

Company Groups: Work in progress? Powers and liabilities

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The elephant at EU level

- I. EU regulation of company groups
- II. Evaluation: where do we stand
- III. Capturing the elephant:
 - I. Do we need a full picture in company law?
 - II. Potential future avenues?

I. EU regulation/initiatives: company law

Draft ninth draft directive

Directive on capital maintenance

Se Regulation

Takeover directive

- EMCA
- Forum Europeum
- Informal Company law expert reports

(Crossborder) mergers

Revised shareholder rights directive

I. EU regulation/initiatives: **other areas**

Competition law

EWC Directive

Banking regulation

Consolidated Reporting:
Financial and non-
financial

Tax law

Insolvency Regulation

II. Evaluation

- Scattered approach
- More emphasis protective than enabling approach
- P level monitoring functions seem to increase at national and EU level due to:
 - Corporate governances codes: emphasis on the undertaking
 - Non-financial reporting
 - (Draft) Supply chain responsibilities

II. National level: The Dutch example: Shell ECLI:NL:RBDHA: 2021:5339 (May 2021)

- “Due to the policy-setting influence RDS has over the companies in the Shell group, it bears the same responsibility for these business relations as for its own activities. The **far-reaching control and influence of RDS over the Shell group** means that RDS’ reduction obligation must **be an obligation of result for emissions connected to own activities of the Shell group. (...)**”

II. Evaluation

- Idea that abstaining from interference is possible an old concept → core group oversight duties at P level:
 - Avoiding competition law infringements
 - Human rights violations
 - Emissions
 - ...

III.1 Do we need a full picture in (EU) company law?

- As monitoring functions increase: need for clearer delineation of powers and responsibilities of the board at P and S level in a cross-border context
- Company law and the division of power is lagging behind
- EU level:
 - Enabling side overlooked due to ‘instruction power’
 - Protection of stakeholders leads to easier adoption of legislation at EU level

III.2 Future avenues

- Recognition of the group interest as a solution?
Rozenblum-doctrine
 - Capital links
 - Business integration
 - Dividing advantages and disadvantages
 - Continuity at S level

III.2 Future avenues: **Content**

- Making groups and their coherence/chosen level of integration more transparent -> providing the option to choose for instruction rights
- Role of the board at S level: safeguarding stakeholder interest and signaling the needs to the P company
- Need to focus more on diligence in decision-making rather than outcome

III.2 Future avenues: **Form**

- Provide more clarity on national rules that is easily accessible
- Clarity regarding trade offs between powers and liabilities
- Codes
 - Codes already contain some provisions
 - Provide clarity in an international context
 - Allow for flexibility
 - Clearer picture of do`s and don'ts