



Group Interest in European Company Law: an Overview¹

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Abstract. Cross-border groups are important for the further integration of the European economy and they have become increasingly common. However, they must be run according to diverging national rules, which makes management cumbersome. One important issue is whether the subsidiary's management may take into account the interest of the group as a whole or whether only the subsidiary's interest is relevant. Currently, Member States follow completely different approaches, which has led to a call for harmonization. This was picked up by the Commission in its 2012 Action Plan on company law. This article sketches the development in recent years both on the academic and the practical level, and identifies the core issues.

Keywords: European company law, group interest, groups of companies

I. Introduction

Groups composed of numerous individual companies are important players in economic reality. Each of these companies is a separate legal entity entering into legal relations with employees and other business partners; each is responsible towards its creditors, both contractual and in tort. Conversely, group members are not jointly and severally liable for the debts of the group as a whole; under general rules of civil and company law, there is no collective responsibility for the liabilities of the entire group.

¹ This paper is based on a lecture delivered on 20 November 2015 at the conference 'Group Interest in Central and Eastern European Company Law' at the National University for Public Service, Budapest. Only indispensable footnotes have been added. In the meantime a Commission expert group, of which the author is a member, has published a report on the issue (Informal Company Law Expert Group 2016), which on many points mirrors positions taken in this paper.

This situation sits well with general precepts of company law, at least as long as another of its buttresses is respected: each company, which is a member of the group, is managed autonomously and its management takes into account only its own interest. That brings civil responsibility and decision-making power into line, thereby avoiding the externalization of costs.

Of course, that is not the reality in most corporate groups as we know them. Very often, decisions are not taken in the interest of the subsidiary but in the interest of the group – which usually means the interest of the parent company. And these decisions are not taken by the management of the subsidiary but in the parent company, and then communicated as wishes, group guidelines, or outright instructions to the subsidiary's management. Such actions may be good for the group as a whole and will probably also benefit the subsidiary; however, they may be detrimental to the company's creditors, any minority shareholders, and other stakeholders. Two examples may suffice to illustrate the issue:

- As a general rule, members of a group specialize in certain tasks; such specialization may be regional as in the example of a bank subsidiary in Austria, which is tasked by its parent company, an Italian bank, to run the group's CEE business out of Vienna. If at a later stage a new lucrative market in the region becomes accessible, the Italian parent may have an interest to run that business itself or through another of its subsidiaries. From a group perspective, legitimate reasons may exist, e.g. more efficient procedures in the company elected to run the business or cultural bonds due to common historical roots. However, from the Austrian subsidiary's perspective, this is a lost business opportunity. The issue will not be pressing for creditors as long as the Austrian subsidiary stays solvent; from the point of view of minority shareholders in the subsidiary, such a decision, however, will decrease the value of their shares.

- Under a cash-pool agreement, all companies in a group transfer their excess liquidity to one company in the group; this cash-pool manager, usually a special purpose vehicle, centrally manages these reserves. In practice, such agreements are increasingly common, also across borders in the single market. They carry at least two advantages: intra-group loans can be arranged easily (which decreases the need for outside finance) and banks will provide better conditions due to the higher volumes involved. The subsidiary will be able to participate in these advantages. As a downside, each subsidiary advancing money to the manager is extending credit to another group company, which may not be in its best interest, especially if the group is entering into crisis. Therefore, the subsidiary may want to ensure that the system contains sufficient safeguards to mitigate these risks; these safeguards will come at a price, usually by limiting the effectiveness of the system from a purely commercial viewpoint or at least by making its operation more cumbersome. In extreme cases, it may be in the best interest of the subsidiary not to participate in such a system at all.

Looking at the matter more closely, two different issues are involved, on which each legislator will have to take a decision:

- May the subsidiary's management take measures which are in the best interest of the group as a whole but not of the subsidiary? Obviously, any affirmative answer has to be nuanced and has to identify the circumstances under which management may do so. That question is central for the subsidiary's management, as it will delineate the danger of incurring civil and/or criminal liability. Therefore, the answer directly influences the ability of the parent company to run the group as an entity, as directors most probably will be hesitant to implement measures detrimental to the subsidiary at the price of becoming personally liable.

- This clarifies whether the directors can follow the parent company's instructions which are in the interest of the group but not of the subsidiary. It does not follow, however, that the directors must follow such instructions by the parent. Such an obligation may be in the parent's interest, although it is probably not necessary, as the absence of any personal liability is likely to make the subsidiary's management compliant with the parent's wishes.

The answers to these questions vary widely between jurisdictions. To a large extent, this is not only an issue for national law as groups these days operate not in single Member States but across the European Union. From the point of view of the parent company, diverging rules in different Member States encumber effective group management as the parent will have to respect the company law rules of each subsidiary. Harmonized rules would enable the group to use the same yardstick irrespective of the applicable company law. Thus, on a very superficial level, there are good arguments for harmonizing the divergent national approaches on the issue.

This paper does not purport to analyse all these issues in detail, but it provides an overview of recent developments in the field. For that purpose, it first takes a brief look at the different approaches taken in the Member States before turning to recent developments on the European level. The paper closes by giving some indications as to legislative choices for any further action on the European level.

II. The National Dimension

As already indicated, national rules on this issue differ widely. Some countries recognize that decisions by the subsidiary may, under certain circumstances, be taken in the interest of the group, even if, judged on their own, they may be detrimental to the subsidiary (e.g. France); others (e.g. Germany, at least outside of contractual groups) do not recognize the interest of the group in such situations. The issue is of importance as managers of the subsidiary may be exposed to (criminal or civil) liability if they do not act in line with the national regulations.

For the purpose of a general overview and disregarding finer points of law,² Member States may be categorized into three groups:³

– The first group takes a very strict approach and, generally speaking, follows the German model of company law. Some countries, e.g. Germany, have (partially) codified their group law, others, e.g. Austria, use general precepts of company law. The most distinguishing characteristic is the parent company's duty to compensate its subsidiary for any losses it has incurred due to unfavourable instructions by the parent. As a compensation, a general *quid pro quo* is not sufficient; rather, the parent has to bestow a benefit on the subsidiary, and under most jurisdictions within a short time period. Although lots of differences between the national regimes remain, this concept is hardwired into the national legal cultures and may only be relaxed with the agreement of all members of the company or with wholly-owned subsidiaries; however, even in these situations, liability may re-appear in the subsidiary's insolvency. Generally speaking, these Member States do not recognize the interest of the group as a justifier for decisions to the detriment of the subsidiary.

– A second group takes a more lenient approach and recognizes the group interest at least to some extent. The most prominent example is the French *Rozenblum* doctrine,⁴ which has been developed by the courts in the context of prosecution for abuse of corporate assets in criminal law, but is applicable to the civil liability of the directors of the subsidiary as well, while the right to give directions to the subsidiary's management is not an issue. This doctrine provides a safe harbour from liability if four conditions are met: (i) the company is part of a group with capital links between companies, which also integrates the businesses within a coherent group policy, (ii) the directors act in the belief to further the common interest of the group, (iii) there is no grossly inadequate compensation, and (iv) the action should not exceed the financial capability of the company, i.e. bring about its insolvency. Typically, under such a rule, a more general *quid pro quo* is sufficient in order to meet the criterion (iii); such a consideration may also be non-monetary and expectations for future compensation may be sufficient. This French model has been quite successful in recent times, as a number of countries have introduced legislative rules with similar effects (e.g. Italy⁵ and the Czech Republic⁶) and in others case-law has developed in this direction (e.g. Spain⁷).

2 I am fully aware that the following categorization is oversimplifying the issue; however, for the present purpose, i.e. showing the basic differences between national approaches, this very broad brush seems sufficient.

3 The following categorization is based on Conac 2013. 194, 199 et seq.

4 Court of cassation, Criminal Chamber, 4 February 1985, *Rozenblum* and *Allouche*, D. 1985, P. 478.

5 Art. 2497 Codice Civile.

6 Sec. 71 et seq. of Law No 90/2012 on commercial companies and cooperatives.

7 Cf. Tribunal Supremo, Sala de lo Civil, Sentencia 695/2015 of 11 December 2015.

– Similar to this last group, but with a different starting point, has been the development in Nordic countries⁸ and countries in the common law tradition. Among others, UK law traditionally recognizes that shareholders are the ultimate decision-makers in the company; from that point of view, recognition of the group interest, i.e. of the dominant shareholder, is logical. The necessary mechanisms for the protection of shareholders and creditors are provided by other institutes, e.g. the remedies for unfair prejudice⁹ or wrongful trading.¹⁰

Thus, on a national level, one can observe a shift towards some recognition of the group interest in recent times. This development has also had some impact on the European discussion.

III. The European Development

1. Forerunners

To the best of my knowledge, the issue of group interest was raised academically for the first time in the 1990s by a group of scholars, the Forum Europaeum on Group Law. They recommended introducing a modified *Rozenblum* doctrine on the European level.¹¹ Similarly, in 2002, the High-Level Group of Company Law Experts ('*Winter-group*') recommended adopting a framework rule for groups addressing various issues of group law, inter alia, allowing managers of a group company to adopt a co-ordinated group policy, provided that the interests of creditors of each company are effectively protected and that there is a fair balance of burdens and advantages over time for each company's (outside) shareholder.¹²

The idea then was dormant for some years. However, in 2011, the Reflection Group on the Future of EU Company Law,¹³ which had been installed by the European Commission to map the road ahead after the failure of the SPE, cautiously encouraged the Commission to consider issuing a recommendation with a yardstick for the management of a subsidiary by recognizing the interest of the group. Details of such a piece of legislation were deliberately left open, presumably because the Reflection Group could not reach a common viewpoint on these issues.

8 For the Nordic owner-oriented corporate Governance structure, cf. Lekval 2014. 52 et seq.

9 Sec. 994 et seq. UK Companies Act 2006.

10 Sec. 214 UK Insolvency Act 1986.

11 Forum Europaeum on Group Law 2000. 165.

12 High-Level Group of Company Law Experts 2002.

13 Reflection Group 2011.

2. Action Plan 2012

As a result, in 2012, the Commission launched a Consultation on the Future of European Company Law,¹⁴ which, *inter alia*, contained a question as to the recognition of group interest. The response was rather favourable even if a bit lukewarm and unbalanced as to region and to profession.¹⁵ This encouraged the Commission to include the issue in its 2012 Company Law Action Plan:¹⁶ It announced an initiative ‘in 2014’ to improve, *inter alia*,¹⁷ the recognition of the concept of ‘group interest’. This was taken up by various organizations close to the business community.¹⁸

At this stage, it is worthwhile to look at some reasons for the increasing importance of the issue at the European level. At least three different aspects seem to be significant in this respect:

– First, over the last decades, we have been witnessing a slow shift of focus. Historically, group law concentrated on the subsidiary and the protection of its creditors and (minority) shareholders. However, these days, group law is (also) understood as enabling law,¹⁹ which should foster the formation and management of cross-border groups and thereby enhance the integration of markets in the European Union. The main instrument lies in the reduction of the cost of cross-border activities via subsidiaries. One important aspect is the harmonization of the rules on group interest as a single set of rules on that issue will help in organizing European cross-border groups along the same lines; additionally, recognizing the group interest as a justification for actions by the subsidiary will facilitate giving (formal or informal) directions to the management of the parent company. Of course, this may necessitate rules on the protection of shareholders and creditors; however, these will not be the purpose of such legislation but a constraint on the main aim of enabling the parent company to run the group efficiently.

– Second, in the field of financial services, legislation increasingly takes an integrated view of financial groups. According to CRD IV,²⁰ the parent company

14 http://ec.europa.eu/internal_market/consultations/docs/2012/companylaw/questionnaire_en.pdf.

15 Feedback Statement of 17 July 2012, pp. 12 et seq. (http://ec.europa.eu/internal_market/consultations/docs/2012/companylaw/feedback_statement_en.pdf).

16 Action Plan: European company law and corporate governance – a modern legal framework for more engaged shareholders and sustainable companies, 12 December 2012, COM(2012) 740 final on pp. 14 et seq. (<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012DC0740&from=EN>).

17 The second issue concerns the information on group structures. See also Informal Company Law Expert Group 2016.

18 For France, cf. *Le Club des Juristes* 2015. For Luxembourg, cf. *Institut Luxembourgeois des Administrateurs* 2015. For details, cf. *Teichmann* 2016. 150, 154 et seq.

19 Cf. *Drygala* 2013. 198; *Hommelhoff* 2013. 535; *Teichmann* 2013. 184.

20 Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, O.J. 27 June 2013 L 176/338.

is responsible for the organization and the management of the bank group, especially from the perspective of risk management. This also implies effective control of and influence on the subsidiaries. As far as banking resolution is concerned, the BRRD²¹ provides for a group financial support agreement in the case of a rapidly deteriorating financial situation of one group member; the group company providing support may take into account the interest of the group if any direct or indirect benefits accrue to it (Art. 19 BRRD). This begs the question how prudential regulation and company law interact.²² Even if such prudential regulation actually overrides any company law barriers to such actions, one may wonder whether such regulation is really bank specific or should be rolled out, at least to some extent, to general company law.

– Finally, under European law, the parent company may become liable for the actions of its subsidiaries. An outstanding example is the ECJ *Akzo Nobel* decision in competition law.²³ According to that decision, anti-competitive behaviour of a wholly-owned subsidiary can be imputed to the parent company as there is a presumption that the latter has made use of its influence over the conduct of the former. Therefore, subsidiary and parent company will incur joint and several liability for the payment of fines for infringements of competition law. Although the presumption is rebuttable, in practice it may be very difficult to show actual lack of influence in such situations. In any case, European company law is lacking instruments for the parent company to compel the subsidiary to abstain from anti-competitive behaviour.

However, by the end of 2014, the date set by the 2012 Action Plan, no initiative on group interest was announced; nor did this happen at a later stage. In particular, the proposal for a European single-member company (SUP), a special form of the national limited liability company, does not deal with the issue. The original Commission proposal²⁴ states in Art. 23 that the parent has the right to instruct this wholly-owned entity; however, that provision is qualified as the right only exists if there is no violation of national law, which of course runs counter to the goal of harmonizing different national provisions. Even this very limited provision has been deleted in the Council's General Approach.²⁵ Whatever the future fate of the SUP may be – and currently there is little reason to be over-optimistic as to its acceptance –, that legislative restraint is hard to justify in substance²⁶ as

21 Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms, O.J. 15 May 2014 L 173/90.

22 Cf. in this vein also Weber-Rey/Gissing 2014. 884.

23 C-97/08 P of 10 September 2009.

24 Commission Proposal for a Directive on single-member private limited liability companies COM(2014) 212 final.

25 Proposal for a Directive on single-member private limited liability companies – General Approach, Interninstitutional File 2014/0120 (COD).

26 Politically, the reason may be that many Member States are reluctant to support the SUP project. Therefore, the Commission tries to minimize controversial issues.

the SUP would be the ideal company form to pursue business activities through subsidiaries in various Member States of the European Union.²⁷

3. Response by Academia

Even if on a European level the momentum behind the recognition of the group interest is intermittent at most, on an academic level, the idea has found overwhelming support in recent years. In recent times, at least three different international groups have come forward with support for some kind of recognition:

- The European Model Company Act (EMCA) is a draft act, which is not a restatement of European company law, but a toolbox for legislators.²⁸ The Act recognizes the group interest as justification for the subsidiary's actions and broadly follows *Rozenblum* lines, but it includes the parent's rights to give instructions to the subsidiary. EMCA contains various measures designed to protect shareholders and creditors.

- In 2015, the Forum Europaeum on Company Groups published a proposal explicitly designed to facilitate the management of European cross-border groups.²⁹ The proposal aims at bringing the different interests of the group companies, including the parent, into equilibrium in the long term,³⁰ which also shows a clear tendency toward a more lenient, *Rozenblum*-inspired approach.³¹ For so-called 'service companies', i.e. small or mid-sized, wholly-owned subsidiaries with purely auxiliary functions, the proposal is even more permissive: such companies must observe all directions by the parent company, unless they have the effect of precluding the company from fulfilling its obligations falling due within the year following the instruction.³²

- Finally, the European Company Law Experts (ECLE), a group of international scholars in the field of company law,³³ has published observations on the reform of group law.³⁴ On a more general note than the two initiatives described above, the paper also takes a rather sympathetic position towards recognizing the group interest.

27 Cf. also Teichmann 2014. 3561, 3565.

28 Cf. <http://law.au.dk/en/research/projects/european-model-company-act-emca/>. At this stage, an official publication unfortunately is still outstanding; however, the text as it stands at this stage is easily accessible on the World Wide Web, e.g.: http://www.jura.uni-wuerzburg.de/fileadmin/02130100/EMCA_FINAL_DRAFT_2015_for_conference_rev.pdf.

29 Forum Europaeum on Company Groups 2015. 299.

30 Forum Europaeum on Company Groups 2015. 299, 303 et seq. (for 'ordinary' companies).

31 Teichmann 2016. 150, 156.

32 Cf. Forum Europaeum on Company Groups 2015. 299, 303 et seq.

33 See: <https://europeancompanylawexperts.wordpress.com/>.

34 European Company Law Experts 2016.

IV. Some Options and Decisions

But what will be the regulatory options if the European Commission decides, after all, to tackle the issue? This crucial question cannot be developed in detail here. A few remarks must be sufficient:

First, the Commission would have to decide on the type of instrument to be employed. As a regulation does not seem to be a viable alternative, two options remain. On the one hand, the Commission could try to harmonize national rules via a directive. This, of course, is the best option from the point of view of the business community, as it would encounter a common regime all over Europe – at least in the fields actually harmonized and assuming such a directive were not to contain any options for Member States. Having said this, politically, such an endeavour may easily become vain as the divergent approaches in the Member States in this field complicate the search for a compromise. From that point of view, issuing a recommendation would be the preferable route as the Commission does not need Member States' approval. Obviously, such a recommendation will not be binding on the Member States, but can only reach the aim of harmonizing national legislation if it develops enough persuasive force over time to overcome Member State resistance. Personally, I do not believe that this will happen easily in such a contested field. One suspects that the Commission's reluctance to tackle the issue may be partially based on this unappealing choice.

Second, and irrespective of the type of instrument, the Commission would have to identify the appropriate scope of application of such rules. At least three different issues come to mind:

– If it is the aim of the recognition of the group interest to facilitate the management of cross-border groups, then such an instrument could be restricted to situations in which parent company and subsidiary have their (real) seat in different Member States. However, this would lead to different legal regimes for the same national company types according to the nature of the shareholder – who may change with time. Additionally, even in cross-border groups, the subsidiary itself may be parent/holding company of a national sub-group. Any rule which curtails the relevance of the group interest to companies with the direct controlling shareholder in another Member State will probably not deal with such situations in an adequate manner; defining indirect control properly in legislative texts in order to encompass these situations is notoriously difficult. To my mind, it would seem preferable to introduce the relevance of the group interest both for cross-border and for national groups – which still leaves the thorny issue of defining the 'group' properly.

– Equally difficult is the question of the type of subsidiaries which should be included. The main issue is whether to include all or only wholly-owned subsidiaries. From a technical viewpoint, harmonization is much easier to

achieve if it is limited to wholly-owned subsidiaries as any protective measures will only have to take the interest of the creditors into account.³⁵ Once minority shareholders may become prejudiced, there is less justification for putting the interest of the group to the fore – which in practice more often than not will mean the interest of the parent company; additionally, with minority shareholders involved, it is much more important to measure the *quid pro quo* of intra-group transactions properly as these shareholders receive not only a fixed amount as (at least typically) creditors do, but are entitled to a share in the subsidiary's residual earnings. As a result, a liberal regime, which is of value to the parent company, is justified more easily with wholly-owned subsidiaries. As a side effect, a rule with a restricted scope may be easier to achieve politically as well as one of the most contentious issues is removed, i.e. the proper amount of and instruments for shareholder protection.

– Probably less crucially, the Commission would have to decide whether to include both private and public limited companies. A more narrow approach limited to private companies may be easier to achieve and will for practical purposes probably be sufficient as long as parent companies can change the type of company without undue burdens under national laws.

Third, the Commission would have to decide whether to propose such a rule as mandatory law or whether to enable companies to opt in via their articles of association; a company opt-out is also possible. From the point of view of signalling towards creditors (and shareholders), a flexible solution definitely seems preferable. In this way, companies may clearly indicate whether they are run exclusively in their own interest.

Fourth and on a more substantial level, the main issue is whether any European rule should just recognize the group interest and leave further specification to the Member States. This, of course, would make legislative success easier to achieve, but may limit the practical impact of such a rule as harmonization may only be achieved superficially if the crucial issues are left to the Member States, namely the type of and timeline for compensation. Conversely, the Commission could propose a fully-fledged test e.g. along Rozenblum principles, which certainly would be more valuable for the business community. An approach somewhere in between could combine a general statement with some type of white list of acceptable behaviour.

Fifth and finally, any such instrument would certainly result in the management of the subsidiary being able to avoid liability if it acts within the interest of the group as a whole. However, one could also imagine that the subsidiary's management in such cases is under a duty to follow instructions³⁶ – which would

35 Which probably limits the indispensable measures to balance sheet and/or solvency tests of some kind.

36 Supportive Hommelhoff 2014. 63, 64.

mean that a failure to do so would be a violation of duties, which in turn may lead to a liability. This, of course, would put additional pressure on management to be compliant. However, one may argue that even without such a duty the parent company will find ways to sanction non-compliance in other ways and that the threat of liability towards the parent company may foster excessively submissive behaviour.

V. Tentative Outlook

As described above, the Commission at this stage has not brought forward any initiatives to fulfil the promise given in the 2012 Action Plan (which, in any case, was not the work of the current Commission but of its predecessor). Is this likely to change?

Currently, there are two contradictory indicators. On the one hand, the Commission's academic advisory group for company law, the Informal Company Law Experts Group (ICLEG), has been working on a position paper on the issue for quite some time which has been published in 2017 and gives some indications as to the scholars' ideas on the issue. Informal Company Law Expert Group 2016.

On the other hand, the recent Commission Work Programme for 2017³⁷ does not mention any work on the group interest but announces company law initiatives to facilitate the use of digital technologies throughout a company's lifecycle and cross-border mergers and divisions. This certainly reveals the current Commission's short-term priorities. This does not necessarily mean that the Commission has renounced the aim of harmonizing the legal regime of the group interest. However, it is safe to assume that the next initiatives will not touch on the issue.

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37 Commission Work Programme 2017: Delivering a Europe that protects, empowers, and defends, COM(2016) 710 final on p. 8 (http://ec.europa.eu/atwork/pdf/cwp_2017_en.pdf).

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