Groups of Companies in the EEC

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A Survey Report to the European Commission
on the Law relating to Corporate Groups
in various Member States

Edited by

Prof. Eddy Wymeersch
University of Ghent, Belgium

With a foreword by

Mr G. E. Fitchew
Director-General
Directorate-General for Financial Institutions
and Company Law
Commission of the European Communities

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Foreword

Cooperation between enterprises has become a necessity in view of the Single Market of 1993. In practice such cooperation has frequently led to the formation of groups of legally independent but economically associated companies. However, in this field, the statute law of most of the Member States is not always in line with economic reality.

Commercial companies are still largely regarded as being independent in law, isolated, forming a whole and having their own economic interests. This legal situation may, however, give rise to tensions either when it impedes the holding company of a group from applying as effectively as it would wish its policies or when the corresponding need to protect the minority shareholders and creditors of each of the companies is not adequately taken into account. For these reasons, the law on groups of companies has since long been the subject of numerous reports, studies and analyses in most of the Member States.

In the late sixties, early seventies, interest in this subject was actively stimulated as a consequence of the increasing interlinkage between enterprises, due inter alia to the initial developments of an internal market within the six original Community Member States. Legislative proposals were developed in some Member States, most notably in France (the so-called Cousté proposal) after specific rules had been introduced in German company law.

The subject was also taken into consideration at the level of the European Community, both as part of the draft Statute for a European Company or "Societas Europea" put forward in 1970 and as one of the subjects that could come under consideration for further harmonization. Simultaneously, intensive academic interest for the subject was aroused in many of the national legal systems. These developments led

the Commission to prepare a draft of a Directive on Group Law in the early 1980s. Following extensive informal consultations, however, the Commission anounced in 1990 its decision not to proceed with a formal proposal.

In the meantime case law in all of the Member States gradually developed procedures, rules and principles that could be taken into consideration in order to provide more adequate solutions to the specific issues related to the existence of a group relationship. The wealth and variety of information contained in the States' national case law was able to offer valuable material for a comparative study of the subject of groups of companies. Therefore the European Commission's services commissioned the present series of studies which are aimed essentially at tracing the main lines of development that have occurred in several of the Member States since the earlier reports and studies were released.

The study was effected by a number of distinguished professors who are also eminent practitioners under the coordination of Professor U. Immenga, of the University of Göttingen.

The reports identify the simultaneous tendency of the national legal systems more and more to take into account the existence of group relationships. They also illustrate and substantiate the variety of approaches and solutions to the legal issues that have been raised in the absence of any overall legislation. This is especially striking in respect of the definition of what is a group: not only do all States apply different definitions, but within each State one frequently finds several different definitions, which adapt the ambit of the rule to the specific needs of the area in question (accounting law, social law, tax law, banking supervisory law, ...).

The question of a groups' functioning vis à vis its subsidiaries and the relationship of group management with the subsidiary's creditors and

minority shareholders have received ample attention in reports on the national legal systems. It is indeed a question of primary importance since in principle a balance should be realized between the interests of the group as a whole and the interests of its various components.

The reports were originally prepared in 1988 and were updated as of mid 1992. The translations have been done by the European Commission's services.

These reports will help to contribute to a better understanding of the group phenomenon and the issues raised and will provide information for national legislators, investors and enterprises about the present overall situation of the development of the law of groups of companies in several Member States.

Geoffrey FITCHEW
Director-General DG XV
Financial Institutions
and Company Law

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The Groups of Companies in Belgian Law

by

Eddy Wymeersch
(Univ. Gent, Belgium)

I. The Present Practice - The Population

1. Groups of companies are a widely encountered phenomenon on the Belgian enterprise scene. It has always actively interested academic research[1].

Groups are mainly composed of S.A. ("société anonyme") type companies. The enterprise at the top of the group most of the time also is an S.A. However, many individuals dispose of several companies, whether S.A. or S.P.R.L. ("société privée à responsabilité limitée") which are horizontally placed next to each other. These are owned by one and the same person (or persons) and therefore could be considered to come under one single direction[2]. Due to the frequent use of bearer shares even in the smaller s.a. type companies, it often is difficult to prove the existence of a controlling shareholding.

Groups can be composed of both S.A. and S.P.R.L. companies, as the legislature abolished the prohibition for a legal person to become a shareholder of a S.P.R.L. by L. 15 July 1985. The law is still too recent to have a serious impact on business practice. The use of the S.P.R.L. in a group context may however present a certain advantage as the transfer of shares can be more easily restricted in the S.P.R.L. type of company.

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1. One could refer to the early studies of *Van Ommeslaghe, P.*, Les groupes des sociétés, *R.P.S.*, 1965, nr. 5280, 153; *Keutgen, G., Le droit des groupes de sociétés dans la CEE*, Bruylant, Brussels, 1973, *C.D.V.A., Les groupes de sociétés*, Martinus Nijhoff, The Hague, 1973, and many others referred to in the latter. Also the six vomules on group law published by the *Study Center on Groups of Enterprises*, Kluwer Rechtswetenschappen, Antwerp, 1980-1991.
2. See for the definition of consortium infra nr. 24. The criterion of joint control refers to the existence of agreements between shareholders to decide, in common agreement, about the orientation of the direction/management of the company. Only "enterprises" are taken into account (art. 2, § 1, R.D. 6 March 1990, as modified).

From 1st of September 1987, the one man company has been introduced in Belgian law, as an S.P.R.L. founded by or owned by one single shareholder. It is rarely used in the group context, as the parent company, its single shareholder would be indefinitely liable.[3]

Even for smaller entrepeneurs, the use of several companies is widely spread, so that one could easily describe to-day's enterprise, except for the smallest, as being mostly composed of a series of companies.

Due to the small size of the country, most businesses also have foreign subsidiaries. Tax planning techniques have motivated many businessmen, even in the sector of the smaller businesses, to make use of affiliated companies incorporated in jurisdictions with a more favourable tax system.

2. Other company forms could be used to form groups of companies, such as the simple commercial company (société en nom collectif) and the limited partnership (société en commandite simple). However in practice these enterprise forms are not frequently used, especially as no special tax advantages flow from their utilization[4].

It is noteworthy that groups of enterprises function in both the field of cooperative societies and that of the non-profit associations (charities-associations sans but lucratif).

Cooperative societies are used in the agricultural and trade union linked enterprises. Especially important are the "Raiffeisenkassen".[5]

The association sans but lucratif (ASBL) is of major importance *i.a.* in the medical care sector, largely dominated by catholic inspired para-political organizations.[6]

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3. Many individuals, especially professionals, availed themselves of the possibility to constitute one man companies, mainly for tax purposes
4. See however the case of the Solvay group, in which many limited liability partnerships have been constituted.
5. See *Gollier, J-M.*, Un groupe belge d'une nature particulière: CERA in *Aspecten van ondernemingsgroepen*, Kluwer Rechtswetenschappen, 1989, 313 e.s. These affiliated although independent corporate entities are subject to specific prudential rules enacted by the law of 17 June 1991, not yet entered into force.
6. It is estimated that there were about 51.125 A.S.B.L. in 1983: see, *Fossoul, X.*, Inventaire des pratiques, in *C.D.V.A., Les A.S.B.L., évaluation critique d'un succès*, Story-Scientia, 1985, p.17. As of 15 Dec. 1991, this amount has increased to 88194.

The evolution of the formation of companies divided according to the different types can be traced as follows:[7]

	6 Feb.1980	28 Jan. 1985	15 Nov.1989	15 Dec. 1991
SA[8]	38730	49605	80514	102231
SPRL[9]	78340	113379	145126	157026
EBV[10]			5344	11179
Coop. S.	6109	8076	36591	54741
SNC[11]	1433	1834	2590	3028
S.Comm.[12]	353	525	1190	1392
S.Comm.Act.[13]	7	10	14	134
GIE[14]				36
GEIE[15]				78
ASBL[16]	47440	61065	78688	88194
Total	172412	234494	350057	418039

S.A. and S.P.R.L. stand for 89% of all incorporated businesses. Of these 166 are stock exchange listed companies[17]. Of all business enterprises, companies account for 49%.[18]

There is no information available as to the importance or frequency of group relationships between these companies. From annual reports and other published data one can ascertain that most larger companies have many, sometimes over a thousand subsidiaries or related enter-

7. Source: N.I.S.
8. Société anonyme- naamloze vennootschap.
9. Société privée à responsabilité limitée - besloten vennootschap met beperkte aansprakelijkheid.
10. Eenpersoonsvennootschap met beperkte aansprakelijkheid; One man company based on the SPRL, introduced beginning 1 Sept. 1987.
11. Société en nom collectif- Vennootschap onder Firma.
12. Société een commandite - Commanditaire vennootschap of vennootschap bij enkele geldschieting.
13. Société en commandite par actions - commanditaire vennootschap op aandelen.
14. Groupement belge d'intérêt économique - Economisch samenwerkingsverband met zetel in België.
15. Groupement européen d'intérêt économique - Europees economisch samenwerkingsverband met zetel in België.
16. Association sans but lucratif - vereniging zonder winstoogmerk.
17. As of February 1st, 1992. The 92 registered holding companies stood for 80,77% of total market capitalization
18. As of 31 December 1990 there were 628.624 enterprises registered, of which 305.000 in company form and 323.624 in personal name.

prises. With respect to smaller enterprises, it often appears that these act in concert as a consequence of their identical shareholding, e.g. one physical person or family owning the shares of several of these companies. In at least one major group, this technique has been followed systematically, thereby attempting to putting itself outside the reach of applicable group law rules.

3. Of importance for the Belgian scene is the distinction between so-called financial holding companies and industrial holding companies.

The first category corresponds to widely diversified conglomerate companies that own stakes in several other enterprises very often without owning of a majority controlling shareholding. Whether the holding company exercises power in the affiliated companies will depend on the factual circumstances, but there would, it seems, not be a fully integrated management.

In the industrial group, the formation of subsidiaries corresponds to an organizational technique. Subsidiaries are 100% owned, minority shareholding are rather rare and not especially liked. As a rule management is rather strictly integrated or at least tightly held by the management of the parent. But here too large differences, due to varying group cultures exist.

4. Group relations come into being for a wide variety of reasons. Apart from purely business considerations, one could mention the industrial relations aspects. As wages as set by "collective wage agreements", applicable to all enterprises belonging to a specified business sector, enterprises are split up to more closely follow these lines of the sector divisions followed for wage setting. Also cases have been reported in which group structures were set up to escape certain rules on industrial democracy. By splitting up the enterprise in several sections, different labour relation agreements may become applicable, some more favourable than others. Also, some groups may thus remain under the threshold for the enterprise council in each of the component enterprises.[19]

Tax treatment often is rather favourable to the formation of group relationships. Under present tax laws, and in order to avoid double taxa-

19. This threshold is fixed at 100 employees according to art. 1, § 1, L. 20 Sept.1948 (*Mon.b.*, 27 Sept. 1948) and art. 3, § 1 R.D. 31 July 1986 (*Mon.b.*, 20 Aug. 1986).

tion, dividends received from another enterprise are considered to have been finally taxed in the enterprise paying the dividend.[20] Finally, important assets such as ships, large real estate properties,and even paintings or copyrights are often held by way of a separate legal person, in order to facilitate their later transfer.

II. The Present Status of the Belgian Legislation

5. There is no general legislation in Belgium on groups of companies. However company law takes into account, and in recent modifications of the law widely recognizes the existence of group relationships. Of importance also is the existence of some form of financial supervision on groups. Other sectors of the legal system recognize the group phenomenon.

A significant part of to-day's rules on groups of companies in Belgium is the result of the administrative action of the Banking Commission,[21] whether on the basis of the supervision of holding companies, as mentioned infra[22] or, since 1935, as a by-product of its surveillance of the disclosures to be made on the public issue of securities.[23]

Although not strictly binding at law, these rules will be made part of the overview that follows. The Banking Commission rules are not to be considered regular rules of law, but rather may be viewed good business practices, as recommended by the Commission and enforced within the limits of its administrative authority.[24] Enforcement of these rules is

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20. Except for a 5% contribution to taxable income; see infra nr. 18. See the law of 23 Nov. 1991 (*Mon.b.*, 15 Nov. 1991).
21. This Government agency was renamed by the L. 4 December 1990 as Banking and Finance Commission (or should it be:"banking and financial" commission). in order to reflect its widened duties of surveillance over the securities markets.
22. See nr 13.
23. Under present legislation (R.D. nr. 185 of 15 July 1935, art.26 e.s.), to be modified in order to implement the EEC Directives on admission of securities to stock exchanges, the Banking Commission only vets the disclosures to be made upon public issue or admission of securities to the stock exchanges, excluding the annual or continuous disclosures.
24. As to the legal status of these recommendations of the Banking Commission, see esp. the study of *Lebrun, J.*, Les normes professionnelles dans l'action de la Commission bancaire, in *C.D.V.A.*, *Le droit des normes pra-*

based on moral suasion; in some cases enforcement has proved to be problematic. Therefore the legislator undertook during the 1988-1991 legislature to mould many of the Banking Commission's recommendations into rules of law.[25]

In a few instances the judiciary has recognized the legal value of the Banking Commission's rules of practice, especially for making more explicit certain general rules of conduct, e.g. for the interpretation of the rules on director's liability, on good faith, on due diligence.[26] Also, the Banking Commission administrative case law is a major source of inspiration for changes in the law, especially in the Companies law.

1. Company Law

6. Belgian companies law still basically reflects the period when company life took place within a single corporate entity. Belgian statutory group law has originally been developed in the fields of accounting law and financial regulation, while company legislation has been developing much slower during the last fifty years. Recently, however, due to the need to implement the EEC directives, some changes had to be brought about.[27] Especially with the changes introduced in July 1991, the Companies Act more and more takes into account the group relationship, mainly to declare the Act's regulations applicable taking into account the situation of affiliated companies. In that sense rules of

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tiques et professionnelles, Bruylant, Brussels, 1984, 115, and *Wymeersch, E.*, La Commission bancaire belge et le droit des groupes de sociétés, *Riv. Società*, 1986, 207.

25. The Law of. 5 December 1984 implementing the Second company law directive has incorporated into the company law several of the Commission's opinions e.g. on preemptive rights, redemption of own shares, issuance of shares below par, etc. A second stage of juridification took place with the regulation on take-over bids including mandatory bids with the RD 8 November 1989. Finally the L.18 July 1991 introduced many rules of company law that expressly take into account the group phenomenon. Several of these rules go back to issues in which the Banking Commission felt unable to impose its views under the previous legislation.
26. See esp. Trib Comm. Brussels, 31 Januari 1980, *J.C.B.*, 1980, 420; comp. with respect to a take-over bid: Brussels, 1 March 1988, *J.T.*, 1988, 232, *D.A.O.R.*, 1988, nr. 6, 15.
27. These are the law of 1 December 1984 implementing the 2nd and part of the fourth directive; also the law of 28 February 1985 implementing the 8th Directive.

group law are introduced to combat avoidance of regulations applicable to the mere parent company. No overall concept of group law has however emerged from these more or less casual regulations.

There are no restrictions on the use of the different corporate forms as instruments for the building of group relationships. All business enterprises may take participations in all other business enterprises[28]. With respect to several types of companies, legal persons including commercial companies can act as director or managing partner of all companies. The SPRL director however has to be a physical person.[29] The use of corporate entities as directors of other bodies corporate is not widely used in practice, although applications are relatively frequently found[30]. The limited partnership with a body corporate as active partner (e.g. GmbH & Co, KG) is very rarely encountered in Belgian practice.

7. The Companies Act as modified by L. 18 July 1991 contains an express provision allowing to enact rules defining parent and subsidiary enterprises[31]. This definition laid down in a Royal Decree of October 14, 1991, is very similar to the one used in accounting regulations and is based on the existence of a control criterion. Legal control exists when a parent enterprise is entitled to exercise the majority of the voting rights, whether as a consequence of its owning the majority of he shares, of voting agreements or of other devices. *De facto* control is found when a shareholder has exercised, during the two last general meetings, the majority of the voting rights and was able to elect the majority of the board members. However, control can be based on any other factual circumstance.[32]

The 1991 changes of the Companies Act were in part aimed at extending the ambit of certain rules, previously applicable to the single company, in view of group affiliations.

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28. Except however the restrictions imposed on the Belgian EIG: Law 17 July 1989.
29. Art. 129 Comp.L.
30. Mainly for liability reasons. It is unclear whether this practice will have to be discontinued under the new rules on "personal interest" of directors, about which infra nr. 11.
31. Art. 53 L. 18 July 1991, implemented by R.D. 14 October 1991.
32. Art. 2 § 3 R.D. 14 Oct. 1991. For a comment of these rules, see *Wymeersch, E.*, in *Braeckmans, H.* and *Wymeersch, E., De vennootschapswetgeving 1991*, Maklu ,Antwerp, 1992 (to be published).

8. In several respects relevant to the present overview Company law has been substantially modified as a consequence of the 1991 legislative reform. The overall trend has been to readjust the relationship between controlling shareholders, often holding a relatively small percentage of the shares, and the rights of other shareholders, mainly the investors at large. As a consequence of the takeover of the Société générale de Belgique, several techniques were introduced to reinforce the position of controlling shareholders, such as: non-voting shares[33], validation of voting agreements[34], of issuance of protective warrants[35], of some poison pill techniques[36], restrictions on share transfers[37], etc.

As a countervailing measure, minority shareholders obtained better protection mainly by way of restrictions on the board's freedom to issue additional shares[38], restrictions on the use of the authorized capital, limitations on systems of self control[39] and by the reintroduction of the minority's right of action.

9. Some of these rules are of special importance in the group of companies context.

Subscription by a company of its own shares, prohibited under the Second Directive, is extended to subscription by subsidiaries.[40] Subsidiaries may not acquire nor possess shares in their parent company for a per-

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33. Art. 48, as modified by L. 18 July 1991.
34. Art. 41, §§ 2,3 and 4, modified by L. 18 July 1991.
35. Art. 74ter as introduced by L. 18 July 1991.
36. Art. 33bis, §§ 3, 4 and 5, as modified by L. 18 July 1991.; also art. 17bis, L. 2 March 1989, as modified by L. 18 July 1991.
37. Art. 41, § 4,as modified by L. 18 July 1991; see for an overview of the former law: *Van Ommeslaghe, P.*, Les conventions d'actionnaires en droit belge, *R.P.S.*, 1990, nr. 6533, 323; *Geens, K.*, Quelques aspects de la clause d'agrément dans la société anonyme, *R.P.S.*, 1989, nr. 6533, 323. Under the new law: *Nelissen-Grade, J.M.*, Goedkeurings- en voorkoopclausules - Overeenkomsten betreffende de uitoefening van het stemrecht, in *De naamloze vennootschap in NV en BVBA na de wet van 18 juli 1991*, Biblo, Leuven, 1992, 11 e.s.
38. Art. 34 bis, § 4 bis.
39. Art. 52 quinquies and sexies, commented infra.
40. Art. 29 § 6, as mod. L. 18 July 1991. In the affair of the Générale de Belgique, the Brussels Court of appeals, although within the framework of an injunction procedure had held that under the former law, nothing prevented a subsidiary to subscribe to its parent's shares. See Pres.Trib.Comm.Brussels, 27 April 1978, *R.P.S.*, 1978, nr. 5987, 239 Pres.Trib.Brussels, 9 February 1988, *J.T.*, 1988, 220 overruled by Brussels, 1. March, 1988, *J.T.*, 1988, 232; *D.A.O.R.*, 1988, nr. 6, 23.

centage exceeding 10% of the parent's voting rights.[41] Another prohibition relates to cross shareholdings: if a company holds ten percent of the voting rights of another company, the latter cannot acquire shares in the former if the voting rights attached would exceed 10%.[42] The prohibition will apply to the company first receiving the notification of the 10% shareholding in its capital.

Apart from these substantive rules, several of the rules of company law, as modified in 1991, take into account indirect relationships, especially through subsidiaries. This is *i.a.* the case for the rule prohibiting a 10% shareholder to acquire shares issued by the board of directors against a contribution in kind. His 10% stake has to be determined taking into account shares held by affiliated enterprises, and in some occasions by third parties acting in concert.[43]

An important rule of company law has been introduced in the takeover regulation. It obliges the acquiror of shares who, as a consequence of his acquisition obtains control of a stock exchange listed company[44], to offer the purchase of all outstanding shares at the highest price he has paid for acquiring control[45].

10. Some attention should be paid to rules limiting voting rights.

Voting rights attached to shares held by a subsidiary in its parent, and exceeding 10% of total voting rights within the parent, will be suspend-

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41. Art. 52 quinquies, introduced by L. 18 July 1991.
42. Art. 52 Septies, introduced by L. 18 July 1991; see for the former position: *Banking Commission, Annual Report,* 1950-1951, 67 e.s.; more recently: 1986-1987, 89; for an overview see *Le Brun, J.* and *Lempereur, C., La protection de l'épargne publique et la Commission bancaire,* Bruylant, Brussels, 1979, nr. 760 e.s.
43. Art. 33bis, § 2, as modified by L. 18 July 1991.
44. In fact, the rule applies only to companies the shares of which are whether listed or widely distributed: see *Banking Commission, Annual Report,* 1989-1990, 111, allowing the application of the takeover regulation in case of a public offer for privately held shares. The offer was of course not successful.
45. Art. 41 of the R.D. of 8 November 1989; here again the controlling share will be determined taking into account indirect shareholdings. For comments see: *Bruyneel, A.,* Les offfres publiques d'acquisition, Réforme de 1989, *J.T.*, 1990, 141 e.s *Wymeersch, E.,* Cession de contrôle et offres publiques d'acquisition, *R.P.S.*, 1991, nr.. 6575, 151; and for a critique: The mandatory takeover bid , in *Hopt* and *Wymeersch, Takeovers in Europe,* London, 1992, (to be published).

ed until the shareholding has been reduced under the 10% level[46]. More generally, in order to limit cross shareholdings, voting rights attached to 10% shareholdings in a Belgian S.A. are suspended unless duly notified. Moreover, if a company has been notified that another company holds 10% or more of its shares, it may not acquire more than 10% of the shares of the latter. Cross shareholdings that exceed the 10% limit have to be divested within one year, in the absence of which voting rights attached to all shares to be divested will be suspended.

Suspension of voting rights may also flow from the regulation on disclosure of significant shareholdings, enacted in 1989 in implementation of the EC directive[47]. All shareholding in stock exchange listed companies exceeding 5% of the voting rights have to be notified to the issuer. Voting will only be allowed for shares that have been notified 45 days in advance[48].

The 1991 changes to the companies law have abolished the previously existing limitation of voting rights for larger shareholders.[49]

11. The 1991 amendments have also changed the position of company directors in several respects.

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46. Art. 52quinquies, § 3. The suspension enters into force only one year after the more than 10% shareholding has been in existence and as far as parties have not decided about reducing the level of cross shareholding under the 10% threshold. However, if no such agreement is reached, reduction takes place for both shareholdings, on a proportional basis.
47. Directive of 12 December 1988, 88/627/EEC, OJ L.348, of 17 December 1988, 62-65. For comments and analyses of the Belgian regulation see: *Van Acker, C.*, De transparantiewet, in *Schrans, G.* and *Wymeersch, E., Financiële herregulering in België*, Kluwer, Antwerp, 1991, p. 301 e.s.
48. Art. 6, L. 2 March 1989.
49. According to the former art. 76, Companies L, no shareholder may take part in a general meeting for more that 20% of voting rights attached to all shares, or for more than 40% of the voting rights represented at a specific meeting. This rule was originally designed to protect minority shareholders against the overwhelming influence of their larger brethern. This rule came down to giving the legal majority only to those shareholders that own a 80%+ shareholding. Also, it would have been unlawful to have one's shares scattered over several relatives or friends as it is a crime to vote with somebody else's shares (art.200) It is striking that this somewhat astonishing rule has not caused greater difficulties in Belgian company practice. The abolition of this rule also lifts possible doubts as to existence of a subsidiary relationship for more than 50% owned S.A. or S.P.R.L. businesses.

On the one hand, new rules have been introduced on directors' "conflict of interest", framed in terms of a "personal interest" of the directors with respect to a decision or transaction decided upon or entered into by the board[50]. Disclosure to the board, and to the general meeting, and no involvement in the decision making nor in the board's vote are the procedural safeguards that have been supplemented by the nullity of the transactions entered into in violation of the rules, and personal liability of the director in case of his "unjustified enrichment" to the detriment of the company. The regulation is expressly rendered applicable to interlocking directors who have no personal interest in the transaction.[51] The rule has caused great uneasiness in groups of companies as subsidiary directors almost always have to abstain from voting, rendering the subsidiary management very burdensome.

Directors' liability has been given teeth as a consequence of the introduction of the minority shareholder's right to sue directors in liability[52]. The action can be brought by a 1% shareholder, or by a shareholder owning shares that represent capital for an amount of at least 50 million BEF. Damages, if any, will be alloted to the company. In the S.P.R.L. company type, a 10% shareholding has to be proved. It is still too early to predict the effect of this right of action on the evolution of company law in general, and on group law in particular, but it is generally believed to be considerable, and may change the previous situation according to which director's liability was often considered a rather theoretical subject.[53]

12. According to the prevailing opinion, Belgian company law does not allow a board of directors to contract away its managing powers[54]. The philosophy is that the board must exercise its powers itself. Any con-

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50. Art. 60, as modified by L. 18 July 1991. Personal interest includes moral, family, and even career interest. For commentary see *Ernst, Ph.*, Belangenconflict in naamloze vennootschappen, *R.W.*, 1991-1992, 585.
51. It is arguable that the nullity and personal liability sanctions would apply to directors that have no personal interest, but are subject to the disclosure rule merely as a consequence of their being members of several boards of directors.
52. Art. 66bis, as introduced by L. 18 July 1991.
53. For a statistical overview see *Van Bruystegem, B.*, Mythe of werkelijkheid van de verantwoordelijkheid van het bestuur, de commissarissen en de vereffenaars in N.V., P.V.B.A. en C.V.A., *J.C.B.*, 1986, 487, who revealed that for the period 1920-1980 only 117 cases had been published, resulting in liability of the director in 48 cases.
54. See infra nr. 34

tractual or other arrangement to the contrary would be void, and expose the directors to liability. This rules effectively prevents the constitution of contractual groups, the need for which has been mentioned by some practitioners. Also, if Belgian groups function under the uniform direction of their parents' management[55], this constitutes only a factual situation. The subsidiaries' directors would remain fully liable to third parties.

2. The Supervision of Holding Companies

13. A Royal Decree n° 64 dated 10 November 1967 introduced a specific form of supervision on certain of the major Belgian holding companies, i.e. those having a share participation portfolio the value of which exceeds 0,5 billion B.Frs. These enterprises have to be registered with the Banking Commission. In practice, as of the end of 1991, 92 enterprises were put on the list, standing for about 80% of the Brussels stock exchange market capitalization in Belgian shares. The list is composed of so-called financial holding companies, and of industrial holding companies, although these categories are not established by law.

R.D. n° 64 contains a regulatory definition of a "subsidiary" and of a subsubsidiary, somewhat different from the one used in the general company law. It is analyzed in the next chapter.

As to the nature of the supervision exercised by the Banking Commission, it is sufficient to mention that the Commission has power to intervene only as far as concerns disclosure of information in order to make the holding company's transactions transparent. The Commission would have no power to direct transactions, nor to forbid operations as contrary to the economic interests of the company. The Commission has made more intensive use of these powers during the last decade, especially to formulate more refined rules of conduct which the holding companies are expected to be guided by. These rules of conduct largely rely on the principles of company law and on those of fairness and good faith that have to be followed in framing corporate deals. An important practice of group law was developed on the basis of this legislation and has in part been introduced in the legislation on

55. A group management committee is functioning in some of the larger groups composed of representatives of the parent and the main subsidiaries.

consolidated annual accounts and in the general companies legislation[56].

14. The original purpose of this legislation certainly has not been to introduce a mechanism from which a form of group law could be developed. In the 1960's, it mainly aimed at organizing some form of Government control on these then major centres of economic power in the Belgian economy. This proved, however, to be more difficult a task than originally considered. Therefore, in 1978, the macro-economic objective of the original legislation was spun off, and the "association of the holding companies with the economic planning"[57] was laid down in separate legislation. Under this legislation, the holding companies (a different definition is used) must inform the Plan Bureau about the investment plans of themselves and of their subsidiaries and subsubsidiaries that could have a direct or indirect impact on the Belgian economy.

It is not generally considered that this last-mentioned legislation was very successful in its achievements.

3. Accounting and Auditing Rules

15. The L. 17 July 1975 "on bookkeeping and annual accounts of enterprises" and its implementing decrees contain a number of disclosures imposed on all larger enterprises and relating to group relations.[58] There are no specific rules on intragroup transfer pricing. On the basis of the same legislation, a decree was issued imposing consoli-

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56. For comments see *Biron, H.*, Le régime belge des sociétés à portfeuille, prémice d'un droit des groupes?, in *C.D.V.A., Modes de rapprochement structurel des entreprises*, Story-Scientia, Brussels, 1988, 175 e.s. *Herbay, M.* and *Nemry, M.*, Approche économique et juridique des comptes consolidés en Belgique, in *Aspects des groupes d'entreprises*, Kluwer, 1990, 343; and more generally: *Juridische aspecten van geconsolideerde jaarrekeningen - Aspects juridiques des comptes consolidés*, 1981, Kluwer, 373 p.
57. L. 20 January 1978.
58. These disclosures include amounts of the claims and liabilities to other group companies, guarantees obtained from and in favour of group companies. For comments on holding companies, see *Nédée, F.*, De holdings vandaag en morgen, *Bank.Fin.*, 1979, 549-564; *Lempereur, C.*, Holdings et sociétés à portefeuille. Le cadre réglementaire, *Réfl. Persp.*, 1981, 213-226; *Lamy, R.*, Les sociétés à portefeuille, concepts et réalités, *Rev. banque*, 1985, nr.8, 63 e.s.

dation of annual accounts on all larger enterprise groups[59]. It has entered into force starting with annual accounts released as from the 31 st of December 1991.

In the field of holding companies, as defined hereinafter, the practice of drafting and publishing consolidated accounts has been recommended by the Banking Commission for at least two decades. The principle was formally established in a Royal Decree of 29 November 1977, at present supplemented by the R.D., 1 September 1986. The 1986 Decree contains detailed provisions relating to the consolidation techniques and methods. It only applies to holding companies registered under the specific legislation mentioned sub 2.2. The decree has been updated in order to conform to the EC Directives as of 1992[60]

With respect to auditing, all larger companies[61] have to appoint at least one auditor, irrespective of their being a part of an audited group. There is no fixed opinion as to whether the group auditor may also act for the subsidiary: according to art. 64bis, the auditor may not accept functions with the parent or the subsidiary that would be incompatible with his independence as an auditor.[62]

4. Banking Law

16. The Banking Act, R.D. n° 185 of 9 July 1935 contains some rules that take into account the existence of group relations in the field of banking and banking supervision. The prudential regulations aimed at securing the bank solvency and liquidity are imposed on a consoli-

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59. R.D. 6 March 1990. For comments see *Maes, J.P. en Stempnierwsky, Y.*, La transposition en droit belge de la Septième directive du Conseil des Communautés européennes relative aux comptes consolidés, *T.B.H.*, 1910, 468-469; *Maes, J.P.*, Juridische aspecten van het consoidatiebesluit, en C. Dauw, De invloed van verschillende consolideringsprincipes en methodes op resultaat en eigen vermogen, both in *Schrans, G. and Wymeersch, E., o.c.*, 202 and 229..
60. RD 25 November 1991 (*Mon.b.*, 5 Dec. 1991)
61. This is essentially the S.A. and S.P.R.L. exceeding the thresholds mentioned in art. 12 § 2 L. 17 July 1975; see nr. 51 and the note.
62. See about this issue in practice, the debate in *Rechten en plichten van moeder- en dochtervennootschappen - Droits et devoirs des sociétés mères et de leurs filiales*, Kluwer rechtswetenschappen, 1986 p. 449 e.s.

dated basis[63]. In practice supervision has been exercised on a consolidated basis since the late seventies.[64]

Under present banking legislation, banks organized as an S.A.[65] are entitled to hold shares in industrial or commercial enterprises but only to a very limited extent[66] Shareholdings have to be restricted to 5% of the bank's own funds, while holdings may not represent more than 5% of the issuer total amount of shares outstanding. Shareholdings in other financial enterprises, or acquired in specific circumstances[67] are exempted, provided aggregated shareholdings do not exceed 35% of the bank's total own funds[68].

17. Traditionally the major Belgian banks were founded as a consequence of the 1934 measure that imposed the split of the then existing general banks ("Universalbanken") into a commercial bank and in a holding company. This Government imposed split was implemented by putting the banking business in a subsidiary, the shares of which were to be sold on the market. Furthermore, it was considered that the holding company should not intervene in the banking business. From this reasoning, the fundamental idea of "autonomy of the banking function" has been developed by the Banking Commission. The rules have been laid down by the Banking Commission in a "protocol", an agreement entered into by the bank, the holding company and the Banking Commission.[69] According to this "protocol" the holding com-

63. See Decree of the Banking Commission, 19 March 1991 approved R.D. 31 May 1991. This legislation has not yet been adapted to the Second banking directive.
64. Art. 11, RD nr.185 of 15 July 1935; an express decree aiming at extending the own fund requirements to the consolidated situation is under consideration.
65. Or S.P.R.L. The rule is not applicable to banks organized under snc or scs form.
66. On the basis of Art. 14, al. 7 of the Banking Act 1935: RD. 8 May 1990 and Decree of the Banking Commission, 29 May 1990.
67. E.g. shares obtained as a consequence of a bankruptcy reorganization of the debtor enterprise.
68. Decree of the Banking Commission of 29 May 1990, approved by M.D. 14 June 1990. Unlisted shares in aggregate may not exceed a 5% limit.
69. The model text is published by the *Banking Commission, Annual Report,* 1973-1974, 242. For the reviewed doctrine on the subject: see *Banking Commission, Annual Report,* 1990-1991, 32 e.v. Comments on the earlier protocols are found in: *Bruyneel, A.,* La Commission bancaire belge, Banque(Fr) 1972,nr. 303, 12 e.s., nr.304,125 e.s.; nr. 305, 247 e.s. *Demain, Ph.,* L'autonomie de la focntion bancaire en belgique, *Réfl. Persp.,* 1976, 3 e.s.; *Henrion, R.,,* La concertation et l'autonomie bancaire, JT., 1972, 293

pany must refrain from intervening in the bank's management, even if the participation of the holding company in the bank's capital is very substantial. Directors of the bank are chosen by the present board members, with the approval of the Banking Commission. Only one director functions as the representative of the holding company. He is not in charge of day-to-day management. Also the holding company will not dispose of its shareholding in the bank except after consultation with the Banking Commission. It fulfils the role of the stable shareholder, to which the bank is firmly attached without being subject to its influence.

These rules are aimed at insulating the bank from the holding company's overall influence or control. In practice, it may be said that this policy has been well received in the banking community and is applied to all credit institutions, whether public[70] or private. In 1991, as pressure for higher profitability increased, this policy was scaled down, allowing the holding company to exercise more influence on the bank's overall management and performance.

5. Taxation

18. There is no general set of rules especially applicable to the taxation of groups of companies located in or managed from Belgium. The main tax exemption applicable to dividend income from shareholdings in other enterprises, whether subsidiaries or not, consists in the recognition that these dividends have been taxed in the subsidiaries and therefore have not to be fully submitted to taxation in the portfolio of the parent. According to the relative importance of shareholding in the total income of the parent, the revenues are considered to have been "finally taxed" in the subsidiary.[71]

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70. See for the public banking sector,the legislator preparing the L 17 June 1991 has several times referred to this applicability of the rules of the banking protocol to the public credit sector.
71. So called "revenus définitivement taxés", whereby the income from the Belgian or foreign subsidiary will not be included in the tax basis for 95% of its amounts (art. 111 e.s. Income Tax Code). The rule is applicable to dividends from all shares, whether these are held in a subsidiary or are a mere investment. The income to be declared by the receiving company includes the tax credit on the dividend, irrespective whether any tax has been levied in the country from which it originates. Therefore share investments are located in low to zero tax countries, entitling the parent to set off against his other taxes the tax credit generated by this shareholding. Large holding companies therefore pay relatively little

Others measures relate to the non-deductibility of certain payments especially for royalties and assimilated services to companies located in countries with an "exceedingly favourable tax system".[72]

19. Some attention should also be paid to the favourable tax regime of which the so-called "coordination centres" can avail themselves.[73] These coordination centres are subsidiaries or branches of multinational groups that locate certain activities or invisible transactions in Belgium and qualify under certain conditions for a favourable tax regime. Royal Decree n° 187 of December 30, 1982 on the so-called "coordination centres" requires that in order to qualify for the favourable tax treatment, in fact an exemption of company tax, the Belgian company must be part of a multinational group with a turnover of more than 10 billion BEF and net assets for more than 1 billion.[74]

6. Labour Law

20. The Law of 20 September 1948 provides for the installation of a works or "enterprise council" in the more important enterprises as soon as there is "an enterprise as a technical unit" counting 100 or more employees. According to the Cour de Cassation, this notion has to be interpreted independently, on the basis of economic and preferably social criteria, and therefore the fact that the enterprise was split over two legal entities does not prevent the law being applicable[75] In order to avoid artificial split ups of enterprises in the economic sense over several corporate entities, the law has expressly formulated specific rules that fix the conditions when these companies have to be viewed

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tax in Belgium. For comments see *Autenne, J.*, Le régime fiscal applicable aux dividendes, plus-values, moins-values et réductions de valeur sur actions à la lumière de la directive sociétés-mères/filiales, *J.T.*, 1992, 233 e.s.

72. For a full overview of the Belgian group taxation, one can refer to the reports of the conference on group taxation organized in December 1987 by the *Study Center on Enterprise groups*, in: *La reconnaissance des groupes de sociétés en droit fiscal*, Kluwer, Antwerpen, 1989.
73. Introduced by R.D. nr. 187 of 30 December 1982, as modified.
74. See for a detailed description *Meyers, J.*, The Special Tax Treatment of Group Finance and Service Companies in Belgium, in *C.D.V.A., Modes de rapprochement structurel des entreprises, o.c.*, 287.
75. Cass., 19 December 1983, *J.T.T.*, 1984, 82.

as one enterprise (eg. single management, same buildings or premises, transfers of personnel) etc.[76]

A Royal Decree of 27 November 1973 introduced the rules according to which economic and financial information must be presented to the members of the enterprise council. This information relates to the "enterprise" and includes, as the situation may be, data concerning the "financial or economic entity of which the enterprise is a part".[77] Also the decree imposes communication of the consolidated accounts of the group to which the enterprise belongs[78] Additional measures were enacted by Collective Agreement, and relate, i.a. to the early notification of reorganizations, mergers, etc. about which the council must he heard.[79]

21. With respect to the application of the law on labour contract relations, it has several times been held in court that the different companies belonging to the same group are to be considered as one employer and therefore the employee can avail himself of the longer termination notice as if both companies were one single entity.[80] Decisive will be whether both enterprises are the same social entity.[81] Conversely, the fact that a single group has gained control of several enterprises does not lead to these constituting one single "employer".[82]

The employee who has gone on strike to support the strike of employees of another company may not be censured; this is the more so as both companies belonged to the same enterprise entity.[83]

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76. Art.14 §2 (b) L. 20 September 1948.
77. Art. 1, RD., 27 November 1973; for a commentary see *De Koster, A.*, De informatiebevoegdheden van de ondernemingsraad ten aanzien van de groep of van de financiële en economische entiteit waarvan de onderneming deel uitmaakt, *R.W.*, 1983-84, 1105.
78. Art. 21 RD., 27 November 1973.
79. Art.11, CAO nr. 9 of 9 March 1972, *Mon.b.*, 25 November 1972.
80. E.g. Trib.Trav.Dinant, 15 June 1982, ment. by *Van Ommeslaghe, P.*, Rapport général, in *Rechten en plichten van moeder- en dochtervennootschappen, o.c.*, 110, nt. 96 Antwerp, 20 December 1983, *Limb.Rechtsl.*, 1984, 83; also Brussels, 2 December 1980, *Med. V.B.O.*, 1982, 768; see as to seniority rules: Trav. Charleroi, 19 June 1984, *T.S.R.*, 1985, 171(merger).
81. The so-called" unité économique d'exploitation", see Cass., 15 April 1985, *J.T.T.*, 1985, 356.
82. Antwerp, 20 December 1983, *Limb.Rechtsl.*, 1984, 79 (refusal to disqualify a contract on trial with a second company purchased by the same group).
83. Cour Trav.Liège, 16 September 1987, *J.T.T.*, 1988, 162.

It would seem that labour law follows more specific notions whereby the "enterprise" is the predominant criterion.

7. Competition Law

22. Belgium has recently introduced legislation on competition, dealing with both anti-competitive agreements and concentration of economic power[84]. There are no cases that have been decided on the basis of this legislation that closely follows the criteria used in competition law at the European Community level.

III. The Definition of Groups and Group Components under Present Law

23. Several parts of Belgian legislation recognize the group phenomenon. An increasing number of specific regulations consider the adressee of the rule not only the company, but also its subsidiaries and sometimes other affiliated enterprises. In this section special attention will be given to the definitions used in the main regulations.

Historically spoken, the group concept was first used in the fields of disclosure and accounting, originally by declaring applicable to the group as such the rules applied to a single enterprise. Much of this development is due to the action of the Banking Commission. Gradually the legislator took over and introduced, first in the field of accounting law, later in taxation and other specific fields, and recently in general company law, a group concept based on the control exercised by one company over another. The most important breakthrough was achieved in the 1991 amendments to the companies law, whereby parent and subsidiary concept are frequently used to delineate the ambit of many of the newly introduced rules.

The definitions used in these different bodies of law are different, firstly because they aim to achieve different objectives, secondly because they stem from different periods in the evolution of the group concept. Since the first technical definitions were introduced in the 1964 holding company legislation, later in the 1976 accounting regulation, the legislator has been able to considerably refine and adjust its approach.

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84. L. 5 Aug. 1991.

These definitions relate to the concept of parent, subsidiary, or affiliated company and are based on domination[85]. They do not purport to define the group of companies as such. One therefore has to assume that a group of companies is composed of a series of companies that stand to each other as parent and subsidiary enterprises.

1. Accounting Regulation

24. The oldest, most refined and detailed definitions are found in the accounting regulations. These definitions are found on the one hand in the regulation on the annual accounts of the single enterprise (R.D. of 8 October 1976) and in the regulation on consolidated annual accounts (R.D. 6 March 1990). The definitions used in both regulations are largely identical[86].

According to Royal Decree of 8 October 1976, as modified in 1990[87], certain information relating to transactions with other group enterprises has to be disclosed whether in the annual accounts or in the annexes to the accounts. Under the chapter of "definition of the headings" one finds the subdivision in "affiliated companies"[88] and companies in which the reporting enterprise holds a significant shareholding.[89] As these definitions are considered generally applicable for several parts of the law, they have been translated in full.

These definitions of "affiliated enterprise" read as follows:

> "§ 1 For the application of the Decree are considered enterprises affiliated with an enterprise,
> a) the enterprises controlled by that enterprise;
> b) the enterprises exercising control over that enterprise;
> c) the enterprises with which the enterprise is forming a consortium

85. See for an early decision: Brussels, 17 March 1969, *Revue fiscale*, 1969, 591, nte.
86. The main difference being that the decree on consolidated accounts contains a definition of the parent enterprise (defined as: the enterprise that controls, on its own or with one or more other enterprises, one or more subsidiaries) and of exclusive control (being: the control exercised by one enterprise, directly or through on e or more of its subsidiaries).
87. By a R.D. 6 March 1990.
88. "entreprises liées" - "verbonden ondernemingen".
89. "Participations" - "deelnemingen".