Welcome to One-week ‘Comparative corporate governance’ class!

Course Objective and Rationale:
Every day in the media, the press relentlessly reminds us of how the global financial crisis has undermined the economy and our confidence in financial markets overall. The global financial crisis clearly demonstrated that poor corporate governance practices can have disastrous consequences, not only for companies and shareholders but also for capital and financial markets and for the economy as a whole. Good corporate governance, in turn, is supposed to help clearly distinguish the line between ownership and control of the company, balance the powers of shareholders, board members, and other stakeholders, while ensuring their accountability. As such, it should lead to better productivity and attract investments. Many countries around the world have already launched or are in the process of launching reforms leading to better corporate governance.
In parallel, in the aftermath of the financial and economic crisis, numerous criticisms have been levelled against passive boards and passive shareholders. To perform better, it is argued on the one hand that boards need to be supported in key areas and be more competent, while the respective roles of Chairman and CEO need to be revisited. On the other hand, the financial crisis has raised questions on the role of institutional investors and there have been calls, specifically at the international, US and European levels, for more shareholder engagement and less conflicts of interest. In addition, the debate about the role of shareholders in ensuring accountability needs to further take into account the different types of shareholders.
From a legal perspective, there have been calls for greater use of regulation over what are considered to be self-regulation codes and standards. These calls tackle the “comply or explain” rule and its efficiency. They can even go further, such as for instance the US response with the Dodd-Frank Act. This approach can be questioned because, in the area of corporate governance, the case is more complex than the one of prudential standards. There have also been instances of regulatory failure. In line with principles of corporate governance, it is questioned whether rather call for jurisdictions to review regularly the capacity of their supervisory, regulatory and enforcement authorities, or to promote forward looking capacities.
The course aims at giving thorough insight into corporate governance practices while providing legal tools to help improve corporate governance practices in listed companies.

Three main areas of tension in corporate governance legal perspectives will be addressed in class:
The first point of tension will focus on a theoretical level, which opposes the shareholder primacy model still defended by most institutional investors worldwide to other models advocating for more participation
of large corporations in general economic welfare, social responsibility and the sustainable long-term performance of business corporations.

A second point of tension will focus on a technical regulatory level. Corporate governance systems have experienced a significant legal transition period due to the soft regulation developments enshrined in corporate governance codes and their integration in legal systems. As a new and disruptive normative tool, corporate governance codes have led to a real upheaval in regulatory mechanisms blurring the dividing line between self-regulation and state regulation. The consequence is a normative complexity which raises issues concerning the scope and effectiveness of corporate governance codes and the existence of various norms within a country’s system of governance.

A third point will focus on a substantive level. Corporate governance standards are now integrated into preexisting legal systems worldwide. This integration is not indifferent to the stability of the legal environment as it raises an issue well known to comparatists, that of cross-border transplants. The different types of acculturation are very present when studying comparative corporate governance and the difficulties in relation to corporate governance transplants are numerous. Owing to the economic, societal and cultural environment of a given country, the ‘path-dependent’ developments in corporate governance systems are of very great importance (Bebchuk and Roe 1999). The risk of grafting disruptive legal transplants into models of corporate governance exists. Consequently, contextualizing corporate governance remains indispensable to allow for a better understanding of corporate governance. Example of transplanted standards will be studied during class related either to shareholders’ power or board’s duties.

Course description:
The course first considers legal corporate governance models focusing on the ideological tensions between the two schools reflected in academic literature, and in international, regional and national frameworks. It will begin with a comprehensive introduction of the theoretical foundations and principles of corporate governance (class 1), underlining the different features of civil law systems in comparison with the common law tradition. It then focuses on the formalisation of corporate governance standards as regulatory tools and governance codes, and the ‘hybridisation’ within legal systems resulting from this dynamic interplay between hard and soft law (class 2). It uses and compare the laws and practices of such European Union member states as the U.K., Germany and France. Examples from other countries are also used in order to illustrate some principles or practices.

Then a substantive study of corporate governance standards highlighting the phenomenon of legal transplants will be provided. Topics covered include rights and equitable treatment of shareholders/investors (class 3), board selection and composition Executive compensation and responsibility (class 4).

The class mainly focuses on listed American and European corporations. The depiction of the socio-cultural environment of all corporate governance systems worldwide cannot be attempted for obvious reasons of length and complexity. Rather, the comparison is limited to the main systems of corporate governance: the
US, the European Union and the ‘parent’ representative systems among the EU member states -- the UK, France and Germany. Asian systems, specifically Indian, Chinese, Japanese corporate governance peculiarities are briefly addressed. Among corporate governance systems, classes do not analyse all types of corporations. Rather, it focuses on large listed companies and their corporate governance systems, in a globalized context presenting higher complexity than middle or small-sized companies.’

Financial, economic and managerial, -- especially organizational behavioural issues and research -- are alluded to when necessary. But this comparative class focuses on legal aspects consistent with the belief that corporate governance is an integral part of general corporate law which itself reflects the larger cultural environment of a given legal system. It seeks to find the individuality of each corporate governance system and determine the cause leading to differences rather to expose uncertain convergence trends.

**Class schedule:**

One-week class of Comparative corporate governance seeks to understand the origins and theoretical foundations of corporate governance models (class 1) and to question their integration in a globalized context through self-regulation corporate governance codes (class 2). It encourages the need for comparative law as a means of thinking about law in a globalized economy, either from a shareholder perspective (class 3), or from the perspective of directors (classes 4). All in all, the course tackles the complex issue of a need for more convergence in corporate governance systems worldwide.

Class 1: Origins and theoretical foundations of Corporate Governance
Class 2: Corporate Governance Codes of Corporate Governance
Class 3: Shareholders’ Rights and Investors’ Engagement
Class 4: Board of Directors (composition, compensation, liabilities)

**Course Policies:**

**Attendance and Class Participation:** Regular and punctual attendance at class sessions is required of each student.

Substantial time should be devoted to the assigned reading before each class. Only a thorough preparation will enable you to participate and take full advantage of class discussions. The reading materials comprise most of the seminal studies that have been done in the field of corporate governance, mainly in the U.S. and in Europe but also in Asia. Beyond the importance of each document, the assigned reading will challenge you to understand the complex socio-economic issues raised by corporate governance discussions.

I will expect students to contribute to class discussions spontaneously and I will call on students as well. The main materials as well as some additional materials are available online and web links are provided.

**Open book Exam : Jan. 2017**
Class 1: Origins and theoretical foundations of Corporate Governance

Class one introduces students to the main theoretical issues at stake in the field of corporate governance. It addresses the theoretical aspects of corporate governance debates and their adoption by legal systems. It first introduces corporate governance main theories and shows how imperative it is that these issues are addressed as part of the legal context in which they are embedded. These debates reflect existing tensions on the nature of companies and the specific roles of shareholders and boards of directors within corporations. At the time of the formulation of what became the economic model of agency theory, a debate took place between A. Berle and E. Dodd, on the issue of the separation between property and control appearing in modern public companies. While Berle supported the traditional principle of restricting directors’ liability to shareholders only, E. Dodd followed an alternative pluralist approach, known as the ‘stakeholder theory’. Using the Berle-Dodd debate as a starting point, the historical background, main legal theories, and the managerial and economic issue central to corporate governance will be discussed. Today’s debates on corporate governance present a blurring line between these two approaches and the adoption of these theories by national legal systems are mixed.

The emergence of corporate governance-related supranational rules at the international and regional levels and the complexity of their implementation within legal systems due to major theoretical dichotomies will then be addressed in the final part of the class one.

Discussion: The corporate governance field is rooted in legal theories from the 19th century. At that time, there was a debate opposing two German lawyers and historians, Otto Von Gierke and Von Savigny. Experts began to elaborate the foundations of what was to become the economic model of agency theory (R. Coase, Jensen & Meckling, Fama…). A debate took place at the beginning of the 20th century between A. Berle and E. Dodd. The issue being addressed by them was the separation between property (belonging to shareholders) and control (in the hands of managers) of public/listed companies. While Berle supported the traditional principle of directors’ accountability to shareholders only, E. Dodd followed a novel pluralist approach, known as the “stakeholder theory”. Lastly, Eccless, a professor of Management practice at Harvard Business law, and alii, evaluated the impact of corporate sustainability on companies’ performances. It raises the legitimate issue of convergence of the two main theoretical models of corporate governance.

First class reading assignment: Please make sure you read the assigned materials thoroughly before answering the questions. Supplementary materials can be helpful but you are not responsible for them for exam purposes.
Materials:
Dodd E.M., “For Whom are Corporate Managers Trustees,” Harvard Law Review, 45, may 1932, n°7, 1145

Questions:
1/ Explain how the history of corporations influenced corporate governance issues; Define corporate governance.
[reading: Braedle U & Kostyuk]

2/ Financial theories, as Jensen and Meckling’s revisited the claim that shareholders own the corporation. Is there legal evidence that shareholders own the corporation they invest in (argue)? Identify the main shortcomings of the shareholder primacy theory
[reading: Blair M. (2003), Stout L. (2003)]

3/ What is Berle’s claim?
[reading: Berle A. (1931-1932)]

4/ What is Dodd’s position?
[reading: Dodd E.M., 1932]

5/ According to Eccles, which theory sustains the current corporate governance movement and its recent evolutions the most? Did the global financial crisis mark a radical shift?
[reading: Eccles & alii, 2014]

6/ Is incorporating social responsibility into the corporate paradigm serving two masters? ; What can be the advantages and disadvantages of stakeholder-oriented firms that are concerned with employees and suppliers compared to shareholder-oriented firms in a model of imperfect competition?

7/ What is the “shared value” concept and what does it require? Is it easier to “do well by doing good” or “do good by doing well”?
Additional materials:


Class 2: Corporate Governance Codes

Class two addresses corporate governance codes and their implementation into legal systems. Corporate governance systems have experienced a significant legal transition period due to the soft regulation developments enshrined in corporate governance codes and their integration in legal systems. Codes have become in a very short time the most shared regulatory tool of corporate governance. The emergence of this modern technique of regulation has encountered difficulties in legal systems, in particular in civil law ones. A new balance between state intervention and professional self-regulation must be found given the continued importance of the role of states in regulating economic and social organizational activities. As a new and disruptive normative tool, corporate governance codes have led to a real upheaval in regulatory mechanisms blurring the dividing line between self-regulation and state regulation. The consequence is a normative complexity which raises issues concerning the scope and effectiveness of corporate governance codes and the existence of various norms within a country’s system of governance. Class 2 addresses the legal issues of corporate governance codes and their implementation in legal systems worldwide. It first presents this regulatory technique, then compares their implementation into legal systems and finally questions their efficiency as a regulatory technique.

Discussion: An important debate in the international corporate governance context is whether countries should develop hard laws, or whether soft regulation. Even though corporate governance codes have common features, they differ fundamentally from one to another (e.g. the UK Combined Code, the Cromme German code, the French Code de gouvernement d’entreprise, compared to the NYSE Principles of Corporate governance). In EU law, these codes go along with the ‘comply or explain’ rule. One main issue regarding this rule is the efficiency of corporate governance codes, along with whether the company adopts conformance or non-conformance to these. Class 2 focuses on examples of full conformance, cases of average number of deviations by non-compliance with codes in Western countries. Still the convergence issue has to be discussed. It is also debatable that a corporate governance Asian model exists.

Second class reading assignment: Please make sure you read the assigned materials thoroughly before answering the questions. Supplementary materials can be helpful but you are not responsible for them for exam purposes.
Materials:


https://business.illinois.edu/aguilera/pdf/CGIR2009_Codes_Aguilera_Cuervo.pdf


Questions:

1/ What is the trigger of corporate governance codes? Would it be appropriate that a single model of corporate governance exist?
[reading: Aguilera, R. V. and A. Cuervo-Cazurra (2004)]

2/ What are the main corporate governance standards according to the UK? What is the purpose of the ‘Comply or explain’ rule? Can it be seen as a mere self-regulation rule?
[reading: the UK code of corporate governance]

3/ According to Arcot and Arcot’s survey, to which extent this comply or explain rule is effective?

4/ What improvements can be suggested to make corporate governance enforcement more efficient, and at which level – international, regional, national-
[reading: E. Wymeersch (2005)]

Additional materials:


The Corporate governance lessons from the financial crisis, OECD, 2009

Aguilera R. and Goyer M., Regulation and comparative corporate governance (feb. 2012), working paper,


A. Pietracosta, Enforcement of corporate governance codes: a legal perspective, Revue trimestrielle de droit financier, 2011
Class 3: Shareholders’ rights and investors’ engagement

Class 3 deals with the standards and rules used by various legal systems in the corporate governance field on shareholders’ perspective. The rights traditionally granted to shareholders by law and which are principally exercised by them at the Annual general meeting, remains a strong element of governance. New issues have arisen in relation to the shareholders’ control over executives and their involvement in the affairs of the company. The level of shareholder engagement and institutional investor expectations regarding governance practices has increased significantly in the past three decades. To acquire a good understanding of corporate governance from shareholders’ perspective, the major changes in ownership structure worldwide and the new expectations of shareholders need to be taken into account. Several governance mechanisms have been set up to tackle these developments, in particular within the EU. Class 3 focuses on the corporate governance challenges raised by the development of this new type of shareholding, proceeds to look into shareholders’ protected rights as well as their potential participation in the decision-making process of the company.

Discussion:
The term ‘shareholder’ covers various ways of investing in a company, from the individual investor to complex institutional investors’ strategies, including intermediation. If it seems easy to identify what an institutional investor is, broadly speaking, it is much more difficult to classify with relevance different categories of investors. Character and degree of ownership engagement vary from one to another. Also, it is unclear what impact the further recent strengthening of shareholder’s protection legislation will have on financial markets dynamics. In addition, proxy vote agencies have spread outside the US, making use of EU directives on shareholders’ representation. Class 3 proposes a framework for analyzing the character and degree of ownership engagement by institutional investors and try to answer various questions regarding intermediaries and proxies. One main issue is to identify the impact of an ownership structure on corporate governance matter.

Materials
Harvard law school forum on corporate governance (December 8, 2016), ‘Some thoughts for board of directors in 2017’, available at: https://corpgov.law.harvard.edu/tag/shareholder-activism/


Van der Elst Ch., ‘The influence of shareholder rights on shareholder behavior’, RTDF 2010, n°1, 50

Questions:

1/ Who are institutional investors and is it possible to classify them? Do various ownership structures compel different corporate governance approaches? (give examples)  
   [reading: S. Celik and M. Isaksson]

2/ How deep institutional investors can influence corporate governance? (give examples of shareholders’ engagement)  
   [reading: Harvard blog]

3/ What are the different approaches to define the “interest of a company”?  

4/ What is a proxy vote agency? Give examples; Do these agencies present risks for corporate governance systems?  
   [reading: Harvard blog]

5/ What are the advantages and flaws of shareholder engagement and activism?

Additional materials:


Class 4: Corporate governance standards on Board of Directors

Class 4 deals with the standards and rules used by various legal systems in the corporate governance field on boards’ perspective.

The board of directors has become the central figure of corporate governance. Traditionally, legislators have held boards to fairly low standards providing that the board of directors is a decision-making organ which makes strategic decisions, as well as a monitoring body. The board is traditionally understood to straddle a dual function: (i) managing the company as well as (ii) monitoring the performance of executives. The law gives the chairman of the board the role of organising and overseeing the work of the board, and leaves it up to the articles of association to determine the rules for convening meetings and the deliberations of the board. Mainly, national legislators require that boards and their chairman use good business judgement and act diligently.

The normative aspects are covered by fiduciary duties (and their equivalent in various jurisdictions), and liabilities in case of their breach (care, diligence etc…). However, both tasks were often carried out poorly and trust was lost as regards major American listed companies in the midst of the Great Depression. Consistent with the agent theory, was suggested the need for better governance practices. This is precisely when corporate governance emerged. While board structure and duties fall into the domain of corporate law, corporate governance tackles the efficient manner these duties are fulfilled.

New concerns were then raised in relation to boards’ effectiveness. In particular, in the aftermath of the global financial crisis, there has been a growing debate about conflict of interests and directors’ expertise. Interlocking mandates, board composition and turnover became a real concern. These factors have been viewed as crucial to assessing the effective involvement directors have in the strategic decisions of the company. Some of the most activist of shareholders have requested compliance with developing higher standards of good behavior, which include transparency about the skills and experience each individual director brings to the board. Some have even challenged the nomination of directors in response to concerns about executive remuneration, strategic business decisions or performance. Every proxy season sees an increasing amount of ‘hot’ topics being raised.

New issues arise at a rapid pace and reach a consensus on convergence of all governance standards has proven difficult. While agreement has been reached on some recurring points (like turnover, availability and expertise), other topics (like independence, quotas, remuneration, CSR requirements) are the subject of much debate and come up as companies are faced with economic difficulties. Authors explain these differences by the ‘considerable variation in the legal provisions which purport to specify the role of the board and its relationship to the shareholders, on the one hand, and the full-time executive management of the company, on the other’ (Davies and Hopt 2013). Additionally, when such legal innovations are adopted from foreign legal systems (from the UK in Europe, for example), their reception in specific legal and cultural contexts often creates legal transplant-related issues and disparate national provisions.

Corporate governance codes must be compared in light of the normative context in which they are created and the important differences in ownership structures. Three main elements will be compared in class: (1) independent board leadership; (2) board composition and directors’ expertise (3) and executive compensation.
**Discussion:** Despite very few stringent requirements regarding how a board of directors should be composed, more and more attention is given to this issue by corporate governance observers, according to whom some corporate governance tools are supposed to have an impact on good behaviors in the board: declaration of conflict of interests, diversity, quotas. In class, discussion focuses on the relevance of these tools and their efficiency in improving corporate governance. As attitudes from jurisdiction towards quota requirements in boards differ quite substantially, according to their legal and cultural context, we will discuss the relevance of having quotas in Board and their impacts on board efficiency. Additionally, as evidence emerged suggesting that some CEOs had effectively bought off directors by providing the individually with special perks or monetary benefits, executive remuneration has become a debated issue worldwide. In addition to media and political coverage for outsize executive remunerations, there is a concern that some remuneration practices may have partly contributed to the global financial crisis since 2008. Few matters in the field of the modern corporation have attracted as much attention as executive remuneration. Executive pay has become and remain an essential trend impacting boards. In response, boards are devoting even more time and attention to the critical issue of appropriate remuneration. Class 4 examines and discusses some new mechanisms on executive compensation that have been put in place, in addition to the constraints stemming from the market forces, in the US, as well as in the European countries: ‘say on pay’, pay ratio and information rules, shareholders’ enlarged power to intervene…. In the last part of the class, we consider common law, state law and civil law foundations for the duties of officers and directors and compare the effectiveness of corporate governance implementation. In spite of the fact the business judgment rule (BJR) is largely recognized in the Western legislation, it is interpreted in different ways, according to a more or less flexible implementation.

**Materials**


Questions:

1/ What are the main outcomes of parity in EU compared to US boardrooms?
   [reading: Harvard Law school forum, nov. 2015; EU report, 2012]

2/ According to 2 French economists, Kramaz & Thesmar, what are the sociological impediments to Boards diversity in France? Is this argument transferable in other countries?
   [reading: Kramaz F. et D. Thesmar, 2006]

3/ What is the expected impact of quota requirements in Boards? May quota reflect an increasingly stakeholder-oriented corporate governance perspective? Specifically in Europe? Would it be possible to introduce quota as a means of better corporate governance practice in US?

4/ What is the real impact of “say on pay” on executive compensation regime?

5/ How the pay ratio works?

6/ What is the position of the remuneration committee in setting executive pay?

7/ The Mannesman and Disney famous cases:
   - What are the main duties of directors and boards?
   - What does the “Business Judgment Rule” mean, on what ground and how does it work?
   - What is the factual context of both cases?
   - What are the legal arguments opposed in both cases?
   - To what extent a comparison of these two cases is helpful to understand the impact of legal and cultural context on corporate governance and directors liabilities?
   - What general conclusion can be reached?

Additional materials

Landier A., D. Sraer et D. Thesmar, Bottom up Corporate governance, NYU working paper, mars 2005,
Nguyen B.D., Does the Rolodex matter? Corporate Elite's small world and the effectiveness of board directors, fév. 2011, EFA 2006 Zurich Meetings Paper,