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Corporate Interest under Belgian Law: A Practical Approach

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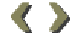

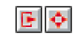

Under Belgian law, the granting of a guarantee needs to be in accordance with the rules on financial assistance, corporate purpose and corporate interest. In the absence of a clear definition in the Belgian Companies Code, the concept "interest of the company" is not an univocal and clear-cut concept and deserves therefore special attention and care as the effectiveness and enforceability of a guarantee depends among others on whether the grant of a guarantee is in the interest of the guarantor.

The aim of the present article is to provide a practical overview of the "corporate interest"-rule with an emphasis on the criteria developed by practice, case law and doctrine to asses whether or not the guarantor has acted in compliance with its corporate interest. Proportionality (risk/benefit) is considered as one of the main criteria especially within the framework of intra-group guarantees.

Finally this article also gives a concise analysis of the possible sanctions in case of guarantees in breach of the corporate interest-rule [1] .

1. Introduction

One key issue in acquisition financing or (re-)financing transactions involving several companies of a group concerns the security package to be provided by group entities to secure the debt obligations of the debtor(s)/other group entities. As part thereof, the security package may often require Belgian companies to provide intra-group guarantees in the form of up-, down- or cross-stream guarantees.

As an exception to the *pari passu* rule of unsecured creditors as provided for under the articles 7 and 8 of the Belgian Mortgage Law (*"Loi Hypothécaire/Hypotheekwet"*), Belgian law provides for a limited list of guarantees. "Guarantees" in this paper is used as a general term covering guarantees of payment (*"sûretés personnelles/persoonlijke zekerheden"*), which aim to provide the creditor with an additional debtor, and security interests *in rem* (*"sûretés réelles/zakelijke zekerheden"*), which always relate to an asset of the debtor's estate [2] .

In this context, Belgian companies may be asked to provide joint and several guarantees for the entirety of the other group companies" obligations, and to grant the creditors security interests in all or substantially all their assets (such as shares, receivables, business assets etc.).

In a multi-jurisdictional context the possibility for and the conditions under which a company grants a guarantee is governed by the *lex societatis*, which according to articles 4 and 110 of the Belgian Code of Private International Law is the law of the place where the company has established its headquarters as from the date of its incorporation; in other words, the company's "real seat" is considered as the place where the management operates [3] whereas the guarantee itself will be governed simultaneously by the *lex contractus* (choice of law by the parties) and the *lex rei sitae* (the law of the place where the secured goods are located) [4] .

The Belgian Companies Code ("BCC") gives the board of directors competence for granting a guarantee, although the articles of association may give competence to another organ. When enforcement of the guarantee is subject to a change of control, an extraordinary shareholders" meeting of the company must approve its granting of the change of control clause [5] .

Under Belgian law, the granting and enforceability of a guarantee depend on whether the company granting it would derive a corporate benefit from the transaction. The limitations to which the granting of an intra-group guarantee is subject are financial assistance, corporate purpose and corporate interest. This paper seeks to focus on the latter, the reason being that despite much attention in the literature [6] , the term "corporate interest" remains somewhat theoretical. This article aims to review its application in practical terms. The final part of the article summarises the possible consequences of breaching the corporate interest rule.

2. Limitations

There is no specific Belgian legal provision which explicitly limits the granting of intra-group guarantees. When a Belgian company is asked to provide a guarantee, a triple test needs to be met: the guarantee must be (i) compatible with the prohibition of financial assistance; (ii) in accordance with the company's corporate purpose; and (iii) in accordance with the company's

corporate interest

i. Firstly, Articles 329, 430 and 629 BCC prohibits respectively a private limited liability company (*"société privée à responsabilité limitée/SPRL – besloten vennootschap met beperkte aansprakelijkheid/BVBA"*), a cooperative limited company (*"société coopérative à responsabilité limitée/SCRL – cooperatieve vennootschap met beperkte aansprakelijkheid/CVBA"*) and a public limited liability company (*"société anonyme/SA-naamloze vennootschap/NV"*) from providing funds, granting loans or providing security with a view to the acquisition by third parties of its own shares or profit certificates. This prohibition does not apply to transactions concluded by banks or other financial institutions in the normal course of business, acquisitions by an employee or management buy-out schemes.

ii. Secondly, the granting of a guarantee must form part of the corporate purpose of the company as set out in its articles of association. It should at least permit the company to engage in a broad range of (financial) transactions, related to or in line with its corporate purposes as set out in the relevant clause.

iii. Finally, granting the guarantee must serve the company's corporate interest, the latter concept being influenced by the concept of group-interest.

The first two limitations mentioned above having been discussed and commented upon extensively in existing doctrine, we will limit the scope of the present article to a closer view on the third limitation, *i.e.* corporate interest and more specifically the acceptance of so-called group interest in order to justify the required corporate interest for cross-, up-, or downstream guarantees.

3. Corporate Interest

3.1. Definition and General Principles

Like any other act performed by Belgian companies, guarantees issued by Belgian companies must be conform to their corporate interest (*"intérêt social/maatschappelijk belang"*) and benefit rules. While the legal term "corporate interest" is commonly used in Belgium, it is not defined in the BCC, although it contains several references [7] . For example, article 19 BCC states that all companies must be established in the parties" common interest.

One of the principles in the Belgian Code on Corporate Governance is that a company must have an effective and efficient board of directors which takes decisions in compliance with the corporate interest.

The lack of a definition of "corporate interest" has generated much discussion, controversy and legal theory.

The Banking, Finance and Insurance Commission has expressed its objection to a definition of corporate interest [8] . In short, the arguments against a precise definition of the term are: (i) the security of transactions; (ii) freedom of action for companies; and (iii) common sense in business transactions. The arguments in favour of a precise definition can be summarised as: (i) a flexible definition as guidance; (ii) the time issue, in terms *inter alia* of avoiding interminable negotiations; and (iii) security of transactions by avoiding vague concepts which can be interpreted widely or narrowly.

Academics have taken positions ranging from a traditional shareholder-oriented view, including future shareholders, *i.e.* maximisation of profit [9] , to a much larger stakeholder view which takes into consideration the interests of employees, customers, suppliers and other creditors [10] .

Majority of Belgian scholars [11] and case law [12] accept a flexible and large interpretation of corporate interest.

Corporate interest is in fact an indication of the limits of acceptable company behaviour, and therefore coincides to some extent with the concept of corporate purpose [13] .

Under the Belgian corporate interest theory, any guarantee granted by a company must be in its corporate interest which in practice means that there must be a "corporate benefit" for the company granting the guarantee and that the risk it incurs must be proportionate to the means available to the company and any potential benefit it would derive from doing so; in other words there is a requirement of so-called sound economic motives.

Non-compliance with the obligation to take into account the corporate interest when granting a guarantee may result in (i) cancellation of the decision to give such guarantee through the theory of abuse of majority or fraud against the law [14] ; (ii) unenforceability, subject to certain circumstances, of the guarantee for third party creditors" bad faith (*i.e.*, the bank that knew or should have known that there was violation of the corporate interest) although lenders have no general duty to check whether a particular transaction is in a company's corporate interest [15] , such as reviewing the board of directors" decision to grant a guarantee; (iii) potential director's liability since the directors must, when performing their management duties, respect the company's interest; and (iv) criminal penalties for abuse of company assets provided that the conditions laid down in article 492*bis* of the Belgian Criminal Code are fulfilled.

3.2. Group Interest

Within groups of companies, the question can be raised whether the board of directors of a company, with respect to intra-group transactions and especially intra-group guarantees, should take into account the group interest over and above the interest of the company and what protection the company's interest deserves.

In the same manner it lacks a definition of "corporate interest", the Belgian Companies Code also lacks a suitable formal legal definition of a corporate group (although art. 16 BCC gives a definition of a "small group", the overall concept of a group and relating theory has as such not been incorporated or adequately dealt with in Belgian law). Although no comprehensive specific set of rules relating to groups of companies has been developed under Belgian law, the economic reality thereof has been accepted and taken into consideration in the case law and, indirectly, in articles 108 and following BCC regarding the requirement for consolidated annual accounts for parent companies.

In the absence of a clear definition, the basis sometimes chosen to define a "corporate group" is the definition of control in article 5 § 1 BCC [16], which implies the idea of a strong central leadership. However, this seems too restrictive, and should be read in combination with the definition of a consortium referred to in article 10 BCC, *i.e.* one or more companies which are not subsidiaries of each other or of one and the same company but are under the same central leadership [17]. The discussion remains open and the economic reality of a group of companies covers a vaster amount of realities than the restrictive approach on the basis of Articles 5 or 10 of the BCC. In the Netherlands *e.g.* a group is defined as an economic entity in which legal entities are linked from an organisational point of view [18], thus adopting an economic rather than narrow legal approach.

Although the concept of group remains, under Belgian law, inconsistently or incompletely defined and/or developed, and notwithstanding the main requirement for a company to always act in its own corporate interest, scholars and case law have over time accepted that a group interest can be considered as a legitimate interest in its own right and that it could, to the benefit of the coordination of the activities of the group and for the purpose of reaching the best result for the group as a whole, be accepted that, under certain conditions, certain sacrifices can be made by a company for the benefit of the group (interest) [19].

In the light of the foregoing, a company can act as guarantor for obligations of a group company (parent, subsidiary or affiliated company) provided that the following conditions are met [20]:

i. the guarantor is part of a fully integrated, interlinked group;

ii. the guarantee is not exclusively for the benefit of one group company (for instance the parent company), but the group as a whole could derive benefit from it and moreover the guarantee is not incompatible with the interest of the guarantor; and

iii. the assistance required of the company must be reasonable and not exceed the capacities of the guarantor (see proportionality condition referred to under Section 3.2.1).

3.2.1. Proportionality

Proportionality is the main criterion to be used by directors to assess to what level risk can be incurred and to justify the extent of financial solidarity accepted by the guarantor. The risk incurred by the guarantor must be proportionate to the benefit it receives from the transaction. Unfortunately, as each structure creates its own balance of risk/benefit no clear definition of proportionality has been developed in case law.

In the case of (re-)financing of a group, it is difficult to assess in abstract to what extent a loan granted to a group company will benefit the guarantor of the group for such loan as this will depend on the particular circumstances, especially the use or potential use of the proceeds and on whether or not the guarantor will indirectly receive part of the borrowed amount.

Due account of the corporate interest seems to be taken when the risks and obligations assumed by a guarantor and the amount guaranteed are proportional to both (i) the benefits derived from the guarantee, the more direct and concrete the benefit, the stronger the argument for validity; and (ii) the financial means available to the guarantor [21]. This proportionality is tested *inter alia* against the following criteria:

- the amount of the guarantee;
- the duration in time of the guarantee;
- the amount of the guarantor's capital and its overall financial condition;
- the likelihood of the the guarantee being called;
- the potential existence of commercial and operational relationships between the guarantor and the company benefiting from the guarantee;
- whether the risk incurred is proportionate to the benefit to the guarantor (*e.g.* current or potential access to funding proceeds);
- whether the risk incurred is reasonable in comparison with the company's financial capabilities and assets;

- whether there are any minority shareholders in the company who might be prejudiced and who could challenge the guarantee; and
- whether the rights and legitimate expectations of other creditors of the company, who could challenge the security, might be impaired.

Finally, a contribution agreement between companies to share the burden of group company obligations between them may help to reduce disproportional issues, but will not be decisive in that regard.

3.2.2. Minimum Assessment ("contrôle marginal/marginale toetsing")

As a general rule the Belgian courts do not have power to assess management decisions or judge decisions by a company's board of directors. As a result, the final responsibility for judging whether a decision will result in a corporate benefit to a company lies with its board of directors [22]. Detailed and reasoned minutes of board meetings are therefore used to justify significant decisions regarding corporate interest. A court will judge these decisions to be improper only in the case of bad faith or when a corporate benefit is clearly lacking, and will only sanction behaviour which is flagrantly contrary to the interest of the company, and creates an imbalance between the different interests at stake [23]. This rule of minimum assessment is comparable to the business judgment rule in common law.

3.3. Practice

The doctrine and the case law do not provide well-defined guidelines for applying the proportionality criteria in specific cases, and business-related issues affecting the guarantor can only be properly assessed by the company's board of directors.

Past and current practice to try to quantify proportionality has taken account of: (i) detailed board minutes setting out the basis for the directors" judgment that there is a corporate benefit; (ii) caps on the amount secured; and (iii) general statements in the security documents [24] that the amount secured will be reduced if necessary to the maximum amount at which the guarantor derives a corporate benefit, as agreed between the parties. The disadvantage of these general statements is precisely that they are too general and vague, and that the parties still have to agree on the amount. It is therefore advisable to state the agreed amount in the relevant documents. However, it is not clear how this last mechanism would work in practice, and it has not yet been tested in the courts.

3.3.1. Detailed Board Minutes

Depending on the transaction, several arguments to be included in the minutes of the board of directors have been developed in practice to address the corporate interest rule. Rather than enumerating all these possible arguments, we have chosen to draft a possible extract from such detailed board minutes, trying to take into account the most relevant arguments. The example assumes a typical transaction whereby the parent company borrows money under a loan agreement. A number of other group companies, including a Belgian subsidiary (the "Company"), are requested to guarantee the loan.

Under the facility agreement, the banks agree to make [...] facilities available to the parent company, for a total amount of [...]. In order to provide the facilities the banks require, amongst others, that the Company enters into a guarantee pursuant to which it would, together with other companies of the group, guarantee the parent company's payment obligations under the facility agreement. The terms and conditions of the facility agreement, and the guarantee requirement, are in accordance with the market conditions for loans of the same kind. The existence of the Company depends inter alia on the existence of its parent company and of the group. Through the facility agreement, the financial position of its parent company will be enhanced, as will that of the group of which the Company forms part. The facility agreement will give the parent company the financial flexibility to enable it to maintain existing inter-company loans with the Company, grant new inter-company loans or grant advances to the Company, including working capital. Thus the Company has the possibility to receive funds under the facility agreement through inter-company loans. In addition, the facility agreement provides the possibility for the Company to accede to the loan agreement as a borrower on more advantageous conditions than if the Company negotiated a loan agreement individually. Due to the commercial and operational links with the parent company and other companies of the group, development of the activities of the other companies will lead to development of the Company's activities and benefits. As to the Company's financial and possible repayment position, the board has taken the view after analysis of the financial situation that the Company will, and will be expected in the future, to be able to respect its obligations; moreover, the parent company's obligations under the facilty agreement will also be guaranteed by other subsidiaries of the parent company whose financial situation is such that it is not expected that the guarantee would not be honoured if called upon. This reduces the likelihood that the guarantee will be fully called on against the Company.

After consideration of the documents related to the transaction, the board of directors has unanimously taken the following decisions:

- *the Company can enter into the transaction without prejudice to the rights of other creditors of the Company and without affecting the normal conduct of its business and activities; and*
- *entering into the transaction falls within the scope of the Company's corporate purpose, and is in its interest, since it will derive benefits therefrom, and will not incur obligations which are disproportionate to its interests and financial means.*

In the case of a downstream guarantee, it is clear that maintaining or increasing the value of the

subsidiary is in the parent's interest, as it potentially leads to a possible increase in dividends for the parent whereas up-stream or collateral guarantees will in principle require additional cautiousness. In the latter cases, interest will exist for the company guaranteeing the loan when it will receive a consideration for the guarantee from its parent or if it will have access to more advantageous borrowing conditions or if it will increase/maintain the commercial relationships between the company and its parent company [25] .

In most cases, the minutes clearly remain hypothetical by using terms such as “benefit”, “financial means” or “proportionate”. They do not mention concrete figures; for example, no information is provided regarding the flow of the funds within the group, or the amounts granted to the guarantor or the creditors within the group.

3.3.2. Guarantee Cap

In addition to detailed board minutes, corporate interest concerns relating to intra-group guarantees can be addressed by placing a cap or limit on the amount of the guarantee. The guarantee cap is in fact a more specific way to clarify the notion of proportionality, since either exact figures or methods of calculation are mentioned or referred to. The most common form of guarantee cap is limiting the amount guaranteed to a percentage of the guarantor's net assets. Net assets are defined in the Belgian Companies Code as the aggregate of the assets appearing in the balance sheet, less provisions and liabilities. A more conservative approach is to limit the guarantee to the amount of the distributable reserves under the Belgian Companies Code. The underlying rationale is that creditors and other unsecured counterparties deal with a company taking into account its shareholders” equity.

The limitation of the guarantee is a matter of agreement between the parties, as neither the law nor the case law gives any guidance in that respect. Experience and practice indicate a figure between 50% and 100% of the company's net assets at the time when the guarantee is granted or when it is enforced against the company, up to the higher of the two. Sometimes an additional qualification of the net assets is included, such as the net assets as defined in the Belgian Companies Code, without taking into account the liabilities under the guarantee concerned or any other guarantee granted by the guarantor for other debts, or any debts of the guarantor towards its parent company or a subsidiary thereof.

In addition to the above, Articles 633 and 634 BCC provide for specific rules and procedures in case the net assets of the company fall below at least 1/2 of the authorized capital, as such situation could result from the enforcement of a guarantee by a creditor.

Another practice when intra-group loans and advances are involved is to ensure that the company's maximum exposure under the guarantee is capped at the highest balance of all intra-company loans and intra-company advances made to it by the parent company or any subsidiary of the parent company, at any time from the date of the guarantee to the date of an enforcement of the guarantee. The purpose of this limit is to make the guarantee proportionate to the benefit the guarantor will derive from such intra-group financing.

Finally, parties seem in practice to favour including language which combines several guarantee limits (net assets, outstanding intra-company loans and advances, etc), in order to approach the best quantification of the proportionality rule. Below are two examples of such Belgian guarantee limitation language.

3.3.2.1. Belgian Guarantee Limitation Language: Example 1

The liability in respect of a Belgian guarantor shall not include any liability which would constitute unlawful financial assistance within the meaning of the Belgian Companies Code, and shall in all circumstances be limited to an amount equal to the higher of the following amounts, with deduction of the total amounts paid at the time of the enforcement under the guarantee:

i. *any amounts (principal plus any accrued interest thereon, commissions, costs and fees) directly or indirectly made available to the relevant guarantor under the loan agreement and which have not yet been repaid* [26] *by such guarantor at the time of enforcement of the guarantee; or*

ii. *X% of the net assets of such guarantor, calculated and certified by the statutory auditors of such guarantor on the basis of the latest audited accounts available at the time of enforcement of the guarantee.*

3.3.2.2. Belgian Guarantee Limitation Language: Example 2

The guarantees, obligations, liabilities and undertakings of a Belgian guarantor under the relevant documents shall be regarded as not undertaken or incurred insofar as they would:

i. *constitute unlawful financial assistance within the meaning of the Belgian Companies Code;*

ii. *exceed the corporate object, not be in the interest of the Belgian guarantor or be disproportionate to such interest; or*

iii. *exceed the highest of:*
    a. *amount;*

    b. *X% of the net assets of such Belgian guarantor at any given time;*

    c. *the aggregate of (1) the reserves of the Belgian guarantor and (2) the profit carried*

forward of such Belgian guarantor at any given time; or

d. *the total of all amounts borrowed under the loan agreement which have, directly or indirectly, been loaned on to such Belgian guarantor through intra-group loans.*

Belgian case law on corporate interest, group interest and group financial assistance is to certain extent limited and the actual cap depends on the specific situation of each security structure and group structure, so it is not possible to establish definitive rules with regard to a cap in order to ensure compliance with corporate benefit for the guarantor.

3.3.3. Case Law

This section briefly summarizes the relevant criteria used by Belgian case law regarding intra-group guarantees and/or group interest.

Belgian case law has confirmed that intra-group guarantees can be granted by a company for obligations of a parent or affiliated company, in the interest of the group, provided that the existence of an integrated group can be effectively shown [27] .

Similarly, guarantees granted by a company which are flagrantly contrary to its corporate interest and are in the sole interest of its parent company (and not even that of the group to which they belong) without even reinforcing the position of the guarantor will be sanctioned by Belgian Courts which will consider (i) that such transactions consists in an abuse of majority by the majority shareholders [28] ; and/or (ii) that the directors of the company having granted the intra-group guarantees are liable for abusive use of the company's assets if the company was experiencing severe financial difficulties and urgently needed cash [29] .

And according to the Brussels Court of appeal, in such case, the liability of the parent company and its directors does not exclude the liability of a bank which, whether by connivance or even by simple negligence, assisted in the misappropriation of the subsidiary's assets. A bank is required to inform itself and research the facts surrounding a transaction [30] .

However, the most relevant criteria used by case law in Belgium refers to the proportionality condition (see Section 3.2.1 *supra*) as Belgian Courts will often verify that group assistance by a company does not leave it in financial difficulties because the assistance granted is disproportionate to its financial means and capabilities and affects its industrial business position and situation, in which case the assistance will be declared null and void [31] .

The limited case law make it clear that each case depends on the particular facts and specific circumstances.

4. Breach of Corporate Interest Rule

Guarantees in breach of the above-mentioned corporate interest rules may not only give rise to directors" liability issues, but also result in the nullity or unenforceability of the guarantee if challenged by a creditor of the company or its trustee in bankruptcy.

Since breach of the corporate interest rule is not strictly within the scope of this article, the overview below is intended to provide only a short description of the consequences of such breaches.

4.1. Liability of Directors [32]

Directors must act in accordance with the Belgian Companies Code, the Articles of Association of the company concerned and their duties as directors. As a guiding principle, they must always act with a view to the company's best interests. Each and every action taken by a director must therefore be taken in the company's interests.

4.1.1. Civil Law

Directors are responsible in civil law for the proper performance of the tasks attributed to them, and are liable for any shortcomings in their management and administration.

4.1.2. Liability to the Company

Directors are liable to the company for ordinary faults committed during their management of the company; this is considered as a contractual liability. An ordinary fault does not include a violation of the Belgian Companies Code or the company's articles of association. The courts will decide what constitutes an ordinary fault on a case-by-case basis (for example a contract that is not at arm's length) by comparing the director's behaviour to that of a *bonus pater familias*. Not acting in the interest of the company, including granting a guarantee, is considered as an ordinary fault.

4.1.3. Liability to Third Parties

In practice, a director is personally liable to third parties for breaching the general duty of care under civil law. The establishment of liability, *i.e.* failure in the duty of care, depends heavily on the court's evaluation. A causal relationship between fault and injury must be proved. Failure to act may also be viewed as a fault. Granting a guarantee which is not in the corporate interest may lead to such liability.

4.1.4. Conflict of Interests

According to the Belgian Companies Code, a director who has a direct or indirect personal financial interest that conflicts with a decision or transaction within his authority as director must notify the shareholders of this before any decision is taken. Even if he has respected this obligation, the director remains jointly and severally liable to pay damages to both the company and third parties for any loss resulting from a benefit unlawfully obtained at the expense of the company. This liability could apply in the case of a conflict of interests in relation to a guarantee granted.

4.1.5. Bankruptcy Law

According to the Belgian Companies Code, in the event of bankruptcy, if the company's liabilities exceed its assets, directors, former directors and anyone else who had *de facto* managerial power in it may be held personally liable, jointly or severally, for up to the amount of the shortfall, provided the court decides that that they committed a manifest and serious error which contributed to the bankruptcy. Granting a guarantee which is not in the corporate interest is considered as a serious error. The enforcement of such a guarantee can contribute to the bankruptcy of the company which granted it.

4.1.6. Belgian Criminal Code: Abusive Use of the Company's Assets or Credit

A special type of liability, abuse of company assets, is penalised under the Criminal Code. Criminal liability results from the deliberate use of the company's assets or credit in a way which the director knew would be against the interest of the company, its shareholders or its creditors. A personal element is also required. A director who acts in this way must do so with fraudulent intent to secure an illicit advantage for himself or another person or company. If a guarantee which is flagrantly not in the corporate interest of the company is granted, and the other conditions required for establishing abusive use of the company's assets are met, the granting of the guarantee may be considered as such an abusive use.

4.2. Sanctions

As noted above, a board of directors enjoys broad discretion in business matters and the courts will review its decisions only minimally. A recent analysis of the legal bases which might lead to sanctions for breaching the corporate interest rule, such as nullity, unenforceability, reduction of the amount of the guarantee or liability of the lender, shows that in the case of a normally prudent creditor, the circumstances under which sanctions could be applied are somewhat limited [33]. The conclusions of this analysis are summarised below.

4.2.1. Nullity

4.2.1.1. Legal Speciality

The courts can annul the granting of a guarantee in manifest violation of a company's legal speciality, *i.e.* to respect certain rules while accomplishing certain acts such as the provisions of the Belgian Companies Code and the articles of association and the profit making rule. The court can only review the legality of documents, not their appropriateness. There seems to be no recent reported case law in relation to this.

4.2.1.2. Belgian Civil Code and Majority Abuse

There is no explicit legal provision that an act which does not respect a company's corporate interest is *ipso facto* null and void [34]. However, two specific causes of nullity seem relevant:

- according to Article 1131 of the Belgian Civil Code, an obligation for an illicit cause has no effects. Article 1133 defines an illicit cause as a cause contrary to law, public order and good conduct; and
- a guarantee which is not in the company's interest can in certain circumstances be considered as an act of majority abuse, which is sanctioned by nullity. Majority abuse implies the existence of minority shareholders, which is somewhat unusual in the context of a group of companies.

4.2.2. Unenforceability

A security may be considered as unenforceable in the following cases:

- when it is granted without consideration, or for inadequate consideration as defined in Article 17, 1° of the Bankruptcy Law, *i.e.* what the guarantor gives is clearly more valuable than what he receives in return, and is granted during the "suspect period" (*"période suspecte/verdachte periode"*) [35];
- when granting the guarantee defrauds other creditors of their rights. The conditions for unenforceability are strict: (i) the other creditor must have suffered prejudice due to the impoverishment of its debtor; (ii) fraud by the debtor; and (iii) complicity of a third party [36].

4.2.3. Reduction of the Amount of the Security

Besides the sanction of nullity or other measures, the court could, on the basis of reasoned

arguments, decide as a remedy to reduce the amount of the security *ex aequo et bono* in the case of a breach of the legal speciality or corporate interest rule.

4.2.4. Lender Liability

It is generally accepted that a lender is only subject to minimal assessment. The case law and scholars agree that the assessment should be restricted to the guarantor's ability to repay the amount, and consequently the validity of the guarantee granted. In practice this means checking the guarantor's legal speciality, corporate purpose and corporate interest, without intervening too much in his business and management. Despite the minimal obligation for assessment, however, the creditor could still be held liable if he has committed a fault subject to criminal penalties (for example, abuse of the company's assets as provided by Art. 492*bis* Criminal Code) or civil sanctions (contractual or aquiline liability). The trustee of a bankrupt guarantor can also hold a creditor liable for intra-group guarantees; in this case the liability is based on Article 1382 and is thus extra-contractual [37] .

5. Conclusion

Belgian companies are increasingly required to grant intra-group guarantees as security for group borrowings. The possible limitations applicable to intra-group guarantees represent one of the determining factors for lenders analysing the overall creditworthiness of the group against which" assets it will try to seek recourse in case of default under the loan. The rules regarding financial assistance, corporate purpose and corporate interest must be taken into consideration when analysing the extent to which group companies can give guarantees. The issue that requires most circumspection from the practitioner drafting the guarantees or board minutes, or analysing the scope and validity of guarantees granted, is the corporate interest question because it covers a spectrum of elements which is not conclusively defined in the Belgian Companies Code, and thus remains open to interpretation according to the circumstances.

Moreover, this issue might also be influenced by the fact that the operation relates to a group of companies and, therefore, involves the concept of group interest which can, subject to certain conditions, be taken into consideration to evaluate the company interest.

The courts and scholars have therefore agreed, on the basis of limited case law, economic reality and practice, on some criteria indicating what is to be understood by "corporate interest" in the light of group transactions. These regularly used criteria stress the importance of proportionality, but whether or not the proportionality test is met will depend to a large extent the specific circumstances at hand.

In practice, in order to justify proportionality and corporate interest in general, detailed board minutes are drawn up outlining the justification of the guarantee and possible limitations on the guarantee, which are reflected in the guarantee documentation itself. This has the advantage of providing some accepted criteria as guidelines, while maintaining the company's freedom of action and decision. On the other hand, since the criteria are neither exhaustive nor mandatory and there is insufficient case law available to establish such definitive criteria, the parties will have to make a judgment call on which limitations or justification in the given circumstances will be sufficient to demonstrate corporate benefit. This requires flexibility from both sides to avoid exhausting and interminable negotiations on the definition of a term which remains decidedly abstract.

The main role is that of the board of directors, as the organ taking the necessary decisions regarding the granting of guarantees and which enjoys a relative liberty, subject to the more or less strict limitations explained above and minimum assessment by the courts. The role of the courts remains relatively limited, as their possibility of assessment is limited, applying only with regard to respect of the limitation rules and sanctions. This results from the right to conduct business freely, freedom of entrepreneurship and the security of transactions.

In the absence of clear and definitive guidance in the law, the doctrine or the case law, it is very difficult to say in abstract which criteria will suffice in order for a guarantee to comply with the corporate interest requirements. The issue must be evaluated case by case, taking into account all the facts and circumstances.

Breaching the rules on corporate interest may lead to liability for directors; it could also result in the nullity of the guarantee. An analysis of the possible sanctions shows that they are very unlikely to apply if the parties are diligent and careful, and are relevant only in cases of flagrant and clear violations.

The major question is therefore whether or not the legislator should at least provide some guidance, without intervening too much in the management of the company or over-restricting freedom to do business. The situation does not call for strict regulation, but rather providing more guidance with regard to concepts such as corporate groups and corporate interest.

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[1] With special thanks to Sasha Lewis, Text Editor, Mons, Belgium; Adrien Hanoteau, Senior Associate, Taylor Wessing, Brussels, Belgium; and Werner Van Lembergen, Partner, Laga, Brussels, Belgium.

[2] T. BOSLY, T. LOHEST, G. NYATANYI and V. MOHY, "Secured Transactions in Belgium", in *International Secured Transactions*, New York, Oceana Publication, Inc., Dobbs Ferry, Issued May 2005.

[3] J. ERAUW, *Handboek Belgisch internationaal privaatrecht*, Gandaius, Kluwer, 2006, p. 567.

[4] J. ERAUW, *o.c.*, p. 429 and following and p. 511 and following.

[5] Under art. 556 BCC, when a company simultaneously grants third parties a security and other rights, such as enforcement or acceleration, which are triggered by a change of control clause, an extraordinary shareholders' meeting must approve the granting of the security and the change of control clause. An extract of the meeting must be filed with the Commercial Court. Failure to comply with these requirements renders the security granted null and void.

[6] J. PEETERS, *Het vennootschapsbelang en de verhouding ervan met het groepsbelang*, Antwerpen, Kluwer, 2002; A. FRANÇOIS , *Het vennootschapsbelang in het Belgisch vennootschapsrecht*, Intersentia, 1999; J.M. NELISSEN GRADE, "Le crédit bancaire et le droit des sociétés", in J.P. BUYLE & A. BRUYNEEL (eds.), *Le crédit aux entreprises, aux collectivités publiques et aux particuliers*, Bruxelles, Ed. Jeune Barreau de Bruxelles, 2002; D. NAPOLITANO, "Ondernemingsfinanciering door kredietinstellingen – vennootschapsrechtelijke aandachtspunten: het specialiteitsbeginsel en het vennootschpasbelang", *R.W.* 1999-2000, p. 417-429; P. VAN OMMESLAGHE, "Les financements de groupe", in J.P. BUYLE (ed.), *La banque dans la vie de l'entreprise*, Bruxelles, Ed. Jeune Barreau de Bruxelles, 2005, p. 225.

[7] Art. 219, 222, 281, 301, 313, 444, 447, 551, 580, 596 and 602.

[8] CBF, *Jaarverslag 1986-87*, p. 82.

[9] J.M. NELISSEN GRADE, "De la validité et de l'exécution de la convention de vote dans les sociétés commerciales", note sous Cass. 13 avril 1989, *R.C.J.B.* 1991, p. 214 and following; A. FRANÇOIS , *o.c.*, n°s 544 and following; L. DU JARDIN, "Le crédit et les garanties entre sociétés groupées", *J.T.* 2000, n° 11, p. 609-615.

[10] K. BYTTEBIER, "Ondernemingsfinanciering door kredietinstellingen", *T.P.R.* 1994, 1540, nr. 55; J. HEENEN, "L'intérêt social", in *Liber Amicorum Paul de Vroede*, Kluwer 1994; E. POTTIER, *L'abus de majorité ou de minorité dans les sociétés anonyme*, Séminaire Van Ham & Van Ham du 23 avril 1998, p. 20 and 21, notes 80 and 84; Prés. Trib. Comm. Bruxelles 27 novembre 1984, *R.P.S.* 1985, p. 81; P. VAN OMMESLAGHE and X. DIEUX, "Examen de jurisprudence sur les sociétés commerciales", *R.C.J.B.* 1993, p. 772 and following.

[11] P. VAN OMMESLAGHE, *o.c.*, p. 238; L. DU JARDIN, *o.c.*, n° 10.

[12] Kh. Luik 17 October 2003, *R.D.C.* 2005, p. 429; P. VAN OMMESLAGHE and X. DIEUX, *o.c.*, p. 722 and following.

[13] The Belgian Supreme Court (*"Hof van Cassatie/Cour de cassation"*) has recognised the link between the two concepts (Cass. 13 April 1989, *R.W.* 1989-90, 254).

[14] Court of Appeal Brussels 10 September 2004, *Dr. banc. fin.* 2006, I, p. 25 and following and note K. MARCOURS, *Lendit: gedachten bij een miskenning van het vennootschapsbelang in een groepscontext.*

[15] Court of Appeal Brussels 15 September 1992, *J.T.* 1993, p. 312; A. FRANÇOIS , "Aspecten van de aansprakelijkheid van de bankier-kredietverlener in het Wiskeman-arrest", *T.R.V.* 1994, p. 275; Y. HERINCKX, "Les financements d'acquisitions d'entreprises: descente de dettes et assistance financière", in J.P. BUYLE (ed.), *La banque dans la vie de l'entreprise*, Bruxelles, Ed. Jeune Barreau de Bruxelles, 2005, p. 281 and following.

[16] E. WYMEERSCH, "Het recht van vennootschapsgroepen", in *Rechtspersonenrecht*, Postuniversitaire Cyclus Willy Delva 1998-99, Gent, Mys & Breesch, p. 397 and following.

[17] K. MACOURS, "Financiering en gecentraliseerd thesauriebeheer bij vennootschapsgroepen", *Dr. banc. fin.* 2001/I, p. 4-16.

[18] Art. 24b, Boek 2 Nederlands Burgerlijk Wetboek.

[19] A. FRANÇOIS , "Het wankele evenwicht tussen vennootschaps- en groepsbelang", *T.R.V.* 1994, 232; K. MARCOURS, "Lendit: gedachten bij een miskenning van het vennootschapsbelang in een groepscontext", *Dr. banc. fin.* 2006, I, p. 33; G. SCHAEKEN WILLEMAERS and J. RICHELLE, "Sûretés dans un groupe de sociétés. Réflexions sur les risques et les sanctions pour le bénéficiaire", *Dr. banc. fin.* 2004/V, p. 283; see also case law referred to under Section 3.3.3.

[20] P. VAN OMMESLAGHE, *o.c.*, p. 247.

[21] Comm. Liège 13 October 1981.

[22] See also J. RONSE, "Marginale toesting", *T.P.R.* 1997, p. 210-211.

[23] E. WYMEERSCH, *Hoofdlijnen van het Belgisch recht van de vennootschapsgroepen*, Financial Law Institute, Working Paper 2008-03, Universiteit Gent, 2008, n° 27, p. 14, (**http://www.law.ugent.be/fli**).

[24] In US law guarantees, often in the section stating that the guarantee is not intended to constitute a fraudulent conveyance.

[25] G. SCHAEKEN WILLEMAERS and J. RICHELLE, *o.c.*, p. 283.

[26] This raises the issue of revolving loans: should there be a revolving cap or not? And how to address a sufficient collateral value throughout the life of the facility? The question of continuously monitoring, preferably on a consolidated group basis, with the need to provide in the facility the possibility to request additional securities if the total cap and hence valuation of the collateral drop below a stated level.

[27] Comm. Brussels 7 April 2003, *Rev. not. b.* 2003, p. 673.

[28] Brussels 9 October 1984, *R.P.S.* 1986, p. 50

[29] *R.P.S.* 1987, n° 6452, 250.

[30] Brussels 15 September 1992, *J.T.* 1993, p. 312; in the case at hand, the subsidiary had granted a guarantee of which the amount exceeded half of its equity.

[31] *R.P.S.* 1978, n° 5987, 236, *R.P.S.* 1981, n° 6139, 145, *R.P.S.* 1982, n° 6173, 45; Comm. Brussels 12 September 2000, *R.D.C.* 2001, p. 787; Brussels Court of Appeal 29 June 1999, *not published*; P. VAN OMMESLAGHE, *o.c.*, p. 249; Cass. 9 March 2000, *T.R.V.* 2001, p. 99, n° 9.

[32] J.-M. NELISSEN GRADE, *o.c.*, p. 38, n° 29; J. PEETERS, *o.c.*, p. 58, n°s 37 and 38; L. DU JARDIN, *o.c.*, Bruxelles, Bruylant, 2002, p. 173, n° 224 and following; F. JENNÉ , “Welke sancties in geval van overschrijding van de wettelijke en de statutaire specialiteit en miskenning van het vennootschapsbelang”, *T.R.V.* 2002, p. 388 and following, note under Gand 1 February 2001; L. CORNELIS, “De aansprakelijkheid van bestuurders van vennootschappen in groepsverband”, in *Aspecten van ondernemingsgroepen*, H. BIRON and C. DAUW, (eds.), Antwerpen, Kluwer, 1989, p. 111 to 193.

[33] G. SCHAEKEN WILLEMAERS and J. RICHELLE, *o.c.*, p. 287-288.

[34] A. CUYPERS and P. ROORYCK, “Persoonlijke zekerheden en vennootschappen”, *Borgtocht & Garantie*, Kluwer, Journée d’étude K.U.Leuven, 28 februari 1997, p. 27 en 28, n° 36.

[35] Generally the six months immediately preceding the bankruptcy, or such longer period as may be determined by a court if the bankrupt company was in liquidation prior to its bankruptcy.

[36] H. DE PAGE, *Traité élémentaire de droit civil belge*, Tome III, 3° éd., 1967, Bruxelles, Bruylant, n° 232, p. 241.

[37] G. SCHAEKEN WILLEMAERS and J. RICHELLE, *o.c.*, p. 287.