The Theory and Practice of Corporate Groups

Erik P.M. Vermeulen
THE FUTURE OF EUROPEAN COMPANY LAW

X. GROUPS OF COMPANIES

QUESTION 19

Do you see a need for EU intervention in the field of groups of companies?
Hey, don't worry about me.

Legal Framework for Groups of Companies
X Groups of Companies

From a business perspective, company groups or holdings are a reality. However, not all national legal systems have come up with specific legal frameworks dealing with groups of companies. Many Member States have legal safeguards in place which try to deal with the most important legal issues that may arise in such a context. At EU level, there were attempts in the past to produce a comprehensive European framework on groups of companies, the so-called 9th company law Directive. This initiative never succeeded. The Reflection Group has tabled recommendations which are not aimed at creating an exhaustive legal framework, but try to target specific aspects where they feel action\(^6\) is needed. We would like to seek views on them.

19. Do you see a need for EU intervention in this field? (Single choice)

- Yes, there should be an EU intervention (Multiple choice)
  - The Commission should recommend the recognition of group interest.
  - The EU should require groups to provide information on their structure in a consolidated, investor-friendly and easy-to-read document.
  - Other: Please specify. (max 500 characters)
- No, there is no need for EU intervention.
- No opinion.
Consultation on the future of European Company Law

X GROUPS OF COMPANIES

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Over two thirds of respondents expressed support for EU intervention in the area of groups of companies. Support came in particular from lawyers but also from companies, trade unions and universities.

Replies by sector

- Lawyer/notary: 30%
- Business federation: 11%
- Research institution/Think tank: 11%
- Other: 8%
- Individual: 5%
- University/College: 5%
- Other financial services: 1%
- Banking: 2%
- Insurance: 6%
- Other liberal profession: 2%
- Auditor/accountant: 3%
- Consultant: 3%
- Public authority: 5%
- Institutional investor: 0.4%
- Civil society: 3%
- Trade Union/Employee body: 2%
- Retail investor: 0.2%
- Company (non-financial): 5%
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The Theory
The Issues

Managers
- HoldCo NL
- Sub HoldCo Sweden

Managers
- Sub 1 Denmark
- Sub 2 Finland

Managers
- Employees
- Creditors
- Society

Branch Dubai
Proponents of EU action supported almost equally measures for better information on the group structure and the recognition of the group interest. Some also recommended other actions in this area, and namely several respondents mentioned the need for rules establishing liability of the parent company for subsidiaries. A small number of respondents also supported a harmonised European framework for corporate groups. Many respondents underlined, however, that any rules on groups should protect the interests of stakeholders involved, namely those of minority shareholders and creditors. Several responses also supported rules on groups of entities other than limited liability companies (such as mutual companies), rules on cash pooling or the need for equal treatment of vertical and horizontal groups.
The Issues

- Recognizing the Interest of the Group
  - Providing Information on the Group Structure, Group Functioning and Management
  - Safeguarding the Interests of Subsidiaries and its Stakeholders

- The Issues
  - Employees
  - Creditors
  - Society

- Managers
  - HoldCo NL
  - Sub HoldCo Sweden
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  - Sub 2 Finland
  - Branch Dubai
The Real Story...

Interest Group Regulation?

Lawyers

No Opinion

No

Yes 80%
No 14%
No Opinion 6%

More Interest Groups

Insurance Companies

74% “Solvency II” – Recognition of horizontal groups

NO 11%
YES: Group Interest 31%
YES: Other 51%

Public Authority

NO 27%
YES: Group Interest 18%
YES: Information 31%
YES: Other 6%
NO OPINION 18%
What about Companies?

Business Federations

- NO: Opinion
  - 19%
- YES: Group Interest
  - 15%
- YES: Information
  - 7%
- YES: Other
  - 14%
- NO
  - 45%

63% Insurance Companies

Non-Financial Companies

- NO: Opinion
  - 14%
- NO
  - 21%
- YES: Group Interest
  - 34%
- YES: Information
  - 24%
- YES: Other
  - 7%

n=26 (54% German)
Because these issues relate to all companies, and most groups are not listed, an EU legislation and/or recommendation on groups should not be limited to public listed companies but also include private ones. However, two different alternative approaches have been also suggested in the Reflection Group. Some members of the Reflection Group are of the opinion that the recognition of the interest of the group should be limited to wholly-owned subsidiaries. Other members considered that the regime should not apply to listed subsidiaries.

Furthermore, some members of the Reflection Group are not in favour of any action at EU level on groups. Other members would not oppose the recognition of a doctrine involving the interest of the group and adoption of ‘an interest of the group’ doctrine, be it for listed or non listed companies, with appropriate safeguards, but only as a choice made by individual companies (opt-in).
The Practice
Safe Harbour for Managers?

- **YES:** Group Interest 32%
- **YES:** Information 34%
- **YES:** Other 15%
- **NO** 17%
- **NO OPINION** 2%

Diagram:
- **Sub 1** Denmark
- **Sub HoldCo Sweden**
- **Sub US**
- **Sub NL**
- **HoldCo NL**
- **Employees**
- **Creditors**
- **Society**
- **Branch Dubai**
Safe Harbour for Managers?

- One-Size-Does-Not-Fit-All
- More Interests than Group, Parent and Subsidiary
- More reporting lines
- Formalization at EU level leads to inflexibility & uncertainty
- Internal Rules & Guidelines
Basic Information on Group Structure (and Management)

- **Sub 1**: Denmark
- **Sub 2**: Finland
- **HoldCo NL**:
- **Sub US**:
- **Sub NL**:
- **Branch Dubai**:

**Employees** → **Creditors** → **Society**

Pie chart:
- **YES: Group Interest**: 32%
- **YES: Information**: 34%
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Diagram:
- **Sub 1**: Denmark
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Investor friendly and easy to read? Generic & boilerplate statements!

Technical information is needed for a clear understanding

“Separation of ownership & control”
Appropriate rules to safeguard the interests of the subsidiary and its stakeholders

YES: Group Interest 32%
YES: Information 34%
YES: Other 15%
NO 17%
NO OPINION 2%

Employees Creditors Society

Sub 1 Denmark
Sub HoldCo Sweden
HoldCo NL
Sub US
Sub NL
Sub 2 Finland
Branch Dubai
1. Focus on “agency problems”

2. Formalization leads to more questions + change in behaviour

3. “Financializing” or “derisking” the group of companies (less innovation and value creation)

Appropriate rules to safeguard the interests of the subsidiary and its stakeholders
No EU Intervention

EU Intervention, but more research is needed: “one-size-does-not-fit-all”

EU Intervention: Opt-in approach (particularly relevant to non-listed groups)
Thank you!

e.p.m.vermeulen@tilburguniversity.edu