Independent Supervisory Directors in Family-Controlled Publicly Listed Corporations

Is There a Need to Revisit the EU Independence Standards?

Fabian Imach*

1 Introduction

The notion of independent directors has been at the heart of academic debate for a number of years now. The presence of independent directors on the board, capable of challenging the decisions and policies of management, is praised in the academic literature as a miracle cure to deal with inherent inefficiency and monitoring problems. It is widely considered to be a key element of good corporate governance as a bonding mechanism between different stakeholder interests and effective monitoring tools. Different rule setters, at EU and Member States level, have established rules concerning the independence of directors in capital market-oriented businesses over the past decade. In the light of the European Commission's recommendation on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board (hereinafter 'the European Commission's Recommendation 2005'),[1] independence should be understood as the absence of any material conflict of interests.[2] The basic idea underlying the concept of 'independent directors' is that corporate governance should ensure that boards exercise appropriate scrutiny over management and shareholders in their capacity as owners of the company.[3] Boards are thought to be most likely to exercise efficient monitoring if they are composed of individuals who are free of any business, family or other relationship, with the company, its controlling shareholder or the management.[4] In this context, independence can no longer be assumed where the potential director is or represents in any way the controlling shareholder.[5] Although not binding on Member States, the European Commission's Recommendation 2005 has been implemented in a majority of the EU Member States either through legislation or through best practice rules based on the flexible 'comply or explain' principle.[6] The European Commission's activities in the field of corporate governance regulation are traditionally limited to listed companies. However, surprisingly, the role and rationale of independent directors in publicly listed corporations under the control of the founder or members of the founding family (hereafter referred to as 'family businesses') remain largely undertheorized. This is particularly true in the context of listed family businesses operating under a dual administrative management and control structure, consisting of an executive and a supervisory board. The lack of academic research in this field is all the more surprising as recent empirical findings suggest that there is a positive correlation between operating performance and family influence in European stock corporations. Against the backdrop of the positive correlation between value creation and family influence in European family businesses, it seems to be appropriate to carry out a critical impact assessment of the independence criteria restricting family influence in order to avoid disproportionate and value-destroying administrative burdens for listed family businesses. The point this contribution makes is that it is important to recognize that independent supervisory directors are a means to an end, and not an end in itself. Although recognizing that an independent functioning supervisory board plays a key role in enhancing transparency and monitoring compliance, the true added value of independent directors lies in their contribution to both accountability and business prosperity. Based on this premise, independent supervisory directors need to deliver genuine benefits to listed family businesses and investors and not merely burden respective businesses with additional and disproportionate administrative costs. The concept of value-maximizing corporate governance, as proposed by this contribution, calls for a judicious use of legal rules and governance tools so as not to deprive businesses of optimal value creation potential for the benefit of all stakeholders.

Against this backdrop, two fundamental questions arise: firstly, is the current focus of the EU regulator on

* Fabian Imach is management consultant at Societaet CHORVS AG, Gesellschaft für disruptive Wettbewerbsgestaltung in Düsseldorf. He has previously worked for BMW AG, JAFFÉ Rechtsanwälte Insolvenzverwalter (Lawyers and Insolvency Administrators) and Porsche Consulting GmbH. He holds a Master degree from Maastricht University, Faculty of Law.

1. Commission Recommendation 2005/162/EC.
2. *Ibid.*, recital 7.
3. Scholderer 2012, p. 169.
4. Commission Recommendation 2005/162/EC, para. 13.1.
5. *Ibid.*, Annex II 1 (d).
6. *Ibid.*, recitals 4, 5 & 1.1, 1.2, 1.3.2.

doi: 10.5553/DOQU/221199812015003001002

empowering independent directors really effective in corporations with a concentrated (family) ownership structure? And secondly, do the European Union's independence standards for supervisory directors vis-à-vis controlling (family) shareholders sufficiently reflect the special needs of publicly listed family-controlled businesses in countries with a dualistic board structure, or is there a need for exceptional rules at the EU level to safeguard the positive effect of family control on firm value? The basic hypothesis at the outset of this contribution is that the current focus of the EU regulator on empowering independent directors is ineffective in corporations with a controlling (family) shareholder. The EU independence requirements, as stipulated in the Commission's Recommendation on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board,[7] do not take due account of the special characteristics of publicly listed family businesses in countries with a dual board structure. Given the key role of listed family-controlled businesses in Europe's economy and their contribution to the entrepreneurial culture, social and economic cohesion and overall prosperity, there is a need for a differentiated corporate governance framework for listed family-controlled businesses at the European level.

The paper is organized as follows: In section 2, the empirical background is provided. After placing the research question in a broader regulatory context (2.1) and stating the significance of the subject matter for orienting corporate governance regulation at EU level (2.2), the underlying empirical studies on the effect of family influence on corporate performance are presented (2.3). In section 3, the role and effectiveness of independent directors are analyzed from an agency theory perspective in the light of the specific characteristics of dispersed (3.1) as compared to concentrated ownership structures (3.2). Against the backdrop of the previous sections, in section 4, the European Union's independence standards for supervisory directors vis-à-vis controlling shareholders, as laid down in the European Commission's Recommendation 2005,[8] are assessed. Section 5 concludes the paper and discusses policy implications.

2 Empirical Background and Theoretical Considerations

2.1 Regulatory Background

Before highlighting the economic significance of listed family businesses, it is worth placing the research question in a broader regulatory context. On 12 December 2012, the European Commission adopted an Action Plan[9] that outlines the initiatives it intends to take forward in the fields of EU company law and corporate governance. They are, inter alia, aimed at enhancing transparency between companies and their shareholders and at encouraging long-term shareholder engagement in EU companies.[10] These initiatives are primarily inspired by the responses to the Commission's 2011 Green Paper on the EU corporate governance framework (hereinafter 'the 2011 Green Paper').[11] The consultations established by the Commission's 2011 Green Paper are part of a broader review of the corporate governance framework in Europe started by the consultation on corporate governance and remuneration policies for financial institutions in June 2010.[12] The 2011 Green Paper addressed three core subjects which are at the heart of good corporate governance: the composition and effectiveness of the board of directors, the shareholders and how to encourage greater engagement and focus on sustainable, long-term performance rather than short-term profit and lastly the issue of how to improve the effectiveness of the 'comply or explain' approach.[13] For the purposes of the 2011 Green Paper, the term 'board of directors' essentially referred to the supervisory role of directors and the term 'non-executive director' included the members of the supervisory board in the dual system.[14] The European Commission has not explicitly addressed the controversial issue of independent supervisory directors in listed family businesses in the 2011 Green Paper, or in the context of the Action Plan.[15] However, the composition and effective functioning of the board of directors were identified by the Commission as being of very high concern for good corporate governance of listed companies in Europe. This is evident from the fact that the issue was addressed, by the 2011 Green Paper, as key consultation topic.[16] Bearing in mind that the 2011 Green Paper was designed to foster a broad debate on issues perceived to be of key relevance for the effective corporate governance of listed companies, the 2011 Green Paper flagged items for public consultation that the Commission had not considered so far.[17] The problem area addressed by this contribution appears to be such an underexposed item. The mere fact that the consultation period for the 2011 Green Paper has expired on 22 July 2011 does not ren-

7. Commission Recommendation 2005/162/EC.
8. Commission Recommendation 2005/162/EC.
9. EC Action Plan on European company law and corporate governance, COM(2012) 740/02.
10. *Ibid.*, p. 4.
11. EC Green Paper on the EU corporate governance framework, COM(2011) 164.
12. EC Green Paper on corporate governance in financial institutions and remuneration policies, COM(2010) 284 final.
13. EC Green Paper on the EU corporate governance framework, COM(2011) 164, p. 3.
14. *Ibid.*, p. 5.
15. EC Action Plan on European company law and corporate governance, COM(2012) 740/02.
16. EC Green Paper on the EU corporate governance framework, COM(2011) 164, p. 3.
17. European Commission, "The EU Corporate Governance Framework", 2014. Available at: <http://ec.europa.eu/internal_market/consultations/2011/corporate-governance-framework_en.htm> (last assessed 17 May 2015).

doi: 10.5553/DOQU/221199812015003001002

der the whole problem area obsolete or outdated. A similar call for action can be derived from the Commission's 'Europe 2020' Communication, which calls for the improvement of the business environment in Europe.[18] Strengthening the corporate governance framework, at EU and national level, is essential to achieve the 'Europe 2020' strategy for smart, sustainable and inclusive growth, because it creates a vibrant environment for foreign and domestic investment and thus for economic development. The idea is that sound corporate governance builds sustained investor confidence and improves corporate competitiveness.[19] This paper contributes to the discussions about the future architecture of the EU corporate governance framework by analyzing the existing EU's independence standards for supervisory directors in the specific context of publicly held family-controlled corporations.

2.2 The Economic Significance of Listed Family Businesses

From the outset, the question of the relevance of the subject matter ought to be raised. Publicly traded corporations, listed on a stock exchange, in which a family holds a controlling interest (*i.e.* a majority shareholding stake or voting power in a company) are a significant phenomenon in Continental Europe.[20] Empirical evidence conducted by Banca March and the Instituto de Empresa Business School, which studied the financial results of 2423 companies listed on various European stock markets with a market capitalization of more than 50 million euros, suggests that 27 percent of the companies were family businesses.[21] According to a study conducted by Faccio and Lang,[22] which analyzed the ultimate ownership and control of 5,232 publicly traded corporations in 13 Western European countries, 36.93 percent of the corporations under consideration were widely held and 44.29 percent were family-controlled.

Given the fact that the combined revenues of the top 100 listed family businesses in Europe reached more than €1,8 trillion in 2011, which corresponds to nearly 14 percent of the European Union's gross domestic product (GDP), the importance of listed family-owned or controlled businesses to the European economy cannot be underestimated.[23] Among such corporations are household names and economic heavyweights like Volkswagen (Piëch/Porsche family), BMW (Quandt/Klatten family) and the consumer goods giant Henkel (Henkel family), which have in place a dual board structure. However, listed family-controlled corporations are not a purely German phenomenon, but more realistically characterized as a European one, as corporations like PSA Peugeot Citroën (Peugeot family), Roche (Hoffman-La Roche heirs) and the world's biggest luxury group LVMH (Arnault family) illustrate. In light of such evidence from the top revenue-generating corporations, it can reasonably be assumed that there are numerous other listed family businesses, having in place supervisory boards, among the smaller-scale stock corporations in Continental Europe. As a result, corporate governance regulation should take into account the special characteristics and peculiarities of this form of business organization.

2.3 The Effect of Family Control on Firm Value and Performance

In order to ensure an efficiency-based assessment of the existing EU's independence standards for supervisory directors in section 4, it is essential to reach reliable conclusions about the economic desirability of family control in European stock market corporations. In doing so, this section does not seek to provide an exhaustive description of all the available academic literature on the effect of family control on firm value and performance, but rather to present an overview of the findings of the most comprehensive studies conducted in Continental Europe.

2.3.1 Firm Performance and Family Control

The effect of the family control of public corporations within the sphere of public capital markets is a growing field of interest in finance and management literature. The Banca March and IE Business report revealed that European family businesses, where a family held at least 20 percent of shares and a family member sat on the executive or supervisory board, have created substantially more value for their shareholders between 2001 and 2010 than their non-family counterparts.[24] Numerical key data provided by the report show that family businesses have outperformed their respective local stock market indexes in all countries examined at similar or even lower risk level.[25] In addition to that better stock return performance, the findings of the report also reveal that listed family businesses not only created more value for their shareholders over the last decade but also generated more employment than listed non-family companies, averaging a growth rate of 3.4 percent compared to 0.8 for their peers.[26] Moreover, a comprehensive analysis of stock market-listed family businesses in Germany has proven that the equity ratio of family businesses is substantially higher than that of non-family businesses and that they have less debt and therefore more free equity, which gives them leeway for medium- to long-term development and better reserves to survive times of economic hardship.[27] All in all, the findings suggest that there is a positive correlation between oper-

18. Communication from the Commission 'Europe 2020'. A strategy for smart, sustainable and inclusive growth, COM(2010) 2020 final, pp. 4-5.
19. Communication from the Commission Action Plan: European company law and corporate governance – a modern legal framework for more engaged shareholders and sustainable companies, COM(2012) 740/2, p. 3.
20. Peng & Jiang 2010, p. 253.
21. Cruz Serrano & Nuñez Letamendia 2012, p. 15.
22. Faccio & Lang 2001, p. 12.
23. Campden Family Business, "Top 100 Family Businesses in Europe", 2012. Available at: <www.campdenfb.com/article/top-100-family-businesses-europe-1> (last accessed 17 May 2015).
24. Cruz Serrano & Nuñez Letamendia 2012, p. 22 *et seq.*
25. *Ibid.*, p. 30.
26. *Ibid.*, p. 35 *et seq.*
27. Achleitner *et al*. 2009, p. 61.

doi: 10.5553/DOQU/221199812015003001002

ating performance and family influence in European corporations.

2.3.2 *The Relationship between Firm Performance and Family Involvement*

The results presented so far indicate a positive correlation between family influence and value creation. This suggests the existence of a family ownership advantage. However, given the heterogeneity of listed family businesses in Europe, the question arises whether the potential performance difference between family and non-family businesses is affected by specific firm-level characteristics, involving different levels of family engagement. Put differently, is the likely superior overall performance attributable to a certain organizational form of involvement of the founding families?

Whilst analyzing different degrees of family involvement, Barontini and Caprio[28] found that the general positive effect of family control can be split according to the degree of involvement of families in management.[29] They confirm that the effect of family involvement is clearly positive, and highly statistically significant, when the family takes up the role of monitoring by occupying non-executive positions on the board of directors.[30] The evidence of superiority of family-controlled corporations relative to non-family ones becomes weaker when a family member takes the position of CEO.[31] However, this does not mean that family-CEO companies perform worse than their non-family counterparts. To put it another way, Barontini's and Caprio's research "does not suggest that family firms perform better the less the family takes an interest in the company".[32] Nevertheless, "it seems better when the family does not manage and limits itself to monitoring; but the group of worst-performing family firms are those in which the family does not manage and stays outside of the board".[33] The effect of family involvement continues to be positive at the inheriting stage, when descendants limit themselves to non-executive roles, or at the very least is not negative, when descendants assume the role of CEO.[34] These findings indicate that the founder effect plays an important role in Continental European companies. It is common ground that the set of valuable managerial skills and the entrepreneurial spirit can vary between generations of the founding family. Hence, the transition between generations can mitigate the positive impact of family influence. Having said that, the positive correlation between active family involvement and overall company performance remains measurable at the inheriting stage, when descendants occupy a non-executive position.[35] Thus, a residual positive effect remains evident and a generation change in the controlling family does not imply a negative blanket effect of family control. In line with the results commented on above, Pindado, Requejo and de la Torre[36] find that active family involvement is positive in terms of corporate performance. According to their results "although family businesses generally outperform, it is family firms with family members seated in the board of directors and those controlled by the first generation, that are the ones that exhibit superior market valuations".[37] Beyond that, family involvement clearly remains positive when family members assume a supervisory role and refuse to engage in executive positions. Interestingly, given the focus of this contribution, Pindado, Requejo and de la Torre[38] suggest a substitution effect between family control as an internal corporate governance mechanism and the legal protection of minority shareholders as an external corporate governance mechanism.[39] Based on their findings, they suggest that "family control can act as a mechanism that aligns the interests of controlling and minority shareholders in institutional environments where minority shareholders' rights are weakly protected".[40]

In short, the findings are consistent with the idea that family ownership is beneficial for Continental European businesses when coupled with some degree of involvement of the family in company supervision as far-sighted stationary controllers.[41] The proven superior valuation and operating performance in turn imply that concentration of share ownership and voting power in the hands of a family may also be beneficial to minority shareholders, because the market value of the corporation is at least theoretically maximized in the long term and thus the value of the corporation's shares. But what policy conclusions can be derived from these empirical studies with regards to corporate governance regulation at European level? To put it in a nutshell, there is at least no empirical basis, which would justify the exclusion of family representatives from the supervisory board.[42] On the contrary, the express aim of the EU regulator must be to safeguard the positive effects of family control and to provide a corporate governance framework, which affords family-controlled corporations the greatest possible freedom as to the composition of their boards.

28. Barontini & Caprio 2006.
29. *Ibid.*, p. 13.
30. *Ibid*.
31. *Ibid.*, p. 14.
32. *Ibid.*, p. 14.
33. *Ibid*.
34. *Ibid.*, p. 22.
35. *Ibid.*, p. 15 *et seq*.
36. Pindado, Requejo & de la Torre 2008, p. 26.
37. *Ibid.*, p. 29.
38. *Ibid.*, p. 27.
39. *Ibid.*
40. *Infra*.
41. *Ibid.*, p. 14.
42. *See also*, with the same result but different reasoning Hofstetter 2005, p. 13.

doi: 10.5553/DOQU/221199812015003001002

3 The Relationship between Ownership Structure and the Role of Independent Directors

In the light of the foregoing, it is reasonable to assume that family control (*i.e.* family ownership and family representation on the board of directors) strongly influences corporate performance and, in doing so, affords potential value for all stakeholders that independent directors per se cannot offer. This finding is in itself sufficient to justify a critical assessment of all regulatory impediments to the shareholders' freedom to choose board members in family-controlled firms. However, it must be questioned whether there is also a positive link between independent supervisory directors and firm performance. Do independent supervisory directors add value by improving the quality of corporate governance and consequently company performance in the long run? If this is the case, this might constitute an objective justification for restrictions to be imposed on the freedom to choose board members. However, if contrary to the expectations of the EU regulator, this is found not to be the case, it must be critically assessed whether the presence of independent supervisory directors is really an efficient means of protecting the interests of shareholders and, where appropriate, other stakeholders in firms with concentrated ownership. To answer these questions, it appears appropriate to address the role and effectiveness of independent supervisory directors in concentrated ownership structures as compared to dispersed ones. A differentiated approach is necessary here, which takes into account the fact that the agency problems that need to be addressed depend on the share ownership structure in a particular jurisdiction and thus also the role and effectiveness of independent directors.[43] In corporations with dispersed share ownership, the primary agency conflict to be addressed is the conflict between opportunistic managers and dispersed shareholders as owners of the company due to the separation of ownership and control.[44] In corporations with controlling shareholders, the focus is more on the problem of alignment of the interests of strong controlling shareholder(s) and weak minority shareholders, as the following shows.[45] It should be pointed out that the following considerations are limited to an analysis of the monitoring function of independent supervisory directors, deliberately excluding advisory services, because there are no logical reasons why the advisory function should not be carried out by independent external experts, *e.g.* external consulting firms.

43. Desender 2009, p. 7.
44. Commission Recommendation 2005/162/EC, recital 7.
45. *Ibid*.

3.1 The Role of Independent Directors in Corporations with Dispersed Ownership Structure

In view of the consistently positive public perception of independent directors, it is remarkable to note that the academic literature has so far failed to establish a reliable correlation between the presence of independent directors on a board and firm performance.[46] Many studies have analyzed the effect of board composition on firm performance in different corporate governance systems; however, the results are not conclusive.[47] Some studies suggest that independent directors can improve board effectiveness and corporate performance, which supports the notion that independents are able to perform a monitoring function and help to safeguard the interests of the shareholders.[48] Other studies, on the contrary, disprove the hypothesis that independent directors improve the value of the corporation.[49] And some studies find no direct correlation between the proportion of independent directors and firm performance.[50] As a consequence of this conflicting evidence, there is uncertainty about the desirability of the whole concept of independence.[51] In this context, it must be stated, however, that it is very difficult to assess the individual contribution of independent directors to shareholder value. Moreover, it may be necessary to have independent directors on the board in order to safeguard certain specific interests, without this having necessarily an influence on corporate performance. It is up to scholars to identify a range of ways to assess the value of independent directors.

Theoretically, independent directors can be desirable from a regulatory perspective if they improve corporate wealth by performing functions that maximize stakeholder value. The legal rationale for appointing independent directors is that their presence on the board would increase the quality of board supervision and reduce the possibility of value-destroying conflict of interest.[52] The underlying conventional wisdom holds that, compared with dependent directors, independent directors are not in any way affected by corporate executives or the appointing shareholders and will therefore have fewer conflicts of interests.[53] As a result, there is a better alignment of their interests with public shareholders' interests and, hence, more effective monitoring against the potential opportunistic behaviour of management and controlling shareholders.[54] The increased monitoring of pressure incentivizes management to act consistently in the interest of share value optimization,

46. Gutiérrez & Sáez 2013, p. 69.; *see* Adams, Hermalin & Weisbach 2009 for an in-depth survey of the literature on boards.
47. For recent overviews, *see* Bebchuk & Weisbach 2010 and Adams, Hermalin & Weisbach 2009.
48. *See, e.g.*, Krivogorsky 2006; Peng & Jiang 2004; Anderson & Reeb 2003; Dahya & McConnell 2005.
49. *See, e.g.*, Bhagat & Black 2002; Horváth & Spirollari 2012; Ritchie 2007.
50. *See, e.g.*, Berming & Frick 2010; Jackling & Johl 2009.
51. Ringe 2013, p. 16.
52. Lawrence & Stapledon 1999, p. 4.
53. Masulis *et al.* 2012, p. 25.
54. *Ibid.*

doi: 10.5553/DOQU/221199812015003001002

which leads to a reduction of agency problems and thus to better corporate performance in the long run.[55] According to this perspective, independent directors are likely to promote investor protection through increasing accountability and corporate integrity.[56] The concept of independent directors originated in the Anglo-Saxon one-tier and dispersed ownership systems as a means of protecting shareholders from managerial agency costs incurred in the classic Berle and Means context of separation of ownership and control.[57] Given the potential separation between ownership and control in corporations with dispersed ownership structures, board independence functions as a mechanism to align the interests of principals and agents.[58] Hence, the main purpose of independents in dispersed ownership systems is to enhance internal control of decision making by solving the managerial capture of the board.[59] In the light of these considerations, strong rules of independence are reasonable and necessary in corporate governance systems where listed corporations have diffuse shareholders. But the factors and issues generating corporate governance problems change in corporations with a controlling shareholder, due to a fundamental shift in the paramount agency problems that need to be addressed.[60]

3.2 The Role of Independent Directors in Corporations with a Concentrated Ownership Structure

The monitoring role of independent directors in corporations with concentrated ownership is largely different from that fulfilled by them in diffuse ownership corporations.[61] In concentrated ownership corporations, controlling shareholders have both the incentives and power to exercise active monitoring over the management. In light of the considerable financial contribution that the controlling shareholder has invested in the corporation, he or she will have the greatest incentive to exercise close and prudential supervision over the management and the corporation in its entirety to safeguard his or her investment.[62] The incentive to exercise active control is accompanied by the voting power of the controlling shareholders (in the shareholders' meeting) to appoint and remove board members and to implement strategic and management changes timely and forcefully where entrepreneurial action needs to be taken.[63] Controlling shareholders are therefore in a superior position to diminish the classical agency conflicts between shareholders and managers and consequently to reduce managerial agency costs.[64] The resulting monitoring advantages are further reinforced by the usual long-term investment horizon of controlling shareholders. Given that long-term shareholders, unlike short-term shareholders, will generally induce managers to maximize the long-term economic value created by the corporation, the managerial tendency to engage in excessive short-term risk taking and economic inefficient short termism will be reduced.[65] It can thus be concluded that in jurisdictions with concentrated ownership structures, independent directors are not needed to efficiently monitor the management, since the corporate executives are already sufficiently monitored by the controlling shareholders.[66]

However, in concentrated ownership structures, a different kind of agency problem arises in the relationship between majority and minority shareholders, to the extent that the controlling shareholder might try to exploit its position of effective control to extract private benefits of control and to seek personal benefits at the expense of minority shareholders.[67] The controlling shareholder has the decision-making power in the shareholders' meeting and on the board to effectively exert his or her power to appoint and remove directors, which in turn ensures that the board decisions are made in his or her interest, but not necessarily in the interest of minority shareholders.[68] Hence, concentration of ownership in the hands of a majority shareholder can pose serious risks for the occurrence of asset expropriation and unfair self-dealing for minority shareholders.[69] Empirical research has shown that minority expropriation hampers investor confidence, hinders the development of financial markets and reduces economic growth.[70] In light of these findings, it must be stated that monitoring mechanisms aimed at reducing minority expropriation are socially valuable from a policy point of view.[71] This raises the key question whether the implementation of independent directors is an effective mechanism for addressing the risk of minority shareholder expropriation and for monitoring the conflicts of interest of controlling shareholders. Perhaps, but the value of independent supervisory directors in reconciling conflicts of interest and in addressing the private benefits agency problem (hereafter referred to as 'tunnelling'[72]) is questionable. Doubts as to the effectiveness of independent supervisory directors arise from the vague definition of their role in listed European companies. The European Commission's Recommendation 2005[73] em-

55. For a comprehensive analysis on how monitoring can be used to balance the distribution of power in corporations and to reduce agency costs, *see* Anand, Milne & Pruda 2010.
56. Gutiérrez & Sáez 2013, p. 67.
57. Berle & Means 1932; Jensen & Meckling 1976.
58. Fama 1980; Jensen & Meckling 1976; Fama & Jensen 1983.
59. Clarke 2007, p. 81.
60. Ringe 2013, p. 16.
61. Ferrarini & Filippelli 2014, p. 10 *et seq*.
62. *Cf.* Hofstetter 2005, p. 13.
63. Davis & Hopt 2013, p. 20.
64. *Cf.* Isakov & Weisskopf 2012, p. 2.
65. However, the view: that firm's managers should favour long-term shareholders over short-term shareholders is not undisputed, *cf., e.g.*, Fried 2014, p. 4.
66. *See* with the same result Gutiérrez & Sáez 2013, p. 73.
67. La Porta, Lopez-de-Silanes & Shleifer 1999.
68. Ferrarini & Filippelli 2014, p. 6.
69. Kang 2013, p. 1; for more explanations on the issue of self-dealing, *see* Goshen & Hamdani 2013.
70. Gutiérrez & Sáez 2013, p. 73; Beck & Levine 2004; Dyck & Zingales 2004.
71. Gutiérrez & Sáez 2013, p. 73.
72. Tunnelling is defined "as the transfer of assets and profits out of firms for the benefit of their controlling shareholders", Johnson *et al.* 2000, p. 2.
73. Commission Recommendation 2005/162/EC.

doi: 10.5553/DOQU/221199812015003001002

phasizes the role of non-executive or supervisory directors "in overseeing executive or managing directors and dealing with situations involving conflicts of interests".[74] The notion of "situations involving conflicts of interests" relates to three areas that involve a potential conflict of interests between managers and shareholders, namely the nomination of directors, the remuneration of directors and the audit of the company's performance.[75] Hence, independent directors are seen as a monitoring device that is particularly effective in controlling the conduct of the executive management and not as a means of preventing the tunnelling of corporate resources through self-dealing and other kinds of related-party transactions at a cost to minority shareholders. In short, independent directors are seen as a protection for shareholders against the managerial capture of the board and not as protection of minority shareholders against blockholders. Given the vagueness of the role assigned to independent supervisory directors it is likely that they are used for the wrong purposes in corporations with concentrated ownership.[76] The appointment of independents to the supervisory board, with the general assignment of supervising the management is not expedient in corporations with concentrated ownership structure, because the main inefficiencies in respective corporations are due to minority expropriation and not managerial misconduct.[77] But even if independent directors are used for the right purposes, it remains doubtful whether the monitoring tools of independent directors are suitable to reduce the risk of minority shareholder expropriation. The most prominent function of independent directors in the context of majority-minority agency problems is the approval and confirmation of related party transactions that involve self-dealing by controlling shareholders.[78] The ex-ante deterrence effect of independents in relation to the prevention of related party transactions is, at best, very small, because unlike disloyal managers blockholders cannot be dismissed or suspended by the supervisory board.[79] It is recognized that directors who collaborate with majority shareholders or engage in these transactions can be dismissed, but collusion would be very hard to prove. The same is true for ex-post-opposition strategies in the case where such suspicious transactions are brought to the table at board level. The tools that independent directors have in their power to oppose self-dealing transactions are limited. For example, independents can vote against self-dealing at board level, but that is only a Pyrrhic victory for board independence, because blockholders can still approve the transaction by using their majority voting power at the board.[80] It is only in circumstances where the majority of the board is composed of independents that any opposition has a chance of success, and a controlling shareholder will hardly accept this. Consequently, rarely will any opposition at board level block related party transactions, and, at best, it can only augment the corresponding costs for the blockholder in terms of negative publicity.[81] The same is true for other opposition strategies such as threatening the blockholder with public disclosure or legal action, which could be employed by independents to combat minority expropriation. The effectiveness of such tools is highly questionable, partly because they are dependent on the quality of anti-self-dealing regulation and because minority shareholders face significant enforcement and litigation problems arising from information asymmetries and collective action problems (to bring a law suit) in corporations with concentrated ownership. In particular, public disclosure is clearly an inappropriate way to punish blockholders for their harmful behaviour. Public disclosure causes or is likely to cause a negative effect on share price and thus can harm blockholders indirectly, but lower stock prices are not especially damaging to large blockholders. In fact, on the contrary, they mainly hurt minority shareholders that are forced to trade for reasons of liquidity.[82]

In light of all this, it is not surprising that the empirical literature struggles to provide reliable evidence in support of the effectiveness of independent directors in corporations with concentrated ownership. From the majority of research projects undertaken, it appears that independents are often appointed mainly to please institutional investors and government regulators, which have pushed for increased board independence to displace more meaningful reform.[83]

4 Analysis of the EU Independence Standards

Against the backdrop of the previous sections, the question arises as to whether and to what extent the European Union's independence standards for supervisory directors vis-à-vis controlling shareholders are expedient, or if they overshoot the mark when applied to corporations with a controlling family shareholder. Considering this focus, this section of the contribution does not aim to provide an all-embracing overview of the EU regime applicable to independent directors but rather focuses on the implications from the family shareholder angle and the legitimacy thereof. In doing so, the cur-

74. *Ibid.*, recital 3.
75. Commission Recommendation 2005/162/EC, recital 9; *see also Ibid.*, Annex I.
76. *See* with the same result Gutiérrez & Sáez 2013, p. 76.
77. Gutiérrez & Sáez 2013, p. 76.
78. For example, Art. 524 of the Belgian Companies Code requires related party transactions to be reviewed by a special committee consisting of three independent directors and at least one independent expert, whereas in many jurisdictions independent directors are not even tasked with the vetting of related party transactions, Ferrarini & Filippelli 2014, p. 17; Varottil 2010, p. 320.
79. Ferrarini & Filippelli 2014, p. 14.
80. For a comprehensive analysis of the ability of independent directors to control related party transactions, *see* Gutiérrez & Sáez 2013, p. 77 *et seq*.
81. *Ibid.*, p. 78.
82. *Ibid.*, p. 79.
83. For a detailed presentation on why investors favour independent boards, *see* Velikonja 2014.

doi: 10.5553/DOQU/221199812015003001002

rently applicable EU independence standards are identified and discussed. Thereafter, the implications for controlling family shareholders are sketched, followed by legitimacy considerations. References to different national corporate governance codes are included to illustrate the practical consequences of the EU standards in countries with a dualistic board structure.

4.1 Independence Standards, Especially vis-à-vis Controlling Shareholders

The starting point for the assessment of the EU independence standards is the definition of director 'independence'. According to the preamble of the European Commission's Recommendation 2005, independence should be understood as "the absence of any material conflict of interests".[84] The European Commission's Recommendation 2005 defines independent directors as board members who are "free of any business, family or other relationship, with the company, its controlling shareholder or the management of either, that creates a conflict of interest such as to impair his or her judgement".[85] Furthermore, the recommendation establishes an extensive catalogue of criteria that Member States should adopt to assess the independence of non-executive or supervisory directors.[86] Annex II of this recommendation stipulates, at paragraph 1(d), that independent non-executive or supervisory directors should not be or represent in any way the controlling shareholder(s).[87] Most of the national corporate governance codes follow the EU recommendation and define the notion of 'independence' in a similar way, focusing on the absence of business and personal relationships with both the company and management board and with significant shareholders.[88] The Netherlands and Belgium are two of the exceptions. The Dutch Corporate Governance Code lacks a general definition of independence. However, the Dutch code, at paragraphs III.2.1 and III.2.2, contains a best practice provision, which sets out a list of criteria that excludes the independence of directors. According to paragraph III.2.2 (e) a supervisory board member shall not be deemed to be independent if he or she is a shareholder holding at least 10 percent of the shares of the company. Similarly, the 2009 Belgian Code on Corporate Governance does not define independence in general terms, but it lists nine categories of impediments to independence in its appendix A.[89] In the remaining Member States of the EU, the criteria for assessing director independence laid down in national corporate governance codes generally mirror those recommended by the Commission.[90] However, there are differences in the definitions of 'significant shareholder'.[91] The 2013 German Corporate Governance Code, for example, generally excludes at § 5.4.2 the independence of a supervisory director if he or she has personal or business relationships with a 'controlling shareholder'. Whereas other national codes take a slightly different approach by setting out specific thresholds with reference to voting shares to determine whether or not a shareholder qualifies as 'significant'.[92] But what are the implications of the strict European independence standards vis-à-vis controlling shareholders on the family shareholder side?

4.2 Consequences for Controlling Family Shareholders

Unlike under many national corporate governance codes,[93] representatives of controlling shareholders cannot be considered to be independent in principle under the European Commission Recommendation 2005/162/EC.[94] Consequently, paragraph 13.1 of the European Commission Recommendation 2005/162/EC creates a comprehensive exclusionary effect with respect to the representatives of the controlling shareholder (as independent directors). From the family shareholder perspective, this means that the freedom to choose board members is seriously restricted. Majority family shareholders are no longer able to freely appoint their preferred representatives to the supervisory board. The foreclosing effect not only directly relates to the possibility of appointing family members but it also includes the election of, for example, lawyers and tax consultants associated with the family. This leads to a weakening of the influence of controlling families to share policy with regards to the composition of the management board and to corporate decisions made at supervisory board level. Moreover, the specific emphasis on the independence of supervisory directors vis-à-vis controlling shareholders jeopardizes succession planning and the smooth implementation of any generational change of family representatives on the supervisory board. Therefore, this potentially hinders the long-term sustainability and prosperity of respective corporations. Of course, it could reasonably be questioned whether the exclusion of family representatives as independent directors is really a problem, because paragraph 4 of the European Commission Recommendation 2005/162/EC merely re-

84. Commission Recommendation 2005/162/EC, recital 7.
85. *Ibid.*, para. 13.1.
86. *Ibid.*, Annex II.
87. *Ibid.*, Annex II, para. 1 (d).
88. Ferrarini & Filippelli 2014, p. 12.
89. *Ibid.*, p. 11; *see* 2009 Belgian Code on Corporate Governance Appendix A 2.4./1 (5) excluding the independence of directors holding 10 percent or more of the companies' capital or representing such shareholders.
90. Ferrarini & Filippelli 2014, p. 11.
91. *Ibid.*, p. 12.
92. *See, e.g.*, the Dutch Corporate Governance Code, at para. III.2.2 (e), or the Belgian Corporate Governance Code, at Appendix A 5 (a) both requiring at least 10 percent capital participation by a shareholder for him/her to qualify as significant; for more examples *see* Ferrarini & Filippelli 2014, p. 12.
93. For example, § 9.3 of the French Corporate Governance Code of Listed Corporations reserves to the board the right to exercise discretion in assessing the independence of directors. Similarly, § 3.P.2. in conjunction with § 3.C.4. of the Italian Corporate Governance Code (2011) leaves discretion to the board to assess independence through criteria which are different from the ones recommended by the Code.
94. *Cf.* Commission Recommendation 2005/162/EC, § 13.1 which reads: "A director should be considered to be independent only if he is free of any business, family or other relationship, with the company, its controlling shareholder […], that creates a conflict of interest such as to impair his judgement".

doi: 10.5553/DOQU/221199812015003001002

quires that a "sufficient number of independent non-executive or supervisory directors should be elected to the (supervisory) board", thus not requiring complete independence of the board.[95] What constitutes a 'sufficient number' of independent directors varies across Member States. National corporate governance codes in principle provide for a minimum number of independents or a given proportion of the same with respect to the other board members.[96] It follows that founding families remain free to appoint family representatives to the board as dependent directors. Therefore, founding families have at least theoretically the possibility to organize majorities on the supervisory board and thus to exert influence over the staffing and the decisions of the supervisory board.[97] So far, so good, but when considering the recommendations for the specific committees in detail, it seems debatable whether the influence of the founding family members can realistically be preserved. This is particularly true with regards to the highly important nomination committee. Annex I § 2.1.1. of the European Commission Recommendation 2005/162/EC stipulates that the nomination committee should be composed of at least a majority of independent non-executive or supervisory directors.[98] The nomination committee is the crucial place for family shareholders to exercise their fundamental governance rights (inter alia the right to appoint and remove board members), which derive from their function as residual risk bearers.[99] It is therefore very alarming that family shareholders, especially at this key place, forfeit their decisive influence. As a result, it is necessary to verify the legitimacy of the EU corporate governance standards vis-à-vis controlling shareholders. In addition, there is a tendency for the independence of supervisory board members vis-à-vis controlling shareholders to become more and more of a general structural requirement in Europe. There is a reasonable concern that the appointment of representatives of the controlling shareholder to the supervisory board will be explicitly excluded as a further step in the future. In consequence, it can be concluded that, even as things stand now, the high proportion of independent directors required dilutes the potential of the controlling families to influence the policy and governance of family corporations. The weakened influence makes it difficult for controlling families to tailor the running of the corporation to the needs of the family as the main residual risk bearers. This constitutes a substantial restriction of the rights of the majority shareholder for which some special justification is required.

4.3 The Legitimacy of Independence Standards

Against this background, the question arises whether the underlying regulatory policy considerations can justify the independence of supervisory directors not only from the management but also from the controlling shareholders. The Commission justifies the presence of independent representatives on the board on a broad-brush basis, *i.e.* as a means of protecting the interests of shareholders and other stakeholders.[100] In taking into account the interests of minority shareholders, the management function should be subject to an effective and sufficiently independent supervisory function.[101] In view of this, it can reasonably be assumed that the Commission's ultimate objectives pursuant to the application of the independence requirement is not simply the neutral and objective supervision of the management function, but rather the protection of the interests of minority shareholders. The obligation to appoint independent directors is principally imposed as a means of protecting minority shareholders against the irresponsible exercise of power by controlling shareholders and the associated agency costs.[102] Furthermore, it should be noted that the institution of independent directors is also designed to protect shareholders and other stakeholders more generally against self-dealing by corporate executives. However, as already mentioned, the monitoring function vis-à-vis the management cannot serve as a justification for independent directors in corporations with a controlling (family) shareholder, because the presence of independent directors on the board is not necessary to make directors responsive to controlling shareholders, who can harness their appointment and removal rights effectively to this end.[103] If we return to the notion of independent directors as means of protecting minority shareholders, first of all, it is astonishing to note that the Commission has not explicitly declared any specific commitment towards the objective of minority shareholder protection.[104] On the contrary, their regulatory goal has been introduced through the back door, which makes it more difficult for corporations to shape their supervisory boards in a way that effectively meets the objectives of the Commission. At the outset, it is important to recognize that the power of independent directors gains legitimacy only through neutrality, but not

95. Commission Recommendation 2005/162/EC, para. 4.
96. For example, a majority of independent directors on the supervisory board is required by the Austrian, Danish and Finnish Codes (respectively at § 53 (a), § 3.2.1 and recommendation 14), whereas the Spanish Code (§ 2.13) and the French Code (§ 8.2) provide for one third of them in corporations with a controlling shareholder; Ferrarini & Filippelli 2014, p. 13
97. The situation is significantly different in corporations subject to the German right of co-determination. Controlling shareholders fear the complete loss of their significant influence over the supervisory board in respective corporations. For a detailed discussion *see* Hommelhoff 2013, p. 955.
98. The remuneration committee (Annex I § 3.1.2) and the audit committee (Annex I § 4.1) should also be composed of at least a majority of independent directors.
99. It should be pointed out that, although supervisory board members are elected by the general meeting of shareholders, the general discussions about the candidates are held at the nomination committee. The nomination committee makes recommendations to the supervisory board with respect to the appointment and removal of directors by the body competent under the national company law, Commission Recommendation 2005/162/EC, recital 12.
100. Commission Recommendation 2005/162/EC, recital 7.
101. *Ibid*.
102. Ferrarini & Filippelli 2014, p. 2.
103. Davis & Hopt 2013, p. 20.
104. The exact role of independent non-executive and supervisory directors is left substantially indeterminate by the Commission. Commission Recommendation 2005/162/EC, recital 3 only states that independents are recruited by companies for a variety of purposes.

 doi: 10.5553/DOQU/221199812015003001002

through capital contribution or work performed.[105] This leads to the key question whether or not the goal of minority shareholder protection, under the pretext of neutrality, justifies the restriction of the governance rights of the majority shareholders in respect of the election of the members of the supervisory board. For example, directors' general fiduciary duties require them to act in good faith and in the company's best interests. As such, it may well be a breach of duty to promote the interests of one group of shareholders over another.[106] Independent directors remain representatives of the shareholders as a whole, rather than the representatives of a distinct section of the corporation. It follows, that independent directors, as fiduciaries, also have to take due account of the interests of the controlling family shareholders.[107] Therefore, independent directors are precluded from depriving controlling families of their influence potential.[108] Seen from this perspective, there seems to be no real need for family representatives on the board, because the board members have to represent the interests of all shareholders anyway. Moreover, at first glance, it appears to be justified that the interests of the minority shareholders should be taken into account at supervisory board level, because minority shareholders also contribute capital to the corporation. Thus, it can be argued that it would not be advisable to allow controlling family shareholders to deny minority shareholders the representation of their interests on the supervisory board, because this would allow the majority shareholder to usurp the capital contribution of the minority shareholder for family purposes.[109] That would be difficult to tolerate. With that in mind, it is important to note, however, that the majority principle is an underlying feature of stock corporations, which are organized along capitalistic lines.[110] That means that in principle the majority decides or, to put it another way: he or she who bears the largest financial risk and has the largest say in the corporation. This principle does not provide for any limitations on the rights of the majority shareholders in favour of the minority shareholders.[111] In other words, controlling shareholders are not legally required to sacrifice their interests to serve the interests of the shareholders as a group.[112] It follows from the above that the introduction of independent directors, also representing the minority shareholders, cannot be justified solely by reference to the capital contribution of the minority shareholder.[113]

105. *See, e.g.*, the composition of the supervisory board under the German system of dualistic codetermination, § 7 German Act on Co-determination of Employees [Mitbestimmungsgesetz].
106. Yip 2007, p. 5.
107. Gutiérrez & Sáez 2013, p. 83.
108. Hommelhoff 2013, p. 960.
109. *Ibid.*, p. 960.
110. Majority voting in director elections is generally the default standard under most European corporate laws. The requirement for an "absolute majority" is the predominant rule, however the "simple majority" rule is applied in several countries including Germany and the UK, *see* Chiappetta, Ferrarini & Hertig 2005, p. 3.
111. Hommelhoff 2013, p. 960.
112. Goshen & Hamdani 2013, p. 9.
113. Hommelhoff 2013, p. 960.

This is particularly true when the interests of the minority shareholders are already sufficiently protected by accompanying (corporate) laws.[114] It is to be noted that minority shareholders are not entirely impotent when excluded from board representation, because minority shareholder protection is provided by general principles of law, by statutory remedies, by procedural instruments and last but not least by listing regimes.[115]

The debatable compatibility of the independent director system with the dual board system, at least in the German and Dutch versions, casts further doubt on the legitimacy of independent directors in corporations with a dual board structure.[116] The point is that in dualistic systems, there is a mandatory separation between the executive management and the non-executives on the supervisory board.[117] For this reason, a sufficient degree of board independence is assured by the institutional separation of the executive and supervisory functions. Moreover, members of the supervisory board, who cannot be simultaneously be members of the executive board, are non-executives by definition, but this does not mean that they are independent.[118] For example, in Germany, supervisory board members are shareholders' or employees' representatives. The presence of independent directors on the board results in a dilution of the influence of blockholders. This in turn can lead to a considerable shift in power on the supervisory board, especially if the supervisory board must contain employee representatives in respect of whose appointment the blockholder plays no role.[119] Some will point out that this is a specific problem that should be tackled at national level by the Member States concerned. In this respect, it should be noted that some of Europe's most important and vibrant economies are organized along dualistic lines, such as Austria, Germany, Poland, the Netherlands and, to some extent, Italy. The European Commission should take note of the peculiarities of these jurisdictions, on the basis of equal treatment with the monistic system. It ought to be stressed here that the standards of independence as they are stipulated in the European Commission's Recommendation 2005 have been elaborated in view of the one-tier system. The role model was the Combined Code in the United Kingdom. This can be criticised because it has been proven that the United Kingdom's widely dispersed ownership structure is a local phenomenon observed only in the United States and the United Kingdom and is by no means the most common ownership model encountered in Central Europe.[120]

Having said all that, the key arguments against independent directors in listed family businesses are the follow-

114. For example, the German Law of Corporate Groups.
115. *See, e.g.*, Barker & Chiu 2014 for alternative ways of protecting minority shareholders in blockholder-controlled companies.
116. Davis & Hopt 2013, p. 16.
117. *Ibid.*
118. *Ibid.*
119. Davis & Hopt 2013, p. 21.
120. *See* on the subject of corporate ownership around the world Coffee Jr. 1999 and La Porta, Silanes & Schleifer 1999 and on control of corporate Europe Barca & Becht 2001.

doi: 10.5553/DOQU/221199812015003001002

ing: firstly, independent directors, unless they are professional non-executive directors, are working part time and, while being independent, may lack the vital know-how, either of the business sector or of the respective corporation.[121] By contrast, entrepreneurial families know their corporations in detail and are likely to have profound industry-specific knowledge that they have gained over years and decades of business activity. Industry-specific know-how is accumulated in entrepreneurial families and passed on to subsequent generations. The same is true for fruitful business contacts and networks. Family board representatives can, when consulted, provide the management board and supervisory board with this wealth of experience. Such exchange of information is unlikely to happen when family representatives are excluded from board participation, for the simple reason that there are no incidental and coincidental meetings at the board buildings. Secondly, it has been proven that the flow of information to independent directors is often suboptimal, particularly in the case of supervisory boards.[122] Independent directors require transparency to perform their monitoring and advisory roles.[123] Information asymmetries between independents and the management board render them practically ineffective. Thirdly, independent directors are noticeably less well paid than the executive directors, in particular if they are supervisory board members, and therefore are likely to be less motivated to devote much of their time and energy to their task.[124] In contrast, family representatives will have the greatest incentive to fulfil the tasks assigned to them, since the reputation of the owner family is closely linked to the success and continued existence of the corporation.[125] Fourthly, the presence of family representatives on the supervisory board leads to a low goal divergence between management and owners, because they can help to maintain a balance between profitability requirements and social responsibility. In this regard, it is noted that the desire for continued existence of the corporation prevents families from private drawings.

To sum up, it can be said that the call for independent directors, who are independent not only from the management but also from the controlling (family) shareholder, overshoots the mark in corporations with a dual board structure. It is up to the European regulator to clearly lay down the fundamental objectives to be pursued by the introduction of independent directors and to provide additional support in favour of the independence criterion vis-à-vis controlling (family) shareholders. As things stand today, considering majority shareholder representatives to be dependent means an unjustified restriction of the rights of the majority shareholders in family-controlled businesses.

121. Davis & Hopt 2013, p. 19.
122. Davis & Hopt 2013, p. 19; Leyens 2006, p. 156 *et seq*.
123. Armstrong, Core & Guay 2012, p. 28.
124. Davis & Hopt 2013, p. 20.
125. Barontini & Caprio 2006, p.14.

5 Conclusion

The aim of this contribution has been to investigate two central research questions. Firstly, it was questioned whether the current focus of the EU regulator on empowering independent directors is effective in corporations with a concentrated (family) ownership structure. Secondly, it has been analyzed whether the European Union's independence standards for supervisory directors vis-à-vis controlling (family) shareholders sufficiently reflect the special needs of publicly listed family businesses in countries with a dualistic board structure or whether there is a need for exceptional rules at the EU level to safeguard the positive effects of family control on firm value. Contrary to the excessively optimistic expectations of the EU regulator, the findings suggest that the institution of the independent director is not a silver bullet that solves all corporate governance problems irrespective of the share ownership structure of a corporation. Instead, there are serious shortcomings in the concept of independent directors when it comes to concentrated (family) ownership structures. Doubts as to the effectiveness of independent supervisory directors as governance mechanism especially arise from the vague definition of the role assigned to them and the rather limited tools of independents to solve minority expropriation problems. There are strong indications that the current focus of the EU regulator on empowering independents is misleading or at least not effective in corporations with a controlling family shareholder. There is a considerable need for the reform of the independent director system to convert them into an effective corporate governance mechanism in concentrated ownership structures in general and in listed family businesses in particular. This raises the question how suitable it is to proceed in this way, particularly from the backdrop of the cost-benefit perspective. It is up to the EU regulator to take a position on this matter.

With regards to the second research question, it can be concluded that the European Union's independence standards for supervisory directors vis-à-vis controlling (family) shareholders in their current form fail to sufficiently take into account the special needs of listed family businesses in countries with a dualistic board structure. There is a need for a differentiated corporate governance framework for listed family businesses in Europe. Given the key role of listed family businesses in Europe's economy and their contribution to the entrepreneurial culture, cohesion and prosperity, it is the Commission's responsibility to safeguard the positive effects of family control on firm value and performance in the long run. To this end, the European Commission should seriously consider exempting listed family businesses that are operating under a dual board structure from the independence requirement vis-à-vis the controlling shareholder. Entrepreneurial families should have the ability to exert their beneficial influence for all stakeholders at supervisory board level. It is in the interests of all European economies that listed family-con-

doi: 10.5553/DOQU/221199812015003001002

trolled corporations can unlock their full economic potential.

6 Bibliography

A. Achleitner *et al.*, "Listed Family Firms in Germany", 2009. Available at <http://ssrn.com/abstract=1490698 or http://dx.doi.org/10.2139/ssrn.1490698> (last accessed 17 May 2015).

R. Adams, B. Hermalin & M. Weisbach, "The Role of Boards of Directors in Corporate Governance: A Conceptual Framework & Survey", Charles A. Dice Center Working Paper No. 2008-21, ECGI – Finance Working Paper No. 228/2009, Fisher College of Business Working Paper No. 2008-03-020, 2009. Available at <http://u.osu.edu/weisbach.2/files/2015/01/AdamsHWJEL2010-2ff7jzc.pdf> (last accessed 17 May 2015).

A. Anand, F. Milne & L. Pruda, "Monitoring to Reduce Agency Costs: Examining the Behaviour of Independent and Non-Independent Boards", 2010. Available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1555043> (last accessed 17 May 2015).

R. Anderson & D. Reeb, "Founding Family Ownership and Firm Performance: Evidence from the S&P 500", 58 *Journal of Finance* 3, 2003, pp. 1301-1329.

C. Armstrong, J. Core & W. Guay, "When Do Independent Directors Improve Firms' Information Environments?", The Wharton School, University of Pennsylvania, Working Paper, 2012. Available at <www.stern.nyu.edu/sites/default/files/assets/documents/con_036073.pdf> (last accessed 17 May 2015).

D. Audretsch, M. Hülsbeck & E. Lehmann, "The Benefits of Family Ownership, Control and Management on Financial Performance of Firms", Indiana University-Bloomington School of Public & Environmental Affaires Research Paper No. 2010-10-03, 2010. Available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1690963> (last accessed 17 May 2015).

F. Barca & M. Becht, *The Control of Corporate Europe*, Oxford University Press, Oxford, 2001.

R. Barker & H.-Y. Chiu, "In Defence of the Minority The UKs New Enhanced Listing Regime", 18 *Journal of Business and Compliance* 5, 2014.

R. Barontini & L. Caprio, "The Effect of Family Control on Firm Value and Performance: Evidence from Continental Europe", EFA 2005 Moscow Meetings Paper, 2005, pp. 1-58. Available at <http://ssrn.com/abstract=675983> or <http://dx.doi.org/10.2139/ssrn.675983> (last accessed 17 May 2015) or 12 *European Financial Management* 5, 2006, pp. 689-723.

L. Bebchuk & M. Weisbach, "The State of Corporate Governance Research", 23 *Review of Financial Studies* 3, 2010, pp. 939-961, Fisher College of Business Working Paper No. 2009-03-20; Charles A. Dice WP 2009-21; Harvard Law and Economics Discussion Paper No. 652. Available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1508146> (last accessed 17 May 2015).

T. Beck & R. Levine, "Stock Markets, Banks, and Growth: Panel Evidence", 28 *Journal of Banking & Finance* 3, 2004, pp. 423-442.

A. Berle & C. Means, *The Modern Corporation and Private Property*, New Brunswick (USA)/London, Transaction Publishers, 1923. Reprint (Mai 1991).

A. Berming & B. Frick, "Board Size, Board Composition, and Firm Performance: Empirical Evidence from Germany", 2010. Available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1623103> (last accessed 17 May 2015).

P. Bezemer *et al.*, "How Two-Tier Boards Can Be More Effective", 14 *Corporate Governance: The International Journal of Business in Society* 1, 2014, pp. 15-31.

S. Bhagat & B. Black, "The Non-Correlation between Board Independence and Long-Term Firm Performance", 27 *Journal of Corporation Law*, 2002, pp. 231-273. Available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=133808> (last accessed 17 May 2015).

F. Chiappetta, G. Ferrarini & G. Hertig, "Board Elections in Europe: Trans-Atlantic and Internal Market Perspectives", Preliminary Summary prepared for the September 27, 2005 Transatlantic Corporate Governance Dialogue Conference. Available at <www.law.yale.edu/documents/pdf/CBL_Symposium10_05/S3-1A%20Board_Europe_Summary_NY_Meeting_2005.pdf> (last accessed 17 May 2015).

D. Clarke, "Three Concepts of the Independent Director", 32 *Delaware Journal of Corporate Law* 1, 2007, pp. 73-111. Available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=975111> (last accessed 17 May 2015).

J. Coffee Jr., "The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications", Columbia Law School Center of Law and Economic Studies Working Paper No. 144, 1999. Available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=142833> (last accessed 17 May 2015).

C. Cruz Serrano & L. Nuñez Letamendia,"Value Creation in Listed European Family Firms (2001-2010)", Banca March and Instituto de Empresa business school report, 2012. Available at: <http://foreigners.textovirtual.com/empresas-familiares/62/53817/value_creation_listed_european_firms_2001-2010.pdf> (last accessed 17 May 2015).

J. Dahya & J. McConnell, "Board Composition, Corporate Performance, and the Cadbury Committee Recommendation", 42 *Journal of Financial and Quantitative Analysis*, 2005, p. 535. Available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=687429> (last accessed 17 May 2015).

P. Davis & K. Hopt, "Boards in Europe – Accountability and Convergence", 61 *American Journal of Comparative Law*, 2013, pp. 301-375; ECGI – Law Working Paper No. 205/2013; Oxford Legal Studies Research Paper No. 40/2013. Available at: <http://papers.ssrn.com/sol3/papers.cfm?ab stract_id=2212272> (last accessed 17 May 2015).

K. Desender, "The Relationship between the Ownership Structure and the Role of the Board", University of Illinois at Urbana-Champaign, College of Business Working Papers 09-0105, 2009. Available at SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1440750> (last accessed 17 May 2015).

A. Dyck & L. Zingales, "Private Benefits of Control: An International Comparison", 59 *Journal of Finance* 2, 2004, pp. 537-600.

C. Duller, "Differences in Management Accounting between Family Enterprises and Non-Family Enterprises: A Statistical Approach", 3 *International Journal of Economic Sciences and Applied Research* 1, 2010, pp. 89-95.

M. Faccio & L.H.P. Lang, "The Ultimate Ownership of Western European Corporations", 2001. Available at SSRN <http://ssrn.com/abstract=286053 or http://dx.doi.org/10.2139/ssrn.286053.> (last accessed 17 May 2015).

E. Fama, "Agency Problems and the Theory of the Firm", 88 *Journal of Political Economy*, 1980, pp. 288-307.

E. Fama & M. Jensen, "Separation of Ownership and Control", 26 *Journal of Law and Economics*, 1983, pp. 301-325.

G. Ferrarini & M. Filippelli, "Independent Directors and Controlling Shareholders around the World", European Corporate Governance Institute (ECGI) – Law Working Paper No.

doi: 10.5553/DOQU/221199812015003001002

258/2014, 2014. Available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2443786> (last accessed 17 May 2015).

J. Fried, "The Uneasy Case for Favouring Long-Term Shareholders", 124 *Yale Law Journal*, 2015, pp. 1554-1628. Available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2227080> (last accessed 6 September 2015).

Z. Goshen & A. Hamdani, "Concentrated Ownership Revisited: The Idiosyncratic Value of Corporate Control", Columbia Law and Economics Working Paper No. 444; ECGI Working Paper No. 206, 2013. Available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2228194> (last accessed 17 May 2015).

M. Gutiérrez & M. Sáez, "Deconstructing Independent Directors", 13 *Journal of Corporate Law Studies* 1, 2013, pp. 63-94.

K. Hofstetter, "One Size Does Not Fit All: Corporate Governance for "Controlled Companies", 2005. Available at SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=802705> (last accessed 17 May 2015).

P. Hommelhoff, "Unabhängige Aufsichtsratsmitglieder in börsennotierten Familienunternehmen", 34 *Zeitschrift für Wirtschaftrecht (ZIP)* 20, 2013, pp. 953-961.

R. Horváth & P. Spirollari, "Do the Board of Directors' Characteristics Influence Firm's Performance?: The U.S. Evidence", 4 *Prague Economic Papers: Quarterly Journal of Economic Theory and Policy*, 2012, pp. 470-486.

D. Isakov & J. Weisskopf, "Are Founding Families Special Blockholders? – An Investigation of Controlling Shareholder Influence on Firm Performance", SES Working Paper No. 428, 2012. Available at SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2134805> (last accessed 17 May 2015).

B. Jackling & S. Johl, "Board Structure and Firm Performance: Evidence from India's Top Companies", 17 *Corporate Governance: An International Review* 4, 2009, pp. 492-509.

M. Jensen & W. Meckling, "Theory of the Firm: Managerial Behaviour, Agency Costs, and Ownership Structure", 4 *Journal of Financial Economics* 4, 1976, pp. 305-360.

S. Johnson *et al.*, "Tunnelling", Harvard Institute of Economic Research Paper No. 1887, 2000. Available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=204868> (last accessed 17 May 2015).

S. Kang, "Controlling Shareholders: Benevolent 'King' or Ruthless 'Pirate'", 2013. Available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2305645> (last accessed 17 May 2015).

V. Krivogorsky, "Ownership, Board Structure, and Performance in Continental Europe", 41 *International Journal of Accounting*, 2006, pp. 176-97.

R. La Porta, F. Lopez-de-Silanes & A. Shleifer, "Corporate Ownership around the World", 54 *Journal of Finance* 2, 1999, pp. 471-517.

J. Lawrence & G. Stapledon, "Do Independent Directors Add Value?", Centre for Corporate Law and Securities Regulation, The University of Melbourne, 1999. Available at <https://www.law.unimelb.edu.au/files/dmfile/IndependentDirectorsReport2.pdf> (last accessed 17 May 2015).

P. Leyens, "Information des Aufsichtsrats: Ökonomisch-funktionale Analyse und Rechtsvergleich zum englischen Board", Tübingen, Mohr Siebeck, 2006.

R. Masulis *et al.*, "Do Independent Directors Matter?", 2012. Available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2022831> (last accessed 17 May 2015).

D. Miller, I. Le Brenton-Miller & B. Scholnick, "Stewardship vs. Stagnation: An Empirical Comparision of Small Family and Non-Family Businesses", 45 *Journal of Management Studies* 1, 2008, pp. 51-78.

M. Peng & Y. Jiang, "Outside Directors and Firm Performance during Institutional Transitions", 25 *Strategic Management Journal*, 2004, pp. 453-471.

M. Peng & Y. Jiang, "Institutions behind Family Ownership and Control in Large Firms", 47 *Journal of Management Studies* 2, 2010, pp. 253-273.

J. Pindado, I. Requejo & C. de la Torre, "Do Family Firms Outperform Non-Family Ones? A Panel Data Analysis of Western European Corporations", XVI Foro de Finanzas, 2008. Available at <www.efmaefm.org/0EFMAMEETINGS/EFMA%20ANNUAL%20MEETINGS/2009-Milan/papers/351.pdf> (last accessed 17 May 2015).

W. Ringe, "Independent Directors: After the Crisis", Oxford Legal Studies Research Paper No. 72, 2013. Available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2293394> (last accessed 17 May 2015).

T. Ritchie, "Independent Directors: Magic Bullet or Band-Aid?", Bond Law, *Corporate Governance e-Journal*, Faculty of Law, Bond University, 2007. Available at <http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1004&context=cgej> (last accessed 17 May 2015).

F. Scholderer, "Unabhänigkeit und Interessenkonflikte der Aufsichtsratsmitglieder", 5 *Neue Zeitschrift für Gesellschaftsrecht*, 2012, pp. 168-176.

U. Varottil, "Evolution and Effectiveness of Independent Directors in Indian Corporate Governance", 6 *Hastings Business Law Journal* 2, 2010, pp. 281-372. Available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1548786> (last accessed 17 May 2015).

U. Velikonja, "The Political Economy of Board Independence", 92 *North Carolina Law Review*, 2014, pp. 855-916, Emory Legal Studies Research Paper No. 13-268. Available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2352109> (last accessed 17 May 2015).

A. Yip, "Independent Directors: Neither Tigers nor Pussy Cats", Singapore Institute of Directors, *The Directors' Bulletin* 1, 2007, pp. 4-7. Available at <www.sid.org.sg/uploads/bulletin/documents/230_1%20of%202007.pdf> (last accessed 17 May 2015).

doi: 10.5553/DOQU/221199812015003001002