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Company Groups and Group Interest – the Case of Romania

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Abstract. A company in the Romanian law is a legal person. The classic approach towards legal personality is to consider such structures as entities with a single patrimony and a single interest, subject of legal rights and liabilities. Meanwhile, company groups represent a very frequent form of organizing business activities, which necessitates new legal approaches. Frequently, there is a conflict between the best interest of a member company of the group and the best interest of the company group itself. Is it correct if we proceed as the classic attitude dictates, and give prevalence to the interests of the single company to the detriment of the group? This article focuses on the problems arising from the conflict between the isolated interest of a company and the general interest of the company group in the context of Romanian company law and insolvency law.

Keywords: company group, group interest, duty of care and loyalty, creditor protection, group insolvency, minority shareholders

I. Overview

Company group as legal reality. The company group as such is not expressly recognized in the Romanian *company law*. But there are no doubts that the *company group* is not only a very frequent economic reality in Romania and other states but a legal reality as well due to the legislative evolutions of the past decades.

But the company group, as a *legal reality*, appears especially in *other legal branches* than company law, such as tax law (transfer pricing, VAT groups, truthfulness of intragroup transactions), accounting law (consolidated annual financial statements), competition law, administrative law (special rules on supervision of credit institutions and insurance companies belonging to a group by the supervisory authorities, public procurement law), capital market law,

labour law, and – from a special post-socialist perspective – also in privatization law (because there are specific rules on the privatization of company groups).

Nevertheless, company law operates with such notions as subsidiary, mother company, control, etc., meaning that it creates all the tools necessary for constructing and operating company groups based on the economic liberty of association.[1] But in company law the main or the only scope of the traditional approach is to regulate the company as it is (its internal structure and *modus operandi*), not as a component of a larger structural concept which is the company group. At international level, the group of companies and 'not the single company has become the prevailing form of European large-sized enterprises, which business activity is typically organized and conducted through a network of individual subsidiaries located in several States inside and outside Europe.'[2]

The Rozenblum doctrine. The importance and the necessity to explore the idea of company group also from a company law perspective was raised in the French (criminal) jurisprudence in the context of the Rozenblum case,[3] and it was practically transformed into a 'doctrine', a statement on how such cases should be examined. The traditional company law concept is that the directors of a company must act in the interest of the company. The states generally 'want to ensure the integrity of the management of each subsidiary so that it is governed exclusively in the interest of that company. The main goal and effect is to protect minority shareholders and creditors of the subsidiary.'[4] The Rozenblum case transformed and nuanced this attitude at least partially.

According to the Rozenblum doctrine, if certain conditions are met, it is a legitimate action if the directors of a certain company act in the interest of the company group even if the action itself is to the detriment of the individual group member. As stated in the legal literature, 'the conditions in French law for the safe harbour are: (1) the firm structural establishment of the group, (2) the existence of a coherent group policy, and (3) an equitable distribution of the revenue and the costs of the business among the members of the group. It has been said of the French position that no group transaction is forbidden so long as there is some *quid pro quo*, though not necessarily an exact counterbalance. However, support provided by a group company must not exceed what can reasonably be expected from it, so that where support is beyond the provider's financial capacity, it will be considered unlawful.'[5] In other words, the Rozenblum doctrine represents a

1 According to Art. 45 from the Romanian Constitution, free access of persons to an economic activity, free enterprise, and their exercise under the law shall be guaranteed.

2 Report of the Reflection Group on the Future of EU Company Law.

3 Rozenblum. Cass. crim. Judgement of 4 February 1985, JCP 1986, II. No 20585.

4 The Informal Company Law Expert Group (ICLEG), Report on the recognition of the interest of the group, October 2016. 5.

5 Ferran, Chan Ho 2014. 40.

defence for directors acting in the interest of a company group and at the same time to the detriment of the company they are directing if the specific conditions are met: the group is characterized by capital links between the companies; there is a strong, effective business integration among the companies within the group; financial support for one company to the another must have an economic *quid pro quo* and may not break the balance of mutual commitments between the concerned companies; the support from the company must not exceed its possibilities or create a risk of bankruptcy for the company.[6]

Does the Rozenblum doctrine represent a specific risk for transition economies? It is a serious question if this doctrine is clear enough to be transformed into a general legal rule taken out of its original context (criminal law).[7] For example, in the case of transition economies as Romania was (and to a certain extent still is), it was stated that introducing such a concept as group interest into legislation is dangerous. 'To assess the likely impact of this doctrine in transition economies, it is worth remembering the legacy of the former socialist countries, where the interest of the people or the state prevailed over individual economic or personal interest. Judges, even if well-trained, independent and impartial, will be familiar with this kind of reasoning, and therefore are likely to err on the side of overstating group interest. It seems therefore advisable to caution against the introduction of this doctrine in transition economies. The doctrine may be useful to modify atomistic economic interests once these are fully recognized, but may undermine the very recognition of such interest if introduced prematurely.'[8]

Sincerely, this argument seems artificially created and it is based on a questionable premise never confirmed in the Romanian (group law or, more generally, company law) jurisprudence that somehow a socialist concept on the primacy of general interest over the individual interest creates an actual predisposition for the judges to overstate the interest of company groups and in consequence override the interest of individual companies. There is a *fundamental misunderstanding*. The doctrine and practice of socialist law meant by public interest the specific interest of the communist state and of the Communist Party, and company group interest does not fit into any of those bygone categories.

Having in mind the arguments presented in this introductory part of the analysis, we have to find out if the group interest as such formed a concern for the Romanian legislator and the issue of group interest was or was not dealt with by the Romanian courts.

6 Conac, Enriques, Gelter 1997. 519–520.

7 The committed criminal offence was the abuse of corporate property (*abus de biens sociaux*).

8 Hopt, Pistor 2003, 26. The problem how to draft a legislation based on the Rozenblum doctrine formed the subject of a debate in Poland. For details, see Sołtysiński 2013, 545–546.

II. Company Law and Group Interest

Abuse of corporate property and recognition of group interest. The ideology behind Law No 31/1990 on companies reflects that each company has its self-standing status and own interest. Every company is a self-standing legal entity. But as the real-life situation is not so simple, we have to look into the approach of the criminal law towards the abuse of corporate property. Through Law No 31/1990 on companies, Romania incriminated the abuse of corporate property, stating that 'shall be punishable with imprisonment from 6 months to 3 years or a fine the founder, manager, general manager, director, member of the supervisory board or of the directorate or the company's legal representative … who uses, in bad faith, goods or credit enjoyed by the company, for a purpose contrary to the interests of the company or in his own benefit or to favour another company in which directly or indirectly has interests…' (art. 272 (1) b), Law No. 31/1990).[9] Practically, this is the legal context for the application of the Rozenblum doctrine, and at first sight all the conditions for the necessity of such an approach as stated in the French legal practice are fulfilled.

In reality, if we read further the Romanian legislation, the legal context is totally different compared to the French one. Through Emergency Ordinance 82/2007,[10] the incriminating text was completed with a new paragraph, very important for group interest. According to this addition, the above mentioned conduct is 'not considered a criminal act' if it is committed by the administrator, director, directorate member, or legal representative in the context of treasury operations between the company and other companies controlled by it or other companies controlling the company directly or indirectly (Art. 272 (2), Law No 31/1990). The law does not give a definition for *treasury operations*, but these practically include the management of holdings, liquidities, loans, financial risks, collections, funding, etc. This means an indirect legal recognition of the group interest in the very context in which the Rozenblum doctrine was created.

But the notion of group interest and the practical problems raised by the functioning of company groups seems a little bit wider than the criminal law

9 The French incriminating text is practically identical: "Le fait, pour les gérants, de faire, de mauvaise foi, des biens ou du crédit de la société, un usage qu›ils savent contraire à l'intérêt de celle-ci, à des fins personnelles ou pour favoriser une autre société ou entreprise dans laquelle ils sont intéressés directement ou indirectement" (Code de commerce – Article L241–3, 4°); in English: 'The use by managers of the company's property or credit, in bad faith, in a way that they know is contrary to the interests of the company, for personal purposes or to encourage another company or undertaking in which they are directly or indirectly involved.' See also Article L242–6 from the Code de commerce. The sanctions under the French law are much more severe than in the case of Romania: imprisonment up to 5 years and a fine of 375,000 euros.

10 An emergency ordinance is a regulation with legal force enacted by the government under extraordinary circumstances and approved/modified/rejected *post factum* by the parliament.

context which gave birth to the Rozenblum doctrine and is reflected in the Romanian legislation.

Abuse of majority and denial of group interest. Outside the criminal law provisions of Law No 31/1990 on companies, the issue of the existence and extent of group interest is not so evident anymore.

The control of the parent company is exercised from a legal point of view and formally through the general assembly, and in consequence the real direction in the context of everyday operation and effective control is practically realized through informal means. How does this theoretical autonomy of the subordinated group member company work in jurisprudence? We can check how some core features of group law work in practice, and we cannot say that there is no serious friction between the functional and patrimonial autonomy of a subsidiary (member company of the group), as a self-standing legal entity, and the control exercised by the parent.

For example, in a recent court case involving practically a (simple) cross-border group, the court denied the concept of group interest. The parent needed a bank loan and the subsidiary, a joint-stock company (*societate pe acțiuni*) had immovable property to guarantee that bank loan. There were some minority shareholders as well, a financial investor and some minor investors (the financial investor being actually a specific entity created through the mass privatization programme). In the general assembly of the subsidiary, the guarantee was approved, with a very large majority. Practically, only one minority shareholder, the financial investor voted against the proposal.

This minority shareholder filed a case to the court, demanding the annulment of the general assembly decision, adducing the fact that the decision serves solely the interest of the parent company and not at all the interest of the company itself. The court ruled in the favour of that minority shareholder, based on the legal text which states that *all shareholders (in this case, the parent company) must exercise their rights with good faith, respecting the rights and legitimate interests of the company (in this case, the subsidiary) and of the other shareholders*.[11] Practically, the decision is based on the *abuse of majority* argument.[12]

The isolated interest of the subsidiary won the battle against the group interest, meaning that under no circumstance the fact that a subsidiary belongs to a company group does not empower the management or even the majority of shareholders to act contrary to the interest of the subsidiary (or of the minority shareholders). We cannot establish the precise content of this approach: from now on, such actions in favour of the parent must be adopted unanimously, being necessary that in all cases all minority shareholders must vote in favour of such decision. There is

11 Law No 31/1990 on companies, Art. 136/1.

12 Târgu-Mureş Court of Appeals, Decision No 1984/2013.

an undeniable legal uncertainty. As it was correctly stated, such uncertain rules or interpretations are not 'user-friendly'; practically, we do not know what the rules require, prohibit, or permit. 'The rules are not accessible, comprehensive, comprehensible or sufficiently determinate… As a result, law cannot perform its guiding function… These obstacles are intensified because of the need for planning to maintain an economic activity. Any business or occupation requires planning that includes forecasting of future legal consequences and assessment of economic alternatives…'[13]

The jurisprudential approach is not fully adapted to the economic needs of a company group, it is not flexible enough, and it produces negative economic effects. There must be a way to reconcile group interest with the protection of the minority shareholders. For example, there is a possibility to only partially affect the immovables to guarantee the bank loan, proportionally with the percentage of the parent in the share capital of that company, giving in this way a specific guarantee to minority shareholders.

Conflict of interests. Law No 31/1990 on companies states also that if a shareholder has regarding a certain issue, either personally or as agent of another person, an interest contrary to the interest of the company, that shareholder must abstain from deliberations on that question[14] and the shareholder breaching this abstention rule will be liable for damages caused to the company if without his vote the required majority would not have been obtained. From the point of view of group interest, this means that the parent company cannot act in its own interest at the general assembly of the shareholders of the subsidiary, but it must respect exclusively and fully the interest of the subsidiary.

Duty of care and diligence and the denial of group interest. The representatives of a company must act according to the duty of care and diligence, with loyalty and in the interest of the company.[15] This duty is respected if, when making a business judgement, the representative reasonably believes that he/she is acting in the interest of the company and on the basis of adequate information.[16] This approach recognizes that not all of the actions of the representatives are in the benefit of the company, but a representative is protected from personal liability if 'decisions are made by disinterested directors acting on an informed basis, in good faith and in the honest belief that their actions serve the corporation's best interest'.[17] This rule is very important, otherwise company representatives will

13 Ávila 2016. 21–22.
14 Law No 31/1990 on companies, Art. 127.
15 Law No 31/1990 on companies, Art. 144/1.
16 High Court of Cassation and Justice, commercial section, Decision No 2827/2011.
17 Shultz 2001. 226.

take a risk-averse attitude in the context in which successful business activity necessitates a certain level of responsible risk-taking. As it was stated, 'the core responsibility of directors is to weigh risk against reward. This is an art, not a science.'[18]

As a consequence, one representative of the subsidiary company must act in the (sole and isolated) interest of the company, otherwise the business judgement rule is infringed.

Freedom of establishment and denial of group interest. If a company group is facilitated by the freedom of establishment rule of the EU law, there are for sure problems with the Romanian rule according to which a person can be the sole member of only one single-member limited liability company.[19]

In jurisprudence, the issue was raised that this limitation is applicable only to Romania, taking into consideration the territorial scope of the law. We do not have a unitary jurisprudence, but most of the interpretations tend to decipher the law stating that this interdiction has a general effect. For example, a German company establishes a single-member limited liability company in Bulgaria as a wholly-owned subsidiary. But this Bulgarian limited liability company cannot establish a single-member sub-subsidiary in Romania due to this rule. The rule is very formal because the German parent company and the Bulgarian limited liability company can establish together a limited liability company in Romania.

Meanwhile, the Romanian trade register cannot check if there is another single-member company of the German parent in another member state, so if the German parent comes alone to establish a Romanian single-member limited liability company, there are no enforceable limitations (which conduct is theoretically a criminal offence because the German parent must declare that it fulfils all the legal conditions to establish a Romanian single-member company).

Therefore, this rule can be seen as an impediment of group formation and an indirect denial of group interest.

The right to give instructions and the denial and group interest. In the present legislative frame, a single-member subsidiary is possible only if this subsidiary is organized as a limited liability company (*societate cu răspundere limitată*). If a joint-stock company is the form needed, another person must be involved: as in the previous example, another group member in most of the cases.[20]

The parent, as a sole member of the limited liability company or in the context of the joint-stock company the parent shareholders exercise the powers

18 Bevans 266.

19 Law No 31/1990 on companies, art. 14.

20 By exception, the state and the local governments can establish single-member joint-stock companies.

of the general assembly or through the general assembly. This tool is a totally different direction mechanism compared to the direct right to give instructions to the subsidiary company executives, not recognized by the law. The right to give instructions can be continuously exercised, outside the formal context of a general assembly, contrary to the idea that 'shareholders should not micro-manage the company'.[21]

Such instructions undoubtedly exist in fact, but the question is if we need to formalize them. Perhaps, the answer is yes, for the following reasons:

– if the instructions exist anyway, it is better for the law to follow the realities, and create a framework for the instructions;

– for better and clearer rules for the sake of an effective management of the company group; practically, for the reason of legal certainty;

– for the executives of the subsidiary, whose rules on responsibility would be clarified in this way.

In case of refusal to act as instructed, the most energetic tool of the parent company is to dismiss the executive who rejected the (informal) instruction. In reality, this is a complicated tool for the parent. Theoretically, this dismissal is *ad nutum*, no specific conditions or justifications are needed. But the text of the law specifies that if the dismissal is without justification, the dismissed executive is entitled to damages. The dismissed company executive can easily argue that his dismissal is without any justification because he has rejected the instruction rightfully, relying on the best interest of the subsidiary and based on his obligations of duty of care and loyalty toward the subsidiary, as shown above.

There is no effective protection outside the criminal law provisions for the subsidiary executive who acts in the interest of the group but against the isolated interest of the subsidiary. To regulate the right to give instruction is not an easy task. If we recognize expressly in the legislation the existence of this right, then practically the parent company will be integrated in the decision-making process of the subsidiary as an 'organ' of the subsidiary, and therefore must hold a certain responsibility in the case of the subsidiary's insolvency. (The best option would be a regulation on the European Single-Member Company, at least for cross-border groups).

Competition law context. Recently, there have been formulated legislative proposals to amend Law No 21/1996 on competition.[22] According to this proposal, the Competition Council (*Consiliul Concurenței* – the Romanian competition authority) may apply the sanction also for the parent company for the activity of a subsidiary with separate legal personality in case in which the subsidiary

21 The Informal Company Law Expert Group (ICLEG), Report on the recognition of the interest of the group, October 2016, 5.

22 Draft law amending and supplementing Law competition, Competition Council, June 4, 2015.

does not decide independently its own conduct on the market but carries out the instructions given to it by the parent company. According to this proposal, the parent company and the subsidiary are treated as one and the same economic entity, single undertaking if the conditions are met, in concordance with the EU case law. In the EU competition law jurisprudence, it is considered that the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organizational, and legal links between those two legal entities.[23]

Direct involvement in the infringement of competition law rules of the parent company was not required by the text of the proposal, and in the case of a wholly-owned subsidiary a presumption of lack of independent decision-making was to be introduced. This proposal was eventually not approved.

Need for reform? Some reform is certainly needed. If we recognize the right of the parent to give instructions to the directors, the outcome will be very interesting. Practically, the company group will become a certain legal institution of Romanian company law. But we must emphasize the goals of such reform. Two antagonistic approaches are possible.

First, the reform can propose stricter responsibility rules for company groups, militating for much stronger creditor protection, for the liability of the parent for the subsidiary and vice versa. I really cannot agree with the maximalist versions of this approach. If we follow this line of reform, the essence of company, of limited liability, of separate legal personality will fade, and in my opinion such a maximalist approach has a paralysing effect on risk-taking and finally on economic development. This will lead to the creation of informal groups with no visible connection between members, practically to the creation of dissimulated groups. The Romanian Code of Fiscal Procedure regulates the joint and several liability of members or shareholders of the over-indebted fiscal debtor (a legal person) by alienating or hiding, with bad faith, under any form the debtor's assets (Art. 25) – text applicable also for company groups. The fiscal authority has the power to issue an enforceable decision in this sense and only an *ex post* judiciary control is possible to check if the legal conditions set up for this measure are met or not.

23 Judgments in *Akzo Nobel and Others* v *Commission*, C-97/08 P, EU:C:2009:536, paragraph 58; *Alliance One International and Standard Commercial Tobacco* v *Commission* and *Commission* v *Alliance One International and Others*, C-628/10 P and C-14/11 P, EU:C:2012:479, paragraph 43; and *Areva and Others* v *Commission*, C-247/11 P and C-253/11 P, EU:C:2014:257, paragraph 30, *Fresh Del Monte Produce Inc. v European Commission and European Commission v Fresh Del Monte Produce Inc.*, C-293/13 P and C-294/13 P, paragraph 75.

Second, a much balanced approach is possible. In this context, I could welcome the approach proposing the adoption of a European directive or recommendation on company groups and group interest. The scope is not to introduce more rules on creditor protection but to create a tool for economic development and a legal tool for better company management. The issue of liability and protection of minority shareholders must be raised in context and not as a goal in itself. The awaited directive on the European Single-Member (Private Limited Liability) Company would or could clarify also some of the uncertainties.[24]

III. Insolvency Law and Group Interest

Specific insolvency rules for company groups. For the first time, a set of specific rules regarding insolvency procedures for company groups were adopted through *Law No 85/2014 on the procedures of insolvency prevention and insolvency,* the third comprehensive post-socialist insolvency regulation.[25] This is the first Romanian law with explicit rules for company groups.[26] Through this law, Romania is among the first EU member states which introduce such legislation regarding the insolvency of company groups.[27]

The notion of company group in insolvency law. According to the insolvency act, the notion of *company group* means two or more companies linked by control and/or qualified ownership. The *group member* can be any of the companies belonging to the group, whether parent or controlled member of the group; controlled member of the group is the company controlled by the parent company.

Control is the ability to determine or to exercise a dominant influence, directly or indirectly, on the financial and operating policy of a company or on the decisions of corporate organs. A person shall be regarded as holding control when:

a) holds directly or indirectly a qualified ownership of at least 40% of the voting rights of that company and any other partner or shareholder directly or indirectly does not hold a higher percentage of voting rights;

b) holds directly or indirectly the majority of voting rights at the general meetings of that company;

24 Proposal for a Directive of the European Parliament and of the Council on single-member private limited liability companies, Brussels, 9.4.2014 COM 212 final.

25 For an English language general overview of the new law, see Glodeanu 2014, 355–392.

26 For the general context, see Mevorach 2007, 179–194; Hirte 2008, 213–236; also see the 'UNCITRAL Legislative Guide on Insolvency Law. Part Three: Treatment of Enterprise Groups in Insolvency – 2010' (therefore: UNCITRAL Guide 2010).

27 Şarcane 2014. 836.

c) as a partner or shareholder of that company has the power to appoint or remove a majority of the members of the administrative, management, or supervisory bodies.

Qualified ownership means the fraction between 20% and 50% owned by a person in another company.

If these conditions are met, the rules on company group insolvency will be applicable to the companies in question. At the request of any interested party, the syndic judge (the specialized insolvency judge) may verify the applicability of these specific rules.

Results of the insolvency law reform regarding company groups. All common rules on insolvency procedures are applicable accordingly in case of insolvency of company groups (or, more precisely, of companies belonging to a company group), but subject to derogation through the provisions of art-s 184–203 of Law No 85/2014, which constitutes a set of special regulations for company groups.

According to the approach of the Romanian legislator, the *coordination* of insolvency procedures is necessary in case that two or more companies belonging to a group go insolvent. Can an insolvency application be issued against the group itself? Of course not, but a creditor can issue, under the provisions of Law No 85/2014, a joint application against group members or against all the members of a group. Similarly, two or more members of a company group can request jointly the opening of insolvency proceedings.

Practically, these rules are applicable only when at least two members of a company group are insolvent, and from the point of view of the creditor both members must have the minimum amount of overdue debt towards the same creditor (the threshold of minimum 40,000 lei, certain, liquid, and due for more than 60 days). If the request is made jointly by the company group members, the minimum amount of debt can be owed to different creditors, but all company group members must register at least a single debt of 40,000 lei, no matter the total amount of the obligations of the debtor company.

Also, in the case of joint application, a member of the company group that is not insolvent or in imminent insolvency, in order to avoid a later opening of insolvency proceedings, may join this joint application. In this case, the joint application for the opening insolvency proceedings shall be approved by the general assembly of associates/shareholders of the non-insolvent group member.

Coordination of insolvency proceedings of company group members. The rules introduced through Law No 85/2014 create the links between insolvency procedures of company group members for a better management of insolvency cases.

The competent court will be the (county-level) tribunal where the seat of the parent company is registered or, alternatively, the tribunal from the seat of the company member with the highest turnover according to the latest published financial statements for all members of the company group. Therefore, the same court will deal with the insolvency proceedings of any group member.

A separate file will be opened for each debtor (member of the group), but the same syndic judge will be appointed to deal with all the cases (if there are separate requests, the syndic judge designated by the random distribution system in the first registered case will be appointed in all of the insolvency proceedings of companies belonging to the same group). This is practically a derogation from the random distribution mechanism of the court cases. Therefore, the joint application for opening insolvency proceedings is the request made by the debtor or creditor, aiming to open concurrently insolvency proceedings of two or more members of the same group of companies, in separate cases, but under the jurisdiction of the same syndic judge. The approach is one of coordination of these procedures instead of consolidation. According to the 'UNCITRAL Legislative Guide on Insolvency Law. Part Three: Treatment of Enterprise Groups in Insolvency', *procedural coordination* means the coordination of the administration of two or more insolvency proceedings in respect of enterprise group members. Each of those members, including its assets and liabilities, remains separate and distinct. The alternative solution would be the *substantive consolidation*, when the assets and liabilities of two or more enterprise group members are treated as if they were part of a single insolvency estate.[28] Romania opted for the first system, i.e. procedural coordination.

The creditor which has a claim against an insolvent debtor, member of company group, jointly and severally liable with another insolvent member company of the same group (for example, in the case of consortiums formed by company group members or in the case when a company group member guaranteed the debts as a jointly and severally liable surety for another member company) can practically participate in both procedures.

Also, the receivers must cooperate in case there are fraudulent transactions and any of the receivers, initiating an annulment case,[29] must inform the other receivers. Under the rules of mandatory collaboration, the receivers will provide the other receivers with the information required to develop compatible and coordinated reorganization plans.

Effects of the joint application. The joint application for insolvency triggers a lot of specific effects, mainly in the interest of a better administration of the procedure.

28 UNCITRAL Guide 2010. 2.

29 For details on treatment of fraudulent transactions in insolvency, see Glodeanu 2014, 380–382.

Creditors' committees nominated for each group member company subject to insolvency proceedings will meet at least quarterly, the main goal being to make recommendations on the activity of the debtor companies and reorganization plans. These joint meetings serve as a coordination tool for the procedures from the point of view of the creditors. Also, the same special administrator (shareholder's representative) must be nominated for each group member by the general meetings of the debtor, and therefore the same person will represent the interest of the shareholders in all parallel insolvency procedures.

If creditors holding at least 50% of the debts are identical for each member of the company group, the management of the affairs of each company will be assigned to the same receiver (judicial administrator) or, when this condition is not met, the receivers must cooperate in the context of a cooperation protocol agreed in 10 days from the start of the procedure and approved by the syndic judge, under the direction of a coordinating receiver.[30] Any of the receivers appointed in the insolvency proceedings of a group member may attend meetings of creditors and creditors' committees of any of the other insolvent group members. Moreover, any receiver can propose a reorganization plan also in the insolvency procedures of the other group members.

As a measure of creditor protection, the law states that all intra-group claims arising from transactions concluded *before* the date of opening of insolvency proceedings are not treated as regular claims but as *subordinated claims* (with minimal chances for payment),[31] which is not justified in my opinion if the claims resulted from the normal or ordinary course of business transactions. Unfortunately, this approach has no facilitating effect for group reorganization. Of course, there is a chance of intra-group fraud, but the fraudulent transactions must be treated separately and the simple existence of the company group, which is nowadays a perfectly normal legal construction to organize business activity, cannot be sanctioned in this way. This tool of creditor protection is at the same time and evidently in the disadvantage of the own creditors of the intra-group creditor company.

There is no clear rule for the problem if company group insolvency rules must be applied in the case when only one member company of the group is insolvent. If not, the intra-group debts maintain their normal rank. The jurisprudence must clarify this aspect. According to my opinion, the company group rules must be applicable even in the case when a single member of the group is insolvent, otherwise the rules have a discriminatory nature: when one company is insolvent, the intra-group claims maintain their rank; when two or more group members are insolvent, the intra-group claims are demoted to a lower rank. I must conclude

30 The law does not determine the rules of nomination of the coordinating receiver, but the syndic judge has the powers to determine which one of the receivers will act in this specific quality.

31 Şarcane 2014. 845.

that the application of group insolvency rules are not preconditioned to a joint request to open insolvency procedures of two or more company group members.[32] The practical consequence will be the use of avoidance methods to simulate intra-group claims as claims owned by third parties. There is the question as to whether collaterals constituted by the insolvent group member, for a claim of another group member, prevent or not the demotion of that claim. Will that claim preserve or lose its special status as a guaranteed claim? In my opinion, those claims have to be treated as guaranteed ones.

Instead, a group member may enter into a loan agreement with another member of the group *after* the opening of the insolvency proceedings to support the activity of the debtor within the period of observation or to support the reorganization plan with the consent of the creditors' committee. In this case, the lending group member will have a claim against the debtor with a higher and usual priority of the claims of such nature, ahead of ordinary unsecured creditors. As it was stated in the UNCITRAL Guide, 'the particular interest of a group member providing finance may relate more to the insolvency outcome for the group as a whole (including that member) than to commercial considerations of profit or short-term gains, especially where there is a high degree of integration or reliance between the businesses of the group members'.[33]

A group member can guarantee a loan agreement entered into with a third party, with the agreement of the creditors' committee.

Procedural aspects. The debtor(s) are obliged to submit to the case file a complete list comprising the members of the company group, whether they are insolvent or not, a description on how the group is functioning, and the list of ongoing contracts concluded between group members.

Group interest and insolvency. The group interest legally exists if certain legal rules are providing priority for the group against the individual and isolated interest of group members. The set of rules analysed above reflects in some way such a legislative approach. We can identify some traces of a specific group interest (joint application for insolvency for group members, coordination of the procedures, the possibility for a non-insolvent group member to join the insolvency proceedings to avoid its own insolvency in the future, methods to support the insolvent group member, etc.). But there is a fragile balance between creditor protection, on the one hand, and group interest, on the other hand, resulting in the lack of unitary approach. If the group reorganization has to be facilitated, the

32 In this sense, the UNCITRAL Guide states that 'it is desirable, therefore, that an insolvency law not establish a joint application as a prerequisite for procedural coordination'. See UNCITRAL Guide 2010, 22.

33 UNCITRAL Guide 2010. 44.

demotion of pre-insolvency intra-group claims will surely have negative effects, and there is no incentive for a non-insolvent group member to join the insolvency procedures under such circumstances. Practically, the ranking demotion of pre-insolvency intra-group claims infringes heavily the group interest, which is not counterbalanced through other legal provisions indirectly and faintly recognizing and protecting such an interest.

IV. Conclusions

We can observe that there are conflicting approaches towards group interest. A reform introducing group interest into company law, based on a unitary approach, aiming to ease the creation and operation of company groups while balancing the interest of minority shareholders and creditors as well, seems necessary, especially in the case of Romania, an EU Member State which was rightfully considered as having 'uncertain laws' on group interest.[34]

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