The Informal Expert Group on Company Law and Corporate Governance

(ICLEG)

Report on Transparency of Company Data

March 2023

ICLEG was established by the European Commission (EC) in 2020 to assist it with expert advice on issues of company law and corporate governance and it held its first meeting on 2 July 2020. The agendas of its meetings are available online in the Register of Commission Expert Groups and Other Similar Entities[1].

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[1] Register of Commission expert groups and other similar entities (europa.eu)

In 2021, the European Commission requested ICLEG to consider the improving of transparency on company data (mainly focused on groups, on disclosure of shareholders and extending BRIS publicity to other entities), in the framework of the initiative "Upgrading digital company law", and several ICLEG members (Mónica Fuentes Naharro, Marco Lamandini, Adam Opalski, Christoph Teichmann and Martin Winner) were charged with producing a report on behalf of the Group. Christian Zib provided expertise on this work as observer. After consultation within the Group, this report reflects the advice of ICLEG to the European Commission as to matters that ICLEG believe merit further consideration.

TRANSPARENCY ISSUES

– Proposals –

Executive Summary

(1) It is important for any company's stakeholder to have access to information on the group's existence and structure, i.e., to know (i) whether a company belongs to a group and, if that is the case, (ii) which one is the parent company and (iii) which is the whole group's structure.

Accounting Directive 2013/34/EU and Anti-Money Laundering Directive (EU) 2015/849 provide some useful information on groups, but do not tackle directly the issues explained above.

(2) There are three main legal policy approaches to the information duties on groups: (1) registral publicity; (2) accounting publicity and (3) commercial publicity.

Registral publicity is the first (and preferred) Proposal. It implies to extend the current business register disclosure regime in Art 14 and 19 (2) of Directive 2017/1132. For this approach the Company Law Directive (EU) 2017/1132 (CLD) would have to offer a definition of what "parent" and "subsidiary" means. This could be just a reference to the Accounting Directive, or, in a more ambitious way, it could be tried to harmonize this concept from a minimum harmonization towards a maximum harmonization.

A second (complementary) Proposal would be to impose a duty on every group member company to identify in its commercial correspondence, who its parent is (or to identify itself as parent company) and/or in the company website (when adopted) the group information.

(3) It should be considered to make information about shareholders of private limited companies available via BRIS, if and to the extent this information is disclosed in the national register of the relevant Member State.

(4) Information in the national registers of the Member States about unlimited and limited partnerships and at least their partners with unlimited liability could easily be made available via BRIS. Since the referral to Art 14 in Art 18 (1) CLD only partially fits for partnerships, such a provision could for instance be implemented as a new independent Article of the CLD.

(5) All Member States covered by ICLEG have the essential data on cooperatives in a register. But not all Member States have them in their national companies register, some partially use special registers not connected with BRIS. For these Member States BRIS can only show, what they have in connected registers, which will not be all existing national cooperatives.

I. TRANSPARENCY ON GROUPS OF COMPANIES

1. THE PROBLEM AND ITS POSSIBLE SOLUTION IN A NUTSHELL

1. As mentioned in a previous report of the ICLEG[2], not only minority shareholders, potential investors, and creditors, but also wider constituencies of stakeholders such as potential business partners, authorities, employees, civil society associations, and communities at large may have a legitimate interest in knowing the structure of the group to which the company belongs – either as a parent company or as a subsidiary and more in general as a company affiliated to the same group. This is evident in the context of the proposal for a directive on Corporate Sustainability Due Diligence[3] which, pursuant to Articles 1(1) and 6(1) of the proposal, with reference to the due diligence duties set out in the proposal not only to operations of the company itself but also to those of its subsidiaries (as defined in Article 3(1)(d) of the proposal, by reference to Article 2(1)(f) of Directive 2004/109). More traditionally, creditors and minority shareholders in a subsidiary may want to know who controls the company and takes therefore the ultimate decision as to the company's business policy; should a subsidiary not meet its obligations when they fall due or become liable for damages, creditors and minority shareholders may want to clarify the role of the parent company in the subsidiary's management and potential demise – and, therefore, its identity, possibly also to extend their claims for potential mismanagement of the subsidiary to the parent company, if allowed under applicable law. Having a clear view of the structure of the group, may also prove useful, and even essential, for authorities to investigate and contrast any possible tax or any other abuse or violation of law.

2. In principle, therefore, giving access to fundamental information concerning a company's affiliation to a group and the overall structure of the group in a clear and user-friendly manner, especially for subsidiaries which are material for the success of the group led by the parent company, is highly beneficial for a wide group of stakeholders, whereas it does not harm the parent company, the subsidiary, or the group as such. It is difficult to see, indeed, what kind of interest deserving protection may justify a claim that the information as to the group affiliation and group structure should be considered (and should remain) confidential. This is even more so, if one just considers that some of that information is already mandatorily disclosed, for listed companies, under the Transparency Directive (Articles 9 and 12 of Directive 2004/109) and other information indirectly pointing at the ultimate parent company is accessible in the context of the BORIS (Beneficial Ownership Registers Interconnection System) AML initiative, starting from March 2021 pursuant to Delegated

[2] ICLEG, "Report on information on groups", March 2016 (Company law and corporate governance (europa.eu)). This report was drafted by the previous ICLEG, established in May 2014. Its members where: John Armour, Gintautas Bartakus, Blanaid Clarke, Pierre-Henri Conac, Harm-Jam de Kluiver, Holger Fleischer, Mónica Fuentes, Jesper L. Hansen, Vanessa Knapp, Marco Lamandini, Arkadiusz Radwan, Christoph Teichmann, Robbert van Het Kaar, Martin Winner.

[3] COM (2022) 71 final

Regulation (EU) No 2021/369. BORIS is a system of decentralized national beneficial ownership registers.

3. From a regulatory perspective, therefore, there seems to be little doubt that the possible insertion of updated data on the affiliation to the group and of the ongoing structure of the group among the documents and particulars to be disclosed in the business registers under Article 14 of Directive 2017/1132 would nicely complete, rationalize and complement the existing acquis; the policy question is, thus, rather one of defining a proportionate regime capable of striking a right balance between clearly visible social benefits and proportionate compliance costs for the companies implicated. A further question pertains to the granularity of the information which may be required and, in particular, whether the disclosure should also embrace the description of the main financial and operational/commercial links between the companies affiliated to the same group (also, "**group member companies**").

4. At a minimum, however, we believe that the information to be disclosed in the business register as to the affiliation to a group according to Article 14 and 19(2) of Directive 2017/1132 should include:
   (i) whether the relevant company is affiliated to a group, and, if that is the case, the identity of the ultimate parent company (within EU and, if the case, the ultimate third country parent);
   (ii) the identity of any direct or indirect subsidiary and the intermediate companies, if any, in the control chain from the ultimate parent company (i.e., controlled by the same ultimate parent company within the group's structure); and
   (iii) an easy and user-friendly figurative description (visualization) of the group structure (a "comprehensive map of the group structure"[4]).

5. If the information referred to above is included among the documents and particulars listed in Article 14 of Directive 2017/1132, this would imply for the relevant company a duty to disclose at the beginning of the affiliation to the group. According to the wording of Article 15 of the same Directive, Member States will have "to ensure that any changes in the documents and particulars referred to in Article 14 are entered in the competent register […] and are disclosed", which results in an ongoing duty of the company to update such information. As specified later, duties (ii) and (iii) would only be on the ultimate parent company, while duties under (i) would be on every group member.

2. BACKGROUND FOR DISCUSSION: NATIONAL COMPANY LAWS PROVIDING AN *AD HOC* TRANSPARENCY LEGAL REGIME OF GROUPS OF COMPANIES

6. So far, few Member States offer a specific regulation on the disclosure in the business register of the affiliation to a group of companies.

[4] ICLEG, "Report on information on groups" (March 2016).

7. The most relevant example is perhaps the Italian case. Article 2497-bis of the Italian Civil Code (ICC) imposes upon a subsidiary, which is subject to "direction and coordination" (under Article 2497 ICC) by its ultimate parent company (a direction and coordination which is rebuttably presumed where the company is controlled by another company: Article 2497-sexies ICC), the duty to disclose in the business register the existence of the parent company; more specifically, this information needs to be registered as such in a specific section of the business register, a section reserved (i) to subsidiaries subject to direction and coordination, and (ii) to the parent company that exercises direction and coordination. The duty must be fulfilled by the directors of the subsidiary. In the event of omission of the required registration, a special form of liability for the directors of the subsidiary applies: they are liable for the damages suffered by third parties for not having known the existence of the direction and coordination of the parent company. This disclosure needs to be updated upon occurrence of material changes in the identity of the ultimate parent company and is, therefore, an "on-going" obligation. It should be noted, however, that the disclosure does not embrace intermediate companies in the chain between the ultimate parent company and the relevant subsidiary nor does it imply an overall description of the whole group and therefore of all the companies affiliated to the same group. In turn, no figurative description of the structure of the group is provided. Finally, it is worth noting that, pursuant to article 2497-bis, paragraph 4, ICC the relevant subsidiary publishes, in a section of its financial statement, a summary of the essential data of the balance sheet of the parent company which exercises direction and coordination over it.

8. It is also to be noted that, under Italian law, every company belonging to a group as a subsidiary must identify itself as such also in its commercial correspondence and its letterhead (according to art. 2497 bis[5]).

9. Italian law also regulates horizontal groups, like contractual groups established pursuant to Article 2497-septies ICC between two or more companies, where contractual provisions and/or provisions in the articles of association confer upon a third company the right to direct the subsidiaries. In the context of cooperatives, this is further detailed in Article 2545-septies ICC. The agreement on which the horizontal cooperative group is based needs to be disclosed at the register of the cooperatives. In the banking sector, Article 37-bis of the Consolidated Act on Banking sets out special rules for the establishment of cooperative banking groups based upon an horizontal contract, whereby the mutual banks affiliated to a cooperative banking group collectively participate to the capital and governance of the holding company (in the form of joint stock company) and, in turn, are contractually subject to the direction and coordination of such holding company (and the relevant provisions of the agreement establishing the group are also replicated in the articles of association of both the holding company and the mutual banks affiliated to the group).

10. Another important experience is offered by Germany, and specifically by the special, statutory provisions for groups of public limited liability companies (AktG). There is

[5] *2497-bis. Pubblicità. La società deve indicare la società o l'ente alla cui attività di direzione e coordinamento è soggetta negli atti e nella corrispondenza, nonché mediante iscrizione, a cura degli amministratori, presso la sezione del registro delle imprese di cui al comma successivo.*

publicity in the Business Register of the so-called "Unternehmensverträge" (entreprise agreements), the most important examples being the "Beherrschungsvertrag" (domination agreement) and the "Gewinnabführungsvertrag" (profit transfer agreement). These agreements establish a vertical group as the domination agreement gives the dominant company the right to issue instructions to the management of the subordinated company. Usually, the agreements reinforce an already existing de facto control based on a majority shareholding. However, also horizontal groups (such as "Gleichordnungkonzerne"), i.e. a group whose members place themselves under a single management, without the companies combined in the group being controlled by one company, may be relevant. These agreements may, on a voluntary basis, be concluded between the parent and a subsidiary company. They require a resolution of the subsidiary's general meeting with a ¾-majority of the share capital represented at the meeting (Sec. 293 Aktiengesetz). Such an agreement will only become effective upon registration in the commercial register (Sec. 294 Aktiengesetz). These provisions are applied by analogy to groups composed of private limited liability companies (GmbH). Groups without such a contractual basis, which are based only on shareholdings, are not subject to this publicity measure in the German Business Registry.

11. Another example of *ad hoc* transparency of groups at the Business Register provides Poland with its new law on groups which entered into force in October 2022. The participation in the group, which results in the application of specific rules of the Polish Commercial Companies Code (PCCC) addressed to groups, is established upon a resolution of the general meeting of the subsidiary, adopted by a ¾-majority of votes. The parent company and the subsidiary are obliged to disclose the participation in the group in their business registers (Art. 21 § 2-3 of the PCCC). Application of some of the rules addressed to groups[6] is dependent upon the entering of information on the participation in the group in the business registers. However, Polish law foresees only the disclosure of a mere reference (note) on the participation of a company in the group. No further information is available.

3. NATIONAL LAWS PROVIDING INDIRECT MEANS OF DISCLOSURE OF THE GROUP'S AFFILIATION: SHAREHOLDERS' IDENTIFICATION

12. Other national laws in Europe provide another means for a subsidiary's stakeholders (creditors, business partners, etc.) to know who the controlling shareholder is by requiring for some types of companies a disclosure of all its shareholders.

13. Some examples are Norway, Italy, Austria and Germany. In Norway, the board of every public and private limited liability company must create a "shareholder book" ("aksjeeierbok") with the shareholders in alphabetical order, including their birthdate number or organization number, digital address, business address, home address or postal address.

[6] Among others, the parent company's right to issue binding instructions to the subsidiary and the safeguard mechanisms to protect minority shareholders and creditors of subsidiaries.

The book can be electronic[7] and anybody can request insight into this book[8]. If a shareholder sells his or her shares, the new owner must notify the company which then has to make sure that the new owner is entered into the shareholder book. As for Austria, Germany and Italy, this information is disclosed via the commercial register, but only for private limited liability companies (yet, in Italy, the identity of the shareholders of a public company is also disclosed together with the financial report on an annual basis). Nonetheless, even in these countries the disclosure only provides the immediate or direct controlling shareholder and not the ultimate parent company, if different, and no comprehensive description or visualization of the group structure is included.

14. This has practical implications. If one wishes to understand who the ultimate parent company of any given subsidiary is, this requires a burdensome "upstream research" by verifying for each subsidiary in the shareholding chain the identity of the respective controlling entity until reaching the ultimate parent company. In turn, where the company is controlled by way of contractual relationships by an entity which is not a shareholder of the subsidiary, this disclosure is of no use to identify the *de facto* parent company.

4. EUROPEAN LAW ALREADY PROVIDING SOME INFORMATION ON GROUPS

15. Most Member States rely on the specific information on the group existence and structure provided by consolidated financial statements (by means of Directive 2013/34/EU). This will be discussed in the next section.

16. Other ways to have access to the controlling shareholder (i.e., its identification) are provided through Directive (EU) 2015/849 ("AMLD") and, to a lesser extent (since it only applies to 100% shareholdings) on the publicity imposed on the sole shareholding (Directive 2009/102/EC).

17. Further, as already mentioned, also in the previous ICLEG's Report on information on groups[9], EU capital markets regulation imposes on listed companies a duty to disclose significant shareholdings in other companies (see, as already mentioned, the Transparency Directive 2004/109/EC[10]), a duty on issuers to identify their controlling shareholders (Prospectus Regulation (EU) 2017/1129[11]) or a duty to include in the annual report additional information on shares with special control rights (Takeover Directive 2004/25/EC). However, these legal provisions apply to listed companies or companies going public only, they are focused on controlling shareholdings only (i.e., leaving aside groups built on a contractual basis) and are relevant at very specific moments (a takeover or when

[7] Limited liability company act of Norway § 4-5.

[8] Limited liability company act of Norway § 4-6.

[9] "Report on information on groups", p. 7-9 (see, footnote 2).

[10] Especially arts. 9, 10 and 12.

[11] Prospectus Regulation (EU) 2017/1129, see Annex I, VIII: "The purpose is to provide information regarding the major shareholders and others that may control or have an influence on the company"

securities are offered to the public or admitted to trading on a regulated market situated or operating within a Member State [Prospectus]). Therefore, they do not appear fully suited to achieve the (more general) goal (transparency on groups' existence and structure) addressed in this paper.

4.1. In particular, information on groups through Directive 2013/34/EU

18. As already stated in the ICLEG Report on information on groups, Directive 2013/34/EU of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings contains rules for both the parent company and the subsidiary. Specifically, see Art 17 (1) and 28 (2) Directive 2013/34/EU.

19. According to article 28 (2), the notes to the consolidated accounts drafted by the parent company must include all the group member companies; however, this information does not provide a "picture" of the group structure but rather a "list" of subsidiaries.

20. According to article 17 (1), any company must disclose in the explanatory notes to its individual financial statements which company is drawing up consolidated annual accounts. Therefore, this disclosure of the parent company only arises when the parent must draft consolidated annual accounts. As the Directive 2013/34/EU provides for several exemptions to the parent's obligation to draft consolidated accounts, this results in a considerable loophole for the purpose described in this paper. Therefore, when an exemption applies (in Spain, for instance, several exemptions are provided in art. 43 Commercial Code, which substantially exempts from consolidation duties all those companies that can draft brief accounts), since there is no duty to draft consolidated accounts, subsidiaries are not obliged to identify their parents and neither are parent companies obliged to provide information on the group member companies in the consolidated accounts.

21. However, if one agrees that, as mentioned earlier, the most useful information for stakeholders in this domain lies in: (i) knowing whether a relevant company is affiliated to a group and, in such a case, (ii) which is its ultimate parent company and also (iii) to have a clear picture of the whole group's structure – and thus of all the intermediate companies in the chain from the relevant subsidiary to the ultimate parent company and all the subsidiaries under common control of the same parent company – Directive 2013/34/EU falls short to disclose the following:

    i. When there is no consolidation duty, neither the parent company nor the subsidiary provides any kind of information on the groups. Therefore, neither the subsidiary's stakeholders nor the parent's stakeholders may have access to this information.

    ii. If accounts are consolidated, the parent company which draws up the consolidated accounts provides information on the composition of the group, more specifically, on its members (a "list" of subsidiaries), but not on its structure.

iii. Finally, even if consolidation applies, the information provided by subsidiaries and parents is linked to their accounting duties and these are due on a yearly basis, not on an on-going basis. Therefore, the information on the parent and on the picture of the group (just on its members, not on its structure) is not updated on an on-going basis.

4.2. Again on disclosure provided by the identification of the controlling shareholder through AMLD

22. The Directive 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing allows to know, e.g. by checking in the national register or the beneficial ownership register (which must be interconnected through BORIS), the natural persons who are beneficial owners in companies.

23. Since the beneficial owner is a natural person (holding or controlling, directly or indirectly, more than 25% of voting rights of the company or controlling the company through other means), when the shareholders of the company are companies as well, the AMLD does not require the "chain of control" until that natural person is identified to be disclosed in national beneficial ownership registers[12]. Therefore, although AMLD has improved the transparency on the controlling shareholder along Member States, the current AMLD rules fall short to disclose group structures[13]:

    a. the tracking of that controlling shareholder (when achieved) does not provide a picture of the whole group's structure, instead only natural persons who are the beneficial owners of a company are disclosed;

    b. as already mentioned in ICLEG Report on information on groups, Directive 2015/849 does not concern itself with groups of companies' structure disclosure as such, but (in line with its purposes) with beneficial ownership and, therefore, with natural persons, cf. art. 3 (6)).

And following the recent CJEU decision from 2022-11-22, C-37/20 and C-601/20 (*Luxemburg Business Registers*), Art 30 (5) lit c AMLD 2015/849 is invalid – the information is not allowed to be publicly accessible in all cases without legitimate interest.

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[12] Only a small number of Member States are requiring this information to be reported to their national beneficial ownership register. In Austria the "chain of control" (intermediate companies) is not publicly available from the BOR. Only the information about the beneficial owner (natural person) is publicly available (only name, date of birth, nationality and country of residence; § 10 WiEReG, based on Art 30 (5) Directive (EU) 2015/849. Some others do disclose the „chain of control", as happens to be in Spain, where the data published by the BOR refer to both the beneficial owner and the chain of control (on this latter, each company's name, domicile, EUID, country, registry data, level in the chain of control): https://www.registradores.org/-/-que-informacion-suministra-el-retir-1?redirect=%2Fregistro-de-titularidades-reales.

[13] However, the new COM proposal for an AML Regulation – currently under negotiations – sets out that the beneficial ownership information to be kept in BO registers should also include "description of the control and ownership structure" (Article 44(1)(c)). See: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0420

5. CONCLUSIONS

24. It is important for any company's stakeholder to have access to information on the group's existence and structure, i.e., to know (i) whether a company belongs to a group and, if that is the case, (ii) which one is the parent company and (iii) which is the whole group's structure.

25. Accounting Directive 2013/34/EU and AMLD provide some useful information on groups, but does not tackle directly the issues explained above for the means explained in (1):

    i. Parent companies are not always obliged to draft consolidated accounts since the Directive provides for exemptions (adopted in many national laws).

    ii. Consolidated accounts do not provide a full picture of the group's structure as such, but a "list" of the group members.

    iii. Information on the groups linked to accounting duties, does not provide an updated (ongoing) information, but information on a yearly basis.

    iv. AMLD has improved the transparency on corporate structures among Member States. However, the tracking of the beneficial owner (when achieved) does not provide a picture of the whole group's structure but of natural persons acting as controlling shareholders.

26. Some Member States provide for different solutions on publicity on groups (apart from the one provided by the Consolidated Accounts Directive and AMLD):

    i. Very few Member States observe specific rules on groups' existence and membership disclosure (Italy and Germany, the latter only for contractual groups) in the Business Register and, even, on commercial correspondence (Italy), with sanctions linked to breach of these disclosure duties.

    ii. Some other Member States impose disclosure/publicity duties on public and/or private limited liability companies to provide identification of all their shareholders. However, this is burdensome for stakeholders who have to 'research' the entire shareholding chain upstream in order to ascertain who the ultimate controlling shareholder is; besides, this regulation does not provide information on groups created on a contractual basis or where intermediate parent companies are registered abroad.

6. PROPOSALS

27. Based on the above, there are two main legal policy approaches to the information duties on groups: (1) registral publicity and (2) commercial publicity. As for the reasons explained above, and from a company law policy perspective, the registral publicity option seems the most appropriate one, though a complementary commercial publicity approach would be advisable for the reasons hereunder explained.

28. Should any of these approaches be taken some changes at the EU level must be made.

First (and preferred) Proposal

Business Register Disclosure Regime

(1) The information as to the affiliation of any given public or private limited liability company included in the scope of Directive 2017/1132 (CLD) to a group should be disclosed in the business register according to article 14 and 19(2) of Directive 2017/1132, by inserting a new letter to this effect in article 14 and a reference in article 19(2)[14].

This would imply for the Member States to establish a duty of the relevant company (each group member) to disclose at the beginning of the affiliation to the group and to publish any subsequent changes in the relevant documents and particulars pursuant to Article 15 of the same Directive.

(2) The information should include:

- **a.** whether the relevant company is affiliated to a group, and, if that is the case, the identity of the ultimate parent company (within EU and, if relevant, the ultimate third country parent company);
- **b.** the identity of any direct or indirect subsidiary and the intermediate companies, if any, in the control chain from the ultimate parent company (i.e., controlled by the same ultimate parent company within the group's structure);
- **c.** an easy and user-friendly figurative description (visualization) of the group structure, i.e., a "comprehensive map of the group structure"[15].

(3) Since transparency duties on (b) and (c) would be burdensome for every group company and (their respective) registrars to be updated every time the group structure changes and even superfluous if the ultimate parent company is obliged to update at the business registry this

[14] Including these items in article 19.2 (and not only in art. 14) would provide useful and free information cross-border (through BRIS).

[15] ICLEG, "Report on information on groups" (March 2016).

information, we consider that duties (b) and (c) should be imposed on the ultimate parent company *only* - provided that it is a Member State company. With this, the duty of the subsidiary is reduced to disclose itself as such and the ultimate parent company [duty (a)], while the ultimate parent company must disclose itself as such [duty (a)] and provide information on the whole group by means of (b) and (c).

(4) Should the ultimate parent company be a third country company, these duties should be imposed on the ultimate Member State intermediate parent company only[16] (or, in case this would not exist, on the Member State subsidiary).

(5) Should this approach be followed, the CLD would have to offer a definition of what "parent" and "subsidiary" mean[17]. This could be just a reference to the Accounting Directive[18] or, in a more ambitious way, it could be tried to harmonize this concept (from a minimum harmonization – now – towards a maximum harmonization).

(6) Policy considerations on the registral publicity approach (pros and cons):

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[16] See, usefulness of Second Proposal as cumulative (that would exempt this obligation from ongoing updating at the Business Registry).

[17] To define parent and subsidiary by means of the definitions in the Accounting Directive means that only vertical groups are included, not horizontal ones (which do not seem to be very common). The extension of disclosure to horizontal groups could be left to Member States like in art. 22.2.b) of the Accounting Directive, based on „unified direction ": ... if that undertaking (a parent undertaking) and another undertaking (the subsidiary undertaking) are managed on a unified basis by the parent undertaking".

[18] The Accounting Directive defines the parent, subsidiary and group as follows in Article 2:

(9) 'parent undertaking' means an undertaking which controls one or more subsidiary undertakings;

(10) 'subsidiary undertaking' means an undertaking controlled by a parent undertaking, including any subsidiary undertaking of an ultimate parent undertaking;

(11) 'group' means a parent undertaking and all its subsidiary undertakings (see a definition of control in art. 22).

Several Directives refer to the Accounting Directive when defining a parent company. See, for instance, Regulation (EU) 2015/848, of 20 May, on insolvency proceedings, defining group of companies in article 2 (definitions) as: *(13) 'group of companies' means a parent undertaking and all its subsidiary undertakings*", and defining "parent undertaking" by remission to the Accounting Directive: *"(14) 'parent undertaking' means an undertaking which controls, either directly or indirectly, one or more subsidiary undertakings. An undertaking which prepares consolidated financial statements in accordance with Directive 2013/34/EU of the European Parliament and of the Council shall be deemed to be a parent undertaking*".

Similarly, article 38. 1. d) of Prospectus Regulation (EU) 2017/1129 states (for administrative sanctions): "*Where the legal person is a parent undertaking or a subsidiary of a parent undertaking which is required to prepare consolidated financial accounts in accordance with Directive 2013/34/EU, ...*".

Article 65 CLD (Additional safeguards in case of related party transactions) states: "*In cases where individual members of the administrative or management body of the company (...) or of the administrative or management body of a parent undertaking within the meaning of Article 22 of Directive 2013/34/EU or such parent undertaking itself, or individuals acting in their own name, but on behalf of the members of such bodies or on behalf of such undertaking, are counterparties to such a transaction, Member States shall ensure through adequate safeguards that such transaction does not conflict with the company's best interests*".

Article 9.c) 1º of SHRD 2017, similarly refers to the accounting Directive to define "group": *"Where applicable, the remuneration report shall contain the following information regarding each individual director's remuneration …c) any remuneration from any undertaking belonging to the same group as defined in point (11) of Article 2 of Directive 2013/34/EU of the European Parliament and of the Council"*.

a. Pros: (1) easy, free and fast access to the information on the ultimate parent company's identity (through BRIS); (2) ongoing information on the group's members and structure (not only on a yearly basis as with annual accounts).

b. Cons:

(1) For this approach to work correctly, some duties should be imposed on the parent's directors to communicate to each subsidiary whether it has been integrated/exited the group; these duties go far beyond the mere amendment of the registral information established in articles 14 and 19 CLD. They would require that the CLD foresees or imposes on national laws to foresee these communications' duties (from parent to subsidiaries) (also see Third Accumulative Proposal);

(2) This registral publicity approach would only apply to companies (which are the subjective scope of the CLD); therefore, partnerships, cooperatives and foundations that frequently appear in group structures as parents or subsidiaries would not be covered. Therefore, CLD would have to be extended (e.g. Art 14) to these legal entities (at least, for this purpose).

(3) In some Member States (e.g. in AT and DE) limited partnerships are mostly part of very simple groups (subsidiaries of the Private Limited in "GmbH & Co KG"), which are transparent in the register anyway, because all MS have partnerships and their unlimited partners in the register. These "groups" should not be forced to additionally disclose group information. This could be achieved by a MS option to exclude groups with only two levels, where a limited or unlimited partnership is the only subsidiary, and the only parent is a partner company registered in the same MS. In this very common case, the information is publicly available already directly from the register of the partnership.

Second (complementary) Proposal

Commercial/company website publicity

(1) A complementary easy and cheap legal instrument would be – following the Italian model – to impose a duty on every group member company to identify in its commercial correspondence (including electronic correspondence) who its ultimate – and, if the case, the intermediate within EU – parent company is (or, if the case, to identify itself as such parent company) and/or in the company website (when adopted) the group information above mentioned.

(2) Should both instruments (commercial correspondence and company website) work as alternative means, in practice, it is likely that only subsidiaries will include this information in their commercial correspondence because the parent company information duty on the group structure is much broader and can be subject to frequent changes (specially for big group structures). Probably, parent companies should use the company website to comply with this information duty. This would be a (welcome) indirect 'tool' to force them to have a company website so that they can include the relevant information there.

(3) It should be noted, however, that:

a. Implementation of this duty (commercial and/or company website) requires changing the CLD at EU level.

b. Company websites are compulsory *only* for listed companies (Art 5 (4) Shareholder Rights Directive 2007/36/EC). Besides, company websites are controlled by the company only and can be changed (or left unchanged) at will – different from the Business Register and from submitted accounting documents, which are under control of the register authority.

c. For these reasons the central electronic platform (referred in art. 16 (3) CLD) could be used instead of a company website[19]. Austria uses options related to the central electronic platform and companies themselves can publish the documents via the central electronic platform ("Ediktsdatei", www.edikte.justiz.gv.at)[20]. This must be conducted by a lawyer or notary using their professional electronic signature[21]. The advantage over a company website would be that 1) the company cannot change published documents anymore, 2) the company does not need to have a website and 3) national central electronic platforms can be connected with BRIS (company websites cannot).

[19] Article 16 para 3: "Member States shall ensure that the disclosure of the documents and information referred to in Article 14 is affected by making them publicly available in the register. In addition, Member States may also require that some or all of those documents and information are published in a national gazette designated for that purpose, or by equally effective means. Those means shall entail at least the use of a system whereby the documents or information published can be accessed in chronological order through a central electronic platform. In such cases, the register shall ensure that those documents and information are sent electronically by the register to the national gazette or to a central electronic platform."[20] § 89j GOG, § 221a (1a) AktG, § 7 (1a) SpaltG, § 8 (2a) EU-VerschG, § 19 (1), § 24 (1) Nr. 7 SEG.

[20] § 89j GOG, § 221a (1a) AktG, § 7 (1a) SpaltG, § 8 (2a) EU-VerschG, § 19 (1), § 24 (1) Nr. 7 SEG.

[21] Verschmelzungsvertrags- und Spaltungsplan-Veröffentlichungsverordnung (VSVV).

Third (complementary) Proposal

Sanctions/Enforceability

Effectiveness/enforceability of the new disclosure duty would call for public sanctions and/or private liability in the event of non-compliance, as shown by the Italian experience. This might be included in the CLD or, better, left to Member States to mandatorily adopt and provide the appropriate sanctions and safeguards in compliance with their legal orders, as long as effectiveness of the new regime in ensured.

II. DISCLOSURE OF SHAREHOLDERS

A. STATUS IN MEMBER STATES

1. Currently, disclosure of the identity of shareholders via register is only mandatory in case of single-member private limited liability companies; the register can be the national business register or a register kept by the company and accessible to the public (Art 3 Single Member Company Directive[22]). In all Member States surveyed, they are disclosed in the business register. Norway in contrast uses a shareholder book kept by the company.

2. Regarding public limited liability companies, anyone who acquires at least 5 % of shares admitted to trading on a regulated market to which voting rights are attached, or financial instruments with similar economic effect is required to notify the issuer and the issuer then has to make this public (Art 9, 13, 14 TrD[23]). Taken together, these rules ensure disclosure of shareholders only in specific cases.

3. For private limited companies with *multiple* shareholders the survey shows that Member States have different approaches to transparency: Some have them in the register (AT, DE, IT; also DK beyond a share percentage of 5 %), some only have the founding shareholders in the register, but not later acquirers (ES, FR, LU), some do not disclose them at all (LT, NL). For these latter groups, the 'veil' is only lifted in certain situations (e.g. after a court decision). Norway uses a shareholder book kept by the company, into which anybody can request insight.

B. POLICY OPTIONS

4. One might consider requiring that all shareholders of private limited-liability companies are disclosed in the national registers and via BRIS (by extending Art 14, 18 and 19(2) CLD). Opinions on this question were divided within ICLEG. On the one hand, this could improve transparency about the ownership of private limited liability companies (e.g. for purposes of holding a shareholder liable or for purposes of fighting money laundering or tax evasion) and for transparency about group structures. On the other hand, one could doubt that this would bring much added value, since BOR already ensures that beneficial owners are disclosed, but following the ECJ-decision on invalidity of Art 30 (5) lit c AMLD 2015/849[24] this information is not allowed to be publicly accessible in all cases without legitimate interest. It was also brought forward, that disclosure via register may expose even persons with a very small shareholding to risks of violence, intimidation or identity fraud. Yet, this risk exists also

[22] Directive 2009/102/EC of the European Parliament and of the Council of 16 September 2009 in the area of company law on single-member private limited liability companies.

[23] Directive 2004/109/EC on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market; last amended by Regulation (EU) 2021/337.

[24] ECJ 2022-11-22, C-37/20 and C-601/20, Luxemburg Business Registers.

for directors as well as for partners of partnerships. However, one could argue that the situation is different for them: Directors have authority to represent the company and partners of a partnership are generally personally liable for the debts of the partnership; hence anybody coming into contact with the company/partnership has a legitimate interest to know their identity. By contrast, small shareholders of a limited liability company do not as such have the power to represent the company and they are also not personally liable for the debts of the company (but could be indirectly, e.g. in case of repayment of contributions).

a) Pros: full shareholder transparency; information available already in some national registers; free access via BRIS, if in Art 19 (2) CLD.
b) Cons: different opinions in Member States on shareholder transparency; risks for shareholders from disclosure (violence, intimidation, identity fraud)

5. A middle way could be to require the information about shareholders of private limited liability companies to be available free of charge via BRIS (Art 18 and 19 (2) CLD) only if and to the extent they are disclosed in the national registers of the relevant Member State, distinguishing between founding, later and current shareholders. This would ultimately leave the decision to Member States but may result in regulatory competition for the solution which the public considers best.

a) Pros: Member States can decide; information available already in concerned national registers; free access via BRIS, if in Art 19 (2) CLD
b) Cons: partial shareholder transparency only (not uniform in Member States)

6. At any rate, for public limited liability companies it would not be practicable to require disclosure of all shareholders. Firstly, this would be very difficult in case of bearer shares; secondly, shares are usually traded frequently on the capital markets. If at all, a disclosure requirement would only be conceivable for non-listed companies. However, of all Member States surveyed, only Italy has the shareholders of non-listed public companies in the register.

III. EXTENDING BRIS TO OTHER LEGAL ENTITIES

1. BRIS currently only covers companies to which the CLD applies, i.e. limited liability companies. However, Members States also register other legal entities in their commercial or companies registers. ICLEG was asked to examine a possible extension of BRIS to partnerships and cooperatives.

2. Right now this is regulated on a voluntary basis. Art 18 (1) CLD states:

   "Member States may also make available *[sc.: through the system of interconnection of registers]* documents and information referred to in Art 14 for types of companies other than those listed in Annex II."

3. This would have to be changed to an obligatory rule for partnerships and cooperatives. The referral to Art 14 CLD would fit for cooperatives, but only partially for partnerships (see below).

A. PARTNERSHIPS

4. ICLEG conducted a comparison of register data/documents on partnerships in national registers of 11 EU/EEA Member States: Austria, Denmark, France, Germany, Italy, Lithuania, Luxembourg, Netherlands, Norway, Poland and Spain[25].

5. This comparison shows that the national registers in all those Member States disclose both unlimited and limited partnerships as well as their partners with unlimited liability. Only half of them also disclose partners with limited liability and their amount of maximum liability (AT, DE, ES, IT).[26] The other half only includes the unlimited partners (FR, LT, LU, NL). This means that unlimited and limited partnerships and at least their partners with unlimited liability could easily be included into BRIS. There would be reason to do so: In several Member States unlimited and limited partnerships are – next to private limited companies – the most common types of registered companies. And where the combined form of private limited & Co limited partnerships is common (like for instance the GmbH & Co KG in DE and AT), the private limited company is included in BRIS, but the partnership is not. BRIS however can only be extended to types of partnerships already registered in Member States (e.g. not to irregular partnerships in IT or to the civil partnership/GesbR in AT) and also should only be extended to partnership types typically having intense business connections (e.g. the OHG/OG and KG in DE and AT; questionable for the registered GbR in DE).

6. From a regulatory point of view it should be noted, that – if the extension of BRIS to partnerships should be accomplished by extension of Art 18 (1) CLD – the referral to Art 14 CLD would only partially fit for partnerships:

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[25] EU/EEA Member States of the ICLEG members and observers.

[26] Italy seems to have the partners with limited liability in the register, but not the amount of their liability.

– Art 14 lit a) – c) CLD (statutes and any amendments along with the complete text as amended) do not fit for partnerships in some countries (e.g. AT and DE), because articles of partnership in written form are not obligatory there and hence are not kept in the register

– Art 14 lit d) (persons who as members of a body constituted pursuant to law are authorised to represent the company) basically would only apply to partners with unlimited liability

– Art 14 lit e) and f) would not or only partially fit for partnerships, but they are conditional anyway.

7. On the other hand, information on the partners and their liability status (unlimited or limited) would be necessary. Only half of the Member States we received feedback from disclose partners with limited liability and their amount of maximum liability in the register. The other half only includes the unlimited partners. But at least information and particulars about unlimited partners (both in unlimited and limited partnerships) are made available by all registers and could be included in BRIS.

B. COOPERATIVES

8. The ICLEG also conducted a comparison of register data/documents on cooperatives in national registers of the same 11 EU/EEA Member States as for partnerships.

9. That comparison showed that all these Member States have the essential data on cooperatives in a register. Of course, there are some discrepancies in details, like the street address being optional only in IT, NO and domestic branches not being registered in FR, LU and NO.

10. National cooperatives exist with limited liability in different flavors and – quite rare – with unlimited liability. Since cooperatives often have a variable capital and the number of members is open, there often is no registered capital of a cooperative. Instead, only the amount of one share in EUR/currency and the type of mandatory coverage of members (e.g. single or multiple amount of one share) is registered. Individual members are not disclosed in the register except the founders via the formation deed.

11. For SCEs the register content is harmonized by SCE Regulation (EG) 1435/2003: Art 11 and 12 refer to the national "law applicable to public limited-liability companies", which itself is subject to Art 14 f) CLD. Next to that there are some provisions on disclosure of certain matters.[27] The amount of the subscribed capital (and an indication that it is variable) is disclosed in the register via the statutes (Art 5 (4) SCE Regulation). An index of the members only has to be kept at the SCE's registered office (Art 14 (4) SCE Regulation).

[27] Art 7 (11), 31, 35 (8), 47 (1), 68, 69, 74 SCE Regulation.

12. Different from the company types already included in BRIS and also from unlimited and limited partnerships discussed for an extension, **not all Member States have cooperatives in their national companies register:** While AT, DK, FR, IT, LT, LU, NL, NO and PL use the companies register, in Germany cooperatives and SCE are kept in special registers (*Genossenschaftsregister*), which would have to deliver the information to BRIS. Annual accounts are in a different database (*Bundesanzeiger*; for accounting years starting from 2022: *Unternehmensregister*[28]). In Spain only insurance and credit cooperatives and SCE are entered into the companies register, others in a special register for cooperatives (*Registro de sociedades cooperativas*) or even in regional registers only, both not being interconnected with BRIS. For these cooperatives it is not possible to show their data in BRIS without connecting the special registers first.

13. This would basically require an extension of Art 22 CLD, which currently states, that the system of interconnection of registers shall be composed of "the registers of Member States". This refers to the "central, commercial or companies registers" (Art 16 (1) CLD) holding the private and public limited companies (Annex I, II and IIA CLD).

14. Such an extension of Art 22 CLD would not be necessary, if separate cooperatives registers are connected to the national companies registers (Art 16 (1) CLD), which again are connected to BRIS.

15. The vast majority of Member States covered in the comparison carried out by ICLEG however keep cooperatives in the same register as private and public limited companies (the "central, commercial or companies registers" in the sense of Art 16 (1) CLD). These Member States already have the cooperatives in "the register" in the sense of Art 22 CLD and are not affected.

16. As a result, this means, that for some Member States BRIS can only show, what they have in connected registers, which will not always be all existing national cooperatives.

C. POLICY OPTIONS

Several options are conceivable:

Option A: Member States make available via BRIS what they have in national registers

17. One option would be to merely require those Member States which have the information in their national register to make it available via BRIS (ideally free of charge, Art 19 (2) CLD).

    a) <u>Pros:</u> the most important information is available already in the national registers; access to the information could be free via BRIS, Member States would probably follow for their national registers (if not free already)

[28] § 339 Abs 1 HGB icw § 8b Abs 2 Nr. 4 HGB; Art 88 EGHGB.

b) Cons: information would not be completely uniform – limited partners of partnerships would be missing from some Member States as well as some cooperatives without further national steps; EU law would not guarantee, that third parties can rely on the information, since Art 14 and Art 16 CLD would continue to apply only to companies listed in Annex II CLD.[29]

18. Such a provision could state, that electronic copies of documents and information on types of companies listed in a new Annex (specifying e.g. for DE OHG/KG and Genossenschaft, for AT OG/KG and Genossenschaft etc) shall be made publicly available through the system of interconnection of registers, provided they are made available by the Member State in a national register.

19. To ensure and harmonize protection of third parties, it could be stated, that Art 16 (5) and – if accepted – the provision on "positive publicity" suggested in the ICLEG Report "Cross-border use of company information" (2023)[30] also apply to these documents and information. This would effectuate a harmonized protection although the disclosure obligation of the documents and information is not harmonized for Member States. The protection would – as is the case up to now in Art 16 – refer to disclosure in the national register, not in BRIS.

Option B: Harmonization of disclosure and protection

20. Alternatively, a new article on mandatory disclosure of information on unlimited and limited partnerships as well as cooperatives could be added on the example of Art 14 for limited liability companies. Included types of companies and cooperatives could be listed in an Annex to the directive. This would mean, that all Member States would have to disclose this information (which they widely do already). For protection of third parties, rules corresponding to Art 16 (5) and the suggested provision on "positive publicity" would need to apply to this information (which is probably the case on national level already).

21. In this case the included documents and information should be limited to a level common in all or most Member States.

22. As a consequence, for partnerships the statutes and their amendments as well as the particulars of the partners with limited liability and their amount of maximum liability are not suggested for harmonized disclosure, because a considerable group of Member States does not disclose them. For cooperatives disclosure of the capital subscribed (and indication that it is variable), the amount of one share and the type of mandatory coverage of members varies between Member States and cannot easily be transferred to a harmonized disclosure.

[29] This might be true even for SCE, because it is doubtful, if the reference in Art 11 (1) and Art 12 (1) SCE Regulation also covers the protection of third parties in Art 16 (4) and (5) CLD. Art 47 SCE Regulation only covers certain aspects of protection.

[30] The suggested provision states: "As against the company concerned, third parties may rely on documents and information made publicly available in the register unless the company proves that they knew that what is disclosed is incorrect."

The same applies to accounting documents of cooperatives, where Directives 2013/34/EU, 86/635/EEC and 91/674/EEC would have to be modified.

23. The list of information to be disclosed in the register could include:

For unlimited and limited partnerships:

– the name and legal form of the partnership;

– the registered office and street address of the partnership and the Member State where it is registered;

– the partnership's address in any official delivery system for electronic messages to the partnership with legal delivery effect;

– the registration number of the partnership and its EUID;

– the particulars of the partners with unlimited liability, indicating their liability status as unlimited;

– the appointment, termination of office and particulars of the persons who either as a body constituted pursuant to law or as members of any such body are authorised to represent the partnership in dealings with third parties and in legal proceedings and information as to whether the persons authorised to represent the partnership may do so alone or are required to act jointly;

– the accounting documents for each financial year which are required to be disclosed in accordance with Directive 2013/34/EU (remark: especially "hidden limited companies" in the sense of Art 1 (1) lit b (i) of mentioned directive);

– information on any domestic branches opened by the partnership;

- information on any branches opened by the partnership in another Member State including the name, registration number, EUID and the Member State where the branch is registered;

– the status of the partnership, such as when it is closed, struck off the register, wound up, dissolved, economically active or inactive as defined in national law;

– any declaration of nullity of the partnership by the courts;

– the appointment of liquidators, particulars concerning them, and their respective powers.

For cooperatives:

– the name and legal form of the cooperative;

– the registered office and street address of the cooperative and the Member State where it is registered;

– the cooperative's address in any official delivery system for electronic messages to the cooperative with legal delivery effect;

– the registration number of the cooperative and its EUID;

– the instrument of constitution, and the statutes if they are contained in a separate instrument; any amendments to these instruments and their complete text as amended to date;

– the appointment, termination of office and particulars of the persons who either as a body constituted pursuant to law or as members of any such body:

(aa) are authorised to represent the cooperative in dealings with third parties and in legal proceedings and information as to whether the persons authorised to represent the cooperative may do so alone or are required to act jointly;

(bb) take part in the administration, supervision or control of the cooperative;

– information on any domestic branches opened by the cooperative;

– information on any branches opened by the cooperative in another Member State including the name, registration number, EUID and the Member State where the branch is registered;

– the status of the cooperative, such as when it is closed, struck off the register, wound up, dissolved, economically active or inactive as defined in national law;

– any declaration of nullity of the cooperative by the courts;

– the appointment of liquidators, particulars concerning them, and their respective powers.

24. For protection of third parties Art 16 CLD would have to be amended by a citation of the newly added article. Member States should have to ensure that the most essential information and documents referred to in the list are available free of charge through BRIS (Art 19 (2) extended to partnerships and cooperatives).

Option C: More harmonization

25. Going even further, one might also consider extending the rules on online formation (Art 13g, 13h CLD), online filing of documents (Art 13j CLD) and/or the rules on branches (Art 28a ff CLD) to partnerships and cooperatives.