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**Contractual Freedom and the Corporate
Constitution; A Study on Where Greek
Law Stands in a Comparative Context
and the Way Forward**

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Contractual Freedom and the Corporate Constitution; A Study on Where Greek Law Stands in a Comparative Context and the Way Forward

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Abstract

Following the recent internationalised financial crisis, there is a recurrent academic and legislative interest in the field of shareholder rights protection; particularly because of the latter being considered essential for shareholder engagement, as evidenced in roundtable debates, proposed and recently introduced legislation. Focusing on rights attached to publicly traded shares, comparative studies provide useful insights on the level of protection available in each jurisdiction; often assessing the competitiveness the law in force has in an international context. What seems to be overlooked though in the relevant literature is the role the corporate constitution assumes as a source of rights. This paper constitutes part of an ongoing comparative study on the protection of shareholders under corporate law. Its subject is the discretion provided by the German, Greek and UK legal frameworks to formulate rights connected with corporate membership by drafting and amending the articles of association. The methodology applied serves the purpose of providing an evaluative opinion on how the legislations therein examined address the matter. The findings of this research illustrate significant differences between the Common Law (on the one hand) and Continental Law (on the other hand) approaches; reflecting their divergent theoretical underpinnings (contractarianism and concession theory). However, this paper identifies and welcomes a notable yet hesitant reform of Greek Corporate Law resulting in a departure from its version of the principle of “stringent law” (Satzungstrenge); a principle that still permeates the German Law on public limited companies. Those conclusions are followed by the suggestion that a more decisive move towards flexibility would be beneficial. The problem of mandatory provisions becoming obsolete could thereby be addressed without recourse to the legislature and the detrimental effect the one-size-fits-all approach adopted by the existing legislation has on SMEs could be mitigated. The British experience offers useful insights towards that direction.

Keywords: Contract, articles of association, Satzungsstrenge, CA 2006, England, Germany, Greece, comparative law, company law

Introduction

Legal and economic academia has experienced significant interest on shareholder rights protection during the past two decades; an interest intensified by the recent crisis. More specifically, there has been a plethora of comparative studies on the role the relevant hard law provisions assume on corporate governance; how they interact with corporate (ownership) structures, whether they operate as a check mechanism for good corporate governance, whether they attract investment in share capital, what is their macroeconomic effect, if any. Interestingly, even a new form of comparative law research methodology has emerged, combining law with econometrics; I refer of course to the “investor protection” indices of the influential “Law and Finance” study,¹ which in turn spurred the emergence of a growing number of (leximetric) indices.²

The aforementioned studies focus excessively on hard law rules, at the expense of an important source of shareholder rights;³ that of the corporate constitution.⁴ The latter is the most fundamental corporate agreement; that is, the agreement by which the company comes into existence. It comes in different names, even when literally translated in a common language; it is challenging to see how the terms “καταστατικό” (Greek) and “Satzung” (German) can by a literal, word-to-word translation in English produce the functionally equivalent term “Articles of Association” (AoA). Evidently, it is much more convenient to look into hard law rules (instead of the provisions found in the corporate constitutions, which, by definition constitute private ordering) because, simply, they apply to all companies subject to the national law in question. In fact, in order to study the effect corporate constitutions have on shareholder protection, thorough research on a significant number of companies is necessary; this might well be the reason why the above mentioned studies did not consider this factor. This paper takes a different approach and looks into the discretion afforded by law to formulate the content of the corporate constitution, conducting a comparative study of three jurisdictions. Greece is selected as a core jurisdiction because of the rather recent developments on the law governing the issue under analysis; in order to

¹Rafael LaPorta, Florencio Lopez de Silanes, Andrei Schleifer and Robert W. Vishny, “Law and Finance”, *Journal of Political Economy*, (December 1998) Vol. 106, No. 6, 1113-55

²Priya P Lele & Mathias M Siems, “Shareholder Protection: A Leximetric Approach”, (April 2007) *Journal of Corporate Law Studies*, Vol. 7, Issue 1, 17-50

³Indicatively some concurrent opinions on the importance of the corporate constitution on shareholder rights: regarding the U.K.: Xuereb Peter, *The Rights of Shareholders*, (BSP, Oxford, 1989), 12; regarding Greece E. Kourakis “The Division of Capital into Shares” in E. Perakis (ed) *The Law of the Société anonyme*, (3rd edt Nomiki Vivliothiki, Athens 2013), 561

⁴An interesting thesis, whose arguments on the effect shareholders’ agreements have on corporate governance complement the arguments of this paper, is that of Stergiou, Vasiliki “The complex relationship of concentrated ownership structures and corporate governance” (2011) PhD thesis, The London School of Economics and Political Science (LSE) <http://etheses.lse.ac.uk/464/1/Stergiou_The%20complex%20relationship%20of%20concentrated%20ownership.pdf> accessed 20 May 2014

assess where Greece now stands in a comparative context, two jurisdictions (Germany and UK) that are influential members of legal families with divergent approaches on the matter are considered. A rather functionalist approach to the methodology of comparative law is applied herein; the study examines how different jurisdictions address specific issues related to its subject by functionally equivalent rules, paying due consideration to the broader corporate and legal context at the same time.¹ Accordingly, the legal nature of the corporate constitution across three different jurisdictions is examined first; particularly, whether emphasis is on the contractual nature of such agreements in each country or not. Thus, the differences between the jurisdictions who either adopt a “contractarian” or a “concession” approach are highlighted.² Then, by recourse to hard law provisions and legal principles, the discretion entailed in regulating corporate affairs via the corporate constitution is examined comparatively. Lastly, the comparative conclusions are assessed, pinpointing at the implications this analysis has on corporate governance.

The Legal Nature of the Corporate Constitution

As regards all the legislations in question within this study, the rights issued by the AoA or any other constitutional document are usually considered being of contractual nature, at least until the formation of the corporation.³ After this point in time, AoA are considered to acquire an “administrative/organisational/constitutional” nature by the Greek and German academic literature and case law;^{4 5} such wording seems to be avoided by scholars in the United Kingdom, where the characterization of the AoA as a contract remains undisputed.^{6 1} Furthermore, when contrasted to its civil law counterparts, the

¹T Weir (tr), K. Zweigert & H. Kötz, *Introduction to Comparative Law*, 3rd Edn., (Clarendon Press: Oxford, 1998), 32 et seq

²The “concession theory”, briefly described, focuses on the assertion that incorporation is a privilege granted by the State. See Dine Janet & Koutsias Marios, *The Nature of Corporate Governance*, (Edward Elgar, Cheltenham 2013), 109

³Be that constitutional document the Memorandum/Articles of Association of Companies Act (hereinafter CA) 2006 (UK company law statute) or the *Satzung* of Aktiengesetz (hereinafter AktG; German Public Limited Companies Act) or any other akin (such as the Greek Public Limited Companies [Anonimes Etaireies; AE] Act; Law 2190/1920). See Andreas Cahn and David C. Donald, *Comparative Company Law: Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA*, (Cambridge University Press, Cambridge 2010), 261 and *Wood v. Odessa Waterworks* [1889] 42 Ch D 636 per Stirling J

⁴M Varela “Content of the Articles of Association” in Perakis, *Société anonyme*, 112 et seq. See also MMCFI of Rhodes 29/1995 and the commentary on AktG art. 23 par. 3. We read in U. Hüffer, *Aktiengesetz*, (Zehnte Auflage, C.H. Beck, München, 2012), 105 that the Articles of Association constitute an agreement “*sui generis*, which can be considered as a debt contract and organization constitution” (in my translation. Original: “*sui generis*, der als *Schuld und Organisationsvertrag bezeichnet werden kann*“)

⁵See V Antonopoulos, *Law of Sociétés anonymes and Limited Liability Companies*, (Sakkoulas Editions, Athens, 2011), 31 (objective interpretation of contract)

⁶Paul Davies & Sarah Worthington, *Gower & Davies Principles of Modern Company Law* (9th edn, Sweet & Maxwell, London 2012), 64 et seq. Since 2006, the role of the Memorandum of

Law of the United Kingdom emphasises the contractual obligations entailed in the corporate constitution at the expense of its constitutional nature. The constitutional enforcement of the Articles is unlikely then to be of the same level between the United Kingdom and the civil law jurisdictions.²

This differentiation serves as inference of the approach towards contractarianism that each jurisdiction follows (the Law of the United Kingdom inclines more towards the latter than the other two countries do). This theory conceives the corporate entity as a “nexus of contracts” among individuals that purports to maximise the wealth of its members.³ The contractual nature of the company’s incorporating document(s) remains undisputed up to date. Accordingly, the corporation is seen as the product of private initiative, free from any sizeable constraints as to its pro-member function and constitution. Company law rules can be understood as serving a cost-efficient standardisation process to the benefit of shareholders.

It would thus be expected that, due to the limited margin of statutory intervention, a rather “contractarian” jurisdiction such as the UK affords much discretion regarding the content of the corporate bylaws. The ensuing paragraph looks into the freedom to arrange the rights and duties of the corporate actors between themselves and *vis-à-vis* the company across jurisdictions; to what extent do the legislations herein examined entrust persons founding, participating and running the company with the power to “write their own tickets”.⁴

Freedom of Corporate Contracting and its Limits Across Jurisdictions

The contractual nature of the rights attached to shares is well established in UK law, throughout its long living historical course;⁵ nowadays the contractual nature of the rights conferred by the articles of association is reflected in CA

Association as a constitutional document has been minimised; thus in this section focus shall be on the Articles of Association

¹One should not overlook the fact that “contract” law differs substantially between civil and common law; see Zweigert & Kötz, 324 et seq.

²see further D French, S Mayson, C Ryan, *Mayson, French and Ryan on Company Law*, (30th edn, OUP, Oxford 2013), 88

³It has to be noted that the “nexus of contracts” theory is viewed with suspicion by Greek academics but is nevertheless not entirely dismissed as an explanatory mechanism for corporate governance. See E. Perakis, “The flexibility of the Private Capital Company (IKE): One size fits all?”, in Greek Society of Commercial Law (eds) *The New Company Law of the Small-medium Enterprise* (L 4072/2012) (Nomiki Vivliothiki, Athens 2013), 35 et seq

⁴Frank H.Easterbrook, Daniel R Fischel, “the Corporate Contract”, (1989), 89 *Colum. L. Rev.*, 1416, 1417

⁵Section 12 CA 1862. Its wording is not different from the preceding Joint Stock Companies Act 1856. See for further discussion R Nolan, “Shareholder rights in Britain” (2006) *E.B.O.R.* 550

2006 Section 33, paragraph 1.¹ This approach is particularly highlighted in early decisions such as *Borland's Trustee v Steel Brothers & Co Ltd.*² As read in Farwell's J definition of (rights attached to) shares: "A share is [...] an interest measured by a sum of money and made up of various rights contained in the contract, including the right to a sum of money of a more or less amount."³

The dictum reveals that shareholder rights in the UK were considered by that time to be primarily contractual in nature; conferred by the constitutional documents or shareholder agreements. Despite the numerous legislative changes since *Borland's*, a paradigm shift has not materialized yet. Shareholders and founders of companies maintain a broad discretion to decide how they are going to conduct their business.⁴ This freedom is only limited by what is regulated by hard law; whatever is not prohibited is permitted.⁵

In order to further understand the contractual autonomy provided by UK law, it is essential to provide some insight regarding the role the Model Articles play in the formation of the corporate landscape.⁶ Model Articles constitute a long-lived tradition,⁷ as the Secretary of State has been given the power to prescribe the latter since the Stock Corporation Act of 1856.⁸ Essentially, the role the Model Articles have is to provide entrepreneurs with an informed and experienced viewpoint as to how they should write their own tickets; "so that companies do not have to reinvent the wheel."⁹ However, their role is even more important in the British corporate law landscape. As to their application, we read in Section 20 CA 2006:

"On the formation of a limited company—

(a) if articles are not registered, or

(b) if articles are registered, in so far as they do not exclude or modify the relevant model articles, the relevant model articles (so far as applicable) form part of the company's articles in the same manner and to the same extent as if articles in the form of those articles had been duly registered."

¹"The provisions of a company's constitution bind the company and its members to the same extent as if there were covenants on the part of the company and of each member to observe those provisions."

²[1901] 1 Ch 279

³R Kraakman et al. *The Anatomy of Corporate Law; A Comparative and Functional Approach* (2nd edn, OUP, Oxford 2009), 89 et seq

⁴See Nolan, page 554. See also *Harben v. Phillips*, (1883) 23 Ch.D. 14, 35-36, per Bowen L. J. ; "[W]hen persons agree to act together in the conduct of a business, the way in which that business is to be carried on must depend in each case on the contract, express or implied, which exists between them as to the way of carrying it on"

⁵Len Sealy and Sarah Worthington, *Cases and Materials in Company Law*, (9th Edn., OUP, Oxford 2010), 178; *Gower and Davies*, 64

⁶The Companies (Model Articles) Regulations 2008 (SI 2008/3229)

⁷Sealy & Worthington, 75

⁸Nowadays such power is allocated by s. 19 CA 2006

⁹BIS, Companies Act 2006 final implementation – changes to constitutional documents, including model articles: a summary of what the new approach means, [online] available at: <http://www.bis.gov.uk/files/file53041.pdf>, [accessed on: 12/10/2013], 2009, 3

Thus, this kind of model corporate constitution can be understood by Civil Law academics and lawyers as a detailed default set of corporate governance rules from which AoA are capable of derogating; otherwise put, an opt-out system. In this sense, they have little in common with the Greek Model Articles.¹

The examination above leads to the conclusion that party autonomy is sacrosanct in Britain; as a starting point, parties are free to reach the agreement that suits their interests best and this agreement might be only constrained by the Law. Default rules exist in the UK; yet, they are systematised, detailed and found outside the Companies Act.

On the contrary side lays Germany.² There, the starting point in formulating the Articles of Association (*Satzung*) is the (statutory) Law, which might in few instances permit for a level of party autonomy.³ More specifically, German Law on public limited companies is rigid; the vast majority of the provisions included in the *Aktiengesetz* are mandatory, leaving very little room for entrepreneurs to regulate corporate affairs themselves.⁴ For this reason, the underlying principle of “stringent law” (*Prinzip der Satzungsstrenge*) is viewed by German scholars as one of the disadvantages the German public limited company has against its limited liability company counterpart.⁵ The principle is said to be founded on the rationale of protecting unsuspecting investors from exploitative contractual arrangements.⁶ It looks as if, to a great extent, the inflexibility of the provisions encapsulated in the *Aktiengesetz* fails to mirror the corporate reality in Germany though; most of the public limited companies in Germany are small and medium-sized businesses, resembling more the corporate model that the limited liability company (GmbH) is designed for than the ideal corporate form of a big (public) capital company. In fact, the abolishment of the principle was proposed in the 67th German Jurists Forum in Erfurt in September 2008.⁷ Rather expectedly, the motion met with strong opposition; participants and most notably lawyers rejected outright the idea as being contrary to a well-

¹KYA. K2-828, (Greek) Government Gazette Issue (hereinafter FEK) B' 216/05/02/2013)

²For an extensive discussion on the matter see Marcus Lutter & Herbert Wiedemann, *Gestaltungsfreiheit im Gesellschaftsrecht: Deutschland, Europa und USA: 11. ZGR-Symposium "25 Jahre ZGR"*, (Walter de Gruyter, Berlin 1998), especially in 123-148 and 187-215

³As observed by Perakis (*Société anonyme*, 5), contrary to what applies to common law jurisdictions (such as the Law of Delaware, where “everything is permitted, unless expressly prohibited”), in continental law jurisdictions “everything that is not permitted is prohibited”

⁴Section 23 para. 5 sentence 2 AktG “*Die Satzung kann von den Vorschriften dieses Gesetzes nur abweichen, wenn es ausdrücklich zugelassen ist*”; “the Constitution can derogate from the rules of this statute only when it is so expressly permitted“. The similarity with the Greek law on the matter is also identified by, among others, Perakis (*Société anonyme*, 4), referring to art 3 of the Greek Civil Code

⁵M Schulz & O Wasmeier, *The Law of Business Organisations*, (Springer, Berlin 2012), 40.

⁶See also Wirth Gerhard, Arnold Michael, Morshauer Ralf and Greene Mark, *Corporate Law in Germany*, (2nd edn, Verlag C.H. Beck, Munich 2010), 67

⁷It is doubtful if the problem can be addressed by “more or less relaxing [...] the principle”; Hüffer, 115

established legal tradition and practice; by an almost unanimous consent.¹The outcome of such pertinence is that fundamental differences persist between the United Kingdom and Germany; falsifying Hansmann and Kraakman's predicted convergence for more than a century.²

As regards Greece, there are indications that the trend is to move towards an intermediate stance between the two approaches above; nevertheless, it can be said with much certainty that Greek Law is steadily moving away from the German standards of contractual freedom. The reform on the Law on Public Limited Companies by enactment of Law 3604/07³ introduced a broader system of optional ("opt-in" and "opt-out") rules than the pre-existing;⁴scattered across the body of Law 2190/1920. To the same, enabling effect works article 2 paragraph 1a Law 2190/1920 (inserted by virtue of the 2007 amendment); which prescribes that unless a derogation from the default statutory provisions is instituted, the corporate constitution does not have "to include provisions that merely constitute repetition of the legal provisions in force" in order to be considered valid and therefore binding *inter partes*(including provisions conferring rights to shareholders).⁵ However, the strict and typical nature of the Greek Law on Public Limited Companies still leaves little room for contractual freedom; at least compared to Britain. It appears that Greece had its own version of *Satzungstreue*,⁶ founded upon the same (underlying) principles⁷ but employing different levels of strictness; the legislator recognised the alienation of the Law from the commercial reality and the recent reform produced a more enabling statute. Nevertheless, regarding matters inextricably connected with shareholder protection and corporate governance, the "leeway" available differs among legislations as the law stands. To further illustrate this argument, let us focus on the legal rules related to appointment and term in office of the board of directors.

Evidence of Divergence

A matter inextricably connected with shareholder empowerment and protection is the appointment and term in office of directors.⁸ A brief look on the approaches followed by the core legislations illustrates that, indeed, both

¹See for further discussion on the minutes of the 67th forum Jessica Schmidt, "Reforms in German stock corporation law - the 67th German Jurists Forum", 2008, EBOR, 638-656

²Henry Hansmann and Reinier Kraakman, "The End of History for Corporate Law", (2001) 89 GEO. L.J. 439

³FEK 189/A/8.8.2007

⁴Antonopoulos, 41

⁵Article 2 para 1a can be said to reflect the interpretation given to the Law in the past; see Greek Council Of State decision 1861/1993 and Antonopoulos, 40

⁶Concurrent view in N Rokas, *Commercial Companies*, (5th edn, A.N. Sakkoulas, Athens 2006), 218

⁷Eg legal certainty

⁸R Kraakman et al. *The Anatomy of Corporate Law; A Comparative and Functional Approach* (2nd edn, OUP, Oxford 2009), 89 et seq

continental jurisdictions maintain a stricter stance regarding what should be left for the “contracting parties” to decide.

Let us consider first the case of appointment/election of directors. Election of directors, under Greek Law as it now stands, is an exclusive competence of the General Meeting.¹ This rule belongs to the “hard core” of the law on Public Limited Companies and cannot be derogated from.² Appointment of the management is entrusted to the members alone.³ The power of the shareholders to determine the composition of the board may only be bypassed by constitutional provision in the case of replacement of vacated seats; even in this case, the law refers to “temporary” Board Members and the enabling statutory provision should be understood as addressing practical issues.⁴ A similar rationale is followed in Germany, where the competence to indirectly determine the composition of the *Vorstand* (management board) is entrusted to shareholders (and, where applicable, employees) exclusively; by electing the members of the Supervisory Board.⁵

Notably, the UK Companies Act is silent as regards who appoints the members of the (there unitary) board.⁶ Even though it is accepted as a principle that the members have a right to elect their properties' managers and representatives, it is up to the corporate constitution to prescribe the proper electorate/appointers;⁷ therefore, the shareholder franchise may be freely limited by the bylaws.

Now, let us briefly switch focus to the differences regarding terms in office. Contrary to continental law,⁹ the UK Companies Act does not provide any statutory minimum nor maximum term. It is left for the Corporate Governance Code to mandate re-election of directors following terms in office not exceeding three years; otherwise, this is a matter exclusively of the Articles of Association.¹⁰ Therefore, a director in a non-listed company may be appointed for life. This, rather contractarian, approach has little in common with the “stringent” Greek provisions; in particular, article 19 (read in

¹Art 34 (1)(b) L 2190/1920 “election of members of the Board of Directors and auditors” is an exclusive competence of the GM that cannot be ceded

²Concurrent Livada, 902-903, Antonopoulos, 376

³acting collectively (GM) or (exceptionally) individually

⁴Concurrent observation by Livada (p 907)

⁵Ss.96 (1), 84(1) AktG; see also C-112/05 - Commission v Germany OJ 2007 C315/5 (the “Volkswagen case”) at 65

⁶notice the difference in wording: in the case of Greece, the term “election” is used by the statute (art. 34 par. 1 item b)

⁷see the default rule in the Model Articles (Public Companies), article 20, bestowing the right to appoint directors to the GM (by ordinary resolution) and the BoD

⁸*Worcester Corsetry Ltd v Witting* [1936] Ch 640, per Lawrence LJ [at 647-650]; Mayson, French & Ryan, 439

⁹in Germany, the maximum term for the *Aufsichtsrat*'s members is four full years, whilst for the *Vorstand* is five (s. 84 AktG); in Greece, the respective term is six years (art. 19 Law 2190/1920)

¹⁰at B.7.1

conjunction with article 2) of Law 2190/1920 sets a statutory maximum of six years, which cannot be derogated by the corporate constitution.¹

The examples above illustrate the permissive, enabling nature of the British statute. They exhibit that some rules applicable to all public limited companies in continental jurisdictions can only be found in provisions (be it hard or soft law) intended for big enterprises/listed corporations in the United Kingdom. The flexibility for companies to regulate their own matters has its effect on shareholder protection; matters associated with the latter issue are left for the parties to agree upon in SMEs, as they see fit. This does not mean that minorities are disenfranchised. *Au contraire*, the statute provides an “umbrella” regime for protection which,² in conjunction with the principle of shareholder primacy³ and the default rules of the Model Articles, ensures that shareholders’ interests are not frustrated.

Implications of the Study and Arguments for a more Enabling Approach

The analysis up to this point shows that the Law of the United Kingdom puts more emphasis to the contractual nature of the corporate constitution than the other two jurisdictions do. Furthermore and not inconsistently with the first finding, the contractual freedom regarding the composition and effect of the Articles of Association is broader in the common law country herein studied than it is in the civil law ones. The above divergences in approach should better be understood in a broader context. Greece is closer to the German theoretical underpinnings. The concession theory encompasses the underlying rationale of Law 2190/1920. Therefore, “stringent law” and “typical” provisions comprise most of the body of Greek company Law. Nevertheless, we pinpointed a move towards more contractual freedom. In fact, the long-discussed abolishment of *Satzungsstrenge* in Germany began to materialise in Greece by the 2007 amendments. Even though the reformed provisions do not result in a statute as enabling as the British one, it appears that the trend is towards this direction. In my opinion, it would be welcome if the legislature took further steps.

Such an initiative may capture some substantial benefits. The most obvious one is that of wider flexibility. The latter is essential, especially in respect to small and medium enterprises. Indeed, stringency of a law designed for large corporations runs against the benefit of smaller companies that are subject to the same legislation; this one-size fits-all approach cannot be justified in a corporate environment where the majority of corporations are in the form of public limited companies and the vast majority of the latter are SMEs. The reported calls in Germany for the abandonment of *Satzungsstrenge*⁴

¹see Greek Supreme Court 5/2004, Nomiko Vima vol.46, 387 et seq, Three-member Athens Administrative Court of Appeal 1226/2005 TNP DSA; Antonopoulos, 395

²The “unfair prejudice remedy” of s. 994 CA 2006; advocating the introduction of a similar approach to Greek law A Spyridonos., *Minority Rights in the Company Limited by Shares*, (Nomiki Vivliothiki, Athens 2001), 563

³S. 172 CA 2006 (“enlightened shareholder value”)

*Satzungsstrenge*¹ may be viewed as exaggerated because the private limited company is the most common corporate form and successfully serves its purpose as the flexible vehicle for small and medium businesses; this is not exactly the case in Greece though. In fact, the flexibility necessary for small corporations was a driving force for the introduction of more enabling provisions in the Greek statute; renowned authors refer to the introduction of a “small AE”² by virtue of the 2007 reform.³ However, the point of reference for the statute remains the ideal form of the Big Capital Company; the “small AE” and the flexibility inextricably connected with its existence constitute exemptions. I believe that a shift towards the British paradigm, where the point of reference is the “small” plc, would be a (belated) pragmatic response to the existing corporate reality.⁴

It might be counter-argued here that the introduction of the Private Capital Company (IKE), a simplified corporate formation bearing resemblance to the German *Unternehmersgesellschaft* (UG) and the French *Société par actions simplifiée* (SAS), might fill the regulatory gap for small corporations better than creating a more enabling statute for public limited companies.⁵ As to that, only time will tell. However, one should not get too excited by the growing numbers in the first years of IKE’s life.⁶ The German experience showed that a similar,⁷ if not more significant, trend to opt for the newly introduced corporate form was followed by an equally significant number of de-registrations shortly afterwards; apparently, many established *UGn* only to avoid the minimum share capital, without having good prospect of keeping the company running.⁸

Continuing, a more enabling approach would have an impact on shareholder protection. From a shareholder point of view, it allows for the ability to offer rights and the respective protection to be tailored for the business in question; sometimes beyond the (default) level offered by hard law. There is also another important dimension of such flexibility; this is the discretion to formulate rights and duties not anticipated in the time of

¹Supra 26

²In German scholarship there has been for years a similar discussion of “*kleine AG*”

³“μικρή ΑΕ εκ του καταστατικού”; E Perakis, *the New Law of the Société anonyme*, (Nomiki Vivliothiki, Athens 2007), 14

⁴Similar views by Livada (P 867)

⁵Perakis, *IKE*, par III (c)

⁶a look the Greek General Commercial Registry (http://www.businessportal.gr/search_1.php) supports such an observation

⁷By no means I imply here that IKE is identical to the UG; however, out of personal experience in legal practice, I have the impression that the most attractive feature of incorporating an IKE is the “1 Euro” capital threshold, as happened in Germany

⁸Heribert Hirte, Christoph Teichmann, *The European Private Company - Societas Privata Europaea (SPE)* (de Gruyter, Berlin 2012), 337

formation of hard law, especially when the latter largely depends on statute.¹ For instance, the European Directive on Shareholder Rights cannot be said to have resulted in a paradigm shift in the English corporate reality, as many of the elements it harmonised regarding voting in GMs were already implemented in practice by virtue of the corporate bylaws.² Arguably, an alert legislature may equally mitigate the deficiency entailed in an outdated statute by updating it;³ however, this approach may have the effect of producing substantial changes in an undesirable frequency. An oft-changing law runs contrary to the principle of legal certainty; a principle significantly valuable in civil law jurisdictions such as Greece. It creates further unnecessary confusion and costs to practitioners and entrepreneurs. An enabling statute may thus effectively capture the benefits of fostering innovation in corporate matters, including shareholder protection.

Conclusion

This paper attempts to draw attention to the contractual dimension of company law, focus being on the corporate constitution. Consistent with the analysis on contractual freedom and its limits is the conclusion that a balance must be struck between hard law and private ordering; this strategy is apparent in all the examined countries. In an economy where a corporate form is of predominant importance, such a balance must be struck within the law applicable on that form. Therefore and for these reasons, the recent amendments of Greek Law are welcome. Further steps can be taken towards that direction.

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¹Alessio M Paces, Corporate Governance and the Coase's Legacy: A Reply to Henry Manne (November 11, 2009) in, Alessio M. Paces, (ed), *THE LAW AND ECONOMICS OF CORPORATE GOVERNANCE - CHANGING PERSPECTIVES*, (Edward Elgar, Cheltenham 2010), 210

² see further Nolan, 566 et seq

³for the effect changes on default rules have on CG, insightful paper by Henry Hansmann, "Corporation and Contract", (Spring 2006) *Am Law Econ Rev* 8 (1): 1-19 first published online March 17, 2006 doi:10.1093/aler/ahj007, 11

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