# Perspectives on Group Corporate Governance and European Company Law

by

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*The need to introduce principles concerning the governance of corporate groups at the European Community level is what underlies the Action Plan of the European Commission (Communication from the Commission to the Council and the European Parliament of 21 May 2003). At the same time, the report of the Reflection Group deals extensively with the issue of EU intervention regarding groups of companies. Beginning with some theoretical premises and the experience of a cross-border group (i.e. the Pirelli Group), the proposal presented below is both a continuation of the basic guidelines of the documents mentioned above and a first response to the "Consultation on the future of European Company Law", launched by the European Commissions, with the objectives of extending the issue's framework and to define new legislative paradigma and conceptual models. More specifically, what it is proposed is the introduction of a number of uniform general principles for "group corporate governance", the essential purpose of which is to improve the "flexibility of the management of groups in their international business activities".*

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## *I. Introduction*

The "Report on the Future of EU Company Law" (hereinafter "the Document") drafted in April 2011 by the Reflection Group[1] as instructed by the

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1 For more information, see section II herein.

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European Commission turns the spotlight back onto a key issue for the future of European company law, asking if – and in what form and with what content – it would be desirable to introduce EU legislation regarding groups of companies. Inspired in part by the Document, in February 2012 the Commission opened a "Consultation on the future of European Company Law", which asks, among other things, if and in what way it would be necessary to intervene in the area of groups of companies[2]. As the reader will be aware, this issue is the subject of recurring debate, and the conclusions reached have been anything but uniform[3].

Looking back, it is important to recall the Proposal for a Ninth Directive on group of companies prepared by the Commission in the late 1970s and early 1980s, which was based heavily on the German model. As the reader will be aware, this proposal was advanced in its definitive form in 1984, but it was not as successful as hoped and was then abandoned and never proposed again. From that moment on, the European Commission appeared to have abandoned all intentions of adopting a comprehensive directive on groups of companies.

It was only towards the end of the last century that discussion heated up again: i) in 1998, a group of academics (i.e. the Forum Europaeum on Group Law) presented a number of proposals for EU-level intervention regarding groups of companies, which recommended not the introduction of comprehensive rules, but rather solutions to specific group-related issues (e.g. proper group management, obligations of the directors in the event of crisis, etc.)[4]; ii) in 2000, the Commission established the "High Level Group of Company Law Experts", which presented its final report in 2002, jointing out a number of areas for intervention.

2 Section X (Groups of companies) of the Consultation on the future of European Company Law begins with a number of assumptions, and specifically: *i)* from a business perspective, company groups or holdings are a reality. However, not all national legal systems have come up with specific legal frameworks dealing with groups of companies; *ii)* at EU level, there were attempts in the past to produce a comprehensive European framework on groups of companies [...].This initiative never succeeded; *iii)* the Reflection Group has tabled recommendations which are not aimed at creating an exhaustive legal framework, but try to target specific aspects where they feel action is needed. Given these considerations and in an effort to seek views on them, the consultation document then asks the following question: Do you see a need for EU intervention in this field (Groups of companies)?

3 See in general Emmerich/Habersack, *Konzernrecht*, 9th ed., München, 2008, 19 ss.; Emmerich/Habersack, *Aktien- und GmbH-Konzernrecht*, 6th ed., München, 2010, 12 ss.; J.M. Embid Irujo, *Introdución al derecho de los grupos de sociedades*, Granada, 2003, 207 ss.

4 See Forum Europaeum on Group Law, Group Law for Europe, in Riv. soc., 2001, 341 ss. (Konzernrecht für Europa – Forum Europaeum Konzernrecht, in ZGR, 1998).

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One of the most recent proposals is the Action Plan of the European Commission (i.e. the Communication from the Commission to the Council and the European Parliament of 21 May 2003) which is based on the work of the High Level Group of Company Law Experts, reached the conclusion that, at the European Community level, a comprehensive legislative intervention is not needed, but instead solutions to specific problems are needed (e.g. the transparency of group's organization and intragroup relations; facilitating the adoption of coordinated group policies for subsidiaries; possible intervention regarding corporate pyramids). Although the Action Plan explicitly calls for, by the end of 2005, a Directive regarding transparency in group's organization and intragroup relations and, by the end of 2008, another Directive providing a regulatory framework aimed at facilitating the adoption of coordinated group policies, nothing was done in the end. As such, the "Report on the Future of EU Company Law" and the "Consultation on the future of European Company Law" return to the issue after nearly ten years and again ask whether there is a need for EU-level intervention in the area of groups of companies.

On the other hand, it is important to note that the green paper on corporate governance published on 5 April 2011 [Green Paper. The EU corporate governance Framework. Com (2011) 164][5] does not deal with groups of companies at all, ignoring that corporate governance necessarily also encompass the complex issues of group corporate governance.

Given all of the above, the goal of this paper is to help define a number of guidelines for EU-level intervention with regard to groups of companies. We will seek to do so by examining both the conclusions of the Reflection Group and the experience of a transnational group like Pirelli. In other words, our proposal will look not only at the extensive theoretical debate, but also at a number of empirical observations regarding how a transnational group effectively operates and which needs such an organization entails.

## *II. The "Report on the Future of EU Company Law" and the Proposal for Corporate Groups*

The Reflection Group was established by the European Commission in December 2010 for the specific purpose of preparing a "Report on the Future of EU Company Law" for the Brussels Conference being organized by the Commission in May 2011 to discuss the development of European company

5 *Green Paper. The EU corporate governance Framework* was published, for example, in Riv. Soc., 2011, 1200 ss. (as was the Commission Document of 15 November 2011 regarding the results of the study).

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law[6]. Given that the last attempt at a general rethinking of European company law dated back to 2003 (the Commission's Action Plan), the goal of the Reflection Group was to analyze the most significant, and common problems affecting all Member States and to recommend a number of solutions and other initiatives.

To that end, the Report was divided into four sections, focused on three issues that were seen as being key for a harmonious development of European company law: *i*) cross-border mobility; *ii*) the contribution of corporate governance, and of institutional investors in particular, in the long-term viability of the companies; and *iii*) groups of companies.

Regarding groups of companies, the Document starts observing 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 States inside and outside Europe". At the same time, there is full awareness that "the group management is the heart of this leading business organisation: the main reason for its success consists in the sophisticated and flexible management issuing from the optimal combination of central control exercised by the parent and local autonomy granted to subsidiaries".

Based on these assumptions, the Reflection Group finds that the main goal of any EU legislation in the field of group companies should be to "maintain and enhance the flexibility of the management of groups in its international business activities". In this regard, it is believed that any legislation on the matter should lead to a recognition of the concept of "interest of the group", so as to give the group parent "a right but also a duty to manage the group and its constituent companies in accordance with the overall interest of the group". The consequences of such a configuration are clear: "in a cross-border situation, that would mean, for example, that if a German parent has a subsidiary in the UK and another one in Italy, the directors of the subsidiaries could be relieved of their duties under UK and Italian law to act in the 'best interests of the company' they are serving and could lawfully rely on the 'best interest of the group'."[7] To sum up, "a more uniform rule could reduce the costs for groups doing business in EU cross-border situations since they would have to invest less in knowing and analyzing the technicalities of each national law."[8]

6 "European Company Law: the way forward", Brussels, 16–17 May 2011. The work of the conference may be found on the web site of the European Commission (http://ec.europa.eu/internal_market/company/modern/index_en.htm).

7 Reflection Group, 60.

8 Reflection Group, 61.

The possibility of adopting this legislative principle is therefore seen as being complex, so it is analyzed in detail by both evaluating the advantages and disadvantages and the solutions that have been adopted by the various Member States.

Before looking more closely at this point, it is interesting to note that the Reflection Group approaches the issue of company groups not from the "traditional" point of view, which seeks solely for protection of the minority shareholders and creditors of the "controlled" company, but rather from an awareness that it is necessary to intervene in the mechanisms of "group governance". In other words, it could be said that group law is considered precisely as "organizational law" governing an entrepreneurial activity.

Based on the observation that transnational groups feel particularly strongly the need to establish companies in the various Member States using a common "legal structure", the Reflection Group finds – we feel rightly – that this goal can be easily reached by way of a directive (either a new one or a modified version of the 12th directive) aimed at establishing a "simplified" model of single-member company.

Finally, regarding the need to ensure the transparency of the group in terms of its existence, nature and functioning (i.e. regarding relations between the various companies of the group), the Reflection Group looks favorable on European legislation currently in effect[9]. As a result, it is felt that only minor amendments and integrations to the existing legislation, and not major interventions, are needed.

## *III. Pirelli Group Experience*

So if the Reflection Group puts forward some EU regulation proposals of the international group of companies trying to figure out (even) their specific needs, we will later proceed to briefly describe the experience of the Pirelli Group, as an example of crossborder group.

The Pirelli Group represents one of Italy's largest business groups with over 30 thousand employees and turnover of almost 6 billion Euros. Over 100 companies are part of the Pirelli Group, in every continents and in more than 30 countries, 16 of which in the European Union. The parent company is based in Italy and is listed on the Milan Stock Exchange. Pirelli's majority shareholder

9 The reference is, in particular, to the directives on transparency (2004/109/EC) and acquisitions (2004/25/EC), to the amendments to the seventh company law directive (in 2003 and 2006), and to the amendments related to financial reporting made to Directive 2006/46/EC, as well as to the introduction of several new IFRSs on the matter.

with just over 25% of the share capital is Camfin, a company in turn listed on the Milan Stock Exchange.

The business organisation model of the Pirelli Group is on three levels:

- the Staff Departments: which guarantee the typical business support activities (legal, finance, administration and control, communications);
- the Business Units: which guarantee monitoring of the overall market scenario and are responsible for the "product lines" of the group (car, motorcycle, truck and agro). At central level, the Business Units also define the sales targets for the Regions and monitor the related results;
- the Regions: which, through management of their respective countries, implement the Business Units strategies, adapting them to local needs. The Regions also provide feedback to the Business Units on data from the various markets, thereafter implementing the sales and marketing strategies.

With regard to organisation tasks involving direction and coordination of the Pirelli Group an essential role is played by the (recently established) Executive Office, and by the Managerial Committees (first and foremost the Management Committee). The Executive Office, composed of the Chief Executive Officer – responsible for the coordination of the activity of the Executive Office – and the Chief Operating Officer – have the task either of defining objectives in a coordinated manner or of guaranteeing standard business guidelines for the implementation of strategic plans. In fact, all the Staff Departments, Business Units and Regions report to the Executive Office, thereby ensuring standardisation of policies and action plans.

The Managerial Committees are of vital importance for managing and coordinating the activities, also in the execution of decisions adopted by either the Parent Company Board of Directors or the Executive Office. The Committees are "venues" where decisions are made and, in particular, policies and guidelines are defined (which then cascade down to be complied with by all other corporate bodies in the Group). The key role among the Committees is played by the Management Committee, comprising top management and all head of Business Units, Regions and Staff Departments.

Chaired by the CEO, the Management Committee has the task of preparing group's strategic guidelines for submission to the Parent Company Board of Directors (the "Board") and to execute and implement the decisions of the Board, monitoring its implementation. The Management Committee meets on a monthly basis, with, among others, the objectives of also to constantly verifying the group's business performance and the developments in the projects, plans and initiatives of common interest to the Group.

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Other Managerial Committees central to the implementation of common group's guidelines are the Investments Committee (composed of the Chief Operating Officer, the Chief Finance Officer, the Chief Administration and Control Officer and the Chief Investor Relations Officer) which approves all Group investments of over 1 million Euros, and the Finance Committee (chaired by the Chairman and CEO and composed of the Chief Finance Officer, Chief Administration and Control Officer and the heads of the key business departments) which is responsible for decision-making on material group's financial issues.

The exercise of the direction and coordination of Pirelli Group therefore firstly involves the "planning" and "general programming" process in which, amongst other things, the limits of operating independence of each company and the objectives to be achieved are established.

The Group direction and coordination activities involves either the adoption of documents which, issued by the Parent Company and disseminated to all corporate bodies, contain the directives and guidelines (Group plans, Group organisational principles, Group guidelines, etc.) or other documents which, albeit not specifically guidelines, are instrumental to these (Operating Plan, Executive Dashboard).

In particular, the Operating Plan contains the objectives and expected performance levels. In addition to ex post verification of day-by-day business activities, the Operating Plan also outlines the actual operating methods to be adopted. Moreover, effective guidelines implementation has to include control procedures for verifying peripheral-level compliance with what is decided at central level.

For this aspect, rules standardisation is of vital importance. The need for such standardisation can be explained in the opportunity to: (i) guarantee comparability of data and information, in view of making the most appropriate and coherent administrative and operational decisions; (ii) avoid discrepancies in the external communications which could potentially undermine the credibility and reliability of data provided to the market by the Group.

Data assessment and comparison is performed monthly through reports prepared by the single companies. These reports allow matching control of the data and information provided in accordance with pre-established parameters. The control functions, as already mentioned, are fully centralised, being able to immediately recognise anomalies and take action as soon as possible to avoid damages or to reduce damage to a minimum.

Pirelli has therefore implemented specific mechanisms to guarantee business guidelines implementation at each group level. However there are a number of limits for Group planning and managing action. In abstract terms, on the

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one hand, not knowing the regulations of the different countries in which Pirelli operates restricts planning freedom and on the other hand, in real terms, implementation of business strategies and economic and financial planning could encounter actual limits in local legislation. In fact, the absence of a common reference framework that accepts the role of the "Group" (as such) limits the options for establishing directives that are immediately applicable by the various subsidiaries, as a "formal" request is required first from the individual subsidiaries involved. This becomes even more complex, therefore, where two or more companies operate in the same country. In fact, after central establishment of strategies for a given geographic area (or country) it is not always (or hardly ever) simple to define the boundaries for implementation of the planning as attributable to one legal entity or another.

## *IV. Introducing Rules for Group Corporate Governance at the EU Level*

It is well known that group of companies have been and continue to be mainly seen – in certain legislative experiences and in many theoretical studies – as a "risk factor" to be regulated in a "negative" sense, in terms of protection of minorities and creditors of the controlled companies. A typical example of this perspective are the German model of 1965 and the different (and much more recent) Italian model of 2003, the latter of which opens with a provision dedicated (not to the "governance of", but) to the "liability of the group parent" (Article 2497 of the Italian civil code).

The experience of the Pirelli Group – as an example of cross-border group – would suggest, on the other hand, a different fundamental business need: that of having at EU level a number of basic, uniform principles regarding the most significant profiles of "group governance". In essence, within the world of large corporations, there is a need for more development in terms of the "organization" of groups of companies, so as to be able to have a number of "positive" rules that a company can follow to either exercise or be subject to the direction and coordination of another company. In this regard, we undoubtedly see partial confirmation of the view of group law as "organizational law" (*Organisationsrecht*)[10] and not merely as "protection law" (*Schutzrecht*).

If we wish to meet these needs, then we need to establish a regulatory framework concerning direction and coordination activities and set, to this

10 For more details see Tombari, *Diritto dei gruppi di imprese*, Milan, 2010, 5 ss.; Id., *Il gruppo di società*, Turin, 1997, 87 ss., where there are additional bibliographic references particularly regarding German literature, which covers the matter more extensively.

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end, a number of "pillars" of group governance (as a model of business) as a whole[11].

In the meantime, however, we must return to our original question: Why must this intervention be proposed and implemented at the EU level? Do we really need "EU group law" (regardless of the content or scope such law could have)? It is our opinion (as supported by experiences such as those of the Pirelli Group) that EU-level intervention is absolutely necessary.

In this regard, one can just consider that the business of a cross-border group is, by definition, a transnational business, i.e. a business that comes into contact with and is governed by the *lex societatis* of multiple countries[12]. And we must add that the regulation profiles of "group governance" are generally not well defined and, in any event, are not uniform at the level of national legislation, which means that there is a great deal of uncertainty with regard to how a transnational group is to be managed.

As we have just mentioned, national laws, while they fail to provide comprehensive, well defined answers to the main issues of group governance, do provide a variety of possible solutions, with the result that managing a group within a European context (i.e. the most important moment in the life of a group) is cloaked in uncertainty and ambiguity. By way of example, one need only recall that certain countries have specific "group law" that is, to an extent, comprehensive. For historical reasons, the main experience in this regard is certainly that of German group law (*Konzernrecht*: §§ 15 ss., 291 ss.; 311 ss. Aktiengesetz)[13], which provides us with a legislative model that, despite its obvious merits, dates back to 1965 and, above all, is focused more on the "protection" of the shareholders and creditors of controlled companies (i.e.

11 In Belgium, attempts have been made to legislate a number of key aspects of the governance of groups composed of publicly listed companies: see De Cordt/Colard, Group of companies governance in Belgium, in *Festschrift für Hopt*, II, Berlin.New York, 2010, 3043 ss. (for more detail, see section IV herein). For an attempt to deal with the issue of group corporate governance, see for example Kleindiek, Konzernstrukturen und Corporate Governance: Leitung und Überwachung im dezentral organisierten Unternehmensverbund, in Handbuch Corporate Governance, edited by Hommelhoff/Hopt/v. Werder, Köln, 2009, 787 ss., where there are many bibliographic references to German literature. On the influence of financial market law on the corporate governance of transnational groups, see Windbichler, Corporate Governance internationaler Konzerne unter dem Einfluss kapitalmarktrechtlicher Anforderungen, ibidem, 825 ss.

12 See, for example, De Cordt/Colard, (note 11), 3043.

13 See in general Emmerich/Habersack, *Konzernrecht* (note 3); Emmerich/Habersack, *Aktien- und GmbH-Konzernrecht* (note 3); Raiser/Veil, *Recht der Kapitalgesellschaften*, 5. Edition, München, 2010, 653 ss.; for historical perspective Altmeppen, Die historischen Grundlagen des Konzernrechts, in *Aktienrecht im Wandel*, edited by Bayer/Habersack, Tübingen, 2007, 1027 ss.

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*Schutzrecht*) than on the "organization" of group governance (i.e. *Organisationsrecht*)[14]. Examples of legislation that are, in part, inspired by this model of group law are those of Portugal (Articles 481–508 of the Portuguese companies code), Hungary, the Czech Republic, and Slovenia.

Italian law certainly has a number of highly original aspects as found in Articles 2497 *et seq.* of the civil code, which were introduced with the company law reform of 2003[15]. Taken as a whole, this legislation is essentially a compromise between two lines of regulation policy. More specifically, on the one hand, we have the need to protect the minority interests and creditors of the subsidiaries, a need which is met, first of all, by introducing a highly detailed, complex set of laws regarding the "liability" of the group parent (Article 2497 of the civil code)[16]. On the other, Italian law (also) governs groups as a form of corporate organization and establishes principles regarding the transparency (either of the composition of the group or of the relations within the group – Article 2497-*bis* of the civil code), the obligation to support the decisions of the controlled company when influenced by the parent company (Article 2497-*ter* of the civil code), and intragroup financing (Article 2497-*quinquies* of the civil code). Therefore, although Italian legislation contains a number of interesting ideas for solutions regarding the matter of group corporate governance, the concept of group governance remains, in many ways, largely unexplored and in need of further development[17]. In Italy, it is also important to note that there is now a relevant principle of group corporate governance in Article 1 (1.C.1, point f) of the Code of Corporate Governance (the latest version approved in December 2011) which states that the board of directors of a publicly listed company may authorize transactions of the "issuer and its

14 On the functioning of *Aktienkonzernrecht* between *Schutzrecht* and *Organisationsrecht* see Emmerich/Habersack, Konzernrecht (note 3), 7–8; Raiser/Veil (note 13), 657; Schall, in Spindler/Stilz, *Kommentar zum Aktiengesetz*, 2. Edition, München, 2010, Vor § 15, 110–111.

15 See in general Tombari, *Diritto dei gruppi di imprese* (note 10) and related bibliographic references.

16 Article 2497 of the Italian civil code (Liability) envisages liability for parent companies for the "abuse" of unified direction directly in respect of the individual shareholders and creditors of the directed and coordinated company (for damage to, respectively, the profitability and value of the equity interest or the integrity of the company's assets). It further states that anyone who has taken part in the damaging event and, within the limits of the benefit received, anyone who knowingly benefitted from said event are also fully liable together with the parent company. For information on this important legislation, see Valzer, *La responsabilità da direzione e coordinamento di società*, Turin, 2011, and related bibliographic references.

17 For an attempt at interpreting Italian group law, including as "organizational law", see for example Tombari, *Diritto dei gruppi di imprese* (note 10), 93 ss.

subsidiaries", when such transactions are of significant strategic and financial importance for the company itself.

Legislation in other countries, on the other hand, groups are envisaged solely for specific purposes. This is the case in Belgium, for example, where legislation includes specific provisions regarding publicly listed companies belonging to a group (see Article 524 of the Belgian companies code) which seek to ensure both an appropriate balance between the interests of the parent company and those of the controlled companies and the proper disclosure of board decisions concerning group relations[18].

Finally, other countries (e.g. the United Kingdom, France and Spain) have only limited amounts of group law and primarily defer the regulation of this type of entity to common company law[19].

In essence, we need to create a uniform field of legislation at the EU level regarding a number of basic principles of group governance and, in this way, overcome the diversity and uncertainty that we see at the national level. This could include both facilitating the functioning of cross-border groups and better protecting the various stakeholders involved (e.g. minority interests, creditors, etc.). Indeed, it has to be clear that more efficient group corporate governance is, the first and best means of protecting a subsidiary's minority shareholders and its creditors.

## *V. Proposals for Solutions*

Although no national legislation approaches group governance, as defined above, in a comprehensive manner, a number of potential solutions can be found in the document drafted by the Forum Europaeum on Company Law and, in particular, in the 2003 Action Plan. These documents propose – as the cardinal rule in group management – the solution offered by the French Court of Cassation, i.e. the "Rozenblum" principle, which is essentially a "French"

18 For more information, see De Cordt/Colard (note 11), 3043 ss.). In particular, based on Article 524 of the Belgian Companies Code, should the board of directors of a publicly listed Belgian firm make a decision that could present a conflict of interests with social interest as well as a benefit to the parent company or other companies of the group, the non-binding opinion of a committee composed of three independent directors is required.

19 See for example for British law Gower/Davies, *Principles of Modern Company Law*, 8. Edition, London, 2008, 228 ss.; Davies, *Introduction to Company Law*, 2. Edition, Oxford, 2010, 95 ss.; for Spanish Law J.M. Embid Irujo (note 3), 21 ss.; Fuentes Naharro, *Grupos de sociedades y protección de acreedores (una perspectiva societaria)*, Navarra, 2007.

theory similar, in certain ways, to Italian case law and its "compensatory advantages" (*vantaggi compensativi*)[20], which has now been partially transposed into law in the latter part of Article 2497(1) of the Italian civil code[21]. Although these contributions are of great importance, they nonetheless deal only with a specific profile of group governance and need, in our view, to be further developed in many ways.

As mentioned[22], the Document presented by the Reflection Group correctly identifies the problem of groups and lays the groundwork for further reflection on group corporate governance. Although this is without question, the solutions proposed are still in need of integrations in order to provide a more thorough response to the needs of companies in terms of group governance.

In light of the above, it would then seem appropriate to start developing new legislative models for group corporate governance to protect not just the companies, but also, and more generally, to protect the interests of their shareholders and other stakeholders. To that end, it might be appropriate to apply agency theory to group corporate governance and ask both how to configure agent-principal relations in such a context and what tools could be used to reduce "agency costs". The "imagination" (*fantasia*) of European lawmakers – i.e. a "supreme virtue", to use the words that Paolo Grossi, a leading expert in the history of law, used in reference to Franz Wieacker[23] – may be of great help in this regard.

If we consider the above view to be valid, while also taking a few ideas from the experiences and proposals summarized above, then EU-level intervention would appear to be appropriate in the form of a directive that establishes a number of *uniform general principles* regarding group governance, principles which – let's be clear – should have the basic purpose (in the view of the Reflection Group) of improving the "flexibility of the management of groups in their international business activities".

Just to give a few possible examples, EU intervention could:

i) expressly establish that the parent company (and its board of directors) has the lawful power of direction and coordination over the subsidiaries, while clarifying that "power of direction and coordination" refers to the ability

20 Montalenti, *Conflitto di interessi e amministratori*, in Montalenti, *Società per azioni Corporate Governance e mercati finanziari*, Milan, 2011, 150 ss.

21 Cariello, The "Compensation" of Damages with Advantages Deriving from Management and Co-ordination Activity (*Direzione e coordinamento*) of the Parent Company (Article 2497, paragraph 1, Italian Civil Code), in ECFR, 2006, 330 ss.

22 See section II above.

23 Grossi, *Un grande giurista del nostro tempo.* Franz Wieacker (1908–1994), in Grossi, *Nobiltà del diritto. Profili di giuristi*, Milan, 2008, 339 ss.

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to intervene in both the strategies of the company and the fundamental management decisions;

ii) define the general principles of "proper management" that the parent company must observe when exercising the powers of direction and coordination (over the subsidiaries) and, consequently, identify areas, procedural principles (including obligations to justify the decisions of controlled companies influenced by direction and coordination of the parent) and limitations within which the parent company may pursue a unified (and coordinated) business strategy through distinct companies (and so distinct "allocation centers"). It would be within this framework of general principles that we would find answers to, for example, the issue of intragroup disclosures or of the centralized treasury of EU-wide groups[24];

iii) define the powers/duties of the boards of directors of the controlled companies. The solution to this problem is of such great importance only if we consider that there is no clear, unified indication in the nations of the European Union as to which interests the directors of a controlled company are to pursue[25]. There remains the underlying problem of the current definition of "legal autonomy" for a subsidiary. In this regard, it is our opinion that a "directed and coordinated" company can no longer be an "autonomous center of decision-making" and may only be considered autonomous to the extent that it: *i*) continues to be a distinct "allocation center" for relationships with its own ("social") interests; and consequently *ii*) remains (and must remain) an "autonomous profit center"[26].

iv) specify any obligations of conduct of the parent company in the event of a "crisis" in one or more companies of the group or in the "twilight zone"[27].

It is in this broader, more comprehensive context that the issue of "group interest" must be faced, as now also suggested by the Reflection Group, even if not expressly regulating it[28]. Indeed, it is our opinion that adequate legis-

24 See, for example, Miola, *Tesoreria accentrata nei gruppi di società e capitale sociale*, in *Studi in onore di Giovanni E. Colombo*, Turin, 2011, 36 ss.

25 See also the Forum Europaeum on Company Law, 375

26 On this topic Tombari, *Crisi di impresa e doveri di "corretta gestione societaria e imprenditoriale" della società capogruppo. Prime considerazioni*, in Riv. Dir. Comm., 2011, 634.

27 Tombari (note 26), 631 ss., ove ulteriori riferimenti.

28 On "group interest" see, for example, M. Embid Irujo, *Pautas de análisis y tratamiento de los conflictos de intereses en los grupos de sociedades*, in Paciello (edited by), *La dialettica degli interessi nella disciplina delle società per azioni*, Napoli, 2011, 191 ss.; Maugeri, *Interesse sociale, interesse dei soci e interesse del gruppo*, in Paciello (edited by), *La dialettica degli interessi nella disciplina delle società per azioni*, Naples, 2011, 245 ss.

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lative intervention in the area of group corporate governance, as defined above, exonerates us from any specific legislation covering "group interest".

As mentioned, a proposal for a "framework" directive with some of the content described above should be drafted in order to protect the interests (not only of the entrepreneurial world, but also) of the various types of investors and creditors, which would, in this way, have a better defined regulatory framework regarding the rules of operation of a cross-border group.

## *VI. Conclusions*

We have noted that the need to introduce principles concerning the governance of corporate groups at the European Community level is what underlies the Action Plan of the European Commission (Communication from the Commission to the Council and the European Parliament of 21 May 2003). At the same time, the report of the Reflection Group deals extensively with the issue of EU intervention at the regard of groups of companies.

And so the proposal presented herein is both a continuation of the basic guidelines of the documents mentioned above and a first response to the "Consultation on the future of European Company Law", whit the objectives of extending the issue's framework and to define new legislative paradigms and conceptual models. More specifically, what is proposed is the introduction of a number of uniform general principles for "group corporate governance", the essential purpose of which is to improve the "flexibility of the management of groups in their international business activities".

The "group of companies" is currently the most common form of organization used within the EU (and beyond) to conduct business of a certain size and complexity. As such, it would appear to be inevitable to (begin to) regulate this form of company organization that has emerged as standard practice, as has been done historically for other forms or models of organization (for business), such as for the joint-stock company. This is also what the experience of a large European group (the Pirelli Group) would suggest.

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