some form of trading on a organised market deserves to be analysed: if the shares are very actively traded, there are good reasons of investor protection for imposing listing on a regulated market. Mandatory listing – without the cooperation of the issuer - is in practice rarely if ever applied.

In legal writing there have been complaints about divergences between the company law and the securities provisions: definitions are not always the same (e.g. on "security", "acting in concert"), there are overlapping provisions, and conflicting duties (e.g. disclosure in securities laws may conflict with secrecy obligations in company law). These differences are regrettable and should be avoid. Some are rooted in different terminologies used in the EU directives, other are due to the local legislative process, other are substantive.

Another, more difficult approach could consist of integrating these two bodies of law resulting into one single regime, applicable to listed companies. A separate regime would than apply to unlisted ones, more closely included in the companies act.

3. A separate regime for listed companies?

Although in some Member states, there may have been attempts to create a specific regime for listed companies [269], these obviously have not been met with great success. In none of the jurisdictions compared has this idea been officially put forward, or been extensively discussed, nor is there any European discussion about this topic[270].

Whether it would be useful to develop a single regime for listed companies, integrating both company law rules and securities regulation, raises a considerable number of issues. One should first determine what are the economic benefits of such a reform. Further, what will be the effect for both listed companies and unlisted companies, as both are likely to be affected? Third, should one integrate securities regulation into company law, or the reverse, introducing a separate regime for listed companies? Should the new regime be mandatory especially for the listed companies, or could it be optional? Finally, should this be dealt with at the Member state level, or be harmonised at the European level?

Not all of these questions will be developed here. One should first start to analyse whether according to the present regulation, a need for integration of both regimes has been identified[271]. Some critics of the present system argue that there are contradictions,

[269] The subject has been discussed in the High Level Group of Company Law Experts, p. 34 e.s. who advised a three pronged approach; See J. WINTER, nt. 45 at 18, who concluded to the negative as to whether a single legal regime has to be developed for listed companies, and D. NAPOLITANO, nt. 14, nr. 378, p. 261 e.s. who refers to "un statut de complément".

[270] In the UK, the distinction between private and public companies was discussed as part of the Company law reform but no changes were introduced, except clarifying the formal rules tracing the limits of private companies (see ss. 58 to 60, Companies Act 2006); see: Final report, Modern Company Law for a competitive economy, vol. 1, 83 (July 2001).

[271] In other words: is there a market failure?

or at least differences in definitions between the two regimes: as previously mentioned, definitions e.g. of “concert action”, of ”control”, of parent-subsidiary have a meaning in company law different from securities law. Internal harmonisation of the concepts is necessary, but should not lead to an overhaul of the entire apparatus. Also, the present company law gives a very narrow view of the rules applicable to listed companies, as company law has to be read through the prism of the more voluminous provisions of securities law. But whether this status is likely to confuse listed companies, that have extensive legal expertise, is questionable. Certain subjects may be more easy to integrate, such as the take-over or prospectus rules, although one would still need to have a separate regime for those transactions that are undertaken by entities that are not subject to the takeover or prospectus provisions, such as foreign bidders, or non-profit bidders. Integration will not eliminate the need for having separate securities regulation. More convincing is the argument that the rules should be adapted to the ownership structure: for closely held companies, a simpler law could be devised, leaving room for contractual freedom, while the more complex apparatus would be applicable to companies with public share ownership, for which more stringent provisions will be necessary for the reasons mentioned above. This approach would lead to an intermediate form between the Sarl-GmH and the SA, as large public company. One is not very far from the French SAS reasoning. But would the regime of the listed companies have to incorporate the securities law provisions? A positive answer is not compelling.

For the smaller, unlisted companies, the advantage would essentially reside in having some of the present provisions become default rules. Although most of the subjects that today are regulated would remain, they could be changed into default rules[272]. In principle this approach could lead to rendering company law more flexible, less complex, better adapted to the needs of the closely held firm. Only the essential, constitutive rules would remain mandatory, along with those flowing from EU directives[273] Some additional provisions would apply to companies that have issued securities to the public without being listed, clearly differentiating between whether they issued shares, or non equity instruments. Another benefit would be that the Sarl-GmbH could be repositioned: it some states it serves more or less the purpose of the unlisted SA, without fully being adapted to the needs of its users (e.g. in a group context).

On the other side of the spectrum, how would the legal regime for listed companies look like. Firstly, some deregulation could take place: in matters where the law can refer to availability of a market, such as for purposes of valuation, equal treatment of shareholders, rules on the issue of shares[274], and the like. In fact, some provisions of the company law directives have already initiated this development[275]. Also, more flexibility may be needed as far as governance and the use of different securities is concerned. But it is more likely that this reform would trigger the enactment of many additional rules aimed at insuring more efficient investor protection, such as the rules on conflicts of interest, on intragroup transactions, on internal governance and controls, flexibility in the board structure and functioning, rules on the functioning of the general meeting, rules on identifying the shareholders and on the exercise of their voting rights. Several of the subjects that have not been regulated up to now, or have been the subject of recommendations or some self

[272] See the Luxembourg proposal mentioned nt. 64.
[273] Which also deserve to be remodelled to be adapted to the needs of the non public SA.
[274] See the French Lepetit report on “Nouvelles formes d’augmentation de capital”, http://www.amf-france.org/documents/general/4317_1.pdf.
[275] See the amendments to the second company law directive by directive 2006/68.

regulatory instruments, would than likely be dealt with in terms of completing the companies act for listed companies. Some instruments such as the mandatory takeover bid will be replaced in the wider context of minority protection. Many of these subjects were once proposed in the 5th company law directive. Some at least deserve to be put on the agenda again, be it in different terms: although it would be impossible to deal with all these issue at the same time, a long term company law reform plan might be needed.

The main advantage would be to have a clearer and more comprehensive regime, that would incorporate the different bodies of rules applicable to listed companies. Users could more easily access the legal regime, and markets would have a better understanding of the underlying company law structure. It would also allow to streamline, or at least to integrate the divergent objectives of company law and securities regulation. When the company is listed, it has a primary responsibility towards the market: minority protection becomes investor protection, care for investors has in some instances priority over care for creditors, and the board's duties run towards the markets, rather than towards the shareholders. A few examples can illustrate this shift in approach: the more static, creditor oriented traditional system of accounting has already been replaced by the shareholder and market oriented approach underlying the IFRS. The financial information on the basis of the company law and of the securities laws (here: the transparency directive) have different functions: reporting on, determining shareholder rights and policing of conduct v. informing the market[276]. The basic company law disclosure should over time be replaced or at least complemented by more market-relevant information. Duties of directors traditionally run to shareholders, not to markets. Also a comprehensive regime for anti-takeover devices will have to be worked out. Therefore the integration of the two bodies of laws will raise more fundamental issues: do the interests of the enterprise have precedence over those of the company? This debate has been going in Europe during the last decades: it is part of the wider political debate on the "financiarisation" of company life. These further perspectives illustrate the difficulty of the exercise and the unlikelihood that it can be realised in one single "big bang". But smaller steps remain possible, and in fact have been undertaken and are likely to be further pursued.

As already mentioned, integrating these two bodies of rules will not result in an outright abolition of the securities rules: these will remain applicable to transactions initiated by foreign entities, e.g. foreign issuers, foreign takeover bids, or exchange listings of foreign securities. Moreover, a certain part of securities regulation is applicable irrespective of the domicile of the company: insider trading rules do not directly affect company relations. The integrated approach will not necessarily result in having one stream of European directives. Indeed many directive provisions, e.g. on insider trading deal with all types of traded "securities", whether domestic or foreign, whether corporate or not, including derivatives. And not all the securities directives deal with company related issues: the Market Abuse Directive contains important provisions, on financial analysts and financial advisors, the prospectus directive also deals with securities issued by unlisted companies.

Integrating company law and securities regulation would not only be a formidable exercise, and unless it would result in very significant lowering of the regulatory requirements, it would also be very voluminous and therefore probably contrary to the present calls of industry for more simple, more flexible and possibly more transparent regulation. However, the present volume of regulation would not necessarily be increased,

[276] E.g. the disclosure in the annual report on share buybacks have essentially a policing function, strengthening the provisions on buybacks.

but better coordinated, made more transparent. On the other hand, whether the integration would make listings more attractive to candidates for listing confronting them with hundreds of pages of rules[277], seems - at least on first appearance - doubtful.

On top of the rather legal agenda, there is a political one as well. Politically spoken, legislators and regulators all over the world undertake considerable efforts to attract businesses, company decision centres, headquarters and direct investment. Although it is not always readily admitted, there is a strong competition among states to attract new financial business, be it new listings, formation of additional firms, generating new work streams for accountants, bankers, lawyers, experts,…. National legislators have recently shown more concern for this approach e.g. by lowering minimal capital requirements, scrapping obsolete rules on the maximum number of shareholders, or facilitating general meetings abroad without jeopardizing the applicable domestic legal regime. It is not clear that legislators could be motivated for entering is such a big exercise, except if it effectively improves the attractiveness of their markets.

The integrated approach would also affect the remit of the market supervisors, who will logically extend their analysis to the whole functioning of the listed company. This may not be uncontroversial. At present, company law matters are most of the time not within the remit of the market supervisors. Company law disputes belong to the remit of the courts. The fields in which the market supervisors can intervene and which they have to police relate to the financial or securities matters, generally flowing from the EU securities directives these days aimed at creating transparent, fair and orderly markets. The creation of a single body of rules for listed companies would raise very touchy questions about the involvement of the market supervisors in company law matters, e.g. on substantive issues of minority protection, exercise of voting rights, appraisal rights, and so many other issues. It seems unlikely that the regulatory integration would lead to rendering the market supervisors in charge of deciding on company law cases, although the latter idea has been floated in the past[278]. The discussion is also likely to spill over to the issue of the enforcement of the corporate governance codes, where market supervisors have up to now taken a very prudent, low-key stand. Ultimately this may even affect the division of power between the justice and the finance ministries in each of the national states. The conclusion is likely to be that the integration of all rules in one single statute would not integrate the legal competences of the respective enforcement bodies.

On the other hand the involvement of the market supervisors might allow the application of the company law rules to be rendered timely, more direct, flexible and better adapted to the needs of the markets. In some fields some supervisors have the right to give non-binding interpretations and on some subjects this has related even to company law issues[279]. These interpretations are given notwithstanding the position taken by the courts.

In the markets, where one deals with complex organisational practices there is a greater need of market participants for guidance about the conduct to be followed. These

[277] In a recent publication (HOPT and WYMEERSCH, European Company and Financial law, 4th edit) the EU securities part stood for 364 pages against 342 pages for the company law provisions (up to end of 2006).
[278] This was the case in the 1960 in Belgium, when some thought that the Banking Commission, of that time, should exercise a general supervisory function on listed companies.
[279] See AMF, Rapport 2007, p. 103, announcing a strengthening of its role in the development of statements (“doctrine”) on financial transactions: http://www.cob.fr/documents/general/8330_1.pdf The AMF annually reports on governance, internal control and remuneration practices: for a summary see: http://www.amf-france.org/documents/general/8139_1.pd.

interpretations have today more and more a European dimension, where the supervisors of the 27 Member states agree about common views to be applied by each of them. These interpretations, recommendations, Q & A, etc. have no binding force, but have authority due to the fact that they express the common view of all market supervisors in Europe. These common guidances are being developed within the Committee of European Securities Regulators (or CESR). In the fields of market abuse, prospectuses, IFRS and transparency useful interpretations have been published by CESR and constitute an additional source of supervisory convergence. In matters of administrative application a similar technique could be used to indicate the good market practice. However, where individual rights of conflicting parties are involved, the market supervisor would be very reluctant to intervene, and certainly would not give a binding nor authoritative interpretation. In any case its decisions only constitute “good practice”, and are in any case be subject to judicial review.

The introduction of an integrated regime might also create tensions at the EU level: as the European directives leave the member states free as to forms and means of implementation, it leaves them freedom to choose for the most adequate solution, be it in company law or in domestic securities regulation. It would be necessary to develop a clear understanding about the orientation of the entire exercise to avoid some member states developing rules outside the integrated framework.

Conclusion

The increase and complexity of legal provisions applicable to companies has struck many observers in the European Union. It raises the question: can we do better? Can we develop a simpler, more coherent and more efficient system? To investigate part of this question, the paper analyses some features – from a helicopter view – of the company laws in a number of jurisdictions that are part of the same Roman-Civil law tradition. The analysis is extended to the increasing importance of securities regulation provisions for companies.

A striking observation relates to the broad analogy of most of these systems: they are all based on the division between the SA/AG and the Sarl/GmbH. Within the AG class, all accept a unitary regime, irrespective of whether the shares are publicly traded or not, with several showing additional provisions for listed companies. These are linked to the securities laws, although the latter are generally kept outside the companies act.

The core dividing line between SA and Sarl is that of access to the public capital markets. Therefore, the archetype of the AG is the publicly traded company, even if that reality is applicable only to a very small – but not insignificant – portion of the overall population. Flexibility could allow to adapt to the needs of the SA with closely held ownership: the degree of flexibility is very variable, going from somewhere close to 0 to a much higher percentage (somewhere say around 60-70%). Small SAs cannot achieve their objectives by making use of this flexibility and therefore have to undergo the whole burden imposed on listed companies. Inefficiencies result.

In order to meet the different needs of each of these two classes of companies, one could develop a two speed system, allowing for a considerable deregulation for smaller companies, with ample use of default clauses, and integration of a larger proportion of the securities rules into the company law for listed companies. By so doing, one would come

somewhat closer to the UK system, where “private companies limited” are opposed to “public companies limited”.

For unlisted companies, more contractual freedom should be opened up as far as the internal organisation of the companies is concerned. The basic hypothesis is that parties know what are the consequences of their decisions and can act accordingly. If protection is needed, the articles of incorporation should provide for it. Third party protection rules will be maintained, at least to the extent that they protect third parties such as creditors. Internal rules on capital maintenance rules could however, if at all maintained, at least be simplified.

For listed companies, inconsistencies between company law and securities regulation has to be eliminated. In a second stage, an analysis is to be made which provisions of securities laws can be introduced in the law for listed companies, whether on a mandatory or a default basis, making the system more coherent. A full scale absorption of securities laws into company law is very difficult to conceive, even if much can be achieved. An approach of better gradual alignment and partial integration would make the regime of listed companies more transparent, coherent and therefore more efficient. Rather than a big bang, this should be a policy orientation to be pursued over a longer period of time. Ultimately, the objective would be to better protect the investors and thereby making financing more attractive for the issuers.

Although there are good arguments for integrating company and securities laws in one single body of law for the largest listed companies, the enterprise is a formidable one and should best be undertaken at the European level. As there are questions of divergence and even conflict between company law and securities rules, these should first be evened out, rather than overhauling the entire corpus of laws and regulations at once. As a long term objective, it is important that this fundamental orientation is taken into account in ongoing work, without upsetting the continuous harmonisation efforts that have to be pursued.

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