Study on the feasibility of reducing obstacles to the transfer of assets within a cross border banking group during a financial crisis

National Report

BELGIUM

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Part I - National regulation

Please provide a presentation of your national regulation (law, cases,...) and attach it as Annex A and B to this document:

- the relevant legal texts and cases in English (of summarized in English).
- If possible, examples of transfer of assets agreements.

For each question, please first consider:

- your national Civil Law, Company Law, and Insolvency Law
- and on a second time explain if there are specific regulations for Banking groups
- on a third time explain if there are specific regulations for cross-border transfer of assets.

Preliminary comment

In the context of this study, we chose to limit our analysis to the regulation concerning the limited liability companies (“société anonyme” or “nameloos vennootschap”), as banking companies are, in most of the cases, constituted under this legal form.

1. Summary

- Generally speaking, is the transfer of assets allowed (could you please precise briefly under which conditions):

In crisis situation:
- from parent to subsidiary
- from subsidiary to parent
- from subsidiary to another subsidiary

In going concern situations:
- from parent to subsidiary
- from subsidiary to parent
- from subsidiary to another subsidiary

Are there specific regulations for cross-border transfer of assets?

- Are there any specific rules in Banking Law in relation to transfer of assets?
  - from parent to subsidiary
  - from subsidiary to parent
  - from subsidiary to another subsidiary

- Are there specific regulations for cross-border transfer of assets?

2. Scope

- Does the notion of company groups exist?
  - Generally speaking in corporate Law? (If it exists, please give a definition, conditions and the main applications?)

In Belgium, there is no general and systematic company group law. The notion of company group does exist, but the “group” is not defined as such in the Belgian Company Code (hereinafter the “BCC”), although various related notions are defined, among which the following:
- **Control**: the power, factual or by right, to exercise a decisive influence on the designation of the majority of the directors of a company, or on its management. Notably, there is legal control when it results from the possession of the majority of the voting rights linked to the shares of the controlled company (article 5 of the BCC). There is exclusive control when it is exercised by one company, alone or with one or several of its subsidiaries (article 8 of the BCC).

- **Mother company**: the company detaining a power of control on another company (article 6 of the BCC).

- **Subsidiary**: the company towards which exists a power of control (article 6 of the BCC).

- **Consortium**: two or more companies, which are not subsidiaries of each other or of a same company, are placed under a single direction (article 10 of the BCC).

- **Associated companies**: a company and the companies which it controls, or control it, with whom it forms a consortium, or other companies which, to the knowledge of its board of directors, are controlled by the companies described before (article 11 of the BCC).

The company group is specifically referred to, but not defined, in article 16 of the BCC, which states that a company and its subsidiaries, or a consortium, is to be considered as a small group if it does not exceed more than one of the following criteria: 250 workers, or annual turnover of 29.200.000 EUR (excl. VAT), or total balance of 14.600.000 EUR.

The use of these notions is mainly limited to accounting law, as we can notably see in the part of the BCC dedicated to the annual consolidated accounts (articles 108 and following).

There are also specific rules related to the publicity of major holdings in companies (article 514 and following of the BCC, and the 2 May 2007 Act on the publicity of major holdings).
It results from the above that the Belgian legislation does not apprehend systematically nor define the concept of "company group".

- Is there in your national law a definition of "group interest" that specifically allows or facilitates intra-group transfer of assets?

- In general corporate law

There is no definition of "group interest" in the Belgian legislation. Furthermore, to the contrary, when a company listed on the stock exchange is concerned, intra-group operations are under certain conditions submitted to a special procedure detailed in article 524 of the BCC (see below, section on Authorization, for further details on this procedure, linked to the issue of the potential conflicts of interest). Therefore, the Belgian legislation does not specifically allow or facilitates intra-group transfer of assets.

However, some decisions from the courts and tribunals use the notion to accept the completion of assets transfers which would otherwise be considered as detrimental to the transferor, but under strict conditions: it can be requested to the companies which are part of a group to momentarily help another company from the group, but only if the sacrifice requested is not out of proportion with the real (financial) possibilities of the company which consents to it, and if that help does not provoke serious and excessive difficulties that can be foreseen at the time of the decision. A company cannot impair its assets in the interest of other companies of the group, and a mother company cannot force a subsidiary to accept an operation that is totally contrary to the interests of the latter (see for instance Brussels court of appeal, 10 September 2004, Forum financier/Dr. Banc et Fin., 2006/1, p. 26, and case law quoted).

It must also be noted that the majority of the Belgian legal theory considers that the group interest cannot be reduced to the interest of the mother company.

- In banking law

(rapports CBFA 1981-82 p 91, 1983-4 p 87)
- Are there specific tax issues that need to be addressed in intra-group transfers of assets?

1. When the transfer of assets is made under conditions more advantageous than the market conditions, the tax administration may consider it as an abnormal advantage. No deduction will be allowed on the part of the company profit resulting from abnormal advantages that the company received, directly or indirectly, from a company with which it is interdependent (articles 79 and 207 al. 2 of the Belgian Income Tax Code; see also below, section on Counterpart for the transfer of assets).

2. The Belgian legislative chambers are currently discussing a draft act (draft nr. 1398) which aims at the transposition into national law of the Directive 2005/19/EC concerning the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States.

- Are there specific regulations for banking groups?

1. Definition of a crisis in the banking sector

1.1 The 20 March 1993 Belgian Act related to the statute and to the supervision of credit institutions (The banking law) defines a crisis situation for a credit institution as a situation where the “financial rehabilitation” authorities may take “financial rehabilitation measures”.

The Belgian “financial rehabilitation” authorities are defined by the banking law as being the CBFA (the Belgian Banking and Finance Commission) and the Commerce tribunal, each in its respective field of competency.

The financial rehabilitation measures that may be taken by the CBFA are the followings (article 57):

- the appointment in the credit institution of a special auditor (Article 57 § 1 al.2 1° of the banking law). As of the date of publication of the appointment of this special auditor, no decision may be taken by the credit institution without its approval;
- the suspension or the prohibition of the activities of the credit institution (article 57 § 1 al.2 2°); in this respect, the CBFA may oblige the credit institution to transfer the shares it owns in another company which may be a credit institution;

- require the replacement of part or all of the directors of the credit institution, and if this is not done, to provide for their replacement;

The Commerce tribunal, in coordination with the CBFA, may decide:

- to declare an composition procedure ("concordat judiciaire") as provided by the 17 July 1997 Act on the judicial composition;

- to declare the credit institution bankrupt.

The financial rehabilitation measures may be taken by the CBFA when this latter sees that the credit institution does not work in conformity with the banking law and all decrees taken for its execution, e.g. that its management or its financial situation are such that it may not perform anymore its commitment, or does not offer enough warranty for its solvency, liquidity or performance, or that its management structure or its administrative or accountancy organization, or its internal supervision are materially insufficient (article 57).

2. The concept of “banking group”

The notion of banking group is present in Belgian financial regulation but covers several different concepts:

1° The banking law provides that when a credit institution is the “mother company”, the credit institution and its subsidiary in Belgium or abroad are subject to the supervision of the CBFA on a consolidated basis (article 49 § 2 of the banking law).

This supervision covers notably: (-) the holding held by the group in other companies, including others credit institutions; (-) the management of the group, the organization of the internal supervision of the group as provided by articles 20 and 20bis of the banking law, which includes reporting and assessment of risk and implementation of procedures which limit the risk of conflict of interests; (-) the solvency, the liquidity, the concentration of risk within the group (article 43 § 1.4). E.g., when the CBFA considers that the need
of own founds does not answer the risk profile of the group, the CBFA may take “financial rehabilitation” measures (article 47 § 3).

The supervision on a consolidated basis may be extended to companies which are not subsidiaries, but in which the credit institution holds participation or other capital links.

The supervision on a consolidated basis does not include the supervision on an individual basis, which still needs to be done (article 49 § 2 al. 7 and 8).

2° When a credit institution is part of a consortium as defined by article 49 § 1 1° (companies which are not subsidiaries of each other, but are placed under the same management, as defined by Article 10 of the Company Code), this consortium is also subject to the supervision of the CBFA on a consolidated basis.

3° When the credit institution is part of a group of companies whose mother company is a financial company which is not a credit institution, Belgian or foreigner, the credit institution is also subject to the supervision of the CBFA on a consolidated basis (definition of a financial company – article 49 § 1.2. and § 2 al. 2 and 3);

4° When the credit institution belongs exclusively or jointly to one or several companies, those latter companies may be requested to communicate to the CBFA the information needed to allow the CBFA to exercise its supervision of the credit institution (article 49 § 5).

5° The directive 2002/87/CE of 16 December 2002 related to the complementary supervision of financial conglomerates has been implemented in the Belgian regulation by new articles in the banking law (article 49 bis), and in the royal decree of 21 November 2005, related to the complementary supervision of financial conglomerates. This regulation introduces the concept of “financial service group” and “mixed financial holding”, which is a group of companies mainly active in the financial sector, and which includes at least one regulated entity established in the EU, of which at least one company is active in the insurance sector and another one in the banking sector or in the investment services sector. The financial conglomerate is the one headed by a regulated company, and the mix financial holding company is the one headed by a non regulated company.
The complementary supervision is mainly concentrated on the following topics: (-) requirement on supplementary supervision, (-) capital adequacy, (-) risk concentration and (-) intra-group transactions, (-) risk management processes and internal control mechanisms, suitability of shareholders and group structures, (-) the coordinator.

- Please specify any relevant information relating to intra-group transfer of assets that has not been dealt with in the previous questions and that would be useful for the study.

- In corporate law

The BCC deals with the issues surrounding the conflicts of interest which might occur in some circumstances, for the members of the board of directors (article 523 of the BCC) or of the executive committee (article 524ter of the BCC), which might have interests opposed to those of the company.

Article 524 of the BCC establishes a special procedure for decisions and operations taken and accomplished within companies listed on the stock exchange, and concerning the relations between this company and companies linked to it.

New specific rules concerning the cross-border mergers of limited liability companies have been introduced in June 2008 in the Belgian company code, in execution of Directive 2005/56/EC.

- In banking law

Of interest for this report are the rules related to the intra-group transactions that are defined as all transactions, made directly or indirectly, with or without consideration among companies belonging to the financial conglomerate or with company closely linked with this financial conglomerate (article 1 16° of the Royal decree 22 November 2005).

The Belgian regulation requires for those intra-group operations a supervisory overview at group level. Four risks should be monitored in particular: concentration of risks, contagion risk, conflict of interests, circumvention of
sectoral rules and the level or volume of risk (article 11, 12 and 21 of Royal decree 21 November 2005). The assessment of the financial conglomerate’s intra-group exposures and risk concentration is also the coordinator’s responsibility.

3. Conditions and sanctions

a) Authorization

- Do decisions to transfer assets have to follow specific approval procedures such as the approval of the board of directors or the transferor or transferee or the approval of shareholders obtained through a special meeting of shareholders?

- **In general corporate law**

1. Generally speaking, there are no specific approval procedures for the transfer of assets, which will be organized by the companies pursuant to their articles of association.

2. When this transfer of assets is part of the contribution of a company’s total assets or of part of the company’s activities (“apport d’universalité ou de branches d’activités”), articles 678 to 680, and 759 and following of the BCC provide for a specific procedure. In this context, the contributing company is exclusively remunerated with shares from the beneficiary company.

The board of directors of the contributing company and of the beneficiary company must draft a contribution proposal, which must be submitted to the Commerce tribunal court office six weeks prior to the special meeting of the shareholders general assembly (article 760 of the BCC).

When the contribution concerns the total assets of the company, the board of directors of the contributing company must also draft a special report, which is communicated, with the contribution proposal, to the shareholders at least one month prior to the general assembly, which must take the decision with ¾ of the votes.
When the contribution concerns only a part of the activities of the company, the
decision will be taken by the board of directors, which doesn’t have to draft a
special report.

The act recording the contribution is submitted to the court office of the
Commerce tribunal, and an extract is published in the the “Moniteur
belge/Belgische Staatsblad”, Belgium’s official journal (article 762 of the BCC)

This procedure may also apply to the assignment of a company’s total assets or
of part of the company’s activities if the parties choose it, but it is not
compulsory in this case (article 770 of the BCC).

3. Article 523 (&524ter) of the BCC states that when a director (or a member of
the executive committee) has, directly or indirectly, a proprietary interest
conflicting with a decision to be taken by the board of directors (or the
executive committee), he must declare it before the deliberation of the board
and this must be mentioned in the minutes. The board of directors must also
mention in the minutes the nature of the proposed decision or operation, and
the pecuniary consequences for the company.

In companies resorting to public offering, the concerned director cannot assist
to the deliberation, or vote.

In his annual report on the annual accounts, the auditor will have to analyze
separately the pecuniary consequences of the operation.

This procedure does not apply when the decision to be taken concerns decisions
or operations concluded between a company and its subsidiary when the
mother company detains directly or indirectly at least 95% of the voting rights
in its subsidiary, or between “sister” companies, both detained at least 95% by
the same company. This procedure does not apply either in an arm’s length
situation (see hereinafter).

4. For companies listed on the stock exchange, article 524 of the BCC provides
for a special procedure which must be followed before decisions or operations
concerning:
- the relations of the listed company with an associated company, except its subsidiaries;

- the relations between a subsidiary of the listed company and an associated company, other than a subsidiary of the subsidiary.

Prior to the decision or operation, a committee composed of three independent directors, assisted if need be by independent experts, must draft a motivated advice, and evaluate the proposed decision or operation, appreciate the gain or harm for the company and its shareholders, determine if it can cause damages which are obviously excessive, considering the company policy, etc.

The board of directors, when taking its decision, must precise of the procedure has been followed and, if need be, explain the reasons why the committee advice has not be followed.

The auditor delivers an opinion regarding the accuracy of the information contained in the committee advice and in the minutes of the board of directors’ decision.

This procedure does not have to be followed for decisions and operations in going concern, under normal market conditions for similar operations, or when they concern less than 1% of the net assets of the company, as resulting from the annual consolidated financial statements.

5. The decisions and operations of the subsidiary (not listed on the stock exchange) of a listed company must be authorized beforehand by the listed mother company when they concern the relations of the subsidiary with associated companies. This authorization is subject to the procedure described here above in point 4 (article 524§5 of the BCC).

- **In insolvency law**

Liquidation: Projet de repartition des actifs : ou c’est approved by third parties, puisqu’il le OK des créanciers ?

- **In banking law**
Banking law does not impose at a company level any specific authorization or notification other than the one provided by Company law. It should however be noted that a transfer of assets transaction should comply with internal rules implemented at the credit institution level and if that is the case at the group level, to monitor solvency, liquidity, concentration of risk, capital adequacy (see here above).

- Do transfers of assets need to be approved by other third parties or supervisory authorities?

- **In general corporate law**

No.

- **In insolvency law**

Liquidation: Projet de répartition des actifs : ou c’est approved by third parties, puisqu’il faut le OK des créanciers ?

- **In banking law**

1. According to Articles 30 and 31 of the banking law, any merger between credit institutions or with a financial institution or any transfer of assets between credit institutions or other financial institutions of the whole or part of its activities (or network) should be notified to the CBFA, which may refuse the transaction within a 3 months period from the notification, and only for reasons related to the healthy and cautious management of the concerned credit institution or of the credits institutions.

If the transfer of assets is a transfer of a holding of shares representing at least 5 % of the capital or of the voting right of a credit institution, the transferee should inform the CBFA of its intention to purchase this holding (Article 24 of the banking law). The CBFA may refuse this project to acquire this holding, also within a 3 months period from the notification of the project of transaction, for reasons related to healthy and cautious management of the concerned credit institution.
In case the transferee is a credit institution located in an EEE country, the CBFA should consult the supervisory authority of the transferee. The transferor should also notify to the CBFA his intention to sell its holding in the Belgian credit institution. The credit institution has also the obligation to inform the CBFA of any modification of the structure of its capital (article 24 § 1 to 6).

These obligations are reiterated each time the transferee increases its percentage of its holding in the credit institution from 5 % to 10 %, 15 %, etc.

A similar obligation exists in case of modification of the structure of the capital in a financial conglomerate (article 14 Royal decree 21 November 2005).

2. In a crisis situation, the CBFA may impose to the credit institution to transfer the holding it owns in another company, including a credit institution, to another company, including a credit institution. This decision may also be directed to any owner of a qualified holding in a credit institution (article 32 § 4 and 5, 24 § 7.2. banking law).

In addition, if a special auditor has been appointed by CBFA (article 57 Banking law) as a financial rehabilitation measure, any decision taken by the credit institution, such as a transfer of assets, needs to be approved by the special auditor.

The special auditor may also recommend to the credit institution in which he has been appointed to transfer the whole or part of its activities (Article 57 banking law).

- Do transfers of assets have to be notified to other third parties or supervisory bodies or published?

- **In civil law**

If the asset transferred is a building or any right in immovable property, the transfer must be registered in the appropriate mortgage registry (“Conservation des hypothèques”).

- **In general corporate law**
1. Generally speaking, transfers of assets do not have to be notified to third parties, nor published.

2. However, when the transfer of assets is part of the contribution of a company’s total assets or of part of the company’s activities ("apport d’universalité ou de branches d’activités"), the act recording the contribution must be published in the “Moniteur belge/Belgische Staatsblad”, Belgium’s official journal (article 762 of the BCC).

3. In the procedure of article 524 of the BCC, described here above, the committee advice and the board of directors meeting minutes are communicated to the auditor, who renders an opinion on the accuracy of the information contained in these two documents.

4. If the assets transferred are shares, the transfer might result in a change in the major holding of the concerned company. If this company is listed on the stock exchange, or if it is provided in its articles of association, the company acquiring or transferring shares, with as result the possession of shares representing 5% (and any multiple of 5) of the voting rights of the company, must notify the concerned company and the Banking and Finance Commission ("CBFA") (see article 514 and 515 of the BCC, and the 2 May 2007 Act on the publicity of major holdings).

5. Conseil de la concurrence qd le transfert a pour csq une concentration

6. When the assets transferred are claims, the transferor and the transferee must notify the transferred debtor of the identity of its new creditor. Without notification, the debtor may validly pay its debt to the transferor, and the transferee won’t be entitled to request a second payment from the debtor.

- **In insolvency law**

  (communiqués aux créanciers et au tribunal de commerce via les rapports des liquidateurs/curateurs, et les projets de repartition, ou bien il faut leur ok et alors c’est ds la ? précédente ?).

- **In banking law**
According to article 31 of the banking law, any merger, and transfer of assets (the whole or part of the activities of a credit institution) are enforceable against third parties from the publication of the authorization given by the CBFA to proceed with the transfer of assets, in the Belgian Official journal.

- Would a specific agreement incorporating the terms and conditions of the transfer between transferor and transferee and executed by their authorized representative be required?

- In general corporate law

In the case of contribution of total assets or of a part of the activities, the BCC requires the drafting of the contribution proposal by both the contributing company and the beneficiary company (article 760). Further than that, no specific agreement is required by law.

- In insolvency law

(Projet de repartition qui doit être approuvé par les créanciers, mais c’est pas vraiment une convention avec des conditions ?)

- In banking law

No.

- Are there differences between transfers in going concern situations / transfers in crisis situations?

- In general corporate law:

When the board of directors (or the executive committee) decisions concern operations that are concluded under the normal conditions and with the normal guarantees of the market for similar operations, the special procedures of articles 523, 524 and 524ter of the BCC described before don’t have to be followed (see article 524 in fine, article 524§1, al. 3,1°, and article 524ter).
It can be reasonably assumed that in crisis situations, most of the transfers of assets will not be organized and operated under the normal conditions and with the normal guarantees of the market for similar operations. Therefore, these operations will have to be submitted to the procedures described here above.

- **Insolvency law**

By definition, the insolvency law deals with crisis situations. We refer to what is said on insolvency law in the answers to the other questions.

- **In banking law**

In a crisis situation, in addition to what is provided in a normal period:

- the CBFA may appoint a special auditor, who should approve any decision to transfer the assets of a credit institution. He also may propose to the credit institution to transfer assets to another credit institution (article 57 § 1, 2°).

- the CBFA may impose to the shareholder of a credit institution to transfer the holding he owns in a credit institution to someone else;

In case the credit institution has been put in a judicial composition ("concordat judiciaire"), any decision to transfer assets should comply with the legislation related to this procedure and, when those assets are banking activities, be approved by the CBFA.

b) **Counterpart for the asset transfer**

- Is the transfer of assets treated differently by your national Law :

  - if it respects the arm’s length principle/normal market conditions dealing (please explain what is considered as arm’s length)

- **In corporate law**
The "arm’s length" principle refers to the fact that an operation is organized and concluded under the normal market conditions presiding over the relationship between independent companies.

As said before, when the transfer of assets respects the normal conditions and is done with the normal guarantees of the market for similar operations, the special procedures of articles 523, 524 and 524ter of the BCC described before don’t have to be followed (see article 524 in fine, article 524§1, al. 3,1°, and article 524ter).

- In banking law

Any decision from a credit institution to transfer assets to another credit institution, and any decision from a credit institution to acquire assets from another credit institution, should comply with the requirement related to a healthy and cautious management (liquidity, solvency, risk concentration, capital adequacy as provided by banking law), at the level of the credit institution, and at a group level if the credit institution is part of a group.

Banking legislation do not provide for other financial warranties to be given by the transferor or the transferee.

When the transfer of a holding in a credit institution is required by the CBFA, or when the transfer of asset is proposed by the special auditor, the conformity with the arm’s length principle is presumed to exist.

- if it is agreed under preferential conditions or disadvantageous to the transferee but advantageous to transferor and the group as a whole

- In corporate law

As said before (see here above what has been said about the definition of "group interest" in Belgium), it can be requested to the companies which are part of a group to momentarily help another company from the group, but only if the sacrifice requested is not out of proportion with the real (financial) possibilities of the company which consents to it, and if that help does not provoke serious and excessive difficulties that can be foreseen at the time of
the decision (Brussels court of appeal, 10 September 2004, *Forum financier/Dr. Banc et Fin.*, 2006/1, p. 26, and case law quoted).

If this is not the case, the operation might be considered as misuse of company assets (see hereinafter, section on Sanctions – criminal law).

- **In tax law**

The tax administration tends to consider that if operations are concluded between associated companies, under conditions more favorable than normal market conditions for independent companies, there is an abnormal advantage or a gratuity.

However, the Belgian legal theory and the case law are more understanding: an advantage is not abnormal if it can be justified by economic motivations. Considering that there are special economic circumstances surrounding associated companies, an advantage granted by one company to an associated company may be justified by temporary financial difficulties and the group interest: other assets are protected, the company suffering the temporary difficulties will be able to solve them and generate profit in the future, the group image and reputation is preserved, etc. (see First instance tribunal of Leuven, 6 February 2004, quoted by S. Van Crombrugge, “Aide financière dans un groupe à nouveau admise”, *Fiscologue*, 2004, n°929, p. 5).

- **In banking law**

There are no specific elements.

  - if there is no counterpart/compensation for the transfer

- **In civil and corporate law**

1. A transfer of assets without counterpart or compensation is a gratuitous or disinterested act. However, commercial companies, such as the limited liability companies, are not set up to accomplish disinterested acts: article 1 al. 1 of the BCC states that a company is constituted by a contract between two or more person, to exercise one or more determined activities, with the purpose to generate a pecuniary benefit for these persons.
Case law has softened this principle, by admitting that a company can accomplish disinterested acts, providing that they are, even indirectly, accomplished with the intention to achieve the corporate purposes (i.e. the activities described in the articles of association) (Supreme court ("cour de cassation"), 13 April 1989, Pas., 1989, I., 825).

Therefore, when analyzing a transfer of assets, especially in the context of a transfer between associated companies, one must look beyond the specific act and its immediate absence of counterpart, to evaluate whether there might be a counterpart, indirect or in the long term, as discussed in the previous section: other assets are protected, this helps the company temporarily in trouble to restore a sound situation, which will allow it to generate profit in the future (which benefits to the whole group), and so on.

If there is no counterpart at all, the operation might be declared void.

2. If there is no counterpart or compensation at all for the transfer, even in the long term, the operation might also be considered as misuse of company assets if the transfer is significantly detrimental to the pecuniary interests of the company, and its creditors (see hereinafter, section on Sanctions – criminal law).

- In banking law

There are no specific elements.

  - if the transfer is included in a loan or credit agreement between transferor and transferee.

We understand that

- In general corporate law

- In banking law
• Are there differences between transfers in going concern situations / transfers in crisis situations?

There are no differences regarding the issue of the counterpart.

c) Compulsory counterparts and guarantees

• Is there any compulsory counterpart or guarantee that transferee should provide to transferor?

- In corporate law

1. As discussed here above, there must be some sort of counterpart to the transfer of assets, even indirectly; otherwise the operation might be declared void (see also hereinafter, section on Sanctions).

Further than that, no compulsory counterpart is imposed by the Belgian legislation, which does not impose any compulsory guarantee either for a transfer of assets.

2. When the transfer of assets is part of a contribution (see here above), the creditors of the transferor and the transferee have two months from the date of the publication in the “Moniteur belge” to request a security, providing that their claim exists prior to the publication and is not yet due (article 766 of the BCC).

- In banking law

There are no specific element.

• Please specify any other relevant information relating to the conditions to be met for a transfer of asset to be authorized that has not been dealt with in the previous question and that would be useful for the study

N/A
d) Financial capacities of the transferor and the transferee

- Does the decision to transfer have to comply with conditions relating to the financial capacities/health of the transferor/transferee?

**- In civil and corporate law**

1. As discussed previously, the group interest cannot take precedence indefinitely on the individual company interest: although the case law accepts that a company may help an associated company, this cannot prejudice the helping company on the long term (see case law on “group interest” quoted here above). The group cannot, even for the sake of the group interest, sacrifice one of its companies.

2. Further than that, there are no specific conditions required by law relating to the financial capacities or health of the parties. Any condition will be agreed upon specifically and contractually by the parties to the operation.

**- In insolvency law**

When a company is in a state of bankruptcy, and has suspended its payments, it cannot decide to transfer assets to the detriment of the company and its creditors.

**- In banking law**

Any transfer of asset from a credit institution to another one should comply with the banking rules related to healthy and cautious management of a credit institution and in case the credit institution is part of a group to the additional monitoring on a consolidated basis (See above).

As said above, any transfer of assets of the whole or part of a banking activity should be notified and approved by the CBFA on a basis of healthy and cautious management (article 30 of the banking law), which contains the monitoring of the financial capacity of the transferor and the transferee.
What are the consequences when the transfer has occurred but those conditions have not been respected?

- **In corporate law**

If the operation is too detrimental for the transferor, it might be declared void by the tribunal (see here above the answer on “group interest”, and hereinafter the section on Sanctions).

- **In insolvency law**

If an operation, which is detrimental to the company, has been executed in the suspect period prior to the admission or declaration of bankruptcy, the operation might be declared void, and the asset will be reincorporated in the company, so that it can be used to pay the company creditors.

- **In banking law**

If the transfer of assets has been decided without taking into account the healthy and cautious principle, the parties which have suffered damages resulting from this breach of the law may engage the liability of the management of the company.

The liability of the CBFA, which has approved such transaction of transfer of assets without taking into consideration the financial capacity of the transferee and the transferor, may be engaged only if it should have been able to analyse this financial situation and if it committed a material breach of its obligations.

- Are there any conditions relating to the consequences of the transfer on the financial situation of the group?

- **In civil and corporate law**

No.
- **In banking law**

As said before, the consequence of any transfer of assets within the group or to a third party has to be analyzed on a consolidated basis (article 49 and 49bis of the banking law).

- What is the rank of claim of the transferor in case of insolvency proceedings of the transferee? Please specify any other relevant information relating to Financial capacities of the transferor and the transferee that has not been dealt with in the previous question and that would be useful for the study (faillite, concordat)

- Are there differences between transfers in going concern situations / transfers in crisis situations?

- **In civil and corporate law:**

There are no differences regarding the financial capacities of the transferor and the transferee.

- **In banking law**

No.

e) Information and transparency

- Does specific information have to be communicated on the transfer to:

- **supervisors**

Article 24 and 30 of the banking law relating to the transfer of shares of a credit institution, the merger of a credit institution and the transfer of assets of a credit institution or financial institution, require the notification of the
transaction to the CBFA, but without specifying which information has to be communicated in addition to the fact of the transfer.

Article 24 § 1 of the banking law provides that when the purchaser of the qualified holding representing 5 % of a credit institution is a credit institution located in an EEE country, the CBFA should consult the local supervisory authority.

- shareholders

- In corporate law

1. In most of the cases, the shareholders are kept informed through the annual report from the board of directors, and the auditor report on the annual accounts, but no specific information on the transfer will be communicated to the shareholders.

2. When the transfer of assets is part of a contribution (or assignment if applicable) of a company’s total assets, the contribution proposal and the special report drafted by the board of directors of the contributing company must be communicated to the shareholders.

3. Within the context of the procedure of article 523 of the BCC described above (conflict of interest within the board of directors), the auditor must analyze separately the pecuniary consequences of the concerned operation in his annual report on the annual accounts, which is communicated to the shareholders.

4. In companies listed on the stock exchange, when the procedure of article 524 of the BCC is applicable, the committee advice, the minutes of the board of directors’ decision and the opinion of the auditor are included in the board of directors’ annual report, which is communicated to the shareholders.

This article also states that the company listed on the stock exchange must indicate in its annual report the substantial limitations or the burdens imposed by its mother company during the year in question (article 524§7).

- In banking law
See hereinafter, section on Third parties.

- **employees**

- **third parties** (specify who can have an access to this information and how)

1. As seen here above, in the procedure organized by article 523 the BCC, the auditor receives information on the transfer, and must describe separately in its annual report the pecuniary consequences of the board of directors’ decision for the company.

2. In the procedure organized by article 524 of the BCC, the board of directors communicates to the auditor the committee advice and the minutes from the board decision, so that the auditor can render its opinion.

   - If yes should this information be communicated before the transfer or after it:

   - **supervisors**

This information should also be communicated before.

- **shareholders**

- In corporate law

1. Before:

   Within the context of the contribution of a company’s total assets, the contribution proposal and the special report drafted by the board of directors of the contributing company must be communicated to the shareholders at least one month prior to the general assembly.

2. After:
2.1. Within the context of the procedure of article 523 of the BCC, the auditor’s annual report on the annual accounts is communicated to the shareholders after the operation.

2.2. Within the context of the procedure of article 524 of the BCC, the committee advice, the minutes of the board of directors’ decision and the opinion of the auditor are included in the board of directors’ annual report, which is communicated to the shareholders after the operation. This annual report also contains the indications relating to the substantial limitations or the burdens imposed by the mother company.

- **In banking law**

  - **employees**

  See hereinafter, section on Third parties.

  - **third parties** (specify who can have an access to this information and how)

The information communicated to the auditor within the context of the procedures organized by article 523 and 524 of the BCC is in both situations communicated after the operation.

- Please specify any other relevant information relating to Information and transparency that has not been dealt with in the previous question and that would be useful for the study

**N/A**

f) **Sanctions**
When a transfer of assets has occurred what are the sanctions (civil liability of the manager or the supervisory authorities, nullity, criminal penalty, ...) that may be incurred:

A- under Insolvency law

Most of the sanctions relating to insolvency are not dealt with in the Insolvency law itself, but are detailed in corporate and criminal law (in which there is a special section on the infractions linked to bankruptcy). We will however discuss all sanctions linked to insolvency in the present subsection.

1. Loi sur le concordat?

1. Bankruptcy Act

1.1. Article 20(Operations decided and executed during the suspect period?): article 20 of

(Restitution of the funds transferred)

2. Company Code

2.1. Action to make good a deficiency in the company’s assets: article 530 of the BCC

In case of bankruptcy of a company, when there is not enough assets to cover the liabilities, and if it is established that they committed a serious and clear misconduct which contributed to the bankruptcy, the directors, former directors and any other effective executive may be declared personally liable, jointly or not, for part or all of the company debts corresponding to the insufficiency of assets.

This action may be exercised by the curator or by the creditors who suffered damages.

The serious and clear misconduct must be understood as a misconduct which an executive reasonably cautious and careful would not have committed, an unforgivable carelessness perceived as such by any reasonable person.
It has been ruled that the attempt to salvage a company in financial trouble through a transfer of assets, the payment of which is organized through an authorized accounting set-off, is not a serious and clear misconduct, even if the attempt fails (Gent Court of Appeal, 21 December 2000, RDC, 2001, p. 739).

2.2. Actions by the curator

The curator may exercise all the actions on behalf of the company, such as the action against the former directors for management wrongdoing (see hereinafter), unless the company renounced it, for instance by voting the directors’ discharge.

3. Criminal Code

3.1. Imprudent operations during the suspect period: article 489

The legal or factual executives of a company in a state of bankruptcy (i.e. there is suspension of payments and excessive indebtedness) may be sentenced to up to one year of imprisonment and a fine if, during the suspect period preceding the formal bankruptcy (when there is already suspension of payments), the company agreed, for the benefit of third parties and without sufficient counterpart, to commitments which are too extensive, considering the financial situation of the company.

3.2. Operations executed with the intention to delay the declaration of bankruptcy: article 489bis, 1° and 3°

The legal or factual executives of a company in a state of bankruptcy may be sentenced to up to two years of imprisonment and a fine if, with the intention to delay the declaration of bankruptcy, they:

- used ruinous means to obtain funds;

- paid or favored one creditor to the detriment of the assets available for distribution to all creditors.

3.3. Embezzlement: article 489ter, 1°
The legal or factual executives of a company in a state of bankruptcy may be sentenced to up to five years of imprisonment and a fine if, with fraudulent intent or malice, they embezzle part of the assets, to the detriment of the creditors.

There might be embezzlement when the assets are transferred without an appropriate counterpart, for instance when the conditions of the transfer are abnormally favorable to the transferee.

3.4. Fraudulent organization of insolvency: article 490bis

The article 490bis of the Criminal Code states that the person who organized fraudulently his insolvency and did not execute his obligations shall be punished with up to two years of imprisonment and a fine.

This infraction requires a specific criminal intent: the will to become insolvent, which can be deducted from all the surrounding circumstances, to impede the execution of obligations and debts existing at the time of the organization of the insolvency, and which are liquid, certain, payable and not seriously contested.

If a company becomes insolvent as a result of one or several transfers of assets, for instance done under unfavorable conditions, this action might be exercised.

B - Under Civil Law

The Paulian action, or revocatory action, is organized by article 1167 of the Civil code. It enables creditors of the companies involved in the transfer to request that the agreement be set aside if it has been made in defraud of the creditors’ rights, so that the latter may avoid the consequences of such fraud.

The following conditions must be met:

- the claim from the creditor must be certain and payable, and must exist prior to the disputed transfer of assets;
- the operation accomplished must impoverish the debtor, to the detriment of the creditor (the creditor can no longer be paid in totality);

- this impoverishment must be voluntary for the debtor, in defraud of the creditor's rights (the debtor knows that the transfer impoverishes it, or increases its insolvency);

- the other party to the disputed transfer is an accomplice to the fraud (the other party knows that the transfer impoverishes the debtor, or increases its insolvency).

The successful Paulian action only benefits the creditor that introduced the action. The transferred asset is transferred back into the debtor's assets, but only the creditor may take advantage of that fact to obtain payment of its claim.

C- under Company Law

1. **Annulment of the operation**

1.1. **Violation of the procedure organized by articles 523 and 524 of the BCC**

Articles 523 and 524 state that if the procedure established by these articles is not followed (see hereinabove), the company may request the concerned decision or operation to be declared void, providing that the other party knew or must have been aware of the violation of the procedure.

1.2. **Absence or insufficiency of counterpart to the transfer of assets**

If there is no counterpart to a transfer, there is a violation of article 1 al. 1 of the BCC (see hereinabove), and therefore the operation might be declared void, because the operation has not been done to realise the corporate purposes and has not produced any pecuniary benefit to the company.

Similarly, as discussed previously, a company cannot permanently compromise its assets, and cannot consent to excessive sacrifices in the interest of other companies belonging to the same group. According to case law, this might be
considered as contrary to public order, and a transfer of assets that would be so detrimental to the company can be declared void because it has an illicit cause which is contrary to the public order (Brussels court of appeal, 10 September 2004, op. cit.).

1.3. **Overstepping of the corporate purpose: article 526 of the BCC**

If the concerned transfer of assets decided by the directors overstepped the corporate purpose, the company won’t be bound by the decision providing that the other party to the transfer knew that the decision overstepped the corporate purpose, or could not ignore it, taking into account the surrounding circumstances.

2. **Directors’ liability**

2.1. **Management wrong-doing: article 527 of the BCC**

The directors have a general obligation of diligence and good management of the company. If they do not comply with this obligation, they might be held liable. The conclusion of a contract under conditions obviously detrimental to the company is considered as a management wrong-doing.

Therefore, when a transfer is declared void because it is too detrimental to the company belonging to a group (see hereinabove), the directors may also be rendered liable by the company.

2.2. **Violation of the BCC or of the articles of association: article 528 of the BCC**

Article 528 states that directors and members of the executive committee are jointly liable towards the company or third parties for all damages suffered as a consequence of a violation of the BCC or of the company articles of associations. If a director did not take part to the violation, he won’t be liable if he proves that he did not commit any wrong-doing, and that he denounced the infraction as soon as possible after he was aware of it.

Therefore, for instance, if the procedures organized by article 523 and 524 are not followed, the directors may be rendered liable by the company or by third parties who suffered damages resulting from the non respect of the procedure.
2.3. **Excessive financial advantage resulting from an operation decided according of the procedure of articles 523 and 524: article 529 of the BCC**

Even when the procedures set up by articles 523 and 524 of the BCC have been followed, the directors may be rendered liable by the company or third parties who suffered damages due to the fact that the concerned operation generated an excessive financial advantage to one or several directors (article 523) or to another company of the group (article 524), to the detriment of the company.

D- under Banking Law

1. **Ongoing situation:**

1.1 **Transfer of shares without informing the CBFA**

If the transfer of shares has not been notified to the CBFA, the CBFA may bring the case before the President of the commercial court (summary proceeding), who may give an injunction to the company or the person that is in breach of its obligation, to give the information that should have been given, order the cancellation of any decision taken by the general assembly, require the transferor of the shares to retransfer them (article 516 of the BCC), or suspend the right of the transferor.

1.2. **Transfer of asset or merger without informing the CBFA**

The banking law does not provide for any specific sanction, but we doubt the CBFA or all interested parties will not be in a position to claim before the competent tribunal the cancellation of the transaction.

Moreover, any transaction of transfer of asset may also engage the liability of the management, either of the transferee or of the transferor, in case the transaction has not complied with all regulation, notably the one related to healthy and cautious management of a credit institution.

2. **In a crisis situation**

When a special auditor has been appointed by the CBFA, any decision to transfer assets without the approval of this special auditor should be considered
to be void, as from the publication of the decision to appoint the special auditor in the Belgian official journal (article 57 § & al. 2.1. § 6). This nullity of the transaction may be claimed by any interested party before the tribunal of commerce (article 57 § 6)

E- under Criminal Law

The new article 5 of the Criminal Code, inserted by the 2 July 1999 Act, introduced the criminal liability of the legal entities for all infractions which are intrinsically linked to the realization of their corporate purposes or to the defense of their interests. As a consequence, companies may now be rendered criminally liable, along with the natural persons who would be identified.

Misuse of company assets: article 492bis of the Criminal Code

Proceedings may be brought against all the executives of the company who used the company assets, with fraudulent intent and for direct or indirect personal purposes, in a way they knew to be significantly detrimental to the pecuniary interests of the company and to those of its creditors or shareholders. The executives face up to five years of imprisonment and a fine.

Similarly to what has been said previously concerning the group interest, the legal theory and the case law admit that an intra-group operation may not be qualified as misuse of the company assets when there actually is a group, structured and organized in view of a common economic policy, and when the operation respects the financial capacities of the company (see for instance Cassation (Supreme court), 3 May 2000, Pas., 2000, I, 820, and J. Spreutels et alii, Droit pénal des affaires, Bruylant, 2005, p. 366 and following).

F- Other

N/A.

g) Third parties
1. Supervisory authorities

- What is the role of the supervisory authorities in case of a transfer of assets (right to be informed, have to give an authorization..)? Please distinguish the home/host supervisory authorities.

1. **Transfer of holding**

The approval of the transfer of qualified holding in a credit institution has to be given by the supervisory authority of the credit institution. If the transferee is located in another EEE country, the supervisory authority of the transferee has to be consulted.

2. **Transfer of asset or merger**

Article 30 of the banking law does not specify if it is up to the transferee or the transferor to notify the transaction. It does not specify either which supervisory jurisdiction should give its approval when the transferor and the transferee are located in two separate jurisdictions. Consequently, we are of the opinion that both supervisory authorities should give their approval.

It is, as said above, the CBFA which should give its approval or not of the transfer of asset on the basis of a healthy and cautious management of the credit institution, and if the credit institution is part of a group, the CBFA should also consider if the transfer of asset is a healthy and cautious operation at a group level.

- Are there any conditions or consequences relating to solvency ratios (implementation of Bale I et II notably)?

- Are there differences between transfers in going concern situations / transfers in crisis situations?
In case the transfer occurs in a crisis situation, the decision of the CBFA will obviously take the crisis situation into consideration. In this situation, the first goal of the CBFA is to protect the banking activities that may need a transfer of assets from one credit institution to another one.

- Please specify any relevant information relating to the supervisory authorities that has not been dealt with in the previous questions and that would be useful for the study

N/A

2. Minority shareholders

- Does a minority shareholder of the transferor have any right concerning the transfer:

  - before the transfer or the decision to transfer (eg. right of opposition, right of approval, right to be informed...),

1. In the context of the contribution of the company total assets (see hereinabove), the minority shareholders, along with all shareholders, receive the contribution proposal and the board report. They vote on the proposal, which will only be approved if ¾ of votes are positive.

2. Except in the situation discussed in the previous paragraph, there are no specific rights to be informed for the minority shareholders. If, one way or the other, they are however informed of a decision to transfer assets, and if they believe that this transfer will potentially benefit only to the majority shareholders, to the detriment of the company, the minority shareholders may bring emergency proceedings against the majority shareholder and the company for risk of abuse of majority. This action is done by the shareholders individually, and not on behalf of the company.

  - after the transfer (eg. Right to have the transfer annulled when transfer disadvantageous to transferor, request for an audit...).
1. **Liability of the executive**

1.1. **Minority action**

Pursuant to article 562 of the BCC, the minority shareholders may bring proceedings against the directors, on behalf of the company. The minority shareholders must represent at least 1% of the voting rights or represent at least 1,250,000 EUR of the company capital.

For instance, the minority shareholders may bring proceedings against the directors if they believe that the directors committed a management wrong-doing when deciding the disputed transfer of assets.

1.2. **Individual action of the shareholders**

The minority shareholders may also, as any third party, act individually against the directors to protect their own interest.

In this case, they must demonstrate:

- a damage, specific to them individually and distinct from the damage that might be suffered by all the shareholders pursuant to the impoverishment of the company;

- the wrong-doing of the directors. This might for instance be in the context of the general liability of article 1382 of the Civil Code, or a violation of the BCC;

- the link between this wrong-doing and their damage.

The minority shareholders may also act against the majority shareholders, if they believe the majority shareholders abused their position to obtain decisions which are exclusively in their interest, to the detriment of the company.

If the transfer of assets has been decided by the general assembly, the minority shareholders, as well as any other interested third party, may bring emergency proceedings to request the decision of the general assembly to be declared
void, if they can prove a misuse of powers (article 64,3°, and 178 and following of the BCC).

2. Information

The shareholders have the right to ask questions to the directors concerning the reports submitted to the general assembly, and concerning the issues at the agenda. The directors must answer these questions, unless the information requested is susceptible to cause serious damages to the company, its shareholders or its employees (article 540 of the BCC).

If this right of questioning is not respected, this might lead to the nullity of the general assembly decisions.

3. Criminal charges

The shareholders may also bring proceedings against the company executive for misuse of the company assets (see hereinabove, Sanctions – under Criminal law, article 492bis of the Criminal Code).

3. Creditors

- Do Creditors of the transferor have any rights concerning the transfer :
  - before the transfer or the decision to transfer (eg. Right of opposition, acceleration rights, or right of approval, right to be informed...),

**Emergency proceedings if they are aware of the decision to transfer (see other third parties).**

- after the transfer (right to have the transfer annulled for fraud when transfer disadvantageous to transferor and aimed at fleecing creditors, ...)
1. General liability of article 1382: they must prove wrong-doing, damages, and the link.

2. If the transfer of assets has been decided by the general assembly, the creditors, as well as any other interested third party, may bring emergency proceedings to request the decision of the general assembly to be declared void, if they can prove a misuse of powers (article 64,3°, and 178 and following of the BCC).

This action must be introduced within six months from the date on which the creditors learned the disputed decision (article 198 of the BCC).

3. The creditors may also bring proceedings against the company executive for misuse of the company assets (see hereinabove, Sanctions – under Criminal law, article 492bis of the Criminal Code).

4. On a banking point of view, the merger of the transferor of assets is enforceable against third party from the publication of the decision of the CBFA to authorize such transfer of assets (article 31 of the banking law).

4. Employees

- Do Employees of the transferor have any right concerning the transfer:

  - before the transfer or the decision to transfer (eg. Right of opposition, acceleration rights, or right of approval, right to be informed...),

In general corporate law, in the context of the cross-border mergers of limited liability companies: right of information

- after the transfer (right to have the transfer annulled when transfer disadvantageous to transferor and likely to result in redundancies...)

If the transfer of assets has been decided by the general assembly, the employees may bring emergency proceedings to request the decision of the
general assembly to be declared void, if they can prove a misuse of powers (article 64,3°, and 178 and following of the BCC).

This action must be introduced within six months from the date on which the employees learned the decision (article 198 of the BCC).

5. Deposit holders

- Regarding the directive 94/19: Who provides the deposit guarantee (the government, national bank, insurers...)? For which amount?

The system of the deposit warranty in Belgium implementing Directives 94/196/EC and 97/9/EC is the following:

- the 17 December 1998 Act set up a public institution: the “fond de protection des dépôts et instruments financiers” (the protection fund of deposit and financial instruments), and authorizes a public institution to set up a manager for one or several systems of deposit warranty.

- concerning the credit institution, article 22 and article 110 and following of the banking law, which describes the obligation to subscribe to the deposit warranty system;

- the declaration from the protection fund to indemnify the depositor who suffers the consequences of a failing institution:

The maximum amount of the deposit warranty was of 20.000 EUR for cash deposit and 20.000 EUR for the financial instrument account. These amounts have been recently (10th October 2008) increased to 100.000 EUR by a declaration of the Belgian government.

- Is there a specific regulation concerning the deposit guarantee in case of a transfer of assets in another Member State?
There is no specific regulation that governs the deposit warranty in case of transfer of assets in another member state. However, it may be assumed that in case of a transfer of assets from one credit institution to another located in another EEE country, the depositor will be covered by the deposit warranty put in place by in the country where the transferee is located.

- If a transfer of assets including deposited funds occurs, does the deposit insurer or guarantor have to be notified?

- Do Deposit holders of the transferor have any right concerning the transfer:
  - before the transfer or the decision to transfer (eg. Right of opposition or right of prior approval)
  - after the transfer (eg. right to have the transfer annulled as deposited funds not part of transferor’s assets but belong to deposit holders...)

6. Member State

- In case of transfer of assets to/from a transferee/transferor located in another Member State, has the host/home Member State any right or obligation?

7. Others
• Please specify any other relevant information relating to third parties that has not been dealt with in the previous question and that would be useful for the study

h) Private international law

• What is the applicable law in case of transfer of assets:
  
  • If the transferor located in your member state and the transferee in another member state?

  - In corporate law

  - In banking law

  • If the transferor located in another member state and the transferee in your member state?

  - In corporate law

  - In banking law

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• Please specify any other relevant information relating to Private international law that has not been dealt with in the previous question and that would be useful for the study
Part II - Evaluation of potential solutions

The purpose of this second part is to analyze potential solutions to remove obstacles to asset transferability. Different categories of solutions will be proposed.

We first would like to know which parts of your legislation would need to be amended in order to implement the solution.

Second, we would like to have your personal opinion about the feasibility of the solutions regarding the legislation in your Member State.

After that, we would like know if you consider that this solution is satisfactory and we would like you to explain why.

Lastly, we would like to know what legal obstacles still remain in your Member State.

Regarding those proposals, please consider that a transfer of assets from the subsidiary to the parent company in a crisis situation should not be considered as a transfer at arm’s length.

1. Transfers from the parent company to the subsidiary or from the subsidiary to the parent at arm’s length:

   • **Proposal n°1**

Community legislation allows:

   - any kind of transfer from the parent company to the subsidiary and
transfers from the subsidiary to the parent at arm’s length.

Possible consequences or conditions:

- Any restriction to those transfers have to be removed by Members States
- After the transfer, specific information about the transfer have to be communicated to supervisors and shareholders

Questions

i) Please provide a summary of the national measures that should be revised in order to reach this result.

ii) In order to determine the feasibility of this solution, please explain precisely whether those modifications would entail

   • frictions or even a disruption of your legal system or

   • entail substantial modifications but no major frictions with established legal principles or

   • merely minor changes.

iii) Please precise if this solution does satisfactorily take into account interests of parent companies, subsidiaries, minority shareholders, creditors, deposit holders, employees, supervisory authorities or Member States as a whole

iv) Please precise whether legal obstacles remain and how they could be removed in banking, insolvency and company law).
2. Transfers from the subsidiary to the parent company (in preferential conditions)

a) Prior and overall agreements

- **Proposal n°2:**

  Similar EU instrument:

  Art. 234 - Solvency II: Amended Proposal for a

  Proposal:

  For this proposal, please consider that an EU instrument has been adopted, which provides that a group agreement under which the parent company and some of the entities of the group can mutually commit themselves to transfer assets in a crisis situation has to be allowed by the Member States. This agreement is endorsed by each legal entity being a party to the agreement. This agreement guarantees financial support from the parent to the subsidiary and from the subsidiary to the parent. This agreement could only be voluntary because of the freedom of contracts, the limited liabilities of companies and minority shareholder rights.

  This agreement is submitted to the supervisory authorities. A group-wide view of solvency and liquidity would be a useful part of the supervisory assessment of an
intra-group transfer. This group-wide approach will be required as part of the review of the CRD on 'colleges'.

The agreement may already be submitted when the subsidiary asks for authorization to take up and pursue the business of credit institutions. This agreement may also be submitted when the subsidiary asks for authorization and will be considered as a modification to the conditions of the authorization to take up and pursue the business of credit institutions.

Possible consequences or conditions:

- The capital adequacy rules is still respected after the transfer

- The transfer does not endanger the transferor's solvency

- The amount of the transfer is to be reimbursed by the transferee to the transferor. In case of insolvency, the creditors of the transferor will be reimbursed before the creditors of the transferor up to the amount of transfers that occurred

- After each transfer, the transferor informs supervisors and the shareholders during the ordinary General Assembly meeting following the transfer

- If the good faith, competence and prudence of the transferor's management is not in question and if the transfer fulfils all the conditions specified above, then the transfer cannot be challenged under Insolvency Law.

Questions

i) Please provide a summary of the national measures that should be revised in order to reach this result.

ii) In order to determine the feasibility of this solution, please explain precisely whether those modifications would entail

  • frictions or even a disruption of your legal system or
- entail substantial modifications but no major frictions with established legal principles or

- merely minor changes.

iii) Please precise if this solution does satisfactorily take into account interests of parent companies, subsidiaries, minority shareholders, creditors, deposit holders, employees, supervisory authorities or Member States as a whole

iv) Please precise whether legal obstacles remain and how they could be removed in banking, insolvency and company law).

b) Strong guarantees covering the risk of outstanding payment

- **Proposal n°3**

Similar EU instrument:


Proposal:

For this proposal, please consider that an EU instrument has been adopted, which provides that a group agreement under which the parent company and some of the entities of the group can mutually commit themselves to transfer assets in a crisis situation has to be allowed by the Member States. This agreement is endorsed by each legal entity being a party to the agreement. This agreement
guarantees financial support from the parent to the subsidiary and from the subsidiary to the parent. This agreement could only be voluntary because of the freedom of contracts, the limited liabilities of companies and minority shareholder rights.

This agreement is submitted to the supervisory authorities. A group-wide view of solvency and liquidity would be a useful part of the supervisory assessment of an intra-group transfer. This group-wide approach will be required as part of the review of the CRD on 'colleges'.

The agreement may already be submitted when the subsidiary asks for authorization to take up and pursue the business of credit institutions. This agreement may also be submitted when the subsidiary asks for authorization and will be considered as a modification to the conditions of the authorization to take up and pursue the business of credit institutions.

Possible consequences or conditions:

- The capital adequacy rules is still respected after the transfer

- The transfer does not endanger the transferor’s solvency

- The amount of the transfer is to be reimbursed by the transferee to the transferor. In case of insolvency, the creditors of the transferor will be reimbursed before the creditors of the transferor up to the amount of transfers that occurred

- After each transfer, the transferor informs supervisors and the shareholders during the ordinary General Assembly meeting following the transfer

- If the good faith, competence and prudence of the transferor's management is not in question and if the transfer fulfils all the conditions specified above, then the transfer cannot be challenged under Insolvency Law.

Questions
i) Please provide a summary of the national measures that should be revised in order to reach this result.

ii) In order to determine the feasibility of this solution, please explain precisely whether those modifications would entail

- frictions or even a disruption of your legal system or
- entail substantial modifications but no major frictions with established legal principles or
- merely minor changes.

iii) Please precise if this solution does satisfactorily take into account interests of parent companies, subsidiaries, minority shareholders, creditors, deposit holders, employees, supervisory authorities or Member States as a whole

iv) Please precise whether legal obstacles remain and how they could be removed in banking, insolvency and company law

c) Liability of the parent company for the subsidiary’s debts

Prior question

Firstly, please indicate if in your Member State, the parent company can be held jointly and severally liable for the subsidiary’s debts and why:

- due to the specific legal form of the subsidiary where the shareholders are systematically liable for all decisions

- due to preferred shares under which the shareholder is systematically liable for some or all decisions of the company
Proposal 4

Then, for this proposal, please consider that a EU instrument has been adopted and creates an automatic liability:

- by means of a specific type of company where the shareholders are systematically liable for all decisions that are disadvantageous for the company

- or by means of a preferred shares under which the shareholder is systematically liable for some or all decisions of the company

Questions

i) Please provide a summary of the national measures that should be revised in order to reach this result.

ii) In order to determine the feasibility of this solution, please explain precisely whether those modifications would entail

   - frictions or even a disruption of your legal system or
   - entail substantial modifications but no major frictions with established legal principles or
   - merely minor changes.

iii) Please precise if this solution does satisfactorily take into account interests of parent companies, subsidiaries, minority shareholders, creditors, deposit holders, employees, supervisory authorities or Member States as a whole

iv) Please precise whether legal obstacles remain and how they could be removed in banking, insolvency and company law).
d) Improving transferability transfer through the introduction of a new concept of "banking group"

- Proposal n° 5

Similar EU instrument:

Draft of the Ninth Company Law Directive for the conduct of groups containing a public limited company as a subsidiary

"Company Law Action Plan" dated May 2003 : “framework agreement” for group companies

Under the "Company Law Action Plan" dated May 2003, the European Commission recommended specific rules on the enforcement of the group policy, for which Member States are required to draft a "frame agreement" for group companies that allows them to adopt a coordinated group company policy, as long as the interests of the companies' creditors are protected. This initiative has not been pursued. There might be merit in further investigating whether the definition of banking groups might remove obstacles in terms of banking law.

In that respect, a draft Ninth Company Law Directive on the conduct of groups containing a public limited company as a subsidiary was presented in December 1984 for consultation. The Commission did not pursue this work. The Directive was intended to provide a framework in which groups are managed on a sound basis whilst ensuring that interests affected by group operations are adequately protected. Particular reference was made to the possibility to transfer assets while protecting the interests of different parties. Under the 9th Directive project, the legal recognition of the 'group' went hand in hand with specific steps to protect minority shareholders and creditors. It must be noted that a banking group would be a contract freely entered into. As contemplated in 1984 under the 9th Directive on company law, if a banking group does not wish to submit to a group regime, it will have to respect the economic interests of the subsidiary.
Proposal:

For this proposal, please consider that the idea of “group company” has been adopted by an EU instrument.

The managers of the subsidiaries will be obliged to follow instructions even if the subsidiaries will thereby incur financial losses. These managers must therefore not be held liable vis-à-vis their own companies. This power of management is accompanied by the right to use the financial resources of the subsidiary, since the economic advantage of the group can be maximized only where there is a complete integration of the two entities.

Once the agreement is concluded, transfers of assets are allowed between the members of the group.

Possible consequences or conditions:

- The constitution of the group is submitted to the supervisory authorities.

- In case of insolvency, there is a possibility for creditors to file their claims with any of the companies of the group

- In case of Insolvency, the creditors of the transferor will be reimbursed before creditors of the transferor up to the amount of transfers that occurred and the possibility for creditors to file their claims to any of the companies concerned by the transfer

Questions

i) Please provide a summary of the national measures that should be revised in order to reach this result.
ii) In order to determine the feasibility of this solution, please explain precisely whether those modifications would entail

- frictions or even a disruption of your legal system or
- entail substantial modifications but no major frictions with established legal principles or
- merely minor changes.

iii) Please precise if this solution does satisfactorily take into account interests of parent companies, subsidiaries, minority shareholders, creditors, deposit holders, employees, supervisory authorities or Member States as a whole

iv) Please precise whether legal obstacles remain and how they could be removed in banking, insolvency and company law

e) Other solutions

- **Proposal n°6**

Supervisors of the transferor and the transferee can jointly authorize transfers of assets without any counterpart if:

- The transferee is facing difficulties but no insolvency proceeding has been opened;

- The transfer does not jeopardize the solvency of the transferor.

Possible consequences or conditions:
- Transfer cannot be challenged by the national company Law, criminal Law or insolvency law because of the special resolution regime for banks/early interventions;

- The legislation ensures the entity providing a transfer a priority right in case of insolvency proceeding of the transferee.

Please feel free to suggest other solutions here.
ANNEX A National regulations relevant in assets transfers between banks
part of a same banking group
ANNEX B Examples of transfer of assets agreements