Groups of Companies – Les groups de sociétés

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Introductory remarks about the subject

‘Groups of companies’ is a topic that affects various different areas of Law. Not only is there a range of definitions in each national or international piece of legislation, but also according to the purpose of the specific rules attached to the concept (Company Law, Competition Law, Tax Law, Capital Markets Law, Labor Law, Insolvency Law, etc.) This is why the point of departure of these remarks will not be to provide any definition; this will rather be given in each national report for the benefit of a more in-depth and wider scope of comparison.

The report is expected to deal only with the so-called subordinated groups, thereby excluding the different forms of joint venture, coordination or cooperation groups. In other words, it is intended to prepare a comparative study of the groups which include a dominant or controlling party (not excluding joint control by more than one entity) and one or more subordinated or controlled companies.

It will be important to establish where the approach of each piece of legislation starts and where it finds its limits. Are the rules structured only around the idea and the consequences of such domination or control? Do they (also) deal with a legal definition of groups thus including a more intense exercise of power over the controlled companies by means of the presence of a unified direction of the group, or einheitliche Leitung, direzione unitaria, dirección unificada, or whichever way this element is called in different languages and countries? Is a so called group management permitted or would it lead to unfavorable consequences?

One very relevant question to be answered by each national report is if and where the legislation or case law in the different areas of law sets a limit to the concept of domination or control. In other words, whether the law of each jurisdiction admits special rules to be applied only where the domination is exercised by means of organic control (where the dominating entity exercises its control over the internal decision making process of the subordinated company), or whether it also includes the so-called external economic control by means of a dominant influence based on a contractual relationship, for example as provided for in Art. 2359 – 3) of the Italian Civil Code.

Another aspect which is relevant for a comparative report is how the law deals with each company’s own interest. Are there concessions to a so-called group interest, which would permit business decisions to take into account the synergies between the different
entities which belong to a group? If so, what are the conditions to impose on a subordinated company as a price for the sacrifice of its own interest?. Would ideas like the French Rozenblum doctrine, or the propositions of the *Forum Europaeum on Groups of Companies* and the *High Level Group of Company Law Experts* be accepted?

Since the purpose of the Academy is to promote the permanent development of new ideas in the field of law, it is of utmost importance to deal not only with statutory law and existing case law, but also with projects and new propositions, both at the national and cross border level.

Groups of companies are not a matter which is exclusive of the private sector. In many countries it is also a subject of concern where state owned or controlled enterprises, or companies that are mixed ventures between public and private entities, are part of the economic activity. It will be interesting to compare how these cases are included, or left aside, when it comes to the application of the private law rules on company control or groups of companies.

The issue of special rules for foreign or multinational groups is also relevant in many ways. This may be important for procedural aspects, for instance: could notice of a claim be served at a subsidiary if the defendant is a foreign head or another member of a group of companies?

The most frequent issue is, of course, when and how liability can be extended to a parent company. It is extremely rare to find legislation that provides for strict liability. But there are large differences when it comes to determining when the parent’s conduct or interference may lead to liability. In relation to this issue, the much wider question arises as to how the *lifting the corporate veil* doctrine is accepted and applied in each country. In most, if at all, this is a matter for case law construction, but in some jurisdictions there are specific statutory rules that admit some form of this doctrine. Its relevance may be enormous, because it may go beyond the limit of just extending the liability of a subsidiary to a parent or to another member of the group – to encompass the possibility of requesting specific *in natura* performance of contractual obligations from other entities than the one which is a party to the agreement.

The range of matters on which the presence of a group of companies may have influence extends to unexpected areas. For instance, would it be acceptable to include a parent company, or a subsidiary, or a sister company, in the binding effects of an arbitration agreement? How far, one could ask, is the controlled company’s will power affected by the head of the group?

It becomes clear that the wide scope of the problems raised by the subject should induce national reporters to treat the questions which are proposed below as of an open kind., to allow for a reasonable response in accordance with the reality of each jurisdiction.

**Practical suggestions for the national reports**

- The International Academy of Comparative Law does not give fixed instructions as to the length of the reports. National Reports are usually between 15 and 25 pages as a maximum; the general report is expected to be between 50 and 60 pages.
- The language used must be either English or French. Nevertheless, where for the sake of ease of reference, a precise reference to legal texts or expressions makes it advisable, account may be taken of the fact that the general reporter can also read Spanish, German, Italian or Portuguese.

- The deadline for delivery to the general reporter is **August 2017**

- Publication of the reports is envisaged, but depends on circumstances some of which are beyond both the Academy’s and the general reporter’s control (finances, contents, length, arrangement with publishers, etc.).

- National reporters don’t need to adhere strictly to the questionnaire, but to follow its structure and order is important so that any reader can easily compare the different national (or international) approaches.

- It would be highly appreciated that the reports contain references to laws, acts, decrees, resolutions, ordinances (ordonnances) and to articles, paragraphs, etc., to allow for follow up of such references. The names of the piece of legislation cited should be maintained as in the country of origin. For instance, a law should be mentioned as law and not as an act, an article or a paragraph should be mentioned as such and not as section, or vice versa.

- Due to differences in each country or system, it is clear that not all the questions can have an answer. Nevertheless, it is expected that at least a minimum of information should be provided on why they are not addressed.

- The focus of the reports should be on the conflicts -both internal and vis-à-vis third parties- arising out of companies’ lack of independence when being part of a group. But the same sort of conflicts should also be addressed at the level of the parent company

- Notwithstanding many propositions at national and international level, no general consensus on reasonable solutions has been found to date for many of the issues raised by the existence of groups of companies. It is therefore worthwhile to continue deepening the knowledge and the discussion in order at least to understand the different approaches that have been developed, especially in view of the fact that the corporate groups’ presence is more often than not a cross-border phenomenon. The Congress of the International Academy provides, as it does in relation to so many other subjects, the chance to advance step by step in the search for solutions.

**Questionnaire**

- Are groups of companies or controlled companies in any way taken into account in any area of law? The following areas should be considered, mentioning the main purpose of rules or case law:

  (i) Company Law
  (ii) Capital Markets Law
  (iii) Bankruptcy Law
(iv) Competition Law
(v) Labour Law
(vi) Environmental Law
(vii) Tax Law
(viii) Consumer Protection and Product Liability Law
(ix) Foreign Investments Law
(x) Private International Law
(xi) The Law governing financial or insurance institutes.
(xii) Other areas of Law (regulatory bodies, procedural Law etc.).

- In regards to Company Law, are the regulations part of general corporate law? Are the rules part of general private Civil or Commercial law?

- How, if at all, are corporate groups or groups of companies defined?

- How if at all, is control of a company defined? What are the differences in the legal definitions provided for in the various areas of Law?

- What are the effects attached to the existence of control or domination?

- Rules on disclosure and accounting

- Are the regulations, if any, on groups and control of a general kind or are there differences according to the company's form (corporations, limited liability companies, partnerships, etc.).

- Is the group recognized as a unified business organization? As a legal entity?

- Rules regarding group management (unified direction, einheitliche Leitung, direzione unitaria, dirección unificada, etc.).

- Organic competences through the different entities which are members of a group.


- Case by case evaluation of group transactions vs. overall evaluation. Compensation of disadvantages.

- Minority shareholder’s protection in the parent company. Conflicts of interest: voting restrictions?

- Creditors’ and third parties’ protection in the subsidiary.

- Creditors’ and third parties’ protection in the parent company.
- Parent and subsidiary board members’ duties and liabilities: loyalty, fiduciary duties, utmost good faith and fairness. Confidentiality, self dealing, duty of non competing, conflict of interests. Other duties within a group.


- Auditors and internal organic supervisory bodies’ rights and duties in relation to subsidiaries and other group companies. Scope of investigation procedures and shareholders’ rights to request them.

- Related party transactions: disclosure and specific mechanisms.

- Separate legal personality of each group company. Guarantees within a group. Each company’s purpose as a limit for guarantees for another entity’s debts. Lettre de patronage.

- Disregarding of the corporate legal entity (lifting the corporate veil, Durchgriff, inoponibilidad de la personalidad juridica) as regards creditors and third parties (also shareholders?) protection.

- Insolvency: when is liability imposed on controlling parties and what is its scope?.

- Subordination and substantive consolidation.

- Liability for factual appearance and for breach of a created confidence.

- Transactions regarding the taking of control. Takeovers. Mandatory bids. Exclusion and withdrawal rights, squeeze out regulations: only for listed public corporations or also for private companies?

- Rules on group information to be provided to the market.

- Group information and rules in Competition Law

- Workers protection and social security regulations vis-à-vis national or international migration within a group.

- Special rules on environmental responsibilities within a group.

- How are groups treated for Tax Law purposes? Differences according to different taxes? Transfer pricing within a group. Special tax rules for enterprise reorganizations (merger, spin off, etc.).

- Liability of parent company in consumer protection and product liability law.

- Relevance of being part of a group in foreign investment law, investment protection treaties and registration of a foreign company in the country.
- Do Private International Law rules on companies change in the presence of a corporate group or of control over a local company. What national law is applicable to group companies in so far as concerns shareholder and creditor protection?

- Are there special rules on groups or control applicable to financial institutions or insurance companies? To other activities?

- Are there special rules on the participation of other group companies in an arbitration procedure?

- Any special procedural rules applicable to groups or companies under the control of another entity? Service of notice of a claim?

- Other matter of interest

- Summary, final conclusions and remarks.