

UNCITRAL Legislative Guide Part 4 Obligations of Directors of Enterprise Group Entities

Enterprise groups are often characterized by varying degrees of economic integration and types of organizational structure that create complex relationships between group members and may involve different levels of ownership and control. Few laws address directors' obligations in the context of enterprise groups and courts in different jurisdictions have accorded differing degrees of recognition which reflect the practical reality of the manner in which enterprise groups operate. This Model Law (ML) builds on the recommendations¹ of the first section addressing the obligations of directors of an individual company in the period approaching insolvency² and develops those recommendations in the context of enterprise groups. Some of the earlier recommendations³ are equally applicable to enterprise groups.

Additional recommendations⁴ address the situation where a director holds a managerial or executive position in more than one group member and conflicts arise in discharging the obligations owed to the different members.

The single entity principle typically requires directors to promote the interests of the company they direct, respecting its limited liability irrespective of the interests of the group as a whole. Where a company that is part of an enterprise group relies, in whole or part, on other group members for essential services⁵, addressing the financial difficulties of the individual company in isolation is likely to be difficult, if not impossible.

The requirement to act in the interests of one company is further complicated when the director holds a managerial position in other group members, making it difficult for the director to separately identify the interests of each group member. Moreover, group members may have competing economic goals which conflict with the interests of the enterprise group collectively. The short and long term interests of the group may involve accepting some detriment to the interests of individual group members. Where a group insolvency solution is pursued, it is reasonable that some safeguards would apply to protect the interests of creditors of the affected group members and other stakeholders.

A director may require a degree of flexibility to weigh the competing interests and act for the benefit of other group members or the group as a whole where that action coincides with the best interests of the directed member. To the extent that the course of action a director chooses to follow in such circumstances is reasonable and directed to avoiding insolvency or minimizing its impact on the directed group member, that director should not be liable for breach of their obligations. Where the course of action chosen gives rise to a conflict between the obligations the director owed to those different group members, that conflict should be disclosed to the affected group members. Typically, collective benefit is not a sufficient justification by itself for acts judged to be prejudicial to creditors. Moreover, directors might also be required to take into account any reasonably foreseeable detriments that might flow to their group member as a result of the course of action taken and to consider the position of their group member's unsecured creditors, particularly where that member's solvency might be affected.

¹ Recommendations 255 to 266

² https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf

³ Recommendations 257 to 266

⁴ Recommendations 269 and 270

⁵ Such as financing, accounting, legal services, supplies, markets, management direction or intellectual property