

**United Nations Commission on
International Trade Law****Fifty-second session**

Vienna, 8–26 July 2019

**Finalization and adoption of texts in the area of insolvency
law****Draft text on obligations of directors of enterprise group
companies in the period approaching insolvency****Note by the Secretariat**

1. In an annex to this note, the Secretariat transmits for finalization and adoption by the Commission at its fifty-second session, in 2019, a draft text on obligations of directors of enterprise group companies in the period approaching insolvency, as requested by Working Group V (Insolvency Law) at its fifty-fourth session (Vienna, 10–14 December 2018) (A/CN.9/966, para. 113). The draft text incorporates changes to document A/CN.9/WG.V/WP.153 agreed to be made by the Working Group at that session (A/CN.9/966, para. 112).

2. The work on this topic proceeded in the Working Group in parallel with work on a legislative text on enterprise group insolvency on the basis of drafts prepared by the Secretariat (A/CN.9/WG.V/WP.125, A/CN.9/WG.V/WP.129, A/CN.9/WG.V/WP.139 and A/CN.9/WG.V/WP.153).¹ It was undertaken recognizing that neither part three of the UNCITRAL Legislative Guide on Insolvency Law, dealing with the treatment of enterprise groups in insolvency (2010),² nor part four of that Legislative Guide, dealing with directors' obligations in the period approaching insolvency (2013),³ addresses the specific issues that might affect the obligations of directors who perform that function for one or more enterprise group members (e.g., a conflict between a director's obligations to its own company and the interests of the enterprise group to which that company belongs). At its forty-fourth session (Vienna, 16–20 December 2013), the Working Group agreed on the importance of addressing those issues and examining how part four of the Legislative Guide could be applied in the enterprise group context, noting that possible solutions needed to be considered carefully so that they did not hinder business recovery, make it difficult

¹ See the reports of the Working Group on the work of its forty-sixth, forty-seventh, forty-ninth, fifty-second and fifty-fourth sessions (A/CN.9/829, A/CN.9/835, A/CN.9/870, A/CN.9/931 and A/CN.9/966).

² Available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/leg-guide-insol-part3-ebook-e.pdf>.

³ Available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/leg-guide-insol-part4-ebook-e.pdf>.



for directors to continue to work to facilitate that recovery, or influence directors to prematurely commence insolvency proceedings (A/CN.9/798, para. 23).

3. At its forty-eighth to fiftieth sessions, in 2015–2017, respectively the Commission noted that, while the work on the topic was already well developed, it would not be referred to the Commission for finalization and approval until the work on enterprise group insolvency was sufficiently advanced in order to ensure consistency of approach between the related texts.⁴ At its fifty-first session, in 2018, the Commission noted that a draft commentary and recommendations on the obligations of directors of enterprise group companies in the period approaching insolvency had been prepared and it was likely that the text could be finalized and adopted at the same time as a draft model law and guide to enactment on enterprise group insolvency.⁵

4. The draft text contained in the annex to this note was prepared on the understanding that it would become an additional section in part four of the UNCITRAL Legislative Guide on Insolvency Law, dealing with directors' obligations in the period approaching insolvency. Cross references in the draft text reflect that approach. Parts of the draft text appearing in square brackets will be completed upon adoption by the Commission of a draft model law on enterprise group insolvency and its guide to enactment.

⁴ *Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17)*, para. 235; *ibid.*, *Seventy-first Session, Supplement No. 17 (A/71/17)*, para. 243; and *ibid.*, *Seventy-second Session, Supplement No. 17 (A/72/17)*, para. 269.

⁵ *Ibid.*, *Seventy-third Session, Supplement No. 17 (A/73/17)*, para. 132.

Annex

Draft text on obligations of directors of enterprise group companies in the period approaching insolvency

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Introduction and purpose of this section

1. This section builds upon recommendations 255 to 266 of the first section, which address the obligations of directors of an individual company in the period approaching insolvency. Focusing on the nature of the obligations and the steps that might be taken to discharge those obligations (as established in recommendations 255 and 256), this section proposes how those recommendations could be revised for application to directors¹ in the context of enterprise groups. Recommendations 257 to 266 of the first section continue to apply in the enterprise group context, however cross references in those recommendations to recommendations 255 and 256 should be read for the purposes of this additional section as references to recommendations 267 and 268 contained in this section.
2. Additional recommendations (recommendations 269 and 270) have been included in this section to address the situation where a director is appointed to, or holds a managerial or executive position in, more than one enterprise group member and a conflict arises in discharging the obligations owed to the different members.
3. This section should be read in conjunction with the first section and also in conjunction with part three of the Legislative Guide. [In addition, in 2019, UNCITRAL adopted a legislative text, the “UNCITRAL Model Law on Enterprise Group Insolvency”, which seeks to facilitate insolvency proceedings for enterprise groups. That text and its accompanying Guide to Enactment provide a framework that is intended to streamline the conduct of such proceedings and assist in the development of a group insolvency solution, including by providing a regime for cross-border recognition of group insolvency solutions and the relief that might be needed to support their development. That Model Law and its accompanying Guide to Enactment provide information that will prove useful to the directors and other office holders that are the focus of this section.]

Glossary

4. This section uses the same terminology as other parts of the Legislative Guide. The following additional terms relate specifically to this section and should be read in conjunction with the terms and explanations included in the main glossary and the glossary accompanying part three of the Legislative Guide:
 - (a) “Enterprise group member” means an enterprise that forms part of an enterprise group;
 - (b) “Group representative” means a person or body, including one appointed on an interim basis, authorized to act as a representative of a planning proceeding;
 - (c) “Group insolvency solution” means a proposal or set of proposals developed in a planning proceeding for the reorganization, sale or liquidation of some or all of the assets and operations of one or more enterprise group members, with the goal of protecting, preserving, realizing or enhancing the overall combined value of those enterprise group members;
 - (d) “Main proceeding” means an insolvency proceeding taking place in the State where the enterprise group member debtor has the centre of its main interests; and
 - (e) “Planning proceeding” means a main proceeding commenced in respect of an enterprise group member provided:
 - (i) One or more other enterprise group members are participating in that main proceeding for the purpose of developing and implementing a group insolvency solution;

¹ The question of who may be considered a director for the purposes of this section is discussed in the first section, chap. II, paras. 13–16. Although there is no universally accepted definition of the term, this section continues to refer generally to “directors” for ease of reference.

- (ii) The enterprise group member subject to the main proceeding is likely to be a necessary and integral participant in that group insolvency solution; and
- (iii) A group representative has been appointed;

Subject to the requirements of subparagraphs (i) to (iii) above, the court may recognize as a planning proceeding a proceeding that has been approved by a court with jurisdiction over a main proceeding of an enterprise group member for the purpose of developing a group insolvency solution within the meaning of [the UNCITRAL Model Law on Enterprise Group Insolvency].

I. Background

5. The first section considers the obligations of directors of individual companies in the period approaching insolvency, providing information on how those obligations are treated under current laws. While some jurisdictions have developed provisions to impose obligations on directors in the period approaching insolvency, the relative advantages and disadvantages of such regimes remain the subject of debate.² The first section underlines the need for early action to be taken when businesses face financial difficulty in order to avoid rapid decline and to facilitate rescue and reorganization. It also notes that, while there has been an appropriate refocusing of insolvency laws in many countries towards increasing the options for that early action to be taken, there has been little corresponding attention paid to creating appropriate incentives for directors to use those options.³ The first section encourages the development of appropriate incentives by identifying, for incorporation in the law relating to insolvency, the basic obligations a director of an enterprise may have in the period approaching insolvency and the steps that might be taken to discharge those obligations. Those obligations would become enforceable only when insolvency proceedings have commenced.

6. In the enterprise group context, the issue of directors' obligations in the period approaching insolvency does not appear to be clearly or widely addressed by national legislation. While the concept of enterprise groups has been considered and developed in many jurisdictions, the question of the obligations of directors of one or more members of those enterprise groups remains somewhat uncertain.

7. Part three of the Legislative Guide, which addresses the treatment of enterprise groups in insolvency, notes that enterprise groups are often characterized by varying degrees of economic integration (from highly centralized to relatively independent) and types of organizational structure (vertical or horizontal) that create complex relationships between enterprise group members and may involve different levels of ownership and control. Those factors, together with adherence to the separate entity approach and the widespread lack of any explicit acknowledgement of the enterprise group reality in the legislation applicable to individual enterprise group members, raise a number of issues for directors of enterprise group members. Adherence to the separate entity approach typically requires directors to promote the success and pursue the interests of the company they direct, respecting the limited liability of that company and ensuring that its interests are not sacrificed to those of the enterprise group. That is to be achieved irrespective of the interests of the enterprise group as a whole, the position of the director's company in the enterprise group structure, the degree of independence or integration among enterprise group members and the incidence of ownership and control. But where that company's business is part of an enterprise group and reliant, at least to some extent, on other enterprise group members for the provision of vital functions (e.g., financing, accounting, legal services, suppliers, markets, management direction and decision-making or intellectual property), addressing the financial difficulties of that company in isolation is likely to be difficult, if not, in some cases, impossible. Failing to

² See chap. I of the first section, paras. 8–10.

³ *Ibid.*, para. 6.

understand the complexity of the director's obligations may bring about the failure that it is hoped to avoid. Part three discusses in some detail the current economic reality of enterprise groups and, in the context of insolvency, the impact of treating enterprise group members as unrelated entities on resolving the financial difficulties of some enterprise group members or of the enterprise group more widely.⁴

8. The requirement to act in the interests of the directed company may be further complicated in the enterprise group context when a director of one enterprise group member performs that function or holds a managerial or executive position in one or more other enterprise group members. In such a situation, it may be difficult for the director to separately identify the interests of each of those enterprise group members and treat them in isolation. Moreover, the interests of those enterprise group members may be affected by the possibly competing economic goals or needs of other enterprise group members and those of the enterprise group collectively. The short and long-term implications for the interests of the different enterprise group members may need to be assessed, which may involve accepting, even if only in the short term, some detriment to the interests of individual enterprise group members in order to achieve a longer term benefit for the enterprise group to which those individual members belong. Where a group insolvency solution is pursued, it is reasonable that some safeguards would apply to protect the interests of creditors of the affected enterprise group members and other stakeholders.

9. Some examples of situations in which the interests of individual enterprise group members may be affected by those of the enterprise group more widely may include where one enterprise group member is a key supplier, or provides finance to another enterprise group member or acts as a guarantor for finance provided by an external lender to another enterprise group member, in an attempt to keep the enterprise group as a whole afloat, including its own business; where one enterprise group member agrees to transfer its business or assets or surrender a business opportunity to another enterprise group member or to contract with that member on terms that could not be considered commercially viable, but where to do so may ultimately benefit the business of the enterprise group member agreeing to such transfer, surrender or contract; or where an enterprise group member enters into cross-guarantees with other enterprise group members to assist the enterprise group as a whole to use its assets more effectively in financing enterprise group operations.

10. Such considerations might be relevant in the period approaching insolvency, when greater control and coordination of the enterprise group's activities may be required to maximize efficiency and design group insolvency solutions to resolve the financial difficulties of the enterprise group as a whole or for some of its parts. At that time, there may also be greater opportunity for advantage to be taken of more vulnerable and dependent enterprise group members for the benefit of other members, such as through transfers of assets, diversion of business opportunities and use of those enterprise group members to conduct more risky transactions or activities or to absorb losses and bad assets.

11. In determining the best interests of the directed enterprise group member, a director may weigh and consider various interests. These interests may also include the interests of other enterprise group members, or the enterprise group as a whole, where those interests are also consistent with the interests of the directed enterprise group member. To the extent that the course of action a director chooses to follow in such circumstances is reasonable and aimed at avoiding insolvency or minimizing its impact on the directed enterprise group member, that director should not be liable for breach of their obligations. Where having weighed the competing interests of the directed enterprise group members, the course of action chosen gives rise to a conflict between the obligations the director owed to those different enterprise group members, that conflict should be disclosed to the affected enterprise group members.

⁴ Legislative Guide, part three, chap. I.

Resolving such a conflict might require mediation or negotiation of the opposing interests.

12. While, as noted above, few laws address directors' obligations in the enterprise group context, courts in different jurisdictions have accorded differing degrees of recognition to the practical reality of the manner in which enterprise groups operate. While the focus is still upon directors exercising their powers for the benefit of their own enterprise group member or members, some jurisdictions may permit directors to have regard, for example, to the direct or derivative commercial benefits accruing to that enterprise group member from pursuing a particular course of action with other enterprise group members and to the extent to which their enterprise group member's prosperity or continued existence depends on the well-being of the enterprise group as a whole. Typically, however, 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 enterprise group member as a result of the course of action taken and to consider the position of their enterprise group member's unsecured creditors, particularly where that member's solvency might be affected. The latter consideration is of particular importance where the transaction is a guarantee or security granted for a loan to another enterprise group member, especially where the survival of that other enterprise group member is not critical to the solvency of the enterprise group member giving the guarantee or security.

13. Other jurisdictions have allowed directors of enterprise group members to act in the interests of the enterprise group as a whole when certain conditions are met, such as that the enterprise group has a structure that affords enterprise group members some influence in the overall decisions; that the enterprise group member took part in a long-term and coherent enterprise group policy; and that the directors in good faith reasonably assumed that any detriment suffered by their enterprise group member would in due course be offset by other advantages. Another approach permits a director of an enterprise group member to act in the interests of the parent provided it does not prejudice the enterprise group member's ability to pay its own creditors and the directors are so authorized, either by the founding documents of the enterprise group member or by shareholders. Under those laws, for the director to avoid liability, the enterprise group member should not be insolvent at the time the director acts, nor should it become insolvent by virtue of that action.

14. This section identifies the extent to which a director of an enterprise group member may take account of considerations beyond the enterprise group member managed by that director in the period approaching insolvency and the safeguards that should apply. Those considerations will, to a greater or lesser extent, reflect aspects of the economic reality of the enterprise group. This section proposes principles for inclusion in the law concerning the obligations of directors of enterprise group members in the period approaching insolvency. These principles may serve as a reference point and can be used by policymakers as they examine and develop appropriate legal and regulatory frameworks. While recognizing the desirability of achieving the goals of insolvency law (outlined in part one of the Legislative Guide, chap. I, paras. 1–14 and rec. 1) through early action and appropriate behaviour by directors, it is also acknowledged that there are threats and pitfalls for entrepreneurs that may result from overly draconian rules.

15. This section does not deal with the liability of directors under criminal law, company law or tort law. It focuses only on those obligations that may be included in the law relating to insolvency and become enforceable once insolvency proceedings commence.

II. Elements of the obligations of directors of enterprise group members in the period approaching insolvency

A. The nature of the obligations

16. The underlying rationale of imposing obligations on directors in the proximity of insolvency is addressed in the first section (chap. I, paras. 1–7), and remains equally applicable in the enterprise group context. The obligations of directors of an enterprise group member continue to be the same basic obligations as established in recommendation 255, but provision might be made to permit the broader context of the economic reality of the enterprise group to be taken into account in determining the steps that should be taken by a director to avoid liability for breach of those obligations. Relevant factors to be considered might include the position of the enterprise group member in the enterprise group, the degree of integration between enterprise group members (as mentioned in recommendation 217 of part three of the Legislative Guide) and the possibility of maximizing value in the enterprise group by designing a group insolvency solution to the enterprise group’s financial difficulties that includes the whole enterprise group or some of its parts. Group insolvency solutions may require a director of an enterprise group member in financial difficulty to take steps that may appear, at first glance, to be detrimental to that enterprise group member, but that will ultimately achieve a better result for it and ensure the continuation of its business and maximization of its value. Taking those same steps in circumstances where they are not likely to benefit the enterprise group member in financial difficulty may expose directors to liability for failure to discharge their obligations reasonably.

17. One consideration for directors evaluating the steps to be taken to address the enterprise group member’s financial difficulties is the impact of those steps on creditors of that enterprise group member, especially when wider group interests are to be accommodated. Recommendation 255 requires directors to have due regard to the interests of creditors, as well as of other stakeholders of the enterprise group member. The interests of creditors may be safeguarded by establishing a “no worse off” standard – i.e., that creditors will be no worse off under the steps that are taken than they would have been had those steps not been taken.

18. The first section (chap. II, para. 5) discusses the types of steps that a director might reasonably be expected to take in order to address financial difficulty, to avoid the onset of insolvency and, where it is unavoidable, to minimize its impact. Those steps would continue to be relevant in the group context and might be supplemented by additional steps, depending on the factual situation, that might effectively require some degree of mutual assistance and cooperation with other enterprise group members. Those additional steps might be affected by the position of the enterprise group member in the enterprise group and require consideration of whether more value might be preserved or created by assisting the implementation of a group insolvency solution for the enterprise group as a whole or some of its parts, than by taking steps that relate only to the individual enterprise group member. Consideration might be given to assessing the directed member’s obligations, both financial and legal, to other enterprise group members; the transactions that should (or should not) be entered into with other enterprise group members; possible sources and availability of finance (both in the period approaching insolvency and once formal proceedings commence), including its provision by the directed enterprise group member to other enterprise group members; and the impact of possible group insolvency solutions, whether limited to the directed enterprise group member or involving the enterprise group more widely, on creditors and other stakeholders of the directed enterprise group member. A director might also consider taking steps to organize informal negotiations with creditors, such as voluntary restructuring negotiations, with a view to devising a group insolvency solution for the enterprise group as a whole or some of its parts where that will benefit the directed enterprise group member.

19. Where insolvency is unavoidable and formal proceedings are to be commenced, a director might consider the court in which those proceedings should commence, particularly when there is a possibility of making a joint application with other enterprise group members and procedurally coordinating those proceedings, as discussed in part three of the Legislative Guide.⁵

Recommendations 267–268

Purpose of legislative provisions

The purpose of provisions addressing the obligations of those responsible for making decisions concerning the management of an enterprise group member that arise when insolvency is imminent or unavoidable is:

- (a) To protect the legitimate interests of creditors and other stakeholders of the enterprise group member;
- (b) To ensure that those responsible for making decisions concerning the management of an enterprise group member are informed of their roles and responsibilities in those circumstances;
- (c) To recognize the impact of the enterprise group member's position in the enterprise group upon the manner in which the enterprise group member should be managed to address its imminent or unavoidable insolvency and the obligations of those responsible for making decisions concerning the management of that enterprise group member, including in situations where they are also responsible for making decisions concerning the management of other enterprise group members; and
- (d) To permit an enterprise group member to be managed, where appropriate, in a manner that will maximize value in the enterprise group by promoting approaches to resolve insolvency for the enterprise group as a whole or for some of its parts, while taking reasonable steps to ensure that the creditors of that enterprise group member and its other stakeholders are no worse off than if that enterprise group member had not been managed so as to promote such approaches to resolution.

Paragraphs (a)–(d) should be implemented in a way that does not:

- (a) Unnecessarily adversely affect successful business reorganization of the enterprise group member, taking into account the possible benefit of maximizing the value of the enterprise group and promoting a group insolvency solution for the enterprise group as a whole or some of its parts; the position of the enterprise group member in the enterprise group; and the degree of integration between enterprise group members;
- (b) Discourage participation in the management of companies, particularly those experiencing financial difficulty; or
- (c) Prevent the exercise of reasonable business judgment or the taking of reasonable commercial risk.

Contents of legislative provisions

The obligations

267. (a) The law relating to insolvency should specify that the obligations established in recommendation 255 will apply to a person specified in accordance with recommendation 258 with respect to a company that is a member of an enterprise group;

(b) Insofar as not inconsistent with those obligations, the person referred to in subparagraph (a) may take reasonable steps to promote a group insolvency solution that addresses the insolvency of the enterprise group as a whole or some of its parts. In so doing, the person may take into account the possible benefits of maximizing the

⁵ Ibid., recs. 202–210.

value of the enterprise group as a whole, while taking reasonable steps to ensure that the creditors of the enterprise group member and its other stakeholders are no worse off than if that enterprise group member had not been managed so as to promote such a group insolvency solution.

Reasonable steps for the purposes of recommendation 267

268. For the purposes of recommendations 255 and 267, and to the extent not inconsistent with the obligations of the person referred to in recommendation 267, subparagraph (a) to the enterprise group member to which that person was appointed, reasonable steps in the enterprise group context might include, in addition to the steps outlined in recommendation 256:

1. (a) Evaluating the current financial situation of the enterprise group member and of the enterprise group to consider whether more value might be preserved or created by considering a group insolvency solution for the enterprise group as a whole or some of its parts;

(b) Considering the financial and other obligations of the enterprise group member to other enterprise group members, whether transactions should be entered into with other enterprise group members, and possible sources and availability of finance;

(c) Evaluating whether the enterprise group member's creditors and other stakeholders would be better off under a group insolvency solution for the enterprise group as a whole or some of its parts;

(d) Assisting the implementation of a group insolvency solution for the enterprise group as a whole or some of its parts;

(e) Holding and participating in informal negotiations with creditors, such as voluntary restructuring negotiations,⁶ where organized for the enterprise group as a whole or some of its parts; and

(f) Considering whether formal insolvency proceedings should be commenced.

2. Where formal insolvency proceedings are to be commenced, considering the court in which they should be commenced, whether a joint application⁷ with other relevant enterprise group members is possible or appropriate and whether proceedings should be procedurally coordinated.⁸

B. Identifying the persons who owe the obligations

20. In the enterprise group context, identifying those responsible for management decisions may be more complex than in the case of a single company. Various layers of management and influence can affect the affairs of any single enterprise group member and the manner in which it conducts its business, particularly in the vicinity of insolvency. Such influence may undermine the ability of the directors of an enterprise group member to take appropriate steps to address the financial difficulties of the directed enterprise group member or involve that member in the financial difficulties of other enterprise group members, to the detriment of the creditors of the directed enterprise group member. This may occur in numerous circumstances, such as where the boards of the two enterprise group members consist of substantially the same persons; where the majority of the board of one enterprise group member is nominated by the other enterprise group member, which is in a position of control; where one enterprise group member controls the management and financial decision-making of the enterprise group; or where one enterprise group member

⁶ Ibid., part one, chap. II, paras. 2–18.

⁷ Ibid., part three, recs. 199–201.

⁸ Ibid., recs. 202–210.

interferes in a sustained and pervasive manner in the management of another enterprise group member, typically in the situation of a parent and controlled enterprise group member.

21. There may also be some enterprise groups in which it is difficult to identify the precise boundaries between enterprise group members because management responsibilities across different boards are blurred. In addition, relevant executives and decision makers may be employed by enterprise group members several steps removed from the enterprise group member in question and the separate identity and liability of that enterprise group member may be generally disregarded in the daily business of the enterprise group. In such situations, serious issues may arise as to the obligations of such persons with respect both to the actual business conducted by the enterprise group member in question and to the enterprise group member by which they are employed.

22. Persons that might be considered to be a director in the enterprise group context could include another enterprise group member or the director of another enterprise group member, including a shadow director⁹ of that other enterprise group member. While some laws do not permit an enterprise group member to be formally appointed as a director of another enterprise group member, such an enterprise group member might nevertheless be regarded as a shadow director of that other member when it exercises influence over or directs its activities.

23. The first section (chap. II, paras. 13 to 16) discusses the persons who owe the obligations discussed above. Recommendation 258 adopts a broad formulation, providing that it should include any person formally appointed as a director or exercising factual control and performing the functions of a director. Paragraph 15 of the commentary to that recommendation notes the types of function that may be expected to be performed by such a person. Those considerations would also be applicable in the enterprise group context discussed in this section.

C. Conflict of obligations

24. It may often be the case in enterprise groups that a director performs that function or holds a management or executive position in more than one enterprise group member, whether as a result of the ownership and control structure of the enterprise group, the alliances between enterprise group members, family ties across the enterprise group or some other aspect of the manner in which the business or businesses of the enterprise group are organized.¹⁰ Whatever the reason, a director who sits on the boards of, or has managerial responsibility for, a number of different enterprise group members may face, in the period approaching insolvency, a potential conflict between the obligations owed to those different enterprise group members as they attempt to identify the course of action most likely to preserve value and provide the best solution to the financial difficulties of each enterprise group member. The nature and complexity of the conflict may relate to the position of the directed enterprise group members in the enterprise group hierarchy, the related degree of integration between enterprise group members, and the incidence of control and ownership. Where a director sits on the boards of the parent and controlled enterprise group members, for example, that director needs to be able to demonstrate that any transaction involving the parent took into account, and was fair and reasonable to, the controlled enterprise group member.

25. In addition, the interests of the directed enterprise group members may be closely intertwined with the enterprise group more widely, requiring the economic reality of the enterprise group as a whole to be considered. In such circumstances, steps that may be regarded as detrimental to a company operating as a stand-alone entity may be reasonable when considered in that broader context. The business of a

⁹ The term is explained in the first section, chap. II, footnote 11 to para. 13.

¹⁰ Legislative Guide, part three, chap. I, paras. 6–15.

subsidiary, for example, may be generally dependent on the business of the enterprise group more widely and it may be appropriate for that subsidiary to provide funding in the short term for other enterprise group members in order to keep that wider business operating and ultimately save the business of the subsidiary itself.

26. Directors facing such a conflict might be expected to act reasonably and take adequate and appropriate steps to address the situation. That might require a director, depending on the factual situation, to identify the nature and extent of the conflict in accordance with applicable law and determine how it might be addressed. It may be sufficient in some circumstances for the director to disclose relevant information regarding the conflict, including its nature and extent, to the affected boards of directors, while in other circumstances wider disclosure to creditors and other stakeholders, including the boards of directors of other enterprise group members, may be reasonable. Such disclosure may be sufficient to support the director's continuing integrity and any lack of the impartiality or independence required can be assessed against the circumstances disclosed.

27. It may be appropriate in some circumstances for the director to refrain from participating in any decisions relating to the conflict that are to be taken by the affected boards or attending meetings at which related issues are to be discussed and for this to be recorded as a deliberate approach, as opposed to an act of omission. Appointment of additional or substitute board members may be possible in some cases and, if the conflict cannot be resolved, the director may consider, as a last resort, resigning from one or other of the affected boards. That might potentially include resignation from the board of an insolvent or a solvent enterprise group member. While that option of resignation may free the director of the dilemma, it simultaneously neglects the larger problem and may exacerbate the situation, especially in the period approaching insolvency, if it leaves the affected enterprise group member or members without the expertise necessary to address their financial difficulties. As noted in the first section (chap. II, para. 27), resignation from the board will not render a director immune from liability, as under some laws they may leave themselves open to the suggestion that the resignation was connected to the insolvency or that they had failed to take reasonable steps to minimize losses to creditors in the face of impending insolvency.

28. Good corporate governance that supports analysis of the situations of the respective enterprise group members giving rise to the conflict and records the reasons for the action taken may be critical to the director in discharging obligations with respect to the conflict. A policy on corporate governance does not, however, replace or limit obligations owed by directors to the enterprise group member or members. It offers indicia as to what steps are considered reasonable to manage the conflict. Different corporate governance policies and standards between the enterprise group members can also lead to conflicting solutions and outcomes, which need to be carefully reviewed and assessed by directors.

Recommendations 269–270

Purpose of legislative provisions

The purpose of provisions on conflict of obligations is to address the situation where a director of one enterprise group member holds that position or a management or executive position in another or other enterprise group members, whether the parent or a controlled enterprise group member. That situation may give rise, in the period approaching insolvency, to a conflict between the obligations owed to the different enterprise group members, which may have an impact upon the steps to be taken to discharge those obligations.

Contents of legislative provisions*Conflict of obligations*

269. The law relating to insolvency should address the situation where, from the point of time referred to in recommendation 257, a director of an enterprise group member who holds that position or a management or executive position in another or in other enterprise group members has a conflict between the obligations owed in relation to the creditors and other stakeholders of those different enterprise group members.

Reasonable steps to manage a conflict of obligations

270. The insolvency law may specify that a director faced with a conflict of obligations should take reasonable steps to manage such conflict. Reasonable steps may include:

(a) Obtaining advice to establish the nature and extent of the different obligations;

(b) Identifying the persons to whom the conflict of obligations must be disclosed and disclosing relevant information, including, in particular, the nature and extent of the conflict;

(c) Identifying when the director should not (i) participate in any decision by the boards of directors of any of the relevant enterprise group members on the matters giving rise to a conflict of obligations, or (ii) be present at any board meeting at which such matters are to be considered;

(d) Seeking the appointment of an additional director when the conflict of obligations cannot be reconciled; and

(e) As a last resort, where there is no alternative course of action available, resigning from the relevant board(s) of directors.