Marek Zięba, The protection of creditors of the subsidiary

summary of the doctoral dissertation

The issue of protection of creditors of the subsidiary is one of the fundamental problems governed by the law of groups of companies. First of all, it should be emphasized that the problem of protection of creditors of the subsidiary occurs only in groups of companies, ie. commercial companies interrelated, between which there exists a relationship of domination and dependence of a permanent nature, and also the companies forming the group have a common economic interests also referred to as interest group of companies. If, however, the existing relationship between the companies do not have the characteristics of a lasting relationship of domination and dependency and can not point to a common interest group of companies, the protection of creditors of these companies is carried out using the general rules of the Commercial Companies Code and the Civil Code.

The protection of creditors of the subsidiary can not be examined only in the context of the relevant provisions of bankruptcy law. In the case of the bankruptcy of a subsidiary its creditors have little chance to satisfy their claims due to the insolvency of the company. Therefore, it is necessary to search for legal instruments capable to protect the interests of creditors of the subsidiary during its activity, ie. the protection in a wider range. Continuing, the protection of creditors of a subsidiary may be implemented indirectly by means of the provisions protecting the stability of company properties. In particular, we can distinguish three groups of regulation. The first of them should include provisions prohibiting reimbursement of contributions to a limited liability company (Art. 189 § 1 of the Commercial Companies Code) and the prohibition of return payments for shares in a company limited by shares (Art. 344 § 1 of the CCC). The second group of regulations should include the provision of Article. 355 § 3 of the Commercial Companies Code, which contains the warrant equivalence of benefits in transactions between a company and its shareholders. It plays a vital role in the legal system as it allows for preventing the carrying out by a subsidiary called "hidden payments" for its dominant shareholder and its related entities. The third group includes provisions regulating the protection of creditors of the company in connection with the reduction of its share capital: Art. 264 and Art. 265 Code of Commercial Companies (In terms of LLC) and Art. 456-458 Code of Commercial Companies (In terms of joint stock company). These adjustments are then supplemented by provisions on liability for illegal payments from the assets of the company and responsibility of board members of

limited liability company with Art. 299 Code of Commercial Companies. However, analysis of the relevant provisions of the Commercial Companies Code allows for a thesis that the protection of creditors of the subsidiary carried out in an indirect way, through a system of standards to protect the stability of the share capital is insufficient. Considering the above, the purpose of seeking legal instruments to implement safeguard the interests of these persons in a wider range, it is necessary to analyze the solutions adopted in the legal systems of foreign countries. This analysis will then be used when assessing the relevant Polish law regulations.

In the legal systems of foreign countries the issue of the protection of the interests of creditors of the subsidiary is also analyzed in the context of groups of companies. It should also be noticed that legislators are often not willing to settle this matter in the form of a bill, and therefore protection of creditors of subsidiary is implemented by means of legal instruments developed by the judicature, which secure the legally protected interests of these persons, in case of abuse by the dominating company of their rights. In this respect, jurisprudence of the foreign countries, in particular cases of legal separation permit the omission of a capital company, which in turn results in favor of the parent company's liability for the obligations of the subsidiary in relation to its creditors, in particularly justified cases, due to the abuse of a separate legal personality of the company. These legal instruments include the doctrine of piercing the corporate veil, which has been developed in the jurisprudence of US courts. It allows to overcome the negative consequences of abuse of the legal form of the company's shareholders' equity, which results in the transfer of the risk of the company's business directly to its creditors. In particular, this applies to cases of thin capitalisation, the company's failure to comply with corporate procedures, confusion of the areas of corporation and its shareholders, abuse of the legal form of the company and when the company's legal form is used by shareholders for illegal purposes. It should be noted, however, that US courts apply the doctrine of piercing the corporate veil only in exceptional cases justified by the circumstances. Also in the German jurisprudence has been developed Durchgriff doctrine, which allows in a justified cases, to accept responsibility for the liabilities of the parent company's subsidiary in relation to its creditors and the parent company's liability for damage caused to its subsidiary in connection with the use of a subsidiary to the binding instructions of the parent company. German judicature in this context, points to the confusion of spheres and assets of the company and its member (shareholder), responsibilities within the corporation, thin capitalisation and liability for acts threatening the existence of the company. Durchgriff doctrine allows the correction by the German judicature the imperfections of the

legal system, allowing the parent company to abuse a separate legal personality of the subsidiary in relation to the principle of non-liability for the obligations of the shareholders of the company. In addition, the English jurisprudence has developed the doctrine of wrongful trading, which defines the principle of liability in the continuation of the company's operations in the situation indicating the imminent approach of its bankruptcy. This doctrine is supplemented by the shadow director doctrine, by means of which it is possible to assign responsibility for the actions of directors of its subsidiary, to the parent company, which allows to guarantee the interests of creditors of the subsidiary, in specific cases, each of which is analyzed by the court.

Following the analysis of selected institutions of foreign law, aimed at the protection of the subsidiary's creditors, to use comparative legal attention during the analysis of the problem of protection of creditors of the subsidiary in the Polish law. First of all, it should be emphasized that the principle of non-liability partners and shareholders for the company's obligations (Art. 151 § 4 and Art. 301 § 5 of the CCC) is not absolute, because in particularly justified cases it is acceptable as an exception acceptance of responsibility for the liabilities of the parent company subsidiary relative to its creditors by means of the concept of abuse of process of Art. 5 of the Civil Code (due to the abuse of a separate legal personality of the company). Next, it should be noted that the Commercial Companies Code is only residual control rights groups of companies, which do not include provisions regulating such as.: the responsibility of the companies participating in the group, including the provisions which regulate the issue of liability of individual members of the group, including providing for liability of a parent company for the liabilities of the subsidiary in relation to its creditors. Referring to earlier comments, there should be outlined that's these issued should not be regulated in the Code of Commercial Companies. First of all, the intervention of the legislature is a last resort, when it is not possible to protect creditors of the subsidiary using the appropriate interpretation of the applicable provisions allowing for preventing abuse in exceptional cases, a separate legal personality of companies. As of today, the courts may assume responsibility for the liabilities of the parent company's subsidiary in relation to its creditors using the construction abuse of process (Art. 5 of the Civil Code). The possible basis for the liability of a parent company for the liabilities of the subsidiary in relation to its creditors must include: undercapitalisation, mixing spheres and assets of the company and its member (shareholder), liability for acts threatening the existence of the company, continuation of operationg in conditions indicating

that the inevitable bankruptcy of the company as well as the abuse of the right to establish subsidiaries.

In addition, under Polish law there should be outlined another instrument for the protection of creditors of the subsidiary, ie. the possibility for creditors of the subsidiary to enter claims directly to the parent company. It is true that authorized should demonstrate that the act or omission of the parent company was aimed at harming directly creditor of the subsidiary. Bearing in mind that the damage is mostly so-called creditor. „indirect damage" a creditor of the subsidiary is an objective difficulty to demonstrate the desirability of the parent company's operations, intended to cause harm directly in its property. Therefore, the possibility for creditors of the subsidiary direct claims against the parent company is justified only in specific cases. However, this legal instrument can also be used to protect the creditors of the subsidiary.

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