CORPORATE GOVERNANCE AND THE PROTECTION OF INVESTORS: A COMPARATIVE AND CRITICAL PERSPECTIVE ON THE LEGAL RESPONSES TO THE ULTIMATE CONCERN AND ON POTENTIAL DEVELOPMENTS

(research work in progress) (*)

by

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(*) Intermediate draft.

Introduction

After the corporate collapses in recent years, the protection of equity investors has been perceived as a top priority all over the world and has inspired, from 2002 to 2004, a global reform process which has been speeding up the move towards the increasing setting of corporate governance standards at an international level. Whereas in 2002, in the USA, the introduction of the Sarbanes-Oxley Act aimed at increasing the effectiveness of the institutional controls, of strengthening the disclosure requirements and the managerial accountability and at preventing the situations of conflicts of interest which had been revealed in the corporate scandals, as regards the European Community (EC), which had already been harmonising Member States securities and financial services laws, in 2003 the Commission published its landmark "Action Plan on Company Law and Corporate Governance" (APCLCG)[1] to set out the initiatives that were regarded as necessary to ensure business efficiency and competitiveness together with investors protection, which initiatives have been implemented to a good extent over the last four years. Lastly, in 2004 the OECD published a revised version of its Principles of Corporate Governance, first issued in 1999 and which aim at serving as a point of reference for policy makers in the development of the legal and regulatory framework for corporate governance. The OECD Principles indicate the legal issues relating to the protection of equity investors which, to a greater or minor extent, are common to any jurisdictions, and suggest the mechanisms to overcome these problems, in light of the ultimate concern which, in essence, they identify in the long-term success of the corporations and in their contribution to sustainable economic development.

In this overall context, this paper – after summarising in particular the direct legal mechanisms which, in the US and in three major EC jurisdictions (France, Germany and the UK) are generally intended to protect equity investors, and especially minority and non-controlling shareholders – aims at assessing how far these mechanisms, and the process of convergence which has also been fostered by EC law and which can be expected to continue, can go in ensuring the *overall* protection of (these) investors. For this purpose, the paper is structured in four parts. Part I proposes to explicit a universally applicable concept of equity investors protection from the OECD Principles, and evidences that the aspects of this protection relating to transparency and disclosure, which have consistently been recognised to US law, have also attracted prominent attention at EC level. Part 2 summarises the legal context, in the US and in the three EC jurisdictions, with regard to the key rights directly recognised to shareholders and to the legal arrangements and developments that, indirectly, contribute to shareholders' protection. Part 3 places this comparative view in the context of the functional convergence which is being promoted by the OECD and pursued by the EC, and Part 4, in conclusion, attempts to assess how far the legal responses to the need of (minority) shareholders protection have gone. In so doing, the paper argues that, whereas in some areas concerning (in addition to disclosure and transparency) the key share ownership functions and protection of minority shareholders against management and controlling shareholders the mechanisms in place have gone to a good extent in the right direction, the legal responses which

[1] Communication COM 284 (2003) "Modernising Company Law and Enhancing Corporate Governance in the EU"(hereinafter: APCLCG)

emerge from an inter-jurisdictional comparison concerning what are generally intended as protections mechanisms still appear to miss an important dimension, which emerges from the Principles and which can give rise to a challenge for legislators and for future academic research.

1. The protection of equity investors in the OECD Principles of Corporate Governance: a twofold dimension.

Whereas the 1999 version of the OECD Principles only used to indicate the common elements underlying good corporate governance, were built on these elements and stated their objective of being a "point of reference", the 2004 version not only indicates the elements of good corporate governance, but presents these as the minimal *means* to achieve *common objectives*. In other words, the "point of reference" appears to have shifted from the common elements on their own to the common objectives to be achieved in six areas: ensuring the basis for an effective corporate governance framework; the rights of shareholders and key ownership functions; the equitable treatment of shareholders; the role of stakeholders in corporate governance; disclosure and transparency; the responsibilities of the board.

In turn, these common objectives can be understood in light of the ultimate common criteria, which should inspire legislators and which is stated by the first principle newly introduced in the 2004 version. This principle, 'ensuring the basis for an effective corporate governance framework', states inter alia that "the corporate governance framework should be developed with a view to its impact on overall economic performance, market integrity and incentives it creates for market participants and the promotion of transparent and efficient markets"[2]. It requires policy makers to focus on the ultimate economic outcomes, and the Methodology for the assessment of the implementation of the Principles (2006) specifies that this means that policy makers should in essence ensure that the benefits of certain policy options outweigh the costs[3]. This outcome can be assumed to be achieved to a higher extent, the higher the extent to which certain policy options in shaping the corporate governance framework help ensuring the "long-term success" of corporations[4], in terms of profitability and competitiveness, as well as the transparency and efficiency of markets in which corporations operate and which thus contribute to the long-term success. From this perspective, the reason why corporate governance arrangements must be credible, well understood across borders and adhere to internationally accepted principles lie in the need "to reap the full benefits of the global capital market, and..to attract long-term "patient capital"[5].

Moreover, a reference to the long-term success can be found in the Principles' section concerning the 'role of stakeholders in corporate governance', where it is stated that 'the corporate governance framework should recognise the rights of stakeholders….and encourage active co-operation between corporations and stakeholders in creating wealth, jobs, and the sustainability of financially sound enterprises'[6]. In this context, the Annotations explain that 'Corporate governance is also concerned with finding ways to encourage the various stakeholders in the firm to undertake economically optimal levels of investment in firm-specific human and

[2] OECD Principles of Corporate Governance, 2004, 17.
[3] Methodology for the assessment of OECD Principles, 2006, 14.
[4] Referred to in the Preamble to the Principles, p. 12.
[5] OECD Principles of Corporate Governance, 2004, 13.
[6] OECD Principles of Corporate Governance, p. 20.

physical capital. The competitiveness and ultimate success of a corporation is the result of teamwork that embodies contributions from a range of different resource providers including investors, employees, creditors, and suppliers. Corporations should recognise that the contributions of stakeholders constitute a valuable resource for building competitive and profitable companies. It is, therefore, in the long-term interest of the corporation to foster wealth-creating co-operation among stakeholders. The governance framework should recognise that the interests of the corporation are served by recognising the interests of stakeholders and their contribution to the long-term success of the corporation'[7].

Arguably, a first dimension which emerges from the OECD Principles as regards the protection of equity investors in corporations can thus be described as the "objective aspect" of this protection: the objective conditions for the long-term success of the corporation, which lie on the one hand in the transparency and efficiency of markets which can allow corporations to collect equity capital, and, on the other hand, in the cooperation between the corporations and the stakeholders.

As regards the first of these conditions, whereas the US market has long been regarded as the most transparent and efficient one and the search, by non-US firms, of listing on US exchanges has been driven by the facilitation of access to US capital market allowed by such listing and by a goal of credibly signalling to investors worldwide a commitment to voluntary compliance with stringent US accounting and disclosure standards[8], the promotion of transparent and efficient markets has also been the focus of the EC's harmonisation efforts in the area of disclosure and capital market law. It appears sufficient to remind: Directive 2001/34/EC, on the admission of securities to official stock exchange listing and on information to be published on those securities, which aimed at harmonising the information that issuers have to disclose to the market[9]; Directive 2003/6/EC (the "Market Abuse Directive")[10], on insider dealing and market manipulation, and the implementing provisions defining details thereof[11], which introduced detailed provisions to detect and prevent situations of insider dealing and market manipulation; Directive 2003/58 EC ("Disclosure Directive"), on disclosure requirements in respect of certain types of companies[12], namely on public and other limited liability companies, which aimed at increasing the disclosure of accounting documents in paper and electronic form; Directive 2003/71/EC ("Prospectus Directive"), on the prospectus to be published when securities are offered to the public or admitted to trading[13], and the implementing

[7] OECD Principles of Corporate Governance, 2004, Annotations, p. 46

[8] G. Hertig, Convergence of substantive law and convergence of enforcement: a comparison, in J.N.Gordon and M.J.Roe (eds), Convergence and persistence in corporate governance, 2004, Ch. 10, p. 334.

[9] Directive 2001/34/EC of 28 May 2001, as amended by Directive 2005/1/EC

[10] Directive 2003/6/EC of 28 January 2003, in OJ 2003 L 096/16

[11] Commission Directive 2004/72/EC of 29 April 2004 implementing the Market Abuse Directive as regards accepted market practices, the definition of inside information in relation to derivatives on commodities, the drawing up of lists of insiders, the notification of managers' transactions and the notification of suspicious transaction; Commission Directive 2003/124/EC of 22 December 2003 implementing the Market Abuse Directive as regards the fair presentation of investment recommendations and the disclosure of conflicts of interest; Commission Regulation (EC) 2273/2003 of 22 December 2003 implementing the Market Abuse Directive as regards exemptions for buy-back programmes and stabilisation of financial instruments.

[12] Directive 2003/58/EC of 15 July 2003, in OJ 2003 L 221/13

[13] Directive 2003/71/EC of 4 November 2003, in OJ 2003 L 345/64 and amending Directive 2001/34/EC.

Commission Regulation[14], which aimed at facilitating access to capital within the EC, as well as increased transparency and market integrity, and, by harmonising the necessary disclosure requirements, created an effective "single passport" for both EC and extra-EC issuers; Directive 2004/109/EC ("Transparency Directive"), on the requirement for information provided about issuers whose securities are admitted for trading on a regulated market[15], supplemented by a recent implementing Commission Directive[16], which established the general principles for the harmonisation of transparency requirements in respect of the holding of voting rights or financial instruments that entitle to acquire existing shares with voting rights.

The Principles also indicate the protection of equity investors in the protection of this category from wrong behaviour on behalf of directors, and in the protection of weaker investors against abuse by stronger investors. This aspect, which can be indicated as a "subjective aspect" of investors protection, underpins numerous recommendations formulated by the Principles with regard to: the exercise of ownership rights by all shareholders; the equitable treatment of all shareholders; disclosure and transparency. In these areas, the Principles recommend the disclosure by institutional investors, the availability to all shareholders of effective remedies for violations of their rights, the prohibition of insider dealing and abusive self-dealings, the protection of minority shareholders from abusive actions by or in the interest of controlling shareholders acting either directly or indirectly. The Annotations to the principle clarify that 'the potential for abuse is marked where the legal system allows, and the market accepts, controlling shareholders to exercise a level of control which does not correspond to the level of risk that they assume as owners through exploiting legal devices….such as pyramid structures or multiple voting rights. Such abuse may be carried out in various ways, including the extraction of direct private benefits….In addition to disclosure, a key to protecting minority shareholders is a clearly articulated duty of loyalty by board members to the company and to all shareholders'[17]. As mentioned above, the disclosure area, and the prevention of insider dealing, has been the focus of EC's efforts intended to promote the transparency and efficiency of markets, but aspects of company law such as the admissibility of multiple voting rights or directors' duties have remained, to date, within the competence of national legislators.

If the two aspects concerning the protection of equity investors are considered together, it may be realised that, in case of minority, non-controlling shareholders – as well as of individual savers investing in the stock market - both the objective aspect (the conditions for companies' continuing success over time) and the subjective aspect (the protection from abuse by strong investors) applies, whereas, in the case of controlling shareholders or institutional investors, which may be broadly characterised as strong investors, only the objective aspect (conditions for companies' continuing success over time) would apply.

On the other hand, having regard to the ownership structures in the world-wide scenario, ownership concentration appears in a sense to be a common feature: whereas continental Europe and much of the world has long been characterised by controlling shareholders, even in the US and the UK, which have been traditionally characterised by dispersed shareholding and control in the hands of management,

[14] Commission Regulation implementing the Prospectus Directive (29.04.2004), OJ L 2004 215/3 ("Prospectus Regulation").
[15] Directive 2004/109/EC of 15 December 2004, in OJ 2004 L 390/38
[16] Commission Directive 2007/14/EC of 8 March 2007, in OJ 2007 L 69/27.
[17] OECD Principles, 2004, Annotations, p. 42

ownership of publicly traded companies tends to be increasingly concentrated in the hands of institutional investors (such as pensions funds, life insurance companies, unit trusts, investment trusts)[18] .

Therefore, this twofold taxonomy – i.e., the categories “weaker investors” (non-controlling shareholders) vs. “stronger investors”, and “objective aspect” vs. “subjective aspect” - can be applied to all jurisdictions, as the category of non-controlling shareholders may be read as including minority shareholders in continental Europe and non-institutional, i.e. individual shareholders in the US and the UK.

2. The protection of equity investors in some jurisdictions: a comparative view

The protection of equity investors has been the subject of several contributions in the international literature, where the legal issue of common interest have attracted much attention, in particular after the corporate collapses in the US and in the EU in the last few years. Prior to the collapses, a milestone work in the literature had already construed an ‘investor protection index’, based on a pre-defined set of shareholders’ rights – specifically, proxy by mail; the block of shares before shareholders’ meetings; cumulative voting or proportional representation; judicial avenues to challenge decisions of either management or the assembly, or the right to require the company to purchase their shares; pre-emptive rights, i.e. the right to buy new issues of stock; right of shareholders holding a certain percentage of the share capital to call on extraordinary meeting – and had found that common law countries perform better than civil law countries[19]. Nevertheless, this index and the related findings have been widely criticised by the subsequent literature, which has pointed out the ability of different legal systems to achieve comparable outcomes in terms of investors’ protection by using different instruments[20], the omission in the construction of the index of fundamental elements relating to corporate law on the whole, which elements have been considered in constructing a new shareholder protection index[21], and the importance of the allocation of power in corporations[22].

This literature appears to focus on one of the legal issues, concerning the protection of investors, which are identified by the OECD Principles and which are common to all jurisdictions: the protection of minority shareholders against either managers or dominant shareholders. The attribution of legal rights to minority shareholders as a sub-group of the “weak investors” category, and the attribution of remedies to individual shareholders, can be seen as the *direct protection* mechanisms, which, however, can be used – and thus need to be considered - in the broader context of the conditions concerning companies’ management and its outcomes. These conditions, which can thus be regarded as the *indirect protection* of minority shareholders and other equity investors, include, together with disclosure and transparency, the rules governing conflicts of interests, directors’ duties and accountability and, in general,

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[18] J. Solomon, A. Solomon, Corporate Governance and Accountability, 2004, p. 91.
[19] R. La Porta, F. Lopez de Silanes, A. Sheifer, and R. Vishny, Law and Finance, 106 J.POL.ECON. 1113 (1998)
[20] E.g.: U.C. Braendle, Shareholder protection in the USA and Germany: - “Law and Finance” Revisited, 2006 German Law Journal 257
[21] P.P.Lele, M.M.Siems, Shareholder protection, A Leximetric Approach, 2007 Journal of Corporate Law Studies 17
[22] S. Cool, The Real Difference in Corporate Law between the United States and Continental Europe: Distribution of Powers, 2005 Delaware Journal of Corporate Law 697

the overall “corporate objective”, i.e. the ultimate purpose of company’s management activity.

Because all these conditions, together with the direct protection mechanisms, reflect the recommendations formulated by the OECD, they can be assumed as a base for the inter-jurisdictional comparison. Within the European Community, part of the OECD recommendations which are intended to remove barriers to shareholders’ involvement have also been implicitly accepted by the new Directive 2007/36[23], on shareholders rights in listed companies (hereinafter: Shareholders Rights Directive), which has been introduced as part of the implementation of the APCLCG and which indicates some of the direct protection mechanisms that must be adopted by Member States. This Directive offers a further, necessary bases for the international comparison.

2.1. Shareholders’ protection in the US (summary)…

With regard to the US, the jurisdiction which best performed according to the proponents of the first “investor-protection index” elaborated by the literature[24], the scenario has been characterised by the “legal competition” between the different States for attracting the incorporation of companies within their jurisdictions, and the Delaware corporate law has emerged as the most influent and successful regime. Accordingly, the literature on comparative corporate governance and shareholder protection, when examining the US legal environment, refers mainly to the Delaware General Corporation Law (DGCL), to the Securities Act of 1933 (SA 1933), to the Securities Exchange Act of 1934 (SEA 1934), to the Rules of the Securities and Exchange Commission based on the SEA 1934 (SEC Rules) to the 2002 Sarbanes-Oxley Act (Public Accounting Reform and Investor Protection Act), to the Listed Companies Manual of the New York Stock Exchange (NYSE Manual) and to the Model Business Corporation Act (MBCA), which is an elaboration of the Committee on Corporate Laws of the Section of Business Law of the American Bar Association, initiaaly issued in 1984 and amended several time. These sources are assumed as a reference point in the present summary too. The key features of the US corporate and securities law environment which affect shareholders’ protection can be systematised as follows:

a) Shareholders’ meetings competences and the position of minority shareholders

US corporate laws does not leave shareholders the final say on the issues – such as dividend payments, share buy-back – that typically fall within the competence of shareholders’ meeting in Europe, but empowers directors to make all decisions or confer directors an exclusive power to make all decisions if a shareholder vote is mandated. The common law principle that the board holds the primary management power is well embodied in the DGCL, which stipulates that “..the business and affairs of every corporation…shall be managed by or under the direction of a board of directors” except as may be otherwise provided by the law or the certificate of incorporation. In the US, shareholders’ meeting substantive powers have traditionally

[23] Directive 2007/36/EC of 11 July 2007 on the exercise of certain rights of shareholders in listed companies, in OJEU L 184 of 14 July 2007, pp. 17-24

[24] R. La Porta, F. Lopez de Silanes, A. Sheifer, and R. Vishny, Law and Finance, cit.

been limited to the election of directors and approval of charter or bylaw amendments, mergers, sales of substantially all of the corporation's assets, and voluntary dissolution, but the NYSE and the Nasdaq amended their listing rules in 2003 by requiring shareholders approval of shares-based compensation plans and by prohibiting brokers from voting their clients' shares to approve these compensation plans, unless the clients instruct the brokers on how to vote. Shareholders' meetings decisions - unlike the typical rules, in European countries, of special majorities for decisions such as mergers or changes in bylaws or articles, which requirements are intended, indirectly, to protect minority shareholders - in the US never require a vote different from a simple majority. Minority shareholders have thus to accept majority's decisions without possibilities to indirectly affect them, and their possibility of influencing the general meeting's agenda is also strongly limited, for two reasons.

First, although they can add an item to the meeting agenda, the effectiveness of this mechanism is strongly reduced. The right to add an item is subject to conditions concerning not only the eligibility, but also the deadline for its exercise, the space limits and the management's right to exclude the proposal from the notice calling the meeting. The eligibility is recognised to shareholders which represent a percentage of 1% of the share capital, increased to 10% for proposals for director election filling vacancies in the board, and an absolute threshold of 2.000,00 $ in terms of fair market value. Despite the low threshold (except for directors election), shareholders must, as a further eligibility requirement, have held shares for 1 year before the proposal. As regards the deadline for the exercise of the right, shareholders must deliver their proposal more than 5 months before the meeting (120 calendar days before company's proxy statement is released), and the proposal, including the accompanying supporting statement, must not exceed 500 words in length. The US proxy rules allow management to refuse to circulate the proposal for 5 reasons: a) the proposal relates to a specific amount of dividend; b) the proposal is regarded as not relevant, which is the case when it relates to operations which account for less than 5% of the company's total assets at the end of the most recent fiscal year, and for less than 5% of the company's net earnings and gross sales for its most recent fiscal year, and it is not otherwise significantly related to the company's business; c) the proposal relates to more than one item per voting right holder for a particular shareholders' meetings; d) the proposal conflicts with one of the management's own proposals to be presented to shareholders at the same meeting; e) the proposal relates to director election. In addition, shareholders have no express right to counter-motion, i.e. to alter a proposal already formulated by the management.

Second, in Delaware shareholders do not have a right to call an extraordinary general meetings: the DGCL grants the statutory powers to call the extraordinary general meeting only to the board of directors and to "other persons" authorized by the company's charter or by- laws, which can thus prevent shareholders from calling up the meeting. The majority of other states, and the revised MBCA, allow shareholders representing 10% of the capital to call the extraordinary general meeting, but, under the revised MBCA, the threshold may be increased up to 25%.

Nonetheless, two counterbalancing elements exist for minority shareholders protection. First, the traditional directors' obligation to promote the interest of shareholders, i.e. to maximise shareholders' profit in order to safeguard their investment and attract new capital [25], relates also to minority shareholders[26]. Second,

[25] Cox, Hazen, Corporations, 2nd ed., 2003, par. 4.10.

[26] Hansmann, Kraakman, The End of History for Corporate Law, 2001 Georgetown Law Journal 439

courts have made it clear that majority shareholders owe a fiduciary duty of good faith and fair dealing to minority shareholders[27] and, in this respect, a doctrine of minority oppression has been developed by the case law. This doctrine, which was initially developed by courts in the ambit of shareholders' primacy and of the related directors' fiduciary duty to all shareholders[28], relies on notions of fairness and implies equal treatment of all shareholders: minority oppression has been described by courts, in the most common formulations, as "burdensome, harsh and wrongful conduct..a visible departure from the standards of fair dealing and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely", or as violations of the fiduciary duty of good faith and fair dealing majority shareholders owe minority shareholders, or to frustration of the reasonable expectations of the shareholders[29].

b) Individual shareholders' rights

Individual shareholders have generally the right to vote by proxy, to cumulative vote, to inspection, and to apply for a court order to call the annual general meeting in particular circumstances; they can also freely transfer their shares before the general meeting. Lastly, different options exist for pre-emptive rights in the various States, and, in case of "exit" at the occasion of specific operations, dissident shareholders finds themselves in a different position according to the situation at stake.

The right to proxy voting is largely used, but, from the perspective of shareholder protection, it appears to be an important tool only in companies subject to the SEC rules, which require that the proxy offers the shareholders the possibility to approve, to disapprove or to abstain on each particular matter. In the other companies, the board, when sending out notices of a shareholders' meeting, usually includes a blank proxy form soliciting shareholder' signature and providing postage at the company's expense; these proxies are exercised by a proxy committee appointed by the board or the management and which is expected to express a positive vote. Minority shareholders are free to engage in proxy solicitation, provided such solicitation follows (in addition to US securities laws and procedures) any procedures established in the company's charter and/or bylaws. Proxy solicitation is used, in particular, in the election of directors deemed to replace current management, as a mechanism of ex ante control which is known as "proxy fight"[30] and which usually involves the search, by a shareholder group nominating its own slate of directors, of the votes of other shareholders. The SEA 1934 allows a public company either to provide a shareholder lists to shareholders wishing to solicit proxies or to send them the soliciting materials. Under the DGCL, shareholder list, containing information on names and addresses of other shareholders, can be obtained by shareholders wishing to receiving it upon demand, which demands need to be under oath, to state the purpose and to declare their status as shareholders accompanied by documentary evidence. On the other hand, proxy rules issued by the SEC under the SEA 1934 establish the obligation to

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[27] Cox, Hazen, cit., par. 11.11

[28] D.G. Smith, The Shareholder Primacy Norm, 1998 The Journal of Corporation Law 277, p. 305 et sq.

[29] R.B. Thompson, The Shareholder's Cause of Action for Oppression, 1993 Business Law 699, D.G. Smith, cit. at 321.

[30] A.v.Aaken, Shareholders Suits as a Technique of Internalisation and control of management, 2004 RabelsZ, .

provide shareholders which a proxy statement which requires full disclosure regarding the vote.

In board elections, shareholders can often use cumulative voting, which allows them to cast all their votes for one candidate and is based on the idea of ensuring a representative of minority shareholders in the board. This shareholders' right is mandatory in 9 States, whereas in several States – including Delaware - it applies if not excluded in the company's articles of association (opt-out choice) and in other States it is allowed only if expressly provided for by the articles (opt-in choice).

The right to vote is determined with respect to the shares held by that shareholder on a specified date prior to the general meeting, known as record date. This is established by the board of directors, who can only set it at some point no more than 60 days and no less than 10 days before the meeting; in case of failure by the board to fix the record date, this is automatically at the close of the business on the day next preceding the day when the notice of the meeting is given, or, in case of waiver of notice, on the day next preceding the day of the meeting.

With a view to a proper use of their voting right and, in general, to monitor corporate affairs, shareholders are granted the right to inspection by both state laws and federal securities law. This covers the lists of shareholders, share registers, stock or transfer books, the minutes of corporate proceedings, the accounts and other financial records, the proxies held and ballots cast in board elections and proxy statements.

In addition to the right to vote, to use/solicit proxies and to inspect documents, shareholders' rights in relation to the general meeting include the right to have the annual general meeting itself convened; DGCL allows any shareholder to apply for a court order to call the annual general meeting if directors fail to duly convene it or if there are no directors in office.

Shares can be freely transferred before the shareholder meeting; the lack of a deposit obligation reflects the fact that, since 1991, US corporations only offer registered shares. If shares are sold after the record date, the buyer can compel the seller to grant him proxies to vote for the transferred shares.

Under DGCL, as well as under the revised MBCA, pre-emptive rights, allowing shareholders to keep their holding unaffected, must be expressly provided for by the articles of incorporation. Some other States, like New York take the opposite approach, by providing for pre-emptive rights but allowing the articles of incorporation to exclude these rights.

Lastly, in cases of mergers, charter amendments, sale of all assets the dissident shareholder, wishing to sell its shares, finds itself in a different position according to the event which triggers its decision to recede from the company. In cases of mergers, the shareholder enjoys an "appraisal right", i.e. a right to receive a fair price, but, in principle, this does not apply in listed companies. In case or charter amendments or sale of all assets, the appraisal right exists only if provided for in the company's charter. In case of takeover, there is no mandatory bid and thus no "exit right" at fair price for minorities.

c) directors' duties

Directors, which are regarded as fiduciaries of the corporation, owe a duty of loyalty and a duty of care. The duty of loyalty requires directors to protect the best interest of the company, and not pursue their own interest over those of the company and its shareholders; it is intended to cover a very wide range of possible situations,

amongst which self-dealing transactions between the manager and the firm when, by buying at a too low or selling at a too high price, the manager as a controlling party may transfer wealth from the company to himself. This is the crucial conflict of interest situation, which state corporations law aim at preventing. Most state corporations law define the issue as involving “a transaction between a corporation and one or more of its directors or officers…..or an organisation in which one or more of its directors or officers are directors or officers, or have a financial interest” and require that such transactions either be “fair to the corporation” or be approved, after full disclosure, by a majority of the disinterested directors or shareholders[31].
The recent reforms, in an attempt to curb self-dealings, have required that companies have a compensation committee entirely composed of independent directors, and have forbidden corporate loans to directors.

The duty of care requires directors to act “with such care, including reasonable inquiry, as an ordinary prudent person in a like position would use under similar circumstances”; it is thus expressed as a standard of desired conduct in terms of reasonably or ordinary diligence, knowledge and skills. In the use of this standard, all States apply what is known as “the business judgment rule”. This rule, which has been specifically defined by the Delaware Supreme Court, “is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interest of the company. Absent an abuse of discretion, that judgment will be respected by the courts. The burden is on the party challenging the decision to establish facts rebutting the presumption”[32]. As a result of this rule, the liability standard is transformed into a gross negligence test[33]. This makes it very unlikely that board decisions result in personal director liability for a violation of the duty of care, and, even if a director were found liable for breach of the duty of care, with no element of improper personal gain from self-dealing, the judgement will generally by covered by an insurance paid by the company[34]. The business judgment rule, however, does not offer directors protection for breach of the duty of loyalty.

d) Disclosure and directors’ independence requirements

The mandatory disclosure requirements, has been increasingly strengthened over time. The contents of the disclosure regimes currently in force are as follows. The SEA 1933 requires, for public offerings of securities in the US, the filing of a registration statement with the SEC and the dissemination of a prospectus containing extensive information about the business and financial history of the issuer. On becoming a public company, an issuer must also meet comparable disclosure requirements in mandatory periodic reports that are filed with the SEC and sent to shareholders, and whose contents are specified in detail in SEC rules. The financial statements must be presented in accordance with U.S. GAAP which have been established by the Financial Accounting Standards Board (FASB), and must be

[31] T.Baums, K.E.Scott, Taking Shareholder Protection Seriously ? Corporate Governance in the United States and Germany, ECGI Law Working Paper n. 17/2003.

[32] Aronson v.Lewls, 473 A.2d 805, 812 (Del.. 1984).
[33] Smith v. Van Gorkorn, 488 A.2nd 858 (Del. 1985).
[34] T.Baums, K.E.Scott, Taking Shareholder Protection Seriously ? Corporate Governance in the United States and Germany, cit.

audited by an independent public accountant in accordance with generally accepted auditing standards (GAAS); moreover, the Sarbanes-Oxley Act has increased the content of each annual and quarterly financial report, by requiring the disclosure of all material off-balance sheet transactions and other relationships with unconsolidated entities that may have a material current or future effects on the issuers' financial conditions. The Sarbanes-Oxley Act has charged a newly created body, the Public Company Accounting Oversight Board (PCAOB), with the responsibility of setting the audit standards, and has introduced one further requirement which is intended the guarantee the reliability of the financial information disclosed by the company, namely the certification, by the company's CEO and CFO, that the financial statements fairly present the operations and financial conditions of the company; criminal penalties are imposed for knowingly false certifications. Both the establishment of GAAP and the setting of audit standards are subject to review and final determination by the SEC.

In relation to private purchases, and purchases and sales of shares in the secondary market, the SEC proscribes any material misstatement or omission made with knowledge by a party involved in a security transaction; as a result, unless there has been complete and proper disclosure, insiders (including the company) may not trade.

The reforms introduced by the Congress, the NYSE and the Nasdaq in the wake of the corporate collapses have required that: a majority of directors be independent, where the independence requirements have been tightened; audit committees, whose powers and responsibilities have been extended, be entirely composed by independent directors; adequate internal control mechanisms exist within companies.

In particular, the Sarbanes-Oxley Act has not only increased the responsibilities of directors in relation to disclosure, but also strengthened their responsibility concerning the internal control system and the prevention of conflicts of interest situations. As regards these aspects, the key provision set: the obligation on management to assess the internal controls and disclose its findings in an "internal control report" to be reviewed by auditors; the prohibition for any officer or director of a public company to take actions to fraudulently influence, coerce, manipulate or mislead any auditor; the obligation on the CEO and CFO, in case the company is required to prepare a restatement due to material non-compliance with financial reporting requirement, to reimburse the company for any bonus or other incentive-based or equity-based compensation received during the 12 months following the issuance of non-compliance documents and for any profits realised through the sale of company's securities during such period; the prohibition for officers and directors to buy and sell shares during blackout periods when employees sales and purchases are restricted, and the company's empowerment to recover any profit resulting from such sales from the offending party; the prohibition for public companies to extend credit to directors or executive officers.

e) Enforcement

Direct actions either to set aside the validity of resolutions adopted by the shareholders' meeting or against directors, and action by or on behalf of the corporation, known as "derivative suits", are possible. Any shareholder can institute the first category of action when he has suffered a damage that was not inflicted on other shareholders, by individually suing corporate directors or by seeking redress e.g. from majority shareholders.

Derivative suits – which can be initiated when a damage has been caused to the corporation or to all shareholders in proportion to their holding – are generally based on a breach of directors' fiduciary duty, and, in particular, of the duty of loyalty. Shareholders must, however, pass several procedural steps before the court considers the substance of the derivative claim: standing requirements; demand requirements; lastly, after the proceedings have begun, the review by a special litigation committee of disinterested shareholders. Standing requirements refers to the absence of conflicts and to the quality of shareholders interests, and do not use raise problems. Nevertheless, demand requirements can be real impediment: the shareholder – unless demand is excused – must require that the board initiate the suit, so that, in case of refusal by the board, if the refusal passes a business judgment review the shareholders is prevented from bringing the derivative claim. The demand requirement does not exist, and the shareholder can bring the suit himself, where the demand would be "futile", which is the case when reasonable doubt exists that: 1) the directors are disinterested and independent, or 2) the challenged operation was otherwise the product of a valid exercise of business judgment. Even after the proceeding is initiated, and the court has determined that either demand is excused or the refusal by the board to bring the claim after demand was made is illegitimate, the special litigation committee may still stop the action. The court may accept this decision if the committee is independent and recommends in good faith that proceedings be dismissed. Despite these requirements, the use of derivative suits is encouraged by the fact that fostered as lawyers can agree on contingency fees, and thus can expect considerable gains if successful, and due to favourable costs provisions, which, for the litigant shareholder, reduce the risk of unexpectedly high costs. In fact, each party pays their own lawyers' costs, irrespective of the outcome of the proceeding, and the shareholder concerned can often claim reimbursement against his own company.

As regards the procedural question of how a claim can be brought, the US offer what is perhaps its most well-known enforcement mechanism, i.e. the efficient class action. A candidate "class" representative takes the initiative, by filing and action and asking the court to "certify the class" i.e. to state that the party's claim are representative of that of the class (of shareholders who have suffered the damage) as a whole. Under DGCL, and under the Federal Rules of Civil Procedure, there are several prerequisites. The Federal Rules of Civil Procedure state that a shareholder may sue as representative party on behalf of all if: the class is so numerous that joinder of all its members is not practicable; there are question or law or fact common to the class; the claim of the representative party are typical of the claim of the class; the representative party will fairly and adequately protect the interests of the class. The DGCL also state he must demonstrate that separate actions would imply a risk of inconsistency, or that the party who opposes has acted or refused to act on grounds generally applicable to the class, or that the question of law or fact common to the members of the class is prominent over any question affecting only individual member, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. If the court agrees, it orders notice to be sent to the members of the class: shareholders who have not taken the initiative are invited to join. Notoriously, the class action mechanism is a popular one, and their use is encouraged by the possibility for lawyers to share in the proceeds through contingency fees, together with the rewarding of well grounded claims.

Class action are also available to enforce private rights of actions created for investors by the SEA 1933, as regards the case of material mis-understatement or omission in a registration statement or prospectus. The rights of action are available to purchasers against issuers, on the basis of strict liability, and against top management and directors, on a negligence basis; the enforcement intended to guarantee the effectiveness of mandatory disclosure is ensured not only by securities plaintiff bar, i.e. by the lawyer who bring the class action proceedings on behalf of a large number of investors, but also by the possibility of public enforcement by the SEC and the US Department of Justice.

2.2. …….and in three major EC jurisdictions

2.2.1. Protection of minority shareholders vs. controlling shareholders: the direct protection mechanisms….

After the Directives intended to foster the transparency and efficiency of markets, the EC legislator, by means of the new Shareholders' Rights Directive, intends to facilitate and encourage effective shareholders involvement, by prescribing minimum standards for a series of direct protection mechanisms.

In particular, the Shareholders Rights Directive provides for:

a) the equal treatment of shareholders who are in the same position with regard to participation and the exercise of voting rights in the general meeting;
b) the convocation of the general meeting, on the one hand, in a manner ensuring both fast access to it on a non-discriminatory basis and effective dissemination of information to the public throughout the Community, and, on the other hand, with a timeframe and content such as to allow shareholders to have sufficient time to consider all issues and to cast informed votes at or in advance of the general meeting;
c) the availability of all information necessary for this purpose in the Internet site of listed companies;
d) the rights for shareholders acting either individually or collectively to put items on the agenda of the general meeting, provided that each such item is accompanied by a justification or a draft resolution to be adopted by the meeting, and to table draft resolutions, which rights must not be subject to shareholding thresholds exceeding 5% of the company's share capital;
e) the right to ask questions related to items on the general meeting agenda and to have them answered;
f) the requirements for participation and vote in the general meeting, specifically: the absence of requirements to deposit the shares with, transfer them to, or register them in the name of another natural or legal person before the general meeting; an obligation on Member States to provide that the right of participation in the general meeting and of vote be determined with respect to a record date, which record date must not lie more than 30 days before the date of the general meeting to which it applies; a further Member States' obligation to ensure that at least 8 days elapse between the latest permissible date for the convocation of the general meeting and the record date; the absence of restrictions to the transfer of shares during the period between the record date determined by Member States and the general meeting;
g) the participation in the general meeting by electronic means;

h) the right of every shareholder to appoint any other natural or legal person as a proxy holder to attend and vote at a general meeting in his name, and the abolition by Member States of any provision which restricts, or allows companies to restrict, the eligibility of persons to be appointed as proxy holders;
i) the prohibition, for Member States, to restrict or allow companies to restrict the exercise of shareholders rights through proxy holders for any purpose other than to address potential conflicts of interest between the proxy holder and the appointing shareholder;
j) the obligation for Member States to enable persons who hold proxies from several shareholders to cast votes for a certain shareholder differently from votes cast for another shareholder, to permit the appointment of proxy holders, the acceptance by companies of the notification of the appointment and the revocation of the appointment by electronic means and only in writing;
k) the obligation for Member States to permit companies to allow their shareholders to vote by correspondence in advance of the general meeting;
l) the facilitation of the effective exercise of voting rights by investors through financial intermediaries and, for this purpose, the obligation on Member States not to impose on these intermediaries disclosure requirements going beyond the identification of each of their clients investor, and to permit financial intermediaries to cast votes attaching to some of the shares differently from votes attaching to the other shares;
m) the determination, for each resolution, of the voting result through methods that reflect the voting intentions expressed by shareholders, and the obligation to make voting results transparent, after the general meeting, at least through the company's Internet site within a period not exceeding 15 days after the meeting.

On the whole, the Shareholders Rights Directive has a prescriptive nature in establishing the *kind of involvement mechanisms* that allow each shareholder to voice his intentions in the general meeting (so-called 'voice mechanisms'), while at the same time offering Member States some *flexibility in the way of running these mechanisms.* The prescriptive nature can be found in provisions intended to protect minority shareholders from abuse by controlling shareholders or directors: this is the case, e.g., for the convocation of the general meeting, which must be issued no later than 21st day before the day of the meeting, and for the identification of situations of potential conflicts of interests between the proxy holders and the appointing shareholders, which situations are identified in particular in those cases where the proxy holder is a controlling shareholder or an entity controlled by such shareholder, or where he is a member of the administrative, management or supervisory body of the company, or of a controlling shareholder or of an entity controlled by this shareholder, or where he is an employee or an auditor of the company or of a controlling shareholder or controlled entity or has a family relationship with a person who is in one of the previously indicated situations. The flexibility can be found, e.g., with regard to: shareholders' right to put items on the agenda of the general meeting, where Member States may provide that this right may be exercised only in relation to *annual* general meeting provided that shareholders have the right to call or to require the company to call an extraordinary general meeting with an agenda including at least all the items required by those shareholders; participation in the general meeting by electronic means, where Member States must permit companies to offer any or all amongst the real-time transmission of the general meeting, the real-time two-way communication enabling shareholders to address the general meeting from a remote location, and a mechanism for casting votes, before or during the general meeting, without the need to appoint a proxy holder who is physically present at the meeting; proxy voting, where Member States may limit the appointment of a proxy holder to a single meeting or to such meetings as may be held during a certain period. This flexibility appears thus based on the assumption that a different use of the same mechanisms can still allow the same degree of shareholders protection.

The Directive must be implemented by Member States by 3 August 2009[35], and its prescriptive provisions, due to their clear and precise formulation, can be expected to have "direct effect", i.e. to directly confer rights to shareholders, if not correctly and/or timely implemented.

Accordingly, the Directive is deemed, in case of listed companies, to restrict the areas where the direct protection mechanisms are still left to the complete discretion of Member States. A comparative view of France, Germany and UK provisions[36] shows that – despite the well known differences in the internal organisation structures, in respect of which the UK requires a single board composed of executive and non-executive directors, German law provides for a two-tier board with a supervisory board elected by shareholders and a management board elected by the supervisory

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[35] Art. 15, 1st paragraph; see, however the limited exception granted by the 2nd paragraph which, for a specific provisions concerning proxies, allow some Member States to postpone implementation to 3 August 2012.

[36] The main sources are the French Code of Commerce, the German Stock Corporations Act ("Aktiengesetz", AktG) – both amended by recent legislation - and the UK new Companies Act 2006, which replaces the previous Companies Act 1985, and the case-law. Other important sources for the overall legal environment on (minority) shareholder protection are, for France: Décret n. 67-236 sur les sociétés commerciales, as amended; Règlement general de l'Authorité des marchés financiers (AMF) 2004; Code Monétaire et Financier, 2000; Recommendations sur le gouvernement d'entreprise, Association Francaise de la gestion financière, 1998 (amended in 2001 and 2004); Principes de gouvernement d'entreprise resultant de la consolidation des rapports conjoints de l'AFEP (Associations Francaise des Entreprises Privées) ed du MEDEF (Mouvement des Entreprises de France), 2003 (French Corporate Governance Principles). For Germany: HGB (Commercial Code), MitBestG (Gesetz uber die Mitbestimmung der Arbeitnehmer, Law on Co-determination) 1976, BGBI I 1153; Zweites Finanzmarktforderungsgesets (Second Financial Market Promotion Act), 1994, BGBI I 1749; Drittes Finanzmarktforderungsgesets (Third Financial Market Promotion Act), 1998, BGBI I 529; KonTraG (Gesetz zur Kontrolle und Transparenz im Unternehmensbereich; Corporation Control and Transparency Act), 1998, BGBI I 786; NaStraG (Gesetz zur Nomensaktie und zur Erleichterung der Stimmrechtsausubung, Law on Registered Shares and Simplification of Voting), 2001, BGBI I 123; WpUG (Gesetz zur Regelung von offentlichen Angeboten zum Erwerb von Wertpapieren und von Unternehmensubernahmen (WpUG), Take-Over Act), 2001 BGBI I 3822; Viertes Finanzmarktforderungsgesets (Fourth Financial Market Promotion Act), 2002 BGBI I 2010; TransPuG (Transparency and Disclosure Act), 2002 BGBI I 2861; German Corporate Governance Code, 2002 (subsequently amended); UMAG (Gesetz zur Unterhehmensintegritat und Modernisierung des Anfrechtungsrecht, Law on the Improvement of Corporate Integrity and on the Modernization of the Regime governing Decision-Directed Suits) 2005 BGBI I 2802. For the UK: Insolvency Act 1986; Company Directors Disqualification Act 1986; Financial Services and Markets Act 2000; City Codes on Take-over and Mergers of the Panel on Takeovers and Mergers; Combined Code on Corporate Governance 2003; Companies (Audit, Investigation & Community Enterprise) Act 2004. The UK has, since the early 90s, produced more codes of best practices than other countries (notably the Cadbury Code, 1992, applied since 1993; the Greenbury Code, 1995, applied since 1996; the Hampel Code, 1998, applied since June 1998), before consolidating them in the Combined Code of 2003 (which has been, in turn, subject to amendmenys based on Smith Report, Audit Committees Combined Code Guidance, 2003; Higgs Report, Review of the role and effectiveness of non-executive directors, 2003).

board, and France leaves individual companies the choice between a single board of directors or a dual board structure with a management organ ("directoire") and a supervisory board - all three jurisdiction resort to basically five kinds of direct protection mechanisms for weak investors, i.e. to mechanisms which consist of rights to act for the purpose of: *a)* expressing minority shareholders' voice in the general meeting, which can be indicated as "voice mechanisms"; *b)* monitoring the management ("monitoring mechanisms"); *c)* keeping the stockholding in the company unaffected by directors or majority decisions, which can be indicative as "shareholding defence mechanisms"; *d)* selling the shareholding at fair prices, which can be indicated as "exit mechanisms"; *e)* obtaining judicial redress, i.e. "enforcement mechanisms". The Shareholders Right Directive leaves to the complete discretion of Member States the mechanisms sub c) and e), whereas it provides for minimum standards for the voice mechanisms and the monitoring mechanisms; the "exit mechanism" sub d) have been affected by another EC Directive, namely the Takeover bid Directive (see infra, d).

a) voice mechanisms

All three jurisdictions offer the right to have a shareholders meeting called, and the right to add an item to the agenda of the general meeting.

The right to have a shareholders meeting convened can be exercised by shareholders by applying for a court order to call the meeting in case of failure to do so by directors or managers when requested by shareholders – which is the case in France and Germany - or by forcing directors to convene the meeting if the law requires them to call the meeting on shareholder' request, which is the case in the UK. All three jurisdictions establish a threshold share requirements for the exercise of this right and, whereas the UK provision which forces directors to call the meeting appears to provide for a more efficient mechanism than French and German provisions which empower shareholders to demand directors or managers to call the meeting in first instance and which entitles them to resort to the court in case of failure by directors or managers to do so, the 5% threshold required in France and Germany in lieu of the 10% threshold required in the UK for public companies makes it easier the initiative to minority shareholders of French or German companies than to shareholders of these UK public companies. Moreover, both France and the UK provides for an individual calling right in specific circumstances. France empowers any shareholder, in case of urgency, to petition the court for the appointment a representative to call the general meeting.

In the UK, if directors are required to call a meeting by shareholders and fail to do so, the shareholders who requested the directors to call the meeting, of any of them representing more than 50% of the total voting rights of all these shareholders, may themselves call a general meeting, and any reasonable expense incurred by the shareholders requesting the meeting must be reimbursed by the company ad retained out of any sum due to directors. If for any reason it is impracticable either to call the meeting in any manner in which the meetings of the company concerned may be called or to conduct the meeting in the manner prescribed by the company's articles or by law, any shareholder can apply to the court for an order to call, hold and conduct the meeting in any manner the court thinks fit.

The right to add an item to the meeting agenda, in both France and Germany, already satisfies the minimum standard required by the Shareholders Rights Directive.

In fact, in both countries, the threshold requirement already complies with the Directive and shareholders can use the right for a twofold purpose. Before the first notice of the meeting, they can take an initiative which will be included in this first notice; after the notice convening the meeting, they can use it for a response to management notice, and in both cases they do not need to inform management about their positions until very shortly – generally taken to mean 7 to 10 days - before the meeting.

In the UK, although the threshold satisfies the Directive requirement, shareholders can find themselves unable to effectively use the right to add an item as a response to an agenda issued by directors, due to the required timeliness, if notice of meeting is issued less than 6 weeks before the annual general meeting, which has been to date the normal case. In this situation, the fact that shareholders' proposal needs to presented no less than 6 weeks before the day of the annual general meeting leaves shareholders, if directors informally agree to put the proposed item on the agenda but subsequently change their mind before issuing the agenda, without a power of response and the only possible option would be to call a meeting themselves. The calling right, however, would be subject for public companies to the 10% rather than to the 5% threshold. In addition, shareholders of UK companies may not propose resolutions to extraordinary general meeting, but, for those meetings, must only rely on shareholder statements, which bear limitations (see table below). It appears thus doubtful whether the overall situation would be in line with the spirit of the Shareholders Rights Directive.

France and Germany offer two additional rights which go beyond the Directive in empowering minority shareholders. The first is a right to counter motion, which can be exercised by shareholders holding 0,5% of the capital in France and by any shareholder in Germany; by presenting draft resolutions which amend the management proposals, shareholders can directly interact with management in the decision making process. In the UK, shareholders reaching a certain thresholds can force the company to circulate statements to all other shareholders, which statement express their position on a draft resolution and require a positive or negative vote but cannot change a management proposals. The second is the right to form Associations of Interests empowered to represent their interests within the company. The French case of this "inside protection" appears to be the most significant: shareholders holding a share capital threshold which is lower the higher the amount of the share capital, after having achieved once the formal status of Association of Interests, are considered to meet permanently the required thresholds in all subsequent meetings for the exercise of the calling right, of the right to add an item to the meeting agenda and of the right to counter motion. The availability of this mechanism to shareholders who have been holding shares for at least 2 years is intended to encourage long-term investments, and it significantly reduces shareholders' coordination costs (as shareholders do not need to bear the costs of proving quorum and communicating with a multitude of other shareholders every time they exercise their rights). No equivalent exists in the UK, where the Shareholders' Association campaign to protect and improve shareholders' rights but does not offer an "inside" voice within companies. The effectiveness of all rights whose exercise is conditional upon reaching a specific threshold depends on the easy of reaching the threshold and thus of communicating with other shareholders, as well as on the possibility of doing so without costs or at reduced costs. In this respect, a unique facilitation is offered by Germany, through a recently implemented shareholders' digital forum in a "special section" in the Federal Electronic Bulletin. Any shareholder can take the initiative by sending his issue and contact address to the editor of the Federal Bulletin, who will publish it in a specifically designated section, that other shareholders can access free of costs. This institution can be used, as regards the “voice mechanisms”, to propose a vote on specific issue in shareholders meetings, or to convene a shareholders meeting on behalf of the company.

All three jurisdictions grant the right to proxy voting, to electronic voting and to vote by mail, in line with the Shareholders Right Directive; however, France poses limitations, concerning the persons to whom proxies can be conferred, which limitations would need to be removed, together with the practice of blank proxies to banks. There are indeed mechanisms intended to prevent to concentration of an excessive voting powers in the hands of few shareholders by virtue of either the proxies received and/or the votes vested in his shares. First, legal and statute provisions generally set the maximum number of votes that may be available to a shareholders including both proxies and the votes in his own name. Second, in the case of blank proxies, the president of the general meeting expresses, for each of these proxies, a favourable vote for proposals put forward by the board or by the directoire, and a negative vote for any other proposals; the shareholder can express a different vote by choosing a representative who accept to vote according to his indication. The blank proxies on their own do not appear, however, to be in line with the aim of the Shareholders’ Right Directive. On the other hand, the vote be mail in France is facilitated through the use of a specific form, which is taken to mean a vote against the deliberation if the form omits an express vote or if it indicates shareholders’ abstention.

Direct protection mechanism for minority & non-controlling shareholders: possibility to express their positions	Right to have a shareholder meeting convened (calling right)	Right to add an item to the agenda of the general meeting	Right to present draft resolutions which amend the management’s proposals (counter motion right)	Right to form Associations of interests representing them within the company	Right to proxy voting/ electronic vote/vote by mail
France	One or more minority shareholders holding at least 5% of share capital are entitled to ask the court to appoint a “mandataire” to call the general meeting, in the event of	Minority shareholders holding a 5% quota in companies with a share capital below 750.000,00 €, and holding a decreasing quota in companies with an higher share capital amount:	Shareholders who hold 0,5% of the capital. The company is obliged to publish these proposals in a second notice (notice of call) 15 days before the meeting on the French Bulletin, the company’s web	Shareholders whose shares have been registered for at least 2 years, who hold a 5% threshold of voting rights in companies with share capital up to 750.000 €, a 4% threshold	Proxies possible to any other shareholder or to the spouse; possible blank proxies to a bank; electronic vote and vote by mail allowed

	failure by directors to do so; the right is also recognised to individual shareholders in case of urgency	4% for the first 750.000,00 €; 2,5% if the share capital is between 750.000,00 and 7.500.000,00 €; 1% if the share capital is between 7.500.000,00 and 15.000.000,00 € and 0,5% if the share capital exceeds 15.000.000,00 €. The right can be used for an initiative, within a reasonable (short) time before the first notice of the meeting, and for a response to management's notice of the meeting, within 10 days after the notice.	site, and on the website of the stock exchanges where the company is listed.	in companies with share capital between 750.000 and 450.000 €, a 3% threshold in companies with share capital between 4.500.000 and 7.500.000 €, a 2% threshold in companies with share capital between 7.500.000 and 15.000.000 €, and a 1% threshold in companies with an higher capital, and who have notified their legal status to the company and to the "Commission des Operations de Bourse", can form an association of interest; after having achieved the association status, the shareholders are deemed to represent the necessary thresholds in all subsequent meetings.	
Germany	Shareholders holding 5% of share capital can ask managers to call the meeting and,	Shareholders holding 5% or an amount of 500.000,00 € in the share capital; the percentage can	Each shareholder can require the publication, by the company, of opposing statements on	Shareholders can form an association of interests; a specific threshold is not expressly	Proxies to managers possible only with binding instructions and proxies to banks

	in case of managers failure to do so, an require a court order; the threshold can be reduced by the articles of association, but not increased	be reduced by the articles of associations, but not increased. The right can be used for an initiative, within a reasonable (short) time before the first notice of the meeting, and for a response to the notice, 7 days after the notice.	an agenda item after the Notice of the shareholder meeting and up to 2 weeks before the meeting; these statements may include a new draft resolution and the management must publish the opposing statement, which can have a maximum length of 5.000 characters, in the company's Web Site, at a place which be clearly marked and easy to find	required, and the privilege of a one-time registration is not granted, however, two established shareholders associations work as watchdogs of minority shareholders	possible, but banks may not exercise the voting rights stemming from proxies at an annual general meeting if, at that meeting, they are also exercising votes of own holding of more than 5%; electronic vote allowed
UK	Shareholders representing 10% of the company's paid-up capital with a right to vote at the general meeting are entitled to require directors, and to obtain, the calling of the general meeting; in private companies, the threshold for the exercise of the calling right is reduced to 5% only for private companies if more than 12 months have elapsed since	The right to add an item is not expressly provided for, but shareholders holding at least 5% of the total voting rights at the annual general meeting to which the request relates, or at least 100 shareholders with average holding amount of at least 100,00 £ per shareholder, are entitled to require the company to give, to all other shareholders, notice of a resolution which may	No. The company is required to circulate shareholders statement of up to 1.000 words, if the request has been put forward by shareholders representing at least 5% of the total voting rights or at least 100 shareholders holding, on average, at least 100,00 £ per shareholders, and has been received at least one week before the meeting to which it relates; nonetheless,	No. Although a UK Shareholders Association exists, it does not provide an "inside" legal protection within companies.	Right to appoint more than one proxy, provided each proxy is appointed to exercise rights attached to a different share or to a different £. 10, or multiple of £. 10, of stock held; all proxies able to attend, to speak and to vote at a meeting and, where a shareholder appoints more than one proxy, each proxy will have a

	the end of the last general meeting which has been duly called and in relation to which any shareholder had rights with respect to the circulation of a resolution no less extensive than they would have had if the meeting had been so called at their request; individual right in case of failure by directors to call the meeting or in exceptional cases	properly be moved (which is generally the case, unless the resolution would be ineffective if passed, or is defamatory of any person or is frivolous or vexatious) at the annual general meeting. The shareholders concerned must, for this purpose, present a request to the company no later than 6 weeks of the annual general meeting, or, if later, than the time at which the notice of the meeting is issued.	the statement cannot be a draft resolution that changes an original management proposal, and it can merely ask other shareholders a positive or a negative vote on proposed resolutions.		vote; electronic vote allowed

One further voice mechanism which is generally associated with minority shareholders' protection – as a way to ensure a proportional expression to their voice - is the one share-one vote rule. Neither France nor the UK adhere strictly to this rule. In France, double voting rights is possible if provided for in the bylaws, but only for fully paid shares held for at least 2 years. In the UK, any shareholder has one vote in respect of each share or each 10,00 £, of stock held, subject to any provision of the company's articles which may thus allow multiple voting. Only Germany has banned multiple voting in 1998.
Lastly, to facilitate the exercise of the voting right, none of the three jurisdictions currently requires share deposit or a block of shares before the meeting, and in this respect they already satisfy the requirement of the Shareholders Rights Directive. Germany, which used to require a share deposit until 2005, has subsequently adopted a record date system, as well as the UK; both jurisdictions require it to be no later than 21 days before the meeting and, in this respect, already comply with the Directive.

b) monitoring mechanisms

The monitoring mechanisms are inherently connected with the voice mechanisms, by allowing minority shareholders to get the necessary information with a view to effective use of the voice mechanisms, and they are recognised, to a different extent, in all three jurisdictions.
The right to ask questions, which according to the Shareholders Rights Directive must be ensured to shareholders as regards items on the agenda of the general meeting, is subject to a restriction in Germany and it appears to be only implicit in the UK.

Direct protection mechanism for minority & non-controlling shareholders: monitoring mechanisms	Right to review transactions or decisions	Right to receive communication	Right to ask questions	Right to individual inspection
France	One or more minority shareholders holding at least 5% of share capital, or, in listed companies, the threshold required to form an Association and the Association themselves, are entitled to petition the court for the appointment of an expert to gather information about suspicious transactions/specific aspects of the management of the company in the absence of a reply, within 1 month, to questions they have asked, and the expert must prepare a report answering the questions posed; moreover, in listed companies shareholders with the thresholds indicated and Associations may file a court action to replace the statutory	Either the board of directors or the directoire must put at the disposal of shareholders all documents that are necessary to allow them to exercise their vote on a fully informed, by either sending these documents or making them available at the company's seat; at any time, each shareholder is also entitled to require and obtain communication of all the same documents that he can find at the company's seat (see right to individual inspection).	As of the communication by the board of directors or by the directoire, each individual shareholder can ask, in writing, questions to which the board of directors or the directoire must give a reply during the meeting; moreover, shareholders holding the minimum thresholds required to form an Association, and Associations of Shareholders themselves, can ask: a)questions, up to twice a year, on "any fact of a sort which may compromise	Each shareholder is entitled to inspect, at the company's seat, the annual accounts and other documents relating to the last 3 financial years: the reports - by the directors, by the members of the supervisory body and by the auditors - that have been presented at the general meetings; the text and the reasons of proposed resolutions; the information concerning candidates for appointment

	auditors in case of error, incapacity, or other good reason such as lack of impartiality or lack of independence		the continuity of the business”, b) questions about specific aspects of the management of the company; in the absence of a “satisfactory reply” to these questions within 1 month, the court appointment of an expert may be required (see right to review).	as members of the board of directors or of the supervisory board; the total amount, certified by an auditors, of the highest remunerations paid; the total amount of payments made in fulfilment of tax obligations; the list and nature of transactions concluded in normal market conditions between directors or shareholders holding more than 10% of voting rights; the minutes of meetings held during the last 3 years
Germany	Shareholders holding at least 1% of the share capital or an amount of at least 100.000,00 € can request the court a special audit for due diligence, for the control of internal transactions and the gathering of information for future shareholders decision, if a decision to appoint the special auditor for due diligence is not taken by the shareholders’ meeting	The management board must give information to shareholders related to the topics that the meeting is called to vote upon; however, any information that is published on the company’s Web site for at least 7 days prior to the meeting is considered to be given; moreover, shareholders are informed, during the financial	Each shareholder can ask all questions that a reasonable shareholder would consider to be relevant for his voting decision.	Financial statements publicly accessible for inspection within 90 days of the end of the financial year; interim reports publicly accessible within 45 days of the end of the reporting period

		year, by means of a half-year financial report and, in the first and second halves, by interim reports or quarterly financial report		
UK	In quoted companies, shareholders representing at least 5% of the total voting rights, or at least 100 shareholders entitled to vote and holding shares with an average paid-up amount of at least 100,00 £.per shareholder, are entitled to obtain an independent report on any poll taken or to be taken at the general meeting, and, for this purpose, directors must appoint an independent assessor; shareholders holding the same threshold can require the company to publish on a website a statement setting out any matter relating to the audit of the company's accounts (including the audit report and the conduct of the audit) to be laid down before the next accounts meeting, or any circumstance regarding an auditor ceasing to hold office since the previous accounts	Each shareholder is entitled: to be sent copies of annual accounts and reports for each financial year; to be provided on demand with copies of the company's last annual accounts, the last directors' report, the last directors' remuneration report and the auditors' report an accounts and all these reports; to be sent proposed written resolutions, to receive notice of general meetings and to be sent a copy of annual accounts and reports; each shareholder is also entitled, on request, to be provided with a copy of directors' service contract or of a written memorandum setting out the terms of contract.	Not expressly provided for, although general questions and answers sessions at general meetings are usual	Individual right to inspect: the shareholders' register; the index of shareholders names that must be kept if the register is not in a form as to constitute an index in itself; the register of directors; the records of resolutions and meetings; the directors' service contract with the company or with a subsidiary of the company, or, if the contract is not in writing, to inspect a written memorandum setting out the terms of the contract; the contracts concerning the company's purchase of its own shares; in cases of loans to directors,

	meeting that the shareholders propose to raise at the next accounts meeting.			quasi-loans and credit transactions with them, a memorandum specifying the nature, the amount, the purpose of the transaction and the extent of the company's liability under any connected transaction is to be made available for inspection by shareholders both at the company's registered office and at the meeting

In Germany, shareholders can use the special section of the Federal Electronic Bullettin to take the initiative (and co-ordinate with each others for reaching the required threshold) to request the special investigation. Moreover, the restriction on the right to ask questions lying in the limitation of this right to questions that could be asked by a "reasonable shareholder" appears to be acceptable in light of the Shareholders Right Directive, as the right to ask questions and the obligation to answer are subject, under the Directive, to measures which Member States may take or allow companies to take to ensure – in addition to the identification of shareholders - the good order of general meetings and their preparation and the protection of confidentiality and business interest of companies[37].
By contrast, in the UK the implementation of the Shareholders Right Directive would require the right to ask questions to be expressly provided.

c) shareholding defence mechanisms

In all three jurisdictions, shareholder also enjoy pre-emptive rights to new issues of shares. This grants each shareholder the possibility to buy new issues of share according to the previously held shareholding quota, to maintain his shareholding unaffected. The pre-emptive right can be excluded only by a special resolution

[37] Art. 9

adopted, in the general meeting, by shareholders representing 75% of the share capital in both the UK and Germany, and two thirds of the share capital in France.

d) exit mechanisms

Minority shareholders' right to exit by selling their shares at a fair price is recognised in takeover cases, as a result of the implementation of the 2004 EC Directive on Takeover Bids[38] and thus of the mandatory bid rule provided for by the Directive. According to this rule, the acquirer of the control over a company is obliged to make a full takeover bid for all remaining voting shares of the company at an equitable price, which protects minority shareholders by granting them the right to sell their shares. The shareholding threshold which triggers the obligation to make a mandatory bid is defined at national level.

National legislations also protect minority shareholders, after a successful takeover bid, by: a) requiring a bidder to compulsorily buy, at a fair price, the shares of the remaining minority shareholders who have not accepted the bid (squeeze out); b) enabling minority shareholders, in the wake of such a bid, to require majority shareholders to purchase their shares at a fair price (sell out).

Exit	Mandatory bid under the mandatory bid rule of the Takeover Bid Directive in case of:	Exclusion of minority shareholders (general corporate law squeeze-out) against fair compensation and/or takeover related squeeze-out (Takeover Directive implementation)	Minority shareholders' right to request the acquisition of their shares by majority shareholders (sell out) at a fair price
France	Acquisition of more than 33,33% of the voting capital or of the voting rights, and acquisition of at least 2% more of the voting capital or voting rights within less than 1 year by persons holding between 33% and 50% of voting capital or voting rights	Shareholders who, after a successful takeover, holds 95% of capital or voting rights has the right to squeeze out remaining shareholders; the threshold applies to both the general corporate law squeeze-out and the implementation of the take-over bid directive, but there are procedural differences	minority shareholders can request the financial market authority to order controlling shareholders with a 95% or plus stockholding to buy their shares; the financial market authority will assess the fairness of the price.
Germany	direct or indirect acquisition of 30% of the voting rights of the target company; the	General corporate law squeeze-out: the general meeting may, upon request of a shareholder	Take-over related sell out procedure: if, following a mandatory bid or a voluntary bid aimed

[38] Directive 2004/25/EC, in OJ 2004 L 142

	obligation is triggered if the threshold is overstepped by shareholders entering into a concert party arrangement even if such an arrangement is not linked to the share acquisition	holding 95% of the share capital (principal shareholder), decide the transfer of the shares of other shareholders to the principal shareholder, in return for the payment of an appropriate cash settlement; Take-over squeeze-out: same threshold.	at the acquisition of control, the bidder would be entitled to apply for a takeover-related squeeze-out, the minority shareholders have the right to accept the bid within 3 months after the end of the regular period for acceptance
UK	acquisition of an interest in shares carrying 30% or more of the voting rights, and acquisition, by the holder of an interest in shares carrying between 30% and 50% of the voting rights, of an interest in other shares which increase the percentage of voting rights in which he has an interest	shareholder who have acquired 90% of the shares to which the offer relates, and 90% of the voting rights carried by those shares; minority shareholders can apply to the court to request that consideration higher than that offered in the bid be paid in exceptional circumstances	minority shareholders may force the bidder to acquire their shares when the bidder holds 90% of the shares and 90% of the voting rights attached to those shares.

Unsurprisingly, amongst the three jurisdictions, the UK – which through its City Code on Take Over and Mergers[39] paved the way to the markets for corporate control, and which developed the world’s most active take-over market in relation to its size – is the one which offers the broadest definition of the conditions which trigger the obligation to make a takeover bid under the Take over bid Directive, the lowest thresholds for both squeeze-out and sell-out and the broadest scope of application of squeeze-out and sell-out provisions. The “interest in shares” is in fact considered to arise: through ownership of the shares; through having the right to exercise or direct the exercise of the voting rights attaching to the shares; through having the right or the option to acquire the shares or call for their delivery or bearing an obligation to take delivery of them by virtue of any agreement to purchase, option or derivative; through being party to a derivative whose value is determined by reference to the price of the shares and which results, or may result, in having a long position in the shares. In turn, the squeeze-out and sell-out provisions, which are supplemented by well-settled rules intended to guarantee the fairness of the price, are deemed to apply equally to all companies and all bids, irrespective of whether or not the companies and bids concerned fall within the scope of the Takeover Bid Directive.

[39] Originally dating back to 1968.

In the two other jurisdictions, the market for corporate control, take-over regulations and squeeze-out are much more recent and have been introduced by legislative provisions; these developments have also affected the implementation of the takeover bid Directive.

In France, the mandatory bid regime was first introduced by a 1989 law on security and transparency of the financial market[40], was amended by subsequent regulations and resulted in a mandatory public bid by the holder of more than 33,33% of capital, or by the acquirer of at least an additional 2% within less than 1 year who already holds more than one third of the capital[41]; it was lastly supplemented by a right, granted to the holder of 95% of share capital, to propose a public withdrawal offer and by a right granted to the minority to petition the financial market authority to require the majority shareholder to buy all outstanding shares[42]. The Paris Court of Appeal, in exercising its power to review decisions by the financial market authority, has been paying particular attention to the “exit price” paid to minority shareholders in either cases, and has been developing a “theory of equitable price” to scrutinise the adequacy of the price offered[43]. Moreover, a 1993 law[44] introduced a general squeeze-out procedure, allowing the holder of at least 95% of capital to squeeze out remaining shareholders after a buy-out offer has been made to the minority; in this procedure, the adequacy of the price offered must also be ensured and, for this purpose, the offer must submit to the financial market authority a project for the squeeze-out operation, which he is required to assess the shares he intends to buy and to get the acceptance of this assessment from the authority itself[45]. In implementing the Takeover bid Directive, the French legislator extended maintained the 95% threshold, but introduced a new squeeze out procedure which may be made within 3 months of the end of the offer period at the offer price and which, unlike the pre-existing squeeze-out procedure, need not be preceded by a buy-out offer. In any case, as a safeguard of the fairness of the price offered to minority shareholders, the financial market authority reviews the price of all public takeovers on the basis of a well-established multi-valuation criteria.

In Germany, after a self-regulatory takeover regime based on a takeover code of 1995, a general corporate law squeeze-out provision was introduced only in 2001[46], almost at the same time as the national take-over law[47], which ended the self-regulatory regime. Under the general corporate law squeeze out[48] above indicated, although the cash settlement is determined by the principal shareholder, he must provide the general meeting with a written report which the appropriateness of the amount is explained and substantiated; the appropriateness of the cash settlement must be reviewed by one or more expert auditors chosen and appointed by the court

[40] Loi du 2 aout 1989, Sécurité et transparence du marché financier.

[41] Règlement général Conseil de marchés financiers (CMF), Titre V, Chapter V, art. 5-5-2 and 5-5-4; after 2004 Règlement Général de l’Autorité des marchés financiers (AMF), art. 234-2.

[42] Règlement général CMF, Titre V, Chapter VI, art. 5-6-1 to 5-6-4; after 2004 Règlement Général AMF, art. 236-2 and 236-3. The transaction is deemed to take place at the offer price (art. 236-7).

[43] C.Danglehant, Les nouveau statut des minoritaires dans les sociétés anonyms cotées; l’application du principle de l’équité, 1996 Revue des sociétés, p. 217 and A. Couret, L’évolution juridique du cadre, 2002/5 Revue francaise de gestion 377, at 385.

[44] Loi n. 93-444 du 31 décembre 1993.

[45] Règlement Général AMF, Art. 237-1 and 237-2.

[46] Unternehmensubernahme-Regelungsgesetz 2001 (Law on the acquisition of Enterprises), BGBI. I 3822

[47] WpUG (Take over Act), cit.

[48] Art. 327a et seq., AktG.

and a shareholders' meeting resolution is needed to carry out the squeeze-out. Also the national takeover-law, according to which upon reaching a threshold of 30% of the voting stock a shareholder has to make the mandatory bid, repeats the same provision, whereby upon reaching a 95% threshold a shareholder may squeeze out the minority by offering an appropriate cash payment. In the implementation of the Directive, Germany maintained the same threshold as in the general corporate law squeeze-out, but no shareholder resolution is needed to carry out a takeover-related squeeze out falling within the scope of the Directive.

In addition to the conditions for mandatory bid, squeeze out and sell out, another aspect in which the implementation of the Directive diverges in the three Member States relates to an important principle introduced by the Directive itself, but in respect of which options were left to Member States during the negotiation process which lead, through a difficult compromise, to the adoption of the Directive itself. The principle at issue is the board neutrality rule, which prevents the board of the target company, during the bid period, from taking any action which may frustrate the bid without the prior authorisation of shareholders meeting, and which thus allow shareholders the final say on the future of the company. The European Commission's Report on the implementation of the Directive[49] shows that, whereas the UK and France have chosen to apply the board neutrality rule, Germany has not, by making a choice which reflects a preference for a more stable corporate control in comparison with the two other countries. At the same time, from the perspective of minority shareholders, this increases the importance of the protection mechanisms which are different from the "exit" ones and which encourage their activism.

e) enforcement mechanisms

All three jurisdictions - which, with a limited exception for French commercial courts, on a loser-pay principle – allow both direct suits and the equivalent of US derivative suit. Any shareholder who has suffered damages not inflicted on other shareholders can bring (direct) suits to set aside the validity of shareholders' meeting decisions or suit against directors; in case of damage to the company, the derivative suit is available with different rules. Steps to facilitate or to extend the possibilities of enforcement have been taken, in the last years, in all three jurisdictions.

In France, the right to challenge the validity of shareholders' meeting resolution is granted without restrictions, as a shareholder can request the nullification of a resolution even if he was not such at the time of the vote or if he voted in favour[50].
French law has also been always "liberal" in allowing individual shareholders to bring, against directors, actions for damages on behalf of the company (action sociale ut singuli), the basis of which is civil liability, considered in light of directors' duty to act "in the interest of the company". Specifically, directors can be held liable for criminal offences, for violations of provisions of law or of the company's statutes, and for mismanagement of the business due to imprudence or negligence. In alternative to individual suits, more shareholders can act collectively, either by appointing one or some amongst them to represent them if they held from 0,5% to 5% of the share capital depending on the amount of the capital itself, or by using the Association of Interests. From the factual viewpoint, individual shareholder suit has been historically

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[49] Commission Staff Working Paper SEC (2007) 268, 21 February 2007, Reports on the implementation of the Directive on Take-over bid.
[50] Cassation Com. 4 July 1995, RJDA 8-9/95 n. 994

a scarcely effective remedy, because the claimant bears the burden of proof and, to a greater extent, because the shareholder who wins the suit cannot, in commercial court, demand lawyers costs back from the loser whereas the shareholder who loses the suit has also no claim for reimbursement against the company. Nonetheless, recent developments (2003-2006) appear to have made enforcement easier, on the one hand by introducing a simplified procedure for injunctions, on the other hand by facilitating Associations in bringing actions as representatives. The simplified procedure allows any shareholder, who cannot obtain from directors the documentation he is entitled to receive, to ask the court either to order directors to communicate these or to appoint a "mandataire" entrusted to transmit the documents and all expense are to be borne by directors[51]. Associations have been empowered to bring proceedings in case of direct or indirect prejudice to shareholders' rights, and they can obtain a court injunction against directors or other persons whose conduct compromises the exercise of shareholders' rights[52]. Although the Association must itself bear the costs for activating shareholders, there is a benefit in terms of cost reduction, from the viewpoint of individual shareholders, in comparison with personal proceedings.

With regard to derivative suits, the fact that this type of action challenges decisions that cause harm for all shareholders in proportion to their holding implies that, in a context where ownership tend to be concentrated, these action has little significance from the perspective of the protection of minority, non-controlling shareholders from possible abuses by controlling shareholders. Consistently with this reality, the French judiciary has developed a doctrine of "abuse of majority power" to contrast the abuse, by controlling shareholders, of their power which derives from the majority shareholding. Any interested party – individual shareholders or others – who has a personal and legitimate interest can institute a claim on this basis; if the action is successful the court nullifies the decision which constitutes an abuse and awards damages to be paid by controlling shareholders. Again, if more individual investors such as minority shareholders have suffered personal damages which result from an action by the same person (e.g., a controlling shareholder) and which have a common origin, the claim may be brought by an Association of Interest in these investors' name, provided the Association has been entrusted for this purpose by at least 2 amongst the shareholders concerned[53]. The "abuse of majority power" is defined as a decision, taken by the board or by shareholders' meeting, that can be shown to have been made "against the general interest of the company and with the unique intention of favouring the majority to the detriment of the minority"[54]. The standard of scrutiny tends to be more stringent in case of board decisions, because the board is empowered to serve only the interest of the company, and less severe in case of decisions by the shareholders meeting, as shareholders' voting rights may be used to take into account their private objectives as well. Accordingly, poor management or a policy that annoys the minority are not sufficient for there to be an abuse of power; for the abuse to be found, there must be a diversion of power in an illegitimate interest or an unjustifiable breach of equality among shareholders. Tunnelling, and excessive director remuneration decided by shareholder meeting (with the decisive vote of controlling shareholders), have been frequently found to constitute abuse.

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[51] Art. 238-1 of the Code of Commerce, as amended by Ordonnance n. 2004-604, art. 51.

[52] Art. 452-1 of the Monetary and Financial Code, as amended by Loi n. 2003-706, art. 15 and Loi n. 2006-387 art. 26.

[53] Art. 452-2 of the Monetary and Financial Code, as amended by Loi n. 2003-706 art. 126.

[54] Société des Anciens Etablissements Piquard, Com. April 18, 1961, Bull. III, No. 175, D. 1961, at 661.

In Germany, over the last few years noticeable efforts have been made to facilitate enforcement and, at the same time, to minimise strike-suits. As regards the first aspect, since 2005 minority shareholders may bring a suit against members of the management board for mismanagement, in their own name and on behalf of the company, if they hold shares amounting to at least 1% of the share capital or, alternatively, € 100.000,00 and if they pass a preliminary hearing in which the court assesses the merit of the case[55]. In this admission procedure, the claimants need to show that they unsuccessfully asked the supervisory board to bring the suit, that facts justifying a suspicion that the company suffered damages as a result of dishonesty of the management or a gross violation of the law or the company's articles of association, and that from the perspective of the company there are no better reasons for abstaining from suing the officers. If the case is admitted to a full trial, the costs of the proceedings will be borne by the company even if the plaintiff loses on the final judgment, whereas if the preliminary hearing does not support the plaintiff, the latter can still proceed at his own risk. Again, shareholders taking the initiative can use the special section on the Federal Electronic Bulletin to co-ordinate amongst themselves for initiating the preliminary hearing.

According to a principle developed by the courts, in Germany any shareholder owes a duty of loyalty to all other shareholders, which includes a duty to promote the purpose of the company, a prohibition to damage the company and a further duty to exert their rights in a responsible manner. Consistently with this duty of loyalty, shareholders have the right of action to set aside shareholders' meeting resolution, by bringing a suit against the company, not only in cases of infringement or the law or of the company's statutes[56] and on special grounds of defects concerning the election of supervisory board[57], the proposals on profit allocations[58] or the approval of annual financial statements[59], but also in case of decisions which benefit, without justifications, one or more shareholders (such as controlling shareholders) over the others[60]. In this latter situation, every shareholder, whether present or not at the shareholders' meeting, is entitled to sue. This becomes thus a protection for minority rights. Moreover, a shareholder can bring a suit to set aside shareholders meeting's resolution if the suspect the management gave him incorrect or incomplete information. However, to avoid strike-suits, the right to challenge resolutions on ground of incomplete or incorrect information has been limited to the case where an objective shareholder would have considered the information to be essential for an appropriate realisation of his shareholders' rights[61], and the same condition applies where the management refuses to provide information. For the same reason, in case of certain operations – increase or reduction of the share capital or contract to enter a corporate group – a "clearance procedure" has recently been introduced; this procedure allows the court to permit the operation to proceed if the suit is groundless or if the violation of law which are alleged are less onerous to the company and the shareholders than any disadvantage that would be created by stopping the transaction[62]. It must also be noted that Germany, in 2005, took the first step towards

[55] Art. 147a of the AktG, introduced by the 2005 Law concerning corporate integrity and modernisation of the right of avoidance (UMAG).
[56] Art. 243, 1st par., AktG.
[57] Art. 251, AktG
[58] Art. 254 AktG
[59] Art. 257 AktG
[60] Art. 243, 2nd par. AktG.
[61] Art. 243, 4th par., AktG.
[62] Art. 246a, AktG.

the US-style “class actions”, by allowing this kind of actions in case of damage to investors deriving from information failures in the financial markets. Although is limited to suits for damages against securities issuers arising out of wrong or misleading or lacking information concerning listed companies, the mechanism introduced deserves attention for the way in which it facilitates the involvement by the mass of investors. In a preliminary proceeding, the plaintiff must prove that the claim at stake concerns an issue (e.g., wrong information) that can display its effects for other investors and other disputes too. Once satisfied in this respect, the court suspends the proceeding, to allow, within a period of 4 months, at least 9 other claims on the same issue to be brought. For this purpose, all preliminary proceedings are published in electronic form in the Federal bulletin and also disclosed in its Web site, so that other investors, who have not taken the initiative, can easily know the preliminary proceedings already brought and join the claim on the issue at stake. After having received at least the minimum number of claims at the expiry of the period, the court defines the object of a “standard proceeding” and remits it to the appellate court. In this second stage, a leading plaintiff is identified by the appellate court, and all other investors who intervened in the preliminary proceeding are invited to join. In the “standard proceeding”, before the appellate court, the individual investor does not incur the risk of bearing further legal costs and lawyers’ fees, beyond the costs for the technical advice which is necessary to ascertain the issuer’s responsibility and which are shared amongst the plaintiffs in relation to the value of each individual claim. After the appellate court has decided on the merit of the standard proceedings, with a judgment which is binding for the courts before which the proceedings was initially brought, each plaintiff continue its own proceeding for the determination of the amount of damages to which he is entitled before the latter court[63]. Arguably, the generalisation of this mechanism to all actions available to minority shareholders would be the decisive step towards an enforcement regime as effective as the US one.

In the UK, under existing law a minority shareholder can rarely bring an action to challenge decisions taken by majority shareholders. Specifically, in England and Welsh the general principle, developed by the case-law and known as the “Foss v. Harbottle”[64] rule, is that if these decisions has caused damage to the company only the company itself can sue, on ground that a shareholder suit would interfere with the decisions of the board of directors acting within its powers, and would enable the shareholder to replace the company itself as the proper claimant in respect of an alleged wrong done to it. This principle, on the ground that directors owe their fiduciary duties to the company and not to individual shareholders, and that the proper plaintiff is the company, creates a ban to (minority) shareholders’ individual suits on the part of the company (derivative suit) if the decision which the shareholders concerned wish to attack has been adopted by ordinary resolutions of the shareholders’ meeting (simple majority). In addition, if the wrong is capable of being ratified, even if there has been no formal ratification a minority shareholder may not bring a derivative suit. Nonetheless, the case-law[65] has specified that the Foss v. Harbotte rule does not apply in cases of: a) ultra vires decisions, i.e. decisions going beyond the limits imposed by the articles of associations to directors’ powers; b) decisions which, according to the company’s statutes, had to be adopted by a qualified

[63] The working of this class-action mechanism is governed in detail by a law on standard proceedings for the protection of financial investors (Law on Example Procedures for Investor Suits, Kapitalanleger-Musterverfahrengesetz (KapMuG)), in force since 2005.
[64] (1843) 2 Hare 461
[65] Edwards v. Halliwell [1950] 2 All ER 1064

majority but which were adopted by ordinary resolution; c) fraud on the minority, i.e. decisions taken purposely to prejudice minority shareholders; d) damage to individual shareholder's personal interests. Whereas the cases in a), b) and d) refers to situations which, by their very nature, fall outside the scope of the Foss. v. Harbottle principle, the key exception to the application of this principle is to be found in case c), i.e. where there would be a fraud on the minority if this wrong were allowed to stand. This can be the cases, e.g., where there has been an expropriation of company property or dishonest behaviour by a director, and the company is improperly prevented from bringing proceedings against the directors by the majority shareholders perhaps because the wrongdoing director controls the majority of votes. In Scotland, substantive law confers shareholders the right to bring action in their own name but on behalf of the company when the decision is fraudulent or ultra vires and so cannot be validated by a majority of shareholders, unless the majority of shareholders acting in good faith have validated or may validate the act.

The new Companies Act allows shareholders to bring suits in two cases: in respect of a cause of action vested in the company, and seeking relief on behalf of the company, in two situations: in case of negligence, default, breach of duty or breach of trust by a director[66], and for protection of shareholders against unfair prejudice[67]. As regards England and Welsh, the new legislation, when allowing the derivative suit for negligence, default, breach of duty or breach of trust by a director, does not formulate substantive rules for replacing the Foss v. Harbottle rule, but makes available the derivative suit for breach of directors' duty to exercise reasonable care, skills and diligence, even if the directors has not benefited personally, and does not require the applicant to show that the wrongdoing directors controls the majority of company's shares. However, the bringing of the action is subject to a two stages procedure, before the substantive suits begins. In the first stage the applicant must provide a prima facie case for being allowed to continue the claim, and the court must consider the issue on the basis of evidence provided by the applicant only; at this stage, the court must dismiss the application if what is filed does not demonstrate a prima facie case and may take any consequential order that it consider appropriate, e.g. a cost order. If the applicant is successful in the first stage, in the second stage the court may require evidence to be provided by the company, and the Companies Act indicates the criteria that the court must take into account in deciding whether to allow the claim, and provides that it must refuse to allow the action to continue if it is satisfied that: a person acting in accordance with directors' duty to promote the success of the company would not seek to continue the claim; the cause of action arises from an act or omission that is yet to occur has been authorised by the company or an act or omission which has occurred was authorised by the company before it occurred or has been ratified since it occurred. Among other factors, in considering whether to grant permission to continue the claim the court must have particular regard to any evidence before it concerning the views of shareholders who have no personal interest, direct or indirect, in the matter.

The protection of shareholders against unfair prejudice is offered, in the new legislation[68], by allowing an individual shareholder to seek judicial remedy if the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interest of the members generally or of some part of its members

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[66] Part 11, s. 260

[67] Part 30, s. 994

[68] By reinstating provisions of the previous Companies Act 1985 (s. 459).

(such as minority shareholders), or if the proposed act or omission is or would be so prejudicial. A (minority) shareholder bringing action on ground of unfair prejudice must show that "the value of his shareholding in the company has been seriously diminished or at least seriously jeopardised by reason of a course of conduct by those persons who have had de facto control of the company, which is unfair to the member concerned"[69]. The court has discretion as regards the type of redress that it may adopt if it finds the claim to be well grounded; the action for unfair prejudice has proven to be more effective than a derivative action under the Foss v. Harbottle rule. As a last remedy available to minority shareholders who consider their position in the company to be compromised and who are prevented from bringing the derivative claim by the Fosse v. Harbottle rule, they may apply to the court for obtaining the winding up of the company[70], which would be ordered if the court considers it to be "just and equitable". However, the court may not order the winding up if alternative solutions are possible, such as an "exit mechanism" for the plaintiff lying in the acquisition of his shares by majority shareholders.

2.2.2. …and the indirect protection

In addition to disclosure requirements and to the prohibition of insider dealing, the main provisions which are intended to contribute to the protection of minority shareholders generally rely on:

a) the separation of functions and, in general, the establishment of "checks and balances" systems within company's structure, which, starting from the well-known UK's Cadbury Code (1992), has inspired the adoption of Corporate Governance Codes, i.e. "codes of best practice" generally requiring companies to comply with the rules that they indicate or to explain deviations from these rules, in many EC and OECD countries, and which has also been an area of EC intervention through measures adopted in the implementation of the APCLCG, namely the 2005 Commission's recommendation on the role of non-executive or supervisory directors of listed companies and on the committee of the (supervisory) board[71] and, as regards the audit function and the responsibility of board members for the disclosure of financial information, Directive 2006/43/EC[72] and Directive 2006/46/EC[73];

b) special majorities for particular shareholders decisions, on the ground that a supermajority, which from the viewpoint of controlling shareholders may be more difficult to reach than a simple majority, offers a better possibility for minority shareholders to take an active part in decision-making;

c) a directors' duty of loyalty intended as a duty not to put personal interests ahead of the company and of all its shareholders, and, in relation to this duty, a special discipline of possible situations of conflicts of interests between controlling shareholders or a management which is the expression of controlling shareholders and minority shareholders; an important aspect within this area, directors' remuneration

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[69] Re RA Noble (Clothing) Ltd (1983) BCLC 273.
[70] s. 122(1) Insolvency Act 1986.
[71] Commission Recommendation 2005/162/EC of 15 February 2005.
[72] Directive 2006/43/EC of 09 June 2006, in 2006 OJ L 157/87
[73] Directive 2006/46/EC of 14 June 2006, in 2006 OJ L 224/1

policy, has been the focus of a 2004 European Commission's Recommendation on a remuneration regime[74]
d) a duty of care and the definition of the "corporate objective", i.e. of the ultimate objective to be pursued by management.

a) As regards the EC measures which can be considered as falling in the area of "checks and balances", the 2005 Commissions' Recommendation invites Member States to introduce a set of provisions concerning the role of non-executive or supervisory directors and the role of the committees of the supervisory board, to be used by listed companies, and it provided guidelines in this respect. This soft-law piece recommends:
-the separation of the role of chief executive director (CEO) and board or supervisory board chairman (depending on the one – tier or two – tier system adopted by Member States);
- a sufficient number of independent directors on the board or on the supervisory board, which, together with a set of independence criteria indicated by the Recommendation, is regarded as regarded as a key criteria to ensure that directors do not represent solely the interest of controlling shareholders;
- the creation of nomination, remuneration and audit committees within the (supervisory) boards in cases where these tasks are not the direct responsibility of shareholders;
- a strong presence of independent directors in board committees and clear delineation of the role of these committees and, specifically, an at least majority number of independent non-executive or supervisory directors in the nomination committee, and the exclusive presence of non-executive or supervisory directors, the majority of whom should be independent, in the remuneration and in the audit committees;
- transparency on independent board directors, through the disclosure of the competences of individual directors and of adequate information on the board's determination of the directors' independence;
- high standards on qualifications and commitments of (supervisory board) members, to allow the required diversity of knowledge, judgement and experience to properly complete their tasks, to ensure specific financial and accounting knowledge in case of members of the audit committee, to limit directors' other commitments and ensure that the latter are disclosed.

A recent Commission's report on the application of the Recommendation by Member States[75] has shown a different situation in the three jurisdictions considered. Almost all recommendations have been implemented in the UK, where all criteria concerning independence, transparency and roles of committees are satisfied and only the recommendation to require disclosure of directors' other commitments is not implemented. By contrast, in France the separation of the role of CEO and board chairman and the requirement of special knowledge for audit committee are not implemented. As regards the roles of CEO and board chairman, the concentration of

[74] Commission Recommendation of 14 December 2004, 2004/913/EC, fostering an appropriate regime for the remuneration of directors of listed companies

[75] Commission Staff Working Paper, SEC(2007) 1021,13 July 2007, Report on the application by the Member States of the EU of the Commission Recommendation on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board

both powers in one person is allowed and the national Corporate Governance Code, in explaining that the law permits as organisational structures a dual board or a single board with or without the separation between the CEO and the chairman, only recommends that whatever option chosen by the company should be explained to shareholders. In Germany, the independence requirement does not appear to be implemented, as the absence of close links between board members and controlling shareholders, which is one of the main criteria listed by the Commission, is not recommended at all, and the Corporate Governance Code, which only requires the supervisory board to include what it considers to be an adequate number of independent members, considers a supervisory board member to be independent if he has no business or personal relations with the company or its management board which causes a conflicts of interests. Moreover, whereas in both the UK and France the creation of a remuneration committee is required on a comply or explain basis, in Germany it is recommended only and deviations from this rule does not need to be explained.

Despite its non-binding nature, which has resulted in the non implementation of some of its key recommendations, the Commission's Recommendation owe its importance to the stated objective of promoting standards ensuring that boards of listed companies offer sufficient guarantees of independence and, in doing so, of promoting the convergence of national corporate governance codes and, ultimately, of allowing investors to benefit from an equivalent level of protection and transparency throughout the EC. At the current stage of the Recommendation implementation, its limits in achieving this goal will be able to be outweigh in part by Directive 2003/43, to be transposed by the end of June 2008, which has extended to all EC listed companies the obligation to have an audit committee or a body performing equivalent functions, and to a greater extent by Directive 2006/46, to be transposed into national law by September 2008. This Directive increases the financial and non-financial information to be disclosed by companies, in particular by listed companies which are required to include a corporate governance statement in annual reports, and establishes the collective responsibility of all board members for all information disclosed and for the corporate governance report. Whereas the additional financial and non-financial information to be disclosed include off-balance items and transactions with related parties, the information to be provided for in the corporate governance report must include at least: the corporate governance practices actually applied, including a description of the main features of any existing risk management systems and internal controls in relation to the financial reporting process; the operation of the shareholders meeting and its key powers, and a description of shareholders' rights and how they can be exercised; the composition and operation of administrative, management and supervisory bodies and their committees. The corporate governance report required by the Directive, which latter is formulated in clear and precise terms and thus deemed to have direct effect if not timely and/or properly implemented, allows (minority) shareholders to have a complete and easy knowledge of their rights and of the composition and operation of the same organs whose independence and proper functioning has been addressed by the Commission Recommendation; this can allow shareholders, together with the additional financial and non-financial information, to assess the proper working of the internal "checks and balances" system and thus the reduction of the risks of failures of this system.

b) Qualified majority requirements extend to a wider range of shareholders decisions in France and in Germany than in the UK, although they are common to all three jurisdictions in cases of changes in bylaws or articles of association, capital increases, mergers and change of corporate purpose (table below),

Qualified majorities required for:	Changes in bylaws articles of association	Capital increase/ share issuance or other equity securities	Bonds issuance	Capital reduction/ Share buy backs	Mergers	Sales of all assets	Change of corporate purpose	Vol. liquid.
France	2/3	2/3		2/3	2/3		2/3	2/3
Germany	3/4	3/4	3/4	¾	¾	3/4	3/4	3/4
UK	3/4	50% + 1			¾		3/4	

c) The most important of the individual principle amongst the OECD Principles, which concerns directors' duties, states that "Board members should act on a fully informed basis, in good faith, with due diligence and care and in the best interest of the company and its shareholders" and, in this statement, it indicates as key elements a duty of care ("..act on a fully informed basis, in good faith, with due diligence and care") and a duty of loyalty ("..in the best interest of the company and its shareholders").

The duty of loyalty to the company and to *all* its shareholders, which is regarded by the Principles as a key to protecting minority shareholders[76], underpins the effective implementation of other principles relating to, e.g., the equitable treatment of shareholders, monitoring of related party transactions and the establishment of remuneration policy for key executive and board members[77], which principle are ultimately aimed at detecting possible conflicts of interests and preventing abusive self-dealings. In this respect, solutions are offered in all three jurisdictions, which solutions generally consist in the pre-authorisations of particular transactions, and, as regards remuneration policy, were recommended by the Commission.

In France, a special regime which has long been in existence for directors'-related party transactions has been extended in recent years, by laws[78] intended to strengthen the protection of minority shareholders, to transactions involving significant shareholders. Specifically, the Code of Commerce requires that all transactions between the company and board members, including those with parties related to board members - unless these transactions are considered to be "current transactions entered into at normal conditions" - must receive the prior approval by the board, must be communicated to auditors, who prepare a special report on these transactions, and must be ratified by the general shareholders meeting by means of a resolution on the auditors' special report[79]. This regime of approval by the board and ratification by shareholder meeting also applies to transactions involving any shareholder holding more than 10% of the voting rights or the parent company, and, in shareholders'

[76] OECD Principles, 2004, Annotations, p. 42.
[77] OECD Principles, 2004, Annotations, p. 59.
[78] Loi n. 2001-420, Art. 105 and Art. 111, and Loi n. 2003-706, Art. 123, which have amended Arts 225-38 et seq. of the Code of Commerce.
[79] Arts 225-38 et seq.

meeting called upon to vote on transactions involving these significant shareholders, the shareholder concerned does not enjoy voting rights and his shares are not considered in the determination of the quorum and of the majority for deliberation. Moreover, in listed companies, this regime has been further extended in 2005 to executive compensation schemes which grant board members a lump-sum bonus at the time of appointment or dismissal[80]. Lastly, in principle the law prevents individuals who are board members or related parties from receiving loans or any form of security from the company[81] . Uniquely amongst all jurisdictions considered, in France the self-dealings transactions above indicated, in case that the required the ex ante authorisation of the board was not obtained and the transaction have produced damages to the company, can be annulled at the initiative of individual shareholders, who have standing to bring a claim for this purpose[82].

In Germany, the concern to prevent conflicts of interest is addressed in relation to both members of the management board and members of the supervisory board, which are all bound by the enterprise's best interest. The Stock Corporation Act establishes a prohibition to compete with the company[83] , does not allow companies to grant a credit to the board members[84] and limits self-dealing transactions[85], whose regulation is also indicated in detail in the Corporate Governance Code. This latter specifies that neither members of one of these bodies may pursue personal interests in his decisions or use, for himself, business opportunities intended for the company. Members of the management board may not, in connection with their work, demand or accept from third parties payments or other advantages for themselves or for any other person nor grant third parties unlawful advantages, and, in case of operations in which he can have a personal interest contrasting with that of the company, any member of the management board must inform the other members and disclose the conflicts of interests to the supervisory board without delay. All transactions between the company and members of the management board must comply with market conditions which are standards customary in the specific sectors, and important self-dealing transactions must be approved by the supervisory board. The approval of the supervisory board is also required for members of the management board to be able to take on sideline activities, such as supervisory board mandates in other companies. In turn, each member of the supervisory board must inform all other members of any conflicts of interest which may result from a role of consultant or directorship function with clients, suppliers, lenders or other business partners, and, in its report to the shareholders' meeting, the supervisory board must inform shareholders about any conflicts of interest which have occurred and about the manner in which these have been overcome. The conflicts of interests which are not temporary ones determine the termination of the mandate. Moreover, a member of the supervisory board can enter advisory and other service agreements and contract for work with the company only with the supervisory board's approval; lastly, another category of operations which is regarded as potential source of conflicts of interests, namely dealings by members of the management and/or supervisory board in shares of the company, and, in this respect, the ownership by management board or supervisory board members of share

[80] Art. 225-42-1.
[81] Art. 225-43.
[82] Art. 225-42 of the Code of Commerce, as amended by Loi n. 2001-420, and CA Amiens, 1 December 1966, Recueil Dalloz 1967, p. 234.
[83] S. 88 AktG.
[84] S. 89, 115 AktG.
[85] S. 112 AktG.

ownership exceeding 1% must be disclosed in the corporate governance report. In Germany, individual shareholders, unlike shareholders in France, do not have standing to challenge management board resolutions concerning self-dealing transactions entered into without the required authorisation of the supervisory board, as only the power to sue members of the management board for breach of duties rests with the supervisory board, which may be required to do so by either a general shareholders' meeting vote by simple majority or by minority shareholders. As previously indicated[86], in 2005 the necessary minority shareholders threshold has been lowered, and this offers a better protection to minority shareholders in case of a supervisory board reluctant to bring suits against the management board (which the common case, given that a suit against the management board for breach of duties would indicate a failure by the supervisory board to exercise effectively its monitoring role).

The unique institution offered by the German legislator to prevent conflicts of interest between controlling and minority shareholders can be found in a specialised area of corporate law dealing with groups ("Konzernrecht"), which indicates specific duties of loyalty that controlling shareholders owe to minority shareholders. Controlling shareholders have a choice between entering into a formal control agreement with minority shareholders or taking control of the company without this agreement. If controlling shareholders decide in favour of such an agreement, they must offer an adequate compensation, which must induce a dividend guarantee and an offer to buy the outstanding shares. This mandatory compensation is subject to review and report by public accountants; subsequently, a separate meeting of minority shareholders is called upon to decide about the agreement, but the compensation remains subject to judicial review ex post. After the control agreement is entered into, the equity investment by minority shareholders is transformed into a debt-like security issued by dominant shareholders, and the majority owners are relieved from various formalities in directing the company's businesses, although the company continues to hold annual meetings. If the controlling shareholders choose not to enter the agreement, they must not influence the business to their advantage without immediate financial compensation to the company: in this respect, specific means of protection for minority shareholders include mandatory disclosure by the board of management, a review, by public accountants, of management conduct concerning corporate opportunities and assets diversion, and liability in cases of misconduct. Transactions amongst affiliated companies – which may represent avenues for assets diversion by controlling shareholders – must be described in an annual report of control relationships, which must be prepared by independent auditors and aims at ensuring that these transactions takes places at arm's –length prices.

In the UK, several provisions of the new Companies Act address potential conflicts of interests situation. A director of a company must avoid a situation in which he has or can have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company, which applies in particular to the exploitation of any property, information or opportunity[87]. Nevertheless, this duty is not infringed if the situation "cannot reasonably be regarded as likely to give rise to a conflict of interest" or if the matter has been authorised by directors; in turn, the authorisation is effective only if any requirement concerning the quorum at the meeting at which the matter is considered is met without counting the director concerned or any other interested

[86] Retro, 2.2.1, e)
[87] Art. 175-177

director, and the matter was agreed to without their voting or would have been agreed to if their votes had not been counted. In relation to transactions or arrangements between the directors and the company, the director of a company must declare, to other directors, the nature and extent of any interest both in a proposed transaction or arrangement and in existing transactions or arrangements[88]. Moreover, specific transactions with directors require shareholders' approval[89]: directors' long-term service contracts; substantial property transactions, i.e. purchases and sales of substantial non-cash assets between a director and the company, where an asset is regarded as substantial if its value exceeds 10% of the company's and is more than 5.000,00 £. or exceeds 100.000,00 £.; loans to directors, quasi-loans and credit transactions; payments for loss of office. In connection with the requirement of shareholders' approval for loans to directors, quasi-loans and credit transactions, a resolution approving the transaction must not be passed unless a memorandum specifying the nature, the amount, the purpose of the transaction and the extent of the company's liability under any connected transaction is made available to shareholders. This availability can be ensured either by sending or submitting the memorandum to each shareholder at or before the time the proposed resolution is submitted to him, in the case of a written resolution, or by making the memorandum available for inspection by shareholders both at the company's registered office for at least 15 days before the meeting and at the meeting itself. The approval for substantial property transaction is not required for transactions between the company and a shareholder[90]. In case of transactions entered into between the company and any directors without the required shareholders approval, these transactions are, in principle, voidable at the instance of the company, and give rise to the concerned directors' liability towards the company itself.

One of the typical issue in which a conflict of interest between shareholders and management can emerge, the directors' remuneration policy, has been addressed by the 2004 Commission's Recommendation on directors' remuneration, which mainly invites Member States to require: the disclosure of remuneration policy, for the purpose of strengthening accountability to shareholders; the shareholders' vote on remuneration policy, on the assumption that shareholders can influence the company's remuneration policy solely through debate and vote at the general meeting; the disclosure of the remuneration of individual directors, and the disclosure of each remuneration component, to allow shareholders to assess the remuneration in light of the company's performance; the prior approval of share and share options-based schemes by shareholders' meeting, in order to limit the potentially negative effects that these schemes may generate on directors' conduct, e.g. in terms of "temptation" to overstate the reported financial performance of the company to which shares price is linked.

The Commission's report on the implementation of the Recommendation[91] shows that, amongst the three jurisdictions under consideration, only the UK has implemented all the recommendations. Whereas the recommendations concerning the disclosure of remuneration policy, the shareholders' vote on remuneration policy and the disclosure of the remuneration of individual directors are implemented on a "comply or explain" basis, the prior shareholders approval of share and share options

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[88] Art. 179-186
[89] Art. 188-226
[90] Art. 192
[91] Commission Staff Working Paper, SEC(2007) 1022, 13 July 2007, Report on the application by Member States of the EU of the Commission Recommendation on directors' remuneration.

based remuneration schemes is required by law. France – where the disclosure on remuneration policy, the general meeting vote on this policy and the disclosure of remuneration of individual board members are required by law - has implemented only in part the recommendation concerning the prior shareholders approval of share and share options based remuneration schemes. In fact, the general meeting decides on share options only, and determine the main conditions of the granting process for the benefit of the management only. In Germany, the recommendations on disclosure of remuneration policy, shareholders' vote on remuneration policy and disclosure of remuneration of individual board members are all partly implemented. The remuneration policy is disclosed to a different extent for the members of the management board and of the supervisory board. For management board members, the Corporate Governance Code, on a comply or explain basis, requires the chairman of the supervisory board to outline the salient points of the compensation system and any changes thereto to shareholders' meeting, whereas disclosure of the policy on supervisory board members' remuneration is recommended without a comply or explain obligation. A resolution of shareholders' meeting is required for the remuneration of supervisory board members, and, because the criteria for this remuneration are specifically indicated in the responsibilities and scope of their tasks as well as in the economic situation and performance of the company, the approval of remuneration policy appear to be in part required, but the remuneration policy of management board members is not subject to a specific approval of the general meeting. Lastly, disclosure of remuneration of each management board members is required as a default rule, as it can be excluded by the general shareholders' meeting by 75% majority.

d) As regards the duty of care, i.e. the duty to act on a fully informed base, in good faith, with due diligence and care in pursuing the corporate objective, the three jurisdictions use either expressly or implicitly a standard of reference, and apply either a "business judgement rule", in the case of Germany, or equivalent criteria, in the case of France and the UK.

Specifically, in France the corporate objective is identified in the "interest of the company", described as "*the overriding claim of the company considered as a separate economic agent*, pursuing its own objectives which are distinct from those of shareholders, employees, creditors including the internal revenue authorities, suppliers and customers, *which nonetheless represents the common interest* of all these persons, which is for the company to remain in business and to prosper'[92]. The continuity and the prosperity over time of the business enterprise is thus the ultimate purpose to be pursued, by adopting the behaviour of a reasonably prudent person. This standard of reference appears to emerge from the fact that directors do not incur liability for errors of business judgement, unless negligence is ascertained; courts are in general reluctant to second guess directors' decisions and use discretion in

[92] See 'Le conseil d'administration des sociétés cotees', Rapport du group du travail Association Française des Entreprises Privées Conseil National du Patronat Français (Vienot 1 Code), 1995, p. 8, emphasis added.

verifying whether negligence has occurred, but, when this is the case, directors are liable without any restrictions[93].

In Germany, the jurisdiction which has been consistently indicated as the one more oriented towards the "stakeholder model" of companies according to which companies have to be managed in the interests of both shareholders and all other constituencies, the Corporate Governance Code specifies that the management board is responsible for independently managing the enterprise and that, in so doing, it is obliged to act in the enterprise's best interest and "undertakes to *increase the sustainable value of the enterprise*"[94] . The duty of care that applies in pursuance of this corporate objective requires both management and supervisory board members to act with the due care and diligence of "a prudent and conscientious" person[95]. The German legislator has codified in 2005 the "business judgment rule" developed in the US and introduced in Germany by the courts; according to this rule, in case of business decisions an infringement of duty is not present if the member of the management or supervisory board could reasonably believe, by gathering appropriate information and avoiding gross negligence, that he was acting in the best interest of the company. However, where this negligence is found, the law establishes a comprehensive liability.

In the UK, s. 172(1) of the new Companies Act has codified the corporate objective in terms of "enlightened shareholder value", by requiring a director to "..act in a way that he considers, in good faith, would be most likely to promote the *success of the company for the benefit of its members as a whole*, and in doing so have regard (amongst other matters) to - (a)The likely consequences of any decision in the long term; (b) the interests of the company's employees; (c)the need to foster the company's business relationships with suppliers, customers and others; (d)the impact of the company's operations on the community and the environment; (e)the desirability of the company maintaining a reputation for high standards of business conduct, and (f)the need to act fairly between the members of the company."
Interestingly, this new codification, in a jurisdiction which has been traditionally regarded as embracing the "shareholder primacy" approach, i.e. as prioritising the interest of shareholders over the concerns of other categories of corporate constituencies, was originated by the awareness that the promotion of the interests of shareholders usually require the interests of other constituencies – listed in s. 172(1) – to be promoted too, and that, at the turn of the century, a wide perception by directors of their duties had indicated as the primary goal the short-term increase of share prices, at the expense of the long-term financial health of the business[96]. The provision at stake has been regarded, by commentators, as embracing an inclusive but not stakeholder model of the company, as it has been stressed that, under this provision, when the interests of shareholders clash with those of other constituencies

[93] Y.Djehane, Responsabilité des organs de la société et de surveillance en Europe: réflexions issues d'études des cas relatifs à la responsabilité des organs exécutifs en France, 2005 Zeitschrift fur Schweizerisches Recht 124

[94] German Corporate Governance Code, p. 6.
[95] Ibid and AktG s. 93
[96] J. Parkinson, Inclusive Company Law, Ch. 2, in J.de Lacy (eds), The Reform of United Kingdom Company Law, Cavedish Publishing, 2002

directors must give priority to shareholders' interests by promoting the success of the company for the benefit of all shareholders[97]. However, a definition of success of the company was omitted in the provision - although ministerial statements indicated that "success of the company" means what shareholders collectively intend to achieve and, for commercial companies, it normally means long-term increase in value - and directors, in pursuing this objective, must exercise the same standards of care, skills and judgment that would be exercised by a reasonably diligent person with the general knowledge, skills and experience that may be expected for carrying out the same functions as the director in relation to the company at issue (an objective test), and with the general knowledge, skills and experience the director actually has (a subjective test)[98]. As regards potential directors' liability, Governmental Explanatory Notes have specified that the corporate objective in terms of success of the company "does not require a director to do more than good faith and the duty to exercise reasonable care, skill and diligence would require, nor would it be possible for a directors acting in good faith to be held liable for a process failure which would not have affected his decision as to which course of action would best promote the success of the company"[99], and that "the decision as to what will promote the success of the company, and what constitutes such success, is one for the director's good faith judgment'[100], which "ensures that business decisions on, for example, strategy and tactics are for the directors, and not subject to decision by the court, subject to good faith"[101]. Commentators[102] have argued that courts, which have traditionally been reluctant to second guess business decisions, will not change this attitude, and that what will continue to apply is a "subjectivisation" of liability developed by the case-law[103] and applied up to date, which produces the same outcome as a business judgment rule.

Although the formulation of the corporate objective in the three countries (continuation and prosperity over time of the business enterprise; increase of the sustainable value of the enterprise; the success of the company for the benefit of the members as a whole) tend to express similar concepts in different words, and the business judgment rule tend or its equivalent tend to safeguard managerial discretion, it can be noted that in Germany, in disputes about whether any management board member acted in due care brought following a damage to the company (and thus, indirectly, to minority shareholders too) a violation of the duty of care is deduced, unless the board member concerned proves otherwise (although, in so doing, he is facilitated by the business judgment rule). The rule, which is intended to facilitate the supervisory board – which has standing to bring the action on behalf of the company against the managers - in its monitoring the management board, would be however of little practical effect in cases where both the supervisory board and the management board were influenced by controlling shareholders and these have taken personal advantages from operations generating on the whole a damage to the company, as the supervisory board could be

[97] Ibid, also P.L.Davies, Enlightened Shareholder Value and the New Responsibilities of Directors, inaugural WE Hearn Lecture, p. 5.
[98] See s. 174 of the Companies Act 2006.
[99] UK Government Explanatory Note, 2007, note 328, p. 51
[100] Ibid, note 327, p. 50
[101] Ibid.
[102] P.L.Davies, cit; also A.Keay, Enlightened shareholder value, the reform of the duties of company directors and the corporate objective, in 2006 Llyoyd's Marittime and Commercial Law Quarterly 335
[103] E.g., Re Smith & Fawlett Ltd, [1942] Ch. 304 at 306; Howard Smith Ltd v. Ampol Petroleum [1974] A.C. 821 at 832.

expected in these situations to collude with the management board. The recently introduced provision aimed at increasing minority shareholders powers to sue derivatively, by granting them this right if representing 1% of the share capital or 100.000,00 €, which has lowered the threshold previously consisting of 10% of capital or 1 million €, was aimed at offering a better remedy against these situations.

2.3. A comparative assessment and the partial fallacy of the comparison

If the US and the three EC jurisdictions considered here are assessed against each others, the differences and the similarities which emerge from the comparative view, and in light of the OECD Principles, may be recapitulated as follows.

The clear differences lie in the stronger "voice" and "monitoring" mechanisms available to minority shareholders in France and in Germany than in the US, with the UK in the between, and in the wider possibility for minorities in France and Germany to affect extraordinary shareholders' meeting decisions thanks to the qualified majority requirements, and, on the other hand, in the stronger "checks and balances" mechanisms in the two Anglo-Saxon countries than in both France and Germany; these stronger checks and balances appears to be evident for the US in the Sarbanes-Oxley Act requirements and, for the UK, in the fact that the European Commission's Recommendation concerning independent directors can be seen as (almost) fully implemented only in this jurisdiction. As regards the voice and monitoring mechanisms, the comparison clearly shows greater possibilities for minority shareholders of French and German companies to interact with management in the formation and alteration of the general meeting agenda, and to activate special audits, than for shareholders in both the US and the UK. The limitations implied on the effectiveness of these kind of rights - which may derive from the threshold requirements, from co-ordination costs and from the fact that in the two continental European jurisdictions the ownership is far more concentrated than in the US and the UK, which implies a management elected ultimately by the controlling shareholders – are being gradually removed by the increased facilitation of coordinated initiatives among minority shareholders, through the Association of Interests in France and the new special section of the Federal Electronic Bulletin in Germany. While strong checks and balances mechanisms, which were first recommended in the UK by the Cadbury Code, are certainly a key to protection of shareholders against management and of minority shareholders against controlling shareholders, and are fully consistent with the OECD principle requiring the equitable treatment of all shareholders[104], the steps undertaken in both France and Germany are capable of increasing the minorities protection in these two jurisdictions too and are certainly consistent with the objectives indicated by the OECD as regards the rights of shareholders and key ownership function: in fact, according to the Principles, "the corporate governance framework should protect and facilitate the exercise of shareholders' rights"[105] and, for this purpose, (all) shareholders should, inter alia, have the opportunity to ask questions to the board, to place items on the general meeting agenda and to propose resolutions, "subject to reasonable limitations"[106], as well as to participate effectively in key decisions. In addition, the comparative view show that these kinds of differences, concerning the rule in place, tend to decrease: whereas in the US, after

[104] OECD Principles. p. 20
[105] OECD Principles, p. 18
[106] Ibid.

the corporate collapses, “voice mechanisms” have been increased[107] and in the UK the introduction of the Shareholders Right Directive is deemed to play the role of strengthening these mechanisms, in both France and Germany the desire to attract international investors, and the likely Commission’s continued efforts to press for the compliance with the Recommendation on independent directors, are deemed to enhance the checks and balances systems, which the respective Corporate Governance codes have already introduced.

The similarities emerge in a key aspect concerning non controlling shareholders and the overall corporate objective, in addition to disclosure and transparency requirements and to the liability concerning this disclosure. Disclosure requirements, as the literature has already documented[108], are converging towards the Anglo-Saxon standards - an important example may easily be found in the requirement both in the Sarbanes-Oxley Act and in the EC Directive 2006/46 to disclose off-balance sheets transactions – and the consequent similarities extend to the responsibility for the reliability of information disclosed, as proved by the certification by both the CEO and the CEF imposed by the Sarbanes-Oxley Act and by the collective responsibility of all board members required by the Directive 2006/46. The similarity in the key aspect regarding non controlling shareholders in their relation with controlling shareholders is evidenced by the minority oppression doctrine in the US, by the abuse of majority power doctrine in France, by the duty of mutual loyalty of shareholders towards each others in Germany and by the fraud on minority case in the UK, all of which share the same purpose to contrast majority shareholders behaviours which are clearly directed against the minority, have the potential for (further) development by the judiciary and pursue the objective indicated by the OECD Principles in the Chapter devoted to the equitable treatment of shareholders, whereby “Minority shareholders should be protected from abuse action by, or in the interest of, controlling shareholders..”[109]. The achievement of this goal indicated by the OECD – towards which, ultimately, is also directed, if management is the expression of controlling shareholders, the regulation which is aimed in all jurisdictions at preventing possible conflicts of interests situation arising in self-dealings, and which is related to directors’ duty of loyalty to the company and to *all* shareholders - could however not be considered without the enforcement aspect. The OECD principle completes the statement by specifying that minority shareholders “..should have effective means of redress”. In this respect, the remedies against cases of damages inflicted on minority shareholders by resolutions adopted at the general meeting (with controlling shareholders’ determinant vote), and the remedies against cases of damages to the minority caused by decisions of directors who, in having regard, by assumption, only to the interest of controlling shareholders, infringe the duty of loyalty to the company and to all shareholders, come both into play. Direct suits result, in all jurisdictions, more effective than derivative suits, by reason of the procedural hurdles on the latter – as it occurs in the US and the UK - or in any case of to the scarce incentive towards their use, as it is the case in France and, in part, Germany, where, however, the new pre-hearing procedure, which allows minority shareholders holding a very low threshold to proceed free of costs in case of favourable court’s preliminary assessment encourages their activism through this

[107] See retro, 2.2.1, the reference to the extension of shareholders’ competences to the approval of share based board’s compensation plans.

[108] G. Markarian, A.Parbonetti, G.J.Previts, The Convergence of Disclosure and Governance Practices in the World’s Largest Firms, 2007 Corporate Governance 294.

[109] OECD Principles, p. 20, A.2.

route. On the other hand, the class-action mechanism, and lawyers' contingency fees, have clearly given US shareholders an advantage – in comparison with minority shareholders in the other jurisdictions - in either direct or derivative suits. However, similarities are gradually emerging in this respect too, as demonstrated by the facilitation of enforcement by Associations of Interest in France and by a class action procedure introduced by Germany in 2005 against cases of alleged company's false statements when issuing shares, and are probably deemed to result in class-actions being introduced in Europe in light of a seemingly general support recently expressed[110]. Furthermore, the similarities can be noted as regards the duty of care which has to be applied in pursuing the corporate objective too, and, ultimately, in the corporate objective. The shareholders' interests primacy in the US, the continuation of the business activity in France, the increase of the sustainable value of the enterprise in Germany and the success of the company for the benefit of the member as a whole (enlightened shareholder value) in the UK are all directed, ultimately, at stating the condition in order for minority shareholders' rights to be exercised over time towards other shareholders and/or towards the management, and for their investment in the company to be safeguarded. In this respect, however, the corporate objective as stated in France, Germany and the UK also brings directly into consideration the "objective aspect" of these investors protection, as it will be subsequently emphasized in paragraph 4.

Whereas the differences and the similarities, taken together, seem to suggest that, at present, France and Germany, through the (still) comparatively stronger voice and monitoring mechanisms have gone farther in the implementation of the OECD principle relating to the facilitation of shareholders' involvement, whereas the US and the UK, through the (still) comparatively stronger checks and balances and in particular for the US through the (still) comparative advantage offered by the class action mechanism, have gone father in the implementation of the OECD principle requiring the equitable treatment of shareholders, such a comparative assessment also reveals a partial fallacy, and not only because of the gradual convergence above indicated which may deprive, to some extent, this kind of assessment of its own purpose. The partial fallacy derives from the fact that, as noted by the Methodology, jurisdictions need to be ranked not against each others but in relation to what they can and need to achieve[111], to secure investors protection, in light of their own internal situation. This implies that each jurisdiction, as regards the "subjective" aspect of minority shareholders' protection, needs to ensure the *most suitable legal tools in light of the structure and patterns of corporate ownership in that jurisdiction*. E.g., it can thus be argued that, in assessing the effective implementation of the OECD principle whereby shareholders should have the opportunity to ask questions to the board, to place items on the general meeting agenda and to propose resolutions, "subject to reasonable limitations", the reasonableness of the limitations depends on the link between management and controlling shareholders: the closer the link, the lower need to be the limitations – in general - on minority shareholders' voice mechanisms and the greater the extent to which monitoring mechanisms need to be enhanced. In this sense, the overall stronger and monitoring voice mechanisms in France and Germany appears to be appropriate in light of the concentrated ownership structure, and the same applies to devices, such as the double voting right in France and the requirement of two-years ownership for registering an Association of Interest,

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[110] See C.Byrne and C.O'Reilly, "Sarkozy, U.S. Lawyers Shift Class-Action Suits to Europe", in The New York Sun, Foreign, 25 July 2007.

[111] Methodology, p. 5

which are intended to encourage, in a context of ownership concentration, the long-term commitment of minority shareholders to their investment. In turn, this long-term commitment, in additional to the beneficial effect of providing companies with an higher amount of "patient capital"[112], undoubtedly encourages an effective minority activism, which is a prerequisite for preventing abuses on the part of controlling shareholders. Accordingly, a mechanism as the one share one vote rule, which was indicated by the literature amongst the rights ensuring shareholders protection[113] in a context of more dispersed ownership, may not necessarily be regarded as such in a context of more concentrated ownership, where, without the encouragement of long-term commitment of minority shareholders, the potential for abuse by controlling shareholders could be expected to be higher. These observations also apply, e.g., to the regimes for self-dealing transactions, where in France the extension of the regimes of board approval to transactions between the company and significant shareholders, and the empowerment of minority shareholders to sue for nullification of these transactions if entered into without the required board approval are consistent with a concentrated ownership structure to the same extent as the exemption, in the UK, from the approval regime for property transactions with shareholders is understandable in light of a more dispersed ownership structure in which the shareholder entering into the transaction is not a controlling one.

Consequently, in the context of the debates on convergence and path-dependency, a first conclusion can be drawn about the kind of desirable convergence.

3. The possible and the desirable future developments …..

3.1. The factors inducing formal convergence…

Undoubtedly, globalisation and the market-driven process which lead companies to seek cross listing in those financial markets, namely the US and the UK, which are regarded as most liquid and as offering 'reputation bonding', can be expected to continue to generate an international convergence towards the Anglo-American model as regards the formal rules concerning disclosure and transparency and the internal governance practices in terms of independence requirements of directors and special committees members, which requirements are intended to ensure the working of checks and balances mechanism. This convergence was, ultimately, accepted at least twice by the EC. First, in its efforts of increasing, by way of harmonisation, the standards of disclosure, the level of transparency and efficient capital markets functioning (through Directives such as the Prospectus Directive and the Market Abuse Directive), and the ultimate outcome should be, over time, that of allowing continental Europe markets to offer advantages equivalent to those of Anglo-American markets, and thus a comparable investors protection in terms of transparency and of liquidity. Second, in the APCLCG and in implementing initiatives such as Directives 2006/43, 2006/46 and the two Recommendations on the remuneration of directors and on independent directors. In fact, in the APCLCG the European Commission expressly stated that "In many areas, the EU shares the same broad objectives and principles of the Sarbanes-Oxley Act and in some areas robust, equivalent approaches already exist in the EU. In some other areas, new initiatives are

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[112] I.e., of long-term equity nvestments that they need to attract, as recognised implicitly by the OECD: principles, p. 13.

[113] R.La Porta, F.Lopez de Silanas, A. Sheifer, and R. Vishny, Law and Finance, cit.

necessary. Earning the right to be recognized at least as equivalent alongside other national and international rules is a legitimate and useful end in itself"[114].

Whereas globalisation and the market-driven process, in which the US can be expected to continue to have an interest not to discourage the search for listing in its capital markets by European companies[115] at the same time as the EC has in interest to increase the attractiveness of its capital markets at least to an equivalent level to the US market (which would be consistent with the "Lisbon-agenda"), can be expected to continue to generate the type of convergence above indicated between the US and the EC, a second factor which can be expected to induce a "market-driven" formal convergence within the EC lies in the inter-jurisdictional competition which has been fostered by the case-law of the Court of Justice on the exercise of the right of establishment. Since 1999, the Court of Justice rulings in the *Centros*[116], *Uberseering*[117] and *Inspire Art*[118] cases, concerning the exercise by companies of the freedom of establishment guaranteed by Arts. 43 and 48 of the Treaty by means of the carrying out of all the business activity through a branch in a Member State different from the one in which the company was created for the purpose of benefiting from a more liberal company law[119], and the transfer of the effective seat in a different Member States while maintaining the legal personality granted by the company law of the State of constitution (which latter may have a more liberal regulation), have made it clear that the choice of a jurisdiction offering a more favourable regulation does not constitute on its own abuse of the right of establishment even if the business activity is directed to other EC markets. Member States' interest to attract companies within their jurisdictions, and the consequent "legal competition" for this purpose, which – for private limited companies - has been using company law regimes in the areas not covered by the notorious EC company law directives, can be expected to concern publicly traded companies as well, especially in light of the Shareholders Rights Directive. In fact, because this Directive, in facilitating the exercise of shareholders' participation rights, can be seen as an "enabling" Directive, i.e. as a Directive fixing minimum standards in this respect but emphasising the importance of direct voice mechanisms for the protection of (minority) shareholders through their activism, national legislators, in implementing it, are indirectly induced to introduce provisions which are even more enabling than the ones indicated by the Directive and to use the options granted to them for further facilitating the involvement of national and other EC shareholders, who could thus see in the jurisdiction concerned the optimal one in which to acquire and/or maintaining (non-controlling) shareholdings. The potential legal competition in respect may well result, ultimately, in a market-driven convergence in formal rules.

3.2.…and the need for functional convergence

[114] COM(2003) 284 final, cit. p. 5.

[115] As demonstrated by various interventions by the SEC to attenuate the impact of the Sarbanes-Oxley Act in its application to foreign issuers seeking listing in the US: see, e.g., M. Tonello, Corporate Governance e tutela del risparmio, Convergenza internazionale e competizione fra sistemi regolamentari, CEDAM, 2006, Trattato di Diritto Commerciale e di Diritto Pubblico dell'Economia.

[116] Case C-212/1997 *Centros* 1999 ECR, I-1459.

[117] Case C-208/00, *Uberseering,* 2002 ECR, I-9919

[118] Case C-167/01, *Inspire Art,* 2003 ECR, I-10155.

[119] In the Centros and In spire Art cases.

Apart from the fact that the drive towards formal convergence in the areas of transparency and disclosure can, in the medium-run, decrease the incentive to migration to Anglo-American capital markets and encourage path-dependency, i.e. attempts at maintaining ownership structures which have long been characterising the corporate panorama of continental Europe jurisdictions, and that a market-driven formal convergence in the area of voice mechanisms, if induced by the Shareholders Rights Directive, may ultimately make these mechanisms no longer relevant in jurisdiction choices by activist minority shareholders, the partial fallacy of a comparative assessment based on formal rules has an important consequence. It reveals that, beyond disclosure, transparency and, after the implementation of the Shareholders Rights Directive, part of the voice mechanisms, formal convergence would not be so desirable, as each jurisdiction would need to maintain and to strengthen in other areas – such as the regulation of self-dealing transactions which may potentially benefit controlling shareholders at the expense of non-controlling shareholders - the legal tools for minority shareholders' protection that are the most appropriate in light of the structure and patterns of ownership structure in its own reality. This would imply not the same or equivalent formal rules from one jurisdiction to another, but rules that – even if different – fulfil the ultimate and equivalent purpose: to allow minority shareholders not to be deprived of the expected benefits from their investment at the benefit of stronger shareholders. This would be the necessary (type of) functional convergence. The desirable developments can thus be described in terms of a 'moderate' convergence or an 'hybridization': formal convergence in areas where the needs correspond from one jurisdiction to another irrespective of the ownership structure, such as disclosure and transparency, and to a certain extent voice mechanisms designed to avoid or minimise shareholders' apathy; functional convergence in the other areas, where each jurisdiction should adequate, over time, its legal tool according to the evolution of ownership structures. This kind of overall developments would be in line with the OECD Principles, which, as explained by the Methodology, are intended to set objectives and are inspired by a functional equivalence in the means to achieve these objectives. The pattern would need to be, on the other hand, brought about by the OECD Principles on themselves, which – despite their being not-binding recommendations – are intended as a point of reference for legislators of all jurisdictions as they reflect what have been perceived as concerns perceived by all member countries.

4. ……and the seemingly 'missing dimension': the protection of 'investors' in the broader sense and the objective aspect of (minority) shareholders protection

The response to the key question – how far the legal mechanisms evidenced by the comparative view can go in ensuring the protection of minority shareholders in the current global context – can be articulated in two arguments.

First, in light of the fact that the encouragement of shareholders' activism needs to be reconciled with the possibility of efficient and effective management by the board, it appears that the direct mechanisms offer or are deemed to offer the necessary and sufficient tools to minority shareholders for protecting themselves against controlling shareholders and/or management, *provided these mechanisms can be easily used.* This applies particularly to "voice", "monitoring" and "enforcement" mechanisms, which by their very nature are complementary to each others in avoiding the extraction of benefits by management and controlling shareholders at the expense of minority

shareholders. The greater the extent to which these mechanisms can be easily used, the greater the extent to which they manage - together with the transparency and disclosure requirement, with the checks and balances mechanisms and with director's duty of loyalty to all shareholders - to ensure the objectives indicated by the OECD as regards the "subjective aspect" of minority shareholders protection (concerning their protection against controlling shareholders and a management which may be affected by these stronger shareholders), i.e. the "exercise of the key ownership function" and the "equitable treatment of all shareholders". Consequently, the partial fallacy of a comparative assessment based on formal rules that are in place, rather than on the consistency between those rules and the ownership structure in each jurisdiction, indicates that the key comparative issue lies in the enforcement mechanisms. In view of the functional convergence which is desirable and which is, ultimately, required by the OECD Principles, it can be argued that the enforcement (which, as it can be deduced from the Methodology, needs to be easily accessible in all jurisdictions[120]) is to be intended as enforcement of rights that need to secure minority protection *in light of the concentration ownership situation in the specific jurisdiction,* and that it must be easier the stronger is the ownership concentration and the weaker is the effectiveness of checks and balances mechanisms.
From these viewpoint, an acceptable conclusion at the present stage appears to be that, thanks to the *combination between more dispersed ownership and easier enforcement* offered by the class-action mechanisms and lawyers' contingency fees, the US (despite the weaker voice and monitoring mechanisms) have gone further than the other jurisdictions in securing the "subjective" aspect of the weaker shareholders protection, followed by the UK, whereas France and Germany are *moving in the right direction* in ensuring this aspect, by increasing the enforcement's accessibility while maintaining their stronger voice and monitoring mechanisms.

Second, it follows from the above comparative view, and from the convergence in disclosure and transparency requirements and generally of capital market laws, that the legislatures in the various jurisdictions have been striving to secure the "subjective aspect" of "weaker" equity investors protection, and that, through the continuing efforts first in the US and subsequently also in the EC to ensure transparent and efficient capital markets, have also been working towards *one of the requirements* for the "objective aspect" of (weak) equity investors protection, i.e. towards the aspect which, by allowing them to collect "patient capital", offer one of the conditions for businesses' long-term success. Nonetheless, as previously indicated[121], it can be inferred that the OECD Principles do indicate another condition for businesses' long-term success. This other condition for the "objective aspect" of weak equity investors protection can be found – in the Principles – in the "wealth creating co-operation between the company and all its stakeholders", because "the interests of the corporation are served by recognising the interests of stakeholders", which are referred to as "resource providers"[122]. In addition to accepting that the interests of the company are served by recognising the interests of stakeholders, the Principles recognise the importance of the co-operation amongst all stakeholders' groups in ensuring the sustainability of financially sound enterprises and in the long-term success of the corporation. Specifically, it is stated in the Annotations to the Principles that corporate governance "..is also concerned with finding ways to encourage the various stakeholders in the firm to undertake economically optimal

[120] Methodology, p. 39.
[121] Retro, par. 1.
[122] OECD Principles, Annotations, p. 46

levels of investment in firm-specific human and physical capital" and that "the competitiveness and ultimate success of a corporation is the result of teamwork that embodies contributions from a range of different resources providers including investors, employees, creditors, and suppliers"[123]. Arguably, an internationally recognised condition for the company's success lies therefore in stakeholders' commitment to the corporation, by means of "firm-specific investments". Consequently, in addition to the category of equity investors, the concept of "investors" in a broader sense needs to include employees, creditors, and suppliers, as well as customers, simply because the business' survival and development over time would be at risk without the firm-specific investments of all these stakeholders categories. In this regard, it was stressed in the managerial literature that "..the proper and unique objective of each company in the society is to maximise the long-run total value of the firm. (…) However, firm value is not technically the same as shareholders value, because "firm value" also includes the values to all other financial claimants such as creditors, debt holders and preferred shareholders (….). Firm value will not be maximised, of course, with unhappy customers and employees or with poor products. Therefore (….) value-maximising firms will be concerned about relations with all their constituencies"[124].

The relations between the corporation and the stakeholders, to be wealth-creating, need to be long-term ones and allow the co-operation to develop over time: management oriented literature has highlighted that, because stable relationships are difficult to build in the current volatile times and in the global markets, these relationships – particularly with employees, suppliers, customers, financers etc.. - become even more valuable[125], so that they become a key asset in the corporations' ability to generate profits over time that can be appreciated *ex ante*. It has been highlighted that shares are, in essence, rights to future incomes[126]: it follows that the higher the company's ability to generate profits over time that can be appreciated ex ante, due to the company's ability to enter into long-term mutually wealth creative relationships with stakeholders which allows it to continue to generate profits over time from the core business activity , the more effective is "objective aspect" of the protection of (weak) shareholders rights to future incomes. This dimension also shows that the protection of equity investors, including minority shareholders, is intertwined with the protection of stakeholders who need to be induced with the corporation[127].

It can thus be inferred that the Principles, in addition to formulating objectives in terms of "*equity* investors" protection, acknowledge this importance of the quality of

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[123] Ibid.

[124] M.Jensen, K.Murphy, Remuneration: Where we've been, how we got to here, what the problems are, and how to fix them, ECGI Finance Working Paper n. 44/2004, July 2004, at 15 ss.

[125] J.E.Post, L.E.Preston, S.Sachs, Redefining the Corporation, Stakeholder Management and Organizational Wealth, Standford University Press, Standford, 2002, p. 254.

[126] P. Ireland, Property and contract in contemporary corporate theory, 2003 Legal Studies 453, at 493.

[127] In this regard, if the most important individual principle of the Principles, according to which "board members should act on a fully informed basis, in good faith, with due diligence and care in the best interests of the company and its shareholders", is red together with another individual principle, whereby the board "should take into account the interests of stakeholders" and with the clarification that a number of other principles are intended to ensure that the most important individual principle is implemented as effectively as possible, it appears evident that the *maintaining and the increase over time of the firm-specific investments by "stake-investors*" - which is possible to an higher extent the higher the degree to which stakeholders consider their interests as safeguarded and enter into long-term relationships with the company - can be regarded as being in the best interests of the company and of (all, including minority) shareholders.

the relations with stakeholders and the need to consider the latter as "*stake*-investors", whose protection is intertwined with the protection of all equity investors. The outcome may appear to be paradoxical: at the same time as, in Germany, the jurisdiction which is typically associated with a stakeholder approach due to its mandatory labour representation requirement in the supervisory board of major companies (co-determination) and in general due to a traditional business culture of search for consensus, the mandatory codetermination is being called into question[128] and is subject to strong criticism in part of the Anglo-Saxon literature[129] , what appears to be suggested by the Principles is exactly that, the more a legal environment provides for the protection of stake-investors and encourages the building of long-term relationships based on mutual trust between the company and all its "resource providers"/"stake-investors", such as employees, suppliers and customers, the more this legal system can be seen as offering the proper framework for fostering the company's ability to generate profits over time from the ordinary business activity, and thus the proper environment for ensuring, ex ante, an essential part of the "objective aspect" of (weak) equity investors protection. Nonetheless, what appears to be a paradox is not really such, as it is suggested by the fact that the corporate objective in itself, as indicated in France, Germany and the UK, always refer, either implicitly or expressly, to the relationships with stakeholders and thus the objective aspect of (minority) shareholders' protection. Interestingly, whereas the continuation over time and prosperity of the business enterprise (France) and the increase of the sustainable value of the enterprise (Germany) refer to this factor implicitly, the jurisdiction where the quality of the relationships with stakeholders is expressly recognised to be important for the success of the company is the UK, the jurisdiction which – like the US - has traditionally been shareholder-oriented. In fact, in the UK the new "enlightened shareholders value" concept embodied in the new Companies Act admits that, in pursuing the success of the company for the benefit of all shareholders, the interests of wider constituencies have to be taken into account[130]. This outcome results from a company law reform which has recognised the importance for the company of fostering long-term relationships with both (all) shareholders and other constituencies and which, despite its rejection of a stakeholder approach, has thus accepted an 'inclusive' philosophy of company law, despite the UK has consistently been characterised by an extremely liquid market, regarded as unsupportive of long-term investment commitments[131]. If this development is red together with the evolution in Germany, the traditionally more stakeholder-oriented jurisdiction, which has witnessed the enlargement of the financial market and the development by legislative means of a market for corporate control in a context in which hostile takeovers were virtually unknown up to the start of the new millennium, it may be argued that each jurisdiction has recognised as important for company's success and thus for the objective aspect of shareholders protection a component (liquid financial markets in the case of Germany, the quality of relationships with the stakeholders in the case of the UK) that was already well accepted in the other (the quality of the relationship in Germany, liquid financial markets in the UK).

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[128] See, e.g., G.T.Sims, Germany rethinks board structure after corruption scandals, in International Herald Tribune, Business, 5 April 2007.

[129] E.Sternberg, Corporate Governance: accountability in the marketplace, 2nd ED, IEA, London, 2004, Ch. 5.

[130] Retro, par. 2, 2.2.2.

[131] J.Parkinson, Inclusive Company Law, cit.

This, in addition to making the importance of the quality of relations with stakeholders even more undisputable for the objective aspect of (minority) shareholders protection, appears to evidence a partly "missing dimension" in the literature on shareholders' protection, which dimension can be noted by considering that the new enlightened shareholder value in the UK has been regarded as stating expectations of a "socially responsible" business behaviour[132]. It can be said that this is a "partly" rather than a "totally" missing dimension, because the comparison between the various jurisdictions concerning the corporate objective, to the extent that it reveals whether stakeholders concerns can be incorporated into the decision-making by company's managements, suggests whether and when the protection of stake-investors is perceived within company law purposes, but it does not address *what would appear to be the key challenge* for legislators: given on the one hand that an increasing body of empirical evidence finds a positive correlation between a socially responsible behaviour, i.e. between the spontaneous internalisation of stakeholders' concerns in the decision-making beyond minimum legal standards which is known as "corporate social responsibility" (CSR), and the long-term success of companies[133], and this positive correlation has also been stressed by the European Commission in specific communications on CSR[134], and given, on the other hand, the defects that devices such a mandatory codetermination may generate as recently suggested by criticism in the case of Germany, this challenge appears to lie in identifying the *legislative options* which, *without imposing* co-determination or particular kinds of relationships, *can effectively encourage the building of long-term relationships* with employees and all other stakeholders as a key to the mutual wealth creation cooperation, and thus as a key to the "objective aspect" of (minority) shareholders protection. Because the legal literature focusing on the mechanisms for minority shareholders protection against controlling shareholders and managers, and on the disclosure requirements offered by securities law, by choice omits this aspect, the elaboration of responses to this challenge which appears to be open for legislators could be an apparently difficult, but innovative, task for (legal and interdisciplinary) academic research.

As a further consequence, if one wishes to construct an "investor protection index", intended as minority (non-controlling) shareholders protection index, one should neither base the index only on the "subjective aspect" concerning the formal rules in place in one jurisdiction nor assume these rules alone as a base for a comparison with other jurisdictions, but should incorporate a twofold dimension in the index: a) the "subjective aspect", which should consist of an assessment of the efficacy of the formal (company law and securities law) rules in place in that jurisdiction in protecting minority shareholders, in light of the degree of ownership concentration and of the efficiency and efficacy of enforcement rules in that jurisdiction; b) the "objective aspect" of (minority) shareholders protection, measured by the ability of national provisions in other sectors of law (e.g., employment law, consumer law..) to

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[132] Some major law firms (Norton Rose, Trevor Smith) have in fact noted, in the enlightened shareholder value, a reflection of the UK Government agenda on corporate social responsibility.

[133] J.Solomon, A.Solomon, Corporate Governance and Accountability, cit., p. 14, 28-29 and 192-196

[134] See COM(2001)366, "Promoting a European Framework for Corporate Social Responsibility"; COM(2002)347final, "A business contribution to Sustainable Development" and COM(2006)136final "Implementing the partnership for growth and jobs: making Europe a pole of excellence on corporate social responsibility"; COM(2006)136final "Implementing the partnership for growth and jobs: making Europe a pole of excellence on corporate social responsibility".

encourage the building of long term relationships with employees, with consumers and in general with all stakeholders.
Apparently, the construction of the index, and in particular the weighting up of the subjective aspect vs. the objective aspect for each jurisdiction against an overall and universally valid measure of "quality" of (minority) shareholders protection (which measure could be intended as representative of the OECD Principle, where both aspects can be regarded as existing), would representing the most challenging task for academic research.

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