Financial Law Institute

Working Paper Series

WP 2017

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The law of groups of companies according to Belgian law

UNIVERSITEIT GENT

August 2017

WP 2017

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This paper is a draft version of the Belgian Report to the International Academy of Comparative Law Fukuoka Congres, 2018

A short historical introduction

Groups of companies have been dominant players in the Belgian economy, especially before the first World War, when many groups of entrepreneurs developed a thriving economy. These groups were often composed of several important families, or leading shareholders, engaging in a specific sector, such as coal and steel. Due to the financial crisis, a law of 1932 decided that the previous conglomerates composed of industrial companies and banks should be split in two different entities or business lines: the banks would be managed independently[1], while the industrial holdings would continue to function as a listed diversified company, some of which are still in existence.

After the Second world war, the industrial structure changed partly into industrial groups, with one or a few shareholders, often a foreign shareholder, while individual shareholders united in diversified business groups of the conglomerate type, or as monoline industrial firms with a large number of subsidiaries. This explains that Belgian group law presents the characteristics of a vertical structure, while at the same time dealing with the relations between shareholders in groups. There probably are no listed companies without a network of subsidiaries and other minority owned related entities, but also many midsize, privately held enterprises are structured in a group format.

1. Sources of group law

The role of Belgian group law is largely concentrated on company law issues, where the basic concepts of group law are laid down[2]. This applies to the definitions of group law components, such as “parent” and “subsidiary” company, definition of “control” and types of control. Strikingly Belgian company law defines the “group” indirectly by referring to the control exercised by one company over another, respectively the “Parent and the Subsidiary company”.

In the practice of the larger Belgian groups, securities market regulations play a more important role. Most stock exchange listed companies are organized as groups where the parent company is listed, but sometimes also some of the subsidiaries. Requirements applicable to these entities are mainly governed by the regulation of financial markets, especially by the disclosure duties, and are supervised and enforced by the market supervisor, in the Belgian case the FSMA or Financial Markets and Services Authority. This observation means that for listed entities, group law and action are largely dominated by financial regulation.

Belgian law is partly composed of acts of the Belgian Parliament (e.g. the Companies code 1999 and the implementing decrees[3]) and partly of European law, especially regulations of the European Institutions which have direct effect in the

[1] This was the so-called “autonomie de la fonction bancaire”, reducing the presence of the holding company in the bank to one director. It is related to the idea that the bank should be run exclusively in its own interest. The rule was abandoned in 1994.
[2] See articles 5 to 11 of the Companies Code of 7 May 1999.
[3] The Code was enacted by L. 7 May 1999. Its revision is under way, and the Code will probably be replaced by a new version, the text of which is still not available. In the field of group law, changes are reported to be minimal.

Belgian legal order. In several instances,– especially in financial regulation – reference should be made to these European regulations: these however will not be analysed in this overview. As most listed companies are structured groupwise, one should also mention the non-legally-binding provisions of the corporate governance code which mainly addresses the functioning of the solo company and the relations among its shareholders.

European law - directives and especially directly applicable regulations - play a significant role in the organization and structure of company groups. The European legislator has adopted directives in the fields of annual accounts or their audit, but has never succeeded in agreeing on a full directive on groups of companies, due to the opposition of several Member States. In financial regulation, on numerous occasions concepts and techniques of group law are mentioned and even regulated. Banking supervisors will scrutiny the banking groups as a whole. In case of insolvency, the recovery and resolution measures will extend to the companies, part of the group, other than the subsidiaries, including upstream companies.[4]

The basic rules on groups are laid down in the Belgian company code where the definitions of the group components can be found, applicable to all company types[5]. The main group provisions apply in practice to limited liability companies, such as the public company limited by shares (société anonyme- naamloze vennootschap), or to the private company[6]. Other company types may also be affected by some group provisions, the most important one being the rules on accounting and auditing, especially the provisions on consolidated accounts, which are governed by the IFRS. Belgian law prescribes the rules for their disclosure[7], where applicable by way of consolidated accounts. Auditors have to report on these companies' accounts, applying the international standards on auditing. Several of these provisions are directly applicable in accordance with European regulations. The definitions on groups may also play a role for other company types, such as partnerships, which are sometimes used for coordinating control, the transfer of their shares being strictly limited.

In a number of specific company law rules, the group dimension is taken into account: by way of example, this is the case for the prohibition for s subsidiary to subscribe to the shares of its parent company; when shares are issued using the authorised capital, the shareholders holding 10% of more of the voting rights are excluded; shares acquired by a subsidiary are added to the parent's quotum of 20% of the parent's treasury shares

Belgian literature on groups of companies is quite rich[8]; there is also useful case law. Important comparative studies have been published which served as a source of inspiration for legislatures and academic research[9].

[4] See the royal decree of 30 Januari2001; There also specific r royal decrees on takeover bids, squeeze outs, etc.
[5] This would be the case for the obligation to establish consolidated accounts, article 108 Companies Code
[6] Or "Besloten vennootschap met beperkte aansprakelijkheid – societe privée à responsabilité limitée »
[7] Article 170 e.s of the Royal Decree of 30 January 2001 implementing the Companies Code
[8] See the annex for the main sources on Belgian group law.
[9] See: EBOR; Forum Europaeum Corporate Group Law (2002), High Level Group of Company Law Experts (2002),

2. *Control and related subjects*

Control is a core concept in the definition of a group: it is defined in the law as "the legal or factual power to exercise a decisive influence on the appointment of the majority of directors, or the orientation of its policy" [10]. Control is exclusive when it is exercised by one party, including by that party's subsidiaries. Control is joint, when a group of shareholders have agreed to decide in common on the policy issues.

The law defines as a "consortium", the case in which several independent companies are subject to a single leadership. The latter may be based on intercompany agreements, on the identical composition of their boards, or on the common ownership of the shares by the same parties, e.g. in the family context. These conceptual definitions are used in other regulations as well, or are considered applicable in different fields: special provisions would be applicable to the consolidation of accounts in a "consortium". The notion of mere "domination" as a separate category would come whether under the general definition of de facto control, or under the notion of "orientation of policy", but is not a separate legal criterion.

Legal control exists where the controlling party is "entitled" to exercise the majority of the voting rights in the general meeting, or when he has the right to the appointment of the majority of the board members in the controlled entity[11]. In these cases, control will be presumed even if it not effectively exercised, which in some cases however, may lead to responsibilities for not exercising it, e.g. for not urging the subsidiary to adopt measures to protect the creditors[12].

As Belgium does not practice multiple voting shares, legal control usually corresponds to the ownership of the majority of the shares. Special mention deserves the pyramids whereby one shareholder can determine the way the controlling shares are voted, as a consequence of his control over a pyramid of separate companies, the ultimate one allowing him to exercise control over the investee group even with a small financial stake at the top company. The phenomenon is still quite frequently met in the Belgian industrial structure[13]. Control in a legal sense will be established at the lowest level of companies, but will normally not include the ultimate shareholder, who might not be subject to group law rules[14].

Reflection Group (2011)

[10] Article 5 Companies Code 1999.

[11] Article 8 Companies Code 1999, referring to the shares held by the parent and its subsidiaries

[12] In case of bank, a duty to avert systemic risks may be accepted as a duty of the even passive shareholder. In practice, the prudential supervisor will normally prod the passive shareholder into action. For a duty for the parent to support a subsidiary: Malherbe a.a, o.c. 1625. See differently in general company law: Dieux, Les groupes de sociétiés, Un état des lieux p 7, referring to P Van Ommeslaghe, Le financement de groupe, La banque dans la vie de l'entreprise.

[13] See: Shermann & Sterling, ISS, ECGI, Proportionality between Ownership and Control in EU listed companies, **2006,** http://ec.europa.eu/internal_market/company/docs/shareholders/study/final_report_en.pdf

[14] On the subject: High Level Group of Company Law Experts (2002), Ch. V: Groups and Pyramids, at pp. 94–100. This will be different for the assessment of that shareholder under the fit an proper test in banking: here reality will prevail.

De facto control refers to the case in which one shareholder holds or controls the voting rights for less than 50% of these rights, but is able to determine the decisions at the general meeting, holding the majority of the shares that have cast their vote[15]. A significant number of Belgian listed companies are controlled on a "de facto" basis[16]. The notion is also used in tax law[17]

3. Types of groups and their formation

By way of presentation, it is useful to distinguish the different ways groups are constituted. The simplest one is the setting up of a subsidiary by the parent, sometimes with one or several outside parties. This process is important from the angle of access to the European markets, esp. in financial services: a EU registered parent has the right to create subsidiaries and branches all over the Union, without further authorisations, or major formalities. This right of free establishment will lapse after the UK Brexit, the UK becoming a third country. From the angle of group law, the creditors and minority shareholders of the subsidiary will enjoy the protection of general company law in the jurisdictions of its establishment.

The group may be formed from the acquisition of an important shareholding in different unlisted companies: these transactions are governed by common contract and company law, e.g. with respect to protections of shareholders, creditors, or employees. Family owned groups of companies are often created this way.

When the holding is acquired through a public bid – most of the time on a stock exchange listed entity- the rules on takeover bids will apply. The bidder must seek to acquire all shares of the target company. A detailed procedure will apply, especially dealing with financial information, and conduct rules, both administrated by the market supervisor, FSMA.

If the company shares are traded on the regulated market, the bidder who has or is seeking acquisition of control, will be obliged to launch a bid on all outstanding shares. Belgian law, pursuant to the Europe directive provides for a mandatory bid at the 30% threshold on all outstanding shares and at the same price of any pre-bid private acquisition. The rule also applies on mere crossing of the threshold, with exceptions. External supervision is exercised by the FSMA on the regularity of the procedure and on the information to be made available to the investors.

[15] See FSMA, https://mcc-info.fsma.be/fr/quest-ce-quun-actionnaire-détenant-le-contrôle-de-la-société, adding that the requirement should apply in the last and the penultimate general meeting.
[16] See Vander Elst,Chr., Shareholders as Stewards: Evidence from Belgian General Meetings (January 1, 2013). SSRN 2270938
[17] See Gent, 3 January 2017, TFR 2017, afl. 521, 392 and http://tfrnet.larcier.be/ (23 May 2017), nt. WOUTERS, P., where the owner of one share was held to be controlling as he determined the policy, was the only person knowledgeable of the activity, while control was stable and continuous.

4. A group of companies is not considered a legal entity

Belgian company law does not consider a group of companies a legal entity: this would mean that each component entity is considered on its own, both with respect to its decisions, its organization, its liabilities. Therefore, there is no group liability, but only individual liability for specific decisions, acts or omissions, e.g. in case of bankruptcy, under certain circumstances extended to another company, usually the parent. Consolidated accounts serve to give a view on the overall value of the group, and its holding entity, but it is agreed that this does not express the concept that the different group entities are one single addressee of the law. Stemming from that view, the position of group management is defined on a one by one basis, and not in terms of overall
group actions. Belgian law does also abstain from recognising the group as a "business organisation", addressing the issues specifically entity by entity: this is different in some parts of the EU law, e.g. in competition cases, where sanctions are imposed on the group as a whole[18]. Similar cases of a consolidated or integrated approach are found in financial regulation, e.g. in the Directive of Recovery and Resolution. These would be considered EU law-based specific applications.

Realities are however very different, and group management decides on the overall aspects of group management. Usually the parent actively coordinates the business decisions of the component entities, most of the time by having its representatives on the board of the subsidiary. But more indirect ways of including a subsidiary in the overall group actions are achieved by commercial means – common products, sales policy, e.g. – but also by management instruments such as common budgets, integrated accounting, single HR policy, delegation of parent's staff, integrated IT, etc. In practice, fully controlled subsidiaries often act as the extended local arms of the parent, and are almost identical to branches. This raises of course a number of issues, e.g. in terms of decision making by the subsidiary board, or in terms of group liability.

The existence of a control relationship does not eliminate the regular functioning of the corporate bodies of the subsidiary such as the general meeting and the board of directors. Legally these bodies adopt decisions pursuing the interest of the subsidiary but taking into account the group interest.

5. Intragroup relations

In legal terms the controlling shareholders exercise their legal privileges as members of the general meeting. In that capacity, they delegate the members of the board of the controlled entities and are enabled to decide on the actions and policies to be

[18] see ECJ (European Court of Justice), C-440/11 P, 11 July 2013 (Commission v. Stichting Administratiekantoor Portielje and Gosselin Group NV); ECJ, General Court, T-543/08, 11 July 2014 (RWE and RWE Dea v. Commission), attributing to a parent activities of a subsidiary that carries out, in all material respects, the instructions of the parent. See: ECJ, 10 April 2014, Joined Cases C-247/11 P and C-253/11 P

developed by these entities. Legally, they are not entitled to give binding instructions, but can outline the overall framework within which the group is expected to function in a coordinated way. The group delegates in the subsidiary boards are expected to implement the policies and decisions adopted at group level, but without putting in danger the position of the subsidiary and its stakeholders, its investors – if any – and its creditors. Non-compliance with group decisions will usually lead to terminate the mandate of the delegates, or even their employment in the group. This functional duality is addressed in Belgian law in different ways.

a. Taking into account the group interest

A first topic is dealing with the inclusion of the group interest in the decision making of a single entity even when the decisions are a charge to the position of the subsidiary. To what extent are subsidiary directors bound to implement group decisions? Can group management impose decisions that are legally binding, thereby risking to shift the liability for detrimental decisions to the parent? And are subsidiaries entitled to support from the group management?

The basic approach which is largely shared in legal writing consists of accepting that the membership of a subsidiary in a group may bring significant benefits to the subsidiary but also results is corresponding charges. Therefore, a balance has to be struck between burdens and benefits to the subsidiary. On the other hand, the powerful position of the parent exposes the subsidiary to its abusive conduct, to the detriment of the subsidiary's investors, its creditors and other stakeholders. The way this balance is struck has been extensively analysed: mainly three systems can be distinguished. A first one, followed in the UK considers a subsidiary as any other independent company, and except if the parent's actions are "unfairly prejudicial" to its interests, the law will not intervene. At the opposite end of the spectrum, according to the German and Austrian law the subsidiary will have to be compensated for the prejudice the group has caused it, based on an annual assessment of benefits and charges[19]. In addition, in the system of contractual groups, the German companies act allows the parent to give binding instructions under the obligation to offer the minority shareholders whether a recurrent compensation or to propose to purchase their shares. The Belgian- French solution – often referred to as the "Rozenblum" technique – accepts that the subsidiary may be exposed to charges, but these should not exceed the financial capacity nor be without a corresponding advantage. Implicitly it decides that a subsidiary, as a separate legal entity, may take into account the group interest in pursuing its own statutory objectives, but only within limits.

The four conditions of the Rozenblum approach can be summarised as follows:

- the existence of group relations between the companies concerned should be based on a common interest, formulated against the background of groupwide objectives
- group internal relations should have a reciprocal consideration

[19] This regime applies to the "de facto groups" (Faktische Konzerne)

- which should not distort the balance of the respective liabilities of the companies concerned
- nor exceed the financial capacity of the group entity supporting the burden

The three systems compared present quite some commonalities: each allows the parent the direct quite substantially the decisions and activities of the subsidiary, allowing to develop a common, possibly groupwide policy. The limits to this freedom consist of the prejudice caused to the subsidiary, for which the criteria seem to be different. Where in the German system annual effective compensation should be offered, in the other systems an exposure to the parent, or a risk of indemnification due to the parent's interventions may be created. The Rozenblum technique traces the outer limits at the level of insolvency of the subsidiary. This criterion can be used for assessing several aspects of group behaviour, such as defining the limits for group instructions or intervention, for determining the parent company's liability or the personal liability of the directors of the subsidiary or more exceptionally of the parent directors, but it has also been used for judging in contract law the validity of certain contracts or, in criminal law, the behaviour of shareholders organising transfers between related companies[20] or in favour of themselves[21]. The Belgian system comes the closest to the French reading, allowing the group interest[22] to be taken into account but with restrictions. The case law contains some examples of these restrictions[23]:

- the parent cannot impose a transaction that is totally contrary to the interest of the subsidiary; or that leads to charges that are disproportional to the subsidiary's effective capacity; support should be based on the interest of the group; but it should not be in the sole interest of the parent
- the parent should not oblige the subsidiary to constitute a guarantee in the sole interest of the parent.

The Rozenblum technique can be criticised as being very lax allowing the parent to impose decisions on the subsidiary, without any clear business justification, and for which no equivalent consideration is due. The is no specific time period for meeting these conditions, while the compensation may be postponed indefinitely. The insolvency criterion is the outer limit: it traces the outer border of the parent's duty of care.

[20] The original Rozenblum case related to a transfer of assets between companies owned owned by the same shareholders, but without economic justification: Rozenblum Cass. crim. 4 February 1985, JCP ed G II, 1986, p. 20585, note J. Didier. Among the other French cases see; (Cass. Crim. fr 14 February 1993, Bull Joly, 1993, 225, note Jeantin; (Cass. crim. 2 December 1991, n° 90-87563). In other cases, reference was made to at least 'un lien logique minimal': CA Paris 14 February 1984, Juris-Data N° 021620; see also Cass. crim. 9 December 1991, Rev Sociétés 1992, 358. For Belgium: Brussels, 15 September 1994, 275, J. Tribunaux, 1993, 312, TRV, 1994, 275, nte A. Francois (Wiskemann case).

[21] Article 492bis Criminal Code, declares criminally liable, directors, including de facto directors who have used in a fraudulent way and for their personal interest, the assets or the reputation of the company, although they knew that this would be significantly detrimental to the company, its shareholders or its creditors.

[22] What this reference to the group interest implies deserves further analyses: is it the parent's interest, or that of the entire group of companies, or even that of one single other subordinated entity? Technically, several legal provisions only take into account the interest of the other party involved in a transaction or decision.

[23] See for an overview, Dieux, X, Les groupes de sociétiés, Un état des lieux, in Liber Amicorum H. Braeckmans. xx

The practical applications of the Rozenblum are manifold. With respect to the independence of judgment of directors of the subsidiary, which although defended as a matter of principle, in practice is usually applied in a very flexible sense, “Rozenblum” allows the directors to follow the indications given by the parent, but up to the limits of the ultimate interest of the subsidiary in terms of solvency, and on an ongoing basis, to ensure that it obtains in exchange a reasonable “consideration”. The latter may consist of any advantage, such as the right to distribute the products of the parent on an exclusive basis, to be able to use the parent’s name, or its trade marks, etc. There does not have to be an agreed framework for this exchange, nor any minimal benchmarks, such as a price.

The Rozenblum approach has been considered a useful criterion in several other EU jurisdictions[24] and was welcomed by the European Commission. However, the Commission has not yet taken a position on this matter.

The Rozenblum approach does not answer the question to what extent the parent has some duty to support its subsidiary and vice-versa, whether the latter can reasonably expect support from the group. For economically integrated groups, where the functioning of the subsidiary is deeply integrated in the overall group, there is a reasonable expectation that this support will continue: a sudden disruption would render the parent liable[25]. At the same time, there is no overall duty to unconditionally support the existence of the group entities. Timely notice of discontinuation should apply, comparable to any other outsourcing agreement.

b. Legal safeguards for minority interests

A second aspect of this question relates to the solutions the legal system can offer to avoid or sanction breaches of this duty of care. There is a wide array of tools to avoid the minority in a subsidiary to be maltreated. Some of these are general company law tools, others are relying on the financial market’s disclosure approach, finally the question can be analysed from the angle of the conflicts of interest and the related party transactions.

A first series of protective techniques is based on general principles of law, including company law. The companies code defines the objective of the company as “procuring a direct or indirect financial benefit to its shareholders of members”[26]. Therefore, shareholders including controlling shareholders can only use their powers and privileges in the interest of that objective. However, these shareholders will assess to what extent their actions will be conducive to this objective: they will only be

[24] P.H. Conac,Director’s Duties in Groups of Companies – Legalizing the Interest of the Group at the European Level , ECFR, 2013, 194
[25] Comp. article 442-6-I-5 of the French Code de Commerce.
[26] Article 1 Companies code; comp. the previous definition in the Civil code, still applicable in France (article 1833 Cc), according to which the company should act in the common interest of its members. The Corporate governance code clarifies that is the “Long term interest” of the company.

sanctioned in case the decisions manifestly or grossly diverge from that objective. These are the cases of “abus de majorité”, “abuse of majority power”, a subcategory of abuse of right. If someone uses his legal or factual position to adopt decisions or undertake actions with a view of inflicting damage, or if a parent imposes decisions or concludes transactions that are manifestly or grossly detrimental to the subsidiary or to the minority shareholders, the court may conclude to abuse and whether set aside the decision or transaction, or allocate damages. In cases of repeated abuse, this may qualify as “serious grounds” allowing the shareholder to withdraw from the company[27].

It is generally not recognized that boards are held to fiduciary duties towards the shareholders, as their duties are considered to be based on the companies law, expressing their general duty of care as can be expected from a normally diligent and responsible director. [28].

The Belgian corporate governance code refers to the role of the representatives of controlling shareholders, mainly in the parent company, inviting them to make a judicious use of their powers and respecting the rights and interests of minority shareholders. Group issues are not specifically addressed.

The protection of minority shareholders of the subsidiary of a group is ensured by several instruments. Changes in the articles are subject to a qualified majority vote, with a 50% quorum and a 3/4th majority. According to general company law, minority shareholders holding at least 1% of the shares[29], may sue the directors in liability in a derivative capacity. However, the plaintiff has to advance the fees and expenses relating to the lawsuit, and if the latter is successful the proceeds will benefit the company. The remedy is rarely used. However, shareholders may also sue directly in civil liability, on the basis of the general rules on negligence, often claiming in the context of a criminal case. Another avenue if the provision in company law according to which directors are jointly and directly liable to prejudiced parties if they have breached the companies act, or the articles of the company[30]. The companies act contains a far-reaching provision declaring the directors jointly and severally liable for the their serious and characterized negligence – “faute grave et caracterisée” – which has contributed to the company’s insolvency. The liability is unlimited, i.e. can amount to the total amount of the loss, as fixed by the tribunal[31]. The liability applies without the strict rules on causation. The action can be brought by the bankruptcy receiver, or by the creditors.

Disclosure is an important instrument for the protection of shareholders, and minorities in particular, but creditors as well. For companies traded on the markets, an extensive

[27] See about this remedy, see infra articles 636 e.s. 642 Companies Code (“de l’exclusion” and “du retrait”)
[28] See article 522 e.s. Companies code, where only the powers of the board are defined, to be exercised with a view of achieved the company’s objective.
[29] Or standing for a value of at least 1.250.000 euro; article 562, Companies Code
[30] Article 528 Companies Code
[31] Article 530. See e.g. Comm Mons, 12 November 1979 JT 1980,265.

information will allow investors to decide with full knowledge and detailed information on the most important aspects of group relations in the parent's financial statements – consolidated but equally important, solo -, while reports on subsidiaries will be published in the parent's annual reports[32]. Belgian law, pursuant to EU directives has introduced an extensive disclosure regime dealing not only with annual and consolidated accounts, but also with a developed regime of continuous disclosures. This information is available in electronic format at the FSMA website[33]. The annual reports of these companies contain specific information on related party transactions as mandated by the Companies Act, which is particularly relevant from the point of view of group law.[34] The annual report of listed companies should also mention the "substantial limitations or charges which were imposed by its parent company or which the listed company has requested to be maintained"[35]. In case of market operations, extensive prospectus disclosures will inform investors.

In rare cases, general company law has accepted that "abuse of majority" can be the basis of remedies, such as liability or nullity of the transaction. This remedy could be applied to the controlling shareholder, and protect creditors as well.

In addition, Belgian legislation contain a specific regime allowing the mandatory transfer of shares especially in cases in which "serious grounds" justify that the relationship be discontinued. These rules are only applicable to unlisted companies or companies that have not issued shares to the wider public, including private companies[36]:

- Shareholders holding 30% of the shares of an unlisted company may request an individual shareholder to transfer his shares to them, on the basis of "serious grounds" in practice for reason of conflicts with that shareholder. The transfer takes place according to a judicial procedure, the judge deciding on the transfer price[37]
- The opposite remedy also applies: any shareholder in an unlisted company may request his shares to be taken over by the shareholders to which the Serious reasons apply. Here too a judicial procedure will be followed[38]. In this case, there is no quantitative limit.
- Both instruments could substantially contribute to better functioning of the company also in a group context.

With respect to companies the shares which have been issued to the public – normally are traded on a regulated market – the regulation contains a comparable remedy

[32] See Royal Decree 14 November 2007, relating to the obligations of issuers of securities admitted to trading on a regulated market. Disclosure about subsidiaries may raise questions of confidentiality, see : Dieux, X. Les groupes de sociétés : Un état des lieux, une obligation de discrétion", §14 Liber Amicorum Herman Braeckmans, November 2017

[33] See FSMA, Stori, or Storage of Regulated Information http://stori.fsma.be/Pages/Search.aspx?PageID=8c74512c-9dd2-452d-8092-d78ee622bf9f

[34] Article 523 Companies Code.

[35] Article 523 §7

[36] BVBA- SPRL articles 334 and 340, Companies Code

[37] See article 636 e.s. 642 Companies Code

[38] see article 642 e.s. Companies Code (sell-out)

allowing the 95% shareholder to take over the remaining shares[39]. But the minority shareholder has no rights to have his shares taken over. This normally is part of a going private resolution.

c. Conflicts of interest and related party transactions

The third strand relates to the conflict of interest subject. The Companies law of Belgium pays ample attention to the issue of conflicts of interest in companies with limited liability[40]. First in the context of the conflicts between a board member and the company. Here the usual rules apply: notification of the conflict to the board, indication of the reasons for the conflict, information to the auditors and report from them, but no obligation to abstain. Only for companies that have issued securities to the public – i.a. all listed companies - the conflicted directors should not take part in the meeting and in any case, abstain from taking part in the vote. The report of the board is published[41]. Similar requirements apply to conflicted members of the management board[42].This provision is not applicable to decisions relating to a company and its 95% subsidiary, or between subsidiaries of the same parent, allowing for flexible management decision in integrated groups.

Decisions or transactions between certain group companies – i.e. related party transactions - are in addition subject to an elaborate procedure: these are transactions, or decisions relating to a listed company and other group companies, "linked companies" in the Belgian terminology. These include the companies subject to the control of the listed company, the companies that control the listed company, the companies that form a consortium with the listed company and all other companies that are controlled by any of the foregoing[43]. Controlling shareholders, other than companies, would not fall under this provision: this is important for family shareholders, or legal entities other than companies, and may raise doubts about the effectiveness of the Belgian regime.

The procedures are based on four elements: an expert opinion, a decision by a subcommittee of independent directors, approval by the board, disclosure[44] . The subcommittee determines the benefits or charges for the company and for its shareholders and whether the decision or transaction is likely to result in "manifestly abusive prejudice to the company in the context of its policy". The full board will discuss

[39] See Royal decree 27 April 2007 (Squeeze out).The Constitutional Court, in its decision of 14 May 2003, held that this is not a breach of the principle of equal treatment; Rechtskundig Weekblad, RW 2003-04, 808 ; TRV 2003, 471, nt.Wauters, M.

[40] Applicable to the private company (BVBA article 258) and to the public company (NV article 523 Companies Code).

[41] For details see article 523 Companies Code; see (iii).

[42] Article 524 ter, Companies Code, not applicable with 95% subsidiaries : article 523 § 3

[43] Some transactions are exempted: day-to day transactions or transactions for less than 1% of the group book value as expressed in the consolidated account

[44] Including the report by the expert, and the decision of the subcommittee ; Deveseler, C, Les conditions d'application de la procédure en conflits d'intérêts et la mise ne cause de la responsabilité des administrateurs en cas de non-respect de l'article 523 du Codes de Sociétés, Note Comm Liege, 21 April 2015 TRVRPS 2016, 284-293

the report, conflicted directors abstaining, and disclose the main documents in its annual report[45].

Breaches of these rules expose the company to nullity of the decision or transaction, but only the other party knew or had reasons to know of the breach. Directors will be exposed to joint and several liability for the prejudice suffered by the company or by third parties, even if the decision was undertaken in compliance with the above procedure, but has procured an "abusive financial advantage to the detriment of the company[46].

The present regime can be criticized as it does not include transactions at the level of the controlling shareholders, other than the parent entity. Individual shareholders- and especially controlling shareholders other than listed companies are not subject to this provision. Also, the present status of information does not allow to assess the actual practices[47] .

Corporate opportunities are not expressly viewed in the Belgian law[48].

6. Legal safeguards for creditors

Creditors of the subsidiaries are protected by a number of general legal or company law tools. In 100% owned subsidiaries, the possibility to have the parent and possibly other group entities liable, may be the main concern for group management.

The creditors of a subsidiary are protected by the instruments generally available to them, as in any company. The difference consists in their possibility to declare the parent liable, and to also involve the directors of the parent, or of other group entities.

General own negligence of the parent may be the cause of its liability: the parent deciding to abruptly stop the activity, or to refuse delivering essential parts for the subsidiary's production process would commit negligence, which would be a sufficient basis for its liability[49].

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[45] Including the report by the independent expert.

[46] Article 529, Companies Code

[47] ***Chr. Van der Elst, The Duties of Significant Shareholders in Transactions with the Company***

In : Hanne Birkmose, Shareholders' Duties, Kluwer Law International (2017) SSRN 2876575
Nordic & European Company Law Working Paper No. 16-11, proposing to convey the decision to the audit committee.

[48] Art. 524(7) Belgian Companies Code, which states that the annual report of the listed entity should mention the substantial limitations or charges which were imposed by the parent company or whose continuation it requested: this is considered to include corporate opportunities. See De Wulf, H., Taak en loyauteitsplicht van het bestuur in de naamloze vennootschap, at p. 705 et seq. (2002),

[49] See for the French law: article 442-6-I-5 of the French Code de Commerce. Brussels 3 February 1988, Journal de Tribunaux, 1988, 516. See on the legal effects of legitimate anticipation of someone's behavior: Dieux, X., Le respect dû aux anticipations légitimes d'autrui, Essai sur la genèse d'un principe général de droit, Bruxelles, Bruylant 1995.

Liability of the parent or of the directors of the parent may be based on their lack of diligence in following up to the activities of the subsidiary and especially its deteriorating financial condition. The continuous activity of the subsidiary was the basis on which the creditors' relied to assess the parent's solvency. As a shareholder, the parent has the right to stop the activity of the subsidiary, and hence avoid additional damage to the creditors of the subsidiary and even to its own creditors

"Wrongful trading" is closely related to the previous case: it may lead to liability if the directors have continued to trade, although they knew or should have known that insolvency was inevitable. Both types of liability can be based on the general regime applicable in case of negligence.

These liabilities can be extended to the parent company, which has acted as "de facto" or "shadow" director, in which case the legal consequences will be directly attributed to the parent and the "shadow" directors will be held in the same terms as the "de iure" directors. This risk of parent liability explains the reluctance of the parents to give formal instructions to the subsidiary, and the differences in composition of the boards of parent and subsidiary.

In case law, there was an important development allowing the "extend the bankruptcy" to the "master of the business" i.e..,. the person behind the company who decides about all company matters, often implying far going commingling of assets. Although the supreme court limited the scope of this technique, it is considered still to be applicable on the basic of general negligence or on abuse of law[50], or contrary to the principle of the unity of the patrimony. [51]

The directors of the subsidiary are normally only liable to the subsidiary. They may be liable to its creditors according to general company law principles for breaches of the companies law or the articles of the company. Whether the circumstances that they acted on the instruction of the parent is relevant in this context could be determined by applying the Rozenblum principle, according to which they may take into account the interest of the parent and of the group, provided the Rozenblum conditions are fulfilled.

Group liability may also be based on statutory remedies. As mentioned above, article 530 of the Belgian companies law declares the directors personally liable for a "faute grave et caracterisée" which has contributed to the bankruptcy[52]. The liability is extended to any person who has had the "effective power to manage the company", what might include the parent company held as a de facto director in the subsidiary. The amount of the liability will be determined by the judge, and could run up to the total bankruptcy losses. The rule is applicable in cases of money laundering and terrorist financing, and in case of a repeated bankruptcy resulting in non-payment of social security contributions[53]

[50] See « abus de droit » : Dieux, Les groupes de sociétés, nt 56, Braeckmans and Houben, ,Vennootschapsrecht nr 62, p.46 See Comm Mons, 12 November 1979, JT, 1980, 265

[51] As laid down in article 7-8 Loi sur les Hypothèques, part of the Civil Code. This famous principle goes back to the writings of Aubry and Rau.

[52] Similarly, for the private company, article 265 Companies Code;

[53] See: Constitutional court, nr. 139/2009, 17 September 2009

Joint trading may be another source of liability: this refers to the case where parent and subsidiary, or two subsidiaries act together in such a way that third parties had the justifiable impression that they were joint business partners, or acted in an unnamed joint venture[54]. They will be treated according to the appearance that was created and be held jointly and indefinitely. In the same vein, joint liability will be decided if the assets of two business firms are so commingled that it would be impossible to identify what belonged to whom[55].

Another theory consists of holding the legal personality of a company for fictitious, and hence attributing all the consequences and liabilities to the person trading under the cloak of the company. Piercing the corporate veil is a technique used in some EU counties but has not been recognized in Belgian law.

7. Conclusion

Belgian law on groups of companies is partly based on statutory provisions, partly on general principles of law, including company law

The statutory part mainly deals with the relations with or between shareholders, and the position of the directors of the subsidiary and of the parent. The practical application of these provisions has to be analysed on the background of the corporate governance rules, of the financial regulation – especially in the field of accounting, auditing and disclosures - and its implementation by the financial supervisory commission. In the group context, the provisions on conflicts of interest- and their specific variety of the related party transactions – constitute a useful complement.

The non-statutory part of group law mainly concerns the relationship of the parent and the subsidiary. Although the latter is considered an independent legal entity, the relations with its parent take into account the organic dependency of the subsidiary. This results in an approach under Belgian law that comes close to the French view, referred to as the “Rozenblum” view, which without allowing formal and binding instructions, allows the subsidiary to take into account the group interest. The outcome is a rather accommodating relationship between parent and subsidiary.

Annex

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[54] Fr Cassation 24 March 1997, Revues des Sociétés, 1997 554, ann P. Didier
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