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Do We Need A Law of Corporate Groups?

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Do we need a law of corporate groups?

Katja Langenbucher[*]

„Corporate groups are a fact of life".[1] This was the starting point for a group of renowned European experts to deliver a report on a possible Directive on corporate group law in 2000.[2] We all know that no such Directive has been issued.[3] However, these days a fresh group of eminent experts has started, among other things, to develop an initiative „on groups of companies".[4] One reason for a European regulation to take its time might be the enormous national differences in dealing with group situations. While some countries, notably the UK,[5] rely on general company law to deal with corporate groups, others provide most detailed rules specifically for groups of companies.[6] German law provides an example for the latter.

Do we need a law of corporate groups? Most countries regulate one or another aspect of group law.[7] This is probably most common for tax and for accounting law. Insolvency law will often take group situations into account and the same is true for labour law. Regulatory oversight for financial institutions or insurance companies usually includes a group dimension. Competition law necessarily does so as well. However, in what follows when we speak about „group law" we will focus on regulation more specifically tuned to genuine questions of company law such as the protection of minority shareholders or creditors, the standards for managerial behavior and the „enabling" function of legal structures.

I. Are groups different?

In a legal order that provides genuine group law for corporations, it will be claimed that groups pose different problems than stand-alone companies, requiring specific norms addressing these issues.[8]

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[1] Forum Europaeum Corporate Group Law, EBOR 1 (2000) 165, 167; see also *Hopt* in: Schmitthoff/Woolridge, Groups of Companies, 1991, 81, 83 with a historical overview.

[2] See Forum Europaeum Corporate Group Law, EBOR 1 (2000) 165 note * for the members of this group.

[3] *Hopt* in: Schmitthoff/Woolridge, Groups of Companies, 1991, 81, 86; *Tröger* SAFE Working Paper No. 66, p. 10.

[4] http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3036; *Hopt* ZGR 2013, 165, 209 et seq.

[5] See in detail *Cahn/Donald* Comparative Company Law, 2010, p. 675 et seq.

[6] *Hopt*, Groups of Companies, A comparative study on the Economics, Law and Regulation of Corporate Groups, ecgi Law Working Paper No. 286/2015, p. 8 et seq.

[7] *Hopt* in: Schmitthoff/Woolridge, Groups of Companies, 1991, 81, 87; *Hopt*, Groups of Companies, A comparative study on the Economics, Law and Regulation of Corporate Groups, ecgi Law Working Paper No. 286/2015, p. 11.

[8] Forum Europaeum Corporate Group Law, EBOR 1 (2000) 165, 169, 171.

Typically, corporate law deals with the interests of shareholders, management and outside creditors. Especially if shares are held in dispersed ownership, the focus of corporate law regulation will be on making sure that management's incentives are aligned with those of the owners and that outside creditors are treated fairly.[9]

Where shares are distributed unevenly between a major blockholder and minority shareholders, corporate law faces the additional problem of weighing the interests of blockholders against those of minority shareholders. There are, however, no third party interests involved in the managing of a stand-alone company. This changes in a group situation.

1. The controlling shareholder may pursue third party interests

Not every blockholder changes the typical principal-agent pattern so fundamentally that it develops into a group situation. What differentiates a group situation from more general conflicts between majority and minority shareholders is the existence of third party interests.[10] In a group situation, the blockholder may not only seek rents for his own benefit. Instead, he may aim at aligning the company with the interests of a parent company or a group of companies. The difference between classic rent-seeking activities of a blockholder and bringing in third party interests is that the transactions he might favour could harm the company as well as his own position as a shareholder in that company, but further the interests of another company.[11] Hence, German group law requires the blockholder to have a business interest reaching beyond managing his own assets.

2. Management may not come through against the controlling shareholder

At first glance, management provides natural checks and balances for such behavior. Classic conflicts between management and shareholders may concern the profitability of different management strategies, the division of profits made, at times the dealing with greedy shareholders or with greedy management. However, the common denominator of both, shareholders and management, in these situations is the interest of the company they are invested in or are running. This common denominator is lacking once a group is established because the blockholder may be interested in aligning the steering of the company with third party interests.[12]

Management's role as the guardian of the company's interest will often be impaired in another way. The controlling shareholder typically insists on board seats reflecting his role, exercising pressure

[9] *Hopt*, Groups of Companies, A comparative study on the Economics, Law and Regulation of Corporate Groups, ecgi Law Working Paper No. 286/2015, p. 4 et seq.
[10] *Hopt*, Groups of Companies, A comparative study on the Economics, Law and Regulation of Corporate Groups, ecgi Law Working Paper No. 286/2015, p. 5.
[11] *Hopt*, Groups of Companies, A comparative study on the Economics, Law and Regulation of Corporate Groups, ecgi Law Working Paper No. 286/2015, p. 5.
[12] *Hopt*, Groups of Companies, A comparative study on the Economics, Law and Regulation of Corporate Groups, ecgi Law Working Paper No. 286/2015, p. 5.

on board members to follow the path he prefers. Even if there are strict managerial liability rules in place, which aim at preventing management from complying with a controlling shareholder's wishes, management will often be forced to comply with plans decided upon elsewhere.

3. Creditors may be more exposed

Groups are different not only with respect to shareholder's and management's incentives. The fact that a company will be steered as a subsidiary rather than a stand-alone entity puts creditors in a different position as well. Covenants may not work out as planned, the assumptions underlying an internal rating assessment of the company may change in important ways, reporting and accounting may become more opaque.[13]

II. The formation of a corporate group

We have said above that legal systems such as the German one, relying on a specific legal regime for group situations, claim that the incentive structure at work in corporate groups differs in important respects from that in stand-alone companies. Group law aims at addressing these concerns.

There are a number of ways in which a group of companies may be created.[14] We will focus on two paradigm situations, (i) the purchase of shares by the future parent company and (ii) the carve-out of assets from the parent company and establishment of a subsidiary.

1. Purchase of shares

A most natural way for a parent-subsidiary structure to be created if the subsidiary is a listed company is the purchase of its shares. German law has not regarded this process as raising questions of group law, hence traditionally not regulated the creation of a group.[15]

European law has changed this assessment. Reporting requirements kick in once a shareholder controls 3% of the shares of a listed stock corporation and further require alerting capital markets when the percentage of shares controlled reaches 5, 10, 15, 20, 25, 30, 50 or 75%.[16] Once 30% of the shares have been under the control of the bidder, he is required to make a mandatory offer to the remaining shareholders to buy their shares, § 35 para. 1 WpÜG. The underlying idea is a

[13] *Hopt*, Groups of Companies, A comparative study on the Economics, Law and Regulation of Corporate Groups, ecgi Law Working Paper No. 286/2015, p. 6 et seq.
[14] *Cahn/Donald* Comparative Company Law, 2010, p. 678 et seq.
[15] *Altmeppen* in: MünchKomm, Einl. §§ 291 et seq. note 16, Vor § 311 AktG note 33; Grigoleit/*Grigoleit* § 311 AktG note 2; *Hopt* in: Schmitthoff/Woolridge, Groups of Companies, 1991, 81, 98; Schmidt/Lutter/*J. Vetter* § 311 AktG note 1; Spindler/Stilz/*Müller* Vor § 311 AktG note 37.
[16] Art. 9 para 1 Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC of 28 May 2001.

contractual thought. A shareholder invests in a listed corporation making certain assumptions about the company and its shareholder structure. Once the latter changes in important ways, the shareholder is granted a right to reassess the investment contract he concluded. Should he wish to exit, he will be guaranteed to do so under fair conditions. The price the bidder is required to offer is based on the stock price during the last six months as well as purchases by the bidder and related parties.

Shareholders who do not wish to exit the company, which has been taken over, so it is assumed under the premisses of take-over law, voluntarily accept the new situation. In this spirit one might argue that there is no need for further minority shareholder protection. Under German law, this is not the case. Instead, German law combines the take-over control just outlined with a law of corporate groups once the take-over has resulted in a group situation.

2. Carve-out of assets

Instead of purchasing a formerly independent company, a group situation might also be created by a hive-down. The future parent carves out assets and establishes a subsidiary as a new legal entity. The parent may hold the new company as a 100% subsidiary, bring in other blockholders or go public, aiming for dispersed ownership while holding a controlling majority himself.

German law provides for rules with a statutory and with a case law background on transactions like these. The Code on hive-downs, spin-offs and mergers aims at consolidating different ways of rearranging an existing group or creating a new one in the way just outlined. It offers building blocks and a legal framework for the process of a hive-down as well as for a spin-off off an entity or a merger of companies and it offers protection for creditors, shareholders and employees.

Focusing on the parent company, there is case law intended to protect its shareholders.[17] If the parent's management decides to carve out the essential part of the company's assets, with 80% serving as a rough guideline, it needs the shareholders assembly's consent with a majority of 75%.

III. The management of a corporate group

So far we have discussed different strategies of creating a corporate group. German law regulates both, the take-over of a stand-alone company and the carve-out of assets, establishing a new subsidiary. However, both areas are in many ways not perceived as the core of German group law. Its main focus lies in regulating the management of a corporate group. The goals underlying group

[17] BGHZ 83, 122 – Holzmüller –; BGHZ 159, 30 – Gelatine I –; BGH NZG 2004, 575 – Gelatine II –; *Conac/Enriques/Gelter* ECFR 2007, 491, 515; Grigoleit/*Herrler* § 119 AktG note 21 et seq.; *Hopt* in: Schmitthoff/Woolridge, Groups of Companies, 1991, 81, 98 et seq.; *Hüffer/Koch* § 119 AktG note 16 et seq.; *Kubis* in: MünchKomm, § 119 AktG note 32 et seq.; *Langenbucher*, Aktien- und Kapitalmarktrecht, § 6 note 42 et seq.; Schmidt/Lutter/*Spindler*, § 119 AktG note 27 et seq.; Spindler/Stilz/*Hoffmann*, § 119 AktG note 22 et seq.

law show most clearly when we compare them to the legal answers a legal system without a specific group law provides.

1. The situation without group law

A legal order without specific regulation tailored to corporate groups operates under the premise that problems arising in a group context will be handled appropriately by standard corporate law, amended by judicial work to fit group situation.[18] The subsidiary is regarded in the same way as any stand-alone company would: Its management has to keep the company's interest in mind and its shareholders owe a duty of loyalty to the company and possibly to fellow shareholders.

If a parent company tries to steer a company in which it holds a controlling share against that company's best interest, dependent on the legal heritage of its company law, different legal rules kick in. The parent company as a major shareholder may be in breach of duties of loyalty towards the company and towards minority shareholders. If the controlling shareholder tries to extract private benefits, there may be rules requiring disclosure or shareholder approval of related party transactions aim at limiting such behavior.

Management is to act according to the subsidiary's interest only, disregarding what may be good for the parent or for the group as a whole. Managers who give in to pressure from the controlling shareholder are faced with the threat of managerial liability.

Outside creditors benefit from standards such as capital maintenance rules which help to hinder the shifting of cash or assets from the subsidiary to the parent or to a third company. Some legal orders accept instances where a „piercing of the corporate veil" allows a creditor to claim compensation from a shareholder instead of being relegated to the subsidiary.[19] Similar rules apply if the parent company is regarded as a „shadow director" and liability ensues.[20] If no comparable remedy is available, there is no way for the creditor to hold the parent company accountable for exercising undue influence on the controlled company.

[18] An overview, including case law adapting the law to the group situation, can be found at Forum Europaeum Corporate Group Law, EBOR 1 (2000) 165, 172 et seq.; *Cahn/Donald* Comparative Company Law, 2010, p. 687 et seq.; *Conac/Enriques/Gelter* ECFR 2007, 491 et seq.; *Hopt* in: Schmitthoff/Woolridge, Groups of Companies, 1991, 81, 85; *Tröger* SAFE Working Paper No. 66, p. 4.

[19] *Barber*, 17 Willamette Law Review (1980), 371 et seq.; *Gevurtz*, 76 Oregon Law Review (1997), 853 et seq.; *Krendl/Krendl*, 55 Denver Law Journal (1978), 1 et seq.; *Hopt*, Groups of Companies, A comparative study on the Economics, Law and Regulation of Corporate Groups, ecgi Law Working Paper No. 286/2015, p. 22 et seq.; *Thompson*, 76 Cornell Law Review (1990), 1036, 1039; skeptical *Bainbridge*, Research Paper "Abolishing Veil Piercing", available at http://ssrn.com/abstract=236967.

[20] *Hopt*, Groups of Companies, A comparative study on the Economics, Law and Regulation of Corporate Groups, ecgi Law Working Paper No. 286/2015, p. 21 et seq; *Caroll* in: Ramsay, Working Paper „Corporate Governance and the Duties of Company Directors", p. 162 et seq. available at http://ssrn.com/abstract=921312.

2. The situation with group law

German group law aims at accommodating two concerns. First, it wishes to provide a considerably wider leeway for managing a corporate group than what „normal“ corporate law would allow for. Second, it is felt that minority shareholders and outside creditors need enhanced protection in group situations.

a) „Enabling“ components

The first aim of allowing for group management to function smoothly is set up to work as „enabling“ law. Shareholder and management duties of „normal“ corporate law are being adjusted to fit the group situation. Depending on the type of group, no duty of loyalty prohibits the controlling shareholder to pursue group interests running against those of the subsidiary as a stand-alone company. Instead, the parent company has a legal right to order certain transactions to be performed at the subsidiary.

Restrictions on capital maintenance do not apply to certain group situations. The intra-group shifting of assets or liquidity is made possible without triggering disclosure requirements or the necessity for the shareholders assembly to consent to a related party transaction.

The duties of the controlled company’s management are not restricted to furthering this company’s interest exclusively. Instead, they allow for an orientation towards group interests. This enables the subsidiary’s management to openly cater to the wishes of the parent company instead of being torn between giving in to pressure from the major blockholder and trying to evade liability for doing so.

b) Protective components

The „enabling“ function of corporate group law is complemented by rules designed to protect minority shareholders and outside creditors.[21] Because the parent company profits from a number of ways in which it may reorient the subsidiary from being a stand-alone entity towards acting as a group member, the law requires the parent to compensate those whose interests are harmed.

Depending on the type of corporate group chosen, minority shareholders may profit directly from appraisal rights or guaranteed dividends. In other cases they benefit indirectly from the parent company being liable for any damage caused to the subsidiary.

Outside creditor’s interests are often compromised if they have contracted with a stand-alone company which then turns into a subsidiary. German group law protects these parties in ways

[21] *Altmeppen* in: MünchKomm, § 291 AktG note 1; Grigoleit/*Servatius* § 291 AktG note 2; *Hüffer/Koch* § 291 AktG note 3; *Koppensteiner* in: KölnKomm, Vorb. § 291 note 5; *Mülbert* in: GroßKomm, Vor §§ 291 et seq. AktG note 2; *Hopt* in: Schmitthoff/Woolridge, Groups of Companies, 1991, 81, 88; Schmidt/Lutter/*Langenbucher* § 291 AktG note 7; Spindler/Stilz/*Müller* Vor § 311 AktG note 2.

similar to the protection of minority shareholders. They profit indirectly from compensation owed to the subsidiary by the parent. If compensation is not granted, creditors may sue in their own right.

3. The dual-track of German corporate group law

German law offers two options for organizing a corporate group. The first does not require the controlling shareholder to act in any specific way. It attaches automatically once a subsidiary is „dependent" („abhängig") from a shareholder. It is called a „de facto group" („faktischer Konzern"). For the second option to apply, the controlling shareholder needs to conclude a contract with the subsidiary. This option is called a „contractual group" („Vertragskonzern").

IV. The de facto group („faktischer Konzern")

1. The concept of „dependency"

The rules on „de facto groups" are applicable as soon as a company is „dependent". § 17 AktG defines a „dependent company" as a legal entity being under the direct or indirect influence of a „dominating company". Such dependency is assumed if the dominating company holds a majority of the shares, § 17 para. 2 AktG. However, „dependency" is not limited to this situation.[22] A subsidiary may also be „dependent" if a controlling company has decisive influence on appointing board members or disposes of other instruments of corporate law to make the subsidiary comply. On the other hand, the mere possibility to threaten with unpleasant consequences for non-compliance, such as stopping a business relationship, do not qualify, as long as there is no corporate law background.

The „dominating company" will not necessarily be a legal entity. A natural person qualifies as a „dominating company" under § 17 AktG if any form of third party business engagement of his raises concerns about his willingness to align his interests with those of the best interest of the dependent company.[23]

2. Enabling component: make use of influence but compensate within a year

a) Using influence to the disadvantage of the dependent subsidiary is legal…

At first glance, §§ 311, 317 AktG do not display any „enabling" feature. § 311 para. 1 AktG reads as a prohibition addressed to the dominating corporation to make use of its influence in a way which results in any form of disadvantage for the dependent subsidiary. However, this prohibition

[22] *Emmerich/Habersack*, Aktien- und GmbH-Konzernrecht, § 17 AktG note 18 et seq.; Grigoleit/*Grigoleit* § 17 AktG note 9 et seq.; *Hüffer/Koch* § 17 AktG note 9; *Hopt*, Groups of Companies, A comparative study on the Economics, Law and Regulation of Corporate Groups, ecgi Law Working Paper No. 286/2015, p. 2 et seq.; *Koppensteiner* in: KölnKomm, § 17 AktG note 40 et seq.; Spindler/Stilz/*Schall* § 17 AktG note 38 et seq.

[23] *Bayer* in: MünchKomm, § 15 AktG note 13; Grigoleit/*Grigoleit* § 15 AktG note 17; *Hüffer/Koch* § 15 AktG note 10; *Koppensteiner* in: KölnKomm, § 15 AktG note 56; Spindler/Stilz/*Schall* § 15 AktG note 10.

does not extend to cases where those disadvantages are compensated within the accounting year, § 311 para. 2 AktG.

This rule triggers the „enabling“ effect of de facto group law: Rules prohibiting major blockholders from using their influence to the disadvantage of the company they are invested in, do not apply as long as the disadvantage caused is compensated.[24] This compensation does not need to be given immediately, but in the course of an entire year[25] and may also consist in a claim granted to the subsidiary.[26]

b) Duties of loyalty and capital maintenance are overruled…

German law provides for a number of rules prohibiting a major blockholder from taking actions which result in damages for the company he is invested in. § 117 AktG captures actions if they have been executed intentionally and allows the company (plus under certain circumstances the fellow shareholders) to claim damages.[27] § 280 BGB provides a more general basis for the company and for fellow shareholders to claim damages if a blockholder breaches duties of loyalty.[28] Capital maintenance rules, which are backed by a European Directive, prevent the company from transferring assets or cash to any of its shareholders.

All of those prohibitions are overruled by § 311 AktG.[29] If this rule applies, neither liability for intentional harm according to § 117 AktG nor liability for a breach of duties of loyalty ensues. The same applies to capital maintenance rules, although there is some discussion about the compatibility of this result with the European Directive.[30]

[24] *Altmeppen* in: MünchKomm, § 311 AktG note 1 et seq.; Spindler/Stilz/*Müller* § 311 AktG note 1; Takahashi Konzern und Unternehmensgruppe in Japan – Regelung nach dem deutschen Modell?, 1994, p. 71 et seq.
[25] BGHZ 179, 71, 78 („MPS“); *Altmeppen* in: MünchKomm, § 311 AktG note 303; Grigoleit/*Grigoleit* § 311 AktG note 49 et seq.; *Emmerich*/*Habersack*, Konzernrecht, § 24 note 10 et seq.; *Hüffer*/*Koch* § 311 AktG note 3; *Koppensteiner* in: KölnKomm, § 311 AktG note 128; Schmidt/Lutter/*J. Vetter* § 311 AktG note 6; Spindler/Stilz/*Müller* § 311 AktG note 54.
[26] *Emmerich*/*Habersack*, Aktien- und GmbH-Konzernrecht, § 311 AktG note 72 et seq.; Grigoleit/*Grigoleit* § 311 AktG note 51; *Hüffer*/*Koch* § 117 AktG note 46 et seq.; *Koppensteiner* in: KölnKomm, § 311 AktG note 129 et seq.; Schmidt/Lutter/*J. Vetter* § 311 AktG note 95 et seq.; Spindler/Stilz/*Müller* § 311 AktG note 57 et seq.
[27] Grigoleit/*Grigoleit*/*Tomasic* § 117 AktG note 1, 18 et seq.; *Hüffer*/*Koch* § 117 AktG note 1; *Mertens*/*Cahn* in: KölnKomm, § 117 AktG note 19 et seq.; Schmidt/Lutter/*Witt* § 117 AktG note 20 et seq.; Spindler/Stilz/*Schall* § 117 AktG note 13.
[28] BGHZ 14, 25, 38; 103, 183, 195 („Linotype“); 129, 136, 143 („Girmes“).
[29] *Altmeppen* in: MünchKomm, § 311 AktG note 15 et seq.; *Emmerich*/*Habersack*, Konzernrecht, § 24 note 25 et seq.; Grigoleit/*Grigoleit* § 311 AktG note 57; *Hüffer*/*Koch* § 311 AktG note 49, 52; Spindler/Stilz/*Müller* § 311 AktG note 63, 66 et seq.; Hölters/*Leuering*/*Goertz* § 311 AktG note 9, 15.
[30] In favor of compatibility: *Emmerich*/*Habersack*, Aktien- und GmbH-Konzernrecht, § 311 AktG note 82; *Habersack*, Europäisches Gesellschaftsrecht, § 6 note 48; Grigoleit/*Grigoleit* § 311 AktG note 56; *Koppensteiner* in: KölnKomm, Vorb. § 311 AktG note 7; Schmidt/Lutter/*J. Vetter* § 311 AktG note 117; Spindler/Stilz/*Müller* § 311 AktG note 63; doubting compatibility: *Schön* FS Kropff, 1997, p. 285, 295 et seq.

c) Management of the subsidiary may lawfully abide by the wishes of the dominating parent company…

We have said above that the subsidiary's management will often find itself in a difficult situation. General corporate law requires it to take into account the interest of the subsidiary as a stand-alone corporation exclusively. At the same time, the controlling shareholder will often exercise considerable pressure on the management to make sure the subsidiary is in line with group interests.

De facto group law takes off some of this pressure. The subsidiary's management is not necessarily required to act upon what is in the best interest of the subsidiary viewed as a stand-alone company. Instead, it may lawfully abide by wishes of the dominating shareholder if certain conditions are fulfilled. Firstly, this requires the actions contemplated to be lawful and in accordance with the company's articles of association.[31] Secondly, the actions may not endanger the solvency of the company.[32] Thirdly, any damage probably caused can be assessed and quantified so as to allow for a later compensation.[33]

If all of these conditions are fulfilled, the subsidiary's management may follow the parent company's strategy. It does not violate its duties vis-à-vis the subsidiary, even if its strategy furthers group interests at the expense of the subsidiary. It is, however, not required to comply with the dominating company's wishes. Put differently, the parent has no legal right to make the subsidiary act according to its wishes.

d) …as long as compensation is granted within a year…

The „enabling" function of group law is inextricably linked with full compensation being given by the parent company. The lawfulness of the subsidiary's management following the parent company's strategy requires first that any disadvantage which will ensue may be assessed and quantifiable ex ante.[34] Examples[35] for possible disadvantages include discounts offered to the parent on the subsidiary's products, loans extended to the parent without requiring adequate securities, participation in cash-pooling agreements or offering business opportunities found by the subsidiary

[31] *Emmerich/Habersack*, Konzernrecht, § 25 note 42; Grigoleit/*Grigoleit* § 311 AktG note 53; *Koppensteiner* in: KölnKomm, § 311 AktG note 100; Schmidt/Lutter/*J. Vetter* § 311 AktG note 111.

[32] *Altmeppen* in: MünchKomm, § 311 AktG note 305, Anh. § 317 AktG note 47; *Emmerich/Habersack*, Konzernrecht, § 25 note 42; Grigoleit/*Grigoleit* § 311 AktG note 53; Schmidt/Lutter/*J. Vetter* § 311 AktG note 111.

[33] *Bürgers/Körber* § 311 AktG note 60; *Emmerich/Habersack*, Konzernrecht, § 25 note 43; Grigoleit/*Grigoleit* § 311 AktG note 53; *Koppensteiner* in: KölnKomm, § 311 AktG note 141; Schmidt/Lutter/*J. Vetter* § 311 AktG note 112; Spindler/Stilz/*Müller* § 311 AktG note 62.

[34] *Altmeppen* in: MünchKomm, § 311 AktG note 172; Grigoleit/*Grigoleit* § 311 AktG note 29; Hölters/*Leuering/Goertz* § 311 AktG note 57; *Hüffer/Koch* § 311 AktG note 26; Schmidt/Lutter/*J. Vetter* § 311 AktG note 112 et seq.; Spindler/Stilz/*Müller* § 311 AktG note 29.

[35] *Altmeppen* in: MünchKomm, § 311 AktG note 225 et seq.; *Emmerich/Habersack,* Konzernrecht, § 25 note 21 et seq.; Grigoleit/*Grigoleit* § 311 AktG note 38 et seq.; *Hüffer/Koch* § 311 AktG note 29 et seq., 36; *Koppensteiner* in: KölnKomm, § 311 AktG note 77 et seq.; Spindler/Stilz/*Müller* § 311 AktG note 41 et seq.

to the parent[36]. Second, the parent company must pay full compensation for any disadvantage suffered by the subsidiary. If full compensation is not paid out, the dominating company is in breach of § 117 AktG and duties of loyalty and capital maintenance rules are being compromised.[37]

e) …and the parent's strategy serves the group interest

De facto group law enables the parent company to manage the dependent subsidiary in line with a parent and/or a group strategy. Although no legal rule explicitly says so, it is commonly assumed that this does not allow for aligning the subsidiary with interests of unrelated third parties.[38]

3. Protective component: Compensating the company, minority shareholders and creditors

So far we have focused on the „enabling" function of de facto group law. The privilege it entails, namely to allow the parent to manage a company it dominates, comes with the obligation to compensate that company for any individual disadvantage suffered in the course of the respective business year.[39]

a) Compensation given to the company

A number of conditions need to be fulfilled for § 311 para. 2 AktG to apply. Firstly, it requires the dominating company to make use of its „influence" („Einfluss") in order to commit the dependent subsidiary to a disadvantageous transaction or business decision.[40] This is generally understood rather broadly as encompassing any type of influence, ranging from outright orders to mere tipps or expectancies.[41]

Secondly, the influence exercised needs to result in a disadvantage („Nachteil").[42] A disadvantage comprises actual losses as well as a mere exposure of the subsidiary's assets or earnings.[43]

[36] Grigoleit/*Grigoleit* § 311 AktG note 38; *Hüffer*/*Koch* § 311 AktG note 29; *Habersack* FS Hoffmann-Becking, 2013, p. 421, 425 et seq.

[37] Grigoleit/*Grigoleit* § 311 AktG note 55, 57; *Hüffer*/*Koch* § 311 AktG note 49; *Koppensteiner* in: KölnKomm, § 311 AktG note 161, 167 et seq.; Spindler/Stilz/*Müller* § 311 AktG note 63 et seq.

[38] *Altmeppen* in: MünchKomm, § 311 AktG note 306; *Hüffer*/*Koch* § 311 AktG note 43; *Koppensteiner* in: KölnKomm, § 311 AktG note 102; Schmidt/Lutter/*J.Vetter* § 311 AktG note 110; Spindler/Stilz/*Müller* § 311 AktG note 53.

[39] *Altmeppen* in: MünchKomm, § 311 AktG note 303; *Conac/Enriques/Gelter* ECFR 2007, 491, 503 et seq.; Grigoleit/*Grigoleit* § 311 AktG note 43 et seq.; *Hüffer*/*Koch* § 311 AktG note 37; *Koppensteiner* in: KölnKomm, § 311 AktG note 98; Spindler/Stilz/*Müller* § 311 AktG note 48 et seq.; Schmidt/Lutter/*J. Vetter* § 311 AktG note 4.

[40] Grigoleit/*Grigoleit* § 311 AktG note 17; Hölters/*Leuering*/*Goertz* § 311 AktG note 40; *Hüffer*/*Koch* § 311 AktG note 23; *Koppensteiner* in: KölnKomm, § 311 AktG note 2; Spindler/Stilz/*Müller* § 311 AktG note 12.

[41] *Altmeppen* in: MünchKomm, § 311 AktG note 75 et seq.; *Hüffer/Koch* § 311 AktG note 13; *Koppensteiner* in: KölnKomm, § 311 AktG note 3; Spindler/Stilz/*Müller* § 311 AktG note 12.

[42] *Hüffer*/*Koch* § 311 AktG note 24; Spindler/Stilz/*Müller* § 311 AktG note 27; *Tröger* SAFE Working Paper No. 66, p. 7.

[43] Grigoleit/*Grigoleit* § 311 AktG note 27; *Hüffer*/*Koch* § 311 AktG note 24; Schmidt/Lutter/*J. Vetter* § 311 AktG note 40 et seq.; Spindler/Stilz/*Müller* § 311 AktG note 27.

Thirdly, the disadvantage needs to be triggered by the parent dominating the subsidiary. This is typically assessed by an ex ante comparison between what a reasonable manager, profiting from the business judgment rule,[44] would have done and what the subsidiary's management did.[45]

If these conditions are met, the dominating company will need to compensate the disadvantage incurred by the dependent subsidiary.[46] This may be done by a transfer of an advantageous position from the parent to the subsidiary or by a contractual agreement allowing the subsidiary to claim such an advantageous position. For an advantage to qualify it needs to be appraisable.[47] Most commentators are of the opinion that advantages are not limited to positions which can formally be represented in a balance sheet. Still, the advantage delivered must result in a transfer of assets which offsets any loss of assets suffered due to the influence by the parent company.[48]

If the dominating company does not deliver adequate compensation, § 317 AktG provides a claim for damages against the parent company. The nature of the damage is assessed from an ex post perspective.[49]

b) Compensation for minority shareholders and creditors

Via the requirement for the dominating company to compensate the dependent subsidiary, minority shareholders and outside creditors profit in an indirect way.[50] Compensation is given to the corporation as a legal entity, not to individual shareholders or creditors on a first come-first served basis.

§ 317 para. 1 s. 2 AktG extends this rule for the benefit of minority shareholders. It captures two situations. The shareholder may bring a claim against the parent company, demanding payout to the subsidiary company, whose management may not actively pursue potential claims. The shareholder

[44] Grigoleit/*Grigoleit* § 311 AktG note 27; *Hüffer*/*Koch* § 311 AktG note 25; Schmidt/Lutter/*J. Vetter* § 311 AktG note 48; Spindler/Stilz/*Müller* § 311 AktG note 31.
[45] *Hüffer*/*Koch* § 311 AktG note 25; *Hopt* Groups of Companies, A comparative study on the Economics, Law and Regulation of Corporate Groups, ecgi Law Working Paper No. 286/2015, p. 22; *Koppensteiner* in: KölnKomm, § 311 AktG note 36; Spindler/Stilz/*Müller* § 311 AktG note 29 et seq.
[46] On difficulties assessing the disadvantage caused *Altmeppen* in: MünchKomm, § 311 AktG note 188 et seq.; Grigoleit/*Grigoleit* § 311 AktG note 27 et seq.; *Hopt* in: Schmitthoff/Woolridge, Groups of Companies, 1991, 81, 103; *Hüffer*/*Koch* § 311 AktG note 31 et seq.; *Koppensteiner* in: KölnKomm, § 311 AktG note 57 et seq.; Schmidt/Lutter/*J. Vetter* § 311 AktG note 48 et seq.; Spindler/Stilz/*Müller* § 311 AktG note 30 et seq.
[47] *Altmeppen* in: MünchKomm, § 311 AktG note 347; Grigoleit/*Grigoleit* § 311 AktG note 46; *Hüffer*/*Koch* § 311 AktG note 39; *Koppensteiner* in: KölnKomm, § 311 AktG note 109; Schmidt/Lutter/*J. Vetter* § 311 AktG note 86; Spindler/Stilz/*Müller* § 311 AktG note 50.
[48] *Emmerich*/*Habersack*, Konzernrecht, § 25 note 52; Grigoleit/*Grigoleit* § 311 AktG note 51; *Hüffer*/*Koch* § 311 AktG note 44; *Koppensteiner* in: KölnKomm, § 311 AktG note 106 et seq.; Spindler/Stilz/*Müller* § 311 AktG note 50.
[49] Grigoleit/*Grigoleit* § 317 AktG note 6; *Hüffer*/*Koch* § 317 AktG note 7; *Koppensteiner* in: KölnKomm, § 317 AktG note 15; Spindler/Stilz/*Müller* § 317 AktG note 10.
[50] Grigoleit/*Grigoleit* § 317 AktG note 1; *Hopt* Groups of Companies, A comparative study on the Economics, Law and Regulation of Corporate Groups, ecgi Law Working Paper No. 286/2015, p. 22.

may also demand payment to himself if he suffers a loss different from the decline in value of his stock, for example a smaller dividend payout.[51]

A similar possibility is provided for outside creditors. §§ 317 para. 4, 309 para. 4 s. 3 AktG allow for creditors to pursue the claim of the dependent company. Other than a shareholder, a creditor may claim payment to himself if his demands against the dependent company are not met.[52]

Both parties are aided to some extent by reporting duties. § 312 AktG requires the subsidiary's management to draft a report on the extent in which the subsidiary is being influenced by the dominating parent („Abhängigkeitsbericht"). The report is not made public, hence neither minority shareholders nor creditors can consult it directly when pursuing a claim against the parent company. However, public accountants (§ 313 AktG) and supervisory board members (§ 314 AktG) have a legal duty to verify that any disadvantage suffered has been compensated. If they express hesitations, this provides a basis for minority shareholders and outside creditors to prepare potential claims.

V. The contractual group („Vertragskonzern")

When the AktG was reformed in 1965, it was not de facto group law, the legislator focused on, but the law on contractual groups.[53] If compared to the de facto group, the contractual group offers further reaching options to manage a dependent subsidiary according to the strategy of the parent or of the group. It rests on one of two forms of a contractual agreement between the parent company and the subsidiary. The first form of contract allows for profit made by the subsidiary to be distributed to the parent company („Gewinnabführungsvertrag"). The second form puts the entirety of managing the subsidiary in the hands of the parent („Beherrschungsvertrag").

1. Concluding the contract

Any of the two forms of contract mentioned above will be agreed upon by the boards of both companies. § 293 para. 1, 2 AktG require the consent of both shareholder's assemblies with a

[51] *Conac/Enriques/Gelter* ECFR 2007, 491, 511; Grigoleit/*Grigoleit* § 317 AktG note 15; *Hüffer*/*Koch* § 317 AktG note 8, 14; *Koppensteiner* in: KölnKomm, § 317 AktG note 40; Schmidt/Lutter/*J. Vetter* § 317 AktG note 32 et seq.; Spindler/Stilz/*Müller* § 317 AktG note 6.

[52] Grigoleit/*Grigoleit* § 317 AktG note 11; Hölters/*Leuering*/*Goertz* § 317 AktG note 27; *Hüffer*/*Koch* § 309 AktG note 23; *Koppensteiner* in: KölnKomm, § 317 AktG note 39, § 309 note 53 et seq.; Schmidt/Lutter/*J. Vetter* § 317 AktG note 27; Spindler/Stilz/*Müller* § 317 AktG note 21.

[53] *Emmerich*/*Habersack*, Aktien- und GmbH-Konzernrecht, § 291 AktG note 3; *Hopt* Groups of Companies, A comparative study on the Economics, Law and Regulation of Corporate Groups, ecgi Law Working Paper No. 286/2015, p. 10; *Mülbert* in: GroßKomm, § 291 AktG note 5 et seq.; Spindler/Stilz/*Müller* Vor § 311 AktG note 12; Spindler/Stilz/*Veil* § 291 AktG note 3.

minimum of 75% assenting votes.[54] It needs to be in writing, § 293 para. 3 AktG, and is accompanied by extensive reporting and auditing requirements. The boards of both, parent and subsidiary, draft a report detailing the contract as such, § 293a AktG. Auditors prepare a detailed report as well, focusing on what will be offered to minority shareholders, §§ 293b et seq. AktG. Both reports, as well as the contract itself and the annual financial statements of the last three years will be presented to the shareholders before the vote on the contract, § 293f AktG.

If the vote is successful, the contract will be included in the commercial register of companies, § 294 AktG.

2. Enabling components

a) Profit distribution agreement

The first form of contract regulates profit distribution exclusively. The subsidiary agrees to transfer its entire profit to the parent, § 291 para. 1 s. 1 AktG, or run its business for the account of the parent, § 291 para. 1 s. 2 AktG. The main reason for profit distribution agreements to be concluded stems from tax law.[55] If a profit distribution agreement has been concluded for a minimum of five years and has been performed, the group qualifies for a tax group regulation.[56]

b) Domination agreement

The second form of contract is more comprehensive. It allows for a full-fledged domination of the subsidiary by the parent company. §§ 291, 308 AktG confer a right to request compliance with its wishes on the board of the parent company. This right overrules both, duties of loyalty and capital maintenance rules, § 57 para. 1 s. 3 AktG.[57]

§ 308 AktG requires the management of the dependent company to comply with lawful orders of the parent company, even if they are disadvantageous for the subsidiary. It differs from the de facto group in that the subsidiary's board does not have a choice to comply with the parent's orders, unless these orders carry the serious risk of leading to insolvency.

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[54] Grigoleit/*Grigoleit* § 293 AktG note 1, 9; *Hopt* in: Schmitthoff/Woolridge, Groups of Companies, 1991, 81, 98; *Hüffer*/*Koch* § 293 AktG note 1, 8; K*oppensteiner* in: KölnKomm, § 293 AktG note 2, 28; Schmidt/Lutter/*Langenbucher* § 293 AktG note 1, 24; Spindler/Stilz/*Veil* § 293 AktG note 13, 17, 37 et seq.

[55] *Hüffer*/*Koch* § 291 AktG note 38; *Hopt* Groups of Companies, A comparative study on the Economics, Law and Regulation of Corporate Groups, ecgi Law Working Paper No. 286/2015, p. 2; *Koppensteiner* in: KölnKomm, § 291 AktG note 4; *Mülbert* in GroßKomm, § 291 AktG note 8; Schmidt/Lutter/*Langenbucher* § 291 AktG note 13; Spindler/Stilz/*Veil* Vor § 291 AktG note 15 et seq.

[56] *Altmeppen* in: MünchKomm, § 291 AktG note 144; *Emmerich*/*Habersack*, Aktien- und GmbH-Konzernrecht, § 291 AktG note 51a et seq; *Hüffer*/*Koch* § 291 AktG note 38; *Koppensteiner* in: KölnKomm, § 291 AktG note 79; Schmidt/Lutter/*Langenbucher* § 291 AktG note 53; Spindler/Stilz/*Veil* Vor § 291 note 17.

[57] *Altmeppen* in: MünchKomm, § 308 AktG note 95; *Emmerich*/*Habersack*, Aktien- und GmbH-Konzernrecht, § 291 AktG note 74 et seq.; Grigoleit/*Servatius* § 308 AktG note 10, 12; *Hüffer*/*Koch* § 291 AktG note 36; *Koppensteiner* in: KölnKomm, § 308 AktG note 28; Schmidt/Lutter/*Langenbucher* § 308 AktG note 24.

3. Protective components

The far-reaching options of aligning the management of a subsidiary with the parent go hand in hand with strong protection offered to minority shareholders and outside creditors. § 302 AktG requires the dominating parent to compensate any loss reflected in the annual financial statement, abiding by capital maintenance rules for the sake of both, minority shareholders and creditors.[58] Similarly, §§ 309, 310 AktG stress the liability of the parent's management for issuing unlawful orders. Minority shareholders may bring a lawsuit, however are allowed to request payment to the subsidiary only. Creditors may bring a lawsuit, they can claim payment to themselves.

a) Minority shareholders

Minority shareholders profit from different provisions for mandatory relief.[59] § 304 AktG is intended to make sure shareholders have a choice between exiting the subsidiary and staying with it. The rule requires the parent company to offer a fixed yearly payment based on what may have been expected as a dividend payment during the years preceding the contract.[60] Alternatively, the contract may provide for a variable payment based on dividends distributed by the subsidiary to the parent company. For minority shareholders who choose to exit the subsidiary, § 305 AktG requires the contract between parent and subsidiary to include an appraisal right.[61] Obviously, the establishment of a fair compensation payment raises a number of complex accounting questions.[62]

b) Outside creditors

Once a contractual group ends, the parent is not any more required to compensate the subsidiary for any losses. Hence, § 303 AktG allows for creditors with outstanding claims to acquire a security. The rule presupposes, that the claim goes back to a situation before the end of the contractual group was made public in the company's register.

[58] *Altmeppen* in: MünchKomm, § 302 AktG note 2; Grigoleit/*Grigoleit* § 302 AktG note 1; *Hirte* in: GroßKomm, § 302 AktG note 4; *Hüffer*/*Koch* § 302 AktG note 3; Spindler/Stilz/*Veil* § 302 AktG note 3.

[59] *Bürgers*/*Körber* § 304 AktG note 2; *Emmerich/Habersack*, Konzernrecht, § 21 note 1; *Hasselbach/Hirte* in: GroßKomm, § 304 AktG note 4 et seq.; *Paulsen* in: MünchKomm, § 304 AktG note 1; *Tröger* SAFE working paper No. 66, p. 9 et seq.

[60] Grigoleit/*Servatius* § 304 AktG note 14 et seq.; *Hüffer*/*Koch* § 304 AktG note 8; *Hopt* in: Schmitthoff/Woolridge, Groups of Companies, 1991, 81, 99; *Paulsen* in: MünchKomm, § 304 AktG note 75; Schmidt/Lutter/*Stephan* § 304 AktG note 75 et seq.; Spindler/Stilz/*Veil* § 304 AktG note 54 et seq.

[61] Grigoleit/*Servatius* § 305 AktG note 2 et seq.; *Hasselbach/Hirte* in: GroßKomm, § 305 AktG note 7 et seq.; *Hopt* in: Schmitthoff/Woolridge, Groups of Companies, 1991, 81, 100; *Hüffer*/*Koch* § 305 AktG note 2 et seq.; *Koppensteiner* in: KölnKomm, § 305 AktG note 3; *Paulsen* in: MünchKomm, § 305 AktG note 1.

[62] *Bürgers*/*Körber* Anh § 305 AktG note 1 et seq.; Grigoleit/*Servatius* § 305 AktG note 13 et seq.; *Hopt* in: Schmitthoff/Woolridge, Groups of Companies, 1991, 81, 100; *Hüffer*/*Koch* § 305 AktG note 24 et seq.; *Koppensteiner* in: KölnKomm, § 305 AktG note 68 et seq.; Schmidt/Lutter/*Stephan* § 305 AktG note 47 et seq.

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