5th ECFR Symposium – Brussels Opening remarks

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Ladies and Gentlemen, Dear Colleagues,

On behalf of the *European Company and Financial Law Review*, the *Revue pratique des sociétés* and the UCLouvain-CRIDES, I would like to welcome you at the 5th ECFR Symposium, which I am particularly proud to receive in Brussels at the Fondation universitaire. The Fondation Universitaire has been created thanks to the generosity of some businessmen as a club where all the Belgian universities can organize conferences and dinners and where every professor can meet colleagues from all around the world.

First of all, I would like to thank H. Hirte, S. Mock and the editorial board of the ECFR for the setting up and the organization of this conference. I also express my gratitude to all speakers – coming from England, France, Germany, Italy, Poland, Switzerland, the Netherlands and, of course, Brussels and Louvain – as well as all the participants present today.

Judging by the program, I have no doubt we are going to have a very interesting day and I would like to say a few words about the two subjects selected this year.

The balance of powers within stock corporations is a fundamental issue in corporate governance. A satisfactory structure of powers implies a sound and transparent organizational structure, with an adequate allocation of powers, an efficient composition of bodies, a clear scheme of attribution of liabilities, a supervision of the management as well as procedures designed for the identification, assessment and reporting of significant risks.

The fundamental difference between continental European company law and U.S. company law resides in the roles granted to the different bodies within a company. In continental Europe, where companies have a concentrated shareholding, an influential role is still awarded to the general assembly. In the U.S, where companies have a diluted shareholding, the most important powers are vested within the board of directors and the management, which can almost act independently because the other bodies are granted limited interference abilities.

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We may suggest links between, on the first hand, legal distribution of powers, and, on the second hand, economic and social history, growth of companies, internal/external financing, development of financial markets, consideration of stakeholders, level of management compensation …

A comparison between the distribution of legal powers in the US and in Europe opens a debate on the level of autonomy granted to managers and on the opportunity of reinforcing the powers of shareholders, especially as to the election of directors and the determination of their compensation. But isn't it an illusion to try to institute a Shareholder Democracy since some shareholders practice empty voting?

Countries have either instituted a two-tier board or a single-tier board system, which respective benefits must be assessed. More recently, the legal requirement to institute an audit committee and a compensation committee has been implemented. Independence of directors has become of crucial importance, which is defined according to financial, personal, functional and commercial criteria and which might, in the future, require expertise in the field of corporate social responsibility.

The recent developments in corporate law are characterized by an increase of "agents" involved in the running of listed companies and by a diversification of regulations organizing their functions. This increase seems to lead to a dilution of liabilities, all the more since the duties of some agents are not always clearly defined.

A traditional debate stirs corporate law: how can one define the corporate interest? Ultimately, the corporate interest corresponds to the interest of the firm, whose continuity and development imply that, according to the context, it takes into consideration the interests of all stakeholders. In certain cases, the company even assumes an authentic social responsibility, taking into account, in a deliberant and coherent manner, social and environmental concerns within the exercise of its activities.

The program of the morning session of the symposium includes concepts of political sciences: the virtues and limitations of "shareholder democracy"; the foundations of "the separation of powers" in companies; "the balance of power" in Eastern European corporations and in the public corporation in EU legislation; "empowering" shareholders in directors' "elections": a "revolution" in the making; Europe's Ius Commune on director "revocability"; the position of "minority shareholders" in takeovers and under schemes of arrangement … .

The bankruptcy of corporate groups is the second subject of this symposium. The development of firms through external growth, by means of change of corporate control and acquisitions of companies, triggers the establishment of significant corporate groups. In addition, companies engaged in many activities resort to branching and set-up groups to carry out hazardous activities in certain structures.

Legal doctrine defines the group as a whole of companies which, while having a distinct legal status, are associated and financially dependent with respect to the controlling company. The control exerted by this latter might reside in any mean allowing to exercise an influential authority on the management and the functioning of the controlled company. But there are obviously different types of group, depending on the degree of integration between enterprise group members.

In its famous judgment "Rozenblum", the French supreme court acknowledged that the common interest of the companies belonging to a group may validate the transfer of funds between them. According to the court, the existence of a group requires that a structured group be founded on non-artificial bases and possesses an economic, social or financial interest in common as well as a highly structured policy applied to all companies belonging to it.

In the absence of a global regulation, as the regulation that arose under German law, heterogeneous and sometimes contradictory legal rules on groups have developed in various fields of law: employment, tax, accounting, banking … Company law apprehends this notion through the regulation of accounts, managers' compensation, conflict of interests …

Each company of a group is subject to the risk of being involved in insolvency proceedings instituted against another company of the group and to bear liabilities of this bankrupted company. Does the control exerted by the mother company on her daughters jeopardize their legal autonomy? Is the mother held by an obligation to support her daughter?

The absence of incorporation of the group implies, in principle, the entering into different insolvency proceedings against each company which belongs to the group. At first glance, the personality and the autonomy of the different companies cannot be disregarded because they belong to the same group. The aim of the instigators planning to set-up a group, in a legitimate business purpose or in order to limit liabilities, must not at first sight be suspected. It is true, however, that the managers have a significant temptation to consider the totality of the companies belonging to the group as a worldwide asset reservoir that can be used freely according to financial needs.

Case law has, as a consequence, gradually emerged to react against misuse. When a subsidiary goes bankrupted, the group to which it belongs may be affected either because the subsidiary is bogus and, as a consequence, the assets of the different companies of the group are intermingled (substantive consolidation), or because the patrimonial liability of the mother company, deemed a leader in fact and in law of the subsidiary, is involved.

The question then arises as to the possibility of "spreading" the proceeding to the companies which are not in default and to retain the same solution for legal entities involved. The institution of a unique procedure against companies whose separate legal personality is a fiction means, on the first hand, that the assets and liabilities of these companies will be combined in order to guarantee a higher solvency level to the creditors of the bankrupted company and, on the other hand, that the creditors of this company will be on equal rank and rights with the creditors of the other companies of the group.

The managers of the involved companies are portrayed as promoters of an isolated corporate interest. However, in complex corporate structures, the company and its managers must necessarily be integrated to a larger structure and give up part of their powers and sovereignty. The strategic negligence reproached to managers can often be justified by the corporate interest in the way that a company of a group can withdraw a future advantage from an act that appears at first stage as adverse.

The special topics of the afternoon session are very interesting and complex: tension between "entity law" and "enterprise law"; pre-bankruptcy restructuring in corporate groups; bankruptcy of corporate groups and transaction avoidance (new recommendations of UNCITRAL); the EC regulation on insolvency proceedings; harmonizing the private international law aspects of addressing vulnerable transactions; cross-border reorganization of insolvent corporate groups; debt-equity swaps in corporate groups …

I would like to end by wishing you all a fruitful and enjoyable conference. Thank you for your attention.