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Varstvo manjšinskih delničarjev v koncernu ter učinek na gospodarsko rast: primer Slovenije[1]

TIL ROZMAN

Povzetek

Izhajajoč iz nekaterih ključnih ugotovitev in kritik t. i. teorije *law matters* ter ob upoštevanju dejstva, da je gospodarska rast v Republiki Sloveniji šibka, predmetni prispevek poudarja pomen varstva manjšinskih delničarjev za gospodarsko rast. Glede na ekonomsko realnost, da je koncern postal prevladujoča oblika velikih podjetij, se prispevek osredotoča na varstvo zunanjih manjšinskih delničarjev. Četudi nekatera pravna področja na nacionalni in EU ravni urejajo posamezna vprašanja v zvezi s koncerni (konkurenčno pravo, davčno pravo, delovno pravo itd.), so ti le redko predmet nacionalnega ali EU prava družb. Slovenija je ena redkih držav članic, ki je kodificirala koncernsko pravo (družb). Predmetni prispevek ugotavlja, da slovenski normativni okvir zagotavlja obsežno varstvo zunanjim manjšinskim delničarjem. Ker pa ni relevantno zgolj kodificirano pravo (v teoriji), temveč je pomembno zlasti izvajanje prava v praksi, je upravičeno in potrebno nadaljnje raziskovanje slovenskega koncernskega prava, in sicer zlasti z vidika vprašanja, ali so doseženi željeni učinki koncernskega prava v praksi.

Ključne besede: • varstvo manjšinskih delničarjev • koncern • gospodarska rast • korporativno upravljanje • slovensko koncernsko pravo

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[1] Prispevek je nastal v okviru temeljnega raziskovalnega projekta z naslovom: »Pravno ekonomski vidiki korporativnega upravljanja v javnem in zasebnem sektorju kot orodja za premagovanje gospodarske in razvojne krize«, ki ga je financirala Javna agencija za raziskovalno dejavnost Republike Slovenije.

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Minority Shareholder Protection in Groups of Companies and its Effect on the Economic Growth: the Case of Slovenia[2]

TIL ROZMAN

Abstract

Building on some of the key findings of the so-called law matters theory and its criticism, and taking into account that the economic growth of the Slovenian economy is weak, this paper emphasizes the importance of the minority shareholder protection for the economic growth. Since a group of companies has become the prevailing form of large enterprises, the focus of the paper is on the outside minority shareholder protection. Although groups of companies are a well-known and established topic in several law sectors at the national and the EU level (competition law, tax law, labour law etc.), they are only seldom the subject of the national or EU company law. However, Slovenia is one of only a few member states that have codified company law relating to group of companies. This paper finds that Slovenian normative framework provides a comprehensive protection for outside minority shareholder. As it is especially the enforcement matters that are relevant, not only the codified law (in books), further research on the Slovenian company law relating to group of companies is legitimate and necessary, and should revolve around the question of whether the regulation has achieved the desired objectives in the practice.

Keywords: • minority shareholder protection • group of companies • economic growth • corporate governance • Slovenian law relating to group of companies

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1. Introduction

Slovenia is one of the EU member states that has been the most significantly affected in the economic and financial crisis. According to the data of the Slovenian Institute of Macroeconomic Analysis and Development (IMAD), after eight consecutive quarterly declines in the Slovenian gross domestic product, growth occurred only in the last quarter of 2013. Furthermore, IMAD and the Vienna Institute for International Economic Studies (WIIW) forecast that in 2014 (at least), not only the economic growth, but also foreign direct investment flows are and will remain modest in Slovenia. One of the main causes for the economic and financial crisis in Slovenia is inefficient and weak corporate governance in the public and private sectors (including SOE). Underlining the importance of the minority shareholder protection for the economic growth, this paper subsequently focuses on a small but significant segment of corporate governance in Slovenia – minority shareholder protection in groups of companies.

2. Why is Minority Shareholder Protection Important for Economic Growth

2.1. The Importance of Law for Economic Growth in General

According to *Samuelson* and *Nordhaus* (1998: 518) there are four factors of economic growth: human resources, natural resources, capital formation and technology. *Todaro* and *Smith* (2009: 142) argue that (only) three factors are of prime importance: capital accumulation, growth in population (and hence eventual growth in the labour supply) and technological progress.[3] Even though economists have recognised the need to take into account the impact of other social systems and it is widely believed that well-functioning law and justice institutions are important for economic development, the economic literature and science only seldom mention the role of law for economic growth. If so, the focus is primarily on the importance of the rule of law in general. Therefore, the contribution of the economic analysis of law, which focuses primarily on the link between legal change and economic development and on the behaviour of economic agents in response to legal rules, is of great importance (Cankar, Deakin, and Simoneti, 2009: 168).

[3] It is interesting that the only contribution to growth theory that merited a Nobel Prize in Economics discovers the consequences of innovation (!) for capital and labour.

2.2. The Link between Minority Shareholder Protection and Liquid Equity Markets

The pioneering theory which has provided empirical evidence on the link between the law relating to the protection of investors and the equity market liquidity is the so-called law matters theory.[4] The theory has advanced in a series of empirical works by *La Porta* et al. (1997; 1998; 1999; 2000). Its impact rests not only on an empirical analysis and the comparison of different models of corporate governance but especially on the findings that the quality of legal protection is an important determinant of corporate governance patterns around the world, and that efficient legal protection leads to more dispersed share ownership and larger capital markets. The key findings of La Porta et al. can be summarized in the following thesis: as law matters and common law countries provide more efficient shareholder protection than civil law countries, the latter should promote changes towards a common law approach (Braendle, 2006: 258). Although this thesis has been criticized for inadequate methodology and erroneous conclusions, the importance of the theory is significant.[5] From the perspective of this paper, the most important finding is that efficient protection of rights of minority shareholders is one determinant of liquid equity markets (La Porta et al., 1997).

La Porta et. al. (1997; 1998; 1999) further argue that efficient shareholder protection results in a higher number of IPOs and listed companies, and in a higher stock market capitalization. The law and finance theory holds that when small investors are poorly protected, they might be willing to buy corporate shares only at such low prices that make it unattractive for corporations to issue new shares to the public, and *vice versa*; in countries where legal systems protect minority shareholder, the later are more willing to invest (La Porta et al., 1998: 1145). In other words, unless the minority investors are adequately protected, they are less willing to provide equity financing.

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[4] Compare with Cankar, Deakin, and Simoneti, Law and Economics Approaches to Corporate Governance, 2009, p. 170.

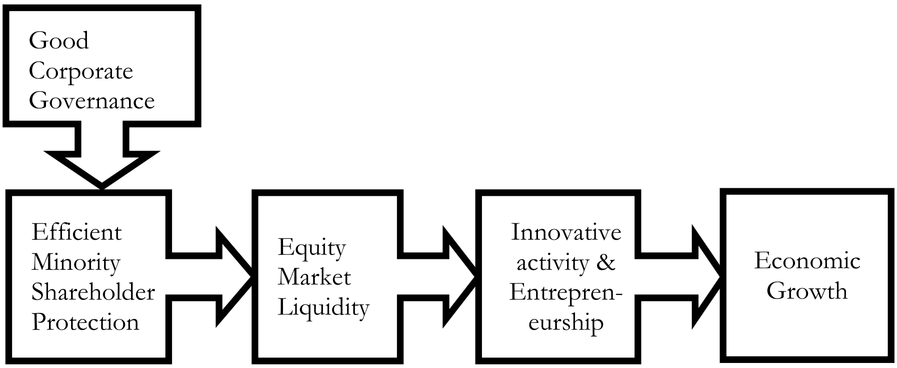
[5] For some of the reviews and criticism see: Siems, What Does not Work in Comparing Securities Laws: A Critique on La Porta et al.'s Methodology, 2005; Baums and Scott, Taking Shareholder Protection Seriously? Corporate Governance in the United States and Germany, 2003; Coffee, The Rise of Dispersed Ownership: The Role of Law in the Separation of Ownership and Control, 2001; Cools, The Real Difference in Corporate Law between the United States and Continental Europe: Distribution of Powers, 2004; Braendle, Shareholder Protection in the USA and Germany - "Law and Finance" Revisited, 2006.

By researching and arguing the correlation between company law and equity market liquidity, *La Porta* et al. have strengthen further research activities in this fields of law and economics. For instance, *Maher* and *Andersson* (1999) have concluded that inadequate minority shareholder protection against expropriation by controlling shareholders is likely to lead to sub-optimal levels of investment by small investors followed by insufficient liquidity in the secondary markets and poor diversification possibilities for investors. When the ability of using one's control powers to maximise one's own welfare by redistributing wealth from minority shareholder is limited, investors anticipate higher returns and are ready to pay more for shares. This can induce controlling shareholders to reduce their stakes or give up control, which in turn leads to more liquid equity markets and dispersed ownership. Therefore, a legal framework that protects minority shareholders from expropriation will promote the liquidity and development of equity markets since small investors are thus willing to invest in companies' stocks. Due to the fact that efficient minority shareholder protection is linked to the liquidity and development of equity markets, legal frameworks need to promote innovative activity, entrepreneurship and other companies that depend on external (equity) financing, and at the same time they must not hinder the development of active equity markets.

Several other studies have shown the same. For instance, *Chung, Elder* and *Kim* (2010) find that better corporate governance and better shareholder protection lead to higher stock market liquidity. *Szentkuti* (2007: 12) stresses that small investors (minority shareholders) invest into companies where they can achieve the greatest benefit with the smallest risk. Since weak minority shareholder protection increases the risk, investors avoid such countries. *Beck* and *Levine* (2000) further confirm that a strong legal protection of outside shareholders and higher levels of financial development are positively and robustly linked with the firm performance. In addition, they find that financial development also stimulates the establishment of new firms.

2.3. The Link between Equity Markets Liquidity and Economic Growth

From this point onwards, the correlation between a liquid and developed equity market on one hand and the economic growth on the other hand is clear – a well functioning and developed equity market helps to channel the resources to its most productive use and thus induces economic growth. Numerous studies have proved that the degree of financial sector development – especially a vibrant stock market – facilitates long-term growth.[6] *Maher* and *Andersson* (1999) find strong complementarities between sound macroeconomic policies and sound microeconomic foundations, and *vice versa*; weakness in microstructures can have profound impacts on the macro level, i.e. economic performance of countries. They further argue that one of the key elements of improving microeconomic efficiency is strong corporate governance and efficient minority shareholder protection. Good corporate governance and minority shareholder protection should manifest itself in enhanced firm performance and can lead to higher economic growth. *Maher* and *Andersson* (1999) point out that an active equity market encourages innovative activity, entrepreneurship and development of dynamic small and medium enterprises. Since an active equity market provides liquidity and exit mechanisms for business angels and venture capitalists, they are more willing to invest and support innovative activity. New enterprises, as well as small and medium enterprises which are essential for innovative activities and economic growth, might have difficulties with obtaining equity financing in the constellation of small and illiquid public capital markets and underdeveloped venture capital markets. Furthermore, while they have no established track record or long-term relationship with the financial sector, their access to debt financing might be likewise limited.



[6] See for instance: Bencivenga, Smith, and Starr, Transactions Costs, Technological Choice, and Endogenous Growth, 1995; Rathinam, Stock Market and Shareholder Protection: Are They Important for Economic Growth, 2010; Levine, Stock Markets, Growth, and Tax Policy, 1991.

3. Two Determinants of Minority Shareholder Protection: Ownership Structure and (Ir)recognition of the Concept of Group of Companies

3.1. Ownership Structure

Since ownership structure significantly differs between the US and the European corporations, the focus of law relating to (minority) shareholder protection is correspondingly different. Anglo-Saxon countries are characterised by dispersed ownership, namely many shareholders hold smaller stakes in the companies. On the other hand, European countries are typical examples of a system with concentrated ownership, i.e. companies are controlled by one majority or a few large shareholder(s). *Bohinc* (2011: 82) points to the latest ownership structure research that shows an extraordinary high degree of shareholder voting power concentration in Continental Europe in comparison to the US and the UK. Therefore, the fundamental issue in the US (and the UK) dispersed corporate ownership system is the conflict of interest between shareholders and management. An imminent problem in the European insider corporate governance systems with concentrated ownership is the conflict between the majority shareholder (or a few large shareholders) and weak minority shareholders. Since concentrated ownership weakens the power of management, in Europe the so-called shareholders activism does not refer to increased monitoring of managers by shareholders (as in the US model of dispersed ownership), but rather to defending the interests and rights of weak minority shareholders against controlling blockholders. According to the researches on corporate ownership structure, shareholders activism has been stimulated by prevalence of strong voting blocks and has became a decisive corporate governance vehicle (Bohinc, 2011: 82, 88 and 89). Therefore, one of the key tasks and main challenges facing company law in concentrated ownership systems is how to develop an efficient corporate governance legal framework ensuring that the majority shareholder or controlling blockholders do not use the company for their own, merely private interests expropriating rents at the expense of minority shareholders.

In relation to the chapter 2.3. it should be stressed that the importance of providing equity market liquidity is (not only Slovenian but also) a wider issue. Since transactions in concentrated systems are typically performed by transferring large blocks of shares, the data on the number of mergers and acquisitions is significantly important for the assessment of the equity market liquidity. According to researches and data of Thomson Reuters, European mergers and acquisitions activity has reached the slowest period since 2003. This fact is particularly significant in comparison with the US (dispersed ownership model) where mergers and acquisitions activity has reached the highest percentage since 2001.[7]

3.2. Group of Companies

When analysing the protection of minority shareholders in Slovenia, this paper, in addition to the concentrated ownership structure (in Continental Europe, including Slovenia), discusses another economic reality, namely the prevalence of groups of legally independent companies. Cooperation between companies has become a necessity in order to compete in the EU single market and globally. In practice, such cooperation has frequently led to the formation of groups of companies that are legally independent entities but economically associated. Furthermore, a group of legally independent companies (rather than a single company) has even become the dominant form of the contemporary large enterprises.[8] Building on this economic reality several law sectors (competition law, tax law, labour law etc.) have recognized a group of companies as a special subject of legal regulation at the national or/and EU level. For instance, European competition law has developed the so-called single economic unit doctrine. On the other hand, European company law has not developed a similar doctrine that would have taken into account the following fact: although affiliated companies are legally independent, they are not isolated from the dominant company and its influence, especially when the dominant company is the majority shareholder.

All attempts to codify and harmonize European company law relating to a group of companies have failed. Furthermore, even at the national level only a few statutes contain specific provisions on groups of companies. In general, there are four approaches at the national levels:[9]

1. comprehensive and codified regulation on groups of companies that derives from the German *Konzernrecht* and has been adopted in Slovenia, Croatia, Portugal, Hungary, Czech Republic, and in some non-European states;
2. partial and codified regulation on groups of companies, e.g. Italian *Codice Civile* recognizes the interest of a group of companies without the

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[7] Thomson Reuters, Preliminary Mergers & Acquisitions Review [http://share.thomsonreuters.com/pr_us/Prelim_MA_Financial4Q13_Review.pdf] (visited 17th July 2014).

[8] See introduction to EMCA, Chapter 16, page 3 [http://law.au.dk/fileadmin/Jura/dokumenter/CHAPTER_16_GROUPS_OF_COMPANIES.pdf] (visited 17th July 2014).

[9] Compare with three approaches in Conac, Director's Duties in Groups of Companies – Legalizing the Interest of the Group at the European Level, 2013.

ambition to comprehensively regulate this subject;[10]

3. recognition of the specific interests of a group of companies that derives from the jurisprudence, e.g. the so-called *Rozenblum* decision of the French Court of Cassation; within the context of criminal law, the court has stated that if the manager had acted in the group's interest, the act could not be considered as a misuse;[11]
4. no specific rules or provisions on group of companies, e.g. UK model.[12]

From the perspective of the company law, the most significant risk regarding affiliated companies is the fact that the dominant company could use its influence on a dependent company in a way that is not in the best interest of the latter. A detrimental outside influence (of the dominant company) on the dependent company can affect the interests of outside minority shareholders and creditors. This detrimental influence can manifest itself in many different ways – intergroup transactions, transfer pricing, diversion of corporate (business) opportunities from the dependent to the dominant company, soft and unsecured loans to the dominant company, etc. Since all of the above lead to lower dividends and lower value of equity, it results in losses for (outside) minority shareholders. Furthermore, detrimental influence may even cause the insolvency of the dependent company; if so, the company is unable to repay its creditors.

If the same shareholder (dominant company) holds the majority not only in one but in two or more companies, there is an even greater risk that the majority shareholder could use the influence on one of the dependent companies in a way that is not in the interest of the latter, but rather in the interest of the dominant company or another company affiliated with it. The conflict between (1) the shareholder that holds majority shares in more than one (dependent) company, (2) the outside minority shareholders and (3) the creditors of the dependent company is the so-called concern conflict (Drygala, Staake, and Szalai, 2012: 623). The main focus of the company law

[10] For more on the Italian approach see: Kousedghi, Protection of Minority Shareholders and Creditors in Italian Corporate Group Law, 2007; Fasciani, Groups of companies: The Italian approach, 2007.

[11] The *Rozenblum* doctrine refers to the abuse of corporate assets within a group of companies and, if all of the following conditions are met, allows for the so-called group defence. Firstly, a group is characterized by capital links between companies that are part of a group; secondly, in addition to capital participation, a strong business integration between companies that are part of a group must exist; thirdly, an intra-group transaction ought to have an economic quid pro quo; and lastly, the intra-group transaction should not expose the company to the risk of bankruptcy (Conac, Enriques, and, Gelter, 2008: 31).

[12] However, a company may take into account the interests of the group even under the UK law (European Commission, Report of the Reflection group on the future of EU company law, 2011: 62-62).

relating to group of companies is to manage this conflict (Kuhlmann, Ahnis, 2001: 1).

4. Slovenian Law Relating to Group of Companies

4.1. Introductory

For the reasons discussed in the previous chapters (i.e. (a) economic growth and foreign direct investments are and will remain modest in Slovenia; (b) several studies have demonstrated that efficient minority shareholder protection may lead to higher economic growth, namely through a developed and liquid equity market; (c) group of companies, rather than a single company, has become the dominant form of the contemporary large enterprises) this part of the paper focuses on some of the most crucial aspects of minority shareholder protection in a group of companies in the Slovenian system with concentrated ownership.

4.2. The Slovenian Law on Group of Companies in General

Although the Slovenian regulation on a group of companies follows the German model of *Konzernrecht*, there is one major difference: the Slovenian model explicitly applies to all companies and not only to public limited companies as in the German law.[13] In the perspective of comparative company law, the Slovenian Companies Act[14] (SCA)[15] is one of the few national statutes that contain a special and comprehensive chapter on group of companies (or to be more precise, on affiliated companies). The subjects of the company law relating to group of companies are legally independent companies that are affiliated on the grounds of corporate law instruments. The company law relating to group of companies is the so-called *lex specialis*; it contains special instruments in order to provide additional legal protection for the outside (minority) shareholders and creditors.

The SCA lists five types of affiliated companies and sets out the general provision specifying that all types of affiliated companies are legally

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[13] Although in Germany, the law relating to group of companies is codified only in the *Aktiengesetz*, i.e. German stock corporation act, the jurisprudence has also expanded the use of certain provisions on limited liability companies.
[14] *Zakon o gospodarskih družbah*.
[15] Official Gazette of the Republic of Slovenia, no. 42/06, no. 60/06, no. 10/08, no. 68/08, no. 42/09, no. 33/11, no. 91/11, no. 32/12, no. 57/12, no. 82/13.

independent. In accordance with the SCA, these five types of affiliated companies are:

1. Majority-owned company and a company with a majority share;[16]
2. Dependent and a dominant company;[17]
3. Companies that are part of a concern;[18]
4. Companies that have mutual capital participation[19] and
5. Companies that are affiliated by undertaking contracts.[20]

The SCA presumes[21] that a dependent company and a dominant company comprise a concern. Since the latter is the prevailing type of affiliated companies, this chapter focuses on the specifics of this type of relationship between companies.

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[16] According to the first paragraph of the article 528 of the SCA, a company has to be considered a majority-owned company if a majority of its shares or voting rights are held by another company, i.e. a company with a majority share.

[17] Article 529 of the SCA explicitly states that a dependent company is a legally independent(!) company which is directly or indirectly controlled by another company, i.e. the dominant company. The second paragraph of Article 529 presumes that a majority-owned company is controlled by the company which holds a majority share in it. Since such a presumption is rebuttable, it is possible to state and prove that although a company holds a majority in another company, it cannot dominate the "dependent" company. For example, articles of association may prescribe that the majority of the votes is not sufficient to take a decision (articles of association may prescribe higher majority, e.g. three quarters of the votes); in such case, it is evident, that although a "dominant" company holds 51% of the voting rights, it cannot control the "dependent" company. Therefore, the company with the majority share could easily contest the presumption that it controls the majority owned company.

[18] The SCA lists three types of concerns: actual, contractual and a concern with a relationship of equality. The latter is different from the first two in that it comprises legally independent companies connected by unified management without(!) the companies being mutually dependent. Since the SCA regulates only actual and contractual concerns, it is not clear which rules and to what extent can be applied to a concern with a relationship of equality.

[19] In accordance with Article 531 of the SCA, companies with mutual capital participation are companies that hold more than one quarter of shares in one another and have a registered office in Slovenia. On the other hand, if one of the companies has a majority share in the other company, the first company shall be considered the dominant company and the other a dependent company. If each company has a majority share in the other company, both companies have to be considered as dominant and dependent companies.

[20] The SCA defines six types of undertaking contracts - controlling contract, profit transfer contract, profit association contract, contract on the partial transfer of profit, contract on the lease of an establishment and contract on the relinquishing of an establishment.

[21] The presumption is rebuttable.

4.3. Actual Concern of Companies

4.3.1. General Rule

The actual concern (germ. *Faktischer Konzern*) comprises a dominant company and one or more dependent companies connected under the unified management of the dominant company, namely without a controlling contract.

Article 545 of the SCA provides a general rule regarding actual concerns. This rule can be summarized in one sentence: the dominant company may not use its influence on a dependent company in a detrimental way! On the other hand, this rule has one important exception: the dominant company may use its influence on a dependent company in a detrimental way if the dominant company compensates the dependent company for the loss. The SCA regulates the extent of influence in an actual concern in a way that it requires the dominant company not to use its influence to induce a dependent company to carry out harmful transactions for itself or to do something or fail to do something to its own detriment, unless(!) the dominant company compensates the dependent company for the loss.[22] The SCA requires that the loss should be compensated for, either during the financial year or it shall be necessary to determine when and how the loss shall be compensated for at the latest by the end of the year in which the dependent company suffered the loss.[23]

According to the third paragraph of Article 545 of the SCA, the members of the management of a dependent company are obliged to compile a report on relations with the dominant company within the first three months of the financial year. They have to state in the report if the dependent company has suffered a loss as a result of transactions with the dominant company or companies affiliated with it, or at the initiative or in the interest of these companies. Furthermore, all actions which a dependent company carried out or omitted to carry out at the initiative or in the interest of the dominant company or companies affiliated with it in the past financial year and which result in a loss for the dependent company, have to be included in the report on relations with the dominant company. As mentioned above, if there were such transactions, the loss has to be either compensated for during the financial year in which the dependent company has suffered the loss, or it has

[22] The first paragraph of Article 545 of the SCA.
[23] In addition, the second paragraph of Article 545 of the SCA requires that the dependent company shall be guaranteed a right of priority with respect to compensation.

to be determined when and how it shall be compensated for.[24] If neither of that happens, the dependent company has the compensation claim against the dominant company. That means that the dominant company must reimburse the dependent company for the damage arising – either voluntarily, or in litigation. The SCA requires that the report on relations with the dominant company includes the clarification whether the dependent company received a suitable payment for each legal transaction and whether, in the case the action was taken, it suffered a loss.[25] The clarification on the suitability of the payment and the "suffered" loss is based on the circumstances known at the time when a legal transaction was carried out or an action was taken. In other word, the clarification is not based on the *ex post* facts but rather on *ex ante* predictions and assumptions that might not even be realized! Article 546 of the SCA requires that a report on relations with affiliated companies has to be submitted to the auditor at the same time as the financial statements and the business report are submitted. It has to be stressed that if there were no transactions (between dependent company and dominant company or companies affiliated with it) that resulted in the loss for the dependent company, this must be clearly stated in the report as well.

4.3.2. Liability

The SCA contains specific provisions regarding the liability of a dominant company and its statutory representatives (Article 547) as well as regarding the liability of the bodies of a dependent company (Article 548).

The liability of a dominant company derives from the fact that it has used detrimental influence on the dependent company, but has failed to compensate the loss by the end of the financial year. If a dominant company induces a dependent company to carry out a legal transaction which is detrimental to the latter, or to do or not do something to its own detriment, without actually compensating for the loss by the end of the financial year or without providing the right to benefit for compensation, it must reimburse the dependent company for the damage arising. In the case of litigation, a compensation claim by the dependent company is generally pursued by the dependent company itself. However, such a claim may also be pursued by any

[24] For legal transactions, the payments and repayments shall be stated, and for actions the reasons for them and the benefits or the loss accrued to the company. In compensating for a loss it shall be precisely stated how such compensation actually proceeded over the course of the financial year and whether the company was guaranteed the right to benefits and to what benefits.

[25] In addition, the fifth paragraph of Article 545 of the SCA requires that the clarification shall be included in the business report.

shareholder or member of the company, however, they may claim payment only for the company (*actio pro socio*). Shareholders or members of the company may also claim compensation for damage caused to them irrespective of the damage that was caused to the company. If the company is unable to repay creditors of the company, the compensation claims may be pursued by them.

In addition to the dominant company, those representatives of the dominant company who induced the dependent company to carry out the legal transaction shall be jointly and severally liable. In accordance with the *mutatis mutandis* application of the provisions of Article 543 of the SCA, the representatives of the dominant company should give instructions correctly and carefully. If they breach their obligations, they are liable to the dependent company for damage arising. The burden of proof rests on the representatives of the dominant company.[26]

The liability for the loss that derives from the detrimental influence on the dependent company is not limited only to the dominant company and its representatives. Under certain circumstances the liability of the bodies of the dependent company may also be established. As mentioned above, members of the management of a dependent company are obliged to compile a report on relations with the dominant company in which they have to state whether the dependent company has suffered a loss as a result of transactions that were made under the influence of the dominant company. If the members of the management of a dependent company breach their duties, i.e. they do not state harmful legal transactions or harmful actions in the report on the company's relations with affiliated companies or they do not state that the company has suffered a loss as a result of a legal transaction or action and that the loss has not been compensated, they are jointly and severally liable.[27] In the event of a dispute whether they have correctly and carefully fulfilled their duties, they shall be required to demonstrate that they have done so. Furthermore, the liability of the members of the supervisory board of a dependent company might be also established; if they breach their duty to examine the report on relations with the dominant company and to report to the general meeting on the findings of the examination, members of the supervisory board of a dependent company are jointly and severally liable. A compensation claim by the dependent company may be also pursued by any shareholder or member of the dependent company, but they may claim

[26] In the event of doubt as to whether they have correctly and carefully fulfilled their obligations, they shall be required to demonstrate that they have done so.
[27] In accordance with the third paragraph of Article 548 of the SCA, a loss does not need to be compensated for by the dominant company if the action was based on a lawful resolution passed by the general meeting.

payment only for the dependent company. Compensation claims may be pursued by creditors of the dependent company if the company is unable to repay them. Claims shall be time-barred after five years.

4.4. Contractual Concern of Companies

4.4.1. General Rule

The contractual concern (germ. *Vertragskonzern*) comprises companies connected by a controlling contract. According to Article 533 of the SCA, a controlling contract is a type of undertaking contract under which a company subordinates the management of the company to another company. If mutually independent companies conclude a contract establishing a unified management without one of them becoming controlled by the other company, such contract is not a controlling contract and does not establish a contractual concern.

Article 541 of the SCA provides a general rule regarding contractual concerns. This rule can be summarized in one sentence: the dominant company has the right to give (even) detrimental instructions concerning the business conduct to the dependent company if such instructions benefit either the interests of the dominant company or another company that is part of a concern. In accordance with the freedom of contract as a general principle of civil law, the contracting parties may agree that controlling contract prohibits detrimental instructions. In other words, unless otherwise provided by the controlling contract, instructions given by the dominant company to the dependent company may be detrimental for the latter, but only if such instructions are in the interest of the dominant company or companies affiliated with it.

The management of the dependent company does not have the right to judge whether instructions given by the dominant company are in the interest of the dominant company or companies affiliated with it. The management of the dependent company has to fulfil the instructions of the dominant company and may not refuse to carry out instructions even if they, in their opinion, do not derive a benefit from the interests of the dominant company or companies affiliated with it.[28] The third paragraph of Article 541 of the SCA covers the situation when an instruction is given to the dependent company for it to carry out an operation that requires the approval of the supervisory board of the dependent company. If the approval is not given

[28] The second paragraph of Article 541 of the SCA.

within an appropriate time period, the management of the dependent company has to inform the dominant company about this. If the dominant company has a supervisory board, it may repeat the instruction only with the approval of the later; after repeating the instruction, the approval of the supervisory board of the dependent company is no longer required.

4.4.2. Liability

Since the dominant company has the right to manage the contractual concern even by giving detrimental instructions to the dependent companies, adequate liability must be established. Therefore, Article 542 of the SCA provides strict rule on the liability of the dominant company: the dominant company has to settle any annual loss of the dependent company arising during the period of the contract if the loss is not settled from other profit reserves to which profit was transferred during the period of the contract.

Not only the dominant company, but also its representatives are liable for any damage caused to the dependent company. Article 543 of the SCA requires the representatives of the dominant company to give instructions correctly and carefully. In case they do not, they breach their obligations and therefore they shall be jointly and severally liable to the company for damage arising; the burden of proof is on the representatives of the dominant company.[29]

Similar as in an actual concern, a compensation claim by the dependent company may be pursued by any shareholder or member of the company, but they may claim payment only for the dependent company. Compensation claims may also be pursued by creditors of the dependent company if the dependent company is unable to repay them. Claims against the representatives of the dominant company must be filed within five years, counting from the day that representatives have breached their obligations; if claims are not filed within that time period, the court dismisses the claims. In addition to the representatives of the dominant company, the liability of the management and the supervisory board of the dependent company may also be established. In accordance with Article 544 of the SCA, the members of the management and the supervisory board of a dependent company are jointly and severally liable if they breach their duties. In the event of doubt as to whether they have correctly and carefully fulfilled their duties, they shall be required to demonstrate that they have done so. The second paragraph of the

[29] In the event of doubt as to whether the representatives of a dominant company have correctly and carefully fulfilled their obligations, they shall be required to demonstrate that they have done so.

aforementioned article explicitly states that the liability of the management board of the dependent company for damage shall not be excluded even by the fact that the supervisory board approved the actions. On the other hand, members of the management shall not be required to compensate for damage caused by an action (or the lack of thereof) that was based on an instruction by the dominant company if such an instruction was necessary to fulfil.

4.5. The Slovenian Law on Group of Companies – final

The Slovenian (codified) law on group of companies provides comprehensive regulation and protection for outside minority shareholders. Although it derives from the German model that applies, according to the grammatical interpretation of the German stock corporation act, only to public limited companies, the SCA extends the influence of the provisions further, namely to all companies. The focus of the Slovenian company law on group of companies is on the protection of outside (minority) shareholders and creditors of the dependent company rather than on the organizational aspects of the group of companies. On the other hand, the SCA contains at least two important organizational provisions regarding a group of companies. Firstly, the right of the dominant company to manage the dependent company and give even detrimental instructions to the later in a contractual concern; secondly, a deferred compensation of the loss in an actual concern.[30]

Since the minority shareholder protection in a group of companies and the so-called concern conflict could be managed not only through special provisions (company law relating to group of companies as *lex specialis*) but also with the proper application of some of the general principles of company law (and exceptions from such principles), it has to be stressed that the SCA also regulates the so-called principle of piercing the corporate veil; such a regulation provides additional protection for outside (minority) shareholders in a group of companies. In accordance with Article 8 of the SCA, members of the company are, in addition to the company, liable if they abuse the company in a way as determined with the aforementioned article (the so-called disregard of the legal person).

5. Conclusion

This paper focuses on the analysis of the Slovenian company law on group of companies, namely outside minority shareholder protection in a group of

[30] Compare with Podgorelec, 2014: 26.

companies, in the perspective of the economic growth. The paper reveals that the Slovenian law provides comprehensive protection for minority shareholders in a group of companies, especially in comparison with other national approaches at the member states level. On the other hand, the Slovenian economic growth is weak and foreign direct investments are modest. It is clear that the correlation between the minority shareholder protection (in a group of companies) and the economic growth is indirect. However, such a correlation exists and should not be ignored. The finding that the Slovenian (codified) law provides comprehensive protection for minority shareholders in a group of companies does not consider the deviation of theory (law in books) and (law in) practice. Therefore, both facts/forecasts together, i.e. current and forecasted weak economic growth and modest foreign direct investments, certainly justify further researches on the efficiency of the Slovenian minority shareholder protection in groups of companies. Regulatory impact analysis is crucial in order to identify whether there is a significant discrepancy between *soll* and *sein*, between theory and practice. In the terminology of La Porta et. al – it is not only "the law that matters", but especially its enforcement!

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