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Groups of Companies - A Comparative Study on the Economics, Law and Regulation of Corporate Groups, 2nd edition

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Abstract

The phenomenon of groups of companies is very common in modern corporate reality. The empirical data on groups of companies are heterogeneous because they are collected for very different regulatory and other objectives. Two main agency problems arise in groups of companies: between the controlling shareholder and the minority shareholders and between the shareholders and the creditors. Regulation by legislators and courts is extensive and controversial, most recently (2023/24) by ESG and value chain law (EU directive CSDDD), though harmonization is slow. There are three regulatory models for dealing with groups of companies: regulation by general corporate and/or civil law (prototype: the UK); regulation by special group law (prototype: Germany's Konzernrecht, under pressure by ECJ case law); and regulation by areas of the law such as accounting law, banking, finance, competition, and tax law (to be found in many countries, including the UK, either combined with the first or the second model). The main strategy for dealing with groups of companies is disclosure and group accounting. It is effectuated by special investigation with a group dimension and by the help of auditors and independent experts. A fair amount of international convergence, at least for listed companies, can be observed as far as shareholder protection is concerned. Related party transactions are a key area of concern for corporate and group law, usually dealt with by specific disclosure and consent requirements. In addition, appropriate standards for directors and controlling shareholders for dealing with agency conflicts in groups of companies have been developed in many countries. These standards become stricter, if insolvency is approaching. The concept of the shadow director plays an important role in extending liability to the controlling shareholder and the parent. Other mechanisms for creditor protection, both in the independent company and in groups of companies, are indemnification, veil-piercing, subordination and substantive consolidation. Creditor protection is still very path-dependent, and convergence is much less advanced.

Keywords: Groups of Companies, Corporate Governance, Principal Agent Conflicts between Minority Shareholders and Controlling Shareholders, Creditor Protection, Konzernrecht, Tunneling, Related Party Transactions, Conflict of Interest, Mandatory Disclosure, Fairness Opinions, Enforcement, Veil-piercing

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GROUPS OF COMPANIES

A Comparative Study of the Economics, Law, and Regulation of Corporate Groups

KLAUS J. HOPT[1]

1 GROUPS OF COMPANIES: PHENOMENON, AGENCY PROBLEMS, AND REGULATION

1.1 The phenomenon of groups of companies

GROUPS of companies rather than single independent companies are the modern reality of the corporation, and most of them are multinational groups. As an example, take the TUI group in Germany, one of the world's leading tourism groups. It has over 250 companies in more than 50 countries with around 60,000 employees and an annual turnover of almost 16.5 billion euros.[2] Modern business can be organized in different ways. The integrated firm working only with its own labor force is rare. More common is distribution by commercial agents or appointed dealers. As the firm becomes bigger, it sets up branches and, especially in trade that crosses over borders, it establishes separate companies as subsidiaries of the firm and forms multinational groups. The groups differ greatly as to structure, organization, and ownership. In the US, groups with 100%-owned subsidiaries are common. In continental Europe, the parents usually own less—very often much less—of the subsidiaries, just enough to maintain control. Some groups have holding structures—for example, the large US

[1] The original version of this article, from 2015, has been published in SSRN, ECGI, and the online version of this handbook. In the meantime, there have been new developments with much new material. The present version is an update through 13 January 2024. All electronic citations were checked on 21 February 2023.

[2] TUI Group, Annual Report 2022, available at https://www.tuigroup.com/en-en/about-us/about-tui-group.

banks—and Swiss banks are beginning to follow.[3] In Europe—for example, in Germany and Italy—pyramids[4] are common, i.e., hierarchical groups with various layers of subsidiaries and subsidiaries of subsidiaries forming very complicated group networks. Groups are run very differently: some are tightly steered by the parent from the top, while others are loosely combined, with largely autonomous profit centers and sometimes fierce group-internal competition.[5] If groups cooperate, they sometimes choose to jointly hold certain subsidiaries.

[3] Jeffrey N. Gordon & Wolf-Georg Ringe, "Bank Resolution in the European Banking Union: A Transatlantic Perspective on What it Would Take", https://ssrn.com/abstract=2361347, August 2014, 45. An example of a holding company outside the financial sector is the German Franz Haniel & Cie. GmbH, which manages a portfolio of independent companies based on a common business model.

[4] See recently Assaf Hamdani, Konstantin Kosenko and Yishay Yafeh, "Regulatory Measures to Dismantle Pyramidal Business Groups: Evidence from the United States, Japan, Korea and Israel", ECGI Law Working Paper No. 542/2020, 20 September 2020, available at https://ssrn.com/abstract=3692970. Cf. also Marcello Bianchi, Magda Bianco, & Luca Enriques, Pyramidal Groups and the Separation Between Ownership and Control in Italy, in: The Control of Corporate Europe 154–87 (Fabrizio Barca & Marco Becht eds., Oxford 2001); Marcello Bianchi et al., "Regulation and Self-Regulation of Related Party Transactions in Italy: An Empirical Analysis", CONSOB Working Paper 75 (2014); Heitor V. Almeida & Daniel Wolfenzon, "A Theory of Pyramidal Ownership and Family Business Groups", 61 J. Fin. 2367 (2006); Joseph P.H. Fan, T. J. Wong, & Tianyu Zhang, "Institutions and Organizational Structure: The Case of State-Owned Corporate Pyramids", 29 J. L. Econ. & Org. 1217 (2013); High Level Group of Company Law Experts, A Modern Regulatory Framework for Company Law in Europe, Report for the European Commission (November 2002), ch. V: Groups and Pyramids, 94–100.

[5] Asli M. Coplan & Takashi Hikino, "Introduction: Business Groups Re-Examined, in: Business Groups in the West: Origins, Evolution and Resilience" 1, at 10 et seq. (Asli M. Coplan & Takashi Hikino, eds., Oxford 2018); John H. Dunning, Multinational Enterprises in the 1970's: An Economist's Overview of Trends, Theories and Policies, in European Merger Control 3–23 (Klaus J. Hopt ed., Berlin, New York 1982).

Special—often cultural—problems arise if, as in rare cases, multinational groups have two parents from different countries. Accordingly, the business concepts of the group differ.[6]

Groups also have different legal forms. This depends on the various corporate forms available in different jurisdictions and sometimes on an international level, such as the Societas Europaea (SE) in the European Union. Legal group regulation, if any, depends on these legal forms,[7] which means that there are stock corporation groups,[8] limited liability company groups, SE groups such as the German insurance giant Allianz,[9] and also groups with commercial partnerships such as parents or subsidiaries. The choice of the form is most often tax-driven.[10] In law, the concept of the group depends on the legal concept of control by the parent. There are different legal concepts of control according to the purpose of the regulation. For accounting purposes, but in some countries also under general corporate law, formal control by at least 51% of the shareholdings is the legal test. For antitrust, and in

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[6] Christian Kirchner, "Ökonomische Überlegungen zum Konzernrecht", Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR) 214–34 (1985). For a recent review of the economic justifications for the existence of groups, and specifically of minority-co-owned groups, see Luca Enriques & Sergio Gilotta, "Justifications for Minority-Co-Owned Groups and Their Corporate Law Implications", ECGI Law Working Paper, No. 693/2023, March 2023, available at http://ssrn.com/abstract_id=4397428, but against legally recognizing a group interest, *infra* note 159.

[7] Forum Europaeum Corporate Group Law, "Corporate Group Law for Europe", 1 Eur. Bus. Org. L. Rev. (EBOR) 165, at 185–87 (2000); John Kluver, "European and Australian Proposals for Corporate Group Law: A Comparative Analysis", 1 EBOR 287, 292–293 at 292–93 (2000).

[8] Aktienkonzern in Germany.

[9] Peter Hemeling, chief legal counsel of the German insurance giant Allianz, on the choice of the SE for the parent: Die Societas Europaea (SE) in der praktischen Anwendung, lecture (Bonn, Zentrum für Europäisches Wirtschaftsrecht 2008).

[10] Wolfgang Schön, "Perspektiven der Konzernbesteuerung", 171 Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht (ZHR) 409–45 (2007).

countries with a special group law as in Germany, substantive control concepts are used, taking into consideration that it may be possible to control the organization with much less than a 50% share depending on the shareholder structure, shareholder presence, voting behavior in the general assembly, and other economic facts.

The objectives of group regulation under corporate law are usually twofold. The main objective is the protection of the minority shareholders and creditors of the subsidiaries in the group. Under this objective, group regulation follows a bottom-up model. A second objective in many countries—including European countries as well as Australia,[11] for example—frequently concerns corporate law provisions aimed at assisting business and the economy by recognizing corporate groups as organizational forms and by facilitating group management. Here, the regulatory perspective is top-down. In countries with strong protectionism and in most emerging countries, the emphasis is more on the organizational side.[12] This chapter concentrates on group regulation with the first objective, i.e., on agency problems in corporate groups and their regulation. Special problems arise for multinational groups, an old phenomenon that was already well known in the nineteenth century,[13] for groups with the state or state enterprises as parent,[14] for financial groups as evidenced by the financial crisis,

[11] For Europe Christoph Teichmann, "Europäisches Konzernrecht: Vom Schutzrecht zum Enabling Law", Die Aktiengesellschaft 2013, 184. For Australia see Kluver, *supra* note 7, at 290–91.

[12] For Spain see José M. Embid Irujo, "Trends and Realities in the Law of Corporate Groups", 6 EBOR 65, 79–81 (2005).

[13] On the difficulties of bi-national groups, many of which have failed for nonfinancial reasons, Wilhelm F. Bayer, "Horizontal Groups and Joint Ventures in Europe: Concepts and Reality", in: Groups of Companies in European Laws 3–17 (Klaus J. Hopt ed., Berlin, New York 1982).

[14] Prototypes for these are the trading companies of the seventeenth century, such as the Dutch East India Company, the South Sea Company, or the Mississippi Company. Cf. Paul Frentrop, A History of Corporate Governance 1602–2002 49–114 (Amsterdam, Deminor 2003).

and for listed groups, i.e., groups in which the parent or a subsidiary or even both are listed. These problems cannot be dealt with here in more detail.

1.2 Empirical Data on Groups and their Use for Regulation

Empirical data on groups is available, but it is usually collected for specific purposes. More recently there has been a growing body of research on corporate ownership with a view toward corporate governance law and codes.[15] Ownership differs considerably between the various countries, with dispersed ownership in the US[16] and in the UK[17] as prototypes[18] and controlling family enterprises and groups of companies as the general rule in continental European states and often also in Far Eastern countries and in emerging economies.[19]

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[15] Ronald J. Gilson, From Corporate Law to Corporate Governance, chapter 1 in this volume##. An extensive collection of the corporate governance codes of many countries is available at the European Corporate Governance Institute (ECGI), Brussels; Dániel Gergely Szabó & Karsten Engsig Sørensen, "Corporate Governance Codes and Groups of Companies: In Search of Best Practices for Group Governance", 15 ECFR 697 (2018).

[16] Marco Becht, Beneficial Ownership in the United States, in: Barca & Becht, *supra* note 4, at 285–99. But this is just the general rule. Exceptions are becoming more frequent, in particular in the field of new technology and for start-up companies.

[17] Marc Goergen & Luc Renneboog, Strong Managers and Passive Institutional Investors in the UK, in: Barca & Becht, *supra* note 4, at 259–84.

[18] This is just a prevailing pattern. In continental European countries, groups with dispersed shareholders are on the advance, for example the German Stock Exchange in Germany and most of the German DAX 30 corporations, on which see Wolf-Georg Ringe, "Changing Law and Ownership Patterns in Germany: Corporate Governance and the Erosion of Deutschland AG", 63 Am. J. of Comp. L. 493 (2015).

[19] Unternehmensgruppen in Mittel- und Osteuropäischen Ländern (Klaus J. Hopt, C. Jessel-Holst & Katharina Pistor eds., Tübingen 2003); Haftungsrisiken für die Konzernmutter, in Mittel- und Osteuropa (Martin Winner ed., Baden-Baden 2013) for Middle and Eastern European countries; Klaus J. Hopt & Katharina Pistor, "Company Groups in Transition Economies: A Case for Regulatory Intervention?", 2 EBOR 1, 4–9 (2001).

Empirical data on multinational enterprises and groups of companies is collected by international organizations such as the OECD, the UN, the G20, Basel, and others.[20] Data on groups is also collected by studies on economic concentration and used for antitrust and merger control regulation in many industrialized countries, including Germany, the European Union and the US.[21]

Of particular relevance when studying the regulation of corporate groups is data on conduct and transactions in groups. Usually it is not collected systematically but is set out by regulatory agencies, in case studies, in national and international court cases, and by reports from practice.[22] Much existing group law is not codified but is case law, developed by courts, as in German limited liability group law, or sometimes by supervisory agencies such as the former Belgian Banking Commission.[23] The extensive contributions of legal academia in many countries with group law do not usually add much in the way of empirical data.

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[20] See for example OECD Guidelines for Multinational Enterprises of 1976, updated 2011.

[21] Cf. German Monopolies Commission, biannual reports on economic concentration; on concentration in Germany, see Volker Emmerich & Mathias Habersack, Konzernrecht (11th ed. Munich 2020) § 1 III comments 19–28a; for France see Paul Le Cannu & Bruno Dondero, Droit des sociétés (9e éd. Paris 2022) nos 1516, 1529 et seq.

[22] Francesco Chiappetta & Umberto Tombari, "Perspectives on Group Corporate Governance and European Company Law", 9 Eur. Company & Fin. L. Rev. (ECFR) 261, at 265–68 (2012) with experience from the Pirelli Group; Vladimir Atanasov, Bernard Black, & Conrad S. Ciccotello, "Law and Tunneling", 37 J. Corp L. 1 (2011) at 25 et seq. with tunneling cases from the US; Bianchi et al. 2014, *supra* note 4, for Italian regulation and self-regulation of related party transactions; on binational groups see Bayer, *supra* note 13.

[23] For a list of landmark cases on German group law, see Klaus J. Hopt, Legal Elements and Policy Decisions in Regulating Groups of Companies, in Groups of Companies 81 (Clive M. Schmitthoff & Frank Wooldridge eds., London 1991); for the former Belgium Banking Commission, Pierre van Ommeslaghe, Les groupes de sociétés et l'expérience du droit belge, in Groups of Companies in European Laws 59 (Klaus J. Hopt ed., Berlin, New York 1982).

1.3 Agency Problems: The Controlling Shareholder and Minority Shareholders, Creditors, and Other Stakeholders

It is generally understood that there are three main agency problems to be dealt with in corporate law: conflicts between managers and shareholders, conflicts among shareholders, here essentially between the controlling shareholder and the minority shareholders, and conflicts between the shareholders as a group and other stakeholders, in particular the creditors of the company and its workforce.[24] Sometimes the concept of stakeholders is conceived more broadly to encompass consumers, municipalities, regions and countries interested in keeping groups and group members within their area, the state as a tax authority, and even non-personified public goods such as the environment, fundamental rights, and others. Most recently this has led to special legislation (ESG and value chain laws) protecting shareholders in France, Germany, the European Union and other countries.

The classic agency conflict concerns the managers as agents of the shareholders. This conflict exists if the shareholders are dispersed, as is common in the US, the UK and some other countries.[25] Much corporate law in the various countries deals with this conflict.[26] For

[24] Reinier Kraakman et al., The Anatomy of Corporate Law 35 (3d ed. Oxford 2017), cited as Anatomy, at 25 et seq. More recently, protecting external constituencies has gotten increased attention, id. at 92–100, including in the European Union with the corporate social responsibility movement and reporting requirements for non-financial information.

[25] See *supra* 1.2.

[26] Anatomy, *supra* note 24, at 49–77; Eddy Wymeersch, Groups of Companies in the EEC, A Survey Report to the European Commission on the Law Relating to Corporate Groups in Various Member States (Berlin, New York 1993); Rafael Mariano Manóvil, ed., Groups of Companies, A Comparative Law Overview (Cham, Switzerland 2020) with 22 country reports; Peter Hommelhoff, Marcus Lutter & Christoph Teichmann, eds., Corporate Governance im grenzüberschreitenden Konzern (Berlin, Boston 2017) with contributions on the UK, the Czech Republic, France, Scandinavia, the Netherlands, Poland and Italy.

controlling shareholders and for the parent in a group of companies, this agency conflict is hardly relevant, because the controlling shareholder will ultimately prevail against the management, not only in the parent company but also in the subsidiaries, either through superior influence on the board or through voting power in the general assembly. It is true that under special circumstances—for example, in multinational groups—control may not be exercised so easily, especially if labor sides with the management of a subsidiary, or if state agencies in the country of the subsidiary pursue country-specific interests. But this is the exception.[27] As to groups of companies, the two most discussed principal–agent conflicts concern minority shareholders and creditors (as well as employees).

1.3.1 Minority Shareholders versus the Controlling Shareholder

This agency problem occurs most frequently in continental European countries where family companies and groups of companies are common.[28] The controlling shareholder may abuse that control position in various ways, such as by self-dealing or through similar related-party transactions, thereby reaping the private benefits of control.[29] The corporate laws of most countries cope with this problem of controlling shareholder opportunism through various strategies and mechanisms of minority protection.[30]

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[27] One special case is groups that are controlled by two or more shareholders at parity, called "parity groups" (*Gleichordnungskonzerne*). The problem here is the sharing of control, not the agency conflict with the management of the subsidiary.

[28] *Supra* 1.2.

[29] For an international comparison of private benefits of control, see Alexander Dyck & Luigi Zingales, "Private Benefits of Control: An International Comparison", 59 J. Fin. 537 (2004); Anatomy, *supra* note 24, at 79–108, in particular 103–08, 164–65; for a more positive evaluation of private benefits of control, see Alessio M. Pacces, Rethinking Corporate Governance, The Law and Economics of Control Powers (London, New York 2012).

[30] Anatomy, *supra* note 24, at 79–108, 87–88, as to creditor protection 121–23.

As we shall see, many jurisdictions deal with this agency problem without distinguishing whether these conflicts arise in an independent corporation or in a group of companies. Yet in groups of companies this agency problem has several particular features.[31] First and most conspicuous is that the controlling shareholder in the subsidiary may act not just opportunistically, in his own private interest, but also responsibly, in the interest not only of the parent but of the group as a whole or of other subsidiaries. While the controlling shareholder of an independent corporation has an individual interest in the well-being of "his" corporation, which somewhat reduces the risk of opportunism at the expense of minority shareholders, this is not necessarily the case if he has important stakes in other companies as a parent of the group or as a controlling shareholder of the parent. In this case, what may be disadvantageous for him in one company may at the same time be beneficial for the other companies. This is what makes the agency conflict in the group generally more complex and acute than it is in the independent company.

Second, steering a group of companies implies making difficult business judgment decisions that may be appropriate or even necessary for the group though they are disadvantageous or even harmful for the subsidiary. This implies a much more difficult balancing of interest between the subsidiary and the parent (and other subsidiaries) than between the minority and the majority in an independent corporation. Examples are easy to find. In most groups, there is a central cash management apparatus where the moneys of the subsidiaries are pooled. It is very common for the parent to take from the subsidiaries cash contributions for the group that from the perspective of the subsidiary may or may not be economically or legally justified, for example for services rendered within the group or more generally for the alleged benefits of belonging to the group. The parent or another group member may be in financial difficulty and need the help of the subsidiary. The parent may

[31] Cf. Emmerich & Habersack, *supra* note 21, § 1 III 3 and in more detail for German group law *infra* 2.2.

need to make a decision about where in the group layoffs or cutbacks should be effectuated; or, more positively, about which of the subsidiaries in the group should have the opportunity to develop a promising new product; or, usually for tax reasons, about where a new subsidiary should be formed that may take away business from the others. In a sense, the latter cases present a horizontal agency problem, not just a vertical one as in the independent corporation. This is not to say that such balancing cannot be done in jurisdictions without separate provisions for groups, but some jurisdictions consider it to be the reason for treating the agency problem in groups of companies separately and differently.

Third, the agency problem is exacerbated if the controlling shareholder in the group holds, instead of 100%, only a block of shares that is enough for control.[32] As seen before, depending on how control is defined, this may be just a 51% block or even, in corporations in many continental European countries in which the attendance rate for common shareholders at the general assembly is low, considerably less—in Germany for example, sometimes under 30%. With the mandatory bid provision for takeovers in many European countries, 30% is usually considered to be control for the purposes of acquiring control as defined under the takeover acts.[33] This angle of exercising control through relatively small stakes is broadened in a number of continental European countries through pyramiding,[34] i.e., by exercising control over a subsidiary through another subsidiary and so on. The actual economic stake of the controlling shareholder at the top of the pyramid may thus become very small, and as a

[32] Luca Enriques & Paolo Volpin, "Corporate Governance Reforms in Continental Europe", 21 J. Econ. Perspect. 117, 122–25 (2007).

[33] Klaus J. Hopt, "European Takeover Reform of 2012/2013—Time to Re-Examine the Mandatory Bid", 15 EBOR 143, 173–76 (2014).

[34] See *supra* note 4.

consequence his risk in the lowest part of the pyramid may be minimal. The temptation to take hidden private profits somewhere in the group increases correspondingly.

Fourth, the agency conflict in a group of companies may be one that concerns not just the minority shareholders in the subsidiary but also the minority shareholders in the parent corporation. This is the case if the management of the parent, in agreement with the controlling shareholder, takes a business decision to invest heavily in a risky subsidiary without shareholder consent in the general assembly of the parent corporation. The famous German *Holzmüller* case is a good example of this.[35]

1.3.2 Creditors versus the Controlling Shareholder

The other main agency problem concerns creditors. As with the minority shareholder agency problem, this conflict is well known in general corporate law for independent companies, and a number of jurisdictions do not have separate rules for this problem in group situations.[36] But again, creditors of groups may be more exposed to controlling shareholder opportunism than creditors of independent companies.[37]

The above-mentioned special features of the conflict also apply here: a smaller incentive on the part of the controlling shareholder to act in the sole interest of the subsidiary because of his stakes in other companies; difficult financial and investment decisions in steering the whole group; exacerbated risk in pyramidal groups; and agency problems, not only for the creditors of the subsidiary but also of the creditors of the parent.

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[35] German Bundesgerichtshof, Decisions BGHZ 83, 122 (1982), *Holzmüller* case; but see also the BGHZ 159, 30 (2004), *Gelatine* case.

[36] Anatomy, *supra* note 24, at 109–43: Transactions with Creditors.

[37] Anatomy, *supra* note 24, at 121–23; Marianne Bertrand, Paras Mehta, & Sendhil Mullainathan, "Ferreting Out Tunneling: An Application on Indian Business Groups", 117 Q. J. Econ. 121 (2002) with experience from India.

Furthermore, quite apart from the precarious situation of involuntary creditors, it is usually more difficult for a creditor of a subsidiary than for a creditor of an independent company to evaluate the risks they are running. The situation is just more opaque, and the divisions between the assets of group members are more blurred. This is true whether or not the creditor knows that the debtor company is a group member. Disclosure under the various national and international transparency provisions is relatively well established as far as the parent corporation is concerned, in particular because of group accounting,[38] but the transparency regime is much less developed as far as the subsidiaries are concerned. As a consequence, the general creditor's risks—ex ante: misrepresentation of value; ex post: intra-group transactions, asset dilution, asset distribution, and debt dilution[39]—are generally higher in groups of companies than in independent companies.

1.3.3 Labor and Other Stakeholders versus the Controlling Shareholder

Similar problems arise for employees and other stakeholders whether these problems are considered to be agency conflicts[40] or not. The decision to hire or fire employees may depend not just on the business situation of the subsidiary but may follow the interest of the group. Restructuring in groups of companies, in particular in multinational groups, is one of the most controversial issues for labor. For example, if a takeover threat looms against an independent company, labor will often seek a coalition with the management and the controlling shareholder against the minority shareholders. In other cases, however, the controlling shareholder in the group may make decisions about labor issues in the interest of the whole group. In a number of countries, the employees may have a say on a co-determined board of an independent company, but if the ultimate decision is made at the top of the group, this

[38] See *infra* 3.2.

[39] Anatomy, *supra* note 24, at 111–16.

[40] For employees in this context, Anatomy, *supra* note 24, at 105–07.

does not help unless there is a special group codetermination there as well. Germany has such a group codetermination system, but only German labor has its representatives sitting on the board of the parent.[41]

As to stakeholders, France, has taken initial steps through its law no 217-399 of March 27, 2017 on the duty of vigilance of parent and outsourcing companies, and through the "Loi Pacte" of no 2019-486 of Mai 22, 2019 on the growth and transformation of enterprises.[42] Germany has followed suit with its law of 16 July 2021 on supply chains.[43] As of 2023, a European directive was due to be enacted during 2024 called the "CSDDD Directive".[44]

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[41] As to the conformity of the German labor co-determination regime with European Law see the judgment of the European Court of Justice, 18 July 2017, C-566/15, ECLI:EU:C: 2017:562 (*Konrad Erzberger ./. TUI AG*), with critical comments by Mathias Habersack, "Germany first?", NZG 2017, 1021, and the controversial discussion before and after the judgment.

[42] See Pierre-Henri Conac & Isabelle Urbain-Parléani, "The 2017 Act on the duty of vigilance of parent and outsourcing companies", Revue Trimestrielle de Droit Financier (RTDF) 2017 (3):90; Conac," National Report on France", in: Manóvil, *supra* note 26, para 4.

[43] Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten vom 16.07.2021, Official Gazette 2021 I 2959, available at https://www.bmas.de Act_on_Corporate_Due_Diligence_in_Supply_Chains.
For initial comments by Patrick Leyens on the many problems of the application of the law on groups, see Handelsgesetzbuch (Commercial Law Commentary), (2) Lieferkettensorgfaltspflichtengesetz, § 2 comments 19-25 (43th ed., Klaus J. Hopt ed., Munich 2024). For more details see Holger Fleischer & Peter Mankowski, eds., LKSG Lieferkettensorgfaltspflichtengesetz, Munich 2023, § 2 comments 228-246, OPAC§ 3 comment 44, § 4 comments 32-38; Christian Gehling & Nicolas Ott, eds., LSG Kommentar, Cologne 2022, § 2 comments 344-361; Alexander Schall, Ingo Theusinger and Pour Rafsendjani, eds., LKSG Lieferkettensorgfaltspflichtengesetz, Berlin & Boston 2023, § 2 comments 266-307.

[44] Council of the European Union, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Brussels, 30 November 2022 (OR. en) 15024/1/22 Rev 1. On 14 December 2023 a final compromise was reached in the Trilogue, see

Many countries deal with this labor agency problem in groups through specific group provisions on labor. In some countries there is even a full-fledged body of group labor law, either codified or developed through case law. This whole area of group-specific provisions in employment law, industrial relations, and labor codetermination is highly complicated and controversial, and it cannot be treated here.[45]

Similar group problems arise in other areas of the law, including in competition, tax and environmental law. These areas will be briefly mentioned later, when we look at the different regulatory models for dealing with groups, but they cannot be treated in more detail here.

2 GROUPS OF COMPANIES: REGULATORY MODELS, LEGAL STRATEGIES AND MECHANISMS

2.1 Regulation by General Corporate and/or Civil Law

Many countries have laws dealing with the agency problems we have described, either general law or group law. As we shall see, most of this law is mandatory,[46] such as disclosure and group accounting requirements in reaction to opaqueness, the principles of related party transactions and tunneling, basic standards for directors and controlling shareholders in groups when these make decisions that affect minority shareholders, creditor protection provisions, and insolvency law. When we deal with these strategies and mechanisms, we

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European Council < Corporate sustainability due diligence: Council and Parliament strike deal to protect environment and human rights - Consilium (europa.eu) >. See more in detail *infra* note 98.

[45] See Simon F. Deakin, Employment Law and Industrial Relations, in chapter 39 in this volume ##. See also *infra* note 92.

[46] Klaus J. Hopt, "Directors' Duties and Shareholders' Rights in the European Union: Mandatory and/or Default Rules?", 61 Rivista delle Società 13–32 (2016). As to mandatory corporate law in the context of disclosure, see Anatomy, *supra* note 24, at 247–48.

shall look at their function, at whether the provisions are mandatory, and at what room is left for self-protection or for enabling law, in particular for creditor protection.[47] But it should be mentioned here that certain countries can do without rules for groups of companies, or at least can do with very few of them. One of these countries is Sweden, where there seems to be no perceived need to deal with group agency problems in more detail. This is astonishing, because the shareholding structure in Sweden is characterized by strong owners and weak minorities. The pertinent studies suggest that the reason may be that the country is small and social control there is effective.[48] Furthermore, creditor protection in general—and more specifically in groups of companies—may be irrelevant or much less relevant for large, voluntary creditors who can choose with whom they contract and can bargain for secured credit. Yet this is not the case for involuntary creditors, and even small or medium voluntary creditors may not really have the option to protect themselves.

If countries choose to address these group agency problems more specifically, they can follow three regulatory models. First, they can choose between regulation through general corporate law, civil law or both (section 2.1) and regulation through special corporate group law (section 2.2). These two models can and usually will be combined with group regulation by specific areas of law (section 2.3). The prototype of the first regulatory model is found in the UK,[49] where a corporate group law "as such" (not functionally, but in the formal

[47] *Infra* 5.1.

[48] Jonas Agnblad, Erik Berglöf, Peter Högfeldt, & Helena Svancar, "Ownership and Control in Sweden: Strong Owners, Weak Minorities, and Social Control", in: Barca & Becht, *supra* note 4, at 228–58.

[49] Paul L. Davies, Sarah Worthington & Christopher Hare, Gower, Principles of Modern Company Law, paras 7-022 to 7-027, on the German Konzernrecht 7-023 to 7-024, on group accounts 22-011 to 22-015 (11th ed. London 2021); Paul L. Davies, Introduction to Company Law 9, 119 et seq. (ch. 5: Majority and minority shareholders), 175–179 (3d ed. Oxford 2020); Janet Dine, The Governance of Corporate Groups (Cambridge

sense of a *Konzernrecht* and apart from group accounting, related-party transaction and group law in specific areas such as tax, insolvency and control transactions, such as are discussed infra at 2.3, 4 and 7) is non-existent. The general civil and corporate law provisions for dealing with agency problems of minority shareholders and creditors are used for independent companies as well as for groups of companies. Many other countries follow the same route. As for corporate law dealing with group problems in these countries, there are considerable differences between the various forms of corporations—for example, stock corporations—particularly if they are listed, limited liability companies, commercial partnerships and, in Europe, the Societas Europaea (SE).

In all these countries, the legitimacy of forming groups—i.e., creating different legal entities within the group and thereby partitioning assets[50] among the creditors of these entities—is principally uncontested, though there have been pleas in US academia for unlimited shareholder liability for corporate tort creditors.[51] In the UK, the separate legal personality doctrine following the *Salomon* case[52] has been firmly upheld for groups as well by a long list of court cases.[53] But as we shall see, there are various civil or corporate law concepts that may capture group situations. One example is the concept of the shadow director who exercises de facto control in the company. The parent may qualify as such a shadow director—for example, in the context of wrongful trading under section 214 of the Insolvency Act 1986—though instructions given by directors of the parent are not a sufficient

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2000); D.D. Prentice, "Groups of Companies: The English Experience", in: Hopt, *supra* note 23, at 99–130. See also

[50] As to the concept and the economic advantages of asset partitioning, see Anatomy, *supra* note 24, at 9, 110.

[51] Henry Hansmann & Reinier Kraakman, "Toward Unlimited Shareholder Liability for Corporate Torts", 100 Yale L. J. 1879 (1991).

[52] *Salomon v. A. Salomon & Co. Ltd*., (1897) Appeal Cases 22.

[53] Gower, *supra* note 49, para 7-027.

basis for this.[54] Another example is piercing the corporate veil.[55] Still, it is clear that British law is at one end of the spectrum as far as the regulation of liability within groups is concerned. In the UK group problems are solved through a combination of creditor self-help, general company law strategies such as section 214 or the unfair prejudice remedy[56], and targeted statutory interventions such as the requirement for group accounts."[57]

2.2 Regulation by Special Corporate Group Law

Many other jurisdictions have chosen to deal with group agency conflicts by more or less extensive bodies of special corporate group law. The prototype for this second regulatory model is Germany with its separate, extensively codified law of corporate groups. A number of other countries, specifically Brazil, Portugal, Hungary, the Czech Republic, Slovenia and Croatia, have basically followed the German example.[58] The German group law has been

[54] *Re Hydrodan (Corby) Ltd* (1994) 2 BCLC 180; *Re Paycheck Services 3 Ltd* (2009) 2 BCLC 309, CA; see *infra* 6.1.

[55] See *infra* 6.3.

[56] Gower, *supra* note 49, paras 14-012 to 14-030.

[57] Gower, *supra* note 49, paras 22-011 to 22-015. Recently the argument has been made that rather than regulating groups of companies by law, shareholder agreements and ownership structures provide better ways to deal with the corporate governance problems in groups, Maribel Sáez Lacave & Maria Gutiérrez Urtiaga, "Corporate Law, Private Contracting and Equal Ownership", ECGI Law Working Paper No 581/2021, 20 April 2021, available at https://ssrn.com/abstract=3826510.

[58] On group law in Germany, Portugal, Slovenia, Hungary, and Italy, Christoph Teichmann, "Konzernrecht und Niederlassungsfreiheit—Zugleich Rezension der Entscheidung EuGH, Rs. 186/12 (Impacto Azul)", ZGR 2014, 45, 49–62; id., *supra* note 11, at 191–95. See also European Model Company Act (EMCA) 2017, available at https://ssrn.com/abstract=2929348, General Comments in Chapter 15 on Groups of Companies, there also Albania and Turkey are mentioned.

described elsewhere and in more detail,[59] so suffice it here to summarize its key elements. First, it is important to note that group law in Germany is codified only for stock corporations (*Aktien-Konzernrecht*).[60] Group law for limited liability companies (GmbHs) and commercial partnerships does exist, and it is extensive, but it is pure case law, which is somewhat different from codified corporate group law.[61] Second, German codified group law distinguishes between contractual groups and de facto groups. Contractual groups are formed by contract between the parent and the subsidiary, but de facto groups are formed by unilateral declaration.[62] In a contractual group, the parent is allowed to steer the group in the sole group's interest, but the parent pays for this legal privilege by obliging itself to make good the losses of the subsidiary and by adequately compensating the minority shareholders of the subsidiary. The legislator's thinking was that the freedom to steer the group would be such an attractive incentive for the parent that in most cases it would enter into such a group

[59] Tobias H. Tröger, "Corporate Groups, A German's European Perspective", in: German and Nordic Perspectives on Company Law and Capital Markets Law (Holger Fleischer, Jesper Lau Hansen & Wolf-Georg Ringe eds., Tübingen 2015), 157–99; Emmerich & Habersack, *supra* note 21. An old but still-useful description of German *Aktienkonzernrecht* in English is by Herbert Wiedemann, "The German Experience with the Law of Affiliated Enterprises", in Hopt, *supra* note 23, at 21–43.

[60] The German *Aktienkonzernrecht* is regulated in the Stock Corporation Act's third book on affiliated enterprises (Arts. 291–328) together with general definitions (Arts. 15–19). There are also general corporate group disclosure duties (Arts. 20–22), but they have lost their relevance because of more far-reaching capital market disclosure rules under European law. The authoritative commentary on German *Konzernrecht* is Volker Emmerich & Mathias Habersack, Aktien- und GmbH-Konzernrecht (10th ed. Munich 2022). For a recent survey on German group law see Walter Bayer, Aktueller Stand und Entwicklungsperspektiven des Konzernrechts, Der Konzern 2023, 1.

[61] Emmerich & Habersack, *supra* note 21, parts 4, 5, and 6; see list of landmark cases in Hopt in Schmitthoff & Wooldridge, *supra* note 23, at 84 n. 15.

[62] Stock Corporation Act, Arts. 18, 302, 309.

contract. Yet this hope turned out to be vain. Corporate reality in Germany is different: contractual groups are rare (and due to diminished tax benefits they are becoming even rarer),[63] and, apart from the few above-mentioned countries, the concept of corporate groups has not been attractive abroad. In the de facto group—i.e., control by the parent without such a group contract—the parent must fully compensate any subsidiary at the end of the year for all acts and transactions caused by the parent that are contrary to the subsidiary's own interest.[64] This rule is complemented by a mandatory group report by the directors of the parent, by group auditing, by examination by the supervisory board of the parent, and by a right of each shareholder of the parent to have a court order an investigation. Yet the efficacy of these mechanisms is an open question.[65] Furthermore, new case law has established a liability of shareholders for threatening the solvency of the corporation in closely held firms.[66]

Italy introduced a special codified group law in 2004. The core is made up of Articles 2497–2497-septies of the Italian Civil Code on the activity of "direction and co-ordination of

[63] Emmerich & Habersack, *supra* note 21, § 11 comment 6: rare for stock corporations, more frequent for limited liability companies (GmbH).

[64] Stock Corporate Act, Arts. 18, 311. See in more detail *infra* 6.2.

[65] Cf. Jochen Vetter in: Aktiengesetz Kommentar § 311 comments 8 and 9 (4th ed. Karsten Schmidt & Marcus Lutter eds., Cologne 2020), but with the remark that German practice has learned to live with the law.

[66] So-called *Existenzvernichtungshaftung*, i.e., responsibility for "annihilating the existence of an enterprise." Johanna Kroh, Der existenzvernichtende Eingriff (Tübingen 2013); Jens Koch, Aktiengesetz, 16th ed. (Munich 2022), § 1 comments 22, 29 et seq.. But this applicable mainly for the GmbHG, Vetter, *supra* note 65, § 317 comment 51.

companies" exercised by holding companies.[67] Apart from various rights and duties of directors and group members and protective measures such as disclosure requirement,T the main achievement of this reform was to provide for a liability of the holding company and its directors toward the subsidiary's shareholders and creditors if the legal requirements are met. As we shall see, this liability can be avoided if compensatory damages are paid. The existence of a group need not be proven by the shareholders or creditors but rather is presumed. In addition, the rules on conflicts of interest have been tightened; they now govern the (independent) corporation as well as groups of companies. Under certain circumstances, the minority shareholders also have a right of withdrawal.

A third group of countries includes France, with its *Rozenblum* doctrine[68] and the crime of abuse of corporate assets,[69] and traditionally also Belgium, with group provisions for publicly listed companies belonging to a group.[70] The *Rozenblum* doctrine has been

[67] Paola Fasciani, "Groups of Companies: The Italian Approach", 4 ECFR 195, 202–31 (2007); Umberto Tombari, Diritto dei gruppi di Imprese (Milan 2010); Giuliana Scognamiglio in Hommelhoff & al., *supra* note 26, at 175 et seq., at 180 et seq. on the group law reform of 2003, in force since 2004.

[68] Cass. crim., 4 February 1985 (*Rozenblum*), Dalloz 1985, 478, Revue des Sociétés 1985, 648; later on Cass. crim., 23 April 1991, Revue des Sociétés 1991, 785; Cass. crim., 9 December 1991, Revue des Sociétés 1992, 358, all three decisions with comment by Bouloc; see the case law report by Marie-Emma Boursier, "Le Fait Justificatif de Groupe dans L'Abus de Biens Sociaux: Entre Efficacité et Clandestinité", Revue des sociétés 2005, 273. Case law since *Rozenblum* has been relatively scarce, Pierre-Henri Conac in Hommelhoff et al., *supra* note 26, at 89 et seq., 95 et seq. See also *infra* 5.3.

[69] See *infra* 4.3.3.

[70] Eddy Wymeersch, "National Report on Belgium", in: Manóvil, *supra* note 26, 659 et seq., 668 et seq.: Intragroup Relations; Jacques Malherbe et al., Droit des Sociétés, Titre 13, Groupes de Sociétés, nos 1827-1831 (5e éd., Bruxelles 2020); Yves De Cordt & Patricia Colard, "Groups of companies governance in Belgium", in: Festschrift für Klaus J. Hopt zum 70. Geburtstag, vol. 2, 3043 at 3047–50 (Stefan Grundmann et al., eds., Tübingen, New York 2010); van Ommeslaghe, *supra* note 23; Xavier Dieux, "Le groupe de sociétés:

developed as case law by criminal courts and is characterized by a more flexible balancing of the interests of parent and subsidiary. This may be more functional than the German solution, but the subsidiary is better protected by German group law.[71] Other European countries such as Spain[72] and Sweden[73] as well as Japan[74] have no comprehensive group law but rather various legal provisions for groups.

The situation in the European Union is still in a developmental stage. The Forum Europaeum Corporate Group Law,[75] the High Level Group of Company Law Experts,[76] the Reflection Group[77], the Forum Europaeum on Company Groups (FECG)[78], the Informal

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phénomène ou institution? Illustration dans un droit frontalier", Revue Trimestrielle de Droit Financier/Corporate Finance and Capital Markets Law Review 2017, 35. In 2019 Belgium enacted a new company code: Code des sociétés et des associations, 23 mars 2019, Moniteur Belge 04.04.2019, p. 33239, on which see generally Yves De Cord & Henri Culot, "La réforme du droit belge des sociétés", Revue des Sociétés 435 (2019).

[71] Cf. Anatomy, *supra* note 24, at 133.

[72] Mónica Fuentes Naharro, National Report on Spain, in: Manóvil, supra note 26, 143 et seq., 147; Embid Irujo, *supra* note 12.

[73] Rolf Doteval, "National Report on Sweden", in Manóvil, *supra* note 26, 129 et seq.; Knut Rohde, "Groups of Companies in Scandinavian Company Law", in: Hopt, *supra* note 23, at 142–52; but see also *supra* section 2.1 for social control.

[74] Eiji Takahashi, "Die Zukunft des japanischen Konzernrechts – Die Reform des Aktienrechts von 2014", AG 2014, 493; id., "Recht und Wirklichkeit der verbundenen Unternehmen in Japan", in: German and Asian Perspectives on Company Law 335 (Holger Fleischer, Hideki Kanda, Kon Sik Kim & Peter O. Mülbert eds., 2016); Tomotaka Fujita, "National Report on Japan", in: Manóvil, *supra* note 26, 167 et seq.

[75] Forum Europaeum Corporate Group Law, *supra* note 7, at 197–207.

[76] High Level Group of Company Law Experts, *supra* note 4, ch. 5.1–4, at 94–100.

[77] Reflection Group, Report on the Future of EU Company Law (for the European Commission), Brussels, 5 April 2011, ch. 4, 59–75, 79–80.

Company Law Expert Group (ICLEG)[79], the European Company Law Experts (ECLE)[80] and the European Model Company Act of 2017[81] have all advocated European harmonization through core group rules more or less in line with the French *Rozenblum* doctrine. The European Union made an effort to regulate group law by the 9th group law pre-draft directive of 1974/75 but did not succeed.[82] In its Company Law Action Plan of 2012, the European Commission announced its intention to proceed in this direction,[83] but then the difficult

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[78] Forum Europaeum on Company Groups, "Proposal to Facilitate the Management of Cross-Border Company Groups in Europe", 12 ECFR 2015, 299, in German language also in ZGR 2015, 507. See also Hommelhoff, Lutter & Teichmann, eds., *supra* note 26.

[79] The Informal Company Law Expert Group (ICLEG), Report on the recognition of the interest of the group, October 2016.

[80] European Company Law Experts (ECLE), "A Proposal for the Reform of Group Law in Europe", 18 EBOR 1–49 (2017).

[81] European Model Company Act, *supra* note 58 Section 15.16. Cf. ECFR Symposium in Vienna 2015 on this Model Act, 13 ECFR 2016, 198–374.

[82] For details Marcus Lutter, Walter Bayer & Jessica Schmidt, Europäisches Unternehmens- und Kapitalmarktrecht, § 12 Europäisches Konzernrecht, with references to the vast literature (6th ed. Berlin/Boston 2018).

[83] European Commission, Action Plan: European Company Law and Corporate Governance—A Modern Legal Framework for More Engaged Shareholders and Sustainable Companies, 12 December 2012, COM(2012) 740 final; Peter Hommelhoff, "Ein Neustart im europäischen Konzernrecht", Kölner Schriften zum Wirtschaftsrecht (KSzW) 02.2014 I 63; Taskforce on European Company Groups (Peter Hommelhoff et al.), Proposal to facilitate the management of cross-border company groups in Europe, draft of November 20, 2014; Tröger, *supra* note 59, at 17–41; Klaus J. Hopt, "Europäisches Gesellschaftsrecht im Lichte des Aktionsplans der Europäischen Kommission vom Dezember 2012", ZGR 2013, 165–215. The Proposal for a Ninth Directive was not successful; see the comprehensive survey on groups of companies in the EU by Stefan Grundmann, European Company Law—Organization, Finance and Capital Markets § 31 (2d ed. Cambridge 2012). As to the proposal for related party transactions more specifically see *infra* section 4.2 with note 137.

discussion on the Shareholder Rights Amendment Directive[84] and the Brexit process arose and required more attention. In any case, no full-fledged European group law is in sight, nor can one be recommended, though this does not exclude core provisions on the European level.[85]

2.3 Regulation by Areas of Law

In comparative law, the two above-mentioned regulatory models for dealing with group agency conflicts are usually contrasted with each other. But this is misleading.The countries that seem not to have group law are merely one that lack a corporate group law. In the UK, group accounting existed well before it was made mandatory by EU regulation.[86] Group law provisions or very often quite extensive group law legislation exists in many countries, though in fields other than corporate law. The list is long, and it includes group law in accounting and auditing,[87] conflicts of law,[88] securities regulation,[89] regulation of banking

[84] See *infra* note 138.

[85] ECLE, *supra* note 80, at 41 et seq.; cf. also Peter O. Mülbert, "Auf dem Weg zu einem europäischen Konzernrecht", 179 ZHR 645 (2015); Holger Fleischer, "Europäisches Konzernrecht: Eine akteurzentrierte Annäherung", ZGR 2017, 1; Jessica Schmidt, "Europäisches Konzernrecht", Der Konzern 2017, 1; Marc Amstutz, Globale Unternehmensgruppen, Geschichte und Zukunft des europäischen Konzernrechts (Tübingen, 2017). For a European directive on group law, see Peter Hommelhoff, "Ein europäisches Gruppenrecht für den Binnenmarkt", in: Binnenmarktrecht als Mehrebenensystem, p. 105-187 (Stefan J. Geibel, Christian Heinze, Dirk A. Verse, eds., Baden-Baden 2023).

[86] On group accounts in the UK Gower, *supra* note 49, 22-011-22-015.

[87] Grundmann, *supra* note 83, § 16 (Seventh Directive). As to the IFRS special regime for publicly traded groups, see id., *supra* note 83, § 18. Audit of consolidated accounts is standard all through Europe. See also *infra* section 4.1.

[88] Moritz Renner, "Kollisionsrecht und Konzernwirklichkeit in der transnationalen Unternehmensgruppe", ZGR 2014, 452–86.

and other financial institutes,[90] insolvency,[91] labor,[92] competition law,[93] product liability,[94] and other public law areas such as tax,[95] environmental, and others. Apart from some

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[89] Konzernrecht und Kapitalmarktrecht (Peter Hommelhoff, Klaus J. Hopt & Marcus Lutter, eds., Munich et al. 2001), with general report and country reports; Klaus J. Hopt, "Konzernrecht: Die europäische Perspektive", 171 ZHR 199, 231–32, 233–35 (2007); High Level Group of Company Law Experts, *supra* note 4, ch. 5.4, at 99–100: no separate listing of subsidiaries in the parent is listed.

[90] "Basel Committee on Banking Supervision (Bank for International Settlements), Joint Forum, Principles for the supervision of financial conglomerates", September 2012; id., "Corporate governance principles for banks", July 2015; Susan Emmenegger, "§ 4 Grundsätze guter Unternehmensführung von Banken aus der Sicht des Basler Ausschusses", in: Handbuch Corporate Governance von Banken und Versicherungen 81 (Klaus J. Hopt, Jens-Hinrich Binder & Hans-Joachim Böcking, eds., 2d ed., Munich 2020); Jens-Hinrich Binder, "§ 16 Interne Corporate Governance im Bankkonzern", ibidem, 437; Ludger Hanenberg, "§ 17 Corporate Governance von Bank- und Versicherungsgruppen – aufsichtsrechtliche Aspekte", ibidem 466; Tobias Tröger, "Konzernverantwortung in der aufsichtsunterworfenen Finanzbranche", 177 ZHR 475 (2013); id., "Organizational Choices of Banks and the Effective Supervision of Transnational Financial Institutions", 48 Tex. Int'l. L. J. 177 (2013); Peter O. Mülbert & Alexander Wilhelm, "Risikomanagement und Compliance im Finanzmarktrecht – Entwicklungen der aufsichtsrechtlichen Anforderungen", 178 ZHR 502, 530–34 (2014); Guido Ferrarini, "Understanding the Role of Corporate Governance in Financial Institutions: A Research Agenda", ECGI Law Working Paper No. 347/2017, March 2017, available at https://ssrn.com/abstract=2925721; Klaus J. Hopt, "Corporate Governance of Banks and Other Financial Institutions after the Financial Crisis", 13 J. Corp. L. Stud. 219–53 (2013); id., "Corporate Governance von Finanzinstituten", ZGR 2017, 438–59. For the European Solvency II directive and the supervision of insurance companies see Meinrad Dreher & Christoph Ballmeier, "Solvency II und Gruppenaufsicht", ZGR 2014, 753.

[91] There have been several international soft law proposals for a harmonization of group insolvency law; see, e.g., UNCITRAL Model Law on Enterprise Group Insolvency, 2019. The revised European Regulation on Insolvency Proceedings (EIR) (EU 2015/848, 20 May 2015) contains provisions on group insolvency, Arts. 56–78, on which see further Reinhard Bork & Renato Mangano, European cross-border insolvency law, Ch. 8 (2nd ed., Oxford 2022). For a comparison between the UNCITRAL Model and the EIR, see Irit Mevorach, "A Fresh View on the Hard/Soft Law Divide: Implications for International Insolvency of Enterprise Groups", 40(3)

Michigan J. Int.' L. 505, 514–529 (2019). For an overview of group insolvency laws in the European Union Member States and further international soft law harmonization proposals, see Bob Wessels & Stephan Madaus, Rescue of Business in Europe (ELI) 306–325 (Bob Wessels & Stephan Madaus, eds., Oxford 2020). The coordination of insolvency proceedings of multinational groups through agreements (so-called "cross-border protocols"), especially between insolvency practitioners, is also of great importance; see Ilya Kokorin & Bob Wessels, Cross-Border Protocols in Insolvencies of Multinational Enterprise Groups (Cheltenham (UK), Northampton (USA) 2021).

[92] Cf. Paul L. Davies, "Labour Law and Multinational Groups of Companies", in Hopt, *supra* note 23, at 208; the fundamental monography by Christine Windbichler, Arbeitsrecht im Konzern (Munich 1989).

[93] On strict liability between members of a "single economic entity" according to the European Court of Justice, see, e.g., 8 May 2013, Case 508/11 P (ENI) (parent liability), Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 2013, 547 with note Nehl; European Court of Justice, 6 October 2021, Case 882/19, (Sumal) (liability of subsidiaries for wrongful acts of the parent; perhaps even liability between sister companies), Neue Juristische Wochenschrift (NJW) 3583 (2022) with note Klumpe. Further on the liability of the "single economic entity" Christian Kersting, "Liability of sister companies and subsidiaries in European competition law", 41 European Competition Law Review (ECLR) 125 (2020). For the critique on the liability approach of the ECJ see, e.g., Christoph Teichmann, "Die grenzüberschreitende Unternehmensgruppe im Compliance-Zeitalter", ZGR 2017, 485, 494 et seq.; Dörte Poelzig, "Das konzernrechtliche Trennungsprinzip und Sanktionsdurchgriff im (europäischen) Wirtschaftsrecht", Die Aktiengesellschaft 2023, 97; see also Eberhard Schollmeyer, "Das Europäische Konzernrecht als Elefant im Raum", ZGR 2023, 108. On the ensuing liability risks for directors, see Klaus J. Hopt, Patrick Leyens, "Corporate Governance durch Aktien-, Kapitalmarkt- und Bilanzrecht", in: Unternehmensführung durch Vorstand und Aufsichtsrat, (Peter Hommelhoff/Klaus J. Hopt/Patrick Leyens, eds., Munich 2023), comments 24-31.

[94] Brigitte Haar, "Piercing the Corporate Veil and Shareholders' Product and Environmental Liability" in American Law as Remedies for Capital Market Failures—New Developments and Implications for European and German Law after "Centros", 1 EBOR 317 (2000) mainly for the USA.

[95] Schön, *supra* note 10, at 409; Hopt, *supra* note 89, at 206.

observations on group law accounting, these area-specific group laws cannot be treated in this chapter,[96] since their objectives are not the resolution of group agency conflicts[97] but depend instead on the specific—and highly diverse—regulatory goals in each of these areas.

Most recently, the megatrend towards liability of the parent company for its suppliers and buyers in the value chain, with laws and court cases concerning the protection of human rights and the climate emerging in a number of jurisdictions like France, Germany, the Netherlands and the European Union,[98] might open a new chapter of corporate group law. For some, it is a breakthrough in parent company liability.[99] Under the new laws, the parent

[96] But see the chapters in this volume, part V on adjacent areas: chapter 38 on insolvency law##; chapter 39 on employment and industrial regulation##; chapter 40 on capital markets/securities law; chapter 41 on financial regulation and chapter 43 on tax law##. See also Mariana Pargendler, "Veil Peeking: The Corporation as a Nexus for Regulation", 169 U. Pa. L Rev. 717 (2021), distinguishing veil piercing (asset departitioning) and veil peeking (regulatory departitioning).

[97] Unless the concept of agency conflict is very broadly understood as encompassing more remote stakeholders and even non-personal public goods such as environment, fundamental rights, and others; *supra* 1.3.

[98] Paul Davies, Corporate Liability for Wrongdoing within (Foreign) Subsidiaries: Mechanisms from Corporate Law, Tort and Regulation, January 2023, available at https://ssrn.com/abstract=4345589, sub III B; Leonhard Hübner/Victor Habrich/Marc-Philippe Weller, "Corporate Sustainability Due Diligence", NZG 2022, 644. Cf. also Klaus J. Hopt, Corporate Purpose and Stakeholder Value – Historical, Economic and Comparative Law Remarks on the Current Debate, Legislative Options and Enforcement Problems, ECGI Law Working Paper No. 690/2023, March 2023, available at http://ssrn.com/abstract_id=4390119.

[99] Cees van Dam, "Breakthrough in Parent Company Liability, Three Shell Defeats, the End of an Era and New Paradigm", ECFR 2021, 714; Karsten Engsig Sørensen, "The Legal Position of Parent Companies: A Top-Down Focus on Group Governance", 22 EBOR 433; idem, "Corporate Sustainability Due Diligence in Groups of Companies", 19 European Company Law 119 (2022); Virginia E. Harper Ho, Gerlinde Berger-Walliser & Rachel Chambers, "Toward Corporate Group Accountability", in: Handbook on Corporate Liability (Martin Petrin & Christian Witting, eds, Edward Elgar 2022), available at https://ssrn.com/abstract=4064308.

companies have extensive duties even as far as the behavior of their subsidiaries is concerned.[100] Also, and apart from duties and liabilities of the parent company under new special laws, courts have begun to impose civil-law duties directly on the parent company, in particular under tort law.[101] This has far-reaching consequences for procedural law and for conflicts of law, in particular as far as the standing of private parties and NGOs and the competency of jurisdictions is concerned.

2.4 Legal Strategies and Mechanisms

In the following sections, selected legal strategies and mechanisms for dealing with group agency conflicts will be analyzed, including disclosure and accounting (section 3), related party transactions (section 4), standards of conduct for the directors and for the controlling shareholder (section 5), transactions with creditors (section 6), and control transactions (section 7). This is done with an emphasis on those jurisdictions that follow the second model, i.e., regulation by special corporate group law. For countries that follow the first model, examples alone are juxtaposed with what is done under the second model, since doing otherwise would necessarily be a repetition of general corporate law dealing with agency problems, as reported in the other chapters of the book, in particular under Part II: Substantive Topics.

[100] The draft directive, *supra* note 98, contains a special article on due diligence at a group level. According to Art. 4a (as incorporated into national law by the Member States), the parent company may fulfil its obligations set out in the directive on behalf of its subsidiaries, yet this is without prejudice to civil liability of subsidiaries in accordance with Article 22. The effects of these far-reaching new requirements are doubtful, since the subsidiaries have the choice of exit and surrendering the turf to foreign competitors who are not subject to the same rules. Paul Davies, *supra* note 98, at 30 is right: "(W)hat is needed is an inducement for companies to exercise voice rather than exit", idem at 33.m

[101] Davies, *supra* note 98; Martin Petrin & Barnali Choudbury, "Group Company Liability", 19 EBOR 771 (2018), pleading for reform and for a sort of enterprise liability.

3 DISCLOSURE AND ACCOUNTING

3.1 General Disclosure under Corporate Group Law

Disclosure and accounting are the most commonly used instruments for protecting minority shareholders and creditors in independent companies as well as in groups of companies.[102] Today much of this disclosure in Europe is harmonized.[103] There has been much discussion about why disclosure rules should be mandatory, as they are in all core jurisdictions. The arguments for mandatory disclosure are both theoretical and empirical.[104] Without mandatory disclosure, there is an underproduction of information. Bad news is preferably suppressed. Voluntary disclosure of bad news may harm the company, in particular if other companies also hide such news. Standardized mandatory disclosure helps investors and the market to evaluate disclosures. Empirical evidence seems to support these arguments for publicly traded firms.[105] Group-specific disclosure[106] relates to the fact of control, to the relationship

[102] Christian Leuz, Peter W. Wysocki, "The Economics of Disclosure and Financial Reporting Regulation: Evidence and Suggestions for Future Research", 54(2) J. Acct. Research 525 (2016); Rüdiger Veil, Disclosure of Major Holdings, 395, in: European Capital Markets Law (Rüdiger Veil, ed., 2d ed., Oxford, Portland 2017); Rüdiger Veil, Martin Ruckes, Peter Limbach & Markus Doumet, "Eine empirische Analyse von Stimmrechtsmitteilungen gemäß §§ 21 ff WpHG und Schlussfolgerungen für die Kapitalmarktregulierung", ZGR 2015, 709.

[103] Konstantinos Sergakis, La Transparence des Sociétés Cotées en Droit Européen (Paris 2013).

[104] Anatomy, *supra* note 24, at 247–54; Hanno Merkt, "Creditor Protection Through Mandatory Disclosure", 7 EBOR 95–122 (2006).

[105] For references for and against, see Anatomy, *supra* note 24, at 246–48.

[106] For the various group disclosure rules in Italy, see Fasciani, *supra* note 57. For Switzerland cf. Peter Weber, Heinz Zimmermann, & Beate Brändli, "The Price Effects of Disclosure of Significant Holdings in Listed Companies: The Case of Groups Acting in Concert", 3 Schweizerische Zeitschrift für Wirtschaftsrecht (SZW) 198 (2012). On the new concept of "entity transparency", see Mariana Pargendler, "The New Corporate Law of

and transactions between the parent and the subsidiaries, and to the formation of the group at the stage of mere block building. The European Transparency Directive requires notification of changes in voting rights from 5% up at several thresholds.[107] In general, disclosure is much stricter in the US and the UK, while it is more lenient in continental Europe and Japan.[108]

An interesting example of limited disclosure is the German group dependency report for de facto groups.[109] This mandatory report by the management board of the subsidiary contains details of the relationship between the corporation and the parent and other affiliated companies. It must be audited by the auditor of the company and by the supervisory board of the subsidiary. It is neither published nor made available to the shareholders, because it contains all the details of the internal activities of the group. But individual shareholders may ask a court for a special investigation if the auditors have refused to provide the audit certificate or have qualified it. In legal academia there has been a call for mandatory disclosure of the group dependency report to the shareholders; however, legislators fear that this would be counterproductive, because in practice the dependency report would become much less meaningful.

3.2 Group Accounting

Corporate Groups", ECGI Law Working Paper, No. 702/2023, April 2023, available at https://ssrn.com/abstract_4412997, finding a distinct treatment of entity boundaries vis-à-vis shareholders and creditors.

[107] On this directive, see Veil, *supra* note 102, 393–431. But see also the critical evaluation of this kind of disclosure by Lucian A. Bebchuk & Robert J. Jackson, "The Law and Economics of Blockholder Disclosure", 2 Harv. Bus. L. Rev. 39 (2012).

[108] Anatomy, *supra* note 24, at 147–251.

[109] Stock Corporation Act, Art. 312; cf. Emmerich & Habersack, *supra* note 21, § 26.

As mentioned before, group accounting is a special area of group law. Though there are many differences as to reach and content, consolidated accounts must be provided under various national and international group accounting provisions, including the GAAP in the US, the International Accounting Standards (IAS) and, as of 2001, the International Financial Reporting Standards (IFRS) in many other countries. The European Union has decided to basically follow IFRS standards for group accounting but has reserved the right not to follow any specific standard. While IFRS standards apply for consolidated accounts, accounting standards for annual financial statements, i.e., for the members of a group, differ greatly among Member States.[110] While in the UK the issuer also has an option to prepare annual financial statements following IFRS standards, annual financial statements in France, Germany, Spain, and Sweden must be prepared in accordance with national accounting law. As far as listed companies are concerned, there is a fair amount of convergence in Europe, but not for closely held groups.[111] There has been work on greater harmonization between the US GAAP and the IFRS, but progress is still slow.

3.3 Special Investigations with a Group Dimension and the Role of Auditors and Independent Experts

Disclosure on groups of companies may be mandatory, but its effectiveness depends on enforcement, and enforcement differs greatly among the jurisdictions. As mentioned before with regard to the German dependency report, this is a task for the auditors as gatekeepers,[112]

[110] On the IFRS, there is a vast literature. On financial accounting information in Europe, see Hendrik Brinckmann, Periodic Disclosure, in Veil, *supra* note 102, § 18 comments 26–31. The Forum Europaeum Corporate Group Law, *supra* note 7, at 191–96 and the High Level Group of Company Law Experts, *supra* note 4, at 95–96 pleaded for better information on the single group members, in particular the subsidiaries.

[111] Hopt, *supra* note 89, at 208–09, 213–16.

[112] On gatekeepers, see Anatomy, *supra* note 24, at 42–43, 122–23.

for special investigation procedures, and, in capital markets, for the stock exchanges and the various capital markets supervisory agencies. Group auditing is a special area of group law. In Europe it is harmonized to a considerable degree.[113] France has had good experience with the *expert de gestion* and the special reports by the *commissaire aux comptes*.[114] In Australia the Australian Capital Markets Authority has broad investigatory powers and even the right to start civil proceedings.[115]

The special investigation procedure is a very promising mechanism, since the shareholders may ask the court to appoint special experts to investigate suspect transactions and possible abuses in independent companies as well as in groups of companies. In the Netherlands this has been said to be a "most effective mechanism," and Switzerland has also had good experiences with it. But in Germany meanwhile, where the Stock Corporation Act has different rules for special investigations in (independent) companies versus in groups of companies, experience with the latter has been less impressive, maybe due to difficult valuation problems (valuation rules are not harmonized in the European Union) and lawsuits that last many years. The Forum Europaeum Corporate Group Law and the High Level Group of Company Experts have recommended that Europe provide for a harmonized mechanism of special investigation.[116]

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[113] *Supra* section 2.3.

[114] Le Cannu & Dondero, *supra* note 21, nos 957 et seq., 1339 et seq. (expert de gestion), nos 516 et seq. (commisaires aux comptes); Maurice Cozian, Alain Viandier & Florence Deboissy, Droit des sociétés nos 686 et seq. (expert de gestion), 1373 et seq. (commissaire aux comptes) (35th ed. Paris 2022).

[115] Kluver, *supra* note 7, at 298 et seq.

[116] Forum Europaeum Corporate Group Law, *supra* note 7, at 207–17; Christine Windbichler, " 'Corporate Group Law for Europe': Comments on the Forum Europaeum's Principles and Proposals for a European Corporate Group Law", 1 EBOR 265, 273 (2000); High Level Group of Company Law Experts, *supra* note 4, ch. 3.4, at 57–59; Klaus J. Hopt, "Comparative Corporate Governance: The State of the Art and International

4 RELATED PARTY TRANSACTIONS

4.1 Related Party Transactions and Specific Disclosure

Disclosure and accounting—rendered effective by the help of auditors and independent experts if needed—makes agency conflicts transparent. While this may lead to appropriate behavior by the agents or self-protective measures by the principals, these beneficial effects cannot be taken for granted, for the agents' temptation to skim off private benefits may be too great. This is also true for controlling shareholders and for parents in groups of companies as agents of minority shareholders and creditors. Strong temptations arise for them in conflicted transactions, particularly in related party (section 4) and control transactions (section 7). Conflicted transactions are an instance of the more general problem of conflicts of interest in corporate law, which cannot be dealt with in more detail here.[117] Corporate law extensively regulates related party transactions for directors and officers,[118] but they present special problems if they involve controlling shareholders.[119] This is even more so for groups of

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Regulation", 59 Am. J. Comp. L. 1 at 57–58 (2011). Cf. also ECLE, *supra* note 80, at 45. The European Model Company Act, *supra* note 58, contains a provision on special investigation, Sections 15.12, 15.14.

[117] See Klaus J. Hopt, "Trusteeship and Conflicts of Interest in Corporate, Banking, and Agency Law: Toward Common Legal Principles for Intermediaries in the Modern Service-Oriented Society", in: Reforming Company and Takeover Law in Europe 51–88 (Guido Ferrarini, Klaus J. Hopt, Jaap Winter, & Eddy Wymeersch eds., 2004); id., "Conflict of Interest, Secrecy and Insider Information of Directors, A Comparative Analysis", 10 ECFR 167–93 (2013). Cf. the comprehensive analysis of conflicts of interest by Christoph Kumpan, Der Interessenkonflikt im deutschen Privatrecht (Tübingen 2014).

[118] Hopt, *supra* note 117, at 167.

[119] See Anatomy, *supra* note 24, ch. 6 on related party transactions and specifically for controlling shareholders 149; Luca Enriques, "Related Party Transactions: Policy Options and Real-World Challenges (With a Critique of the European Commission Proposal)", ECGI Law Working Paper No. 267/2014 (2014), available at https://ssrn.com/abstract=2505188; Holger Fleischer, "Related Party Transactions bei börsennotierten

companies, where such transactions between members of the group are far less visible. And since they are part of normal, group-internal business relations, it is hard—if not impossible—for minority shareholders of a subsidiary to judge whether a transaction was arm's length or whether and to what extent private benefits were extracted.[120] Related transactions can take very different forms and may include straightforward self-dealing as well as cash-flow tunneling, asset tunneling, and equity tunneling.[121] Accordingly, the economics and regulatory problems of related party transactions[122] as well as the reactions by legislators and courts have been manifold. An empirical study suggests that for listed companies, disclosure combined with consent of disinterested shareholders may be the best solution.[123] Special mandatory disclosure rules for related party transactions exist in many

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Gesellschaften: Deutsches Aktien(konzern)recht und Europäische Reformvorschläge", 69 Betriebs-Berater 2691–700 (2014).

[120] OECD, Related Party Transactions and Minority Shareholder Rights (Paris 2012); J.H. Farrar & S. Watson, "Self-Dealing, Fair Dealing and Related Party Transactions: History, Policy and Reform", 11 J. Corp. L. Stud. 495 (2011).

[121] Atanasov, Black, & Ciccotello 2011, *supra* note 22; Simeon Djankov, Rafeal La Porta, Florencio Lopez-de-Silanes, & Andrei Shleifer, "The Law and Economics of Self-Dealing", 88 J. Fin. Econ. 430 (2008); Simon Johnson, Rafael La Porta, Florencio Lopez-de-Silanes, & Andrei Shleifer, "Tunneling", 90 Am. Econ. Rev., Papers and Proceedings 22 (2000); Jeremy Grant, Tom Kirchmaier, & Jodie A. Kirshner, "Financial Tunnelling and the Mandatory Bid Rule", 10 EBOR 233 (2009); Klaus J. Hopt, "Self-Dealing and Use of Corporate Opportunities and Information: Regulating Directors' Conflict of Interest", in: Corporate Governance and Directors' Liabilities 285 (Klaus J. Hopt & Gunther Teubner eds., Berlin, New York 1985).

[122] Luca Enriques & Tobias Tröger, "The Law and (Some) Finance of Related Party Transactions: An Introduction", in: The Law and Finance of Related Party Transactions 1 (Luca Enriques & Tobias Tröger, eds., Cambridge 2019).

[123] Djankov et al., *supra* note 121, 2008; for an enumeration of legal strategies and remedies see Pierre-Henri Conac, Luca Enriques, & Martin Gelter, "Constraining Dominant Shareholders' Self-Dealing: The Legal Framework in France, Germany, and Italy", 4 ECFR 491–528 (2007); Andrew Keay, "The Authorising of

places, such as in the US, the European Union, Germany, and other continental European states as well as in Japan.[124] An empirical analysis of regulation and self-regulation of related party transactions has come up with interesting data for Italy.[125] Many of these disclosure rules are not found in these countries' corporate laws but rather in their securities laws, prominently so in the US and the European Union (in the European Corporate Sustainability Reporting Directive of 2022 or CSRD,[126] which goes far beyond the European Transparency Directive of 2004 as revised in 2013), or are national and international accounting rules, such as annual disclosure following the US GAAP and IAS or IFRS. In most of these disclosure rules, one can find specific provisions for block holders, generally starting at 5%, and for transactions with controlling shareholders. The test is usually that all material related-party transactions not made at arm's length—i.e., not under normal market conditions—should be disclosed. Many of these rules make distinctions according to the size and legal form of the firm. For non-listed firms, the requirements, if any, are much more lenient, while stricter disclosure rules for related party transactions may exist for listed companies under the listing requirements of the stock exchanges than under the law. The dependency report under

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Directors' Conflicts of Interest: Getting a Balance?", 12 J. Corp. L. Stud. 129 (2012). As to the practical difficulties see Alessandro Pomelli, "Related-Party Transactions and the Intricacies of Ex Post Judicial Review: The Parmalat/Lactalis Case" 13 ECFR 2016, 73.

[124] Anatomy, *supra* note 24, at 148–52, 277–89.

[125] Bianchi et al. 2014, *supra* note 4.

[126] Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 as regards corporate sustainability reporting, OJEU 16.12.2022, L 322/15, referred to in this article as the Corporate Sustainability Reporting Directive (CSRD). Cf. Eberhard Vetter, "Corporate Governance und Nachhaltigkeitsberichterstattung", in: Unternehmensführung durch Vorstand und Aufsichtsrat, *supra* note 93, § 42.

German group law has already been mentioned,[127] a report that is not made publicly available but which is audited and given to the board of the subsidiary in order to protect the confidentiality of group-internal transactions. In the end, if one looks beyond corporate law, a considerable amount of convergence between the US, Europe, and Japan can be observed as far as disclosure of related party transactions is concerned.[128] This is particularly true for related party transactions in listed companies, both for directors and controlling shareholders.

4.2 Procedural Regulation of Related Party Transactions

Disclosure may help against related party transactions, but it is not sufficient. In most jurisdictions, it is supplemented by mandatory rules. While these were substantive rules originally, it became clear that setting ceilings on or outright prohibiting certain related party transactions is too inflexible an approach that may sometimes run against the interests of the shareholders, since related party transactions may sometimes be value-enhancing even as they permit the extraction of private benefits for the controller. This is also true in groups of companies, where transactions between the members of the group may be economically beneficial. While a number of substantive rules have been retained—in tax law, for example, under the arm's length standard—more modern regulation is procedural. Usually there are consent requirements: ex ante or, sometimes, ex post; by the whole board or by independent directors; in important instances, by the shareholders; and sometimes, by a supervisory agency.[129] An example of a conflict of interest procedure occurs under Belgian corporate

[127] *Supra* section 3.1.

[128] Anatomy, *supra* note 24, 150–52.

[129] Keay, *supra* note 123; OECD, *supra* note 120, at 35 et seq.: a long comparative list of shareholder approval requirements for related party transactions (excluding salaries). For Belgium it should be remembered that originally much of the Belgian group regulation was autonomously developed by the Belgian Securities

law, where a board committee of three independent directors is in charge of carrying out an assessment of the decision or transaction.[130] In groups of companies, these consent requirements may not work fully, because most often the board of the subsidiary is dependent on the parent, and consent resolutions by the general assembly are of little use if the parent is in control. Then, the consent of independent directors or a decision of only the minority shareholders, as in Australia,[131] may help.[132] An interesting experiment is underway in Italy, where the minority needs to be represented on the board by a minority representative. This seems to be more effective than independent directors.[133]

In May 2017, the European Commission introduced a directive containing a rule for related party transactions that requires the consent of the general assembly for transactions upon a threshold to be determined by the individual Member States.[134] Similarly, transactions

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Commission (Commission bancaire, as it was called at that time), Van Ommeslaghe, *supra* note 23, 59, at 79–91.

[130] De Cordt & Colard, *supra* note 70, at 3046–53; the procedure is still in place in the reformed Belgian Company Code, see Wymeersch, *supra* note 70, at 675–76.

[131] Kluver, *supra* note 7, at 295–297 on specific authorization procedure by minority shareholders; Barbara Mescher & Brett Bondfield, "Corporate Groups and the Duty of Directors to Act in Their Company's Best Interests", 8 Journal of Applied Research in Accounting and Finance 2–12 (2013).

[132] For details, see Anatomy, *supra* note 24, at 85–86.

[133] Bianchi et al. (2014), *supra* note 4, at 24, 25. See also Corrado Malberti & Emiliano Sironi, "The Mandatory Representation of Minority Shareholders on the Board of Directors of Italian Listed Corporations: An Empirical Analysis" (2007), available at https://www.ssrn.com/abstract=965398.

[134] Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement, OJEU 20.5.2017 L 132/1 (Shareholder Rights Directive II), Art. 9c: Transparency and approval of related party transactions. In the meantime, the directive has been incorporated into the law of the Member States, see European Company Law Experts (ECLE), "Implementation of the SRD II Provisions on Related Party Transactions", Revue Trimestrielle

that have had a relevant impact on the corporation's profits or turnover have been subjected to such a consent requirement. A similar rule exists under the Listing Rules of the FSA in the UK.[135] Yet reactions to the draft directive in the Member States, in particular in Germany, had been highly critical, because shareholder constituency, shareholder behavior at general meetings, and the rules governing shareholder rights and voting more generally differed (and still differ) greatly among the Member States.[136] On the other hand, the case for moving forward on a European level had been made convincingly several times, for example by the Forum Europaeum on Company Groups.[137] In general, experience with shareholder approval of major transactions and the uncertainties under the German *Holzmüller* case ought to have suggested a more careful balancing of the benefits and disadvantages of such a rule beyond merely granting the option to the Member States. In any case, the directive should have taken better into consideration the group problem—for example, by providing for a minority shareholder vote or otherwise neutralizing the decisive influence of the parent. In the end, the

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de Droit Financier 2020, 53, ECGI Law Working Paper No. 543/2020, 24 September 2020, available at https://ssrn.com/abstract=3697257; Enriques and Tröger, *supra* note 122. On the draft directive, see Klaus J. Hopt, "Corporate Governance in Europe, A Critical Review of the European Commission's Initiatives on Corporate Law and Corporate Governance", NYU J. L. & Bus. 12 (2015) 139-213.

[135] Listing Rules 11: Related party transactions: Premium listing, in particular paras 11.1.7 and 11.1.11 of the Listing Rules, of Financial Conduct Authority (FCA) as of January 25, 2023, www.handbook.fca.org.uk .

[136] Shareholder Rights Directive II, Art. 9c, *supra* note 134.

[137] Forum Europaeum on Company Groups, *supra* note 83; cf. the early proposal of the Forum Europaeum Corporate Group Law, *supra* note 7. As to other reactions see Tim Drygala, "Europäisches Konzernrecht: Gruppeninteresse und Related Party Transactions", Die Aktiengesellschaft 198, 208–10 (2013); see also the contributions by Enriques and Fleischer, *supra* note 119. For Germany see Jochen Vetter, "Regelungsbedarf für Related Party Transactions?", 179 ZHR 273 (2015). For Italy see Bianchi et al. 2014, *supra* note 4.

final version of the directive of 2017 provided a rather modest version of the rule.[138] The compromise was a more lenient definition of related party transactions that is up to the Member State to concretize, as well as a Member State option that allows a choice between approval of the general assembly and approval by the administrative or supervisory board. In the latter case, the director or the shareholder concerned is excluded from the vote, or at least from having a determining role in the approval process. This leaves German *Konzernrecht* more or less untouched. While the directive of 2017 achieved some harmonization as to group law in European law, there is more to be done on the European level and on the Member State level in particular.[139]

Much like with mandatory disclosure,[140] auditors also play a role in related party transactions. The procedure described above for special investigations by independent experts may help to expose hidden abuses. Other gatekeepers, such as evaluation experts, may help. Under the Belgian procedure, the board committee of three independent directors can ask for the assistance of one or more independent experts, who are to provide technical advice.[141]

5 STANDARS OF CONDUCT FOR THE DIRECTORS AND FOR THE CONTROLLING SHAREHOLDER

[138] For reactions for example in Germany cf. Andreas Tarde, "Die verschleierte Konzernrichtlinie", ZGR 2017, 360; Rüdiger Veil, "Transaktionen mit Related Parties im deutschen Aktien- und Konzernrecht", NZG 2017, 521; for France Conac in Manóvil, *supra* note 26, para 3.1.1.

[139] ECLE, *supra* note 80, at 44 et seq.

[140] *Supra* section 3.3.

[141] De Cordt & Colard, *supra* note 70, at 3052.

5.1 Standards of Conduct for the Directors and the Controlling Shareholders in Independent Corporations and in Groups of Companies

Practically, regulating related party transactions may cover a large fraction of the agency conflicts between directors and controlling shareholders in independent companies as well as in groups. But specific transactions are not the only temptation to opportunism; there are many other situations and business decisions that may be conflicted, such as acquisitions, allocation, and distribution decisions made in the group that have different effects on the group's various member companies. It is therefore important to set the right standard for the directors if an agency conflict arises. The usual standard to which the director is held when dealing with such conflicts is the duty of loyalty.[142] This duty is a most open, flexible fairness concept that will only be concretized ex post and over time by the courts. Traditionally, the duty of loyalty is very strict in the US, the UK, and other Commonwealth countries. One of the reasons for this is that this duty of company directors has its origins in the strict fiduciary position of the trustee under old English trust law. The particularities of procedural law in the United States has produced a considerable amount of case law. The situation in continental Europe is very different, because the duty of care has traditionally played a greater role than the duty of loyalty. Only more recently has the latter become important and the former lost some of its significance due to the importation of the business judgment rule into continental Europe.[143] Many differences still exist, however, as to the

[142] For comparative details, see Anatomy, *supra* note 24, at 161–65; Hopt, *supra* note 117, with examples and case law, 175 et seq.: fraud, loans and credit to directors, self-dealing, competition with the company, corporate opportunities, wrongful profiting from positions, remuneration, and ongoing duty of loyalty.

[143] Klaus J. Hopt, "Die business judgment rule, Ein sicherer Hafen für unternehmerische Entscheidungen in Deutschland und der Schweiz", in: Festschrift für Peter Nobel 217–34 (Bern 2015).

scope, burden of proof, litigation, the cultural perception of certain kinds of business behavior that may or may not be acceptable socially. In some countries, these agency conflicts are dealt with not only in corporate law but also, and sometimes very much so, in criminal law. In France, for example, self-dealing is a criminal *abus des biens sociaux*[144] and apparently the most frequently applied criminal rule of company law.[145] In the aftermath of the financial crisis, criminal prosecution of directors has also been on the advance in countries such as Germany, Austria, and Ireland.[146]

In groups of companies, it is more difficult to identify the right standard for directors since the conflicts are not only within the company—i.e., between the director and the shareholders—but also beyond the company, among the different member companies of the group and possibly their shareholders. In fact, the group-specific duties and liabilities of directors are manifold, including limits on the granting of loans to directors in the group,[147] prohibition on competition in the group, and limits on passing along information to other group members.

Standards for the controlling shareholders have developed more slowly unless, as in exceptional cases, they can be considered to be shadow directors.[148] The standards differ considerably under the national corporate laws and striking as far as enforcement and litigation are concerned.[149] While the standard in the US is entire fairness or utmost good

[144] Art. L. 241-3, L. 242-6 Code de commerce, Conac, Enriques, & Gelter, *supra* note 123, at 518–19.

[145] On *abus des biens sociaux* in groups Cozian et al., *supra* note 114, nos. 2484 et seq.

[146] Klaus J. Hopt, "Responsibility of Banks and Their Directors, Including Liability and Enforcement, in Functional or dysfunctional – the law as a cure?" in: Risk and liability in the financial markets 159 (Lars Gorton, Jan Kleinemann & Hans Wibom eds., Stockholm, Juridiska fakulteten 2014).

[147] Hopt, *supra* note 89, at 236.

[148] This concept is more important for creditor protection and therefore dealt with *infra* at section 6.2.

[149] Anatomy, *supra* note 24, at 162–65.

faith and loyalty, standards are more lenient in continental European countries as well as in Japan due to different shareholder structures and economic and political influence of controlling shareholders and groups. France employs the relatively vague concept of abuse of majority power.[150] Under German stock corporation law, the use of a person's influence over the corporation to the detriment of the corporation or its shareholders is forbidden.[151] This rule is not specifically addressed to controlling shareholders, but it is most important for them. Apart from this provision, it took a very long time for the courts to accept that there are duties of loyalty not only between the controlling shareholder and the company but also of the controlling shareholder to his minority shareholders.[152]

5.2 Specific Standards for Balancing the Interests of Member Companies in Groups

The standards various jurisdictions use to evaluate transactions and business relations in groups of companies differ greatly. In many countries there are rules that try to uphold the interest of the group members against the parent and to compensate subsidiaries in one way or another for damage suffered through intra-group transactions. Germany, France, and Italy require an evaluation of the overall operation of an individual subsidiary and its individual transactions with the controlling company.[153] In this context it has been mentioned that a rule that focuses on individual transactions may be inefficient, since in some cases it will disfavor

[150] Cozian et al., *supra* note 114, nos. 654 et seq.

[151] Art. 117 of the German Stock Corporation Act.

[152] *Linotype* case, German Bundesgerichtshof, Decisions BGHZ 103, 184 (1988) concerning an abusive dissolution of a limited liability company by the majority shareholder. There is later case law and abundant legal literature on fiduciary duties of shareholders towards each other, Koch, *supra* note 66, § 53a comments 20–25, as to corporate groups comments 24–25.

[153] Anatomy, *supra* note 24, at 163–64.

the controlling shareholder by free-riding minority shareholders, while in other cases it will let the controller reap excessive private benefits.[154] German group law is the most stringent, as it does not allow for weighing the disadvantages or advantages the subsidiary derives from being a member of the group. Any disadvantages are measured from the viewpoint of an independent corporation only. Italian group law is more flexible, because it allows the consideration of compensatory advantages for the subsidiary.[155] Spain has been advised to follow the Italian example.[156] The French *Rozenblum* doctrine[157] allows an even more flexible balancing of the interests of parent and subsidiary. The criminal courts that developed this rule allow the subsidiary to take into consideration not only its own advantages from belonging to the group but also the interests of the group.[158] The requirements for doing so are threefold: a stable group structure, a coherent group policy of

[154] Jens Dammann, "Corporate Ostracism: Freezing Out Controlling Shareholders", 33 J. Corp. L. 683–744 (2008), summing up at 744.

[155] Art. 2497 para 1 Codice civile (since the reform of 2004): vantaggi compensativi; Vincenzo Cariello, "The 'Compensation' of Damages with Advantages Deriving from Management and Co-ordination Activity (Direzione e Coordinamento) of the Parent Company (article 2497, paragraph 1, Italian Civil Code)", 3 ECFR 330 (2006); Embid Irujo, *supra* note 12, at 85; Fasciani, *supra* note 57, at 219 et seq.; Scognamiglio, *supra* note 64, at 186; for group corporate governance, Chiappetta & Tombari, *supra* note 22, at 268–71 with the Pirelli experience.

[156] Embid Irujo, *supra* note 12, at 85–87, proposal to follow the Italian example; Mónica Fuentes, "Corporate Groups and Creditors Protection: An Approach from a Spanish Company Law Perspective", 4 ECFR 529 (2007); see also Pablo Girgado, "Legislative Situation of Corporate Groups in Spanish Law", 3 ECFR 363, 368–69 (2006).

[157] *Supra* section 2.2 note 68.

[158] Cozian et al., *supra* note 114, at 2487; Le Cannu & Dondero, *supra* note 21, no 1593; Maggy Pariente, "The Evolution of the Concept of 'Corporate Group' in France", 4 ECFR 317, 321–30 (2007): group interest; Boursier, *supra* note 68.

the parent, and an equitable distribution of benefits and costs among the group members. For Europe, the Forum Europaeum Corporate Group Law, the High Level Group of Company Law Experts, the Reflection Group, and the European Model Companies Act have recommended following and further developing the French *Rozenblum* doctrine by legally acknowledging the group management.[159] The European Commission had responded to this recommendation in its Action Plan of 2012.[160] But this plan faded away. If one day it is taken up again, it would be in the form either of a mere recommendation or at most of a directive, rather than of a regulation that is directly applicable in the Member States. And it is completely open whether any such measure's content would be more on the side of the group than of the minority shareholders. One may ultimately conclude that while there has been some convergence on standards for directors, controlling shareholders, and parents in groups of companies despite different ownership regimes,[161] such convergence has been and will remain considerably less than what has been observed for disclosure, and we shall see that there has been even less convergence in creditor protection.

[159] Forum Europaeum Corporate Group Law, *supra* note 7, at 197–207; Hopt, *supra* note 89, at 222 et seq.; High Level Group of Company Law Experts, *supra* note 4, ch. 5.5, at 96–98; Reflection Group 2011, *supra* note 77; Pierre-Henri Conac, "Director's Duties in Groups of Companies—Legalizing the Interest of the Group at the European Level", 10 ECFR 194–226 (2013). See now also the European Model Companies Act, *supra* note 58, Section 15.16. Contra Luca Enriques & Sergio Gilotta, The Case Against a Special Regime for Intragroup Transactions, 24 EBOR 471 (2023); idem, *supra* note 6, because of the danger for minority shareholders.

[160] EU Commission, Action Plan 2012, *supra* note 83; for reactions in Germany, see Hopt, *supra* note 83, at 165–215; Teichmann, *supra* note 11; Drygala, *supra* note 137.

[161] On path dependency and convergence for the regulation of conflicts of interest and the duty of loyalty, see Hopt, *supra* note 117, at 16–171. For a discussion of the limited relevance of ownership regimes for related party transactions and pertinent standards for directors and controlling shareholders, see Anatomy, *supra* note 24, at 166–69.

6 TRANSACTIONS WITH CREDITORS

6.1 Creditor Self-Help and Guarantees by the Parent

The principle is unequivocal: creditors have no claim beyond the debtor corporation. For groups of companies, this principle of separate legal personality, upheld most stringently in the UK under the Salomon doctrine,[162] also stands firm, and it is mandatory.[163] However, there is room for self-help on the part of the creditors as well as for voluntary action by the debtor parent. As was said before, large voluntary creditors of a group member will usually look after themselves and will either refrain from dealing or will bargain to secure their credit by collateral. It is sometimes said that by monitoring the debtor in their own interest, these large creditors also protect the interests of the smaller, unsecured, or involuntary creditors. Yet this is true only in specific situations, in particular when the debtor gets into financial difficulties. Even then, however, if a creditor is secured, he can sit back without risking his credit.

On the other hand, the parent corporation may have commercial reasons for loosening the partition of assets within the group. Corporate guarantees given by the parent for their subsidiaries are a prime example. Such guarantees (letter of comfort, *Patronatserklärungen*, *lettre de patronage*)[164] differ considerably as to their form and binding force. They may be given to a particular creditor of a member company of the group, part of a general declaration to the market, or sometimes in the annual report, as in the case of Deutsche Bank. "Hard" and

[162] *Supra* section 2.1.

[163] *Supra* section 3.1. On creditor protection see The Law and Economics of Creditor Protection (Horst Eidenmüller & Wolfgang Schön, eds., The Hague 2008).

[164] T.W. Cashel, "Groups of Companies—Some US Aspects", in Schmitthoff & Wooldridge, *supra* note 23, 20, at 38–40 with English and American case law. As to German case law see Patrick Leyens in Hopt, *supra* note 43, § 349 comments 22 et seq.

"soft" forms of such guarantees should be carefully distinguished: the hard form is where the parent stands in as a second debtor or guarantor of the debt;[165] the soft form is a more or less meaningful letter of intent whose force depends on its wording and the circumstances in which it is issued. So the letter of comfort may be treated as a mere statement of present fact rather than as a promise about future conduct.[166] In France, a distinction is made between obligations *de moyens* and obligations *de résultat*, with only the latter giving the creditor a full guarantee of repayment.[167] In the bond market, such guarantees are frequent but, again, of highly different reach and content.[168] In a way, Germany's contractual groups can also be mentioned in this context, since the parent by entering into such a group contract voluntarily accepts liability to creditors of the subsidiary in return for liberty to steer the group in the group interest.[169] But in the end, as practice shows and theory confirms, self-help is not a full substitute for creditor protection by mandatory law.[170]

6.2 Standards of Conduct for the Directors and the Controlling Shareholders

[165] Examples: German Bundesgerichtshof, NJW 3443 (2010) and Wertpapier-Mitteilungen (WM) 326 (2017); Court of Appeals of Düsseldorf, Wertpapier-Mitteilungen (WM) 601 (2011).

[166] *Kleinwort Benson Ltd. v. Malaysia Mining Corp. Bhd* (1989) 1 All ER 785, CA.

[167] See the French cases discussed by Pariente, *supra* note 158, at 341–43.

[168] *Re Polly Peck International plc (in administration)* (1996) 2 All ER 433; William W. Bratton, "Bond Covenants and Creditor Protection: Economics and Law, Theory and Practice, Substance and Process", 7 EBOR 39 (2006). See more generally Mark K. Oulds in Schuldverschreibungsrecht (Klaus J. Hopt & Christoph Seibt eds., 2d ed. Cologne 2023), Part V, Ch. 4 at 4.34 et seq.

[169] Hopt in Schmitthoff & Wooldridge, *supra* note 23, at 104–05; *supra* section 2.2.

[170] Peter O. Mülbert, "A Synthetic View of Different Concepts of Creditor Protection, or: A High-Level Framework for Corporate Creditor Protection", 7 EBOR 357, 375–77 (2006).

In the stage before outright insolvency, mandatory law protects group creditors mainly through the standards of conduct and liability of the directors and controlling shareholders. General creditor protection through disclosure rules is described above. Legal capital requirements, controversial as they are, and protection through limiting asset distributions to shareholders are not treated here.[171] In normal times, these standards of conduct protect both shareholders and creditors. An action of the management of a subsidiary, taken with the consent of the parent and which is harmful to minority shareholders, is usually also harmful to the creditors of the subsidiary.

Yet when the corporation gets into financial difficulties, in particular if insolvency is foreseeable, the standards change, and the duties of the management become stricter. This is true in principle for most jurisdictions. Prototypes are wrongful trading by directors in the UK, the French action *en responsabilité pour insuffisance d'actif*, the Belgian action *en comblement du passif*, and the German liability of the management of the limited liability company for negligent payments after the company has become insolvent or illiquid.[172] While these concepts of creditor protection differ considerably as to their scope, standards,

[171] Id. at 383–94.

[172] For a comparison of the situation in the UK, France, and Belgium, see Forum Europaeum Corporate Group Law, *supra* note 7, at 245–257; Hopt, *supra* note 89, at 225 et seq.; for a comparison of UK and German law, see Felix Steffek, Gläubigerschutz in der Kapitalgesellschaft (Tübingen 2011); for the UK see Paul Davies, "Directors' Creditor-Regarding Duties in Respect of Trading Decisions Taken in the Vicinity of Insolvency", 7 EBOR 301 (2006); on wrongful trading under UK law, see Gower, *supra* note 49, paras 19-05 to 19-012 and Davies 2020, *supra* note 49, at 237-240; for France Cozian et al., *supra* note 114, at 478 et seq., 2509 et seq., with extensive case law, at 488. Cf. European Model Companies Act 2017, *supra* note 58, Section 10.04 on Wrongful Trading.

entitled claimants,[173] and doctrinal nature, suffice it to state in the present context that they are functionally similar. It is true that most of these mechanisms come into play only when the company is actually insolvent, not before; the receiver in insolvency brings the claim against the director or controlling shareholder. But this liability is rooted in the wrongful conduct of the directors beforehand, in proximity to insolvency, and the standard is not fraudulence but negligence. The difficulty for the courts in applying this standard is not to discourage directors from taking risks that may reasonably be expected to save the company on one hand while not to allowing them to engage in risky speculation (gambling for resurrection) at the expense of the creditors if the company has no prospects of continuing on the other. The liability imposed on the directors is special insofar as it is not just normal tort liability with the requirement of causation of the specific harm. Instead, the judge may also order the director to make a partial or full contribution to the assets of the insolvent company.

The group aspect of these mechanisms consists in holding liable the controlling parent as de facto director or shadow director. This functional extension of the notion of a director is used in many jurisdictions, including in the US, the UK, France, Germany, Italy, the Netherlands, Spain, and Switzerland.[174] These jurisdictions vary in their requirements for this liability of the controlling shareholder. Some exercise great restraint. The prototype here is

[173] Liability in Germany is directly to the damages creditors. Wrongful trading results in full liability toward the company.

[174] Gower, *supra* note 49, paras 10-09 to 10-11. For Italy see Alexandra Mohn, *Die Gesellschaftsgruppe im italienischen Recht* (Berlin 2012); for Italy and Spain see Fuentes, *supra* note 156, at 541–44; for Switzerland see Karl Hofstetter & Renate Lang, "Konzern(mutter)haftung", in: Entwicklungen im Gesellschaftsrecht VIII 231 (Peter V. Kunz, Oliver Arter, & Florian S. Jörg eds., Bern 2013); for the Netherlands, see Kroh, *supra* note 66, at 333 et seq. See also the German concept of Existenzvernichtungshaftung mentioned *supra* section 2.2 note 66. In Germany the concept of the shadow director is less important for capturing the parent than it is in other countries because of the existence of a full-fledged, separate group law.

the UK, where a company is not regarded as a shadow director solely by reason of the directors of the subsidiary being accustomed to acting on the instructions of the parent.[175] This has led commentators to state: "So, this is not 'group law' by the back door."[176] But functionally it is, though in a very limited and carefully balanced way. The case law in some other jurisdictions seems less restrained. The French courts treat controlling shareholders and parents as *dirigeant de fait* if they continuously insert themselves into the management and control of the company or subsidiary.[177]

It remains to mention a different instrument for holding parent companies liable well before insolvency. In Switzerland, the parent may be held liable for the debts of the subsidiary if it creates the factual appearance of economic unity of the group.[178] This concept is based on the reliance of creditors and on the responsibility of the parent for creating this reliance. This instrument has gained some positive resonance in Germany, Austria, and France, but the case law has been sparse and the majority of legal academia is not convinced.[179]

6.3 Indemnification, Veil-Piercing, Subordination, and Substantive Consolidation

[175] Gower, *supra* note 49, para 10-011.

[176] Paul Davies & Jonathan Rickford, "An Introduction to the New UK Companies Act: Part I, Part II", 5 ECFR 48 and 239 (2008) at 64 note 70. But see also Davies, *supra* note 98, on UK tort law; Petrin & Choudhury, *supra* note 101, on reform.

[177] See the cases reported by Cozian et al., *supra* note 114, nos 401 et seq..

[178] Konzernvertrauenshaftung, see Hofstetter & Lang, *supra* note 174; Peter Böckli, Schweizer Aktienrecht, 5th ed. (Zurich/Geneva 2022), § 16 comments 130-133; Peter Nobel, Das Obligationenrecht, Das Aktienrecht: Systematische Darstellung, in Berner Kommentar (Zürich 2017), § 4 N 392 et seq.; Benedict Burg & Hans Caspar von der Crone, "Vertrauenshaftung im Konzern", SZW 417 (2010).

[179] Pariente, *supra* note 158, at 333.

Four other mechanisms of creditor protection against controlling shareholders and group parents should be mentioned. Two—indemnification and veil-piercing—are used before, and independent of, insolvency law, and the others—subordination and substantive consolidation—are typical insolvency law mechanisms.

Indemnification is a very far-reaching, group-specific means of creditor protection. The mechanism, for protecting the creditors of the subsidiary in a de facto group of companies, is codified in the German Stock Corporation Act, and it is characteristic of the regulatory model of special group law regulation described above. As mentioned there,[180] the parent must fully compensate any subsidiary at the end of the year for all acts and transactions caused by the parent that are contrary to the subsidiary's own interest. This is a much more dangerous mechanism than merely interfering in the management and control of the subsidiary as the aforementioned condition for treating the parent as a de facto director. Instructions need not have been given to the subsidiary; causation may require mere recommendations or advice, and the recommendations need not have been addressed to the directors of the subsidiary but may consist in resolutions taken by the general assembly and in actions of the representatives of the parent on the board of the subsidiary.[181] The relevant criterion is disadvantage to the subsidiary under an arm's length standard for fully independent companies. In practice, any kind of group contribution (*Konzernumlagen*) to the parent or to other subsidiaries for which there are no equivalent individual benefits to the subsidiary are considered to be disadvantages.[182]

Veil-piercing or lifting the corporate veil is another mechanism many jurisdictions use both in and outside of insolvency. The veil created by the limited liability of the legal entity is

[180] *Supra* section 2.2.

[181] Emmerich & Habersack, *supra* note 21, § 25 passim, in particular comments 2–4.

[182] Id. § 25 comment 26 with case law.

pierced, and the entities or persons behind it are treated as one for purposes of liability. This is obviously a very crude instrument that runs against the very economic and legal reasons for asset partitioning. It is therefore generally used with caution. At one end of the spectrum is the UK, where courts seem to be very reluctant to use this instrument, treating it as definitely more demanding a concept than that of the shadow director.[183] In *Adams v. Cape Industries*, an asbestos case, the court upheld the limited liability of the parent against the victims of asbestos in products distributed by one of its subsidiaries.[184] The observation of one UK expert is telling: "(L)ifting the veil as a means of achieving group liability is a non-starter even in relation to what may be considered the most deserving case, namely the tort victims of a subsidiary company."[185] German and French courts also lift the corporate veil only

[183] Gower, *supra* note 49, ch. 8 on limited liability and piercing the corporate veil, 7–018: small role in British company law, 7-020: only successful in two cases.

[184] *Adams v. Cape Industries* (1990) Ch 433, CA.

[185] Eilís Ferran, Company Law and Corporate Finance 31 et seq. (London 1999). But see Charles Mitchell, "Lifting the Corporate Veil in the English Courts: An Empirical Study", 3 Company, Financial and Insolvency L. Rev. 15 (1999): veil-piercing in the UK is quite frequent despite the different rhetoric of English judges; see also Alan Dignam & Peter B. Oh, "Disregarding the Salomon Principle: An Empirical Analysis, 1885-2014", 39 Oxf. J. Legal. Stud. 16 (2019), according to whose study veil-piercing is somewhat less common in practice than assumed by Mitchell. In the second edition, Eilís Ferran & Look Chan Ho, Principles of Corporate Finance Law (Oxford 2014), p. 30, the statement mentioned above in the text is more nuanced: "However, balancing the social benefits of the corporate structure against its costs is a large policy question that the judiciary is not ideally positioned to address. For this reason, the resistance of the courts in the UK to the adoption of an enterprise approach in relation to liability, even where tort liability of companies within a corporate group is involved, is defensible." In view of the most recent developments, *supra* II 3 at the end, it has been observed that in the area mentioned, "the rule against veil piercing and, pro tanto, asset partitioning between the parent and the subsidiary has been sidestepped", Paul Davies, *supra* note 98, at 30.

rarely and under very strict requirements.[186] On the other end of the spectrum seems to be the US, where courts use this mechanism more frequently.[187] To be sure, we are dealing here with the corporate law mechanism of lifting the veil. But when it comes to competition law, for example, there is much more willingness on the part of antitrust authorities and courts to hold group companies responsible for the antitrust violations of other group members. Under the European Union competition law, a parent company may be liable for an antitrust violation of its subsidiary or, conversely, a subsidiary may be liable for the parent company, which are rather controversial results.[188]

The two mechanisms common to insolvency law in many countries are subordination and substantive consolidation. Subordination is found in many countries including Austria, Germany, Italy, Spain, the US, and New Zealand, but not in the UK.[189] In subordination, the

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[186] "Durchgriff," Markus Roth in Hopt, *supra* note 43, annex § 177 a comment 51b-f; Koch, *supra* note 66, § 1 comments 15 et seq. For France Conac in Manóvil, *supra* note 26, para 3.2.2.

[187] Robert B. Thompson, "Piercing the Corporate Veil: An Empirical Study", 86 Cornell L. Rev. 1036 (1991); Peter B. Oh, "Veil-Piercing", 89 Tex. L. Rev. 81 (2010); David Millon, "Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability", 56 Emory L. J. 1309 (2007); Steven Presser, Piercing the Corporate Veil (New York 2022); Jonathan Macey & Joshua Mitts, "Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil" 100 Cornell L. Rev. 99 (2014); Peter S. Spiro, "Clarifying the Rules for Piercing of the Corporate Veil", 26 J. Corp. L. 479 (2001), available at https://ssrn.com/abstract=2363647, 2013; cf. also Haar, *supra* note 94. But Stephen Bainbridge, "Abolishing Veil Piercing", 26 J. Corp. L. 479 (2001).

[188] See *supra* note 93.

[189] Martin Gelter & Juerg Roth, "Subordination of Shareholder Loans from a Legal and Economic Perspective", *5* Journal for Institutional Comparisons 40 (2007); for the US see Irit Mevorach, "Appropriate Treatment of Corporate Groups in Insolvency: A Universal Rule", 8 EBOR 179 (2007) and David A. Skeel & Georg Krause-Vilmar, "Recharacterization and the Nonhindrance of Creditors", 7 EBOR 259 (2006); for Germany Mülbert, *supra* note 170, at 394–99; Anatomy, *supra* note 24, at 131–32.

controlling shareholder's or parent's debt claims are subordinated to the claims of all other creditors. This does not fully amount to what is now called a voluntary debt–equity swap,[190] since the subordinated claims still rank ahead of all equity held by the parent and other shareholders. The requirements for subordination as an insolvency mechanism differ considerably, ranging from inequitable behavior[191] to automatic subordination of shareholder credits given to the company under German insolvency law.

The insolvency regime can go further, allowing the insolvency courts to coordinate or even consolidate the insolvency proceedings of several group members.[192] Coordination on one hand merely provides an additional procedural layer (the coordination procedure) while keeping the insolvency proceedings of individual group companies separate. Consolidation on the other hand can take two distinct forms. It can be procedural, in which case the companies belonging to the group are treated as a single unit under one bankruptcy proceeding. But consolidation can also be substantive, as when the assets, debts, or both of the different group members are pooled. European and German law only provide for coordination.[193] Procedural consolidation is available for example under the New Zealand Companies Act 1993. Substantive consolidation is provided for under US insolvency law.[194] Under French and Belgian insolvency law, the intermingling of assets (action *en confusion de*

[190] But cf. Anatomy, *supra* note 24, at 131 note 158.

[191] See the Deep Rock doctrine in the US (*Taylor v. Standard Gas and Electronic Corporation*, 306 U.S. 307 (1939)), Anatomy, *supra* note 24, 132; Skeel & Krause-Vilmar, *supra* note 190, at 263–64.

[192] Mevorach, *supra* note 190, at 187–93.

[193] For the European Union, see Arts. 56–77 EIR; Christoph Thole & Manuel Dueñas, "Some Observations on the New Group Coordination Procedure of the Reformed European Insolvency Regulation", 24 Int. Insolv. Rev. 214 (2015). In Germany, see the Gesetz zur Erleichterung der Bewältigung von Konzerninsolvenzen vom 13.04.2017, Official Gazette 2017 I 866, Arts. 269d–269i German Insolvency Code.

[194] Mevorach, *supra* note 190, with further references.

patrimoine) may lead to the insolvency of one company being extended to another.[195] But this mechanism is to be used with caution and is applied only when there is a real intermingling of the assets of the two corporations; usually, fault on the part of the parent is also necessary.[196] The normal legal and commercial relationship between parent and subsidiary is not sufficient. Usually the insolvencies of multinational groups present particular difficulties, due not only to different laws applying and to different receivers and insolvency authorities being involved but also to the latter being openly or, as in most cases, covertly opportunistic in favor of their own country's companies and creditors. Efforts to agree on international consolidation have been ongoing for a long time, but so far only a few steps have been taken in the direction of procedural consolidation.

In the end, one may conclude that many jurisdictions consider creditor protection, particularly in corporate groups, to be an issue of agency conflict that needs to be regulated. But the strategies and mechanisms used for doing so are functionally equivalent only in very basic terms. Fundamental differences remain in policy and even more so in legal doctrine. While we have observed a certain trend toward convergence for minority protection in independent companies and groups of companies through disclosure and, though less so, through standards of conduct, we would hardly dare to make the same assertion for creditor protection.

7 CONTROL TRANSACTIONS

[195] For France, see Art. L. 621-2 al. 2 code de commerce; Pariente, *supra* note 158, at 333–40; Cozian et al., *supra* note 114, at 2506 et seq.; Kroh, *supra* note 66, at 274 et seq. For Belgium see Van Ommeslaghe, *supra* note 23, 59 at 92 et seq.

[196] Pariente, *supra* note 158, at 331–33. It is mentioned that this mechanism may also be used outside of insolvency, but in principle it is an insolvency law mechanism; Cozian et al., *supra* note 114, at 2506: exceptional measure.

The second large category of conflicted transactions in corporate law, besides related party transactions, are control transactions, i.e., transactions by which the control over the corporation is transferred to another person or enterprise, usually by a public takeover.[197] The two typical agency problems in takeovers are between the directors and the shareholders of the target, on one hand, and the majority and the minority shareholders of the target as to the premium and possible exit, on the other.[198] As for the first conflict, there is a fundamental difference between the positions of the UK and some continental European states that have an anti-frustration rule and that of the US and other continental European states that give the directors full liberty to decide whether to refuse or to accept the bid.[199] As to the second conflict, a similar divide exists concerning the mandatory bid and the sharing rule for minority shareholders.[200] The situations and problems are different in takeovers, when the shareholders are on the side of the target diverse or there is a controlling shareholder.[201]

Takeover regulation was developed first, and primarily so, in the US and the UK, where there is no—or no consistent—group law. In countries such as Germany, which has an extensive, codified group law, takeover regulation has appeared only very lately. This is no

[197] Fundamental changes may also imply a change of control, but under nearly all corporate laws, shareholder consent in the general assembly is necessary, and special provisions for creditor protection exist. Cf. Anatomy, *supra* note 24, ch. 7, 171–203.

[198] Bidder agency problems between directors and controlling shareholders on the one hand and minority shareholders on the other are dealt with by general corporate law, not specifically by takeover law. See Anatomy, *supra* note 24, at 208.

[199] Anatomy, *supra* note 24, at 212–15, 215–21; Klaus J. Hopt, "Takeover Defenses in Europe: A Comparative, Theoretical and Policy Analysis", 20 Colum. J. Eur. L. 249 (2014).

[200] Anatomy, *supra* note 24, at 227–30.

[201] Anatomy, *supra* note 24, at 209–10, and 211–31: no controlling shareholder; 229, 231–36: acquisition from an existing controlling shareholder.

coincidence, since group law deals with some of the agency problems of minority shareholders at a later stage, namely when the group already exists and the minority needs protection. Takeover regulation, in particular through legislation of the mandatory bid, comes in at a much earlier stage and allows minority shareholders to exit at the same price as shareholders who accept the bid. The mandatory bid is a protective mechanism at a stage when a new controlling bidder might come in. The mandatory bid has therefore been considered functionally as a group law provision, offering protection by exit before the (new) group is formed.[202] This is true even of a mere transfer of control through the takeover, from the former controlling shareholder in the target to the new controlling shareholder whose bid has succeeded. The shareholders do not know in advance how the new controlling shareholder will use his power and therefore might prefer an early exit at a fair price.[203] Exit after a successful takeover, either through squeeze-out or sell-out, may be facilitated through takeover law, general corporate law, or both. It is always the exit of a minority from a company with a controlling shareholder. This exit exists in independent companies as well as in groups of companies. As to squeeze-out and sell-out regulation,[204] the minority may face greater danger in groups.[205] As to convergence, findings have been mixed. On one hand, takeover regulation has spread from the US and the UK to all over continental Europe and well beyond, into Japan and other countries. But as to agency conflicts, the policies remain

[202] Klaus J. Hopt, Europäisches Übernahmerecht 36–38 (Tübingen 2013); Hopt, *supra* note 33, at 15. As to the exit strategy, see Anatomy, *supra* note 24, at 88, 227–30.

[203] Anatomy, *supra* note 24, at 233.

[204] See the comprehensive comparative study by Christoph van der Elst & Lientje van den Steen, "Balancing the Interests of Minority and Majority Shareholders: A Comparative Analysis of Squeeze-out and Sell-out Rights", 4 ECFR 391 (2009).

[205] For the same reasons as discussed in section 1.3.

fundamentally different, as shown by the cleavage between the countries with and without the anti-frustration rule and those with and without mandatory bid laws.

8 CONCLUSION

1. The phenomenon of groups of companies is a very common modern corporate reality. The empirical data on groups of companies are heterogeneous because they are collected for very different regulatory and other objectives.
2. Two main agency problems arise in groups of companies: one, between the controlling shareholder and the minority shareholders; the other, between the shareholders viz. the controlling shareholder and the creditors. The conflict between labor and other stakeholders and the controlling shareholder is dealt with by labor law, industrial relations, and other fields of law. Stakeholder protection has become a major topic most recently in politics, legal academia, and legislation (ESG and value chain legislation, in particular by France and Germany and in the European CSDDD directive).
3. There are three main regulatory models for dealing with groups of companies: regulation by general corporate law, civil law, or both (prototype: the UK); regulation by special group law (prototype: Germany); and regulation by areas of the law such as banking, competition, and tax law (found in many countries and combined with either the first or second model).
4. The main strategy for dealing with groups of companies is disclosure and group accounting. It is effectuated by special investigation with a group dimension and by the help of auditors and independent experts. One can observe a fair amount of international convergence, at least for listed companies.

5. Related party transactions are a main area of concern for corporate and group law provisions, which usually combine specific disclosure with consent requirements and other procedural regulation of these transactions.

6. In addition, appropriate standards for directors and controlling shareholders in dealing with agency conflicts in groups of companies have been developed in many countries. The duty of loyalty is an open standard to be concretized ex post by the courts. There has been some convergence, but many differences remain, in particular as far as specific standards for balancing the interests of member companies in groups are concerned. The strict, codified German group law standard stands against more the flexible standards found in Italy, France, and other countries.

7. Protection of creditors can be achieved to a certain degree by self-help and through guarantees by the parent. But mandatory protection is still considered to be necessary. There are various national standards for directors and controlling shareholders in independent companies as well as in groups of companies. These standards become stricter if insolvency is approaching. The concept of the shadow director plays a certain role in extending liability to the controlling shareholder and the parent.

8. There are various other mechanisms for creditor protection in independent companies and groups of companies. Some, such as indemnification and veil-piercing, are used when the corporation is still doing well and is operating as a going concern. Others, such as subordination and substantive consolidation, are mechanisms of insolvency law. Creditor protection is still very path-dependent, and convergence is much less advanced.

9. A second group of conflicted transactions, besides related party transactions, comprises control transactions, in particular public takeovers. Takeover law was first developed in the US and the UK and from there has moved into other countries. Takeover law grew up separately from group law and only arrived in countries with group law, such as Germany, at a very late stage. The mandatory bid can be understood functionally as a group-protection measure that allows the shareholders of the target to opt for an early exit at a fair price (group entry control or *Konzerneingangskontrolle*). There has been some convergence, particularly in Europe, but fundamental differences remain as to the anti-frustration rule and the mandatory bid.

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