



Group Interest in Poland

Dorota Maśniak

Department of Civil Law, Faculty of Law and Administration,

University of Gdansk

E-mail: d.masniak@prawo.univ.gda.pl

Abstract: The purpose of this article is to analyse the legal environment of the conception of group interest in Poland. In the Polish legislation, there is no standard category of the group interest. In the doctrine, we have two competing views of the concept of company interest. The first view is emphasizing the autonomous company interest. From the second viewpoint, company interest is only perceived as ‘accessorial’ from the perspective of the interests of the participants in the Corporation. This view leads to identifying the company interest with the group interest. The interest of the group of companies was recognized by the Polish courts, whose decision is recognized as the turning-point. The freedom of the parent is significantly limited if the subsidiary includes minority. Such situation requires achieving balance between the interest of the parent and the minority.

Keywords: group interest, company interest, autonomy of parent

The Concept of Group Interest in Poland

1. Legal Norms

The Polish laws regarding the groups of companies have been, by and large, limited to art. 7 k.s.h. (the Commercial Companies Code). The above provision has been accurately defined in the doctrine as *scarce*¹ or *limited*² *regulation of the holding law*. It refers mainly to concluding between the parent company and the subsidiary company the so-called holding agreement providing for the management of the subsidiary company or the transfer of profit by the said company, and determines the obligations related to the registration of such

1 Romanowski 2008. 6.

2 Szumański 2001. 20.

agreement.³ Other provisions of the Commercial Companies Code defining the concept of parent company and subsidiary company, and also other legal effects resulting therefrom, are not to support regulations concerning the operations of the groups of companies as one economic body, but to counteract the negative consequences related mainly to purchasing stocks or own shares and exercising the voting rights. The institution of the capital group is reflected in the provisions of the Accounting Act. In such context, it has specific features and precise duties in compliance with the provisions of the said Act.⁴ The concept of fiscal capital group can be found in the provisions of the tax law.⁵ Less precise concept of the capital group can be found in the Act on Competition and Consumer Protection.⁶

3 According to Article 7 § 1 k.s.h. (The Commercial Companies Code): 'Where the dominant and the dependent company enter into an agreement which provides for the management of the dependent company or a transfer of profits by such company, excerpts from the agreement with provisions on the liability of the dominant company as a result of non-performance or improper performance of the agreement and on the liability of the dominant company for obligation of the dependent company towards its creditors shall be filed in the registration file of the dependent company.' Further, Article 7 § 2 k.s.h. states that 'If such is the case, the fact that the agreement does not regulate or that it excludes liability of the dominant company referred to in § 1 shall also be disclosed'. In the light of Article 7 § 2 sentence 2 k.s.h., failure to report the above cited circumstances 'within three weeks of the date of the agreement shall result in the invalidity of the provisions on the limitation or exclusion of liability of the dominant company to the dependent company or its creditors'.

4 The Accounting Act of 29 September 1994 (J. L. No 121, item 591 as amended).

5 Tax capital group is a special kind of tax payer income tax, which operates from 1.1.1996. It can be created only by commercial companies with legal personality (limited liability companies and joint-stock companies), which are established in the Republic of Poland. The creation of such a group is combined with some advantages for companies which created it. First of all, these benefits are applied to simplify the procedure for clearance of the corporate income tax law and the tax advances. If the group consists of the company bringing a loss, it reduces the tax base of the group (based on the Law of 02.15.1992 on the income tax from legal persons, i.e. Journal of Laws of 201, item 851, as amended).

6 The legal definition of the capital group indicated in Article 4 point 14 u.o.k.k. (Act on competition and consumer protection) specifies that capital group is a group of all enterprises which are controlled directly or indirectly by one enterprise, including this enterprise. This broad definition does not indicate binding forms of control between the members of the group. It applies to 'all enterprises', which is widely understood as a group of entities, which include the entrepreneur as defined in the Act on freedom of economic activity, i.e. natural persons, legal persons, and organizational units which are not legal persons, recognized by the law as units with the separate legal capacity – performing business on their own behalf. Act on competition and consumer protection adds to this circle also individuals, legal persons, and organizational units without legal personality but with the separate legal capacity, which organize or provide public services (not business within the meaning of act on freedom of economic activity), natural persons performing proprietorship in their own name and for their own account or engaged in the exercise of such profession, natural persons who have control (within the meaning of Article 4 point 4 uokk) of at least one entrepreneur, even if they do not carry on business within the meaning of freedom of economic activity, if they take further action under the control of concentrations (referred to in Art. Uokk 13), as well as business associations (within the meaning of Art. 4 point 2 uokk) for the purposes of the rules on restrictive practices and practices infringing collective consumer interests.

In Polish legislation, there is no standard category of group interest. The proposal to define the said concept can be found in the draft of the act on amending the Commercial Companies Code of 28 July 2009. It provides for adding to the Code the fourth division entitled: Groups of Companies. Within the meaning of the draft (Art. 4 § 1 p. 5¹), ‘the group of companies comprises the parent company and subsidiary company or companies, in actual or contractual permanent organizational solution and with common economic interest (interest of the group of companies)’. In compliance with Art. 21¹ § 1 of the draft, ‘the parent company and the subsidiary company, within the group of companies, is governed, apart from the interest of the company by the interest of the group of companies, taking into account justified interest of the creditors and minority shareholders of the subsidiary company’. Moreover, under Art. 21¹ § 2 of the draft, ‘the parent company or the subsidiary company should reveal in the register their participation in the group of companies’.⁷ According to the draft, the above-mentioned provisions fail to form the principle of priority of the interest of the group of companies over the own interest of the parent company and the own interest of the subsidiary company participating in the group. They rather constitute the directive providing that the role of the parent company or subsidiary company within the group is to try to match the interest of the group of companies with the own interest of a particular company. The said draft of the Codification Commission was widely discussed in the doctrine of law. It was criticized, *inter alia*, for ambiguous regulation regarding taking actions unfavourable for particular subsidiary companies even if, eventually, the profits and losses were justly distributed between the companies within the group.⁸

Company legal interest is a normative legal category (Art. 249 § 1 and Art. 422 § 1 of the Polish Commercial Companies Code). Violation of the company interest authorizes, i.a., members of the Board or the Supervisory Board to appeal the resolution of the shareholders’ meeting which is contrary to that interest (Art. 250 and Art. 422 § 2 point k.s.h. – a judicial review of the resolutions of the general meeting of the shareholders). It is the pattern of proper execution of voting rights of the members and the shareholders.

2. Competing Views on the Concept of Company Interest

2.1. The First View –

Emphasizing the Autonomous (Subsidiary) Company Interest

Proponents of this view emphasize the need to protect the integrity and the existence of the company as such, thereby strengthening and stabilizing the position of minority shareholders, creditors, and employees. Accentuating the

7 www.bip.ms.gov.pl/Data/Files/_public/bip/kkpc/proj090925.rtf.

8 Domański, Schubel 2011. 8–9.

distinctiveness of the company interest may appoint a counterweight to the aspirations of the majority of the shareholder or sole shareholder to subordinate the subsidiary. It may reduce the risk of taking unilateral actions that favour the majority shareholder to the detriment of the minority as well as lessen the risk of insolvency of the company. On the other hand, this approach hinders the proper management of the group. The primacy of the company interest stems from the law. The priority of the board is the company's interest as an entity separate from the shareholders, and not the interest of shareholders as an indicator of the company's interest.⁹

2.2. *The Second View –*

Company Interest Is Only Perceived as 'Accessorial' – from the Perspective of the Interests of the Participants in the Corporation

The company interest is solely the result of focusing on the complex interests of members and others involved in the activities of the company. This view leads to identifying the (subsidiary) company's interest with the group interest. The primacy of the interests of shareholders facilitates using a set of integrated management instruments and the implementation of a unified strategy by the parent company – leading group. The interest of subsidiaries may be subordinated to the good of the group as a whole, determined by the parent company. However, legitimate aspirations of the minority shareholders and stakeholders should be respected. It increases the autonomy of the parent company and creates the possibility of the subsidiaries' closer subordination to the group.

This approach makes it possible to respect the requirements for the activities of such a group treated – from the business perspective – as a single entity. The parent entity is legitimate to implement a uniform strategy. The board members of the subsidiary are authorized to act in the interest of the parent entity and the group as a whole. Acting in the interest of the group usually falls within the category of acting in the interest of the parent entity. The parent entity is legitimate to implement the uniform strategy of the group leading to maximizing the value of investments in the share rights of subsidiary companies, and at the same time respecting substantiated aspirations of the minority shareholders of those companies. Acting in the interest of the group usually falls within the category of acting in the interest of the parent entity. The interests of creditors, employees, and other stakeholders of companies within the group should be taken into account as individual directive on operation only within clear and precisely defined duties resulting from the provisions of the law, and only 'by accessory', i.e. to take into account the interest of business partners and shareholders. The interests

9 Sołtysiński 2015. 33ff; Szumański 2010. 12ff; Brylowski, Kidyba 2015. 8ff; Olechowski 2010. 673.

of employees, creditors, and other stakeholders rank lower in the hierarchy of goals which should be implemented by the officers of the company. Acting in the interests of the parent entity and shareholders of the entire group is unacceptable when the benefits obtained by shareholders become disproportionate to the negative consequences for the stakeholders (proportionality test). In compliance with the view presented in the doctrine, strict compliance with the ban on acting to the detriment of the subsidiary company and in the interest of the entire group of companies would make satisfying the needs of modern economic turnover impossible.¹⁰

3. Group with Wholly-Owned Subsidiaries – the Autonomy of the Parent

The above mentioned interpretation of the concept of company interest makes it possible for the parent entity with 100% share rights of the company to make accomplishments, relatively freely, through the scheduled goals – including the strategy of the group led by the parent entity. It is the sole shareholder who defines the interest of the subsidiary company. The capital company can be established for any legally acceptable purpose, which stems from The Polish Commercial Companies Code (Art. 151 §1). Due to the lack of statutory limitations regarding the purposes of establishing companies, the said principle applies also to joint-stock companies. Therefore, it is not impossible to locate loss-generating business activities in a company, indispensable for the correct operation of other companies from the group or the entire group (i.e. ‘cost centre’). The parent entity and members of the subsidiary boards – implementing the said strategy – should not be accused of acting against the interest of the sole shareholder subsidiary. It is the parent entity who, as a sole shareholder, defines the interest of the company. The role of the company may be limited to a dependent function in the activities of the group, obtaining as a task the completion of a single activity (sale of products, human resources management, and delivery of raw materials to other companies within the group). The company is, therefore, deprived of independent existence outside the group.

Company autonomy does not exist, in fact, as a good thing in and of itself. The autonomy of the sole shareholder company is necessary, not to protect the company but its creditors, employees, and potentially other groups whose rights may be infringed as a result of excluding the personal liability of the sole shareholder for the liability of subsidiaries (Art. 151 § 4 and Art. 30 § 5 PCCC).

Within the remaining scope, the interest of creditors is protected under a directive ordering the sole shareholder and the management to refrain from

¹⁰ Kwaśnicki, Nilsson, 2007. 26.

activities which may put the creditors at excessive and disproportionate risk. Bringing the existence of the company into danger due to the aggressive policy of the group, if it endangers the interest of the creditors, indicates the violation of the provisions of the 'proportionality test', and goes beyond the legitimate conduct in the interest of the company. It is different in the case of taking over the corporate opportunities of a sole-shareholder subsidiary company, which does not affect the ability to fulfil obligations towards the creditors, fails to violate the provisions on the protection of initial capital, and does not lead to disproportionate damages concerning the employees' interest (e.g. group lay-offs not substantiated by the financial standing of the company or the group) but supports the interest of the parent entity or the group. They should be deemed legitimate.

4. Groups with Other Subsidiaries (Multi-Shareholder Company) – the Autonomy of the Parent

The freedom of the parent entity is significantly limited if the subsidiary company includes minority shareholders. Such situation requires a balance between the interest of the parent shareholder and that of the minority. The parent entity cannot demote the controlled company to the role of an instrument for implementing the goals of the group, to the detriment of legitimate aspirations of the minority partners interested in obtaining fair return on investment. The need to balance the interests requires respecting the fundamental interest of business partners to obtain income from the company activity. The parent entity may, within certain limits, decide to choose the long-term growth strategy, which forces the entity to suffer some 'losses' in a short-term perspective. However, it cannot denote the permanent exclusion of the profitability of the company with minority shareholders. The company should adequately benefit from the participation, which will make it possible to compensate for the suffered 'losses'. The benefits obtained by the subsidiary company from the transactions with the parent partner do not need to be of a direct nature. For example, furnishing by the subsidiary company a security on the debt of the parent partner towards a third party may be a prerequisite for ensuring further activity of the holding which ensures the existence of subsidiary company (e.g. it is the sole recipient of its products). Funding may become indispensable for making a particular investment which, in a longer perspective, will bring benefits to all companies within the holding.¹¹ The decisive factor here should be the general balance for the company resulting from the participation in the holding.

11 Olechowski, 2010. 677ff.

5. Protection of Minority

The protection of a subsidiary's asset integrity is achieved by the provision prohibiting any concealed transfers of funds from the company as transactions outside the corporation (Art. 355 § 3 PCCC). This provision is a criterion for assessing the subrogation operations of company assets such as downstream loans, guarantees, which are widely accepted, more problematic upstream loans or cash pooling (Art. 355 § 3 PCCC).

In connection with the transposition of the Thirteenth Directive,¹² protection of minority in a public company has been a little strengthened by the 'sell-out right' in the event of a control take-over of the subsidiary (institution of the mandatory bid from art-s 73–81¹³ Act on Public Offering, Conditions Governing the Introduction of Financial Instruments to Organized Trading, and Public Companies). 'Sell-out right' is also combined with the right of squeeze-out – enabling the minority to require the majority to buy shares following a take-over bid by a shareholder holding not less than 90% of the share capital or by not more than five shareholders holding jointly not less than 95% of the share capital in a closed company (non-public) – Art. 418 PCCC. Other companies (non-public) also have that right.

6. Role of Jurisdiction (and Politics)

The opinion on the 'accessory character' of the concept of company interests relative to the interests of business partners and stakeholders has recently prevailed in jurisprudence. According to the decision of 5.11.2009,¹⁴ the Supreme Court stated that the separate interest of the company as a legal person, disregarding the outcome of the interest of all business partners, determined by common goal specified in the Articles of Association under common goal cannot exist. Therefore, the concept of company interest is a statutory general formula the fulfilment of which requires including compromise-based function of beliefs, aspirations, and conduct.

Along the same lines, the Supreme Court stated in the decision of 22.10.2009¹⁵ that *the interest of the company constitutes a compromise between frequently contradictory interests of minority and majority partners, and its content should take into account legitimate interests of both groups of business partners*. The Supreme Court confirms the traditional interpretation of the concept of company interest as *autonomous interest relative to the interests of particular*

12 Thirteenth Directive 2004/25/EC of the European Parliament and of the Council of April 2004 on take-over bids L 142/12.

13 Journal of Laws 2005 No 184 item. 1539.

14 Case ref. no: I CSK 158/09.

15 Case ref. no: III CZP 63/09.

entities participating in the corporate structure, which results from granting the limited liability company the legal capacity (Art. 11 § 1 and Art. 210 of the Commercial Companies Code). It emphasizes that the *interests of those two categories of entities remain in a functional relationship*. The Constitutional Tribunal in the decision of 2 June 2005¹⁶ emphasized that the interest of the company should not be identified only with the interest of the majority shareholder and that one could not assume that every defensive activity of the minority shareholder would be dictated by the interest of the company or the objective interest of the company.

The interest of the group of companies was recognized by the Court of Appeal in Katowice, whose decision of 3.12.2012¹⁷ is recognized as the turning-point.¹⁸ The Court ruled that the decision – taken in order to implement the common economic goal – of a particular company to formally enter a group associating other companies leads to subordinating ‘the activities of the company to the common interest, which indicates, in fact, limiting the independence through strategic decisions dependent on the economic situation in the country and in the world in the interest of the entire group (namely all participating companies)’.¹⁹ First, the Court indicated that the fact of establishing capital companies and the fact that they join corporations fall within the frame of the freedom of business activity, and, moreover, it is a frequently wanted activity because of the implementation of the economic assumptions of the state. In the process, the adjudicating panel defined the concept of the interest of the group of companies as an approved strategy of economic activity of companies which constitutes the ‘community of company objectives’. In the said context, the Court found the accusation that the very fact of subordinating strategic decisions of Company X to the interest of Corporation is contradicting the law as being groundless since in a situation like this establishing such relationships, in general, would have to be recognized as unlawful. The Court of Appeal found binding the Company Management Board

16 P 25/02, OTK-A Zb.Urz. 2005, no 6, item 65.

17 Case ref. no: V ACa 702/12.

18 Kwaśnicki, Czekaj, <http://www.kwasnicki.com.pl/prawo-holdingowe-interes-grupy-spolek-widza-juz-sady/>.

19 The subject judgment was issued based on the following facts: Company X joined the Corporation associating other companies within the same capital group, on the basis of a resolution of the general meeting. The basis of the Corporation functioning was defined in a special Code. Under its provisions, the purpose of each company being part of the Corporation is focusing on the implementation of the Corporate Strategy (i.e. The strategy of the Corporation), while the strategies of individual companies included in its composition are determined by the Corporate Strategy and should be consistent with it. One of the shareholders of Company X challenged the subject resolution accusing it of violating Art. 375, Art. 375¹, and Art. 368 – Code of Commercial Companies. His request was based on the assumption that the resolution of Company X’s general meeting had issued its binding recommendation to the Management Board on how to manage the affairs of Company X (through the subordination of its operation to the objectives of the Corporation), and also the Management of Company X was subordinated to the Board of the Corporation.

to the interest of the Corporation acceptable. The said statement results from the assumption providing that since the Corporation too is composed of Company X, subordinating the activities of the Board of Company X to the interest of Corporation constitutes activities in the interest of X Company X as well.

The importance of the said adjudication seems more significant since it is closely related to the controversial Art. 23 para. 2 of the draft of SUP directive (now deleted).²⁰ It is necessary to mention that the said provision was criticized by the experts of the Bureau of Research Chancellery of the Sejm, who expressed their opinion on the said draft at the request of the Polish Parliament. They found that *the proposal in the draft legal subordination of the board to the sole partner is not necessary to fulfil the objective of the directive and it unduly limits the autonomy of the Board. The Board shall not be bound by orders contradictory to the law or the Articles of Association (Art. 23 para. 2 of the draft); however, it shall be bound by the orders contradictory to the interest of the company and its stakeholders (creditors, employees).*²¹

Another adjudication, which has already cleared the way towards taking into account the interest of the group of companies under the Polish law, is the adjudication on the so-called Szczecin case. In the decision of 2 April 2008,²² the Regional Court in Szczecin hearing the case, stated, *inter alia*, that ‘the specific aspect of holding (...) made it possible to propose the thesis (...) that persons managing the group of companies in particular transactions should be governed by the interest of the entire group and at least (...) such conduct could not be deemed unlawful, certainly upon retaining the minimum autonomy of subsidiary entities and taking into account the interest of partners (shareholders) and creditors of subsidiary companies’. The Court also pointed out rightly that in a situation when there were no precise national regulations the decision-making process regarding the accused might have been affected by the practice of similar economic entities in Europe concerning the commercial operations within the holding. By referring to transactions made between the entities of the holding, the Court emphasized that the nature of liabilities between the parent company and the subsidiary company is not in opposition to the procedure of applying prices between themselves other than market prices, provided that it falls within the interest of the entire holding. The interpretation of the Regional Court was upheld by the Court of Appeal in Szczecin in the decision of 6 May 2009.²³ The Court rejected the accusations of the prosecutor stating that the court

20 Proposal for a directive of the European Parliament and of the council on single-member private limited liability companies (com (2014) 212 final).

21 P. Sobolewski, *Opinia w sprawie wniosku dotyczącego dyrektywy Parlamentu Europejskiego i Rady w sprawie jednoosobowych spółek z ograniczoną odpowiedzialnością* (COM(2014) 212 final), Warszawa, 28 maja 2014 r. BAS-WAL-WAPEiM-1004/14.

22 Case ref. no III K 288/08.

23 Case ref. no II AKa 142/08.

of first instance made a mistake as to the fact involving unjust assumption of – non-existent in the current state of law – primacy of the protection of legal interest of the group of companies over the legal interest of a single company constituting separate legal entity. The Court has firmly emphasized that the interpretation of the prosecutor supporting the legal and economic autonomy of every company within the holding and, in particular, the statement providing that there was a requirement on the activity of each of the companies (through their representatives) in line with their interests – not necessarily in line with the economic interest of the group of companies the company belongs to – was out of touch with economic reality and prevailing opinions in literature regarding commercial and economic law and economics. Moreover, the Court pointed out that trying to find discrepancies between the interest of the holding and a single entity within the holding, at every transaction made by the accused, was erroneous since it had been indicated that every activity conducted by the accused brought benefits to the entire holding and, consequently, to particular subsidiary companies as well.

7. Conclusions

In summary, serious problems in the Polish company law doctrine were identified as the absence of specific minority rights, which would allow the minority shareholders to obtain compensation in the event of diminution of their investment value in the subsidiary.

Therefore, introducing the concept of interest group to Polish law should facilitate the introduction of new, additional instruments for the protection of minority shareholders and creditors.

References

Journal Articles

- BRYŁOWSKI, P.–KIDYBA, A. 2005. Kategoria interesu w kodeksie spółek handlowych. *PPH*. 4–11.
- DOMAŃSKI, G.–SCHUBEL, J. 2011. Krytycznie o projekcie prawa grup spółek. *Przegląd Prawa Handlowego* 5.
- KWAŚNICKI, R.–CZEKAJ, J. Prawo holdingowe: interes grupy spółek widzą już sądy... <http://www.kwasnicki.com.pl/prawo-holdingowe-interes-grupy-spolek-widza-juz-sady/>.
- KWAŚNICKI, R. L.–NILSSON, D. 2007. Legalne działanie na szkodę spółki zależnej. *Przegląd Prawa Handlowego* 12.

- ROMANOWSKI, M. 2008. W sprawie potrzeby nowej regulacji prawa grup kapitałowych w Polsce. *Przegląd Prawa Handlowego*.
- SOŁTYSIŃSKI, S. 2015. *System Prawa Prywatnego* – vol. 17a.
- SZUMAŃSKI, A. 2001. Ograniczona regulacja prawa holdingowego (prawa grup spółek) w kodeksie spółek handlowych. *Państwo i Prawo* 3.
2010. Spór wokół roli interesu grupy spółek i jego relacji w szczególności do interesu własnego spółki uczestniczącej w grupie. *Przegląd Prawa Handlowego*. 9–17.

Articles in Books

- OLECHOWSKI, M. 2010. Interes spółki kapitałowej wobec relacji kontraktowych w grupach spółek (zagadnienia wybrane). In: *Prawo handlowe XXI w. Czas stabilizacji, ewolucji czy rewolucji*. Księga Jubileuszowa Profesora Józefa Okolskiego eds. M. Modrzewska, Warszawa.