Related party transactions and corporate groups : when Eastern Europe meets the West
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4. RPTs IN CORPORATE GROUPS

4.1. THE CONCEPT OF A CORPORATE GROUP. REGULATION OF CORPORATE GROUPS

4.1.1. Legal entities as the origins of corporate groups

Legal entities are the building blocks of every corporate group. Corporate groups would not exist without legal entities. In fact, legal entities existed before groups came to life. Unlike natural persons, both legal entities and groups of companies are creatures of law, as posited by the European Court of Justice in the famous *Daily Mail* case.[755] However, when legal entities were introduced into the legal realm no clear necessity existed for anything more: they already possessed the necessary features that made them attractive to entrepreneurs: separate personality and limited liability. Today, these features are regarded as the undeniable achievements of corporate theory.[756]

Since the milestone corporate events in the 19th century,[757] the idea of a 'one-man' ('single-member') company has enriched both company law theory and statute. Statutory rules exist that allow for the formation and functioning of single-member companies both at the EU level and at the level of national law. Rules on single-member companies have a twofold nature. Firstly, they provide safeguards against abusive behaviour of shareholders. For instance, Directive 2009/102/EC gives Member States discretionary power to impose special provisions for cases where either a natural person is the sole member in several companies, or a single-member company or any other legal person is the sole member of a company.[758] The logic behind these safeguards is self-evident: regulations where a single natural person owns a chain of companies could create additional risks of non-performance of obligations and other related risks. In Ukraine, these safeguards were previously successfully implemented, but (for private companies) recently removed unexpectedly from the CCU by the LLC Law of Ukraine.[759]

Secondly and more importantly, the effect of these legislative provisions is not exclusively defensive, but also enabling. The legislation does allow persons to be the sole members of private companies. Legal regulation had to undergo a long evolution to reach this level of autonomy in the right of establishment. This right has a crucial theoretical implication: companies are not confined to simple groupings of individuals. On the contrary: membership in a company is devoid of a personal link between the individual and the company. Although a sole shareholder may of course enter into an employment contract with a company and become its director or a member of a company body, a shareholder's role in the company is characterized more by the shareholder's ability to retain a distance from direct participation in the company's operational activity and,

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[755] *The Queen v. H.M. Treasury and Commissioners of Inland Revenue ex part Daily Mail and General Trust PLC (Case 81/87)* OJ C 277 (European Court of Justice), 5511.
[756] Kraakman R and others, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd edn, Oxford University Press 2017), 5.
[757] Harris R, 'The Private Origins of the Private Company: Britain 1862–1907' (2013) 33 Oxford Journal of Legal Studies 339, 340.
[758] Directive 2009/102/EC, Article 2.
[759] LLC Law of Ukraine, chapter 8, paragraph 6(2).

having made a monetary contribution, only attend the general meeting of shareholders (or send a representative).

In cases where several individuals agree to become shareholders in a company, it may in fact be argued that a group of people are united by a common fund. This feature can also be described as corporateness. Otherwise, without a common fund attributed to corporateness, i.e. without an officially formed company, multiple individuals would be qualified as joint debtors or joint tortfeasors.[760] However, the very fact that a company has multiple shareholders does not automatically mean that it comprises a corporate group as defined in the scope of this research. Corporate groups cannot in any way be equated with groups of individuals. The nature and features of corporate groups are studied in greater detail in this section.

4.1.2. The economic and legal views of corporate groups

Corporate groups as a legal and economic phenomenon emerged in the 20th century (and in some countries in the late-19th century[761]).[762] What had previously been purely internal issues, resolved between a firm's separate constituencies, could now be decided at the group level. From an economic point of view, this does not create many problems. Economists have always regarded firms as more than a legal entity. As Harry Rajak notes, scholars and economists use the term 'firm' to overcome the difference between incorporated and unincorporated business entities.[763] A firm's boundaries under the economic approach are based on the distinction between the firm and the market. A firm enters the market with all its available financial and non-financial resources: tangible assets, human capital, know-how, and so on. An alternative route that a firm can take is one of internal development, i.e. organizing transfers of resources or services internally.

In his celebrated article, Ronald Coase carefully studied the idea that legal entities needed to form relationships with other economic players in order to participate in turnover.[764] Coase essentially argued that, if transaction costs become too high to enter into agreements with other firms, it makes more sense to organize an internal system of relationships within the firm's own boundaries.[765] Where a transaction is organized internally, this eliminates some of the marketing costs, including contracting and enforcement cost. At a certain point, the situation may turn around, and it becomes less costly to apply to the market and utilize the price mechanism.

Before Coase initiated this discussion, firms were seen as 'black boxes'. The merit of Coase's article was that he asked profound questions; for example, he wondered '*why a firm emerges at all in a specialized exchange economy*'.[766] Oliver Williamson, who further contributed to the transaction cost theory and rendered it workable, has taken Coase's ideas further. He views the firm as primarily a governance structure,[767] where governance is regarded as an overarching concept.[768]

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[760] Stoljar SJ, *Groups and Entities: An Inquiry into Corporate Theory* (Canberra: Australian National University Press 1973), 189.
[761] Blumberg PI, 'Limited Liability and Corporate Groups' (1985) 11 Journal of Corporation Law 573, 605.
[762] Antunes JE, *Liability of Corporate Groups: Autonomy and Control in Parent-Subsidiary Relationships in US, German and EU law: an International and Comparative Perspective* (Kluwer Law and Taxation Publisher 1994), 109.
[763] Rajak H, 'Corporate Groups and Cross-Border Bankruptcy' (2008) 44 Texas International Law Journal 521, 522.
[764] Coase RH, 'The Nature of the Firm' (1937) 4 Economica 386.
[765] Ibid, 394.
[766] Ibid, 390.
[767] Williamson OE, 'The Theory of the Firm as Governance Structure: from Choice to Contract' (2002) 16 The Journal of Economic Perspectives 171, 191.
[768] Williamson OE, 'Transaction Cost Economics: The Natural Progression' (2010) 86 Journal of Retailing 215, 215.

When Alice Belcher explored Coase's doctrine in combination with the approaches taken by Knight and Weitzman, and sought to make those doctrines applicable to the law, she concluded that they were aimed at incorporating the concept of authority (to direct, to choose, and to dismiss), namely authority over employees.[769] However, this suggestion contains an inherent contradiction, as it applies a specifically legal concept. For the law, authority plays a crucial role, as the law essentially asks whether or not behaviour is allowed.[770] For economics, the answer might be different. For instance, it is inappropriate from the economic perspective to assess whether a manager has the authority to enter into a transaction. Instead, economic theory asks whether it is reasonable to enter into the transaction, how far the firm can go, what it should do to maximize its profits, and so on. The economic boundaries of a firm were notably described by Jensen and Meckling as '*the maximum attainable set of output quantities for various input quantities, given the state of technology and knowledge*'.[771]

The boundaries of the firm, as defined in economic theory, are not immune to blurring. This can be caused by the existence of sophisticated inter-firm arrangements such as long-term framework agreements, franchise contracts, joint ventures and vertical network organizations. Some authors, however, have expressed the opinion that vertical network organizations actually add more specificity to the firm's boundaries, and are unique constructions with their own incentive provisions and coordination devices.[772] This idea deserves further analysis. It is true that vertical integration schemes and long-term contracts cannot simply be equated with market choice. Using these devices, firms would become so closely related that it would be impossible to argue that they are 'going to the market' separately. Accordingly, a group of companies with a separate business policy and affiliates that are responsible for performing certain functions within the group will more likely be viewed as a single firm than separate legal entities within the group's structure. This is entirely fair according to Coase's theory.[773] The fact that the members of the group are individual legal entities is essential for law, but not for economics. Viewing a group of companies as a body in its own right, different from a legal entity, in and of itself contradicts the concept of company, where limited liability, meaning that a company's shareholders as a rule are not liable for the company's debts, is one of the cornerstones.

It would also be incompatible with economic theory to define the market as all other parties that are not the firm's employees or subdivisions. This legalist view of companies as separate legal entities does not suit the objectives of economic theory. In fact, it seems that economic theory has infringed on the legal realm, by adding new and previously unknown items to the agenda. In the 19th century, the idea of separate personality and limited liability were brilliant inventions, aimed at boosting economic turnover. No urgent necessity existed to establish corporate structures with multiple horizontally or vertically integrated companies. At the time of 19th century landmark case *Salomon versus Salomon* in the UK, limited liability and separate personality were viewed as the modern cure for the disease of risky entrepreneurial activity, with lack of proper protection for creditors' rights as a side effect.[774] Today, in a world of corporate groups often formed as transnational companies,[775] the formal implications of *Salomon versus Salomon* no longer reflect

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[769] Belcher A, 'The Boundaries of the Firm: the Theories of Coase, Knight and Weitzman' (1997) 17 Legal Studies 22, 38.
[770] McCarthy KJ, Fiolet M and Dolfsma W, *The Nature of the New Firm: Beyond the Boundaries of Organisations and Institutions* (Edward Elgar Publishing 2011), 5.
[771] Jensen MC and Meckling WH, 'Rights and Production Functions: An Application to Labor-Managed Firms and Codetermination' (1979) 52 The Journal of Business 469, 469.
[772] Baudry B and Chassagnon V, 'The Vertical Network Organization as a Specific Governance Structure: What Are the Challenges for Incomplete Contracts Theories and What Are the Theoretical Implications for the Boundaries of the (Hub-) Firm?' (2012) 16 Journal of Management & Governance 285, 289.
[773] Harper Ho VE, 'Theories of Corporate Groups: Corporate Identity Reconceived' (2012) 42 Seton Hall Law Review 879, 886.
[774] Hill J, 'Corporate Groups, Creditor Protection and Cross Guarantees: Australian Perspectives' (1994) 24 Canadian Business Law Journal 321, 321.
[775] Picciotto S, *Regulating Global Corporate Capitalism* (Cambridge University Press 2011), 129.

economic reality.[776] Classical corporate theory was not designed to protect large polycorporate enterprises, the modern economic constellation of corporate groups.[777] One of the main areas where the classical tools of corporate theory have been rendered obsolete is intragroup liability.[778] Guided by group policy considerations, subsidiaries can empty their pockets and then have no possibilities to restore their finances. Limited liability and separate personality are also not the proper tools for protecting the interests of victims of torts committed by subsidiaries of a group.[779] For example, in cases of environmental pollution or consumer contamination by a subsidiary in one country based on group policy and instructions handed down from the top, it would be unfair if only the subsidiary faced liability without piercing the parent company's corporate veil.[780] Corporate groups by themselves can therefore produce risks that need to be avoided. Those risks have created new challenges for company law and a new battlefield for the legislature.[781]

4.1.3. The concept of affiliation and affiliation challenges in corporate groups

A corporate group's formation is sometimes described as a company's external growth.[782] At the same time, the company's external growth is not limited to the creation of corporate groups only. Working from these premises, Ulrich Immenga wondered why businessmen '*believe that the formation of company systems is the best method for promoting external growth*'.[783] He asked this question in the context of his research into affiliated persons. Answering it requires a brief consideration of his study and an exploration of whether the terminology he used is relevant for the current work as well.

In fact, Immenga himself highlights the vagueness in the definitions of company systems and affiliation in some jurisdictions.[784] To follow the author's line of thought, this is not the case in Germany, where the law is very specific on this topic and refers to the notions of an affiliated group, parent and subsidiary relations, and so on. Still, for Immenga the term 'affiliation' is broader than company systems, and includes for example 'interlocking officers and directors'.[785] This stresses the need to establish types of affiliation that are relevant for corporate groups, and to understand where affiliation gives rise to the emergence of corporate groups.

Affiliation describes the core characteristics of corporate groups. Without affiliation, the notion of groups would be meaningless. However, degrees of affiliation vary, and different schools of thought exist as to how close companies need to be to establish affiliation. This has caused some

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776 Dearborn M, 'Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups' (2009) 97 California Law Review 195, 209.
777 Antunes JE, 51.
778 Ibid, 6.
779 Lipton P, 'The Mythology of Salomon's Case and the Law Dealing with the Tort Liabilities of Corporate Groups: An Historical Perspective' (2014) 40 Monash University Law Review 452, 487.
780 This is illustrated by the example of the Haitian Poisoning Affair, following the death of a five-year-old child from contamination in a country where the subsidiary was located. See: Bartman SM, 'Piercing the Corporate Veil in Haitian Poisoning Affair Rejected in First Instance: German HELM AG Not Found Liable under Dutch Corporate Law' (2016) 13 European Company Law 105, 105.
781 Spindler G, 'Scandals, Regulation, and Supervisory Agencies: The European Perspective' in Hopt KJ (ed), *Corporate Governance in Context : Corporations, States, and Markets in Europe, Japan, and the US* (Oxford University Press 2005), 128.
782 Immenga U, 'Company Systems and Affiliations' in Frankel T (ed), *International Encyclopedia of Comparative Law*, vol 13 (Amer Soc Comparative Law 1988), 4.
783 Ibid, 4. This is reminiscent of the classical question posed by Coase as to why a firm should emerges on the market at all. With Coase, however, the discussion was of a purely economic nature, referring to a firm as a broad concept, as has been described above.
784 Ibid, 3. According to Immenga, this vagueness exists in the US and France, where the definition of affiliation is either too broad, being subject to interpretative freedom, or is not statutory-based.
785 Ibid, 3.

contention among scholars. Scholars and practitioners have developed various theories to help them understand this term, ranging from the narrow ownership-based concept to viewing even loose economic relationships through supply chains as group elements.[786] However, the narrow ownership-based group is unquestionably the most common understanding of this phenomenon. As Harper Ho admits, '*this prototypical group includes a parent company and its direct and indirect subsidiaries, each with a separate legal identity and its own rights and obligations*'.[787] The entities making up a group are usually private companies, but not necessarily. Both incorporated and unincorporated entities, for example partnerships, may become constituent elements of a group, depending on whether the legal requirements allow corporate structures with those types of entities.

The fact that ownership-based groups are the most common form of corporate groupings can be seen from the area where reaching a consensus always requires a great deal of hard work and much effort: EU law. This is where legal notions and the rules surrounding them are coined based on protracted discussion and analysis. Without going into the specifics of EU regulation,[788] a glance at the concept of a 'group' as it is now used in the Accounting Directive shows that it is worded as follows: '*a parent undertaking and all its subsidiary undertakings*'.[789] Similar definitions of groups can be found in IAS 24[790] and IFRS 10.[791] The definitions provided in those instruments are not, by themselves, sufficient to grant an understanding of the relationships in groups; this requires an analysis of the meaning of a 'parent undertaking'. The Accounting Directive defines a parent undertaking as an undertaking that controls one or more subsidiary undertakings.[792] Therefore, the core idea of the 'group' concept based on the provisions of the current sources of EU law mentioned above lies in control.

Not only does the Accounting Directive (similarly to its predecessor, the Seventh Council Directive[793]) place the notion of control at the heart of the 'group' phenomenon, the concept of control is also widely used in the national laws of the EU Member States,[794] as well as in jurisdictions beyond the EU.[795] While this term has already been covered in the previous chapter and is not analyzed in detail here, some group-related issues require further elaboration in the present chapter.

No definition of control is given in Article 1 of the Accounting Directive with all its other relevant definitions, despite the fact the EU legislature defines group through control. Some commentators have expressed concern about this, by criticizing the Directive for lacking sufficient clarity.[796] It is not entirely clear whether, to interpret these provisions, lawyers should either search for clarification of the 'control' notion in other instruments, for instance IAS 27,[797] or else draw on the elements of control in the provisions of the same Directive. Specifically, recital 31 of the Directive reads as follows: '*Control should be based on holding a majority of voting rights, but control may also exist where there are agreements with fellow shareholders or members. In certain circumstances control may be effectively exercised when the parent holds a minority or none of*

[786] Harper Ho VE, 890.
[787] Ibid, 886.
[788] This is done in section 4.1.4, below.
[789] Accounting Directive, Article 2(11).
[790] IAS 24, clause 9(i)(b).
[791] International Financial Reporting Standard 10, as adopted by Commission Regulation (EC) No. 1126/2008 of 3 November 2008 adopting certain international accounting standards in accordance with Regulation (EC) No. 1606/2002 of the European Parliament and of the Council [2008] OJ L 320/1, 29.11.2008, clause 2.
[792] Ibid, Article 2(9).
[793] Seventh Council Directive, Article 1.
[794] 'Corporate Group Law for Europe by Forum Europaeum', 187.
[795] Kluver J, 'European and Australian Proposals for Corporate Group Law: A Comparative Analysis' (2000) 1 Eur Bus Organ Law Re 287, 292.
[796] Søgaard G, 'Introduction of a Group Definition in the New Accounting Directive: The Impact on Future Accounting Regulation' (2014) 11 European Company Law 232, 235.
[797] Ibid, 235.

the shares in the subsidiary'. With this provision, the EU legislature confirms the view that a majority shareholding is the main example of control, but not the only one, describing affiliation in a group. One scenario where a shareholder has only a minority of the shares, but could exercise control nevertheless, is if a majority of the members of the administrative, management or supervisory bodies are appointed solely through the exercise of that shareholder's voting rights. At the same time, some ambiguity exists in the text of the Accounting Directive as to where exactly 'dominant influence' occurs instead of 'control': it is not entirely clear from the text of the Directive how these notions interrelate. Where everyone agrees, based on the literal interpretation of the Directive, is that these notions are mutually exclusive, meaning that 'dominant influence' by itself rules out the possibility of 'control'.[798]

Accordingly, although control is a widely accepted concept, it frequently poses difficulties for interpreting it and applying it in practice to define a group's boundaries. Essentially, two ways exist to determine control: by form and by substance.[799] The principal example of how formal techniques help to establish control is by checking whether a majority shareholding exists. Where a shareholder owns most of the voting rights in a company and, consequently, can appoint its executives, that person is a controller. However, matters become more complicated if the company has many shareholders but no major shareholding. This requires an analysis of other circumstances besides the numbers of shares to identify the company's controller or controllers. This analysis will then be of a qualitative nature, and will use other kinds of relationships besides share ownership, for example contractual relationships, voting results, and so on. Although substantive analysis is more difficult to apply than a formal test, using purely formal criteria sometimes yields unfair results, as ownership of shares is not the only meaningful type of relationship to emerge in groups of companies. At the same time, extensively favouring substantive criteria leads to uncertainty, and it makes sense for the EU authorities to adhere mostly to formal criteria in group company law.[800]

Substantive criteria were used to determine control in the recent case of *Okpabi versus Shell*. The England and Wales Court of Appeal rendered a judgment in which it did not find proximity in the relationship between the ultimate holding company Royal Dutch Shell and its Nigerian subsidiary, as one of the conditions for the Court to have jurisdiction regarding a claim for breach of the duty of care.[801] In response to the plaintiffs' allegation that Royal Dutch Shell imposed mandatory policies, standards and guidelines for the use of pipelines by its subsidiaries, the Court emphasized the universal application of those policies.[802] In other words, according to the Court's reasoning, the relationship lacked operational control particularly for the Nigerian subsidiary.[803] This judgment might be instrumental in helping parent companies decide how to structure their corporate policies to avoid liability for loss or damage caused by their subsidiaries.

Besides loopholes and pitfalls in the substantive interpretation of control and related terms (influence, dominance, and so on), in light of Article 1 of the Accounting Directive a further issue exists, i.e. whether only vertical groups, where entities are fully dependent on each other and lack autonomous decision-making,[804] should be recognized in the definition of a group. Article 1 of the Accounting Directive concerns vertical groups only, since it prefers the concept of control.[805] At the same time, however, the Accounting Directive has not fully eliminated horizontal groups;

[798] Accounting Directive, Article 22(2)(a).
[799] Adinolfi A, 'The Legal Notion of the Group Enterprise: The EEC Approach' in Sugarman D and Teubner G (eds), *Regulating Corporate Groups in Europe* (Baden-Baden, Nomos 1990), 498.
[800] Ibid, 505.
[801] Bergkamp PA, 'Parent Company Liability After Okpabi v. Shell' (2018) 15 European Company Law 112, 114.
[802] Ibid, 114.
[803] Ibid, 117.
[804] Adinolfi A, 'The Legal Notion of the Group Enterprise: The EEC Approach' in Sugarman D and Teubner G (eds), *Regulating Corporate Groups in Europe* (Baden-Baden, Nomos 1990), 503.
[805] Søgaard G, 234.

reference to them is made in the optional paragraph 7 of Article 22 of the Accounting Directive.[806] As provided by that paragraph 7, two undertakings are related by a degree of influence either through their unified management stemming from contractual or constituent documents, or if the same persons occupy positions in the administrative, management or supervisory bodies of both companies. Immenga refers to the latter type of affiliation as ‘interlocking officers and directors’, going beyond company systems.[807] It then follows that ‘company systems’ in Immenga’s research mean primarily ‘vertical groups’ based on control.

This reveals a number of challenges in formulating the boundaries of groups and answering the question of which types of affiliation are irrelevant in corporate groups. Firstly, as has been discussed already, the idea from corporate legal theory that a group is a set of separate legal entities is no longer reflective of the growing demands of economic reality. The enterprise theory, in which an enterprise refers to a combination of parent, subsidiary and affiliated companies, has already been considered by legal scholars.[808] However, equating relationships between legal entities within a group with relationships between, for instance, the research department and the marketing department of a single company has counter-arguments of its own. One reason is that companies in a group might very well have ‘outside’ shareholders.[809] Those outside shareholders do not feature in vertical group relationships, and might hold a small percentage of the share capital in a company belonging to a group. Their role in decision-making procedure is insignificant, yet this does not mean that their interests should be neglected.

Secondly, using substantive criteria to assess relationships within corporate groups lacks clarity. This approach involves using terms – control, dominance, influence and other – and the outcome may appear different in the eyes of different interpreters. That is why formal criteria are reasonably preferred, with substantive tests applied to a lesser extent, given that clarity and certainty may suffer. Recent case law also shows that courts using substantive criteria to determine control may be guided by policy considerations and the further implications of their judgments.[810]

Thirdly, a widespread trend has emerged to view corporate groups primarily as vertical groups. The idea that a parent company exerts control in corporate groups has flooded corporate theory so widely that some authors even include this idea as one of the constituent features of all corporate groups, and by doing so exclude horizontal groups.[811] However, pretending that horizontal groups do not exist is not the solution, especially taking into account that they have emerged as a European phenomenon, as opposed to centralized multinational groups in the US and Japan.[812] In addition, Article 22 of the Accounting Directive provides for some minor optional regulation of these groups, as a legacy of the Seventh Council Directive.[813] Therefore, arrangements of horizontal groups, where for example two companies own shares in each other,[814] do in fact exist and deserve consideration. At the same time, what they bring to the legal realm is uncertainty, as formal criteria do not suit these types of groups. The question is not where the group starts, but where it ends,[815] which is how strong influence needs to be in order to identify a group. This fact, coupled with the desire of the EU authorities to prevent national governments from imposing excessive duties and burdens on groups, may be one reason why EU law favours

[806] Ibid, 34.
[807] Immenga U, ‘Company Systems and Affiliations’, 3.
[808] Landers JM, 590.
[809] Antunes JE, 88.
[810] Bergkamp PA, 117.
[811] Nzafashwanayo D, ‘Corporate Groups under the Laws of Rwanda: An Economic Reality without Legal Identity’ (2016) 7 Beijing Law Review 95, 98.
[812] Bayer W, ‘Horizontal Groups and Joint Ventures in Europe: Concepts and Reality’ in Hopt KJ (ed), *Groups of Companies in European laws*, vol 2 (de Gruyter 1982), 3.
[813] Muller W, ‘Group Accounts under the Proposed Seventh EEC Directive: A Practitioner's View’ in Hopt KJ (ed), *Groups of Companies in European Laws*, vol 2 (de Gruyter 1982), 181.
[814] Rajak H, 522.
[815] Harper Ho VE, 887.

the narrow definition of corporate groups, i.e. vertical groups consisting of entities deemed to be affiliated pursuant mainly to formal criteria.[816] As such, to maintain clarity and consistency, this thesis views groups primarily as control-based vertical groups, unless the text specifies otherwise.

4.1.4. Reasons to create corporate groups

To better understand the legal side of corporate groups, it is necessary to step away from the unity that is characteristic of this economic notion and instead consider their legal diversity. From the perspective of the law, corporate groups consist of multiple independent companies or other legal persons that are linked through a variety of techniques and are termed affiliates.[817] The formation of a group is different from the creation of a single company. Using the example of *Salomon versus Salomon*,[818] where Mr Salomon involved his wife and children in establishing a company, his intentions were quite clear and straightforward: to make a corporate shield that would protect his family and himself personally from excessive claims of creditors. To implement his plan, the merchant did not require more than one legal entity, since a single private company was sufficient.

Matters become more complicated if a corporate group is involved. Bearing in mind that a corporate group, by its very nature, consists of multiple legal entities, the goal pursued by Mr Salomon – to enjoy the benefits of a corporate shield in the shape of a company – is not sufficient to explain all the circumstances surrounding the creation and functioning of corporate groups. The philosophy behind corporate groups is more sophisticated than with a single legal entity. The reasons for introducing a corporate group transcend company law and may concern accounting,[819] environmental law,[820] human rights,[821] tax or anti-competition policy,[822] though tax-driven considerations are particularly prevalent.[823] However, this study does not discuss the areas that fall beyond the issues of corporate law at length, and the importance and essence of corporate groups are analyzed primarily from this perspective.

The question remains, however, why entrepreneurs need to create corporate groups. Their reasoning is not necessarily limited to the reasons for creating legal entities, since groups in and of themselves indicate external growth. To summarize Immenga's thoughts on this form of external growth,[824] the following reasons can be identified. First, where a parent acquires control of an existing subsidiary, the parent has immediate access to resources, workforce and potential, without taking additional measures to develop the company internally. Second, the risks are shared by multiple separate entities, which is the next level of development in the entity doctrine. Natural persons, instead of using a single entity as a corporate shield, might try to conceal their assets and, consequently, distribute the risks behind multiple companies; groups are a safer instrument of corporate protection than ordinary companies. Third, given that control is not restricted to being a majority shareholder only, but can also stem from having de facto control with less than half the share capital, a parent company might prudently acquire control in a subsidiary by owning a small proportion of the shares and influencing the decision-making process.

[816] Adinolfi A, 511.
[817] Picciotto S, 129.
[818] *Salomon v. A. Salomon and Co. Ltd.* AC 22 (United Kingdom House of Lords), 22.
[819] Samaras I and Athianos S, 'Group Accounting: The Effect of IFRS Adoption. The Case of Greece' (2016) 15 Journal of Accounting and Management Information Systems 661.
[820] Bergkamp L, 'The Environmental Liability Directive and Liability of Parent Companies for Damage Caused by Their Subsidiaries ('Enterprise Liability')' (2016) 13 European Company Law 183.
[821] Mwaura K, 'Internalization of Costs to Corporate Groups: Part-Whole Relationships, Human Rights Norms and the Futility of the Corporate Veil' (2012) 11 Journal of International Business & Law 85, 110.
[822] Avgitidis DK, *Groups of Companies: The Liability of the Parent Company for the Debts of Its Subsidiary* (Ant. N. Sakkoulas Publishers 1996), 135-140.
[823] Landers JM, 'A Unified Approach to Parent, Subsidiary, and Affiliate Questions in Bankruptcy' (1975) 42 The University of Chicago Law Review 589, 589.
[824] Immenga U, 'Company Systems and Affiliations', 4-5.

These reasons are by no means exhaustive, nor do they make allowance for potential regulatory requirements that may be in force in a particular country, such as the requirement in some states that foreign companies must conduct their local business through separate subsidiaries.[825] Rather, they offer a short description of the principal corporate motives behind group formation.

4.1.5. Development of EU law on corporate groups

One of the primary sources of EU law, including EU group law, is the TFEU. While it does not make any reference to groups as a separate concept, it does provide for the freedom of establishment for legal entities to create agencies, branches and subsidiaries in the territory of any Member States.[826] This provision entered the TFEU via Article 43 of the Treaty establishing the EC. The European Court of Justice has interpreted this freedom as extending beyond the mere formation of companies in a specific Member State, and including such matters as merging with a target company.[827]

The far-reaching concept of establishment[828] may seem misleading, due to the wording of Article 48 of the TFEU. Freedom of establishment reads as belonging to nationals of Member States, i.e. natural persons. However, if these provisions are interpreted in conjunction with Article 54 of the TFEU, they endow legal entities with the same rights as natural persons have. That is why it is entirely fair to say that rules on corporate groups are directly enshrined in EU primary law.[829]

For secondary law in the EU, the situation is more complicated. EU group law is not codified; acts governing relations within groups are dispersed. However, several authors have divided the various directives on EU company law into two categories: (a) directives governing the formation of corporate groups; and (b) directives governing existing groups.[830] Opinions differ on how to better define the scope of these two categories of EU directives. For instance, in the textbook by Stefan Grundman and Falko Glasow, only the Takeover Directive is referred to as dealing with the formation of groups.[831] It is certainly logical to say that the Takeover Directive is directly related to the issue of group formations, since it establishes safeguards for both blockholders ('squeeze-outs') and minority shareholders ('mandatory bids' and 'sell-outs') from abusive behaviour by the other. At the same time, the textbook by Adriaan Dorresteijn and others. contains a longer list of sources of secondary EU law governing the formation of groups.[832] Among the sources, the authors refer to the Second Council Directive as facilitating the capital requirements for non-cash contributions (now codified in Directive 2017/1132[833]), the Transparency Directive containing disclosure duties triggered by the acquisition of a specific

[825] *Corporate Groups Final Report, Prepared by Australian Companies & Securities Advisory Committee* (Sydney, NSW: The Committee, 2000), 4.
[826] Treaty on the Functioning of the European Union [2012] OJ C 326/47, 26.10.2012, Art. 43(1).
[827] *SEVIC Systems AG, Case C-411/03* European Court reports (European Court of Justice (Grand Chamber)), 10836.
[828] Werlauff E, 'Group and Community? the European Court's Development of an Independent Community Law Concept of the Group and its Significance for National Company Law' (2007) 4 European Company Law 201, 202.
[829] Teichmann C, 'Towards a European Framework for Cross-Border Group Management' (2016) 13 European Company Law 150, 150.
[830] Grundmann S and Glasow F, 756-760; Dorresteijn AF and others, *European Corporate Law* (2nd edn, Kluwer Law International 2009)
, 292-295.
[831] Grundmann S and Glasow F, 759.
[832] Dorresteijn AF and others, 292-293.
[833] Directive 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification) [2017] OJ L 169, 30.6.2017, Art. 49(4).

percentage of shares,[834] Directive 2009/102/EC allowing single-member companies, and the Regulation on the SE Statute, which also applies to groups where an SE is formed either as a holding company[835] or as a subsidiary.[836]

In addition to more general regulation of corporate groups through secondary law, the EU also has specific and sectoral regulations that deal with group-related issues. For instance, Directive 2015/848 on insolvency proceedings includes a separate chapter devoted to insolvency proceedings of members of a group of companies.[837] That Directive provides for cooperation between insolvency practitioners appointed in proceedings involving different members of a single corporate group, and contains special provisions for group coordination proceedings[838] where the group is treated as a single economic entity.

Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms[839] contains rules specifically directed at groups of credit institutions. Among other rules, it provides for consultation obligations of the competent authorities for members of a single group that are located in different Member States.[840] This Directive also provides for information exchanges between authorities in connection with the legal and organizational structure of groups.[841] Groups of credit institutions are also covered by regulatory requirements of Regulation 575/2013 on prudential requirements for credit institutions and investment firms.[842] The purpose of the latter instrument is to ensure that '*the capital requirements apply on the basis of the consolidated situation of those institutions within the group*'.[843] This is achieved through application of the requirements on a consolidated basis.[844] Under Directive 2014/59/EU, establishing a framework for the recovery and resolution of credit institutions and investment firms, a parent undertaking has a duty to draw up and submit to the consolidating supervisor a group recovery plan,[845] which must consider the financial situation of both the group as a whole and its separate group entities, especially if they are in distress.[846] As the foregoing shows, the EU legislature has undisputedly moved away from the long-standing entity approach, which follows the economic reality with shielding and separate personality,[847] and towards the enterprise approach. This also holds true for the Court of Justice of the EU, which

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[834] 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 [2004] OJ L 390/38, 31.12.2004, Article 9.
[835] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), OJ L 294, 10.11.2001, Article 2(2), Section 3.
[836] Ibid, Article 2(3), Section 4.
[837] Regulation (EU) No. 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings [2015] OJ L 141/19, 11.9.2002, Chapter V.
[838] Ibid, Article 61.
[839] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC [2013] OJ L 176, 27.6.2013.
[840] Ibid, Article 16(3).
[841] Ibid, Article 20(3).
[842] Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 [2013] OJ L 177, 27.6.2013.
[843] Ibid, recital 37.
[844] Ibid, Articles 11-16.
[845] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council [2014] OJ L 173, 12.6.2014, Article 7(1).
[846] Ibid, Article 7(4).
[847] Recital 6 of the SE Statute regulation finds it '*essential to ensure the economic unit and the legal unit of business in the Community coincide*', though this provision exists more as an abstract idea, as every company is at liberty to choose between either forming a subsidiary in a Member State or creating a branch.

has been said to apply both concepts for deciding cases.[848] However, the EU could have embraced the enterprise approach even more if the Ninth Directive had been adopted; however, two draft proposals for the directive were not even officially submitted.[849] The second draft of 1984 came very close to the German concept of group law. Having been circulated among the European Commission, it was viewed by the business community as being too cumbersome and inflexible.[850] The draft proposal contained a number of provisions that were similar to those that apply today, namely disclosure requirements for major shareholdings, yet essentially it also included the group concept. In other words, the proposal approached the perception of a company as an economic unit, giving the parent company exclusive managerial authority.[851] To balance the controlling powers, it provided for liability of the parent undertaking in respect of the subsidiary for its loss or damage and its debts. In addition, it put forward the inherently German concept of enterprise agreements. Similar to the German statutory approach, the draft Directive suggested that only dependent public companies were covered by its requirements.[852] In Germany, however, private companies are now subject to group law regulations, due to the legal enforcement practice of judicial authorities.[853]

Although the Ninth Directive failed, its idea of a group interest has not disappeared from legal debate. The turning point in the history of EU group law, when a new direction for developing law in this area was put forward, was the Forum Europeaum in 1998. The Forum essentially argued in favour of recognizing group interests, adhering to the 'Rozenblum' doctrine initially developed by the French courts. The proposal for a directive that was developed by Forum participants and was based on the seminal criminal case decided by the French Cassation Court, incorporated the criteria for regarding the management of a subsidiary acting in the interests of the group as not being in breach of its duty. Essentially, those criteria were as follows: (a) a balanced and firmly established group structure; (b) incorporation of a subsidiary in a long-term and coherent policy; and (c) balanced losses/profits in the long term.[854] The Forum's recommendations drew heavily on case law, marked by greater flexibility than the earlier German-tailored draft of the Ninth Directive. This approach to dealing with group management issues met with instant resistance, being said to lack a proper basis and thus '*betraying the purpose of the project*'.[855]

Following the specific recommendations of the Forum Europaeum, in 2002 the High Level Group of Company Law Experts produced a report (the 'Winter Report') setting out the desired regulatory framework in Europe for tackling the burning issues of company law, including groups and pyramids.[856] Similar to the Forum's vision, the experts of the High Level Group advised not to adopt the Ninth Directive, but to address individual problems by modifying existing provisions.[857] On the subject of group management, it suggested allowing the adoption and implementation of coordinated group policy.[858] This recommendation was reflected in the 2003

[848] Sørensen KE, 'Groups of Companies in the Case Law of the Court of Justice of the European Union' (2016) 27 European Business Law Review 393, 420.
[849] Grundmann S and Glasow F, 763.
[850] Communication from the Commission to the Council and the European Parliament, Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward, COM (2003) 284 final, 21.5.2003, 18.
[851] Gleichmann K, 'The Law of Corporate Groups in the European Community' in Sugarman D and Teubner G (eds), *Regulating Corporate Groups in Europe* (Baden-Baden: European Institute, Florence 1990), 448.
[852] Ibid, 447.
[853] This issue is discussed elsewhere in this chapter.
[854] 'Corporate Group Law for Europe by Forum Europaeum', 260.
[855] Windbichler C, '"Corporate Group Law for Europe": Comments on the Forum Europaeum's Principles and Proposals for a European Corporate Group Law' (2000) 1 Eur Bus Organ Law Re 265, 273.
[856] Winter J and others, *Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe* (Office for Official Publications of the European Communities 2002), 94-101.
[857] Ibid, 99.
[858] Ibid, 100.

Action Plan of the European Commission, which supported the ideas previously expressed by the High Level Group, namely the importance of group policy and the necessity of carefully designed safeguards to balance it. A directive was chosen as the appropriate instrument.[859] While that directive was scheduled to be adopted by 2008, the concerns about its timely adoption and implementation that had been expressed earlier proved justified.[860]

In 2011, the Reflection Group on the Future of EU Company Law revisited the issue of corporate groups in the EU. This time, the expert group suggested that a recommendation, rather than a directive, should be used to deal with group interests.[861] The logic behind this shift was perhaps due to '*national traditions and diverging interpretations*', which are difficult to reconcile with the imperative requirements that ensue from directives. As noted by one of the commentators, this manner of legislation was '*the most cautious and politically accepted proposal*', with the ability to cover a long list of group-related issues.[862] When in 2012 the EU Commission presented a new Action Plan on EU company law and governance, it supported the Reflection Group's recommendation in an abstract manner, by postponing the decision to establish a specific instrument for dealing with group interests until 2014.[863]

Between 2015 and 2017, a series of key proposals from various expert groups were introduced: the Forum Europaeum on Company Groups,[864] the Informal Company Law Expert Group[865] and European Company Law Experts.[866] These were accompanied by other significant discussions, proposals and reports from expert societies of the Club de Jurists, the Luxembourg Institute of Directors, and the European Model Company Act.[867] That model act stipulates recognition of group interests by excusing directors of subsidiaries who act contrary to the interests of the subsidiary but in the interests of the overall group:[868] they should not be deemed to have acted in breach of their fiduciary duties in those circumstances. Besides recognition of group interests, the EMCA contains other significant rules concerning corporate groups, including group management and protection of the parent company's shareholders.[869]

Despite its stated intention to officially recognize the interests of groups, the European Commission has not yet produced any draft instruments on this topic. At present, it remains unclear what will happen next. The Commission's efforts have been contradictory. In 2014, the Informal Company Law Expert Group was composed to assist the Commission by advising on group issues, and it has already produced a report with specific and clear-cut policy recommendations. At the same time, the Commission does not mention group interests among its priorities in recent

[859] Communication from the Commission to the Council and the European Parliament, Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward, COM (2003) 284 final, 21.5.2003, 19.
[860] Bartman SM, 'The Impact of Optional EU Law Making on National Company Law' (2008) 5 European Company Law 271, 271.
[861] Antunes JE and others, 65.
[862] Conac P-H, 'Director's Duties in Groups of Companies – Legalizing the Interest of the Group at the European Level' (2013) 10 European Company and Financial Law Review 194, 225.
[863] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Action Plan: European Company Law and Corporate Governance - A Modern Legal Framework for More Engaged Shareholders and Sustainable Companies, COM (2012) 740 final, 12.12.2012, 15, 18.
[864] Conac P-H, 'Proposal to Facilitate the Management of Cross-Border company Groups in Europe' (2015) 12 European Company and Financial Law Review 299.
[865] Armour J and others.
[866] Böckli P and others, 'A Proposal for the Reform of Group Law in Europe' (2017) 18 Eur Bus Organ Law Re 1.
[867] Teichmann C, 'Towards a European Framework for Cross-Border Group Management', 154-155.
[868] Andersen PK and others, Section 15.16.
[869] Ibid, 369.

programme documents.[870] In other words, EU group law remains fragmented, being enshrined in several different instruments of secondary EU law, with the Accounting Directive in the first place.

4.1.6. Regulation of corporate groups in Germany, Poland and the Netherlands

Having provided an overview of legal regulation of corporate groups at the EU level, the next step is to examine the rules at the level of the individual Member States. Of the three jurisdictions in which this research focuses, the most complex regulation of corporate groups is found in Germany. This jurisdiction has been described as a standard setter, possessing a unified set of legislative provisions to govern corporate groups.[871] This is also the country whose legislation was taken as a model for drafting the Ninth Directive,[872] although that draft failed to impress other the Member States.[873]

Germany belongs to the category of the jurisdictions where the notion of a group interest is not recognized,[874] but instead uses a sophisticated set of statutory rules to balance the rights and duties of the various group constituencies. These rules are laid down in the AktG,[875] which applies to public companies and partnerships as dependent companies.[876] This means that the AktG applies to public companies as dependent companies, regardless of who the shareholder is: the shareholder does not necessarily have to be a company, since a natural person may also qualify.[877]

A group, as defined under the AktG, is characterized by control and a common direction of the controlling enterprise.[878] Two types of groups are outlined: (a) de facto groups, and (b) contract-based groups.[879] The difference between these two kinds of groups can already be inferred from their names: de facto groups are where control is exercised in the absence of a control agreement, for example through a majority shareholding,[880] while in contract-based groups control between entities derives from an enterprise agreement.[881] Yet the differences between the two types of groups are not confined to their names alone.

From the legal perspective, the legal consequences of these constructions are of greater relevance, and here the difference between the two groups is significant. In de facto groups, a controlling enterprise may not exercise its influence to cause the controlled company to undertake any disadvantageous actions, unless the disadvantage is compensated.[882] The precise meaning of disadvantage has been subject to interpretative exercise by the German Supreme Court, and is construed to encompass '*any decrease of or specific risk to the corporation's financial situation or earning position*'.[883] If the disadvantage is not compensated, or no substitutional measures are

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[870] Winner M, 'Group Interest in European Company Law: An Overview' (2016) 5 Acta Univ Sapientiae: Legal Stud 85, 95.
[871] Dearborn M, 215.
[872] Tröger T, 'Corporate Groups: A German's European Perspective' in Fleischer H, Hansen JL and Ringe W-G (eds), *German and Nordic Perspectives on Company Law and Capital Markets Law* (Mohr Siebeck 2015), 166.
[873] Fleischer H, 'A Guide to German Company Law for International Lawyers: Distinctive Features, Particularities, Idiosyncracies', 24.
[874] Armour J and others, 24.
[875] AktG, Book Three.
[876] Schroeder U and Jaecks J, 'Report from Germany' (2007) 4 European Company Law 230, 231.
[877] Langebucher K, 363.
[878] AktG, Article 18.
[879] One further type of corporate group that the act identifies, an integrated company, is very uncommon and accordingly is not discussed here (*Groups of Companies in European Laws*, vol 2 (Hopt KJ ed, de Gruyter 1982), 232).
[880] AktG, Article 17(2).
[881] Ibid, Articles 17(1), 18(1), § 291.
[882] Ibid, Article 311(1).
[883] Tröger T, 'Corporate Groups: A German's European Perspective', 163.

provided by the end of the financial year, the controlling company is liable for any loss or damage caused to the controlled company, and to its shareholders as well, if they have suffered any additional damage besides financial loss.[884] The controlling company will only be exempted from liability if it satisfies the prudent-and-conscientious-manager test.[885] The same rules also apply to the controlling company's legal representatives.[886]

In contract-based groups, conversely, the duty of the controlling company is different, and depends on the type of enterprise agreement. Two main types of enterprise agreements should be discussed here: control agreements and cash pooling agreements. Under a control agreement, the controlling company may issue instructions to the controlled company, and under a cash pooling (or 'profit transfer') agreement one company may extract the other's funds.[887] Unlike de facto groups, in groups functioning under a control agreement the controlling company may issue instructions to the disadvantage of the controlled company, provided that those instructions are advantageous for the controlling company or other affiliated enterprises that are members of the same group,[888] i.e. if they do not threaten the group's existence.[889] This is where the group interest notion comes into play and influences the group's decision-making. As with de facto groups, the controlling company's legal representatives will face liability for disadvantageous instructions if their actions are not those of a prudential and conscientious manager.[890] In exchange for the powers of control or to transfer profits under the control or cash pooling agreement, the controlling company has a duty to compensate any annual net loss that arises while the agreement is in place, in so far as it cannot be compensated from reserves.[891]

This difference in the effects of de facto groups and contract-based groups forms the core characteristics of group law in Germany. It represents the German legislature's approach to balancing the interests of affiliated companies.

Besides the essential rights and duties in corporate groups explained above, other provisions also safeguard a group's minority shareholders and creditors. These apply especially to contract-based groups, and give special protection to creditors and outside shareholders. Creditors are protected by the rule that they must be provided with security in case the contract is terminated or cancelled.[892] Under profit transfer agreements, outside shareholders have the right to adequate compensation by requiring payments in proportion to their shareholdings.[893] Lastly, in all contract-based groups outside shareholders have the right to demand that their shares be purchased from them in exchange for an adequate price.[894]

De facto groups do not offer similar safeguards to creditors and outside shareholders, although the controlling company's obligation to compensate losses itself is directed at protecting those stakeholders and ensuring that transactions within the group are conducted on arm's length terms in so far as is possible.[895] The management board of the controlled company is also obliged to publish a special report on the company's relationships with affiliated companies.[896] This document may not be treated as a mere formality, and may be subjected to an audit review by an

[884] AktG, Article 317(1).
[885] Ibid, Article 317(2).
[886] Ibid, Article 317(3).
[887] Ibid, Article 291(1).
[888] Ibid, Article 308(1).
[889] Tröger T, 'Corporate Groups: A German's European Perspective', 164.
[890] AktG, Article 309(1).
[891] Ibid, Article 302(1).
[892] Ibid, Article 303(1).
[893] Ibid, Article 304(1).
[894] Ibid, Article 305(1).
[895] Dearborn M, 218.
[896] AktG, Article 312(1).

external auditor[897] or the supervisory board.[898] If the management board omits a disadvantageous transaction from the report or fails to disclose that the company suffered a disadvantage, this can constitute grounds for liability.[899]

Unlike public companies, which enjoy largely statutory regulation, private companies in Germany are mostly[900] governed by rules developed in case law,[901] which are often considered to be more positive than the rules for public companies.[902] The most noticeable element of the statutory provisions dealing specifically with corporate groups in private companies is the right of shareholders to issue binding instructions to directors.[903] This right is not fully shared by groups of public companies in Germany.

One rule that the AktG and the GmbHG have in common is a provision that excludes control and profit transfer agreements from the effect of capital maintenance rules.[904] Despite this similarity, however, contract-based groups are regulated more substantially where they involve public companies. This is one of the reasons why some of the AktG's provisions apply here by analogy.[905] For instance, the requirements for shareholder consent have been viewed as suitable for approval of control transactions in private companies.[906] It has been argued if the shareholders do not give their unanimous consent, Articles 304 and 305 of the AktG may be invoked.[907] However, this is not uncontentious, and some critics have expressed the opinion that three quarters of the shareholders must approve the transaction.[908]

The analogy to groups with private companies as dependent entities is not without its limits. In the case of de facto groups, private companies have to take into account the orders of their shareholders, while for public companies following those instructions is prohibited by Article 311 of the AktG. As such, the application of Article 311 by analogy to de facto groups of private companies is considered by some to be inappropriate.[909]

Despite its abundance of detail, the German law on groups of companies nevertheless contains many notions that require clarification and need to be interpreted by the courts. An example is the meaning of a unified direction, which is a key feature of corporate groups.[910] Another example concerns situations where the controlling company in a de facto group chooses to implement a comprehensive mechanism instead of issuing instructions.[911] These cases have been described as qualified de facto groups (*qualifiziert de facto konzern*), and are relevant to both public and private companies as dependent entities. With private companies, the German Supreme

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897 Ibid, Article 313.
898 Ibid, Article 314..
899 Ibid, Article 318.
900 Some provisions of the GmbHG, specifically Article 30, which excludes enterprise agreements from the effect of capital maintenance rules, also concern group law, though only to a limited extent.
901 Wiedemann H, 'The German Law of Affiliated Enterprises' in Hopt KJ (ed), *Legal and Economic Analyses on Multinational Enterprises: Groups of Companies in European Laws*, vol 2 (Gruyter, De, Rechtswissenschaften 1982), 27.
902 Immenga U, 'The Law of Groups in the Federal Republic of Germany' in Wymeersch E and Fitchew MG (eds), *Groups of Companies in the EEC* (Walter de Gruyter 1993), 112.
903 GmbHG, Article 37.
904 Ibid, Article 30(1); AktG, Article 57(1).
905 Schroeder U and Jaecks J, 233.
906 For example, see: *Supermarkt, case no. II ZB 7/88* 105 BGHZ (Federal Court of Justice), 324; *Siemens, case no. II ZB 15/91* 45 NJW (Federal Court of Justice), 1452.
907 Hirte H, *Kapitalgesellschaftsrecht* (RWS-Verlag 2016), 585.
908 Hommelhoff P, 'Protection of Minority Shareholders, Investors and Creditors in Corporate Groups: the Strengths and Weaknesses of German Corporate Group Law' (2001) 2 Eur Bus Organ Law Re 61, 71.
909 *Autokran, case no. II ZR 275/84*, 95 BGHZ (Federal Court of Justice), 340.
910 Immenga U, 'The Law of Groups in the Federal Republic of Germany', 97.
911 Scheuch A, 'Konzernrecht: An Overview of the German Regulation of Corporate Groups and Resulting Liability Issues' (2016) 13 European Company Law 191, 196.

Court's stance on qualified de facto groups has not taken a straight path,[912] shifting from the use of analogy (Articles 302 and 303 of the AktG),[913] to the 'piercing the corporate veil' doctrine and tort liability for 'economic destruction' in more recent case law.[914] These examples highlight the importance of the courts' stance on German group law, which, despite its seemingly rigid and inflexible structure, includes many notions that are subject to interpretation and where the courts' views have evolved.

The next jurisdiction in focus is Poland. Although many aspects of Polish company law follow the German path of regulation,[915] '*Konzernrecht*' is a notable exception. Unlike the German line of legislative changes, Polish company law does not offer the same sophisticated set of uniform rules.[916] Recognition of the notion of a group interest in Poland is not directly enshrined in legislation, and the extent to which it legitimizes the actions of the management boards of subsidiaries is not entirely clear.[917] A number of Polish court judgments have managed to recognize a group interest as a justifying factor for some business decisions of subsidiaries.[918] At the same time, academic views remain divided. On the one hand, statutory law does not permit deviating from the single entity approach. On the other, commentators acknowledge the importance of a group interest and identify the following features for establishing a group: two or more related companies; permanent domination; a common interest.[919]

Attempts to legitimize the notion of a group interest have been undertaken, with the preparation of a draft resembling the French Rozenblum doctrine, with more focus on shareholders' information rights.[920] This draft was rejected, with different pressure groups favouring more marginal or more drastic changes: either introducing the Rozenblum doctrine as it is as preferred by the representatives of foreign investors, or fully abandoning the idea of the legislative recognition of the group interest.[921]

At the same time, although statutory company law in Poland does not make any reference to the notion of a group interest, the KSH provides some rules for controlling (dominant) and dependent companies, including a broad definition of a dependent company.[922] The emergence of dominance automatically triggers various disclosure obligations of the dominant company in respect of its subsidiary, with non-compliance being penalized by the suspension of voting rights deriving from any shares representing more than 33 per cent of the subsidiary's share capital.[923] Furthermore, if an agreement is in place for the management of the dependent company or for a profit transfer,[924] it must be filed and disclosed in the companies register.[925] Other provisions of the KSH address the group context, in particular allowing both dependent and dominant companies to be viewed, in specific situations, as a single economic unit.[926] In practice, groups are common

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912 Ibid, 197.

913 *Autokran, case no. II ZR 275/84*, 95 BGHZ (Federal Court of Justice), 339, 345-348.

914 See *KBV, case no. II ZR 300/00* 151 BGHZ (Federal Court of Justice), 181, 187-188; *Bremer Vulkan, case no. II ZR 178/99* 149 BGHZ (Federal Court of Justice), 10-28; *Trihotel, case no. II ZR 3/04* 173 BGHZ (Federal Court of Justice), 246, 252-262.

915 Sołtysiński S, 'Corporate Boards in Poland' in Davies PL and others (eds), *Corporate Boards in Law and Practice: A Comparative Analysis in Europe* (First edition. edn, Oxford University Press 2013), 512.

916 Armour J and others, 21.

917 Böckli P and others, 25.

918 *Judgment of 3.12.2012* V ACa 702/12 (Appellate Court in Katowice); *Judgment of 6.05.2009* II AKa 142/08 (Appellate Court in Szczecin).

919 Rządkowski M, '"Piercing the Corporate Veil Doctrine in Poland?" A Comparative Perspective' (2015) 20 Comparative Law Review 55, 80.

920 Sołtysiński S, 'Corporate Boards in Poland', 545.

921 Ibid, 546.

922 KSH, Article 4(1).

923 Ibid, Article 6(1).

924 *Umowa o zarządzanie spółką zależną*, inspired by the German *Beherrschung- und Gewinnabführungsvertrag*, though much less complex under Polish law and with virtually no practical significance.

925 Ibid, Article 7(1).

926 For example, see: Ibid, Article 15(2), Article 362(4), Article 394(4).

and in those instances group coordination derives more formal support from group 'by-laws' (*regulamin grupy*) that are adopted by the parent company and accepted by its subsidiaries. The legal status of these by-laws is subject to some controversy.[927]

Company law in the Netherlands favours recognition of the notion of a group interest.[928] The difference between the Polish and Dutch approaches to recognition of this notion is that in the Netherlands it derives not only from established case law,[929] but also directly from the provisions of the BW.

It should be noted first that Article 2:24a of the BW views a group as an economic unit, in which legal persons and partnerships are united into a single organization.[930] This definition in and of itself demonstrates that groups are not regarded in the same manner as single legal entities, and that Dutch statute already goes further than this. In literature, this definition has been criticized for omitting some of the building blocks of groups, namely central management and control, which are regarded as being essential for groups.[931] However, Article 2:24a is not the only provision to recognize the concept of a group interest in the Netherlands. Book 2 of the BW contains other provisions that, although they do not use the word 'group', nonetheless implicitly refer to group relationships.[932] This derives from the wording of Articles 2:140(2) and 2:250(2), which charge supervisory boards with the duty to supervise management's policy and the general course of business conducted by the company and the enterprise connected with it.[933] The concept of an enterprise as used in these articles extends beyond the boundaries of a single legal entity, i.e. a parent or a subsidiary.[934] It is also a reflection of the stakeholder model in action in the Netherlands, meaning that it is not shareholders alone whose interests must be considered.[935]

The interest of the group also finds its reflection in Articles 2:129(4) and 2:239(4) of the BW, concerning the duty of management to follow instructions from another company body of the company if the articles of association so prescribe. In practice, this provision has exactly the same meaning.[936] The limits of this duty differ for private companies (BVs) and public companies (NVs): for private companies, it exists in so far as the instructions are 'in the best interests of the company and the enterprise connected with it', while for public companies the instructions must respect 'general policy'. This concept of general policy was previously also relevant for BVs, and caused interpretative difficulties due to the lack of definition of the notions.[937] Following legislative amendments, BVs have experienced a change in their legal regime. At present, law requires that, provided the articles of association of the subsidiary contain the right for the general meeting to issue concrete and detailed instructions to the board, the interests of subsidiary be always considered together with the group's interests. This development signifies what Steef

[927] Oplustil K, 'Regulaminy (kodeksy) grup spółek jako instrument realizacji interesu koncernowego' in Olejniczak A, Orlicki M and Pokrzywniak J (eds), *Z badań nad prawem prywatnym : księga pamiątkowa dedykowana Profesorowi Andrzejowi Kochowi* (Poznań : Wydawnictwo Naukowe UAM 2017).
[928] Armour J and others, 22.
[929] *Nimox, Decision of 8 November 1991* NJ 1992, 174 (Supreme Court of the Netherlands). In this case, the distribution of profits by the sole shareholder in the company, later declared bankrupt, was considered unlawful, for it violating the rights of creditors and endangering the company's continuity.
[930] BW, Article 2:24b.
[931] Oostrum CHAv, 'Regres bij concernfinanciering' (Dphil thesis, Wolters Kluwer 2019), 363.
[932] Timmermans CWA and Timmerman L, 'The Law on Groups of Companies in the Netherlands' in Wymeersch E (ed), *Groups of Companies in the EEC: a Survey Report to the European Commission on the Law Relating to Corporate Groups in Various Member States* (Walter de Gruyter 1993), 233, 240.
[933] BW, Article 2:250(2), Article 2:140(2).
[934] The concept of 'the company and the enterprise connected with it' in Dutch law is reminiscent, in its stakeholder coverage, of the *Unternehmensinteresse* in German stock company law. In both cases, the concepts extend the idea of shareholder value and cannot be defined as a simple combination of interests, favouring primarily the interests of an economic unit.
[935] Timmermans CWA and Timmerman L, 240.
[936] *Decision of 21 December 2001* NJ 2005, 96 (Supreme Court of the Netherlands).
[937] Bartman SM, 'From Autonomy of Interests to Concurrence of Interest in Dutch Group Company Law', 208.

Bartman has called the ‘concurrence of group company interests’,[938] whereas an ‘autonomy of interests’ rule,[939] stressing the importance of the individual interests of each and every separate company, still prevails for public companies and for all private companies in the event that the articles of association do not contain any provisions on the use of instructions.[940]

The introduction of a concurrence of interests in corporate groups with the 2013 amendments should not be interpreted to mean that the concept of a group interest did not exist before then. In fact, the Dutch Supreme Court had succeeded in shaping the approach to recognition of this concept long before, and continued to do so afterwards, despite lacking a consistent vision of the concept.[941] The earlier *OGEM* case (1988) already stipulated the duty of the parent’s directors to manage the parent and its subsidiaries to the best of their abilities.[942] Since then, the ‘duty of group management’ has entered the realm of Dutch case law[943] and academic sources on the topic.[944] This duty is accompanied by the ‘parental duty of care’,[945] as found in the *Comsys Holding* case,[946] which refers to the duty to compensate excessive risks to the subsidiaries’ creditors. These developments in Dutch statute and case law on groups deal mostly with instruction-based powers of parents, while more complicated constructions of company law beyond instructions are not covered by these duties.

Therefore, in contrast to how groups are regulated in Germany, Poland and the Netherlands do not possess similar sophisticated sets of rules for corporate groups. However, as the Dutch example shows, group law is clearly in place, both in statute[947] and in case law. At present, case law in the Netherlands provides for recognition of a group interest and has elaborated the consequences of that recognition. It is important to bear in mind, though, that the extent to which the group interest is taken into account in the Netherlands largely depends on the provisions of the subsidiary’s articles of association: the less detailed the corporate constituent document of the subsidiary is, the more difficult it becomes to recognize the conduct of the subsidiary’s management as legitimate if it is detrimental to the subsidiary but favourable to the group.[948] In a way, this regulation is reminiscent of contract-based groups in Germany, where the parent is authorized to issue binding instructions in the group’s interests. At the same time, for de facto groups both in Germany and in the Netherlands,[949] recognition of the notion of a group interest at the EU level, as proposed in the EU Commission’s Action Plans,[950] would add clarity and predictability. This applies even more for Poland, where the notion of a group interest is recognized in case law.

4.1.7. Regulation of corporate groups in Ukraine

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[938] Ibid, 208.
[939] Potjewijd G and Van der Kroon J, ‘Report from the Netherlands’ (2007) 4 European Company Law 235, 235.
[940] If the articles of association do not regulate instructions for management, this does not mean that the subsidiary’s management is wholly free from the parent company’s directions. At a minimum, the control that is inherent in parent-subsidiary relationships means that the parent can seek other ways to make the subsidiary’s management implement its instructions, for instance by threatening to appoint a new management.
[941] Bartman SM, ‘Dutch Supreme Court at a Loss over Groups’ (2016) 13 European Company Law 123, 123.
[942] *OGEM, Decision of 10 January 1990* NJ 1990/465 (Supreme Court of the Netherlands).
[943] For example, see: *Decision of 21 December 2001* NJ 2005, 96 (Supreme Court of the Netherlands)..
[944] For example, see: Bartman SM, Dorresteijn AFM and Olaerts M, Van Het Concern (Wolters Kluwer 2016).
[945] Bartman SM, ‘Dutch Supreme Court at a Loss over Groups’, 125.
[946] *Comsys Holding, Decision of 11 September 2009* NJ 2009, 565 (Supreme Court of the Netherlands).
[947] For example Articles 2:24b, 2:129, 2:150, 2:239 and 2:250 of the BW.
[948] Bartman SM, ‘Dutch Supreme Court at a Loss over Groups’, 128.
[949] The latter jurisdiction does not officially use this concept. It is used here for academic purposes only.
[950] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Action Plan: European Company Law and Corporate Governance - A Modern Legal Framework for More Engaged Shareholders and Sustainable Companies, COM (2012) 740 final, 12.12.2012, 15.

The issue that has occupied the minds of corporate law scholars since at least the Forum Europaeum in 1998 is missing from the regulation of corporate groups in Ukraine. However, this does not mean that no group regulation whatsoever is in place – some regulatory acts in fact deal with the group-related issues and are presented below.

Firstly, some general notions and rules are included in the CCU[951] and the Economic Code of Ukraine,[952] namely the meaning of dependent companies and the different types of dependency (simple or decisive). However, these rules lack true legal effect. The fact that a company is dependent essentially triggers only a disclosure obligation: it does not mean that the parent company may or may not issue certain types of instruction, or that management of the dependent company must be indemnified for losses. The same holds true for holding companies and associations of enterprises.[953] Holding companies only have an obligation to bear additional liability if a company that is owned by a holding company goes bankrupt as a result of the holding company's actions.[954] This provision, however, is too abstract to be applied consistently.

Secondly, Ukrainian laws contain reporting requirements. The Law of Ukraine 'On Accounting and Financial Reporting in Ukraine' provides the definition of consolidated financial statements, i.e. containing the accounts of both the controlled and controlling entities, which it then views as a single economic unit.[955] Parent companies are obliged to submit consolidated financial statements in accordance with the national standards or the IASs, in addition to their separate financial statements. They are exempt from the obligation to submit consolidated financial statements if their indicators meet two of the following conditions: (i) the value of their assets is EUR 4 million or less; (ii) their net income is EUR 8 million or less; (iii) the workforce is 50 persons or fewer.[956]

Lastly, rules on corporate groups are also found in the JSC Law of Ukraine, though they do not include a definition of a corporate group. Rather, group-related issues are addressed in relation to simplified mergers between parents and 90 per cent owned subsidiaries,[957] single-member companies[958] and RPTs. For instance, on the subject of RPTs, if a shareholder directly or indirectly owns 100 per cent of an entity's share capital and forms the transaction with the public company directly or through an affiliated person, this fact does not trigger the procedural requirements for RPTs.[959] The idea behind this regulation is that onerous regulation of RPTs is unnecessary if the company does not have any minority shareholders whose rights might be violated. This is most common with groups of companies in which a subsidiary is wholly owned by its parent.

That being said, Ukraine visibly does not have the same sophisticated rules for corporate groups as Germany does. This means, first, that contract-based groups are not relevant for the Ukrainian jurisdiction. Even if two companies enter into an agreement that is reminiscent, in all its separate features, of a control agreement or a profit-transfer agreement,[960] no rules on enterprise agreements exist in Ukrainian company law, nor any legal consequences similar to those described in the AktG. That is why these agreements, if they are formed in Ukrainian territory, are governed by general laws on obligations, including the provisions on the formation, performance and

[951] CCU, Article 118(2).
[952] Economic Code of Ukraine [Господарський кодекс України], Article 126(4).
[953] Ibid, Articles 118-124, 126.
[954] Ibid, Article 126(6).
[955] Law of Ukraine 'On Accounting and Financial Reporting in Ukraine' [Закон України 'Про бухгалтерський облік та фінансову звітність'], paragraph 8, Article 1(1).
[956] Ibid, Article 12(1).
[957] JSC Law of Ukraine, Article 84(4).
[958] Ibid, Article 4.
[959] Ibid, Article 71(2)(2).
[960] AktG, Article 291.

validity of contracts. Second, rules on de facto groups as are found in Germany[961] are also missing from Ukrainian law, so even though it would be futile to deny the existence of corporate groups in Ukraine, their formation does not trigger the same compensation obligations as in Germany.

The situation is more complicated for recognition of the group interest notion in Ukraine. The country does not have any provisions similar to those in the Dutch BW that oblige a company's management to follow instructions from another corporate body,[962] including its parent, if the company's articles of association so dictate. Ukrainian law by comparison does not have the same discretionary rules. For both public and private companies, lists exist of legally required provisions that must be inserted in the entity's articles of association[963] and a general rule allowing other provisions that 'are not unlawful'.[964] Two obstacles arise here: first, it is difficult to say whether provisions in a company's articles under which the management and supervisory boards are permitted to follow instructions from an external company body 'are not unlawful'; second, even if a court finds that the provisions are indeed lawful, this does not automatically lead to adverse legal consequences, as case law shows. These two issues are discussed in detail below.

First, on whether including a duty for management to follow instructions issued by an external corporate body is unlawful, it is important to note that some legal practitioners in Ukraine do in fact include such provisions in companies' articles of association and manage to successfully submit them for registration. Given that the registration authorities may refuse to register the articles if they are incompatible with the Constitution and the laws of Ukraine,[965] the fact that these documents are registered indirectly evidences that the authorities agree to have these provisions included.[966]

When evaluating the risk that provisions in a company's articles of association will be declared invalid for being unlawful, it is important to remember that the Ukrainian courts have invalidated provisions in articles of association on a purely formal basis. For example, the Economic Court of Kyiv previously invalidated provisions in the articles of association in a private company, by reason that they were 'self-contradictory'. On the one hand, the articles included a provision on the company's one-person executive body, yet at the same time that body was given the title of 'general director'. The court held that the title 'general director' referred to an individual in a collegial body ('directorate'), and in this case the body should have been simply called 'director', without 'general'. The court acknowledged the breach of shareholder rights and invalidated the provisions of the articles stipulating management's authority.[967]

In a different case, the court ruled that the provisions of a company's articles were not unlawful. The contested provisions provided for a two-stage appointment of management: first by the supervisory board and then by the general meeting of shareholders. Although the JSC Law of Ukraine stipulates a one-stage process only, the court found that it was not incompatible with statutory requirements.[968] In this case, the result might have been different, had the court applied the same formal criteria as in the case discussed above. That is the source of confusion surrounding the probability of invalidation of articles of association that confer on company bodies of a parent company the right to issue instructions to subsidiary bodies. Even if the officer registering the articles of association overlooks the provision, the risk of their future annulment nevertheless

[961] Ibid, Article 308.
[962] BW, Articles 129(4), 239(4).
[963] JSC Law of Ukraine, Article 13(2); LLC Law of Ukraine, Article 11(5).
[964] JSC Law of Ukraine, Article 13(4); LLC Law of Ukraine, Article 11(6).
[965] Law of Ukraine 'On State Registration of Legal Entities, Natural Persons - Entrepreneurs and Public Associations' [Закон України 'Про державну реєстрацію юридичних осіб, фізичних осіб - підприємців та громадських формувань'] of 15 May 2003, published in Vidomosti Verkhovnoyi Rady Ukrayiny, 2003, No. 31, St. 263, Article 28(1)(5).
[966] The importance of the 'human factor' should not be underestimated here, either: registration officers might simply overlook the provisions in question, either intentionally or through negligence.
[967] *Decision of 16 November 2017* Case No 910/10759/17 (Kyiv Economic Court).
[968] *Decision of 30 March 2015* Case No 910/23044/14 (Kyiv Appellate Economic Court).

remains. This statement is especially true in the case of public companies, where it is prohibited to grant the founders more powers than the law provides.[969] This rule may be interpreted by law enforcement authorities as prohibiting instructions from a parent's bodies.

Secondly, if a company's articles of association are found to be unlawful, this gives more to prove during the resolution of corporate disputes if the constituent documents contain deficiencies. According to Resolution No. 13 of the Plenum of the Supreme Court of Ukraine of 24 October 2008, three conditions must be satisfied for a company's constituent documents to be invalidated: the documents do not meet to the legislative requirements; breaches in the approval of the documents cannot be eliminated; and provisions of the documents violate the plaintiff's rights and legitimate interests.[970] In the absence of all three conditions, courts have refrained from invalidating the constituent documents, instead preferring other remedies, such as ordering the articles of association to be amended and those amendments to be registered.[971] However, in some cases the courts have established violations of the legislative requirements and the other conditions necessary to annul articles of association, in whole or in part. For instance, in one case the court invalidated a provision in an entity's articles that required a qualified majority of more than three fourths (75%+1) of all the shareholder votes for amendment of the articles, instead of 'more than three fourths' (75%+1) of the votes of the shareholders present at the meeting, as required by Article 42(5) of the JSC Law of Ukraine. The court ruled that this provision deprived the shareholders of their rights, potentially leading to a situation where even with the quorum (60%+1 at that moment[972]) the general meeting would be unable to pass a resolution to amend the articles of association.[973] Among other considerations, the court referred to Article 13(3) of the Law, which states that the articles of association may not deprive shareholders of their rights. This provision adds more substance to the argument that the group interest notion is generally not recognized in Ukraine.

The table below presents a comparison of the rules on a parent company's right to issue instructions to its subsidiaries across the studied jurisdictions.

Germany	The Netherlands	Poland	Ukraine
GmbH and contract-based AG, provided that instructions are to the advantage of one of the group companies	A company body of an NV or BV may issue instructions if the subsidiary's articles of association so provide	No explicit regulation, but specific regulation for contract-based groups pursuant to Article 7 of the KSH	No explicit regulation

Table 3. Right of parent companies to issue instructions to their subsidiaries.

Returning to the comparison between Ukrainian and Dutch company law on the recognition of the notion of a group interest, it is important to consider that in the Netherlands, even if the articles of association do not include any reference to the duty of a company's management to follow instructions from another corporate body, the BW nevertheless obliges the company's

[969] JSC Law of Ukraine, Article 13(3).

[970] Regulation No. 9 of the Plenum of the Supreme Court of Ukraine 'On Resolution of Civil Disputes on Annulment of Transactions' [Постанова пленуму Верховного Суду України "Про судову практику розгляду цивільних справ про визнання правочинів недійсними"] of 6 November 2009, available at: http://zakon2.rada.gov.ua/laws/show/v0009700-09/print1501964340775284, accessed on 30 December 2018.

[971] *Decision of 12 February 2015* Case No 910/27663/14 (Kyiv Economic Court).

[972] Currently the quorum in JSCs is 50%+1 of the entity's share capital. For LLCs, the quorum has been repealed.

[973] *Decision of 19 March 2014* Case No 910/16760/13 (Kyiv Economic Court).

directors/management and supervisory board to be guided by the best interests of the legal person and the enterprise connected with it,[974] as discussed above. Ukrainian law does not contain the same rule on the competition of interests, but rather holds exclusively to the interest of the sole company, regardless of whether it is a parent or a subsidiary. This rule is applied equally to public companies,[975] private companies[976] and other legal entities when they are represented in civil turnover.[977] In other words, current regulation in Ukraine legitimates the legal entity doctrine and offers no possibility of adopting an alternative approach in a company's constituent documents.

However, although Ukrainian company law favours the legal entity doctrine and requires directors to act in the exclusive interests of the company, this does not necessarily mean that an external body cannot issue instructions to the subsidiary's management or board and these bodies can be held liable for following those instructions. First, the instructions may be in the company's interests, meaning that no conflict exists between the parent and the subsidiary, or between the subsidiary and its creditors. Second, if the management or the supervisory board acts in a manner that is incompatible with the company's interests by following the instructions of an external body, any company claiming damages from the company's officers would have to satisfy several conditions. The grounds for damages are set out in the Kyiv Appellate Economic Court's decision on a shareholders' derivative action, namely that four conditions must be satisfied: wrongful conduct on the part of the debtor against company's interests; harm in the form of damage to the company; a link between the debtor's conduct and the damage; fault on the debtor's part.[978] In that case, the debtor's wrongful conduct against the company's interests did not stem from following the parent's instructions, but rather from spending company funds without properly reporting the spending or from forming contracts. However, the conditions for director's liability, borrowed directly from tort law, would be the same in the case of damage from following the parent's instructions. At the same time, from the legal perspective it is important to establish whether the company acted in or against the company's interests, and the instructions from the external corporate body are merely one factor for establishing the latter.

Therefore, Ukraine neither has provisions similar to those in Germany, where parent companies possess the right to issue instructions to their subsidiaries, coupled with a duty of compensation, nor does it recognize the group interest notion as in the Netherlands. Moreover, Ukraine has no rules for contract-based groups as in Poland. Nevertheless, certain features of recognition of the group interest notion can be inferred from the practice of the registration authorities; however, these are insufficient for establishing a properly defined recognition of the notion of a group interest.

4.2. RPTs WITHIN CORPORATE GROUPS

4.2.1. Types of RPTs within corporate groups

RPTs are an inherent concept in corporate groups. The risks attaching to these types of instruments in ordinary companies, also apply to groups of companies. Although this does not mean that transactions between companies and non-affiliated parties are always fair and advantageous, as the European Reporting Advisory Group has highlighted, the effect of an RPT on an entity's

[974] BW, Articles 2:129(5) and 2:239(5).
[975] JSC Law of Ukraine, Article 63(1).
[976] LLC Law of Ukraine, Article 40(1).
[977] CCU, Article 92(3).
[978] *Decision of 10 October 2017* Case No 922/2187/16 (Kyiv Appellate Economic Court).

financial performance and position derives from how much influence a related party can exercise over its transactions with the entity.[979] It is more likely that a related party will enter into a transaction with a controlling shareholder that is not on market terms.[980]

The specific concern arising for subsidiaries from RPTs is when they are required to act in the interests of the group, but to their own detriment.[981] These situations include payments of fees or dividends by the subsidiary to another subsidiary/group member, or financial assistance to a group member in need. Internal transactions are divided into two main categories, based on their effect: unjustified and ordinary internal transactions.[982] Detrimental inefficient tunnelling transactions can be further divided, depending on what is tunnelled, into cash flow tunnelling, asset tunnelling and equity tunnelling.[983] Although this distinction sounds right in general terms, it is important to bear in mind that it is based on the standard of review. If the standard of review is too strict, then even efficient transactions might be prohibited or penalized.[984] This level way of regulation would create excessive obstacles for the market economy, forcing enterprises either to seek out other jurisdictions, or else choose other ways to implement their group policies. This distinction is therefore a conditional one.

The presumption of inefficiency of RPTs is based on the conflict of interest hypothesis, meaning that related parties will act in their own interest, disregarding the company's objectives.[985] This theory contrasts with the efficient transaction hypothesis, which is based on the advantages that RPTs carry, including facilitation of coordination and prevention of hold-up problems.[986] Taking one theory and rejecting the other clashes with the findings of Michele Pizzo, who describes RPTs as capable of either fulfilling sound business needs or being used for fraudulent purposes.[987] The author suggests an obviously attractive idea of a contingency framework that unites both theories in so far as the 'organizational context and institutional environment' allow.[988]

Intra-group transactions unquestionably have the potential to damage the company's functioning and the welfare of corporate stakeholders through misappropriation.[989] Famous corporate scandals confirm this, such as Privatbank in Ukraine.[990] However, it is vital for corporate groups to use RPTs. As Steef Bartman acknowledges,[991] these transactions are the reason for many groups to exist, by generating most of their corporate wealth. Zohar Goshen also notes that RPTs are sometimes the best option available to the enterprise.[992] In other words, although conflicted transactions may have a negative effect on enterprises, this does not necessarily mean that the same

[979] *Endorsement of the 2009 Revised IAS 24 Related Party Disclosures, Introduction, Background and Conclusions* (European Commission, Brussels, 4 February 2010, MARKT F3, 2010), 6.
[980] Sørensen KE, 'Shareholders' Duty to Disclose' in Birkmose HS (ed), *Shareholders' Duties* (Wolters Kluwer 2017), 315.
[981] Yasui T, 'Corporate Governance of Financial Groups' OECD Corporate Governance Working Papers Available at: http://dxdoiorg/101787/5jlv1m6zq3nx-en, accessed on 7 December 2018, 24.
[982] Kang SY, 'Rethinking Self-Dealing and the Fairness Standard: A Law and Economics Framework for Internal Transactions in Corporate Groups' (2016) 11 Virginia Law and Business Review 95, 109.
[983] Atanasov VA, Black BS and Ciccotello CS, 1700.
[984] Ibid, 109.
[985] Van der Elst C, 'The Duties of Significant Shareholders in Transactions with the Company' in Birkmose HS (ed), *Shareholders' Duties* (Wolters Kluwer 2017), 203.
[986] Ibid, 204.
[987] Pizzo M, 'Related Party Transactions under a Contingency Perspective' (2013) 17 Journal of Management & Governance 309, 326.
[988] Ibid, 326.
[989] Ahmad E, 'Dilemma of Subsidiary Directors' (Master thesis, University of Groningen 2015), 34.
[990] 'Ukraine's Biggest Lender PrivatBank Nationalised' (*BBC News*, 2016) <http://www.bbc.com/news/business-38365579>, accessed on 1 May 2018.
[991] Bartman SM, 'The Obligation to Contribute in the Case of Group Financing Under Dutch Law: How to Allocate the Pain among Group Members?' (2013) 10 European Company Law 15, 19.
[992] Goshen Z, 'The Efficiency of Controlling Corporate Self-dealing: Theory Meets Reality', 400.

is true for all RPTs. The final evaluation of a transaction's efficiency depends on the circumstances, including the organizational context and the institutional environment.

While intra-group transactions can be divided into the categories of ordinary and unjustified transactions, other, less ambiguous, criteria might also be available for classifying internal transactions. For instance, Rwandan scholar Dieudonne Nzafashwanayo identifies the following types of intra-group transactions: (a) intra-group dealing/trading; (b) intra-group lending; and (c) intra-group guarantees.[993] The first category of internal transactions comprises transfers of goods and services between group affiliates, and is most often based on 'transfer pricing' considerations, namely to shift profits from high-tax to low-tax jurisdictions.[994] The second type is intra-group lending, used to capitalize group members. This type of intra-group transaction is closely linked to the third instrument, intra-group guarantees, which are used to secure the liability of debtors under contracts with principals. In group situations, at least three types of guarantee can be distinguished: upstream (issued by subsidiaries to guarantee loans of parents), downstream (issued by parents to guarantee loans of subsidiaries), and cross-stream (issued to guarantee loans of sister companies).[995]

Based on transaction objects, two main categories of intra-group transactions can be identified: (i) cash payments, loans and provisions of guarantees, where monetary funds or rights to these funds form the object of a transaction; and (ii) transfers of assets, including goods, and provision of services, through swaps or fully payable transactions, where monetary funds are used only as a payment device rather than the actual object of the transaction. This classification of intra-group transactions can be further complicated by the variety of objects in civil turnover, while for tax purposes it is irrelevant whether a transaction involves a transfer of tangible or intangible property, for instance.[996] However, for the purposes of company and group law, in particular, it is more important to distinguish between transactions in which funds are the principal object and other transactions involving non-monetary transfers. Firstly, loans and similar transactions have attracted more regulation than other intra-group transactions. Secondly, with monetary transfers no clear need exists to perform an additional evaluation of the transaction's market value, given that the value is already expressed in monetary terms. Thirdly, monetary transactions always involve transfers of liquid assets, whereas goods and services are not necessarily liquid.

Further classification criteria can be put forward based on existing regulations for RPTs. According to IAS 24, RPTs are defined as transfers of resources, services or obligations.[997] This broad economic view of RPTs might not be applicable to some purely legal transactions that do not involve a performance, such as termination of a contract.[998] Based on this definition, RPTs are purely material transactions.[999] The immateriality of transactions constitutes grounds not to disclose the acts, as they fall outside the scope.[1000] The materiality of RPTs implies that abstract objects (ideas, for instance) do not qualify as objects of transfers for accounting purposes.[1001] While these objects can of course be transferred from one company to another within a group, and still fall under the term 'related party transaction' depending on the participants, from an accounting perspective they are viewed as immaterial. From the perspective of the IASs, transactions are material if they are significant, i.e. if they represent value. The commentary adds

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[993] Nzafashwanayo D, 102-104.
[994] Ibid, 102.
[995] Ibid, 104.
[996] PwC, *International Transfer Pricing 2015/16* (available at: https://www.pwc.com/gx/en/international-transfer-pricing/assets/itp-2015-2016-final.pdf 2015), 9.
[997] IAS 24, para 9.
[998] Ungerer F, 315.
[999] Baums T and Scott KE, 'Taking Shareholder Protection Seriously? Corporate Governance in the United States and Germany' (2005) 53 The American Journal of Comparative Law 31, 42.
[1000] KPMG, *'First Impressions: Amendments to IAS 24 Related Party Disclosures'*, 16.
[1001] Enriques L, 'Related Party Transactions: Policy Options and Real-world Challenges (with a Critique of the European Commission Proposal)', 11.

that the materiality of transactions should be defined on a case-by-case basis, using both qualitative and quantitative criteria.[1002] This manner of regulation offers grounds to separate material and immaterial transactions.

4.2.2. Intra-group loans and cash pooling

Loan agreements are a commonly used instrument for many corporate groups. Like other contractual ties between parent companies and subsidiaries, which are divided into upstream (backwards) agreements to sources of supply and downstream (forwards) agreements to distribution,[1003] loan transactions can also be upstream, downstream and cross-stream. Cross-stream loans, also referred to as lateral loans, are loans between companies that are not subordinate to each other, but are components of the same corporate group.[1004]

From the perspective of their effect, loan agreements can be either on market terms and, consequently, advantageous for the company, or else disadvantageous. The risk of a detrimental effect is especially high where loans are RPTs. CGCs are designed specifically with these types of transactions in mind, which by itself is a sign that they should be treated with caution. As the Dutch CGC warns, loans may only be granted to members of the management and supervisory boards if they are part of the normal course of business, on the same terms that apply to the rest of the workforce and subject to supervisory board approval.[1005] This section analyzes loans from the perspective of group law. The need for this analysis is based on their widespread use in corporate groups for what is commonly known as ‘cash pooling’. Cash pooling is considered to be a technique that does not present an immediate danger,[1006] and intra-group loan agreements are regarded as relatively safe cash pooling, as long as no assets are siphoned out of the company.

The standards for cash pooling differ between jurisdictions. The first and most frequently cited situation is in Germany, where cash pooling arrangements are subject to capital maintenance rules and liquidity protection.[1007]

The capital maintenance rules for public and private companies are similar in some respects. Both for public companies,[1008] as per Directive 2017/1132,[1009] and for private companies[1010] shareholders’ contributions may not be refunded. In Germany, this requirement was subject to a strict regime, launched by the so-called 2003 November judgment of the Federal Supreme Court; it was later relaxed by the MoMiG.[1011]

The MoMiG provisions marked the return of German law to the ‘balance sheet’ test,[1012] meaning that contributions may, in fact, be repaid if a shareholder provides a fully enforceable entitlement in exchange, as viewed at the drawdown.[1013] This change is especially important for

[1002] Ungerer F, 160.
[1003] Picciotto S, 133.
[1004] Cahn A, ‘Intra-group Loans under German Law’ (2010) 7 European Company Law 44, 44.
[1005] Dutch CGC, Principle 2.7 Preventing Conflicts of Interest, 2.7.6.
[1006] Conac P-H, ‘Director’s Duties in Groups of Companies: Legalising the Interest of the Group at the European Level’ in Birkmose HS, Neville M and Sørensen KE (eds), *Boards of Directors in European Companies : Reshaping and Harmonising Their Organisation and Duties* (Wolters Kluwer Law & Business 2013), 100.
[1007] Mader D and Schümann-Kleber K, ‘Germany’ in Willems M (ed), *Cash Pooling and Insolvency: A Practical Global Handbook* (Globe Business Publishing Ltd 2012), 187.
[1008] AktG, Article 571(1).
[1009] Directive 2017/1132, Article 56(1).
[1010] GmbHG, Article 30(1).
[1011] Cahn A, ‘Intra-group Loans under German Law’, 50.
[1012] Mader D and Schümann-Kleber K, 188.
[1013] Heerstraßen F and Nebe F, ‘Cash Pooling after the Reform of the German Act on Limited Liability Companies (GmbHG)’ Loschelder Rechtsanwälte, available at:

corporate groups, as it means that, for both public and private companies, the rules on capital maintenance do not apply in situations involving enterprise agreements in the form of a control or a profit transfer agreement.[1014] In exchange for this exemption, the contracting party in the control or profit-transfer agreement must compensate the other company for any annual net loss that it incurs while the agreement is in effect.[1015] However, it is uncertain whether it is necessary to have a fully enforceable entitlement based on the enterprise agreement in order to avoid the prohibition on repaying contributions. According to the wording of the act, and accepting the idea that this way one party would be burdened by an obligation to obtain more information from its parent company, it seems more plausible to agree with Andreas Cahn, who argues that forcing the subsidiary to perform this duty is incompatible with the principle of legal certainty.[1016] In general, managers of subsidiaries have a fiduciary duty to check their parent companies' creditworthiness on a regular basis and, if any doubt emerges, launch a claim for termination of the upstream agreement or for collateral under the agreement.[1017] However, this duty should not be confused with the duty to evaluate a debtor's situation at the moment of drawdown in order to determine whether the claim is unimpaired.

Where de facto groups are concerned, the rules on distributions by public and private companies require separate analysis, as private companies are subject to different rules.

In de facto groups with public companies as subsidiaries, the parent company has an obligation to compensate the subsidiary for all disadvantages caused, and to observe the period of compensation: during the financial year when the disadvantage was caused, otherwise the time and means may be determined at any moment no later than the end of the financial year.[1018] Unlike with contract-based groups, where funds distributed as loans or cash pooling schemes are explicitly exempt from the prohibition on repaying distributions under the capital maintenance provisions, no explicit provision applies to de facto groups. German scholars debated whether upstream loans in de facto groups should be made subject to the capital maintenance requirements. Strong arguments were made both for and against such a move, from the actual need for these rules to references to capital requirements under EU law.[1019] The debate was settled by a judgment of the Federal Supreme Court, which held that the requirements of Article 311 on de facto groups superseded the capital maintenance rules.[1020] The only nuance was that the Court required the claim for compensation to be unimpaired.[1021] In this ruling, the Court brought compensation claims under the general requirements as applicable to all shareholder loans under the capital maintenance rules.

While for de facto groups consisting of public companies (AGs) the rules on group law manifestly infringe on the realm of capital maintenance, loans in de facto groups with private companies (GmbHs) as subsidiaries enjoy simpler regulation, being subject only to the capital maintenance regulations.

When establishing cash pooling facilities in Germany, companies are required not only to comply with the capital maintenance rules, which are significantly influenced by group law provisions, but also to observe the liquidity protection rules, which are designed to protect creditors. This does not only mean that for upstream loans the manager of a subsidiary must check

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https://loschelderde/fileadmin/user_upload/downloads/pdf/aktuelles/2009/2009-01_DetailsAktuell.pdf, accessed on 5 December 2018, 4.

[1014] AktG, Article 571(1); GmbHG, Article 30(1).

[1015] AktG, Article 302(1).

[1016] Cahn A, 'Intra-group Loans under German Law', 46.

[1017] Spahlinger A and Kortz H, 'Germany' in Baer G and Karen OF (eds), *Financing Company Group Restructurings* (Oxford University Press 2015), 209.

[1018] AktG, Article 311.

[1019] Cahn A, 'Intra-group Loans under German Law', 46.

[1020] *MPS, case no. II ZR 102/07* 179 BGHZ (Federal Court of Justice), 71.

[1021] Ibid, 71, 77.

the parent company's creditworthiness on a regular basis;[1022] another consequence is that the actions of managers may not render the company illiquid or over-extended.[1023] Additionally, for downstream loans, repayments made one year before insolvency proceedings may be voided by the insolvency administrator.[1024] Unlike the previous regime of converting all loans transferred in times of crisis into equity, this serious trigger, which was introduced with the MoMiG and is enshrined in the German Bankruptcy Code,[1025] forces the parent's management to carefully evaluate the economic state of the subsidiary, however difficult that might be.[1026]

Lastly, where cross-stream (lateral) loans are concerned, the rules described above would be incomplete if they could be avoided by simply replacing a parent or a subsidiary with another member of the group, rendering this regulation economically inefficient. As such, the courts in Germany chose the path of establishing the same legal consequences for loans between two members of a group as in relationships between parents and subsidiaries. In other words, 'shareholder loans' are interpreted broadly, by involving direct and indirect shareholders.[1027] The only situation where it is doubtful whether lateral loans will fall under the capital maintenance regulations is with enterprise (control and cash pooling) agreements. Given that the rules for the capital preservation do not apply to these types of agreements, it is unlikely that the parties could catch every possible option for cross-stream loans in their contractual covenants. According to Andreas Cahn, this regulatory gap '*appears to have been neglected*' by the proponents of contractual solutions to corporate groups.[1028]

Upstream, downstream and cross-stream loans are not unknown to Dutch law. These instruments are also used for cash pooling techniques within groups of companies. Additionally, given that zero-balancing is said to be used as one of the cash pooling options in the Netherlands,[1029] the Dutch approach does not initially seem to be as strict and complex as in Germany. At the same time, the requirements in the Netherlands are far from being ineffective. For public companies (NVs), this stems primarily from the fact that the Second Council Directive has been implemented in the Netherlands: distributions, including loans, to shareholders may be made only to the extent that the company's net assets exceed the sum of the amount of the called-up and paid capital and the reserves required by law (balance sheet test).[1030]

The Dutch capital maintenance regime for private companies (BVs) is slightly different, and underwent change in 2009.[1031] Essentially, it combines two tests: the balance sheet test and the distribution test.[1032] The distribution test requires the company's management to ensure that the company will be able to pay its due and payable debts after it has made a distribution.[1033] Only if this requirement is met, may management approve the distribution. If it subsequently emerges that the company is unable to pay its due and payable debts, then the managers are jointly and severally liable to compensate any shortfall resulting from the distribution, plus the statutory

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[1022] Mader D and Schümann-Kleber K, 190.
[1023] AktG, Article 92; GmbHG, Article 64.
[1024] Spahlinger A and Kortz H, 205.
[1025] Insolvency Statute of 5 October 1994 (Federal Law Gazette I page 2866), most recently amended by Article 19 of the Act of 20 December 2011 (Federal Law Gazette I page 2854), Article 135(1)(2).
[1026] Heerstraßen F and Nebe F, 6.
[1027] Vetter J and Schwandtner C, 'Cash Pooling Under the Revised German Private Limited Companies Act (GmbHG)' (2008) 9 German Law Journal 1155, 1175.
[1028] Cahn A, 'Capital Maintenance' in Fleischer H and others (eds), *German and Asian Perspectives on Company Law* (Mohr Siebeck 2016), 179.
[1029] Van Horzen J, 'Netherlands' in Willems M (ed), *Cash Pooling and Insolvency: A Practical Global Handbook* (Globe Business Publishing Ltd 2012), 333.
[1030] BW, Article 2:105(2).
[1031] Verkerk B, 'Modernizing of Dutch Company Law: Reform of the Law Applicable to the BV and a New Legal Framework for the One-Tier board within NVs and BVs' (2010) 7 European Company Law 113, 113.
[1032] Ibid, 115.
[1033] BW, Article 2:216(2).

interest on that shortfall from the date of the distribution.[1034] Managers may consider a number of circumstances to assess the lawfulness of the distribution, for example '*solvability and profitability, off balance obligations, payment dates and life span of company's properties*'.[1035] This test does not apply to NVs.[1036]

Besides these capital maintenance provisions and the burden they place on financial transactions, more generalized corporate requirements apply that serve to preserve the company's capital from disproportionate distributions. When making distributions, members of the management and supervisory boards must be guided by the interests of the company and the enterprise connected with it, i.e. by the group interest.[1037] While an upstream loan or a payment under a downstream loan may of course be justified by the group's interests, this is not necessarily the case. In addition, the ultra vires doctrine may come into play and provide for the avoidance of legal acts that are contrary to the company's objects, if the other party knows that the transaction is at odds with those objects.[1038] The effectiveness of this instrument varies considerably, as companies phrase their articles of association differently. If loans to shareholders are explicitly prohibited under the articles of association, then it will be very likely that a claim for avoidance will be successful. At the same time, it is important to remember that the ultra vires doctrine is unlikely to be invoked if the loan agreement aligns with the group's interests. The judgment rendered by the Supreme Court of the Netherlands in the *Rivier de Lek* case shows that cash pooling facilities installed in the interests of all the group's undertakings are generally allowed.[1039] As such, the use of the ultra vires doctrine for intra-group loan agreements is limited, though it should not be rejected entirely.

In addition to the restrictions described above, bankruptcy law in the Netherlands imposes further restrictions on the execution of intra-group transactions during the one-year period prior to the commencement of insolvency proceedings and performed without any prior obligation to do so. Such transactions are presumed to prejudice the company's creditors, and may therefore be voided at the insolvency administrator's claim.[1040]

Other safeguards are also in place that are often used in business practice in the Netherlands and that may be employed by subsidiaries. For instance, according to agreements within corporate groups, companies may have joint and several liability for the debts of other group members.[1041] However, this and other instruments are optional and are subject to the willingness of the parties concerned.

The Polish regulation of intra-group loan agreements differs first and foremost in that Polish law does not recognize corporate groups, except for some provisions on dominant companies and related parties in the KSH.[1042] As explained above, rules on the group interest notion are also missing from Poland's statutory provisions, despite some attempts to regulate the issue and some law enforcement practice.[1043] It cannot be guaranteed that Poland's judicial

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[1034] Ibid, Article 2:216(3).
[1035] Verkerk B, 115.
[1036] Jong BJD, 'The Distinction between Public and Private Companies and its Relevance for Company Law: Observations from the United Kingdom and the Netherlands' (2016) 27 European Business Law Review 1, 12.
[1037] BW, Articles 2:129(5) and 2:239(5).
[1038] Ibid, Article 2:7.
[1039] *Rivier de Lek, Decision of 18 April 2003* JOR 2003/160 (Supreme Court of the Netherlands).
[1040] Gispen G and Van Gangelen B, 'Insolvency and Directors' Duties in the Netherlands: Overview' (Thomson Reuters Practical Law, 2018) https://uk.practicallaw.thomsonreuters.com/1-635-9172?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1, accessed on 17 May 2018.
[1041] Van Galen R, 'The Netherlands' in Baer G and Karen OF (eds), *Financing Company Group Restructurings* (Oxford University Press 2015), 351.
[1042] Barlowski M, 'Poland' in Baer G and Karen OF (eds), *Financing Company Group Restructurings* (Oxford University Press 2015), 367.
[1043] Rządkowski M, 80.

authorities will regard upstream loans and payments under downstream loans as being in the group's interests.

As a Member State of the EU, Poland has implemented the provisions of the former Second Council Directive, now codified in Directive 2017/1132. This includes the prohibition on reimbursing contributions for both private companies (sp.z o.o.) and public companies (S.A.).[1044] However, the regime is not as sophisticated as in Germany, where group law has an enormous impact on these relationships. Polish law has even been claimed to have stricter capital maintenance rules than Germany, as it does not offer the same exemptions.[1045]

Similar to German and Dutch law, Polish law also includes special safeguards in its bankruptcy regulations. The rule is that transactions between the debtor and another company dominated by the debtor that were made during the six months prior to the start of bankruptcy proceedings are invalid.[1046] The consequences of this provision are limited to directly related companies within a group, and financing through sister companies is not covered by these regulations and so provides a way to avoid these requirements.

Compared with the other jurisdictions examined here, the rules on distributions in Ukraine do not possess any capital maintenance requirements at the same level. Restrictions on distributions are confined to constraints on payments of dividends. Both public and private companies must include the appropriation of undistributed income and dividend distribution on the agenda for their annual shareholders' meetings.[1047] For private companies, dividends are paid to shareholders based on a decision to that effect by the general meeting of shareholders.[1048] This is the same for public companies as far as ordinary shares are concerned (no decision is required for privileged shares).[1049]

The restrictions on dividend payments by Ukrainian public companies are substantially different from the restrictions that apply to private companies. For public companies, the decision to pay a dividend may not be made if the company's net assets are lower than the sum of its share capital, reserves and the amount by which the liquidation value of privileged shares exceeds their nominal value.[1050] Private companies may stipulate dividend payment restrictions in their articles of association.[1051] Statutory restrictions on dividends by private companies come into play in two cases: (a) if the company has unsettled obligations towards shareholders; and (b) if the company's assets are insufficient to pay its creditors' claims, or would be insufficient as a result of the dividend;[1052] this restriction is similar to the distribution test used in the Netherlands, though here it applies to distributions in a narrow sense, i.e. dividends only.

The situation in Ukraine is also different for group law regulations: Ukraine is not under any internationally recognized legal obligation to implement rules on the recognition of group interest or related concepts, nor has Ukraine undertaken to include this concept in its national laws. However, it has detailed rules for RPTs ('transactions with interest'), which are optional for private companies[1053] and mandatory for public companies.[1054] These rules are discussed in Chapters 1 and 5 of this thesis, not in the present section.

1044 KSH, Articles 189, 344.
1045 Opalski A, 'Transakcje między podmiotami powiązanymi w prawie spółek' [2012] Przegląd Prawa Handlowego 4, 16.
1046 Barlowski M, 386.
1047 JSC Law of Ukraine, Article 32(2); LLC Law of Ukraine, Article 31(2).
1048 LLC Law of Ukraine, Article 30(2)(12).
1049 JSC Law of Ukraine, Article 30(3,4).
1050 Ibid, Article 31(1)(2).
1051 LLC Law of Ukraine, Article 27(2).
1052 Ibid, Article 27(1).
1053 Ibid, Article 45.
1054 JSC Law of Ukraine, Article 71.

Of the concepts discussed above in regard to Germany, Poland and the Netherlands, Ukraine possesses similar pre-insolvency regulations. Before the Code of Ukraine on Bankruptcy Procedures was adopted, the Law of Ukraine ‘On Restoring a Debtor’s Insolvency or Recognizing It Bankrupt’ provided for avoidance of transactions conducted one year before insolvency proceedings if they were not on market terms, for example without monetary compensation or where monetary obligations were performed earlier than expected.[1055] The avoidance of these transactions did not depend on whether they were made within a group or not. The new Code of Ukraine on Bankruptcy Procedures preserves the latter provision,[1056] while also adding further provisions specifically targeting RPTs. Under those provisions, contracts formed between a debtor and an interested person during the three years immediately prior to insolvency proceedings may be voided by an economic court if the bankruptcy administrator or a creditor so requests.[1057] Under the Code of Ukraine on Bankruptcy Procedures, this approach is far stricter than that in the Law of Ukraine ‘On Restoring a Debtor’s Solvency or Recognising It Bankrupt’ and the rules in the other jurisdictions studied here.

As demonstrated above, capital maintenance rules influence the regulation of intra-group monetary transactions. This regulation is heavily influenced by the implementation of the Second Council Directive, now codified in Directive 2017/1132, which prohibits distributions if (a) either the value of the entity’s net assets is lower than the company’s subscribed capital and reserves (balance sheet test), or (b) the amount of a distribution exceeds the company’s balance sheet profits (net profits test).[1058] The extent to which the various Member States have implemented this provision depends on their national laws, in particular how broadly they interpret the meaning of distribution.[1059] A common factor shared by all the jurisdictions in focus in this research (Germany, Poland and the Netherlands) is that they extend the requirements governing unlawful distributions not only to public companies (AG, NV and S.A.), but also to private companies (GmbH, BV and sp.z o.o.), only with slightly more flexible requirements.[1060]

The table below presents the main regulatory aspects of distributions through loans in the studied jurisdictions.

Jurisdiction / Type of Regulation	Germany	Netherlands	Poland	Ukraine
Capital maintenance, in particular the prohibition on repayment of contributions	AG and GmbH, except contract-based groups and de facto AG groups	No prohibition on reimbursing contributions, restrictions apply to distributions by NV and BV	S.A. and sp.z o.o.	No prohibition on reimbursing contributions, restrictions apply only to payments of dividends by JSCs and LLCs

[1055] The Law of Ukraine ‘On Restoring a Debtor’s Solvency or Recognising It Bankrupt’ [Закон України ‘Про відновлення платоспроможності боржника або визнання його банкрутом’], Article 20(1).
[1056] Code of Ukraine on Bankruptcy Procedures [Кодекс України з процедур банкрутства], Article 42(1).
[1057] Ibid, Article 42(2).
[1058] Directive 2017/1132, Article 56(1,3).
[1059] Armour J and others, 14.
[1060] Cahn A, ‘Intra-group Loans under German Law’, 45.

Group law regulation, through the recognition of group interests and/or alternative intra-group obligations	AG and GmbH contract-based groups (*Vertragskonzern*): duty to compensate losses AG de facto groups: duty to compensate disadvantages	NV and BV: managers may enter into transactions if they satisfy the group interest + ultra vires doctrine applicable	Group interest recognized by the courts, specific regulation for contract-based groups under Article 7 of the KSH	Group interest is not recognized, no regulation similar to *Konzernrecht*, but detailed rules on RPTs (mandatory for JSCs and optional for LLCs)
'Before insolvency' period, for avoidance of intra-group transactions by the insolvency administrator	1 year for shareholder loans, where repayment was made during that year	1 year for intra-group transactions	6 months for transactions between a debtor and a debtor-dominated company	3 years for contracts between a debtor and a related party, and 1 year for transactions, including intra-group transactions, on non-market terms

Table 4. Regulation of intra-group distributions (loans) to shareholders in the jurisdictions in focus, for public and private companies.

The table above demonstrates that Ukraine does not have the same degree of capital maintenance and group law rules as the other jurisdictions in focus in this research. Distributions based on upstream or downstream loans are subject to more relaxed regulation in Ukraine. At the same time, pre-insolvency statutory requirements show a significant level of correlation with the other national laws. Moreover, the most recent amendments to the bankruptcy regulations in Ukraine make it possible to void RPTs concluded within a three-year 'before insolvency' period, which is far stricter than the one year used in Germany and the Netherlands, or the six months in Poland.