



Faculty of Law, Economics and Finance

Director's duties in groups of company:
legalizing the interest of the group
at the European level

Pierre-Henri Conac

University of Luxembourg

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I. Introduction



Lack of harmonisation of director's duties in groups at the EU level

- Failure of the draft ninth directive on the conduct of groups (1984)
- Forum Europaeum (2000) : Corporate Group Law for Europe
- Winter report (2002) advised ad hoc rules : interest of group, transparency of groups, squeeze-out, protection of creditors (wrongful trading), minority shareholders' protection (sell-out)



Renewed interest of the European level

- Academic support in many Member States and Switzerland
- Recognition of the interest of the group in many Member States
- Report of the Reflection Group on the future of European Company Law (2011)



Several possible models

- UK model : no specific regulation but issues addressed through general company law instruments (wrongful trading)
- German model: specific regulation (contractual groups and de facto groups) with yearly compensation for losses or disadvantages in case of action contrary to the subsidiary's own interest
- *Ius commune* model : no immediate compensation for disadvantages; more common and more flexible



- I. **The need to legalize the interest of the group at the European level**
 - A The advantages of the recognition of the interest of the group



Arguments against the recognition of the group at the EU level

- Not needed: no clear evidence in favor, risk of confusion, subsidiarity
- Politically difficult: would affect the German and the UK system
- But the interest of the group has become *Ius commune* in Europe (Benelux, France, Italy, Nordic countries)



Arguments in favor of the recognition of the group at the EU level

- Cross-border perspective: reduction in legal costs, increased flexibility
- National perspective: increased legal certainty for directors, hopefully improvement in the protection of minority shareholders



B. The need for a cautious approach



The nature of the legal instrument

- A regulation, a directive with a limited scope, a recommendation ?
- An EU wide test on “interest of the group” or a Member State test ?
- A safe harbour for managers of both the EU parent and the subsidiary



The division between European and Member State law

- At EU level: transparency of groups structures, specific rules for wholly-owned subsidiaries (single shareholder company, simplified regime for RPTs), specific regime on cash pooling, EU wide “code of conduct”
- At the Member State level: possible rules on squeeze-out and sell-out



The scope of the recognition

- Geographical : companies registered within the EU (even if owned by third countries), single Member State groups
- Material : listed and/or non listed, unified and/or non unified direction, structured and/or non structured groups, wholly owned and/or non wholly owned subsidiaries ?



II. The distinction between wholly-owned and non wholly-owned subsidiaries

A Wholly-owned subsidiaries



Definition of the interest of the group

- Need for a definition of an “Interest of the group test”
- French Rozenblum test might be too restrictive and vague : capital links between companies, effective business integration among companies, economic quid pro quo, support should not create a risk of bankruptcy



Distinction between outside and within the vicinity of insolvency

- Only creditors need to be protected
- Outside the vicinity of insolvency: recognition of the right of the parent to give direct instructions but subject to the “interest of the group” test
- Within the vicinity of insolvency: wrongful trading, liability of the parent only if it directed the subsidiary, liability of individual directors remain



B Non wholly-owned subsidiaries



Same rules as in wholly owned subsidiaries but with some additions

- Rely on independent directors (listed companies)
- Increased transparency for minority shareholders
- Right to squeeze-out in order to create wholly owned subsidiaries
- Right to sell-out in case of abuse by majority shareholder



IV. Conclusion



Distinctions between EU and Member State level

- EU level: usefulness of the recognition of the interest of the group
- Member State level: increase protection for minority shareholders

Distinctions between types and financial situation of subsidiaries

- Distinction between wholly-owned and non wholly-owned
- Distinction between outside and within the vicinity of insolvency