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Groups of Companies and Liability within the Group

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Abstract

Groups of companies have existed ever since the early 20th century in the legal and economic terms. Over time, their concept was complemented, both in legislation and in the corporate practice. The issue of establishing and managing groups of companies is regulated by the corporate legislation. It particularly regulates the concept of the controlling and subsidiary company, company with mutual shares, holding, concern, association of companies and other forms of company associations. In terms of the legal definition, these are associated companies composed of two or more companies that are affiliated to each other as follows: by share in equity or membership interests (equity-related companies), by contract (contract-related companies); by equity and contract (mixed-related companies). These associated companies include a parent company and one or more subsidiary companies, which may be related by equity, contract or both. Besides the general concept of the associated companies, the author aims to point to the liability in a common activity as a group of companies. A particular attention is drawn to the legal treatment and obligations resulting from the International Accounting Standards and binding financial statements related to them.

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1. Concept of the group of companies, liability within the group

The concept of the group of companies has been defined pursuant to the Company Law (Official Gazette of the FBiH, no. 81/15, Chapter VI, Associated Companies, Art. 51-59; henceforth: CL). In the domestic and comparative law, this legal institute has been resolved through the legal regime of associated companies, i.e. the parent and the subsidiary company. If a company has majority share in the share capital of another company or if it has the right to appoint majority of members in the Supervisory Board or has a majority of votes in the General Assembly pursuant to a contract concluded with the other company, such company is considered the parent and the other company a subsidiary. A parent (controlling) company with majority share in the equity is the company which, directly or indirectly through another company, on the basis of more than 50% share in the equity of another company has more than 50% of the votes in the General Assembly of the subsidiary company. Direct share in the equity which belongs to the parent company or another person who holds such share on its behalf is determined on the basis of the ratio of the nominal amount of such share to the total equity of the subsidiary company.

Indirect share in the equity which belongs to the parent company includes shares and membership interests which belong to the company which is dependent upon it or which belongs to a second party on behalf of the company or on behalf of the company which is dependent upon it (subsidiary companies). A subsidiary company may obtain shares or membership interests in the parent company and exercise its right to vote on the basis of the shares and membership interests which are already at its disposal in accordance with the provision of the law on company with mutual shares (CL, Art. 52). Companies with mutual shares in the equity are related parties where each company has a share in the equity of the other company. The Law does not define the ratio, i.e. the percentage of share in this case (CL, Art. 53). The Law also provides the definition pertaining to the mutual liability of the parent and subsidiary company, which will be discussed separately (CL, Art. 57).

Associated companies include one parent and one or several subsidiary companies, and are organized as:

a) concern,
b) holding,
c) association of companies or
d) another form of organization in accordance with law (CL, Art. 54-56 and 59).

The Law particularly provides that companies should be associated in accordance with regulations pertaining to the maintenance of competition, which indicates that groups of companies may appear within the competition law (CL, Art. 51). With respect to other forms of company associations, companies may affiliate by means of agreement into other forms of affiliation such as: consortium, franchising, community of companies, commercial union, business system, pool, long-term technical and production cooperation and others (CL, Art. 59). These are contractual forms of company associations, rather than status-related. They are established based on a contract, and their legal regime should be viewed through the general regime of obligations (CL, Art. 54-56). It can be seen from the above described that the concept of the group of companies implies any form of the association between companies based on equity and/or contract which may result in the liability (of formally independent companies) as a single company.

In Art. 57, CL recognizes two situations related to the mutual liability of associated companies. They pertain to bankruptcy and bringing the subsidiary company into a position to execute a detrimental legal business or to act or fail to act to its detriment. In the case of bankruptcy, the parent company is jointly and severally liable to creditors in the bankruptcy procedure of a subsidiary company, if the bankruptcy was caused by binding orders, decisions or instructions of the parent company. If the parent company brings a subsidiary company into a position to execute a detrimental legal business or act or fail to act to its detriment, it shall compensate the subsidiary company for the damages caused on such grounds. The request for compensation of damages itself, in the name of the subsidiary company, may be filed by shareholders and members of the subsidiary company who own or represent at least 10% of the share capital of that company or smaller part determined in the statute, as well as the creditors of the company whose claims amount to more than 10% of the share capital of the subsidiary company. Legal representatives of the parent company have the legal obligation to act in the best interest of this company, but not of the subsidiary company as well. The opposite logic also applies, whereby legal representatives of the subsidiary company are bound by law to act in its best interest, but not in the best interest of the parent company as well. This is a solution for the case that the associated companies are equity related.

Contractual association whereby a corporation entrusts another company with running business is a contract on running a company's business. The contract whereby such a company commits itself to transferring its entire profit is the contract on the transfer of profit. For the cases of companies' contractual association, there is a special legal regime for the existence of the contract on the management control. The controlling company is bound to be guided by interests of the entire group when giving the binding directives. The controlling company that exercises the control based on the contract on the management control also has the obligation of due care. If this obligation is not honored and detrimental consequences occur, the right to the compensation for damages shall be materialized. Parent company's directors have the obligation of responsibility when giving binding directives to the subsidiary company's management due to the possible adverse economic consequences. This issue is closely related to the compliance with rules prescribed by the legal institute Business Judgment Rule (CL, Art. 32, Persons with special duties towards the company). The question arises as to whether the right to give binding directives exists in both cases of companies' association, by equity and by contract. This is a legal and a factual question. In contract-related association, it is a matter of fulfilling an obligation. In equity-related association, the controlling company is in the position to give binding directives which will have legal and economic repercussions on the subsidiary company's operations and business, through the activities of its representatives in corporate bodies (assembly, supervisory board, executive board of directors).

It is not only companies that are liable. Besides the corporate liability, there is also the individual liability of the members of company management(s). Thus, besides the parent company, joint and several liability also pertains to the members of controlling company's management who brought the subsidiary company into a position to execute a detrimental legal transaction or to act or fail to act to its detriment. Members of the subsidiary company's management are also jointly and severally liable if they violated their duties, unless they acted according to the directives by the controlling company's management. Liability within associated companies is particularly evident in the case of the existence of the conflict of interest of the associated natural persons who perform particular duties.

Legal consequences of the mutual liability of controlling and subsidiary companies arouse interest, particularly since it is well known that it is one of the ways to avoid various obligations. The basic legal consequences related to mutual liability of these two kinds of companies can be seen in:

a) liability of the controlling company for all the ongoing business operations of the subsidiary company and

b) liability of the controlling company for the obligations of the subsidiary company in the case of the cessation of the subsidiary company's existence.

According to Vasiljević (2001), these are legal issues resolved by means of the case law. Solutions in the domain of the so-called liability within the group of companies are particularly inspiring. Regardless of the legislative solutions, it is obvious that the issue of the liability within the group will also be regulated by the illustrative case law as well. In the legal theory, the following view can be singled out: „The common feature of all forms of the group of companies is the existence of the legal subjectivity of all individual daughter companies (subsidiaries) and legal subjectivity of the controlling company, though not the existence of legal subjectivity of the entire group (as is the case with companies' merger) ; however, in real life, legal subjectivity of subsidiary companies (dependent both directly and indirectly) is often only the fiction, and legal orthodoxy gives way to economic realities (interest of the entire group). In the conflict between legal (subjectivity) and factual (economic unity), factual often prevails. Therefore, although the entire group does not have legal subjectivity, in legal terms, a number of legal solutions is constructed exactly on the assumption of the subjectivity of the group. Legal theory also supports the recognition of the subjectivity of the group in terms of assets as well, particularly by the promotion of the theory of the group's transparency. It, in turn, leads to the economic reality of the group in the legal grounds for mixing up assets of the subsidiary with those of the controlling company, and thus the liability of the parent company for covering the subsidiary's liabilities.

2. Position of the group of companies in the European Union law

Seventh Directive of the EU on Consolidated Accounts, no. 34/2013, adopts the Anglo-Saxon approach to the issue of associated companies (Directive of the European Parliament and Council, no. 34/2013 of 29 June 2013). The approach to associated companies is based on taking the legal control based on the holding of a majority of voting rights, the right to appoint and remove directors or by exercising control pursuant to contract. Besides general obligations, companies also have the obligation to submit the consolidated financial statement if the controlling company can make the factually dominant influence over another company or if the company is managed by the controlling company. It is significant from the viewpoint of the legal institute of piercing the corporate veil, and the relationship that develops between the controlling and subsidiary company. This subject matter also touches upon taxation issues, which is the topic of an EU directive.

The Seventh EU Directive on Consolidated Accounts is also called the "accounting directive". This Directive repealed the previous Council's Seventh Directive of 13 June 1983. The former Directive provided as follows: "A Member State shall require any undertaking governed by its national law to draw up consolidated accounts and a consolidated annual report if that undertaking (a parent undertaking):

a) has a majority of the shareholders' or members' voting rights in another undertaking (a subsidiary undertaking); or
b) has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of another undertaking (a subsidiary undertaking) and is at the same time a shareholder or member of that undertaking; or
c) has the right to exercise the dominant influence over an undertaking (a subsidiary undertaking) of which it is a shareholder or member, pursuant to a contract entered into with that undertaking or to a provision in its memorandum or articles of association, where the law governing that subsidiary undertaking permits its being subject to such contracts or provisions. A Member State need not prescribe that a parent taking must be a shareholder in or member of its subsidiary undertaking. Those Member States the laws of which do not provide for such contracts or clauses shall not be required to apply this provision: etc.

The consolidated financial statements of a group of companies have always been a problem since obligations of reporting have not been honored for various reasons. Let us refer to the valid Directive of 2013, which defines as follows:

a) 'parent undertaking' means an undertaking which controls one or more subsidiary undertakings.
b) 'subsidiary undertaking' means an undertaking controlled by a parent undertaking, including any subsidiary undertaking of an ultimate parent undertaking;
c) 'group' means a parent undertaking and all its subsidiary undertakings;
d) 'affiliated undertakings' means any two or more undertakings within a group;
e) 'associated undertaking' means an undertaking in which another undertaking has a participating interest, and over whose operating and financial policies that other undertaking exercises significant influence. An undertaking is presumed to exercise a significant influence over another undertaking where it has 20% or more of the shareholders' or members' voting rights in that other undertaking.

Legal consequences of the mutual liability of controlling and subsidiary companies arouse interest, particularly since it is known that it is one of the ways of evading various obligations, quite often of tax evasion as well. It is particularly evident in the cases of associated companies headquartered in different sovereignties (countries). These forms of association are also a way to organize business so as to use different forms of association to disperse business risk, expand market through new business acquisitions, decrease tax duties, find cheaper labor etc.

3. Selected case law of the European Union related to groups of companies

According to Trivun (2019), the EU courts apply the Economic Unit Theory (EUT) to define the affiliated companies. According to the EU law: "EUT focuses on economic reality instead on legal norms and considers a series of separate companies as a single person if they are controlled and managed by same shareholders. According to EUT, rights and obligations of one company are imposed on the other. According to Trivun (2019), EU courts can pierce the corporate veil of a parent company to fulfill obligations of the subsidiary company when they are subject to the same control, i.e. when the subsidiary company is fully owned by its controlling company. Thereafter, when it has been concluded that the subsidiary company is not able to get involved in the economic action which is independent of the controlling company, the two companies will be considered as one for the purposes of the EU competition law, despite their separate legal identities."

Legal literature abounds with case-law examples pertaining to individual forms of piercing the corporate veil in the cases of the relations between a group of associated companies. The following ones illustrate this topic very well: "European Court of Justice (henceforth: ECJ) also developed an extremely important legal presumption in recent cases such as General Quimica SA and Other v. European Commission of 2011; Alliance One International and Others v. Commission of 2010; Akzo Nobel and Others v. Commission of 2000; Stora Kopparbergs Bergslags AB v. Commission of the European Communities of 2000; AEG-Telefunken AG v. Commission of the European Communities of 1983, etc.

According to Braut-Filipović (1991) ECJ established that in the cases when a controlling company is the 100%, i.e. the sole shareholder in the daughter company, it will consider that it exerted the decisive influence on the subsidiary company, and that therefore the infringement of market competition by the subsidiary company shall be attributed to the controlling company, which will in turn lead to piercing the corporate veil of the subsidiary company. However, this legal presumption is rebuttable, which means that the controlling company can prove that it did not exert the decisive influence on the subsidiary company. More accurately, the controlling company can prove that the subsidiary company independently took a particular action, without influence and without the received directive from the controlling company. ECJ even went a step further in interpreting this presumption, and explicitly noted that determining the liability of the controlling company does not require the controlling company's direct involvement in the actual infringement, and that the fact that the controlling company generally has the decisive influence on the subsidiary company is sufficient."

According to Braut- Filipović (1991), it is interesting to analyze whether the domains of market competition, ECJ's criteria for piercing the corporate veil can be included in the area of controlling company's liability for criminal or contractual infringements of the subsidiary company. The decisive fact in this respect is that ECJ does not analyze whether, in the actual case, the controlling company has committed an infringement or provided a particular directive or not. It suffices to prove such an economic association between the companies, where the subsidiary company does not constitute an independent economic unit. Such a practice corresponds to the US contractual theory of the controlling company's liability. In the Freeport case (Freeport plc v. Olle Arnoldsson) the plaintiff brought an action before the national court in Sweden against Freeport plc (a company headquartered in the United Kingdom). Freeport plc was the parent company of the second defendant, i.e. Freeport Leisure AB (henceforth: Freeport AB), headquartered in Sweden. The plaintiff negotiated the deal with the controlling company, which in turn established the subsidiary company – Freeport AB, headquartered in Sweden, to fulfill its obligation. When the subsidiary company did not fulfill its obligation, the plaintiff brought an action against both the controlling company and the subsidiary company before Swedish national court. The main objection of the controlling company was that Swedish court had no jurisdiction over it since the action against the controlling company had a contractual basis whereas the action against the subsidiary company is based on extra-contractual liability. The plaintiff argued that the two claims do not have the same legal basis and that the proceedings against the controlling company cannot be conducted together with the proceedings against the subsidiary company before the Swedish court; rather, these proceedings must be separated so as to allow the proceedings against the controlling company only in the United Kingdom, according to the company's domicile. This view was the subject of review by the ECJ, which finally ruled as follows: "On these grounds, ECJ concluded that a court may conduct single proceedings against a number of defendants, irrespective of the fact that claims brought against them have different legal bases, i.e. in one instance on contractual liability and on the noncontractual liability in the other. Besides: it can be argued that such a view is a result of the policy to effectively resolve and easily prove infringements of market competition. Indeed, it is sufficient to prove that the parent company is the sole shareholder in the subsidiary company or that it has the prevailing influence through the authority to give binding directives, appoint directors, etc."

The Commission applied the same reasoning (logic) in the case Re Deere & Co. (National Farmers Union v. Cofabel N.V.), where: "The Commission fined the US manufacturer for prohibiting exports introduced by its subsidiary according to its instructions in some Member States and held the controlling company liable for actions by the subsidiary company. In this case, the controlling company was founded in the USA and had the registered head office in Germany. The Commission based its opinion on the fact that the controlling company exercised control over the subsidiary company. The Commission can obviously use EUT to pierce the corporate veil when a number of separate companies are controlled by the same owner (ResearchGate, 2001; case taken from: www.researchgate.net; Accessed, March, 2021.)"

The question also arises as to who has the burden of proof in the case of actions by associated companies. Courts of the EU countries mostly apply the EUT rule for piercing the corporate veil when a subsidiary company lacks autonomy and control in the enterprise as a whole. When members of an enterprise are subject to the same control (management), the fact that they have separate corporate veils (corporate independence) is irrelevant. Thus, actions by any member of the enterprise can be attributed to the controlling company, which represents the actual power behind the prohibited behavior. Like in the corporate law of the USA, the key problem in imputing liability to the controlling company is whether or not the controlling company exercised control over the subsidiary company and caused prohibited conduct by the subsidiary company.

With respect to the burden of proof needed for piercing the corporate veil, the EU institutions proposed two approaches to defining the necessary level of control needed to be achieved by controlling companies to make them liable for actions by their subsidiary companies:

a) presumption approach, and
b) investigation approach.

According to the theory of presumption approach, the subsidiary companies that are fully or majority owned are considered to be under the absolute control of the controlling company. When this presumption has been made, the burden of proof is transferred to the controlling company, which has to demonstrate that the subsidiary company had a certain level of autonomy that it exercised when participating in the prohibited conduct. On the other hand, according to the investigation approach, the plaintiff who requires the corporate veil to be pierced must prove that the controlling company really controlled the subsidiary company. The burden of proof is on the body that brings the action, i.e. on the plaintiff. This is so because even in the cases of the sole ownership it is quite possible that the controlling company decides not to use its full authority over the subsidiary company.

4. Position of the group of companies in the US law

The approach of the Anglo-Saxon legal circle dates back to 1931 and it has found the widespread application in the US case law. To support the conclusion that piercing the corporate veil is appropriate, the plaintiff must prove that enough listed criteria exist to indicate that the controlling company truly control the subsidiary company. It is particularly impressing to read Professor Powel's test related to relations between controlling and subsidiary companies, and the possibilities to lift the corporate veil. Separate legal institutes of eliminating inequities, as well as making a company the "façade" to take actions which are not in the spirit of law are also examples of instances that could result in lifting the corporate veil in the cases of actions "within the group". US courts still use some forms of Powel test to establish whether to pierce the corporate veil of a subsidiary company to reach the assets of its parent.

According to Trivun (2019), Professor Frederick J. Powel provided a list of factors which indicate that the parent company is held liable for a subsidiary's obligations:

a) the parent corporation owns all or most of the capital stock of the subsidiary,
b) the parent and subsidiary corporations have common directors or officers,
c) the parent corporation finances the subsidiary,
d) the parent corporation subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation,
e) the subsidiary has grossly inadequate capital,
f) the parent corporation pays the salaries and other expenses or losses of the subsidiary,

g) the subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation,
h) in the records of the parent corporation or in the statements of its officers, the subsidiary is described as a department or division of the parent corporation, or its business or financial responsibility is referred to as the parent corporation's own,
i) the parent corporation uses the property of the subsidiary as its own,
j) the directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take their orders from the parent corporation in the latter's interest, and
k) the formal legal requirements of the subsidiary are not observed.

The plaintiff must prove that there are enough of these criteria to indicate that the controlling company truly controls the subsidiary company. These factors focus on the level of control that the controlling company exercises over the subsidiary company, and the extent to which the controlling company has respected the corporate formalities of the subsidiary company. One should keep in mind that this test was developed in 1931, though the corporate world had already been familiar with various forms of creating the illusion of a separate corporate veil, *alter ego* companies or similar forms of using the legal form of companies' independence to evade or avoid application of regulations or fulfillment of obligations. Under the Powel test, neither ownership nor the general ability to control the subsidiary is sufficient to pierce the corporate veil of the subsidiary company. To pierce the veil of the subsidiary, there must be additional evidence of the domination by the parent over the subsidiary. The rationale behind this rule is that every controlling company, by virtue of its controlling interest in the subsidiary, has the right to exercise a certain level of control over the subsidiary. Therefore, to hold a controlling company liable for, e.g. environmental torts committed by its subsidiary, a plaintiff must show that the parent dominated the subsidiary. The separate corporate entity principle is not absolute. Courts and legislatures have pierced the corporate veil to protect more important interests. The most common justification for piercing the corporate veil is a finding that a company is serving as a tool for the shareholders to achieve goals that are prejudicial for public policy, such as fraud or evasion of contractual obligations.

5. Issues of financial statements within the group of companies

According to Isaković-Kaplan (2016), consolidated financial statements of a group present a problem, since the reporting obligations are not respected. Thus: “The World Bank investigations also showed problems in preparation, presentation and interpretation of statements generally and at the same time in consolidated financial statements. During ROSC A&A project, the World Bank have reviewed financial statements of company samples and identified areas where financial statements were not prepared in accordance with IFRS – missing of notes, non-existence of cash flows and auditing statements, non-existence of consolidated or segmented reporting, as well as non-announced transactions with connected parties. In order to fulfill tax authorities’ requests in connection with incomes and expenditures, those who prepare financial statements of general purpose and consolidated financial statements for small and intermediate private firms and firms that have public responsibility usually deviate from financial reporting standards and follow tax rules. Financial statements are not announced in public. In praxis, it is very hard to get financial statements, which is not in accordance with requests of the First EU directive in the area of Law on companies.” (May, 2009, www.Siteresources.worldbank.org; Accessed, march, 2021.).”

In addition, according to Isaković-Kaplan (2016), the following approach is interesting from the viewpoint of the company: “Consolidated financial statements represent systematic preview of financial position and business performance of more legally independent entities that act either as a unique business entity, or as a group. Preparation and presentation of consolidated financial statements is of the key importance for forming and expression of opinion about financial condition and business performance of a group of firms. Regardless of value and importance of their announcement, consolidated financial statements in BiH are not presented publicly. The goal is to review reasons of (no) preparation and (no) announcement of consolidated financial statements from side of entities that act on BH territory. This work analyzed financial reporting problems in BiH and reviewed possible solutions for overrunning of problems in creation, presentation and interpretation of consolidated financial statements in BiH.”

Reference should be made to IAS 24: “Related parties disclosure requires disclosure of related party relationships, transactions and outstanding balances, including commitments, in the consolidated and separate financial statements of a parent, investor with the joint control or a significant influence over the investee, which are presented in accordance with IAS 27 – Separate

Financial Statements. This Standard also applies to individual financial statements (IAS 27, par. 3, p.1). The Standard applies in:

a) identifying related party relationships and transactions;
b) identifying outstanding balances, including commitments, between an entity and its related parties;
c) identifying the circumstances in which the disclosure of the items in (a) and (b) is required; and
d) determining the disclosures to be made about those items."

The objective of this Standard is to ensure that:

a) an entity's financial statements contain the disclosures necessary to draw attention to the possibility that its financial position and profit or loss may have been affected by the existence of related parties, and
b) by transactions and outstanding balances, including commitments, with such parties.

According to Trivun, Silajdžić, Mahmutćehajić, Mrgud, the greatest significance in this area is attached to the rules pertaining to the preparation of consolidated financial statements of the parent and all subsidiary corporation… the purpose of these statements is to provide information on the activities of companies within the group as a single economic entity." This standard has its interpretation as well: "The Standard also defines the meanings of all the terms used. Thus, 'control' in terms of the Standard refers to the power to govern the financial and operating policies of an entity so as to obtain benefits from its activities, while 'significant influence' refers to the power to participate in the financial and operating policy decisions of an entity, which may be gained by share ownership, statute or agreement. The Standard also provides the definition of joint control, which refers to the contractually agreed sharing of control over an economic activity. Associated entity is an entity, including one that is not a legal person, such as partnership, which is neither a dependent entity nor a share in a joint venture and over which the investor has a significant influence, while a joint venture is a contractual arrangement whereby two or more persons undertake an economic activity which is the subject of mutual control. The term 'key management' encompasses persons having the authority and responsibility for planning, directing and controlling the activities of the entity, directly or indirectly, including any director (whether executive or otherwise) of that entity. According to IAS 24, 'close members of the family of a person' are those family members who may be expected to influence, or be influenced by, that person in their dealings with the entity. These may include the person's domestic partner, the person's children or children of the person's domestic partner, or dependents of the person or the person's domestic partner. It should also be noted here that the Standard recognizes situations with not necessarily related parties: two entities simply because they have a director or other member of management in common; two parties simply because they share joint control over a joint venture; providers of finance, trade unions, public utilities, and departments and agencies of a government, simply by virtue of their normal dealings with an entity (even though they may affect the freedom of action of an entity or participate in its decision-making process); and a customer, supplier, franchisor, distributor or general agent with whom an entity transacts a significant volume of business, simply by virtue of the resulting economic dependence.

IAS 27 has its scope and is applied in the preparation and presentation of consolidated financial statements for a group of entities controlled by a controlling company. The Standard does not deal with the accounting methods of business associations and their effects on the consolidation. It is applied in accounting for investments in subsidiaries, joint ventures and associates, when an entity elects, or is required by local regulations, to present separate financial statements. "The following terms are used in this Standard with the meanings specified:

a) Consolidated financial statements are the financial statements of a group, presented as those of a single economic entity.
b) Control is the right to govern financial and business policies of an entity so as to obtain benefits from its activities.
c) Group is a parent and its subsidiaries.
d) Non-controlling interest is equity in a subsidiary not attributable, directly or indirectly, to a parent.
e) Parent is an entity that controls one or more dependent entities.
f) Separate financial statements are those presented by a parent, investor in an associate or a venturer in a jointly controlled entity, in which the investments are accounted for on the basis of the direct equity interest rather than on the basis of the reported results and net assets of the investee.

g) Subsidiary is a company, including other business entities such as partnership, which is controlled by another entity (known as: parent). It is assumed that the control exists when a parent has, directly or indirectly through the subsidiary, more than half of the voting power of an entity, except if in exceptional cases it can clearly be proven that such ownership is not control."

IAS 31, Interests In Joint Ventures, defines the term of control and joint control as: "Control is the power to govern the financial and operating policies of an activity so as to obtain benefits from it. The equity method is a method of accounting whereby an interest in a jointly controlled entity is initially recorded at cost and adjusted thereafter for the post-acquisition change in the venturer's share of net assets of the jointly controlled entity. The profit or loss of the venturer includes the venturer's share of the profit or loss of the jointly controlled entity. Joint control is the contractually agreed sharing of control over an economic activity, and exists only when the strategic financial and operating decisions relating to the activity require the unanimous consent of the parties sharing control (the venturers). A joint venture is a contractual agreement whereby two or more parties undertake an economic activity that is subject to joint control."

6. Possible abuses within the group of companies

Existence of the group of companies is most often a result of various business acquisitions at the capital market, better known as takeovers. They can be hostile or friendly but are always a result of the desire to dominate a given market and achieve a kind of monopoly. As a rule, monopolies are prohibited by themselves, same as the monopolistic behavior. The Criminal Code of the FB&H prohibits the creation of the monopolistic position in the market (Art. 253), and therefore whoever, in a legal person, enters into an agreement by which another legal or a natural person is restrained from the free circulation of goods and services within a determined area or with certain legal or natural persons, or enters into an agreement by which in some other way a monopolistic position in the market for certain legal or natural persons is created, shall be punished by imprisonment for a term between six months and five years. Monopolistic behavior is also prevented by the activity of the Competition Council which, pursuant to the Law on Competition, gives permission for certain acquisitions which would allow the so-called dominant position in a relevant market. Pursuant to the Law on Competition, an undertaking is in a dominant position in the relevant market of goods or services if due to its market power its behavior is significantly independent of its actual or potential competitors, buyers, consumers or suppliers, taking into account the market share of that undertaking on the relevant market, market shares of its competitors, as well as legal and other barriers to the entry of other competitors on the market (Art. 9). The Law also provides for the percentage of share in the relevant market. It is deemed that an undertaking is in a dominant position on the relevant market of goods or services if its market share on the relevant market exceeds 40%. It is also deemed that more undertakings may be in a dominant position on the market of goods and/or services if the joint market share of two or more undertakings in the relevant market exceeds 60%. Further, it is deemed that more undertakings may be in a dominant position on the market of goods and/or services if the joint market share of four or five undertakings in the relevant market exceeds 80%. The Competition Council shall define the category of a dominant position in more details under special regulation. This dominant position and its abuse are prohibited. We can see that legal definitions primarily pertain to the activity of two or more companies, which implies the existence of a group of companies. Thus, any abuse of the dominant position of one or more undertakings in the relevant market is prohibited. The abuse of a dominant position in particular consists in:

a) directly or indirectly imposing unfair purchase or selling prices or other trading conditions which restrict competition;
b) limiting production, markets or technical development to the prejudice of consumers;
c) applying dissimilar conditions to equivalent or similar transactions with other parties, thereby placing them at a competitive disadvantage;
d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contract.

The legal consequence includes the possibility of the action by the Competition Council. The Competition Council issues a procedural decision whereby it:

a) establishes the dominant position and actions by the undertakings which abuse such dominant position and prevent, restrict or distort market competition, and duration of such behavior;
b) forbids any further abusive actions of the undertaking;

c) determines terms and measures to remedy any adverse effects of such actions;

d) determines obligation for the undertaking to apply other appropriate measures that ensure competition among the undertakings on the relevant market and deadlines for their implementation.

Another legal institute within potential activity of the group of companies which deserves attention is concentration. Concentration is considered as:

a) joining or merger of independent undertakings or parts of undertakings;

b) the acquisition of control or decisive influence of one or more undertakings on another undertaking, or more undertakings or a part of another undertaking, or the parts of other undertakings, in particular by:

1) acquisition of the majority of stocks or share of the nominal capital by means of purchase; or

2) acquisition of the majority of voting rights; or

3) any other way, pursuant to the provisions of the laws which regulate the establishment of companies and their management;

c) a long-term joint venture by one or more independent undertakings, acting as an independent undertaking.

Acquisition of control is constituted by rights, contracts or any other means by which one or more undertakings, either solely or jointly, taking into consideration all legal and factual circumstances are enabled to exercise decisive influence over one or more undertakings. The concentrations of undertakings that significantly impede effective competition in the whole territory of Bosnia and Herzegovina or its substantial part, and particularly such creating a new dominant position or strengthening an existing one are prohibited (Art. 12 and 13).

In this context, groups of companies may conclude either formal or informal agreements that qualify as prohibited. These are agreements, contracts, single provisions of agreements or contracts, concerted practices, explicit and tacit agreements between undertakings, as well as decisions and other documents of undertakings the object or effect of which is to prevent, restrict or distort competition on the relevant market and in particular those related to:

a) direct or indirect fixing of purchase and selling prices or any other trading conditions;

b) limit and control of production, markets, technical development or investment;

c) distribution of markets or sources of supply;

d) application of different conditions to equivalent transactions with other undertakings, thereby placing them at a competitive disadvantage;

e) conclusion of agreements that force the other party to accept additional obligations which by their nature according to commercial practice have no connection with the subject matter of such agreements (Art. 4).

All the agreements described above are prohibited and void. It means that all the effects that are achieved by concluding this kind of agreements are neutralized. It is the reason why these agreements are „concluded" in an informal way though with real effects, as if the agreement had been concluded in the written form.

Let us also review the criminal-law aspect of companies' activities. The Criminal Code of B&H defines that a legal person, among other things, stands for „all forms of co-operating enterprises" (Art. 1, Meaning of Terms), while according to the Criminal Code of the FB&H (Art. 2, Meaning of Terms) „a business enterprise, as referred to in this Code, means corporation, company, firm, partnership and any other organizational form registered for performing economic activities." Our criminal legislation also introduced sanctions for legal persons, which primarily refer to business enterprises. If we observe legislative solutions in the region and in our country, we can see that there are two different approaches in B&H. Almost all the countries in the region regulated the criminal liability of legal persons by means of separate laws. B&H is an exception, since it regulated this issue in separate chapters of criminal legislation. Thus, in B&H, there are four levels of the regulation of this issue. The first one is the level of B&H as a state; thus, in the Criminal Code of B&H there is Chapter XIV entitled Liability of Legal Persons for Criminal Offences, including Articles 122-144, which regulate this particular form of liability. In the FB&H, these issues are regulated in the Criminal Code of FB&H, Chapter XIV, Liability of Legal Persons for Criminal Offences, Articles 126-148. In the same way, in Chapter XIV with the same heading, Liability of Legal Persons for Criminal Offences, Articles 125-146, this form of liability is regulated in the RS. Absolutely identical solution can be found in the Brčko District, in the Criminal Code of the BD B&H, Chapter XIV, Liability of Legal Persons for Criminal Offences, Articles 124-148, which deals with this form of liability in the same way as in the previous cases. All the listed solutions have the identical content.

For a criminal offence perpetrated in the name of, for account of or for the benefit of the legal person, the legal person shall be liable:

a) when the purpose of the criminal offence is arising from the conclusion, order or permission of its managerial or supervisory bodies;
b) or when its managerial or supervisory bodies have influenced the perpetrator or enabled him to perpetrate the criminal offence;
c) or when a legal person disposes of illegally obtained property or uses objects acquired in the criminal offence;
d) or when its managerial or supervisory bodies failed to carry out due supervision over the legality of work of the employees.

We can see that the issue of companies' liability is related to the activity of its authorities (supervisory board and company management) and that the company is liable as a consequence of this activity. A separate aspect of liability would occur in the activity of a group of companies within the Economic Unity Theory (EUT) of several companies associated based on capital, contract or both capital and contract.

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Sažetak

Grupe društava u pravnom i ekonomskom pogledu egzistiraju još s početka XX-og vijeka. Vremenom njihov se koncept upotpunjavao, kako legislativno, tako i u korporativnoj praksi. Pitanje osnivanja i upravljanja grupama društava uređeno je korporativnim zakonodavstvom. Posebno se uređuje pojam vladajućeg i zavisnog društva, društva sa uzajamnim učešćem, holdinga, koncerna, poslovnih udruženja i drugih oblika povezivanja društava. U pogledu pravnog određenja to su povezana društva koja čine dva ili više društava koja se međusobno povezuju i to: učešćem u osnovnom kapitalu ili udjelima (društva povezana kapitalom); putem ugovora (društva povezana ugovorom); putem kapitala i putem ugovora (mješovito povezana društva). Ova povezana društva obuhvataju jedno vladajuće i jedno ili više zavisnih društava i ista mogu biti povezana kapitalom, ugovorom ili pak na oba načina. Pored opšteg koncepta povezanih društava autor želi da ukaže i na odgovornost kod zajedničkog djelovanja kao grupe društava. Posebnu pažnju zaslužuje pravni tretman i obaveze koje proističu iz Međunarodnih računovodstvenih standarda i sa njima povezanim obavezujućim izvještajima.

Ključne riječi: Grupe društava, Povezano društvo, Vladajuće društvo, Odgovornost, Međunarodni računovodstveni standardi