RELATED PARTY TRANSACTIONS BY DIRECTORS/MANAGERS IN PUBLIC COMPANIES: A DATA-SUPPORTED ANALYSIS

Alperen Afşin Gözlügöl

Abstract

Related party transactions (RPTs) are one of the primary ways for corporate insiders to expropriate company value at the expense of (minority) shareholders and creditors, and thus attract close regulatory/investor attention around the world. Conventional wisdom in corporate law theory holds however that RPTs entered into by directors/managers (rather than controlling shareholders) in controlled and dispersedly-owned companies are of lesser concern. In controlled companies, such transactions would be effectively monitored by controlling shareholders whereas, in dispersedly-owned companies, executive compensation arrangements would be preferable to RPTs to divert company value for directors/managers. This article challenges this conventional wisdom and puts forward various other theories under which RPTs entered by directors/managers remain a significant concern in terms of value-diversion in both controlled and dispersedly-owned companies.

The article then presents hand-collected data of RPTs entered into by directors/managers who are not significant/controlling shareholders and/or by their related entities in companies listed on the prime standard of the German stock exchange for the years of 2018 and 2019. This dataset and its evaluation provide preliminary indications and exploratory evidence regarding the threat posed by RPTs entered into by abovementioned persons. In addition, up-to-date share-ownership data of those companies and several findings regarding disclosure practices are provided. The article closes with proposing a few regulatory improvements and implications.

Keywords: related party transactions, minority shareholder protection, controlling shareholders, directors/managers, share ownership

INTRODUCTION

While corporate scandals do not surprise the public anymore, a recent string of events involving a high-profile company and executive have sent shockwaves across the world. Recently, the Japanese automobile manufacturer, Nissan's chairman of board of directors, Carlos Ghosn –a highly regarded leader in the automobile industry– was accused of a few wrongdoings, which pitted him against the Japanese justice system.[1] Apart from the ensuing controversial prosecution against him in Japan and his Hollywood-like escape from house arrest to Lebanon, what is the matter of concern for this article is his alleged misdemeanours.[2] As well as being accused of having underreported his remuneration against the Japanese law, the breach of trust resulting from suspicious related party transactions was a main charge.[3] For example, it has been reported that "[…] Mr. Ghosn used the Netherlands subsidiary [of Nissan] to make multiple payments to his older sister for consulting. In one instance, she received a $ 60.000 commission for advising on the housing in Rio de Janeiro, but Nissan found no evidence the sister actually performed such work."[4] Financial Times also reports that "[l]ast week, a brief statement by Tokyo prosecutors said it was investigating allegations that Mr Ghosn had attempted to address unrealised losses from a derivatives transaction totalling ¥1.85bn ($16.7m) by transferring them to Nissan from his personal asset management company at the height of the financial crisis in 2008."[5] These reported transactions would fall under the related party transaction definition in most, if not all, jurisdictions.[6]

---

[1] *Factbox: Financial wrongdoing allegations against Carlos Ghosn*, REUTERS (Jan. 8, 2020, 3:32 PM), https://www.reuters.com/article/us-nissan-ghosn-allegations-factbox/factbox-financial-wrongdoing-allegations-against-carlos-ghosn-idUSKBN1Z71QI.

[2] See Nobuhisa Ishizuka, *Why Is Carlos Ghosn Afraid of the Japanese Justice System?*, THE NEW YORK TIMES (Jan. 16, 2020), https://www.nytimes.com/2020/01/16/opinion/carlos-ghosn-japan.html (explaining the controversial aspects of Japanese criminal prosecution system); Matthew Campbell, *The Tokyo Job: Inside Carlos Ghosn's Escape to Beirut*, BLOOMBERG BUSINESSWEEK (Jan. 14, 2020), https://www.bloomberg.com/news/features/2020-01-14/how-nissan-s-carlos-ghosn-was-smuggled-out-of-japan (detailing Carlos Ghosn's escape).

[3] See Kana Inagaki & Leo Lewis, *Former Nissan chairman Carlos Ghosn rearrested in Japan*, FINANCIAL TIMES (Dec. 21, 2018), https://www.ft.com/content/e4ec80f8-04c5-11e9-99df-6183d3002ee1.

[4] See Sean McLain, *Nissan Probe Alleges Ghosn Used Company Money to Buy Homes, Enrich His Sister*, WALL STREET JOURNAL (Nov. 22, 2018, 9:08 PM), https://www.wsj.com/articles/nissan-probe-alleges-ghosn-used-company-money-to-buy-homes-enrich-his-sister-1542938765?mod=article_inline&mod=article_inline.

[5] See Leo Lewis, Kana Inagaki & Ahmed Al Omran, *Nissan expands Carlos Ghosn investigation*, FINANCIAL TIMES (Dec. 28, 2018), https://www.ft.com/content/a7949ce0-0a88-11e9-9fe8-acdb36967cfc. For further allegations of dubious value-diverting behaviour, see Sean McLain, Phred Dvorak, Sam Schechner & Patricia Kownsmann, *The Fall of the House of Ghosn*, WALL STREET JOURNAL (Dec. 16, 2018, 6:35 PM), https://www.wsj.com/articles/the-fall-of-the-house-of-ghosn-11545003310; Kana Inagaki, Leo Lewis & Chloe Cornish, *Laptop in Lebanon helped Tokyo prosecutors charge Carlos Ghosn*, FINANCIAL TIMES (May 9, 2019), https://www.ft.com/content/b334fe26-718c-11e9-bf5c-6eeb837566c5.

[6] For example, according to International Accounting Standard 24, the definition of related party transaction includes transactions with a member of key management personnel or a close member of that person's family. See IAS 24, para. 9.

These allegations of course remain disputed, awaiting a trial. Yet, if true, these transactions are striking because Nissan is a public company with a controlling shareholder who would supposedly monitor the directors/managers and prevent any value-diversion for the benefit of all stakeholders. The French automobile manufacturer, Renault SA, is effectively the controlling shareholder of Nissan with a stake of around 43%.[7] However, on a closer inspection, it seems that Renault SA, as a shareholder, would not be an effective monitor especially for Carlos Ghosn because Mr. Ghosn was also both the chairman and CEO of Renault SA.[8] And the latter's shares were owned by the French government and Nissan with 15% shareholding each and the rest of shares were dispersedly owned.[9] In essence, Carlos Ghosn as an executive was a very powerful figure despite the existence of a controlling shareholder in Nissan.

Related party transactions present an important issue in terms of the protection of (minority) shareholders and creditors in public companies.[10] Corporate insiders may, and do, divert company value to themselves through self-dealing transactions at the expense of (minority) shareholders and creditors. Yet, most scholarship has focused on the value-diversion via RPTs by controlling shareholders.[11] Conventional wisdom is such that RPTs by directors/managers (who are not the controlling shareholder or related to him/her) do not present a significant problem. In controlled companies, which are common in most jurisdictions,[12] controlling shareholders would monitor the directors/managers and prevent any

[7] See https://www.nissan-global.com/EN/IR/STOCK/INFORMATION/ (last visited Mar. 25, 2020). Although this percentage of shareholding does not provide an incontestable control, it is highly likely that Renault SA has had such a control given that the rest of share-ownership is highly dispersed.
[8] See https://fr.linkedin.com/in/carlosghosn (last visited Oct. 12, 2020).
[9] See https://group.renault.com/en/finance-2/financial-information/key-figures/ (last visited Oct. 13, 2020).
[10] See Vladimir Atanasov, Bernard Black & Conrad S. Ciccotello, *Law and Tunneling*, 37 J. CORP. L. 1, 5–9 (2011) (detailing how insiders can extract value from firms through self-dealing transactions); Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Law and Economics of Self-Dealing*, 88 J. FIN. ECON. 430 (2008) (presenting the anti-self-dealing index as a new measure of legal protection of minority shareholders against expropriation by corporate insiders).
[11] Notable exceptions include Luca Enriques, *The Law on Company Directors' Self-Dealing: A Comparative Analysis*, 2 INT'L & COMP. CORP. L. J. 297 (2000); Andrew Keay, *The Authorizing of Directors' Conflicts of Interest: Getting A Balance*, 12 J. CORP. L. STUD. 129 (2012). See also Klaus J. Hopt, *Conflict of Interest, Secrecy and Insider Information of Directors, A Comparative Analysis*, 10 ECFR 167 (2013); Klaus J. Hopt, *Self-Dealing and Use of Corporate Opportunity and Information; Regulating Directors' Conflicts of Interest*, *in* CORPORATE GOVERNANCE AND DIRECTORS' LIABILITIES 285 (Klaus J. Hopt & Gunther Teubner eds., 1985).
[12] Dispersed share ownership is more common only in the US, the UK and partly in Japan. See, *e.g.*, Rafael La Porta, Florencio Lopez-De-Silanes & Andrei Shleifer, *Corporate Ownership Around the World*, 54 J. FIN. 471 (1999); Mara Faccio & Larry H.P. Lang, *The Ultimate Ownership of Western European Corporations*, 65 J. FIN. ECON. 365 (2002); Julian Franks, Colin Mayer & Hideaki Miyajima, *The Ownership of Japanese Corporations in the 20th Century*, 27 REV. FIN. STUD. 2580 (2014); Stijn Claessens, Simeon Djankov & Larry H.P. Lang, *The Separation of Ownership and Control in East Asian Corporations*, 58 J. FIN. ECON. 81 (2000). For a recent study of corporate control, see Gur Aminadav & Elias Papaioannou, *Corporate Control around the World*, 75 J. FIN. 1191 (2020).

value-diversion through their activities.[13] In dispersedly-owned companies, which are common in the Anglo-Saxon sphere,[14] the main matter of concern in terms of agency problems of powerful directors/managers should be executive compensation, rather than related party transactions because the former is a much easier way of diverting value for directors/managers.[15]

This article critically reviews the conventional wisdom with a support of hand-collected data. As exemplified by the case of Carlos Ghosn, value-diversion via RPTs by directors/managers (who are not controlling shareholders themselves or related to them) in controlled companies does occur. Or, in dispersedly-owned companies, RPTs by directors/managers (other than executive remuneration) can be a common way of diverting company value. **Section I** examines the considerations regarding RPTs by directors/managers in both controlled and dispersedly-owned companies, and puts forward various hypotheses. Through hand-collected data from the annual reports of listed companies on the German stock exchange in two consecutive years, **Section II** presents evidence on the RPTs by directors/managers in controlled and dispersedly-owned companies, evaluates specified hypotheses against the collected data, and provides various regulatory implications. **Conclusion** summarizes the findings of this article.

I. RELATED PARTY TRANSACTIONS BY DIRECTORS/MANAGERS – THEORY

There are various settings in which the existence of a controlling shareholder has different implications in terms of value-diversion via RPTs by directors/managers. First of all, as conventional wisdom largely suggests, it can be claimed that controlling shareholders are monitors with sufficient incentives and power to prevent value-diversion by directors/managers.[16] Their controlling stake in the company gives them incentives to monitor

---

[13] See *infra* note 16–18.
[14] See *supra* note 12.
[15] See *infra* note 34–35. Executive compensation is in fact a specific type of related party transaction. Luca Enriques, Gerard Hertig, Hideki Kanda & Mariana Pargendler, *Related-Party Transactions, in* THE ANATOMY OF CORPORATE LAW 145, 145 (Reinier Kraakman et al. eds., 3rd ed. 2017) (stating that compensation agreements are technically a form of self-dealing). In this article, unless otherwise stated, the term 'related party transactions' does not include executive compensation. Rather, they will be treated separately.
[16] See, *e.g.*, Andrei Shleifer & Robert W. Vishny, *A Survey of Corporate Governance*, 52 J. FIN. 737, 754 (1997) (writing that "[l]arge shareholders […] address the agency problem in that they both have a general interest in profit maximization, and enough control over the assets of the firm to have their interest respected.").

and prevent rent-seeking behaviour by directors/managers of the company.[17] So, RPTs with directors/managers would either not happen or would only be value-increasing.[18] In the following, such a theory will be referred to as '**strong-monitoring hypothesis**'.[19]

Secondly, it can be argued that controlling shareholders are not the effective monitors that they are supposed to be. Rather than the directors/managers being captured by the controlling shareholder, the relationship may be vice versa.[20] Or, the so-called controlling minority structures where controlling shareholders have little economic stake in the company but control over it may diminish their incentives to be effective monitors as well as giving them more incentives to engage in value-diversion themselves.[21] Generally, controlling shareholders come in different types, and it is commonly recognised that not every controller is a good

[17] Ronald J. Gilson, *Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy*, 119 HARV. L. REV. 1641, 1651 (2006) (stating that "[b]ecause she holds a large equity stake, a controlling shareholder is more likely to have the incentive either to monitor managers effectively or to manage the company itself and, because of proximity and lower information costs, may be able to catch problems earlier."); Pierre-Henri Conac, Luca Enriques & Martin Gelter, *Constraining Dominant Shareholders' Self-Dealing: The Legal Framework in France, Germany, and Italy*, 4 ECFR 491, 495 (2007) (expressing that "dominant shareholders are in the best position to monitor managers and prevent their opportunism […]"). Limited regulation of directors' self-dealing in Continental Europe has been associated with the dominance of firms with a controlling shareholder in such jurisdictions where controlling shareholders supposedly play a more than enough monitoring role. See Enriques, *supra* note 11, at 332.

[18] It can also be argued that there might be RPTs that seem value-decreasing at face-value; however, they may be a reward for the performance of directors/managers that cannot be contracted before, thus value-increasing in fact. See Alessio M. Pacces, *Control Matters: Law and Economics of Private Benefits of Control* 7 (ECGI Law Working Paper No. 131/2009, 2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1448164 (stating that "[…] [private benefits of control] extraction [via RPTs] may be efficient […] because the corporate contract is incomplete. When the agent's reward cannot be predetermined for every future state of the world, allowing her to extract private benefits ex-post may be the only way to induce investments that enhance prospective firm value ex-ante, but whose reward for the agent cannot be secured contractually.").

[19] There is supporting evidence for such a theory, especially with regard to executive remuneration. See, *e.g.*, Clifford G. Holderness, *A Survey of Blockholders and Corporate Control*, FRBNY ECON. POL'Y REV. 51 (Apr. 2003) (reviewing the literature that finds that blockholders monitor the compensation of top executives). See also Jeremy S. S. Edwards & Alfons J. Weichenrieder, *Ownership Concentration and Share Valuation*, 5 GER. ECON. REV. 143 (2004).

[20] Kobi Kastiel, *Executive Compensation in Controlled Companies*, 90 IND. L. J. 1131, 1154 (2015) (stating that "controllers and professional CEOs who work together for a long period of time are likely to develop close social and business ties. Such ties, in turn, may negatively influence controllers' ability to remain unbiased and to have an arm's-length negotiation with professional managers."); *id.*, at 1155 (giving the example of Viacom where the controlling shareholder considers the CEO as the son the controller wishes he had). Furthermore, directors/managers may become a 'key person' in the operation of the company, which diminishes the arm's-length negotiation power of the controlling shareholder. On the "key person risk", see Kosmas Papadopoulos, *ISS Lists Top 10 Corporate Governance Topics to Watch in 2019*, THE CLS BLUE SKY BLOG (Jan. 11, 2019), https://clsbluesky.law.columbia.edu/2019/01/11/iss-lists-top-10-corporate-governance-topics-to-watch-in-2019/.

[21] Controlling shareholders can achieve corporate control despite a very low economic stake in the company through dual-class shares, cross-shareholding and pyramid structures. See generally Lucian A. Bebchuk, Reiner Kraakman & George Triantis, *Stock Pyramids, Cross-Ownership, and Dual Class Equity: The Mechanisms and Agency Costs of Separating Control from Cash-Flow Rights, in* CONCENTRATED CORPORATE OWNERSHIP 445 (Randall K. Morck ed., 2000).

monitor.[22] This sometimes results in powerful directors/managers.[23] In the following, such a theory will be called '**weak-monitoring hypothesis**'.

Thirdly, it can be maintained that controlling shareholders may allow value-diverting RPTs by directors/managers as a *quid pro quo*. Directors/managers of a public company owe fiduciary duties to all shareholders and need to act in the best interest of the company.[24] And, thus, they risk legal and reputational losses in allowing/turning a blind eye to controlling shareholders' value-diverting activities.[25] Moreover, remuneration of directors/managers is adversely affected by the controller's tunnelling activities when their compensation packages are tied to performance measures or share price.[26] Consequently, controlling shareholders may

[22] See, *e.g.*, Henrik Cronqvist & Rüdiger Fahlenbrach, *Large Shareholders and Corporate Policies*, 22 REV. FIN. STUD. 3941 (2009) (studying the effects of blockholder heterogeneity); Steen Thomsen & Torben Pedersen, *Ownership Structure and Economic Performance in the Largest European Companies*, 21 STRATEGIC MGMT. J. 689 (2000) (proposing and supporting "the hypothesis that the identity of large owners— family, bank, institutional investor, government, and other companies—has important implications for corporate strategy and performance."); Julian Franks & Colin Mayer, *Ownership and Control of German Corporations*, 14 REV. FIN. STUD. 943 (2001) (studying the ownership of German corporations and finding little association of concentrations of ownership with managerial disciplining).

[23] Consider, for example, the above-explained case of Carlos Ghosn. See *supra* notes 1–9. See also Nan Li, *Do Greater Shareholder Voting Rights Reduce Expropriation? Evidence from Related Party Transactions* 18–19 (Colum. Bus. Sch. Res. Paper No. 18-26, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3128408 (explaining United Spirits Ltd. case which similarly involves improper conduct by a powerful director despite the presence of a controlling shareholder).

[24] See, *e.g.*, Carsten Gerner-Beurle & Edmund-Philipp Schuster, *The Evolving Structure of Directors' Duties in Europe*, 15 EUR. BUS. ORG. L. REV. 191 (2014).

[25] See also Jens Dammann, *Corporate Ostracism, Freezing Out Controlling Shareholders*, 33 J. CORP. L. 681, 709–10 (2008) (writing that while the "agent [directors/managers] may stand to reap only a small portion of the private benefits that he can extract by abusing the control that he exercises on behalf of his principal [the controller]", "the agent may suffer disproportionately if his wrongdoing is detected."). In fact, the risk of incurring financial losses as a result of shareholder suits for the violation of directors' fiduciary duties in overseeing the controlling shareholder's self-dealing transactions is small for a number of reasons, such as the rarity of derivative suits in some jurisdictions or D&O insurance in most public companies. See, *e.g.*, Brian R. Cheffins & Bernard S. Black, *Outside Director Liability Across Countries*, 84 TEX. L. REV. 1385 (2006) (arguing that the out-of-pocket liability risk for outside directors of public companies is similarly very small in many countries). On the other hand, reputational losses can be substantial. See, *e.g.*, Jens Dammann, *Related Party Transactions and Intragroup Transactions*, *in* THE LAW AND FINANCE OF RELATED PARTY TRANSACTIONS 218, 242 (Luca Enriques & Tobias H. Tröger eds., 2019) (stating that "directors who turn a blind eye on a controlling shareholder's misdeeds may face reputational consequences in the labor market and incur financial losses as a result."). There is also the risk of criminal liability. See, *e.g.*, Enriques, *supra* note 11, at 317 (noting that under German law, interested directors who deal unfairly with the company and supervisory board members who have approved the transaction with such knowledge may be held criminally liable); Guohua Jiang, Charles M.C. Lee & Heng Yue, *Tunneling Through Intercorporate Loans; The China Experience*, 98 J. FIN. ECON. 1, 19 (2010) (noting disciplinary/criminal consequences for top management as a result of tunnelling activities by controlling shareholders).

[26] Value-diversion by the controller will cause a discount in the share price and may affect the performance of the company adversely. See, *e.g.*, Carolina Bona-Sánchez, Carmen Lorena Fernández-Senra & Jerónimo Pérez-Alemán, *Related-party Transactions, Dominant Owners and Firm Value*, 20 BUS. RES. Q. 4 (2017) (finding that financial, operating and investment dimensions of RPTs negatively affect firm value due to the presence of an expropriation effect in listed Spanish firms); Michael Ryngaert & Shawn Thomas, *Not All Related Party Transactions (RPTs) Are The Same: Ex Ante Versus Ex Post*, 50 J. ACCT. RES. 845 (2012) (finding that ex post RPTs (transactions initiated after a counterparty becomes a related party) are significantly negatively associated with operating profitability); Mark Kohlbeck & Brian W. Mayhew, *Valuation of Firms that Disclose Related*

allow directors/managers to enter into value-diverting RPTs themselves as a compensation for such risks/losses.[27] Executive compensation may also be a means to 'reward' directors/managers for their implicit collaboration in controlling shareholder's value-diversion.[28] However, it may be a poor way to do so in comparison to RPTs for a number of reasons. First, it is more conspicuous and more in the public and investors' eye given the recent controversies involving executive remuneration.[29] Second, it is easier to understand and evaluate than RPTs that mostly require expert evaluation.[30] Third, it might be more tightly regulated than RPTs. For example, the disclosure requirements might be more demanding.[31] Furthermore, even if RPTs entered into by directors/managers do not seem to be value-decreasing in comparison to potential market transactions, they can still provide some gain for directors/managers (as *quid pro quo*). For instance, directors/managers may satisfy their liquidity needs by selling an asset to the company at the market price (and save search costs). Or, by transacting with the company, they/their firms can earn revenue which might not be possibly earned in the market. In the following, this theory will be referred to as '**quid pro quo hypothesis**'.[32]

Party Transactions, 29 J. ACCT. & PUB. POL'Y 115 (2010) (suggesting that firms that disclose RPTs "have significantly lower valuations and marginally lower subsequent returns" than firms that do not).

[27] See also Kastiel, *supra* note 20, at 1143–44. Furthermore, if directors/managers simultaneously serve in several companies controlled by the same shareholder, controllers may allow such directors/managers to enter into a value-diverting RPT with a controlled company in consideration of acquiescing to minority abuse by the controller in the *other* controlled company.

[28] *Id.*, at 1142 (stating that "controllers may be willing to pay professional managers extra compensation in exchange for their collusion with controllers' extraction of private benefits and as a premium for their loyalty to the controllers."). See also *infra* note 32 and cited sources therein.

[29] See also Lars Norden & Therese Strand, *Shareholder Activism Among Portfolio Managers: Rational Decisions or 15 Minutes of Fame?*, 15 J. MGMT. GOV. 375 (2011) (finding that large media coverage (which is likely for executive compensation in large public companies) results in institutional investors being more active in portfolio companies).

[30] See also Assaf Hamdani & Yishay Yafeh, *Institutional Investors as Minority Shareholders*, 17 REV. FIN. 691, 704 (2013) (stating that "identifying expropriation in what appears to be a legitimate business transaction may require careful analysis, whereas the amount of transfer from the company to its executives in a compensation arrangement is easier to quantify and trigger the media's attention.").

[31] See, *e.g.*, Enriques et al., *supra* note 15, at 147–52 (detailing disclosure requirements on executive remuneration and RPTs in various jurisdictions). Furthermore, 'say-on-pay' provisions which at least grant shareholders advisory vote on executive remuneration are very common while disinterested shareholder vote on RPTs (also known as 'MOM approval') remains the norm only in a handful of countries. See Randall S. Thomas & Christoph Van Der Elst, *Say On Pay Around the World*, 92 WASH. U. L. REV. 653 (2015) (examining say on pay legislation across many countries); OECD, RELATED PARTY TRANSACTIONS AND MINORITY SHAREHOLDER RIGHTS 32–33 (2012) (showing jurisdictions with a disinterested shareholder vote requirement for RPTs).

[32] It is also referred to as '**collusion hypothesis**'. For empirical evidence in support (this evidence also relates to executive remuneration as a way to 'reward' directors/managers for their collusion with the controller's tunnelling), see Kastiel, *supra* note 20, at 1162 (of companies that received negative ISS recommendation in say-on-pay votes, 63.4% were involved in RPTs with their controllers); Min Zhang, Shenghao Gao, Xinjiao Guan & Fuxiu Jiang, *Controlling Shareholder-Manager Collusion and Tunneling: Evidence from China*, 22 CORP. GOV. INT'L REV. 440 (2014) (finding that controlling shareholders with excess control rights collude with managers by weakening performance-based incentives and finding preliminary evidence for rent-sharing behaviour between controlling shareholders and managers); Kun Wang & Xing Xiao, *Controlling Shareholders' Tunneling and*

Lastly, in order to evade rules or attention, controlling shareholders may let directors/managers and/or their related entities transact with the company and then may transact with those parties. For example, a director/manager may buy an asset from the company below the market rate and transfer this asset under the same conditions to the controlling shareholder. Such an evasive scheme may be preferable to controlling shareholder directly transacting with the company to buy the asset because rules governing the controlling shareholders' self-dealing may be harsher than those relating to directorial/managerial self-dealing.[33] Or, controlling shareholder's self-dealing may draw much more investor/media/regulatory attention. In the pages that follow, this theory will be called '**evasion hypothesis**'.

***

In dispersedly-owned companies, the conventional analysis suggests that from the perspective of agency problem resulting from the separation of ownership and control, the main concern in terms of value-diversion should be executive remuneration, rather than related party transactions.[34] This is for example because, it is argued, directors/managers in dispersedly-owned companies are less likely to own (fully or partly) significant businesses to which they can divert value from the public company that they manage.[35]

Executive Compensation: Evidence from China, 30 J. ACCT. & PUB. POL'Y 89 (2011) (suggesting that "[…] controlling shareholders who obtain private benefits from listed companies have less incentive to strengthen the relationship between executive pay and firm performance."); Yongli Luo & Dave O. Jackson, *CEO Compensation, Expropriation, and the Balance of Power Among Large Shareholders, in* 15 ADVANCES IN FIN. ECON. 195, 231 (Stephen P. Ferris, Kose John & Anil K. Makhija eds., 2012) (showing that "there is a strong positive relationship between executive compensation and a controlling shareholder's tunnelling."); Roberto Barontini & Stefano Borzi, *Board Compensation and Ownership Structure: Empirical Evidence for Italian Listed Companies*, 15 J. MGMT. & GOV. 59, 84 (2011).

[33] See also *infra* note 118.

[34] Lucian A. Bebchuk & Assaf Hamdani, *The Elusive Quest for Global Governance Standards*, 157 U. PA. L. REV. 1263, 1306 (2009) (stating that "[t]he constraints on [related party transactions] […] might be vital for [controlled companies] […] but they are far less important for assessing governance at [dispersedly-owned companies] […]"); María Gutiérrez & María Isabel Sáez, *A Contractual Approach to Disciplining Self-dealing By Controlling Shareholders*, 2 J. L. FIN. & ACCT. 173, 197 (2017) (stating that "[m]anagers usually obtain private benefits via remuneration contracts, while controlling shareholders mostly obtain private benefits through self-dealing operations […]."). See also María Gutiérrez & Maribel Sáez, *Deconstructing Independent Directors*, 13 J. CORP. L. STUD. 63, 74 (2013) (writing that "it is important to note that the inefficiencies caused by the managers–shareholders conflict do not exactly match the problems generated by controlling shareholders."); Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 125 YALE L. J. 560, 582 (2016) (expressing that in the typical case of a widely held public company, mismanagement dominates takings (which include conducting favourable RPTs) in terms of agency costs). *Cf.* Victor Brudney, *Revisiting the Import of Shareholder Consent for Corporate Fiduciary Loyalty Obligations*, 25 J. CORP. L. 209, 212, fn. 12 (2000) (writing that "[t]hat protection of public investors from predation by controllers requires firm restrictions does not lessen the former's need for such protection from managers.").

[35] Bebchuk & Hamdani, *supra* note 34, at 1283. *Cf.* Luca Enriques, *Related Party Transactions: Policy Options and Real-World Challenges (with a Critique of the European Commission Proposal)*, 16 EUR. BUS. ORG. L. REV. 1, 6, fn. 22 (2015) (stating that "there is no reason, why, other things equal, managers should prefer excessive compensation to RPTs as a tunneling technique.").

On the one hand, executive remuneration is inevitable because directors/managers have to be paid, and thus provides a permanent and easier channel to divert company value. Indeed, to engage in RPTs, directors/managers may need to own other legitimate businesses to transact with the public company, at least in order not to be seen as bluntly extracting wealth from the latter.

On the other hand, stricter regulation of executive remuneration may cause directors/managers to prefer RPTs as a tunnelling technique.[36] Generally, where executive compensation is the centre of focus due to its eye-catching and controversial nature,[37] the lack of focus on RPTs may leave managerial RPTs unchecked in some cases.[38] Consider, for example, the case where directors/managers are allowed to serve in several companies. One CEO may serve as a board member or chairman in another company (the so-called interlocking directorate).[39] In such a case, directors/managers may tend to favour the company which they think is more promising for their professional career or where there is an urge to increase firm value (or maximize share value) in the short term. Transactions between such companies may be a tool to divert value from one to the other. Another set of cases would be where the wealthy directors/managers buy/sell assets from/to the company at a lower/higher value than the market price, or sell assets at the market price but that are not relevant to the company business. Moreover, even if it is less likely, it cannot be ruled out that directors/managers hold substantial stakes in other firms that transact with the public company where directors/managers serve.[40]

---

[36] See *supra* note 31.

[37] See, *e.g.*, Lucian Arye Bebchuk, Jesse M. Fried & David I. Walker, *Managerial Power and Rent Extraction in the Design of Executive Compensation*, 69 U. CHI. L. REV. 751, 753 (2002) (stating that "[e]xecutive compensation has long attracted a great deal of attention from academics, the media, Congress, and the public at large.").

[38] Donations by the company to directors' preferred charitable organizations or sponsoring by the company of directors' preferred events or organizations also constitute an important agency problem. See Faith Stevelman Kahn, *Pandora's Box: Managerial Discretion and the Problem of Corporate Philanthropy*, 44 UCLA L. REV. 579 (1997); Jayne W. Barnard, *Corporate Philanthropy, Executives' Pet Charities and the Agency Problem*, 41 N. Y. L. SCH. L. REV. 1147 (1997); Roy Shapira, *Corporate Philanthropy as Signaling and Co-Optation*, 80 FORDHAM L. REV. 1889 (2012). These donations are very similar to RPTs in terms of agency cost paradigm: while unfair RPTs provide pecuniary private benefits (although not exclusively), corporate philanthropy serves as a non-pecuniary private benefit of control for managers/directors. So, in this context, one may ask whether to include such donations within the framework of RPT regulation.

[39] Jurisdictions regulate however to what extent directors/managers of a company can serve in similar posts in other companies, especially prohibiting competition with the company. See, *e.g.*, Gerner-Beurle & Schuster, *supra* note 24, at 211 ff. *Cf.* Yaron Nili, *Horizontal Directors*, 114 NW. U. L. REV. 1179 (2020) (revealing "the staggering number of directors who serve on the boards of two or more companies operating within the same industry.").

[40] See also Atanasov, Black & Ciccotello, *supra* note 10, at 25 ff. (providing examples of such tunnelling cases).

II. RELATED PARTY TRANSACTIONS BY DIRECTORS/MANAGERS – DATA

In order to understand which of the abovementioned theories can be further supported by evidence, I hand-collected a dataset on related party transactions entered into by directors/managers of listed companies on the German stock exchange in two consecutive years (2018 and 2019).[41] Germany as a jurisdiction provides a suitable setting for the matter at hand in this study as it involves both controlled and dispersedly-owned companies. In the following parts, I first describe the collection of data and its limitations. I further present the dataset and evaluate the findings with regard to said hypotheses. As the datasets for 2018 and 2019 present more or less the same picture, in the following, I utilize, describe and analyse only the 2018 dataset, noting similarities to and differences from the 2019 dataset in the footnotes when necessary. While the main aim is to understand whether RPTs by directors/managers in controlled and dispersedly-owned companies occur and their characteristics, the data itself and the collection process also illuminate the ownership structure of listed companies on the German stock exchange and lead to further conclusions on the theme of disclosure of RPTs.

A. Description

Among various disclosure requirements,[42] listed companies on the German stock exchange need to disclose related party transactions in their annual reports in accordance with

---

[41] For a similar study, see Andreas Engert & Tim Florstedt, '*Which Related Party Transactions Should Be Subject To Ex Ante Review? Evidence From Germany*', 20 J. CORP. L. STUD. 263 (2020) (while focusing on large RPTs with major shareholders and downstream entities, also offering a glance at the incidence and magnitude of companies' dealings with managers for listed companies in Germany for the year of 2017). See also Geneviève Helleringer, *Related Party Transactions in France: A Critical Assessment*, *in* THE LAW AND FINANCE OF RELATED PARTY TRANSACTIONS 400, 407, fn. 37 (Luca Enriques & Tobias H. Tröger eds., 2019) (citing studies which examine the 120 largest listed companies (by market capitalisation and trading volume) on the Paris Stock Exchange and finding that "RPTs are mainly entered into with managers or with a company that has a common board member or manager; RPTs entered into with a board member (e.g. consulting contracts) are less frequent."); Christoph Van der Elst, *The Duties of Significant Shareholders in Transactions with the Company*, *in* SHAREHOLDERS' DUTIES 199 (Hanne S. Birkmose ed., 2017) (studying the disclosures of shareholder's transactions with the company of the Stoxx Europe Small 200 Index).

[42] In the EU, disclosure requirements have been largely harmonized through various Directives. The Accounting Directive requires the disclosure of RPTs in the notes to the financial statements, allowing however Member States to require or permit companies to disclose all material RPTs that have not been concluded on "normal market conditions". See Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, 2013 O.J. (L 182), art. 17/(1)/(r). The Transparency Directive provides for a half-yearly disclosure of "major related parties transactions". See Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, 2004 O.J. (L 390), art. 5/(4); Commission Directive 2007/14/EC of 8 March

the International Accounting Standard (IAS) 24 as required by the EU law.[43] This standard basically requires a reporting entity (the listed company that is preparing its financial statements) to disclose transactions with controlling shareholders, shareholders with significant influence, key management personnel (directors/managers),[44] their close family members, subsidiaries, sister companies, associates and joint ventures.[45] At minimum, disclosure will include the nature of related party relationship and the amount of transactions.[46] But transactions of a similar nature may be disclosed in aggregate.[47] Furthermore, non-material transactions can be omitted from the disclosure.[48]

In order to be able to collect data on RPTs by directors/managers, I examined annual report of each company listed on the German stock exchange for two consecutive years (2018 and 2019).[49] The dataset includes the companies listed in 'prime standard' as reported by Deutsche Börse as of February 2020.[50] The annual reports of these companies are public and easily accessible.

From these annual reports, I gathered related party transactions entered into by the directors/managers of the companies listed on the German stock exchange ('key management

2007 laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, 2007 O.J. (L 69), art. 4. Lastly, alongside *ex post* disclosure of RPTs in financial statements, listed companies are required by the recent Shareholders' Rights Directive II to disclose material RPTs at the latest at the time of the conclusion of the transaction (real-time *ad hoc* disclosure). See Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement, 2017 O.J. (L 132), art. 9c/(2) [hereinafter Shareholders' Rights Directive II].

[43] International Financial Reporting Standards in general and IAS 24 in particular became applicable for publicly traded firms in Member States through Commission Regulation (EC) No. 1126/2008 of 3 November 2008 adopting certain international accounting standards in accordance with Regulation (EC) No. 1606/2002 of the European Parliament and of the Council, 2008 O.J. (L 320).

[44] IAS 24, para. 9 defines 'key management personnel' as "those persons having authority and responsibility for planning, directing and controlling the activities of the entity, directly or indirectly, including any director (whether executive or otherwise) of that entity."

[45] IAS 24, paras. 9&18. Para. 19 requires separate disclosure for each of the following categories: the parent, entities with joint control or significant influence over the entity, subsidiaries, associates, joint ventures, key management personnel, and other related parties.

[46] IAS 24, para. 18.

[47] IAS 24, para. 24.

[48] IAS 1, para. 31 (stating that "a specific disclosure requirement in a standard or an interpretation need not be satisfied if the information is not material.").

[49] The financial year of some companies does not match with the calendar year. For these companies, the annual reports of 2017/18 and 2018/19 have been examined.

[50] See https://www.deutsche-boerse-cash-market.com/dbcm-en/instruments-statistics/statistics/listes-companies (last visited Mar. 27, 2020). For the different listing segments in Deutsche Börse with different requirements, see https://www.deutsche-boerse-cash-market.com/dbcm-en/primary-market/market-structure/segments (last visited Oct. 13, 2020).

personnel'),[51] their close family members, and entities that are related to them.[52] These transactions include every type of transaction that was concluded with directors/managers and their related entities/persons except those concerning remuneration.[53] I further eliminated transactions that were seemingly entered into by a key management personnel (or his/her related entity) who is/was in fact a significant/controlling shareholder of the relevant company. Moreover, I ignored transactions under €10.000. In order to understand the exact relationship of the related party with the company,[54] I employed DAFNE database, which provides a clear picture of directors/managers' share-ownership in the company and their other dealings/businesses.

To determine the share-ownership structure of the relevant companies, I primarily used the shareholding structure disclosed by the companies in the same annual reports.[55] This provides the advantage that one can determine the share-ownership structure that existed exactly when the relevant related party transaction occurred.[56] I further utilized DAFNE database and information from Deutsche Börse and BaFin[57] to verify ownership data and

---

[51] German stock corporations ('Aktiengesellschaft' – 'AG') have a (mandatory) two-tier board structure and thus 'key management personnel' entail supervisory (*Aufsichtsrat*) and management (*Vorstand*) board members. For the board structure of German companies, see Markus Roth, *Corporate Boards in Germany*, *in* CORPORATE BOARDS IN LAW AND PRACTICE: A COMPARATIVE ANALYSIS IN EUROPE 253 (Paul Davies, Klaus Hopt, Richard Nowak & Gerard van Solinge eds., 2013). Some companies incorporated as 'societas europaea' ('SE'), which gives the option of choosing between a two-tier and one-tier board structure. See Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), 2001 O.J. (L 294), art. 38. The rest (mainly non-German companies which listed on Deutsche Börse) have either one-tier or two-tier board structure.

[52] In collecting RPTs by these related parties, I only considered transactions that were entered into in the pertinent financial year or created expense/income for that financial year albeit being entered into in another financial year. This meant that while some previous transactions that were reported to show (remaining) receivables/liabilities from the transaction (like loans) in the relevant financial year were ignored, continuous transactions (like consultancy agreements) were coded in the dataset separately for each year.

[53] Employment contracts with family members of directors/managers (rather than with themselves) were included in the dataset.

[54] For example, to understand whether the director/manager in question is also a major shareholder or to understand whether the entities that are identified as related party (without disclosing why/how) are a related party because of a connection to a director/manager.

[55] According to section 33 of German Securities Trading Act ('Wertpapierhandelsgesetz' – 'WpHG'), any party whose shareholding in an issuer whose home country is the Federal Republic of Germany reaches, exceeds or falls below 3 per cent, 5 per cent, 10 per cent, 15 per cent, 20 per cent, 25 per cent, 30 per cent, 50 per cent or 75 per cent of the voting rights attaching to shares must notify this to the issuer and simultaneously to Federal Financial Supervisory Authority ('Bundesanstalt für Finanzdienstleistungsaufsicht' – 'BaFin') without undue delay, and at the latest within four trading days. See § 33/(1) Wertpapierhandelsgesetz. Section 160 of German Stock Corporation Act ('Aktiengesetz' – 'AktG') in turn requires such notifications to be published in the annual reports. See § 160/(1)/(8) Aktiengesetz. Furthermore, sections 289a and 315a of German Commercial Code ('Handelsgesetzbuch' – 'HGB') require direct or indirect interests in the share capital exceeding 10 percent of the voting rights to be disclosed in the annual reports. See §§ 289a/(1)/(3) & 315a/(1)/(3) Handelsgesetzbuch.

[56] For this reason, changes in the shareholding percentages after the balance sheet date were not considered (even though reported by the companies in the annual reports as such).

[57] BaFin provides a database of major holdings of voting rights in issuers whose home state is Germany based on publications and notifications of voting rights according to WpHG. See https://www.bafin.de/EN/PublikationenDaten/Datenbanken/Stimmrechte/stimmrechte_node_en.html (last visited Oct. 13, 2020).

clarify unclarities. I then formed five categories of blockholding into which companies are allocated according to the shareholding (or voting rights)[58] of their major shareholder.[59] These categories are (i) companies with no blockholder with 10% shareholding or above, (ii) companies with a blockholder with a shareholding between 10 and 25%, (iii) companies with a blockholder with a shareholding between 25 and 50%, (iv) companies with a blockholder with a shareholding between 50 and 75%, and lastly (v) companies with a blockholder with 75% shareholding or above.

B. Limitations

There are a few factors that may make the dataset on RPTs by directors/managers 'under-inclusive' or 'over-inclusive'. First of all, disclosure made by the companies varies greatly in terms of detail. Some cases are coded 'unclear' when RPTs were disclosed with no information on the identity of related party, or when some identities were known but there was also another category called 'other RPTs' where the identity of related party was not explained. As far as these cases coded 'unclear' involve RPTs by directors/managers (or their related entities), this renders the dataset under-inclusive. Furthermore, in some cases, liabilities were reported due to the members of management and supervisory board, but it was unclear whether they resulted from remuneration or other RPTs.

Secondly, as 'immaterial' transactions are allowed not to be disclosed and defining transactions as such is at the discretion of the reporting company, some significant transactions might have been unreported, resulting in under-inclusiveness.[60]

Thirdly, directors/managers may have indirect interests in transactions with other related parties (*i.e.* transactions other than those that are disclosed to be entered into by key management personnel and their related persons/entities). These interests may not lend

[58] Shareholding and voting rights of a shareholder might differ because of the existence of shares granting different voting rights or of voting rights attached to other instruments than shares.

[59] In determining the major shareholding and its percentage, several rules were followed. Holdings of the same entity/individual (*i.e.* direct and indirect holdings) were aggregated. Pooling agreements between different shareholders regarding the voting rights were also considered. Such agreements have to be disclosed in annual reports according to sections 289a and 315a of German Commercial Code. See §§ 289a/(1)/(2) & 315a/(1)/(2) Handelsgesetzbuch. Insofar as such agreements require voting rights to be exercised uniformly, such shareholdings were also aggregated.

[60] See, *e.g.*, Enriques, *supra* note 35, at 28 (stating that "[a] standard, like the notion of materiality, will give corporate decision-makers wide discretion in determining what to include and, if the rationale is the risk of tunneling, may prove self-defeating, because no insider will be happy to confess that the company is doing something that may indeed be judged as tunneling-prone.").

themselves to be discovered from annual reports, databases and other public information if not explicitly mentioned. This would also lead to under-inclusiveness.

Fourthly, while the '**quid pro quo hypothesis**' predicts RPTs by directors/managers as a reward for acquiescing to minority abuse by controlling shareholders, these transactions may occur in ways that do not require disclosure, rendering any data under-inclusive. For example, transactions may have been concluded with directors/managers after they left the reporting company. Such transactions are not supposed to be disclosed as the related party relationship ends. Or, rather than transacting directly with the reporting entity, directors/managers may transact with other parties such as controlling shareholders directly. Unexpectedly, some annual reports examined in the process of collecting data disclosed such transactions as well.[61]

Lastly, some companies disclose transactions with key management personnel collectively without explaining in detail individual transactions with (different) managers/directors[62] or disclose such transactions without naming the director/manager. Such a disclosure makes it difficult, if not impossible, to discern the exact relationship between the related party and the reporting company. For example, such a disclosure may include transactions with directors/managers who are also controlling/major shareholders, making the dataset over-inclusive.

C. Data

(i) Share-ownership

To start with, it is important to note the shareholding structure of the companies in the dataset. Based on the annual reports of 2018 and other abovementioned sources, the outlook of shareholding structure is as follows:

[61] Two companies disclosed direct transactions between the controlling interest and members of management board. Similarly, another set of two companies reported transactions with managers/directors after they left the company.

[62] IAS 24, para. 24 allows items of a similar nature to be disclosed in aggregate except when separate disclosure is necessary for an understanding of the effects of related party transactions on the financial statements of the entity.

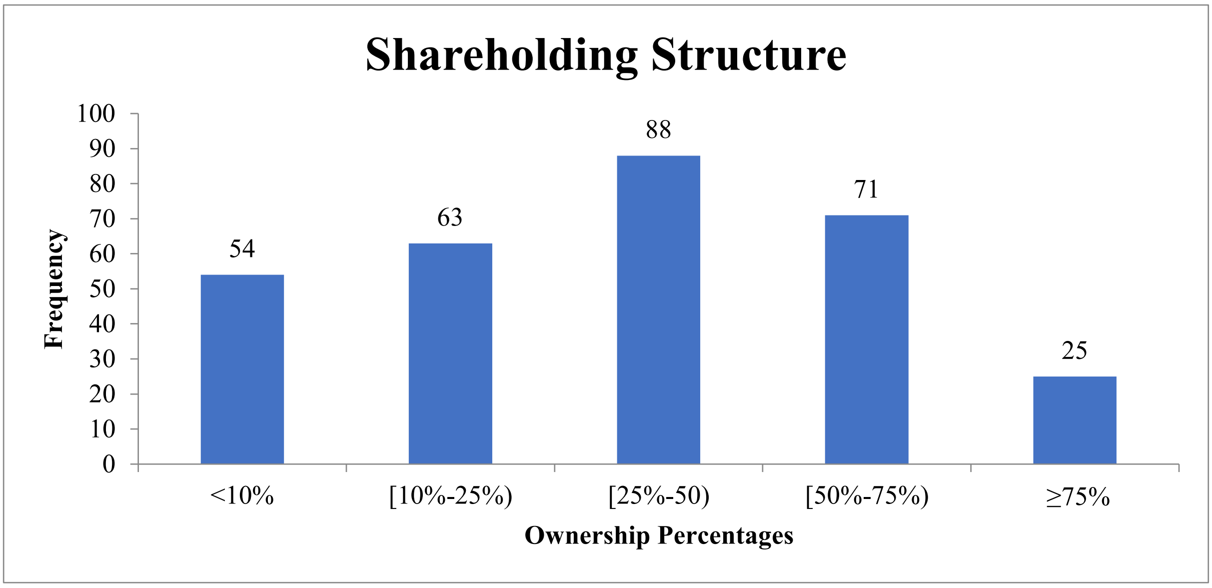

Figure 1 (bars represent the number of companies in each of the five blockholding categories, allocated according to the voting rights of their largest shareholder)

Looking at three main indices (DAX,[63] MDAX,[64] and SDAX[65]), however, reveals considerable variety among the companies with different market capitalizations regarding the share-ownership:[66]

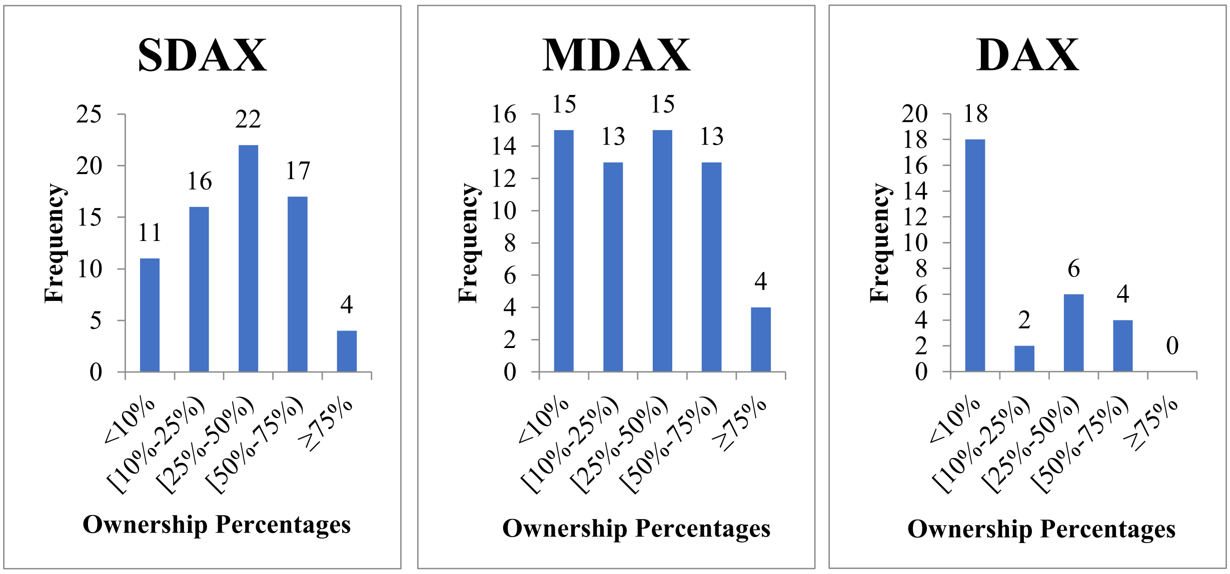

Figure 2 (bars represent the number of companies in each of the five blockholding categories, allocated according to the voting rights of their largest shareholder)

[63] "DAX tracks the performance of the 30 largest and most liquid companies on the German stock market, representing approximately 80 per cent of the aggregate market capitalisation of listed German stock corporations." See https://www.deutsche-boerse.com/dbg-en/our-company/30-facts-about-30-years-of-DAX-29994 (last visited Mar. 23, 2021).

[64] "The MDAX index […] comprises the 60 medium-sized German public limited companies from all industries that rank directly below the 30 DAX® equities based on market capitalisation and order book turnover." See https://www.dax-indices.com/index-details?isin=DE0008467416 (last visited Mar. 23, 2021).

[65] "The SDAX index comprises 70 German public limited companies from all industries that rank directly below the MDAX® equities based on market capitalisation and order book turnover." See https://www.dax-indices.com/index-details?isin=DE0009653386 (last visited Mar. 23, 2021).

[66] Data are based on the composition of indices as they stood on Dec. 31, 2018 (time-adjusted composition of the index is available at https://www.dax-indices.com/composition, last visited Mar. 23, 2021).

The share ownership of the companies listed in the prime standard of the German stock exchange seems to remain still concentrated.[67] Out of 301 companies in the dataset of 2018, 247 companies have at least one blockholder with a shareholding of 10% or above, meaning that only 18% of the companies in the dataset have no such a blockholder. From another perspective, 32% of the companies in the dataset (95 out of 301 companies) have a blockholder with a shareholding above 50%, which effectively provides the absolute control of the company. Decreasing the bar to a shareholding of 25% or above, this figure surges to 61% (183 out of 301 companies).[68]

Dispersed share ownership, on the other hand, appears to occur mostly in the largest companies. Looking at the DAX for example, out of 30 companies, 18 companies have no blockholder with a shareholding of 10% or above in 2018, representing overall one-third of such companies.[69]

Furthermore, the following general features are observed in relation to share ownership. First, large blockholders (with more than 10% shareholding) come in different types: (founding) families, listed or private companies, states/cities, foundations, institutional investors and individuals (sometimes indirectly through a holding company). When one looks at the kind of the ultimate holder of the largest block of shares in the companies in the dataset, the following picture emerges:

[67] Germany as a jurisdiction has traditionally been included in the group of countries with concentrated ownership of company shares. See, *e.g.*, Jeremy Edwards, Marcus Nibler, Erik Berglöf & Julian Franks, *Corporate Governance in Germany: The Role of Banks and Ownership Concentration*, 15 ECON. POL'Y 237 (2000); Franks & Mayer, *supra* note 22. *Cf.* Wolf-Georg Ringe, *Changing Law and Ownership Patterns in Germany: Corporate Governance and the Erosion of Deutschland AG*, 63 AM. J. COMP. L. 493 (2015) (arguing that ownership is diffusing, especially with regard to DAX companies).

[68] Similarly, in the dataset of 2019 consisting of 303 companies, 254 companies have at least one blockholder with 10% or above shareholding, meaning that only 16% of the companies in the dataset have no such a blockholder. Companies with a blockholder with a shareholding of 50% or above comprise 34% of the dataset (102 out of 303 companies). Considering the companies with a blockholder with a shareholding of 25% or above, this number increases to 64% (193 out of 303 companies).

[69] In the dataset of 2019, 17 companies in the DAX index have no blockholder with a shareholding of 10% or above. Furthermore, MDAX and SDAX indices, which consist of companies that rank directly below DAX companies based on market capitalisation (and order book turnover) include a significant number of companies with no blockholder with a shareholding of 10% or above. See *supra* notes 64 & 65 and Figure 2.

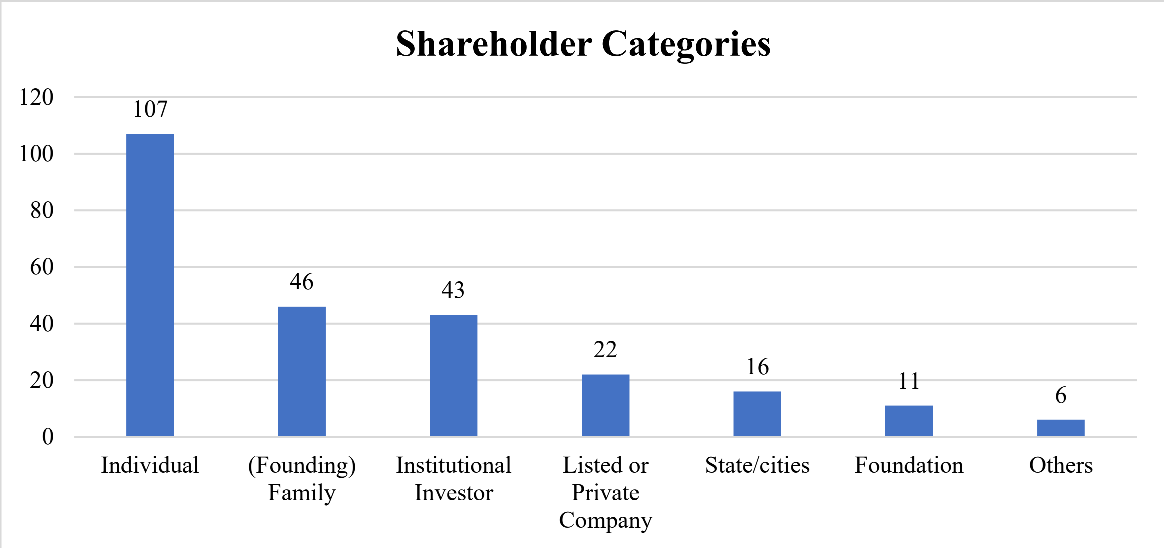

Figure 3 (the bars demonstrate the number of companies, allocated according to the type of the ultimate holder of the largest share block)

The type of the ultimate controller is important because, as mentioned above, controlling shareholders may vary in their monitoring. For example, states and founding families have strong monitoring incentives and skills.[70] But, it has been also shown that monitoring significantly weakens when the control passes to the heir(s) in family-run companies.[71] Institutional investors may be either strong or weak monitors. Private equity firms, venture capitalists, hedge funds, and investment firms run and owned by a small group of investors are generally considered as strong monitors who closely engage with the management of the investee company.[72] Other institutional investors and asset managers are, on the other hand,

---

[70] With regard to states as 'controllers' see, e.g., Pursey P.M.A.R. Heugens, Steve Sauerwald, Roxana Turturea & Marc van Essen, *Does State Ownership Hurt or Help Minority Shareholders? International Evidence From Control Block Acquisitions*, 10 GLOBAL STRATEGY J. 750 (2020); Curtis J. Milhaupt & Mariana Pargendler, *Related Party Transactions in State-Owned Enterprises: Tunneling, Propping, and Policy Channeling, in* THE LAW AND FINANCE OF RELATED PARTY TRANSACTIONS 245 (Luca Enriques & Tobias H. Tröger eds., 2019). On the benefits of family ownership, see Dušan Isakov & Jean-Philippe Weisskopf, *Are Founding Families Special Blockholders? - An Investigation of Controlling Shareholder Influence on Firm Performance*, 41 J. BANKING & FIN. 1 (2014); Ronald C. Anderson & David M. Reeb, *Founding-Family Ownership, Corporate Diversification, and Firm Leverage*, 46 J. L. & ECON. 653 (2003); Ronald C. Anderson & David M. Reeb, *Founding-Family Ownership and Firm Performance: Evidence from the S&P 500*, 58 J. FIN. 1301 (2003).

[71] See, e.g., Belen Villalonga & Raphael Amit, *How Do Family Ownership, Control and Management Affect Firm Value?*, 80 J. FIN. ECON. 385 (2006) (finding that "family ownership creates value only when the founder serves as CEO of the family firm or as Chairman with a hired CEO" and "[w]hen descendants serve as CEOs, firm value is destroyed."); Brian F. Smith & Ben Amoako-Adu, *Management Succession and Financial Performance of Family Controlled Firms*, 5 J. CORP. FIN. 341 (1999) (examining management successions within Canadian family controlled firms and observing negative market reaction to the appointment of family successors); Francisco Pérez-González, *Inherited Control and Firm Performance*, 96 AM. ECON. REV. 1559 (2006) (finding that "firms where incoming CEOs are related to the departing CEO, to a founder, or to a large shareholder by either blood or marriage underperform in terms of operating profitability and market-to-book ratios, relative to firms that promote unrelated CEOs.").

[72] See, e.g., Marcel Kahan & Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 155 U. PA. L. REV. 1021 (2007); L.A.A. Van den Berghe & Abigail Levrau, *The Role of the Venture Capitalist as Monitor of the Company: a corporate governance perspective*, 10 CORP. GOV. INT'L REV. 124 (2002);

weak monitors. Even though they own a large interest in a listed company, the ones who manage the funds invested in the company (and monitor its management) will mostly have minimal financial interest in the value of the company in comparison to beneficial owners of the funds who have the real exposure to the value of the company.[73] Companies which have a controlling interest in a listed company but are themselves also listed and dispersedly-owned (or widely-held) are also likely to be weak monitors. Such dispersedly-owned companies as controllers may be poor monitors because even though the company has a controlling interest, the classical principal-agent problem will arise, and its directors/managers will not be as incentivized financially to monitor the controlled company (and its management self-dealing) in comparison to a shareholder who ultimately controls the listed company (through another company).[74]

Secondly, an important factor with regard to monitoring of a blockholder is whether holdings of shares are through chains of companies. This typically leads to decoupling of economic interest from the voting rights, in other words, an economic stake less than the voting rights of the controller. For example, if the 50% controlling interest in a reporting company is held through Company X in which Company Y holds 60% of the shares, and the ultimate controlling party has similarly 60% shareholding in Company Y, the economic stake of the ultimate controlling party in the reporting company equals to 18% (50%*60%*60%) while controlling 50% of the voting rights. This in turn weakens the incentives of the controller to be a vigilant monitor of the activities by directors/managers. Monitoring incentive of the controller is generally a function of the benefits he/she derives from the monitoring. As the economic stake of the controller decreases, the benefits of the monitoring also diminish and become more likely to be outweighed by the monitoring costs. In the dataset, in 189 companies,

---

Nicholas Bloom, Raffaella Sadun & John Van Reenen, *Do Private Equity Owned Firms Have Better Management Practices?*, 105 AM. ECON. REV. 442 (2015).

[73] Those who manage the funds on behalf of beneficial owners will be entitled to a percentage of assets under management as a fee ('flat fee'). This percentage will be generally very small, giving very little exposure to the value of assets under management. See, *e.g.*, Lucian A. Bebchuk, Alma Cohen & Scott Hirst, *The Agency Problems of Institutional Investors*, 31 J. ECON. PERSP. 89 (2017). Yet, if there is an arrangement based on 'performance fee', the exposure increases substantially. See, *e.g.*, Edwin J. Elton, Martin J. Gruber & Christopher R. Blake, *Investment Fees and Mutual Funds*, 58 J. FIN. 779 (2003). On the governance role of institutional investors, see generally Edward Rock, *Institutional Investors in Corporate Governance, in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 363 (Jeffrey N. Gordon & Wolf-Georg Ringe eds, 2018); Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism; Activist Investors and The Revaluation of Governance Rights*, 113 COLUM. L. REV. 863 (2013).

[74] For example, assume that a shareholder owns 60% of shares of Company Y which in turn owns a controlling interest of 60% in the listed Company X. This shareholder will ultimately have 36% economic stake in the Company X (60%*60%). However, if instead Company Y is widely-held, its directors/managers will have much smaller economic exposure to the value of the controlled Company X.

the largest shareholding was owned by the ultimate blockholder through one or several chains of intermediate entities.

Thirdly, controllers occasionally serve on the boards (either supervisory or management).[75] Fourthly, it is not uncommon that there are more than one blockholder. Last but not least, common ownership of shares of listed companies does not seem to be of a particular concern in contrast to other jurisdictions because such a pattern was not observed during the collection of data.[76]

(ii) RPTs

For the year of 2018, the dataset includes 301 listed companies. Out of these 301 companies, 185 companies did not report any RPT with a director/manager who is not also a significant/controlling shareholder or with a related entity due to a link to these persons. 10 cases were classified *unclear* due to one of the abovementioned reasons.[77] On the other hand, the remaining 106 companies disclosed RPT(s) with a director/manager who is not also a significant/controlling shareholder or with a related person/entity due to a link to these persons.[78] These companies constitute overall 35% of the companies in the dataset. This rate only increases to 46% when looking at companies that disclosed RPTs with their largest shareholders (138 out of 301), which indicates that directorial/managerial self-dealing is *not* significantly less common than shareholder self-dealing. Out of these 106 companies that disclosed RPTs with directors/managers in the 2018 annual reports, 85 companies also reported RPTs with the same or similar related parties for the year of 2019 as well.

---

[75] For a similar finding, see Holderness, *supra* note 19, at 53.

[76] 'Common ownership' denotes the phenomenon that the shares of many listed companies (especially competitors) are jointly held by a small group of institutional investors. The main concern appears to be the potential anticompetitive effects stemming from such a phenomenon. But the matter is highly controversial. See, *e.g.*, José Azar, Martin C. Schmalz & Isabel Tecu, *Anticompetitive Effects of Common Ownership*, 73 J. FIN. 1513 (2018); Martin C. Schmalz, *Common-Ownership Concentration and Corporate Conduct*, 10 ANNU. REV. FIN. ECON. 413 (2018); Einer Elhauge, *Horizontal Shareholding*, 109 HARV. L. REV. 1267 (2016); *cf.* Patrick Dennis, Kristopher Gerardi & Carola Schenone, *Common Ownership Does Not Have Anti-Competitive Effects in the Airline Industry* (FRB Atlanta Working Paper No. 2019-15, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3423505; C. Scott Hemphill & Marcel Kahan, *The Strategies of Anticompetitive Common Ownership*, 129 YALE L. J. 1392 (2020). See also Alec J. Burnside & Adam Kidane, *Common Ownership: An EU Perspective*, J. ANTITRUST ENFORCEMENT 1 (2020) (stating that available evidence suggests that levels of common ownership in Europe are not comparable to those in the US).

[77] See above Part B.

[78] Similarly, for the year of 2019, out of 301 listed companies, 195 companies did not report any RPT with a director/manager who is not also a significant/controlling shareholder or with a related entity due to a link to these persons. 12 cases were classified *unclear* due to one of the abovementioned reasons. In contrast, the remaining 94 companies disclosed RPT(s) with a director/manager who is not also a significant/controlling shareholder or with a related person/entity due to a link to these persons.

Figure 4 demonstrates the number of companies that reported one or more such RPT(s) for each of the blockholder category for the year of 2018. Accordingly, from the group of companies with no blockholder with 10% shareholding or above, 18 companies disclosed one or more such RPT(s) in total. From the companies with a blockholder with a shareholding between 10 and 25%, 26 of these companies disclosed one or more such RPT(s) in total. From the group of companies with a blockholder with a shareholding between 25 and 50%, similarly 26 companies disclosed one or more such RPT(s) in total. From the companies with a blockholder with a shareholding between 50 and 75%, 27 of these companies disclosed one or more such RPT(s) in total. Lastly, only 9 companies from the group of companies with a blockholder with 75% shareholding or above disclosed one or more such RPT(s).[79]

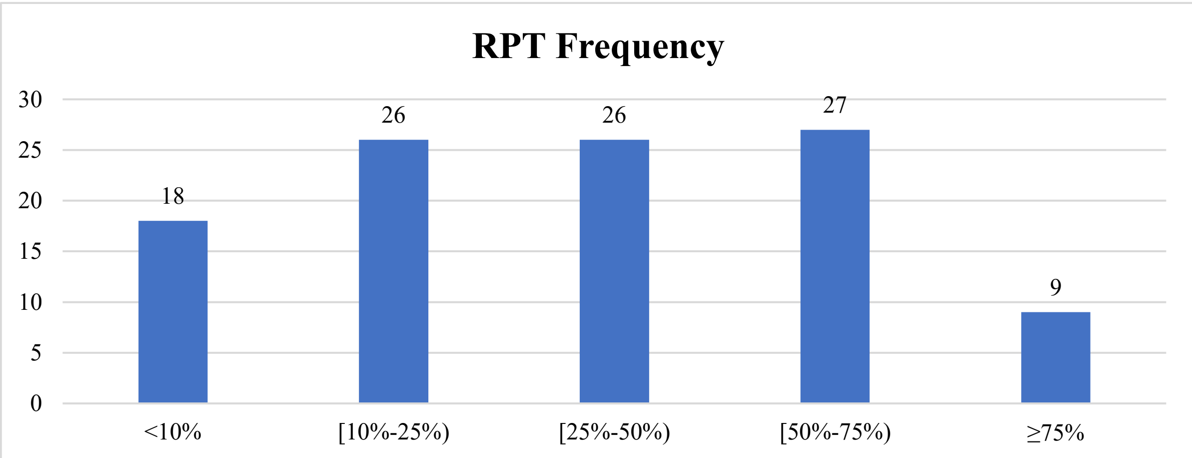

Figure 4

Figure 5 in turn maps this figure onto Figure 1, showing the number of companies that disclosed relevant RPT(s) and those that did not for each blockholding category (relevant RPT meaning an RPT with director/manager(s) who is not also a significant/controlling shareholder and/or with their related entities) for the year of 2018.

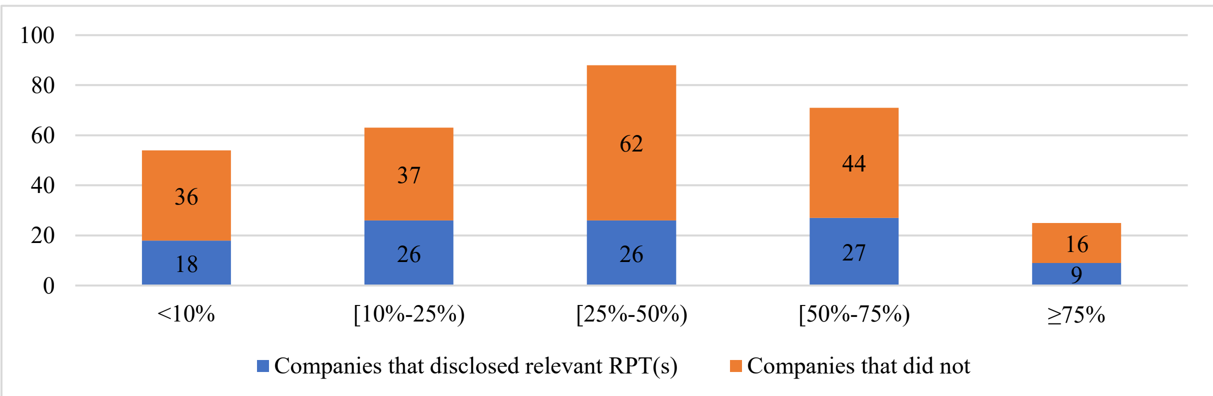

Figure 5

[79] For the dataset of 2019, there is a similar distribution: 10 companies in the interval of <10%; 24 companies in the interval of [10%-25%); 25 companies in the interval of [25%-50%); 24 companies in the interval of [50%-75%); 11 companies in the interval of ≥75%.

Figure 6 depicts the corresponding percentages. Accordingly, for the companies with no blockholder with 10% shareholding or above, 33% of this group disclosed relevant RPT(s). For the group of companies with a blockholder with a shareholding between 10 and 25%, 41% disclosed relevant RPT(s). Of the companies with a blockholder with a shareholding between 25 and 50%, 30% disclosed relevant RPT(s). For the group of companies with a blockholder with a shareholding between 50 and 75%, 38% disclosed relevant RPT(s). Lastly, 36% of the companies with a blockholder with 75% shareholding or above disclosed relevant RPT(s).[80]

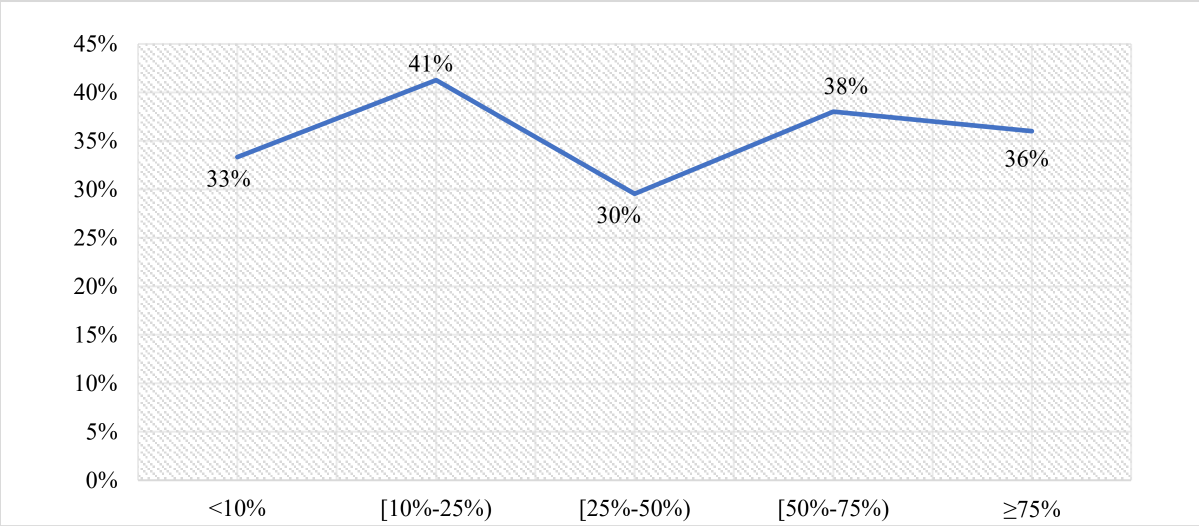

Figure 6

Looking at the types of these RPTs, the following pattern emerges as illustrated in Figure 7 for the year of 2018. The most RPTs (with directors/managers who are not also a (significant/controlling) shareholder and/or with their related entities) concerned purchase or sale of goods or services, with 43 RPTs disclosed in this regard. The next most disclosed type of such RPTs related to consulting agreements with said related parties, with 24 RPTs being in this group. Other types of RPTs related to loan and similar arrangements, obtaining legal services, and rent/lease agreements, with 12, 10 and 9 RPTs disclosed respectively for these categories. 10 RPTs concerned other miscellaneous kinds of RPTs, employment agreements with relatives of said parties being the most conspicuous. Lastly, the types of 21 relevant RPTs were unclear.[81]

[80] For the dataset of 2019, there is a more or less similar picture: 20% (10 out of 49) for the companies in the interval of <10%; 39% (24 out of 61) for the companies in the interval of [10%-25%); 27% (25 out of 91) for the companies in the interval of [25%-50%); 33% (24 out of 73) for the companies in the interval of [50%-75%); 38% (11 out of 29) for the companies in the interval of ≥75%.

[81] For the dataset of 2019, there is a similar distribution: 41 RPTs in the category of 'purchase or sale of goods or services'; 21 RPTs in the category of 'consulting'; 8 RPTs in the category of 'loan and similar arrangements'; 6 RPTs in the category of 'legal'; 8 RPTs in the category of 'rent/lease agreements'; 14 RPTs in the category of 'other'; 17 RPTs in the category of 'unclear'.

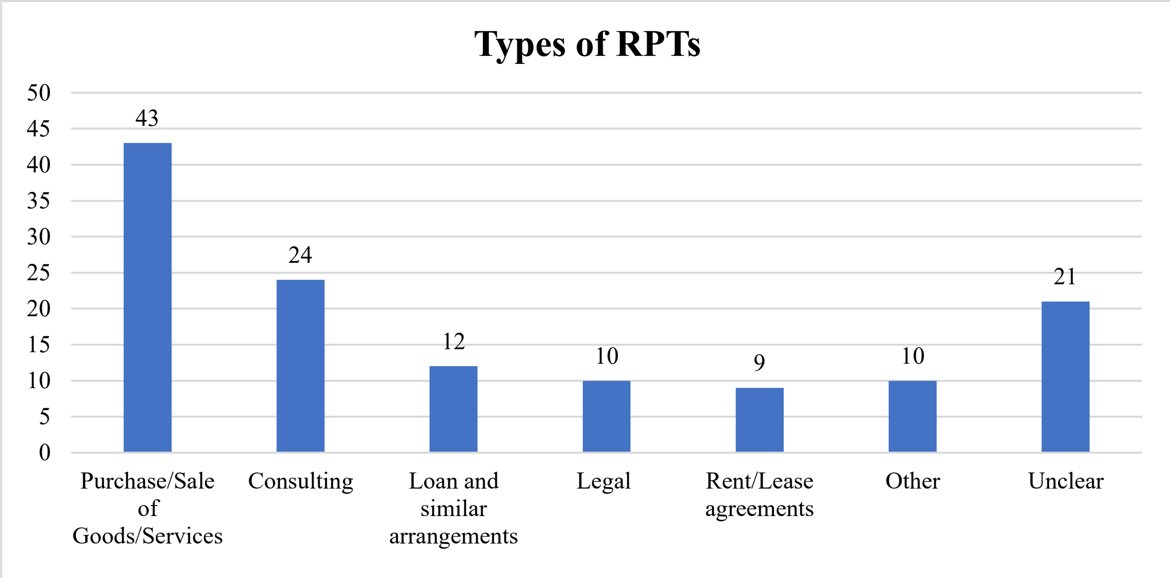

Figure 7

The findings in relation to the value of reported RPTs are also noteworthy. For the year of 2018, these findings however only include RPTs disclosed by 86 companies out of 106 reporting companies because, in other 20 companies, the values were not clear.[82] The following scatter plot depicts the total value of relevant RPTs (RPTs with director/manager(s) who is not also a significant/controlling shareholder and/or with their related entities) disclosed by each company:

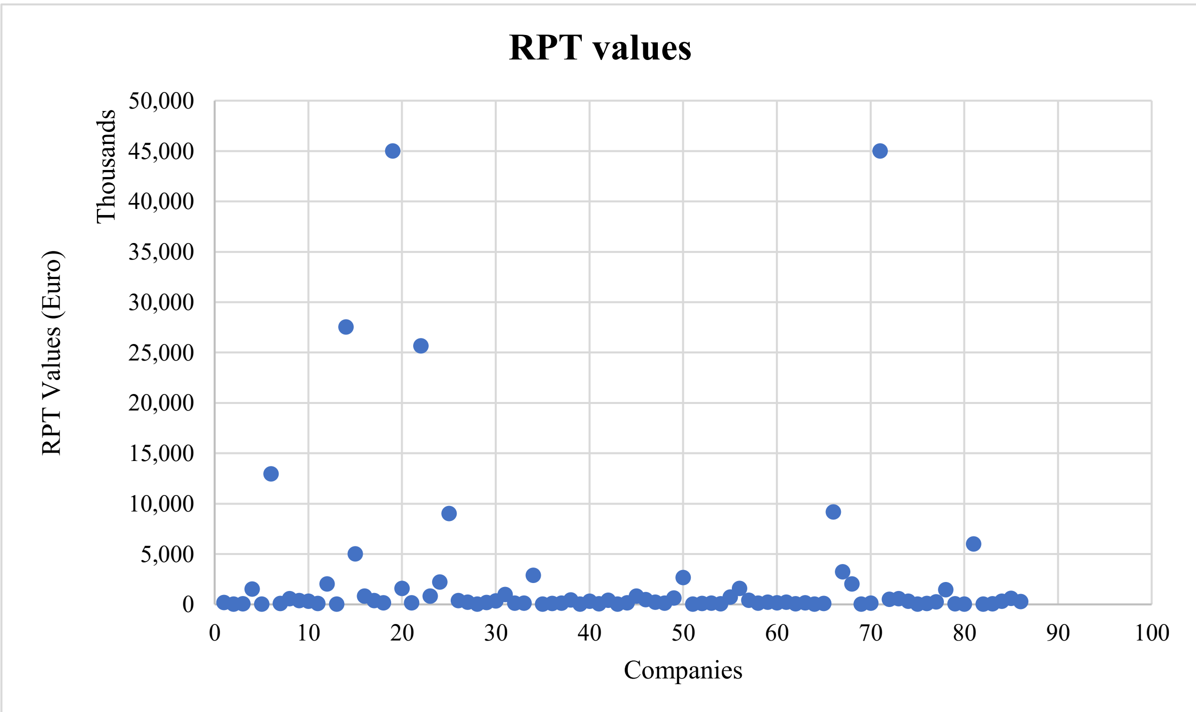

Figure 8 (dots represent total relevant RPT values disclosed by each of 86 companies in the dataset)

[82] In addition, in the case of companies that disclosed more than one relevant RPT, some companies did not disclose clearly the values of all relevant RPTs that they reported.

As most total relevant RPT values remain under €5 million, for a closer inspection, the following scatter plot charts these RPTs:

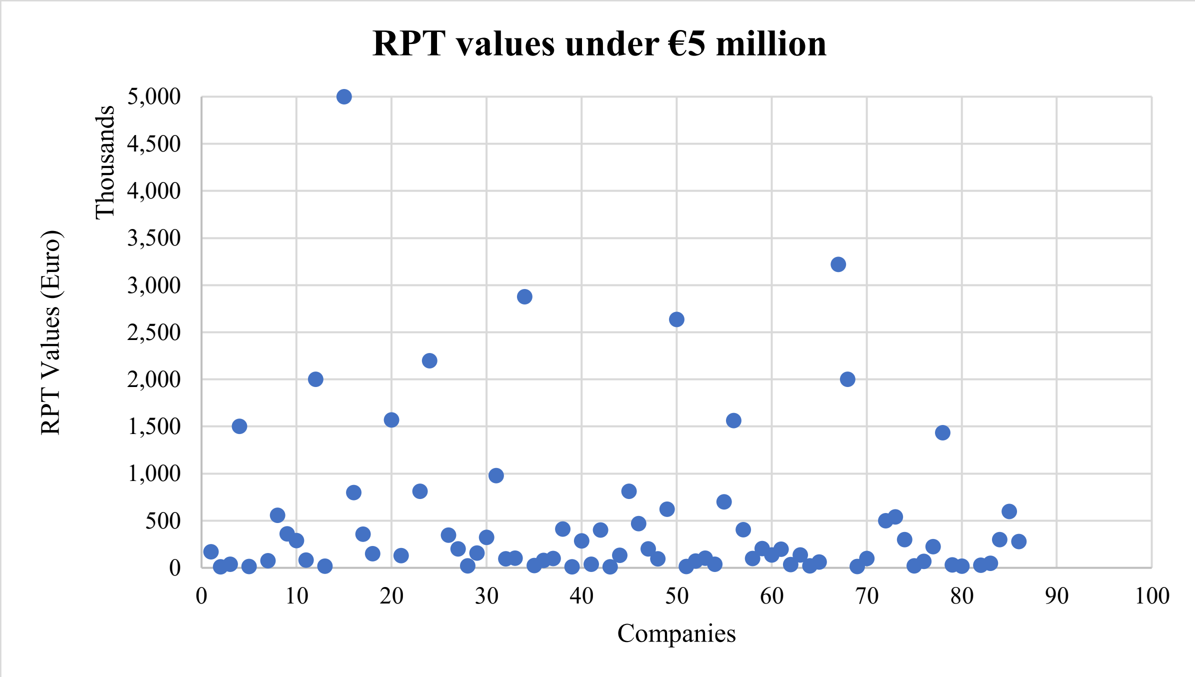

Figure 9 (dots represent total relevant RPT values under €5 million disclosed by each of 77 companies in the dataset)

The largest value disclosed by a company amounts to €45 million while the smallest amount is €10,200.[83] The mean value of transactions is €2,603,858 while the median value is equal to €226,000.[84]

D. Evaluation

There are important findings that may guide one in testing and evaluating said hypotheses. Conventional wisdom with the **'strong-monitoring hypothesis'** would predict that RPTs with directors/managers who are not controlling/significant shareholders or with their related entities do not happen or are not material/substantial to warrant concern in controlled companies. In dispersedly-owned companies, again, RPTs would not be a significant way of value-diversion for directors/managers (in comparison to executive compensation). Indeed, 169 companies did not disclose any relevant RPTs in two consecutive years. Types and

[83] As regards the ongoing loan arrangements, I considered the outstanding amount in the reporting year as the relevant amount (also adding any reported interest expense/income for that year).

[84] For the year of 2019, the largest value disclosed by a company amounts to €101,775,000 while the smallest amount is €10,000. The mean value of transactions is €3,313,375 while the median value is equal to €318,500. These figures only relate, however, to RPTs disclosed by 70 companies out of 94 reporting companies because for the remaining 24 companies, the values of RPTs were not clear.

values of RPTs, on their own, also suggest that RPTs were not expropriating any substantial company value. Mostly, the values of RPTs with directors/managers are relatively small.[85] Most companies also report that these RPTs were concluded under arm's length terms, meaning that there was no value-diversion.[86] Looking at the types of RPTs, transactions are not overtly suspicious as they usually seem to be in the ordinary course of business. Some companies report RPTs that stem from 'interlocking directorate'.[87]

To understand how substantial RPT values reported by the companies in the dataset are, one can look at several materiality thresholds used by jurisdictions in their RPT regulations, *inter alia*, for disclosure or approval requirements. Quantitative materiality thresholds generally consist of 'RPT values' as the nominator and a 'reference value' as the denominator and looks at whether or not this ratio exceeds the value accepted as the relevant threshold. Commonly-used denominators as reference values include 'book equity' or 'profits', both of which reflect the effect of the RPT on shareholders, and 'total assets' or 'turnover', which "relate to the condition of the overall firm".[88] The following charts exhibit ratios of RPT values to 'book equity', 'profits', 'total assets' and 'turnover' of the reporting company in the relevant year:[89]

[85] Taking the cynical view, one would be sceptical of stated values of RPTs, as these values may not reflect the true impact of the transaction on the company in the case of value-diversion, and insiders may try to evade review by undercutting materiality thresholds.
[86] It is debatable whether one should take such statements at face value, considering that only few companies actually attest to the fairness of transactions by an independent third-party opinion. On the other hand, IAS 24, para. 23 requires that "[d]isclosures that related party transactions were made on terms equivalent to those that prevail in arm's length transactions are made only if such terms can be substantiated."
[87] Actually, IAS 24, para. 11 does not require the disclosure of transactions between "two entities simply because they have a director or other member of key management personnel in common or because a member of key management personnel of one entity has significant influence over the other entity." Yet, such transactions are typically considered as self-dealing transactions. See ROBERT C. CLARK, CORPORATE LAW 159 (1986).
[88] Engert & Florstedt, *supra* note 38, at 6.
[89] Relevant figures regarding 'book equity', 'profits', 'total assets' and 'turnover' of the reporting company have been extracted from the DAFNE database as they stood at the end of the reporting period (2018).

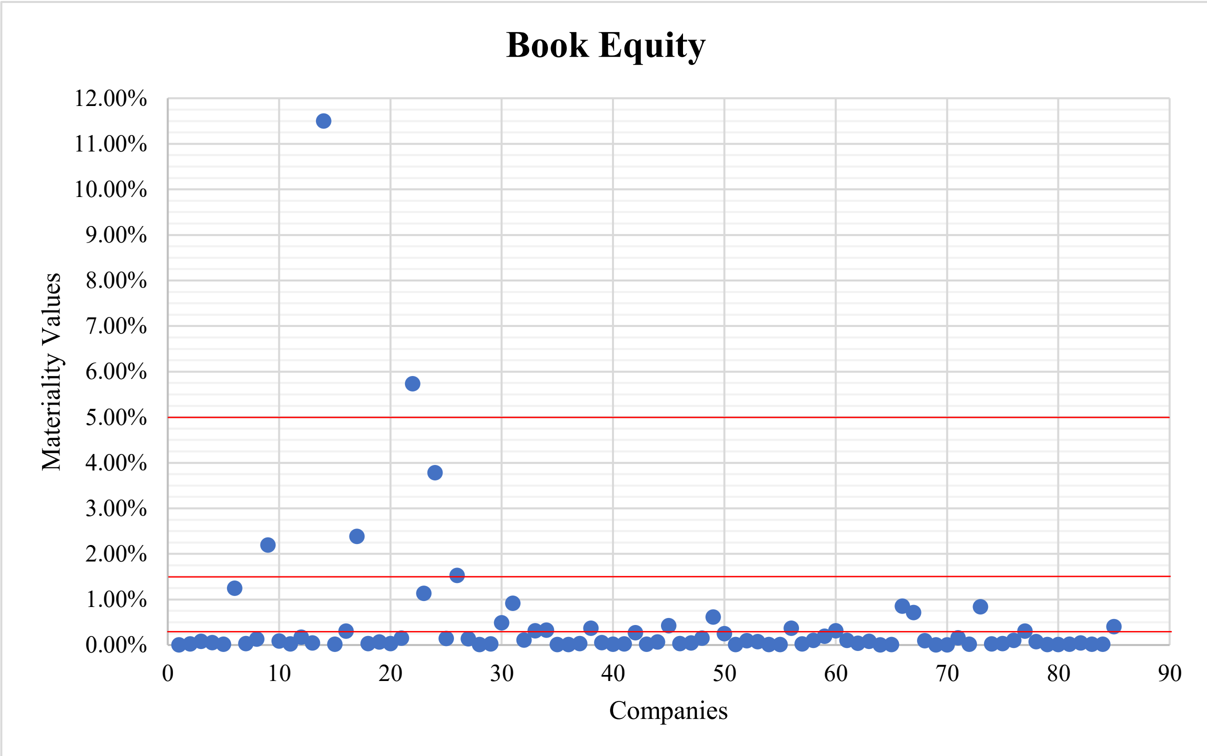

Figure 10 (dots represent the ratio of total RPT values to book equity of each of 86 companies in the reporting year, red lines representing 0.25%, 1.5% and 5% thresholds)[90]

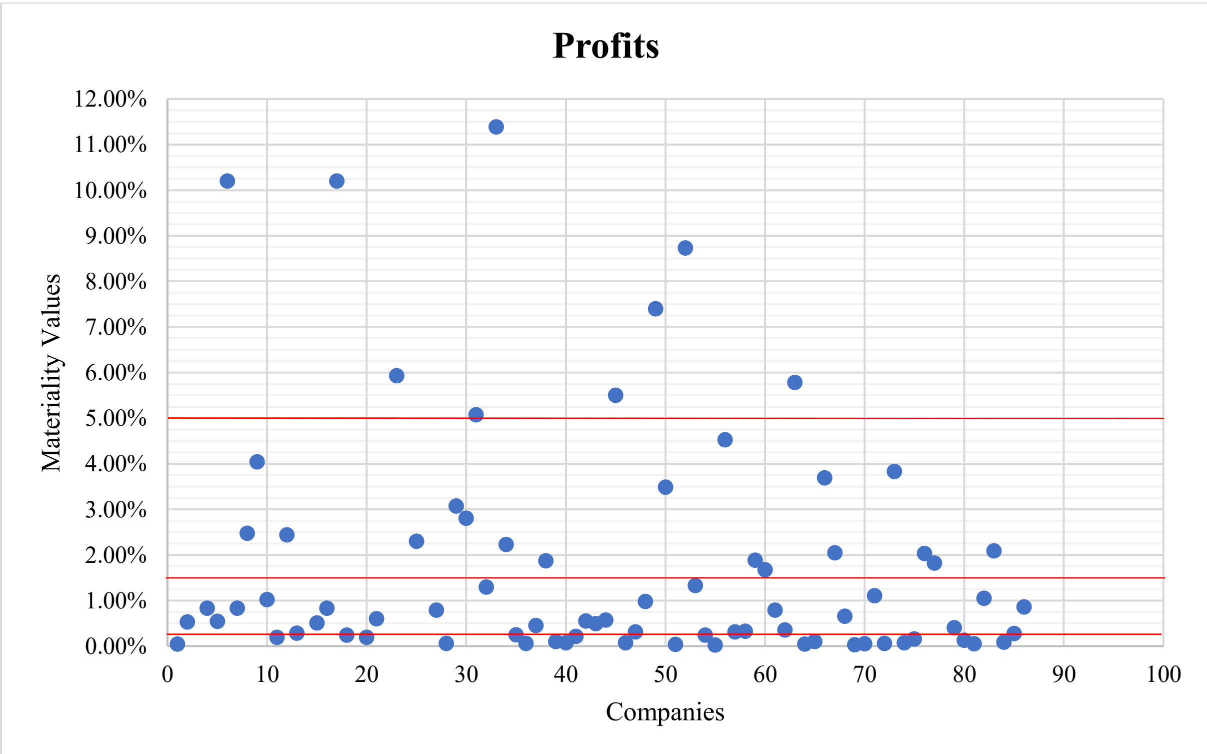

Figure 11 (dots represent the ratio of total RPT values to profits of each of 86 companies in the reporting year, red lines representing 0.25%, 1.5% and 5% thresholds)[91]

[90] One company had zero book equity and therefore is not in the chart.
[91] Fifteen companies reported loss instead of profit. For such companies, the amount of loss was used as the denominator. Furthermore, for seven companies, materiality values [RPT value/profits (losses)] are over 12% and as a result not shown in the figure.

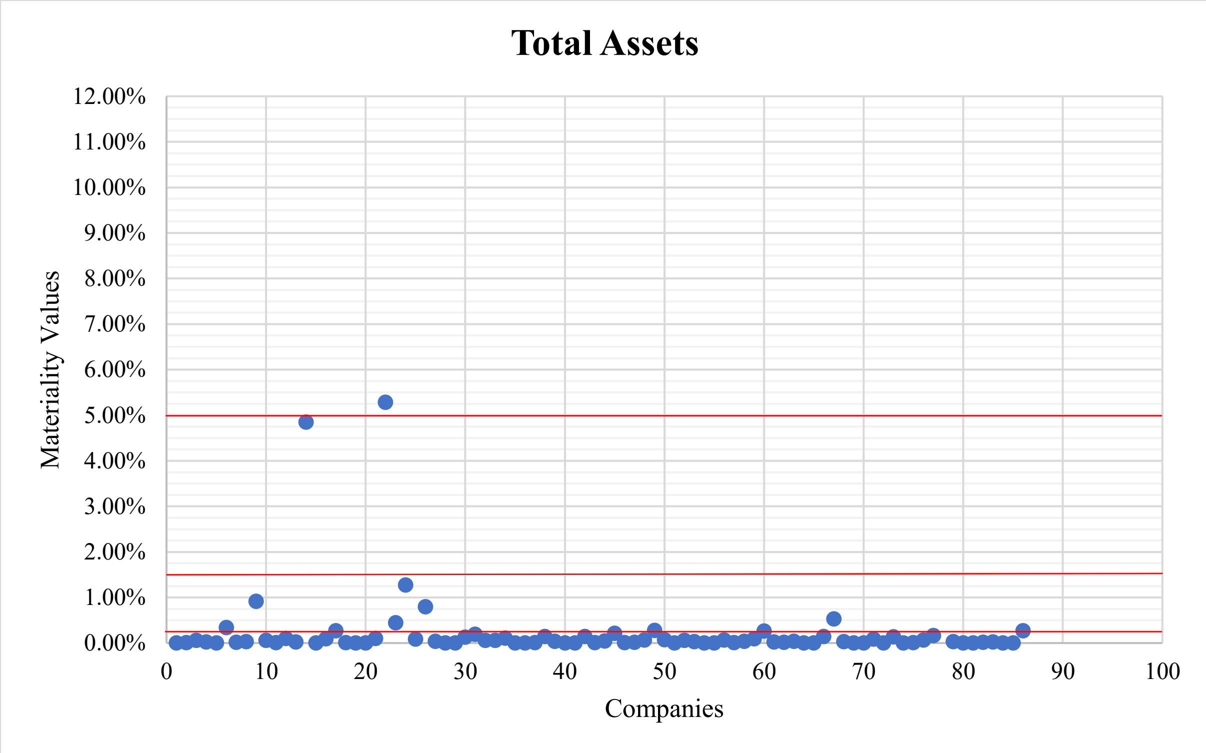

Figure 12 (dots represent the ratio of total RPT values to total assets of each of 86 companies in the reporting year, red lines representing 0.25%, 1.5% and 5% thresholds)[92]

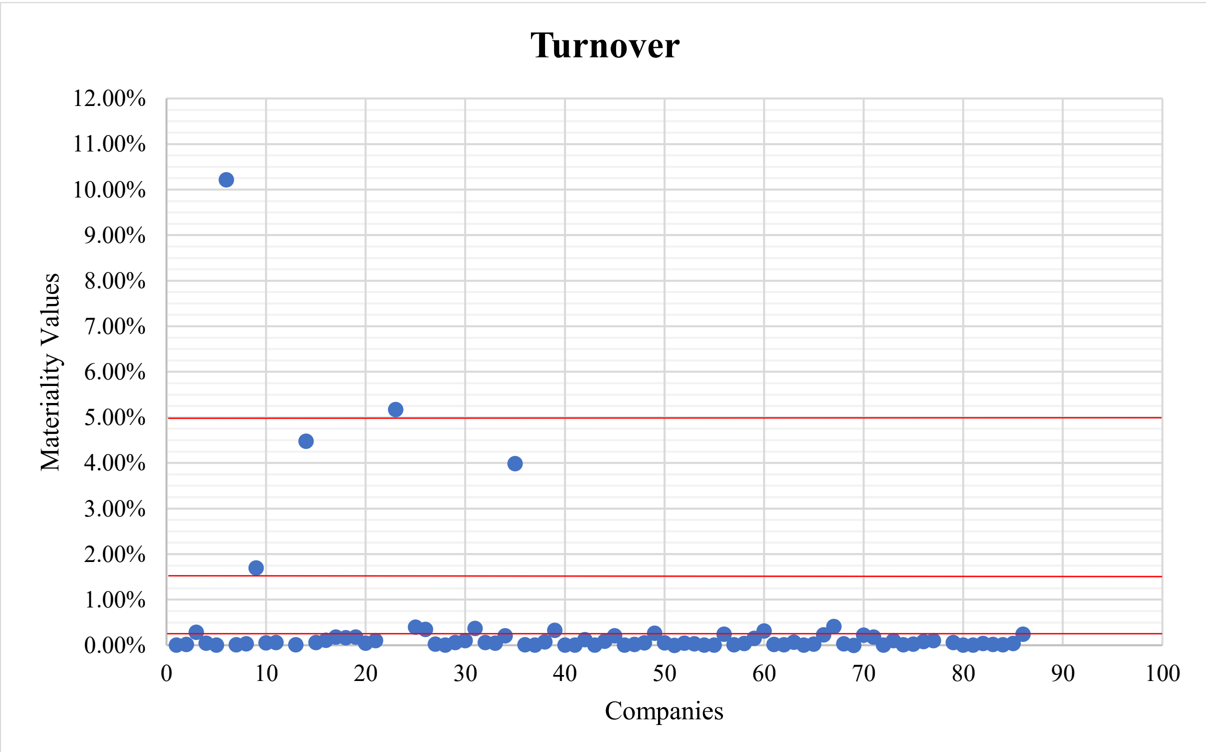

Figure 13 (dots represent the ratio of total RPT values to turnovers of each of 86 companies in the reporting year, red lines representing 0.25%, 1.5% and 5% thresholds)[93]

[92] For one company, the materiality value [RPT value/total assets] is over 12% and as a result not shown in the figure.

[93] For four companies, the materiality values [RPT value/turnover] are over 12% and as a result not shown in the figure.

Different jurisdictions utilize different materiality thresholds. For example, the UK listing regime provides that transactions exceeding 0.25% on at least one of the relevant ratios must be disclosed as well as requiring disinterested shareholder approval for transactions exceeding 5%, again, on at least one of the relevant ratios.[94] In its new RPT rules, Germany utilises as a threshold 1.5% materiality ratio for both disclosure and approval requirements.[95] The red lines in the above figures highlight whether RPT values disclosed by the reporting companies fall below or above these materiality thresholds (0.25%, 1.5%, 5%), using different denominators. As can be observed, in the case of materiality ratios where 'turnover', 'total assets' and 'book equity' are the denominator, most RPT values fall below the 0.25% threshold. This suggests that most of the RPTs are 'small' transactions. However, using 'profits' as the denominator presents a different picture. In that case, most of the RPTs exceed the relevant thresholds and thus would be deemed as 'material'. This indicates that transaction values can still be important for shareholders, considering their impact on profits. In addition, fifteen companies that disclosed such transactions reported 'losses' instead of 'profits'. The below table encapsulates the number of RPT values reported by the companies exceeding or falling short of different materiality thresholds based on different denominators in the materiality ratio.

	<0.25%	**0.25%-1.5%**	**1.5%-5%**	**>5%**
Turnover	69	8	3	6
Total Assets	73	10	1	2
Book Equity	61	18	4	2
Profits	24	28	18	16

In the case of controlled companies, other hypotheses (**'quid pro quo hypothesis', 'weak-monitoring hypothesis'** and **'evasion hypothesis'**), on the other hand, would predict that there should be a significant number of RPTs entered into by directors/managers who are not significant/controlling shareholders and/or by their related entities/persons, despite the presence of a controlling shareholder. The data provide some support for this prediction. Looking at the companies under the absolute control of a shareholder (*i.e.* companies where there is a blockholder with a shareholding above 50%), in 2018, 38% of such companies (36 out of 96 companies) disclosed at least an RPT with directors/managers who are not significant/controlling shareholder or with their related entities. If one adds companies with a

[94] On the UK regime, see Paul Davies, *Related Party Transactions: UK Model, in* THE LAW AND FINANCE OF RELATED PARTY TRANSACTIONS 361 (Luca Enriques & Tobias H. Tröger eds., 2019).
[95] These RPT rules (implementing Shareholders' Rights Directive II) can be found at §§ 111a-c Aktiengesetz.

blockholder with a shareholding between 25 and 50% to this subset of companies, the rate equals to 34% (62 out of 184 companies). If one considers all the companies with a blockholder with a shareholding above 10%, the rate increases to 36% (88 out of 247 companies).[96] Overall, this means that a significant number of companies with large blockholders report RPTs with directors/managers (in both years), which may have been employed to divert company value due to weak monitoring by the controller, or as a *quid pro quo*, or under an evasive scheme of the controller.[97]

Even though it was admitted that the values of most RPTs are not conspicuously large, the **'quid pro quo hypothesis'** would predict that they do not need to be so. Under this hypothesis, they should be just enough to compensate the legal/reputational risks directors/managers incur in acquiescing to abuse of control by the controller (and any resulting drop in their remuneration), which do not necessarily lead to big financial losses for directors/managers.[98] One should also consider the fact that the dataset only includes yearly values of RPTs. In aggregate, the values may reach much more substantial amounts if directors/managers frequently enter into such RPTs in different reporting years.[99] What is most noteworthy is how RPT values compare with the remuneration of the relevant related party. Especially for supervisory board members, low-value RPTs may be more valuable than their compensation packages given that their fixed remuneration is low and performance remuneration is scarce. The below chart represents the ratios of the value of RPTs entered into by directors/managers who are not significant/controlling shareholders or by their related entities/persons to the relevant remuneration of the director/manager in companies with concentrated ownership.[100]

[96] A more or less similar picture also emerges for the companies in the dataset of 2019. 34% of the companies where a shareholder has absolute control (with a shareholding of 50% or above) disclosed at least an RPT with directors/managers who are not significant/controlling shareholder or with their related entities (35 out of 102 companies). If one rather considers companies with a blockholder with a shareholding of 25% and above, 31% of these companies reported such an RPT (60 out of 193 companies). This figure slightly rises to 33% if one also includes companies with a blockholder with a shareholding between 10 and 25% (84 out of 254 companies).

[97] As expected, however, self-dealing by the largest shareholders is more common: 56% - 138 out of 247 companies with a blockholder with a shareholding above 10%.

[98] See *supra* note 25.

[99] Furthermore, as mentioned above, even if RPTs are not value-diverting, they can still provide some financial benefits for directors/managers (as *quid pro quo* for acquiescing to the controller's abuse). See text accompanying *supra* notes 31–32.

[100] Where the identity of the related party was clear, the remuneration of that director/manager as reported in the same annual report was considered. When it was not clear, the average remuneration of a board member (depending on whether the related party is a member of management or supervisory board) was calculated and considered. When transaction values with directors/managers were disclosed in an aggregate way, aggregate remuneration of board members (again, depending on whether the related party is a member of management or supervisory board) was calculated and considered (which may result in the overstatement of the relevant remuneration value in some cases). In some cases, general terms encompassing both supervisory and management

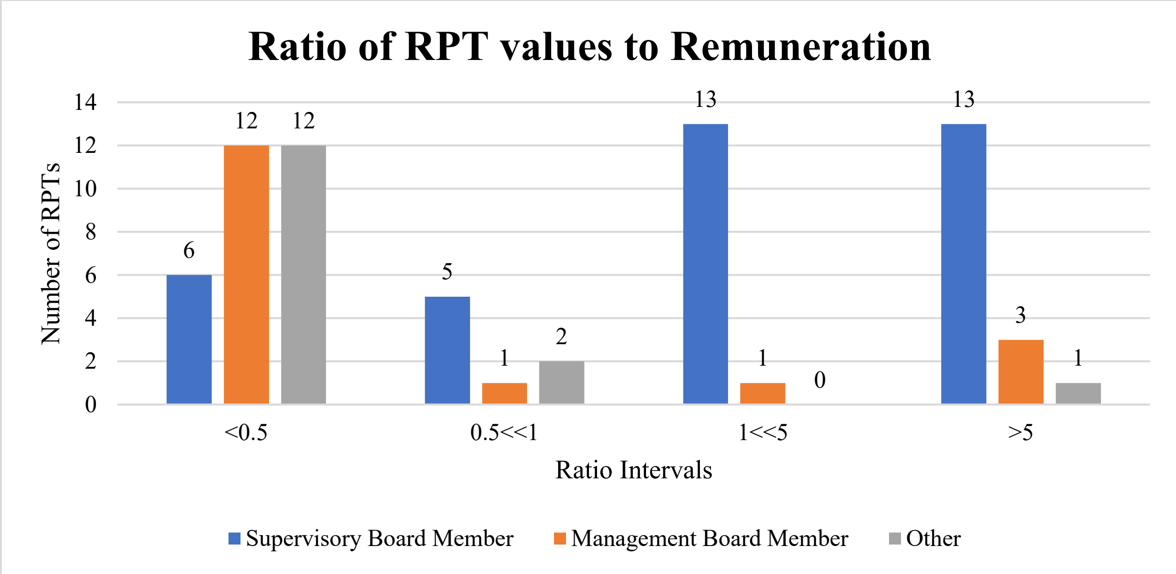

Figure 14 (bars demonstrate how many RPTs were entered into by the supervisory or management board members in the relevant 'RPT value to remuneration' ratio interval)

Indeed, this chart corroborates this prediction. For those identified as in the management board, mostly, their remuneration is much bigger than the values of RPTs they entered into: the values of RPTs are less than half of what they earn as executive compensation. But for those in the supervisory board, it is completely opposite. The value of an overwhelming number of RPTs is bigger than the remuneration. More than one-third of the RPTs by supervisory board members are at least five times large as the relevant remuneration.

Furthermore, **'quid pro quo hypothesis'** would predict that if there are RPTs with directors/managers who are not significant/controlling shareholders or with their related entities/persons, they should be concentrated among supervisory board members. Importantly, the supervisory board is the primary oversight mechanism at least as far as the German stock corporations, other companies with the two-tier board structure, and *societas europaeas* that opted for two-tier board structure are concerned.[101] As a result, controllers would need to co-opt mainly the supervisory board members (through rewarding RPTs) to acquiesce to the abuse

members (such as 'key management personnel' or 'directors') were used. These cases are depicted under the category of 'other' in the chart. Some companies are lacking because either the RPT values or the values of remuneration packages were not clear. Companies with concentrated ownership indicate those with a blockholder with a shareholding above 10% minus those where the blockholder(s) only marginally exceed(s) the ten percent threshold and thus the ownership cannot be reasonably deemed concentrated.

[101] See Roth, *supra* note 51, at 283 ("[t]he supervisory board has to monitor the running of the affairs of the corporation. This is a core duty of the supervisory board explicitly stipulated in the legislation and one of the primary functions of the supervisory board."); Klaus J. Hopt, *The German Law of and Experience with the Supervisory Board* 12 (ECGI Law Working Paper No. 305/2016, 2016) (stating that "the supervisory board has been characterized as a "co-deciding control organ""). Supervisory board is the organ with the task of enforcing the claims of company against insiders. See *id.*, at 13 (noting that in cases where insiders have violated their duties against the company, "the supervisory board is usually under a legal obligation to enforce the liability claim of the company before the courts.").

of control who also risk civil and criminal liability as a result.[102] Indeed, in the dataset, an overwhelming number of relevant RPTs seem to involve supervisory board members or their related entities/persons: 50 out of 82 companies which disclosed relevant RPT(s) with directors/managers and have concentrated ownership[103] reported at least an RPT that involved supervisory board members or their related persons/entities.

This theory would further predict that where there is more (risk of) tunnelling by the controlling shareholder in the reporting companies, one should observe more RPTs that are rewarded to directors/managers who allow or turn a blind eye to this abuse of control. In 2018, out of 82 companies, which disclosed relevant RPT(s) with directors/managers and have concentrated ownership, 53 companies also disclosed RPTs with the largest shareholders.[104] Furthermore, what generally increases the risk of tunnelling by the controlling shareholder is pyramidal-controlling structures. Turning back to the hypothetical example where the economic stake of the ultimate controller is 18% while controlling 50% of the votes in a company thanks to a pyramidal structure,[105] this ultimate controlling party will only bear 18% of the harm the company suffers under his/her tunnelling activities while in the case of parity between the economic stake and voting rights (no chain of share-ownership) the controlling party would bear 50% of the harm that his/her tunnelling activities cause for the company. As a result, in the former case, tunnelling activities would be more profitable. This increases the incentives of the controller to abuse his/her position as a controller,[106] and thus the legal/reputational risks and potential financial harm for the directors/managers if they

[102] See in this regard, Markus Roth, *Outside Director Liability: German Stock Corporation Law in Transatlantic Perspective*, 8 J. CORP. L. STUD. 337 (2008) (stating that "[s]upervisory directors have been held liable in an increasing number of cases in the last 10 years."); Hopt, *supra* note 101, at 14–15. In German law, any distribution of corporate assets to shareholders (except for dividend payments) is prohibited. See § 57 Aktiengesetz. The concept of distribution also includes transactions that transfer value from the corporation to shareholders. See Tim Drygala, § 57 paras. 37–94, KÖLNER KOMMENTAR ZUM AKTIENGESETZ [COLOGNE COMMENTARY ON THE STOCK CORPORATION ACT] (Wolfgang Zöllner & Ulrich Noack eds., 3rd ed. 2011). Directors (on the supervisory board) that execute the hidden distributions are personally liable as there arises a violation of directors' duties. See §§ 93/(3)/(1) and 116 Aktiengesetz. Furthermore, the criminal offense of *Untreue* in § 266 Strafgesetzbuch, which punishes any person that abuses the power accorded to him or her to dispose of the assets of, or make binding agreements for another person, or violates his or her duty to safeguard the property interests of another person when there arise damages as a result, may lead to criminal liability for supervisory (and management) board members. See also Conac, Enriques & Gelter, *supra* note 17, at 520.

[103] This includes companies with a blockholder with a shareholding above 10% minus those where the blockholder(s) only marginally exceed(s) the ten percent threshold and thus the ownership cannot be reasonably deemed concentrated.

[104] It is important to keep in mind that abuse of control by controlling shareholders can happen in a variety of ways (not only through RPTs) such as compensation packages & miscellaneous perks and taking of opportunities.

[105] See the text between *supra* notes 74 and 75.

[106] See, *e.g.*, Gilson, *supra* note 17, at 1649 and cited sources therein; Randall Morck, Daniel Wolfenzon & Bernard Yeung, *Corporate Governance, Economic Entrenchment, and Growth*, 43 J. ECON. LIT. 655, 678–79 (2005).

allow/turn a blind eye to such abuse, which necessitate *quid pro quo* in return. Indeed, RPTs (with directors/managers or their related entities) in the dataset were concentrated in companies where controlling shareholders have strong incentives to tunnel due to the pyramidal structure. In 2018, out of 82 companies, which disclosed relevant RPT(s) with directors/managers and have concentrated share-ownership, in 60 companies, the largest shareholding was held through chain(s) of share-ownership.[107] The type of the controlling shareholder may also be important in terms of tunnelling risk by the controller in the controlled company. Especially, family-run companies have been associated with private benefit extraction.[108] According to this theory, one should also observe in these companies RPTs with directors/managers as *quid pro quo*. The following chart demonstrates the types of the largest shareholdings in the companies in the dataset that disclosed relevant RPT(s) with directors/managers in the reporting year and those that did not.

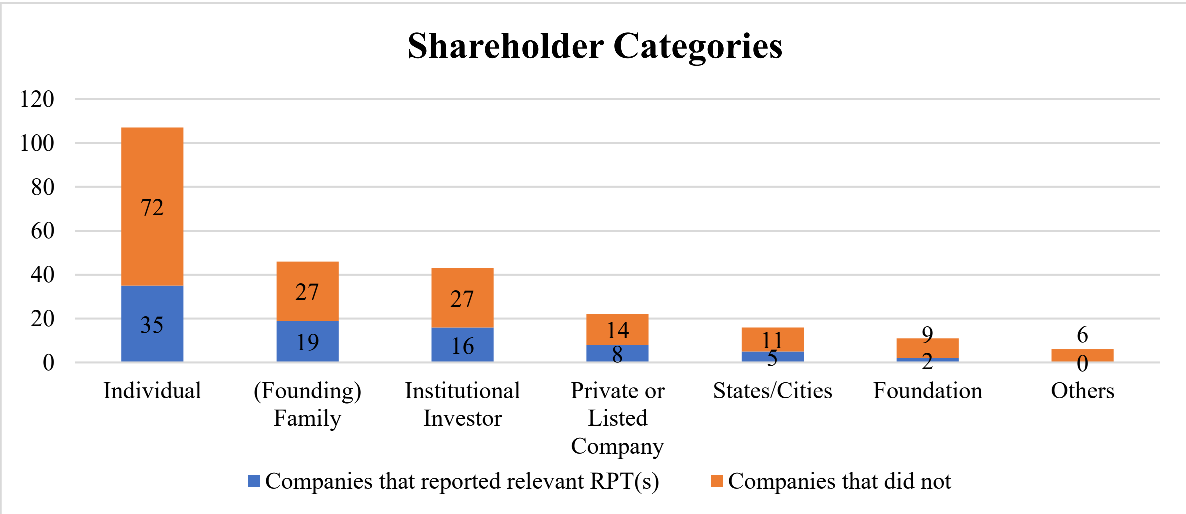

Figure 15 (bars represent the number of companies that disclosed relevant RPTs and those that did not according to the types of the largest shareholding)

Indeed, in terms of *relative* numbers, (founding) family-run companies (where private benefit extraction by the controller is generally common) report most RPTs with directors/managers who are not significant/controlling shareholders or with their related entities/persons: 41.30%.[109]

---

[107] In 2019, out of 79 companies which disclosed relevant RPT(s) with directors/managers and have concentrated ownership, in 57 companies, there was chain(s) of share-ownership.

[108] See Olaf Ehrhardt & Eric Nowak, 'Private Benefits of Control in Founding-Family Owned Firms: An Analysis of the Dynamics of Disproportionate Ownership and Control in Family Firm Ipos' (July 1, 2015), https://ssrn.com/abstract=423506 (examining private benefits of control in founding-family owned firms on German stock exchanges from 1970 to 2011 and showing that substantial private benefits of control exist in these firms); Randall Morck & Bernard Yeung, *Agency Problems in Large Family Business Groups*, 27 ENTREPRENEURSHIP THEORY & PRAC. 367 (2003); Marianne Bertrand, Paras Mehta & Sendhil Mullainathan, *Ferreting Out Tunneling: An Application to Indian Business Groups*, 117 Q. J. ECON. 121 (2002).

[109] Matching the companies from the DAXplus Family-Index with the companies in the dataset, a similar picture emerges: in 2018, out of 83 companies in both said index and dataset, 35 companies disclosed at least an RPT

The identity of the controller may also be important in terms of other hypotheses. Especially, under the '**weak monitoring hypothesis**', as argued above, three types of the controller are important as 'weak monitors', namely (i) heirs; (ii) dispersedly-owned (or widely-held) companies and (iii) certain institutional investors/asset managers.[110] Looking at the companies in the dataset where heirs of (founding) families were shareholders or on the supervisory board, out of ten such companies, five companies reported relevant RPT(s) with directors/managers who are not related to the controlling family. Furthermore, out of nine companies where a dispersedly-owned company was the largest shareholder in the dataset, three companies disclosed RPTs with directors/managers. On the other hand, the data do not provide any indication as to institutional investors/asset managers as 'weak monitors' because institutional investors with controlling stakes in the companies in the dataset were strong monitors (*i.e.* private equity firms, venture capitalists, hedge funds, specialized investment firms). In addition, as stated above, pyramidal share-ownership structures may create weak controllers as monitors (as well as tunnelling-prone controllers).[111] In brief, in such structures, controllers will have much smaller economic stake than their voting rights. This in turn dilutes the incentives to monitor the company. Indeed, as abovementioned, RPTs with directors/managers in the dataset were concentrated in companies with pyramidal share-ownership.[112]

Among companies where shareholders have relatively weak incentives to meticulously monitor the management of the company, one can also include those which are not widely-held but cannot also be deemed as having strong controllers. Rather they have a large blockholder with relatively low shareholding (10%<<25%) or have more than one blockholders, again, with such amount of shareholding. In the first case, the monitoring incentive will be lower because the benefits accruing to that shareholder will be lower, which means that relatively-low value but expropriatory RPTs by directors/managers can still occur.

with directors/managers who are not significant/controlling shareholders or with their related entities/persons, which corresponds to 42.17%. DAXplus Family-Index tracks the performance of family-run companies listed on the prime standard of Deutsche Börse. The selection criteria for the index (which is different to the categorisation used in this article) are as follows: (a) the founding family or families hold directly or indirectly at least 25% of the voting rights or (b) the same sit on the management or supervisory board and hold at least 5% of the voting rights. See https://www.dax-indices.com/index-details?isin=DE000A0YKTL4 (last visited Apr. 11, 2021). The composition of the index changes over time. For the purposes of this study, the composition as it stood on February 2020 was considered (time-adjusted composition of the index is available at https://www.dax-indices.com/composition, last visited Apr. 11, 2021).

[110] See the text accompanying *supra* notes 71–74.

[111] See the text between *supra* notes 74–75.

[112] For the year of 2018, 60 out of 82 companies and for the year of 2019, 57 out of 79 companies. See also *supra* note 107 and accompanying text.

In the latter case, there can be a free-riding problem, each large blockholder leaving the monitoring task (and expense) to the other and hoping to benefit from it. Out of 44 companies in the dataset which fit the above description in terms of shareholding, almost half of them (20) reported RPTs with directors/managers or their related entities/persons.

In weakly-monitored companies, one would also expect the relevant RPT values to be high (relative to other RPTs in the dataset). Although the mean of the subset of RPT values in weakly-monitored companies (€3,347,300) is higher than that of the whole dataset (€2,603,858), these RPTs are not dominant among high-value RPTs in the dataset. The following table demonstrates how many RPTs in the relevant materiality threshold intervals occurred in these companies (in parenthesis):

	0.25%-1.5%	**1.5%-5%**	**>5%**
Turnover	8 (2)	3 (1)	6 (3)
Total Assets	10 (4)	1 (0)	2 (1)
Book Equity	18 (3)	4 (2)	2 (1)
Profits	28 (5)	18 (8)	16 (3)

As to the **'evasion hypothesis'**, the data do not provide any supporting indication. On the contrary, companies that reported RPTs with directors/managers who are not significant/controlling shareholders or with their related entities/persons mostly report also large RPTs with the largest shareholder. As stated above, in 2018, out of 82 companies, which disclosed relevant RPT(s) with directors/managers and have concentrated ownership, 53 companies also disclosed RPTs with the largest shareholders. This is in contrast to what would be predicted by this hypothesis because it shows that controllers can, and did, directly enter into RPTs with the company, which refutes any need or preference for an evasive scheme involving company directors/managers. Furthermore, RPT types directly concern directors/managers as related parties (such as provision or sale of goods or services by related entities, financial, consulting and rent agreements), rather than assets than can be retransferred to controlling shareholders.

Finally, turning to the dispersedly-owned companies,[113] the data establish that a non-negligible part of dispersedly-owned companies enter into RPTs with directors/managers. In 2018, 33% of these companies (24 out of 73 companies) reported an RPT with

[113] These companies include those with no blockholder with a shareholding of 10% or above *plus* those where the ownership can still be reasonably deemed as dispersed because the blockholder exceeds the 10% threshold only marginally.

directors/managers or with their related entities.[114] The values of these RPTs were also considerable. Especially, most of the RPT values were higher than the relevant remuneration for the director/manager in the reporting year, which demonstrates that RPTs can provide bigger benefits than remuneration packages for directors/managers. The below scatter plot depicts the ratios of RPT values to the relevant remuneration values in these companies.[115] For those above the red line, the RPT value is bigger than the remuneration.

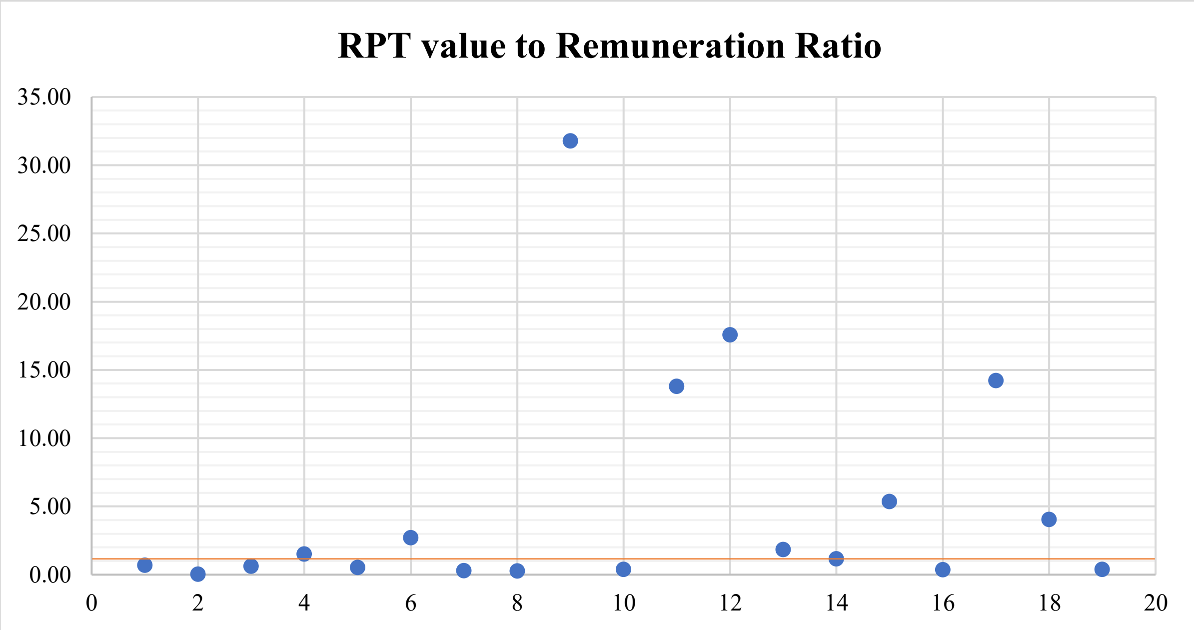

Figure 16 (dots represent the ratio of RPT values to the relevant remuneration disclosed by the dispersedly-owned companies in the reporting year, red line showing the ratio of 1)

These transactions also confirm that venues exist for the directors/managers in such companies to divert company value. Especially, transactions with directors/managers or their related entities concerning purchase or sale of goods or services (which lend themselves especially to cash flow tunnelling)[116] were conspicuous: 14 reported transactions. In addition, companies disclosed some suspect transactions like consulting and financial agreements (8 reported transactions).

[114] For the dataset of 2019, this percentage decreases to 23% (15 out of 65 companies).
[115] As to how this comparison is made, see *supra* note 100.
[116] See Atanasov, Black & Ciccotello, *supra* note 10, at 6–7 (defining cash flow tunnelling as "transactions which divert what would otherwise be operating cash flow from the firm to insiders […]" and giving the example of selling/buying goods or services to/from insiders at below-market/above-market prices).

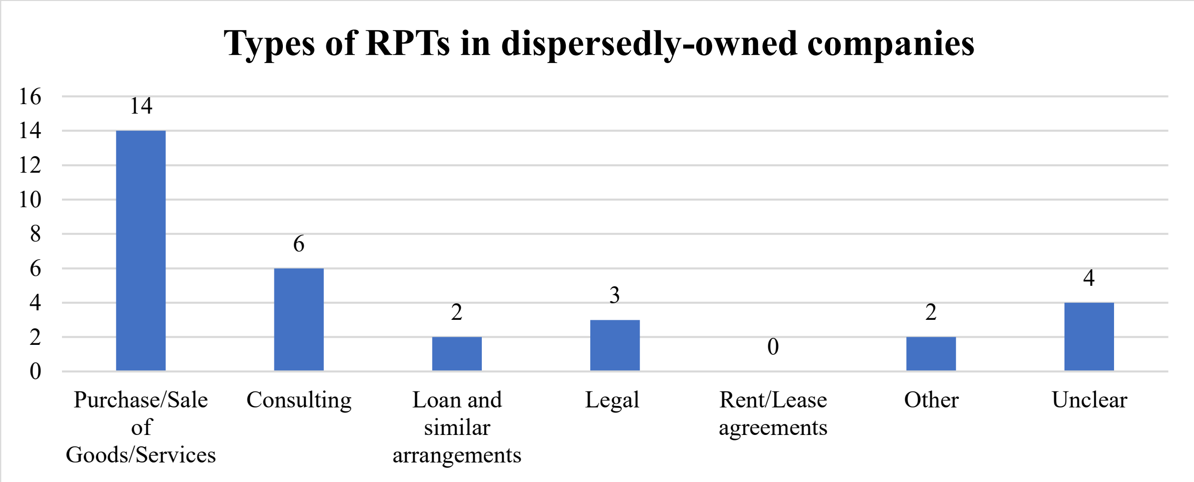

Figure 17

E. Regulatory Implications

There is a great room of improvement regarding the disclosure practices of listed companies.[117] First of all, unclarities of the information provided as to RPTs affect the ability of the readers of annual reports to discern the impact of RPT and to make any evaluation in this regard. As abovementioned, occasionally, the identities of related parties, types and values of the transactions are not clear. These elements are all important to understand whether an RPT is suspicious or value-decreasing, or on the contrary, value-increasing. Companies should be clearer in terms of the counterparty to an RPT, its exact value and its type. Secondly, even if disclosures are satisfactory for the most cases, most of them do not go beyond the minimum standards required by the IAS 24 (para. 18). Lastly, occasionally, disclosures present practical difficulties for the investors. For example, in some disclosures, the name of the related party was clear, yet the nature of the relationship (*i.e.* whether the related party is a sister company, associate, joint venture, or a related entity due to a link to a director/manager) was not. This leaves the investors with the enormous task of figuring out why the disclosed transaction was an RPT while this can be explained at minimal cost by the reporting company. Or, some RPTs were not disclosed under the title of RPT disclosure (in the notes to the consolidated financial statements), but rather elsewhere in the annual report, again compelling the investors to read through the whole annual report to obtain a full disclosure of RPTs.

Beyond disclosure, the picture is less clear. For controlled companies, overall, the data provides supporting indications for the above-explained hypotheses to different extents:

[117] See also Atanasov, Black & Ciccotello, *supra* note 10, at 41 (noting that corporations do not effectively disclose self-dealing and echoing the need for more complete disclosure, and for a broader range of related-party asset sales and purchases); Kastiel, *supra* note 20, at 1174 (proposing an enhanced disclosure regime).

'strong monitoring hypothesis' (strong), **'quid pro quo hypothesis'** (intermediate), **'weak monitoring hypothesis'** (intermediate) and **'evasion hypothesis'** (none). It is likely that the degree to which these hypotheses reflect the actual situation in controlled companies vary in time and from one company to another one. Below, I consider some regulatory implications for lawmakers and regulators who are convinced of and concerned with the issue of RPTs entered into by directors/managers who are not significant/controlling shareholders or with their related entities, in their jurisdiction.[118]

First of all, the above considerations highlight the role and importance of independent directors in overseeing RPTs with directors/managers in controlled companies.[119] Independent directors were conceived to play an important governance role in overseeing inside directors/managers who act as agents of a dispersed group of small shareholders.[120] But, even if there is a controlling shareholder, he/she can fail in his/her monitoring role, as suggested by the '**weak-monitoring hypothesis**'. There is a need for independent directors' monitoring role in such instances. Lawmakers/regulators could consider how to make independent directors more active/vigilant in controlled companies. Furthermore, the independence of such directors from the controlling shareholders should be ensured. One weak point of independent directors in the case of controlled companies has been that their independence from the controlling shareholder has not been necessarily ensured.[121] This in turn, it is thought, undermines their

---

[118] Considering the current legal regime, it appears that some jurisdictions treat directorial/managerial self-dealing differently from the controller's self-dealing. For example, according to Delaware law, while the approval of independent directors or disinterested shareholders only shifts the burden of proof in the case of court review of an RPT by the controlling shareholder, such approval enables managerial/directorial RPTs to be reviewed under the business judgement rule. See Dammann, *Related Party Transactions and Intragroup Transactions*, *supra* note 25, at 236. Belgium is another example. See Enriques, *supra* note 35, at 19.

[119] Admittedly, independent directors are no panacea to the tunnelling problem in public companies. But there is evidence showing beneficial effects. See, *e.g.*, Bernard S. Black, Woochan Kim, Hasung Jang & Kyung-Suh Park, *How Corporate Governance Affect Firm Value? Evidence on A Self-Dealing Channel From A Natural Experiment In Korea*, 51 J. BANKING & FIN. 131 (2015) (utilizing a Korean legal reform in 1999 that improved board independence of 'large' firms, and showing that large firms whose controllers have incentive to tunnel earn strong positive returns, relative to mid-sized firms); Jay Dahya, Orlin Dimitrov & John J. McConnell, *Dominant Shareholders, Corporate Boards, and Corporate Value: A cross-country Analysis*, 87 J. FIN. ECON. 73 (2008) (investigating the relation between corporate value and the proportion of the board made up of independent directors in 799 firms with a dominant shareholder across 22 countries, and finding a positive relation, especially in countries with weak legal protection for shareholders.).

[120] Harald Baum, 'The Rise of the Independent Director: A Historical and Comparative Perspective' (Max Planck Institute for Comp. & Int'L Private Law Research Paper Series No. 16/20, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2814978&download=yes (noting the export of the concept of the independent director from the US and the UK to the world); Guido Ferrarini & Marilena Filippelli, *Independent Directors and Controlling Shareholders Around the World, in* RESEARCH HANDBOOK ON SHAREHOLDER POWER 269, 269 (2015) (stating that "[i]ndependent directors originated in dispersed ownership systems in order to strengthen the monitoring role of the board").

[121] See, *e.g.*, Lucian A. Bebchuk & Assaf Hamdani, *Independent Directors and Controlling Shareholders*, 165 U. PA. L. REV. 1271 (2017); Wolf-Georg Ringe, *Independent Directors: After the Crisis*, 14 EUR. BUS. ORG. L. REV. 401 (2013); Gutiérrez & Sáez, *supra* note 34.

oversight role in terms of controlling shareholders' tunnelling.[122] Proposals have been made to ensure their independence from controlling shareholders, and even to establish their loyalty to minority shareholders.[123] But ensuring that independent directors are truly independent of controlling shareholders is also important with regard to their role in overseeing fellow directors/managers' value-diversion via RPTs when such RPTs are a way of controlling shareholders compensating directors/managers for acquiescing to minority abuse or a part of controlling shareholders' evasive actions (as suggested by the **'quid pro quo hypothesis'** or the **'evasion hypothesis'**).

The highlighted role of independent directors becomes more pronounced if one considers the ineffectiveness of other safeguards in this regard. Considering that transaction values are not relatively large (as observed in the datasets), one would not expect frequent review of such transactions by the courts because they would not particularly fall under the radar of minority shareholders who generally initiate such suits and already suffer under acute collective action problems.[124] Secondly, there might be (minority) shareholder approval requirement. But, such a requirement is generally triggered if the transaction in question fulfils some qualitative/quantitative criteria.[125] If the threshold is relatively high, there is a high possibility that most transactions will not trigger (minority) shareholder approval requirement.

Lawmakers/regulators could also consider tweaking (minority) shareholder approval requirements in the case of RPTs with directors/managers who are not significant/controlling shareholders or with their related entities. These rules are usually designed such that the conflicted shareholder (*i.e.* the counterparty to the RPT, generally the controlling shareholder) does not vote on the transaction.[126] In that case, controlling shareholders will be able to vote on RPTs with directors/managers which are large and important enough to trigger materiality requirements. However, under the **'quid pro quo hypothesis'** or the **'evasion hypothesis'**, controlling shareholders will vote in favour of such transactions even if they are in fact value-

[122] See, *e.g.*, Enriques, *supra* note 35, at 18; Enriques et al., *supra* note 15, at 153.
[123] See, *e.g.*, Bebchuk & Hamdani, *supra* note 121; Gutiérrez & Sáez, *supra* note 34; Ringe, *supra* note 121; Alessio M. Pacces, *Procedural and Substantive Review of Related Party Transactions: The Case for Noncontrolling Shareholder-Dependent Directors, in* THE LAW AND FINANCE OF RELATED PARTY TRANSACTIONS 181 (Luca Enriques & Tobias H. Tröger eds., 2019).
[124] On the enforcement of the duty of loyalty before the courts, see Enriques et al., *supra* note 15, at 164–65. See also Martin Gelter, *Why Do Shareholder Derivative Suits Remain Rare in Continental Europe?*, 37 BROOK. J. INT'L L. 843 (2012).
[125] See Enriques, *supra* note 35, at 18. See also Shareholders' Rights Directive II, *supra* note 42, art. 9c/(1).
[126] See, *e.g.*, Shareholders' Rights Directive II, *supra* note 42, art. 9c/(4) (excluding the controlling shareholder from the vote only when the transaction involves him/her). Similarly, in the UK, where the companies in the premium listing need to submit material RPTs to the shareholder vote, the related party (and his/her associates) is excluded from the vote, meaning that controlling shareholder cannot vote only when he/she is the related party. See Financial Conduct Authority, *Listing Rules* (Oct. 2020) https://www.handbook.fca.org.uk/handbook/LR.pdf.

diverting because they will ultimately benefit them, which means that such transactions are most likely to be approved even if minority shareholders vote against. This suggests that regulations could consider excluding the controlling shareholder from the vote on RPTs with directors/managers even if he/she is not the (direct) conflicted party.[127] This could also be done on an *ex post/ex ante* case-by-case basis under the supervision of a court or regulator.

Furthermore, to prevent controlling shareholders from diverting company value indirectly via transactions entered into by directors/managers under the **'evasion hypothesis'**, a number of regulatory improvements could be considered. First, arbitrage opportunities could be removed through applying the same RPT regime to both transactions with controlling shareholders and transactions with directors/managers.[128] Thus, controlling shareholders would not have incentives to let first directors/managers transact with the company and then transact with those parties to benefit from more favourable regime that applies to directorial/managerial self-dealing. Similarly, if regulators/media/investors pay the same attention to directorial/managerial self-dealing as they do when controlling shareholders engage in RPTs, controlling shareholders would not be able to evade scrutiny by using directors/managers' RPTs as a conduit for value-diversion. Lastly, an enhanced disclosure regime could be introduced. Companies could be required to disclose not only the transactions directors/managers enter into with the company but also those transactions between directors/managers and controlling shareholders. This would shed light on suspicious evasive schemes by the controlling shareholders if any, and as the sunlight is the best disinfectant,[129] would prevent them.

Ultimately, if jurisdictions succeed in overseeing directors/managers' RPTs effectively, not only will it directly decrease value-diversion from the listed companies but also will make it difficult for the controllers themselves to extract wealth from the company. This is because they will not be able to compensate directors/managers via RPTs for the legal/reputational risks and financial harm they incur in the case of controllers' tunnelling or to place such transactions under an evasive scheme whose main purpose is to benefit the controller (as suggested by the **'quid pro quo hypothesis'** and the **'evasion hypothesis'**).

---

[127] See similarly Kastiel, *supra* note 20, at 1166–69 (discussing the need to eliminate the controlling shareholders' absolute influence over the executive compensation arrangements).
[128] In a few jurisdictions, rules that apply to directorial/managerial self-dealing and rules that concern controlling shareholders' self-dealing differ. See *supra* note 118.
[129] See LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914).

Relatedly, a political economy lesson comes in sight. Controlling shareholders are expected to lobby against stringent RPT rules to protect their rents.[130] But they may also do so even if the rules are in fact aimed at directors/managers' self-dealing because these rules will also impinge on their freedom to extract private benefits of control under the **'quid pro quo hypothesis'** or the **'evasion hypothesis'**.[131]

As far as dispersedly-owned companies are concerned, the implications are less far-reaching. Based on the findings, one can at least reasonably argue that RPTs pose as important an agency problem as executive remuneration in dispersedly-owned companies. Such transactions involve companies with interlocking directorates or firms/companies where directors/managers hold significant stakes. Or, directors/managers (and their relatives) may directly contract with the company. For example, while consulting agreements may indeed add value to a company, they are also a perfect and easy disguise to divert company value for directors/managers.

CONCLUSION

Related party transactions have been a key issue to address from the point of view of investors, lawmakers and regulators to prevent value-diversion from public companies by corporate insiders to the detriment of other stakeholders. However, the common wisdom suggests that RPTs entered into by directors/managers either in controlled companies or in dispersedly-owned companies do not pose a particularly problematic challenge. According to this view, in controlled companies, controlling shareholders have incentives and power to avert harmful managerial/directorial self-dealing (also for the benefit of (minority) shareholders and creditors). In dispersedly-owned companies, it is considered, executive remuneration rather than RPTs would be the main source of value-diverting practices.

This article has argued that managerial/directorial self-dealing (through RPTs) in controlled and dispersedly-owned companies may be a bigger problem than predicted. In controlled companies, monitoring by controlling shareholders may be weak for various

[130] See Mark J. Roe & Massimiliano Vatiero, *Corporate Governance and Its Political Economy*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 56, 75 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018). The latest iteration of this phenomenon can be observed in the legislative process of the Shareholders' Rights Directive II with regard to RPTs where there was a significant backlash from the business community against the original proposal which was much stricter than the final Directive. See also Luca Enriques, *A Harmonized European Company Law: Are We There Already?*, 66 INT'L & COMP. L. Q. 763, 770 (2017).

[131] See similarly Enriques, *supra* note 11, at 332–33 (arguing that dominant stockholders will have a strong incentive to lobby against more stringent self-dealing regulations, even if aimed at only directors' opportunism, because rules addressing directors' self-dealing may easily curb majority stockholders' opportunism).

reasons. Or, managers/directors may enter into value-diverting RPTs as a *quid pro quo* for helping controlling shareholders to obtain private benefits of control, or under an evasive scheme that actually benefits the controlling shareholder. In dispersedly-owned companies, RPTs may prove more attractive as a tunnelling technique for directors/managers than executive remuneration for the reasons set forth above.

To get a glimpse of the extent to which these different views reflect the reality, this article has presented hand-collected data of RPTs entered into by directors/managers who are not significant/controlling shareholders and/or by their related entities/persons in companies listed on the prime standard of the German stock exchange for two consecutive years. In addition to informing on the self-dealing practices in those companies, the data provides up-to-date share-ownership statistics and findings regarding the disclosure practices.

Admittedly, the evidence is not conclusive but still provides important preliminary indications regarding each hypothesis. It should be noted that evidence presented is a starting point, not an end-point. What is sure, however, is when opportunities exist for corporate insiders to divert company value (under different settings as contemplated by the theories contrary to the conventional wisdom), they are sometimes exploited as in the notorious case of Carlos Ghosn and Nissan.[132] The regulatory regime can be enhanced in this regard, even if at the margin, and become more considerate of the realities and nuances in the complex world of self-dealing and value-diversion in public companies. The article has lastly presented a few regulatory improvements and implications to be considered by investors, regulators and lawmakers.

Acknowledgements: I would like to thank Prof. Wolf-Georg Ringe and Prof. Christoph Kumpan for their guidance during the writing process. I extend my thanks to the anonymous reviewer for the valuable comments.

Disclosure Statement: No conflicts of interest are present.

Biographical Note: The author is currently a PhD Researcher at Faculty of Law, University of Hamburg, Germany. The author obtained his B.A. in law from Bilkent University, Ankara, Turkey and his LL.M. from University of Cambridge, UK with first class honours. The author currently researches in the fields of corporate governance and comparative company law. See also www.linkedin.com/in/alperen-afşin-gözlügöl-4712a3168.

Supplementary Materials: The dataset on which this article is based is publicly available as supplementary material (via Figshare).

[132] Atanasov, Black & Ciccotello, *supra* note 10, at 42 (stating that "[tunnelling] opportunities exist and are sometimes exploited.").