

The Regime of Related Party Transactions from the Perspective of Intra-group Transactions A Comparative Approach*

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Abstract

The article analyses the provisions of Directive 2017/828 concerning the regulation of transactions with related parties. It explores their impact on companies operating within capital groups and the manner in which they have been implemented into the Polish, German and Italian legal systems. The purpose of this article is to prove that the EU legislator, in an effort to protect the interests of companies and shareholders against the risk of malpractice, has introduced rules that may actually hinder the operational activities of corporate groups. The article also shows that provisions of Directive 2017/828, and the subsequent provisions implemented into the national legal systems of the selected Member States, only partially take into account the specific way in which companies that are part of a group operate. This may lead to problems, particularly with regard to companies governed by Polish law.

I. Introduction

One of the reasons for requiring Member States to introduce rules on the control of transactions with related parties into their legal systems is the risk that such transactions may cause harm to companies and their shareholders. These transactions may allow a related party to misappropriate some form of value belonging to the company. Therefore, according to EU legislators, it is crucial to provide appropriate protective mechanisms to safeguard the interests of companies and shareholders (Recital 42 of Directive 2017/828).¹

However, the protection of these interests cannot be absolute. The introduction of overly strict rules regarding such transactions can lead to the paralysis of companies' activities, especially companies operating within groups of companies. In particular, with regard to companies operating within groups, it is noted that transactions with other group companies usually determine the purpose of the

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¹ Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement [2017] OJ L 132/1 ('Directive 2017/828').

group's existence.²

However, an analysis of Directive 2017/828 leads to the thesis that the provisions of this legal act only marginally take into account the needs of companies operating within groups of companies from the perspective of the regime of transactions with related parties. For this reason, the provisions adopted in this legal act may lead to significant difficulties for the operation of such companies. This applies in particular to the provisions of this regime implemented into the Polish legal system. Nevertheless, for a comprehensive analysis, it is necessary to compare the provisions implementing this regime in other Member States. Due to the similar capital structure, the provisions adopted in the German and Italian legal systems were adopted as representative for comparison. Furthermore, due to the complexity of the issues related to the regime of transactions with related parties, the considerations covered by the work are limited to selected issues related to the application of this regime from the perspective of companies forming a capital group; in particular, the definition of a related party and the materiality threshold. The main research methods used in the study to verify the above thesis are the comparative and dogmatic methods.

II. Definition of Related Party

The provisions of Directive 2017/828 do not introduce an autonomous definition of the concept of a related party. They refer to the definition of this term as regulated in the international accounting standards adopted in accordance with Regulation (EC) 1606/2002.³ As a result, the subjective scope of this term is very broad.⁴

² A. Opalski, 'Transakcje między podmiotami powiązаными w prawie spółek' *Przegląd Prawa Handlowego*, 11, 4 (2012); P. Moskała, 'Zatwierdzanie transakcji wewnątrzgrupowych w zmienionej dyrektywie 2007/36/WE - perspektywy implementacji' *Przegląd Prawa Handlowego*, 1, 26 (2018).

³ Commission Regulation (EC) 1126/2008 of 3 November 2008 adopting certain international accounting standards in accordance with Regulation (EC) 1606/2002 of the European Parliament and of the Council [2008] OJ L 320/1 ('IAS').

⁴ According to IAS 24, the following entities are considered related parties: (a) a person or a close member of that person's family is related to a reporting entity if that person: (i) has control or joint control of the reporting entity, (ii) has significant influence over the reporting entity; or (iii) is a member of the key management personnel of the reporting entity or of a parent of the reporting entity and (b) an entity is related to a reporting entity if any of the following conditions applies: (i) the entity and the reporting entity are members of the same group (which means that each parent, subsidiary and fellow subsidiary is related to the others), (ii) one entity is an associate or joint venture of the other entity (or an associate or joint venture of a member of a group of which the other entity is a member), (iii) both entities are joint ventures of the same third party, (iv) One entity is a joint venture of a third party and the other entity is an associate of the third party, (v) The entity is a post-employment benefit plan for the benefit of employees of either the reporting entity or an entity related to the reporting entity. If the reporting entity is itself such a plan, the sponsoring employers are also related to the reporting entity, (vi) the entity is controlled or jointly controlled by a person identified in (a), (vii) a person identified in (a)(i) has significant influence over the entity or is a member of the key management personnel of the entity (or of a parent of the entity) and (viii) the entity, or any member of a group of which it is a part, provides key management personnel services to the reporting entity or to the

This reference is used by legislators in all the examined legal systems, ie the Polish legislator (Art 90h(1)(2) of the Act on Public Offering),⁵ the German legislator (Section 111a(1) AktG)⁶ and the Italian legislator (Art 3(1)(a) of Regulation 17221).⁷

The analysed legal orders repeat the definition of related party resulting from the provisions of Directive 2017/828. However, it should be noted that, although it does not directly follow from the legislation of these countries, companies may extend this scope in their bylaws and decide that the definition of related parties should also include entities other than those indicated in the international reporting standards. Nevertheless, companies are not permitted to limit the scope of related parties in their bylaws.

Furthermore, in light of the provisions of the International Accounting Standards, the broad definition of a related party means that the scope of application of the related party transactions regime covers a wide range of entities. In practice, however, this definition of a related party raises doubts as to its interpretation, which means that companies subject to the related party regime sometimes have problems quantifying whether a given entity qualifies as a related party under the considered definition.

III. Definition of Materiality Threshold

The rules for determining the materiality threshold are of fundamental importance from the point of view of the regime of transactions with related parties – if a transaction exceeds the materiality threshold, the transaction with a related party will be subject to the obligations of this regime. At the same time, the EU legislator, in light of Art 9c(1) of Directive 2017/828, has granted Member States power to determine the materiality threshold for their own national legal systems. The materiality threshold under Directive 2017/828 may be either quantitative or qualitative.

The materiality threshold under Polish law is five per cent of the value of assets (within the meaning of the Accounting Act)⁸ determined on the basis of the company's most recently approved financial statements (Art 90h(1)(1) of the Act on Public Offering). Only the value of assets resulting from separate (non-consolidated) financial statements is relevant for this determination. The fact that a listed company

parent of the reporting entity.

⁵ The Act on Public Offering and the Conditions Governing the Introduction of Financial Instruments to the Organised Trading System and Public Companies (*Ustawa o ofercie publicznej i warunkach wprowadzania instrumentów finansowych do zorganizowanego systemu obrotu oraz o spółkach publicznych*, of 29 July 2005, initially promulgated in Journal of Laws 2005, no 184, item 1539) ('Act on Public Offering').

⁶ German Stock Corporation Act (*Aktiengesetz*, Act of 6 September 1965, *Federal Law Gazette* I, 1089) ('AktG').

⁷ Consob regulations containing provisions relating to transactions with related parties of 12 March 2010 ('Regulation 17221').

⁸ Accounting Act (*Ustawa o rachunkowości* of 29 September 1994, initially promulgated in Journal of Laws 1994, no 121, item 591).

forms a capital group is legally irrelevant when determining the value of assets. In other words, it does not authorise companies to determine the value of assets for the purpose of establishing the materiality threshold based on data from the consolidated financial statements. A provision in the articles of association changing the basis for calculating the materiality threshold based on the value of assets as reported in the consolidated financial statements would be invalid (Art 2 of the Commercial Companies Code⁹ in conjunction with Art 108 of the Polish Civil Code).¹⁰

A material transaction subject to the related party transaction regime within the meaning of the German Stock Corporation Act is a transaction (within the meaning of Section 111a(1) AktG) whose market value exceeds one point five per cent of the book value of the company's fixed and current assets disclosed in the last approved individual annual financial statements (Section 111b(1) AktG). If the parent company is a listed company and is obliged to prepare consolidated financial statements, the value of the fixed and current assets from the last consolidated financial statements will be used as the basis for calculating the value of the assets for the purpose of determining of materiality threshold.

Considerations regarding Italian law are limited to issues related to transactions classified as material (*operazioni di maggiore rilevanza*).¹¹ Material transactions are those whose value exceeds the five per cent¹² threshold calculated on the basis of one of three criteria: the value relevance ratio (*indice di rilevanza del controvalore*), the asset relevance ratio (*indice di rilevanza dell'attivo*) and the liability relevance ratio (*indice di rilevanza delle passività*).¹³ The economic figures should be determined on the basis of the non-consolidated (separate) financial statement. However, where a consolidated financial statement is prepared, the data from this consolidated financial statement should form the basis for determining the economic values to calculate the materiality threshold based on the applied criterion.

While all of the above provisions governing the materiality threshold comply with Art 9c of Directive 2017/828 (which permits the introduction of quantitative and qualitative thresholds and does not specify an exact materiality threshold), certain differences in the rules should be noted. Firstly, the German and Italian provisions allow data from consolidated financial statements to be taken into account, whereas the Polish provisions do not. Consequently, companies covered by the related party transaction regime must always take the value of assets from

⁹ Commercial Companies Code (*Kodeks spółek handlowych* of 15 September 2000, initially promulgated in Journal of Laws 2000, no 94, item 1037) (the 'CCC' or the 'Commercial Companies Code').

¹⁰ Civil Code (*Kodeks cywilny* of 23 April 1964, initially promulgated in Journal of Laws 1964, no 16, item 93).

¹¹ Different obligations still apply to less material transactions (*operazioni di minore rilevanza*) and immaterial transactions (*operazioni di importo esiguo*).

¹² This threshold, in the case of transactions referred to in point 1.2 of Regulation 17221, is two point five per cent.

¹³ F. Bava and M. Gromis di Trana, 'Disclosure on Related Party Transactions: Evidence from Italian Listed Companies' 6(2) *Accounting, Economics, and Law*, 129 (2016).

non-consolidated financial statements into account when calculating the materiality threshold. The fact that they form a capital group does not affect the ability to use data from consolidated financial statements. This approach therefore fails to reflect the realities of companies forming or emerging as part of a group.

Furthermore, among the differences in the analysed legal orders, the relatively high materiality threshold adopted in Polish and Italian law compared to German law should be noted. Consequently, companies subject to the former two legal orders enter into material transactions falling under the related party transaction regime relatively less frequently than those subject to German law.

IV. Extension of the Scope of the Related Party Regime to Transactions Made by Subsidiaries of a Listed Company

Art 9c(7) of Directive 2017/828 requires Member States to extend the regime for transactions with related parties to transactions between a company's related party and its subsidiary. At the same time, Directive 2017/828 does not offer a definition of a subsidiary. The extension of the related party transactions regime to transactions entered into by a subsidiary and a related party of a listed company is justified by the need to protect the interests of minority shareholders and other stakeholders from being circumvented by transferring valuable assets to subsidiaries (which may fall within an exception to the regime's provisions) and subsequently transferring those assets to related parties outside the regime.

When implementing the above provision, the Polish legislator decided that the regime of transactions with related parties applies to material transactions concluded by a related party of a company with a subsidiary of a listed company being subject to the related party transactions regime (Art 90k of the Act on Public Offering). Due to the lack of a legal definition of a subsidiary of a listed company in the directive, it is indicated in the literature that this concept should be interpreted using the definition of a subsidiary regulated in the provisions of the Act on Public Offering (Art 4 point 15 of the Act on Public Offering).¹⁴ According to this provision, a subsidiary is defined as an entity in relation to which another entity is the parent entity, whereby all subsidiaries of that subsidiary are also considered subsidiaries of that parent entity.

The basis for determining the materiality threshold of a transaction concluded by a related party of a listed company with that listed company's subsidiary is based on the value of the subsidiary's assets. In practice, setting the materiality threshold according to the value of a subsidiary's assets means that it is usually the subsidiaries of listed companies (rather than the listed companies themselves) that enter into transactions with related parties meeting the threshold requiring the listed company

¹⁴ P. Moskała, in M. Wierzbowski et al eds, *Prawo rynku kapitałowego. Tom II. Komentarz* (Warsaw: C.H. Beck, 2023), 424.

to publish a notification containing information about the transaction.

The rules on related party transactions under the German Stock Corporation Act apply to transactions between a subsidiary of a listed company and related parties of that listed company if the listed company is the parent company of the subsidiary within the meaning of the International Accounting Standards (Section 111c(4) AktG). The determination of this relationship, as well as the determination of the status of a related party, is therefore based on the provisions of international accounting standards. As with transactions entered into by listed companies subject to the provisions governing related party transactions, this regime only applies to transactions entered into by subsidiaries where the value exceeds one point five per cent of the fixed and current assets of the listed company as determined on the basis of the annual separate or consolidated financial statements.

In Italy, the regime of transactions with related parties, which is the subject of the provisions of Regulation 17221, applies to transactions with related parties concluded directly or through subsidiaries (Art 2391-*bis*(2) of the Italian Civil Code)¹⁵ in connection with Art 2 of Regulation 17221). The Italian legislator recognises transactions concluded by subsidiaries as an extension of transactions concluded by listed companies, therefore such transactions are subject to the rules for concluding them as if they were concluded by a listed company.¹⁶ A key document in the field of related party transactions through subsidiaries is Consob Communication no DEM/10078683 of 24 September 2010.¹⁷ Consob emphasises that the mere fact of a subsidiary entering into a related party transaction does not mean that all such transactions are subject to approval obligations (without prejudice, however, to disclosure obligations relating to the conclusion of such transactions). The degree to which listed company is involved in the subsidiary's decision-making process is of key importance ie listed company's involvement becomes relevant only when it effectively examines or approves the transaction carried out by the subsidiary. Therefore, listed companies are not required to fulfil approval obligation to all transactions with related parties undertaken by subsidiaries. Rather, each listed company shall adjust this obligation depending on the degree of influence it exerts on the subsidiary. In light of the above considerations, it should be noted that, although Directive 2017/828 obliges Member States to extend the regime of related party transactions also to those entered into by subsidiaries, its implementation varies from jurisdiction to jurisdiction. In this regard, Poland has adopted one of the more restrictive approaches, limiting the scope of entities covered and basing the materiality threshold of the transaction on the value of the assets of the subsidiary of the listed company rather than the listed company itself. Such

¹⁵ Regio decreto 16 March 1942 no 262.

¹⁶ F. Sicchiero, 'La disciplina delle operazioni con parti correlate: analisi, problematiche e possibili soluzioni' *Contratto e impresa*, 346 (2021); T. Florstedt, 'Harmonising Shareholder Protection Laws for Related Party Transactions - Art. 9 c of the Shareholder Rights Directive as the Nucleus of European Group Law' 19(5) *European Company and Financial Law Review*, 721 (2022).

¹⁷ Consob Communication no DEM/10078683 of 24 September 2010.

regulations mean that transactions between subsidiaries of listed companies and their related parties are be subject to the related party transaction rules more frequently than transactions between a listed company and its related parties.

V. Scope of Exceptions to the Related Party Transaction Regime in Relation to Intra-group Transactions

The EU legislator does not assume that the regime for related party transactions applies to all material related party transactions. The rationale for group exemptions from related party transactions rules is related to the same opportunity, to ensure a proper balance between minority protection rules and the proper functioning of the group.¹⁸

One of the exceptions provided for in Art 9c(5) of Directive 2017/828 is generally implicit¹⁹ (though Member States may decide to exclude the application of this exception),²⁰ while the exceptions provided for in Art 9c(6) of Directive 2017/828 are optional (facultative). Member States are entitled, but not obliged, to establish them. From the perspective of intra-group transactions, the most relevant exception is provided for in Art 9c(6)(a) of Directive 2017/828.²¹ However, this is an optional exception and its introduction depends on the decision of the Member States. Theoretically, it is possible to apply an exception specified in Art 9c(5) to intra-group transactions, but in the literature certain limitations on the application of this exception to those transactions have been presented.²²

In Polish law, the exception to transactions concluded by companies from the capital group only covers transactions concluded by a listed company with a company that is its subsidiary, if the listed company is the sole shareholder or stakeholder of the company that is its subsidiary with which it is entering into a transaction (Art 90j(1)(2) of the Act on Public Offering). This exception therefore has a very narrow scope of application and only applies to transactions concluded by a listed company with a wholly-owned direct subsidiary of such a listed company

¹⁸ M. Bianchi and M. Milič, 'Transparency and Approval of Related Party Transactions', in H.S. Birkmose and K. Sergakis eds, *The Shareholder Rights Directive II: A Commentary* (Cheltenham: Elgar Commentaries in Corporate and Company Law, 2021), 314.

¹⁹ This exception applies to transactions concluded in the course of ordinary business and concluded under normal market terms.

²⁰ This exception has been established in Polish law (Art 90j(1) of the Act on Public Offering), German law (Section 111a(2) AktG) and Italian law (Art 13(3c) of the Regulation 17221).

²¹ Member States may exempt the application of or allow companies to exempt the application of the requirements of the regime for transactions with related parties in respect of transactions entered into by a company with its subsidiaries, provided that they are wholly owned by that company or that no other related party of the company has a stake in that subsidiary or that the provisions of national law provide, within the framework of such transactions, adequate protection of the interests of the company, the subsidiary and their shareholders who are not related parties, including minority shareholders.

²² See P. Moskała, *Prawne instrumenty zarządzania zgrupowaniem spółek kapitałowych* (Warsaw, C.H. Beck, 2019), 196-199.

(ie this exception may apply to a single-member limited liability company, a joint-stock company, a simple joint-stock company and, to a limited extent, to European companies in which listed companies held 100% shares of their share capital). In addition, it should be noted that the scope of this exception only covers transactions with companies within the meaning of the Commercial Companies Code.²³ This exception does not apply, for example, to material transactions with foundations and associations.

Under German law, this exception covers transactions involving a listed company and a subsidiary, as defined by international accounting standards (Section 111a (3)(1) AktG) and includes three variants.

The first variant excludes the application of the obligations of the regime of transactions with related parties to transactions with subsidiaries in which the company covered by the regime in question holds, directly or indirectly, 100% of the shares. Therefore, unlike the Polish legislator, the German legislator has extended the scope of this exception to include transactions between a listed company and wholly-owned subsidiaries indirectly controlled by that listed company.

The second variant of the exception covers transactions concluded by a listed company with its subsidiary, in the event that no other person affiliated with the listed company participates in this subsidiary. This exception is justified by the theoretical absence of conflicts of interest and the risk of tunnelling, as the transaction does not involve a related party that could theoretically benefit from the non-equitable outflow of assets from the listed company. The application of this exception does not require a listed company to hold, directly or indirectly, 100 per cent of the shares in a subsidiary.²⁴

The third variant covers transactions entered into by a listed company with subsidiaries that are based in an EU Member State and whose shares are admitted to trading on a regulated market located or operated in a Member State.²⁵

The provisions of Regulation 17221 allow companies to exclude transactions with related parties from the regime, provided that the company subject to this regime exerts significant influence over the subsidiary and no other related party of the listed company holds shares in a subsidiary of that company (Art 14(2) of Regulation 17221).

Similar to German law, the scope of this exception is relatively broad. Although it does not follow from the wording of this provision, according to functional interpretation, it should be pointed out that it may also apply to transactions with subsidiaries in which the company covered by the regime in question holds 100% of shares directly or indirectly (in the case of such transactions, the condition set

²³ See P. Moskała, n 14 above, 419-421.

²⁴ H.C. Grigoleit, 'Commentary to § 111a of AktG', in Id ed, *Aktiengesetz. Kommentar* (München: C.H. Beck, 2020), 1235-1246.

²⁵ I. Romashchenko, 'The Ukrainian Regulatory Approach for Related Party Transactions and the SRD II: A Two-Way Street of Learning' 22(1) *European Company and Financial Law Review*, 75 (2025).

out in Art 14(2) of Regulation 17221 is met – no related party holds shares in such a company).

It should also be noted that the provisions governing operation of groups of companies (Art 2497 - 2497-septies of the Italian Civil Code) are related to the provisions governing transactions with related parties. Although these regimes apply concurrently (Art 2(2) of Regulation 17221), the different philosophies underlying the two sets of rules make their combined application challenging since they pursue other objectives.²⁶ In the context of the exceptions to the related parties regime applicable to intra-group transactions under the legal frameworks of Poland, Germany and Italy, it is important to highlight a significant disparity in the scope of these exceptions. The Polish legislator has adopted a particularly narrow approach, introducing a level of restrictiveness that may be seen as disproportionate when compared to the more flexible regulations in the German and Italian legal systems. Specifically, Polish law confines the application of the exception exclusively to situations where there is a direct control relationship between the parent company and the subsidiary involved in the transaction. This strict interpretation excludes a wide array of intra-group transactions that could otherwise be eligible for exemption under broader interpretations, such as those found in German and Italian jurisdictions. As a result, the Polish approach considerably narrows the potential for corporate groups to benefit from simplified compliance mechanisms in related party transactions regime, placing them at a competitive disadvantage in comparison to companies subject to related party transactions regime under German or Italian law.

VI. The Issue of the Interest of Groups of Companies in Light of the Related Party Transactions Regime

In the literature, the accepted model of exceptions to the obligations of the regime of transactions with related parties under the provisions of the Act on Public Offering is mainly criticised for excluding the concept of the interest of groups of companies from the mechanisms of control of such transactions.²⁷

The literature points out that the concept of the interest of a group of companies has developed most strongly in French and Italian law in the form of the *Rozenblum* doctrine and the theory of compensatory benefits, respectively. In the most general terms, they allow for actions that have negative consequences for an individual company belonging to a holding company, if these activities are in the overriding interest of the group as a whole, and where the long term negative impact on the

²⁶ See more: M. Manna and R. Federico, 'La "ricezione acustica" della direttiva shareholder rights II in Italia. Spunti di riflessione' 1 *LUISS Law Review*, 161-162, (2022); P. Valensise, 'Conflitti d'interessi e parti correlate', in M. Cera and G. Presti eds, *Il Testo Unico Finanziario* (Bologna-Roma: Zanichelli, 2020), 1975.

²⁷ P. Moskała, *Prawne instrumenty* n 22 above, 198-199.

company is balanced by other benefits it obtains from participating in the group.²⁸ Furthermore, it is pointed out that corporate groups are not harmful to economic entities *per se* and – as a rule – it is not justified to emphasise the allegedly inevitable conflict between the interests of the holding company and the interests of its subsidiaries.²⁹ The pursuit of the interests of corporate groups allows for the economic nature and purpose of capital groups to be reflected.³⁰

It seems that this concept has only partially been taken into account in the provisions of Directive 2017/828, and its emanation is an optional exception to the regime of transactions with entities provided for in Art 9c(6) of Directive 2017/828. While the exception, which has been incorporated into the Italian and German legal systems, has a relatively broad subjective scope of application, the scope of this exception under Polish law means that the interest of groups of companies in the reality of the provisions of the Act on Public Offering implementing the regime of transactions with related parties has been taken into account only in an extremely rudimentary form. It seems that the Polish implementation is not as flexible as it should be when it comes to dealing with complex group structures.

VII. Conclusions

The paper argues that the related party transaction regime established under Directive 2017/828 could lead to difficulties regarding intra-group transactions. This is particularly likely if the provisions are not adapted appropriately to the national legal systems of the particular Member State, with due consideration given to the needs of companies operating within corporate groups.

An example of such legislation is the Polish legal system, where the Polish legislator has generally based his work on the minimum requirements of Directive 2017/828, and often only on the literal wording of Directive 2017/828.

It is difficult to understand why the scope of the exception in Polish law, covering transactions entered into by a company with its subsidiaries, is limited to transactions with direct subsidiaries. The provisions of Directive 2017/828 allow transactions between listed companies and indirectly controlled subsidiaries to be excluded from the obligations of the related party regime.³¹ However, the relatively high materiality threshold adopted by the Polish legislator results in the

²⁸ A. Opalski, 'Problem dopuszczalności zawierania umów koncernowych w prawie polskim', in W.J. Katner ed, *Prawo zobowiązań - umowy nienazwane. System Prawa Prywatnego. Tom 9* (Warsaw: C.H. Beck 2023), 1342 and the literature referred therein.

²⁹ J.M. Embid Irujo, 'Trends and Realities in the Law of Corporate Groups' *European Business Organization Law Review*, 6, 87 (2015)

³⁰ P. Błaszczuk, *Ochrona wspólnika mniejszościowego spółki zależnej* (Warsaw: C.H. Beck, 2013), 117.

³¹ J. Lieder and M. Bialluch, 'Commentary to Article 9(c): Transparency and Approval of Related Party Transactions', in J. Lieder and P. Kindler eds, *European Company Law. Article-by-Article Commentary* (Munich/Freiburg: Hart Publishing, 2021), 956.

regime of transactions with related parties being applied relatively infrequently compared to other legislations. To some extent (and certainly not intentionally), this compensates for the lack of consideration of the interests of companies operating within capital groups in the Act on Public Offering, which regulate the regime of transactions with related parties.