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## The Group Interest in Connection with the Groups of Corporations in the Concern Law

In the company law there is a basic principle that the company is an autonomous legal entity and independent from other subjects of law. In the relationship of the parent company and the subsidiaries we can find two perspectives:

- on the one hand an economic perspective, the separate corporations constitute one enterprise (the subsidiaries are or can be instructed/directed by the parent company), the group of corporations is a unitary business entity;
- on the other hand a legal perspective, the coherence and the conflict among the interest of the parent company, the interest of the subsidiaries and the interest of the group.<sup>1</sup>

The interest of the group is recognized in France, Italy, Belgium, the Netherlands, Luxembourg and in the Nordic countries.<sup>2</sup>

We can distinguish among three notions related to the regulation of the group of corporations at the Member States level: the German, the British and the French. In the German approach (Konzernrecht) the concern law only applies to stock companies (Aktiengesellschaft, AG), and both contractual groups (Vertragskonzern) and factual groups (faktischer Konzern) are regulated. The interest of the group are recognized, and the parent company has the right to give instructions to the controlled companies, but it has a duty to compensate the losses and damages of the subsidiaries originating from the direction of the controlling company. In the British approach there is no special provision for the group of corporations. However, the directors of controlled companies are able to take into account the interest of the group in decision-making. In the United Kingdom the subsidiary director's personal liability for wrongful trading is a safeguard contrary to the parent company. In the French approach the interest of the group derives from the Rozenblum decision of the French Supreme Court (1985): the court recognized the interest of the group. In France the directors of the controlled companies may take

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<sup>1</sup> CONAC, PIERRE-HENRI: Director's Duties in Groups of Companies – Legalizing the Interest of the Group at the European Level. *European Company and Financial Law Review*, Vol. 2013., Issue 2., 195., 215.

<sup>2</sup> Ibid. 209.

into consideration – under specific conditions – the interest of the group in their decision-making causing detriments to the subsidiary.<sup>3</sup>

The Rozenblum decision established four requirements for the group of corporations:

- a capital links should exist among the subjects of the group;
- there is an effective business integration within the group in the sense of effort of common interest;
- there are mutual commitments and economic remuneration (benefit) among the concerned companies (in Italy theory of compensatory advantages);
- for a long-term any support from the controlled companies must not exceed their potential.<sup>4</sup>

At the European level there were two attempts to regulate the groups of companies: the fifth directive and the preliminary draft of ninth directive, but they failed.<sup>5</sup> The issue of the group law appeared again in the „Winter report” (Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe of 2002).<sup>6</sup> In the sense of the wholly-owned subsidiaries the 2008 proposal on the Statute for a European Private Company (*Societas Privata Europaea*, SPE) was important.<sup>7</sup> The next step forward the recognition of the group interest was the Reflection Group on the Future of EU Company Law of 2011.<sup>8</sup> In the Action Plan (2012):<sup>9</sup> European Company Law and Corporate Governance – a Modern Legal Framework for More Engaged Shareholders and Sustainable Companies the Commission aimed an initiative in 2014 to recognize the concept of the group interest.<sup>10</sup> The newest developments are the Proposal for a Directive on Single-Member Private Limited Liability Companies (*Societas Unius Personae*, SUP)<sup>11</sup> in connection with the wholly-owned subsidiaries (among others: in order to facilitate the operation of groups of companies), and the Commission’s questionnaire to survey the positions in EU in connection with the recognition of the concept of group interest.

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<sup>3</sup> Ibid. 199–201.

<sup>4</sup> Ibid. 219.

<sup>5</sup> PAPP TEKLA ed.: *Társasági jog* (Company Law). Szeged, 2011, Lectum Kiadó, 612–613.; CONAC: op. cit. 196.

<sup>6</sup> Ibid. 196.

<sup>7</sup> Ibid. 197.

<sup>8</sup> Ibid. 203.

<sup>9</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions.

<sup>10</sup> CONAC: op. cit. 204.

<sup>11</sup> COM(2014) 212 final 2014/0120 (COD).

## 1. Fundamental and general statements in connection with the Hungarian group of corporations

In Hungary the law of groups of corporations is a special field of company law, but also regulated by the Capital Market Act.<sup>12</sup> The concern: a participant of the economic life acquires influence concerning mechanism of decision-making in the limited liability company, stock company, grouping and cooperative society registered in the Firm Registry and operated independently, as a result of that the companies/associations keep their legal independence, but they constitute an economic unit.<sup>13</sup> Within the law of groups of corporations we can separate the recognized (qualified) concern and the de facto (actual/real) concern.<sup>14</sup> The recognized concern is based on a contractual relationship, on a control contract. The de facto concern is founded on the fact of influence acquisition, without concluding a contract.<sup>15</sup> The essence of influence<sup>16</sup> can be:

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<sup>12</sup> CXX of 2001.

<sup>13</sup> PAPP: op. cit. 538.

<sup>14</sup> For details see: VECSEY, MARC: Haftungsrisiken für (ausländische) Muttergesellschaft in ungarischen Konzernstrukturen. In WINNER, MARTIN ed.: *Haftungsrisiken für die Konzernmutter in Mittel- und Osteuropa*. Wien, 2013, facultas.wuv, 736–745.

<sup>15</sup> Papp TEKLA: 2013. évi V. törvény 3. könyv VI. cím kommentárja (Commentary of Title VI of 3rd Book of Act V of 2013). In OSZTOVITS ANDRÁS ed.: *Great Commentary to the Act V of 2013 and to the connecting legal regulations*. Budapest, 2014, Opten Informatikai Kft., 449.

<sup>16</sup> Act V of 2013 Section 8:2 Influence:

(1) majority control means a relationship where a natural or legal person (holder of a participating interest) controls over 50% of the voting rights in a legal person, or in which it has a dominant influence.

(2) The holder of a participating interest is deemed to have dominant influence on a legal person if it is a member of or shareholder in that company and:

- a) it has the right to appoint and recall the majority of the executive officers or supervisory board members of the legal person; or
- b) other members of or shareholder in that legal person are committed under agreement with the holder of a participating interests to vote in concert with the holder of a participating interest, or they exercise their voting rights through the holder of a participating interest, provided that together control more than half of votes.

(3) Majority control is also deemed to exist if the entitlements referred to in subsections 1-2 are ensured indirectly to the holder of a participating interest.

(4) Indirect control on a legal person means a relationship where a person is able to exercise influence on a legal person that has voting rights in that legal person (intermediary legal person). The scope of indirect control means the percentage of control held by the intermediary legal person that correspond to the percentage of control the holder of a participating interest has in the intermediary legal person. If the holder of a participating interest controls more than half of the votes in the intermediary legal person, the control the intermediary legal person has in the legal

- a „voting concern”, where a member acquires the determined percentage of votes and exercises his/her voting rights;<sup>17</sup> or
- the right to appoint, to recall and to establish the remuneration of the executive officers and members of the supervisory board, or
- other way which provides decisive direction and checking for the controlling company above the operation of the controlled company.<sup>18</sup>

There are two opinions in Hungary in connection with the foundation of concern situation:

- a concern situation comes into existence only when the acquisition of share is based on a legal transaction (on privity), but not on a legal fact (for example inheritance), and not on the organizational amendment (for example merger);<sup>19</sup>
- according to the other opinion there is no importance of the legal title of the acquisition, the legal grounds can be ipso iure or succession.<sup>20</sup>

The acquisition of influence is not equivalent to the acquisition of share, it can be established by facts of both company law and private law.<sup>21</sup> The fact and the measure of influence adjust to the proportion of votes; it can be reached by a determined percentage of votes, or by share with priority voting rights, or by establishment of usufruct on the other members' shares, or if the other members have shares with priority rights but without voting rights.<sup>22</sup>

The subjects of the concern situation are the controlling/parent company and the controlled companies/subsidiaries. A group of corporations may consist of stock companies, limited liability companies, groupings and cooperative societies.<sup>23</sup> If a group of corporations is led jointly by several legal persons, they shall enter into an agreement to determine the one enabled to exercise the rights of the dominant member in accordance with the control contract.<sup>24</sup>

The recognized group of corporations means a form of featuring a common business strategy among at least one dominant member that is required to

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person shall be taken into account in its entirety as indirect control held by the holder of a participating interest.

(5) The direct and indirect ownership interest and voting rights of close relatives shall be applied contemporaneously.

<sup>17</sup> BDT 2002. 173. (Casebook of the Courts).

<sup>18</sup> PAPP: op. cit. (2011), 539.; PAPP: op. cit. (2014), 449.

<sup>19</sup> VEZEKÉNYI URSULA: A konszernjogi felelősség kérdőjelei (Question marks of the liability of concern law). *Gazdaság és Jog*, Vol. 2002. Issue 4., 11.

<sup>20</sup> LB Gfv. XX. 31654/200/5.; LB Gf. I. 32620/2000/10. (Decisions of the Supreme Court).

<sup>21</sup> PAPP: op. cit. (2011), 539.

<sup>22</sup> Ibid. 539.

<sup>23</sup> Section 3:49 (2) of Act V of 2013 (Hungarian Civil Code; hereafter abbreviated: CC).

<sup>24</sup> Section 3:49 (3) of CC.

draw up consolidated annual accounts and at least three members controlled by the dominant member under a control contract.<sup>25</sup> By reason of this the conjunctive conditions of the recognized group of corporations are the following: at least one controlling member (with commitment to draw up consolidated annual accounts), at least – permanently – three members controlled by the parent company, and these members conclude a control contract based on a common business strategy. The recognized group of corporations is neither a legal entity nor a legal person.<sup>26</sup>

The concern law regulates only the acquisition of influence in existing companies, it is irrelevant to the influence originating at the timepoint of the foundation of companies.<sup>27</sup> The regulation of concern law is divided into two parts: the rules of process and legal effect of acquisition of influence (general and dynamic regulation of concern law) and the provisions for special rights and duties connecting with the existing influence (particular regulation of concern law).<sup>28</sup>

## 2. The group interest

By means of exercising of influence the controlling company can enforce its interests during the operation of the group of corporations. Through it the interest-identity between the dominant member and the company can be injured, the interest of the controlling member does not necessarily suit the object of the company. One of the duties of concern law is to balance the conflict of interests among the parent company and the subsidiaries,<sup>29</sup> as the exercising of influence concerns the minority of the controlled companies and also their creditors.<sup>30</sup>

This conflict of interests (concern conflict) between the dominant member and the company is legally legitimate, and the „Treupflicht” is effective only in the de facto concern.<sup>31</sup> The subsidiaries are operating under unified direction

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<sup>25</sup> Section 3:49 (1) of CC; MISKOLCZI-BODNÁR PÉTER: Az elismert vállalatcsoport az új Ptk.-ban (The recognized group of corporations in the new Civil Code). In MISKOLCZI-BODNÁR PÉTER – GRÁD-GYENGE ANIKÓ eds.: *Megújulás a jogi személyek szabályozásában – tanulmányok az új Ptk. köréből* (Renewal in the regulation of the legal persons – essays in connection with the new Civil Code). Acta Caroliensia Conventorum Scientiarum Iuridico-Politicarum IX. Budapest, 2014, KRE ÁJK, 148–150.

<sup>26</sup> PAPP: op. cit. (2014), 449.

<sup>27</sup> PAPP: op. cit. (2011), 540.

<sup>28</sup> Ibid. 540.

<sup>29</sup> Ibid. 538.

<sup>30</sup> Ibid. 540.

<sup>31</sup> DARÁZS LÉNÁRD: A konszernjogi uralmi szerződés polgári jogi és/vagy társasági jogi természete (The civil and/or company law nature of the control contract in concern

(in economic sense) and typically according to the interests of the dominant member.<sup>32</sup> The dominant member subordinates the controlled companies to its business interests in return for adequate compensation of detriments.<sup>33</sup> The interests of the group of corporations are primary until the subsidiaries (and their stakeholders: members and creditors) can proportionally share in the benefits of the concern situation and also in the fair dividing of the disadvantages of the group of corporations.<sup>34</sup> It means that in the recognized group of corporations the dominant member can not instruct unlimitedly the management of the controlled companies, and the concern situation does not grant exemption from the liability of the controlled companies' directors for detriments causing by the execution of the dominant member's decisions.<sup>35</sup> Tamás Sárközy is of the opinion that

- the necessary minimum of the autonomy shall be provided for subsidiaries,
- the subsidiaries' management can be instructed only from the reason and to the extent of the performance of the business political conception of the group of corporations.<sup>36</sup>

The recognized group of corporations comes into existence by concluding the control contract (*Beherrschungsvertrag*). If only the dominant member holds any share in the controlled member of a group of corporations, no control contract is required; instead, the mandatory layout of the control contract shall be provided for in the instrument of constitution of the dominant member and the controlled member.<sup>37</sup> The control contract lays down the common business strategy for a group of corporations.<sup>38</sup> The control contract shall inter alia contain the following

- the corporate names and registered offices of the dominant member and the controlled members,
- the mode of cooperation within the group, including the key aspects,
- an indication as to whether the group of corporation is established for a limited period of time or for an indefinite duration.<sup>39</sup>

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law). In *Liber amicorum, Studia A. Harmathy dedicata*. Budapest, 2003, ELTE ÁJK Polgári Jogi Tanszék, 168.

<sup>32</sup> Ibid. 169.

<sup>33</sup> Ibid. 182.

<sup>34</sup> GADÓ GÁBOR: A vállalatcsoport szabályozása az új társasági törvényben (The regulation of the group of corporations in the new company act). *Gazdaság és Jog*, Vol. 2004., Issue 1., 4.

<sup>35</sup> Ibid. 4.; DARÁZS: op. cit. 175.

<sup>36</sup> SÁRKÖZY TAMÁS: Szervezetrendszerek és a polgári jogi jogalanyiség a társasági-egyesületi és az alapítványi jogban (The organizational systems and the civil law legal entity in the law of companies, associations and foundations). *Gazdaság és Jog*, Vol. 2003., Issue 9., 31.; GADÓ: op. cit. 4.

<sup>37</sup> Section 3:54 of CC.

<sup>38</sup> Section 3:50 (1) of CC.

<sup>39</sup> Section 3:50 (2) of CC.

The autonomy of the controlled companies may be restricted in the manner and to the extent specified in the control contract with a view to achieving the common business objective.<sup>40</sup> The control contract shall provide for the protection of the rights of the controlled members, and for the protection of creditors' interests.<sup>41</sup> The general provisions pertaining to contracts shall also apply to control contract.<sup>42</sup> The control contract restricts the economic independence of the controlled companies and makes possible to realize unified business conception, the members are acting in the interests of the concern.<sup>43</sup>

In my opinion the recognition of the group interest is realized through the content of the control contract and by the determination of the common business strategy. But to my mind the common business strategy is not the same as the group interest, the latter is a narrower category: the common business strategy includes also the group interest, but also more (see: business plans, financial reports, budget, business conceptions, organizational relations etc.). The recognition of the group interest is directly expressed in the Hungarian Civil Code in connection with the liability of the subsidiaries' executive officers: the executive officer of a controlled member shall manage the controlled member in accordance with the control contract, under the governance of the dominant member, based on the primacy of the business policy of the group of corporations as a whole; the executive officer shall be exempt from liability to members if his conduct is found to be in compliance with provisions set out in the relevant legislation and in the control contract.<sup>44</sup>

### 3. Safeguards contrary to the parent company in concern law

#### 3.1. Transparency

The dominant member shall make a public announcement on the formation of the group of corporations within 8 days after gaining knowledge of the last decision on the approval of the control contract on two occasions, at least 30 days apart.<sup>45</sup> The public announcement shall contain the control contract and

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<sup>40</sup> Section 3:50 (3) of CC.

<sup>41</sup> Section 3:50 (3) of CC.

<sup>42</sup> Section 3:50 (4) of CC.

<sup>43</sup> DARÁZS: op. cit. 175.

<sup>44</sup> Section 3:55 (4) of CC.

<sup>45</sup> Section 3:51 (3) of CC.

a notice addresses to the creditors and shareholders of the controlled members.<sup>46</sup> The management of the dominant member shall submit an application to the Court of Registry for registration of the group of corporations within 60 days after gaining knowledge of the last approval of the control contract;<sup>47</sup> and the firm registry is authentic and public. After the registration the provisions relating to members with a qualifying holding shall not apply to the group of corporations and its members.<sup>48</sup>

### 3.2. The buy-out right of the subsidiaries' members

The members of a controlled company that participates in a group of corporations may request within a 30-day preclusive period following the second publication of the notice on the formation of the group of corporations that their shares be purchased by the dominant member at the market value prevailing at the time of publication of the announcement.<sup>49</sup> A group of corporations may be registered if all rightful claims of the members of the controlled legal persons have been satisfied, or if the court has dismissed the request of the members in a legal action brought to that effect.<sup>50</sup>

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<sup>46</sup> Section 3:51 (4) of CC.

<sup>47</sup> Section 3:51 (5) of CC.

<sup>48</sup> Section 3:53 of CC; Section 3:324 of CC: Extra commitments of members with a qualifying holding

(1) Where a member of a limited liability company or a shareholder of a private company limited by shares – directly or indirectly – controls at least 3/4 of the votes, the Court of Registry shall be notified thereof within 15 days from the time of acquisition of such qualifying holding for the purpose of registration and publication.

(2) Within a 60-day preclusive period reckoned from the date of notification of the acquisition of a qualifying holding, any member (shareholder) of the company may request that his shares be purchased by the owner of the qualifying holding. The owner of a qualifying holding must purchase such shares at the market value prevailing at the time when the request was submitted, which value may not be lower than the value the shares represent in the company's own capital.

(3) If the company is dissolved without succession, at the request of the creditors the owner of the qualifying holding shall cover any claim for which no satisfaction had been provided, provided that dissolution without succession was brought about in consequence of the poor business decisions of the owner of the qualifying holding. This provision is not applicable in the case where the company is wound up without going into liquidation.

<sup>49</sup> Section 3:52 (1) of CC; BH 2006. 91. (Court Order); SZIT-H-Gf-2009-78. (Decision of the High Court of Appeal of Szeged).

<sup>50</sup> Section 3:52 (3) of CC.



### 3.3. The rights of the subsidiaries' creditors

If a creditor lays any claim to a controlled member participating in the group of corporations at the time of the first publication of the announcement, the creditor may demand adequate safeguards from the controlled member within a 30-day preclusive period following the second publication of the announcement.<sup>51</sup> Any creditor whose claim is already guaranteed – pursuant to statutory provision or contract – shall not be entitled to demand such safeguards, including if it is not justified in light of the controlled member's financial standing or of the contents of the control contract.<sup>52</sup> A group of corporations may be registered if all rightful claims of the creditors of the controlled legal persons have been satisfied, or if the court has dismissed the request of the creditors in a legal action brought to that effect.<sup>53</sup>

Any creditor of the controlled member whose claim reaches 10% of the controlled member's subscribed capital may request the management of the dominant member to provide information on the implementation of the control contract, and on the controlled member's financial standing. If the management of the dominant member fails to comply with the requests, or if the information supplied is insufficient, the creditor may request the Court of Registry to adjudicate that the dominant member is in breach of the control contract.<sup>54</sup>

### 3.4. The protection of the minority stakeholders

A group of members controlling at least 5% of the voting rights in the controlled company and the executive officers of the controlled company may request that the supreme body of the dominant member be convened if they notice any substantive or repeated breach of the control contract. If the management of the dominant member fails to comply with such request within 15 days of the date of receipt, and fails to convene the meeting of the supreme body within 30 days, the Court of Registry shall convene the meeting of the supreme body at the request of the members making the proposal, or shall empower the requesting members to convene the meeting within the prescribed deadline. The costs of the meeting shall be advanced by the dominant member, however, if the request is found unsubstantiated, the costs shall be borne by the requesting parties.<sup>55</sup>

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<sup>51</sup> Section 3:52 (2) of CC.

<sup>52</sup> Section 3:52 (2) of CC.

<sup>53</sup> Section 3:52 (3) of CC.

<sup>54</sup> Section 3:56 (2) of CC.

<sup>55</sup> Section 3:57 of CC.

### 3.5. Employee participation

If employee participation in the supervisory board is mandatory in at least three controlled members of a registered group of corporations, the supreme body of the dominant member may permit, if so requested by the works councils concerned, that the representatives of employees participate in the supervisory board of the dominant member instead of the supervisory bodies of the controlled members. In that case the instrument of constitution of the dominant member shall provide for the setting up of a supervisory board, if the given member did not have one. The mode of delegation of the representatives of employees in that case shall be regulated by way of an agreement (under the general provisions for contracts) among the management of the dominant member and the works councils of the controlled members affected.<sup>56</sup>

### 3.6. Regulation of the relations between the management of the dominant member and the controlled member

The management of the dominant member shall have the right to give instructions to the management of the controlled member as specified in the control contract, and to issue binding resolutions relating to the controlled member's operation. If the dominant member's actions are in compliance with the control contract, the provisions of the Civil Code pertaining to the supreme body's exclusive jurisdiction and to management autonomy shall not apply to the controlled member.<sup>57</sup>

If the control contract provides facilities to delegate competence upon the dominant member for the election and recall of the controlled member's executive officers and supervisory board members, and for determining their remuneration, an employee of the dominant member may be appointed as director of the controlled company.<sup>58</sup>

The executive officers and supervisory board members of the dominant member may also serve at the controlled member as executive officers and supervisory board members.<sup>59</sup>

The management of both the dominant member and the controlled member shall report to their supreme body at the intervals fixed in the control contract, but at least once a year on the fulfillment of the objectives set out in

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<sup>56</sup> Section 3:58 of CC.

<sup>57</sup> Section 3:55 (1) of CC.

<sup>58</sup> Section 3:55 (2) of CC.

<sup>59</sup> Section 3:55 (3) of CC.

the control contract. Any provision of the control contract providing for a less frequent reporting obligation shall be null and void.<sup>60</sup>

### 3.7. Measures of the Court of Registry

In the event of any major or repeated breach of the control contract, the Court of Registry shall, upon request by either of the parties with legal interest:

- call on the dominant member to abide by the control contract,
- introduce supervisory measures,
- dissolve the group of corporations.<sup>61</sup>

## 4. The disadvantageous group's common business strategy and the types of liability

If any controlled member of the group is undergoing liquidation, the dominant member shall be held liable for any debt the member may have outstanding; the dominant member shall be relieved of liability if able to verify that the controlled member's insolvency did not arise as a consequence of the group's common business strategy<sup>62</sup> (secondary, unlimited liability).<sup>63</sup> The instructionright of the dominant member and its result, the dependant situation of the controlled member is the reason for the liability of the dominant member.<sup>64</sup> A casual relation must be between the disadvantageous group's common business strategy and the insolvency of the controlled member: the business policy of the group of corporations caused the detriment (reduction of the assets) of the controlled member; the liability of the following each other dominant members is not joint and several.<sup>65</sup>

The group's common business strategy is an „action programme”: the establishment and planning of the strategic and market transactions for a

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<sup>60</sup> Section 3:56 (1) of CC.

<sup>61</sup> Section 3:60 of CC.

<sup>62</sup> Section 3:59 of CC; BH 2007.418.; BH 2005. 187. (Court Orders).

<sup>63</sup> ÍH 2006. 123.; ÍH 2006. 77. (Decisions of the High Court of Appeal).

<sup>64</sup> ÍH 2004. 36. (Decision of the High Court of Appeal).

<sup>65</sup> 2013. P.4 (Decision of the Curia).

long period, the development of the economic and management conception, draf-ting the business principles and goals etc.<sup>66</sup>

We have to take into account the disadvantageous common business strategy from the aspect of the controlled member and have to examine the activity of the dominant member.<sup>67</sup>

The continuation of the disadvantageous common business strategy shall be qualified as willful, intentional and seriously actionable conduct.<sup>68</sup>

The loan/credit/lend and its partial ceasing by the dominant member to the controlled member, the attempt to sell the share of the dominant member, the single disadvantageous activity of the dominant member, the entering into loss-making contracts by the dominant member and the infringement of the rules of the accounting act by the dominant member do not base the establishment of the continuation of the disadvantageous common business strategy by the dominant member in the Hungarian jurisdiction.<sup>69</sup> If the origin of the detriments of the controlled member can be traced back to objective economic processes and changes, therefore the termination of the loss-making subsidiary by the dominant member is a rational owner's decision, then it can not be considered as the base of the liability of the dominant member.<sup>70</sup> If both the dominant member and the controlled member have losses in consequence of a bad business decision, then it does not mean a disadvantageous common business strategy; the overall effect exercised by particular harms is authoritative for establishment of the disadvantageous common business strategy.<sup>71</sup>

If the business decisions of the dominant member causes losses to the controlled member, and the advantages and disadvantages of this decisions are balanced within the concern, but this conduct of the dominant member establishes the liability of the parent company for the continuation of disadvantageous common business strategy.<sup>72</sup> The disadvantageous common business strategy can be realized by the negligence of the dominant member,<sup>73</sup> by its inactive conduct (no compensation of the subsidiary's loss, no reduction of the capital of the controlled member, no money for maintenance of the subsidiary's real estates) in that interest of reaching own

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<sup>66</sup> ÍH 2005. 34. (Decision of the High Court of Appeal); VECSEY: op. cit. 734.

<sup>67</sup> BH 2008. 91. (Court Order); TÖRÖK TAMÁS: *Konszernjog* (Concern Law). Budapest, 2009, HVG-ORAC Lap- és Könyvkiadó Kft., 181.

<sup>68</sup> Ibid. 181.

<sup>69</sup> BH 2008. 91. (Court Order).

<sup>70</sup> EBH 2005. 1228. (Decision of the Supreme Court).

<sup>71</sup> ÍH 2006. 126. (Decision of the High Court of Appeal).

<sup>72</sup> EBH 2004. 1038. (Decision of the Supreme Court); VECSEY: op. cit. 734.

<sup>73</sup> BDT 2012. 2645. (Casebook of the Courts); NOCHTA TIBOR: Néhány gondolat a konszernfelelősség magánjogi dogmatikájáról (Some thoughts of the private dogmatics of the concern liability). In MISKOLCZI-BODNÁR PÉTER – GRÁD-GYENGE ANIKÓ eds.: *Megújulás a jogi személyek szabályozásában – tanulmányok az új Ptk. köréből*. (Renewal in the regulation of the legal persons – essays in connection with the new Civil Code). Acta Caroliensia Conventorum Scientiarum Iuridico-Politicarum IX. Budapest, 2014, KRE ÁJK, 238.

economic aims.<sup>74</sup> This decision of the Hungarian Curia is a controversial question in the Hungarian legal literature:<sup>75</sup> the legal ground of the liability of the dominant member can be a negligence, but only then, when this negligence is an infringement of the rules of law or of the instrument of constitution, otherwise the Curia gives priority to the creditors' protection against the owner's interest.

We can also find a provision for the responsibility of the controlling company in the act on bankruptcy proceedings and liquidation proceedings, and it is not quite harmonious with the regulation in Hungarian Civil Code.<sup>76</sup> In respect of the liquidation of a company under control by qualified majority, a single member company or a sole proprietorship, the controlling party or the sole member (shareholder) shall be responsible without limitation for the company's liabilities which are not covered by the debtor's assets during the liquidation proceedings, if the court has established the unlimited and full liability of such member (shareholder) for the company's debts pursuant to a claim filed by the creditor during the liquidation proceedings or within a 90-day preclusive period following the time of publication in the *Cégközlöny* (Firm Gazette) of the resolution on the final conclusion of liquidation proceedings, on account of such member (shareholder) having had a permanent disadvantageous business strategy from the standpoint of the debtor company.<sup>77</sup> The content of the statements of facts in Civil Code and in Bankruptcy Act is different:

- the dominant member controls over 75%, or 100% of the voting rights in the controlled member on the ground of Bankruptcy Act;
- the liability of the parent company is valid under liquidation in the Bankruptcy Act, and after liquidation in the Civil Code;
- for claim there is a preclusive period in the Bankruptcy Act, but the general term of limitation in the Civil Code;
- the condition „permanent” is required in the Bankruptcy Act, and not in the Civil Code in connection with the continuation of the disadvantageous common business strategy;
- the dominant member is liable for any debt of the controlled member, which were staying unsatisfied by the subsidiary's assets in accordance with the Civil Code, but upon the Bankruptcy Act the controlling company is liable only for such debts which were claimed by the creditors during the liquidation process, or within a preclusive deadline;
- the provision of the Civil Code emphasizes the causal relation between the liquidation of the controlled member and the common business strategy.

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<sup>74</sup> Kúria Gfv. X. 30.082/2012. (Decision of the Curia).

<sup>75</sup> SZEGEDI ANDRÁS: A Kúria döntése az egyedüli részvényes felelősségéről (The decision of the Curia about the single-member shareholder's liability). *JeMa, Jogesetek Magyarázata*, Vol. 2013., Issue 2., 26–30.

<sup>76</sup> Act XLIX of 1991 Section § 63 (2).

<sup>77</sup> VECSEY: op. cit. 788–789.

The act on public firm information, firm registry and winding-up proceedings also mentions the liability of the dominant member.<sup>78</sup> If the Court of Registry removed a firm with member's limited liability from the firm register by way of involuntary de-registration procedure, the firm's former member – registered at the time of de-registration – shall bear unlimited liability for the outstanding claims of the firm's creditors, if found to have abused his limited liability. A member is considered to have abused his limited liability if having had a permanent disadvantageous business strategy, or who disposed over the firm's assets as his own, or who supported a resolution, in respect of which he knew, or should have known given reasonable care that such resolution was clearly contrary to the significant interests of the firm. Here there are also differences between the contents of the statements of facts in Civil Code and Firm Act:

- the rule in the Firm Act can be applied only for the member of the limited liability company, for the shareholder and for the member of the cooperative, but not for the member of a grouping (where the member has secondary and unlimited liability), opposite to this the regulation in the Civil Code refers to all legal entities in concern law;
- the condition „permanent” is required in the Firm Act, and not in the Civil Code in connection with the continuation of the disadvantageous common business strategy;
- the continuation of the disadvantageous common business strategy is identical with the abuse of member's limited liability in the Firm Act;
- the liability of the dominant member can be established only after the involuntary de-registration procedure according to the Firm Act;
- the provision of the Civil Code underlines the causal relation between the liquidation of the controlled member and the common business strategy.

Beside the safeguards contrary to the controlling company in the concern law other measures can be found in the Hungarian company law for protection of the subsidiaries; without the demand of fullness:

- the information right of the controlled member;<sup>79</sup>
- the prohibition of voting during the passing resolution;<sup>80</sup>

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<sup>78</sup> Act V of 2006 §§ 118/A (1), (2).

<sup>79</sup> Section 3:23 of CC: Confidentiality and obligation of information

(1) The executive officer is required to keep the members of the legal person informed concerning the legal person, and to provide access for them to the legal person's documents, records and registers. The executive officer shall be entitled to request a written declaration of confidentiality before the provision of information or access.

(2) The executive officer may refuse to give information and to provide access to documents if this would infringe upon the legal person's trade secrets, if the requesting party exercises his right in a manner which is abusive, or if he refuses to make a declaration of confidentiality despite having been asked to do so. If the requesting party considers the refusal of information unjustified, he may request the Court of Registry to order the legal person to provide access to the information.

- the liability for the legal person's debts (transfer of liability, Übergang der Haftung);<sup>81</sup>
- the piercing of the corporate veil (Haftungsdurchgriff);<sup>82</sup>
- the wrongful trading,<sup>83</sup> but this provision in the Civil Code does not accord with other relevant rules (§ 118/B in Firm Act and § 33/A in Bankruptcy Act) and with the provision on the liability of the subsidiaries' executive officers (Section 3:55 (4) of Civil Code);
- the safeguards for the lawful operation of the legal person (the judicial oversight of Court of Registry,<sup>84</sup> the judicial review of the resolution of legal person by court,<sup>85</sup> the protection of minority stakeholders,<sup>86</sup> the arbitration proceeding<sup>87</sup> etc.).

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<sup>80</sup> Section 3:19 (2) of CC: Passing resolution

(2) In the process adopting a resolution the following persons may not vote:

- a) any person for whom the resolution contains an exemption from any obligation or responsibility, or for whom any advantage is to be provided by the legal person;
- b) any person with whom an agreement is to be concluded according to the resolution;
- c) any person against whom legal proceedings are to be initiated according to the resolution;
- d) any person whose family member has a vested interest in the decision, who is not a member or founder of the legal person;
- e) any person who maintains any relation on the basis of majority control with an organization that has a vested interest in the decision; or
- f) any person who himself has a vested interest in the decision.

<sup>81</sup> Section 3:2 (2) of CC: Liability for the legal person's debts

(2) In the event of abuse of limited liability on the part of any member of a legal person, on account of which any outstanding creditors' claims remain unsatisfied at the time of the legal person's dissolution without succession, the member in question shall be subject to unlimited liability for such debts.

<sup>82</sup> Section 6:540 of CC: Liability for the acts of members of legal persons

(2) If a member of a legal person causes damage to third party in connection with his membership, liability in relation to the injured person lies with the legal person.

(3) Liability of the member and the legal person shall be joint and several if the damage was caused intentionally.

<sup>83</sup> Section 3:118 of CC: Liability of executive officers in respect of third parties

In the event of a business association's dissolution without succession, creditors may bring action for damages up to their claims outstanding against the company's executive officers on the grounds of non-contractual liability, should the executive officer affected fail to take the creditors' interests into account in the event of an imminent threat to the business association's solvency. This provision is not applicable in the case where the company is wound up without going into liquidation.

<sup>84</sup> Section 3:34 of CC; §§ 72-91 of Firm Act.

<sup>85</sup> Sections 3:35-3:37 of CC.

<sup>86</sup> Sections 3:103-3:106 of CC.

<sup>87</sup> Section 3:92 of CC.

## 5. Short overview in the Central-East Europe in connection with the interest of the group

The German concern law influenced the legislation of Portugal (1986), Hungary (1988), the Czech Republic (1991-2002), Slovenia (1993), Croatia (1993), Albania (2008), and most recently Turkey (2012), and outside Europe: Brazil (1976).<sup>88</sup> In Spain (2002) and Switzerland there were attempts to regulate the recognition of the group interest.<sup>89</sup>

In Poland there is no standard category for the group interest; a reference to the group interest can be found in the draft of the amendment (28 July 2009) of the Commercial Companies Code: 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); the parent company and 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.<sup>90</sup>

In Austria the concept of the group interest is not recognized in the legal texts, the general tools of company law are used in order to tackle the legal problems of the group of corporations (for instance: prohibition to distribute assets). The §§ 56, 70, 84 and 238 of Austrian Act on Stock Companies regulate the relations within the group of corporations at the factual and at the contractual groups of corporations.<sup>91</sup>

In Serbia the linking company may be a corporate group (concern), a holding company, or a mutually-owned company; there are three different types of corporate group: the factual, the contractual groups and the group of equal members (the companies do not subordinate to each other, but are managed in united manner). Under the effective Serbian Law on Business Organizations, in the contractual group of corporations the controlling company shall have the right to issue binding instructions to subsidiaries (with due diligence of the acting directors of the parent company), taking into account the group's interest.<sup>92</sup>

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<sup>88</sup> CONAC: op. cit. 199–200.

<sup>89</sup> Ibid. 200., 202.

<sup>90</sup> MASNIAK, DOROTA: *Recognition of concept of group interest in Poland*, contribution to the workshop about the group interest, 18–19 February 2015, Vienna, WU FOWI, Societas CEE Company Law Research Network.

<sup>91</sup> WINNER, MARTIN: *Group interest in Austria*, contribution to the workshop about the group interest, 18–19 February 2015, Vienna, WU FOWI, Societas CEE Company Law Research Network.

<sup>92</sup> DUDÁS ATTILA: *The legal recognition of group interest of companies under Serbian Law*, contribution to the workshop about the group interest, 18–19 February 2015, Vienna, WU FOWI, Societas CEE Company Law Research Network.



In Romanian law the concept of the group interest is not determined in the legal texts, but the phrase appears in the Romanian jurisdiction (it is of importance in insolvency law). The act on companies (1999) has classical attitude to this topic: each company is an independent entity with independent interests.<sup>93</sup>

After this short overview – which reflects very different approaches of the group of corporations – I reckon that it is necessary to clarify the concept of the group interest, and on its ground the relation among parent company and subsidiaries (for example: according to the instruction right of the controlling company) at EU level in order to provide a „safe harbour” for managers of controlling and controlled companies against civil and criminal liability.

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