

Between Enabling Law and Protecting Law – Some Remarks on the Method of Regulating the Law of Groups of Companies in Polish Commercial Companies Code

Andrzej Herbet

Ph.D., DSc, Associate Professor, Department of Commercial Law, Faculty of Law, Canon Law and Administration, Catholic University of Lublin, correspondence address: Al. Raclawickie 14, 20–950 Lublin, e-mail: andrzej.herbet@kul.pl

 <https://orcid.org/0000-0002-5835-7438>

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Abstract: Although the groups of companies have been an indispensable part of the modern economy for several decades, they still continue to attract unwavering attention of both practice and doctrine of corporate law. The numerous legal challenges posed by the functioning of multi-level structures, based on diverse types of dominance and dependance relations adopt different regulatory strategies manifest a universal appeal. Yet, the national legislators adopt different regulatory strategies, aimed at securing the interests of various stakeholders, including minority shareholders, dependent companies and their creditors. As a result, the contemporary discourse entails two concepts – one emphasizing the risks and responsibilities associated with it (*protecting law*) and the other one, supporting the creation of groups, as well as instruments for their effective management (*enabling law*). The aim of the article is to verify the extent to which these concepts are addressed by the most recent Polish group law regulations, viewed in a comparative context outlined by selected European jurisdictions.

1. Introduction

For several decades the topic of groups of companies (French: *groupes de sociétés*)¹ has attracted the attention of the EU legislature, national legislators and, above all, the practice and doctrine of corporate law.² Given the current degree of economic concentration, boosted by the liberal rules of capital movements, such ever-increasing interest is hardly a surprise.³ In virtually all developed countries, the majority of legal entities, which appear on the market as juridically independent, are entangled in various types of relations of dominance and dependence. If these relations correspond to certain quantifiers of the intensity and durability of the influence exerted by the dominant organization (i.e., the so-called corporate power, German: *Konzernherrschaft* or *Konzernleitung*), the entities included in such a specific “conglomerate” can, from a functional and economic standpoint, be treated as a single economic unit.⁴

¹ In some jurisdictions, the terms “holding” or “concern” (German: *Konzern*) are interchangeable, at least in principle. This differentiation is primarily terminological in nature and is the result of the different legal traditions of individual countries. See: “Corporate Group Law for Europe: Forum Europaeum Corporate Group Law,” *European Business Organization Law Review* 1, no. 2 (2000): 185, <https://doi.org/10.1017/S156675290000148>.

² See e.g.: Michael Bode, *Le groupe international de sociétés. Le système de conflit de lois en droit compare français et allemande* (Bern–Bruxelles–Frankfurt am Main–New York–Oxford–Wien: Peter Lang, 2010); Guy Keutgen, *Le droit des groupes de sociétés dans la CEE* (Bruxelles–Louvain: Bruylant, 1973); Frédéric Magnus, *Les groupes de sociétés et la protection des intérêts catégoriels. Aspects juridiques* (Bruxelles: Larcier, 2011). In German-language literature, see in particular the two special issues of *Zeitschrift für Unternehmens- und Gesellschaftsrecht* (ZGR): *Corporate Governance im grenzüberschreitenden Konzern*, eds. Peter Hommelhoff, Marcus Lutter, and Christoph Teichmann, ZGR-Sonderheft 20 (Berlin–Boston: De Gruyter, 2017); *Vom Konzern zum Einheitsunternehmen. Aktuelle Entwicklungsperspektiven des deutschen und europäischen Konzernrechts*, ZGR-Sonderheft 22, (Berlin–Boston: De Gruyter, 2020).

³ See: Christoph Teichmann, “Europäisches Konzernrecht: Vom Schutzrecht zum Enabling Law,” *Die Aktiengesellschaft*, no. 6 (2013): 184; as well as: “Corporate Group Law for Europe: Forum Europaeum Corporate Group Law,” 168.

⁴ The phenomenon of depreciation of the separate legal personality of group companies and the “collective” perception of the group as a single economic entity has intensified in recent years, especially in the context of European state aid and competition law. See, e.g., CJEU Judgment of 10 September 2009, *Akzo Nobel and Others v. Commission*, Case C-97/07. With regard to the definition of a group in European legal science, see such classical titles as: Ludwig Raiser, *Die Konzernbildung als Gegenstand rechts- und wirtschaftlicher Untersuchung*

Of course, the functioning of a company within a group comes with specific risks, which are extremely difficult to eliminate upon the general instruments of company law. These risks are usually defined from the perspective of typical “group outsiders” (minority shareholders and creditors of subsidiaries⁵), especially when it comes to “sacrificing” the interests of a single company in the name of the interests of the group, the rules for intra-group transactions and application of the *arm’s length rule*. The legally permissible instruments that may ensure effective management of the group and the rules for valuing the interests of the group and specific companies by the members of its bodies (going beyond the typical so-called *agency problems*) raise numerous concerns. These are further exacerbated by the lack of transparency regarding the group’s existence, composition, strategy and operating principles. On the other hand, groups of companies enjoy undisputable benefits, e.g., in terms of their access to technology and capital, financial liquidity,⁶ the option to outsource certain costs, etc. It is also worth mentioning special purpose vehicles (SPVs) created by the parent company for particular projects or the so-called service companies, whose sole task is to perform specific activities for the benefit of other group entities.

In this context, one may well wonder whether the problems related to the functioning of this complex economic and juridical phenomenon should be resolved based exclusively on general legal principles or a separate legal regulation. Nonetheless, the latter scenario requires determining the *ratio* and scope of the desired legislation. In today’s legal discourse, models of regulating the law of groups of companies entail two concepts – one emphasizing the risks and responsibilities associated with it (*protecting law*) and the other supporting the creation of groups, as well as instruments for their effective management (*enabling law*). The article aims to verify the extent to which these concepts are addressed by the most recent Polish

(Berlin: 1964), 51 ff; Marcus Lutter, *The Law of Groups of Companies in Europe. A Challenge for Jurisprudence* (Deventer: 1988), 11 ff.

⁵ Such an approach seems simplistic: operating in a holding company may also entail additional risks for minority shareholders and creditors of the parent company (e.g. due to the transfer of profit to a subsidiary).

⁶ See: José Engrácia Antunes, *Liability of Corporate Groups: Autonomy and Control in Parent-Subsidiary Relationships* (Florence: European University Institute, 1991), 96.

group law regulations. For this purpose, the following sections examine the methods of regulating groups of companies in selected European jurisdictions and suggested by expert bodies. This comparative overview is followed by a substantive analysis of the Polish legal system, which is assessed against this backdrop and with respect to the protecting-enabling law relation.

2. Groups of Companies and Their Regulation from a Comparative Perspective

There is no uniform approach to the regulation of group law among European legal systems. In short, there are three basic models of regulatory approach towards the problems related to the functioning of groups of companies; accordingly, these promote (a) general instruments of company law or civil law⁷; (b) specific provisions of group law, or (c) specific provisions of law relating directly to particular areas of law (competition, insolvency, tax, environmental law, etc.).⁸ Jurisdictions with specific group law arrangements (b) are also not a uniform category. They differ in the scope of regulations and the method of approach: from those that regulate corporate law separately and in detail (Germany, Portugal, Hungary, Slovenia, Croatia, Brazil, Turkey), to those that only introduce selected solutions supplementing general company law regulations (Italy, the Czech Republic since 2014), to those in which such solutions are the result of case law (France).

German law is a classic example of comprehensive regulation of group company law or, to be precise, the law of affiliated enterprises (German: *Recht der verbundenen Unternehmen*). The system of relevant regulations,

⁷ This approach has been adopted in France, as well as in *common law legal systems*, in which less attention is paid to the internal relations between shareholders, and the emphasis is put primarily on the impact of a company's possible insolvency on creditors – and thus, *de facto*, also an issue that is not specific to the law of groups of companies.

⁸ See: José Engrácia Antunes et al., eds., *Report of the Reflection Group on the Future of EU Company Law*, April 5, 2011, 59; and José Miguel Embid Irujo, *Trends and Realities in the Law of Corporate Groups*, 71, accessed September 29, 2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=699141; Klaus J. Hopt, *Groups of Companies. A Comparative Study on the Economics, Law and Regulation of Corporate Groups*, ECGI Law Working Paper No. 286/2015, accessed September 29, 2023, <http://ssrn.com/abstract=2560935>. The latter model, which is found in such countries as Denmark, Sweden and Finland and in principle in EU law, is commonly referred to as the “piecemeal approach.”

not only the eldest but also the most extensive in the world, was first introduced by the German Act on Joint Stock Companies⁹ and subsequently expanded in the case law of the German *Bundesgerichtshof* and the doctrine on limited liability companies.¹⁰ The scope of application of these internally differentiated norms is determined by the existence of the so-called group power (*German: einheitliche Leitung*), presumed to exist in the case of dominance and dependence relationships between entities. It comprises extremely diverse structures, including both the so-called contractual and *de facto* groups.¹¹ One characteristic feature of the former type is a binding instruction, with an extremely narrow margin of self-assessment and the possibility of refusal to execute it by the members of the subsidiary's governing bodies, and an equivalent in the form of an obligation to compensate the subsidiary or its minority shareholders.¹² On the other hand, with respect to *de facto* groups, the primary protection methods involve reporting obligations, audits,¹³ and the liability of the parent company and its officers, or the officers of the subsidiary.¹⁴ Despite comprehensive regulations, the German model of group law is criticized by both German and foreign scholars for being extensively formalistic and inflexible.¹⁵

France exemplifies a legal system in which the lack of statutory group law solutions is creatively complemented by case law. Its core is the concept of flexibly balancing the interests of individual group companies in accordance with the so-called *Rozenblum doctrine*, formulated in the jurisprudence

⁹ See: Articles 15–22 and 291–328 of the German Stock Act (*German: Aktiengesetz*) of 6 September 1965 (BGBl. I, S. 1089, as amended); hereinafter: AktG, especially par. 18.

¹⁰ See: S. Mock, “National Report on Germany,” in *Groups of Companies*, eds. R. Manóvil, J. E. Antunes, P. H. Conac, D. Corapi, D. Benincasa, R. Dotevall, M. Naharro, M. Fujita, F. Gevurtz, F. Heindler, F. Kuyven, M. Lemonnier, A. Moreira, M. Marques, M. Mock, G. Nilsson, M. Olaerts, T. Papadopoulos, V. Pönkä, S. Tang, N. Tepeš, H. Markovinović, P. Miladin, V. Tountopoulos, M. Uzal, R. Valsan, E. Wymeersch, R. Zagradišnik (Hague: Springer, 2020), 303; Volker Emmerich, in *Aktien- und GmbH-Konzernrecht*, eds. Volker Emmerich and Mathias Habersack (München: C.H. Beck, 2022), 24–5.

¹¹ See: Emmerich and Habersack, eds., *Aktien- und GmbH-Konzernrecht*, 54.

¹² See: Article 304, 35 and 308 AktG.

¹³ See: Article 312 and 314 AktG.

¹⁴ See: V. Emmerich, *Aktien*, p. 441.

¹⁵ See: Antunes et al., *Report of the Reflection Group on the Future of UE Company Law*, 60; Irujo, *Trends and Realities in the Law of Corporate Groups*, 67.

of French courts – *incidentally*, in criminal cases.¹⁶ This concept legitimizes the pursuit of the entire group's interests by individual company managers, provided that certain conditions are met, namely: (a) the existence of a permanent organizational link between the companies expressed, e.g., in coordination of their activities by the parent company; (b) the implementation of a common, long-term business policy (strategy) aimed at balancing the interests of the individual group companies; and (c) ensuring a long-term balance between the benefits and losses that result from group membership.¹⁷ In its original form, however, it is not linked to any specific instruments for managing the group or exercising dominant influence over subsidiaries.

An interesting example of a transition from a comprehensive model of corporate law based on the German model to a more flexible limited-regulation model referring to the concept of group interests and the *Rozenblum* doctrine¹⁸ is Czech law.¹⁹ Currently, the concept of a group of companies introduced therein covers only *de facto* groups²⁰ under the unified management of a parent company. Its essence is coordinating or managing key activity areas to pursue the interests of the group within the framework of

¹⁶ See the precedential judgment of the Chambre Criminelle de Cour de Cassation of 4 February 1985; Cass. Crim. JCP/E 1985, II, 14614. For more information, see, e.g., Pierre-Henri Conac, “Director’s Duties in Groups of Companies – Legalizing the Interest of the Group at the European Level,” *European Company and Financial Law Review*, no. 2 (2013): 200.

¹⁷ See: Irujo, *Trends and Realities in the Law of Corporate Groups*, 88; Tomasz Staranowicz, “Podstawowe problemy regulacji koncernu w prawie spółek [Basic Problems of Concern Regulation in Company Law],” *Kwartalnik Prawa Prywatnego* 18, no. 2 (2009): 396.

¹⁸ See: Conac, “Director’s Duties in Groups of Companies,” 208; Paweł Błaszczuk, “Introduction,” in *Kodeks spółek handlowych. Komentarz do zmian (tzw. prawo holdingowe)* [*Code of Commercial Companies. Commentary to the amendments (so-called holding law)*], eds. Andrzej Szumański, Radosław L. Kwaśnicki, and Filip Ostrowski (Warsaw: C.H. Beck, 2022), side note no. 34.

¹⁹ See: the Czech Act on Commercial Companies and Cooperatives (cz. *Zákon o obchodních společnostech a družstvech*) of 22 March 2012, 90/2012 Coll, also known as the Act on Commercial Corporations (cz. *Zákon o obchodních korporacích*), hereinafter: ZOK.

²⁰ Group agreements, such as agreements on the management of a subsidiary or on the transfer of profit by a subsidiary, which were concluded under the previous regulation of the group law, in force until the end of 2013, expired by operation of law six months after the entry into force of the new regulation.

a single policy.²¹ Following the normativization of this concept, (a) each entity of a group may invoke the interest of the group; (b) the parent entity has the right to issue binding instructions to its subsidiaries, provided that they are consistent with the interests of the parent entity or other entity forming the group; and (c) claiming action in the interest of the group exempts the members of corporate bodies from liability, provided that they act with due diligence and that the further rules of the *Rozenblum* doctrine are met.²²

A similar though more limited variant of such a regulation was implemented in the Italian legal system following the 2004 reform. Specific rules introduced at that time are contained in as few as 8 articles of the Italian Civil Code,²³ which concern: parent company liability; the obligation to justify decisions taken in the interest of the group; group structure transparency; the right of exit of the subsidiaries' minority shareholders; the presumptions related to the application of these provisions and the subordination of claims by group members against other claims in the event of subsidiaries' bankruptcy. Interestingly, Italian law does not explicitly define the group of companies itself, and the scope of the regulation is defined by the concept of a subsidiary subject to management or coordination by another legal person (Italian: *direzione e coordinamento*) or included in the consolidated financial statements.²⁴ A key element of the Italian regulation is the general formula of the parent company's liability towards the shareholders and creditors of its subsidiary for improper management and acting in its own or someone else's interest, which refers to the *Rozenblum* doctrine and the so-called theory of compensatory benefits.²⁵ This liability is, howev-

²¹ See: Błaszczuk, "Introduction," side note no. 34.

²² According to Article 81.2 of the ZOK, governing body members may be exempt from liability if they demonstrate that they could reasonably expect to be compensated for the damage caused to the subsidiary in the interests of the parent company or another member of the group within a reasonable time. This does not apply if the company becomes insolvent. See: Błaszczuk, "Introduction," side note no. 35.

²³ See: Italian Civil Code (Italian: *Codice civile*) of 16 March 1942, RD n. 262, as amended; hereinafter: CC.

²⁴ An interesting solution in Italian law is also the presumption of management or coordination by another entity resulting from specific provisions of the articles of association. See: Błaszczuk, "Introduction," side note no. 30.

²⁵ See: Article 2497 of the CC.

er, excluded if the damage did not arise or was fully compensated due to the actions of the parent company.²⁶

3. Groups of Companies and Their Regulation from the European Expert Bodies' Perspective

While analyzing the evolution of group law regulations, the strategic documents of the EU bodies (mainly the European Commission) and expert groups provide an interesting perspective, drawing extensively on the experience of individual Member States. Following the collapse of the Ninth Directive draft, which did not even go beyond the stage of an unofficial document,²⁷ the first substantial project was the report of the so-called *Forum Europaeum Corporate Group Law*. Drafted in 2000, the document was the first to outline a proposal for limited regulation of group law based on the concept of group interest. The proposals presented at that time were further referenced by the 2002 report of the so-called *Winter Group*²⁸ and the 2003 *European Action Plan*.²⁹ The documents emphasized the need to ensure transparency in group relations and the uniform management of a parent company over its subsidiaries, subordinated to the interest of the entire group, yet taking into account the interests of creditors and minority shareholders. The 2011 position of the so-called *Reflection Group* was similar, as it underlined the right and obligation of the parent entity to manage

²⁶ See: Magdalena Zmysłowska, "Odpowiedzialność przebijająca w prawie amerykańskim i włoskim [Piercing Liability in American and Italian Law]," *Prawo w działaniu. Sprawy cywilne* 32, (2018): 53 ff.; Piotr Moskała, "Konstrukcja odpowiedzialności cywilnoprawnej we włoskim prawie spółek [The Construction of Civil Liability in Italian Company Law]," *Studia Prawa Prywatnego*, no. 1 (2016): 30 ff.

²⁷ Proposal for the Ninth Directive Based on Article 54(3)(g) of the EEC Treaty on Links Between Undertakings and, in particular, on Groups, accessed September 29, 2023, <https://op.europa.eu/en/publication-detail/-/publication/7a0f7266-a05a-43ee-844c-45798999f3ca/language-en>.

²⁸ See: Jaap Winter, in Jaap Winter, Jan Schans Christensen, José M. Garrido Garcia, Klaus J. Hopt, Jonathan Rickford, Guido Rossi, and Joelle Simon, *Report of the High-Level Group of Company Law Experts on Issues Related to Takeover Bids in the European Union*, eds. G. Ferrarini, K. J. Hopt, J. Winter, E. Wymeersch (Oxford: Oxford University Press, 2002), 97.

²⁹ See: EC Communication of 21 May 2003, *Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward*. Antunes et al., *Report of the Reflection Group on the Future of UE Company Law*, 60; Irujo, *Trends and Realities in the Law of Corporate Groups*, 60.

the group in accordance with its interests, proposed a normative distinction of the concept of group interest and indicated that its advantage would be to increase the legal security of members of the group participants' bodies.³⁰ This direction was further strongly confirmed in a 2014 report by the *Informal Company Law Expert Group*³¹ (which, however, perceived the interest of the group as the sum of the isolated interests of the group's members) and the 2015 proposal by the *Forum Europaeum on Company Groups*³² (though the latter nuanced both the permissible mechanisms of management and responsibility related to group relations depending on the degree of integration and the role of a given company in the group).

The most recent, and at the same time the most extensive and concrete proposal for the regulation of group law at the EU level, is the draft of the *European Model Company Act* of 2017. Although the EMCA brings to the forefront the right of the parent company to issue binding instructions to the subsidiary,³³ with reference to the *Rozenblum doctrine*, it also implements the concept of the interest of the group of companies, which provides the basis for excluding the liability of subsidiary managers, regardless of whether they acted to carry out such instruction or not.³⁴ Moreover,

³⁰ Ibid. In this respect, see also: Błaszczuk, "Introduction," side note no. 47.

³¹ See: John Armour et al., *Report on the Recognition of the Interest of the Group*, October 30, 2016. In this case, the proposed solutions are also differentiated depending on whether we are dealing with a sole proprietorship or the participation of third parties. Of note is also the proposal to publish the so-called whitelist of typical and permitted intra-group transactions.

³² See: Pierre-Henri Conac et al., "Proposal to Facilitate the Management of Cross-Border Company Groups in Europe (March 30, 2015)," *European Company and Financial Law Review (ECFR)*, no. 12 (2015): 299 (*Transformacje Prawa Prywatnego*, no. 2 (2015): 67 et seq). For a broader discussion in this regard, see also: Krzysztof Oplustil, "Koncepcje interesu grupy spółek w pracach europejskich gremiów eksperckich (EMCA, FECG, ICLEG) [Concepts of the interest of the group of companies in the works of the European expert bodies (EMCA, FECG, ICLEG)]," *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 81, no. 1 (2019): 13.

³³ See, in particular, sections 15.09 and 16 of the EMCA draft. Notably, the instruction is not binding on directors appointed by entities other than the parent company and persons performing special functions (e.g., so-called independent directors).

³⁴ See, in particular, section 15.16 of the EMCA draft. Apart from acting in the interests of the group, an officer must prove the following to be exempt from liability: (a) the officer acted in good faith and based on information that he had access to prior to making the decision; (b) the officer could have assumed that the damage or other adverse effect would be offset within a reasonable time; and (c) the action did not pose a threat to the continued

the EMCA provides for the right of compulsory buyout of shares held by subsidiaries' minority shareholders and the correlated right of the minority to demand the repurchase of those shares, as well as the liability of the parent company for damage to subsidiaries' creditors.³⁵

4. Groups of Companies and Their Regulation in the Polish Commercial Companies Code

Poland is also a jurisdiction where the complex phenomenon of groups of companies has been normalized in law. Following an unsuccessful attempt to regulate this issue in 2010³⁶ and over a decade of legislative stagnation, the Act of 9 February 2022 amending the Commercial Companies Code and certain other acts³⁷ came into force on 13 October 2022. Article 4(1) (51) of the CCC provided a legal definition of a group of companies and a new Section IV of Title I of the CCC (Articles 211–2115) introduced a limited regulation of the group law. The explanatory memorandum to the 2022 amending Act and the first original commentaries emphasized that the group law regulations should be primarily perceived *as enabling law* (given the explicit recognition of the binding instructions as the only mechanism for influencing subsidiaries³⁸) and pointed to intellectual inspiration drawn from the *Rozenblum* doctrine. At the same time, the new legislation established solutions aimed at balancing the risks borne by the “corporate outsiders,” associated with facilitations in group management. Those include specific, but relatively narrowly defined, rules on parent company liability towards the subsidiary, its shareholders and, in the event of the subsidiary's insolvency, also its creditors.³⁹ Contrasting with the above assumptions are regulations providing not only for a special corporate exit right

existence of the subsidiary. In the case of a single-member company, the only applicable condition is (c). For more information, see: Oplustil, “Koncepcje interesu grupy spółek w pracach europejskich gremiów eksperckich,” 10; Błaszczuk, “Introduction,” side note no. 52.

³⁵ Ibid., side note no. 47.

³⁶ See the draft act amending the Commercial Companies Code and the Act on the National Court Register, version of 25 June 2010, prepared by the Civil Law Codification Commission, and the draft act on reducing administrative barriers prepared under the auspices of the Ministry of Economy, version of 8 March 2010.

³⁷ Journal of Laws of 2022, item 807.

³⁸ See: Articles 21²–21⁵ of the CCC.

³⁹ See: Articles 21¹²–21¹⁴ of the CCC.

(sell-out) of minority shareholders but also for the compulsory acquisition of their shares by the parent company (squeeze-out).⁴⁰ Although it is somewhat inspired by the reports of *Forum Europaeum* and ICLEG, the EMCA project, French jurisprudence and Italian and Czech law, the new Polish law on groups of companies does not have a direct comparative prototype, but is rather the result of an original – and, occasionally, quite surprising – fusion of structures from different legal systems.

According to the above legal definition, a group of companies is

a parent company and a company or subsidiaries which are capital companies, guided by a common strategy in accordance with the resolution on participation in a group of companies in order to pursue a common interest (the interest of a group of companies), justifying the exercise of unified management by the parent company over the subsidiary or subsidiaries (Article 4(1.1)(51) of the CCC).

The three main principles of the new regulation are certainly positive. They include (a) a distinction between the existing relationship between companies belonging to a group of companies and the “ordinary” relationship of dominance and dependence (Article 4(1)(51) of the CCC; Article 4(1)(4) of the CCC); (b) codifying the concept of “group interest”; and (c) partial differentiation of the principles of uniform group management and the parent company’s liability depending on the degree of its integration (Article 214, Articles 1–3 of the CCC).⁴¹ Whether these general assumptions have been implemented optimally is another issue entirely. At the same time, the concept adopted by the Polish legislator is characterized by at least three elements which require a thorough analysis (going beyond the scope of this article) and which raise doubts already at face value, including at the level of general assumptions.

First, the explanatory memorandum to the 2022 amending Act refers to the establishment of *de facto* concerns, and the wording of Article 4(1)

⁴⁰ See: Articles 21¹⁰–21¹¹ of the CCC.

⁴¹ These rules are different for single-member subsidiaries and those in which other shareholders participate (in principle, this should refer to non-group shareholders). A classic example of this differentiation is the limited possibility of refusing to carry out a binding instruction: in the case of a single-member company, refusal is only possible if it would lead to insolvency.

(51) of the CCC refers directly to the relationship of dominance and dependence existing between group participants. However, an *opt-in* model has been adopted for the reference scope of the new regulations. In the CCC, a group of companies is *quasi-contractual*,⁴² and the application of Article 211 et seq. depends on the adoption of a resolution on this matter by each company joining the group.⁴³ A resolution of the management board is generally sufficient in the case of parent companies; for subsidiaries, a resolution of the shareholders' meeting or the general meeting of shareholders, adopted by a majority of at least 3/4 of votes, is necessary (Article 211(2) of the CCC). In addition, each group participant is obliged to disclose this in the Register of Entrepreneurs of the National Court Register (Article 211(3) of the CCC), and most of the regulations on facilitating group management and related liability do not apply until such disclosure appears.⁴⁴ Therefore, it is necessary to distinguish between *de facto* (in the broader, previously accepted sense) and *de jure* groups (i.e., formalized groups of companies within the meaning of the new provisions of the Commercial Companies Code). This raises questions about the compatibility of the new regulation (based on the indicated formal criteria) and the essence of a group of companies (as a phenomenon that is a product of economic life defined by a specific set of factual relations) and, consequently, on whether it can be a panacea for the risks associated with the abuse of the so-called dominant influence.⁴⁵ A separate issue is whether businesses will deem the balance of positive and negative aspects of a formalized group of companies to be favorable enough to be subject to this regime. The initial results are far from encouraging: not a single formalized group of companies was entered into the Register of Entrepreneurs of the National Court Register during

⁴² Adam Opalski, "Nowe polskie prawo grup spółek – krytyka założeń konstrukcyjnych (cz. I) [New Polish Law on Groups of Companies – Critique of Construction Assumptions (part I)]," *Przegląd Prawa Handlowego*, no. 8 (2023): 5.

⁴³ Further, the resolution must refer to a common strategy which, therefore, must be a formally adopted document.

⁴⁴ The exception is parent companies with their registered offices located abroad, in which case the subsidiary's register entry only needs to disclose participation in a group of companies.

⁴⁵ At this point, it is difficult to assess the inclination of the jurisprudence to apply, e.g., the new provisions of the Commercial Companies Code on the parent company's liability towards groups particularly exposed to the effects of such action, *per analogiam* to the so-called *de facto* holdings.

the first year of validity of the new regulations.⁴⁶ Finally, the relationship between the real factors (i.e., the existence of a relationship of dominance and dependence, the actual exercise of corporate influence) and the formal factors (adopting a resolution on group participation, establishing and following a common economic strategy) proves extremely problematic.⁴⁷

Second, inspired by the *Rozenblum doctrine*, the Polish legislator obliged group companies to be guided by group interests as well as their own – “as long as it does not lead to the detriment of creditors or minority shareholders or minority shareholders of the subsidiary (Article 211(1) of the Commercial Companies Code).” The interest of a group of companies also determines the shape of further regulations on such things as (a) allowing group body members, liquidators or proxies to claim that they were acting in the group’s interest (Article 211(4) of the CCC); (b) allowing the parent company to issue binding instructions to subsidiaries on managing company affairs (Article 212(1) and (3)(2) of the CCC); (c) excluding the liability of parent company body members or liquidators for damages (Article 215(2) of the CCC); (d) the rules governing the supervision by the parent company corporate bodies over the pursuit of group interests by the subsidiary (Article 217(1) of the CCC). What contrasts with the meaning of this concept is the extremely vague way in which it is conceptualized normatively. Against the backdrop of the Commercial Companies Code, it is impossible to determine unequivocally whether group interest and company interest are separate concepts or, on the contrary, whether group interest defines how company interest is construed, as well as whether these interests can be competitive or conflicting, whether they can (or should) be aligned, and whether it is justified to operate only in one general category

⁴⁶ See: Bartosz Wojsław, “Bezużyteczne prawo Jacka Sasina. Prawie nikt nie skorzystał z martwych przepisów,” *Rzeczpospolita*, October 20, 2023, October 21, 2023, <https://www.rp.pl/abc-firmy/art39296351-bezuzyteczne-prawo-jacka-sasina-prawie-nikt-nie-skorzystal-z-martwych-przepisow>.

⁴⁷ By way of example, a question arises as to the consequences of the parent company losing an appropriate majority of votes or its actual failure to exercise unified management over its subsidiaries despite their prior adoption of resolutions on group participation.

or rather a distinction should be made between the general and specific group interests, etc.⁴⁸

Third, from a normative point of view, the parent company's only instrument of influence over its subsidiaries is a binding instruction (Articles 212–215 of the CCC). Apart from this assumption being counterfactual,⁴⁹ one must note that the legislator has chosen an extremely formalized⁵⁰ and illegible, at times borderline incoherent,⁵¹ way to regulate this issue. The literature already emphasizes that the problem in corporate relations is often the “pre-emptive” action of the subsidiary's bodies “as dictated by” the parent company. In the absence of any presumptions related to in-group decision-making,⁵² there are concerns that the new regulation would only exacerbate this situation and that the establishment of a formal, binding instruction would be somewhat of a “sword of Damocles” for subsidiaries, confirming that they would inevitably have to comply with the parent company's will.⁵³ Considering the above, the provisions intended to balance the decisive influence of the group leader with their liability towards the subsidiary, its shareholders or creditors (Articles 2112–2114 of the CCC), which directly refer only to narrowly construed damage caused

⁴⁸ See: Anne-Marie Weber, “Interes grupy spółek – ciało obce w sporach uchwałowych [Interest of a Group of Companies: A Foreign Body in Disputes About Resolutions],” *Przegląd Prawa Handlowego*, no. 7 (2023).

⁴⁹ In practice, instruments used for uniform group management often include informal instructions, policies, regulations, decisions of joint committees and other bodies, etc.

⁵⁰ See: Article 21²(2), Article 21³(1), Article 21⁴(1) of the CCC.

⁵¹ In particular, it concerns the issue of the need for the subsidiary's governing body to decide on whether to follow a binding instruction. See: Article 21²(3)(2–4), Article 21³(1) and (3), Article 21⁴(1–3) of the CCC. These provisions raise many concerns that must be addressed, starting with the consequences of a failure by the subsidiary's management board to take any decision, the effects of deciding to modify the parent company's instructions, the possibility of sending a binding instruction to a body of the subsidiary other than the management board, etc.

⁵² For example, concerning 100% integrated groups, covered by consolidated financial statements, in the scope of activities that are directly included in the common strategy.

⁵³ A separate issue with respect to a binding instruction is that the control over its content under Article 214 of the CCC may prove illusory in practice. This is because Article 215 of the CCC excludes the personal liability of subsidiary (and parent company) governing body members for damage caused by its implementation.

by the execution of a binding instruction (and not other adverse consequences), seem far from sufficient.

5. Summary

The comparative law analysis highlights the lack of a uniform approach to regulating group law in Europe. However, it makes it possible to identify certain trends in this domain. First, there has been a noticeable shift in the perception of the role of group law in recent years, emphasizing the significance of mechanisms that ensure efficient group management. Nevertheless, the imperative to ensure effective protection, particularly in cases involving the abuse of decisive influence over subsidiaries by the parent companies, is widely acknowledged. Therefore, it is the choice between *enabling law* and *protecting law* that determines the primary function of group company law, and not the scope or content of the regulation.⁵⁴ Second, the idea to regulate this issue comprehensively and thoroughly is not widely supported. Yet, there is a broad consensus on the need to ensure transparency of group relations and transactions between related entities, as well as calls for recognizing the interests of a group of companies as a factor that should mitigate potential conflicts of loyalty among group members' officers and determine the possible exclusion of their liability. While the new Polish regulation on corporate groups is heading in a similar direction, it does not live up to the hopes invested in it. Due to its optional nature, the ambiguity of its core concept of group interest and its relation to group company interest, the formalism of the regulations on issuing binding instructions by the parent company, as well as the fragmentation of regulations protecting subsidiaries and the “corporate outsiders,” even entities operating within permanent and uniformly managed structures are not willing to submit themselves to this regime.

⁵⁴ For a similar view, see: Staranowicz, “Podstawowe problemy regulacji koncernu w prawie spółek,” 383. The author refers to the so-called balancing function of groups of companies.

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