european corporate governance institute

Corporate Governance Regulation: A Primer

Law Working Paper N° 750/2024
January 2024

Brian R. Cheffins
University of Cambridge and ECGI

© Brian R. Cheffins 2024. All rights reserved. Short sections of text, not to exceed two paragraphs, may be quoted without explicit permission provided that full credit, including © notice, is given to the source.

This paper can be downloaded without charge from:
https://doi.org/10.67929/ecgi-law-750-2024

european corporate governance institute

ECGI Working Paper Series in Law

Corporate Governance Regulation: A Primer

Working Paper N° 750/2024
January 2024

Brian R. Cheffins

© Brian R. Cheffins 2024. All rights reserved. Short sections of text, not to exceed two paragraphs, may be quoted without explicit permission provided that full credit, including © notice, is given to the source.

Abstract

This paper offers a primer on corporate governance regulation. Justifications for state intervention in the corporate governance context are canvassed initially. Potential drawbacks with regulation are discussed next. The paper then surveys "rule types", focusing primarily on the "presumptive" and mandatory varieties. The paper concludes with a discussion of corporate governance codes.

Keywords: corporate governance; regulation; transaction costs; externalities; fairness; public choice theory, hypothetical bargaining model, enforcement; corporate governance codes

JEL Classifications: G34, G38, K22

Brian R. Cheffins
S. J. Berwin Professor of Corporate Law
University of Cambridge, Faculty of Law
10 West Road
Cambridge, CB3 9DZ, United Kingdom
phone: +44 1223 330084
e-mail: brc21@cam.ac.uk

Corporate Governance Regulation: A Primer

Brian R. Cheffins*

Abstract

This paper offers a primer on corporate governance regulation. Justifications for state intervention in the corporate governance context are canvassed initially. Potential drawbacks with regulation are discussed next. The paper then surveys "rule types", focusing primarily on the "presumptive" and mandatory varieties. The paper concludes with a discussion of corporate governance codes.

JEL Codes: G34, G38, K22

Keywords: corporate governance; regulation; transaction costs; externalities; fairness; public choice theory, hypothetical bargaining model, enforcement; corporate governance codes

January 2024

To be published in Martínez-Echevarría y García de Dueñas, A. (dir.), González Sánchez, S., Bethencourt Rodríguez, G. (coords.), *Gobierno Corporativo Sostenible: Regulación vs. Mercado*

* S.J. Berwin Professor of Corporate Law, Faculty of Law, University of Cambridge. This paper is based on a chapter in Brian R. Cheffins, *Advanced Introduction to Corporate Governance and Law* (Cheltenham, UK: Edward Elgar, forthcoming) and also draws heavily from Brian R. Cheffins, *Company Law: Theory, Structure and Operation* (Oxford: OUP, 1997), chapters 3-6.

Electronic copy available at: https://ssrn.com/abstract=4684999

Private ordering plays an important role in the corporate context. Welfare-enhancing results and socially desirable outcomes may often follow but this cannot be taken for granted. There accordingly is the potential for economically beneficial state intervention in the corporate governance space. This paper explores this possibility as part of a general primer on corporate governance regulation. The exercise is relevant for those interested in corporate governance because public officials play a key role in shaping governance practices that impact those affected by corporate activity.[1]

Identifying arguments in favour of regulation is a key element of this paper, with problems potentially afflicting private ordering featuring. Sub-optimal private ordering outcomes do not necessarily justify state intervention, however. Instead, problems with the promulgation, administration and enforcement of legal rules can undercut the case in favour of regulation, including in the corporate governance space. Pragmatic responses to this reality can include lawmakers giving corporate participants such as shareholders and others substantially affected by corporate activity substantial scope to override applicable standards and delegating rule-making responsibility to parties closer to the market than civil servants and legislators. These approaches tend to dovetail with corporate governance codes, a mechanism deployed in a large number of countries.

The paper is organized as follows. We consider initially justifications for regulation. Downsides will then be canvassed. A survey of "rule types", focusing primarily on "presumptive" and mandatory rules, comes next. Finally, the role corporate governance codes can play as a regulatory half-way house between private contracting and government regulation will be considered.

---

[1] Anat R. Admati, "A Skeptical View of Financialized Corporate Governance" (2017) 31 J Econ Persp 131, 141.

Electronic copy available at: https://ssrn.com/abstract=4684999

1 Justifications for Regulation

Voluntary exchanges and market dynamics do much to shape corporate governance. Justifications for regulation of private ordering are commonly divided into two categories. The first is comprised of economically-oriented rationales for intervention where the animating principle is increasing economic efficiency. The reasoning involved is that government action is justified since the correction of market failures will allocate resources to more highly valued uses, thereby increasing aggregate social welfare.

Arguments advanced to make the case for government intervention extend beyond those grounded in economic logic,[2] so the second regulation justification category is made up of arguments for state action lacking an explicit economic rationale. Non-economic goals commonly cited as justifications for regulation include ensuring parties have an opportunity to participate in decisions substantially affecting them and fostering beneficial community-oriented values, such as fairness and trust. The following discussion of arguments in favour of regulation focuses initially on economics before turning to non-economic considerations. We begin with a scene-setting exercise for efficiency related justifications for regulation.

1.1 Efficiency Considerations and Regulation -- Basic Context

Parties, acting rationally, will only enter into a bargain if each anticipates being made better off by proceeding. A transaction therefore should increase each party's personal utility and transfer resources to more highly valued uses, meaning in economic terms it will be allocatively efficient. By extension, markets, as the aggregate result of private ordering, should channel resources to more highly valued uses. Economic theory confirms this line of

[2] Eric A. Posner, "The Boundaries of Normative Law and Economics" (2021) 38 Yale J Reg 657, 658.

Electronic copy available at: https://ssrn.com/abstract=4684999

reasoning by indicating that if a series of assumptions are fulfilled, markets will yield outcomes which increase aggregate social welfare.

Economists, when they identify the efficiency properties of markets, postulate as a departure point that transactors act voluntarily, contract while being aware of all relevant information and incur no costs concluding transactions. Also, parties are assumed to be capable of assessing what is in their own best interests and can be fully confident that bargains struck will be performed in the manner agreed. In the real world, however, these assumptions are not always fulfilled. Correspondingly, it cannot be taken for granted that private ordering will yield welfare-enhancing results. It is possible, therefore, that public officials can make improvements via regulation. Sub-sections 1.2 to 1.5 consider departures from economists' assumptions relating to markets potentially justifying state intervention that are relevant in the context of corporate governance. Sub-sections 1.6 to 1.8 canvass arguments in favour of state intervention in the corporate governance space not based on efficiency considerations and sub-section 1.9 draws attention to overlaps between economic and non-economic rationales for regulation.

1.2 Imperfect Information

When market participants lack full information, they will not able to predict with certainty whether their transactions will yield mutually beneficial outcomes. In practice contracting in the absence of perfect information is endemic and few contracts would be legally enforceable if the law required parties to be fully informed.[3] Imperfect information nevertheless can provide an economically oriented justification for regulation in various corporate contexts. For instance, government-fostered transparency can make regulation that

[3] Jonathan Morgan, *Great Debates in Contract Law*, 3rd ed. (London: Bloomsbury, 2020), 150-51.

Electronic copy available at: https://ssrn.com/abstract=4684999

is justifiable on other grounds more effective by improving the informational environment for regulators and by making it easier for private actors to assist regulatory efforts.[4] Moreover, where there are symmetric information problems -- all parties share the same information deficiencies – the law can play a potentially beneficial "gap-filling" role by supplying rules that mimic terms parties would agree upon under ideal contracting conditions. Sub-section 1.3 picks up on this point briefly and sub-section 3.6 explores it in greater depth.

Where there is asymmetric information, meaning one transactor knows more than the other(s), state intervention can potentially be justified under additional circumstances. For instance, there is a strong case for precluding better-informed parties from acting fraudulently by intentionally providing false and misleading information to others. Regulation can be justified in economic terms in this context on the basis there should be a substantial reduction of socially wasteful investments by potential victims safeguarding themselves and by unscrupulous parties prioritizing deceit.

In the corporate context, the notion of a "market for lemons"[5] is often cited to justify mandated disclosure in a commonplace asymmetric information scenario, namely where well-informed proprietors of businesses are seeking to carry out offerings of shares targeting less informed public investors. Among a cohort of public offerings some likely will deliver excellent value for investors while others will generate disappointing returns (the "lemons"). If investors struggle to distinguish higher quality (more valuable) shares from lower quality (less valuable) shares, investors will proceed on the assumption that all public offerings are of average quality. Higher quality shares will then sell at lower prices than they would if

---

4 Ann M. Lipton, "Not Everything Is about Investors: The Case for Mandatory Stakeholder Disclosure" (2020) 37 Yale J Reg 499, 517-19.

5 G.A. Akerlof, "The Market for 'Lemons': Quality, Uncertainty and the Market Mechanism" (1970) 84 QJ Econ 488.

Electronic copy available at: https://ssrn.com/abstract=4684999

investors could detect the differences between what was on offer, which will discourage better companies from distributing equity to the public. Lower quality shares thus could drive out higher quality equity, leaving investors with the unappetizing prospect of investing only in the "lemons". The viability of equity markets will correspondingly be jeopardized. Lawmakers can respond by promulgating rules compelling those organizing public offerings of shares to divulge pertinent facts. This should go some way toward reassuring investors that they will have ready access to the information they need to identify firms with a genuinely promising future and to shun lemons.[6]

1.3 Costs of Contracting

With transactions information deficiencies are a potential cause of contractual gaps because lack of awareness of salient circumstances can preclude the parties from addressing key matters. Transaction costs are another cause of contractual gaps: parties to an agreement can find it time-consuming, inconvenient and expensive to identify, negotiate and reduce to contractual language all relevant points. For instance, discussing remote but potentially contentious contingencies can make parties nervous and jeopardize the prospects of reaching agreement, which can result in them leaving salient issues open to close a deal. Likewise, whenever transactors haggle over contractual details they will be foregoing the opportunity to shift to potentially more productive activities so they may well leave some matters open to move on to greener pastures. Moreover, even with substantial sums at stake parties will always find at a certain point that the expenses involved with formalizing matters by way of contractual terms exceed the benefits, which again means there will be contractual gaps.

---

[6] Bernard S. Black, "The Core Institutions that Support Strong Securities Markets" (2000) 55 Bus Law 1565, 1568.

Electronic copy available at: https://ssrn.com/abstract=4684999

From an efficiency perspective, the obvious regulatory move when transaction costs cause contractual gaps is the same as when information problems do likewise (sub-section 1.2): provide "gap-filling" rules formulated by hypothesizing how transactors would deal with issues under ideal contracting conditions. In the corporate context, directors' duties stand out as a well-known facet of corporate governance that has been accounted for using such logic. For instance, well-known law and economics scholars Frank Easterbrook and Daniel Fischel have characterized such duties as "a response to the impossibility of writing contracts completely specifying the parties' obligations."[7]

This contractual characterization of duties such as those directors owe has been highly influential,[8] but also controversial. Critics maintain analyzing directors' duties by reference to implicit contracts counterproductively fails to acknowledge potential unfairness arising from the advantageous position directors occupy and risks watering down the law counterproductively by removing the moral taint associated with breach.[9] As we will see shortly, promoting values such as fairness and trust can serve as independent justifications for regulation, which means a robust formulation of directors' duties can be justified even if it is instructive to think of such duties in terms of implicit contracts.

1.4 Negative Externalities

When a consumption or production decision or a transaction adversely affects people not directly involved this is referred to as a negative externality. Negative externalities can result in overproduction from a societal point of view because of increased demand following

---

7 Frank H. Easterbrook and Daniel R. Fischel, "Contract and Fiduciary Duty" (1993) 36 J L & Econ 425, 426.

8 Robert H. Sitkoff, "The Economic Structure of Fiduciary Law" (2011) 91 Boston Univ L Rev 1039, 1039-40.

9 See, for instance, John L. Howard, "Fiduciary Relations in Corporate Law" (1991) 19 Can Bus LJ 1, 17-18; Tamar Frankel, *Fiduciary Law* (Oxford: OUP, 2011), 232, 238-39.

Electronic copy available at: https://ssrn.com/abstract=4684999

on from lower prices that do not reflect the adverse impact on non-parties. Government, it has often been argued, can improve matters by using a mix of taxes, regulation and liability rules to force suitable cost internalization.

Justifying state intervention on the basis of negative externalities needs to be done with care. Economist Ronald Coase demonstrated in a famous 1960 article that in what appear to be externality situations the affected parties can often transact, which means the negative externality justification for regulation falls away.[10] For Coase's reasoning to apply, though, the affected parties need to be in a position to reach an agreement about how to deal with the activities in question. If private ordering is not practicable, the externality rationale for state intervention re-emerges.

Consider climate change. Regulation potentially could be justified in terms of negative externalities because firms that are disproportionately responsible for the bulk of overall emissions currently bear only a fraction of the climate-related costs involved and because many of those potentially adversely affected – such as future generations -- are not in a position to bargain.[11] What is less clear is the appropriate regulatory response, which could take the form of regulation "external" to corporations such as taxes on carbon emissions or corporate governance related rules such as mandatory climate-related disclosure under securities law.[12]

1.5 Collective Action Problems

[10] "The Problem of Social Cost" (1960) 3 J L & Econ 1.

[11] John Armour, Luca Enriques & Thom Wetzer, "Mandatory Corporate Climate Disclosures: Now, but How?" [2021] Columbia Bus L Rev 1085, 1089-90, 1092.

[12] Ibid., 1090-94 (endorsing the latter on the basis that political inaction is precluding the adoption of taxes on carbon emissions or any meaningful form of carbon pricing).

Electronic copy available at: https://ssrn.com/abstract=4684999

A collective action problem exists when the rational, self-interested behaviour of individuals precludes them from acting jointly when doing so would increase the aggregate welfare of all involved. Why might this occur? Assume that all affected are aware of the efficiency properties of the contemplated arrangement. The individuals in question might each still decide it is not in their self-interest to move forward. Therefore, nothing would happen, and welfare-enhancing change will be foregone. State intervention could help to correct matters.

There are two related reasons affected parties might not step forward when joint action will likely be welfare-enhancing. First, an individual might calculate that even if they do nothing, other affected individuals will do enough to make the beneficial change happen. If the deduction is accurate, the individual would receive at no personal cost the same upside as those who did their part. In other words, they would be able to "free ride" off the contributions of others.

The possibility of free-riders in turn provides a second reason for a party acting rationally not to contribute to beneficial collective action. Numerous individuals anticipating the beneficial change potentially would step forward if they were confident that others would act, defraying costs for all concerned. The attitude of these individuals would likely change, however, if they expected substantial free riding. They would reason that contributing to a lost cause is futile and remain passive. As suggested, nothing would happen, which is where the state might beneficially intervene.

Corporate governance debates primarily relate to publicly traded companies and such firms are highly susceptible to collective action problems with corporate governance implications. Managerial agency costs can impose substantial losses on shareholders, and shareholders typically have powers, such as electing new directors, they can exercise collectively that can do much to keep senior management in check. It would seem to follow

Electronic copy available at: https://ssrn.com/abstract=4684999

that shareholder monitoring would serve reliably as a beneficial governance corrective. This can by no means be taken for granted, however, and collective action problems are an important reason why.

The disciplining of management in publicly traded companies is a classic collective good: all shareholders benefit whether or not they contribute to the discipline. Shareholders with small equity stakes in a mismanaged company thus will rationally tend to wait for others to step forward and free ride off the efforts of those that happen to do so. As UK regulators the Financial Conduct Authority and the Financial Reporting Council (FRC) said of shareholder engagement by investment managers and institutional asset owners in 2019, "some firms may not invest as fully as they otherwise might and instead 'free-ride' on the stewardship of others. This leads to under-investment in stewardship, poorer standards and uneven coverage of stewardship across the market."[13] The primary policy response in the UK has been the Stewardship Code, a set of FRC-promulgated principles with which investment managers and institutional investors can identify themselves as signatories if they commit themselves to follow detailed guidance the Code offers on shareholder engagement with publicly traded firms.[14]

1.6 Fairness

Regulation of market transactions can be justified on a number of grounds without invoking efficiency-related considerations such as those just canvassed. "Fairness" is one potential departure point for defending state intervention without invoking economic logic and it has indeed come into play in the corporate context. In Delaware, the state where a majority of American publicly traded corporations are incorporated, a judge assessing

---

13 FRC/FCA, *Building a Regulatory Framework for Effective Stewardship* (London: FRC/FCA, 2019), 22.

14 Financial Reporting Council, *Stewardship Code* (London: FRC, 2020).

Electronic copy available at: https://ssrn.com/abstract=4684999

whether directors have breached duties they owe will forsake deferring to the directors under what is referred to as the business judgment rule when there is an element of self-dealing involved and will instead review matters by applying a considerably more exacting "entire fairness" standard.[15] In the UK an "unfair prejudice" remedy under which disgruntled shareholders can petition a court for relief on the grounds they have been unfairly prejudiced by those running the company dominates the minority shareholder protection landscape, albeit to a much lesser extent with publicly traded companies.[16]

When people deploy "fairness" as a justification for legal intervention, they tend to treat the meaning as being self-evident and avoid defining the concept. Still, some clarification of the meaning of fairness is required to assess properly when there might be a defensible case for regulation. A helpful approach is to focus on two types of fairness that are often discussed in relation to contractual behaviour, "procedural" and "substantive". Procedural fairness relates to the methods which market participants use to negotiate, formulate and conclude transactions. With substantive fairness the concern is the end result. Substantive fairness in turn can relate either to individual transactions or the impact bargaining arrangements have collectively on the distribution of wealth in society.

Taking matters in reverse order, corporate law scholar Kent Greenfield has argued that corporate law should be used to help to reallocate societal resources in a fair manner in favour of corporate participants other than shareholders – "stakeholders" -- reasoning "(a) stakeholder-oriented corporate law would work at the initial distribution of the corporate

---

15 Reza Dibadj, "Networks of Fairness Review in Corporate Law" (2008) 45 San Diego L Rev 1, 4-5.

16 Companies Act 2006, c. 46, s. 994; Paul L. Davies, Sarah Worthington and Chris Hare, *Gower Principles of Modern Company Law*, 11th ed. (London: Thompson Reuters, 2021), 544, 559.

Electronic copy available at: https://ssrn.com/abstract=4684999

surplus and would benefit stakeholders up and down the economic hierarchy."[17] This sort of explicit redistribution of wealth reasoning in favour of state intervention is the exception to the rule in the corporate governance space. Corporate governance commentators who prioritize a "fair" redistribution of wealth in society typically assume that policy tools such as tax law and direct benefits (e.g. cash transfers) can deliver results much more effectively than corporate law and related regulation.

With transaction-specific fairness, in the corporate context this is more likely to come into play with legal doctrines when shareholders are involved than other corporate participants. For instance, with the UK unfair prejudice remedy, only "members" (shareholders) can apply for relief.[18] Similarly, while a Delaware court will be prepared to take a fairness-centred approach when reviewing director conduct in a dispute affecting shareholders of a public company, it will not do the same with creditors.[19] This shareholder orientation with fairness has been explained on the basis that shareholders are vulnerable transactionally as compared to other corporate participants because they do not know in advance what return they will receive as shareholders and do not know when they will receive whatever ultimately comes their way.[20]

When courts are prepared to evaluate transactions in the corporate context by reference to fairness both the procedural and the substantive versions are potentially relevant.

---

17 Kent Greenfield, "Saving the World with Corporate Law" (2008) 57 Emory Law Journal 947, 978. See also Kent Greenfield, *The Failure of Corporate Law: Fundamental Flaws and Progressive Possibilities* (Chicago: University of Chicago, 2007), 153-57, 170, 182.

18 Companies Act 2006, s. 994(1).

19 Jared A. Ellias & Elisabeth de Fontenay, "Law and Courts in an Age of Debt", (2023) 125 U Penn L Rev 2025, 2028, 2033-25, 2045-46 (advocating, however, that courts take a different approach).

20 *Ibid.*, 2029-30, 2048-49.

Electronic copy available at: https://ssrn.com/abstract=4684999

In Delaware, when the entire fairness standard is operation, a court will scrutinize both the process by which a challenged decision was reached and the outcome to assess whether the corporation's directors were seeking to achieve a fair outcome (typically involving a fair price) and in fact achieved this.[21] As for the UK's unfair prejudice remedy and procedural fairness, assuming the petitioner has ultimately been prejudiced in some way,[22] procedural missteps by those controlling a company can justify relief, such as where they have engaged in physical threats to try to achieve a desired outcome, have silenced minority shareholders by failing to hold shareholder meetings or have failed to consult when there was an entitlement for this to occur.[23] Conversely, so long as the ultimate outcome for an aggrieved minority shareholder amounts to unfair prejudice, a disgruntled shareholder can obtain relief without showing that the individuals controlling the company acted in bad faith, intended to harm the applicant or engaged in any other form of procedural misconduct.[24]

1.7 Participation

With procedural fairness, the focus is typically on particular transactions. Procedural concerns can also potentially justify state intervention in the corporate context in a wider way. Arguably the state should seek to ensure that those involved with companies should have a say in decisions that materially impact their economic welfare. One reason is that people tend to gain self-respect and dignity and flourish as individuals when they can participate in deliberations affecting them. Another is that, as a matter of ethical and moral theory, decisions attain greater legitimacy when those affected are consulted. For instance,

---

21 Weinberger v. UOP, 457 A.2d 701, 710–11 (Del. 1983).

22 *Irvine v Irvine (No. 1)* [2007] 1 BCLC 349.

23 Victor Joffe *et al.*, *Minority Shareholders: Law, Practice, and Procedure*, 6th ed. (Oxford: OUP, 2019), 369, 387-89.

24 Brenda Hannigan, *Company Law*, 6th ed. (Oxford: OUP, 2021), 438.

Electronic copy available at: https://ssrn.com/abstract=4684999

most accept that in a democracy statutory measures that can restrict individual liberty are legitimate because citizens elect the members of the legislature.

Theoretically, the possibility of fostering of participation in corporate affairs is a topic relevant for all corporate stakeholders. Nevertheless, serious analysis of the topic has been restricted to two constituencies, shareholders and employees.[25] "Shareholder democracy", for instance, is a theme that has frequently been invoked as a justification for providing shareholders with a substantial say in corporate affairs, particularly with regards to the supervision of management. A politically-oriented analogy can plausibly be drawn between a company and its shareholders on one hand and a nation-state on the other. Simplifying away for the moment a minority of jurisdictions where employees choose some board representatives,[26] shareholders, as with a country's electorate, vote to appoint and dismiss their leaders, the directors in the case of companies. Also, shareholders in companies often have the power to vote on fundamental changes which resemble constitutional issues, such as alterations to the corporate constitution and the dissolution of the enterprise. Given these dynamics, it is unsurprising that the notion of shareholder democracy is invoked to justify regulation fortifying shareholder rights. A caveat is in order, however: "shareholder democracy is generally considered of instrumental value."[27] Advocates, in other words, tend

---

25 Alejo José G. Sison and Joan Fontrodona, "Participating in the Common Good of the Firm", (2013) 113 J Bus Ethics 611, 611-12, 615, 623.

26 OECD, "OECD Corporate Governance Factbook 2023", https://www.oecd-ilibrary.org/finance-and-investment/oecd-corporate-governance-factbook-2023_6d912314-en , 138, 167-68 (13 of 49 jurisdictions surveyed).

27 Abraham Singer and Amit Ron, "Models of Shareholder Democracy: A Transnational Approach" (2018) 7 Global Constitutionalism 422, 425.

Electronic copy available at: https://ssrn.com/abstract=4684999

not to be interested in vindicating participatory rights per se but rather are counting on shareholder engagement to enhance managerial accountability beneficially.[28]

With workers, they play a key role in determining the success (or lack thereof) the companies that employ them enjoy. Also, for staff the fate of their employer can have an important bearing on their economic well-being. Moreover, employees are subject to the authority of management in a way that other stakeholders are not since employers have substantial scope to issue instructions to staff.[29] These workplace dynamics have been drawn upon to argue in favour of regulation giving employees an important say in the way that companies are run. Such reasoning has been used, for example, to justify laws that various countries have which give employees the right to select at least some directors in larger companies.[30]

1.8 Preserving Trust in Business

Markets can richly reward bold change, which creates incentives for those running companies to pivot away opportunistically from well-established social bonds and commercial arrangements. Corporate responses to market forces thus can undermine the public's trust in business, and do so in a way various commentators believe justify corrective regulatory action. Colin Mayer, an Oxford academic, has said "Restoring trust in corporations is urgent because without it our economic systems will continue to collapse, our

---

28 Ibid., 425-26; Leo E. Strine, Jr., "Can We Do Better by Ordinary Investors? A Pragmatic Reaction to the Dueling Ideological Mythologists of Corporate Law" (2014) 114 Colum L Rev 449, 450-51 (discussing Lucian Bebchuk, a prominent advocate of shareholder rights).

29 John Parkinson, "Models of the Company and the Employment Relationship" (2003) 41 Brit J Indust Rel 481, 497.

30 Jeffrey Moriarty, "Participation in the Workplace: Are Employees Special?" (2010) 92 J Bus Ethics 373 (canvassing the reasoning in detail but ultimately arguing it is unpersuasive because the logic could plausibly invoked to justify participatory governance rights for other stakeholders.)

Electronic copy available at: https://ssrn.com/abstract=4684999

financial systems to fail, and our environment to degrade."[31] Vince Cable, the UK's business secretary, said in 2013 when discussing government proposals to toughen a regime under which directors could be disqualified from serving in that capacity for other companies and to fortify disclosure of share registers "We need to build trust in the City (London's financial district) and business. Trust is crucial. We need to prevent the excesses of the past happening again."[32] Likewise, with a 2014 European Union directive instructing Member States to enact legislation requiring large companies to engage in non-financial reporting in relation to matters such as the environment and human rights,[33] the European Commission indicated one objective was "to enhance the trust citizens have in business and in markets."[34]

1.9 Efficiency Revisited

A reader might plausibly infer from the way in which the foregoing discussion of justifications for regulation has been organized that efficiency-based rationales for state intervention and arguments for regulation focusing on other considerations operate in entirely separate realms. In fact, the two can readily overlap. Consider dishonest contractual behaviour. As well as regulation of fraud being justified economically because this will discourage socially wasteful investments by potential victims and unscrupulous transactors

---

31 Colin Mayer, *Prosperity: Better Business Makes the Greater Good* (Oxford: OUP, 2019), 45.

32 David Oakley and Helen Warrell, "Cable Plans Crackdown on Negligent Directors" Financial Times, July 15, 2013, 1.

33 Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014, amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

34 EU Commission, Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council Amending Council Directives 78/660/EEC and 83/349/EEC as Regards Disclosure of Nonfinancial and Diversity Information by Certain Large Companies and Groups (16 April 2013) SWD (2013) 127 final, 23.

Electronic copy available at: https://ssrn.com/abstract=4684999

(see sub-section 1.2), there is a procedural fairness rationale for regulation: parties should be able to enter into bargains in the absence of coercion and deceit.

Boardroom diversity is a corporate governance-related topic where economic and non-economic rationales for state intervention dovetail.[35] Advocates of laws designed to foster more diverse and socially representative boards along dimensions such as gender and race often cite as a justification fostering better long-term financial outcomes for companies. At the same time, though, in the boardroom context many commentators maintain "(d)iverse leadership advances a variety of broader societal goals."[36] For instance, regardless of economic outcomes, regulation mandating board diversity is potentially justifiable on the basis that boardroom change will help to reverse past gender inequities and foster racial inclusion.

2 Regulation Drawbacks

We have considered thus far a wide range of potential problems with private ordering. Analysts who advocate state intervention often seem to assume that government can intervene beneficially whenever markets are not operating perfectly. Such reasoning, though, involves a key logical error. Economic analysis places considerable stress on the idea that steps taken can give rise to costs as well as benefits. This insight is pertinent with government regulation as with many other activities. Ignoring potential costs with state intervention brings into play what some call the nirvana fallacy. In particular, one cannot make the case scenario B is superior to scenario A by simply setting out the problems

---

35 Anindita Jaiswal Jaishiv "The Missing Theory for Regulation and Lawmaking: Women in Corporate Leadership" (2022) 22 J Corp L Stud 807, 808-9, 822-23; Jill E. Fisch, "Promoting Corporate Diversity: The Uncertain Role of Institutional Investors" (2023) ECGI Working Paper Series in Law, No. 699/2023, 6-13.

36 Fisch, *supra* note 35, 13.

Electronic copy available at: https://ssrn.com/abstract=4684999

associated with A. Instead, one must also consider B's downsides. This part of the paper consequently canvasses regulation's drawbacks, focusing particularly on possible defects in the law-making process and potential problems with the administration and enforcement of legal rules.

2.1 Interest Groups

A feature of the law-making process that can potentially weaken the case for state intervention is the potentially detrimental influence of interest group lobbying of public officials. A school of thought known as public choice theory emphasizes this point. Public choice theorists characterize government action as a commodity which is allocated in accordance with the forces of supply and demand and assume that public officials act in a rational, self-interested fashion motivated by elements as diverse as power, income, prestige, security, convenience and loyalty to an idea or institution.

Economists presume markets tend toward delivering efficient outcomes. Those analyzing regulation from a public choice perspective are considerably less optimistic about the interaction of supply and demand in the government context. The contours of a given law are thought of as the product of an intricate web of implicit, self-interested exchanges among politicians, interest groups, voters and regulators where the end result will often do little to advance the public interest. According to Easterbrook and Fischel, once the possibility of self-interested lobbying is taken into account it can seem that "only by accident will interest group laws serve the broader public interest."[37] The primary concern here is that organizations strongly wedded to particular issues have a disproportionate and often counterproductive influence over the policymaking process. For instance, according to a

[37] Frank H. Easterbrook and Daniel R. Fischel, "Mandatory Disclosure and the Protection of Investors" (1984) 70 Va L Rev 669, 671.

Electronic copy available at: https://ssrn.com/abstract=4684999

summary of what reputedly "went wrong" with a protracted overhaul of UK companies legislation culminating in 2006,[38] "'(t)he weakest link' in the process were pressure groups and lobbying in Parliament which derailed years of deliberations and distorted incentives."[39]

Adoption of public choice theory in an extreme form where it is assumed little other than interest group rent-seeking drives regulatory outcomes ignores unwisely the possibility that lawmakers pursue public interest goals.[40] Even regulation sceptics such as Easterbrook and Fischel acknowledge there are occasions where it is difficult to distinguish between interest-group and public interest explanations for regulation.[41] Conversely, though, with regulation affecting corporations it is naïve to dismiss the possibility that self-serving motives of those potentially affected can have an adverse impact and result in counter-productive state intervention.

2.2 Counterproductive Regulator Incentives

If those responsible for regulating corporate affairs consistently seek to vindicate agreed upon policy goals in a public-minded fashion the potentially detrimental effects of interest group lobbying should be tempered substantially. According to public choice theory due to self-interest they often come up short on this count. For instance, close connections between public officials and the businesses they regulate can have a counter-productive impact. Those with regulatory responsibilities may well be keen to stay on the good side of those they oversee, particularly if they want to keep open the possibility of leaving public

---

38 Companies Act 2006, c. 46.

39 Arad Reisberg, "Corporate Law in the UK After Recent Reforms: The Good, the Bad, and the Ugly" (2010) 63 Current Legal Problems 315, 371.

40 Stephen M. Bainbridge, "Corporate Decisionmaking and the Moral Rights of Employees: Participatory Management and Natural Law" (1998) 43 Vill L Rev 741, 772.

41 Easterbrook and Fischel, *supra* note 37, 672.

Electronic copy available at: https://ssrn.com/abstract=4684999

service to work in the sector they currently oversee.[42] The default setting here likely will be to avoid imposing unwelcome, tough (if justified) rules and to refrain from administering existing regulatory measures vigilantly.

Outcomes can be counterproductive in a different way if "careerists" not envisaging leaving government and seeking to thrive in that environment set the tone. Some may push hard to expand state intervention because this will enhance their personal clout and influence. Also, given that public officials responsible for overseeing the business sector receive no direct benefits if corporations flourish but can be blamed at least partly for serious corporate mishaps, a disproportionate bias in favour of safety and soundness could readily take hold.[43] Either way, there will be momentum in favour of counterproductively excessive regulation.[44]

2.3 Lack of Familiarity with the Marketplace

Potentially counter-productive regulatory incentives aside, public officials need to be able to diagnose to prescribe. Ideally, they will have a good understanding of the conduct with which they are dealing, including the relevant market environment and the nature of the activities to be supervised. With respect to corporate governance, there is reason for concern on this front. Government officials have often spent their entire career in the public sector, which means that whatever their administrative and rule-formulating capabilities they will lack direct knowledge of how companies function and equity markets operate. The possibility correspondingly exists that those charged with regulating corporate activity will

---

42 John C. Coates, "Private vs. Political Choice of Securities Regulation: A Political Cost/Benefit Analysis" (2001) 41 Va J Intl L 531, 563 (discussing the federal Securities and Exchange Commission in the US).

43 David A. Becher and Melissa B. Frye, "Does Regulation Substitute or Complement Governance?" (2011) 35 J Banking & Fin 736, 736-37.

44 Brett McDonnell, "Dampening Financial Regulatory Cycles" (2013) 65 Fla L Rev 1597, 1614.

Electronic copy available at: https://ssrn.com/abstract=4684999

misjudge the problems they are dealing with and do a poor job of evaluating potential policy changes even when their diagnosis of market failure is correct. This increases the likelihood that the costs of regulating will exceed the benefits.

In the corporate context, a situation where lack of full familiarity with market conditions on the part of public officials is likely to be problematic is where those involved in companies do not react passively when they encounter market imperfections that potentially could justify regulation. Often company participants will, in the absence of state intervention, take affirmative action in order to address problems arising from their interactions so as to reach outcomes that leave all concerned better off. Under such circumstances, regulation might well be largely redundant, likely meaning the attendant costs (see sub-section 2.6) will be incurred for little benefit. Moreover, strategies company participants otherwise would have adopted to reach mutually beneficial outcomes in an unregulated environment might well be abandoned, perhaps ultimately leaving parties worse off.

Disclosure by companies making public offerings of shares is a topic where there has been extensive debate about the extent to which the voluntary provision of key information by companies and their investment bankers seeking to persuade investors to purchase equity being issued counteracts the "market for lemons" tendency with equity markets (see sub-section 1.2) and thereby undercuts the case in favour of mandatory regulation. The logic is also potentially salient in relation to proposals that regulation should be used to readjust managerial priorities in publicly traded companies in a socially responsive direction. Reputedly, there are various "channels of social demand" affecting today's public company executives, such as product markets (many consumers place a high priority on the social responsibility of the firms they purchase from), labour markets (employees often prioritize working for socially responsible employers) and investor preferences (key asset managers

Electronic copy available at: https://ssrn.com/abstract=4684999

seek to attract clients by promising to invest in socially responsible firms).[45] To the extent public officials contemplating intervening to reorient corporate priorities in a socially aware direction disregard these market-oriented social demand channels, there is a possibility that redundant and even counterproductive regulation will be introduced.

2.4 Timing

In circumstances where state intervention is theoretically merited difficulties relating to timing may mean that the legislative response is ultimately counterproductive. One potential complicating feature is "statutory stagnation"[46] that leaves legislative measures badly out-of-step with contemporary conditions. Corporate law reform typically is technical and apolitical in nature, which means that it is unlikely to be a governmental priority from an ideological or political standpoint. Thoroughgoing statutory reform correspondingly can be difficult to achieve on a timely basis, with amendments being restricted to piecemeal tinkering. For instance, Canada's federal corporation statute was last overhauled in the mid-1970s, having been previously comprehensively amended in 1934.[47] And there has only been one wholesale revision of the Delaware General Corporation Law since it was enacted in 1898, this being in 1967.[48]

An opposite source of concern on the timing front is counter-productive legislative haste. In the corporate context, a stock market meltdown accompanied by business scandals

---

45 Michal Barzuza, Quinn Curtis & David H. Webber, "The Millennial Corporation: Strong Stakeholders, Weak Managers" (2023) ECGI Working Paper Series in Law Nº 687/2023.

46 Mirit Eyal-Cohen, "Unintended Legislative Inertia" (2021) 55 Ga L Rev 1193, 1195.

47 Robert W.V. Dickerson, John L. Howard & Leon Getz, *Proposals for a New Business Corporations Law for Canada* (Ottawa: Information Canada, 1971), 2; Industry Canada, *Consultation on the Canada Business Corporations Act* (Ottawa: Industry Canada, 2015), 1 (noting, though, that significant amendments were made in 2001).

48 Steven A. Bank and Brian R. Cheffins, "Corporate Law's Critical Junctures" (2021) 77 Bus Law 1, 37.

Electronic copy available at: https://ssrn.com/abstract=4684999

is a scenario where this risk can be acute. In the ordinary course corporate law reform will not be a priority for interest groups such as investors as well as the general public. However, with share prices falling sharply and with media scrutiny of prominent corporations increasing investor pressure for substantial reform could grow substantially, reinforced by public discontent deteriorating economic conditions foster.[49] Lawmakers, aware of the onus for speedy action the perceived crisis has created, may well enact new laws with minimal deliberation, perhaps resulting in legislation "cobbled together from proposals made, and rejected, in the past."[50] Such logic has been invoked to denounce corporate governance measures in America's 2002 Sarbanes-Oxley Act[51] and 2010 Dodd Frank Act[52] as "quack" legislation.[53] This harsh verdict is controversial, but even academics defending these pieces of legislation acknowledge there was a "messy process"[54] involved and concede that there were measures enacted that were "inconsistent or poorly conceived".[55]

2.5 Enforcement Challenges

The distinguished American jurist Roscoe Pound drew attention in the early 20th century to a divide between "law in books" (substantive legal doctrine) and "law in action"

---

49 Ibid., 8.

50 Frank H. Easterbrook, "When Does Competition Improve Regulation?" (2003) 52 Emory LJ 1297, 1298.

51 Sarbanes-Oxley Act of 2002, Pub. L. 107–204, 116 Stat. 745.

52 Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 (hereinafter Dodd-Frank Act), Pub. L. 111-203, 124 Stat. 1376.

53 Roberta Romano, "The Sarbanes-Oxley Act and the Making of Quack Corporate Governance", (2005) 114 Yale LJ 1521; Stephen M. Bainbridge, "Dodd-Frank: Quack Federal Corporate Governance Round II" (2011) 95 Minn L Rev 1779.

54 Robert A. Prentice and David B. Spence, "Sarbanes-Oxley as Quack Corporate Governance: How Wise Is the Received Wisdom?" (2007) 95 Geo LJ 1843, 1907.

55 John C. Coffee, "The Political Economy of Dodd-Frank: Why Financial Reform Tends to be Frustrated and Systemic Risk Perpetuated" (2012) 97 Cornell L Rev 1019, 1050.

Electronic copy available at: https://ssrn.com/abstract=4684999

(enforcement and compliance).[56] In the corporate context, the distinction is pivotal because regardless of whether legal rules are, on their face, well-suited for the task of regulating company affairs, the situation can end up being different in practice. Company participants often do not simply passively comply with rules applicable to them. Instead, they may well restructure their affairs to sidestep the law or simply ignore regulations in place. "Law in books" therefore may well not deliver anticipated beneficial change.

Enforcement can provide potentially recalcitrant corporate participants with incentives to adhere to applicable rules. There are two archetypes, "public" and "private". With public enforcement, government officials take steps to identify and sanction rule-breaking. As for private enforcement, this occurs when private actors seek legal redress for breaches of applicable laws. Shareholder litigation is an example, such as a "derivative" suit where a minority shareholder seeks relief on a company's behalf for a breach of duty by directors of the company when the board will not sue.

An obvious implication of the "law in books"/"law in action" dichotomy is that if a public authority has been vested with responsibility to enforce corporate governance-related measures it will need to be given sufficient funding to bring proceedings in appropriate circumstances. If this does not happen and company participants are side-stepping with impunity rules they find to be costly or inconvenient, the policy initiative likely will fail.[57] Still, while substantial enforcement may often be needed for policy success, it does not guarantee beneficial results. A potential difficulty is that when market participants well aware of applicable regulations and possible sanctions for breach adjust their behaviour in response, due to what can be characterized as a "pass-along" problem the ultimate outcome

---

56 Roscoe Pound, "Law in Books and Law in Action" (1910) 44 Amer L Rev 12.

57 Andrew Keay, "The Public Enforcement of Directors' Duties: A Normative Inquiry" (2014) 43 Common L World Rev 89, 101.

Electronic copy available at: https://ssrn.com/abstract=4684999

may still not be that sought by lawmakers. Consider the introduction of laws mandating substantial employee involvement in corporate governance of publicly traded firms that are unpopular with those who run such firms. Those in charge might respond by exiting the stock market to sidestep the rules or by shifting operations to countries lacking similar worker participation requirements. The change to the law thus might do little to benefit employees and could even leave them worse off.

2.6 Costs

Even if a regulatory regime has a sound theoretical rationale, has not been afflicted by counterproductive lobbying or self-interested bureaucratic behaviour and induces market participants to behave in the manner intended, state intervention still might not be a sensible policy move. The difficulty is that regulation can give rise to significant costs. If these are substantial enough, a regulatory scheme which has some positive effects will not yield an overall net benefit for society.

One key category of costs is "administrative." The public bodies tasked with formulating rules, monitoring behaviour and enforcing compliance incur these. Most obviously, with government departments, regulatory agencies and the courts the staff has to be paid and the facilities in which they work have to be maintained and kept in good working order.

"Compliance" costs regulated firms incur is a second key category. The most obvious are "direct", with companies hiring staff, paying professional advisors and operating internal protocols to ensure that there is compliance with relevant requirements and that suitable documentation is properly prepared and filed on time. There are also "indirect" compliance costs. For companies, regulation compelling disclosure of information with commercial value can result in competitive losses as duly informed rivals capitalize. Doubts concerning

Electronic copy available at: https://ssrn.com/abstract=4684999

the applicability of regulation might impede the negotiation and conclusion of beneficial corporate-related transactions.[58] Firms additionally may incur costs lobbying for regulatory exemptions and exclusions, or reduced burdens generally.

Public officials ideally will work hard to control and minimize the costs associated with regulatory activity and will refrain from intervening where these are substantially out of proportion to anticipated benefits. There is reason to doubt, however, how scrupulous public officials will be on this front. Unless they are contemplating a move to the sector they oversee (sub-section 2.3), they are unlikely to benefit personally by reducing regulatory burdens and, in the absence of a damaging political controversy, are unlikely to suffer adverse consequences if a regulatory regime is complex and expensive. Pre-intervention impact assessments can potentially forestall regulation that will be counterproductive due to attendant costs, but with such exercises anticipated benefits tend to be optimistically speculative in nature and costs frequently are estimated conservatively.[59]

3 Rule Types

Assuming that public officials determine that regulatory intervention is justified in principle in the corporate context, the nature of the rules deployed can have an appreciable impact on how the costs and benefits play out in practice. To see how, it is necessary as a preliminary manner to canvass briefly the key rule types, these being mandatory, presumptive and permissive. After we have done this, we will focus primarily on the advantages and disadvantages of the first two types. We will also consider a rationale for state intervention not highlighted thus far, namely reducing transaction costs by putting in place waivable rules

---

58 Peter O. Mülbert, "A Synthetic View of Different Concepts of Creditor Protection, or: A High-Level Framework for Corporate Creditor Protection" (2006) 7 Eur Bus Org L Rev 357, 384.

59 Martin Petrin, "Regulatory Analysis in Corporate Law" (2016) 79 Modern L Rev 537, 538, 554-61.

Electronic copy available at: https://ssrn.com/abstract=4684999

that mimic what corporate participants would contract for under optimal bargaining conditions.

3.1 A Rule Typology

Legal rules can be divided into three basic categories: permissive ("may"), presumptive ("may waive") and mandatory ("must" or "must not"). With permissive rules they most often legitimize arrangements that otherwise might not be valid and thus are sometimes referred to as "enabling" provisions. Such measures only govern if those potentially affected opt in.

Permissive rules can be important in the corporate context. For instance, when those establishing a business want to shield key investors from full responsibility for its debts, they will likely opt into a regime tailor-made to achieve this outcome by incorporating a company offering limited liability for shareholders. With respect to corporate governance, however, presumptive and mandatory rules are of greater practical import than their enabling cousins.

"Presumptive" rules apply without the parties affected taking an affirmative step -- no opting in is involved. Still, while presumptive rules apply automatically to the conduct they govern, company participants retain considerable choice in determining the extent to which such measures operate. This is because there will be an explicit option available to displace the rules. A presumptive law applies, then, unless those governed by it elect to opt out. Such measures accordingly are sometimes referred to as "default" or "suppletory" rules.

As with presumptive rules, mandatory measures apply automatically to the conduct being governed. Parties, however, lack an explicit opt out mechanism. Consequently, mandatory rules, sometimes referred to as "immutable", are in principle significantly more coercive in nature than their presumptive counterparts.

Electronic copy available at: https://ssrn.com/abstract=4684999

It might seem from the foregoing that it is relatively simple to classify rules relevant to corporate governance within a permissive/presumptive/mandatory framework. The process, though, is often not straightforward since with a legal rule it can be unclear if opting out is permitted and if it is, precisely when. Consider, for instance, directors' duties. Under UK company law, by virtue of case law principles a company's shareholders can pass resolutions that regularize transactions affected by breaches of duty and release directors involved from liability to the company.[60] Shareholders, however, cannot whitewash breaches of duty if this amounts to "fraud on the minority", which includes the misappropriation of money, property or advantages that belong to the company.[61] Reputedly, the question of precisely which breaches of directors' duties shareholders can ratify under the common law is "the most difficult in company law."[62] Despite such complexities, however, with respect to analyzing regulatory responses to corporate governance policy challenges, drawing a distinction between mandatory and presumptive rules offers helpful insights.

3.2 Mandatory Rule Drawbacks

A reader might be wondering why all rules governing publicly traded firms are not mandatory in nature. The idea of contracting out of legal rules hints at evasion, which in turn is a term with connotations of shifty, underhanded behaviour. Mandatory rules have attributes, however, which mean they are not suitable in many, let alone all, corporate governance circumstances.

---

60 See, for example, *Regal (Hastings) v. Gulliver* [1942] 1 All ER 378, 389; *Hogg v. Cramphorn* [1967] Ch 254 (Ch D).

61 *Atwool v. Merryweather* (1867) LR 5 Eq 464n; *Burland v. Earle* [1902] AC 83, 93.

62 Stanley M. Beck, "Corporate Opportunity Revisited" in Jacob S. Ziegel (ed.), *Studies in Canadian Company Law*, v. 2 (Toronto: Butterworths, 1973), 193, 233.

Electronic copy available at: https://ssrn.com/abstract=4684999

With mandatory rules, one drawback is that they can deter parties from customizing their operating environment to meet distinctive needs and requirements, thereby inhibiting the achievement of mutually beneficial outcomes. This point is potentially highly salient in the public company context. Publicly traded companies are heterogeneous, with variations including the size and type of the business, the personalities and skills of the directors, the particular attributes of the chief executive officer and varying preferences of key corporate participants. It has correspondingly been said that in the public company context "no one size fits all."[63] To the extent this is correct, even mandatory rules with a plausible policy justification can impose substantial costs on a wide range of publicly traded firms.

Mandatory rules do not dictate outcomes fully with arrangements and transactions that come within their purview. Instead, affected parties often can sidestep a mandatory rule with sufficient restructuring. This gives rise, however, to a second difficulty with mandatory rules: potentially substantial transaction costs.

A third problem with mandatory rules relates to law reform. If mandatory rules are hindering numerous beneficial transactions and are causing corporate participants to incur substantial costs to put legitimate and proper business arrangements in place, ideally lawmakers will make prompt adjustments to correct matters. As sub-section 2.2 indicated, however, with respect to amending corporate law lawmakers may be slow to act. Matters therefore may not improve for a substantial period of time.

3.3 Arguments in Favour of Mandatory Rules

Despite possible disadvantages with mandatory rules, their use can potentially be justified in various ways in the corporate context. One such circumstance is where opting out

---

63 Derek Higgs, *Review of the Role and Effectiveness of Non-Executive Directors* (DTI 2003), paras. 1.19, 16.1.

Electronic copy available at: https://ssrn.com/abstract=4684999

by corporate participants is likely to be self-defeating in a way that undermines the rationale for regulation. With respect to public company shareholders, the nature of voting makes this a realistic possibility. Shareholders who know their votes in isolation cannot dictate the outcome of a shareholder resolution could be "rationally apathetic" about the outcome, meaning they will not investigate or think seriously about matters which are the subject matter of voting. They correspondingly might well unthinkingly endorse a resolution put before them, or not vote at all. Either way, where directors or influential shareholders stand to benefit personally from a presumptive rule opt out shareholders can implement, the likelihood increases a resolution which operates contrary to the interests of neutral shareholders will pass.

For policymakers the most obvious response to concerns about self-defeating waivers is to make a rule mandatory. Company law rules can also be calibrated, however, to discourage disadvantageous waivers without foreclosing opt outs entirely. The law governing ratification of directors' duties in the UK illustrates the point. Where a director stands to benefit from the passage of a shareholder resolution relating to a breach of duty the Companies Act 2006 stipulates that the director's votes and those of any person connected with them are to be disregarded.[64] This reduces at least to some degree the likelihood of a company's shareholders endorsing a counterproductively self-serving directors' duties waiver.

A second circumstance where the deployment of mandatory rules can be justified is where the objective of the laws in question is to deal with externalities. In situations where parties conduct their affairs in a manner which has negative side-effects on others, presumptive rules may offer little protection for those who are adversely affected since those

64 Section 239(4).

Electronic copy available at: https://ssrn.com/abstract=4684999

engaging in the conduct in question may well opt out if the applicable laws do not serve their own interests. Hence, if the state is going to correct externality problems successfully, mandatory laws may be required.

A related but more intricate externality-based justification of mandatory disclosure regulation can be advanced in the context of public share offerings. Companies carrying out such transactions may well divulge substantial amounts of information to win over investors. Such voluntary disclosure potentially undermines information-asymmetry related arguments that can be advanced to justify mandating disclosure by those organizing public offerings of shares (see sub-section 1.2). Still, a revised externality-oriented case in favour of mandatory disclosure obligations can be made. In an unregulated environment, the types of information companies and their advisers disclose in support of public offerings might diverge substantially and data may be presented in widely varying formats. The resulting lack of comparability could impair equity markets by imposing substantial investigation costs on an investing public too widely dispersed to lobby for uniformity. A mandatory disclosure regime which compels companies carrying out public offerings of shares to divulge salient information in a prescribed manner correspondingly might be justifiable on the basis of third-party effects.

A third set of circumstances where a case can be made for mandatory rules is where public officials are seeking to achieve goals other than fostering efficiency gains. When corporate participants feel that a presumptive legal scheme does not serve their interests, which may well be the case when the policy objective is unrelated to correcting market failures, opting out could be high on the agenda. Waivers on a large scale could well undermine the policy logic which underlies the laws in question. The most obvious cure will be to make the relevant laws mandatory.

Electronic copy available at: https://ssrn.com/abstract=4684999

In the corporate governance realm, fostering boardroom diversity is a topic where the foregoing logic could well apply. Evidence on whether "diverse boards improve firm economic value remains inconclusive at best."[65] This casts doubt on whether mandating boardroom diversity on efficiency grounds can be justified, and also implies that adherence to a presumptive rule could be patchy. Numerous advocates of boardroom diversity cite, however, non-economic rationales for state intervention, such as the fostering of equality and the promotion of social justice (sub-section 1.9). To the extent regulation of boardroom diversity is justifiable on such grounds, mandatory rules may well be in order.

3.4. The Role and Significance of Presumptive Rules

Presumptive rules affecting corporate governance fall between their permissive and mandatory cousins. Unlike permissive measures, default rules apply automatically – opting in is not required. And, in contrast with mandatory laws, corporate participants have explicit scope to opt out.

It is not entirely clear how important presumptive rules are practically in the corporate governance context. One reason is that their prevalence varies between countries. For example, corporate legislation in the U.S. offers considerably greater scope for private ordering than corporate statutes in most other jurisdictions.[66]

Gauging the practical importance of presumptive rules in the corporate governance context is also challenging because it is unclear how prevalent opting out is. "Contractarian" corporate law academics who emphasize market dynamics at work within companies and who moved to the US corporate law scholarship forefront as the 20th century drew to a close

---

65 Fisch, *supra* note 35 at 7.

66 Jens Dammann, "The Mandatory Law Puzzle: Redefining American Exceptionalism in Corporate Law" (2014) 65 Hastings LJ 443, 443-44, 448-49 (using the term "enabling" in the way "presumptive" and "default" are used here).

Electronic copy available at: https://ssrn.com/abstract=4684999

initially assumed that so long as statutory rules were predominantly presumptive corporate law was "trivial" because such rules could be avoided at little cost and thus would often be displaced.[67] In fact, opting out of presumptive rules can be time consuming and expensive due to legal fees and related expenditures. Some contractarian scholars indeed now acknowledge the content of presumptive rules can matter considerably because the freedom to opt out "is exploited in remarkably small degree".[68] Empirical evidence on the extent to which contracting around presumptive rules actually occurs in the public company context is mixed.[69]

3.5 Pros and Cons of Presumptive Rules

Some contractarian scholars suggest that "(t)here is no dispute…that a substantial part (if not all) of corporate governance" should take the form of default rules.[70] Depending on how presumptive standards are framed, they indeed have in the corporate context important potential advantages in comparison with both permissive and mandatory rules. Assume a law corresponds with the preferences of most but not all of the corporate participants to which it applies. As between a permissive and presumptive format, the latter logically will be preferable. If the rule is merely permissive, most of those affected will either have to incur the costs associated with electing to invoke it or forego making a welfare-enhancing change. If the rule is presumptive, on the other hand, there is no such dilemma. Instead, the law will

---

67 See, for example, Bernard S. Black, "Is Corporate Law Trivial: A Political and Economic Analysis" (1990) 84 Nw Univ L Rev 542, 557.

68 Henry Hansmann, "Corporation and Contract" (2006) 8 Amer L Econ Rev 1, 4.

69 See Michael Klausner, "Fact and Fiction in Corporate Law and Governance" (2013) 65 Stanford L Rev 1325 (customization is rare); Gabriel Rauterberg and Eric Talley, "Contracting out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers" (2017) 117 Colum L Rev 1075 (contracting out is commonplace).

70 Lucian Arye Bebchuk and Assaf Hamdani, "Optimal Defaults for Corporate Law Evolution" (2002) 96 Nw Univ L Rev 489, 496 (using the term "enabling" in the way "presumptive" and "default" is used here).

Electronic copy available at: https://ssrn.com/abstract=4684999

apply without any affirmative action being necessary, and only a small minority of corporate participants will have to take the time and trouble to displace a rule that is disadvantageous for them.

Assume again that a law corresponds with the preferences of most of the corporate participants to whom it applies, but the choice is between a mandatory and default format. For the minority governed by a mandatory provision that does not correspond to their preferences, they face an unenviable choice: remain governed by a sub-optimal rule or take whatever presumably extensive steps are required to side-step it. The situation should be markedly better when a rule is presumptive. While opting out will not be costless, carrying out the relevant procedure should be considerably simpler than end-running the rule in mandatory form. Transaction cost savings should accordingly follow.

The transaction cost-oriented logic favouring a presumptive rather than mandatory format will be even more compelling with a legal rule that does not correspond to the preferences of most corporate participants governed by it since they will be confronted with the unenviable choice just specified. This does not foreclose, however, the possibility that a mandatory approach might be justified. When rules are introduced to counteract externalities or to achieve non-economic goals that those regulated dislike, the beneficial effects will likely be largely nullified if opting out is permitted (see sub-section 3.3).

3.6 Presumptive Rule Specification

Assume that the transaction cost logic just canvassed persuades public officials that rules affecting corporate governance they promulgate should, in the main, be presumptive. Such logic could be pushed further to specify the content of the presumptive rules in question. Sub-section 3.5 provided a spoiler alert on this point by focusing on the extent to which rules match the expectations and needs of company participants. To elaborate,

Electronic copy available at: https://ssrn.com/abstract=4684999

consider a presumptive legal rule that is suitable in this way in most instances. Parties will only avail themselves of the option to override occasionally. Transaction costs correspondingly will be lower with "gap filling" of this sort than they would if the rule only conformed with the preferences of a minority of corporate participants affected. There is a public policy argument in favour of deploying this sort "majoritarian" gap-filling default, articulated forcefully by UK insolvency expert Riz Mokal: "if there are two methods of bringing about a certain goal in these circumstances, we must choose the method which is less costly to implement, other things being equal. Any other decision would amount to wasting resources, since the same objective could have been attained and in addition, a surplus would be available for application towards other valued goals."[71]

How can cost-reducing majoritarian defaults be identified and formulated? Deploying hypothetical bargain analysis -- ostensibly "the predominant theory of contractual interpretation"[72] -- is a plausible approach. For public officials minded to use the hypothetical bargaining model to identify a majoritarian default, the first step will be to identify those hypothetically "bargaining": the category or categories of company participant affected by the issue in question. The second will be to determine the considerations which are likely to influence the approach of those affected, such as assuming that shareholders in publicly traded firms typically have diversified share portfolios rather than investing heavily in one or two firms.

The third step for public officials using a hypothetical bargain approach to identify a majoritarian default rule will be to deduce how the corporate participants in question would deal with the matter at hand under ideal bargaining conditions, such as perfect information

---

71 Rizwaan Jameel Mokal, "On Fairness and Efficiency" (2003) 66 Mod L Rev 452, 457.

72 Bebchuk and Hamdani, *supra* note 70, 491, n. 8.

Electronic copy available at: https://ssrn.com/abstract=4684999

and zero transaction costs. The actual behaviour of corporate participants may provide a useful rough and ready guide concerning idealized contracting outcomes, with the caveat that where there are substantial contracting obstacles only the most basic issues are likely to be addressed explicitly.

Fourth and finally, the conclusions public officials reach regarding what corporate participants would contract for under ideal conditions will need to be translated into workable legal rules. This will involve making choices such as whether to deploy a simple, categorical easy-to-understand standard that may fail to address significant contingencies explicitly or a detailed set of measures intended to address all significant questions likely to arise but which might become rapidly out-of-date as circumstances change.

Laws framed in accordance with a hypothetical bargaining framework will never suit everyone's needs. Even with the most carefully calibrated legal standard there inevitably will be some atypical parties for whom that standard will not represent a suitable approach to the issue in question. Still, when the hypothetical bargaining model is used to formulate presumptive rather than mandatory rules specific allowance is made for this possibility. Those involved in companies will have an explicit option to displace the default rule and develop their own arrangements, and as a matter of contractarian logic, real bargains will appropriately trump their hypothetical counterparts. Easterbrook and Fischel maintain that corporate law (at least the American version) "almost always conforms" to a model akin to that just described.[73]

Given that under a contractarian approach real bargains should be privileged in comparison with presumptive rules formulated by way of hypothetical bargaining analysis it

[73] Frank H. Easterbrook and Daniel R. Fischel, *The Economic Structure of Corporate Law* (Cambridge MA: Harvard University Press, 1991), 15.

Electronic copy available at: https://ssrn.com/abstract=4684999

would seem to follow that lawmakers should always make it easy for those governed by a presumptive rule to opt out. This is not necessarily so, however. If imprudent waivers or adverse third-party effects are a real risk but there are also serious concerns about the costs mandatory rules will impose on contracting parties a beneficial way forward can be to permit opting out but use a "sticky" default to make this challenging.[74] Building in a disclosure obligation is a potentially attractive technique for supressing rule waivers. When such a requirement is in place, only parties sufficiently motivated to divulge otherwise private information will orchestrate an opt out and when they go ahead affected parties will be better informed than they otherwise would have been, which should make it more likely that the ultimate outcome will be mutually beneficial.[75]

A way public officials can impede opting out with an explicit information-eliciting arrangement will be to put in place a "comply or explain" regime. The idea will be that the party prioritizing displacing the presumptive rule will need to explain why this will be a beneficial move. Being forced to disclose in this way should discourage opting out without precluding the possibility while leaving those affected by any waiver that does occur fully informed about the logic involved.

"Comply or explain" statutory corporate law rules are a rarity.[76] A simple affirmative legislative disclosure obligation concerning the relevant topic is a more likely response where asymmetric information gives rise to concerns about counterproductive waivers of

---

74 Ian Ayres, "Regulating Opt-Out: An Economic Theory of Altering Rules" (2012) 121 Yale LJ 2032, 2045, 2084-88.

75 Ibid., 2045, 2062-63, 2087, 2098-99.

76 Larry Fauver et al, "Board Reforms and Firm Value: Worldwide Evidence" (2017) 125 J Fin Econ 120, 124. For an exception, see Dodd-Frank Act, s. 972.

Electronic copy available at: https://ssrn.com/abstract=4684999

presumptive rules.[77] For most who have even just a passing acquaintance with corporate governance, however, the "comply or explain" phraseology will be familiar. This is because the concept is a mainstay of corporate governance codes, which the next and final section of this paper discusses.

4 Corporate Governance Codes

According to a 2016 UK government consultation document, corporate governance "involves a framework of legislation, codes and voluntary practices."[78] We have just been considering the nature of legislation that regulates corporate governance and touched on voluntary moves by corporate participants in so doing. We consider codes here.

Codes clearly merit independent analysis in a primer on corporate governance regulation. Reputedly "(a)s a tool of modern corporate governance, there is nothing as ubiquitous as the corporate governance code."[79] Indeed, among 49 jurisdictions the Organisation for Economic Co-operation and Development (OECD) surveyed in 2023, only three did not have a code, with the United States being the most notable outlier.[80] Approximately 100 countries worldwide currently have a corporate governance code.[81]

We will start by identifying the key features of corporate governance codes and then will consider the pros and cons of this extra-statutory mechanism. A caveat is in order,

---

77 Michael J. Whincop, "Contracting Around the Conflict Rule: An Empirical Analysis of a Penalty Default" (2002) 2 J Corp L Stud 1, 6.

78 Department for Business, Energy and Industrial Strategy, *Corporate Governance Reform: Green Paper* (London: DBEIS, 2016), 10.

79 Cally Jordan, "Voluntary Codes of Corporate Governance: Evolution and Implications" in Oonagh Fitzgerald (ed.), *Corporate Citizen : New Perspectives on the Globalized Rule of Law* (Waterloo, Ont.: Centre for International Governance Innovation, 2020), 209, 209.

80 OECD, *supra* note 26, 41.

81 Ilir Haxhi, "Comparative Corporate Governance" (2023), working paper, 52, https://ssrn.com/abstract=4375692.

Electronic copy available at: https://ssrn.com/abstract=4684999

though. This discussion focuses on codes targeting companies as opposed to codes addressed to investors in publicly traded firms, namely "stewardship" codes such as Britain's discussed in sub-section 1.5.

4.1 The Nature of Codes

Corporate governance codes can be generated by individual firms for their own particular purposes, by bodies aiming to provide guidance on a transnational basis to national policymakers and by entities seeking to shape corporate governance practice within a single jurisdiction.[82] To simplify the analysis, we will focus on the final type, national codes. A serviceable definition of a national code for our purposes is "a non-binding set of principles, standards or best practices, issued by a collective body and relating to the internal governance of corporations."[83] Sub-section 4.2 will pick up on the "non-binding" point and consider briefly who issues codes. The focus here is on "internal governance of corporations", and more particularly the types of companies involved and the topics codes canvass.

National corporate governance codes typically target all publicly listed companies within a jurisdiction, though there are codes that focus on particular categories of publicly traded firms and on large privately held companies.[84] As for the topics covered, this varies across countries.[85] Nevertheless, since the inception of corporate governance codes, board

---

82 Francesca Cuomo, Christine Mallin and Alessandro Zattoni, "Corporate Governance Codes: A Review and Research Agenda", (2016) 24 Corp Gov: Intl Rev 222, 223; Matteo Gargantini and Michele Siri, Corporate Governance Codes, (2023) Bocconi Legal Studies Research Paper Series, 13.

83 Andrew Keay, "Comply or Explain in Corporate Governance Codes: In Need of Greater Regulatory Oversight", (2014) 34 Legal Stud. 279, 279-80, quoting the law firm Weil, Gotshal and Manges.

84 Cuomo, Mallin and Zattoni, *supra* note 82, 225.

85 Ruth V. Aguilera and Alvaro Cuervo-Cazurra, "Codes of Good Governance" (2009) 17 Corp Gov: Intl Rev 376, 383.

Electronic copy available at: https://ssrn.com/abstract=4684999

structure and composition has been a main concern.[86] Executive remuneration, shareholder engagement, internal financial reporting and risk management also often feature,[87] with stakeholders and boardroom diversity growing in prominence.[88] With the topics canvassed, codes most often deal with these by way of provisions that recommend how companies should proceed in relation to particular governance issues.[89] Some codes, however, also contain various high-level statements, often referred to as "principles", that are thought of as so essential to good corporate governance that all companies which a code governs are expected to apply them.[90]

4.2 Codes and Self-Regulation

Laws governments issue on the topic of corporate governance typically impose automatically applicable (though perhaps waivable) requirements.[91] Codes, in contrast, have a strong self-regulatory orientation. For instance, though codes can contain ostensibly mandatory high-level principles, "most of their recommendations are not binding on substance, but allow the addressee to choose another approach."[92] Also, the legislature in the relevant jurisdiction will not promulgate the code. Instead, another body will be in charge, with the self-regulatory aspect being most pronounced when a code's custodian is a body that

---

86 Gargantini and Siri, *supra* note 82, 14.

87 Ana Taleska, "Board-Shareholder Engagement and Disclosure Obligations Under Corporate Governance Codes", (2023), unpublished working paper, 6.

88 Ian MacNeil and Irene-marié Esser, "The Emergence of 'Comply or Explain' as a Global Model for Corporate Governance Codes" (2022) 31 Eur Bus L Rev 1, 28.

89 Gargantini and Siri, *supra* note 82, 8.

90 Ibid., 10, 24.

91 Aguilera and Cuervo-Cazurra, *supra* note 85, 377.

92 Eddy Wymeersch, "European Corporate Governance Codes and Their Effectiveness" in Massimo Belcredi and Guido Ferrarini (eds.), *Boards and Shareholders in European Listed Companies: Facts, Context and Post-Crisis Reforms* (Cambridge: CUP, 2013), 67, 116.

Electronic copy available at: https://ssrn.com/abstract=4684999

is a private organization such as an association of business firms or investors and least pronounced when the issuer is a securities regulator or stock exchange formally vested with statutory powers.[93]

The discretion companies to which a code applies have to deviate from what the code recommends means there is some resemblance to presumptive company law rules. There are crucial differences, however. With a presumptive company law rule, if the parties affected do nothing, the rule applies. In contrast, since codes are not comprised of potentially binding legal measures, if corporate participants do nothing code provisions will not have any effect. Instead, affirmative self-regulatory action is required to put in place arrangements corresponding to what is recommended.

From an efficiency perspective an obvious role for presumptive legal rules to play is to reduce transaction costs by mimicking arrangements parties would adopt under ideal bargaining conditions (sub-section 3.6). The departure point with codes is usually different. Their provisions most often do not simply reflect existing public company preferences but instead represent what drafters of the code believe is ahead-of-the-curve "best practice,"[94] with the code typically being constructed to "nudge" companies toward adoption. The "nudge" mechanism most often will be a "comply or explain" arrangement,[95] usually backed by an obligation companies have to disclose the extent to which they adhere to the corporate governance code in question.[96]

---

93 Ibid., 114. On who custodians are in practice, see OECD, *supra* note 26, 42.

94 Ales Kubíček, Petra Štamfestová & Jiri Strouhal, "Cross-Country Analysis of Corporate Governance Codes in the European Union" (2016) 9 Econ & Sociology 319, 319.

95 OECD, *supra* note 26, 40 (82% of jurisdictions surveyed). See also Haxhi, *supra* note 81, 52 ("widely used").

96 Cuomo, Mallin and Zattoni, *supra* note 82, 223; MacNeil and Esser, *supra* note 88, 26.

Electronic copy available at: https://ssrn.com/abstract=4684999

Stock exchange listing rules usually impose code-related comply or explain disclosure obligations but this can also be done by statute.[97] The way in which disclosure is supposed to occur provides much of the nudge in favour of compliance. When a company is complying, little (if anything) needs to be said. In contrast, with a failure to comply, a company is under an onus to describe affirmatively why an arrangement with a "best practice" badge of approval is not suitable for the company. Side-stepping the disclosure obligations associated with non-compliance provides companies subject to a corporate governance code with an incentive to fall into line with code guidance.

When a code-related comply or explain regime is in place, its impact typically will be muted to some extent because there will not be official regulatory verification of the extent of compliance and the adequacy of explanations advanced. It will instead usually fall to market actors, most obviously shareholders, to track compliance and to instruct non-compliant companies offering unsatisfactory explanations to say more or adhere to code recommendations.[98] Regardless, comply or explain can substantially fortify self-regulatory corporate governance codes, with market-based pressure to conform contributing to code compliance.

4.3 Evaluating Codes

With respect to corporate governance state intervention has potential drawbacks (section 2). Corporate governance codes can provide a way to foster beneficial governance change while ameliorating a number of these. Potentially problematic features with state intervention include time constraints legislators face, self-interested lobbying by pressure groups and regulator unfamiliarity with the marketplace, with a mandatory format for laws

97 Gargantini and Siri, *supra* note 82, 20.

98 Keay, *supra* note 83, 280, 282, 294.

Electronic copy available at: https://ssrn.com/abstract=4684999

compounding such difficulties because parties adversely affected cannot explicitly displace sub-optimal rules that might be enacted. Corporate governance codes potentially provide a beneficial workaround with these regulation drawbacks.

Time constraints are considerably less likely to be a challenge with a corporate governance code as opposed to legislation because there is no need to find a spot on a potentially crowded parliamentary agenda. Corporate governance codes indeed are amended with considerable frequency.[99] Behind-the scenes lobbying likely will occur, but awareness that proposed measures will not be legislatively binding should temper the pressure brought to bear and make it easier for code reform to proceed unencumbered.[100] As for lack of familiarity with the marketplace, a corporate governance committee or similar body vested with responsibility for determining the content of a country's corporate governance code can be staffed with members with substantial corporate governance expertise considerably better positioned to anticipate best practice than governmental regulators.[101]

Justifying the use of corporate governance codes would be more challenging if companies routinely ignored code guidance. Under such circumstances, investors and other interested parties would lose interest in departures from the relevant standards, thereby dissipating the discipline the compliance nudge comply or explain arguably should provide. This danger, however, appears to be more theoretical than real given that compliance with

---

99 OECD, *supra* note 26, 41-42.

100 Marc T. Moore, "The De-Privatisation of Anglo-American Corporate Law" in Roman Tomasic (ed.), *Routledge Handbook of Corporate Law* (London: Routledge, 2017), 32, 42 (describing 2003 reforms in the UK).

101 Gargantini and Siri, *supra* note 82, 11.

Electronic copy available at: https://ssrn.com/abstract=4684999

comply or explain-based codes tends to be substantial, especially with larger firms lacking a dominant family shareholder.[102]

The case in favour of corporate governance codes is far from open-and-shut, however, with substantial compliance ironically being part of the case against. Concerns have been expressed that high compliance rates are a manifestation of an unwelcome code trend, namely "box ticking" by investors unprepared to consider the persuasiveness of explanations companies offer for non-compliance. A "comply or else" environment correspondingly reputedly exists, leaving companies under a strong onus to adopt "best practices" not suitable to their specific conditions.[103] Under such circumstances, the prospect of rapid amendment of codes becomes a vice rather than a virtue because companies will have to implement a steadily changing and perhaps increasing list of ill-suited governance strictures.

The nature of the body tasked with promulgating a country's corporate governance code also can switch from a virtue to a vice. If direct proximity to market practice that should have left that body well-positioned to identify beneficial state of the art governance arrangements dissipates, then the likelihood increases that a code's guidance will be superfluous to good governance or perhaps even antithetical to it. For instance, in the UK, where the FRC, a quasi-governmental regulator, dictates the content of the UK Corporate Governance Code, Tim Martin, the founder and chair of the listed pub group JD Wetherspoon, caustically referred in 2019 in relation to the Code to "(t)he vast gap between the technocrats who make the rules and commercial reality."[104] While this assessment may

---

102 Ibid., 23; Francesca Cuomo and Alessandro Zattoni, "Codes of Governance" in Garry D. Carnegie (ed*.), Handbook of Accounting, Accountability and Governance* (Cheltenham, UK: Edward Elgar, 2023), 49, 59-60.

103 Gargantini and Siri, *supra* note 82, 23.

104 Q1 Trading Update, 13 November 2019, Wetherspoon, Investors: Reports, Results, Presentations, https://www.jdwetherspoon.com/investors-home/reports-results-presentations .

Electronic copy available at: https://ssrn.com/abstract=4684999

be overly harsh, with governmental or quasi-governmental bodies being responsible for the content of the corporate governance code in nearly half of the jurisdictions the OECD surveyed in 2023 and with this proportion increasing,[105] the risk that codes will frequently be out of touch with market conditions cannot be dismissed out of hand.

Corporate governance codes have been described as "indispensable".[106] Given their potential drawbacks this is open to question.[107] In those circumstances where enacting statutory measures dictating governance-related change is not feasible or is undesirable, codes could be replaced by an obligation for publicly traded companies to disclose how their governance practices tally in relation to concise governance checklists financial services regulators compile under delegated statutory authority. Corporate governance innovation could then proceed with investors and other interested parties being able to find out readily how public companies are governed but in the absence of the potentially counterproductive "comply or else" mentality that corporate governance codes can foster.

105 OECD, *supra* note 26, 42. See also MacNeil and Esser, *supra* note 88, 26.

106 Haxhi, *supra* note 81, 53.

107 Brian R. Cheffins and Bobby V. Reddy, "Thirty Years and Done – Time to Abolish the UK Corporate Governance Code" (2022) 22 J Corp L Stud 709.

Electronic copy available at: https://ssrn.com/abstract=4684999

european corporate governance institute

about ECGI

The European Corporate Governance Institute has been established to improve *corporate governance through fostering independent scientific research and related activities.*

The ECGI will produce and disseminate high quality research while remaining close to the concerns and interests of corporate, financial and public policy makers. It will draw on the expertise of scholars from numerous countries and bring together a critical mass of expertise and interest to bear on this important subject.

The views expressed in this working paper are those of the authors, not those of the ECGI or its members.

www.ecgi.global

european corporate governance institute

ECGI Working Paper Series in Law

Editorial Board

Editor	Amir Licht, Professor of Law, Radzyner Law School, Interdisciplinary Center Herzliya
Consulting Editors	Hse-Yu Iris Chiu, Professor of Corporate Law and Financial Regulation, University College London
	Martin Gelter, Professor of Law, Fordham University School of Law
	Geneviève Helleringer, Professor of Law, ESSEC Business School and Oxford Law Faculty
	Kathryn Judge, Professor of Law, Coumbia Law School
	Wolf-Georg Ringe, Professor of Law & Finance, University of Hamburg
Editorial Assistant	Asif Malik, ECGI Working Paper Series Manager

https://ecgi.global/content/working-papers