LUISS Guido Carli
LIBERA UNIVERSITÀ INTERNAZIONALE DEGLI STUDI SOCIALI

Dipartimento di Giurisprudenza

CATTEDRA DI EUROPEAN BUSSINESS LAW

THE RECOGNITION OF THE INTEREST OF GROUPS OF COMPANIES IN EUROPEAN COMPANY LAW

RELATORE

Chiar.mo Prof.

Nicola De Luca

CANDIDATO

Marina Dell'Utri

Matricola n.149423

CORRELATORE

Chiar.mo Prof.

Ugo Patroni Griffi

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INTRODUZIONE

La presente tesi si incentra sul fenomeno dei gruppi di società ed in particolare sul tema legato al possibile riconoscimento del cosiddetto "interesse di gruppo", uno dei temi principali del moderno dibattito in ambito di diritto societario, al fine di valutare l'introduzione di una comune disciplina a livello europeo.

Nell'economia moderna i gruppi di società rappresentano la forma organizzativa maggiormente diffusa per le imprese che intendano espandersi sul mercato e ampliarsi a nuovi orizzonti, ottenendo sia i vantaggi derivanti dalla crescita come la possibilità di sfruttare le economie di scala, sia quelli legati alla separazione delle diverse entità del gruppo come la diversificazione dei rischi. Nell'ultimo secolo, ed in particolare negli ultimi cinquant'anni, il ruolo assunto dai gruppi di società è cresciuto esponenzialmente sostituendo la centralità del modello basato una singola società che aveva caratterizzato, invece, l'espansione economica del secolo precedente.
I gruppi di società si caratterizzano per la compresenza di più società che godono di personalità giuridica distinta, ma al contempo configurano un unico soggetto economico comportandosi come un'unica entità sul mercato. I vantaggi i tipici dei gruppi dipendono intrinsecamente da questa struttura che combina l'unicità del soggetto economico con la pluralità giuridica dei diversi soggetti che ne fanno parte.
Allo stesso tempo, però, l'esigenza di contemperare questo binomio comporta nella gestione dei rapporti infragruppo, con particolare riferimento al caso di gruppi verticali, uno sforzo costante di bilanciamento degli interessi in gioco tra i diversi soggetti ad ogni titolo coinvolti nella vita e nella gestione del gruppo, in via indiretta o diretta. Ciò è ancora più forte nel caso di sussidiarie non interamente controllate in cui l'esigenza di tutelare le posizioni dei creditori e degli azionisti di minoranza, che per definizione sono portatori di interessi diversi e spesso confliggenti, diviene ancora più pressante.
Tra le varie tematiche che riguardano dal punto di vista del diritto societario i gruppi di società, un ruolo preponderante è quello afferente al riconoscimento di quello che genericamente viene definito come interesse di gruppo. Tale espressione, lungi dall'essere di facile interpretazione o da aver trovato una collocazione unitaria in dottrina o in giurisprudenza, può essere intesa come la possibilità di condurre la gestione e

l'amministrazione del gruppo perseguendo obiettivi che garantiscano la stabilità e il benessere dello stesso nella sua interezza piuttosto che delle singole società che ne fanno parte. Tale approccio flessibile rende plausibile che vengano compiute determinate operazioni, per lo più sotto impulso delle società madre, che, pur in mancanza di un immediato beneficio per le sussidiarie, fondano la loro ragion d'essere nell'idea di promuovere un benessere collettivo del gruppo.

La questione, per quanto di non semplice intuizione, non è astratta ma ha delle serie implicazioni nella gestione dei gruppi e nella protezione dei soggetti in essi coinvolti.

Un sistema rigido che non riconosca in nessun caso tale possibilità potrebbe cristallizzare l'allocazione dei benefici e delle responsabilità rendendo lenta e farraginosa la gestione del gruppo; d'altra parte, una soluzione che ammetta ciecamente qualsiasi operazione rischiosa o che giustifichi ogni atto purché compiuto in un ben definito interesse di gruppo, si presterebbe molto facilmente ad abusi da parte della maggioranza. La risposta su quale dei due approcci sia migliore non è univoca e non è semplice da trovare; si tratta d'altra parte del tema più centrale nella definizione dei rapporti infragruppo e delle loro dinamiche.

L'obiettivo di questo lavoro è quindi proprio quello di provare a fornire una risposta alla generale domanda sulla liceità e sui benefici connessi all'adozione di un modello che riconosca l'interesse del gruppo, soprattutto qualora questo venisse implementato come regola a livello europeo.

Pertanto, il primo capitolo fornirà dapprima una panoramica generale sui gruppi di società, sul loro funzionamento e sui tipici vantaggi che comportano. Allo stesso tempo, sarà analizzata la situazione attualmente vigente in Europa con riguardo all'assenza di armonizzazione della disciplina dovuta al fallimento delle varie proposte, tra cui in particolare quella riguardante una possibile Nona Direttiva in materia di diritto societario, largamente ispirata al sistema tedesco così come introdotto del 1965 con la riforma della legge azionaria tedesca. Saranno poi messi in luce, invece, i tipici problemi che riguardano i gruppi di società e il loro corretto governo quali i problemi di agenzia e il riconoscimento dell'interesse del gruppo, quest'ultimo argomento chiave dell'elaborato. Sarà fornita quindi una breve panoramica delle soluzioni adottate dal diritto societario dei singoli Stati Membri a livello europeo.

Nel secondo capitolo, date le profonde divergenze dei singoli ordinamenti nazionali sul tema, saranno analizzate in ottica comparatistica le diverse soluzioni fornite dai principali

Stati offrendone un inquadramento generale volto a rintracciare, tra le diverse opzioni, la soluzione che maggiormente si presti a fare da esempio da adottare a livello europeo.
In via generale è possibile distinguere tra paesi che riconoscono l'interesse del gruppo e paesi che, invece, ritengono che la distinta personalità giuridica delle società facenti parte dello stesso sia un concetto così imprescindibile da non poter in nessun caso sacrificare la protezione degli interessi immediati di ogni singola società che ne fa parte, per cui non sarà lecito imporre operazioni svantaggiose, se non strettamente compensate con criteri specifici e predeterminati.
Per fornire un quadro delle diverse possibilità, saranno analizzate le discipline previste in Francia, Italia e Germania che rappresentano le soluzioni maggiormente diffuse dal momento che gli altri Stati, seppur con piccole differenze, adottano meccanismi a queste riconducibili.
La Francia rappresenta il paese che maggiormente si è fatto avanti nella definizione dell'interesse del gruppo ed è, pertanto, fondamentale nell'analizzare la situazione esistente in Europa. Sin dagli anni Cinquanta e soprattutto a partire dal 1985 con la nota decisione Rozenblum, le Corti francesi hanno riconosciuto, dapprima in ambito penale e successivamente anche nel contesto civilistico, la centralità dell'interesse del gruppo come strumento idoneo a escludere, purché vengano rispettate quattro condizioni, la responsabilità degli amministratori che abbiano agito secondo lo stesso. Tale riconoscimento consente di considerare l'interesse del gruppo come un mezzo adatto a guidarne l'azione amministrativa e la sua gestione, consentendo in maniera più semplice il perseguimento di una politica di lungo periodo.
Il sistema tedesco, centrale per chiunque intenda affacciarsi al tema dei gruppi in Europa, si pone agli antipodi rispetto alla soluzione fornita dalla dottrina Rozenblum richiedendo (sebbene si debba distinguere tra le diverse categorie di gruppi previste dalla legge azionaria tedesca) che ogni tipologia di danno arrecato in conseguenza delle direttive della società madre nei confronti delle sussidiarie debba essere oggetto di rigida compensazione entro l'anno fiscale.
Da ultimo, verrà mostrata la soluzione italiana, la quale fornisce una risposta sotto certi punti di vista mediana tra le due appena illustrate. D'altra parte, l'Italia, ha dovuto confrontarsi con la presenza di una disciplina completa sui gruppi di società, fortemente influenzata da quella tedesca e a questa inspirata, e con la volontà di riconoscimento dell'interesse di gruppo, alla stregua della soluzione francese, teorizzata in dottrina e successivamente recepita dal legislatore con la riforma del diritto societario del 2003. La

convivenza tra le due soluzioni ha comportato in Italia il riconoscimento l'interesse del gruppo attraverso la teoria dei vantaggi compensativi, ma allo stesso tempo, la previsione di specifici meccanismi per evitare abusi da parte della maggioranza. Tale soluzione è degna di pregio, proprio perché bilancia i due sistemi.

Alla luce di quanto appena detto, è possibile ipotizzare che una futura risposta a livello europeo porti all'adozione di un sistema che ignori il riconoscimento dell'interesse del gruppo ovvero alla previsione di un meccanismo che, invece, consenta tale obiettivo.

Nel terzo capitolo si mostrerà che se è vero che in Europa manca una disciplina unitaria sul tema in ambito societario, bisogna sottolineare però che negli anni sono stati previsti degli istituti che hanno parzialmente già fornito una risposta.

È il caso, anche se non esclusivamente, degli accordi di supporto finanziario infragruppo così come introdotti dalla Banking and Recovery Resolution Directive nel 2015. Tale istituto prevede che, nel caso di una crisi che coinvolga un gruppo bancario transfrontaliero, possano essere stipulati accordi di supporto finanziario tra le diverse società del gruppo la cui disciplina ammette sotto più punti di vista che si possa e anzi sia opportuno salvaguardare la solvenza del gruppo nella sua interezza. Si tratta di fatto del primo riconoscimento formale a livello europeo dell'interesse del gruppo e pertanto tali accordi saranno oggetto di un'attenta analisi.

Allo stesso tempo, il terzo capitolo fornirà un breve quadro della situazione adottata dal diritto della concorrenza a livello europeo che, nell'interpretazione fornitane dalla Commissione Europea e dalla Corte di Giustizia Europea, sembra rispondere alla domanda accettando l'interesse del gruppo al punto tale da portare sua "entificazione" attraverso l'elaborazione della *single economic entity doctrine.*

Tornando più da vicino al contesto prettamente societario, saranno evidenziate le iniziative, per lo più informali, che, nel corso degli anni, hanno dato vita ad un vero e proprio dibattito sul possibile riconoscimento dell'interesse del gruppo culminato nell'adozione delle indicazioni fornite dalla Commissione Europea sia nell'Action Plan del 2003 che in quello del 2012. Tuttavia, preme ricordare che, nonostante le diverse raccomandazioni, l'Unione Europea non ha ancora raggiunto una disciplina unitaria sul tema.

Per fornire una visione il più completa possible, sarà anche mostrata la soluzione adottata dall'European Model Company Act la quale, pur riconoscendo legittima la necessità di ragionare in termini di interesse di gruppo, allo stesso tempo afferma che è necessario introdurre delle cautele volte ad evitare eventuali abusi della maggioranza.

E d'altra parte, è proprio da questa considerazione che dovrebbe muoversi qualsiasi futuro intervento a livello europeo: è chiaro, infatti, che un futuro riconoscimento, armonizzando i diversi regimi nazionali e superando pertanto le divergenze che attualmente li caratterizzano, comporterebbe numerosi vantaggi che si manifesterebbero soprattutto con riferimento ai gruppi transfrontalieri, quali un notevole abbattimento dei costi a livello di gestione nonché la possibilità di perseguire politiche più a lungo termine.
Tuttavia, inevitabilmente, una simile regola ridurrebbe notevolmente il grado di protezione riconosciuto ai diversi soggetti interessati nella vita del gruppo quali gli azionisti di minoranza e i creditori, portatori di interessi diversi e difformi.
Pertanto, sarà necessario individuare un punto di equilibrio tra le diverse soluzioni, al fine di contemperare l'esigenza di una gestione flessibile del gruppo con il bilanciamento dei diversi interessi in gioco, scongiurando così ogni forma di abuso.

INTRODUCTION

The subject of this thesis is the analysis of the phenomenon of groups of companies, especially the theme about the possible recognition of the so-called "group interest", i.e. one of the main topics in the modern company law debate, to evaluate the importance of the introduction of a common European discipline.

In the modern economy, groups of companies represent the most widespread organizational form for those companies aiming at expanding into the market to widen their horizons. Through the adoption of this model, it is possible to obtain the advantages related to the growth of the company as the possibility of exploiting economies of scale and those advantages linked to the separation of different entities of the group such as the diversification of risks.

Since the last century, and particularly during the last fifty years, the relevance assumed by groups of companies has constantly grown, replacing the centrality of the single-company model that characterized the economic expansion during the previous century.

Groups of companies consist of several companies owning legal distinct personalities which act as a single economic entity in the market through specific strong inter-connections. The evident benefits of this group structure depend on the combination between the single group entity and the legal plurality of the numerous subjects part of it.

However, in the management of intra-group relations - especially in the case of vertical groups - the need to reconcile this binomial aspect entails a constant effort to balance the interests at stake and to take into consideration the needs of all subjects which are, directly or indirectly, involved in management of the group. This need is felt strongly in the case of not wholly-owned subsidiaries; in this case the need to protect the position of the creditors and the minority shareholders, having different and often conflicting interests, becomes very compelling.

In light of this, as regards the issues concerning groups of companies under a company law perspective, the recognition of what is generally addressed as the group interest acquires a preponderant role. Obviously, this expression is not universally interpreted by academics or by courts. It could be interpreted as the possibility of managing of the group

by pursuing objectives that ensure the stability of the group as a whole and the benefits of the entire group rather than the individual companies part of it. This flexible approach implies that it is plausible to undertake some transactions - especially under the influence of parent companies - which, even not benefiting the subsidiaries in immediate terms, are justified by the idea of promoting the collective welfare of the group, so that all members may benefit from it even in a not direct or immediate way.

The issue is not abstract but leads to serious implications for the group management and the protection of each involved subject. When a rigid system does not recognize this possibility, it could crystallize the allocation of any benefit or responsibility, slowing the management of the group. On the contrary, if a solution blindly admits any hazardous operation or justifies any act as long as it is conducted according to a not well-defined group interest, it can easily conduct to an abuse by the majority. The question as to which of the two approaches is better is not clearly unequivocal and cannot easily be found. It must be recalled that this is the most central issue in the definition of intra-group relations and their dynamics.

Therefore, the aim of this work is to try to find an answer to the general question about the convenience and benefits of adopting a unique suitable model that guarantees the interest of the group, especially when this model is implemented at European level.

Chapter 1 of the thesis will provide a general overview of corporate groups, how they work and the typical benefits they entail. Moreover, the current situation in Europe will be analyzed specifically as regards the lack of harmonization due to the failure of the numerous proposals, especially the one regarding a possible Ninth Company Law Directive, largely inspired by the German system introduced in the 1965 reform of German corporate law. Then, common problems concerning groups of companies and their appropriate governance such as agency problems and the recognition of group interest, the key topic of the text, will be highlighted below. In addition, a brief overview of the solutions adopted in the company law of individual Member States will be discussed.

Due to the intense divergences of the national systems on the subject matter, Chapter 2 will highlight, under a comparative perspective, some solutions implemented by several Member States providing a general overview aimed at finding among the lots of options, a solution that could be suitable as model at European level.

Broadly speaking, it is possible to distinguish between countries which identify the interest of the group and countries which, on the contrary, consider the distinct legal personality of the companies part of a group as an essential and unavoidable concept. This implies that it is not possible, under any circumstance, to sacrifice the protection of the immediate interests of each individual company and that it would not be lawful to impose disadvantageous transactions unless strictly compensated for by specific and predetermined criteria.

In order to highlight some different possibilities, the present work will analyze the disciplines provided in France, Italy and Germany. Their solutions represent the prevalent models since the other Member States - even if slightly different - adopt several mechanisms that can be traced back to them.

France assumed a leading role in defining group interest and the analysis of its rules are therefore relevant if considering the European situation. Since the 1950s and especially since 1985 with the Rozenblum decision, the French courts have recognized, first in the criminal context and later in the civil context too, the centrality of the group interest as a means of excluding, when four conditions are met, the liability of those directors who have acted in accordance with it. This recognition makes it possible to consider the group interest as a suitable means of guiding the group's administrative actions and its management, making it easy to pursue a long-term policy.

The German system must be considered central to approach the subject of groups in Europe. It contrasts with the solution provided by the Rozenblum doctrine by requiring (although a distinction between the different types of groups provided for by the German Corporate law must be taken into consideration) that any kind of damage caused according to the parent company's directives on its subsidiaries must be subject to strict compensation within the fiscal year.

Finally, Chapter 2 will introduce the Italian model providing, to some extent, a reasonable solution between the ones mentioned above. Indeed, Italy has had to deal with the presence of a complete regulation on groups of companies, strongly influenced by the German one and inspired by it, and with the will to recognize the group interest under the French inspiration. This desire was first theorized by experts and subsequently implemented by the legislator in the general 2003 company law reform. The coexistence of the two solutions implies that Italy recognizes the group interest through the so-called "*compensatory benefits"* theory, but at the same time it provides specific tools to prevent

abuse by the majority. This solution is worthy of mention because it balances the French solution with the German one.

Considering what already said, it is possible to trace reasonable solutions at the European level back to the adoption of a system that ignores the recognition of the group interest in contrast with another one which ensures its merits.

Chapter 3 will show that if it is true that Europe lacks a unified discipline in the corporate sphere, there have nevertheless been institutes that have partially given an answer over the last years.

Although not exclusively, an example could be the intra-group financial support agreements introduced by Banking and Recovery Directive in 2015. This institution provides that in case of a crisis involving a cross-border banking group, financial support agreements may be concluded between the entities part of the same group. Considering different aspects, according to their regulation it is possible and no doubt advisable to safeguard the solvency of the group as a whole. This represents the first formal recognition at European level of the group interest, and it will therefore be the object of a deep critical analysis.

In addition, Chapter 3 will provide a brief overview of the situation adopted by competition law at the European level, because, as interpreted by the European Commission and the European Court of Justice, it seems to answer the question by considering the group interest to such an extent that it has even led to its "entification" through the development of the single economic entity doctrine.

As regards the corporate context, Chapter 3 will also show informal initiatives that started a strong debate on the possible recognition of the group interest, which led to the adoption of the indications provided by the European Commission both in 2003 Action Plan and 2012 Action Plan.

However, it is fundamental to say that despite strong recommendations, the European Union has not introduced a unique unambiguous discipline on the subject yet.

To conclude, Chapter 3 will also show the solution adopted by the European Model Company Act which, even if it recognizes the legitimate need to reason in terms group interest, states that it is necessary to introduce every possible precaution to avoid the risks of potential abuses by the majority.

In conclusion, any future intervention at the European level should take into consideration this reflection: it is clear that any future recognition at European level, will harmonize all different national regimes overcoming the divergences that currently characterize them.

This could lead to several advantages above all with reference to cross-border groups, such as a notable reduction in management costs as well as the possibility of pursuing long-term policies.

However, inevitably, such a rule would considerably reduce the degree of protection of the subjects involved in activity of the group, i.e. minority shareholders and creditors, having different and opposing interests.

Therefore, it will be fundamental to work and to find a balance between all possible solutions regarding the need for flexible group management and the different interests at stake, to avoid any form of abuse.

CHAPTER 1

GROUPS OF COMPANIES AND THEIR INTERESTS

Nowadays groups of companies represent a unique and central phenomenon in the economic and legal world. Indeed, they are one of the favorites and chosen models to support growth and to handle the management of the most complex economic business, they represent "the modern reality of the corporation".[1]

It is usual to think and imagine groups of companies as the prototype of the biggest enterprises with large turnovers, possibly listed in stock exchanges, trading goods or providing services all around the world. If this picture is surely quite common and suggestive, it does not correspond to reality. This model is not chosen only by large companies, but also small and medium-sized organizations have decided to benefit from the advantages of this structure. This consideration offers a more complete idea of their diffusion, and it is a sign of how the knowledge of their functioning must be object of deep interest. To have an empirical vision of that, it is useful to analyze some statistical data. [2] In 2013 in Italy, groups involved approximately one third of the employees of the companies present in the Statistical Register of Active Companies (ASIA).[3] The weight of groups, in terms of employees, is 56.8% if calculated with respect to limited companies alone, a number that rises to 87.2% in the monetary and financial intermediation sector.[4]

Under a European perspective, a recent study (data extracted in June 2021)[5] refers that in 2019, the multinational enterprise groups operating in Europe and registered in EuroGroups register were more than 174,531.

Their analysis is therefore fundamental to understand the functioning of the markets and

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[1] Hopt K. J. (2015), p. 2.

[2] These data do not show the simple number of enterprises; rather they refer to fundamental benchmarks such as turnover or employment.

[3] ASIA is the acronym used for "*Archivio Statistico delle imprese attive*". It was created in 1996 according to the provisions of the Eu Regulation n. 2816/93 concerning the cooperation in the development of the public registers used for statistical purposes, then repealed and replaced by the Regulation CE n. 177/2008.

[4] As reported by the ISTAT in 2015.

[5] Eurostat (2021). The analysis is based on data from the EuroGroups register (EGR) the statistical business register of the European Union Member States and European Free Trade Association (EFTA) countries on multinational enterprise groups.

the underlying dynamics guiding them.

1.1 The definition of group of companies

Groups of companies are formed by two or more companies each one having its own legal personality but acting as a single entity on the market being subject to a common control and management. The companies part of a group keep their legal autonomy intact, but "they lose, in the connection with others, economic independence and operational discretion".[6]

A similar description can be considered as a general framework, but it is important to recall that it is quite arduous to find a common definition of corporate groups. This is due to different factors. First of all, the concept of a group could be analyzed under both legal and economic perspectives; while the first is functional to find the rules regulating this world, the latter is more oriented to explain the functioning of this model, which is, according to some authors, an alternative between market and enterprise.[7]

In addition, inside the legal framework, it is impossible to find a unique idea of corporate groups. This depends not only on the different legislations and experiences of the countries, but it is due to the fact that this phenomenon assumes a different role in several fields of the law. This leads to the consequence that not only each country is going to have its own rules, but also that each branch (competition law, company law, tax law, insolvency law etc.) will trace its parameters in different ways and for different purposes.[8]

As regards the analysis of this work, which aims to detect the possibility to introduce common European Union provisions for the recognition of the group interest, the question about what a corporation group is, is strongly linked with company law issues.

Other areas will be inspected just to make comparisons and as a source of inspiration for a possible harmonization of the disciplines.[9]

Notwithstanding the distinct definitions, something remains certain. The companies being part of a group are different actors following the same management plan so that they

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[6] Callegari M. (2019), p. 609.

[7] For a complete overview see Witting, C. A. (2018), p. 168. The reference is to the transactions cost theory elaborated by Williamson and Coase. Group of companies may contemplate both the advantages coming from the integration of the supply of goods or services and those coming from the market as the possibility to reach economies of scale.

[8] Manovil, R. M. (2020), p.2.

[9] See below; special attention will be given to Competition law solution and "enterprise approach".

could seem and effectively are a single enterprise, albeit they continue to be, under a strict legal point of view, several subjects.

Yet, it is important to highlight that there is not just a single category of group of companies, rather they differ from each other for the individual relationships among the companies being part of it and the power which could be exerted by one entity to the others.

The 'vertical groups' represent the most common and widespread type of structure. In this case, in virtue of specific relationships, a company, known as *parent company,* is able to deeply influence the life of the other members, *the subsidiaries* subjected to its direction and control.[10]

The 'horizontal groups'[11] are configurable whenever the common management of the companies part of it is not based on subordination, but on a "contractual agreement by which several companies comply with a unitary management that each contributes to determine on an equal footing with the others".[12]

As just mentioned, in vertical groups a company assumes a leading role; the expression 'parent company' used to identify the entity playing this role is a good metaphor; just like children, subsidiaries have a deep relationship with the company controlling them. The parent company can give directives and control the members. For this to be effective, the presence of two elements is needed.[13]

The first element is control, which is generally related to the votes in the general meeting; the latter is common management of the different enterprises of the group, intended as the capacity to directly intervene in the management and the business choices of a company.

The analysis of this research will not investigate the single types of companies which could be part of a group, nor the main interstate differences which could be raised conducting a similar study. It is enough to remember what some illustrious authors have clearly affirmed regarding the different notions of companies all over the world. According to them, it is possible to enumerate five different elements which contribute to

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[10] Control and common management represent the core to identify a phenomenon of groups.

[11] Campobasso G. (2013), p-283-285.

[12] They are defined in this term by §18 of the Aktg: *"*If legally separate enterprises are subject to common direction, although none of such enterprises controls the other, such enterprises shall constitute a group and the individual enterprises shall constitute members of such group".

[13] These elements are quite common in most of the regulations of different countries, despite they do not acquire the same relevance.

identify a company, despite the specific national aspects. They are legal personality, limited liability, transferable shares, delegated management under a board structure and investor ownership. "These characteristics respond to economics exigencies of the large modern business enterprises. Thus, the corporate law everywhere must, of necessity, provide them." Therefore, since they describe a type of company present in national regulations, the model suggested by them will be used in this analysis.[14]

1.2 The role of control and common management

As seen, one of the elements necessary in order to configure a group of companies is the control. There are many definitions of company control; like the definition of groups, they change in every country's provision and inside their framework, in each branch of the law.[15]

In the field of company law, a partial European harmonization has been reached as regards the discipline of consolidated accounts.[16] Directive 2013/34/EU of the European Parliament and of the Council contains some useful definitions which identify the subjects obliged to draw up the financial consolidate statements.[17]

According to the provisions of Article 22:

"A Member State shall require any undertaking governed by its national law to draw up consolidated financial statements and a consolidated management report if that undertaking (a parent undertaking):

a) has a majority of the shareholders' or members' voting rights in another undertaking (a subsidiary undertaking);

b) has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of another undertaking (a

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[14] Armour J., Hansmann H., Kraakman R., Pargendler M. (2017), p.1.

[15] A central importance in European context, is assumed by the notion of control provided by the Council Regulation (EC) No 139/2004 of 20th January, 2004 on the control of concentrations between undertakings (the EC Merger Regulation).

[16] Initially, the discipline was provided by Fourth Council Directive (78/660 ECC of 25 July 1978) and by Seventh Council Directive (83/349/ECC of 13 June 1983). Directive 2013/34/EU of 26 June 2013 has replaced them.

[17] De Luca N. (2021), p.238.

subsidiary undertaking) and is at the same time a shareholder in or member of that undertaking;

c) *has the right to exercise a dominant influence over an undertaking (a subsidiary undertaking) of which it is a shareholder or member, pursuant to a contract entered with that undertaking or to a provision in its memorandum or articles of association, where the law governing that subsidiary undertaking permits its being subject to such contracts or provisions".*

These rules show three different types of control which can be exert by a company in order to be considered as a "parent"; this list is – with some peculiarities or small differences - present in almost all specific regulations of control relevant for company law purposes.

The first category is the *'legal control'* configurable when a company has the majority of the voting rights in the general meeting of another company; the second one, the *'de facto control'* considers the situation in which a company, despite not owning the majority of the voting rights, is however able to exercise the control on another company. This could happen for several reasons, for instance in case of lack of another controlling shareholder or due to the presence of shareholders' agreements. The last type of control defined by Article 22 is - under a comparative perspective - the most complex institution. It reflects the solution adopted by various countries which provide for the 'controlling agreements'.[18] As it will be seen analyzing German provisions, this term indicates a specific type of contract through which a company gives another entity participating its legal capital the exclusive right to exercise influence and control on itself. The part benefitting from the contract is able to impose mandatory and binding instructions the controlled company shall comply with. The admissibility of these type of agreements is not universally accepted so that they represent one of the major obstacles to the harmonization of disciplines at European level.[19]

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[18] The main reference is §291 of the *Aktiengesetz* (German Stock Corporation Act).

[19] For instance, in Italy there is a profound debate about the admissibility of controlling agreements. The new Article 2497-septies of the Italian Civil Code - introduced by the Legislative decree n. 6 of 17th January 2003 - has provided - among the hypothesis of *'Direzione e coordinamento*' - the situation in which a company exerts its influence on the life of another company by virtue of a contractual agreement or statutory provisions. According to some authors this hypothesis could represent the recognition of these contracts in the Italian system. Nonetheless, the restrictive thesis can be considered significantly prevalent. It affirms that controlling agreements are not possible in Italian system because they would hurt the general principles established for contracts (as the lawfulness of the cause) and the provision of Article 2380-bis of the Italian Civil Code which assigns the management of the company to its directors in an exclusive way.

However, for a vertical group to configured the presence of control must be accompanied by a *quid pluris*, the element of common management. This term identifies the capacity to directly influence the life of another company. Control alone would be insufficient to constitute a unitary and coherent group policy which is preliminary to behave as a single enterprise on the market. As underlined, to form a group companies must act as a sole subject from an economic point of view and show a coherent behavior on the market. The abstract possibility to exercise an influence on the life of the subsidiary is not relevant, rather the effective use of this power must be assessed. Hence, it is necessary that this influence is exercised in practice - the reason for it being irrelevant -to determine a global strategic plan for the group.

There are various parameters to identify the presence of this dynamic element. The presence of the same directors, the predisposition by the parent company of strategic, industrial and financial plans, the centralization of financial decisions, the adoption of a cash-pooling system are considered by the courts symptomatic of the effective unitary management of the companies forming a group of companies.
The necessary presence of this dynamic element - which makes the existence of the group effective pursuing its scope and allowing a coherent conduct on the market - is present in the principal legislations on groups of companies. The separation between the control and the common management – and the relevance of the second - is intuitive considering the Italian and German provisions on the matter. The reform of Italian Company law through the Legislative decree n. 6 of 17th January 2003 has established that the presence of control represents a simple presumption in order to individuate the so-called "*direzione unitaria"* meant as the capacity to influence the life of a company. [20] A similar solution is offered by §17-18 of the Aktg which the Italian system is largely inspired by.

[20] The Italian Parliament (2003), p. 43 states that: ″In implementing the delegation, in Article 2497 of the Italian Civil Code it was considered inappropriate to give or recall any notion of group or control […]. From another point of view, it has been considered that the central problem of the group phenomenon regards the liability of the parent company towards shareholders and creditors of the subsidiary. In order to give a correct approach and solution to these liability problems, it was necessary to base the discipline on the "fact" of the exercise of direction and coordination activities of a company exercised by a different subject and on the circumstance that the action was traceable to the pursuit of an entrepreneurial interest, even if carried out in violation of the correct principles for corporate management".

1.3 Historical background

In order to fully understand corporate groups, it is necessary to recall their origins.
Groups of companies saw their initial growth in North America in the 19th century, being adopted in Europe only later.
Professor Phillip I. Blumberg affirms that there are both ontological and historical reasons to explain the spread of this model. He states how due to the changes related to the Industrial Revolution, the corporation laws of the western countries would have become anachronistic to sustain the growth of the economy and the creation of higher standards of production. A similar transformation required new instruments able to support it. Therefore, the traditional approach providing a single acting subject and, more specifically, an individual corporation, no longer satisfied the existing economic reality. Consequently, the need to find new instruments was felt and the model of corporation groups was suitable to be an answer.[21]
For other authors there are additional reasons able to explain the phenomenon. In their vision the spread of group of companies can be related to the will to find an instrument against antitrust provisions which had started to be emended in that period. Indeed, the concentrations between companies were not initially taken in consideration by the antitrust laws. Consequently, to create organizations which operated as a single entity, but benefitting from the separation could represent a way to avoid the strict competition rules. The Sherman Act,[22] did not address the phenomenon of concentrations; it was only later, after having witnessed the inconsistency of this approach that mergers and the acquisitions started to be considered by competition policy. The formal recognition of the role of concentrations under an antitrust perspective was by the Clayton Act of 1914;[23] immediately after that the first antitrust controls of concentrations were implemented.

Regardless of this, what is intuitive is that the growth and the expansions of new markets and possibilities together with the impact of the theory of the liberalism to increase

[21] Blumberg P.I., (2005), p.607.

[22] Sherman Act (1890), 15 U.S.C., §1-7.

[23] Clayton Act (1914), 15 U.S.C., § 12-27. The original §7 of the Clayton Act states: ″That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share of capital of another corporation engaged also in commerce where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition or to restrain such commerce in any section or community, or tend to create a monopoly in any line of commerce […]".

profits[24] has brought about the creation of branches or new entities to assist and support the operations of a company.

However, the revolutionary event which signed the expansion of corporation groups was the recognition of the possibility - before unknown - for a corporation to hold shares of other companies. Before 1888 - except for exceptional cases provided by specific clauses in the acts of incorporation and just for specific sectors [25]- the entities were not authorized to own others' stocks;[26] it was just in that year that a New Jersey legislation authorized all corporations to hold stocks in other companies; this solution was then followed by the other States.

In Europe the development and the expansion of groups was reached in a second period.[27]

What is certain and common to American experience is that "if one looks to modern world economy at the 20th century, one concludes that enterprises have increasingly chosen to organize and conduct their business operations in the form of a cluster of various separate corporations rather than as a single corporate entity".[28] For this reason, European countries witnessing their exponential diffusion felt the need to introduce rules on the corporation groups too.

At European level, the first complete regulation of groups of companies was introduced in Germany in 1965 with the reform of the German *Aktiengesetz* (AktG), the German Stock Corporation Act.

Other countries have experienced different solutions and even now, the discipline of group of companies is far from being completed. Some examples will be presented analyzing the single countries of European Union and their responses to the problem of the recognition of the interest of groups.

In addition, at European Union level, the idea to create a common system and discipline was felt very soon too. Unfortunately, the harmonization has not been reached yet.

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[24] In 1776, Adam Smith in "*The wealth of Nations*" affirmed that "No society can surely be flourishing and happy, of which the far greater part of the members is poor and miserable".

[25] Pardolesi R., Patroni Griffi U. (1997), p 8. For instance, it is the case of banks and transport companies.

[26] For more examples see Friedman L.M. (2019), page 503. It is the case of Alabama (1851- 1852) which recognized the Wetumpka Bridge Company the right to own stock in the Perdido Junction Railroad company.

[27] Despite that, the first group of companies in Europe *Industrie du Gaz Ge* was created in Geneve in 1861.

[28] Antunes J. (2005), p.194.

1.4 European provisions for groups of companies: the lack of harmonization

As noted, the European Union lacks a common regulation of groups of companies, even though the idea to create a legal status of groups of companies has been on the agenda of the European Commission for several years.[29]

The reason for the need of harmonization relies on the effectiveness of the principle of the Freedom of establishment provided by Article 49.2 of the Treaty on the Functioning of the European Union (TFEU) which states: "Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital". In order to make this right effective, it is necessary that Member States have a common legal framework so to overcome the differences in national legislations which would limit it. This consideration assumed a major significance in the case of cross-border groups i.e. groups of companies operating in several Member States.

1.4.1 *The attempts*

Traces of the initiatives undertaken by the European Union institutions date back to the 1970s in a pre - draft for a Ninth Company Law Directive which was never enacted, remaining as an internal document. The pre-draft was criticized for several substantial aspects by the BDI (Federal Association of German Industries) which paradoxically was one of the most active entities in the following attempts. The document resulted in a new draft some years later.[30]

It was in 1984 that the proposal for a Ninth Company Law Directive, more organic and aware of the critiques, was provided with the idea to create a common framework.

The draft was strongly influenced by the *Konzernrecht* (the German regulation for corporate groups), introduced in the 1965 revision of the German *Aktiengesetz* (AktG), the German Stock Corporation Act. The text of the proposed Directive adopted the German model for corporate groups giving a central role to domination and providing a

[29] ECLE (2016), p. 3 ff.

[30] Bohlhoff K. and Budde J., (1984), p.173.

division in the field of group of companies among the so-called *de facto groups* and those originating from an *enterprise agreement.*[31] The strong relationship with *Konzernrecht* is probably the reason for the failure of this draft; while Germany was strongly convinced about it, other Member States rejected a similar solution.

The difficulties met to create a harmonized discipline are the consequences of some factors. Among them, it is noteworthy that each Member State has its own provisions; still today the legal and factual framework for groups of companies is far from being developed at the same level in the different legislations.

Nowadays there are countries which do not have an organic discipline of corporate groups, offering only specific rules concerning them;[32] others, like Italy, lack a definition of a group of companies (although Italy has adopted a more complete approach after 2003).

After this failure, no new proposal for a directive was provided, at least regarding a general company law framework for groups of companies. This has brought about two main consequences. First, only specific sectors related to group of companies have been regimented by a European common system through directives or regulations.

Second – especially in relation with theme of the recognition of the interest of the group- the European Commission has continued to be active through consultations, action plans and by giving a role and space to informal groups of experts who have elaborated recommendations in the will to create the coveted harmonization.

These initiatives undertaken by the European Union will be presented later on.

1.4.2 *Specific sectors*

There are individual and specific areas connected to corporate groups which are regulated by European Union provisions (as the rules regarding consolidated financial statements which have been introduced from 1978 and then modified).

Recently, some common rules have been implemented in the field of insolvency proceedings. Regulation 2015/848/UE[33] has enacted many provisions applicable when the insolvency involves two or more companies being part of a group. These provisions are

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[31] This division is offered by the AktG. The matter will be discussed it in Chapter 2 of this work.

[32] For instance, it is the case of France.

[33] Recast European Insolvency Regulation "REIR" (Regulation (EU) 2015/848 of the European Parliament and of the Council of 20th May 2015 on insolvency proceedings).

essentially based on a duty of communication among different proceedings and on the so-called group coordination proceedings with the intervention of an independent common coordinator.[34]

Another sector providing specific rules is Competition Law. The cases analyzed by the European Commission and the European Court of Justice have elaborated the "*single economic entity theory*". Due to this solution, in the field of competition law groups of companies are considered as a single unit as a consequence of the adoption of an entrepreneurial and market-oriented approach. Indeed, it has been established that "the term 'undertaking' must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal".[35] In addition, specific rules address the phenomenon of groups in the field of the merger control system.[36]
Furthermore, tax provisions assume a special role. Council Directive 90/435/EEC, now Directive 2011/96/EU, provides for special rules for taxation when the parent company and the subsidiaries have a different nationality avoiding a double taxation on the dividends.
Groups are also indirectly involved in other provisions like those regarding extraordinary operations as mergers, both in case of domestic companies, both in case of cross-border mergers[37] and takeover bids.[38]
In addition, the European system offers specific provisions regarding single aspects of the life of companies as rules regarding the related party transactions after the reforms introduced by the new Shareholders Rights Directive II 2017/828 EU.

1.5 The economic approach

As previously mentioned, group of companies are born as an economic phenomenon. Reconnecting to historical analysis, they are born and raised to support the growth of the

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[34] De Luca N., (2021), p. 547.

[35] European Court of Justice (1984) Case C-170/183, *Hydrotherm Gerätebau GmbH v Compact del Dott. Ing. Mario Andreoli & C. Sas*, EU:C:1984:271 para 11. For a more complete analysis of the theme see the Chapter 3 of this work.

[36] Council Regulation (EC) No 139/2004 of 20thJanuary 2004 on the control of concentrations between undertakings (the EC Merger Regulation).

[37] See De Luca N. (2021), p. 493. The rules are now included in Directive 2017/1132/EU.

[38] Directive 2004/25/EC on Takeover Bids.

business and to obtain the advantages connected to it (e.g., economies of scale). [39]

The literature concerning the economic definition of groups of companies is very prosperous and tends to study the phenomenon under a structural perspective giving importance to the growth on the market and to the possibility of allocating assets and functions to the different entities of the group.

As for legal issues, there have been many definitions concerning groups of companies. Recalling what has already been exposed, it is possible to affirm that "under an economical point of view, corporate groups are an industrial organizational structure that have gained certain benefits by virtue of that structure. Once groups are formed, several companies lose their effective independence to function together under the direction of a parent or controlling company, resulting in higher productivity as a whole (synergy effect)".[40]

Most of the authors agree identifying some elements whose presence demonstrate the existence of a group. "A group of companies is configurable when more enterprises which are independent and enjoy their own legal personality are under the stable direction of a sole and common subject which control them. Consequently, there are several elements which can be considered: a plurality of subjects, a common company directing them, the presence of a common purpose, this purpose is determined by the subject who has the control, there is a relationship, generally subordination among them".[41]

As already stated, it is common that - under an economic point view - the group is seen and acts as a single entity on the market. This is the reason of the birth of the so-called paradox of the group, meant as a cohabitation between a sole economic subject with a plurality of several legal entities.

1.6 The advantages of being part of a group

The economic aspect of the group is functional to understand the ontological advantages of the structure and how their expansion can be justified. There are several benefits coming from the choice to adopt a group structure.

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[39] Economies of scale are, according to the Cambridge Dictionary "the reduction of production costs that is a result of making and selling goods in large quantities, for example, the ability to buy large amounts of materials and reduced prices".

[40] Takahashi E. (2010), p.4

[41] Buttà C., (1982), p. 61.

Preliminarily it is important to underline that the main aim of a group structure is to obtain growth on the market. The creation of a group tends to increase the dimension and the role played by the company. It is not the case to investigate the reasons why growth is pursued, and which are the advantages coming from a bigger structure. Broadly speaking, this is an economic issue. For the purposes of this work, it is enough to remind what Alfred Chandler[42] said about the reasons underlying the pursuit of growth and why this is generally accepted as a long-term purpose for the generality of companies. He has affirmed that growth is pursued in order to lower costs of operation and to increase revenues and profits. At the same time, he has confirmed that business growth "can be achieved through strategies including horizontal combination, vertical integration and internalization, diversification, and expansion into foreign markets".[43]

Analyzing all these strategies, it is evident that the group structure presents the advantage combine all of them creating not just a single entity, but different ones behaving as a sole subject.

Indeed, the innovative scope that they have brought can be effortlessly appreciated.

As already underlined, they overcome the rigid contraposition between market and enterprise, typical of the Williamson and Coase transaction cost theory introducing a middle ground able to combine the characteristics of two systems.

Indeed, the advantage of a group of companies is connected with the binomial unity and plurality which is the immanent characteristic of groups of companies. This structure combines the benefits of a single big economic unity- which allows the exploitation of the dimension of a large enterprise - with those offered by the articulation in several distinct and autonomous organizational structures having separate legal personality. This grants the entities of the group to allocate assets and liabilities among each other; the companies will continue to be separated and therefore - except for some cases - autonomously liable for their own debts distributing the financial or economical risks to more subjects.

This reduces in a consistent way the business risk associated with the activity of the group increasing the number of possible actors involved in the operations carried out by the group.

This is generally accompanied by the elaboration of a diversification program which assigns different functions to the single companies part of the group. Some entities will be

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[42] Chandler, A. D. (1990), p. 146 ff.

[43] Witting C.A. (2018), p.24.

entrusted with an operational function, both for production or for distribution purposes, others with a financial one, others - in particular the controlling company - with a strategic and decisional role. At the same time, this diversification could also be accompanied by an internationalization program which provides the dislocation of the subsidiaries in different countries.

Yet, oppositions could be expressed that this goal could be reached by the creation of simple branches, but the fact that the single company has a legal personality and therefore has its own personal structure is surely more efficient, in terms of control and management and for reducing the typical enterprise risk. "In a single corporation, liabilities incurred by an unprofitable division may wipe out the profits of the entire business and bring to insolvency. By segregating parts of the enterprise into separate legal entities while the rest of the enterprise may remain unaffected".[44]

In addition to these ones, other strategic purposes can also be identified, not necessarily bound to economic reasonings.

First, the fact that a company controls and directs the life of other companies implies that all the decisions and the action plans - especially for the pursuit of long-term objectives - could be assessed and decided in an easier way due to the presence of a single decisional center; this entails a reduction of time and costs to obtain a common expression of will.

Furthermore, the capacity of the companies to obtain financing support is also increased by the presence of different subjects. [45]

All these direct or indirect economic aspects shall be connected with those related to shareholdings and ownership. See the following example:

Imagine that a company A acquires 51% of the legal capital of the company B; A will exert a de jure control over B.

Then, suppose that B decides to buy 51% of the legal capital of the company C; B will have control over C and also A will have it with a total investment of 25% on C capital (since it owns 51% of B capital).

If C decides to acquire 51% of D, it is clear that A will have the control of D with an even lower level of initial investment and the reasoning could continue ad infinitum resulting in a company E, F, G etc.

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[44] Cahn A., Donald D.C. (2018), p.829.

[45] *Ibidem.*

This effect, typical of vertical groups of companies, permits the control of a large enterprise with a comparatively minor capital invested.
In addition, other advantages are related to an easier possibility - especially under tax provisions - to sell the shares of a company part of the group, rather than sell assets or branches of a company. Furthermore, specific and favorable tax systems are provided for group of companies.

1.7 The other side of the coin: the problems connected

Despite their many advantages, groups of companies also imply numerous issues relating to their management and functioning. The most problematic aspect regards the active role and the grade of protection recognized to the subjects involved in the life of the companies within the group. The presence of different subjects, each with its own interests and exigencies, entails the need to find a balance between them ensuring the correct management of the group and making the benefits coming from this structure effective. Indeed, the risk of abuse and incorrect administration represents a constant threat. Consequently, external or internal tools avoiding a similar danger must be found. The different legal systems have found an answer to cope with the risks. The introduction of a form of liability imputable to the parent company together with the provisions of sell-out rights must be acknowledged in this sense.[46]
"It is certain that groups of companies - whenever a subordination relationship can be found- do not benefit all the parties involved to the same degree; minority shareholders and creditors of the subsidiary companies are constantly exposed to the risk of abuse by the controlling company".[47]

1.7.1 *Agency problems*

Inevitably groups of companies carry traces of the unavoidable problems in the life of an enterprise: the notorious "*agency theory"* is without doubt applicable and referrable to groups as well.

[46] For instance, in 2003 Italy introduced the liability coming from the "*abuso da direzione e coordinamento*", a form of liability for the entity which exercised an abusive influence on the controlled companies.

[47] Takahashi (2010), p.34.

What is unusual is that they acquire - with reference to this field - a more complex and interesting perspective which is a direct consequence of the number of subjects involved. The higher presence of players in a group of company brings a stronger need to counterbalance the interests involved finding the real scope of the business activity. Therefore, agency problems assume a peculiar deepness in this field of company law. Traditionally, the theory of agency[48] identifies three different relationships which must be considered problematic for the immanent risks of abuse and opportunism. They are the ones between the:

- board of directors and shareholders,
- controlling and minority shareholders,
- shareholders and stakeholders.

Increasing the number of companies may proportionally jeopardize the correct management and administration. The controlling shareholders - and obviously the directors of the parent company - are not going to face only the opposing interests of the minority ones, but they are exposed to the exigencies of the other companies being part of the group.

Some decisions which could be justified in the light of the interest of a company could harm others and be considered just as a mere opportunistic choice.

Imagine an infra-group transaction moving liquidity or assets from a successful company to another which confronts a situation of crisis. These kinds of operations move the balance of the relationships among the subjects involved in the life of different enterprises reaching a major degree of complexity to identify the most correct solution and to avoid abuses. On one hand, there is the interest of the controlling company, on the other hand those of the subsidiaries not to lose their assets and value.

The need to balance the different interests is stronger than in the case of a transaction made by a single company since it implies both the usual internal agency problems, such as the conflicts between directors and shareholders, and a new perspective involving the different entities of the group and the interests that they might have.

As for the protection of minority shareholders and subsidiaries, the protection of creditors

[48] This theory was enunciated for the first time by Berle A. and Means G. in 1932. However, the fathers of the theory are considered Jensen M.C. and Meckling W.H. who offered a comprehensive framework of the theme in 1976.

may also suffer in group of companies. The general creditor risk is higher in groups of companies than in independent companies.[49]

1.7.2 *The problem regarding the interest of the group*

As it has been observed the proper governance of groups of companies involves a more complex balancing act in order to satisfy the various interests at stake. Hence, what is the interest that must be considered predominant?

How to balance the different legal personalities in the presence of a *single economic entity*? [50] Is it correct to sacrifice assets or resources of a subsidiary company in order to benefit the other ones? Do creditors have the right to claim that the instructions given by the parent company are in no way dangerous for the subsidiaries?

The questions could be numerous and with them even more the possible answers. The choice to adopt one or the other solutions is an act of freedom, and each regulation is going to select the one that it deems better.

Among the possible doubts, the more interesting is perhaps the following: is it possible that the advantage coming from being part of group could justify operations which could seem dangerous at that moment? Can a form of compensation be operative?

The main risk is that a company, exploiting its position, imposes charges and burdens to other companies. The parent company – and generally majority shareholders - could harm the others with an operation that seems profitable but which at the same time endangers the other parties. Now, if this could be positive for the company being advantaged by this economic operation, it may not be the case for the other company which has lost assets and economical resources.

There are three different approaches that can be found in order to give space and recognition to what is referred to as the "*interest of the group'*.

A first solution emphasizing legal personality of the subjects involved, "ensures the integrity of the management of each subsidiary so that it is governed exclusively in the interest of that company".[51] Another one could enhance the economic unity of the group and therefore justify harmful actions for the subsidiaries.

The more interesting solution is perhaps the one proposing a midway approach

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[49] Hopt K. J. (2015), p. 7.

[50] This expression derives from Competition law.

[51] ICLEG (2015), p. 5.

guaranteeing compensative mechanisms. Being part of a group brings advantages, consequently it is possible that some burdens can legitimately be required.
The concrete application of this approach is that: "the directors of a subsidiary can permit some disadvantages to the subsidiary in the pursuit of the interest of the group, without having to compensate the subsidiary for this damage immediately or within a short time period and to the full amount".[52]
Some countries have adopted this third approach, despite with important differences on how this compensation is supposed to operate (for example regarding the time of validity or the subjects involved).

The idea to counterbalance loss and benefits comes - according to some authors - from a basic economic principle. Francesco Denozza[53] has affirmed that the economic Kaldor-Hick's criterion can be considered as the forerunner of the Italian theory of the "compensatory benefits" which has been implemented in the Italian Civil Code with the reform operated by the Legislative decree n.6 of 17th January 2003 and which at the time had already started to be discussed by experts. This theory provides a justification for the liability of the parent company whenever the "damage resulted to be compensated in the light of the overall result of the direction and coordination activity or eliminated due by specific transactions".[54]
Even though Denozza's analysis considers the Italian provision, there is no reason to believe that it could not be expanded to similar systems adopted by other Member States.
As disclosed, he reconnects this compensative mechanism to the efficiency criterion elaborated by the economists Nicholas Kaldor and John Hicks in 1939.
This represents a mechanism to evaluate the efficiency of a system of distribution and allocation of resources for which a system is efficient if, while damaging certain subjects, it is able to benefit others, and these are able to compensate (even at a potential level) for the subjects who have been damaged.

A single solution to the problem has not been recognized yet in the field of company law. The main aim of this work is to answer this question analyzing the situation in Europe,

[52] *Ibidem.*

[53] Denozza F. (2000), p. 327-338.

[54] Article 2497 of the Italian Civil Code.

and due to the lack of a common regulation of group of companies in the European Union the work will analyze the solutions adopted by single Member States and the interest shown by European institutions on the matter as by the Action Plan of 2012.[55]

1.8 State of play in Europe

Member States have different and even conflicting approaches to the recognition of the interest of the group in company law and to individuation of the burdens that can be legitimately imposed to a subsidiary company.
The main reason for these differences can be traced back to the different degree of protection of creditors and minority shareholders which is recognized.
Generally, countries which aim to protect them will not adopt this model or, at least, they will introduce some precautions and tools to narrow down the risks of abuse. It is quite obvious that there is an imminent risk to damage the subsidiaries by pursuing just the interest of the common management of the group. This implies that these countries are going to sanction every action that does not protect the individual company.
On the contrary, Members States which are interested in the complex benefit, will provide, at least at case law level, a recognition of the interest of the group, adopting a more flexible idea of management.[56]

Three different models can be found among Member States regulations. It must be reminded that: *"*the main difference is whether the directors of a subsidiary can permit some disadvantages to the subsidiary in the pursuit of the interest of the group, without having to compensate the subsidiary for this damage immediately or within a short period of time and for the full amount".[57]

1) <u>Member States which recognize the interest of the group by legislative provisions:</u>

It is the case of Italy which in 2003[58] introduced an autonomous discipline - despite its solutions has been strongly influenced by the Rozenblum doctrine - which excludes the

[55] European Commission (2012), p. 14.

[56] ICLEG (2015), p.20.

[57] *Ibidem.*

[58] Reform of the Italian Civil Code provided by the legislative decree n. 6 of 17th January, 2003.

liability of the directors of a parent company who show that the damage is compensated by the advantages coming from the the group policy and by specific operations.[59]

2) Member States which recognize the interest by case law:

France is the leading country for the influence its rules have played in recognizing the interest of the groups. The solution has been adopted through case law[60] and the principles enshrined by the courts have represented the basis for the choices made by other European countries. It is the case of Belgium, Estonia, Denmark, Ireland, Luxembourg, the Netherlands, Poland, Spain.

3) Member States which do not recognize the interest of the group:

Austria, Germany - the interpretation of the German system is not unique, and it will be further investigated - Croatia, Latvia, Slovenia, Lithuania, Bulgaria, Finland, and Slovakia do not recognize the interest of the groups.

This work will now be focused on three countries: France, Italy, and Germany briefly showing legislative framework for groups of companies and their approach to the subject of the recognition of the interest of the groups.
Yet they are the most representative Member States in this field, since their provisions summarize the different solutions and approaches to the problem. Other European countries - even if slightly different - have incorporated the solutions adopted by these countries.[61]

[59] The topic will be further discussed.

[60] Judgment of the French Court of Cassation, Criminal Chamber of 4th February 1985, *Rozenblum and Allouche*. To be more correct, the first traces are present in the Judgment of the Tribunal Correctionnel of Paris of 16th May 1974, *Agache- Willot.*

[61] It is the Belgian position which, despite being strongly linked to French Rozenblum model, offers a softer perspective.

CHAPTER 2

A COMPARATIVE PERSPECTIVE

2.1 The French model

French jurisdiction plays a leading role in the debate for the recognition of group interest in corporate relationships. This predominant position - acquired in the jurisdictional and academic panorama - is due to the formalization of the possibility for the parent company to pursue the welfare of the group on its entirety and eventually burden the subsidiaries in order to follow a global group strategy.

This position is quite strongly affirmed in France and notwithstanding the fact that it was firstly advanced in the field of criminal law, it is likely to be a general principle with deep implications in company law and for the management of corporation groups.

French courts - since the second part of the 20th century - have established the validity of certain categories of transactions among companies belonging to the same group, which might seem harmful under the subsidiary's perspective, but may be justified considering the connections and relationships between the entities of the group.

This position "declares the group influence a lawful objective and allows group entities to make sacrifices for supporting group objectives".[62] Sacrifices and burdens are possible if they are counterbalanced by some returns coming from a strategic and common plan.

The main practical implication of this principle is that the "group interest should be allowed to be claimed by the leaders of the parent company or the subsidiary companies, for criminal as well as civil liability".[63]

The recognition of the group interest was obtained through case law and its enunciation - known as Rozenblum doctrine – has exerted a strong influence not only on French approach to groups of companies but has represented a source of inspiration for other countries. As it will be highlighted below, the European debate by scholars and

[62] Wymeersch E. (2007), p. 3. However, he immediately highlights that: "the group influence cannot go to the point that it would sacrifice the subsidiary's interest and those of its creditors to the group. Hence there are certain safeguards".

[63] Club de Juristes, (2015), p.10.

academics has shown a deep interest for this theory and its application.[64] In addition, many countries all over Europe have decided to adopt a similar approach to the Rozenblum one.
Before thoroughly investigating the theory and its implications, below are some lines concerning the phenomenon of group of companies in France.

2.1.1 Group of companies in France

France has not implemented a complete framework for groups of companies; nothing remotely closed to the German *Konzenrecht.*[65] In addition, no definition of what a corporation group is - at least for a general purpose - directly provided by the law. Yet, France opted not to implement a comprehensive legislation for groups of companies, meanwhile other European countries - primarily Germany - were adopting a similar solution. As known, in 1965 Germany provided a general reform of the *Aktiengesetz* introducing additional sections[66] referring to the phenomenon of group of companies. As already seen, on the grounds of this new proposal, even European institutions were fiercely discussing to adopt a similar solution.
The lack of a regime for groups of companies might seem odd, if we consider that France enjoys a privileged role in defining the admissibility of the group's interest. Actually, France analyzed the possibility to adopt the German model, but it was soon perceived to be too rigid and not suitable to its specific needs.[67] This has brought about an active role of case law in this field which was considered sufficient to deal with the issue and therefore a common regulation was not felt necessary to be implemented. Consequently, the lack of definition by law stopped being an issue, since the courts filled the omission introducing some criteria in order to establish the presence of a group of companies.
However, some clarifications are needed since it is not entirely correct to affirm that there are no legislative provisions about group of companies in France.
First, there are rules about control and relationships in case of acquisitions of shareholdings which were immediately introduced under the influence of the German reform.

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[64] *Ex multis*, Forum Europaeum on Group Law, (1998), p.1 ff.

[65] As the German law on affiliated companies and groups of companies is generally referred to.

[66] In particular, §15 ff and §291 ff. of the Aktg.

[67] Conac P.H. (2020), p.88.

Indeed, in 1966 the French Commercial Companies Act[68] introduced some important concepts related to groups of companies, such as the notion of *filiale, participation, contrôlant, participation réciproques*. These provisions are now, with small differences, contained in the Chapter 3, of the Book 3 of the French Commercial Code.[69]
They distinguish the case when a company owns more than half of the legal capital of another company; this one would be its *filiale* (art. L233-1 60), from the different situation that occurs when the shareholding is between the 10-50% of the legal capital; in that case it would be a simple *participation* (art. L233-2 61).

Article L. 233-3 of the French Commercial Code provides a notion of control.

"I. - For the purposes of sections 2 (crossing of thresholds) and 4 (cross shareholdings) of the present chapter (Subsidiaries, shareholdings by other companies and controlled companies), any person, legal or natural, is deemed to control another company:
1. When it directly or indirectly holds a fraction of the capital that gives it a majority of the voting rights at that company's general meetings.
2. When it alone holds a majority of the voting rights in that company by virtue of an agreement entered into with other partners or shareholders and this is not contrary to the company's interests; 3. When it effectively determines the decisions taken at that company's general meetings through the voting rights it holds; 4. When it is a partner in, or shareholder of, that company and has the power to appoint or dismiss the majority of the members of that company's board of directors or members of the management board or of the supervisory board.
II. - It is presumed to exercise such control when it directly or indirectly holds a fraction of the voting rights above 40% and no other partner or shareholder directly or indirectly holds a fraction larger than its own.
*III. - For the purposes of the same sections of the present chapter, two or more companies acting jointly are deemed to jointly control another company when they effectively determine the decisions taken at its general meeting*s."

This definition of control is quite similar to the ones adopted in other Member States as Article 2359 of the Italian Civil Code and §17 of the German Aktg.
The main difference can be found in the absence of provisions regarding the second element which configures a group of companies *i.e,* the dynamic element - represented by the common management of the group - as for the Italian *direzione unitaria* or the German *einheitliche Leitung.*
Other rules, limited to listed companies, were enacted by the *Commission des operations de bouse* (COB) established in 1967. Moreover, there are also other specific provisions as

[68] Law 66-538 of 24th July 1966.

[69] See L233-1 à L233-5-1.

those aiming at ensuring the transparency of shareholding structures in the case of joint ventures (Art. L233-7), provisions on consolidated financial statements (Art. L233 16-L233-28), and provisions that indirectly affect the group of companies (Art. L233-38 ff, relating to directors' interests).

Second, but most important, France is part of the European Union since its birth and since the Treaty of Rome[70]. Indeed, all the rules deriving from European law must be directly applied in France. Therefore, there are some rules of European derivation, which discipline the phenomenon of groups. It is the case of the rules regarding the accounting sphere,[71] the transparency of shareholdings for takeover bids, the rules regarding competition sphere.

2.1.2 The recognition of the interest of groups

2.1.2.1 <u>The position before the Rozenblum doctrine</u>

The challenge of the recognition of the interest of groups is the core of the French approach to groups of companies. The solutions adopted by the courts, since the early 1950s, show the idea that "*ignorer la réalité du groupe conduirait à une répression trop sévère. En effet, la raison d'être du groupe résidé dans la recherche d'un profit commun pour les sociétés membres*".[72] A group of companies is characterized by this unique cohabitation between unity (*Einheit*) and plurality (*Vielheit*) and ignoring it would deprive the nature of this complex phenomenon. This implies that the relationships incurred among the same group must be assessed jointly. If certain conditions are met, interpreted restrictively, no liability can be configured on directors acting in the interest of the group.
This formulation was proposed in the criminal field, and it was later transposed in the civil context.[73] The subject matter of the interest of the group was raised for proceedings

[70] In 1951France was one of the signatories of the Treaty of Paris for the establishment the European Coal and Steel Community.

[71] In particular, the notion of control for the accounting sphere is provided by L233-16.

[72] Boursier M., (2005), p. 275.

[73] For a first application in the civil context, see the judgment of the French Court of Cassation of 3rd April 1990.

regarding the provisions against the abuse of corporate assets, *abus de bien socieux*[74] provided by Article L242-6 of the French Commercial Code for stock corporations (*sociétés anonymes*). A similar provision is provided by Article 241-2 of the French Commercial Code for limited liability companies (*sociétés à responsabilité limitée*).

These provisions apply to board chairmen, directors or managing directors of listed and non-listed companies. They prohibit "using the company's property or credit, in bad faith, in a way which [the person] knows is contrary to the interests of the company, for personal purposes or to favor another company or undertaking in which [the person] has a direct or indirect interest." The sanction is a prison sentence up to five years and a fine up to 375,000 euros.[75]

Criminal prosecutions can be initiated either by public prosecutors or by a minority shareholder acting in the name of the company (*action sociale ut singuli*). In this case, a person can initiate a criminal prosecution by filing a criminal complaint (*plainte avec constitution de parte civile*) with the Dean of Examining magistrates (*Doyen des Juges d'Instruction*) of the first-degree Court (*Tribunal correctionnel*). The criminal complaint must establish that it is "possible" that there has been a damage and that there is a link between the damage and the alleged abusive conduct.[76]

These provisions, enacted in 1935 did not address the peculiarities of a group context.

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[74] Member States have shown a tendency to attribute relevance to the group interest in regards of white collars crimes.

[75] According to L242-6:*"Est puni d'un emprisonnement de cinq ans et d'une amende de 375 000 euros le fait pour : 1° Le président, les administrateurs ou les directeurs généraux d'une société anonyme d'opérer entre les actionnaires la répartition de dividendes fictifs, en l'absence d'inventaire, ou au moyen d'inventaires frauduleux ; 2° Le président, les administrateurs ou les directeurs généraux d'une société anonyme de publier ou présenter aux actionnaires, même en l'absence de toute distribution de dividendes, des comptes annuels ne donnant pas, pour chaque exercice, une image fidèle du résultat des opérations de l'exercice, de la situation financière et du patrimoine, à l'expiration de cette période, en vue de dissimuler la véritable situation de la société ; 3° Le président, les administrateurs ou les directeurs généraux d'une société anonyme de faire, de mauvaise foi, des biens ou du crédit de la société, un usage qu'ils savent contraire à l'intérêt de celle-ci, à des fins personnelles ou pour favoriser une autre société ou entreprise dans laquelle ils sont intéressés directement ou indirectement ; 4° Le président, les administrateurs ou les directeurs généraux d'une société anonyme de faire, de mauvaise foi, des pouvoirs qu'ils possèdent ou des voix dont ils disposent, en cette qualité, un usage qu'ils savent contraire aux intérêts de la société, à des fins personnelles ou pour favoriser une autre société ou entreprise dans laquelle ils sont intéressés directement ou indirectement. Outre les peines complémentaires prévues à l'article L. 249-1, le tribunal peut également prononcer à titre de peine complémentaire, dans les cas prévus au présent article, l'interdiction des droits civiques, civils et de famille prévue à l'article 131-26 du code pénal. L'infraction définie au 3° est punie de sept ans d'emprisonnement et de 500 000 € d'amende lorsqu'elle a été réalisée ou facilitée au moyen soit de comptes ouverts ou de contrats souscrits auprès d'organismes établis à l'étranger, soit de l'interposition de personnes physiques ou morales ou de tout organisme, fiducie ou institution comparable établis à l'étranger*".

[76] Helleringer G. (2019), p.12. See also Conac P.H. (2020), p.100.

However, it is quite clear that the relationships between companies belonging to the same group need a different and more flexible approach to detect an abuse of corporate assets. Therefore, from the first decisions made by the French courts, the presence of group of companies has been detected in order to exclude the configuration of the crime of abuse of corporate assets, if the typical conduct is committed "*in the interest of the group*". The idea at the basis of a similar reasoning is that the corporate interest, being the ultimate aim of the directors, may give way to a different, broader notion of interest, which takes into account the fact that a company belonging to a group - even though it has an autonomous legal personality and it is a separate entity - does not constitute a monad, but lives and breathes in a broader context, made up of a various relationships at different levels, which cannot be ignored in the overall assessment of the actions of its directors.

A fundamental question, therefore, arises:

"*Est-il opportun de sanctionner un acte contraire à l'intérêt social d'une des sociétés alors qu'il bénéficie à l'ensemble du groupe et à long terme à la société elle-même? Quelle serait l'utilité juridique et économique d'une telle sanction*" ? [77]

French courts soon started to deal with the issue offering an answer to this question.
The first trace of the idea that in the presence of a group, the rules regarding the abuse of corporate assets, needed a more specific treatment is in 1955.[78] However, in order to have a more comprehensive vision of the matter it was necessary to wait several years later.
It was the decision pronounced by the *Tribunal correctionnel* of Paris in the famous Agache-Willot case of 1974[79] (and even more by the French Court of Cassation in the Rozenblum case which followed a decade later) that laid the foundations for the first recognition of the phenomenon of groups of companies through the identification of its interest. The conditions in order to exonerate any liability in the case that directors acted following the group interests were set up accurately by the *Tribunal correctionel* of Paris on May 16th, 1974. This decision is known as *arrêt* Agache-Willot deriving from the

[77] Boursier M. (2005) p.272. The author quotes also Cesare Beccaria's "*Dei delitti e delle pene*" to underline the need of proportionality when inflicting a sanction.

[78] Judgment of the Tribunal Correctionnel de la Seine of 11th May 1955. Afterwards, some other decisions laid down the foundations for a more comprehensive system enunciated by the *Rozenblum* decision.

[79] Judgment of the Tribunal Correctionnel of Paris of 16th May 1974, *AgacheWillot*.

name of the group involved.

The directors of Agache-Willot group were sued for *abus de bien soucieux* for two different abusive conducts related to the acquisition of the textile company Saint-Frères.

First, they were indicted to have used Saint-Frères' resources in order to pay previous personal debts. Second, they were also accused of making the Saint-Frère company bear the cost of acquiring Bon Marché.[80]

Convicted on the first point, they were acquitted for abuse of corporate assets on the second point on the grounds that this acquisition was "*susceptible de renforcer le groupe et que les avances de cette société à d'autres sociétés du même groupe, répondant à la poursuite d'intérêts légitimes, ne constituent pas des agissements délictueux*".

The decision clearly affirms that in the presence of a group an abuse of corporate assets must be evaluated under a totally different perspective; the presence of a group can legitimately represent a defence for the directors in case of an economic operation justified in light of the group perspective.

As noted by Professor Marie-Emma Boursier, "the criminal division recognises a certain degree of financial permeability within the group and concludes that the classic legal elements constituting the offence of misuse of corporate assets must be set aside, as the directors of the group necessarily have direct or indirect interests in all the companies and their personal interests are often difficult to distinguish from the interests of the group".

However, the sacrifices imposed on a company must serve the interests of the group and be limited. Hence, there are some conditions which must be satisfied in order to fulfil this limit.

First, it is required the existence of an economic structured group. Second, the sacrifices imposed to the companies must find their justification in an overall, coherent policy conducted in the interest of the group. Third any transaction needs a *quid pro quo* and cannot be disproportionate to the company's economic possibilities.

The criteria individuated by Agache-Willot decision were later expanded by the Rozenblum case and the following decisions.

[80]As many could know, Bon Marchè is a famous department store in Paris. Founded in 1838, it is considered one of the first modern department stores. It was acquired in 1970 by the Agache-Willot through the Saint-Frere.

2.1.2.2 The Rozenblum doctrine

The most important case on the theme is the Rozenblum case decided by the French Court of Cassation "*Cour de Cassation"* in 1985.[81] Despite some precedents can be found, it is with the *arrêt* Rozenblum that the topic of the recognition of the group's interest has acquired strength.

The name of the case and of the subsequent theory deriving from it, comes from Mr. Rozenblum, a *promoteur immobilière* who had set up fifty-two companies, mostly for the real estate promotion that, after an unsuccessful diversification program, failed. Consequently, he was accused of *abus de bien sociaux* to have moved assets between the different companies to sustain those that were making losses.

He tried to defend himself before the courts by claiming that the money movements were justified by the existence of a group among the companies involved. The French Court of Cassation rejected Mr. Rozenblum's defense in the concrete case, but expressed a powerful principle, intended to be a point of no return. The Court established that in order for the *abuse of bien sociaux* not to be configured : "the financial aid consented by the managers of the company which is part of a group in which they are directly or indirectly interested should be motivated by the common economic interest in relation with the global policy of the group, should not be devoid of counterpart and should not provoke imbalance of the mutual obligations, nor exceed the financial capacity of company that is supporting the burden".[82]

What is fascinating about this *arrêt* - and the following decisions which have explained the point consistently - is the maturity shown by the French courts. The matter of the interest of groups entered the debate many decades later. In those years, the only point of reference was the German Aktg whose approach was opposed to this providing that any kind of loss needs to be immediately counterbalanced.

For the first time, it was established that the directors of a solvent company part of a group can take into consideration the interest of the group when making a decision that causes an immediate disadvantage to a subsidiary. This has represented a completely innovative approach.

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[81] Judgment of the French Court of Cassation, Criminal Chamber of 4th February 1985, *Rozenblum and Allouche*.

[82] *Ibidem.*

What is important to underline is that despite the *safe harbour*, the Rozenblum doctrine does not go so far as to state that the interest of the group allows to jeopardize assets or lose resources of the subsidiaries. At the same time, this mechanism should not be applicable in the case of insolvency of the companies involved. The idea is still one of equity and balance of the interests at stake.

According to this decision, it is possible to identify four criteria which must cumulatively be met in order to exclude the liability of directors:

1) The existence of a group which the companies are part of.
2) The pursuit of a common interest by a global group policy.
3) An appropriate consideration for the transaction.
4) The fact that the transaction must not be detrimental for a company.

These criteria, partially already formulated by the Agache-Willot decision, represent the condition for an act to be considered legitimate in the light of the existence of a group.

3.1 The existence of a group which companies are part of.

The requirement of a group structure was better formulated in the judgment of 4th September 1996,[83] which explicitly states for the first time that "the financial assistance provided by the company's director to another company in which he is interested in, escapes the provisions of the texts criminalizing the abuse of corporate assets if, the existence of a group of companies is established and if the company is a subsidiary of the group".

The first criterion represents the need for the companies involved in a prejudicial transaction justified by the shield of the group to be effectively part of a group which enjoys stability and certainty regarding the relationships between the companies which are part of it. This implies that if control is exercised by a natural person a similar solution could not be applied. It is necessary a deep relationship between its members so that the group can be considered from an economic point of view as an entity acting individually on the market. However, this does not imply that the parent company can exert such a

[83] Judgment of the French Court of Cassation, Criminal Chamber of 4th September 1996.

strong influence that the subsidiaries become mere executors of its plans. If this was the case, it would be an abuse of rights, as the legal personality of the subsidiaries would lose its significance. Hence, French courts have established that when a company is dismembered for no real reason - for example for the simple tax benefits that derive from it - and its activities are not diversified, it would not be a group.
Hence group notion is interpreted strictly, and its existence must be considered at the moment of the conclusion of a possible detrimental act.
A very interesting aspect has been analyzed by the Court of Cassation in the field of the leverage buy-out operations. The Criminal Chamber, in fact, rejected the group justification in a judgment of 23rd May 2002, considering that a parent company that had no real activity and was created exclusively for the purpose of buying a target company could not constitute a group with it.[84]

3.1 The company's directors act in accordance with what they believe to be the common or shared interests of the company and the other members of the group pursuing a group policy.

The second criterion enunciated by the Court in the Rozenblum case entails that to exclude any liability, it is necessary to individuate a coherent group policy. This criterion is general and does not imply that the group should be centrally managed; there is a common group interest even if the various subsidiaries are active in different economic fields.
Nonetheless there must be a strong, effective business integration among the companies within the group. The interest of the group has to be assessed according to a plan whose objective is to give a balance to the different interests at stake.
It is necessary that the decisions which are going to impact on the group - and indirectly on the subsidiaries - are evaluated under a common strategic plan elaborated *ex ante* which shows the presence of deep interconnections among the companies being part of the group. It is necessary that this plan shows a coherent group policy, and that eventual burdens or detrimental disadvantages are allocated under a reasoned perspective. The common interest should move this plan putting the exigencies into balance.

[84]Judgment of the French Court of Cassation, Criminal Chamber of 11th May 2002.

On 23rd April 1991, the French Court of Cassation decided a case where the companies were only connected by debatable financial operations which were concealed in the accounts by fictitious commercial agreements. In the view of the Court, there was no common policy adopted by the board of directors or the general meeting, neither the will to pursue an interest of the group itself. [85]

Having made these premises about the role of the common policy, questions could arise for the meaning of the term "interest of group". Despite the critics that may be made, its value cannot be discussed. "*L'intérêt commun est la raison d'être du fait justificatif de groupe parce qu'il est la raison d'être du groupe dont il a motivé la constitution*."[86]

Without being rhetorical or abstractive on the theme, the Courts have elaborated three different notions which could be taken in consideration.

The criminal division of the French Court of Cassation defines it as the realization of an economic, social or financial interest which shall be shared by the group. For this purpose, *"*the community of interests is at the heart of the system. The parent company does not play alone, it is looking to achieve the best possible advantage for the entire group at two levels: at a common policy formulated "by the group" and not only by its dominant party, but also "for the group" as a whole with an aim of rationalization".[87]

3.1 The transaction's consideration should be appropriate and not inadequate, from the subsidiary's perspective.

The third criterion is related to the value of the transaction. The reason for this rule to exist relates to the protection of minority shareholders and creditors of the companies involved which otherwise would bear an excessive loss. Hence, it is necessary that the financial support - or those transactions which could be analyzed under the perspective of the abuse of corporate assets - are not conducted without a counterpart and do not break the balance between the respective commitments of the companies. The financial aid from one company to another company must have an economic *quid pro quo* even if the operation shall not be necessarily conducted at arm's length.

This criterium is often cumulated with the fourth one so that many authors talk about

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[85] Judgment of the French Court of Cassation of 23rd April 1991.

[86] Boursier M. (2005), p. 295.

[87] Pariente M. (2007), p. 324.

three Rozenblum criteria, nor four.[88]

3.1 The transaction should not bring into question the company's ability to pay its debts.

The last criterion provides that the value of transactions involved must not exceed the financial capacity of the company. The main reason for this rule is - as for the third one- the need to protect creditors of the subsidiary as well as minority shareholders. It affirms that the interest of the group cannot entail the failure of a company. The Rozenblum solution can be applied only to a solvent company since an operation, albeit in the interest of the group, cannot pose a risk to the existence of the subsidiary. Indeed, the transaction must not create a risk of bankruptcy for the company. Therefore, the financial possibilities of the applicant company are assessed on the day of the assistance and on an objectively determinable criterion.

As already indicated, the judgements after the Rozenblum decision have continued to interpret the question enunciating additional criteria and giving clarifications to the pre-existing ones.
Without entering excessively the matter - as the aim of this work is to give relevance to subject matter of the recognition of interest of groups under the European perspective - the theme related to the abuse of corporate assets in case of a group do not represent the only situation in which the interest of the group shall be considered in France.
After the Rozenblum doctrine, other spheres of French law started to be interested on the matter. For instance, this is the case of L225-231 of the French Commercial Code. This provision establishes that an association or one or more shareholders representing at least 5% of the shared capital can submit written questions to the chairman of the board of directors, or to the executive directors on one or more of the company's management operations and its controlled companies. In this case the request shall be examined in the light of the interest of the group.[89]

As previously mentioned, France has assumed a leading role in defining what the interest

[88] Such is the case of the Forum Europaeum.

[89] Pariente M. (2007), p.327.

of a group should be and whenever it can be considered as a parameter - both *ex ante* and *ex post* - to individuate the more optimal management of a group.

France's predominancy has increased significantly for two main reasons.

First, it is considered as an essential model for all the jurisdictions aiming at adopting a position in this debate. As seen in Chapter 1, several other countries have adopted a similar approach. It is the case of Belgium[90], Netherlands[91], Luxembourg, Spain and other ones already quoted. The reason of its success can be traced back to the idea that it overcomes the German system and the rigid mechanisms of compensation provided therein.

Second, it met the favor of various experts who have suggested the introduction of a uniform discipline at European level.[92] For example this is the solution adopted by the European Company Model Act at Chapter 15.16.

However, some authors have considered that the approach used is too rigid since the criteria are defined too narrowly and are not easily satisfied.

At this point, another last question is necessary. Is the Rozenblum defense applied in practice?

The surprising answer is no. A study elaborated by professor Boursier[93] has shown the evolution in 20 years, from 1985 to 2005 of the Rozenblum defense. The results were deluding; only 9 judgments out of 75 accepted it.

However, it is possible to read these results in the opposite perspective. The main reason of this failure of the model is not due to its non-fulfillment, rather to the fact that the interest of the group is automatically considered as a general criterion to orient the management of the group.

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[90] Belgium offers a solution so similar to the Rozenblum doctrine that often the model is addressed as the French-Belgian approach, opposed to the German one.

[91] In the Netherlands, the so called "*Nimox doctrine*" was elaborated starting from a Dutch Supreme Court decision of 1991. It offers a solution inspired by the French Rozenblum approach but simplified.

[92] The theme will be further discussed later.

[93] Bousier M. (2005), p. 273 ff.

2.2 The German model

The German system plays a central role in the jurisdictional dynamics of group of companies in Europe. As already mentioned, Germany decided to introduce a comprehensive legislation long before other countries.
The other jurisdictions - which were experimenting the same expansion of the phenomenon - [94] started to provide only singular provisions, not a general system as the one enacted by the Germans in 1965. This choice is not related to a specific and different situation existing in Germany if compared to other countries, rather it can be defined as an intuition of the *Bundestag*. Germany's role as a main character role is confirmed by the fact that Europe and other Member States have always considered the possibility to implement its system. In addition, there are several Member States which have adopted - to some extent - the German model. It is the case of Portugal (1986), Slovenia (1993), Czech Republic (1991), Hungary (1988). Nonetheless, countries which decided to opt for a different solution, did not ignore this system and took inspiration from it.[95]

Proceeding in order, the German legislator tried to solve the problem of the growing influence of groups of companies, implementing specific rules on groups in the German Stock Corporation Law, the *Aktiengesetz*, under the sections §15 ff. which mostly provide definitions and §291ff. which contain specific rules for the management of groups.
These rules refer solely to stock corporations (*Aktiengesellschaft*) and not to limited liability companies (*Gesellschaft mit beschränkter Haftung, GmbH*) which represents the prevalent type of company in Germany. Neither did these provisions find application for the commercial and civil partnerships.
This has brought to an inefficiency of this model and it has been underlined that "due to its limited scope of applications and some of its questionable foundations the actual law of group of companies reflects only partially the original concept of the German legislator".[96]

Section 18 of the AktG offers a definition for groups of companies. It is the only

[94] K. Bohlhoff and J. Budde (1984), p. 164.

[95] For example, the relation between Article 2497 of the Italian Civil Code and §18 of the Aktg.

[96] S. Mock (2020), p.303.

jurisdiction among those analyzed to introduce a general provision for company law.[97]

"(1) If a controlling and one or more controlled enterprises are subject to the common direction of the controlling enterprise, such enterprises shall constitute a group and the individual enterprises shall constitute members of such group.
If enterprises are parties to a control agreement (§ 291) or if one enterprise has been integrated into the other (§ 319), such enterprises shall be deemed to be subject to common management. A controlled enterprise and its controlling enterprise shall be presumed to constitute a group.
(2) If legally separate enterprises are subject to common direction, although none of such enterprises controls the other, such enterprises shall constitute a group and the individual enterprises shall constitute members of such group."

While the second part of the Section concerns the horizontal groups, the first one is referred to the vertical groups which are characterized by relationships not on an equal basis.
For a vertical group of a companies to be configured, it is necessary the presence of *eineitliche Leitung* so that the companies being part of the group act according to a group strategy under the directions of a parent company.
Reading this provision, it is evident that the Italian legislator was deeply influenced by this mechanism. It is established that what makes a group and allows it to obtain the advantages of this model is the presence of the common direction, as a dynamic and effective element of the phenomenon of groups of companies which allows it to act as a single entity on the market through the execution of a common plan.
In addition, as the provision contained in Article 2497sexies of the Italian Civil Code, there is a presumption for a group to exist in case of control.[98]

According to the German law, the creation of a group can be obtained as a result of four different situations:

1) An entreprise agreement (§291).

[97] In any case, the rules for special subjects, as tax or accounting matters, continue to be independent.

[98] The notion of controlled and controlling enterprises are enunciated under §17: "Legally separate enterprises over which another enterprise (controlling enterprise) is able to exert, directly or indirectly, a controlling influence, shall constitute controlled enterprises. A majority owned enterprise shall be presumed to be controlled by the enterprise with a majority shareholding in it".

2) The so-called de-facto groups (§17 and §311).
3) By cross-shareholdings (§328).
4) By integration of enterprises (§319).

Without entering into the merits of the last two solutions whose application is more residual, the core of German provisions concerning groups of companies is rather related to the first two cases i.e. when a corporation group exists thanks to a special contract among its members and when – albeit the lack of a similar contract – a company shows a deep level of dependence on another company due to the presence of a direct or indirect control relationship between them.

2.2.1 *Enterprise agreements and control agreements*

In order to form a group under the German Aktg a possibility is to stipulate an enterprise agreement (*Unternehmensvertrag*) between companies which will result in the constitution of *de iure groups* (*Vertragskonzern*).
This category comprises contracts in which a corporation agrees to be managed by another enterprise *i.e.* control agreement (*Beherrschungsvertrag*), or in which a corporation agrees to transfer all of its profits to another enterprise *i.e.* agreement to transfer profits (*Gewinnabführungsvertrag*).[99] These two types of contracts are usually combined in what is customarily referred to as an *Organschaftsvertrag.* The analysis of this work will be focused on the first ones: the contractual agreements.
In this case specific formal requirements are provided due to their substantial effect on a corporation's independence. Indeed, after having signed a similar contract, the companies lose their autonomy since "the purpose of the controlled enterprise is no longer to run an independent business, rather to run its business under the control of the controlling enterprise".[100] Control agreements must be written, approved by a favorable shareholder resolution adopted by a three-fourths majority of the capital, and recorded in the respective commercial register.[101]

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[99] There are other types of enterprise agreements as "profit pooling agreements", "agreements to transfer part of a profit", or "agreements to lease operations" and an "agreement to surrender operations". They are less common than others.

[100] S. Mock (2020), p.307.

[101] §293-294 of the Aktg.

Finally, it is required a full explanation to the shareholders of the reasons to conclude the agreement.[102] According to §293a, it is necessary a "comprehensive written report that explains and justifies legally and economically the conclusion of the enterprise agreement, its detailed provisions and especially the nature and the level of compensation according to § 304 and of the settlement according to § 305."

The definition of control agreements is provided by §291 of the Aktg according to which it is the contract in which "*a stock corporation or a partnership limited by shares submits the direction of the company to another enterprise*".
On the contrary, the principal managerial aspect is provided by §308 which regulates the relationships existing between the controlling company and the controlled one: "In the case of a control agreement, the controlling enterprise shall be entitled to issue managerial instructions to the management board of the company. Unless otherwise provided in such an agreement, instructions may be issued which are unfavorable to the company, if they are beneficial to the controlling enterprise or to the affiliated enterprises which are members of the same group as such controlling enterprise and such company. The management board shall be obligated to comply with the instructions of the controlling enterprise. The management board may not refuse compliance with an instruction on the grounds that such instruction does not in its opinion serve the interests of the controlling enterprise or of affiliated enterprises that are members of the same group, unless these instructions manifestly do not serve such interests".
Considering this, in presence of a control agreement, the controlling company has the right to give instructions to the board of directors of the other companies. Unless otherwise provided, the instructions may also be detrimental to the subsidiary if they are useful for realizing an interest of the controlling company or of the companies being part of the same group. The administrative body must comply with these directives, despite their negative impact on the controlled company. It is not entitled to refuse to comply with an instruction even when, in its opinion, that instruction does not serve the interests of the different subjects involved. However, this rule is mitigated by some remedies.
First, the representatives must use the ordinary diligence of a conscientious manager towards the company when giving instructions. If they fail to do so, they shall be jointly

[102] K. Bohlhoff and J. Budde (1984), p. 166.

and severally liable to the company for the resulting loss;[103] the members of the controlled company are also liable to the company for failure to perform their duties if the acts for which they are held liable are not due to the execution of binding instructions from the controlling company.[104] Second there is a specific duty of disclosure for the conclusion of the contract. Third, there is a general duty to compensate losses (§302). Fourth, the provisions of §304 ensures a minority shareholder the possibility to claim the controlling shareholder an adequate compensation.

2.2.2 *The de facto groups*

The other fundamental way to set up a group of companies - and perhaps the most important because of its diffusion- is generally addressed as de facto group of companies. This expression reflects the situation in which a company according to the notion of control provided by §17 - directly or indirectly - controls another company. The main characteristic of this system which distinguishes it from the enterprise agreements is that the parties do not expressly regulate *ex ante* their relationship through a specific contract. This gives uncountable benefits in terms of effectiveness of the management of the group. In addition, no formal requirements as those provided by 292§ ff. are requested.

The rules given for the de facto group prohibit the controlling company to impose burdens to the subsidiary without providing a fully compensation within a year.[105]

§ 311 of the Aktg provides that "in the absence of a control agreement, a controlling enterprise may not exercise its influence to cause a controlled stock corporation or partnership limited by shares to undertake or refrain from undertaking a burdensome transaction, unless any disadvantage is compensated. If such compensation is not made during the fiscal year in which the controlled company is caused such disadvantage, the time and means by which the compensation will operate shall be determined no later than the end of such fiscal year. The controlled company shall be granted an entitlement to the measures designated to serve as compensation.".[106]

The main reason for this rule is "the protection of outsiders i.e., the protection of minority shareholders and creditors of the company through the ban of a damage of the company

[103] §309 of the Aktg.

[104] §310 of the Aktg.

[105] Tröger T.H. (2015), p.7.

[106] §311 of Aktg.

indirectly protected. For the controlling company this means at the same time, that disadvantages can never be justified due to of the interest of the controlling company or of the group but always only through an economic compensation of them".[107]

According to this provision, the controlling company may not give orders to the subsidiary which might prejudice its interest or be harmful to it unless the difficulties suffered are compensated within the fiscal year. However, if similar directives are given, the parent is liable to pay damages to the subsidiary and, if direct damages occur, also to the individual shareholders of the subsidiary.[108]

The compensation shall occur by the end of the fiscal year. If this obligation is not fulfilled during the fiscal year in which the controlled company has suffered such disadvantage, the time and means of compensation shall be determined no later than the end of such fiscal year.[109]

For this provision to be effective, there are specific duties of disclosure. The management body of the controlled company is required to draw up, within the first three months of each fiscal year, an annual report on all the legal relationships it has with the controlling company as well as the ones with the other subsidiaries of the group. This report analytically describes any consideration given or received together with the indication of the advantages and disadvantages for the company.[110]

The report, drawn up by the directors of the subsidiary, must then be submitted to the auditors of the supervisory board and to the external auditors if the annual financial statements must be object of audit.

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[107] K. Schmidt/Lutter (2010) p.3906. More generally, see Cahn A., Donald D.C. (2018), p. 834. According to them the *Konzrenrecht* is based "on the notion that the general rules on minority and shareholder protection are insufficient if a controlling shareholder has substantial business interests besides the stake in the controlled corporation because the controlling shareholder may have an incentive to damage the corporation for the sake of promoting these other business interests, and because it may be difficult to detect whether the controlled corporation has in fact been damaged if it is engaged in business with other companies dominated by the controlling shareholder*"*.

[108] §317 of the Aktg.

[109] §317 of the Aktg "If a controlling enterprise causes a controlled company with which a control agreement does not exist to enter into a transaction or to undertake or refrain from undertaking any act which is disadvantageous for such controlled company, without compensating such disadvantage by the end of the fiscal year or granting to the controlled company an entitlement to any measures serving as compensation for this, such controlling enterprise shall be liable for any resulting damage to such controlled company. Such controlling enterprise shall also be liable to the shareholders of the controlled company for any resulting damage to the shareholders insofar as they have suffered damage in addition to any loss incurred as a result of the damage to the company. The controlling enterprise shall not be liable if a prudent and a conscientious manager of an independent company would have entered into such transaction or undertaken or refrained from undertaking such act*."*

[110] §312-315 of the Aktg.

2.2.3 *The recognition of the interest of the group*

After having analyzed the main features of German *Konzerencht* regarding the two principal categories of groups of companies provided therein, it is necessary to ask whether Germany recognizes and protects the interest of the group.
The correct answer is no, even though it cannot be affirmed that the solution is - at least partially - taken into consideration.
With regard to the control agreement, no importance is given to the group itself or to its interest, since this interest seems to be flattened out and absorbed by those of the controlling company which mostly arbitrarily decides what disadvantages a company part of the agreement may suffer. This is the consequence of the fact the company completely loses the right to determine in an independent and autonomous way the strategic and business actions to take.[111]

Therefore, if no space can be found for the interest of the group with reference to control agreements, more reasonings are possible regarding the second category of groups *i.e., de facto* groups. As already highlighted, §311 of the Aktg affirms that it is possible for the parent company to impose unfair transactions or burdens to the subsidiaries on the condition that the disadvantages are compensated in the fiscal year. This idea could seem a concept similar to the assessment provided by the *Rozenblum* doctrine.

However, a deeper analysis shows the differences existing between these systems. Indeed the compensative mechanism provided by §311 reflects an *ex-post* assessment which requires that every operation is immediately compensated with a mathematical and analytical vision and does not consider the role played at the moment of defining the group policy and the long term aims of the group.[112] The mechanism seems to be excessively rigid and does not take into account that the group is a dynamic element and therefore evaluations cannot be conducted on a daily basis as if they were a mathematical operation. The group pursues a common policy and strategy which constitutes its

[111] The only limit to a potential endless power of the controlling company is represented by the second part of §308 of the Aktg which affirms that the controlled company shall compel with disadvantageous instructions "unless such instructions manifestly do not serve the interest of the company or of the affiliated".

[112] Forum Europaeum on Group Law, (2001), p. 341 ff.

founding element as affirmed by the second Rozenblum criterion. Conversely, in German solution the compensatory mechanism, far from being a system of weights and counterweights for the evaluation of the group policy in its entirety, represents a simple "*theory of indennizzo*".[113] Indeed, it provides a simple quantification, and definition in numerical terms, of the unfairness in order to reach a compensation in money; a system which completely addresses and recognizes the interest of the group, instead, provides a set of criteria for evaluating the nature and the coherence of a business decision within the dynamic framework of group policy.[114]

2.3 The Italian model

Italy has adopted a similar approach to the French Rozenblum model recognizing the interest of groups of companies. Italian jurisdiction allows the directors of a parent company to act according to a group strategy pursuing what they believe the best solution for the group. This implies that intra-group transactions could bring immediate negative consequences for the subsidiaries if they are counterbalanced in a subsequent time. This does not entail the lack of tools against tunneling or any form abuse by the majority, but only that - under some safeguards - the interest of the group shall be evaluated as a parameter to conduct the director's actions.

The Rozenblum doctrine can be legitimately considered the predecessor of the Italian system. However, unlike the Rozenblum solution whose elaboration is due to the courts, the Italian system expresses the enunciation of this concept by law collocating in an autonomous provision.

Undoubtedly, this gives prestige to the Italian model. In the view of civil law countries, the law represents the primary source. It grants a wider juridical certainty and a greater protection not only for the interest of minority shareholders and subsidiaries, but also for creditors.

Moreover, the Italian attitude to the phenomenon of groups of companies is more structured than the French one. The system is collocated in an autonomous Title of the

[113] R. Pardolesi, U. Patroni Griffi (1997), p.10. Montalenti (1995), p. 731. The question will be further discussed analyzing the initiatives at European level.

[114] *Ibidem.*

Italian Civil Code[115] and enjoys more extensiveness, providing for a comprehensive system for the management of group of companies and the relationships between parent and subsidiaries.

In addition, while the implementation of the Rozenblum doctrine, elaborated in criminal law, has been passive in the civil sphere, in the Italian system distinct tracks have been maintained so that the civil and criminal liability of directors in case of abuse of corporate assets keep rules that are separate and not coincident.

Before analyzing the group interest, it is fundamental to investigate the rules concerning corporate groups in Italy.

2.3.1 Groups of companies and the liability for "direction and coordination activity"

The group structure developed quite early in Italy[116] and contributed - together with the industrial districts - to the economic development of the country first after the First World War and then, even more strongly after the Second World War.

Indeed, the Italian economic substrate is characterized by small-medium sized companies with a high level of concentration in the ownership. In this context, the group structure has represented for the Italian enterprises a way to obtain the benefits coming from a big dimension (also on an international size) exploiting the advantages of diversification.[117]

Notwithstanding this importance under an economic perspective, the phenomenon of groups was not regulated - with some exceptions - by law until the reform of 2003.

This has entailed that the framework of groups of companies was entrusted for more than 80 years to the normal rules of company law and the mechanisms provided therein.[118]

The Italian Civil Code of 1942 mostly ignored the phenomenon of groups and was far from defining a comprehensive framework. This lack was related to an old vision of

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[115] The new Italian Civil Code of 1942 contains both the civil provisions and the commercial ones.

[116] According to some authors, the first Italian group of companies was set up in 1889, under the control of the "*Società per lo sviluppo delle imprese elettriche*". See for example Pardolesi R., Patroni Griffi U. (1997), p.10. For others, the first corporate group in Italy can be found in the public sector. The IRI (Instituto per la Ricostruzione Industriale) was set up in 1933 and it was a *holding* for some important Italian companies. For this purpose, see P. Jaeger (1994) p.476.

[117] Tombari U. (2009), p.2.

[118] Before the Reform, Articles 2737 and 2391 of the Italian Civil Code - which regulate conflict of interests - were used to deal with the conflicts between the group interest and the parent's one.

company law which gave absolute priority to the individual company.[119]
Only a few dispositions concerned spheres strictly related to the groups. Such is the case of Article 2361 which recognized the possibility for companies to acquire shareholdings in other companies and the notion of control provided by Article 2359. Yet the original version of Article 2359 was far from the completeness that it has reached today. In any case this situation did not deal with the use of control over the companies as an instrument to direct and coordinate their activity in the view of a unitary interest.[120]

However, the Italian legislator could not have ignored group of companies for a long time, also due to the European interventions on the theme.
A first approach was to address single sector of the group life introducing individual rules. It is the case of the Law n. 216 of 1974 which established the duty to draft consolidated accounts and. Other examples are:

- The Legislative decree n. 127 of 1991, on accounting matters.
- The Law n. 95 of 1979 and legislative decree n. 270 of 1999 on the extraordinary administration of large enterprises in case of insolvency.
- The Legislative decree n. 385 of 1993, on the supervision of large banking groups, and the Legislative decree n. 58 of 1998 (TUF) on the supervision of groups of companies authorized to financial intermediation.
- The Law n. 287 of 1990 on competition law.

In parallel, the need to introduce a general framework for group of companies was recommended by many experts[121] and the courts started to express on the topic.[122]
Eventually, Italy decided to adopt a common and general framework for group of companies through the reform of the Italian company law enacted by the Law n.366 of

[119] According to Pardolesi R., Patroni Griffi U. (1997), p.7 "The regulation of public limited companies by the legislator - at the beginning of the last century- in respect of the model of the independent company was difficult to reconcile with the phenomenon of groups of companies".

[120] Corapi D., Benincasa D. (2020), p.111.

[121] *Ex multis* Scognamiglio G. (1996) p.1ff; Jaeger P.G., (1994), p. 476 ff.

[122] For example, the Italian Court of Cassation, in its judgment n. 5123 of 8th May 1991, stated that "the possibility that several companies may organize their economic activities with a view to pursuing a common interest which goes beyond those achievable by the individual company is not denied ".

30th October 2001 and implemented by the Legislative decree n.6 of 17th January 2003.[123] The reform introduces a new *Capo*, *C*apo IX in the 5th Title of the 5th book of the Italian Civil Code, under Articles 2497-2497septies naming it "direction and coordination activity", *attività di direzione e coordinamento*.

The Italian legislator chose to adopt a low-profile not giving a definition of groups of companies, but acknowledging their economic nature, decided to address the core of the phenomenon: its management and the role played by the parent company in defining the group strategy and the policies to be pursued.[124]

For this reason, the entire Title is dedicated to the activity of direction and control which can be defined as "the effective exercise of the power of a company to direct and coordinate other companies according to a unitary and common plan through a coordination of the essential functions of the dependent company as finance, sales, purchases, personal policies, organizations".[125]

Under the Italian legislator's perspective relevance must be given to the management of the companies being part of a group which, despite keeping their legal autonomous personality intact, act as a single entity on the market.

The Italian legislator was strongly influenced by the German *Konzerencht* and specifically by the provision of §18 of the Aktg. Like in the German *eineitliche Leitung*, the Italian jurisdiction also focuses on to the dynamic element of groups of companies.

The Italian legislator tried to simplify by providing, under Article 2497-sexies a presumption of the existence of this dynamic element in the case that a company: (i) a exerts one of the hypotheses of control provided by Article 2359 of the Italian Civil Code[126] or (ii) is obligated to draft the consolidated account.[127]

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[123] It was a general reform of the Italian Company Law which strongly influenced and modernized the traditional Italian system. The Italian Civil Code is dated back to 1942, therefore several reforms were necessary in order for it to be suitable to new and modern needs.

[124] Scognamiglio G. (2001), p.7.

[125] U. Tombari (2010), p.24. He identifies some parallelisms with the notion of *eineitliche Leitung* provided by §18 of the Aktg.

[126] Article 2359 of the Italian Civil Code, in its actual formulation, identifies three different types of control: *de iure* control (in the case that a company holds a participation in the capital of another company in a measure conferring the majority of the voting rights exercisable in the ordinary general meeting), *de facto control* (in the case that a company owns a quantity of voting rights sufficient to exercise a leading influence in the general meeting); *control by agreements* (in the case that a company is under the dominant influence of another company by virtue of special contractual relationships with it).

[127] The same presumption is provided by §17 of the Aktg.

The core of the 2003 Italian reform in the group context[128] is the introduction of a form of liability for the entity which exerts the activity of *direzione e cordinamento* whenever in its powers, it has violated the principle of correct management causing damages to the shareholders and the creditors of the subsidiaries.

For this purpose, Article 2497 of the Italian Civil Code states that: "Companies or bodies which managing and coordinating companies act in their own entrepreneurial interest or in the interest of others in breach of the principles of proper corporate and management of such companies, shall be directly liable towards (i) the shareholders of such companies for the damage caused to the profitability and value of the shareholding; (ii) the company's creditors for the damage caused to the integrity of the company's assets". At the same time, it is established that also those "who took part in the harmful act and, within the limits of the advantage obtained, the person who knowingly benefited from it" shall be jointly liable.[129]

According to some authors, this has represented a "Copernican revolution"[130] if compared to the past system where the liability was focused on the directors of the parent company and subsidiaries involved as natural persons.[131] It is important to underline that the provision of a liability for the entity exercising the common management does not imply that it should be liable for the obligations assumed by the subsidiary in its decisional autonomy.[132] Indeed, the directors of the subsidiaries still enjoy all the powers and maintain a margin of autonomy. If it were not so, the sense of plurality of the group would be lost and the subsidiaries would become mere executors of the parent's

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[128] Italian Parliament (2003), p. 43 states that: "it was held that the central problem of the group phenomenon was that of the liability of the parent company towards the shareholders and creditors of the subsidiary".

[129] Article 2497 of Italian Civil Code.

[130] This expression has been formulated by Abbadessa P. (2008), p. 279.

[131] For example, Article 90 of the Legislative decree n.20 of 8th July 1999, on the extraordinary administration of large enterprises in crisis established that in the case of unitary directions of the companies being part of a group, the directors of the company exercising this direction shall be jointly liable with the directors of the subsidiaries in crisis for the damages coming from their directional activity.

[132] The parent company is liable if the damage is directly derived from its instructions. This connection must be demonstrated. Recently the Tribunal of Rome in its judgment of 8th January 2021 has stated that: "Indeed, the mere fact that an entity holds a position of control and consequent powers of direction over another company does not imply that it is liable for every choice and activity made by the directors of the controlled company. Yet, the liability under Article 2497(1) of the Civil Code presupposes that the damage to the profitability and value of the shareholding of the (minority) shareholders of the controlled company and/or the damage to the integrity of the company's assets, with the consequent insufficiency of those assets to satisfy the company's creditors, are the result of activities and choices made in implementation of the directives of the parent company and constitute an abusive and unlawful exercise of direction and coordination activities, in breach of the principles of correct management of the controlled company".

desires.[133] Companies of the group keep their legal autonomy and retain – at least partially - their independence. Therefore, the parent company can be considered liable if it is demonstrated that the only reason for the subsidiary to adopt a detrimental decision was due to its influence.

This concept is reinforced by the provision of Article 2497ter of the Italian Code. It establishes that whenever a subsidiary's decision is taken under the influence of the parent company, it must be analytically motivated.[134] This duty is addressed to the resolutions of the general meeting and the board of the directors which must show exactly the evaluation and the reasons which the decision to adopt a similar resolution was based on. In this sense this Article is "functional to the identification and delimitation of management responsibilities, making it possible to assess *ex post* both the legitimacy of the parent company's actions and the involvement of directors liability".[135]

Therefore, for the liability to be configured, it is necessary to demonstrate:[136]

- The exercise of a coordination and direction activity which is presumed in the cases described by Article 2497 sexies.
- The breach of the principle of correct management of the group. This situation verifies whenever the parent company operates for its own personal interest or for a third party's one.
- The presence of a damage to the shareholders and the creditors of the subsidiary. The damage must be referred to the value of the shareholdings for the shareholders and the value of the company's assets for creditors.[137]

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[133] Reflecting on the theme, it is a similar concept to the one elaborated by the first and second Rozenblum criteria.

[134] In addition, there are specific duties of disclosure related to the activity of common management and direction as the provisions of Article 2497bis. See also Article 2428 of the Italian Civil Code.

[135] Tombari U. (2010), p.59.

[136] Judgment of the Tribunal of Rome of 18th February 2021. "It is necessary to give the proof of the "cumulative" existence not only of the power of direction and coordination, but also of further elements such as: i) the violation of the principles of proper corporate management of the controlled company; ii) the fact that the parent company has acted in its own or another's entrepreneurial interest; iii) the damage caused to the profitability and value of the shareholding and/or the damage caused to the integrity of the company's assets; iv) the causal link between the abusive conduct the damage".

[137] A recent judgment of the Court of Appeal of Naples of 8th June 2020 n.2035 has confirmed that "It is necessary to prove (i) the immediate causal impact that the management choices and decisions adopted by the dominant company have had on the management of the controlled company, and (ii) the impoverishing effect that their implementation has had on the latter's general assets and so to the creditors".

- The causal nexus between the alleged abusive conduct and the damage.

According to Article 2497, the action can be brought by:

- a shareholder of the subsidiary *for the damage caused to the profitability and value of the shareholding;*
- a creditor of the subsidiary *for the damage caused to the integrity of the company's assets.*

A very debated question is whether a controlled company is entitled to bring an action against the controlling company for the damage caused by the abuse of the direction and coordination activity. There are two different interpretations by scholars. Some authors exclude this hypothesis[138] attributing relevance to a literal interpretation of text, to the difference between the wording of the rule and the *legge delega* which instead explicitly provided for such legitimation. On the contrary, other ones[139] argue that the controlled company may bring an independent action against the entity exercising the direction and coordination activity, affirming that the damage suffered by creditors and shareholders is nothing more than a reflection of the one suffered by the company.[140]

Another question was raised analyzing the third paragraph of Article 2497 which establishes that "the shareholder and the corporate creditor may take action against the company or entity exercising the direction and coordination activity only if they have not been satisfied by the company subject to the direction and coordination activity". However, the Italian Court of Cassation in its decision of 5th December 2017, n. 29139 established that this provision "does not provide for a condition for the admissibility of a liability action - brought by a shareholder or corporate creditor against the company exercising the activity of direction and coordination - consisting in the unsuccessful enforcement of the subsidiary's assets or in the prior formal claim for compensation addressed to it. The legislator, in fact, had placed solely on the parent company the obligation to compensate shareholders and corporate creditors damaged by the abuse of its activity."

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[138] Ex *multis* Abbadessa P., (2008), p.279

[139] G. Scognamiglio, (2007), p. 964 ff.; V. Cariello (2004), sub 2497.

[140] A very clear reasoning on the theme which affirmed the entitlement of the controlled company to bring an action is offered by the *ordinanza* of the Tribunal of Milan of 20th December 2013 n. 42294.

A final point which should not be ignored is the nature of this liability. Since its introduction - and even before in the academic debate - one of the major issues related to the liability of the parent company was about its intrinsic characteristics.

Summarizing and to introduce briefly the subject, according to the Italian system civil liability can be divided into two different categories: the *contractual liability*[141] in presence of a breach of a duty deriving from a previous contract between the parties and the *extracontractual liability*[142] deriving from an unlawful act of a subject without a preexisting contractual obligation.

The question is not just an academic one. On the contrary, it is designed to have a strong impact on the real essence of the action provided by Article 2497 since the burden of proof will have to be borne by different subjects.

In the first case the plaintiff will have to prove the relationship with the defendant and the breach of duty, while the defendant has the burden of proving facts preventing, modifying or extinguishing the plaintiff's claim.

In the second case the plaintiff will be called to demonstrate the damage, the fault, the causal nexus between the conduct and the damage.

A clear position on the theme is not evident; there are indeed different judgments which give relevance once to the extracontractual solution[143], the other to the contractual one.

2.3.2 The theory of "the compensatory benefits"

2.3.2.1 Article 2497 of the Italian Civil Code and the "compensatory benefits"

Long before the introduction of Article 2497 by the 2003 reform, the experts had shown a deep interest for theme of the recognition of the interest of groups - strongly related with the liability of the parent company- affirming that a compensation should operate whenever a single dangerous intra-group transaction is counterbalanced by other group relationships or by the policy of the group.

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[141] This is just a literal translation since the concept of contractual liability under common law system is quite different from the civil law ones.

[142] This one is a literal translation too. The concept is similar but not equivalent to the one of tort of negligence.

[143] Judgment of the Tribunal of Napes of 29th December 2021, n. 10393. See also judgment of the Tribunal of Prato of 8th November 2016, n.1136.

It has been highlighted that "the harm caused by one single intra-group transaction might find compensation in other transactions or group relationships, whether past or future." [144]
The initial point for this reasoning was the awareness that in a group context, everything acquires a different meaning, and it is not possible, neither desirable to use the general company law provisions ignoring these peculiarities.
Professor P. Montalenti[145] made a very lucid description of the theme in 1995. He recognized the importance to protect the interest of groups whose lack would compromise the same nature of the phenomenon. He affirmed that: "The group interest is one of the interests which emerge when the companies are organised in the form of a group. An analysis of industrial groups clearly shows that three different interests emerge in the group: the interest of the parent company, the interest of the subsidiaries and the group interest. The group interest is the point of equilibrium, the centre of convergence, the axis of coordination between the interest of the parent company and the interest of the other companies in the group. Denying this reality means proposing, in terms of legal theory, a model of enterprise that does not exist in terms of the group*"*. In the same work he suggested that a compensative mechanism should operate in the case of gains and losses in the context of the group.
Undoubtedly, the very thriving debate developed by intellectuals[146] and the interest shown by the courts to the phenomenon of groups influenced the Italian legislator who, being aware of the theme, decided to implement what the experts had already started to call theory of the "compensatory benefits", *teoria dei vantaggi compensativi*.[147] This theory recognizes the exclusion of the liability of the parent company whenever a dangerous conduct has been performed pursuing the group interest.
For this purpose, the last part of Article 2497 of the Italian Civil Code, establishes that "there shall be no liability if the damage is missing at the light of the overall result of the direction and coordination activity or if it has been entirely eliminated as a result of finalized operations".
If the second hypothesis shown by Article 2497 does not raise serious doubts - imagine the case in which the parent company immediately and with regularity reimburses the subsidiaries after a risky loan - the first situation described by the Article is less clear.

[144] Conac P.H., Enriques L., Gelter M., (2007) p.504.

[145] Montalenti P. (1995), p. 710 ff.

[146] Not only at national level, but also in the European panorama.

[147] Montalenti P. (1995) p.710 ff.

Different interpretations regarding the scope of this rule were raised immediately after the enactment of the Reform. The choice is not only a question of opportunity or policy making, rather it reflects deep implications in the protection of the interests of the subjects which are involved in the group, especially creditors and minority shareholders.[148] Recognizing an excessive field of application to this theory and therefore sustaining that every detrimental act must be justified just for the advantages coming from the management of the group, would make these provisions a *safe harbour* for any kind of abuse. This mechanism, whose main advantage is to ensure the effectiveness of the group and the possibility to pursue long term plans,[149] would become the recognition of the possibility for the parent company to commit a "legal robbery".

In this context, the first question for the interpreter is whether the membership of the group is enough for this mechanism to operate. The advantages of the group structure have been extensively discussed, so it is normal to argue if they could be sufficient to compensate an eventual damage coming from a group policy. Even though these premises could seem persuasive, the answer is negative. Italian courts have established that these kinds of advantages are not sufficient to overcome the liability provided by Article 2497.[150] The reasoning is simple if analyzed under the previous considerations. Recognizing that every kind of advantage should be taken into consideration, would lead to possible abuses.

After having eliminated the advantages coming from the simple membership of the group, the question could arise once more. Which advantages should be taken into consideration?

For this purpose, the main theme is whether the advantages must be concretely obtained by the subsidiaries or if, instead, it is possible to look at all those benefits which could be

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[148] Enriques L. (1997), p. 699 affirms that "The greater the flexibility granted to controlling shareholders in exercising unitary group management, the greater the possibilities for them to abuse their dominance by transferring assets from one company to another within the group to the detriment of the to the detriment of minority shareholders".

[149] More generally, according to Denozza F. (1997), p. 335, the theory of the "compensatory benefits*"* rises from the need to prevent the implementation of inefficient group policies.

[150] See for example the judgment of the Tribunal of Rome of 5th February 2008 n.2688 "The existence of such benefits cannot be posed in hypothetical terms and cannot be inferred from mere membership of a group but must be concrete and subjected to a precise demonstration, in accordance with the rules governing the proof of legal facts". In the same sense, also academics agree to exclude the relevance of the benefits coming from the simple participation in a group. For instance, Denozza F. (2000), p. 337 affirms that: "in particular, an advantage connected with mere group membership does not grant the protection of investors, who could believe that a company has a certain value, without being informed of the fact that in that in reality this value is composed of a stable part and a volatile part, susceptible to be acquired later thanks to other companies of the group".

enjoyed consequently on the condition that they were at least foreseeable when the detrimental transaction was enacted.[151]

The first solution adopts a rigid conception of the model giving relevance only to the advantages concretely obtained by the subsidiaries.[152] The sustainers of this theory affirm that there are formal reasons which depone for this solution, based on the general principle that legislator *ubi voluit dixit.* In their vision the same text of Article 2497 seems to exclude the possibility to give relevance to future benefits. "The text evokes - at a first reading - the need for the damage to have already been restored at the time when it is necessary to assess whether the liability exists: the verbal forms chosen ("is missing" and "eliminated") might suggest this".[153] They add another formal argument to their conviction based on the textual difference between Article 2497 and Article 2634 of the Italian Civil Code. As it will be examined shortly, the theory of compensatory benefits is also present in the field of criminal law as prescribed by Article 2634 of the Italian Civil Code. According to this last provision the advantages which must be evaluated in the assessment are those "realized or reasonably foreseeable, deriving from the affiliation or from belonging to the group". Undoubtedly this represents a more comprehensive expression if compared to the civil one. The supporters affirm that the difference between the texts of the two rules implies that merely foreseeable advantages are not capable of excluding the civil liability.

On the contrary, the second thesis is much more flexible. According to this approach, it is not necessary to consider the benefits concretely achieved by the company, but also the predictable ones at the time the decision to conduct a certain dangerous operation was effected.

This solution seems to be supported by textual elements found in Article 2497 too.

As already observed the damage is absent not only when it has been eliminated due to an

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[151] In the case the proof of the removal of the damage is provided during the litigation and in accordance with the procedural rules, it puts an end to the matter in issue. *Ex multis* Alpa G. (2004) p.662.

[152] This thesis is very close to the rigid compensation system provided by the Aktg. According to Spiotta M. (2021) p. 830 this vision is "characterized by an arithmetical assessment of advantages and disadvantages, with the consequence that the distinction between legitimacy and illegitimacy of a harmful transaction for the individual company would consist in the full compensation of loss and gain as required by German shareholder law". This rigid vision has had the favors of illustrious authors as Luca Enriques and Denozza F. who opted for a conservative and rigid approach. F. Denozza (2000), p. 329, argued that: "If a rigid constraint is not imposed, so that it is certain that the company harmed by the group policy will receive effective and fair compensation, the risk is that the transfer of resources, opportunities, profits, etc. from one group company to another are decided by the parent company in an essentially discretionary manner".

[153] Ventruozzo M. (2016), p.15.

operation finalized to this end, but also when it is lacking in the light of the overall result of the direction and coordination activity. The supporters of this theory remark that when the law was drafted, the legislator was aware that the group is not a rigid structure, rather it is made up by the intersections of relationships among its members at several levels that cannot be assessed *uti singuli.*

According to some authors,[154] a recent confirmation about the will to attribute importance also to the future advantages that may arise from group synergies could come from the new provisions regarding insolvency proceedings introduced by the new Italian reform as regulated by the Legislative decree n.14 of 12th January 2019 which introduced the *Codice della Crisi*, the new Italian Insolvency and Crisis Code.[155]

The Code dedicates an entire Title, Title VI to the rules regarding insolvency and financial distress of groups of companies under Articles 284-292. They apply to all the entities whose center of main interest is in Italy; these rules generally provide that a company may apply for an early restructuring proceeding as an independent entity or as part of a group of companies.[156]

Among these provisions, the ones regarding a specific judicial composition with creditors, the *concordato preventivo* are strongly linked with the theme of the advantages coming from a future global group strategy and with the importance to preserve the solvency of the group as a whole.

In the case of a common application by the group "an explanation of the reasons why it is more beneficial, in order to better satisfy the creditors of the individual companies, to submit a unitary plan or mutually connected and interfering plans instead of an autonomous plan for each company" must be indicated. The plan or plans shall quantify "the estimated benefit for the creditors of each company in the group, also as a result of the existence of compensatory advantages, achieved or reasonably foreseeable, deriving

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[154] For instance, see Cagnasso O. (2021), p. 219 ff.

[155] Legislative decree n. 14 of 12th January, 2019. Its entering into force has been delayed several times; it should enter into force on the 15th July 2022 respecting the time for the implementation of Insolvency Directive. The Code aims at an organic reform of the insolvency proceedings.

[156] As the discipline for the intra-group support agreements which will be shown later, the entire discipline seems to be geared towards a recognition of group synergies. For example, in the case of opposition to the judicial approval by shareholders who claim the damage which should incur to their companies, the Tribunal may give the consent if it "excludes the existence of a damage in view of the countervailing benefits accruing to the individual companies from the group plan".

from the link or from belonging to the group".[157] Without entering in the core of the discipline, according to some authors the textual data, in respect of the terminological coherence with Article 2634 of the Italian Civil Code is the proof that the Italian legislator has legally recognized the future compensatory benefits also in the field of commercial law.

2.3.2.2 Article 2634 of the Italian Civil Code

The rules provided for compensatory benefits in the context of civil liability do not represent the only provision in Italian law that attributes relevance to the compensatory mechanism in the context of a corporate group, nor in a chronological order can it be considered the first.

Indeed, through the reform of Criminal law, enacted by the Legislative decree n. 61 of 11th April 2002, the legislator, introduced a new felony in the Italian Civil Code, Article 2634 *infedeltà patrimoniale*, providing a special discipline for the abuse of corporate assets.[158]

The provision, which is undoubtedly comparable to the French *abus de bien socieaux*, punishes directors, liquidators and general managers of a company who, in a situation of conflict of interest have performed detrimental operations causing a damage to the company in order to gain personal profits.[159] The sanction is a prison sentence from six months to three years.

Unlike the French provision, the Italian one explicitly addresses the singularities of the abuse of corporate assets in the case of a group of companies.

The third part of Article 2634 establishes that in case of a group "the profit of the

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[157] Article 284 of the Codice della Crisi, as modified by the Legislative Decree n.147 of 26th October 2020 (known as *Decreto Correttivo*).

[158] Before the enactment of the reform, no criminal provision was addressed to punish the abuse of corporate assets; therefore, ordinary criminal provisions were used for this purpose. However, the need to provide a specific disposition was soon perceived for two reasons: (i) the incapacity of these instrument to suit the problem; (ii) the existence of specific repressive models in many European legal systems.

[159] Article 2634 of the Italian Civil Code provides that "Directors, general managers and liquidators who, having an interest in conflict with that of the company - in order to procure for themselves or for others an unfair profit or other advantages - carry out or participate in deliberating acts of disposition of the company's assets, intentionally causing financial damage to the company, shall be punished with imprisonment from six months to three years. The same punishment shall apply if the act is committed in relation to assets owned or administered by the company on behalf of third parties, causing financial damage to the latter. In any case, the profit is not unfair, if it is compensated by advantages - achieved or reasonably foreseeable - deriving from the connections or from the memberships the group […]".

affiliated company shall not be unfair if it is compensated by advantages, realized or reasonably foreseeable, deriving from the affiliation or from belonging to the group.*"* This provision configures a *cause of exclusion of specific intent* (which is a necessary element for this crime to be configured) and, therefore, of the *typicality of the criminal conduct*.

The reason of this rule is based on the general oft-repeated idea that in the group context it is inborn that a compensative mechanism could operate and it would not be appropriate[160] to ignore the special context due to the existence of the group.

The judge's assessment will have to be made *ex ante* in accordance with Article 2634(3): the offence is excluded only when the harmful transaction is accompanied by advantages or by the intention to compensate the disadvantages. It is important to underline that, as the text suggests, the reference is not to a single specific operation whose aim is to remove the prejudices suffered by one or more companies of the group - as it is for specular civil provision - [161] but on the general membership of the group. As already seen this terminological difference has brought about a strong debate on the difference between the two cases focused on the fact that the criminal provision could encompass a wider range of hypothesis.

However, the Italian Court of Cassation has established - as for civil matters- that it is not possible to interpret it too extensively; it has stated that: "the provision of the third paragraph of the aforementioned Article 2634 of the Italian Civil Code applied in the presence of compensatory advantages - achieved or "reasonably" foreseeable, on the basis of certain and not random elements" but that "the mere hope or expectation of future benefits is not sufficient".[162]

For the sake of completeness, it must be reminded that the rules of the compensatory advantages were provided by the legislator with the reference to the crime of *infedeltà patrimoniale*. Nonetheless, the experts and the courts have suggested that this could be a

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[160] Please refer to the previous considerations.

[161] As it has been underlined, the theme is quite debated.

[162] Judgment of the Italian Court of Cassation, Criminal Chamber of 23rd June 2003, n.38110. For a similar solution see the judgment of the Italian Court of Cassation, Criminal Chamber of 20th June 2017, n. 48354 which affirms that: "in order to exclude the distractive nature of an intra-group transaction invoking the compensatory benefits, it is not sufficient to allege mere participation in the group, or the existence of an advantage for the parent company, since the party concerned must demonstrate the positive final balance of the transactions carried out in the logic and interest of the group, an indispensable element for the transaction to be considered lawful".

general concept which could find application also in other sectors different from the provision of Article 2634 of the Italian Civil Code. The position has assumed a strong role in the field of the provisions against bankruptcy as a mechanism to exclude the *typicality of the conduct*.[163]

[163] *Ex multis* Judgment of the Italian Court of Cassation, Criminal Chamber of 10th December 2013 n. 49789 *"*In case of bankruptcy, the provision contained in Article 2634 of the Civil Code [...] gives normative value to principles - already inferable from the system - applicable also to the conduct. Therefore, where it is ascertained that the act carried out by the director is not in the interest of the company and has caused damage to the company's assets, it is the director's responsibility to demonstrate the existence of a group situation, in the light of which the act takes on a different meaning, so that the indirect benefits of the bankrupt company are not only effectively connected to an overall advantage for the group, but also capable of effectively offsetting the immediate negative effects of the transaction carried out, so that in the agent's reasonable expectation it is not capable of affecting the reasons of the company's creditors*."*

CHAPTER 3

THE EUROPEAN RESPONSES

3.1 Introduction

After having analyzed the principal responses provided by national laws regarding the recognition of the group interest, time has come to wonder what its state of play at European level is.

In this regard, as underlined in Chapter 1, the European system does not provide for a harmonization on the subject of groups, nor does it offer a general recognition of its interest or organically addresses the subject of intra-group relationships.[164] This has brought about the growth of an intense debate, supported also by the European Commission on the possibility to introduce a framework for what is generally addressed as group governance.

Before examining the evolution of the European initiatives , the debate and the advantages that would derive from the introduction of a harmonized system, it is the case to show which are the rules already provided by the European laws that seem to have answered the question or to have accepted a certain approach to the problem of groups.

Notwithstanding the fact that - since the failure of the proposal for a Ninth Company Law Directive[165] - the European Union has renounced to introduce a common framework for groups as formalized in the Action Plan of 2003,[166] there are several aspects of the life of groups of company which have stolen European institutions' interest.

Some of them are more specifically connected to the issue of a possible recognition of the group interest at European level.

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[164] It must be reminded that the Regulation 2001/2157/EC of 8th October 2001 on the Statute for a European Company (Societies Europe- SE) does not deal with group law but leaves the matter to Member States. A solution could have been offered by the Proposal for a Directive on single-member private companies with limited liability (COM/2014/0212 final – 2014/0120 (COD), called the Societas Unius Personae (SUP) which contained some references for the management of the groups in its initial version. However, these rules have been deleted during the negotiations.

[165] Draft Proposal for a Ninth Council Directive pursuant to Article 54(3)(g) of the EEC Treaty relating to links between undertakings and in particular to groups.

[166] European Commission (2003), p. 19.

3.2 The banking sector

A first acceptance of the European legislator towards the interest of the group can be identified in some of the rules provided for the recovery and resolution of credit institutions and investment firms as introduced by Directive 2014/59/UE[167] (Banking Recovery and Resolution Directive, BRRD). This Directive offers harmonized instruments to prevent and to handle the crisis and the financial distress of credit institutions and investment firms[168] providing a common framework to wind up failing European banks and investment firms.

After the financial crisis of 2008, European institutions had to deal with a profound economic crisis whose main risk was a general collapse of the banking systems in several Member States. In this context, the Directive, emended in 2019 by Directive (EU) 2019/879,[169] offers a general system to manage difficult situations aiming at avoiding a systemic crisis.

For this purpose, "it entails four key elements: (i) the preparation and prevention of failures through recovery and resolution planning; [170] (ii) early intervention powers; (iii) the application of resolution tools and powers in a case of a bank failure; and (iv) coordination between national authorities".[171]

Chapter 3 of the Directive, entitled "Intra-group financial support" represents an example of the first category of these measures, also defined as *ex ante* measures, and provides under Articles 19 – 26 the discipline of a peculiar institute: the intra-group support

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[167] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council.

[168] The Directive was proceeded by many communications of the Commission regarding the State aid to banks, named the Crisis Communications: the last Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favor of banks in the context of the financial crisis ('Banking Communication') was published in 2013.

[169] Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalization capacity of credit institutions and investment firms and Directive 98/26/EC

[170] The idea of ex ante intervention in crisis management has been fully implemented by the EU legislator through Directive (EU) 2019/1023 (Insolvency Directive).

[171] Pancotto L., Gwilym O.; Williams Jonathan (2018), p. 1.

financial agreements.[172] They are a special kind of intra-group transaction designed to grant the financial aid inside the same banking group in case of financial distress of an entity being part of it. They are provided to ensure financial stability and to avoid the jeopardizing of resources allocating liquidity optimally when the group is in financial distress. The reason for the introduction of these rules is provided by the Recital 38 of the Directive:

"The provision of financial support from one entity of a cross-border group to another entity of the same group is currently restricted by a number of provisions laid down in national law in some Member States. Those provisions are designed to protect the creditors and shareholders of each entity. Those provisions, however, do not take into account the interdependency of the entities of the same group. It is, therefore, appropriate to set out under which conditions financial support may be transferred among entities of a cross-border group of institutions with a view to ensuring the financial stability of the group as a whole without jeopardising the liquidity or solvency of the group entity providing the support. Financial support between group entities should be voluntary and should be subject to appropriate safeguards. It is appropriate that the exercise of the right of establishment is not directly or indirectly made conditional by Member States to the existence of an agreement to provide financial support. The provisions regarding intra-group financial support in this Directive do not affect contractual or statutory liability arrangements between institutions which protect the participating institutions through cross-guarantees and equivalent arrangements. Where a competent authority restricts or prohibits intra-group financial support and where the group recovery plan makes reference to intra-group financial support, such a prohibition or restriction should be considered to be a material change for the purpose of reviewing the recovery plan".

The reason for the introduction of a similar system is the awareness that in an economic distress and financial difficulty, the assistance that is given from a company of a cross-border banking group to another entity of the same group established in another Member State could be restricted by national interventions. Member States may promote ring-fencing policies in order to protect domestic stakeholders limiting the circulation of intra-groups financings and money transfers, aiming at preserving the stability of their own country, but without considering the interdependency of the entities of the group.[173] Such interventions would not consider the interest and the stability of the group as a whole.

Infra-group support agreements are not concluded in a moment of no return of the crisis, rather in a previous moment; through its conclusion one party undertakes to provide

[172] The discipline has not been emended by Directive Eu 2019/879.

[173] Kokorin I. (2021), p.795.

financial support to the other party whenever the latter needs it. This financial support cannot be prohibited by the national authorities since the conclusion of the agreement implies a commitment on the parties which cannot be restricted. The agreement must be considered as a promise to provide support and it is finalized in order all Member State do not forbid cross-border financing concluded according to its provisions. The rationale for the harmonization of the rules is better explained by the European Banking Authority Guidelines, given in 2015 in the respect of Article 23(2) BRRD. The reason "was to overcome obstacles to an optimal allocation of liquidity and available collateral in groups in distress, especially cross-border groups, resulting from Member States' national laws, which did not consider the specific needs of banking groups, and diverging national regulatory requirements concerning intra-group agreements. In the broader interests of financial stability, which is enhanced by strengthening recovery options for groups in distress, the Directive recognizes the objective of restoring the financial stability of the group as a whole, while maintaining adequate safeguards".[174]

Reading the Guidelines, it is immediately evident that the European legislator was aware that the group as whole has an intrinsic additional value which must be preserved and protected through appropriate instruments. Hence, this position is emphasized in the discipline of intra-group financial agreements as individuated by BRRD, being the protection of the interest of the group and the need to preserve its entirety some of the elements for the assessment of the agreement, as demonstrated by Article 19 and thereafter. Therefore, financial support agreements appear as a peculiar kind of legal transaction in terms of legislative technique and content, if compared to the general rules for groups of companies.[175]

Financial support agreements can be concluded between entities being part of the same cross-border group: a parent institution in a Member State, a Union parent institution or an entity referred to in point (c) or (d) of Article 1(1) BRRD [176] and its subsidiaries in other Member States or third countries that are institutions or financial institutions covered by the consolidated supervision of the parent undertaking. Therefore and to

[174] EBA Guidelines (2015) p.7

[175] Cagnasso O. (2021), p.219.

[176] Letter c identifies: "Financial holding companies, mixed financial holding companies and mixed activity holding companies that are established in the Union". Letter d mentions: "A parent financial holding companies in a Member State, Union parent financial holding companies, parent mixed financial holding companies in a Member State, Union parent mixed financial holding companies".

simplify, the support might cover one or more subsidiaries of the group, and may provide for financial support from the parent undertaking to subsidiaries (downstream support) , from subsidiaries to the parent undertaking (upstream support), between subsidiaries of the group (cross-stream support) or any combination of those entities[177] and must provide the support to any other party to the agreement that meets the conditions for early intervention pursuant to Article 27[178] which is generally related to signs of a possible difficult situation, providing that the additional conditions laid down by Chapter 3 BRRD are also met.

The existence of the agreement can be divided in two steps: its conclusion and its execution which shall grant the support in a subsequent moment, when the indications of crisis are effectively present.

The interest in the preservation of the company providing the support is reinforced by certain rules which are not only procedural, but which relate more closely to the content of the agreement. These agreements could be considered uncertain or hazardous for the enterprises being part of the group since the general context of crisis could have a negative impact on the company. Consequently, they could not be appreciated by all those who have a specific interest in the entity's stability and the preservation of its assets and capital. Hence, the European legislator have prescribed specific guarantees, both regarding the content of the agreement and the process for its conclusion, which are aimed at avoiding any abuse as the agreements must not jeopardize the liquidity or solvency of the group entity providing the support.

The support ensured through the conclusion of this agreement may have the most varied contents and it is not subject to any constraint of reciprocity. According to Article 19(5) the group financial support agreement may be provided in the form of a loan, the provision of guarantees, the provision of assets for use as collateral, or any combination

[177] Kokorin I. (2021), p.795 ff.

[178] Article 27 individuates the circumstances for an early intervention measure. They occur where an institution (i) infringes or (ii) is likely to infringe in the near future - due, inter alia, to a rapidly deteriorating financial condition, including deteriorating liquidity situation, increasing level of leverage, non-performing loans or concentration of exposures, as assessed on the basis of a set of triggers, which may include the institution's own funds requirement plus 1,5 percentage points - the requirements of Regulation (EU) No 575/2013 (on prudential requirements for credit institutions and investment firms) , Directive 2013/36/EU (on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms) , Title II of Directive 2014/65/EU (Authorization and operating conditions for investment firms) or any of Articles 3 to 7, 14 to 17, and 24, 25 and 26 of Regulation (EU) No 600/2014 (on markets in financial instruments and transparency duties).

of these forms of financial support, in one or more transactions, including between the beneficiary of the support and a third party. The agreement shall be approved by the competent national authority and by the general meetings of the companies involved.[179] In addition, it is established the necessary presence of a consideration for the financial support.

The assessment of the authority shall value whether the agreements respond to the conditions laid down by Article 19 and Article 23. These criteria show a very modern and flexible approach provided by the European legislator. Indeed, BRRD affirms that the opportunity of the support should be evaluated not under a rigid and static perspective rather adopting a mechanism of cost-benefits considering the advantages which could come from the solvency of the group on its entirety.

For this purpose, Article 19 - and especially Article 19(7) - furnishes a list of principles the proposed agreement shall comply with. For the aim of this work the most interesting point is given by Article 19(7)b which affirms that "in entering into the agreement and in determining the consideration for the provision of financial support, each party must be acting in its own best interests which may take into account of any direct or any indirect benefit that may accrue to a party as a result of provision of the financial support". Indeed, this Article expresses the need to value the relationships and the synergic value[180] coming from the group. To admit that the assessment of the validity of the agreement must consider not only the direct and immediate benefits deriving from the consideration but the entire future situation created as a consequence of its conclusion, means to recognize a functional and dynamic approach to the relationships within the group.

Undoubtedly, the European legislator seems to have accepted a model close to the Rozenblum one. Refusing a rigid compensative method as the one provided by §311 Aktg, it is preferred a model which enhances the group and the synergies developed within it recognizing the importance of the stability of the group on its entirety. A similar solution is more suited to the reality of groups and their dynamics.

The fact that these agreements have considerable points of contact with the recognition of group interest in company law had already been underlined by P.H. Conac before the approval of the BRRD. He affirmed that: "For instance, in the financial sector, the

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[179] In implementing the Dlirective, Member States have provided reinforced majorities. See Article 69 quaterdecies of the Italian T.u.b. (Testo Unico Bancario). Legislative decree n.385 of 1st September 1993.

[180] Pepels S. (2020), p. 97 defines it as "The additional value that may be included in the enterprise as a whole and would be lost if the enterprise's individual components were sold separately".

proposal for a recovery and the resolution directive (RRD) of June 2012 includes significant provisions on the financial support provided by one entity to another within a cross-border group".[181]

To be legally concluded, the contract must be authorized by the national competent authorities.[182] The competent authority shall grant the authorization if the terms of the proposed agreement are consistent with the conditions for financial support delineated by Article 23 which recalls the principles of Article 19 and introduces other concepts the assessment should be inspired to. Among the conditions that the competent authorities across the European Union shall consider there are: (i) the risks which would materialize for the providing entity if the support was not provided; (ii) the expected success of the support (iii) the terms of the support (iv) the possible impact on the financial stability and the resolvability of the providing entity (v) the reasonable expectation of repayment for the intermediary providing the support in the form of repayment of the loan, or recovery of the principal, interest and expenses of any security requested. In addition, a special role is given to the financial stability of the group as a whole. In this sense Article 23(b) establishes that "the provision of financial support has the objective of preserving or restoring the financial stability of the group as a whole or any of the entities of the group as the interests of the group entity providing the support" is a condition to which the authorization is subjected to. The process "should analyze and compare the direct and indirect benefits for the group as a whole, which may result from rescuing an ailing group member".[183]

These de facto addresses the issue of group interest requiring a virtuous composition between the notions of individual social interest and group interest.[184]

The importance of the interest of the group is also enhanced under another aspect of the new discipline: the consideration required in exchange of the financial support.

It is provided that the group financial support agreement requires a consideration specifying the principles for its calculation and for any transaction made according to

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[181] Conac P.H. (2013), p. 211.

[182] Competent authority means a public authority or body officially recognized by national law, which is empowered by national law to supervise institutions as part of the supervisory system in operation in the Member State concerned.

[183] Kokorin I. (2021), p.796.

[184] Lamandini M. (2018), p.185.

it.[185]

The initial agreement must provide the principles for calculating the remittance of the financial support.

The question of the remuneration plays a central role in defining the relationships within the group as another fundamental issue lurks: the balancing of interests between the parties involved in the definition of the process.

The need for a consideration for the intra-group transactions presents a first similitude to the Rozenblum test. As already individuated by the French Courts, the presence of the group is not enough to justify any act of liberality, rather it is necessary a *quid pro quo* for the conclusion of the agreement. However, it is not established that any operation should have an economic return or should happen at arm's length. Article 19.7 (e) states that "the principles for the calculation of the consideration for the provision of financial support are not obliged to take account of any anticipated temporary impact on market prices arising from events external to the group". When necessary to achieve the purpose of the agreement, the criteria may disregard the market price. This would happen especially if the price could be influenced by abnormal factors external to the group or if the party providing the support has relevant non-public information at its disposal because it belongs to the same group as the beneficiary.

Therefore, it seems that the legislator intended to adopt an approach very similar to the Rozenblum one.[186] As known, this theory requires that a transaction - in order to exonerate the directors - must have a consideration but does not state that the amount of the consideration must be equal to the sum initially received considering the advantages which may arise from the synergies of the group.

What is relevant for the aim of this work is that the introduction of intra-group financial support agreements represents the first intervention of the European legislator to recognize the group interest. This can be considered as an excellent starting point to provide a broader discipline for all cross-border groups and not only for banking groups.[187]

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[185] Article 19(a) BDRR.

[186] Martino E. (2018), p.17

[187] The provisions for banking groups have already shown points of the contact with the general groups. For example, under the Italian system, the Legislative Decree n. 385 of 1st September 1993, on the supervision of large banking groups strongly influenced the discipline of the "*attività da direzione e coordinamento*" according to Article 2497 ff. of the Italian Civil Code.

3.3 The group interest in a competition law perspective

Among the various approaches provided by the European system to the subject of groups of companies, the one offered by competition law is certainly one of the most interesting. In contrast to the canonical interpretation of groups which tends to attribute importance to the fact that their members have their own legal personality, the rules laid down by competition law give a central importance to an economic concept of the group based on the fact that several entities behave as a unique actor on the market.

Actually, antitrust law is not new to this market-oriented approach which gives relevance to the economic conduct of a subject rather than to its formal classification.

Competition law - or rather its interpretation by the European Court of Justice - has always embraced an economic notion of undertaking looking at the market position of the subject rather than at its formal qualification. In the lack of a legislative definition, an all-encompassing and colorful notion of undertaking - which aims at including all the entities which act dynamically on the market - has been accepted. Indeed, as stated by the European Court of Justice since the *Höfner/Macroton* decision,[188] an undertaking shall be "every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed". Economic activity exists, for the purpose of Articles 101 and 102 of The Treaty on the Functioning of the Europen union (TFEU) when an entity offers goods or services to meet a customer or costumers' demand.[189] This broad notion has led to consider public entities as undertakings and consequently subjected to competition law whenever they do not exert typical powers of a public authority as for example in the case of services related to the maintenance and improvement of air navigation safety. [190]

The reasons behind this choice relate to the last aim of competition policy which is to prohibit firms form engaging conducts which will distort the competitive process and harm competition. This implies that "not all economic interactions between separate legal

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[188] European Court of Justice (1991) Case C-41/90 *Höfner and Elser v Macrotron GmBH* EU:C: 1991:161, para. 21.

[189] European Court of Justice (2000) Joined Cases C-180–184/98, *Pavel Pavlov v. Stichting Pensioenfonds Medische Specialisten*, EU:C:2000:428, para 75. European Court of Justice (2006) Case C-224/04 *Ministero dell'economia e delle finanze/Cassa di Risparmio di Firenze* EU:C: 2006:8 para.108.

[190] European Court of Justice (1994) Case C-364/92 - *SAT Fluggesellschaft / Eurocontrol* EU:C: 1994:7, para 28.

entities are capable of having competitive significance"[191] as it is necessary to scrutinize only the one having a real impact on the market.

This broad notion of subject could not have implications for groups of companies. If it is true that groups are from an economic point of view a single subject and if it is true that antitrust provisions look at the economic conduct of the actors, it is natural to consider them as a single subject for antitrust purposes. No change of direction with respect to the general regulation of the matter can be found.

In this respect, the European Court of Justice, from the first cases in which it was called upon to rule, developed the so-called single economic entity theory. This theory – which does not only apply to groups – affirms that whenever several entities behave as a single one on the market due to particular links between them - such as controlling relationships - they must be regarded as a single entity for competition policy. The Court has affirmed that: "In competition law, the term undertaking must be understood as designating an economic unit for the purpose of the subject-matter of the agreement in question even if in law that economic unit consists of several persons, natural or legal".[192]

The lack of independence and the incapacity to exert an autonomous economic constraint on the market are all factors which should be considered defining an economic unity and determining its role.

The application of the single economic theory has two main consequences:

- the irrelevance for competition purposes of the agreements concluded between subjects forming a single economic entity since they lack the capacity to lessen the competition on the market;[193]
- the need to identify the correct subject who liability for an eventual infringement should be attributed to.

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[191] Ododu O., Bailey D. (2014), p. 1725.

[192] Euopean Court of Justice (1984) Case C-170/183, *Hydrotherm Gerätebau GmbH v Compact del Dott. Ing. Mario Andreoli & C. Sas*, EU:C:1984:271 para 11.

[193] See § 11 of the Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements Text with EEA relevance which affirms that: "Companies that form part of the same 'undertaking' within the meaning of Article 101(1) are not considered to be competitors for the purposes of these guidelines. Article 101 only applies to agreements between independent undertakings. When a company exercises decisive influence over another company, they form a single economic entity and, hence, are part of the same undertaking".

The single economic entity theory has been applied for several and often distinct cases as the relationships between employer and employee, principal and agents, and - as already mentioned - in the case of control.[194] Corporate groups represent one of the more flourishing sectors for the application of the single economic entity theory.

In the case of vertical groups, the predominant role of the parent company and the common group policy implies that it would be difficult that "a company subordinated to another company's economic policy would autonomously decide its market conduct".[195]

In the same sense it has been explained that Article 101(1) TFEU "refers only to relations between economic entities which are capable of competing with one another and does not cover agreements or concerted practices between undertakings belonging to the same group if the undertakings form an economic unit"[196] and that "for the purposes of the application of the competition rules, the unified conduct on the market of the parent company and its subsidiaries takes precedence over the formal separation between those companies as a result of their separate legal personalities".[197]

One reason for a similar approach is that the parent company and the subsidiaries - especially in the case of a wholly-owned entity – would have an identity of interests because - as the owner is entitled to transfer all the subsidiary's profits to itself - any profit ultimately accrues to the same person.[198] Another argument can be traced back to the control itself which suggests that the influence exercised by the parent company over the subsidiaries implies that they act as a single subject on the market.

These reasonings have brought to the creation of a presumption by the Commission and by the European Court of Justice: in case of an infringement committed by a wholly-owned subsidiary it is presumed that it acted under the instructions of the parent company. Indeed, as stated by the European Court of Justice: **"**As that subsidiary was wholly-owned, the Court of First Instance could legitimately assume, as the Commission has pointed out, that the parent company in fact exercised decisive influence over its subsidiary's conduct".[199]

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[194] Wish R., Bailey D. (2018), p.93.

[195] Pauer N.I. (2014), p.2

[196] Court of First Instance (1995) Case T-102/92 *Viho v. Commission* EU:T:1995:3, para.47.

[197] *Ibidem.*

[198] Odudu O, D. Bailey (2014), p.1729.

[199] European Court of Justice (2000) Case C-286/98 *P Stora Kopparbergs Bergslags v Commission* EU:C: 2000:630, para.29.

The natural consequence of the lack of independence and the incapacity to exert an effect on the market brings - under an effective and economic approach as the one offered by competition law - an important consequence: the parent company is considered responsible. The liability of the parent company for a subsidiary's infringement is known as parental liability. Unlike the general company law system which considers the different legal personalities of the entities of the group, competition law follows a more elastic solution. Indeed it - in respect of an economic approach - has held the parent company liable for the anti-competitive conduct materially engaged by its subsidiaries, when it actually exercises over them a decisive influence which deprives them of any economic independence.[200]

In *Akzo v. Commission* decision,[201] one of the most important cases on this subject, the European Court of Justice has reaffirmed the presumption to have participated in an infringement of European competition law for the legal entity that exercises "decisive influence" or "control" over the conduct of the infringing undertaking.

"It is clear from settled case-law that the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company […] having regard in particular to the economic, organizational and legal links between those two legal entities […]Thus, the fact that a parent company and its subsidiary constitute a single undertaking within the meaning of Article 81 EC enables the Commission to address a decision imposing fines to the parent company, without having to establish the personal involvement of the latter in the infringement. […]. It is sufficient for the Commission to prove that the subsidiary is wholly-owned by the parent company in order to presume that the parent exercises a decisive influence over the commercial policy of the subsidiary. The Commission will be able to regard the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market."

More recently, the approach to the issue seems to have partially changed its orientation.

In the recent *Sumal* judgment,[202] the European Court of Justice had to decide on a request for preliminary ruling from the *Audiencia Provincial* of Barcelona. The fundamental question was whether a national court can order a subsidiary company to pay

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[200] Fiorentino S., Giorgi A. (2021), p.73.

[201] European Court of Justice (2009) Case C-97/08 *P Akzo Nobel and Others v Commission* EU:C:2009:536.

[202] European Court of Justice (2021) Case C-882/19 *Sumal SL v Mercedes Benz Trucks España SL*, EU:C: 2021:800.

compensation for the harm caused by the anticompetitive conduct of its parent company in the case the Commission has imposed a fine solely on that parent company.

In its decision, the Court has recognized the relevance not only of the upstream but also the downstream liability overcoming the classic model of parental liability as defined in the previous decisions. The Court has stated "that the concept of the economic unit - in addition to bottom-up or "upward" liability of the parent company where the object of attribution is the anticompetitive conduct of a subsidiary - in principle also allows top-down or "downward" liability. Therefore, a subsidiary can be held civilly liable for the anticompetitive conduct of its parent company".[203]

The Court has adhered to the theory that attributes liability to the parent company not due to its instructions to the controlled enterprises, but because it contributes to determine the individuality of the group on the market. "It is the very existence of an economic unit that determines the liability of the parent company for the anticompetitive conduct of the subsidiary. […]. For the purpose of imputing liability to the parent company for the anticompetitive conduct of the subsidiary under its decisive influence, what matters is the 'general relationship' between them as legal entities forming a single undertaking under competition law". [204]

This solution considering prevalent the entirety of the subject acting on the market has brought to a completely innovative approach towards the theme of the liability. "Conversely, if the basis of the joint liability of the parent company and the subsidiary is the economic unit acting as a single undertaking in the market, then there is no logical reason to prevent liability from being attributed either by applying a bottom-up process. It follows from this that, for the purpose of imputing liability to the parent company for the anticompetitive conduct of the subsidiary under its decisive influence, what matters is the 'general relationship' between them as legal entities forming a single undertaking under competition law. In this reconstructed model of the economic unit, there is no logical reason why liability cannot be attributed not only in the 'bottom-up' sense (from the subsidiary to the parent company), but also in the 'top-down' sense (from the parent company to the subsidiary)". [205]

For this purpose, the decision affirms that:

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[203] Reichow C. (2021), p. 1326.

[204] Opinion of Advocate General Pitruzzella (2021), para.35 and 44.

[205] Opinion of Advocate General Pitruzzella (2021) para.38.

"On that basis, the concept of an 'undertaking' and, through it, that of 'economic unit' automatically entail the application of joint and several liability among the entities of which the economic unit is made up at the time that the infringement was committed. […]. Therefore, the possibility for the victim of an anticompetitive practice of invoking, in the context of an action for damages, the liability of a subsidiary company rather than that of the parent company cannot automatically be available against every subsidiary of a parent company targeted in a decision of the Commission punishing conduct that amounts to an infringement. Therefore, the same parent company may be part of several economic units made up, depending on the economic activity in question, of itself and of different combinations of its subsidiaries all belonging to the same group of companies. If that were not the case, a subsidiary within such a group could be held liable for infringements committed in the context of economic activities entirely unconnected to its own activity and in which they were in no way involved, even indirectly. […] The liability of that subsidiary cannot however be invoked unless victim proves that, having regard, first, to the economic, organizational and legal links referred to in paragraphs 43 and 47 of the present judgment and, second, to the existence of a specific link between the economic activity of that subsidiary and the subject matter of the infringement for which the parent company was held to be responsible, that subsidiary, together with its parent company, constituted an economic unit".

After having offered a synthetic panorama of the role and the interpretation of the phenomenon of groups of companies under an antitrust perspective, spontaneous questions should arise regarding the attitude of this discipline towards the recognition of the group interest.

It is quite evident that the first implication of the single economic entity doctrine applied to group of companies i.e. the irrelevance for competition policy of the intra-groups transactions seriously challenges the theme of the recognition of group interest.

Yet competition law offers a very interesting point of view for the purposes of this work. The reason is that the model adopted by this branch of the law unifies the group in such a way that it becomes an independent entity, even though from a purely legal point of view it is far from being a unique subject. The emphasis to the economic aspect of the group is maximum overturning the general company law approach.

As it will be referred to later, this model represents the excessive and pathological consequence of recognizing the group interest as a separate one from those regarding its members and should not be reproduced under a company law perspective.[206] The pursuit

[206] The issue is complex and intersects the possibility to *pierce the corporate veil*. See for example Sorensen K.E. (2016), p. 395 who states that: "Without the sake of completeness, it is an institute, introduced in common law countries which allows the Courts to disregard the limited liability of a corporation considering the rights or duties of a corporation as the rights or liabilities of its shareholders; this is

of interest of the group as an instrument to ensure a better management of the companies should be something different from the "*entification*" of the group.[207]

This is possible and encouraged under the competition law perspective since a "central concern of competition law and policy is that a firm or firms with a market are able in various ways to harm the consumer welfare"[208] resulting in the need to repress of all the conducts which could endanger the correct functioning of the market.

3.4 The interest of the groups in the financial services sector: an overview

As seen in Chapter 1, after the failure of the project to introduce a single framework for groups of companies, the European legislator has chosen to intervene regulating individual sectors deemed relevant especially in the case of cross-border groups.

The responses that have been offered are not unique and unambiguous, nor can it be said - except for the discipline contained in the BRRD for intra-group support agreements- that the issue of the group interest has been addressed or recognized.

However, an approach that goes beyond the traditional rigid view of groups is emerging.[209] This tendency gives importance to the group on its entirety rather than only to the various entities part of it. Under this light and for the sake of completeness, it is worth mentioning some aspects regarding the financial services sector.

With regard to the above, it has been recorded that "in the recent directives dealing with banking supervision one sees a further tendency to overcome the legal division that exist in groups between parent and subsidiaries and to deal only at group level".[210]

Undoubtedly it must be considered that in this sector the relevance of the group as a whole is particularly strong since financial activities are "based on confidence and on the assumption that each subsidiary will benefit from the support of other members of the

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generally related to pathological and abusive conducts". Transposing the institution in the context of corporate groups, it would lead to overcome the singular legal personalities of the entities being part of a groups.

[207] Cariello V. (2012), p. 270.

[208] Wish R., Bailey D. (2018), p.2.

[209] Another sector in which the tendency towards a functional and dynamic approach to group of companies is emerging - although the principle of personal and financial responsibility of the member companies is maintained - is the insolvency in case of cross-border groups after the introduction of Recast European Insolvency Regulation "REIR" (Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings).

[210] Wymeersch E. (2007), p. 11.

group".[211] Therefore, in the area of financial services, the legislation has increasingly taken an integrated view of financial groups. Some examples can be found in Directive 2013/36/EU[212] which gives relevance to the banking group as a whole in its risk management and organization and as regards the assessment procedure.
A similar integrated vision of the group is also proposed by Regulation 575/2013 of 26 June 2013 on prudential requirements for credit institutions and investment firms (Capital Requirements Regulation or 'CRR') and more recently by Directive (EU) 2019/2034 on the prudential supervision of investment firms.

3.5 The debate for the appropriate recognition of the interest of the groups in company law

European Union has perceived the importance of having a harmonized structure for groups of companies in company law at an early stage.[213] Nonetheless, the various projects which have been proposed over the years[214] have failed in their common scope: to provide a comprehensive and uniform set of rules for groups of companies that could be adopted by all Member States. The reasons for this failure can be attributed to several factors, one of which is undoubtedly the structural diversity in the national approach to

[211] ICLEG (2015), p.15.

[212] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC.

[213] Please refer to the Chapter 1 for a more detailed explanation of the proposals and initiatives carried out by European Union for group of companies. As reminded by the European Parliament (2021), p.1 "the legal basis of this intervene is represented by Articles 49, 50(1) and (2)(g), and 54, second paragraph of the Treaty on the Functioning of the European Union (TFEU). An effective corporate governance framework creates a positive EU-wide business environment in the internal market. The objective of harmonizing company law is to promote the achievement of freedom of establishment (Title IV, Chapter 2 of the TFEU) and to implement the fundamental right laid down in Article 16 of the Charter of Fundamental Rights of the European Union, the freedom to conduct a business within the limits of Article 17 of the Charter (right to property). Article 49, second paragraph of the TFEU, guarantees the right to take up and pursue activities in a self-employed capacity and to set up and manage undertakings, in particular companies or firms .The purpose of EU rules in this area is to enable businesses to be set up anywhere in the EU, enjoying the freedom of movement of persons, services and capital, to provide protection for shareholders and other parties with a particular interest in companies, to make businesses more competitive, and to encourage businesses to cooperate over borders".

[214] For some more recent ideas, although they did not aspire to a unitary framework see the Proposal for a Directive of the European Parliament and of the Council on single-member private limited liability companies of 2014. On the theme see Teichmann C. (2015), p. 203-224.

company law.[215] Indeed, the discipline regarding corporate groups involves delicate balances between different and often conflicting demands of the subjects orbiting around it and it is not effortless to find an equilibrium which considers the several exigencies at risk.

Different countries offer special and not coincident policies and instruments. This implies that it is not easy or perhaps even desirable overcoming the substantial differences in legislations. As seen, several Members States grant a common and complete legal framework for groups of companies; others only regulate some aspects regarding them. Obviously, the obstacles are more considerable in the recognition of the interest of the group as it would depend on the rights recognized to the shareholders to influence the management of a company.[216]

The principal danger in the will to create a common framework is to attribute a predominant role to a jurisdiction - on the basis that it provides a more complete framework - without considering the ontological differences among the national disciplines and which should be the best option to mitigate them. It has been correctly underlined that "the attitude of Member States to the harmonization process is often to ask which national law has had the greatest impact on certain parts of European company law harmonization".[217] A similar solution is not acceptable, and it could be considered the reason for the failure of the different attempts since they were all characterized by a more or less uninspired reproduction of the German *Konzernrecht.*

Notwithstanding the failure of the attempts, the European interest for group of companies was soon renewed and assumed a more interesting approach attributing a central role to the recognition of the interest of the group.

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[215] For a negative vision of the harmonization process see Hansmann H, Kraakman R. (2000), p. 28 "The European Union has been the locus of the most intense efforts to date at self-conscious harmonization of corporate law across jurisdictions. That process, however, has proved a relatively weak force for convergence: Where exists substantial divergence in corporate law across member states, efforts at harmonization have generally borne little fruit. Moreover, harmonization proposals often have been characterized by an effort to impose throughout the E.U. regulatory measures of questionable efficiency, with the result that harmonization sometimes seems more an effort to avoid the standard model than to further it. For these reasons, the other pressures toward convergence described above are likely to be much more important forces for convergence than are explicit efforts at harmonization". See also Enriques L. (2006), p. 1. Ten years later the same author proposes again a negative vision of the impact that the EU company law harmonization program had had on European company law and corporate governance. See Enriques L. (2017), p. 764 ff.

[216] ICLEG (2016), p. 5.

[217] Hopt K.J. (2006) p.1174.

This reintroduced interest is strictly related to the role played by the groups of companies in Europe as they are inextricably linked to the effectiveness of freedom of establishment, [218] in particular to what is defined as the second right of establishment.

Indeed, the lack of harmonization represents a limit to the effectiveness of the possibility to set up a company or a subsidiary in the internal market. "In Europe the corporate group has a special importance because if the acquisition or founding of subsidiaries were not legally possible, companies would not, in practice, be able to avail themselves of their right of free establishment under Articles 43 and 48 EC [ex Art. 52 and 58 ECT]. The connection between the right of establishment on the one hand, and the nationality of the companies on the other, leads precisely to the establishment of small and large corporate groups".[219]

In the light of these considerations, the interest for the theme has soon returned to the fore. Roughly fifteen years after the failure of the Proposal for a Ninth Company Law Directive,[220] under the impulse of many illustrious professors and academics, the possibility to introduce common rules for corporate groups was resumed.

In 1998, a group of important company law professors, the so-called Forum Europaeum elaborated a draft directive for a European regulation of groups based on several standards and rules, with the idea to introduce a common policy across Europe to create a *Konzernrecht für Europa.*

The forum Europaeum is still an offspring of the tradition that gives the German system a predominant role in defining groups of companies. The formulations found therein generally follow the German *Konzernrecht* tradition.

However, the submitted provisions soon departed from a static idea of the management of the group incorporating the theme of the group interest singing the praises of the system proposed by the Rozenblum doctrine rather than the one offered by German Aktg.[221] The reasons for the preference accorded to the French solution are bound to three main

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[218] Forum Europaeum (1998), p. 343.

[219] *Ibidem*.

[220] Draft Proposal for a Ninth Council Directive pursuant to Article 54(3)(g) of the EEC Treaty relating to links between undertakings and in particular to groups. See the first Chapter.

[221] In this sense see Forum Europaeum (1998), p.385 "The European Union, considering the European internal market, should legitimize groups operating in this market in all Member States and ensure that they can be managed as a whole and not as individual parent companies and subsidiaries on a secure legal basis. To this end, the European Forum is proposing a model regulation based on the French example and the Rozenblum principle".

aspects:

1) it gives preeminence to the group in its entirety, not the single companies being part of it;
2) it effectively safeguards the existence of the subsidiary as an entity capable of functioning independently and not merely as a "mass of assets capable of covering nominal capital";
3) it protects the existence of the subsidiaries not through single transactions but considering the organization and the policy of the entire group.

This represents the first formal international recognition of the value of the Rozenblum doctrine. Since then, it has acquired importance and has met the favors of the majority of the interventions in the debate on the recognition of the interest of the group.
The model adopted by the Forum Europaeum partially revises the original version of the Rozenblum doctrine, combining the third and fourth requirements and introducing the criterion that there must be a balance between advantages and charges within the group, suggesting the solvency of the companies involved in the transaction.
The Rozenblum model from then on has always been praised by the experts, by other branches of European law and by the European Commission acquiring an ever-increasing importance.

The comprehensive proposal of the Forum Europaeum was not investigated on. Albeit the model did not have a direct influence by an implementation of its disposals, it has the merit to have renewed the interest for the theme of group of companies and to have highlighted the importance and the centrality of the group interest.

In 2001, the European Commission instructed a group of company law experts coming from different Members States, the "High Level Group of Company Law Experts" with the scope to make recommendations on a modern regulatory framework in European Union for company law. In 2002, they presented their final report, the Report on a Modern Regulatory Framework for Company Law in Europe also known as "Winter Report" named after the Chairman of the group, professor Jaap Winter. This document discouraged the adoption of an all-encompassing intervention on the issue of groups. The experts affirmed that: "we do not recommend the undertaking of a new attempt to bring

about the Ninth Company Law Directive on group relations. Rather, the Group recommends that the Commission considers provisions within the existing range of corporate law to address specific problems".[222] Rather they identified three different central areas related to group of companies, among which there is the enucleation of the theme of the recognition of the group's interest. The report grasps the importance of the theme and therefore affirm that it should be opportune to require Member States to provide a rule allowing the subjects involved in the management of a group to recognize the group interest and to adopt a coordinated group policy.
In parallel, a similar rule should grant protection for the interests of creditors of each company and a fair balance of burdens and advantages for each company's shareholders. Indeed, the Winter Report accepts the principle that a transaction made for the benefit of the group is legitimate if the injustices suffered by a company are justified by other advantages; in its vision such a regime would facilitate the creation and functioning of groups of companies.
According to the document, the specific details of a similar regime can be left to Member States.

In response to the High-Level Group,[223] the Commission in its 2003 Action Plan on "Modernizing Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward"[224] stated – regarding group of companies - that while no overall directive may be needed, specific provisions dealing with issues of groups of companies - as suggested by the High-Level Group - may be useful.
The Action Plan of 2003, rejected to introduce a common policy for group of companies in Europe. It states that: "The Commission, following the Group's recommendation, takes the view that there is no need to revive the draft Ninth Directive on group relations, since the enactment of an autonomous body of law specifically dealing with groups does not appear necessary, but that particular problems should be addressed through specific provisions in three areas".[225] In particular, regarding the implementation of a group

[222] Final Report on a Modern Regulatory Framework for Company Law in Europe, (2002), p.94.

[223] For a complete reconstruction of the several formal and informal initiatives see ECLE (2016), p. 1-7.

[224] Communication from the Commission to the Council and the European Parliament Modernizing Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward (2003), p. 18 ff.

[225] European Commission (2003), p. 19.

policy, the European Commission explained that : "Member States should be required to provide for a framework rule for groups that allows those concerned with the management of a company belonging to a group to adopt and implement a coordinated group policy, provided that the interests of that company's creditors are effectively protected and that there is a fair balance of burdens and advantages over time for that company's shareholders. The Commission sees the introduction of such a rule as an important step towards improved business efficiency and competitiveness, but stresses that appropriate safeguards have to be carefully designed. A proposal for a framework Directive to this effect will therefore be presented in the medium term". [226]

Despite the good purposes, the theme has fallen into oblivion for about ten years and no initiative was carried out. Nonetheless, in 2011 the Reflection Group on the Future of Company Law - a new group of academics - established by the Commission in December 2010 for the specific purpose of preparing a "Report on the Future of EU Company law" for Brussels Conference organized by the Commission in May 2011 to discuss the development of European Company Law considered it again.

The report, published in 2011, divided in chapters, expressly considers the phenomenon of group of companies in Chapter 4. The text begins stating that "the international group of companies – not the single company – has become the prevailing form of European large-sized enterprises, which business activity is typically organized and conducted through a network of individual subsidiaries located in several countries inside and outside Europe" and that "any EU legislation and/or recommendation on groups of companies should seek to maintain and enhance the flexibility of the management of groups in its international business activities".[227]

The analysis of the report is focused on specific arguments related to groups; among them a particular attention is given to the theme of the recognition of the interest of the group. The report asserts that: "in order to enhance the flexibility of the management of groups especially on a cross-border basis, an EU recommendation should bring the consecration of the interest of the group ("*Konzerninteresse*", "*intérêt du groupe*", "*interesse di gruppo*"). Similarly, to the case of an individual company (whose directors must promote the company interest), the parent corporation could be vested with a right but also a duty

[226] *Ibidem.*

[227] Reflection Group on the future of European company law (2011), p.59.

to manage the group and its constituent companies in accordance with the overall interest of the group".

In the view of this, the Report affirms that there are several reasons for the introduction of a European recognition of the interest of groups especially regarding cross-border groups.[228]

- It would help the parent companies located in European countries recognizing the interest of the group to manage and enter transactions with their subsidiaries located in other European countries without having to analyze whether the legislation in the other country recognizes the group interest. This would lead to a considerable reduction in terms of costs and time for group policy planning.[229]
- The lack of flexibility in some Member States could also represent an obstacle to the parent companies from other Member States that are used to this flexibility. It would provide the management of the parent company with more legal certainty and flexibility when managing a foreign subsidiary improving the freedom of establishment.
- Member States which have adopted the German approach but wish to have an opportunity to change to a more flexible approach might have the motivation for such a change.
- It might help to clarify the duties of the board of directors of European companies, both at the parent and at the subsidiary level reducing uncertainty.

For all these considerations the final recommendation of the Report to the European Commission is "to consider, subject to evidence that it would be a benefit to take action at the EU level, to adopt a recommendation recognizing the interest of the group".[230]

On the basis of this text, the Commission launched a public consultation related to the different topics discussed therein. As regards the themes related to groups of companies, two-thirds of the responses from the business community expressed support for a European intervention, especially regarding the enhancement of the informations

[228] The optimal management of cross-border groups is the principal reason for a possible European harmonization.

[229] Correctly they underline the distinction existing between the situation in which the companies are solvent and the one in which they are near to insolvency. The second hypothesis entails a more compelling exigence to grant creditors. As it will be discussed later, a similar solution is adopted also by the EMCA.

[230] Reflection Group on the future of European company law (2011), p.65.

available in the group context and the recognition of the group interest. In addition, the protection of the interest of minority shareholders and creditors was also supported.

From the responses to the consultation, the Commission in its 2012 Action Plan on Company Law [231] concluded that: *"*the public is in favor of well-targeted EU initiatives on groups of companies and that it will, in 2014, come with an initiative to improve both the information available on groups and the recognition of the concept of "group interest".[232]

In the steps that followed, the Commission's Informal Company Law Expert Group (ICLEG) [233] in March 2016 issued a Report on the appropriate recognition of the interest of groups analyzing in detail the situation in Member State and in Europe introducing several reasons - mostly related to the facilitation of cross-border management - for which to foster a European intervention.
According to the text, the advantages would be higher for Small and Medium Size Enterprises (SMEs) engaged in cross-border activities considering that the directors of the SMEs are less likely to be able to bear the cost of legal advice on the company law of other Member States. In addition, it recalls that for a SME to create a subsidiary acquires a fundamental importance. Indeed, it represents the first step to grow or to enter in a transnational market.[234]

In parallel, other academic interventions inspired by the Rozenblum doctrine were approved.
It is the case of the 2015 Proposal of the Forum Europaeum on Company Groups lead by Professors Marcus Lutter and Peter Hommelhoff, "to facilitate the management of cross-

[231] Communication from the Commission to the European Parliament, the Council, the European economic and social Committee and the Committee of the regions Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies.

[232] European Commission (2012), p. 14.

[233] Its role is "to assist the Commission in the implementation of company law directives, including on the questions related to disqualified directors. To advise, among others, on developing policies related to company law/corporate governance and artificial intelligence (in particular on liability of companies and directors); those related to "sustainable companies" (in particular on relationships within the group of companies, on company and group interest, instructions within the group and sustainability, duty of care and due diligence); and on developing company law policies that could tackle the undesired behavior of some letter-box companies".

[234] Teichmann (2016), p.153.

border company groups in Europe" calling for a directive on the theme.
In 2015, a report of the French Think Tank Club des Juristes "*Towards Recognition of the Group Interest in the European Union*", called on the European Commission to adopt a framework recommendation on groups. In the same year the *Institut Luxembourgeois des Administrateurs* prepared a report on the group interest and subsidiary governance in Luxembourg.
As professor Teichmann correctly underlines[235] this text is quite interesting as several subsidiaries of cross-border groups are based in Luxembourg. What emerges from the document is the lack of certainty about the role of the parents' instructions and the correct solution in case of a possible conflict of interests., Hence, it suggests the introduction of a European rule able to avoid this uncertainty obliging the directors of the subsidiaries to find a constant balance between all the interests involved.

The academic debate has not been followed by any European intervention yet, at least for the moment. Nonetheless it has had the merit to generate a general convergence towards this model which has been recorded by different countries across Europe. The influence of the Rozenblum model was so profound in European national legislations that it has been affirmed that this represents something similar to an *ius commune*.[236]
While no Member State has declined the example of the Rozenblum model in favor of a rigid compensatory approach, the majority of Member States have decided to follow the French approach. It was the case of Belgium and Italy, Netherlands, Czech Republic (2014)[237], Poland (2010), Greece (2014). In addition, two Supreme Courts adopted - with some adjustments - the Rozenblum approach too. The first is the Supreme Court of Estonia and the second is the Supreme Court of Spain.
However, it must be underlined that the Rozenblum solution has often been mitigated by the adoption of some elements coming from the German system as for example sell-out rights.

[235] Teichmann C. (2016), p.154. See this text for a more complete framework.

[236] EMCA (2017), p.372. See also Conac P. (2013), p.208.

[237] The case of the Czech Republic is quite particular. At first, it adopted a model inspired by the German one, then decide to overhaul it with a French-oriented framework keeping some guarantees typical of the *Konzernrecht.*

3.6 The solution adopted by the European Model Company Act

Since 2007 a group of company law experts based in Aarhus University (Denmark)[238] has worked on a draft for a European Model Company Act (known as EMCA) with the aim to provide a general company law statute which could be enacted by Member States entirely or by the adoption of single provisions resulting in a final text in 2017. The group which prepared the EMCA has acted independently from other institutions, but the European Commission has expressed support for the project.[239]

The instrument is clearly inspired to United States experience and to the Model Business Corporation Act (MBCA) [240] providing a comprehensive system for company law. Both MBCA, and EMCA are not compulsory; States are not obliged to adopt this system. Indeed, The EMCA is designed as a "*free-standing general company statute*" that can be adopted by Member States, either in its entirety or by the implementation of selected provisions.[241]

Differently from all the other initiatives reported, the EMCA does not aim at providing a common European instrument, rather it acts as a model to be implemented at national level.

The EMCA has deeply analyzed the phenomenon of group of companies dedicating the Chapter 15 to the theme offering a common regulation which could be adopted by the European countries. The reasons for this choice are different considering still lack a systematic regulation and countries which already provide a complete system for groups. In the first case, the need to provide a comprehensive system was felt necessary, in the latter it would be a way to bring a modern solution and regime for group of companies.[242]

Among the different matters related to groups, the solution offered by the EMCA

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[238] De Luca N. (2021), p. 28.

[239] EMCA (2017), p. 2.

[240] The Model Business Corporation Act (MBCA) is a model act prepared by the Committee on Corporate Laws of the Section of Business Law of the American Bar Association. In 2002, it was followed by 24 states. The MBCA has contributed to shape several standards for United State corporate law. For a comparison between the solutions offered by the EMCA and the positions of MBCA see Klausner M. (2016), p. 363-369. He addresses three merits to the European solution: (i) it is appliable to both listed and not listed companies; (ii) it can be partially enabled by national legislations which decide to implement its solutions; (iii) it is generally based on standards rather than on determined rules.

[241] EMCA (2017), p. 1.

[242] Conac P.H. (2016), p. 302.

responds with an accurate analysis to the recognition of the interest of groups. In this regard, the possible solutions met by the experts in finding a common model for the countries of the European Union, were respectively the German model as identified by §311 Aktg or alternatively the Rozenblum model.
As the EMCA favors flexibility in the management of the group, the recognition of its interest and the right to give instructions are the touchstones of the chapter on groups. In the EMCA vision, their provision would be helpful not only for the parent companies, but also for the directors of the controlled companies granting certainty for the intra-group transactions.[243] This has brought about the adoption of a solution largely inspired to the French one in accordance with the favors already shown.
However, it opted – with a solution echoing the draft directive of Forum Europaeum of 1999 - for a simplified version of the Rozenblum test that does not require all four criteria to be satisfied. However, it is clear that the recognition of the interest of the group does not imply a duty to manage a group in a centralized manner or to ask the subsidiary to always take into account the interest of the group. It is only a possibility, not an obligation.

According to paragraph 16 of Chapter 15 of EMCA:

"If the management of a subsidiary, especially as a result of an instruction issued by the parent company, takes a decision which is contrary to the interests of its own company, it shall be not deemed to have acted in breach of their fiduciary duties if:
(a) the decision is in the interest of the group as a whole, and
(b) the management may reasonably assume that the loss/damage/disadvantage will, within a reasonable period, be balanced by benefit/gain/advantage, and
(c) the loss/damage/disadvantage, referred to in the first sentence hereof, does not include any which would place the continued existence of the company in jeopardy".

Section 16 protects the managers of the subsidiary against liability if they take a decision or apply an instruction contrary to the interests of the subsidiary considering the interests of the group. However, it does not provide a definition of the "interest of the group". The reason is that a satisfactory definition would be very difficult - if not impossible - to find

[243] EMCA (2017), p. 386.

due to the infinite diversities of situations in groups. Therefore, it is left to the judges to decide on a case-by-case basis.

Under the Rozenblum influence in order to avoid that any conduct could be justified at the light of an indefinite interest of the group, some guarantees are prescribed. However, comparing this solution to the one identified by the French Courts it is immediately evident that it provides a for simpler version of a possible defense.

According to the EMCA authors' vision, the Rozenblum doctrine, despite it recommends a flexible and general entrepreneurial model, has the limit of requiring a series of rigid and complementary cwhich must coexist for the exoneration to directors' conduct to exist. The idea to introduce a "*simplified Rozenblum test*" as a possible solution for the introduction of a general theory for European system is not new; the Forum Europaeum had already hypothesized to adapt and modelling the French model.[244]

The EMCA solution overcomes the first criterium which had already been determined by the Agache-Willot decision. Indeed, there is no requirement that the group has a balanced and firmly established structure. The reason to eliminate this condition is bound to the idea to provide more flexibility to the management of the group and to avoid limiting the recognition of the interest of the group through a restrictive judicial interpretation of the concept of "*balanced and firmly established structure*" as individuated by French Courts.

Being aware that reducing the conditions would impact on the guarantees for the subjects involved in the transaction and that it would encourage the risk of abusive comportments, the EMCA proposes to intervene correcting other problems as the lack of information enhancing the duties of disclosure and transparency.

A partially different rule is provided in case of a wholly-owned subsidiary.

In this case the second condition provided by section 16 does not apply. This means that there is no need "for the management to reasonably assume that the loss/damage/disadvantage will, within a reasonable period, be balanced by benefit/gain/advantage". Therefore, if a decision is taken in the general interest of the group and does not comprise the stability of the entities being part of it the directors shall not be deemed to be responsible. Undoubtedly, this entails the danger of a lower degree of protection for the subsidiaries. This choice, whose value could be argued, comes from the consideration that in this case the need to protect minority shareholders is missing. This implies that the only subjects which interest must be safeguarded from an eventual

[244] Forum Europaeum (1998), p.363 ff.

shift of assets are the creditors of the subsidiary and its stakeholders as the employees. For this reason, it has been affirmed that "as long as the transaction does not place the continued existence of the company in jeopardy, there is no need for protection".[245]

Other important questions are related to the possibility for a parent company to give binding instructions to the subsidiary which is a right recognized by the EMCA.
In its section 15(9), the EMCA affirms that the possibility to give instructions and directives to the subsidiaries is the direct consequence of the power that the parent company is able to exert on them. This power is naturally recognized upon the controlling entity and does not depend on any formal recognition or public declaration. The EMCA critics the solution proposed by the Forum Europaeum which had given importance to the registration of the controlling relationship in a public register (with the aim to protect creditors and third parties). In the EMCA vision, there is no need for this formal requirement since the company would influence the controlled ones regardless the fulfillment of this obligation.[246]
Nonetheless the power to give binding instructions and to determine the policy and the choices of the subsidiaries shall not be endless. Even in the control agreements, according to §308 ff. Aktg, there is a limit to the possibility that the parental directives are fulfilled.[247]
For this reason, the EMCA has provided specific limits to the powers of the parent company with the aim to counterbalance them. Hence, it provides sell-out rights, a specific form of parental liability related to the possible insolvency of the controlled companies and general information and investigation rights.
In addition, the solution proposed by the EMCA identifies a limit of the power of the controlled company in the interest of the group. Whenever a parental instruction violates the interest of the group, then it should not be considered binding for the subsidiaries. The inborn limit of the power of the parent company is represented by Section 16. Therefore, in this case the directors of the subsidiary are going to be considered personally liable in

[245] Conac P.H. (2016), p.312.

[246] EMCA (2017), p. 380.

[247] §308(2) of the Aktg "1 The management board shall be obligated to comply with the instructions of the controlling enterprise. 2 The management board may not refuse compliance with an instruction on the grounds that such instruction does not in its opinion serve the interests of the controlling enterprise or of affiliated enterprises that are members of the same group as such controlling enterprises and such controlled company, unless such instructions manifestly do not serve such interests".

case they have acted although they were not obliged to. This consideration is valid also for the wholly-owned subsidiaries; however in that case the safe harbor will have a broader field of application since it will not be necessary to show the possible future benefits able to counterbalance an harmful act.

To complete the picture, it must be reminded that the directors who have not been appointed by majority shareholders are not compelled to follow their directives. It is the case of the Italian solution which provides that in the case of a listed company some directors shall be appointed by the minority shareholders through the presentation of specific lists.[248] However, this point of the EMCA solution has been criticized.[249]

3.7 Is it time for a possible common European rule?

The topic of the recognition of the group interest and its state of play - both at national and at Europen level- has been discussed at length.

Hence, two main questions arise spontaneously: is it desirable to recognize the importance of the group's interest as a general principle in European Company law and intervene in this area and if so, what should the scope and the consequences of this intervention be?

In this sense, the first consideration is to individuate which model among those analyzed should be the most relevant as a possible source of inspiration and which one could be taken as a reference point for a subsequent intervention. In the light of the previous considerations, the most desirable solution should be to adopt a system that recognizes the existence and value of the interest of the group as a distinct concept from the interests of the individual companies part of it resulting in the composition of the different interests of the entities of the group.[250]

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[248] Article 147-ter of the Legislative decree n.58 of 24th February 1998.

[249] Schon W. (2019), p. 371.

[250] An interesting definition is given by a judgment of the Italian Court of Cassation of 5th December 1998, n.12325 which states that: "The existence of a common action, inspired by a unitary management, which necessarily implies an interest of the group, understood as the pursuit of common goals, even transcending the objectives of the individual companies belonging to the group, cannot be disregarded. [...]. This does not imply to question the legal autonomy or the patrimonial autonomy of the single subsidiaries within the group, but admit the possibility that a subsidiary company assumes obligations in favor of another company of the group or of the parent company itself. From this point of view, there is no reason to exclude the validity of such a commitment, except in the hypothesis that it does not represent, for the company itself, even a mediated or reflected advantage. In other words, the concept of "synallagma" must be configured in a peculiar way, having to take into account, the group logic and the economic interest that, albeit mediately, is realized by the company that assumes the obligation".

This implies that in the determination of the group policy and in the assessment of the director's activity, a company should consider the general vision of the group.

To implement a system like the German one which albeit does not ignore the theme does not enhance the synergies of the group preferring a more static vision of the management would bring to an excessive rigidness in the group governance.

Furthermore, it must be reminded that in respect to the past, a positive general tendency has been recorded giving relevance to the managerial aspect of the group and to a solution not anchored to a negative vision only focused on the protection of minorities.[251]

"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, which should foster the formation and management of cross-border groups and thereby enhance the integration of markets in the European Union".[252]

This is witnessed by the growing interest for the management of groups not only in national legislations or European sectorial interventions, but also in the corporate governance codes, specifically for those regarding the management of listed companies.[253]

For example, the Italian *Codice di Autodisciplina* of 2020[254] shows an integrated vision of the group. Under Article 1, it is established that the board of directors shall guide the company *towards sustainable success*. In this respect, the management body defines the strategies not only of the company, but also of its group and monitors their performances.

This active managerial position towards groups makes the question regarding the identification of the principles for a correct group governance more compelling.

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[251] As it has been underlined by the Forum Europaeum (1998), the effective degree of protection granted also in a similar system is not as effective as it was desired. See also Enriques L. Hertig G. Kanda H. (2017), p. 163. "Whether the German regime strikes the right balance between the need for flexibility in the management of connected firms and minority shareholder protection remains disputed. In the past, parent companies frequently ignored the indemnification or compensation requirements—unless the subsidiary was insolvent, in which case not much was left for minority shareholders anyway. Nowadays, improvements in business practices and an increase in litigation risks seem to have resulted in a more adequate treatment of minority shareholders".

[252] Winner (2016), p.90. See also Teichmann C. (2016), p.150-157 who individuates a "shift of perspective. From the protective approach of the late 70s in the last century, to the 'enabling law' approach of the early twenty-first century".

[253] Since the form of group represent the model chosen by the bigger and transnational enterprises, most of listed companies are part of a group par excellence.

[254] The Code has been prepared by a special Committee, il *Comitato per la Corporate Governance* made by several business associations (ABI, ANIA, Assonime, Confindustria), professional investors (Assogestioni), and Borsa Italiana S.p.A. This 2020 version has entered into force on 1st January 2021.

Therefore, the problem of defining the duties and the rights inside a group framework should be one of the priorities of company law. From this perspective, the Action Plan of 2012 was clear on the topic by attributing a predominant role to the theme of the recognition of the group interest.

As it has been correctly noted: "the notion of social interest of a company is usually not defined for the same reasons as it should be defined for a group".[255] The existence of a group implies that the entities being part of it are strongly linked and interconnected in pursuing a common program for the group. This suggests an overall assessment of the operations of the group, rather than those of the single company.

The interest of the group shall be held whenever an operation finds its inborn nature in the interconnections between the entities of the group. What should be granted is "the possibility for a parent company to take decisions – or to have its subsidiaries take decisions – which are first and foremost part of a global strategy of the group, and which are superior to the particular interests of each individual entity. However, such decision-making strategies should not endanger any subsidiary".[256]

The interest of the group is one of the focal points which anchor the proper management of the group to. In order to pursue long-term objectives, it could ensure a fair allocation and management of resources within the group making the reasons for the choice of this instrument effective, without endangering the aims of the organisms involved in the group context.

Therefore, at this point an excellent question shall be: to what extent such reasoning is legitimate? Yet, to recognize the existence of a group interest - diverse from the parent's interest – taking into account the needs of all the group parts means conferring importance to the group phenomenon under its economic connotation. This implies a partial defeat of the traditional concept by which companies of the group are and must be distinct bodies in order to give relevance to the *Vielheit* of the group. This methodology could lead to sharpen what has been defined as the paradox of the group, granting an additional value of the group itself.

However, this does not entail that the group would acquire a distinct and new personality or that it shall be deemed to act as autonomous new legal subject; the recognition of the interest of the group does not coincide to the "*entification*" of the group.

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[255] EMCA (2017), p. 386.

[256] Club de Juristes (2016), p. 11.

As highlighted, substantial differences can be found between the competition law approach and the need to recognize the common strategy of the group. It is essential to distinguish "*l'emancipazione dell'interesse di gruppo dalla soggettivizzazione del gruppo: la prima non presuppone la seconda e ne può, anzi ne deve, fare a meno*".[257]

However, the idea to introduce a system based on the group interest has received a prompt criticism for several reasons.[258]

A first thesis [259] affirms that the debate regarding the recognition of the interest of the group is sterile. In presence of a vertical group to impose on the parent company a duty to reconcile its own interest with the one of its subsidiaries (and in particular of its creditors and minority shareholders) would be not to grasp the essence of the phenomenon of vertical groups assimilating them to the horizontal ones. This argument has largely been developed by Stefano Covino referring to a distinguished German theory on the theme.

A second critic has been made by many experts who have affirmed that the approach given to the interest of the group is echoed so much but does not lead to a concrete conclusion as it is not understood what this interest actually is and what it could imply.

The issue is surely complex. Hence, this is the reason why a European intervention would be desirable.

There is a kernel of truth in this vision. An apodictic affirmation would deprive the essence of a similar institution; the risk is to make this expression inconsistent.

This implies the exigency to define exactly what the interest of the group shall mean and moreover to introduce specific remedies in order to avoid that acting "*in the interest of group*" could justify any - even dangerous - managerial action. If recognizing the interest of the group would bring to an improvement of what is generally addressed as group governance,[260] it is also true - as remarked by the majority of the experts and also by the Courts all over Europe - that nothing excludes the risk of abuses by the majority shareholders.

The presence of vertical relationships in groups imply the danger that the majority

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[257] Cariello V. (2012), p. 270.

[258] In addition, some experts have criticized that the authors who contributed to the debate and drafted the several papers on the theme are often the same people. The risk of crystallization is elevated inside a similar choice. See for example Schön W. (2019), p.350.

[259] See S. Covino (2020) who makes references to a distinguished German theory on the theme.

[260] Szabo G.D, Soresen K.E. (2018), p. 698.

decides to direct the companies according to its personal interests using the interest of the group as a general shield from any liability deriving for breach of duties. The German legislator has acknowledged a similar menace deciding to introduce a mechanism as the one provided by §311 of the Aktg responing to the need to protect minorities and creditors.[261] A recognition of the group *sic et simpliciter* without any guarantee or corrective mechanism is not a solution.

As already stated by Aristoteles in his Nicomachean ethics, the best solution is in the middle, *μέσον τε καὶ ἄριστον* therefore it is necessary to find a solution which takes into account the exigencies at stake.

The Italian system is illuminating introducing some instruments as the duty of motivation in case of a decision influenced by the parent company and the duty of disclosure provided by Article 2497bis of the Italian Civil Code in order to grant creditors and minority shareholders. Other possible solutions should be to strengthen the procedural controls and requirements - as already partially provided by the rules concerning related party transactions[262]- and to offer sell-out rights in case of abuse by majority.[263]

Yet, in 2011 the Reflection Group Report had already furnished a *correct Rozenblum* solution simplifying its strict criteria and at the same time providing a series of guarantees for minority shareholders and creditors. In addition, in the vision of the EMCA the necessity to counterbalance any possible abuse of the majority shareholders and the parent company can be found too. In order to realize this intent, the text introduce the prevision of squeeze-out rights (section 15.11), sell-out rights (section 15.15), general rights of information and the right to request a special investigation (sections 15.12 and 15.14).

In addition, both the solutions underline the differences incoming whenever a company operates near to insolvency. The logic for a similar distinction is related to the protection of creditors. As long as the company is *in bonis*, the pursuit of a future advantage, - when at least foreseeable - could be enough to justify a potential hazardous transaction. At the same time under an *ex-post* perspective, it could easily operate as a disclaimer for directors who have pursued the interest of the group.

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[261] K. Schmidt/Lutter (2010) p.3906.

[262] The discipline has already been improved by the EU Shareholder Rights Directive II EU2017/828.

[263] Conac P.H. (2013), p. 223. Tröger T.H. (2014), p.40 advocates for the introduction at European level of a sell-out right affirming that "a much broader sell-out right for minority shareholders might constitute a viable option". In his idea, such a sellout right would be akin to the mandatory bid rule, but not limited to specific acquisition techniques.

On the contrary, if the company was close to insolvency, a similar system would have no reason to exist. “In case the subsidiary has no reasonable prospect of - by means of its own resources - avoiding a winding-up (crisis point), directors of the subsidiary should protect creditors and therefore unbalanced transactions to the prejudice of the subsidiary should not be protected.”[264]

Having acknowledged the opportunity and value of a system that recognizes the interest of the group, in terms of flexibility and fair allocation of the resources, the question remains as to which would be the benefits of a centralized system within the European Union.

The solution is not straightforward to resolve and there has been no lack of divergent opinions. It must be admitted that the entire the debate (shown in the previous part of the work) encourages a single European system able to lessen the existing barriers in the legal treatment of the various Member States.

The principal merit of this idea is that it would make the principle of freedom establishment effective. The reference is to the right granted by Article 49 of TFEU according to which “restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State”.

Article 49 explicitly addresses the subsidiaries and it is clear that this reference is attached to the theme of groups and to the hypothesis of cross-border groups i.e., those operating in more Member States. It is for these specific entities that a uniformity of managerial rules could have the most relevant effects.

The members of a group are continually called to decipher the different legislations and the limits to the management powers provided therein resulting in an expenditure both in term of time and resources which shall not be appropriate. The European legislations should consider the difficulties a corporate group is confronted with when operating

[264] EMCA (2017), p. 388. Section 15.17 of EMCA introduces a specific form a parental liability “Whenever a subsidiary company, which has been managed according to instructions issued by its parent in the interest of the group, has no reasonable prospect, by means of its own resources, of avoiding a winding-up (crisis point), the parent company is obliged without delay to affect a fundamental restructuring of the subsidiary or to initiate its winding-up procedure”.

cross-border.[265]

These complications derive from the lack of not uniformity inside European countries about the authentic content of the management of groups and the related theme of their interest. National laws offer a multitude of possible solutions – often contradictory – resulting in the consideration that "managing a group in Eu context is cloaked by uncertainty and ambiguity".[266]

Indeed, a parent company incorporated in the law of a Member state shall take into consideration the different approaches and rules reigning the subsidiary's world in case it is set up in another Member State. A similar situation – implying costs both related to time and to asset - will inevitably affect the dynamism which should connotate a group of companies. Intra-group transactions should be inspired by the reduction of the costs connected to the market, cumulating the advantages coming from acting as a single enterprise with those coming from the separate legal personalities; to slow down the process for their conclusion due to legal uncertainty could deprive their significance.

In addition, a further risk is the one of a bidding war for the protection of minorities in the group which would – at the end – dramatically reduce their rights.

Furthermore, a similar vagueness could have an impact on non-European groups. In the case a parent company set up in a third country has subsidiaries in one or more Member States, it will face different rules and possibilities.[267]

It is worth mentioning that the uncertainty not only dominates countries which have not implemented the theme, but also countries which dealt with this matter offering a recognition of the interest of groups.

The French Club de Juristes Report[268] and the ICLEG Report[269] have recalled a famous Italian case, the Parmalat-Lactalis case, as an example of uncertainty which could rise even in the case of cross-border groups set up in countries which like Italy and France address the group interest.

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[265] Tiechmann (2016), p.152.

[266] Chiappetta F., Tombari U. (2012), p. 269.

[267] Conac P.H. (2013), p.211.

[268] Towards Recognition of the interest of groups in European Union, Club des Juristes (2015), p. 1-60.

[269] Report on the appropriate recognition of the interest of groups of the Commission's Informal Company Law Expert Group (ICLEG).

The case dealt with a related party transaction between a French parent company, Lactalis and its Italian subsidiary Parmalat, both active in the dairy market.
In 2011 Lactalis Group acquired through a takeover bid 83% of Parmalat S.p.A.
Lactalis requested Parmalat to purchase the Latin American subsidiaries of Lactalis for a price of Euro 900.000.000 (the so-called LAG operation); this operation represented a related party transaction according to the Consob[270] Regulation n. 17221/10 regarding related party transactions. The operation was concluded with the approval of the general meeting of Parmalat, the supervisory board and the special committee for the assessment of the related party transactions.
Nonetheless, Parmalat's minority shareholders argued that the price for the transaction was overvalued and the reason for a similar consideration was to give Lactalis the necessary liquidity to reimburse the loan obtained to pay for Parmalat's acquisition. Therefore, they decided to request a judicial control according to the provisions of Article 2409 of the Italian Civil Code and Article 152 of the Italian Legislative decree n.58 of 24th February 1998.
The Tribunal of Parma decided to appoint an expert to determine the fairness of the consideration paid by Parmalat. In parallel, the Tribunal discovered that the advisor who had established the fairness of the consideration lacked independence, as it was the bank which co-financed the takeover for Parmalat's acquisition and had the outstanding loan.
The expert held by the Tribunal sustained that Parmalat had overpaid 16% for the LAG acquisition. The Bologna Court of Appeal upheld the Tribunal decision. In parallel, the Consob found the members of the audit committee (*collegio sindicale*) guilty of breach of their duty not to have correctly monitored the respect of the rules for related party transactions. Criminal persecutions towards the members the board of directors are still pending.

The Club des Juristes noted that – as known - Italy recognizes the interest of the group through the "compensatory benefits*"* theory but that "This decision nonetheless illustrates that even when such recognition does exist, legal uncertainty remains because of the lack of harmonization at European level"; despite the question was referred to procedural aspects as those provided by the Consob Regulation for related party transactions, "it is

[270] Consob- Commissione Nazionale per le Società e la Borsa is the Italian public authority responsible for regulating the Italian securities market.

clear at the same time that what is considered to be in the interest of the group might not be understood the same way in France and Italy and that some targeted harmonization would be helpful".[271]

Therefore, there are convergent reasons for a common European rule which no doubt should engage political consequences as the reaction of Germany and the resulting consequence that a similar model, if implemented, could have on the structure of the Aktg.[272]

Yet, the introduction of a European rule is not the sole possibility to solve this deadlocked situation.

For example, Professor Cariello has welcomed an interpretative use of Comparative company law which could bring to a spontaneous convergence of the different national experiences without the risk that the idea of harmonization remains as a mere idea, not followed by any concrete intervention.[273]

Notwithstanding the relevance of this theory, a European approach to the theme should be the most admired solution. It would effectively grant a major degree of certainty since Member States would have to compel with the European Union indications. In any event it would be desirable that a European intervention does not stop at the mere identification of the possibility to compensate the advantages under the light of the group. Rather it should address all the themes connected to the group management as the conditions for the parent company to give instructions to the subsidiaries. In addition, it could offer a comprehensive system regarding cash-pooling agreements and all those corporate situations which arise when the group is seen in its dynamic and efficient components.[274]

Nonetheless, the actual scope of such an intervention will depend on which instrument is

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[271] Club de Juristes (2015), p. 20.

[272] Conac P.H. (2013), p. 207.

[273] Cariello V. (2012), p.264. He proposes to: (i) identify the issues that are currently debated and the questions likely to produce an evolution of the matter towards decision-making structures and strategies oriented to the protection of the so-called community of interests involved in group action; (ii) identify the interpretative criteria that are suited to the interpretation of written rights on the assumption that there is no universal equivalence of the hermeneutical canons that govern the concretization of the rules contained in the provisions; (iii) hypothesize their circulation in other legal systems and to verify whether such circulation is possible and useful in terms of the general principles of individual rights and of a possible existing organic regulation of groups;(iv) define the impact of this circulation on the formation of domestic law and/or its interpretation, especially by case law.

[274] Moreover, many authors have emphasized the desirability of a model that does not consider all the subsidiaries in the same way, but which analyzes whether a company is wholly-owned or not. In the first case the possible management problems would arise only towards creditors and stakeholders, nor towards the other shareholders. Therefore, in this case it would be possible to introduce a simplified system.

going to be used for this purpose. There is no certainty about which could be the best option, if a directive, a regulation or a recommendation and which could be European Union's eventual proposal.[275]

The debate developed on the subject is divided as regards the most appropriate instrument. For example, The Reflection Group suggested that the recognition of the interest of the group could be obtained by a recommendation; the ICLEG has proposed a similar solution. In this case the European Union would only be able to make suggestions, but the choice to introduce a similar system and which should be the extent of these new rules shall be decided by each Member State. A more flexible instrument giving more space to European countries could incur the favors especially of those countries which have historically adopted a more conservative attitude to group of companies. However, it must be remarked that that this solution could not be as effective as desired.

Many experts have suggested that the best approach would be the introduction of a directive on the theme. This would have two principal benefits: (i) it would certainly have a significant impact on the reduction of costs which is one of the main aspects to consider when trying to improve cross-border activities; (ii) in this case the rules will have a binding effect and Member State will be obliged to transpose them into their jurisdictions. This would no doubt improve cross-border management since it would create a harmonized solution in all Member State resolving the problems connected to the different legislation and ensuring a better group governance.

[275] Conac P.H. (2013), p. 225.

CONCLUSIONS

It is beyond doubt undeniable that groups of companies represent one of the most common models for the modern enterprises, especially for those aiming at growing on the market. This brings a compelling demand to find the most appropriate criteria to conduct them and which a correct group governance should be inspired to.

In parallel to the debate about the corporate governance of a single company, the need to identify principles and concrete instruments which the directors should follow could have a positive influence on the life of the entities being part of a group.[276]

This would entail a less demanding activity for the parent's directors reducing uncertainty and fastening the decisional process. In addition, this would imply a simplification for the management of the subsidiaries whose bodies could freely decide which operations should be justified or not under a possible group strategy.

Most important, this would ensure that the exigencies the group was created for, are effective and do not remain on paper. The group is different from a single enterprise and continuing to apply rules established for a single company would deprive the sense of this phenomenon. If a company A, part of a group, aims just at the immediate welfare of company A, there would not be any sense in exploiting the synergies of a group. There would neither be any need to use the group form because a common vision would be missed. What is the purpose of setting up a group if group strategies are forbidden? This would happen if the interest of the group was not recognized.

Therefore, for the group system to be correctly exploited and structured, it must be admitted the need to individuate a common framework of rules and principles which a correct group governance should be inspired to. A similar system should - at least partially - give relevance to the *Einheit* of the group being based on the recognition of its synergies whenever it is considered as a whole.

It could be argued that possibly to create a branch, which would not have a separate legal personality could be a solution to avoid the unusual requirements and problems related to group of companies meanwhile ensuring the growth of the enterprise.[277]

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[276]As correctly suggested by Langernbucher K. (2016): "groups pose different problems than stand-alone companies, requiring specific norms addressing these issue".

[277] Reflection Group on the future of European company law (2011), p.61.

This solution is not only unconvincing, but wrongly formulated. There is the demand to find a model which considers the existence of groups as an undeniable fact and tries to answer the problems connected without looking for loopholes.
Yet groups exist and their importance is growing year by due to the globalization process which affects the expansion of this model and consequently the underlying needs to find a system able to give answers. Multinational groups are expanding through intense diversification and internationalization programs and are going to continue doing so due to the improvement of communications and transports.

In the light of these considerations, to recognize a European rule which ensures the possibility to consider the group on its entirety and that recognizes its interest as a separate one from those of the entities being part of it - especially the parent's one- would imply a simplification in the life of the cross-border European groups. It would overcome the substantial differences existing in the several national legislations allowing certainty and reducing costs. A similar rule should ensure managerial flexibility, but at the same time should grant several tools to prevent abuse by majority shareholders.
This would reduce the incoming risk that each Member State could act on its own reducing the level of protection and consequently the free circulation of people and services or harming the freedom of establishment which should be fundamental for the European internal market to be operative. Therefore, as emphasized from many quarters, a European intervention on the subject of groups and on the of recognition of groups interest would be desirable.

The only limit to this respectable intention is linked to a fundamental question: "Would uniformity in the law on the books translate into uniformity in the law in action across EU Member States"? [278]

The answer is not a simple one and a possible response can be given only seeing in practice the actual scope of a similar intervention. Indeed, several aspects would change in relation to the instrument used by European Union and the freedom left to Member State to sharpen the boundaries of the rules introduced.
What is certain is that an initiative at European level could at least lay the foundations to

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[278] Enriques L. (2017), p. 772

eliminate the differences that exist in the various European systems and consequently facilitate the management of European cross-border groups.

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