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No Private Ordering Please, We're Italian

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Abstract

Private ordering enables investors to design firm-specific governance arrangements. Aided by specialized lawyers, sophisticated contracting parties can engage in complex private ordering exercises yielding agency cost-minimizing governance structures. Venture capital ('VC') contracting is a notable example. Through decades-long iterations, US VC contracts have emerged as the best real-world solutions to the challenges of financing high-tech firms, informing transactional practice globally. Yet, the law, corporate law included, can hinder the "transplant" of US VC contracts. In a companion paper, we provide systematic evidence that German and Italian corporate laws literally crash contracting parties' ambitions to transplant US VC contracts. Importantly, we spotlight that blackletter corporate law provisions are less often to blame for this outcome than (widely accepted) scholarly interpretations. Corporate law in action is thus 'über-mandatory'. This essay complements our previous research by asking how Italian legal culture can explain this character. We note that Italy's internal legal culture grants legal professionals wide discretion on how to interpret the law and how they use it to complement blackletter law with a number of implicit rules and principles of a mandatory nature. External legal culture, in turn, explains legal professionals' (and chief among them legal scholars') inclination to build a 'system' of mandatory corporate law rules. To begin with, the long-standing predominance of banks' role in corporate finance created demand for rigid corporate laws. Second, legal professionals' inclination to extend mandatory corporate law is consistent with their self-interest as it increases demand for legal services and, hence, their rents. Third, few Italian legal scholars appear to trust markets and decentralized rulemaking as efficient and fair tools to allocate resources, consistently with the dominant political ideology. Lastly, Italian legal scholars aspiring to establish their academic reputation and advance their careers face stronger incentives to identify novel mandatory requirements that constrain private ordering – thereby demonstrating their mastery of the legal system – rather than to advocate for legal deference to existing private ordering solutions, which may be perceived as trite and unoriginal.

Keywords: Comparative Corporate Law, Comparative Corporate Governance, Legal Culture, Regulatory Styles, Financial Contracting, Venture Capital, Private Ordering, Start-ups

JEL Classifications: G38, K22, L26

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This Essay has been written by invitation of the Italian Law Journal and is forthcoming in a special issue on Italian legal culture.

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Yet, the law, corporate law included, can hinder the "transplant" of US VC contracts. In a companion paper, we provide systematic evidence that German and Italian corporate laws literally crash contracting parties' ambitions to transplant US VC contracts. Importantly, we spotlight that blackletter corporate law provisions are less often to blame for this outcome than (widely accepted) scholarly interpretations. Corporate law in action is thus 'über-mandatory'.

This essay complements our previous research by asking how Italian legal culture can explain this character. We note that Italy's internal legal culture grants legal professionals wide discretion on how to interpret the law and how they use it to complement blackletter law with a number of implicit rules and principles of a mandatory nature. External legal culture, in turn, explains legal professionals' (and chief among them legal scholars') inclination to build a 'system' of mandatory corporate law rules. To begin with, the long-standing predominance of banks' role in corporate finance created demand for rigid corporate laws. Second, legal professionals' inclination to extend mandatory corporate law is consistent with their self-interest as it increases demand for legal services and, hence, their rents. Third, few Italian legal scholars appear to trust markets and decentralized rulemaking as efficient and fair tools to allocate resources, consistently with the dominant political ideology. Lastly, Italian legal scholars aspiring to establish their academic reputation and advance their careers face stronger incentives to identify novel mandatory requirements that constrain private ordering – thereby demonstrating their mastery of the legal system – rather than to advocate for legal deference to existing private ordering solutions, which may be perceived as trite and unoriginal.

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De te fabula narratur.
Horace, *Satires*, I, 1, 69-70

I. Introduction

In Italy, like in many other jurisdictions, the law can be conceptualized as a nested structure reminiscent of a *matryoshka* doll. In this analogy, the legal regime applicable to a specific case represents the innermost doll, encased within a larger, more comprehensive structure: the 'system'. This system can be understood as a rationally ordered, all-encompassing virtual repository of legal rules, concepts, and principles.[1] It is collectively shaped by legal professionals—including scholars, practitioners advising private parties, and, most authoritatively,[2] judges—who continually refine and articulate its contents. The 'system' is the result of how, consistent with a jurisdiction's 'internal legal culture',[3] legal professionals apply their jurisdiction's metarules[4] to combine, organize, and rationalise the raw materials of the relevant legal sources in a coherent intellectual construction. Our third *matryoshka* doll comprises those legal sources, namely the Constitution, EU Treaties and secondary legislation, domestic legislative acts, governmental regulations, customs, and whatever else a jurisdiction recognizes as a valid legal source. Legal sources, in turn, are shaped by 'external legal culture', a combination of politics, market forces, ideology, and philosophical ideas[5] that can be viewed as the fourth and largest *matryoshka* doll: as such, it shapes not only legal sources but also the 'system' and, ultimately, the legal regime that applies to the individual case.

This analogy should illuminate the relevance to this special issue of the Italian Law Journal on Italy's legal culture of an ongoing research project on corporate law and venture capital ('VC') contracting that we have been working on together with Tobias Tröger.[6] In

[1] The idea of a 'system' of rules has its origin in Savigny's scholarship, which Italian legal scholars made their own in the second half of the 1800s. See eg N. Lipari, *Le categorie del diritto civile* (Giuffrè: Milano, 2013), 21-22.

[2] To be fair, it is at least open to debate whether courts' authority is above legal academics' when it comes to identify what the law in action is that applies to a specific case, but it is safe to say that, in the absence of precedents from the Italian Supreme Court (*Corte di Cassazione*) and possibly even from its Joint Divisions (*Sezioni Unite*), lawyers will find the answer in the writings of top legal academics to be as relevant for their case as, if not more relevant than, case law from lower courts.

[3] J.Ø. Sunde, 'Legal Culture: Ideas of and Expectations to Law Made Operational by Institutional(-Like) Practices', in: S. Koch and M. M. Kjølstad eds, *Handbook on Legal Cultures* (Springer: Cham, 2023), 13, 24 (defining internal legal culture as 'the ideas and expectations and the institutional practices of those regularly engaged with the legal culture').

[4] P. Legrand, 'European Legal Systems Are Not Converging' 45 *International and Comparative Law Quarterly*, 52, 57 (1996) (defining metarules as 'the rules developed by a legal system (or, more accurately, by the actors within a legal system) in order to help it manage its body of rules').

[5] See Sunde, n 3 above, 24: 'external legal culture […] is the part of legal culture that is influenced by primarily non-legal actors and activities, such as politics, economy, or communication technology'.

[6] See L. Enriques, C.A. Nigro and T.H. Tröger, 'Venture Capital Contracting as Bargaining in the Shadow of Corporate Law Constraints' (2024); Id, 'Can U.S. Venture Capital Contracts Be Transplanted to Europe? Systematic Evidence from Germany and Italy' (2024); and Id, 'Mandatory Corporate Law as an Obstacle to Venture Capital Contracting in Europe: Implications for Markets and Policymaking', in B.J. Broughman and E. de Fontenay eds, *Research Handbook on the Structure of Private Equity and Venture Capital Investments* (Colchester: Edward Elgar Publishing, forthcoming). For the sake of brevity and considering the focus of this Journal issue, we do not discuss German law and legal culture throughout this essay.

companion papers we show that Italy's corporate law (similar to Germany's) rejects virtually all the elements of the sophisticated contractual framework that US legal practitioners have elaborated over decades to govern the relationships between VC funds ('VCFs') and entrepreneurs within VC-backed start-ups.[7] By identifying the corporate law rules, concepts and principles[8] that determine such an outcome, we also gain insight into how the 'system' originating them is built up.

This essay builds on our previous research's findings to shed light on what determines Italian corporate law in action, namely the internal and external legal culture of Italian (corporate) law scholars. It shows that they widely share an almost unfettered inclination to 'find' new legal implicit rules, concepts, and principles that have little to no explicit basis in the relevant legislation and are almost invariably of a mandatory nature. As an outcome, corporate players find themselves trapped inside a corporate law regime that looks like a labyrinth of restrictions. In other words, Italian corporate law displays an '*über*-mandatory'' structure.

This essay explains how internal and external legal culture explains such a structure. First, it sheds light on the toolkits that legal professionals use to build this 'system' of mandatory rules. Second, it identifies four external forces that contribute to shaping such a system. First, the long-lasting predominance of banks' role in the market for corporate finance has resulted in a demand for rigid corporate law, whilst the lack of alternative, more modern, forms of market-based financing until very recently has simultaneously implied a lack of demand for more flexible corporate law. Second, legal professionals' inclination to extend the domain of mandatory corporate law is consistent with their self-interest: the more expansive the net of mandatory rules and principles, the higher the demand for legal services and, hence, the higher legal professionals' rents. Further, a political culture favourable to private ordering is largely alien to Italian legal elites. The prevailing view among legal scholars is in fact one that deeply distrusts markets as a tool to allocate (rights to) resources. Finally, Italian legal academics who aim to establish themselves as well-respected scholars among their peers have strong incentives to elaborate new mandatory rules and principles.

The remainder of this essay is organized as follows. Section II summarizes the results of our research on VC contracting under German and Italian corporate laws. Section III zooms in on the mandatory structure of Italian corporate law to show that, despite recent reforms, Italian legal scholars use local metarules to find new mandatory implicit requirements that constrain private ordering in significant respects. Section IV provides four non-mutually exclusive explanations for the resulting *über*-mandatory structure of Italian corporate law. Section V concludes.

[7] See L. Enriques et al, Can U.S., n 6 above.

[8] In our companion papers (n 6 above), we call these concepts and principles 'implicit precepts, whether narrow or wide-ranging'. Here, we use the terms that are common among Italian legal scholars to describe the units of the 'system'.

II. Our Findings

Our research project, now comprising three papers in addition to this essay,[9] delves into the question of how corporate law matters for the development of VC markets.

In one of our companion papers, we refine the theory that corporate law can support (hinder) efficient VC contracting and thus possibly enhance (curb) VC activity because of its relative flexibility (inflexibility). We offer a primer of the multiple mechanisms by which rigid corporate law affects the adoption of the presumptively efficient VC contracts governing the VCF-entrepreneur relationship in the US.[10]

Our analysis rests on the premise that sophisticated market participants are fully capable of safeguarding their interests, especially when advised by specialized legal counsel. This assumption applies not only to experienced actors such as VCFs but also to the fund-raising firms and their founders.[11]

Consistent with this premise, we then outline the key features of an ideal pro-VC corporate law.[12] We define corporate law as optimally flexible for VC contracting if it (a) adopts a hands-off approach regarding the legality and enforceability of private ordering solutions that shape VC deals, (b) refrains from employing *ex post* gap-filling mechanisms that might restrict the exercise of resultant rights in ways inconsistent with the financial and economic rationales underlying VC contracts, and (c) provides remedies in the case of abuse in the exercise of such rights. If corporate law exhibits those features, contracting parties can delineate their rights and obligations via contract with a high degree of certainty.

Delaware corporate law conforms nearly perfectly with this pro-VC corporate law model. The Delaware General Corporation Law has an enabling nature because of the explicit choice of its lawmakers. Building on that premise, all players involved in the process of interpreting and applying corporate law—scholars, lawyers, and courts—obey metarules largely favourable to private ordering.[13] As a result, Delaware corporate law in action allows contracting parties to shape as they see fit any aspect of their business relationship, including the prescriptive contents of the fiduciary duty of loyalty. At the same time, Delaware corporate law ensures that parties stick to contractual promises by policing abuse strictly but also consistently with the financial and economic logic of the relevant transaction.[14] Under this framework, contracting parties can plainly rely on private ordering to predetermine their own expected behaviour.[15]

VCFs and entrepreneurs have built upon Delaware corporate law's enabling nature to create a sophisticated contractual framework with two primary objectives: first, to address the

[9] See n 6 above.
[10] L. Enriques et al, Venture Capital, n 6 above, 12-16.
[11] ibid, 9.
[12] ibid, 10-11.
[13] ibid, 16.
[14] ibid, 16-18.
[15] ibid, 19.

severe problems of uncertainty, information asymmetries, and moral hazard that characterize the funding of highly innovative projects;[16] and, second, to align VC-backed firms' lifecycles with the organizational and operational features of VC funds.[17]

Through decades of iterations, US VC contracts have reached high levels of standardization and ultimately emerged as the best real-world solution to the challenges bedevilling the financing of high-tech projects.[18] Economic theory thus predicted that US VC contracts would gain popularity across jurisdictions over time, serving as a model for value-enhancing private ordering.[19] Transactional practice globally has to date confirmed these predictions.[20]

Outside the US, however, the applicable legal regime, including corporate law, may limit VCFs' and entrepreneurs' ability to transplant US VC contracts. The more prescriptive a given corporate law is, the harder it is for contracting parties to transpose into their contracts such clauses and/or functionally equivalent arrangements—that is, arrangements that enable contracting parties to achieve (1) the same practical result as the model solution (2) without incurring higher costs.[21] When functionally equivalent arrangements are also unavailable, for instance due to anti-avoidance rules, contracting parties must content themselves with arrangements lacking either of those features, or both (hereinafter, 'alternative arrangements').[22]

Rigid corporate law can prevent contracting parties from resorting to private ordering to allocate control and cash-flow rights as they see fit via constraints that stem not only from legal uncertainty, but also from either 'absolute' or 'relative' prohibitions.[23] Absolute prohibitions rule out not only the relevant US clause itself but also, possibly via general anti-evasion principles or other doctrines, any alternative arrangements.[24]

Relative prohibitions rule out the viability of a specific US-style contractual arrangement and functionally equivalent solutions but allow contracting parties to resort to alternative arrangements.[25] Relative prohibitions may admit alternative arrangements, for instance, subject to specific provisos to the original US clause or to their finding place in shareholder agreements rather than in the VC-backed firm's corporate charter.[26]

Relative prohibitions imply that market participants can only enter VC deals under a suboptimal contractual framework. Although, admittedly, we cannot say by how much this

[16] ibid, 7-8.
[17] ibid, 8-9.
[18] ibid, 14-15.
[19] ibid, 15.
[20] ibid.
[21] ibid.
[22] ibid.,12.
[23] ibid, 13-14.
[24] ibid, 14
[25] ibid, 13.
[26] ibid.

efficiency gap is bound to increase VC-backed firms' cost of capital, at the margin, it can be expected to reduce the number and/or size of VC deals, which will lead to an overall thinner VC market with negative ramifications for innovation and economic growth.[27] The most recent high-level policy debate echoes these views.[28]

In the second of our companion papers, we conduct a comprehensive analysis of Italian corporate law governing both *società per azioni* (SPA) and *società a responsabilità limitata* (SRL) and assess the extent to which it impedes the transplant of US VC contracts.[29] We find that Italian corporate law includes both absolute and, to a greater extent, relative prohibitions that make, with one exception, all the arrangements that typically comprise US VC deals unviable, whether as such or as functionally equivalent solutions. More precisely, those arrangements: (a) are null and void; or (b) are valid only if relocated within shareholder agreements and/or contingent on being subject to either *ex ante* or *ex post* scrutiny regarding the fairness of their terms or the conduct of the party exercising the resulting rights; and/or (c) are subject to a high degree of uncertainty as to their validity or the conducts they permit.

Contracting parties have no better option than to replace those contractual provisions, to the extent possible, with alternative arrangements that, by definition,[30] entail higher costs or bring lower benefits to the parties. The bottom line is that contracts governing Italian VC deals prevent VCFs and entrepreneurs from defining the terms of their business relationship as they see fit.[31]

Importantly, our analysis reveals that the incompatibility between Italian corporate law and US VC contracting practices rarely stems from explicit blackletter corporate law provisions. Rather, it is more often the function of scholarly (and/or courts') interpretations. We now account for how internal legal culture shapes the way scholars construe the law.

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[27] ibid, 14-15.

[28] The so-called 'Draghi Report' stresses the importance of corporate law in supporting high-tech firms' access to capital across Europe and advocating a special pan-European corporate law regime for such firms. See EU Commission, *The Future of European Competitiveness - A Competitiveness Strategy for Europe*, 9 September 2024, available at https://commission.europa.eu/topics/strengthening-european-competitiveness/eu-competitiveness-looking-ahead_en, 29-30.

[29] L. Enriques et al, Can U.S., n 6 above.

[30] See text following n 20 above.

[31] L. Enriques et al, Can U.S., n 6 above, 23. See also C.A. Nigro and L. Enriques, '*Venture capital* e diritto societario: un rapporto difficile' *Analisi Giuridica dell'Economia*, 149 (2021); P. Giudici and P. Agstner, 'Startups and Company Law: The Competitive Pressure of Delaware on Italy (and Europe?)' 20 *European Business Organization Law Review*, 597 (2019) and P. Agstner et al, 'Business Angels, Venture Capital e la nuova s.r.l.' *Rivista Orizzonti del Diritto Commerciale*, 353 (2020 no 2). Giudici and his coauthors have more recently gathered empirical evidence that, as they claim, supports the view that Italian corporate law is more adequate than previously thought. See P. Giudici et al, 'The Corporate Design of Investments in Startups: A European Experience' 23 *European Business Organization Law Review*, 787 (2022). We have argued elsewhere that their empirical evidence in fact confirms our findings, to the extent that functional equivalence is itself functionally defined. See L. Enriques and C.A. Nigro, 'Corporate Law and Venture Capital in Italy: What Does the Empirical Evidence (Really) Tell Us?', *Oxford Business Law Blog*, 16 November 2023, available at *https://blogs.law.ox.ac.uk/oblb/blog-post/2023/11/corporate-law-and-venture-capital-italy-what-does-empirical-evidence-really*.

III. How Internal Legal Culture Fosters 'Über-Mandatory' Corporate Law

Italian corporate law's pronounced aversion to private ordering, which incidentally goes well beyond VC contracting,[32] may sound surprising and counterintuitive. After all, Italian corporate law on the books includes several elements that are consistent with the ambition of 21st century policymakers to increase its flexibility. In 2003 the Italian Parliament delegated the Italian Government the regime governing SPAs and SRLS, instructing it to design corporate law rules that would be instrumental to 'promoting the creation, growth, and competitiveness of businesses, including by facilitating their access to domestic and international capital markets'.[33] Time and again scholars have emphasized the pro-private ordering role of this directive and some of the provisions that the Government then enacted,[34] with many of them concluding that the reform had dismantled the rigidities that had until then characterised Italian corporate law.[35]

In addition, between 2012 and 2017 the regime governing SRLs underwent further changes in the same direction.[36] Following these reforms, leading scholars concluded that private ordering is now virtually unlimited for SRLs.[37]

While Italian corporate law on the books appears to be more respectful of contractual freedom today than at the start of this century, it is very far from the enabling model of corporate law that can be observed elsewhere.[38] If one redirects one's attention from blackletter corporate law to corporate law in action, the framework one observes becomes one of significant rigidity: as Giudici and his coauthors have poignantly put it, 'Italian company law remains still a "prisoner" of explicit or even more dangerous implicit prohibitions that limit economic development'.[39]

The immediate cause of this persistent inflexibility lies in the country's internal legal culture, which enables scholars to elaborate, and practitioners and courts in their different

[32] For instance, under Italian corporate law, shareholders have a withdrawal right ('*diritto di recesso*'), a remedy that is similar to US appraisal rights. Many Italian legal scholars have argued against the legality of private ordering solutions aimed to expand its scope. See eg E. Granelli, 'Il recesso dalle società lucrative a dieci anni dalla riforma', *Giurisprudenza Commerciale*, 2013, I, 862, 870-75.

[33] See Art 2, c 1, lett a), Legge 3 October 2001 no 366. See also Artt 3, c 1, lett a) and b) and 4, 2, lett a), Legge 3 October 2001 no 366 (both stressing that the to-be-passed reform should expand the role of private ordering in defining the governance of SPAs and SRLs). Following this law, Italy's corporate law was reformed organically in 2003 with the declared intention of making it friendlier to private ordering. For details, see G. Ferrarini, P. Giudici and M. Stella Richter *jr*., 'Company Law Reform in Italy: Real Progress?' 69 *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 658 (2006).

[34] See eg the contributions to G. Cian ed, *Le grandi opzioni della riforma del diritto e del processo societario* (Padova: Cedam, 2004).

[35] See eg F. D'Alessandro, 'La provincia del diritto societario inderogabile (ri)determinata. Ovvero: esiste ancora il diritto societario?*' Rivista delle Società*, 34 (2003).

[36] For details, see P. Giudici and P. Agstner, n 31 above, 614-17.

[37] See eg G. Zanarone, *La S.R.L. a vent'anni dalla riforma del diritto societario* (Milano: Giuffrè Francis Lefebvre, 2023), 710.

[38] See P. Giudici and P. Agstner, n 31 above, 599.

[39] Ibid.

capacities to apply, several implicit restrictive rules, concepts, and principles that hinder private ordering.

Italian statutory law's metarules are part of the story. In particular, the Italian Civil Code ('*Codice Civile*') provides that, if statutory law does not define explicitly the regime governing a specific set of facts (which may well include a contractual clause), then such regime must be determined by considering the legal provisions governing 'similar cases' or 'analogous matters' (*analogia legis*).[40] In case no such provisions exist, account has to be taken of the 'general principles of the legal system' ('*principi generali dell'ordinamento giuridico*') (*analogia juris*).[41] In addition, the Civil Code contains a broad anticircumvention rule, which declares null and void any agreement that is instrumental to evading a mandatory provision,[42] irrespective of the legal form of the transaction.[43]

But Italy's metarules grant legal professionals discretion in the interpretation of the law that goes well beyond the use of analogy and anti-avoidance rules. It is widely accepted that they may infer or deduct the existence of implicit, hitherto latent mandatory requirements from explicit rules, other implicit mandatory requirements and even from abstract 'concepts' and 'categories' that may or may not be explicitly defined in legal sources. In fact, Italian legal scholars' core expertise lies in constructing a systematic framework from relevant legal sources, a skill deeply rooted in a robust legal tradition dating back to the late 19th century and heavily influenced by contemporary German legal scholarship.[44] This expertise involves isolating the building blocks of the legal system—rules, concepts/categories, and principles—to create a logically coherent theoretical structure.[45]

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[40] Art 12, Disposizioni sulla legge in generale. See eg L. Enriques, 'Scelte pubbliche e interessi particolari nella riforma delle società di capitali' *Mercato Concorrenza Regole*, 145, 173 (2005) (highlighting Italian courts' and scholars' inclination to apply other corporate law rules by analogy to fill supposed gaps in blackletter corporate law); and P. Giudici and P. Agstner, n 31 above, 626 (accounting for how legal rules applicable to SPAs end up applying by analogy to SRLS as well). One example regards the commonly accepted interpretation of the regime governing the recharacterization as equity contributions of any loans that a shareholder may extend to the firm when it is under financial distress. See, for SRLs only, Art 2467, Codice Civile. With the support of scholars, courts have concluded time and again that this provision is the expression of a wide-ranging precept applying also to SPAs. See, eg, U. Tombari, 'La partecipazione di società di capitali in società di persone come nuovo "modello di organizzazione dell'impresa"', *Rivista delle Società*, 2006, 201; Corte di Cassazione, 7 July 2015 no 14056.

[41] See Art 12, Disposizioni sulla legge in generale.

[42] See Art 1344, Codice Civile.

[43] An example comes from the regime governing contractual arrangements that result in a waiver of the shareholder's withdrawal rights (see n 32 above). Such arrangements are null and void. See Art 2437 (6), Codice Civile. As to SRLs, blackletter corporate law stipulates that in a number of instances shareholders can exercise their withdrawal rights 'in any case'. See Art 2473, Codice Civile. While this regime may appear to apply only to arrangements outlined in the firm's constitutional documents, scholars argue, drawing, *inter alia*, from the supposedly broad scope of the prohibition on *societas leonina* (see n 51 below), that it extends to any private ordering solution that could effectively result in a waiver of the withdrawal rights , including those located in shareholder agreements. See C.A. Nigro and D. Maltese, 'Private equity, fusioni e rinuncia all'*appraisal right*: note su un caso statunitense con cenni all'esperienza italiana' *Rivista di Diritto Societario*, 631 (2022).

[44] See eg P. Grossi, *La cultura del civilista italiano* (Milano: Giuffrè, 2002), 15-23.

[45] cf F. D'Alessandro, 'Il metodo nel diritto commerciale' *Rivista Orizzonti del Diritto Commerciale*, 401, 401-412 (2019 no 2). This has always been part of Italian corporate law scholars' mindset. See F. D'Alessandro, 'Il diritto pretorio delle società a mezzo secolo dal codice civile', in M. Bessone ed, *Diritto giurisprudenziale* (Torino: UTET, 1996), 221, 237 (flagging courts' pronounced tendency to extrapolate from blackletter corporate

In the specific context of corporate law, scholars' 'construction' of the 'system' mainly relies on:

1. the rationale of statutory provisions (as identified by scholars themselves because Italian lawmakers are usually silent thereupon);[46]
2. explicit standards, such as equity ('*equità*'), fairness and good faith ('*correttezza e buona fede*'), and reasonableness ('*ragionevolezza*');[47]
3. provisions in the Italian Constitution ('*Costituzione Italiana*');[48]
4. foundational legal concepts, including for example the idea of 'property' as a fundamental component of private law relationships;[49]
5. foundational statutory provisions of the law of partnerships and companies,[50] which apply to any firm, irrespective of its organizational form.[51]

law, with the inputs of scholars, a variety of principles, generally with a wide-ranging scope, "aimed at protecting the most various interests") (our own translation).

[46] An example comes from scholarly work discussing the provision codifying the corporate opportunity doctrine. See Art 2391, c 6, Codice Civile. Italian corporate law explicitly provides that creditors have the right to sue directors for failure to comply with their duties as regards the preservation of the firm's assets. See Artt 2394 and 2476, c 6, Codice Civile, respectively for SPAs and SRLs. Drawing from this provision, which may be used also to sue a director that misappropriates a corporate opportunity, scholars conclude that the corporate opportunity doctrine protects (also) creditors and that, thus, the relevant provision is mandatory. See eg F. Barachini, 'L'appropriazione delle *corporate opportunities* come fattispecie di infedeltà degli amministratori di S.p.a.', in P. Abbadessa and G.B. Portale eds, *Il nuovo diritto delle società.* Liber Amicorum *Gian Franco Campobasso*. Vol. 2, UTET: Torino, 2006, 603.

[47] cf L. Enriques, 'Società per azioni', *Enciclopedia giuridica* (Milano: Giuffrè, 2017), X, 958, 967.

[48] cf L. Calvosa, *La clausola di riscatto nella società per azioni* (Milano: Giuffrè, 1995), 276-279 (arguing that, in light of Artt 42 and 43 Costituzione Italiana, the shareholder whose shares are redeemed has the unwaivable right to receive their fair value and that this is key to prevent a shareholder from capturing part the value of the shares of other shareholders). See also n 49 below.

[49] The emergence of principles derived from the constitutional provision protecting private property is a good example of how doctrinal constructs of the concept of property can be used to 'find' additional principles. In brief, legal scholars seem to follow the following argumentative scheme. First, they reify company shares, making them the object of a property right; then, they notice that a shareholder's (economic) right is to a given fraction of the cash-flow rights of a firm. Second, they infer that any transaction (eg, a forced liquidation of the individual equity stake) at a price lower than the current value of the shares is an expropriation in the legal sense. They therefore address such expropriation by applying the relevant constitutional protection. See Art 42, para 3, Costituzione Italiana. See eg Vincenzo Salafia, 'Squeeze out *statutario*' 26 *Società* (Le) 1450, 1452 (2007). See also G.B. Portale, 'Tra diritto dell'impresa e metamorfosi della s.p.a.', in M. Campobasso et al eds, *Società, banche e crisi d'impresa.* Liber Amicorum *Pietro Abbadessa. Vol 1* (Torino: UTET, 2014), 107, 113 (stressing the importance of using the concept of property and the remedial apparatus that assists it under Italian (constitutional) law to address opportunism in the corporate context).

[50] The Italian term '*società*', which we usually translate as 'company', is in fact used in a broader meaning in the Codice Civile, such that it comprises both partnerships and companies. See Art 2247, Codice Civile.

[51] The prohibition on *societas leonina* as laid down in Art 2265, Codice Civile is the most prominent example. That provision, on its face, only applies to partnerships. Legal scholars and courts have historically held, though, that this provision also applies to companies irrespective of their business organizational form and whether the arrangement is located in the firm's constitutional documents or in shareholder agreements. The main rationales underlying this view are that the arrangements departing from it would make a shareholder insensitive to the firm's fate and thus create incentives to make irresponsible decisions and that it would alter the logic (*causa negotii*) of the corporate contract. See eg N. Abriani, '*Il divieto del patto leonino. Vicende storiche e prospettive applicative'* (Milano: Giuffrè, 1994), 41-51.

[51] Another example are the constraints that derive from the idea that the 'system' requires interpreters to distinguish between equity and debt and hence to qualify a security as a share if and only if it exposes its holders

The combination of *analogia legis* and *juris* and anti-avoidance rules with the sprawling number of implicit rules and broad principles elaborated by legal scholars (and courts), heavily encroaches on private ordering. This is also because seldom do corporate law scholars view cases that fall outside the scope of explicit provisions as unregulated[52] and therefore subject only to tort law and self-regulation via contracts.[53] As our findings show for VC contracting, such cases, when taking the form of contractual arrangements, are much more likely to be held to be inconsistent with one or more mandatory requirements,[54] whether explicit or, more often, implicit,[55] and therefore declared null and void.

As an outcome, contractual freedom is limited well beyond the boundaries that lawmakers may explicitly draw. Contractual practice reflects these constraints because of the influence thereupon of legal gatekeepers, namely attorneys, notaries, courts and arbitrators, all of which share scholars' legal culture.[56]

In performing their advisory function, attorneys may encourage contracting parties not to agree on arrangements that are clearly contrary to statutory or case law or even the implicit legal rules that predominant legal scholarship has identified as part of the 'system'. Should borderline arrangements nonetheless slip through into the draft of the firm's constitutional documents, they may not pass notaries' scrutiny. Italian notaries operate under regulations providing that they must refuse to notarise a deed if its terms are against the law.[57] To support their members/affiliates in understanding what is against the law, notaries' local associations issue guidelines[58] that express their views on whether specific private ordering solutions are compliant with the law and, as the case may be, under what conditions and within what limits. Over time, these guidelines have become increasingly sensitive to private players' needs.[59] Yet,

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to the firm's risk. See eg N. De Luca and A. Stagno D'Alcontres, *Manuale delle società* (Torino: Giappichelli, 2nd ed, 2023), 188-95, 237-50.

[52] cf A.D. Scano, 'La "parola" e il "silenzio: contributo allo studio delle lacune nella disciplina delle società a responsabilità limitata' *Rivista delle Società*, 1122 (2021) 1142-1153 (proposing a complex theory about how to fill regulatory gaps in which, owing to its autopoietic nature, corporate law, rather than tort law or contract, plays the most important role).

[53] For an application, see M. Lamandini, 'Autonomia negoziale e vincoli di sistema nella emissione di strumenti finanziari da parte della Spa e delle cooperative per azioni' *Banca Borsa Titoli di Credito*, 519, 520 (2003) (making an example that shows that, under Italian corporate law, private ordering operates only within the space left empty by the system as reconstrued by way of interpretation).

[54] See Art 1418, Codice Civile.

[55] See eg M. Lamandini, n 53 above, 520 (arguing that, in moulding the rights pertaining to a 'share', private ordering is subject to the constraints stemming from the many principles that the corporate law 'system' comprises).

[56] cf M.A. Livingston, P.G. Monateri and F. Parisi, *The Italian Legal System. An Introduction* (Stanford: Stanford University Press, 2nd ed, 2015), 72-90 (discussing Italian legal professionals' education).

[57] See Art 28, Legge 16 February 1913 no 89. Case law endorses a broad interpretation of the statutory provisions defining that duty, finding that notaries breach it also in the event of deviations from the notarial best practices as enshrined in defining the requirements that contractual arrangements must meet to be valid. See L. Enriques et al, Mandatory, n 6 above, 11-13.

[58] See, e.g., Consiglio Notarile di Milano, Massime notarili in materia societaria, available at *https://www.consiglionotarilemilano.it/societa/massime-commissione-societa/*. See also Consiglio Notarile dei Distretti Riuniti di Firenze, Pistoia e Prato, *Indice sistematico delle massime in materia societaria*, available at *https://www.consiglionotarilefirenze.it/index.php/indice-sistematico-delle-massime.html*.

[59] This applies particularly to those issued by the Milan notaries' association.

while attempting to cater to market participants' needs, those guidelines cannot overlook widely accepted scholarly interpretations of corporate law that embrace the existence of a specific implicit rule or general principle.[60] Thus, they often take a mixed approach: they allow for a specific private ordering solution, but only provided that it meets specific requirements and/or is designed in such a way as to be compliant with some 'general principles'.[61] Transactional practice regularly incorporates contractual arrangements that conform to such guidelines.[62]

Courts and arbitrators, in turn, hold scholarly interpretations in high regard.[63] Given scholars' general posture towards private ordering, courts and arbitrators unsurprisingly make decisions that curtail the exercise of contractual freedom.[64] Such a stance also aligns with other deeply felt convictions of judges and arbitrators. First, they display a general tendency to sympathize with the (supposedly) 'weak contracting party' ('*il contraente debole*').[65] Second,

[60] See text preceding n 57 above.

[61] For instance, the Milan notaries association's guidelines qualify drag-along right provisions as valid so long as they meet specific requirements. See Consiglio Notarile di Milano, Massima no 88 of 22 November 2005 'Clausole statutarie disciplinanti il diritto e l'obbligo di "covendita" delle partecipazioni (artt. 2355-bis e 2469 of the Codice Civile)', available at https://www.consiglionotarilemilano.it/massime-commissione-societa/88/. A second example are the Milan notaries association's guidelines on private ordering solutions to allocate the proceeds of so-called liquidity events. According to those guidelines, these private ordering solutions are valid provided that they are designed in such a way as to be compatible with two general principles of corporate law, namely, those resulting from the prohibition on *societas leonina* (see n 51 above) and the 'principle of fair value' (according to which a shareholder who is forced to divest has the right to receive at least the fair value of his shares as determined by reference to the valuation criteria set in the corporate law rules on withdrawal rights (see n 32 above)). See Consiglio Notarile di Milano, *Massima no 126 of 5 March 2013* "*Ripartizione non proporzionale del corrispettivo della vendita o del riscatto di partecipazioni sociali (artt. 2348 e 2468 del Codice Civile)*", available at *www.consiglionotarilemilano.it/massime-commissione-societa/126/*.

[62] See P. Giudici et al, *The Corporate Design*, n 46 above, 811.

[63] See eg M.A. Livingston, P.G. Monateri and F. Parisi, n 56 above, 131-133. For instance, case law has recently confirmed the significant role of the distinction between debt and equity theorized by scholars (see n 51 above). See Corte di Cassazione 4 July 2018 no 17498, *Rivista di Diritto Societario*, 441 (2020). Likewise, courts have endorsed scholars' view that the concept of property has relevance in interpreting and applying corporate law when defining the regime applicable to drag-along right provisions. See Tribunale di Milano 31 March 2008, *Rivista di Diritto Societario*, 370 (2010).

[64] One example concerns expulsion provisions included in the firm's constitutional documents under the regime governing SRLs. According to the applicable statutory law, these provisions must be framed in such a way as to define "specific instances of a fair ground" ('*specifiche ipotesi di giusta causa*') as trigger events of the expulsion. Art 2473-bis, Codice Civile. Scholars have offered the most restrictive interpretation of this wording, construing it as requiring an analytical description of the facts that can trigger the shareholder expulsion. Courts have promptly endorsed this interpretation and regularly apply it. For details and references, see B. Maini, C.A. Nigro and G. Romano, 'Diritto vivente e istituti morenti: l'esclusione del socio di s.r.l. (a vent'anni dalla riforma organica del diritto societario)' (on file with authors), 11-14. The most recent example comes from the case law that has invoked the principle of fair value (see n 61 above) to curtail contract-based caps on the price that a shareholder can obtain when exercising their withdrawal right (see n 32 above). For details see N. De Luca, 'Dal socio leone all'agnello sacrificale? Considerazioni sulla clausola di recesso a prezzo definito', *Banca Borsa Titoli di Credito*, II, 369 (2021). Courts' approach to drag-along right provisions is another instructive example in this respect. See Tribunale di Milano 31 March 2008, *Rivista di Diritto Societario*, 370 (2010) (invalidating drag along right provisions granting one shareholder the right to co-sell the other shareholders' shares along with their own at any possible price for failing to include a proviso making reference to the principle of fair value (see n 61 above)). Arbitrators do not take a different approach. See also Lodo Arbitrale, 29 July 2008 (reaching the same conclusion as to drag-along right provisions).

[65] See eg A. Stabilini and M. Trapani, 'Clausole di "drag along" e limiti all'autonomia privata nelle società chiuse' *Rivista di Diritto Commerciale,* 949, 965 (2010) (making this point as they comment on the approach that an Italian court took when deciding on the validity of a drag-along provision).

they typically have significant expertise in doctrinal interpretation but no business experience.[66] As a result, they have a strong inclination to protect the supposedly weaker party (in the VC setting, the entrepreneur) by declaring private agreements null and void. The nearly exclusive focus on the validity of the relevant arrangements has the significant advantage of allowing them to avoid a thorough examination of the facts of the case before them.[67] Finally, courts strive for fair outcomes *ex post*, without considering whether those outcomes are at all consistent with parties' reciprocal expectations *ex ante*[68] or could disrupt existing contractual practices and/or make certain private ordering solutions no longer viable, given the litigation risks they are revealed to entail.[69]

These three features (the inclination to protect weak contracting parties, the preference for legal analysis to fact-finding, and the tendency to look at cases only from an *ex post* perspective) contrive to make enforcement actors at least as alien as legal scholars to a deferential stance to private ordering.

In sum, Italian legal culture grants corporate law scholars substantial freedom to shape the 'system' governing the formation, governance, and management of corporations. This freedom contributes to the *über*-mandatory nature of Italian corporate law, which, through the involvement of lawyers, notaries, courts, and arbitrators, significantly influences everyday business practices.

IV. How External Legal Culture Affects the Italian Corporate Law Über-mandatory 'System'

Having shown how internal legal culture works as a driver of Italian corporate law' *über*-mandatory structure, it is now time to focus on what role *external* legal culture plays in shaping it.

The general premise here is that, like law in general, *any* given corporate law's rigidity or flexibility is the function of a variety of factors,[70] ranging from the relevant formal legal sources to the applicable metarules as well as culture (broadly conceived).[71] We focus here on

[66] cf R. Rordorf, 'Giudici per il mercato o mercato senza giudici?' *Le Società*, 152, 156 (2000) (stressing the problems associated with having judges with limited to no knowledge of economics).

[67] See eg A. Perrone, *I soldi degli altri* (Milano: Giuffrè, 2008), 34-36 (discussing the private enforcement of financial services contracts under Italian law and arguing convincingly that courts often declared the nullity of such contracts to quickly achieve the goal of protecting investors).

[68] See G.D. Mosco and C.A. Nigro, 'I doveri fiduciari alla prova del capitalismo finanziario' *Analisi Giuridica dell'Economia*, 257, 275 (2021) (highlighting that Italian courts often adjudicate litigation based on the outcome of the litigated transaction while neglecting to consider the overall terms governing the business relationship between shareholders and the evolution of that relationship across time).

[69] On Italian courts' tendency not to consider the prospective impact of their decisions on the behaviour and incentives of market players more broadly, see L. Enriques, 'Do Corporate Law Judges Matter? Some Evidence from Milan' 3 *European Business Organization Law Review*, 765, 807-809 (2002).

[70] cf J. Dammann, 'The Mandatory Law Puzzle: Redefining American Exceptionalism in Corporate Law', 65 *Hastings L.J.* 441 (2014).

[71] Mark J. Roe, 'Can Culture Constrain the Economic Model of Corporate Law?' 69 *Univ. Chi. L. Rev.* 1251, 1253 (2002).

four distinct elements of Italy's external legal culture, broadly defined as to encompass 'the part of legal culture that is influenced by primarily non-legal actors and activities, such as politics, [economic forces], or communication technology'.[72]

Let us first concede that legal sources themselves play a role in determining the law's rigidity. True, statutory corporate law has undergone several reforms meant, on their face, to broaden the scope for private ordering.[73]

Yet, as we reported in Part III, statutory metarules allowing for *analogia legis* and *juris* and providing for a general anti-avoidance rule push interpreters in the direction of interpretations unfavourable to private ordering. In addition, the law comprises broad standards of conduct ('*clausole generali*'), such as fairness and good faith,[74] that do apply to shareholders' and directors' behaviour and, hence, can be used creatively to restrict private ordering, especially in light of the incomplete nature of the arrangements governing the firm. At the same time, we should note that many of the corporate law constraints to private ordering are not derived from such explicit standards of conduct.

Similarly, constitutional principles, such as reasonableness and the references in the Italian Constitution to social utility as a constraint on freedom of enterprise ('*libertà di iniziativa economica*'),[75] as well as to the 'social function' of property,[76] may offer additional tools for legal scholars' subtle crafting of limits to contractual freedom. Yet, to be fair, those constitutional principles are so broad that they cannot, *per se*, provide a strong argument in support of the conclusion that a given precept banning a particular contractual arrangement is part of the 'system'. In addition, corporate legal scholars display no tendency to refer to the Constitution's provisions on property rights to argue that specific proprietary rights should be curtailed in the interest of society as a whole. Rather, they use those provisions to advocate for solutions aimed to protect the individual interests of shareholders against the company and/or other shareholders.[77] In other words, they use these constitutional provisions to protect private property rather than to constrain it.

If legal sources provide at best a partial explanation for Italian corporate law's *über*-mandatory structure, what other forces are at play? We posit that four non-mutually exclusive factors have, together, stronger explanatory power. Two of them are economic in nature (path dependence relating to how companies are financed; legal professionals' self-interest), while

[72] See n 3 above.

[73] See text accompanying nn 33-37 above.

[74] See generally M. Libertini, 'Clausole generali, norme di principio, norme a contenuto indeterminato. Una proposta di distinzione' *Rivista Critica del Diritto Privato* (2011); Id., Ancora a proposito, n 96 above.

[75] Art 41, Costituzione italiana: 'L'iniziativa economica privata è libera. Non può svolgersi in contrasto con l'utilità sociale o in modo da recare danno alla salute, all'ambiente, alla sicurezza, alla libertà, alla dignità umana' ('Private economic initiative is free. It may not be conducted in a manner that conflicts with social utility or causes harm to health, the environment, safety, freedom, or human dignity'; our own translation).

[76] Art 42, Costituzione italiana.

[77] See nn 48-49 above for instances of this use of constitutional provisions.

two (the prevailing ideology about the role of markets and the state and 'scholarly bravura', or how legal scholars prove their worth to peers) relate to legal culture more narrowly defined.

1. Path dependence. Decades-long patterns in corporate finance have acted as an external force indirectly shaping the 'system' with the intermediation of lawmakers and scholars. Incumbent financiers, namely banks, had a strong preference for mandatory corporate law, while no other interest group has been able to push to push effectively in the opposite direction.

As a latecomer economy, Italy's economic development throughout the 20th century owes much to bank financing, with market-based finance, let alone private equity, having had a much smaller role.[78] From a public choice perspective, banks' central role in the economy explains the pervasive presence of corporate law rules to protect creditor interests.[79] In general, creditors can be held to prefer rigid corporate law rules so as to economise on transaction costs: the more companies' constitutional documents look the same, the less frequently will creditors need to gauge the effects of deviations from the default regime on creditworthiness and, as the case may be, to bargain for specific protections in loan covenants.[80] In short, a powerful interest group, banks, had a strong preference for rigid corporate law rules.[81]

At the same time, because VC, like private equity more broadly, is such a recent phenomenon in Italy,[82] for decades and decades no interest group was there to push back on the pervasiveness of mandatory rules. Shareholdings in private companies have traditionally been in the hands of families,[83] meaning that shareholders relied on informal arrangements based on trust, rather than explicit contracts, to define their mutual expectations.[84]

How these market dynamics had an impact not just on the relevant legal sources but also crept into the 'system' with the intermediation of legal scholars and courts is harder to pinpoint. But one channel may well be the fact that litigation over corporate law questions has

[78] See eg A. Aganin and P. Volpin, 'The History of Corporate Ownership in Italy', in R.K. Morck ed, *A History of Corporate Governance around the World*, (Chicago: Chicago Univ. Press 2005), 325, 328. The private equity and venture capital markets only took off at the turn of the century in Italy. See C. Bentivogli et al., *Il* private equity *in Italia* (Bank of Italy Occasional Paper No. 41) (2009), available at *https://www.bancaditalia.it/pubblicazioni/qef/2009-0041/index.html?com.dotmarketing.htmlpage.language=1&dotcache=refresh*, 7.

[79] On the centrality of creditor protection in Italian corporate law see eg F. Nieddu Arrica, *I principi di corretta gestione societaria e imprenditoriale nella prospettiva della tutela dei creditori* (Torino: Giappichelli, 2016), 5-32. No one doubts that corporate law rules aiming to protect creditors are mandatory. See eg G.C.M. Rivolta, *Diritto delle società. Profili generali* (Torino: Giappichelli, 2015), 149.

[80] See G. Strampelli, *Distribuzioni ai soci e tutela dei creditori. L'effetto degli IAS/IFRS* (Torino: Giappichelli, 2009), 38.

[81] cf L. Enriques and J.R. Macey, 'Creditors Versus Capital Formation: The Case against the European Legal Capital Rules', 86 *Cornell L. Rev.* 1165, 1203 (2001) (stressing banks' interest in preserving the regime on legal capital).

[82] See C. Bentivogli et al. n 78 above.

[83] M. Bianchi, M. Bianco, S. Giacomelli, A.M. Pacces and S. Trento, *Proprietà e controllo delle imprese in Italia. Alle radici delle difficoltà competitive della nostra industria* (Bologna: Il Mulino, 2005), 90-92.

[84] On the significance of trust in private companies, see eg F.H. Easterbrook and D.R. Fischel, 'Close Corporations and Agency Costs' 38 *Stanford L. Rev.* 271, 274 (1986).

traditionally arisen in the context of bankrupt companies, where the interest of creditors looms large, while shareholders are out of the picture (and are often the villains in the story).

2. Self-interest. The *über*-mandatory model of corporate law is intuitively consistent with the private interests of legal practitioners (among whom most corporate law scholars must also be counted[85]).[86] Demand for their services is bound to stay high in a setting where practically nothing can be done without legal advice, given the complexity of finding alternative arrangements in such a sprawling system of implicit mandatory principles and the ensuing uncertainty as to the applicable regime.[87] Note that the legal advice required in such a legal environment is not the transaction cost engineering work typical of US corporate lawyers, who sharply focus on finding solutions that maximize the joint welfare of contracting parties[88] with virtually no legal constraints.[89] Rather, it takes the form of guidance on how to shape private ordering in a way consistent with the strictures of the 'system',[90] with demand therefor being ultimately created by the crafters of the 'system' themselves.

At the same time, the 'system' empowers judges with greater discretion in deciding (corporate law) cases, because every private ordering exercise becomes subject to their screen.[91]

Far be it from us to claim that a desire to keep demand for legal services high and to grant judges' greater power over corporations *motivates* scholars in articulating, and other corporate law professionals to apply, restrictive interpretations of existing legal texts. Scholars and judges are most likely not even aware of the intuitive correlation between *über*-mandatory corporate law and legal professionals' rents. But it is fair to argue that, had a laissez-faire approach to private ordering better served the legal profession's interests, the state of affairs we have shed light on would have been less likely to emerge.

3. Ideology. It is only reasonable to suspect that an ideology contrary to private ordering, markets, and free enterprise also contributes to the *über*-mandatory structure of Italian corporate law.

To be sure, evidence of such an ideology is hard to find in Italian corporate law scholars' works. Particularly telling is the fact that they seldom refer to the Constitution to substantiate

[85] See eg M. Libertini, 'Passato e presente del diritto commerciale (a proposito di tre libri recenti)' *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 735, 764 (2020).

[86] cf L. Enriques, Scelte pubbliche, n 40 above, 145.

[87] Italian corporate law also entails widespread uncertainty as to the validity of the arrangements used in VC deals or the way in which contracting parties can exercise the ensuing rights. See Enriques et al., Venture Capital, n 6 above, 43-46 (discussing this point and providing examples).

[88] See R.J. Gilson, 'Value Creation by Business Lawyers: Legal Skills and Asset Pricing' 94 *Yale L.J.* 239 (1984).

[89] At least so long as the transaction only involves privately held companies as is the case with VC-backed firms.

[90] cf B. Maini, C.A. Nigro and G. Romano, n 64, 33 (providing an example).

[91] L. Enriques, Scelte pubbliche, n 40 above, 170-171.

mandatory interpretations of the law;[92] and when they do refer to it, they do so out of the concern of protecting some shareholders against other shareholders.[93] In other words, they build upon the 'liberal' provisions protecting private property rather than using the Constitution's references to the social function of property and the social limits to economic freedoms to constrain shareholders' and managers' freedom. This attitude starkly contrasts with the systematic use of the Constitution that many prominent Italian private law scholars – some responding to Marxist views and some inspired by social-catholic doctrines – have made since long to, in short, socialise private law.[94]

Unlike private law scholars, corporate law academics, especially since the decade in which progressive, constitutionally based private law scholarship set sail (the 1970s), have tended 'to retreat within the golden cage of technicality and specialization', as a leading business law scholar, Mario Libertini, has recently put it.[95] Scholars' arguments in favour of interpretations that invalidate private ordering solutions are in fact rather technical in character. And when scholars do refer to the interests underlying the principles they elaborate, they draw from generic rationales, like creditor protection, the need to curb abuse of power, whether by majority or minority shareholders, and even a 'technocratic', efficiency-based rationale, namely the idea that constraining contractual freedom is conducive to firms' higher profitability.[96]

Ironically, in the second half of the 20th century, some of the best and most highly regarded corporate law scholars took a Marxist perspective on capitalism and its institutions, chief among them the corporation. However, as recently noted by Floriano d'Alessandro, 'in an apparent paradox, what happened was that those scholars would put forward the most conservative and even reactionary interpretations of the law: such interpretations were meant to demonstrate how backward and inimical to the working classes the capitalist system was'.[97]

It would be wrong to conclude, though, that ideology has had no role to play. While an overtly anti-market, private-ordering-averse ideology may have exerted minimal discernible influence on Italian corporate scholars' ostensibly technocratic and politically neutral interpretations, think of it this way: *the absence of a pro-market, pro-private-ordering vision*

[92] See V. Cariello, *Il Codice di* Corporate Governance*. Da soluzione a problema* (Torino: Giappichelli, 2024), 223-24.

[93] See nn 48-49 above and text corresponding to n 77 above.

[94] See P. Grossi, n 44 above, 155-58; P. Rescigno, G. Resta and A. Zoppini, *Diritto privato. Una conversazione* (Bologna: il Mulino, 2017), 163-65; P. Perlingieri, *Il diritto civile nella legalità costituzionale*, II (Edizioni Scientifiche Italiane: Napoli, 2020).

[95] M. Libertini, 'Due contributi di giuscommercialisti alla teoria generale del diritto' *Rivista Orizzonti del Diritto Commerciale*, 291, 291-292 (2020 no 1) (our own translation) (the entire sentence is as follows: '[dopo la morte di Ascarelli e Bigiavi], la disciplina [del diritto commerciale], pur mantenendo una produzione dottrinale di qualità, è apparsa incline a ripiegare entro la gabbia dorata del tecnicismo e dello specialismo').

[96] See eg M. Libertini, 'Ancora a proposito di principi e clausole generali, a partire dall'esperienza del diritto commerciale', *Rivista Orizzonti del Diritto Commerciale*, 1, 9 (2018 no 2) (reporting as commonly held the view that 'a rich set of *mandatory* and default rules is functional to a greater degree of efficiency for the private sector as a whole' (our own translation; emphasis added); M. Notari, 'Interesse dell'impresa e posizioni soggettive nell'evoluzione del diritto societario: note a margine della ricostruzione dello stile giuridico neoliberale di Francesco Denozza', in R. Sacchi and A. Toffoletto eds, *Esiste uno 'stile giuridico' neoliberale?* (Milano: Giuffrè Francis Lefebvre, 2019), 85, 100.

[97] F. d'Alessandro, Il metodo, n 45 above, 416 (our own translation).

has facilitated the emergence of the *über*-mandatory system of corporate law we have described. If any attention had been given to the legislative intent of the reforms adopted in the past three decades,[98] the legal sources of Italian corporate law would have lent themselves to interpretations favourable to private ordering rather than to ones curtailing it. But that fell on deaf ears: legals scholars harbouring a benign view of private ordering were a small minority twenty years ago and dwindled even further over time.[99]

Second, and related to this, leaving aside the individual and, if there is one, the collective ideology of corporate law scholars, Italy as a country clearly stands out as a coordinated economy within the 'variety of capitalism' framework.[100] That implies a broader political culture which, owing much to socialist and social-catholic ideologies, clearly considers collective, centralized, tools to allocate resources as preferable to markets.[101] The dominant political *Zeitgeist* inevitably moulds the attitude towards markets of corporate law scholars, reticent as they may mostly be about their views on markets and state intervention.[102]

4. Bravura. One final element to consider for the understanding of our findings relates to one peculiar feature of doctrinal legal scholarship: doctrinal scholars' skills are best tested on their ability to 'find' new principles from both the available legal sources and the principles that are already part of the 'system'.[103] Each new concept and principle a scholar can find is a brick the scholar adds to the 'system' edifice, and one that, by definition, eats into the territory of private ordering.[104] Adding a 'negative brick,' that is, holding that there is no brick that constrains a given private ordering arrangement, is awkward to say the least. It is almost an admission that one lacks the modicum amount of creativity that is needed to infer new principles from the 'system' or, worse, the knowledge of the literature required to find the one principle among the many that legal scholarship has already found, that applies to that specific

[98] See text accompanying nn 33-34 above. See especially Legge 3 October 2001, no 366, which, as noted above, delegated the government to reform the law of SPAs and SRLs in its entirety with the primary objective of 'promoting the creation, growth, and competitiveness of businesses, including by facilitating their access to domestic and international capital markets'. It is fair to say that the view that this provision should be used as a key metarule to interpret the reformed law (see L. Enriques, *Società*, n 47 above, 958) has never gained any traction.

[99] M. Libertini, Ancora, n 96 above, 9: '[the] strand of research [opposing the use of standards and, conversely, expressing favour for statutory autonomy] has remained […] rather weak and the ideological stance of exalting contractual freedom in corporate law has faded considerably' (our own translation).

[100] See eg C. Crouch, 'Typologies of Capitalism', in B. Hancké ed, *Debating Varieties of Capitalism: A Reader* (Oxford: Oxford University Press, 2009), 75, 84.

[101] See eg A. Mingardi, 'Why Italy's Season of Economic Liberalism Did Not Last' 25 *The Independent Review* 593 (2021).

[102] A prominent exception is F. Denozza, 'Lo stile giuridico neoliberale', in R. Sacchi and A. Toffoletto eds, n 96 above, 1-38, whose extremely critical stance on what he calls the neoliberal legal style – which is ultimately a critique of a neoclassic economic approach to policy questions – has gone virtually unquestioned within the circle of Italian business law scholars.

[103] We draw inspiration for this intuition from a comment by Paolo Giudici, who, in discussing one of our papers, argued that a prospective legal scholar whose career progress depends on the ability to impress senior scholars has an incentive to adapt to the mainstream and write articles and monographs where new legal concepts and principles are found.

[104] See M. Libertini, Ancora, n 96 above, 20 ('i principi si realizzano mediante regole di rango inferiore: essi sono norme rivolte ai produttori di norme di livello più basso tra i quali, secondo la dottrina più plausibile, si pongono anche gli autori di atti di autonomia privata').

arrangement. In fact, the thesis that a given private ordering arrangement (such as a specific clause in the corporate charter) should be considered valid rests on two assertions: (1) no overriding principles challenge the validity of the arrangement and, therefore, (2) the principle of contractual autonomy applies. Assertion (1) is painstakingly hard to demonstrate analytically because it requires proving a negative. In contrast, assertion (2) relies on *one* centuries-old principle, namely that contractual freedom rules in the absence of mandatory requirements.

If those who aspire to advance their careers must demonstrate their ability to 'master the system', those who sit atop the hierarchical ladder have an interest in preserving the canons of what constitutes 'good legal scholarship'. In fact, making career progression contingent on the proven ability to uncover the system's building blocks enables those who control such careers to preserve both the value of their human capital (which has been built upon the display of the same kind of bravura, i.e. uncovering implicit 'principles' and mandatory rules) and their influence. Similarly to how monopolists prevent the adoption of new technologies to protect their rents,[105] so is making sure that there is one single, broadly accepted notion of what constitutes good legal scholarship a means to perpetuate the value of top academics' human capital and their influence in the selection process.[106] In short, in a community of scholars almost entirely dominated by doctrinarism, there is no prestige to be gained from exercising self-restraint in the collective endeavour of building the 'system'. If you want to be part of that community and gain the respect of its most prominent members, you add your brick and worry not about the negative consequences, if any, for the dynamism of your country's economy. After all, you can always assert, as Italian legal scholars in fact do,[107] that a system that heavily constrains private ordering is welfare-enhancing because it prevents private parties from choosing suboptimal solutions, if not for themselves then for society.[108]

V. Conclusion

Our companion papers with Tobias Tröger show that Italian corporate law hinders the transplant of virtually all the clauses of US VC contracts due to a plethora of mainly implicit requirements to be found in the 'system' of rules that doctrinal legal scholarship moulds. This 'system' imbues Italian corporate law with its rigid mandatory structure, which subsequently permeates everyday transactional practice through the intermediation of lawyers, notaries, courts, and arbitrators. VC contracting is, however, just one major example of how Italian corporate law stands in the way of private ordering in more broadly.

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[105] *Cf*, eg, S.L. Parente and R. Zhao, 'Slow Development and Special Interests' 47 *Int'l Econ. Rev.* 991 (2006) (introducing rent-seeking coalitions that monopolize the supply of productive factors and create considerable barriers to the adoption of superior technology to protect their rents).

[106] This attitude is clearly instrumental also to protecting rents in the market for professional legal services. See Section IV.2 above.

[107] See n 96 above and accompanying text.

[108] Rigorous economic analysis of law has seldom been part of the Italian corporate law scholar's toolkit. cf M. Libertini, *Passato e presente del diritto commerciale* (Giappichelli: Torino, 2023), 67-68. Generic (supposedly) efficiency-based arguments in favour of one pro-regulatory solution or the other are relatively common, though, especially drawing from asymmetric information and market power, rarely matched by considerations of government failures or unintended consequences (or, in other words, the nirvana fallacy rules. See generally H. Demsetz, 'Information and Efficiency: Another Viewpoint' 12 *J.L. & Econ.* 1, 1-2 (1969)).

Our essay builds on those findings to account for the proximate and ultimate causes of that state of affairs. The proximate cause of the burgeoning number of constraints on private ordering under Italian corporate law is Italy's internal legal culture, including its metarules. The ultimate causes lie instead with external legal culture. We have speculated that four factors can be singled out as having mainly contributed to the *über*-mandatory structure of Italian corporate law. First, the traditionally central role of banks in financing Italian firms and the only recent growth of private equity explain the strong role creditor protection plays in shaping corporate law and its aversion to flexible solutions. Second, legal professionals' ability to extract rents from a highly mandatory structure of corporate law favours its persistence. Third, the absence of a pro-contractual freedom mindset among the (legal) elites and, more generally, an ideology consistent with Italy's characterization as a coordinated economy are the cultural precondition for the state of affairs we have spotlighted. Finally, (legal) academics' ultimate goal is to establish themselves as reputed scholars within their field. For this purpose, using the doctrinal legal scholarship's toolkit to 'find' new principles eroding private ordering's turf is a much better strategy than advocating that, in the absence of explicit statutory prohibitions, contractual freedom should prevail.

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