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LATVIAN APPROACH OF RECOGNISING THE INTEREST OF THE GROUP. IS THERE A NEED FOR AMMENDMENTS?

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Abstarct

The relevance of this study is that Latvian Group of Companies Law focuses on creditor and minority shareholder protection, less concerned with pursuing the interest of the group. That raises the question of whether centralised management can be incorporated. Additionally, creditor and minority shareholder protection are exposed to specific issues. The limited scope of the duty to compensate the losses of an accounting year, absence of direct liability of the parent company and difficulties to determine disadvantageous transactions and other detrimental measures are concerns in creditor protection. Minority shareholder protection has been criticised regards future profits, an amount payable for indemnity and a mechanism applicable for calculation for the redemption of stocks (capital shares). **The main problems** identified in the research paper: are the effectiveness of the establishment of centralised management; direct liability of a parent company; exit and buy-out rights of minority shareholders. **The research paper undertakes the following tasks**: 1) to examine a parent company's right to give instructions in Group of Companies Law; 2) to analyse a parent company's and its lawful representative liability in Group of Companies Law; 3) to examine minority shareholder protection, which is not members of the group, in Group of Companies Law; 4) to compare results of previous tasks with German and Portuguese group law and French Rozenblum doctrine. **The research paper concludes** that there is no need to amend the Group of Companies Law because exposed inefficiencies can be fixed by advancing case law. Moreover, the research paper proves the effectiveness of the German model of group law. The novelty of the analyzed topic is manifested in the fact that there is a shortage of case law and the present literature on Group of Companies Law does not cover the issue of the recognition of the interest of the group. **The methodology** will be that of legal doctrinal research, legal theory method, the reform agenda research and comparative analysis.

Keywords: Latvian Group of Companies Law, centralised management, creditor protection, minority shareholder protection.

Introduction

Statement of the problem

On the one hand, it is acknowledged that economic concentration has progressed significantly and a group of companies' structures are used commonly, despite legal system difficulties to regulate them. The group of companies are created to establish centralised management (Dine, 2006) and/or carry out a profit shift (Strupišs, 2007). On the other hand, the interest of each member of the group is independent profitability and sustainability, while the interest of the group is the economic well-being of an organisation, which points to potential differences in concerns. The company's autonomous profitability and sustainability safeguard its creditors' and minority shareholders' interests (Blumberg, 2001: 301). In order to balance conflicting interests in Latvia a group of companies is regulated by a specially designed code of Group of Companies Law.

The regulatory basis for Group of Companies Law is "the law on affiliated companies" (Konzenrecht) laid down in German Aktiengesetz (AktG). Also Portuguese group of companies' law (sociedades coligadas) implemented in Código das Sociedades Comerciais (CSC) is based on German *Konzenrecht.* The German rules on recognition of the interest of the group are characterized as "costly, complicated and ineffective" (Hommelhoff, 2001: 68) and it can be effective for large groups, but its appropriateness for a smaller groups of companies is debatable (Hopt & Pistor, 2001: 1). The Portuguese

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system on recognition of the interest of the group is described as a decentralised management model (Engracia, 2005: 376). Alternative to German and Portuguese systems provide the French model (*Rozenblum doctrine*). An important note should be made that although the Rozenblum case was a criminal prosecution for abuse of corporate assets, the doctrine is applied also in corporate law. Rozenblum doctrine establishes "group defence" or "safe harbour", in which under certain conditions can be accomplished legitimate and genuine centralised management without unreasonably exposing creditor and minority shareholder's interests.

In the light of all the foregoing, there are reasonable grounds for questioning recognition of the interest of the group in Latvian Group of Companies Law.
Significance of research

The present literature does not address the issue in satisfactory manner despite the identification of problems; it rather focus more on matters of formation, capital and disclosure requirements in the fields of banking law, tax law and competition law. Group of Companies Law is characterised as being vogue and ambiguous, as well as insufficient due to shortage of case law in respective fields (Grīnberga, 2020a: 7). Moreover, the recognition of the interest of the group at he EU level has been also well-disputed issue. In the 1970s the European Commission (EC) proposed 3 significant attempts for regulating the group of companies. The first attempt in 1972 was the proposed fifth directive on company law to govern joint – stock corporations. In 2001 the proposal was withdrawn. The second attempt in 1974 was a draft for a ninth company law directive based on the German model (*AktG*). The ninth company law directive proposed an autonomous body of law specifically dealing with a group of companies. In the 1980s the ninth company law directive was dropped due to the lack of support. It was argued that German law for a group of companies was too rigid and not particularly effective (Conac, 2013: 196). The third attempt was to implement a chapter of a group of companies in a Regulation of *Societas Europaea*, but was also dropped in the 1980s. Instead in 1983 the Directive on consolidated accounts was adopted. Member States' company laws are left to deal with recognition of the interest of the group at national level.

The object of the research is the recognition of the interest of the group in Latvian Group of Companies Law. **The purpose of the research** is to examine whether Latvian Group of Companies Law recognition of the interest of the group could be improved.

Results

German model only restricts centralized management for participation groups, but there is sound reasoning for it. French *Rozenblum* doctrine compared to German model establish in overall more flexible centralized management framework that allows pursue of the interest of the group with clear certainty. However, German model is superior for creditor and minority shareholder protection. Based on the above considerations, Group of company's law is a comprehensive and advanced set of rules for corporate groups. Absence of direct liability of a parent company in contractual group threatens creditor interests. Based on the legal norm interpretation methods the liability can be directly extended to the parent company in contractual groups. Consequently, there is no need to change legal framework for group of companies; it can be simply improved by advancing case law.

Management of the subsidiary

The interest of the group is achieved by exercise of control (Dine, 2006: 43). The control is formed by a decisive influence on a basis of a group of company's contract or participation (Article 3 of Group of Companies Law). A group of companies contract is a management contract, a transfer of profit contract and both contracts included in one (a management and transfer of profit contract). The management contract (*pārvaldes līgums*) determines that a company subjects its management to another company and shall be entered into writing. The transfer of profit contract (*peļņas nodošanas līgums*) determines that all or part of profits is transferred to another company and shall be entered into writing. Moreover, a parent company uses a decisive influence for issuing instructions in a subsidiary that creates centralised management in a group of companies" structure.

Article 26 of Group of Companies Law provide that a parent company has the right to give binding instructions, which can be detrimental to a subsidiary's independent or autonomous interests, if a management contract or a management and transfer of profit contract is concluded. A transfer of profit contract without added management contract brings only economical changes (Houwen et al., 1993: 236–238). Therefore, the absence of legal structural changes, the right to give binding instructions is not bestowed on the parent company without a management contract. The right to give

binding instructions allows completely establish centralised management.

Further, The take – over of a company is an instrument of creating and organizing group structure. In the take – over, corresponding companies retain legal independence, thereupon is not analogue to reorganization in the general company law or amendments to the articles of association. Article 41, paragraph 1 of Group of Companies Law institute that the right to issue binding instructions is also provided for a parent company in case of a take – over of a subsidiary, if a management contract or a management and transfer of profit contract is concluded. The difference is the parent company is entitled to give binding instructions to the taken over subsidiary without considering disproportionality between the benefit of a group and prejudice of a subsidiary.

The right to give instructions in participation group of companies' structure shall not be permitted at least to the same extent as under a group of company's contract. Based on Article 29, paragraph 1 of Group of Companies Law, the parent company cannot induce a subsidiary to enter into disadvantageous transactions or any other detrimental measures. Unless compensation for losses incurred as a result of disadvantageous transactions or detrimental measures is made. Establishment of a participation group structure does not lead to complete subordination, interests of subsidiary are predominant and the parent company's right to exercise detrimental influence is limited. Nevertheless, the parent company cannot issue binding instructions to a subsidiary even beneficial to its sustainability and profitability. Criticism of Portuguese model for limiting power to give instructions to arm's length and its restriction on centralised management (Engracia, 2005: 376) are applicable also for participation groups of Group of Companies Law.

According to *Rozenblum* doctrine in France the subsidiary can follow a parent company's instructions, if a group is characterised by capital links between companies and there is effective and strong business integration (Cour de Cassation, Chambre criminelle, du 4 février 1998). Business integration means a common interest and coherent policy. The reference to common interests suggests that the interest of the group does not coincide with the interest of the parent company. The common interests consist of profitability as a group rather than achievement of separate opportunities. It can be economic, social or financial interest. The existence of common interest can be displayed if companies influence each other in complementary matters. The outcome of the influence, whether it is favourable or unfavourable, has no significance in the context of structuring a group of companies in the *Rozenblum* doctrine. The question arises how the consideration of the subsidiary's and group's interests should be measured and over which time period it should be weighted. (Conac, 2013: 218).

Analysis of Creditor protection

Article 20, paragraph 1 of Group of Companies Law provides that during the term of a group of companies contract a parent company has the duty to compensate the losses of an accounting year of a subsidiary. The notion of losses in a reporting year is fitting for transfer of profits, but is in question for safeguarding other interests of subsidiary. Article 20, paragraph 1 of Group of Companies Law is matching German Article 302 of *AktG* and Portuguese Article 502 of *CSC*. In Germany, it is detected that losses from withdrawing assets that value increases over time can stretch to multiple years, e.g. immovable property, participation in different companies, as well as profitable production plant (Wymeersch, 1993: 104). According to Portuguese (*CSC*) system, transfer – pricing, profit manipulation and use of subsidiary's facilities without payment are also considered as actions outside of the framework of the concept of losses in a reporting year (Engracia, 2008: 29). It is concerning whether Article 20, paragraph 1 of Group of Companies Law will cover losses from withdrawing assets and accounting manipulation. In Portugal, the risk of circumventing duty to compensate losses of a subsidiary in a reporting year is limited by providing in Article 501 of *CSC* direct liability of the parent company for subsidiary's creditors.

According to Article 27, paragraph 5 of Group of Companies Law, a creditor can raise a claim for losses suffered, insofar as satisfaction of his or her claim is not covered by the subsidiary, if a management contract or a management and transfer of profit contract has been entered into. From the wording of Article 27, paragraph 5 of Group of Companies Law it is not clear whether a creditor can claim losses suffered only from the parent company's lawful representatives or also from the parent company itself. Important consideration can be made to the argument that Article 27, paragraph 5 of Group of Companies Law is under the section of liability of lawful representatives of a parent company. German Article 309, paragraph 4 of *AktG* is identical to Article 27,

paragraph 5 of Group of Companies Law. In the German case law an extension of the creditor's right to directly satisfy claims for losses suffered against the parent company itself is established, based on Article 309, paragraph 4 of *AktG* (BGHZ Urteil vom 24 Juni 2002). So far Latvian lower court case law reflects an approach of limiting rights of subsidiary's creditors only to satisfaction of losses suffered from parent company's lawful representatives, therefore, excluding the parent company itself (Rīgas apgabaltiesas Civillietu tiesas kolēģijas 2013. gada 17. septembra spriedums).

If a management contract has not been entered into, the parent company, in line with Article 33, paragraph 1 of Group of Companies Law has the duty to compensate or grant the relevant right to claim compensation for losses caused for disadvantageous transactions or any other disadvantageous measurers within a reporting year. A parent company cannot circumvent previously mentioned obligation on grounds of suffered losses by the same transactions. The difference with Article 20, paragraph 1 of Group of Companies Law is that the scope of Article 33, paragraph 1 of Group of Companies Law is narrowed down to disadvantageous transactions or other detrimental measures only. Disadvantageous transactions or other detrimental measures are not analogous to losses in Latvian Civil law (Grīnberga, 2020b:2). Referring to transparency rules of Article 30 of Group of Companies Law, in a report on dependency, disadvantageous transactions or any other detrimental measures should be singled out. However, Article 33 of Group of Companies Law is identical to German Article 317 of AktG. The same criticism of the German (*AktG*) model of subsidiary's interest protection in participation group can also be applied to Article 33 of Group of Companies Law. It is not always evident, whether a transaction or a measure will be detrimental, which explicit transaction and to what extent (Houwen et al., 1993: 236–238). Moreover, it is confidential information, therefore, other than shareholders, it is difficult to access (Böhlhoff & Budde, 1984: 170). To counterbalance opacity of the report on dependency Article 31 of Group of Companies Law constitute mandatory examination by an auditor. The report on dependency together with annual financial statements is submitted to the Enterprise Register, which means the report on dependency is kept in the respective subsidiary's Enterprise Register case file (Strupišs, 2007: 13). The dependency report is not included in the list of restricted accessibility information (Latvijas Republikas Uzņēmumu reģistra galvenā valsts notāra 2021. gada rīkojums Nr. 1-7/68). By submitting a written statement of reason, creditors can receive the report of dependency. According to Article 33, paragraph 4 of Group of Companies Law, even though a group of companies contract has not been entered into Article 27, paragraph 5 of Group of Companies Law shall apply. Nevertheless, Article 33, paragraph 3 of Group of Companies Law precisely determines joint liability of parent company itself and its lawful representatives. In adverse manner of contractual group a parent company in participation group can be directly liable to creditors.

In France *Rozenblum* doctrine not only allow flexible management of a subsidiary, but also protects creditors by prescribing that financial equilibrium cannot be distorted (Cour de Cassation, Chambre criminelle, du 4 février 1998). Financial equilibrium can be achieved by compensation and it can be also non-monetary or future compensation. Achievement of common interest is not exceeding its possibility, if insolvency risk is not triggered for either company (Conac, 2013: 218). A subsidiary's independent interests have to be taken into consideration and artificial support is prohibited (Guyon, 2003: 670).

Analysis of Minority shareholder protection

Article 24 of Group of Companies Law provides minority shareholders the exit right, if a group of companies contract has been entered into. Minority shareholders' have the right to demand acquiring of his or her shares or the stock for appropriate compensation. The obligation to acquire minority shareholders shares or the stock liaise on the "other party" of the group of companies contract or in other words, correspond to the parent company. Compensation may be in a form of: share or stock of the parent company or money. Article 24 of Group of Companies Law exit right of minority shareholders is indistinguishable from the settlement payment model vested in German Article 305 of *AktG*. In reference to Article 12, paragraph 3 of Group of Companies Law, for conclusion of group of companies contract is required acceptance of three quarters of the equity capital represented at a subsidiary's shareholder's meeting, which means that minority shareholders role for negotiating appropriate compensation are confined (Wymeersch, 1993).

Nonetheless, minority shareholders can seek judicial review of determination of appropriate compensation, according to Article 24, paragraph 7

and 8 of Group of Companies Law, which balances the interests of the parties affected by the group of companies contract. Moreover, determination of compensation for minority shareholders in a form of money in Article 24, paragraph 4 Group of Companies Law has been scrutinized for not taking into account further profit prospects of the subsidiary as it is in Article 23, paragraph 3 of Group of Companies Law. Assessment of profit prospects include margin of the subsidiary's future profits, which minority shareholders would be able to receive, if he or she had retained shares or the stock (Strupišs, 2007). Precise indicators of the value of further profit prospects *prima facie* cannot be identified; it changes case by case. Notwithstanding, exclusion of further profit prospects brings greater certainty. Reasonably potential financial gains are traded for legal certainty. Further, Article 23 of Group of Companies Law rules on indemnity and Article 24 of Group of Companies Law compensation mechanism have significant distinction in application scope. Rules on indemnity govern minority shareholders in circumstances, in which they remain in a participation position, while compensation mechanism regulates minority shareholder exit rights, i.e. withdrawal of participation in a company. This specific discrepancy is grounds for justifying separate settlement arrangements.

Minority shareholders of a subsidiary may request a buy out in line with Article 47 of Group of Companies Law, if a parent company has acquired (directly or indirectly) 90 % of shares or a stock of a subsidiary, but is not carrying out take – over. Buy out right has significant importance because the parent company can decide not to carry out take – over of a subsidiary – even though has acquired 90 % of a stock (shares), in order to circumvent a compensation to excluded shareholders of a subsidiary stipulated in Article 38 of Group of Companies Law.

The *Rozenblum* doctrine in France does not stipulate additional protection to minority shareholders, therefore, they are left to rely on general company law rules (*Code de commerce*) on misuse of majority by the parent company to protect themselves (Wymeersch, 1993: 157 and 161–162). Consequently, the French system does not grant minority shareholders exit rights. However, at the EU level, it is considered that exit rights have to be entitled to minority shareholders (Kraakman, et el, 2017: 95).

Conclusions

1. As long as a group of companies stay clear from insolvency the *Rozenblum* doctrine for rational intra-group transactions creates flexible group defence or safe harbour, which is more practical than German model. However, German model more effectively protects creditor minority shareholder interests.

2. Article 27, paragraph 5 of Group of Companies Law and respective case law do not install direct liability of a parent company in contractual group. It is contradictory because Article 33, paragraph 3 of Group of Companies Law sets joint liability of a parent company and its lawful representatives in participation group. Consequently, in a participation group the parent company cannot induce a subsidiary to enter into disadvantageous transactions or any other detrimental measures, but has direct liability, while in contractual group the parent company can issue binding instructions that can be even detrimental, but has no direct liability to creditors. This discrepancy can be resolved by advancing case law.

3. Group of Companies Law for minority shareholders provides rights to request acquiring his or her shares or a stock (exit right), receive compensation for excluding of a company and request of redemption (buy out right). Active and passive side of an intra – company relationship is taken into consideration. Separate settlement arrangements for rules on indemnity and compensation mechanism are justified and assured. Minority shareholders under Group of Companies Law are appropriately protected.

4. There is no need to change regulatory framework for Group of Companies Law in order to enhance centralised management or minority shareholder protection. Identified problems in creditor protection, which can be fixed by changing case law, is not sufficient grounds to abandon German model and introduce French system.

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ЛАТВІЙСЬКИЙ ПІДХІД ДО ВИЗНАННЯ ІНТЕРЕСІВ ГРУПИ. ЧИ Є ПОТРЕБА ВНОСИТИ ЗМІНИ?

Анотація

Актуальність цього дослідження полягає в тому, що Закон Латвії про групу компаній зосереджується на захисті кредиторів і міноритарних акціонерів, меншою мірою стурбований переслідуванням інтересів групи. У зв'язку з цим виникає питання, чи можна включити централізоване управління. Крім того, захист кредиторів і міноритарних акціонерів піддається певним проблемам. Обмежений обсяг обов'язку відшкодовувати збитки звітного року, відсутність прямої відповідальності материнської компанії та труднощі з визначенням невигідних операцій

та інших шкідливих заходів є проблемою захисту кредиторів. Захист міноритарних акціонерів був підданий критиці щодо майбутнього прибутку, суми, що підлягає виплаті за відшкодування збитків, і механізму розрахунку для викупу акцій (часток капіталу). **Основні проблеми,** визначені в науковій роботі: це ефективність встановлення централізованого управління; пряма відповідальність материнської компанії; права виходу та викупу міноритарних акціонерів. Дослідницька робота ставить перед собою такі **завдання**: 1) дослідити право материнської компанії давати вказівки в Законі про групи компаній; 2) проаналізувати відповідальність материнської компанії та її законного представника в Законі про групи компаній; 3) розглянути захист міноритарних акціонерів, які не входять до групи, у Законі про групи компаній; 4) порівняти результати попередніх завдань з німецьким та португальським груповим правом та французькою доктриною Розенблюма. У дослідницькій роботі робиться **висновок,** що немає потреби вносити зміни до Закону про групи компаній, оскільки виявлені неефективності можна виправити шляхом вдосконалення судового права. Більше того, наукова робота доводить ефективність німецької моделі групового права. **Новизна** проаналізованої теми проявляється в тому, що існує дефіцит судової практики, а в сучасній літературі з права груп компаній не висвітлюється питання визнання інтересу групи. **Використовується методологія** дослідження правової доктрини, метод теорії права, дослідження порядку денного реформ і порівняльний аналіз.

Ключові слова: Закон Латвійської групи компаній, централізоване управління, захист кредиторів, захист міноритарних акціонерів.

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