Introduction

The major 2008 financial crisis in the United States, and the Eurozone financial crisis thereafter, has reignited the old debate on corporate governance and financial regulation. While the global economy has not fully recovered, the most turbulent times of the recent crisis have passed. The harsh experiences are still fresh, yet it is not too early to reflect upon them. It thus seems that early 2015 is a rather apt time to publish a collection of articles dedicated to the multifaceted and complex connection between corporate governance and financial regulation. This is by no means an easy task: one cannot simply point to a specific cause for the emergence of the crisis, and one most definitely cannot suggest a simple solution towards recovery of the global and local financial markets, as well as public trust in them. Nonetheless, each article in this collection contributes a unique perspective that can either highlight a possible cause of the crisis or help in developing possible solutions for recovery.

The terms “financial regulation” and “corporate governance” are rather vast, perhaps even vague, concepts. Financial regulation may range from legally binding provisions to mere recommended guidelines. It may intervene in the innermost workings and structure of companies, their management and boards, or influence from the outskirts by shaping the way companies interact with other market and state actors. It may be imposed on banks or on other financial institutions. Similarly, corporate governance can relate to varied issues, ranging from boards’ composition to issues of CEOs succession; from methods of decision-making to the relations between majority and minority shareholders. Some corporate-governance measures are determined, formulated and enforced by the regulators (and in some respects are used as a means of financial regulation), while other measures are independently adopted by firms and corporations. Notwithstanding the wideness of their definitions, both corporate governance and financial regulation, as well as the connection between them, can be said to have had a direct influence on the emergence of the financial crisis; and most probably they are also a part of the solution.

Myriad questions arise from this connection, and the articles gathered here tackle them from various perspectives. Some articles explore the interrelation between regulation and corporate governance by focusing on a specific country and on specific cases and regulations, while others develop theoretical models that are not necessarily embedded within a specific legal system or context. Some aim their contentions at the regulators, some focus on investors, and some articles do both. Some of the authors call for stricter corporate regulation and make the case for restricting the power of managers and majority shareholders, some warn against regulation that is too vast, and some do not opine on the adequate scope of regulation and corporate governance. Lastly, each article deals with a different aspect of regulation and corporate governance: the ways in which they exclude or complement each other, their historical roots, their local and global contexts and impacts, the extent to which their scope may influence the emergence of a financial crisis and its consequences, and so on. Brought together, the articles in this collection portray a comprehensive picture of the conditions that led to the crisis, of the current state, and of the paths that should be taken in order to find a way out of it and prevent its future recurrence.

Brian Cheffins explores the rise of corporate governance in the United States in the second half of the twentieth century, as well as its demise in the first decade of the new millennium. By analyzing extensive academic scholarship and financial media coverage, the author stresses the circumstances that led to the flourishing of the "imperial CEO," *inter alia*, the growing size of corporations and the deregulation tendency that was prominent during the last decades of the twentieth century. Cheffins also compares the evolution of corporate governance in the financial sector with its parallel evolution in nonfinancial institutions. While in most sectors the "imperial CEO" that achieved prominence in the 1980s lost its power following the corporate scandals of the early 2000s, matters were different for the autocratic CEOs in the large financial companies. The latter received a corporate governance "free pass," even after the early 2000s financial crisis, eventually jeopardizing their firms and the financial sector at large, and plausibly contributing to the crisis that rocked the market in 2008. It was that crisis that effectively ended the "free pass" and acted as a corporate-governance equalizer for U.S. financial companies.

Barak Orbach further analyzes corporate governance in the United Sates by focusing on the prevailing inaction preference that leads to deregulation of corporations. He also highlights the strong connection between deregulation and growing income inequalities, and between both and the exploitation of rent opportunities by strong financial actors. Orbach shows that the preference for government inaction, which has gained popularity since the 1970s, has provided sophisticated interest groups and market actors with the opportunities to utilize market imperfections to their benefit. The author argues that the legal tendency of inaction, which is usually considered socially preferable (especially by American policymakers and scholars), actually accommodates those opportunities, thereby contributing to the growth of income inequalities as well as to the financial collapse of corporations.

Gerhard Wagner analyzes the German directors' and officers' liability regime, and shows how it not only broadens corporate governance in Germany, but also incentivizes their reckless financial conduct. According to Wagner, the liability regime combines contradictory elements that cancel each other out and create a situation in which managers lack the necessary incentives needed for deterrence. On the one hand, managers under the current German law are personally liable for damages caused to the company by their actions, with no cap on the amount that could be assessed upon them. This, theoretically, makes them risk-averse — not always in the best interests of the company. On the other hand, this regulation is under-enforced and, moreover, corporations can purchase for their managers insurance that covers the entire possible damage. Consequently, deterrence, which is the primary goal of the strict liability regime, is eliminated by the lack of enforcement and by the insurance policy. The author therefore recommends enhancing managers' deterrence by combining several means. First, shareholders should be allowed to file claims against managers, thus strengthening the enforcement of the liability regime. Second, capping damages and changing the insurance policy would make the amount paid by managers in case of a damage suit both feasible and effectively deterrent.

Maribel Sáez and María Gutiérrez discuss the influence of the combination of too vast corporate governance with unsufficient regulation of dividend policies in firms with controlling shareholders. The authors show that law provides powerful insiders — in this case: the controlling shareholders — with control over those policies, whereas the legal protection of outside minority shareholders is rather weak. This protection is even weaker than that given to the creditors of firms. The outcome of this lack of protection, as empirical evidence reviewed in the article clearly shows, is abstention from dividend distribution and the expropriation of minority shareholders. Sáez and Gutiérrez thereby highlight the less familiar aspect of corporate governance and specifically of the agent-cost problem: rather than focusing on the relations between managers and shareholders, the authors focus on the relations among the shareholders themselves. They conclude by calling for further research that would facilitate developing regulatory tools aimed at ensuring the minority shareholders' rights.

Another flaw of the connection between corporate governance and regulation deficit is explored by Érica Gorga, who offers an insightful analysis of transnational securities litigation. Gorga compares the outcomes of private lawsuits that were filed in the United States and in Brazil in cases dealing with two large nonfinancial Brazilian firms that suffered severe losses during the 2008 economic crisis. The author shows that whereas American investors in these companies were compensated, Brazilian investors recovered nothing.

This outcome is a result of the exclusion of foreign-cubed claims from U.S. securities law protection, combined with the lack of appropriate legal antifraud protection in Brazilian law. According to Gorga, this outcome is both unjust and inefficient, as American and Brazilian investors purchased similar shares. The lack of compensation for the Brazilian investors, the author argues, imposes upon them the costs of the companies' corporate governance misconducts and exacerbates wealth transfers from foreign investors to American investors. Gorga examines several possible solutions, and concludes that the most adequate solution would be to develop mechanisms for transnational securities litigation that provide similar protection for all investors in a specific company, regardless of their nationality.

Edward Iacobucci deals with another way to overcome the problems arising from too vast corporate governance: enhancing the fiduciary duties owed by managers and boards. However, while usually such duties are considered to be owed towards shareholders and other stakeholders, Iacobucci unveils the evolving tendency of Canadian courts to interpret them as owed to the corporation itself. One such duty is to ensure that the corporation obeys statutory law, and specifically obeys the legal obligations aimed at mitigating corporations' risks. The author contends that this recent development has created ambiguity regarding the implementation and application of fiduciary duties, and it also might be criticized as overregulation. Nonetheless, drawing upon a comparative analysis, Iacobucci suggests that this form of fiduciary duty indeed incentivizes managers and directors to conform to regulations that protect not only the corporation but also the interest and welfare of shareholders and other stakeholders alike. Mainly, this form of fiduciary duty can serve as a means of preventing corporations from falling into financial crisis due to lack of compliance with financial regulation.

Contrarily, Luca Enriques and Dirk Zetzsche warn against overregulation. More precisely, they point to the drawbacks of rapid and expansive regulation as a reaction to financial crises. The authors examine one of the most prominent regulatory directives set forth in an attempt to restore public trust after the recent crisis: the European Fourth Capital Requirements Directive (CRD IV). They survey its provisions that target the corporate governance of bank boards and argue that these provisions suffer from an array of flaws. Some reflect a one-size-fits-all mindset that is incongruent with the variety of banking firms, while others are based on insufficient empirical evidence. Some provisions, such as enhanced board liability and the preference for an unfriendly board, might lead to dysfunctional boards and might even exacerbate managerial mistakes. However, the authors do not conclude that the CRD IV's requirements should be renounced. Rather, their solution to the aforementioned shortcomings focuses on implementation: they contend that softer, more gradual enforcement may mitigate some of the concerns that arise when interfering too abruptly with corporate governance.

Some solutions for ensuring responsible and effective corporate governance are not regulation-related. One such solution is suggested by Sharon Hannes, who sets the backdrop for overcoming the passivity that characterizes institutional shareholders and renders them unwilling to exert their influence on the companies in their portfolios. Hannes proposes an innovative mechanism aimed at translating this passivity into activism, by introducing a new kind of actor that would be responsible for improving company performance on behalf of institutional shareholders: teams of experts that form independent task forces. This mechanism would enable institutional shareholders to remain involved and ensure adequate management of the companies. The proposal is comparable to the way in which hedge funds operate today, i.e., exerting influence on management in order to enjoy the resulting spike in share value. However, Hannes's mechanism has two significant advantages over hedge funds: long-term benefits for shareholders, as well as significantly reduced costs. The author also raises some implementation concerns, but leaves them for future research.

Yair Listokin focuses on another way of improving corporate governance: a variety of possible decision-making mechanisms. Alongside the often taken-for-granted majority voting, he offers an alternative, more efficient decision-making mechanism, known as the Vickrey-Clarke-Groves Pivotal Mechanism. Given a group of stakeholders with heterogeneous preferences of voting, this mechanism takes into consideration not only how many stakeholders support each option, but also the intensity of their preferences. It incentivizes stakeholders to truthfully reveal their preferences and their intensities, thereby eliciting the efficient decision that should be made from a Kaldor-Hicks perspective and which would not necessarily have been achieved by ordinary majority voting. Nevertheless, since this mechanism might be costly in some cases, Listokin suggests enacting it as a menu option and not as a mandatory one-size-fits-all kind of mechanism. Moreover, he calls for conducting more thorough tests in order to better comprehend the mechanism's strengths and flaws, so it could be implemented more efficiently.

Closing this issue, Michal Barzuza ties between local regulation, corporate governance, and the divergence among U.S. corporations with respect to the state in which they choose to incorporate. If Delaware is known for its value-boosting law and is preferred by many corporations, why do so many others choose to incorporate elsewhere? This puzzle has preoccupied many corporate law scholars in the past decades, and Barzuza suggests it is a consequence of heterogeneity in firms' preferences for managerial protection. Managers who do not seek strong protection would choose to incorporate in Delaware, whereas managers who seek such protection would prefer to incorporate in their home states, or in Nevada — if the protection provided by their states is not strong enough. This innovative perspective on the divergence in incorporations may provide an alternative explanation for corporations' preferences, and may have broader implications in other areas of corporate law. Future research is needed, according to Barzuza, in order to identify which managers and firms seek strong protection and which do not.

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