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The governance of company groups

By Professor, Dr. jur. Karsten Engsig Sørensen[*]

The majority of listed companies are part of a group linked through ownership and/or other mechanisms to exercise control. The popularity of group structures is based on a number of economic and legal advantages, including facilitating the supply of goods and services, economies of scale, reaching new markets or new activities, sharing the provisions of internal services such as loans and facilitating mergers and acquisitions. This working paper presents a comparative overview of the regulation of groups in company law. It also discusses how different corporate governance codes make recommendations on issues relevant to the boards in company groups.

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Table of contents

1. Introduction

This working paper introduces some of the corporate governance issues which boards of listed companies that are part of a group of companies may be faced with. It presents and identifies the main issues, illustrates different legal and regulatory approaches and provides some examples of actual corporate practices.

The working paper is made available to the OECD Corporate Governance Committee as a background to their thematic peer review on the duties and responsibilities of boards in company groups.

The working paper first explains briefly in Sections 2 and 3 why groups exist and why they present a unique business structure. After pointing out different types of groups in Section 4, Section 5 includes a brief comparative overview of the regulation of groups in company law. Section 6 presents and discusses how different corporate governance codes[1] and the G20/OECD Principles of Corporate Governance (G20/OECD Principles) make recommendations on issues relevant to groups of companies. Section 7 summarises the main messages in the working paper.

2. Why do groups of companies exist?

The majority of listed companies are part of a corporate group. This means that they are part of a group of companies that are linked through ownership and/or other mechanisms to exercise control.

The popularity of group structures seems to be based on a number of economic and legal advantages offered by this way of organising the business. Economic theory, in particular transaction cost economics, provides some explanation for why enterprises may prefer to integrate the supply of goods and services into the group instead of acquiring them on the market. Economy of scales and synergy effects may also explain why enterprises may want to expand.[2] Expansion may take place by organic growth or external growth. Sometimes, organic growth will involve setting up new subsidiaries, for instance when trade is extended to new markets or new activities. Additional companies may be set up to perform internal services, for instance financial services facilitating loans between the companies in the group or by negotiating services from external banks for the whole group.[3] External growth is often achieved by the acquisition of control over companies and thus the formation of a subsidiary.[4] If a company contemplates to merge with another, this may be effected by conducting a merger (in company law), but often mergers are conducted by setting up a group structure, for instance a holding structure. The reason for this is that a legal merger either may not be possible (for instance in a cross-border context) or may be a more complicated and expensive procedure than the creation of group structures. Finally, collaboration with other enterprises may add to the group structure, for instance by adding corporate joint ventures.

Even if this may explain why group structure may result from growth, this does not explain why enterprises keep the group structure instead of getting rid of or simplifying it.[5] The multitude of companies that forms the group complicates the governance of the group (see Section 3), and furthermore, it is costly as each company may require their own general meeting, own board,[6] accounts etc. Therefore, there must be a reason why the group structure is kept. If there are minority shareholders in the subsidiaries, it may be difficult or expensive to abandon the group structure, but in other cases, it may be possible to simplify the group structure by simply merging the companies of the group. There is, however, a range of reasons why this is not done, and here only a few will be mentioned: *First,* the subsidiary offers the parent company limited liability for the possible debt of the subsidiary. *Second,* if the enterprise is very large, the individual company in the group may act as a natural profit and management centre.[7] *Third*, if the enterprise conducts business across several jurisdictions but one company in the group is conducting its activity mainly in one jurisdiction, it will often be an advantage that this company uses a local – and therefore well-known – corporate form instead of operating as a branch in the name of the foreign company.[8] *Fourth*, maintaining a group structure may make it easier to finance a business with diversified activities.[9] *Fifth*, if an existing company is acquired, which possesses a valuable goodwill, brand and favourable agreements, these values may best be preserved by continuing operation of the acquired corporate entity.[10] *Sixth*, sometimes a group structure is imposed by regulations as, for instance, financial regulations, which may prevent that different activities are conducted in the same company.[11] *Finally*, group structures may be tax-driven.

Group structures may be an alternative to growth as, for instance, it may be part of a strategic alliance (and not a merger) to establish cross-holdings with other companies.[12] Similar strategic alliances may be achieved through contracts and/or interlocking directorships.

3. Groups of companies as a unique business structure

Groups raise a number of issues both for the companies in the group as well as for regulators and enforcement agencies. In the present context, the focus will be on the corporate governance issues that are unique for groups. The governance issues differ according to the specific structure of the group. Since the most common structure is that of a parent company and one or several subsidiaries, this structure is the primary focus in the following.

In such a group structure the board of the parent company must decide to what extent it will integrate the subsidiaries in the group, and how best to implement this policy. Since the subsidiaries may handle activities and assets that are vital to the parent company and its performance, the governance of subsidiaries is often a very important issue for the board of the parent company. This does not necessarily mean that the subsidiaries should be integrated in the same way. There may be a need to ensure a close integration of some subsidiaries, for instance, because they perform necessary services within the group, whereas other subsidiary may have more autonomy and may even compete with other companies in the group.[13] Handling subsidiaries is often made even more difficult by the fact that there may be a great number of subsidiaries,[14] and by the fact that each of these subsidiaries are separate companies with their own governance structure. In many groups subsidiaries are situated in different countries, and therefore the parent company needs to cope with the company laws (and other laws) of different jurisdictions (see Section 5).

Group structures also have implications for the shareholders of the parent company. These shareholders will be further removed from the activities conducted in the subsidiary compared to the activities conducted in the parent company. Normally, they will not be able to directly influence the affairs of the subsidiaries since the board of the subsidiary answers to their shareholders represented by the board of the parent company. Thus, the group structure has created an additional layer of management-shareholder relationship between the parent company's shareholders and the subsidiary.

The group structure may also create some challenges for the board of the subsidiary. If the subsidiary should follow the group policy formulated by the parent company, the board in the subsidiary may be faced with the problem how to balance the interests of the group and the subsidiary. Often there will not be a conflict, but sometimes the board may be asked to perform an act which will benefit the group, but may harm the subsidiary. Balancing these interests becomes more complex and pressing when the subsidiary has minority shareholders and when the economics of the subsidiary are stressed.

Groups may share services or facilities. Often they also share financial resources, for instance, through cash-pooling arrangements or other jointly negotiated financial arrangements for the group. The latter may result in the bank requiring that one group company guarantees for the commitments of others, or in cross-default clauses. Some group companies may operate as in-house productions or services facilities. As a result, there may be an extensive net of commitments, and transactions in services and goods between the companies of the group. This may have implications for the stakeholders in the individual companies of the group. Also, such transactions will imply tax implications as they may shift the taxable income from one company to another, and if these companies are situated in different tax jurisdictions, the tax authorities are likely to react.[15]

4. Different types of groups

In most jurisdictions, there are definitions of what constitute a group of companies in company law, accounting law, and tax law.[16] The definitions tend to focus on whether a company (parent company) controls another company (the subsidiary) through different means such as voting rights, rights to appoint members to the board, agreements, etc. The definitions may be rather complex. Even so they will not cover all types of groups.

Since different group structures raise different governance issues, it is necessary to distinguish between them. There is a great variety of group structures and therefore only the most common ones are outlined.

The most common group structure is the hierarchic group with a parent company (possibly a holding company)[17] with one or several subsidiaries. The listed company can either be the parent or one of the subsidiaries. In some cases groups contain several listed companies.[18]

As mentioned, the governance issues are mainly determined by the position the listed company has in the group. The majority of listed companies have subsidiaries.[19] These companies will then be faced with the problem of deciding how to govern the subsidiaries and how this may affect the position of the shareholder of the listed company. This raises a number of issues that are discussed in Section 6.2.

Some listed companies are subsidiaries.[20] Here the issue is to what extent the listed company may accept to govern according to a group policy and how the other shareholders of the listed company may be protected from the consequences of such group policies. It normally does not matter how the parent company controls the listed company as the important factor is that it has control.[21] The nature of the parent may differ, but this will not necessarily change the nature of the governance problem. Thus, it will normally not make a difference whether or not the parent company is listed. If the parent company is not conducting any business activities of their own, for instance being a holding company, a foundation or a state,[22] the parent may not feel the need to develop a group policy, as there is no need to coordinate activities. However, if the holding company or foundation controls other subsidiaries that perform business activities, there may be a need to implement a group policy, and therefore the problem will be the same as when the parent company itself conducts business. The governance issues raised for listed subsidiaries are discussed in more detail in Section 6.1.

The listed company may also be involved in joint ventures where they exercise joint control over the joint venture company together with the other joint venture partner(s). Such joint ventures raise some governance issues that are similar to those raised by the governance of subsidiaries. But there are also differences – not the least because the joint venture is subject to joint control with the other joint venture partners – and therefore these issues will not be dealt with further here.

Some listed companies may be part of a pyramid structure where they can be either a parent company, a subsidiary or both. Such pyramid structures are relatively common in some jurisdictions.[23] Pyramid structures are control-enhancing devices that allow the ultimately controlling shareholder to exercise control with a smaller investment. They present some special governance issues for the shareholders in the companies under the pyramid,[24] but the governance issues between the ultimate parent company and the listed subsidiaries that conduct business activities are the same as outlined above. The special problems raised by pyramid structures will not be discussed further.

A listed company may also be part of a group dominated by cross-holdings with other companies. These crossholdings do not need to be large enough to create control, but may, nevertheless, bind the companies together in a group. Such structures are frequent in some jurisdictions.[25] The governance issues they raise will be slightly different from those that occur in groups based on a more clear hierarchy (parent-subsidiary) and given that the latter is more common, the focus will be on these in the following.

5. National legal frameworks and the duties of boards in company groups

The governance of groups will have to take into account the legal framework that each group company is subject to.[26] The extent to which national company law regulates groups of companies differs substantially.[27] The objective of this regulation is usually twofold; it may serve to enable the functioning of the group or it may serve to protect shareholders, creditors, and other stakeholders of the individual company.[28]

Enabling rules are, for instance, rules which facilitate that the parent company may control its subsidiary as, for instance, the German rules on control contracts.[29] But it may also be rules that facilitate group governance as, for instance, rules on the exchange of information in groups, rules that facilitate inter-group loans, or rules that allow the boards to act in the interest of the group (see in Section 5.2).

Protective rules may either focus on protecting the stakeholders of the parent company or those of the subsidiary. The first type tends to be less developed than the latter. As both have implications for the governance of groups of companies, they will briefly be outlined separately.

Rules designed to protect the stakeholders in the parent company

Rules aiming to protect the stakeholders in a parent company are for instance found in the requirement of consolidated accounts or group accounts that are found in many jurisdictions. One of the purposes of such accounts is to ensure that the shareholders and creditors of the parent company are presented with a true picture of how the group as a whole is doing, and thus to prevent that intra-group transactions are used to inflate the result in the parent company. There are other reporting regimes that parent companies may be required to make on a consolidated basis that also serve to ensure that the stakeholders of the parent company may monitor how the group is performing.[30]

Other group rules serve the purpose of protecting the parent company from group activities that may harm the parent company. For instance, the restrictions applicable to a parent company's acquisition of its own shares may also apply to subsidiaries' acquisitions of shares in the parent company.[31] Other rules aim to offer some protection to the shareholders for the fact that a substantial part of the group's activities may not be conducted in the parent company but in subsidiaries which are removed for the immediate influence of the shareholders. This protection may take the form of a protection when an activity of the parent company is excreted to a subsidiary.[32] Alternatively, it may protect the shareholders by allowing them to request information about the relationship with subsidiaries,[33] or the right to bring derivative suits directly against the directors of the subsidiaries.[34]

A question that bears great importance for this paper is whether the board has a duty to implement some form of supervision or even governance over a subsidiary. In many jurisdictions it seems that the board's duty does not really extend beyond its duty to govern the parent company itself, but there are a few jurisdictions where a duty to oversee the subsidiaries is developing.[35] Such a duty to oversee the subsidiaries may also be induced by regulation outside company law. Special regulation applicable to financial institutions may require that the parent company takes responsibility for the governance of the whole group, especially from a risk management perspective.[36] The regulation aims to ensure that not only the parent company but also the group comply with the special duties imposed on risk management in such companies. As a result, there are a number of corporate governance frameworks focused on insurance companies and banks that address how the board of the parent company should govern the group.[37] There are other rules which may also induce the parent companies to supervise their subsidiaries. For instance, parent companies may be held liable for infringements of competition law committed by their subsidiaries.[38] Such liability can also be imposed for certain other infringements committed by subsidiaries under tax law, environmental law, etc. Such a liability will at least give the parent company an incentive (if not a duty) to supervise its subsidiaries.

A final inducement for the board of the parent company to engage in the governance of their subsidiaries is found in the different guidelines and reporting regimes for corporate social responsibility. These often recommend that parent companies should undertake to adopt and implement a group CSR policy.[39] Mostly, these are soft law instruments, but the area seems to evolve constantly and there are instances where hard law has emerged.[40] This development coupled with a few very high profiled cases have resulted in an extensive debate about parent companies' responsibilities for human rights transgressions of their subsidiaries.[41] Even though the likelihood that a parent company has to pay damages is often hypothetical, this development may, nevertheless, have implication for the governance of groups. Thus, in the media and public opinion, parent companies may be perceived as being responsible for human rights infringements, corruption and environmental harm caused by their subsidiaries, and parent companies may thus face criticism or potentially reputable damage for such transgressions. [42] Whether for this reason or for other reasons it seems that listed companies often adopt group CSR policies and implement them in their subsidiaries.[43]

The ability of the parent company to supervise and control subsidiaries depend on the rules governing the subsidiary. Control will normally be exercised through the general meeting and through the ability of the parent company to choose the management of the subsidiary. Whether the parent company has the ability to give binding instructions to the management of a subsidiary differs from jurisdiction to jurisdiction, but even without such a right it will normally be possible to exert influence on the management. Normally, the parent company does not have a formal legal right to demand detailed information from its subsidiary as a shareholder of the subsidiary.[44] A few countries allow the parent company to access information from a subsidiary,[45] but in many jurisdiction such access will be problematic.[46]

Above, the responsibility of the board of the parent if they fail to supervise their subsidiaries has been discussed. It could also be contemplated whether the board may face responsibility if they go too far in the implementation of a group policy. This issue can be addressed from two point of views. *First,* it may be asked whether the board of the parent company may infringe their duty to the parent company when governing the subsidiary. In principle, the board should be responsible for all the decisions they make (or do not make), including those that involve the subsidiaries. For instance, if the board decides to support a subsidiary with additional funding even though it is no longer likely that the subsidiary will survive, this could form the basis for a liability claim. Nevertheless, it seems that such liability issues seldom occur.[47] This may be due to different factors such as the business judgement rule. Also, it may not be clear to outsiders that the board of the parent company has initiated an action that involves the subsidiary. If the parent company recommends that a subsidiary should take a certain action and the board of the subsidiary takes this action, it will often be more relevant to discuss the responsibility of the latter board towards the subsidiary. *Second*, the parent company's involvement in the management of the subsidiary may have consequences under the rules governing the subsidiary. In this case, the parent company comes into conflict with the rules seeking to protect the shareholders in the subsidiaries (see below).

Rules protecting stakeholders of the subsidiary

The bulk of company law rules of relevance to groups of companies focuses on the protection of stakeholders in subsidiaries that are part of a group. Some jurisdictions have introduced rules specific aiming at regulating groups, but often the issues are regulated by more general company law provisions that are not specifically designed for groups.

Stakeholders in a subsidiary may be protected at the time when the group is established. If a listed company is subject to a takeover, some jurisdictions may protect the shareholders through disclosure and a mandatory bid rule. Takeover regulations may also offer some protection for the employees of a company. Some of the jurisdictions also have a regime for protecting shareholders and creditors at the formation of the group when this is formed through entering into a control contract between two companies. In Germany, such a contract will allow the parent company to give instructions to the subsidiary. To protect the remaining shareholders of the subsidiary, they are offered either to sell their shares or are offered a minimum dividend if they continue being shareholders of the subsidiary. Creditors of the subsidiary are protected by a duty for the parent company to compensate the subsidiary for any losses it may suffer after the contract has been entered into.[48] Even though such contracts are possible in Germany and other jurisdictions such as Brazil,[49] they are not frequently used.

It is more common that company law protects stakeholders after the group has been formed. The key question is how the board of the subsidiary should handle being part of a group, and this question is by far the most debated issue in relation to the regulation of groups. Here the regulations often differ considerably, and because the issue is often determined by case law, the law is often unclear or only give a vague guidance.[50] In some jurisdictions the rule is that the board of the subsidiary has to act in the interest of that company and not in the interest of the group or the parent company. Other jurisdictions allow the board to act in the interest of the group. Often this is done by introducing a standard by which they may act in the interest of the group if it is not threatening the ability of the subsidiary to pay its creditors and/or if the subsidiary does not suffer a loss as a consequence hereof, as the subsidiary will often benefit from being part of a group. Consequently, a decision made in the interest of the group that inflicts harm on the subsidiary may be compensated by other decisions that benefits the subsidiary. Some jurisdictions allow that a subsidiary makes decisions in the interest of the group if it is balanced with future advantages flowing from the relationship with the other companies in the group.[51] Often the standard is different depending on whether or not there are minority shareholders in the subsidiary. If there is no minority shareholder, it may be sufficient to ensure the solvency and thus the continued existence of the subsidiary.[52] Also, it differs how concrete a balancing advantages should be, and how fast balance should be ensured.

The fact that law is sometimes dismissive of (or unclear about) actions performed in the interest of the group may make it difficult for the board of the subsidiary to act according to a group policy. Consequently, the board may have to abstain from performing actions suggested by the board of the parent company and may have some difficulty in engaging in group policies. If the board of the subsidiary violates their duty to the subsidiary by acting in the interest of the group, they may be liable towards the subsidiary for any loss the company may suffer as a consequence hereof.

Because this diversity of rules makes it difficult for cross-border groups to operate, the European Commission announced in its 2012 Action Plan that they will propose an initiative that will improve the recognition of ‘group interests’ and thus make it easier for groups to operate across the EU.[53] So far, no proposal has been issued.[54]

Apart from the rules governing the duties of directors, there are other company law rules that may have an impact on the governance of the subsidiary. There may be a number of rules aiming at the protection of minority shareholders that could also affect how parent companies may act in a subsidiary.[55] Some of these rules are specifically designed for groups – as for instance found in Germany[56] – but more often, the general company rules regulating conflicts between majority and minority shareholders are applied to groups. Thus, parent companies are just one form of controlling shareholders, although, in some regard, a special kind; contrary to other controlling shareholders, parent companies may not only act in their own interest but may aim to act in the interest of the group. Normally, a controlling shareholder will not act to harm the company unless the shareholder gains from the act. On the other hand, a parent company may act to harm a subsidiary if it benefits other members of the group. Consequently, conflicts with minority shareholders may be more complex in groups than in other situations where a company has a controlling shareholder.[57]

One of the mechanisms introduced in many jurisdictions to protect minority shareholders is rules on related party transactions. Such rules will be introduced in the EU Member States as a consequence of the recently amended Shareholder Rights Directive,[58] but they already exist in many jurisdictions worldwide.[59] Other relevant minority protection mechanisms are special investigation rights, duty of loyalty of controlling shareholders, and prohibition of majority abuse.

If the parent company engages in the management of the subsidiary in a way that conflicts with some of the standards outlined above, it may have different consequences. The parent company may be liable to pay damages to the subsidiary. In those countries that have a special regulation on groups, the liability of the parent company is regulated directly. This is, for instance, the case in German law where a parent has a duty to compensate a subsidiary for any loss caused by the parent company that is contrary to the interests of the subsidiary.[60] But in the majority of countries that do not have such specific group rules different constructions may be used to establish a similar liability. One of the most common constructions is that the parent company is made responsible as a *de facto* or shadow director of the subsidiary whereby the parent company is judged according to the standard that applies to the directors of the subsidiary.[61]

Finally, it should be mentioned that the remedy of piercing the corporate veil is often discussed in relation to groups. If a parent exercises control over its subsidiary, it may become more likely that the veil will be pierced. Even though control is one of the factors that may lead to piercing the veil, it will normally not in itself be enough. Most jurisdictions are very reluctant to pierce the veil in company law and often reserve this remedy for cases of abuse, intermingling of assets or the similar.[62] However, in some jurisdictions, including Brazil[63] and People's Republic of China (China)[64] the remedy is used more frequently.

Another group of stakeholders that may be affected by the group structure is the employees of the subsidiary. In some countries workers have the right to be represented in the board, but if the decisions concerning the subsidiary is taken by the parent company, it may not be worth much to be represented on the board of the subsidiary. For this reason, a number of jurisdictions that allow for worker participation have introduced the right of the workers of the subsidiary to participate in the election of workers representatives on the board of the parent company.[65] Also in jurisdictions that only allow for the consultation of workers they may have taken into account the fact that decisions in a group may be taken by the parent company.[66]

6. Key issues in the G20/OECD Principles and the duties of the board in national corporate governance codes

As it appears from Section 5, it cannot be assumed that the company laws of most jurisdictions have clear and comprehensive rules on the governance of groups. Therefore, one could assume that there could be a need for supplementing recommendations in the corporate governance codes. Despite this and despite the fact that most listed companies are part of a group, most corporate governance codes have only a few rules addressing the specific group governance issues outlined above.[67]

To contemplate how national codes address this issue a distinction will be made between situations where the listed company is a subsidiary and a parent company. As appears from the above, the challenges faced by the board of a subsidiary and that of a parent company differ significantly.

Often corporate governance codes do not include a definition of a group even though they may have some recommendations applicable to groups of companies. It seems that the definitions found in law in most jurisdictions suffice.

Listed subsidiaries

If the listed company is a subsidiary, it raises the question to what extent the board may accept to be integrated in the group. Furthermore, it raises the question whether there is a need for special safeguards to protect the other shareholders of the subsidiary (hereinafter referred to as the 'minority shareholders' as they are in the minority compared to the controlling parent company), as well as other stakeholders. To some extent, these issues are dealt with in some codes in the form of indication of the duty of the board, the rules on independent directors and other safeguards for the shareholders and creditors.

Duties of the board

There are some codes which stress that the board has the duty to act in the interest of the listed company and the duty to act in the interest of all shareholders.[68] This may indicate that the board should not prioritise the interest of the group over that of the listed company, but due to the vagueness of the codes this is not entirely clear. A few codes are clearer in rejecting that the board may prioritise the interest of the parent company.[69] In the sample examined, there are not any codes that clearly allow the board to pursue the interest of the group.[70] Neither are there any codes that explain how the board may balance the interest of the group with that of the listed company, for instance by making sure that any action taken in the interest of the group is later compensated by an advantage granted to the listed company. Even though the rules on this in several jurisdictions are vague or unclear, it does not seem that the codes do much to clarify the duties of the board on this point.

The G20/OECD Principles recommend that the board has a duty of loyalty to the company and all the shareholders.[71] In the annotations, it is further stipulated that this duty of loyalty is also a key feature for members of board who are working within the structure of a group of companies. The duty of loyalty thus relates to the company and not to the controlling company of the group. This very clearly seems to indicate that the duty of the boards of listed subsidiaries is towards the listed company and not towards the group.

The G20/OECD Principles, however, indicate that it in some situations it may be possible to act in the interest of the group. The annotation to Principle II.G. states: “A particular issue arises in some jurisdictions where groups of companies are prevalent and where the duty of loyalty of a board member might be ambiguous and even interpreted as to the group. In these cases, some countries have developed sets of rules to control negative effects, including by specifying that a transaction in favour of another group company must be offset by receiving a corresponding benefit from other companies of the group.” This statement seems to refer to the Rozenblum doctrine and similar doctrines used in several jurisdictions. It may be read as an acceptance that if the board ensures that there is such a balance of favours – and if this is accepted under national law – the board has observed its duty of loyalty.

To conclude, the G20/OECD Principles have a very clear starting point, but it also seems to accept that some modification – in the form of balancing – is acceptable if national law so provides. Thus, the solution to some degree defers to national law, but only if the solution is to ensure that advantages and disadvantages are balanced. The G20/OECD Principles do not condone that a listed subsidiary subordinates itself to a group policy that goes further than balancing.[72]

Independent directors

Independent directors may also have implications for the parent company’s ability to influence the board of the listed company. If independent directors are unaffiliated with the parent company, they may act as a counterbalance to impede the board from adopting decisions that benefit the parent company but are detrimental to the other shareholders.

Many of the codes examined have adopted recommendations for independent directors. However, the recommended number of such directors are often not stated precisely, or varies. Only few codes recommend that the majority of directors should be independent,[73] while most codes that state a specific number indicate that it should only be a minority. Recommending that a majority of the directors should be independent ensures a high protection of the minority, but may also make it very difficult for the parent company to implement a group policy. Maybe to avoid this, the Spanish Code suggests that the normal recommendation that half the directors should be independent does not apply when there is a controlling shareholder who controls more than 30 per cent of the capital. In this situation, the recommended number of independent directors is a third of the board.[74]

The definition of an independent director varies slightly, but it seems that in all codes analysed, a director will only be independent if he or she is not affiliated to the parent company.[75]

The G20/OECD Principles address the issue of independent directors in Principle V.A.5 and VI.E. The recommendations are not very specific as they indicate that the issue should be dealt with taking into account the variety of board structures and different practices in different countries. It is, however, indicated that there should be a “sufficient number”, and that it is possible also to require that they should be independent from controlling/dominant shareholders.[76] Thus, the G20/OECD Principles do not take a firm position on whether independent directors should be unaffiliated to a parent company and whether they should be a majority or a minority of the board.

Protecting minority shareholders (and creditors) through disclosure

Minority shareholders (and to some extent creditors) may also be protected through disclosure, and the G20/OECD Principles contain several examples of this.

For instance, information about the parent company and the group structure may make it easier for the shareholders and creditors to foresee the consequences and possible risks that flow from the fact that the listed company is part of a group. The annotations to Principle V.A.3 indicate that shareholders have the right "…to information about the structure of a group of companies and intra-group relations. Such disclosures should make transparent the objective, nature and structure of the group." This does not only cover the group structure 'below' the listed group but also information about the parent company. Thus, it is recommended that the disclosure should include data on major shareholders that control the company and significant shareholding relationships. Furthermore, the recommendation that the beneficial owners are disclosed would also mean that the persons that ultimately control the parent company should be disclosed. This is supplemented by Principle II.E.2 that recommends disclosure of capital structure and control arrangements. In particular, that includes those arrangements that ensure a disproportionate influence compared to the shareholders' ownership, such as pyramid structures and cross-shareholdings. Taken together, these Principles should ensure that the shareholders get information about the parent company. However, it may not ensure that they get the full information about the group which the parent company heads or is part of, and thus, for instance, information about sister companies to the listed company. The requirements in Principle V.A.3 cited above do not necessarily require that the larger group that the parent company is part of should be disclosed. The format of disclosure it not stipulated either. The point has been made that what the shareholders need is a simple – visual – presentation of the group structure and the group functioning and management.[77] Looking at the national codes examined, there does not seem to be any recommendation on this form of disclosure.

Alternatively, the shareholders may be given access to information about the group's activities. This could include information about transactions between the listed company and the parent company and its sister companies. Several codes have rules requiring disclosure of related party transaction, but often these regulations go beyond disclosure, and therefore it will be dealt with in the following section.

Another way of getting information about the group could be to ask the board. Such a right to ask questions to the board is recommended in Principle II.C.3. But the provision does not specify what shareholders can ask about (apart from questions relating to the annual external audit) and consequently, it is not entirely clear whether the question could include information about the companies' transactions with other members of a group.

Substantial minority protection

In several places, the G20/OECD Principles indicate the need for a protection of minority shareholders that goes beyond disclosure. Normally, the recommendations does not specifically address the group situation, but may nevertheless be used in this context.

Protection may result from recommendations on related party transactions. As mentioned in the section above, several codes have recommendations on this. Even though some clearly cover transactions between the listed company and its parent company, many codes are not clear about whether or not this is the case. Also, they are not clear about whether they cover transactions with sister companies.[78] It seems that the recommendations on related party transaction are more focused on transactions with the company's director than with other companies in the group. A few of the codes only recommend that related party transactions should be disclosed, but the majority recommends that the board should approve or monitor these transactions.[79]

The G20/OECD Principle V.A.6, also recommends that rules on related party transactions should be adopted. The annotations to the Principle suggest that such rules should "…at least include entities that control or are under common control with the company…". This should cover the parent companies and all other companies in the group headed by the parent company, including sister companies. But it could also include the companies that may control the parent company. The annotations to the Principle go further and suggest that transactions with all major shareholders, even indirect, should be included. The G20/OECD Principles indicate the solution that only material transactions are disclosed on an ongoing basis, but make a reservation for recurrent transaction on 'market terms'. This latter exception would be very important in groups of companies and it could potentially mean that a large number of group transactions will not be disclosed. Whereas Principle V.A.6 concerns the disclosure of material related party transactions, Principle II.F.1 recommends that the regulation should go beyond disclosure. Without making any precise recommendation it is pointed out that in most jurisdictions the board's approval is needed for such a recommendation, but "…shareholders may also be given a say in approving certain transactions, with interested shareholders excluded." The latter solution must refer to a solution where the general meeting must vote on the transaction and that the votes of the parent company should be excluded from this vote.

So, the G20/OECD Principles firmly recommend that material on transactions with the parent company and sister companies should be disclosed. The Principles open the possibility of exempting recurrent transactions which may, to some extent, undermine the disclosure in groups. They stop short of recommending that the rules should be taken beyond disclosure, but as indicated, many codes do require the board's approval of such transactions. There is a possibility to develop the recommendations on related party transactions so that they will operate as an important mechanism for minority protection in listed companies with parent companies.[80]

Principle II.G states that minority shareholders should be protected from abusive actions by, or in the interest of, controlling shareholders. Clearly, this could also cover some form of abusive conduct undertaken by parent companies. The annotation to the Principle points out that this protection may be achieved by rules on disclosure and a clearly articulated duty of loyalty for board members – solutions that have already been highlighted above. Other remedies are also mentioned, but apart from the remedy of requiring a controlling shareholder to buy out the minority, none of these remedies are particularly focused on group situations. The G20/OECD Principles do not address the question whether there should be a mandatory bid rule which could act as a protection on the establishment of a group, see above in Section 5.2.

Listed parent companies

Since most listed companies are parent companies, it raises the questions how the listed companies should approach the governance of their subsidiaries (Section 6.2), and whether there is a need to offer the shareholders of the listed company certain rights as a consequences of the group structure (Section 6.2).

How to manage and supervise the subsidiaries

Many codes take the starting point that the board is responsible for governing the listed company and not the group.[81] The G20/OECD Principles take a similar position. In the introduction to Section VI it is stated that the corporate governance framework should ensure the strategic guidance of the company. According to Principle VI.A, the board members should act in the best interests of the company and the shareholders. In Principle VI.D.1, it is stressed that the board is responsible for the corporate strategy and although this is a relatively open term that could include the subsidiaries, the annotation to the same principle stresses that this includes oversight of the company's risk management, thereby presumably indicating that it does not go beyond the listed company. Principle VI.D.2 mentions the duty to monitor the effectiveness of the company's governance practice – not the groups'. And the annotation to the Principle discusses a review of the internal structure of the company – not of the group. Principle VI.7 requires the board to ensure the integrity of the corporation's accounting and financial reporting systems. It may be argued that it is natural for the G20/OECD Principles to use the listed company as its starting point, and that this should not exclude that the company is sometimes interpreted as the group. This interpretation is, however, made somewhat unlikely by the fact that in the annotation, the accompanying Principle VI.C points out the possibility that the company and its subsidiaries comply with certain CSR guidelines, and Principle VI.D.7 suggests that compliance programmes should extend to subsidiaries.

It may be argued that this should in fact be the recommended solutions. As outlined in Section 5.1, most jurisdictions do not impose a duty on the board to govern subsidiaries. It may even be argued that if the board undertakes to get involved in the management of the subsidiaries, it may run the risk that the directors or the listed company become liable for infringement of the company law governing the subsidiary, see Section 5.2.

Nevertheless, there are also arguments in favour of implementing group governance. Thus, it may make sense from a business perspective to coordinate the companies in the group as this may enhance the overall results of the group. Also, if mistakes are made in the subsidiaries, it may have consequences for the listed company as any loss suffered by the subsidiary will show in the books of the listed company. Finally, parent companies may have to pay for certain transgressions of their subsidiaries (for instance competition law infringements) and the listed company may suffer reputational damages, see Section 5.1.

Even if it is concluded that the benefits of governing the subsidiaries outweigh the risks, the recommendations will still need to address the question how to limit the risks. To do this the recommendations about group governance will have to be rather open-ended since the groups differ and since the relevant company laws may differ. In particular, they will also need to reflect the fact that the duties of the board of the subsidiary may not allow for certain interventions from the listed parent company, and the fact that it may have unwanted consequences if the 'instructions' are given too directly to the board of the subsidiaries. This could, for instance, be achieved by ensuring that the recommendations allow for the management of the subsidiaries to confirm, adapt and implement the group policy, and by ensuring that the governance structures are aligned with the group structure, e.g. the entities in the group should also be decision centres.

Looking at those codes that have recommendations, it seems that they either focus on how the board of the parent company should act (Section 6.2) or less frequently focus on how the board of the subsidiary should be composed and conduct their activities (Section 6.2).

The board's duty to govern the group

In the event that codes address group governance, the approaches vary from very general statements to more specific – but often fragmented – recommendations. In an attempt to give an overview, the subsection below groups the most important recommendations under headings indicating the main issues addressed.

General recommendations to govern the group

There are a few codes that indicate in general terms that the board should also engage in group governance, but without specifying how this should be done. This is the case in the Austrian

Code that suggests that the management should manage the enterprise, which is defined as the listed company and its subsidiaries.[82] In the Italian Code, it is also made clear that the board has to manage the entire group as it is recommended that the board should "examine and approve the strategic, operational and financial plans of both the issuer and the corporate group it heads...".[83] The recently adopted UK Code has now for the first time addressed the issue of group governance in a very general way by stating, "For parent companies with a premium listing, the board should ensure that there is adequate co-operation within the group to enable it to discharge its governance responsibilities under the Code effectively".[84] The Latin American Companies Circle recommends that the board "usually takes overall responsibility for the organization and strategic coordination within the group".[85] The national codes only vaguely indicate a broader duty of the board to manage the group.[86]

Recommendations for group policies

Another approach is to recommend that the board should adopt different forms of group policies. For instance, it may be recommended that the group should adopt a strategy for the group.[87] The G20/OECD Principles point out that the group may commit to certain CSR guidelines including the OECD Guidelines for Multinational Enterprises, and the Slovakian Code reflects this.[88] Finally, as mentioned, the G20/OECD Principles recommend that the board should adopt a compliance policy for the whole group.[89] The Latin American Companies Circle seems to recommend all of these in addition to group policies on "limits to the selling of fixed assets, limits of indebtedness, rules for related party transaction, fixed and variable compensation and managerial evaluation".[90]

If it is recommended that the board should adopt group policies, it seems to be implied that they should also be implemented in the subsidiaries. However, only a few codes explicitly address the implementation of group policies.[91] Therefore, it is often not clear what role the listed parent company should play in implementing group policies, including how they should exercise control over the subsidiary, if necessary. An exception is the recommendation of the Latin American Companies Circle that discusses different ways of controlling subsidiaries, focusing mainly on which directors to elect to the board of the subsidiary. The recommendations first point out that the subsidiary may not need a board, but may settle for a sole administrator. If there is a board, the advantages of appointing persons from the parent company (ensures a high degree of communication and full alignment) and selecting non-executive or even independent directors (can add professional skills and may safeguards minority shareholders) are outlined.[92] This is the only recommendation of those examined that discusses this highly practical issue of selecting the right management for the subsidiaries.[93]

Recommendations for supervision of subsidiaries

Closely linked to governing the subsidiaries is the supervision of what is going on in the subsidiaries. Most codes do not address these issues, even though it seems to be normal practice that boards spend time on the oversight of subsidiaries.[94] Those codes that address the issues do so in different ways. Some codes make it clear that the board should ensure that it receives information about the subsidiaries.[95] Other codes even suggest different ways of ensuring that the board receives the necessary information about the subsidiaries. For instance, the Italian Code facilitates this by indicating that executives from the group may participate in the board meetings.[96] According to the Bangladeshi Code, the minutes of the board meetings of the subsidiaries should be placed for review before the board of the listed company.[97] Other codes indicate that internal control[98] and risk management systems[99] should be extended to include subsidiaries. Also, a few codes indicate that the audit of the parent should extend to the subsidiaries.[100]

Another form of supervision takes place when the parent company requires certain decisions from the subsidiary to be approved by the board of the parent company.[101] In the Austrian Code, the supervisory board of the listed company should approve major transactions in the subsidiaries if they are relevant to the group.[102] According to the Russian Code, the board should decide with a qualified majority or majority vote on “material issues relating to activities of any legal entities controlled by the company”.[103] The same is stated in the Italian Code, “Moreover, the issuers shall adopt adequate measures to ensure that subsidiaries submit to the Board of the parent company, for prior review, material transactions, without prejudice to the principle of autonomous management, in the event that the subsidiary is also a listed company.”[104] In some codes, it is also suggested that the board should approve the transactions entered into by the subsidiary with a related party.[105]

Finally, supervision of the group may be achieved by setting up a whistleblowing system. However, only few of the codes mention such a system as a potential measure for internal control,[106] and none of them specifically point out that they may be set up to cover the whole group. In practice, however, group-wide whistleblower arrangements are not unusual.[107]

The most detailed recommendations about supervision measures are found in the recommendations formulated by the Latin American Companies Circle, as they suggest the following measures: *first*, having regular monitoring meetings among representatives from the holding company and from its subsidiary to follow-up on the implementation of directives and performance; *second*, setting a corporate-wide independent internal audit function with a direct reporting line to the parent company’s board and appointment of an external auditor; *third*, implementing risk management practices; and *fourth*, establishing an efficient management information system to monitor key strategic indicators.[108]

None of the codes address the issue whether the parent company or the individual directors of the board of the parent company may get access to information in the subsidiary. As mentioned in Section 5.1, it differs to what extent there is a legal right to access information in a subsidiary, but even if there is not such a right, it may be possible to ensure access through agreements.[109]

Related party transactions with subsidiaries

A separate problem is whether the rules on related party transactions require the board to approve transactions between the listed company and its subsidiaries. Some codes exclude transactions between the listed company and its wholly or partially owned subsidiaries from the recommendations on related party transactions.[110] There is one code which makes it clear that transactions between a listed parent company and a listed subsidiary should be subject to disclosure.[111] Most often, the definition of a related party is left to the companies to decide,[112] or is not addressed at all,[113] or there is a reference to a definition of ‘related party’ outside the code.[114] The G20/OECD Principles set out a more clear approach to addressing transactions with subsidiaries. While the annotation to Principle II.F.1 suggests that related party transactions should be disregarded if there is *no specific interest* of a related party present, the annotation to Principle V.A.6 states that in cases where *specific interests* of related parties are present, material transactions with consolidated subsidiaries should also be disclosed.

Thus, it seems that there is no uniform solution to whether transactions between listed companies and their subsidiaries should be covered by recommendations for related-party transactions. From the perspective of the shareholders of the listed parent company it may be less important to ensure that such transactions are taking place at an arm’s length, since even if profit is transferred to the subsidiary, it will still belong indirectly to the listed company. Only in the case of a transaction to a partially owned subsidiary will the shareholder of the listed parent company risk losing value as the profit that is moved from the listed company to the subsidiary shifts from belonging 100% to the group to only belonging partly to the group.

This could mean that transactions with wholly-owned subsidiaries may be exempted, whereas transactions with partially owned companies should not.[115]

Protection of stakeholders in the subsidiaries

This raises the question whether the codes should also aim to safeguard minority shareholders and other stakeholders in the subsidiaries. If so, this would be an additional argument for applying the rules on related party transactions regarding transactions with subsidiaries as the rules may ensure that profit is not transferred from the subsidiary to the listed company or other companies in the group.

It can be argued that the main aim of the codes is to ensure good governance and shareholder protection of the listed company and not of its non-listed subsidiaries. On the other hand, codes may also aim to reconcile potential conflicts with minority shareholders (and creditors) in the subsidiaries as governing a group also means avoiding such conflicts. Most codes, however, do not mention this problem and consequently, it is uncertain whether they also aim to protect stakeholders in subsidiaries. An exception is the recommendations adopted by the Latin American Companies Circle which state: “Moreover, in the case of partially-owned subsidiaries, the adoption of clear governance rules results fundamentally in order to permit shareholders not related with a corporate group to understand the applicable decision-making process and the relationship among a holding and its subsidiaries, especially with respect to payment of dividends, intercompany transactions, access and use of information from subsidiary companies.”[116]

Thus, the Circle suggests that listed companies should adopt transparent and clear governance rules, *inter alia* to help the minority shareholders of the subsidiaries. For this reason, it is also recommended that the listed company should disclose their group polices.[117] Later, it is recommended that some form of alignment of interest between the listed company and the minority shareholders in the subsidiaries should be achieved through entering into shareholder agreements. It is also recommended that minority shareholders should get the same information from the subsidiary as the listed parent company and that the protection of minority shareholders interest is safeguarded through the appointment of independent directors (see also Section 6.2).[118]

None of the codes seem to address the position of the employees of subsidiaries. Several codes stress that the interests of employees should be taken into account, but this seems to refer to the employees of the company itself, not its subsidiaries.[119] There are a few references to consultation of employees and employee representation, but none that seem to include the employees of the subsidiaries.[120]

Governance in financial institutions

As indicated in Section 5.1, group governance in financial institutions represents a special case. Often the financial regulations require that the parent company ensures the soundness of its financial subsidiaries and, if necessary, supports its subsidiaries.[121] Not surprisingly, the codes especially developed for financial institutions often deal intensively with how parent companies should implement this duty.

For instance, the Corporate Governance principles for banks, prepared by the Basel Committee on Banking Supervision (BCBS Principles), dedicates principle 5 to governance of group structure. The Principles establish that the “the board of the parent company has the overall responsibility for the group and for ensuring the establishment of operation of a clear governance framework appropriate to the structure, business and risks of the group and its entities.”

This overall recommendation is also supported by several more specific recommendations on how to govern the subsidiaries. Several of these reflect the recommendations already encountered in some of the ‘normal’ codes for listed companies, focusing on risk management and internal audit in the group.[122] Further features not previously encountered but of potential relevance inin non-financial groups include:

- Recommendations that the board should aim to have the full overview and understanding of the group.[123]
- Recommendations that the board should formulate a corporate governance framework that clearly defines roles and responsibilities at all levels of the group.[124]
- Recommendations that the parent company should "set the tone at the top" with regard to corporate values and risk awareness.[125]
- Recommendations that the board should ensure that there is a group-wide flow of information.[126]
- A recommendation that appropriate processes and controls should be introduced to identify and address potential intragroup conflicts of interests, such as those arising from intragroup transactions.[127]
- A recommendation that there should be policies for establishing new structures and legal entities.[128]

By stressing the duty of the board in the parent company to govern the subsidiaries, one should assume that the recommendation would be that the subsidiary board should act in a subordinated manner. This is also the first impression when reading the recommendations for subsidiary boards in the BCBS Principles. Here it is stressed that the subsidiary board is responsible for the effective risk management of the subsidiary, but that the board should support the group-wide risk management. Also, the board should align the strategy of the subsidiary to the group-wide strategy.[129] However, not all subsidiaries need to be integrated fully in the group policy, as they may also operate under a less centralised model.[130] Furthermore, the codes often stress that the autonomy of the subsidiaries should be respected. In the BCBS Principles, para. 95, it is made clear that when establishing oversight over subsidiaries, the parent company should respect "…the independent legal and governance responsibilities that might apply to subsidiary boards." Similarly, under the OECD Insurer Guidelines the governance system should recognise the responsibility of boards within the group to "exercise independent decision-making".[131]

These latter reservations seem to reflect that even though the financial regulations imposed on the parent company the duty to exercise group management, the rules applicable to subsidiaries may not fully allow for this. The BCBS Principles indicate that there is a duty to act in the interest of the group when conducting intragroup transactions, but this recognition of the interests of the group does not always clearly appear from the financial regulations applicable to the subsidiary. Normally, the subsidiary may have to comply with the company law applicable to the company, and as outlined in Section 5.1, this does not always allow the board to act in the interest of the group. Potentially, there may be a conflict between applicable company law and the financial regulation, which complicates the issue further.[132]

Summing up

Thus, the codes only sporadically address how the board should deal with the governance of subsidiaries. Still, when putting together the recommendations found in different codes, some special issues related to governing subsidiaries become clear, and a range of possible recommendations is available. Even more recommendations are found in the codes given for financial institutions. Since these codes are based on the premise that parent companies under the rules applicable to financial institutions have a duty to govern their subsidiaries, the recommendations in these codes may not be fully transferable to non-financial companies, as the latter most likely are not under such a duty (see Section 5.1).

Composition and duties of the board of the subsidiary

The codes seldom have any recommendations about how the boards of the subsidiaries should be composed or perform their duties. There are, however, two codes that seem to transfer the recommendations set for the board of the listed company to apply to the boards of the subsidiaries. This is apparently the case in the Cyprus[1] Code which states: “Where a listed company applies the provisions of the Corporate Governance Code it is deemed that the Code also applies to the whole Group of Companies to which the Company belongs, namely also to the subsidiary through central subcommittees as Central Audit Committee etc. Where the subsidiary companies of the listed company themselves maintain Committees which are referred to in the Corporate Governance Code of the CSE, namely the Nomination Committee, the Remuneration Committee and the Audit Committee, then the subsidiary companies themselves must also apply the provisions of the Corporate Governance Code of the CSE.”[133]

The wording seems to indicate that the code in its entirety applies to subsidiaries. Another possible reading of the provision is that the code only applies to subsidiaries that adopt the committees mentioned.

A different approach is used by the Austrian Code. The introductory notes state: “For rules that apply not only to the listed company itself, but also to its associated group companies, the term ’enterprise’ is used instead of ’company’.” This remark gives the impression that substantial parts of the code also apply to subsidiaries. A study of the code, however, shows that this approach is mainly used to specify when the duties of the board of the listed company extend to the group and is not used so much to extend the recommendations of the code to the boards of the subsidiaries. However, the codes extend the limitation on loans to members of the supervisory board to loans from subsidiaries and recommend that the subsidiaries should establish external communication structures.[134]

Apart from these two examples, there are a few examples where specific recommendations are extended to the boards of the subsidiaries. *First*, there are codes that suggest that the recommendations on independent directors should also apply to boards of subsidiaries. Para. 5(i) of the Bangladeshi Code provides, “Provisions relating to the composition of the Board of Directors of the holding company shall be made applicable to the composition of the Board of Directors of the subsidiary company”. As the Bangladeshi Code also includes a requirement that one fifth of the board should be independent directors, these rules must also apply to subsidiaries of a listed company. Similarly, the recommendations adopted by the Latin American Companies Circle suggest that they should be independent directors appointed in partially owned subsidiaries, since such directors may act as guardians of the interests of minority shareholders of the subsidiary.[135] *Second*, there are a few codes which indicate that dealings between a subsidiary and parties that are related to the listed company should be subject to the same rules on related parties as those applicable to the listed company.[136] In three of the codes (the Greek, Italian and Russian), it is foreseen that such transactions should also be approved by the board of the listed company. *Third*, the Belgian Code’s recommendations on severance pay are extended to apply to members of the boards of subsidiaries.[137]

It may be argued that if the recommendations reflect best practices they should be used not only in the listed company but also in (material) subsidiaries. Otherwise, listed companies may avoid best practices just by outsourcing parts of the business to subsidiaries. Another reason for extending the recommendations is that it should contribute to safeguarding minority interests in the subsidiaries. There

1 Note by Turkey: The information in this document with reference to “Cyprus” relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Turkey recognises the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of the United Nations, Turkey shall preserve its position concerning the “Cyprus issue”.

Note by all the European Union Member States of the OECD and the European Union: The Republic of Cyprus is recognised by all members of the United Nations with the exception of Turkey. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus.

may, however, also be reasons for not extending the recommendation in this way. First of all, subsidiaries differ and some are simply too small or perform a type of activity where it would not be optimal to apply the recommendation developed for listed companies. Furthermore, corporate governance recommendations often reflect the legal rules in a particular jurisdiction, and therefore recommendations developed for a listed company in one jurisdiction may not be appropriate for subsidiaries in another jurisdiction. Next, there is no general agreement that recommendations for listed companies should also aim to protect minority shareholders and other stakeholders of the subsidiaries, see the discussion above. Finally, extrapolating recommendations to subsidiaries may also create some unwanted problems, especially as it may make it more difficult to integrate subsidiaries in the group. If, for instance, subsidiaries have independent directors and adopt rules on related party transactions, it may make it more difficult to persuade the subsidiary to adopt a group policy or to conduct inter-group transactions.

Special protection of shareholders in listed parent companies

As mentioned in Section 5.1, consolidated accounts and other consolidated reports give the shareholder an overview of the activities of the group. There are a few codes that make references to such consolidated accounts and reports.[138]

Often, it is important for the shareholders to get an overview of the group structure. The rules governing consolidated reports may require some information about the group structure to be disclosed, but it may not give the full overview.[139] Looking at the codes, they do not seem to recommend additional disclosure of the group structure. As outlined above in Section 6.1, however, the G20/OECD Principles indicate that shareholders have the right "…to information about the structure of a group of companies and intra-group relations. Such disclosure should make transparent the objective, nature and structure of the group."[140] This suggests that the shareholders should be offered information about the group structure 'below' the listed companies, e.g. subsidiaries, joint ventures, etc.

A few codes recommend an even wider disclosure of information about the group.

The Russian Code in para. 287 suggests the following, "The company should disclose information not only about itself but also about any legal entities which are controlled by and are material to the company. In particular, information on roles of each of the material legal entities controlled by the company, major areas of their business, functional relations between the key companies within the group, and mechanisms that ensure lines of reporting and control within the group constitutes an important aspect of information disclosure within the group."

The Latin American Companies Circle suggests that group policies should be published.[141] Since the Circle suggests that groups should adopt a range of different group policies, the consequences of this recommendation – just like the consequence of that found in the Russian Code – will be that the shareholder will receive information about how the group operates.

Some codes suggest that more specific information should be given to the shareholders. If the rules on related party transactions cover transactions with (partially owned) subsidiaries, information of these transactions may be disclosed.[142] More often, in order to ensure that the group structure is not used to 'circumvent' the intention with disclosure, specific disclosure requirements are extended to include the disclosure of activities related to the subsidiaries. Thus, for instance, several codes require that a remuneration report should disclose the remuneration which each board member or executive receives, and this is often extended to include remuneration received from subsidiaries.[143] If this was not the case, it would be very difficult for the shareholders of the listed companies to get the full picture of the amount of remuneration each person receives. Similarly, some codes extend reporting requirements on loans to directors to include loans from other companies of the group.[144]

Another way the shareholders may receive information is by asking questions to the board. The codes do either not address this issue or, if so, they do not address the question whether the shareholders may ask questions about the subsidiaries. This also applies to the G20/OECD Principles as they confirm the right to ask questions, but do not specify whether this includes questions about the subsidiaries and other group-related issues.[145]

Listed companies also have to disclose material information on an ongoing basis. This issue is normally extensively addressed in security law, and not in the codes. The G20/OECD Principles suggest that the shareholders should have the right to “obtain relevant and material information on the corporation on a timely and regular basis”.[146] The reference to corporations seems to indicate that material information on subsidiaries should not be disclosed. This, however, does not seem to reflect normal practice as it will sometimes be required that material information about subsidiaries should be disclosed.[147]

An alternative to receiving information is to grant the shareholders the right to decide on issues related to subsidiaries. However, none of the codes suggest that shareholders should decide on issues relating to subsidiaries. Thus, no codes suggest that the shareholders of a listed company should approve the setting up or acquisition of a subsidiary or the transfer of substantial assets to a subsidiary.[148] Some of the codes suggest that the board of the parent company should be involved in material transactions undertaken by the subsidiary[149] or transactions with related parties undertaken by the subsidiary,[150] but none of them recommend that the shareholders of the listed parent company should be consulted about such transactions.

Even though the G20/OECD Principles recommend that shareholders should have the right to approve or participate in decisions concerning fundamental corporate changes, it is not clear that this involves the acquisition of subsidiaries. Such participation is recommended by the sale of all assets, but an internal transfer to a subsidiary may not be covered by the term ’sale of all assets’. The annotation to Principle II.B stresses the importance that the company is able to transfer operational assets and even divesting all assets and become a holding company. The fact that the importance of this ability is stressed could indicate that this will not be one of the fundamental changes that require shareholder approval or participation. Furthermore, the G20/OECD Principles suggest that shareholders ought to have a say on related party transactions, but as mentioned above, it is not clear whether the Principles recommends that transactions with subsidiaries should be covered.[151] The G20/OECD Principles suggest that shareholders should participate in the nomination of members to the board of the company,[152] but that right does not extend to members of the board of the subsidiaries.

To conclude, the codes only to a limited extent address the special issues relating to the protection of shareholders of a parent company. Since providing shareholders with information and the ability to participate in the making of important decisions are often key issues in the codes, and considering that most listed companies have several subsidiaries, this it rather surprising.

7. Final remarks

The above presentation may give the impression that the national corporate governance frameworks deal rather coherently with the issue how groups should be governed. With a few exceptions, however, this is not the case.[153] For example, most codes have a few or even no[154] provisions concerning this issue, and it is only when pieced together that it is clear that the issue can be addressed in many different ways. Because the recommendations outlined in this working paper are pieced together of many different codes, there is no coherent policy underlying these recommendations, and not surprisingly, the recommendations sometimes appear to be incoherent.

However, if a listed company is a subsidiary of a group, the issue is normally more extensively addressed than if the listed company is a parent company. Given that the latter situation is at least as important as the first one, this seems surprising. The explanation, however, seems to be that many of the mechanisms intended to protect minority shareholders from controlling shareholders and other rules intended to protect minority shareholders also affect the position of a parent company towards a listed subsidiary. Therefore, the recommendations outlined for listed subsidiaries are not necessarily conceived as recommendations for groups of companies.

The codes often contain recommendations that may make it more difficult to implement a group policy where there is a listed subsidiary. On the other hand, the codes seem more positive towards implementing group policies in groups when the listed company is a parent company. This apparent case of double standard may be explained by the fact that the codes focus on protecting stakeholders of a listed company. Nevertheless, it needs to be considered whether the codes should take a wider approach as to which stakeholder to protect when the listed company is a parent company.

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Annex A. OECD Corporate Governance Working Papers

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N° 3	1 Aug 2011	The Exercise of Shareholder Rights: Country Comparison of Turnout and Dissent Paul Hewitt
N° 2	1 May 2011	Enhancing the Role of the Boards of Directors of State-Owned Enterprises W. Richard Frederick
N° 1	1 May 2011	Competitive Neutrality and State-Owned Enterprises Antonio Capobianco, Hans Christiansen

Notes

[1] The author has co-authored a study which analyses the recommendations on the governance of groups in 15 corporate governance codes, and the result of this analysis is used in the following, see Dániel G. Szabó and Karsten Engsig Sørensen, 'Corporate Governance codes and groups of companies: in search of best practices for Group Governance, forthcoming in the European Company and Financial Law Review 2018, pp. 697-731 (see pre-print version https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3120942). The study includes an analysis of 15 codes selected from the 47 codes available in English on the OECD webpage. The 15 codes were selected based on the number of group-specific keywords they contained, based on the assumption that the codes containing most of these keywords were likely to provide most guidance on group-related issues. The 15 countries are: Austria, Bangladesh, Belgium, Cyprus, Finland, France, Greece, Hungary, Italy, Luxembourg, Pakistan, Russia, Slovakia, Spain and Turkey. In addition to these codes, this working paper includes references to the UK Code because it was recently amended, and the recommendations by the Latin American Companies Circle entitled Corporate Governance Recommendations for Company Groups, November 2014, because this is one of the few examples of recommendations focusing on groups of companies. Some references are made to some of the corporate governance guidelines adopted for financial institutions, see the text at notes 122-133.

[2] See Eiji Takahashi, 'Market-Organization-Corporate Groups: An Economic Analysis of the Law of Corporate Groups', The Journal of Interdisciplinary Economics, 2010, pp. 45-71.

[3] Sometimes companies (Special Purpose Vehicles) that are formally not part of the group are formed, and in this capacity they are able to serve less worthy purposes for the group.

[4] Ever since the end of the 19th century it has been possible for one company to own another company, and since then, group structure has emerged as a result of external growth, see Philip I. Blumberg, 'The Transformation of Modern Corporation Law: The Law of Corporate Groups', Connecticut Law Review 2005, pp. 605-617.

[5] The process of substituting corporate structures with structures within a single company (or few companies) is sometimes termed 'divisonalizing', see Peter Muchlinski: Multinational Enterprises and the Law, OUP, 2007, p. 46.

[6] In this working paper the term 'board' is used in the same broad way as in the G20/OECD Principles, p.10.

[7] See also Hermann H. Kallfass, 'Ökonomische Analyse der Konzernbildung', in Mestmäcker & Behrens (eds.): Das Gesellschaftsrecht der Konzerne im internationalen Vergleich, 1991, pp. 19-49. This does not mean that all subsidiaries are management centres as the management structure in groups often cuts across the formal legal structure, see Tom Hadden, 'Inside Corporate Groups', International Journal of the Sociology of Law, 1984, pp. 271-286.

[8] The benefits of operating a specific form may not only be that it is locally known, but also that it offers the optimal conditions for the activity performed vis-à-vis tax, accounting requirements, company law, etc. See also Kallfass (supra note 7) pp. 36-38.

[9] See also Richard A. Posner, 'The Rights of Creditors of Affiliated Corporations', University of Chicago Law Review 1976, pp. 499-526 and Henry Hansmann & Reinier Kraakman, 'The Essential Role of Organizational Law', Yale Law Review 2000, pp. 387-440. Henry Hansmann & Richard Squire in Gorden & Ringe (eds.): Oxford Handbook of Corporate Law and Governance, 2018, pp. 251-274, at. 261 assumes that in practice, this benefit may not be achievable as some groups neglect to make entity-level accounts, which is a prerequisite for a focused credit analysis.

[10] Maintaining the acquired company as a separate entity also denies the company's creditors recourse to the acquiring company's assets, see Hansman & Squire (supra note 9) p. 262.

[11] On these segregation regulations, see Takahiro Yasui, 'Corporate Governance of Financial Groups', OECD Corporate Governance Working Papers, No. 20, pp. 6 and 15.

[12] Such cross-holdings are an essential part of the Japanese keiretsu structure, see Ronald J. Gilson & Mark J. Roe, 'Understanding the Japanese Keiretsu: Overlaps between Corporate Governance and Industrial Organization', Yale Law Journal 1993, pp. 871-906. Keiretsu may partly be explained by a strict merger control, but may also offer different advantages for those that are part of a keiretsu, see Jean McGuire & Sandra Dow, 'Japanese keiretsu: Past, present, future', Asia Pacific Journal of Management, 2009, pp. 333-351.

[13] See also the discussion of the optimal degree of autonomy in subsidiaries in Bongjin Kima, John E. Prescott, and Sung Min Kim, 'Differentiated governance of foreign subsidiaries in transnational corporations: An agency theory perspective', Journal of International Management, vol. 11, 2005, pp. 43-66; and Geoffrey C. Keil, Keven Hendry and Gavin J.Nicholson, 'Corporate Governance Options for the Local Subsidiaries of Multinational Enterprises', Corporate Governance: An International Review, 2006, Volume 14, Issue 6, pp. 568-576.

[14] For instance, the fifty largest listed companies in Australia, Malaysia and Singapore show that they had on average between 50-100 partially and wholly owned subsidiaries, see Mak Yuen Teen & Chris Bennett: Governance of Company Groups, CPA Australia, 2014, pp. 15-17, http://www.iclifgovernance.org/file/files/governance-co-groups.pdf).

[15] For a presentation of the main tax issues associated with international groups, see, for instance, Muchlinski (supra note 5), pp. 269-306.

[16] In economic literature, the term 'business group' or 'economic group' is sometimes used instead of 'corporate group'. The difference seems to be that the former may include entities that are not companies and may include companies that are not controlled in the sense outlined in the main text. For a review of the economic literature on the topic, see Andrea Colli & Asli M. Colpan, 'Business Groups and Corporate

Governance: Review, Synthesis, and Extension', Corporate Governance: An International Review, 2016, pp. 274-302.

[17] Some groups have more than one parent company, as, for instance, is the case in the Unilever group. But this relatively seldom occurs.

[18] Some codes even have special recommendations for groups with several listed companies, see for instance the Spanish Code, Recommendation III.1.2.

[19] In Latin America, it seems that most listed companies are part of a group, see the OECD report, 'Corporate Governance of Company Groups in Latin America', 2014 p. 24.

[20] Here the number of companies are somewhat lower. For instance only 10.6% of the companies listed in Japan have a parent company, see Hideki Kanda, 'Corporate Governance in Japanese Law: Recent Trends and Issues', 11 Hastings Business Law Journal, 2015, pp. 69-83, at p. 75. Figures collected by the OECD indicate that generally, the number of listed subsidiaries in Asia is high, see OECD Equity Markets Review, Asia, 2017, p. 35.

[21] The manner of control may matter to the other stakeholders in the listed company, as some forms of control may be more difficult to detect.

[22] For instance, large groups in China are often state-controlled, see Keun Lee and Young-Sam Kang in Asli M. Colpan, Takashi Hikino and James R. Lincoln (eds.): The Oxford Handbook of Business Groups, OUP, 2010, pp. 210-236.

[23] Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, 'Corporate Ownership Around the World', The Journal of Finance 1999, pp. 471-517, at 499-500.

[24] See Lucian Bebchuk, Reinier Kraakman and George Triantis in R. Morck (ed.): Concentrated Corporate Ownership, University of Chicago Press, 2000, pp. 445-460.

[25] La Porta, Lopez-de-Silanes & Shleifer (supra note 23) at 499-500. It seems, however, that in recent decades, cross-holdings have to some extent been dismantled in some jurisdictions, for instance, Germany and Japan. See Reinier Kraakman et al: The Anatomy of Corporate Law, A Comparative and Functional Approach, OUP, 2017, p. 26.

[26] There is not one law that applies to the group as each company in the group applies its own law. As a main rule, the company law applicable to the parent company will govern the duty of the board of the parent and the position of the stakeholder in the parent company. The company law applicable to the subsidiary governs 1) how the stakeholders in the subsidiaries are protected, 2) the extent to which the board of the subsidiary can submit to a group policy and 3) the extent of the parent companies' liability. For a more detailed and nuanced account of the IPL issues in groups, see Hans Jürgen Sonnenberger: Vorsläge und Berichte zur Reform des europäischen und deutschen international Gesellschaftsrecht, 2007.

[27] Often the regulation of groups is found outside company law, in insolvency law, tax law, labour law, banking law, etc. Also in these areas the rules tend to differ, but it is not possible to outline this regulation here.

[28] See also Klaus J. Hopt in Gorden & Ringe (eds.): Oxford Handbook of Corporate Law and Governance, OUP, 2018, pp. 603-633.

[29] See the German Public Companies Act (Aktiengesetz) § 291 et seq.

[30] This may be a consolidated CSR report (or non-financial reports), corporate governance statements or country-by-country reporting requirements (taxation). Additionally, the European Commission has announced that it will propose an initiative that will improve the information available on groups, see the 2012 Action Plan, COM(2012) 740, p. 15.

[31] See, for instance, the rules applicable to public companies in the EU according to the consolidated company law directive, Directive 2017/1132, Article 67. It is common also to restrict the subsidiaries' ability to vote on shares acquired in the parent. Some jurisdictions go further and limit the possibility to establish or vote in certain cross-holdings between companies that are not in a parent-subsidiary relationship.

[32] For this reason, in German law, it has been discussed whether the decision to spin-off part of the business to a subsidiary should be confirmed by the shareholders, see for instance Richard M. Buxbaum, Extension of Parent Company Shareholders' Rights to Participate in the Governance of Subsidiaries, 31 Am. J. Comp. Law, 1983, pp. 511-519, and Marc Löbbe, 'Corporate Groups: Competences of the Shareholders' Meeting and Minority Protection – the German Federal Court of Justice's recent Gelatine, Macrotron Cases Redefine the Holzmüller Doctrine', German Law Journal, 2004, pp. 1057-1079.

[33] This is, for instance, the case in the Nordic countries, see Jesper Lau Hansen: Nordic Company Law, 2003, p. 95 and German and US law, see Andreas Cahn and David C. Donald: Comparative Company Law, 2010, CUP, pp. 512-13.

[34] This was made possible in Japan by a reform adopted in 2014, see Junko Ueda, 'Directors' Duties and Liability in Corporate Groups: A Japanese Perspective', European Business Law Review, 2016, pp.223-241.

[35] On the discussion in Germany, see, for instance, Lukas Beck, 'Konzernrecht für die Konzernwirklichkeit', Die Aktiengesellschaft, 2017, pp. 726-740, Detlef Kleindiek in Peter Hommelhoff, Klaus J. Hopt & Axel v. Werder (Hrsg.): Handbuch Corporate Governance, Schäffer/Poeschel, 2009, pp. 787-823 and Mathias Habersack in Peter Hommelhoff, Marcus Lutter & Christoph Teichmann (Hrsg.): Corporate Governance im Grenzüberschreitenden Konzern, De Gruyter, 2017, pp. 270-289. For the position in the Netherlands, see Loes Lennarts in Hommelhoff, Lutter & Teichmann, ibid, pp. 135-138, and the discussion of implication of the Japanese 2014 reform of the rules on internal risk management systems for groups in Junko Ueda, 'Directors' Duties and Liability in Corporate Groups: A Japanese Perspective', European Business Law Review, 2016, pp. 223-241.

[36] See, for instance, the Capital Requirement Directive, Directive 2013/36/EU, Articles 74 et seq and Article 84 et seq This policy is also supported by the Principles for the Supervision of Financial Conglomerates, published by the Joint Forum, 2012, as according to Principle 10 supervisors "… should seek to ensure that the financial conglomerate establishes a comprehensive and consistent governance framework across the group that addresses the sound governance of the financial conglomerate, including unregulated entities, without prejudice to the governance of individual entities in the group."

[37] See also at notes 122-133.

[38] In the EU, there is a presumption for the parent company's liability for fines imposed on a subsidiary that are wholly or nearly wholly owned. The position in other jurisdictions, for instance the US, does not seem to go so far. See Carsten Koenig, 'Comparing Parent Company Liability in EU and US Competition Law', World Competition, 2018, pp. 69-100.

[39] This, for instance, is the case with the OECD Guidelines for Multinational Enterprises and the new reporting regime for non-financial information adopted in the EU, Directive 2014/95/EU. For a more detailed account, see Dániel G. Szabó & Karsten Engsig Sørensen, 'Non-financial reporting, CSR frameworks and groups of undertakings: application and consequences', Journal of Corporate Law Studies, 2017, pp.137-165.

[40] For instance, the recently adopted France vigilance law and the UK Bribery Act. The French law requires that the parent companies of certain large groups should publish a vigilance plan to identify and prevent the risk of serious infringements of human rights in the group. If the plan is not published or implemented, the parent company may be held liable for the infringement of human rights if the harm could have been avoided with a proper fulfilment of the obligations, see http://www.assemblee-nationale.fr/14/ta/ta0924.asp. Similarly, the UK Bribery Act 2010 makes a UK company liable if it has not taken sufficient steps to prevent bribery conducted by its foreign subsidiary, see section 8(3). This liability may, however, be avoided if it is documented that due diligence procedures are in place, see Principle 4 of the Guidance published by the Ministry of Justice, see www.gov.uk/government/uploads/system/uploads/attachment_data/file/181762/bribery-act-2010-guidance.pdf.

[41] For a survey of the different approaches to make parent companies liable and the limitation of each of these, see the survey by Gwynne Skinner, Parent Company Accountability; Ensuring Justice for Human Rights Violations, September 2015, report prepared for the International Accounting Roundtable (ICAR), http://icar.ngo/wp-content/uploads/2015/06/ICAR-Parent-Company-Accountability-Project-Report.pdf.

[42] There are several empirical studies that support the idea that the reputation of an enterprise is of major importance to its management and for its value: see, among others, Ronald J Burke, Martin Graeme and Cary L Cooper: Corporate Reputation: Managing Opportunities and Threats, Gower, 2011.

[43] See the study of 42 Danish listed companies in Dániel G. Szabó & Karsten Engsig Sørensen, 'Pursuing CSR Policy in Corporate Groups: Insights in the Operation of Groups from Consolidated Non-Financial Reporting', European Company Law, 2018, pp. 51-60.

[44] In respect of the EU and its Member States, see Stefan Grundmann, European Company Law, 2012, pp. 298-300. Similar rules apply in the United States as well, see Julian Velasco, 'The Fundamental Rights of the Shareholder', UC Davis Law Review, Vol. 40, No. 2, 2016, pp. 420-421.

[45] See for example as to German private companies, GmbHG § 51a (there is no similar provision for public companies) and the Danish Companies Act § 134.

[46] See the comparative overview by Gerhard Manz & Barbara Mayer, 'Gesellschaftliche Herausforderungen im internationalen Konzern', Internationales Steuer- und Wirtschaftsrecht, 2015, pp. 529-538.

[47] The issue, however, seems to be discussed in Japan. See Junko Ueda, 'Directors' Duties and Liability in Corporate Groups: A Japanese Perspective', European Business Law Review 2016, pp. 223-241.

[48] See supra note 29.

[49] See Kraakman (supra note 25) p. 163 and Valery Fedchuk, 'Modern Legal Regulation of Corporate Groups in National Private Law', 17 Uniform Law Review, 2012, pp. 561-574.

[50] See, for instance, the comparative surveys in Carsten Gerner-Beuerle, Philipp Paech & Edmund Philipp Schuster, 'Study on Directors' Duties and Liability, prepared for the European Commission DG Markt, April 2013, the Informal Company Law Expert Group (ICLEG), 'Report on the recognition of the interest of the

group', October 2016, and Hommelhoff, Marcus Lutter & Christoph Teichmann (Hrsg.): Corporate Governance im Grenzüberschreitenden Konzern, 2017.

[51] The Rozenblum judgment handed down in France has worked as an inspiration for other European countries and may work as an inspiration for European harmonisation, see also Pierre-Henri Conac, 'Director's Duties in Groups of Companies – Legalizing the Interest of the Group at the European Level', European Company and Financial Law Review, 2013, pp. 194-226.

[52] Thus, if the subsidiary is insolvent, the duties of the directors may change, see for instance on US law J. Haskell Murray, '"Latchkey corporations": fiduciary duties in wholly owned, financially troubled subsidiaries, Delaware Journal of Corporate Law, Volume 36, Issue 2, pp. 577-624.

[53] See COM(2012) 740, p. 15.

[54] The Informal Company Law Expert Group (ICLEG) has however suggested a range of proposals (supra note 50).

[55] For an overview of these mechanisms, see Kraakman et all (supra note 25) pp. 79-89 and 145-169, and the World Bank report, Protecting minority investors: Going beyond related-party transactions, 2015.

[56] The primary feature is the group dependency report for de facto groups in Germany, see Aktiengesetz § 312.

[57] Hopt (supra note 28) pp. 607-608.

[58] See Directive 2017/828 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement.

[59] See OECD: Related Party Transactions and Minority Shareholders Rights, 2012.

[60] See Aktiengesetz § 311.

[61] See Hopt (supra note 28) p. 627 and Irit Mevorach, 'The Role of Enterprise Principles in Shaping Management Duties at Times of Crisis', European Business Organization Law Review, 2013, pp. 471-496, and Gerner-Beuerle et all (supra note 50). Other ways of holding the parent company liable are based on doctrines of factual appearances, agency, and vicarious liability. See for instance Blanaid Clarke, 'The Duties of Parent Companies' in Birkmose: The Duties of Shareholders, Kluwer Law International 2017, pp. 229-253, and Christian A. Witting: Liability of Corporate Groups and Networks, CUP, 2018.

[62] See e.g. the comparative analysis in Mads Andenas & Frank Wooldridge: European Comparative Company Law, 2009, CUP, pp. 480-490; Siel Demeyere, 'Liability of a Mother Company for its subsidiary in French, Belgian and English Law', European Review of Private Law, 2015, pp. 385-414, and Karen Vandekerckhove, Piercing the Corporate Veil, 2007, Wolters Kluwer.

[63] See Kraakman et all (supra note 25) p. 132 and Jose Maria Lezcano Navarro in Roman Tomasic (ed.): Routledge Handbook of Corporate Law, 2016, pp. 259-279.

[64] See Kimberly Bin Yu and Richard Krever, 'The High Frequency of Piercing the Corporate Veil in China', 23 Asia Pacific Law Review, 2015, pp. 63-87.

[65] This is, for instance, the case in Germany and the Nordic countries. It should be noted that such rights for group representation are often not fully implemented in cross-border groups. See here the recent decision of the Court of Justice of the European Union accepting this fact, Case C-566/15, Erzberger.

[66] See, for instance, the European Works Councils, Directive 2009/38/EC.

[67] See Szabó & Engsig Sørensen (supra note 1).

[68] See Szabó & Engsig Sørensen (supra note 1), pp. 706-709.

[69] See, for instance, the Slovakian Code, Notes to Recommendation V.A which states that the duty of loyalties forbids members to prefer the interests of only certain shareholders, the Finnish Code, p. 22, and the UK Code, provision 7.

[70] The Italian Code, p. 8, recommends that the board should pursue the strategic objectives of the group, but the same sentence recommends that it should pursue the objectives of the issuer itself. Therefore, it does not clearly prioritise the interests of the group.

[71] See Principle VI.A. The same is stated in the annotation accompanying Principle II.G, VI.B and VI.E.

[72] The Principles needs to observe the requirement of the company law applicable to the listed company. It is possible for the Principles to set higher standards of independence than that of national law – for instance by suggesting that the board should never act in the interest of the group, even though national law does allow this. It may, however, not suggest that the listed company submits to the interest of the group to an extent that it not allowed by national law.

[73] See Austrian Code, Recommendation 53 and Finnish Code, Recommendation 10.

[74] See Spanish Code, Recommendation 17.

[75] For an even broader overview of how the definition of an independent director differs in the OECD, see the OECD Corporate Governance Factbook, 2017, pp. 98-100.

[76] See the annotations to Principle VI.E.

[77] See the recommendations of the Informal Company Law Expert Group (ICLEG): Report on information on groups, March 2016. These recommendations are addressed to the European Commission, that has previously stated that it wants to improve the information in groups. So far, however, no proposal has been published.

[78] One explanation for this unclarity could be that often the definition of related party transactions is found in legislation and thus not in the codes, see the overview given in the OECD Corporate Governance Factbook, 2017, pp. 68-69.

[79] See Szabó & Engsig Sørensen (supra note 1) pp. 711-713. A broader examination of jurisdictions shows that it is not uncommon that shareholders approve related party transactions, see OECD: Related Party Transactions and Minority Shareholders Rights, 2012, pp. 32-36.

[80] Inspiration to how the rules may be developed as a group rule can be found in Peter Böckli et all, ‘A Proposal for the Reform of Group Law in Europe’, European Business Organization Law Review 2017, pp. 1-49.

[81] See Szabó & Engsig Sørensen (supra note 1), pp. 714-717.

[82] Austrian Code, para. 13, and the definition of the term ‘enterprise’ on p. 12.

[83] Italian Code, para. 1.C.1.(a).

[84] See the UK Code, p. 3.

[85] See Latin American Companies Circle, Corporate Governance Recommendations for Company Groups, November 2014, p. 3.

[86] See Finnish Code, p. 9, and Luxembourg Code, para. 3.7 ("Directors must acquire an excellent understanding of the company’s business activities, and of the group’s structure”).

[87] See Austrian Code, para. 11 (suggesting that the board should adopt a group strategy); Italian Code 1.C.1(a) (indicating that the board should adopt a strategy for the group), and Latin American Companies Circle, Corporate Governance Recommendations for Company Groups, November 2014, p. 3. In the same direction, the UK Code, p. 3 (suggesting that the board should communicate the parent company’s purpose, values and strategy to the subsidiaries) and the Russian Code, para. 66 (indicating that it should be determined what power the listed company should have in developing the strategy for the subsidiaries).

[88] See Slovakian Code, notes to para. V.C. The adoption of different group policies for environmental and social concern is also recommended by the Latin American Companies Circle, Corporate Governance Recommendations for Company Groups, November 2014, p. 3.

[89] See also the Austrian Code, para. 21.

[90] See Latin American Companies Circle, Corporate Governance Recommendations for Company Groups, November 2014, p. 6. The recommendation, however, makes the reservation that too detailed and too broad group policies may impact the subsidiaries negatively, especially when subsidiaries are engaged in different businesses. Therefore, it is also recommended that subsidiaries should set out their own operational policies and procedures.

[91] See Austrian Code, para. 11 (suggesting that the board should discuss implementation of group policies) and para. 21 (suggesting the certain compliance requirements should be implemented throughout the group). Also the Italian Code, para 1.C.1.(a) mentions that the board should monitor the implementation of plans for the company and the group periodically.

[92] See Latin American Companies Circle, Corporate Governance Recommendations for Company Groups, November 2014, p. 5.

[93] A partial regulation is found in the Austrian Code, para. 44, which prohibits that members of the supervisory board of the listed company are members of the management board of its subsidiaries.

[94] A survey conducted by Deloitte showed that the majority of boards spent significant time on the oversight of subsidiaries, see Deloitte: Governance of Subsidiaries. A survey of global companies, September 2013, p. 10.

[95] See Austrian Code, para. 34; Bangladesh Code, para. 5(iii)-(v); Greek Code, Annex II.2(f) (information on transactions entered into by the subsidiary with related parties); Italian Code, para. 1.C.6 (allowing the chair of the board to request the presence of executives from subsidiaries at board meetings); and Russian

Code, para. 144-145 (giving board members a right to get information on subsidiaries), and the same code, para. 147 (the board should automatically be given information about a subsidiary).

[96] See Italian Code, para. 1.C.6.

[97] See Bangladeshi Code, para. 5(iii).

[98] See Italian Code, para. 1.C.1(c) and 7.C.1.(a) (including significant subsidiaries in the internal control) and the Russian Code, para. 272(3). An indirect encouragement to have internal control measures at group level can be found in the reporting requirement for the consolidated corporate governance statement, mirrored in the Finnish Code, p. 55. The recommendation of the Latin American Companies Circle also recommends group-based risk management, but makes the reservation that in conglomerate groups, it may be preferable to let each company take responsibility for their own risk management, see p. 6.

[99] See Austrian Code, para. 9 (indicating that the board should be informed about risk management in subsidiaries); Italian Code, para. 1.C.1(c) and 7.C.1(a) (including subsidiaries in the risk management); Russian Code, para. 258(6).

[100] Russian Code, para. 272(3) (the internal auditor of the parent company can carry out internal audit in the subsidiaries) and Belgian Code, para. 5.2./10 (calling for an audit review of the whole group).

[101] The survey conducted by Deloitte (supra note 95) p. 11, showed that as many as 84% of the groups participating required that certain actions of their subsidiaries should be approved by the parent company. In many jurisdictions, it is possible for shareholders to reserve the right to approve certain decisions. Therefore, it may be possible to formulate the articles of association of the subsidiaries in a way that allows the listed company to approve them. Formally, that should normally take place at the general meeting of the subsidiary, but the acts of the companies in some jurisdictions may allow to forego the formalities so that a board meeting of the listed parent company may suffice. It must be assumed that such an informal approach will be difficult if the subsidiary has minority shareholders.

[102] See Austrian Code, para. 35.

[103] See Russian Code, para. 170(10).

[104] Italian Code, p. 9.

[105] See the references in section 6.2.1.2.

[106] See the Italian Code, p. 35, and the Pakistan Code para. V(c) and IX. A more indirect recommendation of such arrangements is found in the G20/OECD Principles, Principle VI.D.6 and the UK Code, provision 6.

[107] Thus, an investigation of 42 Danish listed companies showed that 35 have whistleblowing arrangements that covered the group, see Szabó & Engsig Sørensen (supra note 43). The Deloitte survey showed that 81% of the respondents had extended their whistleblower policies to its large subsidiaries, see Deloitte (supra note 95) p. 14.

[108] See Latin American Companies Circle, Corporate Governance Recommendations for Company Groups, November 2014, p. 3.

[109] Agreements may also facilitate the flow of sensitive information between the companies, see, for instance, the Data Protection Regulation, Regulation 2016/679, Article 28(3) on data processing agreements and Articles 47 on binding corporate rules.

[110] See Finnish Code, annotations to Recommendation 28 (suggesting that wholly owned subsidiaries are not related parties). The definition of a related party in the EU accounting directive 2013/34/EU includes transactions between a parent company and its subsidiary, but the directive allows the Member States to exempt the disclosure requirements regarding transactions with a wholly owned subsidiary, see Article 17(1)(r).

[111] Spanish Code, Recommendation 2.

[112] Slovenian Code, V.A.6 (giving some suggestions as to what is meant by a 'related party', but seemingly leaving the decision to the companies).

[113] Bangladesh Code, French Code, Italian Code, and Pakistan Code.

[114] See Greek Code, p. 9 (referring to international account standards); Belgian Code, para. 2.4/1(7) (referring to CoC Art. 11); Russian Code, para 289(4) (referring to international accounting standards); Turkish Code, Article 3(g) (referring to international accounting standards). This is also the solution in the G20/OECD Principles as Principle II.F.1. calls for "broad but precise definitions of what is understood to be a related party".

[115] Thus, according to recent revision of the Shareholder Rights Directive 2017/828/EU, Article 9c(6)(a), Member States can exempt transactions with wholly owned subsidiaries from the normal rules adopted for related party transactions.

[116] See Latin American Companies Circle, Corporate Governance Recommendations for Company Groups, November 2014, p. 3.

[117] See Latin American Companies Circle, Corporate Governance Recommendations for Company Groups, November 2014, p. 8.

[118] See Latin American Companies Circle, Corporate Governance Recommendations for Company Groups, November 2014, p. 6-7.

[119] See, for instance, G20/OECD Principles, pp.10 and 51, and Principle VI.A and the UK Code, provision 5.

[120] The Austrian Code, p. 65, however, also refers to the fact that the group representation is required by law. The G20/OECD Principles refer to employee participation in Principle IV.C and representation in Principle VI.G, but does not mention that this could or should include employees of the subsidiaries.

[121] Another feature which makes the financial institutions a special case is the important role of stakeholders, including the supervisory authorities, see Yasui (supra note 11) and Yannick Hausmann & Elisabeth Bechtold, 'Corporate Governance of Groups in an Era of Regulatory Nationalism: A Focused Analysis of Financial Services Regulation', European Company and Financial Law Review, 2015, pp.341-371.

[122] See BCBS Principles, para. 96 and OECD Guidelines on Insurer Governance (hereinafter 'OECD Insurer Guidelines') para. III.C, third and fourth bullet points, focusing on control functions.

[123] See BCBS Principles, Principle 5, second sentence, and OECD Insurer Guidelines, para. III.A.

[124] BCBS Principles, para. 96, first bullet point and OECD Insurer Guidelines, para. III.C, first bullet point.

[125] BCBS Princples, para. 30, and OECD Insurer Guidelines, para. I.A.2, second bullet point.

[126] BCBS Principles, para. 96, sixth bullet point, and OECD Insurer Guidelines, para. III.D.

[127] BCBS Principles, para. 96, fourth bullet point.

[128] BCBS Principles, para. 96, fifth bullet point.

[129] BCBS Principles, paras. 97-98.

[130] Thus, a greater independence is foreseen for significantly regulated subsidiaries in the BCBS Principles, para. 99. A decentralised model is also described in the Issues Paper by the International Association of Insurance Supervisors, 'Approaches to Group Corporate Governance; Impact on Control Functions', October 2014 (available at https://www.iaisweb.org)

[131] OECD Insurer Guidelines, para. III.C, second bullet point.

[132] For an account of this conflict from a German perspective, see Daniela Weber-Rey & Evgenia Gissing, 'Gruppen-Governance – das Gruppeninteresse als Teil des internen Governance-Systems im Finanzsektor', Die Aktiengesellschaft, 2014, pp. 884-891

[133] See Cyprus Code, p. 4.

[134] See Austrian Code, paras. 47 and 67.

[135] See Latin American Companies Circle, Corporate Governance Recommendations for Company Groups, November 2014, p. 7.

[136] See Greek Code, Annex II.2(f) and para. 4.1; Luxembourg Code, para. 5.7; and possibly the Russian Code, para. 321 and the Turkish Code, Article 9(1).

[137] Belgian Code, para. 7.18.

[138] See G20/OECD Principles, Principle V.A.1. Principle V.A.2 also mentions CSR and country-by-country reporting.

[139] As mentioned above, this is the reason why the Commission has indicated that they will propose additional disclosure rules because they think that the present disclosure requirements are insufficient. A similar conclusion that group structures are not reported fully in one place was reached in OECD: Related Party Transactions and Minority Shareholders Rights, 2012, p. 12.

[140] Principle V.A.3.

[141] See Latin American Companies Circle, Corporate Governance Recommendations for Company Groups, November 2014, p. 8.

[142] As outlined above in section 6.2.1.1, only one code clearly covers transactions with subsidiaries (Spanish Code, Recommendation 2).

[143] Belgian Code, paras. 7.8 and 7.12, Cypress Code, Annex 2.A.ii, Finnish Code, p. 61, French Code para. 25.2, Greek Code, para. 1.11, Hungarian Code, para. 4.1.11, Russian Code, para. 294(10) and the Slovakian Code, para. IV.A.4.a. In a similar vein, the Luxembourg Code recommends that the remuneration should be reported to a remuneration committee and that this report should include remuneration received from any company of the group, see para. 8.12.

[144] See for instance Cyprus Code, para. C.2.3, Hungarian Code, para. 4.1.11, and Russian Code, para. 294(11).

[145] Principle II.C.3. The same is true for the right formulated in the Shareholder Rights Directive, see Directive 2007/36/EC, Article 9.

[146] Principle II.A.

[147] For instance, according to the EU transparency directive 2004/109/EC Article 6(1), the management statement should include information on material events that affect not only the company but also controlled undertakings. Also, the duty to publish insider information according to the market abuse regulation, Regulation 596/2014, Article 17(1), may also cover information about events taking place in subsidiaries, see Rüdiger Veil (ed.): European Capital Market Law, 2017, Hart Publishing, pp. 357-358.

[148] The recommendation of the Latin American Companies Circle recommends that acquisition of material subsidiaries should require the approval of the board of the parent company, see p. 4. Transferring assets to a subsidiary may also affect the creditors of the parent company as it may lead to what has been termed 'involuntary structural subordination', see Hansmann & Squire (supra note 9) pp. 263-264.

[149] See Austrian Code, para. 35; Italian Code, p. 9; and Russian Code, para. 307.

[150] See section 3.2.2 above.

[151] Principle II.F.1.

[152] Principle II.C.4.

[153] The exceptions being the recommendations of the Latin American Companies Circle and those developed for financial institutions.

[154] It should be recalled that the 15 codes that are part of the study in note 1 were selected from 47 codes as those that promised to have the most extensive recommendations on group issues. Many codes mention nothing or very little about group governance.