

Public Consultation on
**Draft Revisions to the
G20/OECD Principles of Corporate Governance**

**Response from
Corporate Governance Institute of the
Frankfurt School of Finance & Management**

Introduction

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The Corporate Governance Institute (CGI) of the Frankfurt School of Finance & Management appreciates the opportunity to comment on the Draft Revisions to the G20/OECD Principles of Corporate Governance. CGI is a think tank and research center that promotes research and best practice in corporate governance. Founded in 2020, the CGI builds on Frankfurt School's high-class faculty to generate insights from the connection between practice and theory.

The draft revisions aim to update the G20/OECD Principles of Corporate Governance in light of the recent evolutions in capital markets and corporate governance policies and practices. Given the Principles' key role as global standard to guide policymakers and regulators in the area of corporate governance, we acknowledge the vital importance of the revision process.

We thank the OECD Corporate Governance Committee and Secretariat for taking stock of and analyzing the recent developments in the corporate governance field to ensure the Principles' continued relevance and usefulness. We broadly welcome the revisions in the draft document and are glad to see that new issues were addressed, including sustainability and resilience, virtual shareholder meetings, bondholder rights; and existing ones considered more deeply, including external auditors, stewardship codes, company groups, board diversity, board committees, and boards' risk management oversight duties. Furthermore, we greatly appreciate the decision to create a dedicated chapter for sustainability and resilience, which underlines the importance given to this topic and helps readers to view and examine sustainability-related issues under one heading.

In this document we include detailed comments and suggestions on the points where we believe the draft could be further improved. The comments are presented in two sections: General Comments and Comments by Chapter. Our revision suggestions are indicated in **blue** text. We hope that our comments and suggestions will be of assistance to the OECD Corporate Governance Committee and Secretariat.

GENERAL COMMENTS

- In the 2015 version, the principles and their sub-principles (i.e., the parts of the text written in bold) are expressed using only “should” clauses, which set a reasonably decisive tone. The draft document, however, does not strictly follow this rule and uses more tentative “may” clauses in several principles and sub-principles.

We wonder if this is an intended departure from the document’s original approach and structure (which provided strong guidance in principles/sub-principles, followed by their rationale and alternative implementation methods and examples in their respective annotations) and whether principles/sub-principles with “may” clauses should be viewed as subordinate to those with “should” clauses.

Given that the principles/sub-principles set out below are deemed by us to be essential issues for good governance and sustainability, we would be grateful if the OECD Corporate Governance Committee would continue to use the word “should” in the final text. The complete list of principles/sub-principles with “may” clauses is quoted below (**bold** used as emphasis):

*I.F. Digital technologies **may** be used to enhance the supervision and implementation of corporate governance requirements, but also require that supervisory and regulatory authorities give due attention to the management of associated risks.*

*II.A. Basic shareholder rights should include the right to: 1) secure methods of ownership registration; 2) convey or transfer shares; 3) obtain relevant and material information on the corporation on a timely and regular basis; 4) participate and vote in general shareholder meetings; 5) elect and remove members of the board; and 6) share in the profits of the corporation. Basic shareholder rights **may** also include the right to approve or elect the external auditor.*

*III.A. The corporate governance framework should facilitate and support engagement by institutional investors with their investee companies. Institutional investors acting in a fiduciary capacity should disclose their policies for corporate governance and voting with respect to their investments, including the procedures that they have in place for deciding on the use of their voting rights. Stewardship codes **may** offer a complementary mechanism to support such engagement.*

*V.E.2. Boards should consider setting up specialised committees to support the full board in performing its functions, in particular the audit committee – or equivalent body – for overseeing disclosure, internal controls and audit-related matters. Other committees, such as remuneration, nomination or risk management, **may** provide support to the board depending upon the company’s size, structure, complexity and risk profile. Their mandate, composition and working procedures should be well defined and disclosed by the board which retains full responsibility for the decisions taken.*

*VI.A.1. Sustainability information should be considered material if it can reasonably be expected to influence an investor’s assessment of a company’s value. If consistent with a jurisdiction’s legal and disclosure requirements, such assessments **may** also consider sustainability matters that are critical to a company’s key stakeholders or a company’s influence on non-diversifiable risks.*

■ According to paragraph 10 on page 8, throughout the Principles, the term “stakeholders” refers to “*non-shareholder stakeholders and includes, among others, employees, creditors, customers, suppliers and affected communities*” and therefore excludes shareholders. We acknowledge that this definition could improve readability by avoiding using “other” every time but given that the Principles serve as a leading international standard in the field of corporate governance, we believe that careful consideration should be given when deviating from the conventional definition of the term and to using the word “further” than “other” as the latter appears somewhat secondary.

■ In the new “IV. Sustainability and resilience” chapter, there is due emphasis on consistent, comparable, and reliable disclosure. Such emphasis is to be welcomed, particularly in this chapter, since there are now multiple sustainability reporting standards, none of which is generally accepted by all market participants. Nevertheless, we suggest that the Principles encourage authorities to ensure and facilitate consistent, comparable, and reliable disclosure in other disclosure areas, which are not subject to internationally recognized reporting standards. For instance, although many companies disclose data on board diversity, director meeting attendance, or executive and director remuneration, the different data categories or definitions that they adopt make it burdensome or impossible to make comparisons across companies. In such cases, we think it would be a good practice if relevant authorities provided clear guidance to companies in their jurisdictions about which data to disclose and their respective definitions. Whenever feasible and applicable, clear-cut reporting templates should be created to be used in company disclosures. Consistent and comparable disclosure is indispensable for conducting high-quality cross-sectional analyses and research and is also an essential factor in ensuring the efficiency of capital markets.

■ Paragraph 11 of the “About the Principles” makes it perfectly clear that the Principles do not have a binding nature:

11. The Principles are non-binding and do not aim to provide detailed prescriptions for national legislation. Rather, they seek to identify objectives and suggest various means for achieving them, typically involving elements of legislation, regulation, listing rules, self-regulatory arrangements, contractual undertakings, voluntary commitments and business practices. The manner in which a jurisdiction chooses to implement the Principles will depend on its national legal and regulatory context. The Principles aim to provide a robust but flexible reference for policy makers and market participants to develop their own frameworks for corporate governance.

Despite this clear flexibility given to jurisdictions, we see multiple references to conditional statements such as “where a jurisdiction’s legal and regulatory framework permit” throughout the Principles, a complete list of which is provided below (**bold** used as emphasis).

*Paragraph 1. (...) This is primarily achieved by providing shareholders, board members and executives, employees along with other stakeholders **where a jurisdiction’s legal and regulatory framework permit**, as well as financial intermediaries and service providers with the right information and incentives to perform their roles and help to ensure accountability within a framework of checks and balances.*

*Paragraph 6. (...) A sound framework for corporate governance with respect to sustainability matters, **in accordance with a jurisdiction’s laws and regulations**, can help companies recognise and respond to the interests of shareholders and different stakeholders, as well as manage their own long-term success.*

III.C. (...) *At the same time, institutions should disclose what actions they are taking to minimise the potentially negative impact on their ability to exercise key shareholder rights **to the extent applicable under a jurisdiction's law.***

V.A. (...) *Where **consistent with jurisdictional requirements**, boards may take into account the interests of stakeholders, notably when making business decisions in the interest of the company's long-term success and performance.*

VI.A.1. *Sustainability information should be considered material if it can reasonably be expected to influence an investor's assessment of a company's value. **If consistent with a jurisdiction's legal and disclosure requirements**, such assessments may also consider sustainability matters that are critical to a company's key stakeholders or a company's influence on non-diversifiable risks.*

VI.D. *The corporate governance framework should consider the rights, roles and interests of stakeholders **consistent with jurisdictional requirements** and encourage active co-operation between corporations, shareholders and stakeholders in creating wealth, jobs, and sustainable and resilient companies.*

*(...) **Consistent with jurisdictional requirements**, the governance framework should therefore consider the rights, roles and interests of stakeholders and their contribution to the long-term success of the corporation.*

Conditional statements such as these do not exist in the prior version, and we think they are not necessary given the clear non-binding nature of the Principles. In addition to their redundancy, their use could have the unintended consequence of undermining the Principles in which they are mentioned. We therefore suggest that the OECD Corporate Governance Committee continue to leave out such conditional statements throughout the text.

COMMENTS BY CHAPTER

About the Principles

Paragraph 2 (p.6) and Paragraph 10 (p.8)

The deletion of "other" in the first sentence of paragraph 2 may lead to confusion since, as already mentioned above, according to its conventional definition, the term "stakeholders" comprises shareholders. The definition of "stakeholders" for the purposes of this document only appears later in the text in paragraph 10. If the intention is to keep this definition of stakeholders, which excludes shareholders, then it may be helpful to provide this definition before or as soon as the term appears in the text for the first time. Furthermore, we suggest the following changes in Paragraph 2 to emphasize the prominent role that employees have in corporations:

*Corporate governance involves a set of relationships between a company's management, board, shareholders, **employees**, and ~~other~~ **further** stakeholders.*

Paragraph 3 (p.6)

Given the growing emphasis on ensuring sustainable growth, we propose the following edit in the last sentence of paragraph 3:

*For those who provide capital, either directly or indirectly, good corporate governance serves as an assurance that they can participate and share in the company's value creation on fair and equitable terms. It therefore affects the cost at which corporations can access capital **to ensure sustainable growth** ~~for growth~~.*

Paragraph 4 (p.6)

We are of the opinion that a reference to attracting longer-term capital should be kept in Paragraph 4. Hence, we suggest the following changes:

*If companies and countries are to reap the full benefits of global capital markets, **and attract longer-term capital**, their corporate governance frameworks must be credible, well understood both domestically and across borders, and aligned with internationally accepted principles.*

Paragraph 5 (p.6)

To strengthen the language of the following phrase in Paragraph 5, we suggest the use of "should" instead of "may":

*Providing them with a system in which they can share in corporate wealth creation, knowing their rights are protected, will give households access to investment opportunities that **may-should** help them to achieve higher returns for their savings and retirement.*

Paragraph 8 (p.7)

Paragraph 8 clarifies the intended focus of the Principles by stating the following:

The Principles focus on publicly traded companies, both financial and non-financial. To the extent they are deemed applicable, the Principles may also be a useful tool to improve corporate governance in companies whose shares are not publicly traded. While some of the Principles may be more appropriate for larger companies than for smaller ones, policy makers may wish to raise awareness of good corporate governance for all companies, including smaller and unlisted companies as well as state-owned enterprises.

We understand that the paragraph refers to companies with publicly traded equity by the phrase "publicly traded companies." However, we suggest here a reference also to companies with publicly traded debt, which have become especially relevant given the recognition of bondholder rights in Sub-principle VI.D.6.

Chapter I. Ensuring the basis for an effective corporate governance framework

Preamble (p.10)

As stated in paragraph 6 on page 7, supporting the sustainability and resilience of corporations and, in turn, contributing to the sustainability and resilience of the broader economy is one of the three major public policy benefits of well-designed corporate governance policies. Therefore, we believe the corporate governance framework should be monitored to maintain and strengthen its contribution to the "sustainability and resilience of corporations." Please consider revising the sentence quoted below:

Countries seeking to implement the Principles should monitor their corporate governance framework with the objective of maintaining and strengthening its contribution to market integrity,

access to capital markets, economic performance, the sustainability and resilience of corporations, and transparent and well-functioning markets.

Principle I.F (p.13)

Maintaining a human element in the supervisory process would not only safeguard against risks of incorporating existing biases in models but also help mitigate the risks of an over-reliance on models and digital technologies. We recommend the following edit to the annotations of Principle 1.F:

When artificial intelligence and algorithmic decision-making are used in supervisory processes, maintaining a human element in the process may help to safeguard against risks of incorporating existing biases in algorithmic models and mitigate the risks associated with an over-reliance on models and digital technologies.

Chapter II. The rights and equitable treatment of shareholders and key ownership functions

Preamble (p.15)

We propose the following addition in the Preamble to Chapter II so that the text explicitly mentions and emphasizes the ability of shareholders to exercise their rights efficiently:

All shareholders should therefore be able to exercise their rights efficiently and have the opportunity to obtain effective redress for violation of their rights, at a reasonable cost and without excessive delay.

Preamble (p.16)

The substantive factual prerequisites of management and board members' liability do not generally pose a problem and are typically interpreted strictly enough within the national laws. However, the liability regime requires the effective assertion of liability claims. We, therefore, welcome the increased emphasis on derivative lawsuits in the draft revisions. We suggest strengthening the phrase as shown in the following edit:

The confidence of minority investors is enhanced when the legal system provides mechanisms for minority shareholders to bring lawsuits when they have reasonable grounds to believe that their rights have been violated. Some countries have found that derivative lawsuits filed by minority shareholders on behalf of the company ~~may be act as~~ an efficient additional tool for enforcing directors' fiduciary duties, if the distribution of litigation costs is adequately set.

Principle II.A (p.16)

We support the recognition of the right to approve or elect the external auditor as a basic shareholder right. This is already a generally accepted practice, with 86% of surveyed jurisdictions assigning the primary responsibility for appointing and/or approving the external auditor to the shareholders (OECD, 2021a).

However, we find the use of "may" in the statement "*Basic shareholder rights may also include the right to approve or elect the external auditor.*" too hesitant and suggest that the right to approve or elect the external auditor should be given equal priority as the other five basic shareholder rights.

Sub-principle II.C.3 (p.17)

We appreciate that general shareholder meetings in virtual or hybrid formats have been taken into the scope of the Principles. We suggest the following addition to the annotations to Sub-principle II.C.3:

*However, due care is required to ensure that virtual or hybrid meetings do not decrease the possibility for shareholders to engage with and ask questions to **boards and management** in comparison to physical meetings.*

We further propose that the text here explicitly discourages cherry-picking of questions by boards and management to avoid complex or controversial questions. Furthermore, transparency should be encouraged around how the questions will be curated, combined, and paraphrased.

Sub-principle II.C.5 (p.18)

According to the annotations of Principle V.E.3:

Disclosure about other board and committee memberships to shareholders is therefore a key instrument to improve board and committee nominations.

We understand that disclosure about committee memberships should not only cover memberships held within the same company but also those held on other companies' boards. We deduce this from the research output cited in the OECD issues paper (Rey, 2022), titled "The role of board-level committees in corporate governance", which states, "Research has shown that members who are members of several committees within the same firm (busy internally) can increase their performance if not over-stretched, while members who are members of committees in different companies (busy externally) may reduce their committee work."

To make Sub-principle II.C.5 consistent with Sub-principle V.E.3 and the research cited by Rey (2022), we suggest editing it to recommend disclosing information about any committee memberships (both internal and external) that nominees hold.

Sub-principle II.C.5 (p.18)

As quoted below, the annotations of Sub-principle II.C.5 refer to many different forms of say-on-pay.

The different forms of say-on-pay (binding or advisory vote, ex ante and/or ex post, board members and/or key executives covered, individual and/or aggregate compensation, remuneration policy and/or actual remuneration) play an important role in conveying the strength and tone of shareholder sentiment to the board.

Making room for such different forms is reasonable as there is yet no international consensus on how to structure say-on-pay. However, in the interests of good corporate governance, and to ensure consistency and comparability, we suggest that a move towards standardization should be stated and encouraged here.

Sub-principle II.C.7 (p.18)

Sub-principle II.C.7 addresses the elimination of impediments to cross-border voting, which can be especially relevant for countries, where foreign holdings constitute a significant part of company ownership. We propose the following addition to the annotations of the sub-principle to encourage the use of blockchain technologies as an additional method to eliminate impediments to cross-border voting:

The use of blockchain or similar technologies should be implemented on a global scale to ensure substantially expedited cross-border voting, particularly in countries with significant foreign holdings, so that also international shareholders can vote their shares shortly before or even at shareholder meetings.

Principle II.H (p.22)

Principle II.H states:

Markets for corporate control should be allowed to function in an efficient and transparent manner.

According to the OECD (2021b) study, several countries already had mechanisms to protect certain domestic strategic assets from foreign acquisitions before the COVID-19 crisis, and with the pandemic, some policymakers tightened their control rules and screening mechanisms for foreign direct investment (FDI). Notably, FDI screening mechanisms were tightened in 16 out of the 46 jurisdictions surveyed in the study. Such actions contradict Principle II.H. They constitute an impediment to the functioning of the market for corporate control, just like anti-take-over devices, which are mentioned in Sub-principle II.H.2.

We propose mentioning mechanisms such as FDI screening within the scope of this principle.

Chapter III. Institutional investors, stock markets, and other intermediaries

Principle III.D (p.25, 26)

The revised version of Principle III.D states:

The corporate governance framework should require that regulated entities that provide analysis or advice relevant to decisions by investors, such as proxy advisors, analysts, brokers, ESG and credit rating agencies, index providers and others, disclose and minimise conflicts of interest that might compromise the integrity of their analysis or advice.

Hence, the focus of the principle is the disclosure and minimization of conflicts of interest that the mentioned regulated entities may be subject to. However, we are of the opinion that the insertions made to the annotations of this principle have a broader scope than solely dealing with conflicts of interest. Rather, they encourage transparency and disclosure in a broader sense, which we strongly support. We suggest the addition of a new principle or sub-principle for the general transparency requirements (other than those related to conflicts of interest) discussed in the annotations to this principle, possibly expressed as follows:

The methodologies used by ESG and credit rating agencies, index providers, and proxy advisors should be transparent and publicly available to clients, rated companies, and other market participants.

Chapter IV. Disclosure and transparency

Sub-principle IV.A.2 (p.29)

Parts of the annotations of Sub-principle IV.A.2, which address disclosures on company objectives and sustainability information, have been deleted to refer the readers to the new chapter on sustainability and resilience. The clause below is among those deleted:

This may include disclosure of donations for political purposes, particularly where such information is not easily available through other disclosure channels.

Some countries require additional disclosures for large companies, for example net turnover figures or payments made to governments broken down by categories of activity and country (country-by-country reporting).

We strongly suggest that the disclosure of “donations for political purposes” and “payments made to governments” continue to be explicitly mentioned in the text. Furthermore, we propose that lobbying activities, which are not coherent with companies’ sustainability-related commitments, should also be disclosed. This should include donations to lobby organizations undermining the credibility of basic ESG principles. We believe such a disclosure requirement would be a step consistent with Principle VI.C.1, which assigns boards the responsibility to “ensure that companies’ lobbying activities are coherent with their sustainability-related commitments”.

Sub-principles IV.A.3 and IV.A.4 (p. 29, 30)

Sub-principle IV.A.3, which used to be in Chapter II, was duly moved to Section IV. However, we think there are now overlaps between Sub-principles IV.A.3 and IV.A.4. As these two sub-principles are very similar, they could be merged to be considered under the same heading.

Sub-principle IV.A.5 (p.30)

We propose the following changes to the annotations of Sub-principle IV.A.5 to make the language stronger:

*Information about board and executive remuneration is also ~~of a significant concern to~~ for shareholders. Of particular interest is the link between remuneration and long-term company performance. Companies ~~are generally expected to~~ should disclose information on the remuneration policies applied to board members and key executives as well as remuneration levels or amounts, so that investors can assess the costs and benefits of remuneration plans and the contribution of incentive schemes, such as stock option schemes, to company performance, including resilience and sustainability. **Remuneration information should be disclosed in a way that allows a year-to-year comparison.***

Sub-principle IV.A.5 (p.30)

The new additions to the annotations of Sub-principle II.C.5 state:

Directors’ and officers’ liability insurance policies may also change managerial incentives, thus warranting shareholder approval or disclosure.

We agree with this argument and propose that Sub-principle IV.A.5 be revised to include disclosure of directors’ and officers’ liability insurance policies.

Due to the dramatic increase in directors' and officers' liability insurance costs in recent years, it has been noted that companies are pushed to decrease their insurance coverage or simply bear the liability risk themselves rather than buy insurance. We propose that such material changes in liability insurance policies should also be disclosed in due course.

Sub-principle IV.A.5 (p. 30)

The new text added to the annotations of Sub-principle V.D.5 regarding the design of remuneration policies states:

These policies, however, may not fulfil their goal if they are frequently adjusted in the absence of a significant change in the business strategy or a structural transformation of the context in which the company operates. Specifically, the likelihood of an economic downturn is a factor that corporate officers reasonably can consider when accepting their remuneration package and may not immediately justify an adjustment of the terms for their remuneration.

Adjustments to remuneration packages of the sort explained above were indeed carried out by companies during the COVID-19 crisis. Namely, some companies changed executive bonus plans, switched performance metrics, and ignored missed targets to avoid a significant drop in executive pay due to the pandemic (OECD, 2021b). We recommend that Sub-principle IV.A.5 encourage the timely disclosure of such changes to remuneration packages.

Sub-principle IV.A.6 (p. 31)

We appreciate that the principle now names "composition of boards" within the scope of disclosures to be made about board members. We think it would be a good practice if regulatory or listing authorities provide clear guidance to companies in their jurisdictions about which diversity statistics to disclose and their respective definitions. When companies are required to follow a clear-cut template in their disclosures, the overall data will be consistent and comparable across companies. The formation of reliable and useful statistics will only be possible if authorities provide clear guidance from the top.

Sub-principle IV.A.9 (p.32)

Annotations to Sub-principle IV.A.9 now include the following statement:

Most jurisdictions publish a national report reviewing adherence to the code by publicly traded companies as a good practice to support effective disclosure and implementation of "comply or explain" codes.

We strongly agree with the role that such national reports can play in supporting the effective disclosure and implementation of corporate governance codes. These reports would also provide important input to the review process of corporate governance codes, especially when sufficiently granular acceptance data are available to allow analyses at the breakdown of different company characteristics. Such reports could, for example, be used to answer policy-relevant questions, such as whether explanations on non-compliance are of expected quality or whether some code recommendations are adopted only by larger companies or only by companies from specific industries. As new observations are made from the data and insightful trends are identified, the corporate governance code could be reviewed and adjusted.

Despite these critical potential uses, we are surprised to see that these national reports are produced in a relatively low percentage of jurisdictions (62%) reviewed by the OECD Corporate Governance

Factbook 2021 (OECD, 2021a). Furthermore, among the jurisdictions that publish a report, only 58% do it annually.

We encourage further emphasis in the annotations of Sub-principle IV.A.9 on the benefits of national reports and encouragement towards their production.

Sub-principle IV.A.10 (p.32)

We propose the following edits to the last sentence of the annotations to Sub-principle IV.A.10 to improve clarity:

*As a consequence, the timely **and sufficiently detailed** disclosure of material information on debt contracts, including the impact of ~~the most significant material~~ risks related to **an actual or imminent** covenant breach and the likelihood of their occurrence, is necessary for investors to understand a company's business risks.*

Principle IV.E (p.34)

Principle IV.E states:

Channels for disseminating information should provide for equal, timely and cost-efficient access to relevant information by users.

We strongly agree with this principle. To create a level playing field for all information users, it is essential to ensure that each potential user can easily retrieve publicly available data, not only those with access to costly data vendor solutions. Although disclosure documents are typically available on company websites, it is often cumbersome to locate a document on these websites as each company has its own way of organizing its website and publishing its disclosures. We propose that the Principles explicitly encourage authorities to build a centralized system (such as SEC EDGAR in the US), which holds all types of filings made by all listed companies in their jurisdiction. Ideally, the database should be freely available to the public, easily searchable, and retrievable.

Chapter V. The responsibilities of the board

Principle V.A (p.35, 36)

Principle V.A states:

Board members should act on a fully informed basis, in good faith, with due diligence and care, and in the best interest of the company and the shareholders, taking into account the interests of stakeholders.

The following annotation to Principle V.A, however, weakens the standpoint of the principle itself due to its use of "may." We strongly recommend the following edit:

*Where consistent with jurisdictional requirements, boards ~~may~~ should ~~take into account~~ have **due regard** to the interests of stakeholders, notably when making business decisions in the interest of the company's long-term success and performance.*

Sub-principle V.D.5 (p. 38)

We believe the following text from the annotations of Sub-principle V.D.5 refers to remuneration package adjustments of the sort carried out by companies during the COVID-19 crisis, such as changing

executive bonus plans, switching performance metrics, and ignoring missed targets to avoid a significant drop in executive pay due to the pandemic (OECD, 2021b). We propose the following changes to the text:

Specifically, the likelihood of ~~a~~ significant economic downturn is a factor that corporate officers reasonably ~~should~~ ~~can~~ consider when accepting their remuneration package and ~~may~~ ~~does~~ not immediately justify an adjustment of the terms for their remuneration.

Sub-principle V.D.8 (p. 39)

Annotations of Sub-principle V.D.8 advise companies “to establish and ensure the effectiveness of internal controls, ethics, and compliance programmes or measures to comply with applicable laws, regulations, and standards..”

We propose a revision here to assign the board the responsibility of ensuring continued compliance with laws and regulations even when subject to fast-changing legal and regulatory environments. During the COVID-19 crisis, for example, companies faced severe difficulties in keeping up with the continuously changing health regulations or the new rules about virtual general shareholder meetings. Companies should have the mechanisms and policies ready in place to survive such challenging legal environments, and board members should be able to dedicate sufficient time to provide effective monitoring and advice in times of crisis. We propose the following text as an addition to the annotations to address these concerns:

Compliance programmes or measures should be sufficiently adaptable to fast-changing legal and regulatory environments and board members should be able to dedicate adequate time to ensure continued compliance in such environments.

Principle V.E (p. 41)

We welcome the clarification on what can constitute independence in the annotations to Principle V.E. In the last sentence of independence criteria, it is stated, “It may also be considered good practice to limit the number of boards on which a director may serve.” The rationale for this criterion is not immediately clear; we suggest further clarification on why this criterion is relevant for independence.

Sub-principle V.E.3 (p. 42)

When setting limits on the total number of board and committee memberships that directors can hold, we suggest that one should also consider the increased time demands on directors due to the increasingly complex responsibilities faced by boards in recent years, such as the oversight of companies’ sustainability policies and practices. Demands on boards could become especially pressing when there is an industry- or an economy-wide crisis such as the COVID-19 pandemic, and as a result, a large majority of companies need increased board oversight and guidance all at once. Accordingly, the maximum number of board and committee memberships may need to be adjusted downwards to allow for such cases.

Sub-principle V.E.2 (p. 42)

We suggest the following addition to the annotations to Sub-principle V.E.2:

The establishment of additional committees remains at the discretion of the company and should be flexible according to ~~the~~ corporation’s business profile and the needs of the board.

Sub-principle V.E.4 (p. 42, 43)

We appreciate the addition of new board diversity dimensions into the document. We think it could be helpful to provide more detailed guidance in the annotations, for instance, by providing a discussion of the different forms of board diversity considered in the various jurisdictions, which have already adopted a broader view on diversity. We also suggest the addition of “international experience” to the list of possible diversity dimensions mentioned in the text.

Chapter VI. Sustainability and resilience

Principle VI.A (p. 45, 46)

Given the evolving nature of the sustainability practice and the associated legal framework, the new chapter “Sustainability and Resilience” offers flexibility concerning the materiality definition adopted and makes room for both financial materiality and double materiality. The choice of which materiality definition to use for regulatory purposes depends on the jurisdiction, and there is yet no international consensus.

We are concerned that this discrepancy across jurisdictions may lead to regulatory arbitrage, since fulfilling disclosure requirements given a financial materiality assumption is typically more straightforward and less costly than meeting disclosure requirements dictated by a double materiality assumption. Furthermore, different materiality definitions across jurisdictions could be expected to hamper sustainability disclosures’ consistency, comparability, and reliability. Investors’ inability to make reliable comparisons across companies could, in turn, hurt the efficiency of capital markets.

A move towards internationally accepted sustainability disclosure standards may be stated and encouraged here as the medium-term goal.

Principle VI.A (p. 45)

Annotations to Principle VI.A suggest policymakers consider devising sustainability disclosure requirements that are flexible with respect to the size of the company and its stage of development. In addition to this explicitly stated flexibility option, small companies always have the option not to comply with the recommendations of “comply or explain” corporate governance codes as long as they explain their reasons for noncompliance. Given the already available flexibility in the Principles, we think that there is no reason to single out “larger companies” in the following phrase:

~~Larger~~ Companies and their service providers, as well as regulators themselves, may face a learning curve in their understanding of sustainability matters and might need time to develop adequate processes and good practices. This may justify prioritising disclosure requirements of some of the most relevant sustainability matters, phasing in other requirements such as for assurance, or establishing some recommendations in “comply or explain” corporate governance codes.

Sub-principle VI.D.6 (p. 49)

Annotations to the newly added Sub-principle VI.D.6 state:

In bond issuances offered to a large number of investors, an independent bond trustee is typically assigned to represent them, review instances of covenant default and protect the interests of minority bondholders during debt restructuring. While the exact scope of a trustee’s activities is

generally contractually defined, policy makers may enact regulation regarding the eligibility of a trustee and its duties prior to and during a default.

Although the bond trustee is typically tasked with representing bondholders and protecting their rights, the trustee actually has little incentive to actively engage in enforcing bondholder rights due to their fixed fee structure and weak legal obligations towards bondholders (Çelik, Demirtaş, and Isaksson, 2015).

Accordingly, we propose that policymakers should be encouraged to also work towards aligning bond trustee and bondholder interests.

Sub-principle VI.D.6 (p. 49)

Given the extended and substantial rise in the use of corporate bond financing, we greatly appreciate the addition of a new sub-principle to address bondholder rights. However, in comparison to how the Principles now address bondholder rights, Sub-principle VI.D.7, which deals with creditor rights in general, remains undetailed and less prescriptive. Properly addressing creditor rights is especially relevant for many countries, where loans and other various types of debt financing form a significant percentage of debt financing. We recommend a review and update of Sub-principle VI.D.7 (or the introduction of a new sub-principle, if deemed necessary) to include more detailed guidance on how to protect and enforce creditor rights, in general.

Sub-principle VI.D.7 (p. 50)

We propose the following edit to the annotations of Sub-principle VI.D.7:

Companies with a good corporate governance record are ~~often~~ generally able to borrow larger sums on more favourable terms than those with poor records or which operate in less transparent markets.

Sub-principle VI.D.7 (p. 50)

We suggest here a brief clarification about how an effective and efficient insolvency framework may contribute to improved access to capital and better capital allocation. A summary of the detailed discussion available in the OECD issues paper, titled “The role and rights of debtholders in corporate governance,” could be considered (De Oliveira, Magnusson, and Mulazimoglu, 2022).

REFERENCES

- Çelik, S., G. Demirtaş and M. Isaksson (2015), "Corporate Bonds, Bondholders and Corporate Governance", OECD Corporate Governance Working Papers No. 16, <https://doi.org/10.1787/5js69lj4hvnw-en>.
- De Oliveira, C., C.M. Magnusson and T. Mulazimoglu (2022), "The Role and Rights of Debtholders in Corporate Governance", OECD Corporate Governance Working Papers No. 23, <https://dx.doi.org/10.1787/d6b7cca5-en>.
- OECD (2021a), "OECD Corporate Governance Factbook 2021", <https://www.oecd.org/corporate/corporate-governance-factbook.htm>.
- OECD (2021b), The Future of Corporate Governance in Capital Markets Following the COVID-19 Crisis, Corporate Governance, OECD Publishing, Paris, <https://doi.org/10.1787/efb2013c-en>.
- Rey (2022), "The Role of Board-level Committees in Corporate Governance", OECD Corporate Governance Working Papers No. 24, <https://dx.doi.org/10.1787/8a97a3f6-en>.