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

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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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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. 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); and regulation by areas of the law such as banking, competition, and tax law (to be found in many countries, 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.

I. Groups of Companies: Phenomenon, Agency Problems, and Regulation

A. The phenomenon of the 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 Pirelli group in Italy, which is not one of the very biggest. It has over 100 companies in more than 30 countries, 16 of them in the European Union, with over 30,000 employees and an annual turnover of almost six billion euros.[1] 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-per cent-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 banks – and Swiss banks are beginning to follow.[2] In Europe – for example, in Germany and Italy – pyramids[3] are common, i.e., hierarchical groups with various layers of subsidiaries and subsidiaries of subsidiaries forming very complicated group nets. 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 with fierce group-internal competition.[4] If groups cooperate, they sometimes choose to jointly hold certain subsidiaries. Special – often cultural – problems arise if, as in rare cases, multinational groups have two parents from different countries. Accordingly, economic concepts of the group differ.[5]

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,[6] which means that there are stock corporation groups,[7] limited liability company groups, SE groups such as the German Allianz insurance giant,[8] and also groups with commercial partnerships such as parents or subsidiaries. The choice of the form is most often tax-driven.[9] 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 per cent of the shareholdings is the legal test. For antitrust and in countries with a special group law as in Germany, substantive control concepts are used, taking into consideration that economic control may be possible with much less than 50 per cent depending on the shareholder structure, voting behavior, 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 the creditors of the subsidiaries in the group. Under this objective, group regulation follows a bottom-up model. A second objective that appears frequently in many countries – including European countries as well as Australia,[10] for example – concerns the 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 rather top-down. In countries with strong protectionism and in most emerging countries, the emphasis is more on the organizational side.[11] This article 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,[12] for groups with the state or state enterprises as parent,[13] for financial groups as evidenced by the financial crisis, 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.

B. Empirical data on groups and their use for regulation

Empirical data on groups are available, but they are usually collected for specific purposes. More recently there has been growing research on corporate ownership with a view toward corporate governance law and codes.[14] Ownership differs considerably between the various countries: dispersed ownership in the US[15] and in the UK[16] as prototypes;[17] and controlling family enterprises and groups of companies as the general rule in continental European states, but also often found in Far Eastern countries and in emerging economies.[18] Empirical data on multinational enterprises and groups of companies are collected by international organizations such as the OECD, UN, G20, Basel, and others.[19] Data on groups are also collected by studies on economic concentration and are used for antitrust and merger control regulation in many industrialized countries, including Germany, the European Union, and the US.[20]

Of particular relevance when studying the regulation of corporate groups are data on conduct and transactions in groups. Usually they are not collected systematically but are set out by regulatory agencies, in case studies, by national and international court cases, and by reports from practice.[21] Much of the existing group law is not codified law but is case law by courts, such as the German limited liability group law, or supervisory agencies, such as the former Belgian Banking Commission.[22] The extensive legal contributions of academia in many countries with group law do not usually add much in the way of empirical data.

C. 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 (and 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.[23] Sometimes the concept of stakeholders is conceived more broadly, encompassing: consumers; municipalities, regions, and countries interested in keeping groups and group members within their area; the state as a tax authority; and even non-personal public goods such as the environment, fundamental rights, and others.

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.[24] Much corporate law in the various countries deals with this conflict.[25] For 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 by superior influence on the board or by 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 the subsidiary, or if state agencies in the country of the subsidiary pursue country-specific interests. But this is the exception.[26] In groups of companies, the two relevant principal-agent conflicts concern the minority shareholders and the creditors (as well as the employees).

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.[27] The controlling shareholder may abuse that control position in various ways, such as self-dealing and similar related-party transactions, thereby reaping private benefits of control.[28] The corporate laws of most countries cope with this problem of controlling shareholder opportunism by various strategies and mechanisms of minority protection.[29]

As we shall see, many jurisdictions deal with this agency problem without distinguishing whether these conflicts arise in the independent corporation or in a group of companies. Yet in groups of companies, this agency problem has several particular features.[30] First and most conspicuous is the fact that the controlling shareholder in the subsidiary may not just act opportunistically in his own private interest; he may act responsibly in the interest not only of the parent, but of the group as a whole and/or 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 the 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 the 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 in the controlled 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 where the moneys of the subsidiaries are pooled. It is very common that the parent takes contributions from the subsidiaries for the group that may or may not be economically and/or legally justified from the perspective of the subsidiary, 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 difficulties and need the help of the subsidiary. The parent may need to make a decision about where in the group layoffs or cut-downs should be effectuated or, more positively, which of the subsidiaries in the group should be attributed the opportunity to develop a promising new product or where, usually for tax reasons, a new subsidiary should be brought up 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 it is considered by some jurisdictions 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 only a block of shares that is enough for control instead of 100 per cent [31] As seen before, depending on how control is defined, this may be just a 51 per cent block, or even considerably less in corporations in many continental European countries in which the attendance rate of the common shareholders at the general assembly is low. In Germany, for example, this is sometimes under 30 per cent. With the mandatory bid provision for takeovers in many European countries, 30 per cent is usually considered control for the purposes of acquiring control in the sense of the takeover acts.[32] This line of exercising control with relatively smaller stakes is prolonged in a number of continental European countries by pyramiding,[33] i.e., exercising control over a subsidiary by another subsidiary and so on. The actual economic stake of the controlling shareholder at the top of the pyramid may thus become very small, with the consequence that 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, in a group of companies, the agency conflict may not just be one that concerns the minority shareholders in the subsidiary. The minority shareholders in the parent corporation may also be affected. This is the case if the management of the parent in agreement with the controlling shareholder takes the 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.[34]

2. Creditors versus the controlling shareholder

The other main agency problem concerns the creditors. As for the minority shareholder agency problem, this conflict is well known in general corporate law for the independent company, and a number of jurisdictions do not have separate rules for this problem in group situations.[35] But again creditors of groups may be more exposed to controlling shareholder opportunism than creditors of independent companies.[36]

The above-mentioned special features of the conflict also apply here: a smaller incentive 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.

Furthermore, quite apart from the precarious situation of involuntary creditors, it is usually more difficult for a creditor of a subsidiary to evaluate the risk he runs than for a creditor of an independent company. 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,[37] but transparency is much less developed as far as the subsidiaries are concerned. As a consequence, the general creditor risk – ex ante: misrepresentation of value; ex post: intra-group transactions, asset dilution, asset distribution, and debt dilution[38] – is generally higher in groups of companies than in independent companies.

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[39] or not. The decision of whether employees are hired or fired may not just depend 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, belongs to the most controversial issues for labor. For example, in the case of a takeover threat 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 take decisions in labor issues in the interest of the whole group. In a number of countries the employees may have a say in the co-determined board of the independent company, but this does not help if the decision is finally made at the top of the group, unless there is a special group co-determination also there as well. Germany has such a group co-determination system, but only German labor has its representatives sitting on the board of the parent.

Many countries deal with this labor agency problem in groups with specific labor group provisions. In some countries there is even a full-fledged labor group law, either codified or developed by case law. This whole area of group-specific provisions in employment law, industrial relations, and labor co-determination is highly complicated and controversial and cannot be treated here.[40]

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

II. Groups of Companies: Regulatory Models, Legal Strategies, and Mechanisms

A. Regulation by general corporate and/or civil law

Many countries deal with the agency problems described before by law, either general law or group law. As we shall see, most of this law is mandatory,[41] such as disclosure and group accounting as a reaction to opaqueness, the principles of related party transactions and tunneling, basic standards for directors and controlling shareholders in groups when making decisions that affect minority shareholders, creditor protection provisions, and insolvency law. When we deal with these strategies and mechanisms, we shall look at their function, whether the provisions are mandatory, and what room is left for own protection or for enabling law, in particular for creditor protection.[42] But it should already be mentioned here that certain countries can do without rules for groups of companies, or at least with very few of them. This is the case in Sweden, for example, where no need seems to be felt to deal with group agency problems in more detail. This is astonishing because in Sweden the shareholding structure 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 is effective.[43] 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 and medium voluntary creditors may not really have a choice to protect themselves.

If countries choose to address the group agency problems more specifically, they can follow three regulatory models: First, they can choose between regulation by general corporate and/or civil law (II A) and regulation by special corporate group law (II B). These two models can and usually will be combined with group regulation by areas of law (infra II C). The prototype of the first regulatory model is the UK.[44] There corporate group law as such (apart from group accounting, for example) 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 the corporate law in these countries dealing with group problems, 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 European company (SE).

In all these countries, the legitimacy of forming groups – i.e., creating different legal entities within the group and thereby partitioning assets[45] among the creditors of these entities – is principally uncontested, though in US academia there are pleas for unlimited shareholder liability for corporate tort creditors.[46] In the UK, the separate legal personality doctrine following the Salomon case[47] has been firmly upheld by the courts for groups as well.[48] But as we shall see, there are various civil or corporate law concepts that may catch 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 as directors of the parent are not a sufficient basis for this.[49] Another example is piercing the corporate veil.[50] Still, it has been said that "[i]t is clear that British law is at one end of the spectrum as far as the regulation of liability within groups is concerned." There, the group problems are "solved by a combination of creditor self-help, general company law strategies as section 214, or the unfair prejudice remedy[51] and targeted statutory interventions, such as the requirement for group accounts."[52]

B. Regulation by special corporate group law

Many other jurisdictions have chosen to deal with group agency conflicts by more or less extensive 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 have basically followed the German example, namely Portugal, Hungary, the Czech

Republic, and Slovenia.[53] The German group law has been described elsewhere in more detail,[54] so it suffices here to summarize its key elements. First, it is important to see that in Germany, group law is codified only for stock corporations (*Aktien-Konzernrecht*).[55] Group law for limited liability companies (GmbH) and for commercial partnerships exists and is extensive, but it is pure case law, which is rather different from codified corporate group law.[56] Second, 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.[57] In a contractual group, the parent is allowed to steer the group in the sole group's interest, but the parent has to pay for this legal privilege by being obliged to make good the losses of the subsidiary and by adequate compensation for the minority shareholders of the subsidiary. The legislator's thought was that the freedom to steer the group would be such an attractive incentive for the parent that in most cases it would enter such a group 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),[58] 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.[59] This rule is complemented by a mandatory group report of the directors of the parent, by group audit, examination by the supervisory board of the parent, and by the right of each shareholder of the parent to have an investigation at the order of the court. Yet the efficacy of these mechanisms is an open question.[60] Furthermore, new case law has established the liability of the shareholders for threatening the solvency of the corporation in closely held firms.[61]

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 companies" exercised by holding companies.[62] Apart from various rights and duties of directors and group members, and protective measures such as disclosure, the main achievement of this reform was to provide for a liability of the holding company and its directors towards 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 is presumed. In addition, the rules on conflict of interest have been tightened: they 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[63] and the crime of abuse of corporate assets,[64] and Belgium, with group provisions for publicly listed companies belonging to a group.[65] The Rozenblum doctrine has been developed as case law by criminal courts and is characterized by a more flexible balancing of interests of the parent and the subsidiary. This may be more functional than the German solution, but the subsidiary is better protected by German group law.[66] Other European countries such as Spain[67] and Sweden,[68] as well as Japan,[69] have various legal provisions for groups.

The situation in the European Union is still in its developmental stage. The Forum Europaeum Corporate Group Law,[70] the High Level Group of Company Law Experts,[71] and the Reflection Group[72] have all advocated European harmonization by core group rules in line with the French Rozenblum doctrine. Most recently, in December 2012, the European Commission announced its intention to proceed in this direction.[73]

C. Regulation by areas of law

In comparative law, the two above-mentioned regulatory models of dealing with group agency conflicts are usually confronted with each other. Yet this is misleading. In those countries that apparently do not have a group law, this is also true only as far as corporate group law is concerned. In the UK, group accounting existed well before it was made mandatory by EU regulation.[74] But group law provisions and very often quite an extensive group law legislation exists in many countries, though in fields other than corporate law. The list is long and includes group law in accounting and auditing,[75] conflict of laws,[76] securities regulation,[77] banking and other financial institutes,[78] insolvency,[79] labor,[80] competition law,[81] product liability,[82] and other public law such as tax,[83] environment, and others. Apart from some observations on group law accounting, these area-specific group laws cannot be treated in this chapter,[84] since their objective is not the solution of group agency conflicts[85] but depends on the specific – and highly diverse – regulatory goals in each of these areas.

D. Legal strategies and mechanisms

In the following paragraphs, selected legal strategies and mechanisms for dealing with group agency conflicts will be analyzed, including Disclosure and Accounting (III), Related Party Transactions (IV), Standards for the Directors and for the Controlling Shareholder (V), Transactions with Creditors (VI), and Control Transactions (VII). 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 to 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.

III. Disclosure and Accounting

A. 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. Today much of this disclosure in Europe is harmonized.[86] There is a long 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. [87] 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 hide such news. Standardized mandatory disclosure helps the investors and the market to evaluate disclosure. Empirical evidence seems to support these arguments for publicly traded firms.[88] Group-specific disclosure[89] relates to the fact of control, to the relationship 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 on changes in voting rights from 5 per cent up at several thresholds.[90] In general, disclosure is much stricter in the US and the UK, while it is more lenient in continental Europe and Japan.[91]

An interesting example of limited disclosure is the German group dependency report for de facto groups.[92] This mandatory report by the management board of the subsidiary contains the details on 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 available to the shareholders because it contains all the details of the internal life of the group. But the individual shareholders may ask the 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, the legislators fear that this would be counterproductive because in practice the dependency report would become much less meaningful.

B. Group accounting

As mentioned before, a special area of group law is group accounting. Consolidated accounts, though with many differences as to the reach and content, must be provided under various national and international group accounting provisions, including GAAP in the US and International Accounting Standards (IAS) and, as of 2001, 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 the consolidated accounts, the accounting standards regarding annual financial accounts, i.e., those for the members of a group, differ greatly between the Member States.[93] While in the UK the issuer has an option to also prepare the annual financial accounts following IFRS standards, in France, Germany, Spain, and Sweden the annual financial accounts 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.[94] There is work on more harmonization between US GAAP and IFRS, but progress is still slow.

C. Special investigation with group dimension and the role of auditors and independent experts

Disclosure on groups of companies may be mandatory, but the effectiveness depends on enforcement, and enforcement differs greatly among the jurisdictions. As mentioned before in relation to the German dependency report, this is a task for the auditors as gatekeepers,[95] for special investigation procedures, and, on 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.[96] In France there is good experience with the *expert de gestion* and the special reports by the *commissaire de compte*.[97] In Australia the Australian Capital Markets Authority has broad investigatory powers and even the right to start civil proceedings.[98]

The special investigation procedure is a very promising mechanism since the shareholders may ask the court to appoint special experts to investigate suspected 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. Meanwhile in Germany, where the Stock Corporation Act has different rules for special investigation in the (independent) company and in groups of companies, the experience with the latter is less impressive, a fact that may be 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.[99]

IV. Related Party Transactions

A. Related party transactions and specific disclosure

Disclosure and accounting – rendered effective by the help of auditors and independent experts if need be – makes agency conflicts transparent. While this may lead to appropriate behavior of the agents or self-protective measures by the principals, these beneficial effects cannot be taken for granted, for the agents' temptation to reap off private benefits may be too great. This is also true for controlling shareholders and parents in groups of companies as agents of minority shareholders and creditors. Strong temptations arise for them in conflicted transactions, in particular in related party transactions (IV) and control transactions (VII). Conflicted transactions are part of the more general problem of conflicts of interest in corporate law that cannot be dealt with here in more detail.[100] Related party transactions are regulated extensively by corporate law for directors and officers,[101] but if they involve controlling shareholders they present special problems.[102] This is even more true for groups of companies. There such transactions between members of the group are far less visible and, since they are part of the normal group-internal business relations, it is hard – if not impossible – for minority shareholders of a subsidiary to judge whether they are made at arm's length or whether and to what extent private benefits have been extracted.[103] Related transactions can take very different forms and may include straightforward self-dealing, as well as cash flow tunneling, asset tunneling, and equity tunneling,.[104] Accordingly, the reactions by legislators and courts are manifold. A recent empirical study suggests that for listed companies, disclosure combined with the consent of disinterested shareholders may be the best solution.[105] Special mandatory disclosure rules for related party transactions exist in many countries, such as the US, the European Union, Germany and other continental European states, and Japan.[106] Most recently, an empirical analysis of regulation and self-regulation of related party transactions has come up with interesting data for Italy.[107] Many of these disclosure rules are not found in the corporate law of these countries but are rather part of the securities laws, prominently in the US and in the European Union (the European Transparency Directive of 2004 as revised in 2013), or are national and international accounting rules, such as annual disclosure following US-GAAP and IAS/IFRS. In most of these disclosure rules, one can find specific provisions for block holders, generally starting at five per cent, and transactions with controlling shareholders. The test is usually that all material related party transactions that have not been concluded 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 for listed companies, stricter disclosure rules for related party transactions may exist under the listing requirements of the stock exchanges than under the law. The dependency report under German group law has already been mentioned.[108] This report is not publicly available but is audited and given to the board of the subsidiary in order to protect the confidentiality of group-internal transactions. At the end, if one does not just look at 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.[109] This is particularly true for related party transactions in listed companies for both directors and controlling shareholders.

B. Procedural regulation of related party transactions

Disclosure helps against related party transactions, but it is not sufficient. In most jurisdictions it is supplemented by mandatory rules. While these rules originally were substantive, it became clear that fixing ceilings or the outright prohibition of certain related party transactions is too inflexible an approach and may sometimes run against the interest of the shareholders. 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 are kept – for example, in tax law under the arm's length standard – more modern regulation is procedural. Usually there are consent requirements: either ex ante or sometimes ex post; by the whole board or by independent directors; in important cases by the shareholders; and sometimes by the supervisory agency.[110] An example of a conflict of interest procedure occurs under Belgian law where a board committee of three independent directors is in charge of carrying out an assessment of the decision or transaction.[111] In groups of companies, these consent requirements may not fully work because the board of the subsidiary is most often 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,[112] may help.[113] An interesting experiment is found 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.[114]

The European Commission is considering introducing a rule for related party transactions that would require the consent of the general assembly for transactions upon a threshold of five per cent of the assets of the company, but the text of the reform proposal of the shareholder rights directive of 9 April 2014 is very controversial and under consideration of the Council (with various compromise proposals since 2014). Similarly, transactions that have a relevant impact on the profit or turnover of the corporation would be subjected to such a consent requirement. A similar rule exists under the Listing Rules of the FSA in the UK.[115] First reactions in the Member States, in particular in Germany, are highly critical because the shareholder constituency, shareholder behavior in the general assemblies, and the rules governing shareholder rights and voting differ greatly among the Member States, but the case for moving forward on a European level has been made convincingly by the Forum Europaeum on Company Groups.[116] In general the experience with shareholder approval of major transactions and the uncertainties under the German Holzmüller case suggest a careful balancing of the benefits and disadvantages of such a rule. In any case, such an initiative of the European Commission would need to take into consideration the group problem – for example, by providing for a minority shareholder vote or otherwise neutralizing the decisive influence of the parent. A compromise would be a Member State option that would allow to choose between the approval of the general assembly and the approval of the board, in the latter case the director or controlling shareholder being excluded from the vote or at least from having a determining role in the approval process.

Similar to the case of mandatory disclosure,[117] the auditors also have a role for related party transactions. The special investigation procedure by independent experts described above may help to expose hidden abuses. Other gatekeepers such as evaluation experts can 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.[118]

V. Standards for the Directors and for the Controlling Shareholder

A. Standards for the directors and the controlling shareholders in independent corporations and in groups of companies

Regulating related party transactions may practically cover a large part of the agency conflicts of directors and controlling shareholders in independent companies as well as in groups. But opportunism is not just a temptation for specific transactions; there are many other situations and business decisions that may be conflicted, such as acquisition, allocation, and distribution decisions made in the group that have different impacts for the various group member companies. It is therefore important to set the right standard for the directors if an agency conflict arises. The usual standard for the director when dealing with such conflicts is the duty of loyalty.[119] This duty is a fairness concept that is open and flexible and 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 the fact that this duty of company directors has its origins in the strict fiduciary position of the trustee under old English trust law. Due to the particularities of US procedural law, a considerable amount of case law has emerged. 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 while the former has lost some of its significance due to the import of the business judgment rule into continental Europe. Many differences still exist, however, as to the reach, the burden of proof, the litigation, and the cultural perception of certain kinds of business behavior that may or may not be acceptable socially. In some countries, these agency conflicts are not only dealt with by corporate law, but also and sometimes very much so by criminal law. For example, in France, self-dealing is a criminal *abus des biens sociaux*[120] and apparently the most frequently applied criminal rule of company law.[121] In the aftermath of the financial crisis, criminal prosecution of directors is also on the advance in countries such as Germany, Austria, and Ireland.

In groups of companies it is more difficult to find the right standard for the directors since there the conflicts are not only within the company – i.e., between the director and the shareholders – but beyond the company between 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 of granting loans to directors in the group,[122] prohibition on competition in the group, and limits for passing on information to other group members.

Standards for the controlling shareholders have been developed more slowly, unless as in exceptional cases they can be considered shadow directors.[123] They differ considerably under the national corporate laws, and the differences are striking as far as enforcement and litigation are concerned.[124] While in the US the standard is entire fairness or utmost good faith and loyalty, the standards are more lenient in continental European countries and in Japan, a fact that is due to the different shareholder structure and the economic and political influence of controlling shareholders and groups. In France there is the relatively vague concept of abuse of majority power.[125] Under German stock corporation law the use of the influence of a person over the corporation to the detriment of the corporation or its shareholders is forbidden.[126] This is not specifically addressed to controlling shareholders, but it is most important for those. 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.[127]

B. Specific standards for balancing the interests of member companies in groups

For groups of companies, the standards used by the various jurisdictions for evaluating the 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 compensate in one way or another the subsidiaries for damages suffered by intragroup transactions. In Germany, France, and Italy, an evaluation of the overall operations of an individual subsidiary and its individual transactions with the controlling company must be made.[128] In this context it has been mentioned that a rule that focuses on the individual transactions may be inefficient since in some cases it disfavors the controlling shareholder by free-riding minority shareholders while in other cases it lets the controller reap excessive private benefits.[129] German group law is the most stringent as it does not allow weighing the disadvantages or advantages the subsidiary derives from being a member of the group. The 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.[130] Spain has been advised to follow the Italian example.[131] The French Rozenblum doctrine[132] allows an even more flexible balancing of the interests of the parent and the subsidiary. The criminal courts that developed this rule allow the subsidiary to also take into consideration the interest of the group, not only its own advantages from belonging to the group.[133] The requirements for doing so are threefold: a stable structure of the group, a coherent group policy by 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, and the Reflection Group have recommended following and further developing the French Rozenblum doctrine by legally acknowledging the group management.[134] The European Commission has responded to this recommendation, and according to its Action Plan of 2012 it will come up with such an initiative.[135] But it is expected that the form of this initiative will be a mere recommendation or at the most a directive rather than a regulation that is directly applicable in the Member States, and its content will be more on the side of the group than of the minority shareholders. In the end, it may be concluded that, while there is some convergence on the standards for directors, controlling shareholders, and the parents in groups of companies despite different ownership regimes,[136] this convergence is and will be considerably less than what has been observed for disclosure, and we shall see that for creditor protection there is even less convergence.

VI. Transactions with Creditors

A. Creditor self-help and guarantees by the parent

The principle is unequivocal: no claims of creditors beyond the debtor corporation. This principle of separate legal personality that is most tightly upheld in the UK under the Salomon doctrine[137] also stands firm for group of companies and is mandatory.[138] However, there is room for self-help on the side of the creditors and for voluntary action by the debtor parent. As was said before, large voluntary creditors of a group member will usually look after themselves and either refrain from dealing or bargaining for securing their credit by collateral. By monitoring the debtor in their own interest, it is sometimes said that 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 asset partition 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*)[139] differ considerably as to their form and binding force. They may be given to a particular creditor of the group member company or can be part of a general declaration to the market, sometimes in the annual report as in the case of the Deutsche Bank. Hard and soft forms should be distinguished carefully: in the former case, the parent stands up as a second debtor or as a guarantor of the debt;[140] in the latter, this is a more or less meaningful letter of intent depending 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, not a promise about future conduct.[141] In France, a distinction is made between the *obligation de moyens* and the *obligation de résultat*, with only the latter giving the creditor a full guarantee of repayment.[142] In the bond market, such guarantees are frequent, but again with highly different reach and content.[143] In a way, the German contractual groups can also be mentioned in this context, since by entering such a group contract, the parent voluntarily accepts the liability to the creditors of the subsidiary in return for the liberty to steer the group in the group interest.[144] But in the end, as practice shows and theory confirms, self-help is not a full substitute for creditor protection by mandatory law.[145]

B. Standards for the directors and the controlling shareholders

In the stage before outright insolvency, mandatory law protects group creditors mainly by standards and liability of the directors and controlling shareholders. General creditor protection by disclosure rules has been described above. Legal capital requirements, as controversial as they are, and protection by limitations on asset distributions to shareholders are not treated here.[146] In normal times, these standards of conduct protect both shareholders and creditors. Actions of the management with the consent of the parent that are harmful to minority shareholders are 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. In principle, this is true for most jurisdictions. Prototypes are the wrongful trading of directors in the UK, the French *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.[147] While these concepts of creditor protection differ considerably as to their reach, standards, entitled claimants,[148] and doctrinal nature, in the present context it suffices to state 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, and the receiver brings the claim against the director or controlling shareholder. But the liability is rooted in the wrongful conduct of the directors before, namely in the vicinity of insolvency, and the standard is not only fraud but negligence. The difficulty for the courts in applying this standard is on the one hand not to discourage directors from taking risks that may reasonably be expected to save the company, but on the other not to allow them to engage in risky speculations at the expense of the creditors if the company has no prospects to go on (gambling for resurrection). The liability imposed on the directors is special insofar as it is not just a normal tort liability with the requirement of causation of the specific damage, but the judge may 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 director is used by many jurisdictions, including the US, the UK, France, Germany, Italy, the Netherlands, Spain, and Switzerland.[149] These jurisdictions vary in the requirements for this liability of the controlling shareholder. Some are very reticent to do so. The prototype is the UK. There a company is not regarded as a shadow director by reason only that the directors of the subsidiary are accustomed to act on the instructions of the parent.[150] This led commentators to state: "So, this is not 'group law' by the back door."[151] But functionally it is, though in a very limited and carefully balanced way. Case law in some other jurisdictions seems less restrictive. The French courts treat controlling shareholders and parents as *dirigeant de fait* if they continuously mix themselves in the management and control of the company or subsidiary.[152]

A different instrument for holding parent companies liable well before insolvency should still be mentioned. In Switzerland the parent may be held liable for the debts of the subsidiary if it creates the factual appearance of an economic unity of the group.[153] This concept is based on the reliance of the creditors and on the responsibility of the parent for this reliance. This instrument has gained some sympathy in Germany, Austria, and France, but case law is rare and the majority of legal academia is not convinced.[154]

C. Indemnification, veil-piercing, subordination, and substantive consolidation

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

A very far-reaching, group-specific means of creditor protection is indemnification. It is a mechanism codified in the German Stock Corporation Act for protecting the creditors of the subsidiary in a de facto group of companies, and it characterizes the regulatory model of special group law regulation described above. As mentioned there,[155] 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 mixing into the management and control of the subsidiary as the aforementioned condition for treating the parent as a de facto director. Instructions to the subsidiary are not necessary, mere recommendations or advice may qualify for the requirement of causation, and the recommendations need not be addressed to the directors of the subsidiary but may consist in resolutions taken by the general assembly and in acts of the representatives of the parent in the board of the subsidiary.[156] The relevant criterion is the disadvantage for the subsidiary under an arm's length standard for fully independent companies. In practice all kinds of group contributions (*Konzernumlagen*) to the parent or to other subsidiaries for which there are no equivalent individual benefits for the subsidiary are considered to be disadvantages.[157]

Veil-piercing or lifting the corporate veil is another mechanism that is used in many jurisdictions, both outside and in insolvency. It means that the veil created by the limited liability of the legal person is pierced, and the two entities or persons are treated as only one for the 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. On the one end is the UK where the courts seem to be very reluctant to use this instrument and treat it as definitely more demanding than the concept of the shadow director.[158] In *Adams v Cape Industries*, an asbestos case, the court upheld the limited liability of the parent against the asbestos victims of products distributed by one of its subsidiaries.[159] The observation of a 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."[160] German courts also lift the corporate veil only rarely and under very tight requirements.[161] On the other side of the spectrum seems to be the US, where the courts use this mechanism more frequently.[162] To be sure, we are dealing here with the corporate law mechanism of lifting the veil. When it comes to competition law, for example, there is much more willingness on the side of the antitrust authorities and the courts to hold the parent responsible for antitrust violations of its subsidiary.[163] As mentioned above, group legislation and regulation for specific areas is special since it has very different regulatory objectives. For competition law, this may amount to a liability of the parent without real negligent behavior if a subsidiary commits an antitrust violation, a rather controversial result.

The two mechanisms that are common to insolvency law in many countries are subordination and substantive consolidation. Subordination is known in many countries such as Austria, Germany, Italy, Spain, the US, and New Zealand, but not in the UK.[164] In subordination, the 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,[165] since the subordinated claims still rank before all equity that is held by the parent and other shareholders. The requirements for subordination as an insolvency mechanism differ considerably, reaching from inequitable behavior[166] to automatic subordination of shareholder credits given to the company under German insolvency law.

The insolvency regime can go further and allow the insolvency courts to consolidate the insolvency proceedings of several group members.[167] Consolidation can be merely procedural, in which case the companies belonging to the group are treated as a single unit under one bankruptcy proceeding. Consolidation can also be substantive, when the assets and/or debts of the different group members are pooled together. Procedural consolidation is possible, for example, under the New Zealand Companies Act 1993, and substantive consolidation is provided for under US insolvency law.[168] Under French and Belgian insolvency law, intermingling of assets (*action en confusion de patrimoine*) may lead to extending the insolvency of one company to another.[169] But this mechanism should be used with caution and is applied only when there is a real intermingling of the assets of the two corporations, and usually a fault on the side of the parent is necessary.[170] The normal legal and commercial relationship between parent and subsidiary is not sufficient. Usually the insolvencies of multinational groups present particular difficulties. These difficulties are due not only to the different applicable laws and competent receivers and insolvency authorities, but also to the open or, in most cases, hidden opportunism of the latter in favor of their own national companies and creditors. Efforts to agree on international consolidation have been going on for a long time, but up to now only some steps in the direction of procedural consolidation have been made.

In the end, it may be concluded that creditor protection, in particular in corporate groups, is considered by many jurisdictions to be an agency conflict that needs to be regulated. But the strategies and mechanisms used for doing so are equivalent in function only on 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 the independent company and the groups of companies by disclosure and, though less so, by standards, we would hardly dare to confirm this for creditor protection as well.

VII. Control transactions

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.[171] The typical agency problems in takeovers exist between the directors and the shareholders of the target, on the one hand, and between the majority and the minority shareholders of the target as to the premium and a possible exit, on the other.[172] For the first conflict, there are the fundamentally different positions of the UK and many continental European states that have the anti-frustration rule, and the US and other continental European states that give the directors full liberty to decide whether to refuse or accept the bid.[173] As to the second conflict, a similar divide exists concerning the mandatory bid and the sharing rule for the minority shareholders.[174] In takeovers the situations and problems are different when the shareholders are diverse on the side of the target or there is a controlling shareholder.[175]

Takeover regulation was developed first and primarily in the US and the UK where there is no – or no consistent – group law. In countries such as Germany, with an extensive, codified group law, takeover regulation appeared only very late. This is no coincidence since group law deals with some of the agency problems of minority shareholders at a later stage, namely when the group exists and the minority needs protection. Takeover regulation, in particular by the mandatory bid, comes in at a much earlier stage and allows the exit of the minority shareholders at the same price as those shareholders who accept the bid. The mandatory bid is a protective mechanism at the stage when a new controlling bidder might come in. The mandatory bid has therefore been considered functionally to be a group law provision, offering protection by exit before the (new) group is formed.[176] This is true even in cases of mere transfer of control by 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 control power and therefore might prefer an early exit at a fair price.[177] The exit after the takeover has been successful, either by squeeze-out or sell-out, can be allowed by takeover law and/or general corporate law. 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[178] the dangers for the minority may be greater in groups.[179] As to convergence, the findings are mixed. On the one hand, takeover regulation has spread from the US and the UK all over continental Europe and well beyond into Japan and other countries. But as to dealing with agency conflicts, the policies remain fundamentally different as the cleavage between the countries with and without the anti-frustration rule and with and without the mandatory bid show.

VIII. Conclusion

1. The phenomenon of the 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.

2. Two main agency problems arise in groups of companies: between the controlling shareholder and the minority shareholders and 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.

3. There are three main 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); and regulation by areas of the law such as banking, competition, and tax law (to be found in many countries, either combined with the first or the 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. A fair amount of international convergence, at least for listed companies, can be observed.

5. Related party transactions are a main area of concern for corporate and group law provisions. Specific disclosure is usually combined with consent requirements and other procedural regulation of related party transactions.

6. In addition, appropriate standards for directors and controlling shareholders for 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 is 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 flexible standards in Italy, France, and other countries.

7. Protection of creditors can be achieved to a certain degree by self-help and guarantees by the parent. But mandatory protection is still considered necessary. There are various national standards for the directors and controlling shareholder in the independent company as well as in groups of companies. 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.

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

9. A second group of conflicted transactions besides related party transactions comprise 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 is some convergence, in particular in Europe, but fundamental differences remain as to the anti-frustration rule and the mandatory bid.

[#] This article is to be published as ch. II 26 *Groups of Companies* in Jeffrey Gordon/Georg Ringe, eds., OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE, Oxford University Press 2015. The names of journals and reviews are usually spelt out only for the first time; later on the usual abbreviation is used.

[1] Francesco Chiappetta/Umberto Tombari, *Perspectives on Group Corporate Governance and European Company Law*, 9 EUROPEAN COMPANY AND FINANCIAL LAW REVIEW (ECFR) 261 (2012) at 265.

[2] Jeffrey N. Gordon/Wolf-Georg Ringe, *Bank Resolution in the European Banking Union: A Transatlantic Perspective on What it Would Take,* http://www.ssrn.com/link/oxford-legal-studies.html, August 2014, p. 45.

[3] Marcello Bianchi/Magda Bianco/Luca Enriques, *Pyramidal Groups and the Separation Between Ownership and Control in Italy*, in: Fabrizio Barca/Marco Becht, eds., THE CONTROL OF CORPORATE EUROPE, Oxford 2001, p. 154-187; M. Bianchi/A. Ciavarella/L. Enriques/V. Novembre/R. Signoretti, *Regulation and self-regulation of related party transactions in Italy, An empirical analysis,* CONSOB Working Paper 75, January 2014; Heitor V. Almeida/Daniel Wolfenzon, *A Theory of Pyramidal Ownership and Family Business Groups,* 61 JOURNAL OF FINANCE 2367 (2006); Joseph P. H. Fan/T. J. Wong/Tianyu Zhang, *Institutions and Organizational Structure: The Case of State-Owned Corporate Pyramids,* JOURNAL OF LAW, ECONOMICS & ORGANIZATION 29 (2013) 1217; 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, p. 94-100.

[4] John H. Dunning, *Multinational Enterprises in the 1970's: An Economist's Overview of Trends, Theories and Policies*, in: Klaus J. Hopt, ed., EUROPEAN MERGER CONTROL, Berlin, New York 1982, p. 3-23.

[5] Christian Kirchner, *Ökonomische Überlegungen zum Konzernrecht,* ZEITSCHRIFT FÜR UNTERNEHMENS- UND GESELLSCHAFTSRECHT (ZGR) 1985, 214-234.

[6] Forum Europaeum Corporate Group Law, *Corporate Group Law for Europe*, EUROPEAN BUSINESS ORGANIZATION LAW REVIEW (EBOR) 1 (2000) 165 at 185-187; John Kluver, *European and Australian proposals for Corporate Group Law: a comparative analysis,* 1 EBOR 287 (2000) at 292-293.

[7] *Aktienkonzern* in Germany.

[8] Peter Hemeling, chief legal counsel of the German insurance giant Allianz, on the choice of the SE for the parent.

[9] Wolfgang Schön, *Perspektiven der Konzernbesteuerung*, ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT (ZHR) 171 (2007) 409-445.

[10] For Australia see Kluver, *supra* note 6, 1 EBOR 287 (2000) at 290-291.

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

[12] Dual-headed structure, Peter Böckli, SCHWEIZER AKTIENRECHT, 4th ed., Zurich et al. 2009, § 11 comments 149-153 with references; on the difficulties of bi-national groups, many of which failed for nonfinancial reasons, Wilhelm F. Bayer, *Horizontal Groups and Joint Ventures in Europe: Concepts and Reality,* in: Klaus J. Hopt, ed., GROUPS OF COMPANIES IN EUROPEAN LAWS, Berlin/New York 1982, p. 3-17.

[13] Prototypes are the trading companies of the 17th 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, Amsterdam (deminor) 2003, p. 49-114.

[14] Barca/Becht, *supra* note 3, with an enumeration of further studies.

[15] Marco Becht, *Beneficial Ownership in the United States,* in Barca/Becht, supra note 3, p. 285-299.

[16] Marc Goergen/Luc Renneboog, *Strong Managers and Passive Institutional Investors in the UK,* in: Barca/Becht, supra note 3, p. 259-284.

[17] This is just a prevailing pattern. In European countries, groups with dispersed shareholders are on the advance: for example, the German Stock Exchange in Germany.

[18] Klaus J. Hopt/Katharina Pistor, eds., UNTERNEHMENSGRUPPEN IN MITTEL- UND OSTEUROPÄISCHEN LÄNDERN, Tübingen 2003; Martin Winner, ed., HAFTUNGSRISIKEN FÜR DIE KONZERNMUTTER IN MITTEL- UND OSTEUROPA, 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 (2001) at 4-9.

[19] See for example OECD Guidelines for Multinational Enterprises of 1976, update 2011.
[20] Cf. German Monopolies Commission, biannual reports on economic concentration; on concentration in Germany, Volker Emmerich/Mathias Habersack, KONZERNRECHT, 10th ed., Munich 2013, § 1 III comments 19-28; for France see Paul Le Cannu/Bruno Dondero, DROIT DES SOCIÉTÉS, 3e éd., Paris 2009, nos 1519-1537.
[21] Chiappetta/Tombari, *supra* note 1, 9 ECFR 261 (2012) at 265-268 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 s. with tunnelling cases from the US; Bianchi et al. 2014, *supra* note 3, for Italian regulation and self-regulation of related party transactions; on binational groups Bayer, *supra* note 12.
[22] 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: Clive M. Schmitthoff/Frank Wooldridge, eds., GROUPS OF COMPANIES, London 1991, p. 81-110; for Belgium, Pierre van Ommeslaghe, *Les groupes de sociétés et l'expérience du droit belge,* in: Klaus J. Hopt, ed., GROUPS OF COMPANIES IN EUROPEAN LAWS, Berlin/New York 1982, p. 59-98.
[23] Reinier Kraakman/John Armour/Paul Davies/Luca Enriques/Henry Hansmann/Gerard Hertig/Klaus Hopt/Hideki Kanda/Edward Rock, THE ANATOMY OF CORPORATE LAW, Oxford 2d ed. 2009, p. 35-53, cited as Anatomy.
[24] See supra I B.
[25] Anatomy, *supra* note 23, p. 55-87; cf. the survey on group law in Germany, France, UK, USA, the European Union and Switzerland in Peter Böckli, *supra* note 12, § 11; 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.
[26] A special case includes the groups that are controlled by two or more shareholders at parity, so-called parity groups (*Gleichordnungskonzerne*). There the problem is the sharing of the control, not the agency conflict with the management of the subsidiary.
[27] Supra I B.
[28] For an international comparison of private benefits of control, see Alexander Dyck/Luigi Zingales, *Private Benefits of Control: An International Comparison,* 59 Journal of Finance 537 (2004); Anatomy, *supra* note 23, p. 89-113, in particular p. 107-113, 178; 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.
[29] Anatomy, *supra* note 23, p. 89-113, 98-99, as to creditor protection p. 127-128.
[30] Cf. Emmerich/Habersack, *supra* note 20, § 1 III 3 and in more detail for German group law infra II B.
[31] Luca Enriques/Paolo Volpin, *Corporate Governance Reforms in Continental Europe,* 21 Journal of Economic Perspectives 117 (2007) at 122-125.
[32] Klaus J. Hopt, *European Takeover Reform of 2012/2013 – Time to Re-examine the Mandatory Bid,* 15 EBOR 143 (2014) at 173-176.
[33] Bianchi et al. in Barca/Becht, *supra* note 3, p. 154-187.
[34] German Bundesgerichtshof, Decisions BGHZ 83, 122 (1982), Holzmüller case; but see also the BGHZ 159, 30 (2004), Gelatine case.
[35] Anatomy, *supra* note 23, p. 115-151: Transactions with Creditors.
[36] Anatomy, *supra* note 23, p. 127-128; Marianne Bertrand/Paras Mehta/Sendhil Mullainathan, *Ferreting Out Tunneling: An Application on Indian Business Groups,* 117 QUARTERLY JOURNAL OF ECONOMICS 121 (2002) with experience from India.
[37] See infra III B.
[38] Anatomy, *supra* note 23, p. 116.
[39] For employees in this sense, Anatomy, *supra* note 23, p. 100-113.
[40] See Jeffrey Gordon/Georg Ringe, eds., OXFORD HANDBOOK OF CORPORATE LAW AND CORPORATE GOVERNANCE, Oxford 2015, chapter V 46.
[41] As to mandatory corporate law in the context of disclosure, see Anatomy, *supra* note 23, p. 277-298.
[42] Infra V A.
[43] 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 3, p. 228-258.
[44] Gower/Davies, PRINCIPLES OF MODERN COMPANY LAW, 9th ed. (Paul L. Davies/Sarah Worthington), London 2012, part 4, p. 687-717, 719-747; Paul L. Davies, INTRODUCTION TO COMPANY LAW, 2d ed., Oxford 2010, p. 95-100; Janet Dine, THE GOVERNANCE OF CORPORATE GROUPS, Cambridge 2000; D. D. Prentice, *Groups of Companies: The English Experience,* in: Hopt, *supra* note 22, p. 99-130.
[45] As to the concept and the economic advantages of asset partitioning, see Anatomy, *supra* note 23, p. 10.
[46] Henry Hansmann/Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts,* 100 Yale L. J. 1879 (1991).
[47] *Salomon v A. Salomon & Co. Ltd.*, (1897) Appeal Cases 22.
[48] Davies 2010, *supra* note 44, p. 96.

[49] *Re Hydrodan (Corby) Ltd* (1994) 2 BCLC 180; *Re Paycheck Services 3 Ltd* (2009) 2 BCLC 309, CA; both referred to by Davies 2010, *supra* note 44, p. 97; see infra VI A.
[50] See infra VI B.
[51] Davies 2010, supra note 44, p. 232-238.
[52] Davies 2010, supra note 44, p. 99 and 100.
[53] 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 at 49-62; idem, *Europäisches Konzernrecht: Vom Schutzrecht zum Enabling Law,* DIE AKTIENGESELLSCHAFT 2013, 184 at 191-195.
[54] Tobias H. Tröger, *Corporate Groups, A German's European Perspective,* SAFE Working Paper, Frankfurt am Main, September 22, 2014; Emmerich/Habersack, *supra* note 20. 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 22, p. 21-43.
[55] The German Aktien-Konzernrecht is regulated in the Stock Corporation Act third book on affiliated enterprises (Art. 291-328) together with general definitions (Art. 15-19). There are also general corporate group disclosure duties (Art. 20-22), but they have lost their relevance because of more far-reaching capital market disclosure rules under European law.
[56] Volker Emmerich/Mathias Habersack, *supra* note 20, parts 4, 5 and 6; see list of landmark cases in Hopt in Schmitthoff/Woldridge, *supra* note 22, p. 84 note 15.
[57] Stock Corporation Act, Art. 18, 302, 309.
[58] Emmerich/Habersack, *supra* note 20, § 11 comment 6: rare for stock corporations, more frequent for limited liability companies (GmbH).
[59] Stock Corporate Act, Art. 18, 311. See in more detail infra VI B.
[60] Cf. Jochen Vetter in Karsten Schmidt/Marcus Lutter, eds., AKTIENGESETZ KOMMENTAR, 2d ed., Cologne 2010, § 311 comments 8 and 9, but with the remark that German practices have learned to live with the law.
[61] So called "Existenzvernichtungshaftung", i.e., responsibility for "annihilating the existence of an enterprise", Johanna Kroh, DER EXISTENZVERNICHTENDE EINGRIFF, Tübingen 2013.
[62] Paola Fasciani, *Groups of Companies: The Italian Approach,* 4 ECFR 195 (2007) at 202-231; Umberto Tombari, DIRITTO DEI GRUPPI DI IMPRESE, Milan 2010.
[63] Cass. crim., 4 February 1985 (Rozenblum), Dalloz 1985, p. 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. See infra V C.
[64] See infra IV C 3.
[65] Yves De Cordt/Patricia Colard, *Groups of companies governance in Belgium,* Stefan Grundmann et al., FESTSCHRIFT FÜR KLAUS J. HOPT ZUM 70. GEBURTSTAG, Berlin/New York 2010, vol. 2, p. 3043 at 3047-3050; van Ommeslaghe, *supra* note 22.
[66] Cf. Anatomy, *supra* note 23, p. 141.
[67] Embid Irujo, *supra* note 11.
[68] Knut Rohde, *Groups of Companies in Scandinavian Company Law,* in: Hopt, *supra* note 22, p. 142-152; but see also supra II A for social control.
[69] Eiji Takahashi, *Japanese Corporate Groups under the New Legislation,* 3 ECFR 287-309 (2006).
[70] Forum Europaeum Corporate Group Law, *supra* note 6, 1 EBOR 165 (2000) at 197-207.
[71] High Level Group of Company Law Experts, *supra* note 3, ch. 5.1-4, at 94-100.
[72] Reflection Group, REPORT ON THE FUTURE OF EU COMPANY LAW (for the European Commission), Brussels, 5 April 2011, ch. 4, p. 59-75, 79-80.
[73] 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 54, p. 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 had not been successful, see the comprehensive survey on groups of companies in the EU by Stefan Grundmann, EUROPEAN COMPANY LAW - ORGANIZATION, FINANCE AND CAPITAL MARKETS, 2d ed., Cambridge et al., 2012, § 31. As to the proposal for related party transactions more specifically, see *infra* IV B with note 116.
[74] Davies 2010, *supra* note 44, p. 96.

[75] Grundmann, *supra* note 73, § 16 (Seventh Directive). As to the IFRS special regime for publicly traded groups see idem, *supra* note 73, § 18. Audit of consolidated accounts is standard all through Europe. See also infra IV A Disclosure.

[76] Moritz Renner, *Kollisionsrecht und Konzernwirklichkeit in der transnationalen Unternehmensgruppe,* ZGR 2014, 452-486.

[77] Peter Hommelhoff/Klaus J. Hopt/Marcus Lutter, eds., KONZERNRECHT UND KAPITALMARKTRECHT, Munich/Vienna/Berne 2001, with general report and country reports; Klaus J. Hopt, *Konzernrecht: Die europäische Perspektive,* ZHR 171 (2007) 199 at 231-232, 233-235; High Level Group of Company Law Experts, *supra* note 3, ch. 5. 4, at 99-100: no separate listing of subsidiaries in the parent is listed.

[78] Basel Committee on Banking Supervision (Bank for International Settlements), JOINT FORUM, PRINCIPLES FOR THE SUPERVISION OF FINANCIAL CONGLOMERATES, September 2012; Eddy Wymeersch, *Financial Institutions as Members of Company Groups in the Law of the European Union,* 2 EBOR 81 (2001); Hopt, *supra* note 77, ZHR 171 (2007) 199 at 206/207; Tobias Tröger, *Konzernverantwortung in der aufsichtsunterworfenen Finanzbranche,* ZHR 177 (2013) 475; idem, *Organizational Choices of Banks and the Effective Supervision of Transnational Financial Institutions,* Tex. Int'l L. J. 48 (2013) 177; Jens-Hinrich, *Interne Corporate Governance im Bankkonzern,* in: Klaus J. Hopt/Gottfried Wohlmannstetter, eds., HANDBUCH CORPORATE GOVERNANCE VON BANKEN, Munich 2011, p. 686; Klaus J. Hopt, *Corporate Governance of Banks and Other Financial Institutions After the Financial Crisis,* 13 JOURNAL OF CORPORATE LAW STUDIES (JCLS) 219-253 (2013). For the European Solvency II directive and the supervision of insurance companies see Meinrad Dreher/Christoph Ballmeier, *Solvency II und Gruppenaufsicht,* ZGR 2014, 753.

[79] Horst Eidenmüller/Tilmann Frobenius, *Ein Regulierungskonzept zur Bewältigung von Gruppeninsolvenzen: Verfahrenskonsolidierung im Kontext nationaler und internationaler Reformvorhaben,* ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (ZIP) 2013, suppl. to issue 22, p. 1-20; Heribert Hirte, *Towards a Framework for the Regulation of Corporate Groups' Insolvencies,* 5 ECFR 213-236 (2008); Michele Reumers, *Cooperation between Liquidators and Courts in Insolvency Proceedings of Related Companies under the Proposed Revised EIR <European Insolvency Regulation>,* 10 ECFR 554 (2013) pleading for cooperation in multinational insolvencies; as to veil piercing in insolvency in New Zealand, see Davies 2010, *supra* note 44, p. 100.

[80] Cf. Paul L. Davies, *Labour Law and Multinational Groups of Companies,* in: Hopt, supra note 22, p. 208; the fundamental monography by Christine Windbichler, ARBEITSRECHT IM KONZERN, Munich 1989.

[81] Strict parent liability according to the European Court of Justice, 8 May 2013, Case 508/11 P (ENI), EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (EUZW) 2013, 544 with note Nehl; European Court of Justice, 26 September 2013, NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT (NZG) 2014, 65; Meinrad Dreher, *Groups of Undertakings and Competition – Regulatory Approaches in Europe,* 2 EBOR 187-221 (2001); Christian Kersting, *Wettbewerbsrechtliche Haftung im Konzern,* DER KONZERN 2011, 445-459.

[82] 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 317-352 (2000) mainly for the USA.

[83] Schön, *supra* note 9, ZHR 171 (2007) 409; Hopt, *supra* note 77, ZHR 171 (2007) 199 at 206.

[84] But see Gordon/Ringe, *supra* note 40, ch. V 43 and 48 for banks and financial regulation; ch. 44 on insolvency law; ch. 46 on employment and industrial regulation; and ch. 49 on tax.

[85] 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 I C before 1.

[86] Konstantinos Sergakis, LA TRANSPARENCE DES SOCIÉTÉS COTÉES EN DROIT EUROPÉEN, Paris 2013.

[87] Anatomy, *supra* note 23, p. 277-294; Hanno Merkt, *Creditor Protection Through Mandatory Disclosure*, 7 EBOR 95-122 (2006).

[88] For references for and against, see Anatomy, *supra* note 23, p. 279-280.

[89] For the various group disclosure rules in Italy, see Fasciani, *supra* note 62. For Switzerland cf. Peter Weber/Heinz Zimmermann/Beat Brändli, *The Price Effects of Disclosure of Significant Holdings in Listed Companies: The Case of Groups Acting in Concert,* SZW 2012, 198.

[90] Rüdiger Veil, *§ 20 Transparency of Major Shareholdings and Financial Instruments,* in Rüdiger Veil, ed., EUROPEAN CAPITAL MARKETS LAW, Oxford/Portland 2013, p. 310-347. 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,* HARV.BUS.L.REV. 2 (2012) 39.

[91] Anatomy, *supra* note 23, p. 181.

[92] Stock Corporation Act, Art. 312; cf. Emmerich/Habersack, *supra* note 20, § 26.

[93] On financial accounting information in Europe, see Hendrik Brinckmann, *Periodic Disclosure,* in Veil, *supra* note 90, § 18 comment 30-34. The Forum Europaeum Corporate Group Law, *supra* note 6, 1 EBOR 165 (2000) at 191-196 and the High Level Group of Company Law Experts 2002, supra note 3, ch. V.2., at 95-96 pleaded for better information on the single group members, in particular the subsidiaries.

[94] Hopt, *supra* note 77, ZHR 171 (2007) 199 at 208/209, 213-216.

[95] On gatekeepers, see Anatomy, *supra* note 23, p. 128-130.

[96] Supra II C.
[97] Art. 225-231 French code de commerce, Le Cannu et al., *supra* note 20, nos 945-951, special report by the commissaire de compte, no. 756, 506-524; Maurice Cozian/Alain Viandier/Florence Deboissy, DROIT DES SOCIÉTÉS, 22e éd., Paris 2010, nos 404-408, 1524.
[98] Kluver, *supra* note 6, 1 EBOR 287 (2000) at 298 et s.
[99] Forum Europaeum Corporate Group Law, *supra* note 6, 1 EBOR 165 (2000) at 207-217; 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 (2000) at 273; High Level Group of Company Law Experts 2002, supra note 3, ch. 3.4, at 57-59; Klaus J. Hopt, *Comparative Corporate Governance: The State of the Art and International Regulation*, AM. J. COMP. L. LIX (2011) 1 at 57-58.
[100] 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: Guido Ferrarini/Klaus J. Hopt/Jaap Winter/Eddy Wymeersch, eds., REFORMING COMPANY AND TAKEOVER LAW IN EUROPE, Oxford 2004, p. 51-88; idem, *Conflict of Interest, Secrecy and Insider Information of Directors, A Comparative Analysis*, 10 ECFR 167-193 (2013). The most recent book on conflict of interest is by Christoph Kumpan, DER INTERESSENKONFLIKT IM DEUTSCHEN PRIVATRECHT, Tübingen 2014.
[101] Hopt, supra note 100, 10 ECFR 167-193 (2013).
[102] See Anatomy, *supra* note 23, Ch. 6 on related party transactions and specifically for controlling shareholders p. 157, 166; 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, October 2014; Holger Fleischer, *Related Party Transactions bei börsennotierten Gesellschaften: Deutsches Aktien(konzern)recht und Europäische Reformvorschläge*, BETRIEBS-BERATER 2014, 2691-2700.
[103] 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 JCLS 495 (2011).
[104] Atanasov/Black/Ciccotello 2011, *supra* note 21; Simeon Djankov/Rafeal La Porta/Florencio Lopez-de-Silanes, Andrei Shleifer, *The Law and Economics of Self-Dealing*, JOURNAL OF FINANCIAL ECONOMICS 88 (2008) 430; Simon Johnson/Rafael La Porta/Florencio Lopez-de-Silanes/Andrei Shleifer, *Tunneling*, 90 AMERICAN ECONOMIC REVIEW, PAPERS AND PROCEEDINGS 22 (2000); Jeremy Grant/Tom Kirchmaier/Jodie A. Kirshner, *Financial Tunnelling and the Mandatory Bid Rule*, 10 EBOR 233; Klaus J. Hopt, *Self-Dealing and Use of Corporate Opportunities and Information: Regulating Directors' Conflict of Interest*, in: Klaus J. Hopt/Gunther Teubner, eds., CORPORATE GOVERNANCE AND DIRECTORS' LIABILITIES, Berlin/New York 1985, p. 285-326.
[105] Djankov et al., supra note 104, 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 Directors' Conflicts of Interest: Getting a Balance?*, 12 JCLS 129 (2012).
[106] Anatomy, *supra* note 23, p. 155-161, 277-289.
[107] Bianchi et al. 2014, *supra* note 3.
[108] Supra III A.
[109] Anatomy, *supra* note 23, p. 158-161.
[110] Keay, *supra* note 105, 12 JCLS 129 (2012); OECD, *supra* note 103, p. 30 at p. 35 et s.: a long comparative list on 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 Commission (Commission bancaire, as it was called at that time), Van Ommeslaghe, *supra* note 22, p. 59 at 79 -91.
[111] De Cordt/Colard, *supra* note 65, FESTSCHRIFT FÜR HOPT 2010, p. 3043 at p. 3046-3053.
[112] Kluver, s*upra* note 6, 1 EBOR 287 (2000) 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 (JARAF) 2-12 (2013).
[113] For details, see Anatomy, *supra* note 23, p. 92-94.
[114] Bianchi 2014, *supra* note 3, 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*, available at http://www.sssn.com/abstract=965398, 2007.
[115] Paras 11.1.7 and 11.1.11 of the Listing Rules der Financial Conduct Authority (FCA) as of January 2015, http://media.fshandbook.info/content/FCA/LR.pdf (5 per cent up).
[116] Forum Europaeum on Company Groups, *Proposal to Facilitate the Management of Cross-Border Company Groups in Europe*, 12 ECFR (2015), forthcoming (cf. already the proposal of the Forum Europaeum Corporate Group Law, *supra* note 6). As to other reactions see Tim Drygala, *Europäisches Konzernrecht: Gruppeninteresse und Related Party Transactions*, DIE AKTIENGESELLSCHAFT 2013, 198 at 208-210; see also

the contributions by Enriques and Fleischer, *supra* note 102. For Germany see also Peter Hommelhoff, *Ein Neustart im europäischen Konzernrecht*, KÖLNER ZEITSCHRIFT ZUM WIRTSCHAFTSRECHT 02.2014 I 63; Christoph H. Seibt, *Richtlinienvorschlag zur Weiterentwicklung des europäischen Corporate Governance-Rahmens*, DER BETRIEB 2014, 1910; Christoph H. Seibt, *Regulierung von Transaktionen mit nahestehenden Personen und Unternehmen durch den Vorschlag der Europäischen Kommission zur Revision der Aktionärsrechterichtlinie – Zusätzliche Vorabinformationen und Geschäftsführung durch die Hauptversammlung?* in: Bundesverband der Deutschen Industrie e.V., ed., ERFORDERLICHE HARMONISIERUNG ODER UNNÖTIGER SYSTEMBRUCH? DER VORSCHLAG DER EU-KOMMISSION ZU RELATED PARTY TRANSACTIONS, Berlin 2014, p. 6; Jochen Vetter, *Regelungsbedarf für "Related Party Transaction"*, ZGR 2015, issue 2/3, forthcoming. For Italy see M. Bianchi/A. Ciavarella/L. Enriques/V. Novembre/R. Signoretti, *Regulation and self-regulation of related party transactions in Italy, An empirical analysis*, CONSOB (Rome) 75, January 2014.
[117] Supra III C.
[118] De Cordt/Colard, *supra* note 65, FESTSCHRIFT FÜR HOPT 2010, at p. 3052.
[119] For comparative details, see Anatomy, *supra* note 23, p. 173-178; Hopt, *supra* note 100, 10 ECFR 167 (2013) with examples and case law, p. 175 et s.: fraud, loans and credit to directors, self-dealing, competition with the company, corporate opportunities, wrongful profiting from positions, remuneration, and ongoing duty of loyalty.
[120] Art. L. 241-3, L. 242-6 Code de commerce, Conac/Enriques/Gelter, *supra* note 105, p. 518-519.
[121] Cozian et al., *supra* note 97, no. 623 p. 337.
[122] Hopt, *supra* note 77, ZHR 171 (2007) 199 at 236.
[123] This concept is more important for creditor protection and therefore dealt with: infra VI B.
[124] Anatomy, *supra* note 23, p. 175-178.
[125] Cozian et al., *supra* note 97, nos 381-382.
[126] Art. 117 of the German Stock Corporation Act.
[127] Linotype case, German Bundesgerichtshof, Decisions BGHZ 103, 184 (1988) concerning an abusive dissolution of a limited liability company by the majority shareholder.
[128] Anatomy, *supra* note 23, p. 176-178.
[129] Jens Dammann, *Corporate Ostracism: Freezing out Controlling Shareholders*, 33 J. CORP. L. 681-744 (2008) 692-699, summing up at 744.
[130] Art. 2497 para 1 Codice civile (since the reform of 2004): vantaggi compensative; 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 11, 6 EBOR 65 (2005) at 85; Fasciani, *supra* note 62, 4 ECFR 195 (2007) at 219 et s.; for group corporate governance, Chiappetta/Tombari, *supra* note 1, 9 ECFR 261 (2012) at 268-271 with the Pirelli experience.
[131] Embid Irujo, *supra* note 11, 6 EBOR 65 (2005) 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 (2006) at 368-369.
[132] Supra II B.
[133] Cozian et al., *supra* note 97, nos 1483-1486, 1490; Le Cannu et al., *supra* note 20, nos 1496 et s., 1576; Maggy Pariente, *The Evolution of the Concept of "Corporate Group" in France*, 4 ECFR 317 (2007) at 321-330: group interest; Boursier, *supra* note 63.
[134] Forum Europaeum Corporate Group Law, *supra* note 6, 1 EBOR 165 (2000) at 197-207; Hopt, *supra* note 77, ZHR 171 (2007) 199 at 222 et s.; High Level Group of Company Law Experts, *supra* note 3, ch. 5.5., at 96-98; Reflection Group 2011, *supra* note 72; 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).
[135] EU Commission, ACTION PLAN 2012, supra note 73; for reactions in Germany, see Hopt, supra note 73, ZGR 2013, 165-215; Teichmann, supra note 53; Drygala, *supra* note 116.
[136] On path-dependency and convergence for the regulation of conflict of interest and the duty of loyalty, see Hopt, *supra* note 100, 10 ECFR 167 at 16-171. For a discussion of the limited relevance of ownership regimes for related party transactions and pertinent standards of directors and controlling shareholders, see Anatomy, *supra* note 23, p. 179-182.
[137] Supra II A.
[138] Supra III A. On creditor protection, see Horst Eidenmüller/Wolfgang Schön, eds., THE LAW AND ECONOMICS OF CREDITOR PROTECTION, The Hague 2008.
[139] T. W. Cashel, *Groups of Companies – Some US Aspects*, in: Schmitthoff/Wooldridge, *supra* note 22, p. 20 at 38-40 with English and American case law.
[140] Examples: German Bundesgerichtshof, NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2010, 144, 3443; Court of Appeals of Düsseldorf, WERTPAPIER-MITTEILUNGEN (WM) 2011, 601. For more case law, see Klaus J. Hopt in Adolf Baumbach/Klaus J. Hopt, eds., HANDELSGESETZBUCH (COMMERCIAL LAW COMMENTARY), 36th ed., Munich 2014, § 349 comments 22 et s.

[141] *Kleinwort Benson Ltd. v Malaysia Mining Corp. Bhd* (1989) 1 All ER 785, CA, also referred to by Davies 2010, *supra* note 44, p. 96 note 73.
[142] See the French cases discussed by Pariente, *supra* note 133, 4 ECFR 317 (2007) at 341-343.
[143] *Re Polly Peck International plc (in administration)* (1996) 2 All ER 433, also referred to by Davies 2010, *supra* note 44, p. 95 note 73; William W. Bratton, *Bond Covenants and Creditor Protection: Economics and Law, Theory and Practice, Substance and Process,* 7 EBOR 39 (2006). These guarantees must be distinguished from subordination agreements among creditors; cf. Gower/Davies, *supra* note 44, para 31-10 at p. 1187.
[144] Hopt in Schmitthoff/Wooldridge, *supra* note 22, p. 104-105; supra II B.
[145] Peter O. Mülbert, *A Synthetic View of Different Concepts of Creditor Protection, or: A High-Level Framework for Corporate Creditor Protection,* 7 EBOR 357 (2006) at 375-377.
[146] Idem at 383-394.
[147] For a comparison of the situation in the UK, France, and Belgium, see Forum Europaeum Corporate Group Law, *supra* note 6, 1 EBOR 165 (2000) at 245-257; Hopt, *supra* note 77, ZHR 171 (2007) 199 at 225 et s.; 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/Davies, *supra* note 44, para 9-6 at p. 230-232 and Davies 2010, *supra* note 44, p. 86-90; for France Cozian et al., *supra* note 97, nos 296-301, with extensive case law, no 301.
[148] The German liability is directly to the damages creditors. Wrongful trading results in a full liability toward the company.
[149] Gower/Davies, *supra* note 44, paras 9-7 p. 232-233 on section 214 Insolvency Act; paras 16-13 to 16-23 p. 510-517 on case law; paras 16-17 p. 514 on section 250(3) of the Company Act 2006. For Italy, see Alexandra Mohn, DIE GESELLSCHAFTSGRUPPE IM ITALIENISCHEN RECHT, Berlin 2012; for Italy and Spain, see Fuentes, *supra* note 131, 4 ECFR 529 (2007) at 541-544; for Switzerland see Karl Hofstetter/Renate Lang, *Konzern(mutter)haftung,* in: Peter V. Kunz/Oliver Arter/Florian S. Jörg, eds., ENTWICKLUNGEN IM GESELLSCHAFTSRECHT VIII, Bern 2013, p. 231; for the Netherlands, Kroh, *supra* note 61, p. 333 et s. See also the German concept of *Existenzvernichtungshaftung* mentioned supra II B note 61.
[150] As to the different wording of this in the Company Act 2006 and the Insolvency Act 1986, see Gower/Davies, *supra* note 44, para 9-7 note 34.
[151] 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.
[152] See the cases reported by Cozian et al., *supra* note 97, nos 261, 1510.
[153] *Konzernvertrauenshaftung*, see Hofstetter/Lang, *supra* note 149; Böckli, *supra* note 12, § 11 comments 475-479; Benedict Burg/Hans Caspar von der Crone, *Vertrauenshaftung im Konzern,* SCHWEIZERISCHE ZEITSCHRIFT FÜR WIRTSCHAFTS- UND FINANZMARKTRECHT 2010, 417.
[154] Pariente, *supra* note 133, 4 ECFR 317 (2007) at 333.
[155] Supra II B.
[156] Emmerich/Habersack, supra note 20, § 25 passim, in particular comments 2-4.
[157] Idem § 25 comment 26 with case law.
[158] Davies 2010, *supra* note 44, p. 98; Gower/Davies, *supra* note 44, ch. 8 on limited liability and lifting the veil.
[159] *Adams v Cape Industries*, (1990) Ch 433, CA, briefly resumed by Davies 2010, *supra* note 44, p. 97-99.
[160] Eilis Ferran, *Company Law and Corporate Finance,* London 1999, p. 31 et s. 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 different rhetoric of English judges; Davies 2010, *supra* note 44, p. 97 mentions that the courts have become more restrictive.
[161] "Durchgriff", briefly Markus Roth in Baumbach/Hopt, *supra* note 140, annex § 177 a comment 51b-f; Uwe Hüffer/Jens Koch, AKTIENGESETZ, 14th ed. 2013, comments 15 et s..
[162] Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study,* 76 CORNELL L. REV. 1036 (1991); 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, 2013; Jonathan Macey/Joshua Mitts, The Three Justifications for Piercing the Corporate Veil, Yale Law School, John M. Olin Center Research Paper No. 488, 2013; Peter S. Spiro, Clarifying the Rules for Piercing of the Corporate Veil, available at http://ssrn.com/abstract=2363647, 2013; cf. also Haar, supra note 82, 1 EBOR 317 (2000). But Stephen Bainbridge, *Abolishing Veil Piercing,* 26 J. CORP. L. 479 (2001).
[163] European Court of Justice, 8 May 2013, Case 508/11 P (ENI), EUZW 2013, 547.
[164] 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 New Zealand, Davies 2010, *supra* note 44, p. 99-100; for Germany Mülbert, *supra* note 145, 394-399; Anatomy, *supra* note 23, p. 138-139.

[165] Contra Anatomy, *supra* note 23, p. 138 note 132.
[166] See the Deep Rock doctrine in the US (*Taylor v. Standard Gas and Electronic Corporation*, 306 U.S. 307 (1939)), Anatomy, *supra* note 23, p. 138; Skeel/Krause-Vilmar, *supra* note 164, 7 EBOR 259 (2006) at 263-264.
[167] Mevorach, supra note 164, 8 EBOR 179 (2007) at 187-193.
[168] Mevorach, supra note 167, with further references.
[169] For France, see Art. L. 621-2 al. 2 code de commerce; *Pariente,* supra note 133, 4 ECFR 317 (2007) at 333-340; Cozian et al., *supra* note 97, nos 1508-1509; Kroh, *supra* note 61, p. 274 et s.. For Belgium, see Van Ommeslaghe, *supra* note 22, p. 59 at 92 et s.
[170] Pariente, *supra* note 133, 4 ECFR 317 (2007) at 331-333. There it is mentioned that this mechanism may also be used outside of the insolvency, but in principal it is an insolvency law mechanism; Cozian et al., *supra* note 97, no 1507: exclusively in insolvency.
[171] 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 23, ch. 7, p. 183-224.
[172] 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.
[173] Anatomy, *supra* note 23, p. 233-238, 238-245; Klaus J. Hopt, *Takeover Defenses in Europe: A Comparative, Theoretical and Policy Analysis*, 20 Colum. J. Eur. L. 249-282 (2014).
[174] Anatomy, *supra* note 23, p. 252-256.
[175] Anatomy, *supra* note 23, p. 227-232, and p. 233-256: no controlling shareholder; p. 229, 256-263: acquisition from an existing controlling shareholder.
[176] Klaus J. Hopt, EUROPÄISCHES ÜBERNAHMERECHT, Tübingen 2013, p. 36-38; Hopt, *supra* note 32, 15 EBOR 143 (2014) at 169-171. As to the exit strategy, see Anatomy, supra note 23, p. 99.
[177] Anatomy, *supra* note 23, p. 258.
[178] 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 391-439 (2009).
[179] For the same reasons as discussed in I C. Cf.

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