Chapter 1. Introduction

This section offers an introduction to the topic of the thematic review, describing the background against which the work was conducted. It covers the concepts of flexibility and proportionality; their use in the G20/OECD Principles of Corporate Governance; and describes the rationale for a flexible and proportional approach to corporate governance by offering historical and contemporary examples. It also highlights its applicability to some of the opportunities and challenges that come with current capital market developments.

The purpose of the Corporate Governance Committee's (the Committee) thematic peer reviews is to facilitate effective implementation of the G20/OECD Principles of Corporate Governance (the G20/OECD Principles) and to help policy makers, regulators and market participants to respond to developments that may influence the relevance and effectiveness of their existing corporate governance framework.[1] For this purpose, the Committee decided to conduct a thematic analysis on how flexibility and proportionality can be used when implementing the G20/OECD Principles.

This report presents the results of the review which identifies criteria and mechanisms that may motivate and allow flexibility and proportionality in the implementation of rules and regulations relating to selected regulatory areas covered by the G20/OECD Principles. It is structured as follows: This first chapter introduces the overall approach. The next two chapters describe the methodology and present the main results. Then six separate chapters address the results in more detail for the areas of regulation that are reviewed.[2] Each of these six sections also contains a case study to illustrate the reasoning behind proportionality and flexibility provisions and their application in one of the participating jurisdictions. The annex presents the full questionnaire used for the reviews.

Flexibility and proportionality in corporate governance

Flexibility and proportionality, as general concepts, form an inherent part of the legal framework of most jurisdictions. In the context of corporate governance, it is manifested in the many options for contractual freedom that company law allows for when establishing a company's governance structure and purpose, as well as in the differential application of elements of legal and regulatory framework to companies depending upon their specific character.

The opposite end of the spectrum from flexibility and proportionality would be a "one-size-fits-all" approach, in which the corporate governance framework (or elements thereof) would be mandated to all companies equally, without taking into account relevant differences among them. Typical flexibility and proportionality considerations reflected in corporate governance frameworks include characteristics such as the size of a company, ownership and control structures, geographical presence, sector of activity, a company's stage of development and/or whether a company's securities are publicly traded.

The main point of departure for applying flexibility and proportionality in practice is to enable the corporate governance framework to accommodate differences in company practices that while achieving desired regulatory outcomes, allow or facilitate companies' individual development and the most efficient overall deployment of their resources. Likewise, flexibility and proportionality prevent the unnecessary adoption of requirements that may impose burdens and restrictions on companies without effectively promoting the overall outcomes.

As a result, flexibility and proportionality rules have been applied in relation to a variety of matters within corporate governance frameworks. Disclosure rules for example are frequently differentiated according to various criteria. Other factors that are commonly subject to a flexibility and proportionality approach are the composition of the board, the establishment of board committees, remuneration practices, shareholder and stakeholder (including employee) rights. Well known national examples of applying flexibility and proportionality in the area of corporate governance include the US JOBS Act[3] and the European Union's Accounting and Transparency Directives.[4] But examples abound.

Within the Italian framework, for example, flexibility and proportionality are provided for SMEs in the Consob regulation and in the listing rules.[5] In Chile, independent directors are only mandated if a company has market capitalisation and a free float above a certain minimum.[6] Similarly, in Sweden, worker representation on the board is mandatory only in companies of a certain size.[7] In the UK, the flexibility and proportionality approach is used in the 2016 Green Paper on Corporate Governance Reform[8] as it seeks to discuss whether the UK's largest privately-held companies –where they are of similar size and economic significance to public companies– should be expected to meet higher minimum standards of corporate governance and reporting than other privately-held firms.[9]

More recently, the European Commission has launched a consultation for "Building a proportionate regulatory environment to support SME listing"[10] that aims to assess the impact of regulation on SMEs incentives to listing so as to "further alleviate the administrative burden on listed SMEs and revive the local ecosystems surrounding SME-dedicated markets, while keeping investor protection and market integrity unharmed" (European Commission, 2017).

The public policy rationale for flexibility and proportionality

In a market economy, the production of goods and services can be organised in a great number of different legal forms. Co-operatives, partnerships, limited liability corporations, joint stock companies, either privately-held or listed, are just a few examples. The reason why our legal systems make all of these different forms available is that the character of economic activities varies, as do the personal preferences of the individuals that are engaged in these activities.

For example, a law firm whose business model requires little fixed capital may be best served by choosing the limited liability partnership form, while a capital-intensive mining venture with an uncertain outcome may opt for the joint stock corporate form. The variety of legal forms also facilitates the pursuit of different objectives that founders and participants may have. Some organisations are established to generate profits, while others are run for social purposes, charity, or the advocacy of special causes.

The G20/OECD Principles do not refer to any specific legal form, since they focus mainly on companies which are "publicly traded" and that, in principle, can include different legal forms. The dominant legal form of publicly traded companies is the joint stock company, but there are examples of publicly traded companies adopting other legal forms, like the limited liability companies in the US or the cooperatives in Italy.

Irrespective of their legal form, publicly traded companies are not a homogenous group. They differ greatly with respect to size, ownership structure, stage of development and the industries in which they operate. This is why the G20/OECD Principles state that policy makers have a responsibility to make sure that the corporate governance framework for listed companies is flexible enough to meet the needs of firms that operate under widely different circumstances.

Just like good corporate governance, the notion of flexibility and proportionality is not an end in itself. And it is by no means a way to weaken the effectiveness of the corporate governance framework. On the contrary, flexibility and proportionality is a necessary prerequisite for creating an effective legal environment that can support the ultimate policy objectives of the G20/OECD Principles, namely to support economic efficiency, sustainable growth and financial stability.

When addressing the issue of flexibility and proportionality, it is essential to think about regulation in economic as well as legal terms. It requires an understanding of the incentives of market participants and how ongoing structural developments in the financial and corporate sectors may influence, or even alter, these incentives. After all, in order to achieve their objectives, laws, regulations and practices must be designed with respect to the economic reality in which they will be implemented.

As a first step, it may therefore be useful to briefly recapitulate the evolution of the corporate form. Why was it established and how has it evolved over time in response to economic events. By doing that, we will find that legislators have never been alien to the concepts of flexibility and proportionality when circumstances change. This is true for differences between corporate forms as well as the ability of publicly traded companies to deviate from the default rules that are provided in the typical company law contract.

Flexibility and proportionality in company regulation

As regards joint stock companies, one of the first flexibility and proportionality reforms took place in Germany almost 150 years ago. The very first German joint stock companies act (*Aktiengesetz*) was introduced in 1870. It applied to all joint stock companies (*Aktiengesellschaft*) and was considered very liberal. Due to abusive use of the liberal regime, the act was replaced in 1884 by a new, more formalistic and restrictive piece of legislation, including mandatory rules on, inter alia, the organizational structure of the company.

Complaints were soon heard against this mandatory approach from small and medium sized businesses. They requested a new form of limited liability company adapted to the, typically, more closed structure of ownership in small firms. Eight years later, in 1892, Germany therefore introduced a separate form of company with limited liability, the *Gesellschaft mit beschränkter Haftung* (GmbH) aimed at smaller businesses, typically with a smaller number of owners.

During the decades to come, equivalents of the GmbH concept spread all over Europe. In France the joint stock company, *Societé Anonyme* (SA), was complemented with the *Société à Responsabilité Limitée* (SARL) in 1925, and in Italy the S.p.a. was complemented with the S.r.l. in 1942. In the UK two categories of the limited liability company, private and public companies, were introduced in 1907. Today, in almost every country in the world there are two major forms of companies with limited liability for the owners or two categories thereof: AG – GmbH, SA – SARL, S.p.a. – S.r.l., Plc – private company, etc.

But flexibility and proportionality in company law reforms did not stop after these developments. In many jurisdictions additional steps have been taken by the legislator. In France, for example, a new company form "in between" the SA and the SARL was introduced in 1994, called *Société par Actions Simplifiée* (SAS).[11] It was introduced to combat certain rigidities in the law governing the SA and the SARL, which could not always be overcome by means of the introduction of special provisions in the company's statutes, or via shareholders' agreements. The SAS was intended to be a flexible legal form combining the advantages of legal personality and a considerable degree of contractual freedom.

In 1999, a decision by the European Court of Justice on the freedom of establishment[12] indirectly triggered a wave of flexibility and proportionality reforms in many EU member states. In Germany, France, and several other jurisdictions, subtypes of the limited

liability company were introduced to make the formation of such companies easier and less risky for entrepreneurs. In Germany the official name of this "mini-GmbH" is *Unternehmergesellschaft* (UG), while in France it is *Entreprise Unipersonelle à Responsibilité Limitée* (EURL). Similar subtypes exist in many other EU member states. A common feature of these limited liability companies is that they may not offer shares for subscription by the public. Hence, while there are exceptions to this rule (cf. publicly traded LLCs in the US), since they cannot be listed, these types of limited liability companies may be considered to be of only limited interest from the perspective of the Corporate Governance Committee.[13]

Regulatory flexibility and proportionality of several kinds exists also among joint stock companies, i.e. companies that may turn to the public to raise capital. Here, proportionality may relate to, inter alia, the size of the company. In such cases certain provisions in the company legislation makes a distinction between companies of different sizes. As mentioned above, employee representation on the board is mandatory in Swedish companies of a certain size. And in Chile, independent directors are only mandated if a company has market capitalisation and a free float above a certain minimum.

A different and typically much more important kind of flexibility and proportionality relates to the distinction between "listed" and "non-listed" joint stock companies. In many jurisdictions, rules with respect to the organisational structure of the company and other issues are stricter, and to a larger extent mandatory, for listed companies than for non-listed companies. But not even this is exhaustive. Within the Italian framework, for example, flexibility and proportionality is provided in the regulation to give more flexibility for, and to improve the corporate governance of, SMEs[14] and in the listing rules (with the aim to improve SMEs corporate governance). And as mentioned above, the UK 2016 Green Paper on Corporate Governance Reform adopts a flexibility and proportionality approach to discuss whether the UK's largest privately-held companies – where they are of similar size and economic significance to public companies– should be expected to meet higher minimum standards of corporate governance and reporting (Department for Business, 2016).[15]

Furthermore, in many countries there are also different categories of market places for trading in shares. In the European Union, a distinction is made between regulated markets and alternative trading platforms (ATPs). EU member states are only bound to apply certain company law directives to the regulation of companies whose shares are admitted to trading on a regulated market. That is, for example, the case with the EU Shareholders' Rights Directive.[16]

In the same vein, we find flexibility and proportionality following from corporate governance codes. In many jurisdictions all listed companies (or only companies listed on regulated markets) must adhere to a corporate governance code on a "comply or explain" basis, while typically no such codes exist for non-listed companies or companies whose shares are traded on ATPs.

Finally, the listing rules of many market places have provisions on corporate governance matters. In some cases this is due to legislative requirements, while in other cases such provisions have been introduced at the initiative of the exchanges themselves, often with the aim to increase confidence in the business of the exchange. Regardless of the rationale, this is another example of regulatory flexibility and proportionality.

To summarise, flexibility and proportionality in the field of company law and corporate governance is nothing new; it has been practised and continued to evolve for a long time. While the flexibility and proportionality concept may indeed be complex, as it relates to different aspects of companies, the common ground is the acknowledgement that "one size does not fit all."

Regulation meets reality

The development of the G20/OECD Principles was informed by a number of special studies that highlighted key developments in both the financial and corporate sectors. They included developments with respect to corporate listings, an analysis of growth companies and the role of institutional investors.

This empirical research, together with the practical experiences of the review group, resulted in a number of changes and amendments to the G20/OECD Principles. It also resulted in a further elaboration of the concept of flexibility and proportionality in the G20/OECD Principles. In addition to acknowledging the need for flexibility and proportionality, the G20/OECD Principles also provide examples of corporate characteristics that may call for flexibility and proportionality, such as size, ownership and control structure, geographical presence, sectors of activity and the company's stage of development. The G20/OECD Principles also recognise that corporations do not operate in a vacuum and that changing circumstances in the financial and corporate sectors over time may call for adjustments in the corporate governance framework.

These observations are of direct relevance to the implementation of the G20/OECD Principles when jurisdictions have to translate its recommendations into laws and regulations. As mentioned above, this requires a good economic understanding of how different legal provisions influence the incentives of market participants, such as shareholders, managers, board members, service providers and stakeholders. But it also requires an empirical understanding of real world developments that over time may influence these incentives and, as a consequence, the effectiveness of existing laws and regulations. In the following sections, three interrelated examples of such developments are discussed. Each of them has triggered a discussion about the merits and the boundaries of flexibility and proportionality in corporate governance frameworks.

The decrease in smaller growth company listings

The use of primary equity markets can be an important source of equity funding for smaller growth companies that want to grow and develop as independent entities. For a company that gets listed, the access to equity funding is not limited to the funds that are raised in the initial public offering (the "IPO"). Equally important is the ability to raise additional equity through a secondary public offering[17] sometime after the listing. As a matter of fact, every year since 2000 such secondary offerings have raised more equity for non-financial companies than the IPOs themselves. We also know that once they are listed, smaller growth companies use this additional source of equity funding at approximately the same rate as larger more established companies (OECD, 2015$_{(2)}$). Moreover, being listed does not only provide access to long-term capital in the form of equity. It also facilitates the use of other forms of capital market based corporate finance, such as corporate bonds (Çelik, Demirtaş and Isaksson, 2015).

Against this background and the documented positive correlation between equity finance and economic growth, concerns have been raised about the marked decline in the listings of smaller growth companies. Globally, the average annual number of growth companies

that made an IPO of less than USD 50M (USD 100M) was 1 373 (1 739) in the period 1996-2000. That number fell to 1 041 (1 179) in the period 2001-2007 and to only 627 (785) in the period 2008-2016. At the same time the share of growth company proceeds from all non-financial company IPO proceeds also declined from 8% (19%) in the period 1996-2000 to 6% (15%) in the period 2008-2016. Again, the fall is particularly marked in advanced economies where the share of smaller growth company IPOs more than halved.[18]

Changes in corporate characteristics and business models

At its origin, corporate ownership and shareholder oversight was mainly relating to the residual claim on fixed assets used in production. Improved access to finance and a boost to competition have eroded the primacy of capital over other relevant corporate inputs. Many of today's largest companies are increasingly dependent on intangible assets and talent from unique human resources. This has given rise to two main discussions with respect to corporate governance arrangements.

The first relates to the relative powers of capital and human resource providers. While the joint stock company is an association of capital, many corporations today depend equally much on key human assets that are not easily appropriated or even monitored.[19] This may, for example, appear in parts of the financial industry where personal networks play an essential role and in companies that still depend heavily on the expertise and strategy of a successful entrepreneur. Under such circumstances, it is not unusual that the company founders will require –and investors agree to cede– certain control rights before an IPO.[20] It may also have implications for remuneration practices where shared ownership in many cases is expected and/or demanded from key corporate personnel.

The second discussion relates to the increased complexity of evaluating corporations, particularly when they are heavily dependent on intangible assets and key human resources. This is a key economic function assigned to capital markets and essential for efficient allocation of capital from household savings to productive investments. Today's concern is that while corporations have become more complex and idiosyncratic, large scale investing has become more indexed, standardised and passive. This mismatch may lead to a situation where smaller growth companies do not necessarily get the attention, access to capital or contractual arrangements that will allow them to develop their full potential as independent entities.

In such cases, smaller growth companies may just remain privately held, which may limit their growth prospects and also deprives a broader public of the opportunity to share in their wealth creation. Alternatively, they may be acquired by larger firms that will integrate them in their current business and/or discontinue their activities which could have developed future competition if remained independent. Furthermore, some may grow to become what is now called a "unicorn;" privately-owned companies with valuations above USD 1 billion that attract a significant amount of investment (often indirectly from pension funds and other institutional investors) via venture capital and hedge funds, while offering only a fraction of the corporate governance requirements expected from listed companies. Hence, giving growth companies the scope for flexibility and proportionality may have long term and economy wide effects on the rejuvenation and dynamics of the business sector (Isaksson and Çelik, 2013).

Another important corporate development, with potential implications for the implementation of corporate governance rules, is the fact that an increasing number of corporations today actually have a controlling or dominant owner. This is particularly

accentuated in emerging markets, but controlling owners are also common in most advanced economies, including the US and Continental Europe. It has been argued that the conclusions that stem from an analysis of the principal-agency problem that follow from dispersed ownership are of limited help when addressing corporate governance issues in companies that have controlling owners. Their presence is generally assumed to provide strong incentives for informed ownership engagement and to overcome the fundamental agency problem between shareholders and managers. There are also arguments that the incentives for controlling owners to assume the costs for this ownership engagement are weakened by restrictions on the controlling owners to exercise their rights and be properly compensated for their efforts to monitor.

Increase in institutional ownership

In reality, share ownership may differ from the traditional textbook assumptions that shareholder actions are driven by a direct and uncompromised relationship between company performance and the income of a large number of small direct shareholders.

In addition to direct ownership by a company's ultimate beneficiaries, today's advanced economies are characterised by greater ownership by institutional investors. In the United Kingdom, for example, direct ownership by households in 2014 was down to a mere 12 percent with different categories of institutional investors, notably investment funds, being the dominant category of owners. Japan too has seen a marked decrease in the share of equity held by households, from around 30% in 1980 to 17% in 2016. The same is true for the United States, where households, who traditionally have been quite significant owners of public equity during the period 1980-2016 have been replaced by institutional investors as dominant owners of shares in publicly listed companies.[21]

One driver behind the increased importance of institutional investors as corporate owners, such as pension funds and to some extent investment funds, has been the transformation of pension systems towards funded plans and the establishment of mandatory and voluntary private pillars that are intended to complement existing government sponsored pension systems in many countries. As a result, private pension funds in the OECD area have reached significant sizes, representing as much or more than their own economy's GDP. This is for example the case in Australia (124%), Canada (159%), Denmark (209%), Iceland (151%), Netherlands (180%), Switzerland (127%), and the United States (135%).[22]

Another development that has contributed to the growth of institutional investors has been the formation of sovereign wealth funds (SWFs). Many economies, in particular natural resource exporting countries, have created SWFs to serve as pension reserve funds, financial stabilization funds or state ownership agencies. These funds either directly or through cross investments in other institutional investors invest extensively in public equity markets.

Other factors that have contributed to the increase in collective investment vehicles include modern portfolio theory, which increasingly has gained ground as investment strategy followed by investors around the world. As a result, the trend has been to pool capital into large diversified portfolios that can take advantage of any economies of scale and enhance the risk-return relationship. The advances in technology have also facilitated the introduction of new investment vehicles that follow the same diversification principle.

The shift from direct household ownership to institutional investors has inspired several regulatory and voluntary initiatives aiming at increasing the level of ownership

engagement by institutional investors. Some jurisdictions have, for example, decided to impose different requirements for ownership engagement on different types of institutional investors. Alternatively or complementary to such regulatory requirements, some regulators have chosen to rely on investor stewardship codes or other guidelines. For example, in 18 out of 42 jurisdictions covered in the 2017 OECD Corporate Governance Factbook there is a legal requirement for institutional investors to disclose their voting policies and in 12 jurisdictions they are forced to disclose their actual voting record. Similarly, 17 jurisdictions have some form of stewardship code for encouraging the disclosure of their voting policy and 10 for encouraging the disclosure of actual voting records.

The G20/OECD Principles of Corporate Governance recognises that some countries have begun to consider adoption of codes on shareholder engagement (stewardship codes), which institutional investors are invited to sign up to on a voluntary basis. But the G20/OECD Principles also states if shareholder engagement is not part of the institution's business model and investment strategy, mandatory requirements to engage, for example through voting, may be ineffective and lead to a box-ticking approach.

The impact of the new trends on policy making in corporate governance

As illustrated by the examples above, the evolving landscape raises some challenges to policy makers. How to recover the listing gap, in particular for growth companies? How to understand the increasing role of institutional investors and approaches toward corporate governance? How to apply standards and rules for growth companies with idiosyncratic corporate governance patterns?

Addressing these challenges is key for policy makers to maintain capital markets as an effective driver for growth. As a consequence, several initiatives have been taken to analyse and adjust elements of the corporate governance framework. These initiatives have used a flexibility and proportionality approach to target aspects of laws and regulations that may be of particular importance to companies of diverse size and at distinct stages of development.

With respect to growth companies, for example, the US Congress passed the Jumpstart Our Business Start-ups (JOBS) Act, aiming at easing the regulatory process for passing the registration threshold and lowering the costs to remain listed.[23] Another example involves the changes in UK regulations following the Kay Review of UK Equity Markets and Long-Term Decision Making.[24] Other initiatives include regulatory adjustments in Israel to allow for a longer transition period to implement corporate governance rules that are associated with a full IPO and scaling with respect to disclosure requirements for companies under a certain size. In Italy, smaller companies may enjoy differential treatment with respect to issues such as the disclosure of major shareholdings, mandatory bid thresholds and procedures for related party transactions.

Several jurisdictions are also reconsidering their attitude toward the one-share-one-vote principle with a view to allow and/or encourage long-term investments which can be particularly relevant for growth companies and, in general, for all companies which are more dependent on intangible assets and on human capital resources. Examples in this direction are provided by France, where the *Loi Florange*[25] has made the loyalty shares with double voting rights the default standards for listed companies; by Italy, where loyalty shares have been made available to listed companies and the ban for multiple voting rights has been removed for IPOs, and by Singapore, whose stock exchange has

introduced a framework to list companies with dual class shares, along with safeguards against risks that come with such a listing structure.

Furthermore, in several jurisdictions a number of initiatives are in place to adapt the local corporate governance codes to the specific features of small and growth companies, in order to overcome the "large companies" bias which usually characterizes codes.[26] Such bias can prevent investors from fairly understanding and evaluating corporate governance practices by those companies. In some cases the initiatives lead to the elaboration of a specific code for listed SMEs, while in others a single code provides for a differentiation of the standards according to companies size and/or stage of development.

An important aspect of a policy making inspired by the flexibility and proportionality approach is the use of the policy tools to create a more flexible framework. This includes a variable combination of "scaled" rules and standards for different categories of companies identified ex-ante, and a larger room for individual companies to deviate from default rules and to make use of contractual freedom to define corporate governance arrangements. While "scaled" rules and standards can be more effective in reducing the burdens on targeted companies, the individual company approach can avoid the problems connected with arbitrary ex-ante identification of different classes of companies and of differentiated regimes and allow companies to define their own model on the base of their specific features and of the desired relationship with stakeholders.

Flexibility and proportionality in the G20/OECD Principles of Corporate Governance

The G20/OECD Principles are strongly aligned with the concept of flexibility and proportionality. Chapter I of the G20/OECD Principles states that the corporate governance framework should promote transparent and fair markets, and the efficient allocation of resources, and that it should be consistent with the rule of law and support effective supervision and enforcement. It further says that the corporate governance framework should be developed with a view to its impact on overall economic performance, market integrity and the incentives that it creates for market participants and the promotion of transparent and well-functioning markets.

Chapter I recognises that the corporate form of organising economic activity is a powerful force for growth, and that the regulatory and legal environment within which corporations operate therefore is of key importance to overall economic outcomes. The G20/OECD Principles further highlight that policy makers have a responsibility to put in place a framework that is flexible enough to meet the needs of corporations operating in widely different circumstances, facilitating their development of new opportunities to create value and to determine the most efficient deployment of resources.

The annotations add that, where appropriate, corporate governance frameworks should allow for flexibility and proportionality, in particular with respect to the size of listed companies, but also with respect to other factors such as the company's ownership and control structure, geographical presence, sectors of activity, and the company's stage of development. The annotations further state that in the design of the regulatory framework, policy makers should remain focussed on ultimate economic outcomes and, when considering policy options, they should undertake an analysis of the impact on key variables that affect the functioning of markets. For example, in terms of incentive structures, the efficiency of self-regulatory systems and when dealing with systemic conflicts of interest.

Last but not least, the Methodology for Assessing the Implementation of the G20/OECD Principles of Corporate Governance (OECD, 2017 (1)) notes that the views of the corporate sector with respect to how they rate the flexibility of the corporate governance framework (e.g. is it regarded as too much "one size fits all" and as not addressing the specific needs of business), are useful in forming an assessment of the quality of the regulatory framework.

In conclusion, flexibility and proportionality are at the centre of some of the most significant trends shaping corporate governance frameworks and can be an effective policy tool to address some of the regulatory challenges ahead. The next two sections of this report will describe the research conducted by the Committee to take stock of the use of flexibility and proportionality within the corporate governance frameworks of jurisdictions participating in the Committee.

Notes

[1] The Committee has produced six thematic peer reviews until this date: Risk Management and Corporate Governance; Supervision and Enforcement in Corporate Governance; Board Member Nomination and Election; Related Party Transactions and Minority Shareholder Rights; The Role of Institutional Investors in Promoting Good Corporate Governance, and Board Practices: Incentives and Governing Risks.

[2] The area of pre-emptive rights was not chosen for an in-depth analysis.

[3] See more online at: www.sec.gov/spotlight/jobs-act.shtml.

[4] The EU's Accounting Directive (2013/34/EU) which regulated accounting requirements for firms within the Union, aims at doing so "designing and delivering regulation of the highest quality whilst respecting the principles of subsidiarity and proportionality and ensuring that the administrative burdens are proportionate to the benefits they bring". For that, it defines different categories of companies (micro undertakings, small, medium, or large undertakings/groups) based upon criteria such as balance sheet size, net turnover, and average number of employees during the financial year. Similarly, one of the stated aims of the EU's Transparency Directive (2013/50/EU) was "to make the obligations applicable to listed small and medium-sized enterprises more proportionate, whilst guaranteeing the same level of investor protection".

[5] Concerning listing rules, Borsa Italiana established a listing segment dedicated to midsize companies who voluntarily adhere to and comply with high transparency and high disclosure requirements, high liquidity (minimum 35% of free float), and corporate governance in line with international standards.

[6] Article 50 Bis of the Chilean Stock Company Law states that listed companies must appoint at least one independent director when they have a market capitalisation equivalent to or greater than USD 85 million (measured in a peso-denominated unit) and at least 12.5% of its issued voting shares are held by investors that individually control or hold less than 10% of such shares.

[7] Under the 1987 Act on Board Representation for Employees in Private Employment, Swedish employees have the right to elect 2 board members in almost all companies with more than 25 employees and 3 board members in companies with more than 1 000 employees which operate in several industries.

[8] See more about the UK's Green Paper on Corporate Governance Reform online at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/584013/corporate-governance-reform-green-paper.pdf.

[9] The UK's Kay Review of Equity Markets and Long-term Decision Making touched upon flexibility and proportionality issues as well, arguing that the government and regulatory policy should aim to ensure there are no unnecessary disincentives to using equity markets, either for companies or investors. See more online at: www.gov.uk/government/consultations/the-kay-review-of-uk-equity-markets-and-long-term-decision-making.

[10] See more about this consultation online at: https://ec.europa.eu/info/consultations/finance-2017-barriers-listing-smes_en.

[11] This "simplified joint-stock company" was the first hybrid legal form enacted under French law and was based on common law principles with a structure similar to a limited liability company under United States Delaware Law. The firm has a single controlling person (Président or chairperson) and no board, and may have a separate Directeur Général for the operation of the company, but this is not required. See: www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000727529&categorieLien=id.

[12] As stipulated in the Treaty on the Functioning of the European Union (as reinforced by the European Court of Justice case-law), the freedom of establishment and the freedom to provide services guarantee mobility of businesses and professionals within the EU. According to this, self-employed persons and professionals or legal persons within the meaning of Article 54 of the Treaty who are legally operating in one Member State may carry on an economic activity in a stable and continuous way in another Member State. This implies eliminating discrimination on the grounds of nationality and, if this freedom is to be used effectively, the adoption of measures to make it easier to exercise, including the harmonisation of national access rules or their mutual recognition. See more online at: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A61997CJ0212.

[13] For a review of the use of contractual freedom in the governance arrangements of publicly traded LLCs in the US, see "The Governance of Publicly Traded Limited Liability Companies".

[14] Concerning regulation, differential treatment for "small companies" is provided with respect to major shareholdings disclosure, takeover rules, and related party transactions.

[15] The recent answer from the UK government to the green paper agrees to explore this policy (Department for Business, Energy & Industrial Strategy, 2017).

[16] See more online at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2014%3A213%3AFIN.

[17] These include sales of shares by the founders.

[18] See OECD Equity Market Review of Asia 2017

[19] In "In Search of New Foundations", Zingales highlights the evolution of the corporation that emerged after the second industrial revolution towards that of our times. About the first one, he describes its main features as: i) It was asset intensive (which required great access to a limited offer of financing); ii) The size of the investment needed to enter the market created a huge barrier for competition, which therefore was low; iii) It was vertically integrated (managed all parts of the production and commercialization process internally); iv) It had high control over employees (there was no outside market for specialized workers as the firm was dominant in their market), and v) Power was concentrated at the top, creating an agency risk due to separation of ownership and control. According to his analysis, this model gave us the corporate governance approach focused on shareholder control, investor protection, accountability and transparency. But that model evolved overtime and the XXI century firm has developed away from its predecessor: i) Physical assets are less unique and as a result of better legal protection, intellectual assets are generating more value; ii) It is less dependent on financing to enter the market (also financing has become more accessible) and it is subject to significant competition which demands more innovation and efficient management of costs; iii) It is no longer vertically integrated (to the point

it is hard to determine the contours of the firm itself due to varying degrees of association and/or cooperation within the supply chain), iv) It has less control over employees (there is a great outside market of competitors and financing for leaving employees), and v) Control from the top is diluted, leading to a challenge to establish power to keep the firm from the risk of disintegration.

[20] SNAP, the parent company of the start-up behind the popular phone application 'Snapchat' conducted its IPO in 2017 where it offered investors only shares without voting rights, a first for an IPO in the US. See more online at: www.reuters.com/article/us-snap-ipo-investors-idUSKBN1685R0.

[21] Source: Japan, Flow of Funds, Bank of Japan; United Kingdom, Ownership of UK quoted shares, Office for National Statistics; United States, Financial Accounts, L. 223 Corporate Equities, Federal Reserve.

[22] Source: OECD Global Pension Statistics, Pension Markets in Focus 2017, Figure 2. Total private pension assets include pension funds and other providers of retirement products in 2016.

[23] The US JOBS (Jumpstart Our Business Startups) Act, as defined by the Act itself, aims "to increase American job creation and economic growth by improving access to the public capital markets for emerging growth companies." The act defines emerging growth companies as those with total gross revenue of less than USD 1.07 billion and offers them reduced regulatory and reporting requirements for a period of up to five years from their IPO. These include scaled financial reporting requirements for prospectuses and scaled executive compensation disclosure and auditor attestation of internal control over financial reporting. The act also raised from USD 5 million to USD 50 million the limit of the small issue offering exemption from Securities and Exchange Commission ("SEC") registration requirements within any 12-month period, as well as increased the shareholder threshold to register a class of equity securities with the SEC from 500 to 2 000 persons (or 500 or more persons who are not accredited investors).

[24] The UK's Kay Review touched upon flexibility and proportionality issues as well, arguing that the government and regulatory policy should aim to ensure there are no unnecessary disincentives to using equity markets, either for companies or investors.

[25] The *Loi Florange* was promulgated in March 2014 and aims to support long-term shareholders by permitting the generalization of double voting rights for registered shareholders holding their shares for more than two years before a vote. See more online at: www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000028811102&categorieLien=id.

[26] For more information on the use of corporate governance codes see 2017 OECD Corporate Governance Factbook.

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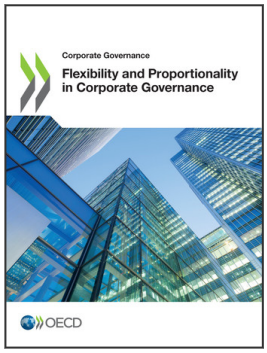

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