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Liability in the atmosphere of groups of companies

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Abstract

Groups of companies are a complex corporate structure, whose regulation can be problematic, especially when it comes to liability. Indeed, liability within corporate groups draws forth a series of issues principally due to the principles of separate corporate personality and limited liability. In the context of limited liability, which is based on the notion of separate legal personality, the main issue waxes the protection of the creditors, in particular the creditors of the subsidiaries. One can find three regulatory templates for handling corporate groups and their liability: policing via general company and/or civil law (such as the English model); policing via special group legislation (such as the German model); and policing via branches of law such as insolvency law, antitrust law, and contract law, among others (which is the case in numerous jurisdictions, either coupled with the first or the second model). Lifting the corporate veil has come as an answer to corporate separateness, by permitting to ignore the shareholders' limited liability and hold them personally liable for the debts of their companies in specific circumstances. However, one can hardly find cases in which the corporate veil has been successfully lifted, due to many factors. Other important questions that are posed in the scope of corporate groups liability are the parent company's liability for the payment of its daughter companies' debts when insolvency strikes and other respects, besides the matter of group liability. Furthermore, liability is as well a key player in terms of tort law, and corporate social responsibility has therefore found a place in the sun in the present climate.

Keywords: Corporate Groups, Liability, Parent Company, Salomon principle, Limited Liability, Corporate Governance, Shareholders, Corporate Management, Creditor Protection, Conflict of Interest, Lifting the corporate veil, Parent-subsidiary relations, Principal-agent problem, Single Economic Unit, Corporate Social Responsibility.

Resumen

Los grupos empresariales son una estructura corporativa compleja, cuya regulación puede ser problemática, especialmente cuando se trata de responsabilidad jurídica. De hecho, la responsabilidad jurídica en grupos empresariales plantea una serie de cuestiones debido principalmente a los principios de personalidad jurídica separada y de responsabilidad jurídica limitada. En el contexto de la responsabilidad jurídica limitada, que se basa en la visión de personalidad jurídica separada, el problema principal es la protección de los acreedores, en particular los acreedores de las filiales. Se pueden encontrar tres plantillas regulatorias para el manejo de grupos empresariales y su responsabilidad jurídica: regulación por derecho general empresarial y / o civil (como el modelo Inglés); regulación por derecho especial de grupos (como el modelo Alemán); y la regulación por campos del derecho como el derecho concursal, el derecho de la competencia, y el derecho contractual, entre otros (como es el caso en numerosas jurisdicciones, ya sea junto con el primer o el segundo modelo). El levantamiento del velo societario se ha presentado como una respuesta a la personalidad jurídica separada, al permitir ignorar la responsabilidad jurídica limitada de los accionistas y responsabilizarlos personalmente por las deudas de sus empresas en circunstancias específicas. Sin embargo, es difícil encontrar casos en los que el velo societario se haya levantado con éxito, debido a muchos factores. Otras cuestiones importantes que se plantean en el ámbito de la responsabilidad jurídica de los grupos empresariales son la responsabilidad jurídica de la sociedad gestora frente a sus filiales en muchos aspectos, además de la cuestión de la responsabilidad jurídica del grupo. Además, la responsabilidad jurídica es también un actor clave en términos de derecho delictivo y, por lo tanto, la responsabilidad social corporativa ha adquirido gran relevancia en el ámbito actual.

Palabras clave: Grupos empresariales, Responsabilidad jurídica, Sociedad gestora, El principio de Salomon, Responsabilidad jurídica limitada, Gobernanza societaria, Accionistas, Gestión corporativa, Proteccion de acreedores, Conflicto de interés, Levantamiento del velo societario, Relaciones entre la sociedad gestora y su filial, Problema del agente-principal, Entidad económica única, Responsabilidad social corporativa.

List of abbreviations

A.C.: Law Reports, Appeal Cases 1875 - 90; 1891 -

Aff.: affaire

AktG: Aktiengesetz (German Stock Corporation Act)

A.L.R.: Australian Law Reports

All E.R.: All England Law Reports

Art.: Article

Ass. Plén.: Assemblée plénière

BCC: British Company Cases

B.C.L.C.: Butterworths Company Law Cases

BRDA: Bulletin rapide de droit des affaires, Francis Lefebvre

Bull. crim: Bulletin des arrêts de la Cour de cassation, chambre criminelle

CA: cour d'appel

Cass. Com: Cour de cassation, Chambre commerciale

Cass. crim.: Cour de cassation, Chambre criminelle

Cf.: confer

ch.: Chapter

Chron.: Chronique

C.M.L.R.: Common Market Law Reports

Comm.: commentaire

D.: Recueil Dalloz

Del.: Delaware

E.C.R.: European Court Reports

Ed(s). : Edition(s)

e.g. : For example

Et al. : et alia (and others)

Et seq. : et sequentia (and the following)

Etc. : et cætera

EWCA: Court of Appeal

EWHC: England and Wales High Court

Ex. : exemple

ff: And the Following Pages

Ibid.: ibidem

i. e.: That is

JCP E: Semaine Juridique, édition Entreprise et affaires

JCP G: Semaine Juridique, édition Générale

Joly: Bulletin Joly Sociétés

LGDJ: Librairie générale de droit et de jurisprudence

Litec: Librairie technique

Lloyd's Rep.: Lloyd's Law Reports

N°: Number

n. : Note

N.S.W.L.R.: New South Wales Law Reports 1970 -

N.Y.: New York

Obs : Observation

OECD: Organisation for Economic Co-operation and Development

p.: Page

Para.: paragraph

RJDA: Revue juridique droit des affaires

Rev.: Revue

s.: section

SCI: société civile immobilière

Supp.: supplement

Tex. Civ. App.: Texas Civil Appeals Reports

TGI: Tribunal de grande instance

TPI: Tribunal de première instance

UK: United Kingdom

US: United States

Vol.: volume

W.L.R.: Washington Law Reporter (D.C.)

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INTRODUCTION

"Réalité économique fuyante, fluctuante, diversifiée, les groupes de sociétés ressemblent à des hydres dont le droit ne semble pouvoir saisir qu'une tête à la fois".[1]

The notion of group of companies is miscellaneous, and may thus not be readily appreciated by the legislation.[2] A group of companies may be generally portrayed as at least two companies related through control or majority shareholding.[3] This picture could encompass the broad diversity of group forms. Companies may definitely be related via equity shares or via agreements. Moreover, groups may be organized vertically (hierarchically) with classes of holding companies and controlled enterprises, or they may be organized horizontally, with chains of sister group companies acting on par and controlled, for instance, through interrelated boards and routine assemblies of the directorates.[4] On top of variances in legal form, group forms may differ as regards degrees of economic dependence. They may fluctuate from multi-industry companies and other groups with considerable diversification in which the related companies act

[1] Translation in English of the original French phrase: "Groups of companies are an elusive, fluctuating and diverse economic reality. They can be compared to a Hydra of whom the law does not seem to be able to grasp more than one head at a time". See, Moreau, M. A. (1992). La mobilité des salariés dans les groupes de dimension communautaire: quelques réflexions à partir d'une analyse comparée. Travail et Emploi, 53(3), 56-69, (p. 58). Available at: https://travail-emploi.gouv.fr/publications/Revue_Travail-et-Emploi/pdf/53_3130.pdf. [Accessed: December 12, 2022].

[2] Fasquelle, D. (2006). Les faillites des groupes de sociétés dans l'Union européenne: la difficile conciliation entre approches économique et juridique. Bulletin Joly Sociétés, 2, 151.

[3] United Nations Commission on International Trade Law. (2010). Legislative Guide on Insolvency Law. Part three: Treatment of enterprise groups in insolvency, (Glossary, 4(a)). Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/leg-guide-insol-part3-ebook-e.pdf. [Accessed: December 12, 2022].

[4] United Nations Commission on International Trade Law. (2010). Legislative Guide on Insolvency Law. Part three: Treatment of enterprise groups in insolvency, (paras. 6-9). See also Muchlinski, P. T. (2007). Multinational Enterprises and the Law (2nd ed.). Oxford University Press, (ch. 2); Mevorach, I. (2009). Insolvency Within Multinational Enterprise Groups. Oxford University Press, (ch. 1).

in distinct markets and have particular own interests,[5] to amalgamated groups[6], which factually act as one company with intemingled liabilities and assets around the companies.
Among both clusters, the unitary group, united in respect of the affairs of the companies instead of their liabilities and assets, is a very familiar form of direction.[7] Such group companies act as separate entities, but the group in its entirety jointly carries out one business, or the business of the companies is considerably interrelated in such a way that certain companies rely on other group companies for basic operations (for instance, the presentation of judicial services). In such groups, the companies' commercial interests may be integrated or companies may be directed to achieve external group strategies, which may not necessarily suit perfectly the individual interests of every group company.[8] Despite that, there might be significant discrepancy in such structures as well. Hence, unity may derive either from harmonization of central policies or from active central control and intervention of a holding company in the daily operations of the daughter companies. Unity may be exhibited in statements to lenders and the market, or exclusively disclosed when observing, for instance, how key operations are conducted or the means by which the affairs are funded. Unity may as well be apparent in the distinct possible legal forms, that is not solely the classic hierarchical form in which a holding company controls its daughter company, but for instance as well, in which the direction of members is harmonized throughout the companies' directorates and the "nerve centre" of the entire group is actually situated out of the companies as such.[9] Moreover, groups could be a melange of

[5] Posner, R. A. (1976). The Rights of Creditors of Affiliated Corporations. The University of Chicago Law Review, 43(3), 499-526, (p. 510).

[6] United Nations Commission on International Trade Law. (2010). Legislative Guide on Insolvency Law. Part three: Treatment of enterprise groups in insolvency, (paras. 10-16). See as well Mevorach, I. (2009). Insolvency Within Multinational Enterprise Groups. Oxford University Press, (ch. 5).

[7] See Blumberg, P. I., Strasser, K., Georgakopoulos, N., & Gouvin, E. J. (2005). Blumberg on Corporate Groups (2nd ed.). Aspen Publishers, (s. 6.02).

[8] Engrácia Antunes, J. (1994). 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 Publishers, (p. 116).

[9] Ibid.; Tricker, R. I. (1984). Corporate Governance: Practices, Procedures, and Powers in British Companies and Their Boards of Directors. Gower Publishing Company, (pp. 148-149); Muchlinski, P. T. (2007). Multinational Enterprises and the Law (2nd ed.). Oxford University Press, (ch. 2, pp. 67-70).

various corporate forms, for instance, a multi-industry company divided into a number of unitary subsidiaries acting in various markets.

Despite of the popularity of the group reality and the particular questions it poses, legal systems generally abstain from prescribing direct regulations that would tackle the specific problems emerging apropos of the group form.[10] Certainly, the variety of legal and organizational forms of groups creates difficulties for their policing, as answers that may be appropriate for one kind of group may not be suitable for the other kinds. Typically, the traditional standards of corporate law (limited liability and separate legal personality) may not be best suited to identify and approach all the consequences of the practices of groups.

One may then wonder if the group should be treated in its entirety, or if the presence of a group (and the interconnections between the group companies) should be disregarded and every company should be dealt with as a separate legal entity.[11] In this respect, the accepted ideas are based on entity law, which considers the separate company as the proper "player", honouring its separate legal personality and its shareholders' or related companies' limited liability. Conversely, legal principles based on enterprise law are considerate of the economic reality of the comprehensive corporate group, which counts the independent but affiliated companies which constitute it, and, as applicable, with corresponding rights and liabilities to its general economic operation, in other words, to the group in its entirety.[12] Hence, the latest group understanding attends to treat groups per se and, somewhat, to delineate the legal limits of the corporate structure in order that they fit economic reality.[13]

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[10] For instance, Companies Act 2006, (s. 679). Available at: https://www.legislation.gov.uk/ukpga/2006/46/section/679. [Accessed: December 12, 2022].

[11] Mevorach, I. (2013). The role of enterprise principles in shaping management duties at times of crisis. European Business Organization Law Review, 14(4), 471-496.

[12] Berle Jr., A. A. (1947). The Theory of Enterprise Entity. Columbia Law Review, 47(3), 343-358; Schmitthoff, C. M. (1978). The Wholly Owned and the Controlled Subsidiary. Sweet & Maxwell, (p. 218); Blumberg, P. I. (1990). The Corporate Entity in an Era of Multinational Corporations. Delaware Journal of Corporate Law, 15(2), 283-330, (p. 283). Available at: https://www.djcl.org/wp-content/uploads/2014/08/THE-CORPORATE-ENTITY-IN-AN-ERA-OF-MULTINATIONAL-CORPORATIONS.pdf. [Accessed: December 12, 2022].

[13] Blumberg, P. I. (1993). The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality. Oxford University Press, (p. 253).

Parent-daughter relations (one company holds all or the majority of shares in another company) and common ownership (the same shareholder holds majority shares in several companies) mould what is known as groups of companies or affiliated companies. Many branches of law, comprising, naturally, company law, but also bankruptcy law,[14] competition law,[15] revenue law,[16] rules of civil procedure,[17] and so on, face the difficulties posed by groups of companies. Within the EU, Portugal and Germany possess heretofore structured laws for groups of companies, that in both instances, still police solely fractionally the substantial scope relevant to the group reality. In the other Member States there are particular regulations, for instance, on group employment law or group insolvency law. Moreover, in numerous jurisdictions there is a considerable volume of judicial precedent regarding corporate groups.

Most of developed legal regimes have legislations fashioned to limit, in some cases, the liability of individuals. In the United Kingdom for instance, corporate law permits companies in the process of incorporation to select limited liability,[18] which would bind corporate affiliates, when a company is insolvent, to the payment of the price of unpaid shares, or to payments they have accepted to make (through guanrantees), and nothing else.[19] In the past, when business organization law was being developed, limited liability signified dealing with a corporation as a legal entity, but it progressively begun to make its own mark.[20]
Limited liability partisans have praised it enthusiastically, qualifying it as "the corporation's most precious characteristic" and ushering it in as the tool which has considerably served

[14] See for instance, In re Auto-Train Corp., 810 F.2d 270 (D.C. Cir. 1987); Fish v. East, 114 F.2d 177, 191 (10th Cir. 1940); 860 F.2d 515 (2nd Cir. 1988).

[15] See for instance, Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752 (1984).

[16] Internal Revenue Code 2018, (§ 1501 and § 1504(a)).

[17] See for instance, Alto Eldorado P'ship v. Amrep, 124 P.3d 585 (N.M. Ct. App. 2005).

[18] Companies Act 2006, (s. 3). Available at: https://www.legislation.gov.uk/ukpga/2006/46/section/3. [Accessed: December 12, 2022].

[19] See Insolvency Act 1986, (s. 74). Available at: https://www.legislation.gov.uk/ukpga/1986/45/section/74. [Accessed: December 12, 2022].

[20] Lawson, F. H. (1953). A Common Lawyer Looks at the Civil Law. Michigan Law Review, (p. 200).

corporate evolution, beyond every other legal novelty in corporate law.[21] Actually, the majority of corporations do select limited liability,[22] and in view of this, the blazoning that it is the backbone of corporations besides corporate separateness by a category of corporate law academics, waxes comprehensible.[23] It did not merely overcome, beyond belief, the scepticism originally manifested by the upper class, but it became as well backed by the commercial and politic milieus, and drove other states, discovering its commercial benefits, to take after. Notwithstanding the part taken by limited liability in business, it has generally been the topic of animated scholar discussions.[24]

As regards governance within the framework of corporate groups, it comes with several particular questions. Group governance essentially implicates the comparison of the group interests with the group entities' ones. Establishing an equilibrium among both interests is not necessarily straightforward, for instance, the European Commission, following great discussion, has manifested, in 2012, its will to make a beeline for the acknowledgement of the notion of "group interest" across the European Union.[25] The context of this proposal was the fact that it may not be obvious for the board of directors of both the daughter company,[26] and of the holding

[21] Cataldo, B. F. (1953). Limited Liability with One-Man Companies and Subsidiary Corporations. Law and Contemporary Problems, 18(4), 473-504, (pp. 473-474).

[22] See Companies Act 2006 Guidance, Incorporation and names. Available at: https://www.gov.uk/government/publications/incorporation-and-names/incorporation-and-names. [Accessed: December 12, 2022].

[23] See Kraakman, R., Armour, J., Davies, P., Enriques, L., Hansmann, H. B., Hertig, G., Hopt, K. J., Kanda, H., & Rock, E. (2009). The Anatomy of Corporate Law: A Comparative and Functional Approach (2nd ed.). Oxford University Press, (p. 5).

[24] See Imanalin, A. (2011). Rethinking limited liability. Cambridge Student Law Review, 7(1), 89-99.

[25] European Commission. (2012). Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies, (p. 15). Available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0740:FIN:EN:PDF. [Accessed: December 12, 2022].

[26] Engrácia Antunes, J., Baums, T., Clarke, B. J., Conac, P. H., Enriques, L., Hanak, A. I., Hansen, J. L., de Kluiver, H. J., Knapp, V., Lenoir, N., Linnainmaa, L., Soltysinski, S., & Wymeersch, E. (2011). Report of the Reflection Group on the Future of EU Company Law. European Commission, (p. 60). Available at: http://dx.doi.org/10.2139/ssrn.1851654. [Accessed: December 12, 2022].

company,[27] how the group interests should be compared with the single daughter companies' interests. A number of proposals have been submitted to the Commission on the recognition of corporate groups interest,[28] but some scholars assume that certain questions are already answered by the codes of corporate governance.[29]

In relation to public companies, they are in the majority affiliated to group, and whilst the majority of them are holding companies with a great number of daughter companies, there are also some illustrations of public daughter companies. Public companies are hence confronting the question of group governance, being either holding companies or daughter companies.

Against the background of the globalized world of business, the last decenniums have been marked by the geographic spread of corporate groups, mainly via the incorporation of daughter companies overseas or via foreign equity investments. These activities, that have been backed by a regulative environment incentivizing investment,[30] have prompted the propagation of transnational corporate groups.

Governance within multinational groups is paramount, merely for it represents a central issue for corporations in this ever-evolving atmosphere, that are ever more attracting the eyes of regulatory bodies, shareholders, the personnel and other corporate constituencies, public authority, and the press.[31]

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[27] The Informal Company Law Expert Group (ICLEG). (2016). Report on the Recognition of the Interest of the Group. European Commission, (p. 29). Available at: http://dx.doi.org/10.2139/ssrn.2888863. [Accessed: December 12, 2022].

[28] Ibid.; See as well, Forum Europaeum on Company Groups. (2015). Proposal to Facilitate the Management of Cross-Border company Groups in Europe. European Company and Financial Law Review, 299-306. https://ssrn.com/abstract=2886365. [Accessed: December 12, 2022]; and European Company Law Experts. (2017). A Proposal for the Reform of Group Law in Europe. European Business Organization Law Review, 18, 1-49. Available at: https://link.springer.com/article/10.1007/s40804-017-0066-2. [Accessed: December 12, 2022].

[29] Szabó, D. G., & Sørensen, K. E. (2018). Corporate Governance Codes and Groups of Companies: In Search of Best Practices for Group Governance. European Company and Financial Law Review, 15(4), 697-731.

[30] See Treaty on the Functioning of the European Union, (articles 47 and 49). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN. [Accessed: December 12, 2022].

[31] See Petit, P., & Chekroun, D. (2016). Governance of transnational groups: What are the stakes: What are the challenges. International Business Law Journal, 6, 617-652.

The formation of multinational groups is connected with policies of corporations that necessitate their direction to make decisions with important legal effects, by incorporating offshoots with no legal presence or daughter companies constituting legal entities (either under the control of the holding company or within a joint venture (JV)), or by purchasing existent corporations. Hence, a "group of companies" comprises the daughter companies controlled exclusively by the holding company altogether.

Governance alludes to the direction and control mechanism of the group. Trouble in group governance, as represented by the Volkswagen lawsuit, unveils the veiled difficulties. In this lawsuit, it was not the liability of the daughter companies that was pursued (although the latter were, actually, primarily liable for the acts perpetrated), but the liability of the direction. This illustrates how the liability of the holding company is increasingly becoming the target in the eyes of ethics and the press against the background of corporate groups. Therefore, the holding company must acquire full control of all the companies related to it and contemplate how governance can manifest in the group in its entirety, when the latter is marked especially and simultaneously by the organizational and territorial contrast between the companies that constitute it.

Rendering the holding company sensible of its liability in view of ethics and the press for each of the companies controlled by it runs counter to the lack of legal admission of the group per se. There is an actual dissonance among, for one thing, the admission of the group according to the legislation, and for another, the economic reality and the "vox populi".

Overall, such dissonance can be found in corporate law. The corporate group has no legal presence as it is bereft of a legal personality. Even if the principle of corporate separateness is continuously being challenged, legislations at large (such as French corporate law) are not keeping pace at all with corporate groups.

Nonetheless, French legislation does not dismiss groups, with their particular regime, especially as regards taxation for example.

Similarly, the concept of group governance is admitted where a daughter company affiliated to a corporate group discharges all or some of the personnel on financial grounds, whilst the other daughter companies in the very group are capable of staying solid. The personnel is generally

rightful in attributing liability to the holding company which did not preserve their positions, for instance by attempting to reassign them to the group.
Moreover, this dissonance among the absence of legal admission and the economic reality accommodating the group handicaps consistent policing and permits some groups to avoid their liabilities.

Corporate groups structures are particularly exposed to mismanagement where group companies face financial difficulties. The European Economic Community (EEC) had as well submitted proposals for treating corporate groups.
Four kinds of groups are handled by the proposals, including the regular parent-daughter relation, and de facto groups.
In the United Kingdom, to the extent that managers and lenders are involved, the Law Society would favour the lenders' rights to be treated by insolvency law and other concerns to be treated by other areas of law. Pursuant to Jane Welch, such partitioned perspective is certainly unavoidable but it does not contribute to the creation of consistent and reasoned legislations for the corporations or the group in its entirety.
The proposals are somehow equivocal in their treatment. For one thing, it applies solely to reliant corporations that constitute public limited companies; for another thing, the holding "undertaking" is not covered. Hence, when the proposals attribute liability to an "undertaking which directly or indirectly exercises a decisive influence over decision-making", the Law Society stipulates that this could similarly regard a major lender or labor union. The description lacks a differentiation among the operation pursuant to guidance given as opposed to the response to external factors. For instance, it is unclear whether the practices of a main rival will necessarily have significant impact on policy-making.
Any enterprise operating as a corporation's de facto director holds joint and several liability to that corporation for any harm emerging from mismanagement. In the UK,
the Institute of Chartered Accountants in England and Wales (ICAEW) considered that the rules were excessively stringent and the Law Society emphasized that UK legislation did not even attribute liability to directors for mismanagement as regards their own corporations.

Pursuant to Irit Mevorach,[32] seeking the interest of the group might serve the settlement of the financial troubles. Anyhow, prescribing provisions for this context is demanding, assuming the diversity of group forms and the likely undermining of the advantage of limited liability where rules are provided for the entire group. The discord lies between entity law (that approaches every group company independently) and enterprise principles (approaching the group as a unit). There is room for fashioning the UK "wrongful trading" regime, actually being followed as a global model, to suit the group background. In that regard, enterprise principles should be resorted to solely to assist in the identification of the financial pattern, instead of to countermand entity law.

Nowadays, enterprises are more and more run as groups of companies, through a chain of single daughter companies.[33] This form constitutes a developed phase of evolution that refines the concepts of limited liability and legal entity. Hence, as far as the legal system emulates those standards as regards groups of companies, every company in a group is considered as a separate entity, holding liability for the payment of its individual debts, and the managers are obligated to the particular company they manage. Nevertheless, regarding the group form, the corporate constituencies' interests may not be restricted to the company towards which they are acting, but may in fact be connected with and influenced by the conducts of other group companies. Specifically, there may be more occasions for overlooking or misconduct by direction of more susceptible and reliant companies in the group, particularly in the vicinity of insolvency. On the other hand, group companies' managers may reasonably have an outlook over the whole group when contemplating openings and interest, particularly when the group is run as an intertwined enterprise.

Whilst the policing of the obligations of managers near insolvency varies among legal regimes,[34] the wrongful trading regime as the one laid down in the English Insolvency

[32] Mevorach, I. (2013). The role of enterprise principles in shaping management duties at times of crisis. European Business Organization Law Review, 14(4), 471-496.

[33] See Blumberg, P. I., Strasser, K., Georgakopoulos, N., & Gouvin, E. J. (2005). Blumberg on Corporate Groups (2nd ed.). Aspen Publishers, (s. 1.01).

[34] See INSOL International. (2017). Directors in the Twilight Zone V. Available at: https://www.insolindia.com/uploads_insol/resources/files/directors-in-the-twilight-zone-v-1034.pdf. [Accessed: December 12, 2022].

Act[35] seems, according to Irit Mevorach,[36] to be achieving success, as it is actually present (in various shapes) in numerous legal regimes.[37] Those provisions allocate an obligation on managers to make allowances for the interests of the creditors of the firm when the latter is in financial trouble. Distinctly, the English system actually constituted a valuable approach globally, before the UNCITRAL Working Group V (Insolvency Law) submitted in 2020 the second edition of its Legislative Guide on Insolvency Law [38] adding a section (section 2) on "enterprise group insolvency context".[39]

In 2013, after having submitted the first edition of its Legislative Guide on Insolvency Law,[40] putting forward a list of recommendations similar to the wrongful trading regime, the Working Group UNCITRAL had recognized that the situation of managers of companies pertaining to a corporate group is more complicated, and that this concern does not seem to be explicitly or

[35] Insolvency Act 1986, (s. 214).

[36] Mevorach, I. (2013). The role of enterprise principles in shaping management duties at times of crisis. European Business Organization Law Review, 14(4), 471-496.

[37] For instance, in the UK, Australia, New Zealand, Singapore and South Africa. See Westbrook, J. L., Booth, C. D., Paulus, C. G., & Rajak, H. (2010). A Global View of Business Insolvency Systems. Martinus Nijhoff Publishers, (p. 54).

[38] United Nations Commission on International Trade Law. (2019). Legislative Guide on Insolvency Law. Part Four: Directors' obligations in the period approaching insolvency (including in enterprise groups). Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-11273_part_4_ebook.pdf. [Accessed: December 12, 2022].

[39] See, for a review of UNCITRAL work on obligations of directors in enterprise groups near insolvency, Kokorin, I. (2021). The future of harmonisation of directors' duties in the European Union: The Preventive Restructuring Directive and group insolvencies. International Insolvency Review, 30(3), 321-481. Available at: https://doi.org/10.1002/iir.1429. [Accessed: December 12, 2022].

[40] United Nations Commission on International Trade Law. (2013). Insolvency Law: Directors' Obligations in the Period Approaching Insolvency. Available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/V13/807/89/PDF/V1380789.pdf?OpenElement. [Accessed: December 12, 2022]; and United Nations Commission on International Trade Law. (2013). Report of Working Group V (Insolvency Law) on the work of its forty-third session. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/V13/831/21/PDF/V1383121.pdf?OpenElement. [Accessed: December 12, 2022].

extensively approached by domestic law.[41] The Working Group had indicated then that it might address this concern in prospect occasions,[42] and indeed, kept its word.

In fact, pursuant to Irit Mevorach, it may seem eccentric to revolve around English legislation when analyzing groups, as the UK system is reputed to be a supporter of company law (religiously honouring the corporate separateness of group companies and their holding companies' limited liability) as illustrated by lawsuits such as Adams *v.* Cape[43] and by the absence of straightforward provisions regarding groups.[44] Nevertheless, legal systems that strived to conceive a unique policy (founded on enterprise law) concerning liability within the scope of groups have by now tried it with few results.[45] It seems as well reasonable to hold that enterprise law should not countermand company law when it comes to matters touching on the concept of limited liability. It should play a more modest part. In terms of directors' duties, it should expedite addressing mismanagement of the group by revolving around the group situation. Moreover, as far as legal regimes will seek recommendations of the UNCITRAL regarding group enterprises, such recommendations may well gain momentum internationally. The components of a corporate group are not conventionally established in UK legislation, but it is a notion read in business as a chain of affiliated entities where one entity (the holding company) controls the others via ownership and directorial control. There is a disconnection among the legal perspective on limited companies and business reality. The legislation does not impose liability on holding companies for their daughter companies for it deals with corporations as legal entities with separate legal personality. Nonetheless, groups actually act jointly financially and directorially, usually with a large degree of integration. They transfer assets and function as integrated organizations. This gives rise to several questions, comprising the unjust

[41] United Nations Commission on International Trade Law. (2013). Insolvency Law: Enterprise Groups – Directors' Obligations in the Period Approaching Insolvency, (paras. 40 and 41). Available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/V13/808/12/PDF/V1380812.pdf?OpenElement. [Accessed: December 12, 2022].

[42] United Nations Commission on International Trade Law. (2013). Report of Working Group V (Insolvency Law) on the work of its forty-third session, (para. 105). Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/V13/831/21/PDF/V1383121.pdf?OpenElement. [Accessed: December 12, 2022].

[43] Adams v. Cape Indus. PLC, [1991] 1 All E.R. 929.

[44] Companies Act 2006, (ss. 1159 and 1162); Insolvency Act 1986, (ss. 249, 435 and 251).

[45] Daehnert, A. (2007). Lifting the Corporate Veil: English and German Perspectives on Group Liability. International Company and Commercial Law Review, 18(11), (p. 393).

attributions of risk to the daughter companies' lenders for different purposes. Certainly, guaranteeing that lenders are au fait with the threats they may face when dealing with members of groups could be an answer to the said question. However, it can as well be practical to review the strengths and weaknesses of applying more unified provisions to groups of companies, for instance resorting to concepts like consolidation, imposing liability on the holding company for the payment of its daughter company's debts in case of wrongful trading, contributions, and ruling that a controlling shareholder should have a fiduciary duty towards the daughter companies.[46]

EU antitrust law interdicts simultaneously cartels[47] and the abuse of dominance.[48] Offences to these interdictions generate deterrent penalties and important compensation claims by sufferers. Regarding such damages, the issue of liability is highly valued. The interdictions of EU antitrust law are aimed at "undertakings".[49] Hence, the undertaking is as well liable to penalties levied by the Commission according to Article 23 of Regulation 1/2003.[50] Furthermore, claims for compensation by victims are as well addressed to undertakings.[51] Pursuant to the judicial precedent of the European Court of Justice **(**ECJ), undertakings can besides being composed of single (moral or physical) entities, be as well composed of a number of separate legal persons that constitute an economic entity, this brings up the issue of what legal person or persons are to hold liability in such circumstances.

[46]See Wong, C. K. (2018). Is there merit in imposing a more integrated regime on corporate groups which would take away flexibility? Or is it preferable to ensure that creditors are well informed as to the risks which they run in contracting with entities within such group structures? Company Lawyer, 39(8), 257-259.

[47] Treaty on the Functioning of the European Union (TFEU), (art. 101(1)).

[48] TFEU, (art. 102).

[49] TFEU, (arts 101 et seq.).

[50] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02003R0001-20090701&from=EN. [Accessed: December 12, 2022].

[51] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, (art.1 para.1). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104&from=EN. [Accessed: December 12, 2022].

In virtue of existing judicial precedent, in that regard, liability for penalties does not solely encompass the legal person that perpetrated the antitrust law offence as such, but as well the blameless holding company.[52] Some domestic legal regimes also contemplate this concept. The ECN Plus-Directive[53] actually intends to inaugurate the assignment of liabilities to holding companies concerning mulcts levied according to domestic law as it demands the Member States to adopt the concept of undertaking[54] "for the purpose of imposing fines on parent companies and legal and economic successors of undertakings".

The UK Competition Appeal Tribunal (hereafter "the Tribunal") adopts the judicial precedent of the ECJ also in English tort law.[55] Yet, more strikingly, the Tribunal practically automatically adopts the general principles of European Union law, asserting that "it would be both wrong and unnecessary to apply the English rules of attribution".[56] On this point, the judgement of the Tribunal has adequately acknowledged the significance of the EU concept of "undertaking" as part of civil liability for cartel harms. Additional Member States, for instance, France,[57] and Spain[58] have as well inaugurated liability for groups or at a minimum for parent companies.

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[52] Imperial Chemical Industries Ltd v Commission of the European Communities (48/69) EU:C:1972:70, ([132] and [135]); Akzo Nobel NV v Commission of the European Communities (C-97/08) EU:C:2009:536, ([54] et seq.); General Química SA v European Commission (C-90/09 P) EU:C:2011:21, ([38] et seq.).

[53] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, (art. 13 para.5). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0001&from=EN. [Accessed: December 12, 2022].

[54] ECN Plus-Directive, (art. 2 para.10) as per the judicial precedent of the ECJ.

[55] Sainsbury's Supermarkets v Mastercard [2016] CAT 11 1241/5/7/15 (T), ([363]). Available at: https://www.catribunal.org.uk/sites/default/files/1241_Sainsburys_Judgment_CAT_11_140716.pdf. [Accessed: December 12, 2022].

[56] Ibid., ([364]).

[57] French Code de commerce, (art. L481-1). Available at: https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000034161974. [Accessed: December 12, 2022].

[58] Ley 15/2007, de 3 de julio, de Defensa de la Competencia, (art.71.2.b)). Available at: https://www.boe.es/buscar/pdf/2007/BOE-A-2007-12946-consolidado.pdf. [Accessed: December 12, 2022]; See Maillo, J. (2018). Antitrust damages claims in Spain: before and after the Damages Directive. In P. L. Parcu, G. Monti, & M. Botta (Eds.), Private Enforcement of EU Competition Law: The Impact of the Damages Directive (pp. 148-171). Edward Elgar Publishing, (p.162 et seq.). Available at: https://doi.org/10.4337/9781786438812.00013. [Accessed: December 12, 2022].

Eventually, in its late Skanska judgement,[59] the ECJ has found that art.101 TFEU is naturally implementable when imputing liability (simultaneously for mulcts and compensation, yet without considering the directive as outdated) in order that the EU concept of undertaking becomes conclusive.[60] This highlights the significance of taking a deeper dive into the concept of undertaking and the significance of scrutinizing if this overshadows the accepted principle of attributing liability to a holding company for its daughter company and as well includes attributing liability to the daughter company for its holding company or related entities.
The issue of if according to EU law a blameless daughter company can as well hold liability for the cartel offence of one of its related entities still has not been solved directly. Moreover, it is unsettled whether a blameless daughter company may hold liability for the cartel offence commited by its holding company. Several academics have responded to this interrogation affirmatively.[61] In the MasterCard judgement,[62] the Tribunal has thoroughly treated of the EU legislation regarding the liability for compensation. Following a meticulous examination of the judicial system of the ECJ, it excluded any liability of the blameless daughter company or related entity in virtue of EU law and eventually as well in virtue of UK legislation.[63] On this point, it regarded "decisive influence" as an essential precondition for imputing liability,[64] a concept that will require to be analysed at length and that, eventually, has to be excluded.
Whilst the ECN Plus-Directive[65] principally dements that fines can be levied on the "undertaking", it details this in art.13 para.5 by directly merely demanding the Member States to adopt the EU concept of undertaking for the sake of levying sanctions on the holding company and its successor companies without deeming the related entities liable. Nevertheless, it needs to

[59] Vantaan kaupunki v Skanska Industrial Solutions Oy (C-724/17) EU:C:2019:204. Available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62017CJ0724. [Accessed: December 12, 2022].

[60] Ibid., ([28] et seq.).

[61] Monopolies Commission. (2015). Special Report 72: Criminal sanctions for cartel infringements, (para.37).

[62] Sainsbury's Supermarkets v Mastercard [2016] CAT 11 1241/5/7/15 (T). Available at: https://www.catribunal.org.uk/sites/default/files/1241_Sainsburys_Judgment_CAT_11_140716.pdf. [Accessed: December 12, 2022].

[63] Sainsbury's Supermarkets v Mastercard [2016] CAT 11 1241/5/7/15 (T), ([363(8)], [363(11)] et seq.).

[64] Ibid., ([363(22)] et seq.).

[65] ECN Plus-Directive, (art.13 para.1).

be verified if art.13 para.5 solely underlines the most significant form of group liability or if it aims to reject the liability of related entities from the context of the Directive. Anyway, a rejection of the liability of related entities would solely confine the context of the Directive and could have no effect on the concept of undertaking as determined in European Treaties. Hence, the Member States may well be obligated to hold related entities liable surpassing the direct conditions of the Directive because of the principle of effective judicial protection accepted in Treaties. Actually, with the ECJ implementing art.101 TFEU automatically regarding undertakings' liability,[66] the liability of related entities could be determined earlier in the Treaties in order that a more restricted secondary legislation perspective would be inappropriate (regardless of a residual extent of implementation for secondary legislation).[67]

There is as well reasonable grounds for the analysis of the issue of the liability of blameless daughter companies or related entities for their holding company in virtue of EU legislation. Whilst the liability of the blameless holding company for its offending daughter company is surely of utmost significance in fact, the issue of the liability of the blameless daughter company or related entity may in fact as well carry weight. At the outset, attributing liability to the related entity guarantees general entitlement to collect against its assets. Conversely, confining liability to the holding company signifies that lenders are solely entitled to collect against the shares of the holding company in the related entity. This would result in subordinated liabilities to the lenders of the holding company as against the lenders of the daughter company and would be detrimental to them, especially in the event that the holding company is not the only shareholder in the daughter company.

Moreover, the issue of the liability of the blameless daughter company or related entity is fundamental for a prospect divestiture of these entities; a liability in virtue of antitrust law will considerably impact on the terms and conditions of the agreement of purchase and sale of the entity.

The blameless daughter company's or related entity's collective liability may as well result in the competence of another jurisdiction as regards tort legislation. Where, for instance, the blameless

[66] Vantaan kaupunki v Skanska Industrial Solutions Oy (C-724/17) EU:C:2019:204, ([28] et seq.). Available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62017CJ0724. [Accessed: December 12, 2022].

[67] TFEU, (art. 103).

related entity holds liability because of civil joint liability, the whole cartel may be prosecuted at the place of incorporation of the blameless related entity.[68] The UK Provimi lawsuit presents an illustration of such situation.[69]

Eventually, the blameless related entity's liability can as well be consequential if the blameless daughter company has been indicted for compensation accidentally, (for instance owing to a change of company name in the group) and the action against the offending daughter company has become obsolete meanwhile. The actual significance of the issue of the liability of related entities is highlighted by the occurrence that it was lately directed at the ECJ.[70]

In virtue of EU legislation, a holding company can hold liability for the infringement by its daughter company of European competition law, notwithstanding if this holding company contributed to or even knew the violation. The European Commission (EC) simply has to establish that a holding company is empowered to and in fact exerts "decisive influence" on its daughter company. There is praesumptio iuris tantum that a holding company in fact exerts decisive influence on its 100 per cent held daughter companies.

Conversely, the concept of separate legal personality has been invariably followed in the United States competition law. Holding companies have held liability solely when it was established that they had either contributed to the violation of competition law or knew it and did not proceed to cease it.

During the elaboration of the regime of liability of parent companies in European antitrust law throughout the ultimate few decenniums, the EC, and the EU Courts (comprising the Court of Justice of the European Union (CJEU) and the General Court (GC)), have practically disregarded the fundamental concepts of limited liability and separate legal personality. According to the

[68] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, (art.8 para.1). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02012R1215-20150226&from=EN. [Accessed: December 12, 2022].

[69] Provimi Ltd v Aventis Animal Nutrition SA [2003] EWHC 961 (Comm); [2003] E.C.C. 29.

[70] Audiencia Provincial de Barcelona, s.15a, order of 24 October 2019, Rollo nº775/2019—Sumal v Mercedes Benz Trucks España; See Wagener, H. M. (2019, November 15). And Again: Liability for Cartel Damages. D'Kart. Available at: https://www.d-kart.de/en/blog/2019/11/15/auf-ein-neues-haftung-von-konzerngesellschaften/. [Accessed: December 12, 2022].

existing sources,[71] no commensurably growing regime of liability of parent companies has been adopted in any other branch of European legislation (environmental liability for instance), and domestic legislations are mainly as well more considerate of separate legal personality.[72] Pursuant to some academics, above all else, this apparently outcome-based regime of practically strict liability poses significant questions in terms of due process and legal rights.[73] The inopportune efforts of the EU Courts and the EC to account for a blatant deviation from the fundamental concept of individual responsibility by mentioning the notion of the single economic entity has seemingly brought about a question of trust that remains disregarded in some Member States such as Luxembourg and Belgium for instance.

Moreover, in operational terms, the regime of the liability of parent companies of the EC may actually deter benevolent and productive corporate compliance steps by holding companies as such arrangements as such have been considered by EU Courts as establishment of the exertion of decisive influence by the holding company.

According to the EC's executive vice-president, "if our ideas are never challenged, they never get better".[74] Therefore, some academics challenged the grounds and the growth of the regime of liability of parent companies in European antitrust law so as to stimulate a revision of this regime by EU Courts and the EC.[75]

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[71] See Leddy, M., & Van Melkebeke, A. (2019). Parental liability in EU competition law. European Competition Law Review, 40(9), 407-416.

[72] Koenig, C. (2018). Comparing Parent Company Liability in EU and US Competition Law. World Competition: Law and Economics Review, 41(1), 69-100, (pp. 71-72). Available at: https://ssrn.com/abstract=2922142. [Accessed: December 12, 2022]; Demeyere, S. (2015). Liability of a Mother Company for Its Subsidiary in French, Belgian, and English Law. European Review of Private Law, 23(3), 385-413, (pp. 409-413). https://doi.org/10.54648/erpl2015028. [Accessed: December 12, 2022].

[73] Leddy, M., & Van Melkebeke, A. (2019). Parental liability in EU competition law. European Competition Law Review, 40(9), 407-416.

[74] Vestager, M. (2017). How competition can build a better market. Speech at the American Enterprise Institute.

[75] Leddy, M., & Van Melkebeke, A. (2019). Parental liability in EU competition law. European Competition Law Review, 40(9), 407-416.

Contract and tort actions brought against a firm do not impact on shareholders where their liability is limited for their own firm's debts. Shareholders shielded by limited liability may want the company to act in such a way that they would not have wanted it to act had it been an unlimited company. In the United Kingdom for instance, the legal evolutions of the eighties prohibiting managers (comprising shadow and de facto directors) from swindling lenders and insolvent trading, and the disqualification act which were mount as a control of the suitability of managers have primarily not succeeded in filling the gap in business organization law as regards groups of companies. The twofold protection of limited liability prohibits lenders of a firm in a state of insolvency from lodging complaints against other solid firms in a group of companies. Specifically, tort claimants are at the most detrimental situation, since they cannot barter for liability for the debts of a firm in a state of insolvency and cannot attenuate their damages by asking for personal guarantees. According to Ali Imanalin,[76] notwithstanding the movement of the debate from fixing the effects of insolvency to restructuring firms, time has come to revise the concept before a future industrial disaster arises, resulting in cross-border class actions.[77] Several contemporary EU Courts and UK courts decisions have underlined how tort liability may undermine the safeguard granted by the parallel principles of limited liability and corporate separateness within the framework of groups of companies. Such legal undermining mirrors, for one thing, the varying efficiencies of corporations and, for another thing, the stages where groups of companies act. The context of this tort liability rests on various principles of company control in virtue of European and UK legislations. The said decisions play an important role in the scholar discussion regarding if the concept of justice or broader public policy conception should make a holding company hold liability for its daughter company's deeds.

Those legal elaborations have repercussions for the liability held by affiliates to a group of companies, where an affiliate to that group participates in anticompetitive behaviour infringing either European or English antitrust law.[78] Hence, some academics consider that there is an all

[76] Imanalin, A. (2011). Rethinking limited liability. Cambridge Student Law Review, 7(1), 89-99.

[77] See Hensler, D. R., & Peterson, M. A. (1995). Understanding Mass Personal Injury Litigation. RAND Corporation. Available at: https://doi.org/10.7249/RB9021. [Accessed: December 12, 2022].

[78] See Enterprise Act 2002, (s.188). Available at: https://www.legislation.gov.uk/ukpga/2002/40/section/188. [Accessed: December 12, 2022]; Enterprise and Regulatory Reform Act 2013. Available at: https://www.legislation.gov.uk/ukpga/2013/24/contents/enacted. [Accessed: December 12, 2022].

the more pressing necessity to guarantee complete compliance with antitrust law at an intra-group level in view of the consequent effects on groups of companies liability.[79]
The legal elaborations contemplated seem to contradict the deep-rooted principles of limited liability[80] and corporate separateness,[81] i.e., that investors (either human or non-human shareholders) are released from the liability of the corporation in which they own shares, as this corporation holds liability by itself. The relevant European and UK decisions suggest that investors (especially non-human shareholders) in corporations which do not abide by European or English antitrust law may experience considerable undermining of the advantages granted by these concepts. The litigation shows the ability of European antitrust law to inflict far more risks upon a non-human shareholder when the latter exerts decisive influence or control on a daughter company and the coincidental requirement of active control by the holding company of the operations of such daughter company. Contemporary UK litigation suggests that, the more holding companies endeavour to guarantee groupinternal compliance so as to circumvent liability, the higher the potential that due care may have been owed by the holding company to guarantee the effectiveness of this compliance plan under English law. Moreover, when an investor or manager induces an infringement of antitrust law, it may hold direct tort liability.

The practical use of letters of comfort (also known as letters of intent) varies depending on the context of their issue. By comparison with their duty to provide a level of assurance, letters of comfort are couched only in vague wording, and are consequently not legally binding.
To assure the liability of the holding company for its daughter company, a guarantee must generally be attached to the preliminary statements of the firm that holds the liability.

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[79]See Hughes, P. (2014). Competition law enforcement and corporate group liability - adjusting the veil. European Competition Law Review, 35(2), 68-87.

[80] Incorporation according to an enabling statute was first inaugurated in England by the Joint Stock Companies Act 1844, with limited liability following under the Limited Liability Act 1855. Available at: https://www.legislation.gov.uk/ukpga/1855/133/pdfs/ukpga_18550133_en.pdf. [Accessed: December 12, 2022].

[81] Salomon v Salomon and Co Ltd [1897] A.C. 22; Lee v Lee's Air Farming [1961] A.C. 12; and Adams v Cape Industries Plc [1990] Ch. 433.

The motives for joint-stock companies' directors to issue letters of comfort are liberty, confidentiality and adaptability, moreover, in terms of business, letters of comfort are a lot more admissible than an overly legalistic legal paper.
For their part, banks appreciate the switch to a milieu of confidence and benevolence. When a letter of comfort is issued by the manager of a wide group, demanding an extra surety bond would be considered as inopportune.

The 2007-2008 financial crisis has occasioned a lot of global controversy on the part of companies in society.[82] It has as well posed ethical issues as regards the manner in which companies act.
For example, in Australia, the ASIC v Macdonald lawsuit[83] has put the corporate social responsibility of managers on the map. James Hardie Industries Ltd's (JHIL) board happened to have infringed its due care and diligence in virtue of s.180(1) of the Corporations Act 2001 (Cth)[84] after its approbation of a communiqué including misrepresentation, that was transmitted to the Australian Securities Exchange.
The Australian government requested a report of the inquiry into the matter after public scandal regarding the inadequate compensation by JHIL of the victims of asbestos fibers due to the corporation's negligence.[85] The lawsuit underlined "significant deficiencies in Australian corporate law", pursuant to the James Hardie Inquiry.[86] The case brought up the issue of whether present Australian legislation regarding the theories of limited liability and lifting the corporate veil in groups of companies properly mirror modern social outlook and morals.

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[82] See Quo, S. (2011). Corporate social responsibility and corporate groups: the James Hardie case. Company Lawyer, 32(8), 249-253.

[83] ASIC v Macdonald (Nº11) (2009) 256 A.L.R. 199.

[84] Corporations Act 2001, Available at: https://www.legislation.gov.au/Details/C2022C00306. [Accessed: December 12, 2022].

[85] James Hardie. (2004). Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation. (James Hardie Inquiry). Available at: https://webarchive.nla.gov.au/awa/20041019002540/http://pandora.nla.gov.au/pan/45031/20041019-0000/Volume1.pdf. [Accessed: December 12, 2022].

[86] James Hardie Inquiry, (Vol.1, Part 5, p. 571).

Beforehand, what is actually a group of companies and how does it operate? How can liability be attributed through the various legal areas covering groups of companies? Who assumes this liability and on what grounds? Is liability shared within corporate groups? Which branches of law are most sensible to corporate groups and their liabilities? What answers do they provide for the questions related to such liabilities and what what are their shortfalls in a group scenario? This thesis is aimed to answer these questions. Thus, the substance of the thesis is divided into three main parts observing especially european jurisdictions with a main focus on french civil law and english common law and with some references to other advanced international jurisdictions, and proceeds as follows. The first part strives to address the matter of the liability within corporate groups in the ambit of corporate law, and in particular, in the vicinity of insolvency. The second part exhibits the answers of competition law to liability in corporate groups. Then, the third part will approach liability in corporate groups from contractual and tort perspectives. Eventually, the remainder of the thesis will manifest as debates and deductions as regards the various subject-matters treated.

I. LIABILITY OF CORPORATE GROUPS IN THE AMBIT OF CORPORATE LAW

1. French company law and corporate groups

According to Eric Thomas,[87] a corporate group can be described as an entity incorporating some firms constrained by financial links by means of which the head of the group (the holding company) conserves control on the others and arranges integrity in policy-making.
The concept of the group is tackled by French legislation through some procedures which are implemented in company law, that determines its extent, greet data-related conditions and guarantee the application of standards which can secure all of the firms' assets. Those procedures are defined in the perfunctory inventory below.
Through the purchase of stock in a different corporation, a corporation aims at exercising control over its direction, hence, the other corporation waxes its daughter company, and it actually accedes to the position of holding company. Above all, the concept of control is described by the French "Code de commerce",[88] with stress on the explicit or implicit holding of most of rights to vote. Even though it as well involves the concepts of joint control and paradoxically implicit control, this original description is purely legitimate and stays partly limitative.
After all, art. L233-16 of the French "Code de commerce" includes a second, further developed, description, that impels a duty for quoted companies to disclose consolidated financial statements. This second description, centering more on reporting requisites, is as well founded on national, EU or global principles. Nowadays, this double description has as a result an explicit impact over diverse present activities. A Regulation of 2004, for instance, laid down the rules for assessing the assets moved to firms via mergers in the light of the presence of control among the firms at stake.[89]

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[87] Petit, P., & Chekroun, D. (2016). Governance of transnational groups: What are the stakes: What are the challenges. International Business Law Journal, 6, 617-652.

[88] French Code de commerce, (art. L233-3). Available at: https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000031564650. [Accessed: December 12, 2022].

[89] Règlement du Comité de la Réglementation Comptable nº2004-01 du 4 mai 2004 relatif au traitement comptable des fusions et opérations assimilées. Available at: https://www.anc.gouv.fr/files/live/sites/anc/files/contributed/ANC/1_Normes_fran%C3%A7aises/Reglements/2004/

Such duty to provide consolidated financial statements has as well assisted in the restriction of the sham increase of the evident assets of firms engaged in a mutual share portfolio. Whereas this mutual share portfolio is vacant if no one of the firms engaged in the agreements constitutes a publicly-traded company, direct or indirect ownership and cross holdings specifically are nowadays policed stringently. Concerning mutual share portfolio, one firm cannot acquire shares in another firm when the latter owns over 10 per cent of the capital of the former.[90] Nonetheless, any shift infringing this rule would not be unpermitted, in the light of the saying "no nullity without a law", for there is no legal rule in this sense regardless of the Order of 2016, regarding the revision of the law of contract. However, the managers of the corporation would be prone to criminal punishments.[91] Moreover, concerning the provisions on cross-shareholdings, besides a similar criminal punishment attributed to the managers of the corporation, the right to vote associated with such ownership is strictly and merely dismissed.

Assuming the presence of financial links instituted among holding companies and their subsidiaries, it is not unusual for firms affiliated to the very group to have the same managers. As a result, arrangements embarked on by the holding company and its subsidiary are always bound by the "regulated agreements" process founded on deductive control (preliminary approval of the directorate, …), or on inductive control, firstly conditional on authorization by the shareholders' assembly.

After all, neither is it unusual for the holding company to enter into some agreements with its subsidiaries: be they cash transactions, subsidiary domicile contracts or direction agreements. Concerning direction agreements, the activity is firmly policed so as to impede it, providing solely for the shif of profits from the subsidiary to the holding company. In other ways, the firms would unavoidably run the risk of being subject to a criminal sanction of exploitation of the assets of the company. Furthermore, cash transactions among firms affiliated to the very group are very usual. Even though a banking dominance is obviously set forth in French

Abroges/Reglt_2004_01/Reg2004_01.pdf. [Accessed: December 12, 2022]. This regulation was repealed by the Règlement de l'Autorité des Normes Comptables n° 2014-03 relatif au plan comptable général. Available at: https://www.anc.gouv.fr/files/live/sites/anc/files/contributed/ANC/1_Normes_fran%C3%A7aises/Reglements/Recueils/PCG_Janvier2019/PCG_2019.pdf. [Accessed: December 12, 2022].

[90] French Code de commerce, (art. L233-39).

[91] French Code de commerce, (art. L247-3 al. 1).

legislation,[92] some exemptions are set up, in particular to allow a company to "carry out cash transactions with companies that have direct or indirect financial links with it, which give one of the companies in question effective power of control over the others".[93]

Moreover, those cash transactions must not be understood in a limitative way. This expression hence involves simultaneously the acceptance of credit transactions and funds. This conducts us to the concept of effective control of company law, that permits a company to accept funds from firms below the wing of the same holding company.[94] For instance, a holding company can thus provide an a la carte collateral on the side of the subsidiary. The other side of the coin, in other words, the subsidiary's collateral of the holding company's engagements, stays conditional on the corporate interest of the subsidiary and therefore manifests a larger threat.[95]

The points mentioned above mark the group but after all do not render it a concern of law as such.

The standard provided for by the judicial precedent is that a corporate group is not a legal entity and may possess rights and duties. As the firms affiliated to a group have a separate corporate personality, they are, thus, only subject to the agreements which they have personally closed. Nevertheless, whereas France lacks group law in itself, this does not signify that group interest cannot be acknowledged. Certainly, it is not always inconsistent with the independence and autonomy of the affiliated firms to the group.

Actually, solely such group's interest may be able to formalize the group concept.

The judicial precedent in France acknowledges this concept of group interest through the Rozenblum case law rendered in 1985 by the Cour de cassation, the latter viewed that the deeds representing the infringement of abusing the assets of the company lose their criminal essence if they are perpetrated in the context of relationships among two firms affiliated to the very group. Put differently, the presence of a corporate group is likely to excuse financial support

[92] French Code monétaire et financier, (art.L511-5).

[93] French Code monétaire et financier, (art.L.511-7).

[94] Comité des Établissements de Crédit et des Entreprises d'Investissement. (2008). Rapport annuel du Comité des établissements de crédit et des entreprises d'investissement. Available at: https://acpr.banque-france.fr/sites/default/files/media/2017/10/30/cecei_ra_2008.pdf. [Accessed: December 12, 2022].

[95] Cass. com., 13-11-2007, n° 06-15.826. Available at: https://www.legifrance.gouv.fr/juri/id/JURITEXT000007633226/. [Accessed: December 12, 2022].

among two corporations, which would be atypical out of a group, if it meets four collective requirements which were beforehand read very stringently:

- the presence of a group, demonstrated by a uniform policy and legal and economical relations;
- the activity in question must be prescribed by the group's general interest;
- the corporation which assumes the costs of that must be compensated; and
- the activity is adjusted to this corporation's financial capability.

In 2016, the Criminal Chamber of the Court of Cassation upheld this economic perspective, that mirrors neatly the corporate reality.[96] It as well annexed two new conditions: firstly, it tempers the purely collective essence of the demanded requirements by incorporating a more international perspective to the economic interest of the transaction thought to be an exploitation of the assets of the company; second, it follows justifications attached to an examination of the faith of the denounced individuals comprising their good intentions, or in any event a lack of the evidence of an intentional wish to damage the interests of the unfavorably impacted on firm. This inaugurates an ethical integrant in the examination of a typically factual motive.

This criminal judicial precedent does not set forth release from the civil liability which may be associated with the links among firm affiliated to a same group. The precedent has as well determined the limits instituted for the notions of interference and appearance, by virtue of a range of requirements unique to every situation. Nevertheless, the "Cour de cassation" does not directly acknowledge the integrity of holding companies and daughter companies if those firms solely have mutual managers[97] or a significant legal link.[98] At the same time, according to a decision rendered in 2006 by the "Cour de cassation", the lenders of a group entity have the right to require the settlement of the due by another group entity given that the intermeddling of the

[96] Cass. crim., 6-4-2016, n° 15-80.150.

[97] Cass. Com., 15-10-1974, nº 73-12.391. Available at: https://www.legifrance.gouv.fr/juri/id/JURITEXT000006993034. [Accessed: December 12, 2022].

[98] See Cass. Com., 13-1-2009, nº 07-17.141, Available at: https://www.legifrance.gouv.fr/juri/id/JURITEXT000020111147. [Accessed: December 12, 2022]; and Cass. Com., 6-5-1991, nº 89-18-969, Available at: https://www.legifrance.gouv.fr/juri/id/JURITEXT000007107147/. [Accessed: December 12, 2022].

second entity is marked, in as much as it has conducted them to think rightly that it was engaged in the commitment of the first entity.[99]

In any way, the appearance standard is aimed at guaranteeing third parties acting in good faith, and interference is sanctioned if it became detrimental to the daughter company.

Thereby, the liability of the holding company can be brought about based on a fault by the daughter company when a false appearance is drawn or if there is marked interference in the direction.

Moreover, this group interest is not coordinated at the EU dimension that presents differing forms of such interest.[100]

Due to the lack of a specific legislation addressing groups, a number of movements are crystallizing in France to devote more attention to the group structure. "A move in that direction would bring French liability law closer to other legislations which can consider a parent company liable for the actions of its subsidiary", as asserted by Brun.[101]

The revision of the law of obligations promoted by the Catala proposal[102] in 2005, aims to institute a specific liability system for groupinternal relationships. This proposal seeks to rectify holding company liability by reforming art.1360 of the Napoleonic Code, and provides that: "[…] a person who controls the economic or financial activity of a business or professional person who is factually dependent on that person even though acting on his own account, is liable for harm caused by this dependent where the victim shows that the harmful action relates to the first person's exercise of control. This is the case in particular as regards parent companies in relation to harm caused by their subsidiaries […]".

[99] Cass. ass. plén., 9-10-2006, nº 06-11.056.

[100] See Conac. P. H. (2015). Towards Recognition of the Group Interest in the European Union? Club des Juristes. Available at: https://orbilu.uni.lu/bitstream/10993/28103/1/CDJ_Rapports_Group-interest_UK_June-2015_web.pdf. [Accessed: December 12, 2022].

[101] Anziani, A., & Béteille, L. (2009). Rapport d'Information n° 558 fait au nom de la commission des lois constitutionnelles, de législation, du suffrage universel, du Règlement et d'administration générale (1) par le groupe de travail (2) relatif à la responsabilité civile, (p. 61). Available at: https://www.senat.fr/rap/r08-558/r08-5581.pdf. [Accessed: December 12, 2022].

[102] Avant-projet de réforme du droit des obligations et du droit de la prescription. Available in English at: http://www.justice.gouv.fr/art_pix/rapportcatatla0905-anglais.pdf. [Accessed: December 12, 2022].

This signifies that the holding company, to the extent that it controls the operations of a different entity, would hold liability for harms occasioned by the daughter company. Where the sufferer of the abuse demonstrates that the harm results from the exertion of control, such liability could be imposed on the holding company. Article 1360 institutes assignment of debts as grounds for implementation of civil liability as a result of the activities of the daughter companies.
The basis for such liability in the Catala proposal is the activities of the daughter companies, and thus is not linked to the abuse as such but only the factor of control.[103] According to Nicole Stolowy,[104] this pioneers the prospect of a liability system generated by the position as holding company.
This liability "would make it possible to assign some of the risk of liability resulting from prejudice caused by economic activities to the true decision-makers, which would be both fairer to professionals in a situation of dependency and more protective for victims".[105]

2. An overview of the organization of corporate groups

2.1. Corporate governance in multinational corporate groups

How can governance be defined? In virtue of Lord Cadbury, the begetter of modern company governance, governance is the regime by which companies are directed and supervised so as to guarantee that their growth is overseen. The directorate and the chief executive are in charge of the determinination of the background and the standards, and of applying the regime.

Concerning the definition of a multinational group, the latter has no actual corporate, accountancy or financial personality. Nevertheless, it is present in the business world. French

[103] Grimonprez, B. (2010). Pour une responsabilité des sociétés mères du fait de leurs filiales. Revue des sociétés, 1, 715.

[104] Stolowy, N. (2014).The concept of the group of companies: the specificity of the French model. Journal of Business Law, 8, 635-650.

[105] Anziani, A., & Béteille, L. (2009). Rapport d'Information n° 558 fait au nom de la commission des lois constitutionnelles, de législation, du suffrage universel, du Règlement et d'administration générale (1) par le groupe de travail (2) relatif à la responsabilité civile, (pp. 88-99).

legislation does not acknowledge groups as such, but solely the entities which are affiliated to groups as separate legal persons. Nonetheless, groups are actually a necessary part of the economy in France and the world in general. As reported by Daniel Lebègue,[106] what is intended by "group", is the mingling of the holding company, daughter companies, shares and the offshoots they direct and for which they are liable. The annual account of the holding company usually determines the periphery of the group.

The multinational essence of a group does not deny its nationality, that is the one of the holding company. There are no corporations or groups devoid of a nationality. Most of manufacture and units can be spread around the globe, but group governance is what is mounted by the chairman of the group. Notwithstanding the geographical and operational variety of the companies which constitute it, the group has a mutual policy and governance. Prominent cases (such as Erika oil spill[107] and Rana Plaza) show that the legal or ethical liability of the holding company can be drawn on due to answerable conducts by the subsidiaries or even providers and outsourcers. Therefore, the decisive requirement for each group to have a way of commanding and controlling is a strong governance regime, that must: be common to all group companies; be used upwards-downwards; and render the divisions and daughter companies of the group liable.

Transnational corporate governance must satisfy three requirements: answerability, uniformity and liability. Contemporary big corporations must disclose their affairs clearly, fastly and unfeignedly, not solely to investors, but to every corporate contituency and to society overall. They are constrained by answerability. Great governance is overall consisting of presenting confirmed financial and non-financial data which enkindles trust to all of the stakeholders of the corporation. The financial market has been enduring a lack of trust from 2008, mainly because of a remissness in answerability to investors, vendees and personnel.

Transnational corporations have a conformity duty as well. They are not solely supposed to implement provisions and rules, but as well to conform to principles, an ethical code and morals: human rights; fulfilling tax clearance duties; and repudiating corruption.

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[106] Petit, P., & Chekroun, D. (2016). Governance of transnational groups: What are the stakes: What are the challenges. International Business Law Journal, 6, 617-652.

[107] Cass. Crim., 25-9-2012, nº 10-82.938. Available at: https://www.legifrance.gouv.fr/juri/id/JURITEXT000026430035/. [Accessed: December 12, 2022].

Within a group, the holding company and its managers are more and more often held liable for the conducts of their subsidiaries, but as well for the ones of their providers and outsourcers. Control generates a duty for surveillance, and increasingly incorporates the liability of the parent company and its directors. Modern lawsuits (such as Volkswagen, Rana Plaza, UBS, and HSBC) have reflected this modification of perspective and actions.
In principle, all of the transnational groups must consider these new necessities in their updated governance regimes.

Daughter companies' and majority shares' direction is commanded by the principle of independence of every firm. Yet, this independence is exercised as part of group governance and control practiced by the holding company. It cannot function by any other means, save for recognizing the threat of inconsistency and collapse in the group's policy.
Thereby, the "string of pearls" policy of HSBC, with their numerous acquisitions of institutions and units which were devoted to preserving their personal identifications, culture, and policies, conducted to a lack of control and a serious downturn in respect of risk management and ethical code. There cannot be any controlled and durable evolution in a transnational group without firm community governance.

The charge of determining the policy of the group and applying unified governance is borne by the directorate and the holding company's managing directors. This is the basic vocation of the board members, yet they must as well appoint outstanding directors, apply sensible intern control mechanisms in the group, exercise risk management and guarantee morals coherence.
The directorate and the executive committee are supported in this responsibility by the central facilities of the group, by accountancy and financial directors, legal directors, staff, compliance and auditing directors. The board members' secretary, the subsidiaries' director and the individual responsible for the upper management of the group take a specifically significant part within group governance.
Chiefs of departments, subsidiaries or geographical areas are as well engaged in the drawing of the group's policy via politic meetings conducted by the board members and the general managers. Their performance objectives and some of their variable pay are founded on

accomplishedly conducting the unified planned scheme of which they are completely in charge, as rewarded managers.

Overall, transnational groups have inaugurated a group startegy for their managing directors' position and remuneration direction. They as well have a unified strategy as regards information systems, risk management and compliance.

Thus, multinational groups generally have a unified directing and controlling regime which is extensively organized and unified. They have minute options in a scope where one company's wrongdoings have legal or press-related impacts on the whole group, and mainly over the ones in charge of controlling and managing the group.

From this perspective, compared to public administrators, firms are a lot more compliant towards a measure of integrity and liability, that is clearly the pledge of their best effectiveness.

2.2. The imposition of liability in multinational corporate groups

The transnational company currently plays a central role in globalization. As noted by Eric Thomas,[108] after all, when a transnational company's daughter company or its outsourcer is set apart for responsibility, liability is generally researched at the greatest point of the group's hierarchy. This illustrates the growing answerability of the holding company (simultaneously legal and press-related) that must then exercise full control on all of its affiliated companies. This modification of pattern evidences the admission of the economic presence of a corporate group. Despite of the absence of a legal entity, a corporate group is admitted with regard to its economic union, its objectives or its territorial dimension. Therefore, it must be recognized that in most times, the group has a global extent and that it truly makes up a multinational company. However, the crossing of borders by multinational groups is a fact for which there is actually no legal material able to coherently and properly determine either the real notion of "group", or the scope of the concept of a "transnational dimension".

[108] Petit, P., & Chekroun, D. (2016). Governance of transnational groups: What are the stakes: What are the challenges. International Business Law Journal, 6, 617-652.

The deployment of such groups is assumingly founded on a territorial extent which is impending to them. Eventually, their organization crosses geographical points of law, that are thus not a key player in their policy anymore.

Actually, multinational groups apply a structured organization which is prescribed by their purpose. This structured organization may be established on an international or zonal per-state matrices ground, or otherwise by virtue of business entities mixed with the territorial prioritization of some operations (marketing, manufacture, research and development, and so on).

So as to meet the projection of their various stakeholders (shareholders, human resources, contractors, customers and providers, and so on), groups must hence follow a governance form which presents a digest of their present and foreseen activities, in order that they can conserve efficient management of the risks linked to the evolution of their operations.

The mingling of the economic existence of the multinational group and the absence of a legal material tackling this concept automatically generates the issue of the liability which can be researched against those multinational companies in their entirety, their holding company or even their managers. Actually, as soon as this liability has been attributed, there is then the issue of determining its origin (criminal, civil, or administrative**)** while defining the dimension at which it will be implemented, in other words, nationally, at a broader dimension or even globally.

Ultimately, due to its form and its functioning mechanisms, the multinational group functions with respect to simultaneously national and global principles. It has thus become fundamental to harmonize this contrasting conjunction which conducts to the formation of amalgamations, that are at times unnecessary, usually mounting and at most supplementary.

For the management of the occasioned risks, the company must centralize those principles in order to be able to establish simultaneously mechanisms and conducts from them.

Hence, the multinational group faces a complicated network of legal and regulative principles from many instruments which are modelled to control its global operations and differ between hard law and soft law.

3. Liability in corporate groups against the background of insolvency

3.1. An overview of the regimes in European jurisdictions

"Capitalism without bankruptcy is like Christianity without hell".[109]

There have been, at the European Union level, numerous litigations where the CJEU regarded, for instance, domestic taxation regulations which disfavour overseas holding companies.[110] At the same time, there haven't been any litigations in which corporate law regulations have been judged as disfavouring overseas holding companies. Nevertheless, this issue was approached by the Impacto Azul case.[111] The litigation regarded Portuguese law in virtue of which a holding company could hold liability to the daughter company's lenders. This law was solely relevant to holding companies incorporated in Portugal. In the particular litigation, the BPSA 9 corporation bought some real estate from Impacto Azul Lda (Portuguese corporation). There has been transfer of the estate but BPSA 9 was not capable of exchanging the amount of money according to the agreement, because it was in financial distress. As the corporation was in a state of insolvency, Impacto Azul Lda stipulated that the holding company of BPSA 9 should hold liability for the payment of such amount. This holding company was established in France and was hence not liable to the Portuguese legislation regarding the liability of holding companies. Impacto Azul Lda stipulated that this distinction in the consideration of Portuguese and overseas holding companies violated the right of establishment of Article 49 TFEU. The CJEU upheld that the said article prevents any domestic rule that is likely to inhibit or dissuade from the enjoyment of the right of establishment. In default of coordination of the regulations on corporate groups at the EU dimension, it pertains to the Member States to set out the regulations. The occurrence that the rules regarding holding companies' liability to their daughter companies' lenders are not relevant to holding companies incorporated in other Member States is not in

[109] Frank Borman (1928-), astronaut, former Chairman, CEO of Eastern Airlines.

[110] See CJEU, Case C-282/07 Truck Center. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62007CJ0282&from=en. [Accessed: December 12, 2022].

[111] CJEU, Case C-186/12 Impacto Azul. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62012CJ0186&from=EN. [Accessed: December 12, 2022].

conflict with Article 49 TFEU. Pursuant to some scholars, this preclusion of overseas holding companies is not likely to dissuade holding companies from other Member States to be incorporated in Portugal for example.[112] Afterwards, it was asserted by the CJEU that: "In any event, parent companies having their seat in a Member State other than the Portuguese Republic may choose to adopt, through contractual means, a system of joint and several liability for the debts of their subsidiaries".[113]

Daughter companies are the companies in which the various interests coincide. At the outset, the company members, in this instance, principally the holding company, or conceivably, the minority partners, bring the residual claims. They may be disagreeing with the lenders, the personnel and other corporate constituencies, which are given priority to payment over company members. The holding company as a stockholder determines the outlook for the firm, its liquidation or its takeover by an acquirer. Lenders cannot complain that the forced liquidation harms them, or that the daughter company is purchased by an inadequate acquirer, or even by a company in a state of insolvency, given the holding company has not infringed the relevant rules such as the ones on insolvent trading.[114] In several laws, liquidation may be subject to extra protection, for instance, in virtue of employment laws,[115] the laid off staff is comprised in the category of the creditors, generally receiving a preferential right to payment.
This economic unity is interpreted in several countries as the daughter companies managers' legal duty to comply with the directions of the holding company, although they may be disadvantageous for the daughter companies. In several countries, such imperative directions may raise the liability of the controlling holding company. Nevertheless, in the majority of

[112] See Sørensen, K.E. (2016). Groups of companies in the case law of the Court of Justice of the European Union. European Business Law Review, 27(3), 393-420.

[113] See CJEU, Case C-186/12 Impacto Azul, ([37]).

[114] CA Paris, 4-9-2012, n° 11-12359, UPS; CA Paris, 10-4-2008, n° 07/10060, Sté San Carlo Gruppo Alimentare SPA c/ Ancelin et a. - TGI Péronne, 18-8-2009, n° 07/00856, Ancelin et a. c/ San Carlo Gruppo Alimentare SPA et a.

[115] See for example, Belgian Labour law of 13 February 1998, "Procédure Renault". Available at: https://www.ilo.org/dyn/natlex/natlex4.detail?p_isn=49186&p_lang=fr. [Accessed: December 12, 2022].

countries, the managers of daughter companies should ignore the directions of the holding company when they are evidently disadvantageous for the daughter companies, which should be done by the established deadlines. There is even a more selective factor that implies that daughter companies managers' should ignore the parent's directions when the latter are unfair with regard to the daughter companies.

The question of whether a company has to consider the profits it takes from its integration into a group and the limit to which such profits are compensated by the liabilities that it holds acordingly, is answered in the light of domestic law, judicial precedent, market coordination, among other things. According to some academics, there seems to be three methods to answer this question.[116]

A prime technique regarding if and how a daughter company will have to counterbalance the liabilities assigned to it by other group companies is provided for by corporate law in Germany for instance. When there is exertion of de facto control within a group, the daughter company with minority partners must receive a compensation by the end of the fiscal year,[117] in this context, on the ground of yearly evaluation of the effective profits and liabilities, regardless of the difficulty to define the latter.[118] Actually, this perspective consists of discerning the disadvantages of the group control, and extinguishing such disadvantages by providing compensation.

This legal system is not extended to privately held companies (GmbH) but judicial precedent may conduct to identical decisions. The German technique is adopted, with some adjustments, in some other countries.[119] Corporate law in Portugal for instance, prescribes that holding

[116] Böckli, P., Davies, P. L., Ferran, E., Ferrarini, G., Garrido Garcia, J. M., Hopt, K. J., Opalski, A., Pietrancosta, A., Skog, R., Soltysinski, S., Winter, J. W., Winner, M., & Wymeersch, E. (2016). A proposal for reforming group law in the European Union - Comparative Observations on the way forward. Available at: http://dx.doi.org/10.2139/ssrn.2849865. [Accessed: December 12, 2022].

[117] German Stock Corporation Act, (s. 18 and 311). Available in English at: https://www.gesetze-im-internet.de/englisch_aktg/index.html#gl_p1740. [Accessed: December 12, 2022].

[118] Hopt, K. J. (2015). Groups of Companies A Comparative Study on the Economics, Law and Regulation of Corporate Groups. European Corporate Governance Institute Working Paper Series in Law, 286/2015, 10.

[119] See for example, the Spanish Anteproyecto de Ley del Código Mercantil (2014). Available at: https://www.icab.es/export/sites/icab/.galleries/documents-noticies/2014/anteproyecto-de-ley-del-codigo-mercantil.pdf. [Accessed: December 12, 2022].

companies have the right to give directions to their daughter companies although these are conflicting with the interests of the latter, given they support the group interest, or the holding company's interest. Such directions may not be linked to intra-group funds transfer. The holding company holds joint liability for all the daughter companies incorporated in Portugal, but not for foreign daughter companies.[120]

Under the second technique, the presence of the interest of the group[121] is recognized but without impelling either a yearly assessment of profits and liabilities or a direct compensatory obligation. As per this approach, the group context helps to delimit the extent of admissible group control, penalizing the non-observance of such extent based on liability or yet on "validity of acts". This corresponds to the French Rozenblum[122] doctrine adopted in the judicial precedent of some Member States such as Spain,[123] by which the general equilibrium of profits and liabilities is a condition such that the liabilities should neither trouble the financial position of the firm which holds them, nor be with no compensation, by that means encountering the risk of upsetting the equilibrium of the mutual profits and liabilities among the firms involved. This as well signifies that the liabilities assigned by the group should not overshoot the financial capability of the firm holding the liabilities, that is, conduct to the insolvency of the latter. Furthermore, the liabilities assigned to a daughter company should be indemnified by a fixed compensatory payment by the other firm and they should not disturb the equilibrium of the separate liabilities of the firms concerned.[124]

[120] Engrácia Antunes, J. (2008). The Law of Corporate Groups in Portugal. Institute for Law and Finance, Working Paper, 84.

[121] See Winner, M. (2016). Group Interest in European Company Law: an Overview. Acta Universitatis Sapientiae, Legal Studies, 5(1), 85-96.

[122] Cass. crim., 4-2-1985, n° 84-91.581 Rozenblum. Available at: https://www.legifrance.gouv.fr/juri/id/JURITEXT000007064646/. [Accessed: December 12, 2022].

[123] Sentència del Tribunal Suprem 695/2015 (Sala Civil), 11-12-2015.

[124] Rozenblum case; Cass. crim., 4-02-1985, Juris-Data n°1985-000537; Bull. crim. 1985, n°54; Rev. sociétés 1985, p. 688, note by B. Bouloc; JCP G 1986, I, 20585, note by W. Jeandidier; D. 1985, jurispr. p. 478, note by D. Ohl. h.

The Rozenblum doctrine establishes four requirements applicable to avoid civil liability, which are so mathematical that there could hardly be any deviation from it.[125] The four conditions are: (1) the presence of group relationships among the firms involved should be founded on a group interest, crafted in the context of group strategy; (2) intra-group relationships should have adequate compensatory payment; (3) that should not upset the equilibrium of the separate liabilities of the parties; (4) nor overshoot the financial capability of the group company holding the liability.

Tribunals in France do not expressly mention the Rozenblum conditions in civil lawsuits, but do consider the presence of a group so as to define if a specific deal could be interpreted as being benefitial to a specific firm, particularly in terms of a guarantee given by a firm in the interest of other firms (members of the same corporate group).[126] Furthermore, the fundamental approach is found to be universal. It has been implemented in the judicial precedent of Belgium and in some other countries which have enunciated, not in the exact same wording, the exact same approach, i.e., permitting group policy, under the reservation that the presence of the daughter company should not be put at risk. The doctrine has been welcomed by some EU experts,[127] and by the Commission[128] as a cornerstone to succeeding efforts to harmonize EU corporate law against the background of corporate groups.[129] The Rozenblum case was mainly a criminal lawsuit

[125] See as a rare deviation from the Rozenblum approach, Cass. crim., 6-4-2016, n° 15-50.150, FD, Droit des sociétés n°6, June 2016, comm. 115, R. Salomon.

[126] Cass Com., 19-11-2013, n° 12-23.020; Cass. com., 10-2-2015, n° 14-11760, SCI Somopi c/ Sté Industrias Murtra, D (cassation partielle CA Montpellier, 19-11-2013), BJS 31-5-2015, p. 234, note F. Danos; Gazette du Palais, july 28, 2015 n°209, P. 26, chron. J.-M. Moulin.

[127] Forum Europaeum Corporate Group Law, High Level Group of Company Law Experts, Reflection Group; see P.H. Conac, Directors' Duties in Groups of Companies – Legalizing the Interest of the Group at the European Level, ECFR, 2013-194-226.

[128] European Commission. (2012). Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies. Available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0740:FIN:EN:PDF. [Accessed: December 12, 2022].

[129] For instance, Andersen, P. K., Andersson, J. B., Bartkus, G., Baums, T., Clarke, B. J., Conac, P. H., Corbisier, I., Daskalov, W., Engrácia Antunes, J., Fuentes, M., Giudici, P., Hannigan, B., Kalss, S., Kisfaludi, A., de Kluiver, H. J., Opalski, A., Patakyova, M., Perakis, E. E., Porkona, J., Roest, J., Sillanpää, M. J., Soltysinski, S., Teichmann, C., Urbain-Parleani, I., Vutt, A., Sørensen, K. E., Winner, M., & De Wulf, H. (2017). European Model Companies Act (1st ed.). Nordic & European Company Law Working Paper n° 16-26. Available at: https://ssrn.com/abstract=2929348. [Accessed: December 12, 2022].

regarding the abuse of corporate assets, but there as well prominent other lawsuits regarding civil liability only.[130]

The Rozenblum doctrine is the basis for reviewing some elements of group practices, such as establishing the liability of the holding company or the personal liabilities of the daughter companies' managers or more atypically of the managers of the holding company, but has as well been resorted to for reviewing the legality of some contracts in contract law, or the activities of company members making transfers among fellow firms in criminal law.

A corresponding yet somehow distinct concept is adopted by Italian corporate law. The regime in Italy is founded on a wider approach firstly by impelling firms to reveal their integration into a group, and by impelling a general obligation to direct the firm adequately and in the light of the "principles of fair corporate and business management".[131] When this obligation is infringed, the controlling firm will be liable to company members and lenders for the loss occasioned to the assets or the profits of the firm. Nevertheless, there will not be liability when there is no loss, considering the general mutual behaviour of the controlled and the controlling firms, or when the loss is overcome owing to supplementary measures taken as a compensation for the loss. Such cases must be adjudicated based on analysis and account for the motives and the interests that have motivated the judgment. The Italian civil code refers in particular to "finanziamenti" or financing (in any form, including guarantees).[132]

Under the third technique adopted by some other countries, the presence of the group interest is recognized but it does not generate particular effects, at a minimum as regards liability. A group's daughter company is regarded as any other single company and the means of redress relevant to the parent-daughter relation are similar to the ones relevant to all the other firms.[133]

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[130] See Cass, Crim fr.13-2-1989; Cass.crim 9-12-1991; Freyria, C., & Clara, J. (1993). L'abus de biens sociaux et de crédit en groupe de sociétés. La Semaine juridique - Entreprise et affaires, 19, 247. Brussels, 15 September 1994, 275, J.Tribunaux, 1993, 312, TRV, 1994, 275, note by A. Francois (Wiskemann case).

[131] In Italian, "principi di corretta gestione societaria e imprenditoriale", Codice civile, (art.2497).

[132] Italian Codice civile, (art.2497, Quinquies).

[133] Davies, P., Hopt, K. J., Nowak, R., & Van Solinge, G. (Eds.). (2013). Corporate Boards in Law and Practice: A Comparative Analysis in Europe. Oxford University Press, (68 e.s., II A. and B, p. 7 et seq.).

Pursuant to some academics, this signifies that the group background is considered as an illustration of a larger issue of company law, for instance, the one of abuse from a controlling investor (when he is or isn't a different entity) or of injustice towards lenders when the firm is near insolvency (if the firm belongs to a group or has a controlling company member or not).[134] Simultaneously, the rights and liabilities of the managers have been determined in a clearer manner. This is the concept adopted by the UK, it is founded on the basic principle that a firm should not direct its business in a way being "unfairly prejudicial" to the group interests, either the group as a whole or a part of the group.[135] This principle does not apply to corporate groups only but to all corporate businesses. It safeguards company members exclusively, not the other corporate constituencies. As regards the safeguard of creditors, the wrongful trading principle is key.[136]

In the same breath, cash management is an example of the obstacles to the control authority of the holding company.[137] There are different means to guarantee that the funds of the distinct subsidiaries are centralized so that debit and credit entries are balanced, decreasing total debt, as an effective cash management may facilitate the access to greater financial markets. By centralizing its cash, the daughter company gambles on the company in which cash is centralized. When this company is on the brink of insolvency, for instance as a result of the embezzlement of the subsidiaries' financial resources by the holding company, it should abstain from cash management, securing itself from becoming insolvent as well. For instance, collaterals may be demanded as a protection, in the shape of a reverse repurchase agreement for all of the parties (which is a prudential regulation in several countries).[138] Joint liability or guarantee are as

[134] See Böckli, P., Davies, P. L., Ferran, E., Ferrarini, G., Garrido Garcia, J. M., Hopt, K. J., Opalski, A., Pietrancosta, A., Skog, R., Soltysinski, S., Winter, J. W., Winner, M., & Wymeersch, E. (2016). A proposal for reforming group law in the European Union - Comparative Observations on the way forward. Available at: http://dx.doi.org/10.2139/ssrn.2849865. [Accessed: December 12, 2022].

[135] Companies Act 2006, (s.994).

[136] See Insolvency Act 1986, (s.214).

[137] French Code monétaire et financier, (art.L511-7 para.I-3); Guyon, Y. (2003). Droit des Affaires. Tome 1, Droit commercial général et sociétés (12th ed.). Economica, (nr. 617), mentioning the Rozenblum lawsuit.

[138] Guyon, ibid.

well applied, yet they may expand liability to parties that are not liable in principle. Notional cashpooling without raising cash is a simplified version and does not pose such issues: it is solely when there is actual transfer of funds that the risk and the difficulty are expanded. Every group company should define its individual risk in the cash management strategy, every participant preventing being jeopardized by the other insolvent contributors. Collaterals secure contributors from the outcomes of the other participants' insolvency. According to some scholars, the limitation or the exclusion of the liability of the contributors to the strategy of the group should be made possible either via closing the agreement or by demanding further protection.[139]

3.2. The English regime

3.2.1. Corporate separateness and limited liability

Some assert that unlimited liability can be a workable solution for numerous companies to run their business activities in a manner that generates as well economic efficiency. Certainly, shareholders of some kinds of companies (partnership for instance) cannot limit their liability for their companies' debts.[140]

Due to the fact that the principle of corporate separateness and the doctrine limited liability are very tightly knitted, they originally seemed like two peas in a pod. The two concepts offer protection, which produces economic efficiency.[141] Hence, limited liability grants, as a financial and contract instrument, a mass of benefits to a legal person and its shareholders, constituting the most convincing argument for the maintenance of the system. A typical economic explanation of the corporate form, comprising the one of limited liability, can be seen in the well-known book

[139] See Böckli, P., Davies, P. L., Ferran, E., Ferrarini, G., Garrido Garcia, J. M., Hopt, K. J., Opalski, A., Pietrancosta, A., Skog, R., Soltysinski, S., Winter, J. W., Winner, M., & Wymeersch, E. (2016). A proposal for reforming group law in the European Union - Comparative Observations on the way forward. Available at: http://dx.doi.org/10.2139/ssrn.2849865. [Accessed: December 12, 2022].

[140] See Limited Liability Partnerships Act 2000.

[141] Hansmann, H., & Kraakman, R. (2000). The Essential Role of Organizational Law. Yale Law Journal, 110, 387, (p. 393).

entitled "The Economic Structure of Corporate Law".[142] From an economic perspective, the corporate structure is based on a "leonine contract" where the excess of contracting expenses, which would have been elseways borne by parties engaged in the formation of the corporation, is limited. In the UK for example, parties do not have to bargain everytime for limited liability as it happened before the Limited Liability Act 1855, and the legislation minimizing transaction costs reduces the resulting social costs as well.[143]

For instance, pursuant to Pettet, Lloyd's (a famous insurance company in the UK) illustrates well how an unincorporated company could take advantage of limiting the liability of its shareholders.[144] Lloyd's has been the world's insurance marketplace for a long time. It asked its brokers to secure the payment of loss caused by the insurance policy counting "the last cufflink".[145] Sometime, the company confronted class actions regarding air contamination by asbestos in the United States. Being in the vicinity of insolvency, Lloyd's accepted to incorporate limited liability firms. Few months later, there was large capital inflows in Lloyd's, that, having reviewed its long-established standards, ultimately permitted trading with limited liability to human (non-corporate) subscribers to insurance policy.[146] Based on the illustration of Lloyd's, one may identify what limited liability advocates have promoted: i.e., "no prudent man would risk more than he would afford to lose" and hence, the system would incite the wealthy, middle and labouring social classes to make capital investments to enhance its business objectives. By the same token, a shareholder should be capable of investing in a firm without being concerned about consequently holding financial liability for the debts of that firm.

There has been concern about a firm simply shifting liability from company members to lenders, encouraging recklessness. Limitation of liability is the backbone of such practices. That is why

[142] Easterbrook, F. H., & Fischel, D. R. (1991). The Economic Structure of Corporate Law. Harvard University Press, (pp. 7-42); see as well, Halpern, P., Trebilcock, M., & Turnbull, S. (1980). An Economic Analysis of Limited Liability in Corporation Law. The University of Toronto Law Journal, 30(2), 117-150.

[143] Posner, R. A. (1992). Economic Analysis of Law (4th ed.). Little Brown and Company, (pp. 393-397).

[144] Pettet, B. (1995). Limited Liability - A Principle for the 21st Century? Current Legal Problems, 48, 125, (pp. 137-139).

[145] Ibid., (p. 137).

[146] Ibid., (p. 139).

the concept of the limitation of liability of shareholders inaugurated by the Limited Liability Act 1855 was not accepted by the upper class and faced by express scepticism in the late 1800s.[147] Company members want corporate managers to take higher risks in conducting their business activities, in the light of such a system. As stated formerly, higher risk is associated with higher return. Hence, it is easy to discern a moral hazard risk: a firm's common shareholders do not lose anything if the firm fails owing to poor management, yet they become wealthier where the risk of collapse does not surface. According to Ali Imanalin,[148] dissenters alleging that limited liability has generally been a politic conception, recognize as well that it underpins corporate social irresponsibility. The discussion on this matter is considerate of groups of companies.

Hence, liability within groups of companies poses complex questions. The existing English legislation, as pointed out by Ali Imanalin,[149] does not define a limit among corporate and non-corporate shareholders. Any entity within a group is indeed a separate company with separate liabilities and assets and its managers have fiduciary obligations to support the soundness of the specific entity of which they are board members.[150] Notwithstanding that, "fiduciary duties in the vicinity of insolvency form a notoriously murky area where legal space warps".[151] Identically, when a firm is in the vicinity of winding-up, managers are obligated to the creditors of the specific firm in the group, instead of the group in its entirety. In groups of companies, a daughter company could freely undertake risky ventures with the consequence that, in case it eventually fails, other affiliates to the group wouldn't have any duty at all to pay the debts owed by the firm in insolvency to its creditors. Firms within a group may close contracts together.[152] In opposition

[147] Talbot, L. E. (2008). Critical Company Law. Routlege-Cavendish, (pp. 54-57).

[148] Imanalin, A. (2011). Rethinking limited liability. Cambridge Student Law Review, 7(1), 89-99.

[149] Ibid.

[150] Ferran, E. (2008). Principles of Corporate Finance Law. Oxford University Press, (pp. 31-32).

[151] See Licht, A. N. (2021). My Creditor's Keeper: Escalation of Commitment and Custodial Fiduciary Duties in the Vicinity of Insolvency. Washington University Law Review, 98(6), 1731-1764. Available at: https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=6543&context=law_lawreview. [Accessed: December 12, 2022].

[152] Re Polly Peck International plc (1996) 2 All ER 433.

to several states in which the tribunals are empowered to amalgamate assets of distinct firms forming a group of companies, UK corporate law does not allow for any exception to the rule that every firm in a corporate group is a separate company.

At the same time, the paramount effect of limited liability is that firms hold liability for the payment of their own debts. In the majority of legal regimes, this approach governs simultaneously single firms and groups of companies.[153] Nevertheless, the group form opens the way for misconduct of corporations and disregard for group companies, in particular during financial distress. Yet, harmonized direction of the group could, on the other hand, support corporate rescue. According to Irit Mevorach, the issue is how requirements on the pre-insolvency duties of managers should make room for this situation of the group scope, for one thing guaranteeing that lenders are shielded from misconduct of the group and, for another, providing the required flexibility necessitated for achieving fruitful outcomes during financial distress.[154]

As per UK legislation, managers are obligated to their firm. This applies even when the firm is a holding company owning daughter companies.[155] When the daughter company is in a state of insolvency, the basic standard is that solely the daughter company holds liability for its debts and the holding company does is not liable at all in that context.[156] Usually, putting limited liability aside (or piercing the corporate veil) hardly happens and is limited to cases where the corporate form was a cover and was employed to circumvent legislation.[157] This unique deviation from limited liability might not involve cases in which groups acted via subsidiaries for diverse business aims, but in which the lenders of these subsidiaries have incurred loss due to the manner

[153] See OECD. (1980). Responsibility of Parent Companies for Their Subsidiaries, (paras. 65-70).

[154] Mevorach, I. (2013). The role of enterprise principles in shaping management duties at times of crisis. European Business Organization Law Review, 14(4), 471-496.

[155] Lindgreen v. L. & P Estates Ltd (1968) 1 Ch 572; Charterbridge Corp. Ltd. v. Lloyds Bank (1970) 1 Ch 62.

[156] See re Southard (1979) 1 WLR 1198 (CA).

[157] See Adams v. Cape Industries plc (1991) 1 All ER 929; Trustor AB v. Smallbone (2001) (Nº2) (2001) 3 All ER 987; VTB Capital plc v. Nutritek International Corp (2013) UKSC 5; Prest v. Petrodel (2013) UKSC 34.

the group was directed, for instance, because of a group strategy which made the subsidiary considerably vulnerable to financial crisis.[158] However, the reasoning that all companies in a corporate group are to be considered as one (the single economic entity theory) has been strongly condemned as a ground for piercing the corporate veil.[159]

Otherwise, the veil may be pierced based on the wrongful, or fraudulent trading provisions which allow attribution of liability for wrongful direction of the company or for lack of action to reduce creditors' harm when it could be known that insolvent liquidation was inevitable.[160] Those rules mainly concern managers. Nevertheless, UK fraudulent trading provisions apply to any parties who were deliberately engaged in conducting the company for the purpose of defrauding creditors.[161] Even if it concerns managers, wrongful trading provisions describe the latter vaguely to count shadow and de facto directorship. The notion of shadow directorship involves individuals pursuant to whose guidance the de jure directors of the firm are used to operate,[162] and may hence comprise holding companies or their managers.[163] Consequently, the rule may conceivably involve outsiders. However, at last, there is no instruction on how the rule should be implemented in a group situation. Accordingly, UK tribunals have been rather disinclined to attribute group liability.

Overall, pursuant to Irit Mevorach,[164] the implementation of the fraudulent and wrongful trading provisions to holding companies in England seems to have had marginal impact on the

[158] See Hadden, T. (1993). Regulating Corporate Groups: An International Perspective. In J. McCahery, S. Picciotto, & C. Scott (Eds.), Corporate Control and Accountability: Changing Structures and the Dynamics of Regulation (p. 343). Clarendon Press, (pp. 362-363).

[159] See Woolfson v. Strathclyde Regional Council (1978) SC 90 (HL); cf. DHN Food Distributors Ltd v. Tower Hamlets LBC (1976) 1 WLR 852 (CA).

[160] Insolvency Act 1986, (ss. 213-214).

[161] Ibid., (s. 213).

[162] Ibid., (s. 251).

[163] See Re Hydrodan (Corby) Ltd (1994) B.C.C. 161; Re Paycheck Services 3 Ltd (2010) UKSC 51); Wilkinson, S. (1987). Piercing the Corporate Veil and the Insolvency Act 1986. Company Lawyer, 8, 124, (p. 125).

[164] Mevorach, I. (2013). The role of enterprise principles in shaping management duties at times of crisis. European Business Organization Law Review, 14(4), 471-496.

legislation.[165] Certainly, the explanation of the rules has been quite compact in this scope, such that the group situation is at times disregarded. Hence, establishing fraudulent trading by a holding company may necessitate that the liquidator primarily demonstrates that the daughter company was ran (by its directors) in a defrauding way.[166] It as well seems to her that holding companies may conduct corporate affairs as one unit, grant guarantees to the creditors of the daughter company to convince them to deal with the latter while it is in financial distress, and later, stop backing it. This may not serve to hold the holding company liable.[167] Alternatively, to demonstrate the shadow directors' wrongful trading, a liquidator may require to prove extensive intervention in the direction of the daughter company and encroachment on decision-making of the managers of the subsidiary.[168] Tribunals are as well disinclined to attribute liability in cases in which there was material undercapitalization of the business entities.[169] Generally, UK tribunals appear really attentive to the hindrance to the doctrines of limited liability and legal personality.[170] It has been reported that any alternate process might demand deeper inquiry and the potential interference of legislators. The cases where holding companies should hold liability for their daughter companies' debts are the object of high public interest and discourse. It is possible that the legislation is deficient in this matter. Coming to a judgement would demand a deeper inquiry into public policy problems than is at hand where the judiciary receives an application for an interlocutory order.[171]

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[165] See Omar, P. J. (2003). The European Initiative on Wrongful Trading. Insolvency Lawyer, 6, 239, (p. 245); Mokal, R. J. (2005). Corporate Insolvency Law: Theory and Application. Oxford University Press, (pp. 284-292); United Nations Commission on International Trade Law. (2013). Insolvency Law: Directors' Obligations in the Period Approaching Insolvency, (paras. 56-57, and Recommendations 10 and 11). Available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/V13/807/89/PDF/V1380789.pdf?OpenElement. [Accessed: December 12, 2022].

[166] Re Augustus Barnett & Son Ltd (1986) 2 BCC 98904.

[167] Ibid.

[168] Re Hydrodan (Corby) Ltd (1994) BCC 161; Secretary of State for Trade and Industry v. Deverell (2000) 2 BCLC 133; Milman, D. (2000). A fresh light on shadow directors? Palmer's In Company, (5), 1-2; Payne, J. (2001). Casting Light into the Shadows: Secretary of State for Trade and Industry v. Deverell. Company Lawyer, 22, 90.

[169] See Re Purpoint Ltd. (1991) BCC 121.

[170] Chandler v. Cape plc (2012) EWCA Civ 525.

[171] See obiter dictum by Hoffmann J in Re Augustus Barnett & Son Ltd (1986) 2 BCC 98904, ([98908]).

Hence, under the UK system, directors will be disinclined to bring claims against fellow group companies or their managers. Certainly, it has been contemplated that using the notion of shadow director for a liquidator to establish wrongful trading is unpractical.[172] The default of lucid perspective on group liabilities complicates the imposition of liability on group companies. Consequently, the existing perspective might prevent directors from suing other guilty directors, rather than preventing mismanagement of the group.

The UNCITRAL Legislative Guide on Insolvency Law identically provides a broad approach to the parties in charge of the direction of a firm and comprise parties exerting de facto control and playing the role of managers,[173] as well mentioning the notion of shadow directorship.[174] Hence, it could likely be relevant to outsiders. Certainly, in the group situation, it may well be that a group company, generally the holding company, would exercise shadow directorship on its daughter companies, by what means, although it did not assume the role of a manager, it would keep track of, and actually, control its daughter companies, which are members of a tightly knitted corporate group. In that context, the notion of shadow directorship is very pointful since it is founded on the economic fact of effective intrusion in the direction instead of on the conventional status of owner of the daughter company.[175]
Nevertheless, the notion of shadow directorship may solely tackle particular scenes reproducing how the managers of the firm are used to operate pursuant to the guidance of other parties.[176] In the group context, issues of common liability may surface in other circumstances. A reason for this is that business practice for groups departs from the one of single companies, that are directed either by their de jure or de facto directors or by other parties which directed the

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[172] Milman, D. (2000). A fresh light on shadow directors? Palmer's In Company, (5), 1-2.

[173] See United Nations Commission on International Trade Law. (2019). Legislative Guide on Insolvency Law. Part Four: Directors' obligations in the period approaching insolvency (including in enterprise groups). Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-11273_part_4_ebook.pdf. [Accessed: December 12, 2022].

[174] Ibid., (para. 26).

[175] See as well Collins, H. (1990). Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Integration. Modern Law Review, 731, (p. 741).

[176] Ibid., (p. 742).

directors. A company integrated into a corporate group may have participated in the general direction of the group of companies and the group policy may have had repercussions for the financial position of the company by various methods. Hence, while an expansive description of manager, in particular the notion of shadow directorship, could be pointful for group situations, the rules concerning group liability for mismanagement near insolvency need more expansion to accord with the "twists and turns" in this corporate form.

The limitation of the liability of holding companies and other companies or parties in the group (to the insolvent company's debts) is based on a judicious business logic. Piercing the corporate veil should simply not be manageable, except if the group companies' businesses are amalgamated. According to Irit Mevorach, UK enterprise law should not formulate new obligations and reliefs in that respect and a vigilant perspective is necessitated. A simple parent-daughter relation or the direction of a group as a single company is not enough to excuse intermingling liabilities and assets throughout the companies. It as well appears convenient not to compel holding companies to automatically subsidize their daughter companies when they become insolvent. Furthermore, the non-corporate shareholders or managers of the holding company should not hold liability for the daughter company's debts simply because the holding company may hold liability. This would imply piercing the corporate veil two times and obstruct the essential purpose of limited liability of promoting entrepreneurs and risk-taking investors. Nonetheless, the holding company or other group companies should hold liability for the insolvent company's debts if the directors of the group had been obstructing the capacity of the insolvent company to circumvent insolvency or to alleviate its consequences when insolvency threatens. There comes the turn of UK enterprise law to enter the game. One more time, its part should be moderate. It should not substitute entity law by attributing liability founded on the group reality, in other words, strict liability on group companies or their managers for the insolvent company's debts. Instead, it should contribute to detect the nature of the business practice so as to endorse the objectives of policing managerial work in the framework of insolvency. UK enterprise law could, in particular, be valuable in exposing the parties which could have directed the company in the brink of insovency. On top of that, it could signal cases of mismanagement and misconduct in a group scope, outside the limitations of the formal

interpretation of wrongful trading. A reason for this is that UK enterprise law would draw attention to interrelations within groups, push outside separate corporate personality.

Revealing the factual liable persons who have directed a company (and who have inflicted loss upon creditors) may be less straightforward in a group situation (as against a single entity context), in which there may be many dimensions of direction influencing how that company's business is carried out and the manner it was dealing in the vicinity of insolvency. Within a group, the directions or instructions of the holding company or other affiliated entities to daughter companies may not always substitute policy-making by the company at stake as is usually demanded to unveil shadow or de facto directors. However, other group companies may still exercise such control or intervention in the business of the daughter company, factually influencing its affairs near insolvency. That may produce an obstruction to the daughter company's capacity to circumvent insolvency or attenuate its effects. A holding company may, for instance, be look as subsidizing a daughter company (comprising via another group company) when insolvency threatens. Eventually, such subsidization may be interrupted when the holding company understands that it won't be possible to save the daughter company's business from unfortunate failure. The managers of the daughter company may actually depend on the subsidization of the affiliated company in carrying on the business nearly as much as before the distress, however the outcome could be a worsening of the insolvency state of the daughter company. This modus operandi may cover misleading statement of fact to voluntary creditors that may successively engender relief against the concerned solvent parties.[177] However, group subsidization and eventual overlooking, or also neglect of the interests of the creditors of the insolvent daughter company during the enforcement of the group strategy, may constitute wrongful trading. This would apply although the managers of the daughter company did not relinquish control and did not abide by any directions or guidance.[178] In that context,

[177] Contex Drouzhba v. Wiseman (2007) EWCA Civ 1201.

[178] Cf. Re Hydrodan (Corby) Ltd (1994) BCC 161 and Secretary of State for Trade and Industry v. Deverell (2000) 2 BCLC 133; Prentice, D. (1998). Corporate Personality, Limited Liability and the Protection of Creditors. In R. Grantham, & C. Rickett (Eds.), Corporate Personality in the 20th Century (pp. 99-125). Hart Publishing, (pp. 116-117).

particular attention should be drawn to tightly knitted groups and the directorial structure that permits a certain level of management freedom to the subsidiary while staying economically counting and considerably dependent on the solidity of the group. Identically, in cases of fraudulent trading, such daughter companies may not as such conduct their affairs fraudulently, since their managers may have been ignorant of the intent to fraud of the affiliated entity (or its managers), for example, by permitting the daughter company to carry on its business, being aware of its uncapability to pay its debts. Nonetheless, the possible liability of the affiliated entity should be taken into account, even if the direction of the subsidiary did not conduct the affairs in a fraudulent way.[179]

Horizontal decentralization in group management should as well be considered. There, it may be hard to find a single company that held and exercised central control on (or guided) the insolvent company. Actually, the directors of a group of members may have contributed cooperatively. Whilst the companies in such groups may have their proper policy-making courses and stay conventionally autonomous, there could exist a high level of integration between the distinct boards of directors. Hence, the managers of the company in a state of insolvency could definitely be informed of the interests of the group and the facts related to the resolution to adopt a specific modus operandi vis-à-vis the company. Once more, they do not have to relinquish control or circumvent taking decisions, but instead, against this background, direct the group in cooperation. In such circumstances, if fraud or recklessness could be found in the acts of the direction, the company's own directors may be liable, but other companies and managers out of the company may hold liability as well, although they have not outweighed the decision of de jure directors or performed the functions of managers of the relevant company.

Hence, disadvantageous intervention by group companies or their managers, that might negatively influence creditors of insolvent companies in the group, may not be extensive but instead the outcome of group policy-making or the result of group subsidization and eventual overlooking of a daughter company. It does not neither always have to be pervasive and consistent. Resolutions influencing the conduct of the insolvent company may be taken directly before the opening of insolvency proceedings, in other words, solely whenever insolvency becomes unavoidable, where there may be higher motives to transfer assets from one of the

[179] Cf. Re Augustus Barnett & Son Ltd (1986) 2 BCC 98904.

group companies to another one or to surrender some companies regarded as hopeless cases. It should be admitted that the reality that members are financially and directorially interconnected or are owned by a holding company having the ability to control their business might result in higher influence during periods of distress, such that it could be detrimental to lenders.
According to Irit Mevorach, strategic management models concerning duties of managers could be formulated correspondingly. They should allocate duties to circumvent insolvency or attenuate its consequences not solely on managers but as well, directly, on group companies and their managers which could affect the business of the insolvent company to the disadvantage of the creditors, without always guiding its directors in a sustained and persistent way. Simply depending on notions such as shadow and factual directorship is not enough. The enterprise perspective, that revolves around the economic context of the corporate and directorial form of the group, is needed so as to expedite revealing the group members which might have pursued a wrong course of action in the brink of insolvency of a group company.
The enterprise perspective could even serve the policing of group directorial duties (where insolvency threatens) and expedite addressing what may be referred to as "group wrongful trading" by revealing specific threats of mismanagement and misconduct in a group situation. In that context, as well, notions such as shadow directors are futile as they keep dark about the substance of the duty which may be allocated to affiliated companies in a group. Certainly, mismanagement of a group may push outside the formal reading of what corresponds to wrongful trading, and the policing of such acts may demand a more stringent perspective in specific cases.
Hence, on top of the common wrongful trading background, in which managers (comprising shadow directors) carry on their business or undertake risky ventures being aware that insolvency is near and not making any effort to reduce the loss of creditors, the enterprise perspective could suggest certain backgrounds in which group companies were very susceptible. Such backgrounds should generate a group wrongful trading presumption, that is solely rebuttable by corporate groups acting suchwise when they are capable of demonstrating that they took every step they could.
Directorial structures making some companies very susceptible would comprise corporate groups which followed a group policy which indulged the group interest altogether (or the interests of

some group companies) to the detriment of other group companies' interests.[180] This could be revealed not solely from forms of hierarchy, and of central control but as well from horizontal groups structures in which there was concerted direction of the companies and members acted for the sake of conflicting group interests. The "subservient subsidiary situation"[181] would be particularly worrying, as the subsidiary would have simply been in the service of the group, in other words, was used by some companies in the group or alternatively served to maximize the total profit of the group, but was not capable of making normal profit to honour its duties. The situation of under-capitalization of subsidiaries is as well controversial. Certainly, an under-capitalized subsidiary is a likely background in a group scope, in which funds may, in the normal course of business, be obtainable from other group companies, minimizing the actual significance of the adequate-capitalization standard.[182]

The question may as well be posed in groups with lower levels of cooperation in which, in the ordinary course of business, the insolvent company may have been autonomous (with minimal control by the holding company). Nonetheless, such a directorial pattern and form may be modified when financial distress is imminent. In such circumstances, intra-group policy may come about at the expense of the company in financial crisis, entrepreneurial opportunities may be redirected to other group companies and/or assets may be sold to other group companies at unjustifiably low prices. Daughter companies may as well be in a very susceptible situation when they were created or used by the group to grasp deficits and toxic assets or to undertake the riskier ventures of the group.[183]

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[180] Woolfson v. Strathclyde Regional Council (1978) SC 90 (HL); cf. DHN Food Distributors Ltd v. Tower Hamlets LBC (1976) 1 WLR 852 (CA).

[181] See Muscat, A. (1996). The Liability of the Holding Company for the Debts of Its Insolvent Subsidiaries. Routledge, (pp. 200-201).

[182] See Landers, J. (1975). A Unified Approach to Parent, Subsidiary and Affiliated Questions in Bankruptcy. University of Chicago Law Review, 42(4), 589, (p. 597).

[183] See Hadden, T. (1993). Regulating Corporate Groups: An International Perspective. In J. McCahery, S. Picciotto, & C. Scott (Eds.), Corporate Control and Accountability: Changing Structures and the Dynamics of Regulation (p. 343). Clarendon Press, (p. 364); Schmitthoff, C. M. (1978). The Wholly Owned and the Controlled Subsidiary. Journal of Business Law, 222; Collins, H. (1990). Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Integration. Modern Law Review, 731, (pp. 736-738).

Global strategic management models on the duties of managers should entail that, in situations of groups which followed a policy making some companies at risk of becoming insolvent, the parties controlling such companies must make every effort to guarantee that the company can still circumvent insolvency or attenuate its effects (when insolvency is inevitable because of other motives). This may comprise provision of entrepreneurial opportunities and capital injection. Liability will be attributed, except if it is plausible to demonstrate that such particular efforts have been made. The director would solely necessitate to prove that the distressed company was in a susceptible situation in the group.

Certainly, it is as well true that it is usually the group which can in fact support (instead of prejudice) the insolvent company in sorting out its financial problems, for instance, by presenting new finance, surety to creditors, entrepreneurial opportunities, etc. Pursuant to Irit Mevorach, it is crucial that the legislation on the obligations of managers (applied to attribute group liability in some cases) does not deter groups from making such efforts. However, the wrongful trading regime as seen in the global models, with the aforementioned amplification concerning groups suggested by Irit Mevorach, would actually promote and galvanize such actions. It would demand making efforts to circumvent insolvency or attenuate its effects, instead of attributing strict liability to affiliated companies, while making allowances for the group context. This signifies that in default of a relation characterized by misconduct or a participation in the direction of the company, affiliated companies and their managers do not have to be apprehensive whatsoever about making efforts to resolve the financial difficulties of the company in difficulty.[184] Moreover, when there was such participation, efforts made by the directors of the group (comprising the sake of the interests of the group) intended for supporting and saving a daughter company would be counted positively when contemplating possible liability.

According to Irit Mevorach, there could exist other means to tackle the issue of group liability apart from by elaborating wrongful trading provisions.[185] Nevertheless, such means are usually

[184] Australian Corporation Law 2001, (s. 588V).

[185] United Nations Commission on International Trade Law. (2010). Legislative Guide on Insolvency Law. Part three: Treatment of enterprise groups in insolvency, (paras. 95-104). Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/leg-guide-insol-part3-ebook-e.pdf. [Accessed: December 12, 2022].

either excessively extensive or excessively confined to tackle the labyrinth of the group case. In New Zealand, a remarkable provision is that of the contribution order.[186] This system seems very interesting for groups during insolvency as it accomodates them with a customized provision. It does not cover a general obligation allocated on firms and management, but is instead solely relevant to corporate groups. In that context, it permits ordering an affiliated entity to pool its assets with the insolvent entity being wound up. Contribution orders are founded on justice, since the tribunal may attribute liability if "just and equitable" in this case.[187] The tribunal should consider some criteria before taking such a decision, comprising the scope of the involvement of the affiliated entity in the direction of the entity in liquidation, its actions vis-à-vis lenders, and the limit to which the liquidation is imputable to the conduct of the affiliated entity. The tribunal is as well entitled to take into account such additional elements at its discretion.[188]

Certainly, critics have qualified this law as "revolutionary" in respect of its resort to enterprise standards, but have as well contemplated that it has actually been rarely used.[189] A main challenge has been defining how to harmonize the separate interests of the insolvent daughter company's lenders and of the affiliated entity's ones, in particular when a contribution order may jeopardize the solidity of the group company not yet involved in insolvency procedures.[190]

Certainly, the issue with the contribution order is, pursuant to Irit Mevorach, that it is quite

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[186] New Zealand Companies Act 1993, (ss. 271, 272), Available at: https://www.legislation.govt.nz/act/public/1993/0105/latest/whole.html. [Accessed: December 12, 2022]; and for more details about the interesting section 271 of New Zealand Companies Act 1993, see Rawcliffe, S. (2015, February 4). Section 271 Companies Act 1993. Harkness Henry Lawyers. Available at: https://www.harknesshenry.co.nz/2015/02/04/section-271-companies-act-1993/. [Accessed: December 12, 2022].

[187] See Austin, R. P. (1998). Corporate Groups. In R. Grantham, & C. Rickett (Eds.), Corporate Personality in the 20th Century (pp. 71-89). Hart Publishing, (pp. 84-85); Blumberg, P. I., Strasser, K., Georgakopoulos, N., & Gouvin, E. J. (2005). Blumberg on Corporate Groups (2nd ed.). Aspen Publishers, (s. 90.05[B]).

[188] Great Britain. Insolvency Law Review Committee. (1982). Insolvency Law and Practice: Report of the Review Committee (vols. 2-3). H.M. Stationery Office, (ch. 51).

[189] Blumberg, P. I., Strasser, K., Georgakopoulos, N., & Gouvin, E. J. (2005). Blumberg on Corporate Groups (2nd ed.). Aspen Publishers. (s. 90.02).

[190] United Nations Commission on International Trade Law. (2010). Legislative Guide on Insolvency Law. Part three: Treatment of enterprise groups in insolvency, (para. 103). Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/leg-guide-insol-part3-ebook-e.pdf. [Accessed: December 12, 2022].

expansive and seems to be grounded in enterprise law rather than emerging from a definite obligation. Accordingly, it can be said that, whilst it is unjust that an insolvent daughter company's lenders will be paid by a fragile company, the affiliated company's lenders may reciprocally stipulate that they were subject to the separate personality and did not predict to have to vie with any other group companies' lenders. As aforementioned, in contexts covering veil piercing and asset intermingling, and insofar as the separation and distinction of liabilities and assets was respected in the normal course of business and the group was not combined, enterprise legislation should contribute to the illumination of the financial pattern but should not build a backbone for overlooking the corporate structure. Alternative kinds of provisions which attribute liability as per formal control,[191] or that overlook the separate legal personality pursuant to justice,[192] are identically inaccurate except if they are attached to an establishment of wrongful or fraudulent trading.[193]

Certainly, wrongful trading provisions serve, according to Irit Mevorach, as a rationale for addressing mismanagement. It is as well becoming widely acknowledged that directors should be bound by some particular duties through the period in which insolvency waxes looming or inevitable. The duties of directors, within a group, should arise from identical standards, whilst enterprise legislation should contribute to the assimilation of the group financial structure and expedite addressing group mismanagement. As far as an affiliated company's liability is imposed in light of this, the eventuality that a contribution order might subsequently threaten apropos of the insolvency of that very affiliated company as well should not impact on the factuality of liability. Indeed, there will be less stimulus to conduct a company in a state of insolvency. The economic situation of the party who infringed the duties is as well a criterion to consider when deciding whether to award the relief and the limit of the contribution order. The reliefs for infringement of the obligation may as well differ and may comprise simultaneously support for

[191] See German law on affiliated companies and groups of companies ("Konzernrecht"), German Stock Corporation Act of 1965 ("Aktiengesetz"), (para. 291 et seq.).

[192] For instance, equitable subordination (see in the United States, 11 U.S. Code § 510(c). Available at: https://www.law.cornell.edu/uscode/text/11/510. [Accessed: December 12, 2022]).

[193] See Landers, J. (1975). A Unified Approach to Parent, Subsidiary and Affiliated Questions in Bankruptcy. University of Chicago Law Review, 42(4), 589, (pp. 597-606).

the insolvent company and subservience of the actions of the managers as lenders.[194] The relief is given at the discretion of courts, but the duties should be set and should follow from an establishment of loss to lenders created by wrongful trading. The resort to enterprise standards to fit the group context in with the wrongful trading provisions as well guarantees that the span of misconduct backgrounds in a group scope is comprised. Other wanting notions, such as piercing the corporate veil in cases of "cover" companies, as a recourse to tackle the issue of group liability for the debts of daughter companies, would not pass muster.

3.2.2. Corporate groups directors and insolvency

In the UK, entity law honours, the limited liability and separate legal entity principles in the group scenario. The benefits of such basic company law notions are well-documented. Microeconomics imply that the specific notion of limited liability is key for promoting trade, reducing investing risks and minimizing different transaction costs, comprising the ones connected with the supervision of the directors of the entity.[195]

The benefits of limited liability are relatively less considerable in groups with central control, comprising wholly owned daughter companies. In such case, the holding company does not constitute a hands-off investor with a passively-managed portfolio. The holding company is as well expected to supervise the activities of the daughter company anyway.[196] Still, even such group forms profit from risk limitation, which promotes trade, as without limitation of liability, they might not have engaged in the ventures that they carried out via daughter companies. Moreover, since entity law (specifically its limited liability regime) simplifies asset partitioning

[194] English Insolvency Act 1986, (s. 215(4)).

[195] Easterbrook, F., & Fischel, D. (1985). Limited Liability and the Corporation. University of Chicago Law Review, 52, 89; Easterbrook, F. H., & Fischel, D. R. (1991). The Economic Structure of Corporate Law. Harvard University Press.

[196] Blumberg, P. I., Strasser, K., Georgakopoulos, N., & Gouvin, E. J. (2005). Blumberg on Corporate Groups (2nd ed.). Aspen Publishers, (s. 1.01, ch. 6); Strasser, K. A. (2005). Piercing the Veil in Corporate Groups. Connecticut Law Review, 37, 637, (pp. 638-639).

or the division of pools of assets between the separate companies in a group of companies, it may contribute to the advantages of lenders vis-à-vis distinct groups structures. Partitioning assets guarantees that the lenders of every company will not have to vie with the lenders of other companies when insolvency strikes and can, thus, limit their supervisory measures to the specific company with which they are dealing. Successively, this diminishes the credit costs for corporate persons.[197]

Certainly, in some groups structures, partitioning of assets might be a misleading maneuver. This applies where a group has concentrated assets and liabilities, with the consequence that, true to their financial structure, there is no factual segregation of assets.[198] Pursuant to Irit Mevorach, in these situations, entity law sould be overruled by enterprise law that will enforce particular concepts to permit the integration of assets and liabilities near insolvency, guaranteeing their equitable and effective partitioning.[199] Yet, in other situations, the group form does not, in itself, overcome the economic function of limited liability and thus, in theory, entity law should govern, except if limited liability isn't affected by the specific enterprise principle.[200]

Limited liability should, therefore, lead in the group scenario, open to limited circumstances exacted by entity law, for instance, through reliefs in wrongful trading or tort regimes, or in situations in which the corporate veil may be pierced to curb excessive corporate risk-taking and misconduct of the corporate structure to the detriment of lenders.[201] Still, according to Irit

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[197] Hansmann, H., & Kraakman, R. (2000). The Essential Role of Organizational Law. Yale Law Journal, 110, 387.

[198] According to Irit Mevorach: "a façade of asset partitioning", Mevorach, I. (2009). Insolvency Within Multinational Enterprise Groups. Oxford University Press, (ch. 1, pp. 224-225).

[199] Ibid., (pp. 225 and 255-259); United Nations Commission on International Trade Law. (2010). Legislative Guide on Insolvency Law. Part three: Treatment of enterprise groups in insolvency, (Recommendations 219-220). Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/leg-guide-insol-part3-ebook-e.pdf. [Accessed: December 12, 2022].

[200] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02013L0034-20211221. [Accessed: December 12, 2022]; United Nations Commission on International Trade Law. (2010). Legislative Guide on Insolvency Law. Part three: Treatment of enterprise groups in insolvency. Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/leg-guide-insol-part3-ebook-e.pdf. [Accessed: December 12, 2022].

[201] Landers, J. (1976). Another Word on Parents, Subsidiaries and Affiliates in Bankruptcy. University of Chicago Law Review, 43, 527, (p. 529); Brudney, V. (1992). Corporate Bondholders and Debtor Opportunism: In Bad Times and Good. Harvard Law Review, 105, 1821; Prentice, D. (1998). Corporate Personality, Limited Liability and the

Mevorach, an enterprise perspective that would permit revolving around the particular group situation and the issues and questions that could emerge in this scope is still needed for these general principles to fit exactly with the group background. Within groups, the prospects for cost externalizing to the detriment of lenders, which is a common affair in the vicinity of insolvency,[202] might be wider and could emerge by distinctive means, for instance, when daughter companies are controlled by their holding companies that inhibit their "standalone profit", or when the group abuses the relationships among the companies to move assets at the expense of some companies.[203] As stated by Robert Monks, the "corporation is an externalizing machine (moving its operating costs and risks to external organizations and people), in the same way that a shark is a killing machine".[204] On the other hand, the group structure may unveil that a modus operandi adopted by directors or the controlling parties in the group that is evidently prejudicial to the lenders of a daughter company (if its relation with the group is disregarded) was actually adequate in a group scope. Hence, an appropriate inquiry of the advantages and disadvantages to lenders may necessitate consideration of the group financial structure. That is to say, even though entity law should primarily govern in concerns influencing limited liability, enterprise law has a part to perform as well. It should not assign rights and liabilities on the general economic rationale in such circumstances, but could guarantee efficient conformity to the limited circumstances of limited liability by underlining the importance of the group structure.

Protection of Creditors. In R. Grantham, & C. Rickett (Eds.), Corporate Personality in the 20th Century (pp. 99-125). Hart Publishing, (pp. 102 and 109); Ramsay, I. M. (1998). Models of Corporate Regulation: The Mandatory/Enabling Debate. In R. Grantham, & C. Rickett (Eds.), Corporate Personality in the 20th Century (pp. 215-270). Hart Publishing, (p. 256).

[202] Prentice, D. (1998). Corporate Personality, Limited Liability and the Protection of Creditors. In R. Grantham, & C. Rickett (Eds.), Corporate Personality in the 20th Century (pp. 99-125). Hart Publishing, (p. 105); Ramsay, I. M. (1998). Models of Corporate Regulation: The Mandatory/Enabling Debate. In R. Grantham, & C. Rickett (Eds.), Corporate Personality in the 20th Century (pp. 215-270). Hart Publishing, (p. 259).

[203] Landers, J. (1975). A Unified Approach to Parent, Subsidiary and Affiliated Questions in Bankruptcy. University of Chicago Law Review, 42(4), 589, (p. 597).

[204] Robert Monks (2003) Republican candidate for Senate from Maine and corporate governance adviser in the film "The Corporation".

Theoretically, the segregation of assets and limited liability entails that managers avoid failure and seek their own company's interest. They should honour their company's limited liability and not surrender its interest so as to serve the one of the group. Still, with respect to financial structure, the group interests and the ones of particular group companies may be integrated, particularly when the group is tightly knitted. The issue is to which limit this financial structure should perform a part in the legislation on the liabilities of managers when insolvency threatens their company.[205] For instance, UK legislation is to some extent vague on this question.
UK Legislation observes scrupulously the notions of limited liability and legal entity, in the group scope as well.[206] Under this perspective, it entails that managers support the solidity of the company they manage as a separate legal entity with its own lenders, although it is affiliated to a group.[207] As part of insolvency, managers of group entities could be prone to liability for actions brought by the insolvency practitioner, comprising according to the fraudulent or wrongful trading regimes, or to a disqualification order, questioning directorial policies that, by seeking the group interest, may have been detrimental to the entity. Hence, in the *Genosyis Management* lawsuit,[208] for instance, mutual managers of a holding company and its daughter company were held liable for the violation of their fiduciary obligations to the daughter company. This occurred when they closed a contract with a defaulting lender according to which the latter made payments to the holding company instead of the daughter company. The tribunal found that the managers had not taken into account the specific interests of the daughter company, especially the ones of the latter's lenders, considering that the entity was insolvent during the closing of such contract.

[205] Engrácia Antunes, J., Baums, T., Clarke, B. J., Conac, P. H., Enriques, L., Hanak, A. I., Hansen, J. L., de Kluiver, H. J., Knapp, V., Lenoir, N., Linnainmaa, L., Soltysinski, S., & Wymeersch, E. (2011). Report of the Reflection Group on the Future of EU Company Law. European Commission. Available at: http://dx.doi.org/10.2139/ssrn.1851654. [Accessed: December 12, 2022]; and European Commission. (2012). Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies, (para. 4.6.). Available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0740:FIN:EN:PDF. [Accessed: December 12, 2022].

[206] Adams v. Cape Industries plc (1991) 1 All ER 929; Re Polly Peck International plc (1996) 2 All ER 433; Ord v. Belhaven Pubs Ltd (1998) 2 BCLC 447.

[207] Re Polly Peck International plc (Nº3) (1996) 1 BCLC 428, 440.

[208] Re Genosyis Management Ltd, Wallach v. Secretary of State for Trade and Industry (2007) 1 BCLC 208.

Yet, UK tribunals have recognized that it may be complicated to define a precise limit between the interests of the daughter company and the ones of the other group companies. Hence, the tribunal denied, in *Facia Footwear*,[209] a summary judgement issued against managers when the managers of the daughter companies paid important sums to other group companies according to group contracts, where cross guarantees were comprised. The tribunal observed the interconnections among the group companies. This signified that when the company group failed, the daughter company would also fail. Hence, the intent of the managers to promote the success of the group balanced with the daughter company's interests.[210] It has been found that the issue posed in every situation is if the managers observed their entity's interests when acting (which, ostensibly, profited the holding company, another group company or the group in its entirety) or instead acted ignoring the interests of their specific entity.[211] Managers should be highly sensitive to observe the lenders' interests where the entity is near insolvency, yet UK tribunals have acknowledged that it may be difficult to predict disadvantages or advantages in a group scope. "In essence, the complaint is that the common group directors preferred the interests of International and Flexibles, to those of Films. It is a case which foreshadows for group directors an almost impossible position, when one group member becomes insolvent", as argued in *Klempka v. Miller*.[212]

Hence, despite the strict adhesion of UK legislation to the limited liability principle and the lack of a clear recognition of the group structure in the law regarding the obligations of managers, it does take into account group interdependence in this scope, although from the perspective of the single company. Nevertheless, the lack of an explicit notion of group interest and of a drawing of clear lines for its boundaries in the rules linked to insolvency, can engender unreliability concerning the applicable responsibilities, and a plausible incompatibility with the financial structure. International principles regarding wrongful trading such as the ones proposed by UNCITRAL should make efforts to elucidate the limits of such observance of the group interests by managers near insolvency.

[209] Facia Footwear Ltd v. Hinchcliffe (1998) 1 BCLC 218.

[210] Oxford Pharmaceuticals Ltd, Wilson v. Masters International Ltd (2010) BCC 834.

[211] Charterbridge Corp Ltd v. Lloyds Bank Ltd (1969) 2 All ER 1185 at 1194.

[212] Klempka v. Miller (Re Parkside International) (2010) BCC 309 at 325.

Indeed, Irit Mevorach considers that, when the apportionment of liabilities is in question, entity law should primarily govern. A regime that satisfies the interests of the lenders of every company within a group where the entity is near insolvency would conform to such standard. At this point, the principal duty allocated to boards in virtue of the wrongful trading regime, particularly as they figure in the international principles,[213] is to contemplate the lenders' interests where the managers can predict that insolvency is near or inevitable, especially by making every effort to circumvent insolvency (as appropriate) or attenuate its effects. Theoretically, in a group scope, managers should guarantee that they make such efforts observing the state and interests of the specific company they manage.

The regime of wrongful trading aspires as well to guarantee, still, that managers have enough freedom to observe what is better for their own entity during financial trouble. In particular, the principles urge managers to consider recovery options.[214] From this perspective, it is needed that managers make efforts to circumvent insolvency or attenuate its effects, instead of immediately opening insolvency procedures. In numerous group backgrounds, in particular when groups were intertwined, making such efforts would in fact demand reciprocal support between, and collaboration with, the other group companies. The enterprise perspective would elucidate this fact.

In particular, account should be taken of long-run or other implicit discerned advantages from seeking the interests of the group or supporting other group companies when regarding the extent of group intertwinement and interconnection, and as to the place of the distressed company in the corporate group. Effectively, what may be considered as a prejudicial effort in cases where the company has acted as a "standalone" entity, not connected with other companies, may actually be an adequate effort to make nearinsolvency in a group scope. For instance, in cases where the affairs of the concerned daughter company were usually reliant on the broader group affairs or on certain of its affiliated companies, that daughter company may certainly necessitate to

[213] United Nations Commission on International Trade Law. (2013). Insolvency Law: Directors' Obligations in the Period Approaching Insolvency, (Recommendations 1-3). Available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/V13/807/89/PDF/V1380789.pdf?OpenElement. [Accessed: December 12, 2022].

[214] Ibid., (Recommendation 1, purpose of legislative provisions).

subsidize or present other advantages to its related companies in an effort to save the group altogether, comprising its own affairs. An additional illustration is a case where a daughter company has postponed the initiation of insolvency procedures for it expected an arrangement for the group to be sold altogether (or of a part of it). This is possible when a group has been intertwined as concerns its business and was directed as an individual undertaking. In these group structures, the insolvency of the company will usually touch other group companies (and reciprocally). Still, even in groups with relatively light control, and that considered a decentralization of their organizational structure before the distress (in other words, daughter companies were directed independently and solely core policies were decided at a group-wide dimension) certain control may be lost near insolvency for bona fide economic purposes advantageous to the (actual insolvent) lenders of the company. Hence, financial distress may expedite and enhance a centralized group direction, as intertwinement of the businesses may be demanded so as to bump up the effective management of the group affairs, for instance, the intertwinement of a restructuring. Pursuant to Irit Mevorach, as far as the insolvent company's interest was observed in controlling the financial crisis,[215] and the selected policy was adequate and helpful to circumvent insolvency or attenuate its consequences, the managers should not hold liability for wrongful trading. Actually, they may resort to the enterprise perspective, identifying the group structure, when pleading against liability claims for wrongful trading. The wrongful trading provisions should highlight that directing a company during distress with a group level approach is excusable, and efforts to circumvent or attenuate the effects of insolvency may comprise support to other group companies. This would guarantee appropriate consideration of the apportionment of assets and limited liability, whilst according to managers ample autonomy to make efforts that are advantageous to the financially distressed company under the economic reality of the company group activity.

On the other hand, in a group scope, managers should make sure not to be contended with the interests of the lenders of the insolvent company, by, for instance, subsidizing or transferring assets to other group companies when this might not profit the distressed company.

[215] See for example, NACIIL. (2017). Directors' Liability in the Twilight Zone. Available at: https://nvrii.nl/wp-content/uploads/2021/08/Preadviezen-2017.pdf. [Accessed: December 12, 2022]; INSOL International. (2017). Directors in the Twilight Zone V. Available at: https://www.insolindia.com/uploads_insol/resources/files/directors-in-the-twilight-zone-v-1034.pdf. [Accessed: December 12, 2022].

Therefore, special consideration is demanded for cases in which some group companies were in a considerable prejudicial situation in the group (the subservient subsidiary situation for instance). In such cases, parties and legal persons apart from de jure directors (the holding company for instance) may hold liability for the payment of the debts of the company, but the directors of the company, as well, should be capable of demonstrating that they strived to prevent (as appropriate) prejudice to lenders against such backgrounds.

3.3. Corporate groups creditors and insolvency in European jurisdictions

3.3.1. The effects of shadow directorship on creditors

In France and Belgium, the holding company holds liability to the lenders of the daughter company solely when it exercises shadow directorship.[216] When the factors of such directorship are not found, the holding company is not (at a minimum on a legal basis) demanded to make efforts for the recovery of its daughter company, nor to assume liability for the payment of the latter's debts. Put differently, the flat group organization, in which holding company and daughter company direct their businesses "at arm's length", does not jeopardize the holding company. The situation of the holding company is not distinct from the one of private shareholders. It is a special situation explained by the need to restrict jeopardy, a vital protection in nowadays business environment.

France and UK judicial rulings determine the margin over which the stucture waxes the one of a qualified, in lieu of a flat, group not solely in strikingly ambiguous wording but as well at an extremely high echelon. In general, the direction of the daughter company is usually envisaged to operate, following preveniently, nearly servilely, the guidelines of the holding company. According to some scholars, this margin has to be reviewed, first, for the sake of legal reliability concerning the kind of the specific group organization, and, second, for the sake of the issues of

[216] When it is "dirigeant de fait".

the lenders of the daughter company.[217] As the boundary between the flat group structure the qualified one is, owing to its legal and political significance, a vexed question in numerous EU jurisdictions.

Under the UK regime, the holding company that exercises shadow directorship should be forced to make the required efforts to guarantee that the situation of the lenders does not decline more once the daughter company has attained the critical stage. The holding company must either make instant efforts for the recovery of the daughter company, or, if unintending or impotent to carry out such recovery, apply for its liquidation. Those are the sole means accessible by the holding company exercising shadow directorship. Omission or lukewarm recovery measures will lead similarly to liability, that is, in the long run, the outcome of the former practices that have established the exercise of shadow directorship by the holding company.

In case the holding company selects the means of instantly applying for a liquidation of its daughter company, this does not signify that it is legitimately forced to make extra spending so as to save the business of the daughter company. Indeed, business activity covers the threat of liquidation, and this is also true to the daughter companies of the group. There is no specific duty on a holding company, as the chief of a group, to support its daughter companies. This duty may arguably be excused in some drastic singular cases. In a nutshell, whilst the holding company may be encouraged to save a daughter company, it has no duty to do the latter.

Pursuant to some scholars, in principle, the holding company's obligations and the circumstances in which it is demanded to come into play, should be precisely presented in the legislation so that the tribunals do not necessitate to exert broad discretion, the legislation being unprecise.[218] The tribunal's discretion in measuring the compensation amount should not be extended.

In case the holding company opts for steps to restructure the daughter company, the direction of the latter is forced to comply with the pertinent guidelines of the holding company. Failing that, the holding company cannot hold liability for "wrongful trading". The duty to comply does not discharge the daughter company from contemplating its public duties. Once irremediable

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[217] See Hommelhoff, P., Hopt, K. J., Lutter, M., Doralt, P., Druey, J. N., Wymeersch, E. (2000). Corporate group law for Europe. European Business Organization Law Review, 1(2), 165-264.

[218] Ibid.

manifestations of non-profitability surface, the direction must petition for an order of liquidation of the daughter company.

So as to evade a rush of the lenders of the daughter company for the holding company and the assets of the latter (and in particular, for the sake of the less enlightened lenders and of the ones less capable of taking action), the actions for damages against a shadow director's "wrongful trading" should be handled only by the liquidation officer or by the insolvency practitioner or opened by the tribunal as such.

3.3.2. Creditors and COMI shift

The perspective of group COMI (centre of main interests) does not, in principle, always cover choice of jurisdiction. The tribunal can find that, forasmuch as the group's "head office functions" are conducted by the controlling holding company, the COMI of every single group entity is situated in the same counry as the one of the controlling holding company. Insofar as the judgment of the tribunal is not challenged and reversed on appeal in its own country, it is considered as valid and, in theory, must be observed by the tribunals in other countries. Nevertheless, the perspective of group COMI does actually cover moving the daughter companies' COMI, or at a minimum pretending, for functional and financial motives, the daughter companies' COMI to be situated in a country other than the one where the COMI is effectively situated from a purely legal perspective. According to Nicolaes W.A. Tollenaar,[219] on grounds of the decision of the ECJ in the *Eurofood* litigation, a daughter companay having its headquarters and all or the majority of its assets and operating activities in one single country, is only to be expected to have its COMI in that country, and not in the country of its holding company on the grounds that the holding company conducts the group's "head office functions". This approach was upheld by the judgment of Stanford International Bank Ltd (In Receivership), Re,[220] of 2009, where the "head office functions test" was directly denied. The finding of the

[219] Tollenaar, N. W. A. (2010). Dealing with the insolvency of multi-national groups under the European Insolvency Regulation. Insolvency Intelligence, 23(5), 65-73.

[220] Eurofood IFSC Ltd (C-341/04) (2006) E.C.R. I-3813.

judge on the relevant review for the definition of the COMI has been then confirmed by the Court of Appeal.[221] This complicated the resort to the perspective of the group COMI in the UK where it was the established method.

Moving the COMI, or "artificially" pretending the COMI to be situated in another country than the actual one, can harm lenders and other corporate constituencies. Domestic creditors will not necessarily be capable of attending principal insolvency proceedings which are opened overseas. Furthermore, moving a COMI does not solely modify the place of the procedures, but as well the relevant legislation.[222] For instance, the place of the COMI defines the "ranking of claims".[223] In the BenQ Mobile Holding BV, Re litigation, the definition of if the COMI was situated in the Netherlands or Germany had impact on the engaged lenders.[224] It is shocking that lenders can be chiselled out of their dues by a fast and easy COMI movement, near insolvency, without their approval. As a movement of the COMI modifies the implementable legislation, it can produce a rude awakening for other engaged parties, for example managers and other group members. In several countries, the liability of managers is founded on bankruptcy legislation besided corporate and tort legislations. Modifying the implementable insolvency legislation can abruptly subject managers to severe liabilities under the latterly implementable insolvency legislation (in the Netherlands for example, managers can hold liability for the total loss in case the financial statements of the firm were filed inopportunely). For accurate legal safeguard and reliability it is necessary for the COMI (in other words, the implementable legislation) to be determinable and rather steady. The legal unreliability of the perspective of COMI of groups is enhanced by the event that the place of actual control of the group can be modified very simply. In case, for example, the corporation is liquidated and a control modification occurs, the new place of actual control is very likely to be moved into a different country. Hence, the implementable legislation, from the perspective of group COMI founded on the "command & control" factor, can be prone to recurrent and unpredictable modification. Moreover, in numerous situations, the eventual

[221] Stanford International Bank Ltd (In Receivership), Re (2009) EWHC 1441 (Ch); (2009) B.P.I.R. 1157.

[222] Stanford International Bank Ltd (In Receivership), Re (2010) EWCA Civ 137.

[223] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, (art. 7 2.(i)). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02015R0848-20220109&from=EN. [Accessed: December 12, 2022].

[224] Ibid.

holding company of the group is domiciled out of the EU, in the US in particular.[225] In such situations, the principal place of business test, regularly implemented, could conduct to the improbable deduction that neither of the group entities incorporated and operating in the EU has its COMI in there and hence that the EC Regulation on Insolvency Proceedings 2000 is not implementable in any way.

The techniques to circumvent separate insolvency proceedings used in Collins & Aikman[226] and EMTEC[227] do not appropriately safeguard lenders and other corporate constituencies from the consequences of moving the domestic COMI to the same country. The initiation of separate insolvency proceedings, or the distribution of local assets as though separate insolvency proceedings were initiated, for example, does not reinstate the ranking of claims on assets available out of the country of the separate insolvency proceedings. The ranking of claims on such assets is ruled by the principal insolvency proceedings and, as a result, is perverted by the movement of the COMI notwithstanding separate insolvency proceedings being initiated or envisaged. The initiation of separate insolvency proceedings cannot as well hinder the modification of the implementable legislation in the principal insolvency proceedings impacting on parties otherwise, for example apropos of the liability of managers and of conducts harming creditors.

The perspective of transferring the COMI of domestic daughter companies to the same country can be very detrimental to the stakeholders. Pursuant to Nicolaes W.A. Tollenaar,[228] it seems that moving COMI might be admissible insofar as insolvency is not threatening and all present and prospect liabilities will ascertainably be completely met. Nonetheless, near insolvency, when a deficit is expected, a movement of COMI should, according to him, solely be permitted with the approval of (at a minimum most) of the lenders and conceivably other substantially impacted on parties. In that context, it is striking that there is a major difference between the absence of

[225] See for instance In re Ci4Net.com Inc (2005) BCC 277 (Ch D).

[226] Collins & Aikman (Collins & Aikman Corp Group (Application for Administration Orders), Re (2005) EWHC 1754 (Ch).

[227] T. Com. Nanterre 3rd Ch., 15-2-2006, EMTEC, D. 2006, n° 2006P00149, SAS Emtec professional products; T. Com. Nanterre 3rd Ch., 15-2-2006, 2006P00154, GMBH MPOTEC Augustaanlage.

[228] Tollenaar, N. W. A. (2010). Dealing with the insolvency of multi-national groups under the European Insolvency Regulation. Insolvency Intelligence, 23(5), 65-73.

safeguard of lenders against a movement of COMI and the rather great level of safeguard granted to the interested parties against a movement of the registered office by way of a merger in virtue of the Mobility Directive.[229]

3.3.3. Attribution of risks to creditors

An answer to the question that there are unjust attributions of risk to a daughter company's lenders when dealing with group companies is to guarantee that creditors are au fait with the risks. As per Landers,[230] the daughter companies' creditors may deal with pharaonic costs in assessing the risks they are undertaking, for the holding company is entitled to transfer assets and risks throughout the group in a way that profits the group instead of the daughter company. It was as well advanced by the Cork Report[231] that company decisions are frequently taken for the purposes of increasing total returns instead of guaranteeing the fitness of any daughter company, and it may be very complicated to calculate the financial or risk non-compliance of a daugter company at any single point.

Firstly, daughter companies' lenders in a group may be misrepresented as regards the holding of assets which are accessible to settle their dues. Moreover, dealings in groups may not be directed at arm's length. Resources may be moved around, or loans granted at non-market prices, and dividends and guarantees could be granted regardless of the consequences on the interests of the firms. Neither can daughter companies' creditors find relief in the provisions ruling the obligations of managers. Legal tradition prescribes that managers are obliged to their firm, in lieu of to the daughter companies that their decisions may impact on. The Cork Report as well

[229] Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02019L2121-20191212&from=EN. [Accessed: December 12, 2022]; See for instance, BenQ Mobile GmbH & Co, Re and BenQ Mobile Holding BV, Re, February 5, 2007, Munich 1503 IE 4371/06; BenQ Mobile Holding BV, Re [2008] B.C.C. 489; and District Court Amsterdam February 28, 2007, LJN: AZ9992.

[230] Landers, J. (1975). A Unified Approach to Parent, Subsidiary and Affiliated Questions in Bankruptcy. University of Chicago Law Review, 42(4), 589.

[231] Great Britain. Insolvency Law Review Committee. (1982). Insolvency Law and Practice: Report of the Review Committee (vols. 2-3). H.M. Stationery Office, (para.1926).

reported a scene where a 100 cent held daugter company is misdirected and exploited for the interest of a holding company. If the daugter company intitiates winding-up, its lenders see that the holding company provides a cap as regards its loan and a sizeable fraction goes to the holding company before the daugter company's unprotected creditors are reimbursed. Cork perceived such a legal approach as "undoubtedly defective". According to David Milman,[232] an additional issue for the lender of a daugter company is that amongst the mentioned difficulties, it may be hard to figure out fundamental concerns such as which entities are affiliates to the group and which inter-entity relationship is groupinternal.

Pursuant to Catherine KY Wong,[233] it is hence evident that guaranteeing that lenders are au fait with the risks they will encounter in dealing with group companies could settle the issue of unjust attributions of risk to the daughter companies' lenders. Nevertheless, she acknowledges that this is no tea party. As one cannot seem to find any definite or exact propositions regarding means of doing so, she considers that it is necessary to inquire if enforcing a more unified system on groups of companies would absolutely eliminate adaptability, and that linked answers are irrelevant.

One of the interesting answers advanced to handle the insolvency of international groups is the equitable doctrine of substantive consolidation.[234] In practice, substantive consolidation covers treating the group as a single unit, by what means all assets and liabilities of the different group entities are pooled together into a single "pool". The majority of countries regard substantive consolidation as an "extraordinary remedy"[235] that is only used where for instance,

[232] Milman, D. (1999). Groups of Companies. In D. Milman, & C. Durrant (Eds.), Corporate Insolvency: Law and Practice (3rd ed.). Sweet and Maxwell, (pp. 222-223).

[233] Wong, C. K. (2018). Is there merit in imposing a more integrated regime on corporate groups which would take away flexibility? Or is it preferable to ensure that creditors are well informed as to the risks which they run in contracting with entities within such group structures? Company Lawyer, 39(8), 257-259.

[234] United Nations Commission on International Trade Law. (2010). Legislative Guide on Insolvency Law. Part three: Treatment of enterprise groups in insolvency, (Recommendations 220-231). Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/leg-guide-insol-part3-ebook-e.pdf. [Accessed: December 12, 2022]; Finch, V. (2009). Corporate Insolvency Law: Perspectives and Principles (2nd ed.). Cambridge University Press.

[235] See In re Owens Corning, 419 F.3d 195, 211 (3d Cir. 2005); see Kelsey, M. K., Newman, S. A., Denny, D. B., & Cassidy, D. S. (2017, November 3). Two Recent Cases Demonstrate That Disputes over Substantive Consolidation Are a Live Issue for Corporate Debtors in Chapter 11. Gibson Dunn. Available at: https://www.gibsondunn.com/two-recent-cases-demonstrate-that-disputes-over-substantive-consolidation-are-a-live-

the assets and liabilities of the different group entities are so combined that they cannot be divided, or where there are numerous related companies,[236] or where there is purposeful undercapitalization of some companies,[237] among other rare situations. Overall, in many other situations, substantive consolidation is usually not considered as a viable vehicle for handling groups. The separate legal status of entities contributes to a significant economic use and is generally respected as appropriate. Nevertheless, in the mentioned situations where the assets and liabilities of the group entities cannot be divided, substantive consolidation can represent a fruitful answer.

Indeed, consolidation of estates[238] allows the tribunal to ignore the corporate separateness of every group affiliate in adequate cases and combine their assets and liabilities, considering them as if owned and assumed by a unique firm. The assets are considered as though they were comprised in a unique estate in the common interests of all lenders of the combined group affiliates.[239] They comprise circumstances where there is a high level of unity of the activities and business of group affiliates, rendering it very complicated to separate the liabilities and assets of distinct group affiliates so as to discern, for instance, the holding of assets and the creditors of every group affiliate, without considerable waste of money and time which would eventually prejudice all lenders. It could be stated that not many states present statutory authority for consolidation of estates; thus it is bound by firm rules of evidence and does not have broad application (it might not be a great answer as against guaranteeing that creditors are au fait with risks). Furthermore, in Germany, law faces the question in a legalistic manner by

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issue-for-corporate-debtors-in-chapter-11/#_ftn1. [Accessed: December 12, 2022]; and Koppel, M. D. (2017, December 1). Substantive consolidation: A tale of two cases. The Tax Adviser. Available at: https://www.thetaxadviser.com/issues/2017/dec/substantive-consolidation-two-cases.html. [Accessed: December 12, 2022].

[236] See e.g., In re ADPT DFW Holdings, LLC, __ B.R. __, 2017 WL 4457439 (Bankr. N.D. Tex. Sept. 29, 2017).

[237] See e.g., Official Comm. of Unsecured Creditors of HH Liquidation, LLC v. Comvest Group Holdings, LLC (In re HH Liquidation, LLC), 2017 WL 4457404 (Bankr. D. Del. Oct. 4, 2017).

[238] For a critical examination of substantive consolidation, see Brasher, A. (2006). Substantive Consolidation: A Critical Examination. [Unpublished treatise]. Harvard University, (pp. 16-17). Available at: http://www.law.harvard.edu/programs/corp_gov/papers/Brudney2006_Brasher.pdf. [Accessed: December 12, 2022].

[239] United Nations Commission on International Trade Law. (2010). Legislative Guide on Insolvency Law. Part three: Treatment of enterprise groups in insolvency. Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/leg-guide-insol-part3-ebook-e.pdf. [Accessed: December 12, 2022].

trying to provide for the framework of formal legal relationships among the firms within a group. The shortfall of such a tactic is that it creates a somehow strict legal parameter which may inordinately confine undertakings, turn out insensitive to modification and still not eliminate the necessity for litigation. Moreover, Posner[240] has proposed that deeming a holding company as systematically assuming liabilities of a daughter company would conduct to functional vacillations, eventually immoderately increasing capital costs.

However, according to Catherine KY Wong, it is beneficial to resort to consolidation in answering the questions above. Numerous jurisdictions weigh distinct points to attain a fair and balanced resolution, comprising observing the existence of consolidated accounts for the group, if all group companies have a unique bank account, the common shareholdings and interests among the group companies, the level of complexity in separating personal liabilities and assets, and if there is combined overhead expense, direction, accountancy and other linked expenditures between distinct group companies. In the United States, for instance, by the agency of its federal equity power, they would use consolidation when the businesses of the group entities are tightly knitted or the lenders can be proven to have treated the debitors as a single economic entity. In these consolidations, the liabilities and assets of the group are treated as a single entity based on a pooling agreement. Pursuant to Catherine KY Wong, Posner's challengers would as well stipulate that, even if there is no doubt that ineffectiveness is generated by the unreliability which results from the difficulty of measuring risk in group forms where holding companies could hold liability for daughter companies, general unreliability could maybe be even bigger via motivation to mislead the creditors of the groups. The creditors would invoice fees mirroring uncertainty. Hence, pursuant to Catherine KY Wong,[241] one cannot claim that enforcing a more unified system on groups of companies in answering the questions of groups is irrelevant. She contends that maybe enforcing a further unified system via the resort to consolidation is of comparable relevance to guaranteeing that lenders are au fait with their risks.

[240] Posner, R. (1976). The Rights of Creditors of Affiliated Corporations. University of Chicago Law Review, 43(3), 499.

[241] Wong, C. K. (2018). Is there merit in imposing a more integrated regime on corporate groups which would take away flexibility? Or is it preferable to ensure that creditors are well informed as to the risks which they run in contracting with entities within such group structures? Company Lawyer, 39(8), 257-259.

Overall, one can perceive something rather bizarre at the EU dimension. For one thing, there is tremendous strain in the sense of acknowledging the legal use of the interests of the group.[242] For another thing, numerous challenges to substantive consolidation can be noticed although this solution has restrictions. Therefore, who seems to be favoured within such an ambit? "Cherchez la société mère", hinted Professor Alexandre de Soveral Martins.[243]

At the same time, it was shown that contribution is as well an adequate answer.[244] Exercising judicial discretion, tribunals in New Zealand can oblige one firm in a group to contribute to the assets in case that the other group becomes insolvent. Such injunctions are given when the tribunal sees this fair and balanced, and account will be taken of the position of the holding company, in particular of its responsibility in the failure of the daughter company.
As aforementioned, another technique of enforcing a more unified system on groups of companies is making the holding company liable for the daughter company's debts when there is wrongful trading or insolvency. This makes a holding company liable for a debt of a daughter company where the latter has continued trade while insolvent or in the vicinity of insolvency,

[242] See e.g., Engrácia Antunes, J., Baums, T., Clarke, B. J., Conac, P. H., Enriques, L., Hanak, A. I., Hansen, J. L., de Kluiver, H. J., Knapp, V., Lenoir, N., Linnainmaa, L., Soltysinski, S., & Wymeersch, E. (2011). Report of the Reflection Group on the Future of EU Company Law. European Commission, ([60]). Available at: http://dx.doi.org/10.2139/ssrn.1851654. [Accessed: December 12, 2022]; the European Commission. (2012). Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies, ([13]). Available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0740:FIN:EN:PDF. [Accessed: December 12, 2022]; the Forum Europaeum on Company Groups. (2015). Proposal to Facilitate the Management of Cross-Border company Groups in Europe. European Company and Financial Law Review, 299-306. Available at: https://ssrn.com/abstract=2886365. [Accessed: December 12, 2022]; Conac. P. H. (2015). Towards Recognition of the Group Interest in the European Union? Club des Juristes. Available at: https://orbilu.uni.lu/bitstream/10993/28103/1/CDJ_Rapports_Group-interest_UK_June-2015_web.pdf. [Accessed: December 12, 2022]; Böckli, P., Davies, P. L., Ferran, E., Ferrarini, G., Garrido Garcia, J. M., Hopt, K. J., Opalski, A., Pietrancosta, A., Skog, R., Soltysinski, S., Winter, J. W., Winner, M., & Wymeersch, E. (2016). A proposal for reforming group law in the European Union - Comparative Observations on the way forward, (with regard to "Instrument" on Related Party Transactions). Available at: http://dx.doi.org/10.2139/ssrn.2849865. [Accessed: December 12, 2022]; and the Informal Company Law Expert Group (ICLEG). (2016). Report on the Recognition of the Interest of the Group. European Commission. Available at: http://dx.doi.org/10.2139/ssrn.2888863. [Accessed: December 12, 2022].

[243] In English: "Search for the parent company", de Soveral Martins, A. (2019). Groups of companies in the Recast European Insolvency Regulation: Around and about the "group". International Insolvency Review, 28(3), 354-362, (p. 361).

[244] Wong, C. K. (2018). Is there merit in imposing a more integrated regime on corporate groups which would take away flexibility? Or is it preferable to ensure that creditors are well informed as to the risks which they run in contracting with entities within such group structures? Company Lawyer, 39(8), 257-259.

and the holding company was informed or should have been informed of such trade. According to Catherine KY Wong, there is a deficiency in this answer. It depends on identifying a parent-subsidiary relationship, and legal determination of the latter may be unsuccessful in catching illustrations of de facto control and be liable to avoidance via the exploitation of share portfolios. Cork as well refused to suggest that a parent company should be liable for the debt of a daughter company in a state of insolvency, and he abstained from presenting a suggestion, due to foreseen impacts on entrepreneurialism, complexities in ascription of liability and the necessity to pay attention to the possible effects on long-term present creditors.

Nevertheless, it cannot be stated that enforcing a more unified system on groups of companies via this technique is irrelevant. The advantage of the technique is that it is not conditional on identifying that the holding company is a shadow director of its daughter company, but enforces a positive duty on the holding company to protect the interests of the unprotected creditors of the daughter companies. In Australia, tribunals may, by injunction, judge that a group constitutes a pooled one. The consequence is that unprotected creditors are capable of bringing action against any or each of the firms in the pooled group. As per Collins,[245] in the United Kingdom, tribunals do not hold holding companies usually liable for debts but may report cases of wrongful trading, and it observes the facts of economic control instead of ownership rules. The Re Hydrodan[246] litigation has specified that the question was if a daughter company's managers enjoy their own discretion and independent judgment, and to identify shadow directors, it had to be proven that the daughter company's board did not enjoy this discretion and independent judgement, but operated pursuant to the holding company's instructions.

An analogous but more general answer, by enforcing a more unified system on groups of companies, is considering that a controlling shareholder (the holding company) should have a fiduciary duty to the daughter company and other controlled firms, and that the controlling holding company should assume the charge of evidencing that dealings with the controlled firm are just, except if these dealings have been approved by "disinterested shareholders". It can be stated that such an extreme revision is improbable from a political approach. A discretionary

[245] Collins, H. (1990). Ascription of Legal Responsibility to Groups and Complex Patterns of Economic Integration. The Modern Law Review, 53(6), 731-744.

[246] Re Hydrodan (Corby) Ltd (1994) B.C.C. 161 Ch D.

policy is more susceptible to be inaugurated: for instance, creditors of firms within the group are liable to invoice fees mirroring the complexities of appraising where and if the tribunals will impute liability to the holding company, even though it is more susceptible to denunciations for unreliability.

However, this answer is not irrelevant. When the holding company is held liable, its directors may be incited to take risks diligently. As per Hadden,[247] parental liability would decrease the trend of making extremely complicated group company structures for inefficient motives, for instance to circumvent legislative duties and to form "dump" daughter companies.

Moreover, an answer to the reasoning that such an extreme revision is politically improbable could be to exonerate the holding company from such possible liability when daughter companies are identified, in other words, given that these daughter companies are financially directed in a way that separates their assets and liabilities from the ones of the other part of the group and that the separation is recorded in a way that would allow an insolvency administrator to track down the assets impacted on by it. Thereby, it strengthens once more the perspective that enforcing a more unified system on groups of companies is not irrelevant.

In conclusion, pursuant to Catherine KY Wong, it is certainly right that it is preferable to guarantee that creditors are au fait with the risks that they encounter in dealing with companies in such group forms. Nevertheless, provided that this is no tea party and, even though there are shortfalls when we investigate techniques of enforcing a further unified system on groups of companies, that it cannot be told that there is irrelevant to make so, all of those techniques should be taken into account when answering the question of unjust transfer of risk. Every answer has its proper pros and cons, and could be employed where relevant. For all that, business environment alters so promptly that a steady answer to questions concerning groups would indeed be unappealing.

[247] Hadden, T. (1984). Inside Corporate Groups. International Journal of Sociology of Law, 12, 271.

3.3.4. Instruments for the protection of corporate groups creditors

Numerous juridictions face the principal-agent problem by either general statute or group legislation. Evidently, the majority of this legislation is binding,[248] like consolidated accounts and disclosure as a reply to opacity, the standards of tunneling and related party transactions, fundamental requirements for managers and majority shareholders in groups when taking actions that influence minority shareholders, creditor cushion rules, and insolvency legislation. When tackling these tactics and procedures, one shall observe their role, if the rules are binding, and what place is given to individual protection or for enabling act, especially for creditor cushion. However, it becomes relevant to mention that some states can dispense with provisions for corporate groups, or at a minimum with most of these provisions. This applies to Sweden, for instance, where it seems unnecessary to cope with group principal-agent problem more fully. This is impressive for in Sweden the share portfolio structure is defined by powerful owners and feeble minorities. The relevant inquiries imply that the explication may be that Sweden isn't a big state and social control is then efficient.[249] Moreover, creditor cushion usually (and particularly in corporate groups) may be impertinent or far less pertinent for powerful voluntary creditors who can select with whom they deal and can count on secured loans. However, this does not apply to involuntary creditors, and yet small and medium voluntary creditors may not actually have an option to secure themselves.

When states select to tackle the principal-agent problem concretely, they can adopt three regulatory templates: firstly, they can select among policing by general civil and/or company law and policing by special company group law. Those two templates can and generally will be comingled with group policing by law fields. The United Kingdom is an example of the first

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[248] Kraakman, R., Armour, J., Davies, P., Enriques, L., Hansmann, H. B., Hertig, G., Hopt, K. J., Kanda, H., & Rock, E. (2009). The Anatomy of Corporate Law: A Comparative and Functional Approach (2nd ed.). Oxford University Press, (pp. 277-298), referred to as Anatomy.

[249] Agnblad, J., Berglöf, E., Högfeldt, P., & Svancar, H. (2002). Ownership and Control in Sweden: Strong Owners, Weak Minorities, and Social Control. In F. Barca, & M. Becht (Eds.), The Control of Corporate Europe (pp. 228-258). Oxford University Press; Bianchi, M., Bianco, M., & Enriques, L. (2001). Pyramidal Groups and the Separation Between Ownership and Control in Italy. In F. Barca, & M. Becht (Eds.), The Control of Corporate Europe (pp. 154-187). Oxford University Press.

regulatory template.[250] There company group law per se is absent (excluding, for instance, consolidated accounting). The general company and civil law regulations for tackling principal-agent problems of creditors and minority shareholders are employed for one-man companies and also for corporate groups. Numerous other states follow suit. Regarding the company law in those states tackling group issues, there are significant varieties among the distinct structures of companies (for instance, joint-stock companies) especially when they are listed, private limited companies, partnership businesses, and the European company (SE) in Europe.

In each of those states, the legacy of constituting groups (in other words, establishing separate legal persons in the group and by that means dividing assets[251] between the creditors of those persons) is generally unobjected, yet some United States scholars call on unlimited shareholder liability for business tort creditors.[252] In the United Kingdom, the Salomon principle of separate legal entity[253] has been strongly confirmed by the tribunals also for groups.[254] However, there are distinct company or civil law notions which may evoke group cases.[255] One illustration is the notion of the shadow director, who exerts de facto control in the firm. The holding company may be counted as such a shadow director (for instance, as part of wrongful trading according to

[250] Gower, L. C. B., & Davies, P. L. (2012). In P. L. Davies, & S. Worthington (Eds.), Principles of Modern Company Law (9th ed.). Sweet & Maxwell, (part 4, pp. 687-717, 719-747); Davies, P. L. (2010). Introduction to Company Law (2nd ed.). Oxford University Press, (pp. 95-100); Dine, J. (2000). The Governance of Corporate Groups, Cambridge University Press; Prentice, D. (1991). Groups of Companies: The English Experience. In C. M. Schmitthoff, & F. Wooldridge (Eds.), Groups of Companies. Sweet & Maxwell; Hopt, K. J. (1991). Legal Elements and Policy Decisions in Regulating Groups of Companies. In C. M. Schmitthoff, & F. Wooldridge (Eds.), Groups of Companies. Sweet & Maxwell, (pp. 81-110); for Belgium see Van Ommeslaghe, P. (1982). Les groupes de sociétés et l'expérience du droit belge. In K. J. Hopt (Ed.), Groups of Companies in European laws (pp. 59-98). De Gruyter, (pp. 99-130).

[251] Kraakman, R., Armour, J., Davies, P., Enriques, L., Hansmann, H. B., Hertig, G., Hopt, K. J., Kanda, H., & Rock, E. (2009). The Anatomy of Corporate Law: A Comparative and Functional Approach (2nd ed.). Oxford University Press, (pp. 277-298).

[252] Hansmann, H., & Kraakman, R. (1991). Toward Unlimited Shareholder Liability for Corporate Torts. Yale Law Journal, 100, 1879.

[253] Salomon v A. Salomon & Co. Ltd., (1897) Appeal Cases 22.

[254] Gower, L. C. B., & Davies, P. L. (2012). In P. L. Davies, & S. Worthington (Eds.), Principles of Modern Company Law (9th ed.). Sweet & Maxwell, (part 4, pp. 687-717, 719-747); Davies, P. L. (2010). Introduction to Company Law (2nd ed.). Oxford University Press, (p. 96).

[255] See Hopt, K. J. (2015). Groups of Companies A Comparative Study on the Economics, Law and Regulation of Corporate Groups. European Corporate Governance Institute Working Paper Series in Law, 286/2015.

section 214 of the Insolvency Act 1986), yet orders given as the holding company's managers are not adequate grounds for that.[256] Lifting the corporate veil is an additional illustration. Nonetheless, it has been stated that "[i]t is clear that British law is at one end of the spectrum as far as the regulation of liability within groups is concerned". The group issues are, there, "solved by a combination of creditor self-help, general company law strategies as section 214, or the unfair prejudice remedy[257] and targeted statutory interventions, such as the requirement for group accounts".[258]

Under French law, the daughter company's lenders (and less commonly the holding company's ones) may be safeguarded in many respects against the effects of group policies. Those reliefs will become relevant not solely in event of the debitor firm's insolvency (insolvency legislation includes convenient reliefs),[259] but as well out of the conventional scope of insolvency. Those reliefs will be in particular implemented in the group scope by permitting action to creditors against other entities within the group (holding companies and other daughter companies) and as relevant, to the managers of the latter, on top of action against the debitor, and its managers. Generally, the daughter company lenders' rights should solely be enjoyable against the entity with which they have dealt, or against which they have an action. As properly prompted by the Court of Cassation in France, there isn't any general group liability.[260] Group liability solely arises from the legislation, or where the conduct of a group entity, mainly the holding company, have resulted in the extension of the scope of the action of the lenders.

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[256] Re Hydrodan (Corby) Ltd (1994) 2 BCLC 180; Re Paycheck Services 3 Ltd (2009) 2 BCLC 309, CA; Gower, L. C. B., & Davies, P. L. (2012). In P. L. Davies, & S. Worthington (Eds.), Principles of Modern Company Law (9th ed.). Sweet & Maxwell, (part 4, pp. 687-717, 719-747); Davies, P. L. (2010). Introduction to Company Law (2nd ed.). Oxford University Press, (p. 97).

[257] Gower, L. C. B., & Davies, P. L. (2012). In P. L. Davies, & S. Worthington (Eds.), Principles of Modern Company Law (9th ed.). Sweet & Maxwell, (part 4, pp. 687-717, 719-747); Davies, P. L. (2010). Introduction to Company Law (2nd ed.). Oxford University Press, (pp. 232-238).

[258] Ibid., (pp. 99 and 100).

[259] See United Nations Commission on International Trade Law. (2013). Insolvency Law: Directors' Obligations in the Period Approaching Insolvency. Available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/V13/807/89/PDF/V1380789.pdf?OpenElement. [Accessed: December 12, 2022].

[260] Cass. com., 12-6-2012, RJDA 11-12. 968; Cass. Com., 9-10-2006, RJDA 1- 07, nr 50.

At their discretion, group companies could have assumed a number of group liabilities (for instance, letters of intent, guarantees) lowering the requirement of cushion of lenders by statute. The creditors of the daughter companies are primarily safeguarded by general reliefs suitable for all corporations and may use all reliefs which may be sought against their debitor and its managers. An extension of their action may happen in circumstances in which the firm has carried on trading, even though it was in a state of insolvency, or was remedilessly becoming insolvent. In such situation, the firm's managers may hold liability on grounds of "wrongful trading", as expressed in corporate or insolvency legislation. This is an illustration of the managers' general duty of care, signifying that liable corporate managers (or generally liable entrepreneurs) should not have carried on trading and placed the contractors of the firm in jeopardy if they were aware, or should have been aware that the firm was foreseeable to be in a state of insolvency and would not be capable of paying its dues. In event of "wrongful trading" the resort of creditors may be expanded to the holding company, when the latter behaved as a "shadow" or "de facto" director,[261] being assigned the similar duties as the daughter company's de jure director. This may occur when the holding company acted as a daughter company's manager, even though not having been designated in that ability, and still vigorously directed the daughter company's affairs. The supplemental liability is not particular to group legislation: even in a small firm the investor may induce this liability when he commenced to gain control of the direction of the firm, even though not having been officially designated as a manager. Being a de facto director, he may moreover hold liability for "wrongful trading" by not interrupting the firm's activity, even though it was doomed to failure. In the scope of the group, this liability may coincide with the one of the managers of the subsidiary, who participated at the call of the holding company in too precarious commercial activities: they should have rejected its call, and otherwise, may hold liability. The fact that they performed at the call of the holding company would not change their personal liability, even though it might be regarded as an extenuating circumstance, or might entitle them to bring action against the holding company.

For a holding company to be held liable for "de facto" directorship, there needs to be a running interference by the holding company in the affairs of the daughter company, and not a unique

[261] See UK Insolvency Act 1986, (s. 214(7)).

resolution, nor the simple presence of a controlling interest. In the scope of the group, de facto group amalgamation conducting to interfering centralized management might well maximize this threat of liability of the holding company. The majority of holding companies will dodge this kind of liability by dodging giving formal commands to the daughter company, or by submitting their commands as "recommendations" keeping the director of the daughter company "free" to proceed,[262] even though this may not be enough to reject the influence of the holding company.[263] In theory, the senior management of the group needs to give enough autonomy to the companies of the group to establish their personal policy-making and permit their board members and direction to define the boundaries of their personal liability.

Liability of the holding company may as well be the result of negligent behaviours which may have occasioned the failure of the daughter company: French legislation admits liability when a litigant, in this situation the holding company, has suddenly interrupted its relationships with its daughter company, rendering the latter insolvent.[264] Other states, as for instance Germany, have identical precedent, but are more conservative.[265] This situation is distinct from the former one as no measure by the daughter company is covered. Hence, the managers of the daughter company should not be deemed liable. The principle is relevant not solely in the scope of the group, but would as well be relevant in event of sudden stop of all business relations. A corresponding situation is that of the holding company occasioning the daughter company's insolvency by enforcing resolutions which unconsidered or damaged the interests of the daughter company: for instance, by enforcing a resolution which transferred the risk from the holding company to its daughter company which eventually collapses. Imposing the simple carrying on of the seriously jeopardized activities of a daughter company without appropriate financial aid could as well

[262] See Hopt, K. J. (2015). Groups of Companies A Comparative Study on the Economics, Law and Regulation of Corporate Groups. European Corporate Governance Institute Working Paper Series in Law, 286/2015, (p. 21); for the UK Secretary of State for Trade and Industry v Deverell (2000) 2 B.C.L.C. 133, CA.

[263] Hopt, K. J. (2015). Groups of Companies A Comparative Study on the Economics, Law and Regulation of Corporate Groups. European Corporate Governance Institute Working Paper Series in Law, 286/2015, (p. 22).

[264] See French code de commerce, (art. L442-1(II.)). Available at: https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000044224525. [Accessed: December 12, 2022]; vs. Brussels, February 3, 1988 JT, 1988, 516.

[265] German Stock Corporation Act, (§ 309 IV 3).

represent an act of negligence, conducting to liability of the holding company. Some have contended all for a "devoir de secours",[266] in virtue of which the holding company should come into play if it spots a degradation of its daughter company's situation. Pursuant to the measure taken by the holding company, this may be considered as intervention in the direction of the daughter company, rendering it a "de facto" director, thus making the holding company liable. In general, this kind of actions will not be prescribed by the holding company, but realized via a modification in the direction of the daughter company, to be resolved by the holding company in its daughter company's annual meeting. The holding company is in general not liable for what it consented as an investor.

One should bear in mind that the daughter company's lenders have no legitimate reason to find the daughter company permanently in bonis. When insolvency strikes, the managers of the daughter company are eligible to undertake the required actions and petition for winding-up, or other legal actions. It is not the obligation of the holding company to guarantee that the daughter companies are permanently kept solid. The liability of the holding company should solely interfere where the latter has ordered particular behaviours which could be qualified as unjustified intervention, or negligence in their own power.[267]

In some member states,[268] the "action en responsabilité pour insuffisance d'actif" or "comblement de passif" are reliefs implemented by statute when bankruptcy (or an identical process) has been initiated and given that insolvency is somehow allocated to the action or omission of the manager or previous manager or any other individual who has factually owned the right to direct the firm: those individuals will hold personal liability for all or some of the dues of the firm, pursuant to the judicature's judgement, given that their action or omission led to

[266] For "devoir de vigilance" in France, see: https://www.assemblee-nationale.fr/14/dossiers/devoir_vigilance_entreprises_donneuses_ordre.asp. [Accessed: December 12, 2022]; see Pietrancosta, A., & Boursican, E. (2015). Vigilance: un devoir à surveiller. La Semaine juridique - Édition générale, 19, 553.

[267] Compare with Ley 16/2022, de 5 de septiembre, de reforma del texto refundido de la Ley Concursal, (art. 7). Available at: https://www.boe.es/buscar/act.php?id=BOE-A-2022-14580. [Accessed: December 12, 2022].

[268] See French Code de commerce, (art. 651-2); and Belgian Code on Companies and Associations.

the insolvency.[269] The grounds for this extensive liability are distinct: in a number of jurisdictions, "a manifest gross negligence"[270] is needed, and a ''management error"[271] will be enough in other ones. In several states this liability may as well be imputed in event of non-compliance with the social law, tax fraud or money laundering.[272] The English regulation on "wrongful trading" is so far similar, providing for liability of the individuals who carried on trading of a firm beyond the stage where they "knew, or ought to have concluded that there was no reasonable prospect of avoiding insolvent liquidation"; and did not undertake "every step with a view to minimising the potential loss to the company's creditors". It should be differentiated from "fraudulent trading", since this concerns trade with the aim of intentionally swindling and mulcting their lenders.[273]

The judicial precedent in Belgium proclaimed the liability of the investor of small enterprises for the bankrupt enterprise's debts, in case that investor behaved as the de facto director and perpetrated a grave direction fault,[274] by that means commingling the "de facto director" and the "wrongful trading" notions. The principle could as well be implemented to majority shareholders, which interfered actively in the activities of the daughter company. According to some scholars, its implementation in the scope of the group is not accurate, being implementable to all corporations.[275] It deviates general principles of liability as far as the judicature can hold

[269] See Belgian Code on Companies and Associations; French Code de Commerce, (art. 651-2, "faute de gestion ayant contribué à cette insuffisance d'actif").

[270] See Belgian Code on Companies and Associations.

[271] See French Code de commerce, (art. 651-2).

[272] See Belgian Code on Companies and Associations; for an application Comm. Mons, 12 November 1979 JT 1980, 265.

[273] Compare Insolvency Act 1986, (s. 214 v. s. 213(1)): "Fraudulent Trading" occurs "If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, the following has effect".

[274] See Belgian Code on Companies and Associations; for an application Comm Mons, 12 November 1979 JT 1980, 265.

[275] Böckli, P., Davies, P. L., Ferran, E., Ferrarini, G., Garrido Garcia, J. M., Hopt, K. J., Opalski, A., Pietrancosta, A., Skog, R., Soltysinski, S., Winter, J. W., Winner, M., & Wymeersch, E. (2016). A proposal for reforming group

the respondent liable for all (or not one) of the debts of the corporation, in addition to the ones which were occasioned by the respondent or under his power.

According to German legislation the manager of a Gesellschaft mit beschränkter Haftung (or GmbH, signifying "company with limited liability") may hold liability for payment realized after the GmbH has lost its liquidity or its solvency.[276] Whereas quite distinct in terms of doctrine, the safeguard of the creditor is eventually quite analogous to the English wrongful trading.

The joint brokerage of holding company and daughter company may engender the emergence of a partnership making the two business partners hold liability. This is an implementation of common policies, known in French language as the "théorie de l'apparence"[277] that is conditional on limitative requirements regarding the behaviour of the holding company. For instance, when the holding company and its daughter company caused ambiguity regarding who is the contracting party: the two can hold liability.[278] "Confusion des patrimoines"[279] has as well been referred to, in such event where the assets and liabilities of the holding company and its daughter company are combined to the extent that they constitute a "masse" or one bankruptcy estate: there the two parties will hold joint liability for the full dues with their joint assets.[280] If the holding company and its daughter company were joint tortfeasors, they will hold joint liability under principles of group liability in tort.

Additional grounds adduced at times for group liability are that of "fictivité de la personne morale": this relief presumes the legal personality to be esteemed as an illusion, that would be

law in the European Union - Comparative Observations on the way forward. Available at: http://dx.doi.org/10.2139/ssrn.2849865. [Accessed: December 12, 2022].

[276] See Act on the GmbH, (§ 64).

[277] Namely "reliance on outward appearances" or "Konzernvertrauen" in Swiss law.

[278] See Swissair, BG 15 November 1994 and Motor Columbus.

[279] See French Code de commerce, (art. 621-2). Available at: https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000045178127. [Accessed: December 12, 2022].

[280] See French Code de commerce, (art. 621-2. al.2); and see Hopt, K. J. (2015). Groups of Companies A Comparative Study on the Economics, Law and Regulation of Corporate Groups. European Corporate Governance Institute Working Paper Series in Law, 286/2015, (p. 21).

esteemed void and thence, the judicature will order the bankruptcy of the entity trading beneath the lid of the legal personality.[281] At times, the legal personality is proclaimed a "shell or fictitious" firm permitting direct taxation of the holding company. Legal doctrine in Belgium mentions "abuse of the legal personality" happening in event of lack of division among the corporation and the investors assets, or the inoperative inner policy-making of the firm, driving creditors to clutch at the assets of the investors. Yet, several authors have contested that, mentioning the theory of the unity of assets and liabilities of civil law.[282]

As aforementioned, "piercing or lifting the corporate veil" is at times employed as a method to attain the individuals or firms behind the firm, for the legal personality is supposed to be divested, all connections being explicitly related to investors, or managers, and thus holding them liable for everything being conducted by the firm. This quite brusque technique is seldom employed in the majority of the EU, even though it was occasionally implemented in environmental litigations. In the United Kingdom, it has usually been tackled very restrictedly.[283] A certain litigation evokes that the principle is accessible solely when a firm is employed to dismiss a liability that is already present,[284] but not in other respects. In Spain, it appears to be employed more often. This method should not be confounded with the extraordinary rules by which one should bear in mind the identity, particularly the investors' nationality, a typical non-strategic tool. Moreover, this argument has been employed for announcing the holding company and its daughter company as a single economic unit,[285] even though the result may be more cogently achieved via other methods (like joint trading, de facto director).

Eventually, general civil legislation theories can frequently be implemented in the scope of the group in order to impute liability to the holding company or majority shareholder. Hence, in the

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[281] See French Code de commerce, (art. 621-2. al.2); vs. Comp. Antwerpen, 1 February 1994, TRV 1996, 62; Cass. 6-12-1996, Arr. Cassatie, 1996, 491.

[282] Alluding to the prominent Aubry and Rau theory of unity and indivisibility of patrimony (estate).

[283] Adams v Cape Industries plc (1990) Ch. 433 (CA).

[284] See Prest v. Petrodel (2013) UKSC 34.

[285] See DHN Food Distributors v Tower Hamlets, (1976) 1 W.L.R. 852, (p. 860), (Mayson, French & Ryan (2005)).

litigation in the English Supreme Court where lifting the veil was denied, the corporation was dealt with as owning its property in trust for the account of its eventual beneficial owner.[286] When the holding company exerts full control on the activities of its daughter company, it may be considered as having a direct duty of care towards the personnel of the daughter company prejudiced due to such activities.[287]

[286] See Prest v. Petrodel (2013) UKSC 34.

[287] Connelly v RTZ Corp Plc (1998) A.C. 854, HL; Lubbe v Cape Plc (2000) 1 W.L.R. 1545, HL; Chandler v Cape Plc (2012) EWCA Civ 525.

II. THE ANSWERS OF COMPETITION LAW TO LIABILITY IN CORPORATE GROUPS

1. The regime in European antitrust laws

1.1. The rebuttable presumption of liability of the parent company

The concept of liability of the holding company has expanded quite randomly in the beginning of the Seventies. However, the pertinent lawsuits do not set a logical argumentation for the concept. More precisely, it has evolved cumulatively since the Seventies until 2009 when the CJEU explicitly addressed in Akzo Nobel[288] the concept of a (hypothetically) praesumptio iuris tantum that a holding company exerts decisive influence on its 100 per cent held daughter companies.

The concept appears to have had its grounds in the Imperial Chemical Industries, Plc (ICI) lawsuit of 1972 on concerted practices in colorant industries.[289] In the beginning, according to some scholars, it is remarkable that the CJEU appears to have employed in ICI the notion of parental liability to strengthen the competence of the Commission over the English respondent by accrediting the action of its EU daughter companies to it.[290] The headquarters of ICI were located in the UK and hence out of the EU then. ICI had asserted to the Court and to the Commission that the latter wasn't competent on the matter. The firm had as well asserted that (being the controlling shareholder) its relation with its daughter companies was restricted to the provision of colorants and that although the Commission was competent, it would be conflicting with the legislation of several EU Member States to ascribe liability to it for the acts of its subsidiaries.[291]

[288]Judgment of 10 September 2009, Akzo Nobel NV v Commission (C-97/08 P) EU:C:2009:536. Available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=72629&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1694696. [Accessed: December 12, 2022].

[289] Judgment of 14 July 1972, Imperial Chemical Industries (ICI) Ltd v Commission of the European Communities (48/69) EU:C:1972:70; (1972) E.C.R. 619.

[290] Leddy, M., & Van Melkebeke, A. (2019). Parental liability in EU competition law. European Competition Law Review, 40(9), 407-416.

[291]Ibid., (p. 626).

In this decision, the CJEU decreed, in terminology that was thereupon cited in numerous cases approaching parental liability, that a competition law violation perpetrated by a subsidiary may be ascribed to the holding company when "although having separate legal personality", the daughter company "does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company".[292]
Put differently, the holding company can be deemed liable for the EU competition law violations of its subsidiary when the latter is not independent as regards its acts on the market for its holding company: is empowered to and; in fact exerts decisive influence on the daughter company.[293] Whether the holding company acknowledged the illicit behaviour of the subsidiary was not an express section of the parental liability test of the CJEU.
What was therein intrigating is that the Commission identified what it esteemed at a minimum as a "smoking gun" involving the holding company explicitly in the violation. As per the Commission, ICI actually acknowledged the transgressing behaviour: ICI had transmitted telegraphs to its EU daughter companies commanding them to raise a price that had been declared by competing colorants providers.[294] The CJEU resorted to this reportedly inculpatory evidence to substantiate its decision on jurisdiction.[295] Hence, as per the Court, the holding company was itself implicated in the concerted practices at issue in force in the EU.
Consequently, the imputation of liability to the holding company for the conduct of its subsidiary was futile. Yet, the terminology of the Court concerning decisive influence and attribution was subsequently mentioned as a ground for liability of a holding company that wasn't cognizant of the violation.
The following important evolution in precedent arose in 1983 when the CJEU confirmed in AEG a Commission ruling penalizing AEG for the illegitimate implementation of a discriminating distribution policy by its home electronics subsidiaries and

[292] Judgment of 14 July 1972, Imperial Chemical Industries (ICI) Ltd v Commission of the European Communities (48/69) EU:C:1972:70; (1972) E.C.R. 619, ([133]).

[293] Ibid., ([137]).

[294] Ibid., ([138]).

[295] Ibid., ([137]-[142]).

itself.[296] Mentioning ICI, the CJEU decided that the subsidiary's separate corporate personality does not obstruct the attribution of its action to its holding company.

AEG asserted that "it is impossible to ascribe a 'general distribution policy' to the parent company on the basis of documents in a file which were drawn up exclusively by its subsidiaries and in which it played no part".[297]

Yet the CJEU, mentioning ICI, argued that it "appears superfluous" to confirm if a holding company in fact exercised a decisive influence on the action of its 100 per cent owned subsidiary for the latter "necessarily follows" the system of its unique parent in a discriminating distribution regime.[298] The terminology employed, such as "appears superfluous" and "necessarily follows" appears to be the essence of the decisive influence presumption in subsequent parental liability lawsuits. The assertion of the CJEU on this matter is worth mentioning for it expresses at the beginning that there must be a demonstration of the factual exertion of decisive influence, yet it then observes in the subsequent phrase that this can be presumed as part of a 100 per cent owned subsidiary.

Given this, the CJEU validated the Commission's "imputation" of the action of the fully possessed subsidiary to the holding company AEG without supplemental observation of AEG's factual influence on that action. Actually, AEG liberated the Commission from the encumbrance of having to demonstrate the actuality of decisive influence on the conduct at issue, enabling it to resort to a presumption apropos of 100 per cent owned subsidiaries.

It sounds important that AEG was a "vertical" litigation in which the holding company at a minimum assisted the establishment of a distribution system for the subsidiaries. This might have conducted the tribunal to employ the terminology it did concerning subsidiaries "necessarily" respecting a distribution system of the holding company. Still, a vertical distribution link which automatically implicates the manufacturing holding company is a very distinct scene than a horizontal cartel lawsuit where the transgressive behaviour can easily happen without the holding

[296] Judgment of 25 October 1983, Allgemeine Elektricitäts-Gesellschaft AEG-Telefunken AG v Commission (107/82) EU:C:1983:293.

[297] Ibid., ([47]).

[298] Ibid., ([50]).

company's awareness. And still, cartel lawsuits constitute the ones where the presumption has been applied most frequently from the 1983 AEG decision.

At the late 1990s and the debut of the new millenary, some judgements were elucidated by professionals as calling into question the effectiveness of the decisive influence presumption.[299] Most prominently, in 1994, the Commission levied forfeits on Stora for the implication of its subsidiaries in antitrust infringement regarding cartonboard provision. After six years, whilst Stora wholly owned the infringer, its subsidiary Kopparfors, the CJEU argued in its decision that the GC "did not hold that a 100 per cent shareholding in itself sufficed for a finding that the parent company was responsible".[300] Moreover, the CJEU mentioned the occurence that the firms were unitedly represented throughout the administrative formality as a supplementary determinant in confirming the imputation of liability to Stora by the Commission and the GC for the anti-competitive practices of Kopparfors.[301]

In 2005, posteriorly to Stora, the GC ruled that DaimlerChrysler could be deemed liable for the implication of its almost wholly owned Belgian subsidiary in a violation of art.101 TFEU incorporating a cartel between Belgian DaimlerChrysler merchants.[302] The GC founded this deduction on the presumption and on the occurence that DaimlerChrysler had operated as the only solicitor of the Belgian subsidiary during the administrative formalities.[303] Strikingly, quoting Stora, the GC stipulated that "a 100 per cent shareholding does not in itself suffice for a finding of responsibility against the parent company".[304]

[299] Opinion of Advocate General Kokott of 23 April 2009, Akzo Nobel v Commission (C-97/08 P) EU:C:2009:262, ([55]-[61], [63]-[66]).

[300] Judgment of 16 November 2000, Stora Kopparbergs Bergslags AB v Commission of the European Communities (C-286/98 P) EU:C:2000:630, ([28]).

[301] Ibid., ([29]).

[302] Judgment of 15 September 2005, DaimlerChrysler v Commission of the European Communities (T-325/01) EU:T:2005:322.

[303] Ibid., ([219]-[222]).

[304] Ibid., ([219]).

As mentioned previously, these mentions made in Stora and DaimlerChrysler by the EU Courts were explained by some professionals as expressing that there may not be a forceful presumption that a holding company had exerted decisive influence on its subsidiary.[305]
Nevertheless, in 2009, the CJEU explicitly ascertained a forceful presumption of decisive influence in Akzo Nobel, a price fixing and market division lawsuit in chemicals industry.[306] In Akzo Nobel, the respondents stipulated that the presumption had relevance exclusively when there was supplemental affirmation that the holding company actually exerted decisive influence on the subsidiary. The tribunal rejected that reasoning as a misinterpretation of Stora, stating that "it is sufficient for the commission to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent exercises a decisive influence over the commercial policy of the subsidiary".[307]
For a rebuttal of the presumption and hence a circumvention of liability, the Court stated that the holding company had to submit proof that its subsidiary "acts independently on the market". Hence, Akzo Nobel ascertained in lucid terminology that as soon as the Commission has demonstrated whole ownership, in default of an actual rebuttal, it can rule that the holding company is "jointly and severally liable for the payment of the fine imposed on its subsidiary" regardless of the lack of acknowledgement of the illicit practice.
As mentioned previously, the presumption and the shift of the burden of proof verified in Akzo Nobel happened to be hard to rebut in EU tribunals. Thus far, the presumption has failed to be rebutted in EU tribunals on substantive basis, in other words, there seems to be no lawsuit where, by virtue of the proof provided to rebut the presumption by the parties, the EU tribunals have judged that the holding company did not exert decisive influence on its subsidiary. In 2011, in the sole lawsuit where the GC overruled the Commission on this question (Gosselin), its decision was vacated by the CJEU by appeal.
Gosselin implied a cartel on the international carriage of goods services market. In a 2011 decision, the GC, judged that Portielje (the holding company), had accomplishedly rebutted the

[305] Opinion of Advocate General Kokott of 23 April 2009, Akzo Nobel v Commission (C-97/08 P) EU:C:2009:262, ([55]-[61], [63]-[66]).

[306] Judgment of 10 September 2009, Akzo Nobel NV v Commission (C-97/08 P) EU:C:2009:536.

[307] Ibid., ([61]).

presumption of its exertion of decisive influence on Gosselin and vacated the judgement of the Commission as it concerned Portielje.[308] The holding company had submitted proof that: the first assembly of its board members occured just after the cessation of the transgression; the sole manner the holding company could have influenced the action of the subsidiary was to exert its right to vote at the shareholder assembly of the subsidiary, yet no assembly had been convened throughout the phase of the transgression; and there was just a limited correspondence among the holding company's and the subsidiary's boards of directors (solely half of the directors of Portielje as well served on the board of directors of Gosselin, and Gosselin's directors were by then members of the board of directors prior to Portielje's acquisition of the shares of Gosselin, which demonstrated that Portielje had not permuted the structure of the board of directors of Gosselin).[309]

After two years, the CJEU vacated, in 2013, the ruling of the GC for the reason that the GC had not considered "all the relevant factors relating to the economic, organisational and legal links which tie that author to its holding entity and, therefore, of economic reality".[310]

The CJEU specifically judged that the occurrence that the holding company did not endorse official direction decisions throughout the transgression phase was not enough to deduce that decisive influence had not been exerted. The CJEU continued that the GC should have taken account of the personal relationships[311] present among the legal personalities.[312] In essence, there was no rebuttal of the presumption although it appeared that this circumstance was evidently exculpatory.

In its 2012 decision, the GC validated the liability of the holding company for a cartel in the chemical substances industry where its subsidiary NCHZ had been engaged, which reinforced the presumption.[313] The appellant stipulated that it was a "pure financial investor" and that

[308] Judgment of 16 June 2011, Gosselin Group NV v European Commission (T-208/08) EU:T:2011:287.

[309] Ibid., ([53]-[59]).

[310] Judgment of 11 July 2013, European Commission v Stichting Administratiekantoor Portielje (C-440/11 P) EU:C:2013:514, ([66]).

[311]Judgment of 16 June 2011, Gosselin Group NV v European Commission (T-208/08) EU:T:2011:287, ([57]).

[312] Judgment of 11 July 2013, European Commission v Stichting Administratiekantoor Portielje (C-440/11 P) EU:C:2013:514, ([66]-[68]).

[313] Judgment of 12 December 2012, 1. garantovaná a.s. v European Commission (T-392/09) EU:T:2012:674.

accordingly it did not exert decisive influence on its subsidiary.[314] The Court dismissed this reasoning and indicated that the mention of a "pure financial investor" made in the opinion of the Advocate General in Akzo Nobel must be interpreted as alluding to an investor owning shares in a firm with the one purpose of making profit and with no implication in the direction of the firm.[315] There was in 1. garantovaná, inter alia, considerable correspondence in the holding company's and the daughter company's directorate.

In its Elf Aquitaine decision of 2011, as though the CJEU conceded the severity of those conclusions, it held for the first time that the decisive influence presumption intends to reach a compromise among the functional application of EU antitrust rules and the cushion of legal principles comprising the presumption of innocence, the rights of the defence, along with the principles of legal certainty and of self-responsibility. The CJEU stated that the rebuttable essence of the presumption is key to ensure that compromise.[316]

It is noteworthy that the CJEU did hold in Elf Aquitaine that the Commission is constrained to justify properly why the proof submitted by a holding company for the rebuttal of the presumption is insufficient.[317] The EU Courts have then, according to this principle, vacated some Commission judgements for non-success in properly explaining why the proof presented by the holding company did not suffice for the presumption's rebuttal.[318]

In the Edison case of 2011,[319] for instance, the Court vacated a Commission judgement that levied forfeits on a holding company for the engagement of its 100 per cent owned subsidiary in

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[314] Opinion of Advocate General Kokott of 23 April 2009, Akzo Nobel v Commission (C-97/08 P) EU:C:2009:262, ([67]).

[315] Judgment of 12 December 2012, 1. garantovaná a.s. v European Commission (T-392/09) EU:T:2012:674, ([52]); See as well, judgment of 12 July 2018, The Goldman Sachs Group v European Commission (T-419/14) EU:T:2018:445, ([151]).

[316] Judgment of 29 September 2011, Elf Aquitaine SA v European Commission (C-521/09 P) EU:C:2011:620, ([59]).

[317] Ibid., ([153]).

[318] Judgment of 5 December 2013, European Commission v Edison (C-446/11 P) EU:C:2013:798, ([20]-[32], [63]-[67]); see as well, Judgment of 16 June 2011, L'Air liquide v European Commission (T-185/06) EU:T:2011:275, ([68]-[83]); and Judgment of 15 September 2011, Koninklijke Grolsch v European Commission (T-234/07) EU:T:2011:476, ([76]-[94]).

[319] Judgment of 16 June 2011, Edison v European Commission (T-196/06) EU:T:2011:281.

a cartel on the chemical markets.[320] The proof demonstrated that the holding company behaved as a non-operating holding company (NOHC) which confined itself to running financial audit, and that the offending subsidiary had the essential quarters and divisions to direct its business autonomously.[321] The Commission, in its judgement, had not assessed this proof and had merely resorted to the parental liability presumption by penalizing the holding company.

The Court deduced that the Commission had transgressed its obligation to justify why the appellant had not sought a rebuttal of the presumption and voided the Commission judgement in as much as Edison SpA was regarded.[322] Mentioning Elf Aquitaine, the CJEU reaffirmed the ruling of the GC.[323]

Regardless of the findings in Edison and Elf Aquitaine, the Court has confirmed the presumption that ownership equals decisive influence, and in case this presumption is not rebutted the holding company is liable for the action of the subsidiary. Seemingly, the baneful defect is not that the presumption is hardly rebuttable, or that the Commission does not assess decent essays for its rebuttal. Instead, that defect is the Court's endorsement and constant compliance with the presumption inceptively for it gives rise to liability even when there is a lack of proof that the holding company did even acknowledge the action at issue. Pursuant to some academics, the rebuttable presumption has seemingly waxed a disguisement to vindicate a creed inconsistent with due process and the concept of self-responsibility.[324]

As per the presumption, the holding company is urged to bring a negative proof, in other words, that it doesn't exert decisive influence, which is very hard to do anyway. According to the same academics, the proper factor for liability, aligned with basic due process norms and greeting fundamental principles, is if the holding company was knowledgeable about the activity and did not proceed to cease it.[325] As the authority to investigate of the Commission on this concern is

[320] Merlino, P. (2014). Edison: A Glimpse of Hope for Parent Companies Seeking to Rebut the Parental Liability Presumption? Journal of European Competition Law & Practice, 5, 463-466.

[321] Judgment of 16 June 2011, Edison v European Commission (T-196/06) EU:T:2011:281, ([61]-[68]).

[322] Edison v Commission (T-196/06) EU:T:2011:281, ([61]-[94]).

[323] Judgment of 5 December 2013, Commission v Edison (C-446/11 P) EU:C:2013:798.

[324] See Leddy, M., & Van Melkebeke, A. (2019). Parental liability in EU competition law. European Competition Law Review, 40(9), 407-416.

[325] Ibid.

wide, they consider that the shift of the burden of proof, presumptions, and the expenses and intricacies of such manoeuvres are useless.[326]

The imputation of liability to a holding company for its subsidiaries' anti-competitive practices has considerable repercussions on public and as well private antitrust law implementation.
In respect of public implementation, parental liability can occasion a considerable inflation in penalties. Parental liability is pertinent, especially in the second phase of the penalty calculation procedure. Parental liability may influence the assessment of aggravation, the plausible inflation of the penalty to guarantee dissuasion, the implementation of the 10 per cent ceiling, and the inquiry of the capability of the offending company to discharge the penalty.
As per para.28 of the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02), of 1 September 2006 (the "Fining Guidelines"),[327] the Commission may inflate the cost of the penalty when there is aggravation, especially in event of relapse by the offending enterprise. In examining if a firm has perpetrated the same or an identical violation formerly, the Commission and the EU Courts have applied the regime of parental liability to consider as well precedent violations perpetrated by the holding company or any subsidiary of the group although the subsidiary in question at the present litigation was not implicated. This considerably inflates the amount of litigations where the Commission and the EU Courts may inflate a firm's penalty by reason of relapse.
In its 2003 decision in Michelin, for instance, the GC reaffirmed a Commission judgement which levied a penalty on Michelin France for a policy of loyalty discounts to tire traders which turned out to have represented an abuse of dominance.[328] The Commission had doubled the original cost

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[326] Judgment of 12 July 2018, Goldman Sachs Group Inc v European Commission (T-419/14) EU:T:2018:445, ([48]-[52]).

[327] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC0901(01)&from=EN. [Accessed: December 12, 2022]; Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02003R0001-20090701&from=EN. [Accessed: December 12, 2022].

[328] Judgment of 30 September 2003, Manufacture Française des Pneumatiques Michelin v Commission of the European Communities (T-203/01) EU:T:2003:250.

of the penalty for another firm of the Michelin group, NBIM, had been forfeited for an identical action earlier in 1981.[329] Michelin France stipulated that the aggravation of relapse should not be implemented in this litigation for Michelin France and NBIM were distinct firms.[330] The Court deduced that the Commission was empowered to inflate the penalty of the appellant due to relapse as both firms were over 99 per cent owned by the very holding company (Compagnie Générale des Établissements Michelin)[331] and hence the decisive influence presumption was relevant.

As per para.30 of the Fining Guidelines, the Commission may inflate the cost of the penalty to guarantee that it is an adequate deterrent, especially if the offending enterprise has "a particularly large turnover beyond the sales of goods or services to which the infringement relates".[332] In evaluating if a firm has a sizeable revenue which would prompt the inflation for deterrence, the Commission and the EU Courts regarded the revenue of the offending firm's holding company, disregarding the one of the offending firm itself.

In its Total SA decision of 2011, for instance, the GC reaffirmed a Commission judgement which levied a penalty on Arkema for its implication in a cartel in the chemical industries, and for which its holding companies Total and Elf Aquitaine were judged jointly and severally liable as per the concept of parental liability. The Commission had increased the initial cost of the penalty by three to guarantee that the penalty was an adequate deterrent.[333]

Total and Elf Aquitaine, on appeal before the GC, disputed the inflation for deterrence stipulating that it was devoid of relevant legal grounds.[334] The GC judged that the Commission

[329] Michelin v Commission (T-203/01) EU:T:2003:250, ([282]).

[330] Ibid., ([289]).

[331] Ibid., ([290]).

[332] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, (para.30). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC0901(01)&from=EN. [Accessed: December 12, 2022].

[333] Commission Decision of 3 May 2006 relating to a proceeding under Article 81 of the Treaty establishing the European Community and Article 53 of the EEA Agreement against Akzo Nobel NV, Akzo Nobel Chemicals Holding AB, EKA Chemicals AB, Degussa AG, Edison SpA, FMC Corporation, FMC Foret S.A., Kemira OYJ, L'Air Liquide SA, Chemoxal SA, Snia SpA, Caffaro Srl, Solvay SA/NV, Solvay Solexis SpA, Total SA, Elf Aquitaine SA and Arkema SA. (Case COMP/F/C.38.620 — Hydrogen Peroxide and perborate) (notified under document number C(2006) 1766), ([463]-[466]). Available at: http://data.europa.eu/eli/dec/2006/903/oj. [Accessed: December 12, 2022].

[334] Judgment of 14 July 2011, Total SA v European Commission (T-190/06) EU:T:2011:378, ([228]).

was empowered to inflate the cost of the penalty to ensure deterrence on account of the elevated global revenue of both holding companies.[335]

As per para.32 of the Fining Guidelines and art.23(2) of Regulation No 1/2003, penalties cannot transcend 10 per cent of the offending company's total revenue in the prior business year. The EU Courts and the Commission explained this limit as alluding to the revenue of the holding company of the offending undertaking where the holding company has as well been deemed liable for the transgression.

In its 2011 decision in FMC Foret, for instance, that related as well to a cartel in the chemical industries, the GC validated the Commission's penalty on FMC Foret, for which the holding company FMC was deemed jointly and severally liable. FMC Foret, on appeal before the GC, contested its penalty on the ground that it overshot 10 per cent of its total revenue in 2005.[336] The GC vacated this appeal and indicated that the 10 per cent limit of art.23(2) of Regulation No 1/2003 must be assessed in the light of the revenue of the whole FMC group, not solely the revenue of the offending undertaking FMC Foret.[337]

As per para.35 of the Fining Guidelines, the Commission may extraordinarily diminish the penalty levied on the offending firm if it is proved that the penalty would "irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value".[338] In evaluating whether to diminish a firm's penalty by virtue of para.35, the Commission and the EU Courts regard the economic state of the offending firm's whole group. In its 2011 judgement in the Prestressing Steel lawsuit, for instance, the Commission dismissed some steel firm's appeals for a diminution of the penalty by virtue of para.35 of the Fining Guidelines for it observed that the firms could receive financial support from other firms of their group or even from the family by which the group is owned.[339] The GC confirmed this ruling on

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[335] Total v Commission (T-190/06) EU:T:2011:378, ([230]).

[336] Judgment of 16 June 2011, FMC Foret v European Commission (T-191/06) EU:T:2011:277, ([315]).

[337] FMC Foret v Commission (T-191/06) EU:T:2011:277, ([323]-[325]).

[338] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, (para.35). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC0901(01)&from=EN. [Accessed: December 12, 2022].

[339] Commission Decision Of 30 June 2010 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (COMP/38.344 – Prestressing Steel),

appeal and deduced that the conjectured availability of funds at group echelon sufficed in itself to dismiss a penalty diminution appeal for incapability to discharge.[340]

Briefly, it sounds appropriate to deduce that the Commission and the EU Courts enjoy every given occasion to inflate the relevant penalty by extending liability above the corporate entity implicated in the transgression. Besides the inquisitive defects previously detected in the parental liability regime, this formulaic fanaticism to inflate penalties as far as possible seemingly jeopardizes the reliability of those establishments.

1.1.1. Parental liability and cartels

The ECJ upheld in 2013[341] the cartel pronouncements rendered by the Tribunal upon the Spanish raw tobacco leaves industry.

The Akzo lawsuit upheld in 2009 that, when a holding company owns the whole capital of a subsidiary, decisive influence by this holding company is presumed. Thus, the judicature can levy a penalty upon the holding company,[342] on grounds of its total revenues, without determining personal participation in the conduct of the daughter company.

([1175]). Available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/38344/38344_5856_3.pdf. [Accessed: December 12, 2022]; Summary of Commission Decision of 30 June 2010 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement against the undertakings ArcelorMittal, Emesa/ Galycas/ArcelorMittal (España), GlobalSteelWire/Tycsa, Proderac, Companhia Previdente/Socitrel, Fapricela, Nedri/HIT Groep, WDI/Pampus, DWK/Saarstahl, voestalpine Austria Draht, Rautaruukki/ Ovako, Italcables/Antonini, Redaelli, CB Trafilati Acciai, I.T.A.S., Ori Martin/Siderurgica Latina Martin, Emme Holding (Case COMP/38.344 — Prestressing Steel). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC1119(01)&from=EN. [Accessed: December 12, 2022].

[340] Judgment of 2 June 2016, Moreda-Riviere Trefilerías v European Commission (T-426/10) EU:T:2016:335, ([521]-[527]).

[341] Joint cases Alliance One International, Inc c/ European Commission (C-668/11 P) and Alliance One International Inc. c/ Commission europeenne (C-679/11 P), september 26, 2013.

[342] See Judgement of the CJEU of march 29, 2011, ArcelorMittal Luxembourg SA c/ European Commission (C-201/09). Available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=80815&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=12936. [Accessed: December 12, 2022].

The ECJ clarified that, although the Commission can resort to the "capitalist" presumption, it is not necessarily required to do it. In this situation, along with the occurrence that the holding company owned the whole capital of its daughter company, the Commission resolved to evidence the effective influence of the holding company. This test is named the "dual basis" technique.
Simultaneously, the ECJ as well decided on parent-daughter liability in a different litigation concerning synthetic rubber industry.[343]
This litigation is the first where the ECJ has implemented parental liability in the framework of a JV with full functionality.
It upheld the Commission and Tribunal judgements. Both corporations, Dow and DuPont, were thus convicted to a joint and several fine for the implication of their joint corporation in a cartel.

The disinclination of UK tribunals to the single economic entity concept is one that would improbably resist the "incoming tide" of European legislation.[344] In several quite fresh litigations, UK tribunals have had to observe if a UK firm that executed a contract ruled to have been violating art. 101(1) TFEU incurred tort liability, merely by being a member of an "undertaking" as part of European legislation, or if some higher guiltiness or fault was necessitated if tortious liability was to arise. The apellants in those litigations, so as to allocate themselves to the competence of UK tribunals and to take advantage of concomitant procedural benefits, had pursued to stipulate that UK firms acting within a wider group were liable for the cartelized prices invoiced by the group, uncomplying with fault or awareness on the side of the respondent firms.
Firms with incorporation in UK have their domicile there as part of legal claims and a respondent domiciled in UK (when the appellant is pursuing to allocate all the companies of the group, wherever incorporated, to the competence of UK tribunals) is here mentioned as an "anchor defendant".

[343] European Commission c/ Dow Chemical Company (C-179/12 P), september 26, 2013.

[344] Lord Denning M.R. in Bulmer (HP) Ltd v J Bollinger SA [1974], ((Ch. 401, p. 418-419), qualifying the influence of EU legislation in England).

Simultaneously in Provimi Ltd v Aventis Animal Nutrition SA[345] and Cooper Tire & Rubber Company v Shell Chemicals UK Ltd,[346] the English High Court found, at first instance, that there were accurate reasons to bring an action against these UK firms that had applied a cartel (in which other companies of the group have participated), whether or not the respondent UK firms had had awareness of the cartel. Kennelly has advanced[347] that the Wood pulp[348] litigation "provides support for" the suggestion that simple application without awareness is enough to evidence a violation of art. 101(1), in that situation with a consequent liability to mulcts.

Aikens J. argued, in Provimi, that the applying subsidiary was liable as it was member of the very "undertaking" (as determined according to European antitrust law) as the companies of the group against which the initial breach judgement had been rendered: "… There is no question of having to 'impute' the knowledge or will of one entity to another, because they are one and the same".[349]

The Court of Appeal, in the appeal brought in the Cooper Tire litigation,[350] disputed the stance taken by the High Court in the two of those litigations. It wondered if simple application of a cartel, without awareness of the implied illegitimacy, was enough. It questioned if subsidiaries should be liable for the practices of their holding companies strictly as an outcome of their being conditional on degrees of control which entered these firms into the notion of an undertaking as per EU legislation. On grounds of the pleadings of the litigants, it found that it did not necessitate to judge the point. Nonetheless, it contemplated that, had a judgement on the matter been essential at that level in the procedure, it would have conferred the concern on the CJEU.

[345] Provimi [2003] E.C.C. 29.

[346] Cooper Tire & Rubber Company v Shell Chemicals UK Ltd [2009] EWHC 2609 (Comm).

[347] Kennelly, B. (2010). Antitrust Forum-Shopping in England: Is Provimi Ltd v Aventis Correct? The Competition Policy International Antitrust Journal, 2, 7.

[348] A Ahlstrom Osakeyhtio v Commission of the European Communities (C-89/85) [1993] E.C.R. I-1307.

[349] Provimi [2003] E.C.C. 29, ([31]).

[350] Cooper Tire & Rubber Europe v Shell Chemicals UK Ltd [2010] EWCA Civ 864.

In KME Yorkshire v Toshiba Carrier UK Ltd, the Court of Appeal went back to the question.[351] Etherton L.J. observed that the question of absence of awareness was not posed:
"The Provimi point does not arise in the present case because, for the reasons I have given, the respondents have made a stand-alone claim against KME UK clearly alleging that it participated in, and implemented, the cartel arrangements with knowledge of the cartel agreement".
Concerning the question of fault, he explained that Toshiba's and other appellant firms' counsellor at law recognized that the appellants were forced to evidence that KME UK and the other respondents had had awareness of the cartel arrangement and acts. Thus, there was a recognition that not being aware of the application of the cartel did not generate liability according to art.101 TFEU. Etherton L.J. deduced, en passant, regarding if awareness of the cartelized price could be attributed, referring to the Akzo Nobel litigation[352] as reference, that: "… Since the point was argued … I will express my own view that it is clear that, save in a case where the parent company exercises "a decisive influence" (in the language of EU jurisprudence) over its subsidiary or the same is true of a non-parent member of the group over another member, there is no scope for imputation of knowledge, intent or unlawful conduct. The jurisprudence on this aspect is, in my view, plain and settled … Where, for example, a company does not decide independently on its own conduct on the market, but in all material respects carries out the instructions given to it by its parent company, having regard to the economic, organisational and legal links between them, the unlawful conduct of the subsidiary will be imputed to the parent company. In such a situation, in the language of EU jurisprudence, the parent exercises a "decisive influence" over its subsidiary. The subsidiary is not absolved from its own personal responsibility, but its parent company is liable because in that situation they form a single economic entity for the purposes of Article 101 [TFEU] …".
Hence, awareness of wrongfulness would require to be proven, except when a holding company exercises decisive influence on a daughter company when such awareness could be attributed, since this degree of control makes both firms members of the very undertaking. Decisive influence, as precised previously, can happen at comparatively low degrees of capital participation and, in this situation, awareness will be attributed among "parent" and daughter

[351] KME Yorkshire v Toshiba Carrier UK Ltd [2012] EWCA Civ 1190.

[352] Akzo Nobel NV [2009] E.C.R. I-8237.

companies. It as well maintains the plausibility that, although when decisive influence is not present, verified awareness may be proven to exist.

As such, when a corporate group unintentionally applies a cartel in situations in which it constitutes a member of a single "undertaking" with the member of a cartel in the group, it is liable to become a respondent in a tort claim.

The perspective of a number of UK tribunals in anchor defendant litigations manifests ambiguity concerning the essence of a single economic entity. There will be a single undertaking, the member firms to which will be imputed joint and several liability, when the required control necessitated for the firms to make up a single economic entity has been evidenced. The requisite that some level of awareness and liability on the side of the subsidiary be evidenced, although when control and thus a single economic entity is present, is incompatible simultaneously with the notion of liability of an undertaking and with the concept of joint and several liability, as supported by the GCEU and CJEU. Control, and the capacity to exert it in a manner that averts the infringement of EU antitrust law, is the only fault necessitated.

1.1.2. Deterrence and parental liability

As aforementioned, the GC, in one of its decisions, upheld the penalties levied by the Commission in the World Wide Tobacco España, SA v European Commission litigation.[353] The facts were rather explicit. Indeed, the Commission remarked that the Spanish tobacco industry was cartelized by contracts from 1996 to 2001: among processors on the (maximum) mean price of carriage of every kind of tobacco and on the amounts that they could purchase from the manufacturers; and on prices among manufacturers.

The Commission has then levied penalties on the companies in question.

[353] Judgment of the General Court (Fourth Chamber) of 8 March 2011. World Wide Tobacco España, SA v European Commission (T-37/05). Available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=80239&pageIndex=0&doclang=ES&mode=lst&dir=&occ=first&part=1&cid=15664. [Accessed: December 12, 2022].

After the judgement rendered by the Commission in 2004, the plaintiff brought legal actions before the GC, where it objected to the cost of its penalties.

The appeal brought by WW Tobacco España SA aimed at, inter alia, the multiplier implemented for deterrence.

The tribunal highlighted, as a first step, that deterrence is one of the theories which must be taken into account in the determination of the amount of the mulct. So as to do it, the range and the financial capacity of the corporation in question may especially be considered. As per the practice of the tribunal, the implementation of a multiplier to the basis of the penalty is explained by the occurrence that a firm having a considerably greater total revenues than the other participant in the cartel could be in a better position to find the needed resources for the settlement of its due.

The plaintiff, in this litigation, objected to the finding of the Commission that it was part of a huge global group, which based the implementation of a multiplier to the penalty's basis, stating that the firm was independent in that period.

The tribunal completely upheld the argumentation of the Commission. In fact, the judicature observed that the plaintiff pertained to a strong group and that they made up a single economic unit. Hence, as per the tribunal, the Commission may solely implement a multiplier for deterrence when the holding company exerts a decisive influence on the activities of the daughter company, which was the situation of WW Tobacco España in the period of the offence. Conversely, the Commission had not been capable of evidencing that the other participants in the cartel made up a single economic unit with the holding company and was consequently legally excused in not implementing any multiplier to them. In conclusion, the tribunal held that the Commission had contemplated the equal opportunity principle.

Hence, the tribunal upheld the mulcts' amount calculated by the Commission. Nevertheless, the lack of clarification concerning the requirements which determine the independence of a daughter company from the holding company may be blamed. According to some academics, the European tribunals' approach demonstrates that the concept of parental liability is more linked to economics than law.[354]

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[354] Tercinet, A., Bermond, J-C., Amiel, F., Fourquet, J., & Jalabert-Doury, N. (2011). Competition policies. International Business Law Journal, 3, 301-320.

Whilst the EU tribunals have not explicitly declared the motive behind the present principle of parental liability in EU antitrust law, critics relevantly aver that it is destined to lead to factual extensive deterrence.[355] Still, the principle of parental liability may not, in fact, lead to more significant deterrence.

Deterrence happens when the legislation initiates a risk of fines which are higher than the conjectured benefits of transgressing the regulations counter to an abuse of dominance or in constituting a cartel. Assuming that it is not essential for the Commission to demonstrate a holding company's factual implication or cognition in its subsidiary's violation of antitrust law to deem it liable, it is unsettled from what conduct holding companies are in fact being deterred. Deterrence can be achieved solely when liability is derived from effective action.[356] An action exclusively contemplated by the subsidiary cannot generate deterrence of the holding company. The pertinent issue is whether the principle produces further incitements for holding companies to stimulate or implement firm compliance systems. Apparently, holding companies seek the deviation of liability for a subsidiary's illicit conduct that they ignored and usually assert a strict compliance system for the subsidiaries. Nevertheless, the enforcement of compliance systems by holding companies has been considered by the GC as proof of the exertion of decisive influence by it on the subsidiary.

In Schindler Holding of 2011, for instance, the GC ruled that "the implementation within the subsidiaries of Schindler Holding of that code of conduct rather suggests that the parent company did in fact supervise the commercial policy of its subsidiaries, particularly since the applicants themselves have confirmed that compliance with the code of conduct was checked by means of regular audits and other measures taken by an employee of Schindler Holding responsible for compliance".[357]

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[355] See, e.g., Wahl, N. (2012). Parent Company Liability – A Question of Facts or Presumption? 19th St. Gallen International Competition Law Forum ICF (June 7th and 8th 2012). Available at: https://ssrn.com/abstract=2206323. [Accessed: December 12, 2022].

[356] See, e.g., Hofstetter, K., & Ludescher, M. (2010). Fines Against Parent Companies in EU Antitrust Law: Setting Incentives for 'Best Practice Compliance'. World Competition, 33(1), 55-76.

[357] Judgment of 13 July 2011, Schindler Holding Ltd v European Commission (T-138/07) EU:T:2011:362, ([88]); confirmed on appeal in judgment of 18 July 2013, Schindler Holding v European Commission (C-501/11 P) EU:C:2013:522, ([113]-[114]).

This terminology induces that a holding company or majority shareholder may actually have been incited to hold the function of a casual observer instead of that of a compliance protector. This threat may be empowered by the occurrence that the Commission does not regard the enforcement of compliance systems as an extenuating circumstance.[358] In 1999, the Commission even categorized as an aggravation, in British Sugar Plc, the presence of a "failed" compliance system.[359]

Therefore, although a holding company has aspired to compliance within the group and is ignorant of the offending action, it may be deemed partially liable owing to this aspiration. And its aspiration to establish compliance will not even diminish the cost of the penalty. This situation may generate the unwanted consequence of firms weighing the expense of strict compliance systems against the threat that (several or few members of the personnel at) a subsidiary will overlook their instruction for the promotion of their individual positions or else. Intrinsically, the regime of parental liability, as implemented according to the GC, appears conflicting with the objective of deterrence promotion.

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[358] See, e.g., Commission Decision of 31 May 2006 relating to a proceeding under Article 81 of the Treaty establishing the European Community and Article 53 of the EEA Agreement (Case No COMP/F/38.645 — Methacrylates) (notified under document number C(2006) 2098). Available at: http://data.europa.eu/eli/dec/2006/793/oj. [Accessed: December 12, 2022]; Summary at [2006] OJ C322/20, (para. 386); Summary of Commission Decision of 21 February 2007 relating to a proceeding under Article 81 of the Treaty establishing the European Community (Case COMP/E-1/38.823 — Elevators and Escalators) (notified under document number C(2007) 512 final), (paras 688, 754). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008XC0326(01)&from=EN. [Accessed: December 12, 2022].

[359] See, Commission Decision of 14 October 1998 relating to a proceeding pursuant to Article 85 of the EC Treaty Case IV/F-3/33.708 - British Sugar plc, Case IV/F-3/33.709 - Tate & Lyle plc, Case IV/F-3/33.710 - Napier Brown & Company Ltd, Case IV/F-3/33.711 - James Budgett Sugars Ltd (notified under number C(1998) 3061), (para. 208). Available at: http://data.europa.eu/eli/dec/1999/210/oj. [Accessed: December 12, 2022].

1.1.3. Parental liability and fundamental principles

The regime of the liability of the holding company has engendered a controversy over whether the regime is consistent with fundamental principles, primarily, with the principle of self-responsibility and the presumption of innocence.[360]

Firstly, the perspective of parental liability of the CJEU in competition law sounds to be conflicting with the doctrine of self-responsibility implied in art.6(2) of the European Convention on Human Rights (ECHR). Mengozzi literally elucidated in Siemens that "in accordance with the principle of personal responsibility, itself the corollary to the principle of fault, each person is responsible only for his own acts. In accordance with the principle that penalties must be specific to the offender and the offence, more specifically, a person may be penalised only for acts imputed to him individually".[361]

The regime of parental liability appears contrary to this principle for it can generate the levy of penalties on one legal entity (the holding company) for the actions of a separate legal entity (the daughter company) although the holding company was not implicated in nor was aware of the violation, and although it had strived to obstruct its subsidiaries from transgressing the competition law regulations.

However, the EU tribunals have routinely ruled that the principle of parental liability is not solely consistent with the principle of self-responsibility but that it actually represents "the expression of that very principle".[362] EU tribunals argued that "EU competition law is based on the principle of the personal responsibility of the economic unit which has committed the infringement" and thus "if the parent company is part of that economic unit, it is regarded as personally jointly and severally liable with the other legal persons making up that unit for the infringement committed".[363]

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[360] Wahl, N. (2012). Parent Company Liability – A Question of Facts or Presumption? 19th St. Gallen International Competition Law Forum ICF (June 7th and 8th 2012). Available at: https://ssrn.com/abstract=2206323. [Accessed: December 12, 2022].

[361] Opinion of Advocate General Mengozzi of 3 September 2015, European Commission v Siemens Österreich and Siemens Transmission & Distribution v European Commission (C-231/11 P) EU:C:2013:578, ([75]).

[362] Judgment of 27 September 2012, Nynäs Petroleum v European Commission (T-347/06) EU:T:2012:480, ([40]).

[363] Judgment of 27 April 2017, Akzo Nobel v European Commission (C-516/15 P) EU:C:2017:314, ([57]).

According to some scholars, this constitutes circular logic.[364] Firstly, it disregards the occurrence that the regime of the single economic entity was partially instituted to secure companies from claims of illicit group-wide accords or indentures infringing arts 101 or 102 TFEU. Furthermore, if as a general principle the economic entity is liable for violations of antitrust law by any affiliate to the group of companies, it would be initially irrelevant to discuss the question of parental liability. Eventually, the principle of self-responsibility implied in art. 6(2) of the ECHR[365] simultaneously secures physical and legal entities, rather than "economic units" of entities. As per art. 6(2.) of the ECHR, holding companies should not be destituted of their rights merely due to their economic relationships with other firms of their groups.[366]

Second, the parental liability presumption in circumstances of 100 per cent ownership is conflicting with the doctrine of the presumption of innocence laid down in art.6(2) of the ECHR.[367] The decisive influence presumption implies burden-shifting to the holding company to show that it should not be deemed liable for violations of its subsidiary. This is essentially incompatible with the presumption of innocence for the respondent has to prove the absence of its decisive influence and thus its guiltlessness.

Although it can be stipulated that the presumption as such is consistent with art. 6(2) of the ECHR, which is apparently not the case, according to EU legislation and the ECHR, the concord of the presumption with those principles should at worst be depending on the practical rebuttal of the presumption.[368] In Elf Aquitaine, as mentioned previously, the CJEU found that the rebuttable essence of the presumption is fundamental to ensure a balance among the practical

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[364] See Leddy, M., & Van Melkebeke, A. (2019). Parental liability in EU competition law. European Competition Law Review, 40(9), 407-416.

[365] European Convention on Human Rights, (art. 6(2.)), on the presumption of innocence greeting the right to a fair trial). Available at: https://www.echr.coe.int/documents/convention_eng.pdf. [Accessed: December 12, 2022]; and for an interpretation of this specific art., see European Court of Human Rights. (2022). Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (criminal limb). Council of Europe/European Court of Human Rights. Available at: https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf. [Accessed: December 12, 2022].

[366] Leupold, B. (2013). Effective enforcement of EU competition law gone too far? Recent case law on the presumption of parental liability. European Competition Law Review, 34(11), 570, (pp. 579-580).

[367] Judgment of 16 December 2015, Martinair Holland v European Commission (T-67/11) EU:T:2015:984, ([29]).

[368] Judgment of 29 September 2011, Elf Aquitaine v European Commission (C-521/09 P), ([59]).

implementation of the EU antitrust regulations, for one thing, and for another, the cushion of fundamental rights comprising the presumption of innocence and the legal certainty principle.[369] Nevertheless, according to the case law at hand, when it is complicated to refute the presumption, and unclear how to make so, this "balance" appears to foster the side of its implementation.

The ECtHR still has not assessed the concord of the ECHR with the decisive influence presumption. Yet, it has prescribed precise conditions for presumptions of criminal law overall to be held consistent with the presumption of innocence laid down in art.6(2) of the ECHR.

The paramount lawsuit in this field is Salabiaku v France,[370] that regarded a presumption that a person holding illicit goods was criminally liable for contrabanding regardless of the fact of if there was negligence or criminal intention. The plaintiff stipulated that the presumption provided for in French legislation was "almost irrebuttable", and hence inconsistent with the presumption of innocence.[371] The ECtHR found that while Member States are entitled to evidence, according to art.6(2) of the ECHR, mixed criminal presumptions of law and facts which are relevant regardless of negligence or criminal intention, those presumptions must be restricted "within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence".[372]

In view of this precedent, the EU tribunals have routinely emphasized in antitrsu law lawsuits that the decisive influence presumption is rebuttable and that this renders the latter consistent with due process and fundamental rights.[373] Nevertheless, as elucidated previously, the occurrence that the presumption has solely merely been refuted (and yet solely on a couple of instances on formal or procedural basis owing to the lack of motives from the Commission) evinces that in fact the presumption is not restricted "within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence". According to

[369] Ibid.; see as well, judgment of 8 May 2013, ENI SpA v Commission (C-508/11 P) EU:C:2013:289, ([50]).

[370] EctHR, judgment of 7 October 1988, Salabiaku v France (A/141-A) (1991) 13 E.H.R.R. 379.

[371] Salabiaku v France (A/141-A) (1991) 13 E.H.R.R. 379, ([26]).

[372] Salabiaku v France (A/141-A) (1991) 13 E.H.R.R. 379, ([28], [30]).

[373] See, e.g., judgment of 19 June 2014, FLS Plast v European Commission (C-243/12 P) EU:C:2014:2006, ([27]); judgment of 11 July 2014, Sasol v European Commission (T–541/08) EU:T:2014:628, ([139]–[141]); judgment of 29 September 2011, Elf Aquitaine v Commission (C-521/09 P), ([59], [62], [65]–[67]).

some scholars,[374] advocate General Bot sounds as having reaffirmed that, by confessing in 2010 that the presumption is "very difficult to rebut", and that accordingly, the presumption should be implemented, on a case-to-case ground, by considerations apart from ownership which exhibit that the holding company actually exerted a decisive influence on its daughter company.[375]

1.1.4. The Private Damages Directive

Concerning private antitrust, the Private Damages Directive[376] may involve, in private actions, the EU regime of parental liability. The Directive mentions the concept of "undertaking" when determining its theme and scope of application.[377] Art.1 of the Directive institutes specifically that the remedial rules in the Directive are intended to guarantee that sufferers of competition law transgressions perpetrated by "an undertaking or by an association of undertakings" are entitled to demand damages for the endured harm "from that undertaking or association."

Pursuant to some academics, the Private Damages Directive should as well induce a revision of the concept of parental liability in European antitrust law since the undesirable effects of the principle would be inflamed if the principle is implemented in damages lawsuits of the EU jurisdictions.[378]

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[374] See Leddy, M., & Van Melkebeke, A. (2019). Parental liability in EU competition law. European Competition Law Review, 40(9), 407-416.

[375] See Opinion of Advocate General Bot of 26 October 2010, ArcelorMittal Luxembourg v Commission and Commission v ArcelorMittal Luxembourg (C-201/09 P) EU:C:2010:634, ([212]–[213]).

[376] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. Available at: http://data.europa.eu/eli/dir/2014/104/oj. [Accessed: December 12, 2022].

[377] See Koenig, C. (2017). An Economic Analysis of the Single Economic Entity Doctrine in EU Competition Law. Journal of Competition Law & Economics, 13(2), 281-327, (p. 286).

[378] See Leddy, M., & Van Melkebeke, A. (2019). Parental liability in EU competition law. European Competition Law Review, 40(9), 407-416.

In Europe, private antitrust proceedings are nascent. Even if it was formerly academically practicable to bring private actions in Europe, complainants ran into empirical barriers, comprising for instance inaccessibility to documentation in legal regimes in which the procedure of discovery is unestablished. The 2014 Private Damages Directive has been implemented in all European jurisdictions legislations and was developed to minimize these barriers. The application of the Directive has thus far prompted an important quantity of actions for damages. It has been admitted by the Commission in its bulletin introducing the Directive, that private damages cases and public implementation are designed to serve as "complementary tools".[379] Contrastingly, the anticipated progress of private antitrust litigation in domestic courts that intend to resort to the Commission's principle of parental liability engenders complex issues, for instance, the uncertainty of whether the parents of companies implicated in the violation are jointly and severally liable for harms by virtue of the domestic law directing the case or are they susceptible to be counted as respondents in these actions and hence face complex procedural conflicts that simply retard procedures and increase everyone's expenses, comprising those of the judicial system. Moreover, arises the question of whether it is likely that fines raised on companies become exorbitant owing to the amalgamation of parental liability in both private and public implementation. Accordingly, evoking that domestic competition organizations and tribunals imitate the liability principles of the Commission, which in effect certifies that complainants' attorneys would prosecute every member of a supposedly offending subsidiary. Consequently, pursuant to some scholars, the Private Damages Directive may be an additional motive to revise the regime of parental liability.[380]

[379] European Commission. (2014, November 10). Antitrust: Commission welcomes Council adoption of Directive on antitrust damages actions. [Press release]. Available at: http://europa.eu/rapid/press-release_IP-14-1580_en.htm. [Accessed: December 12, 2022].

[380] Leddy, M., & Van Melkebeke, A. (2019). Parental liability in EU competition law. European Competition Law Review, 40(9), 407-416.

1.2. Group liability on grounds of the doctrine

1.2.1. The "undertaking" concept

Both the main TFEU provisions on European antitrust law, arts 101 and 102, prevent "undertakings" (a company "engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed")[381] from embarking on anticompetitive agreements or abuse of a dominant position.[382] Whereas there was no interpretation of the word "undertaking" in the initial EEC Treaty (or in any ulterior Treaty), the CJEU has interpreted the word as an "economic unit" which can represent physical or moral entities.[383] The "concept of [an] undertaking is an economic one", as specified by Wils.[384]

European antitrust law recognizes that entities in a group of companies may, actually, consist of one undertaking. The CJEU has found that undertakings can consist of a single economic unit when they: "… form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market, and if the agreements or practices are concerned merely with the internal allocation of tasks as between the undertakings".[385]

The CJEU, in Viho v Commission,[386] defined the notion of the "single economic unit" as being founded on the absence of independence obtained by a 100 per cent held subsidiary, the business conduct of which is managed by the holding company. The instructions of the Commission concerning horizontal cooperation agreements[387] point out that a firm exerting decisive influence

[381] Höfner v Macrotron (C-41/90) [1991] E.C.R. I-1979, ([21]).

[382] The word "undertaking" has the identical signification as per both arts 101 and 102 TFEU: Societe Italiano Vetro SpA v Commission of the European Communities (T-68/89) [1992] E.C.R. II-1403, ([357]-[358]).

[383] Hydrotherm Geratebau GmbH v Compact de Dott Ing Mario Andreoli & CSAS (170/83) [1984] E.C.R. 2999 ; an undertaking covers "… a unitary organization of personal, tangible and intangible elements which pursues a specific economic aim on a long term basis …": Shell v Commission (T-11/89) [1992] E.C.R. II-757, ([312]).

[384] Wils, W. P. J. (2000). The undertaking as subject of EC competition law and the imputation of infringements to natural or legal persons. European Law Review, 25(2), 99-116.

[385] Bodson v SA Pompes Funèbres des Régions Libérées SA (30/87) [1988] E.C.R. 2479, ([19]).

[386] Viho Europe BV v Commission of the European Communities (C-73/95 P) [1996] E.C.R. I-5457.

[387] Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, (para. 11). Available at: https://eur-

on another (and every other entity on which such influence is exerted by that holding company) constitute a single economic entity and thus consist of a single undertaking. Contracts concluded among these controlling and controlled entities, as one enterprise, are not bound by art.101 TFEU. Nonetheless, any anticompetitive agreement embarked on with a third-party by such a firm (or when the concerned firms have dominant position, any abuse exercised by any such firms) is a one for which any such controlled and controlling firm is jointly and severally liable as per the very creed. Hence, a holding company that exercises "decisive influence" on a subsidiary is at perceptible risk of being held liable for antitrust law infringements undertaken by that subsidiary and thus jointly and severally liable with the latter for the resultant administrative mulcts that it induced.

There is a consequent question, that is the extent of liability to civil claims encountered by affiliates to a group of companies in terms of antitrust law infringements. Pursuant to Paul Hughes,[388] this issue is progressively being solved via a growing and oblique motion by UK judges en route for the admission of the European concept of the single economic entity, with its concomitant group liability. Based on those legal elaborations, an affiliate to a group of companies (when that group connection fits in the single economic entity doctrine) would apparently hold tortious liability[389] for EU and UK antitrust law violations as long as it applies an anticompetitive agreement originated by the corporate group, although it may not be directly aware of any implied illegitimacy.

As per a distinct doctrine of control by the holding company, UK tribunals may rule that group policies and compliance programmes represent the handling of liability to third-parties. This may subject the holding company to tort actions at common law from the ones to whom it has handled this liability if the group policy-setting or compliance arrangements turn out deficient.

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lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114(04)&from=EN. [Accessed: December 12, 2022].

[388] Hughes, P. (2014). Competition law enforcement and corporate group liability - adjusting the veil. European Competition Law Review, 35(2), 68-87.

[389] In R. v Secretary of State for Transport Ex p. Factortame Ltd (No.7) [2001] 1 W.L.R. 942, John Toulmin QC described a tort as "a breach of non-contractual duty which gives rise to a private law right to the party injured to recover compensatory damages at common law from the party causing the injury".

The issue of the civil liability of the faultless related entity or daughter company primarily demands an observation of the legal notions upholding group liability in virtue of antitrust law. The latter allocates duties[390] and liabilities and penalties[391] to undertakings. The EU concept of enterprise is thus pivotal.

The applicable rules of antitrust law that refer purposefully to "undertakings" instead of entities or legal persons, intend to safeguard competition. Business practice affects competition, with the consequence that antitrust law is solely capable of safeguarding competition if its provisions are designed for business organizations. Hence, it is key for the safeguard of competition that antitrust law tackles such business organizations.
Therefore, judicial precedent describes the concept of "undertaking" as any company involved in business practice, notwithstanding its legal structure and the means by which it is funded.[392] Since the legal structure is hence impertinent, a number of separate legal persons can be regarded as jointly making up a single undertaking as part of antitrust law when these companies make up an economic entity. An economic entity is considered present when a daughter company "although having a separate legal personality […] does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company […], having regard in particular to the economic, organisational and legal links which tie those two legal entities".[393]

In virtue of this judicial precedent concerning the economic entity, the ECJ attributes to the holding company the cartel offence of its daughter company. Nevertheless, it is unclear how the ECJ deems the holding company liable. More precisely, the daughter company's offence is

[390] See TFEU, (arts 101 et seq.)

[391] See Council Regulation (EC) No 1/2003, (art. 23); TFEU, (arts 101 et seq.); Directive 2014/104/EU, (art. 1 para. 1).

[392] Alliance One International Inc, formerly Standard Commercial Corp v European Commission and European Commission v Alliance One International Inc (C-628/10 P & C-14/11 P) EU:C:2012:479, ([42]).

[393] General Química SA v European Commission (C-90/09 P) EU:C:2011:21, ([37]). Available in English at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=84961&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4150038. [Accessed: December 12, 2022].

attributed to the economic entity. Thus, the offence is regarded as having been perpetrated by the economic entity to the effect that the latter is to hold liability for such offence. Therefore, if the ECJ considers the daughter company's offence as the one of the economic entity, such offence is simultaneously an offence of the holding company and the other group companies, in order words, in particular as well an offence of related entities or non-compliant subsidiaries.

1.2.1.1. "Joint action triggers joint liability"

The liability of the undertaking can simply be imputed to a legal person when the undertaking is composed solely of a single legal person. Nevertheless, the economic entity is marked by the reality that a number of separate legal persons jointly make up a single undertaking in virtue of antitrust law. In such situation, the undertaking is composed of a number of legal persons. However, because of the unitary concept of undertaking, this has no effect on the imputation of liability. Instead, following the economic approach existent in antitrust law, it is essential to guarantee that the liability of an undertaking composed of a single legal person economically correlates with the liability of an undertaking composed of a number of legal persons.
Pursuant to Christian Kersting,[394] where no distinction is admissible concerning the liability of an undertaking composed of a single legal person and an undertaking composed of a number of legal persons as regards the economic effect of liability, the "liability of the undertaking" must be read as "joint and several liability of all legal entities making up the undertaking". This is the sole manner to guarantee that the totality of assets with which the undertaking collectively acts in the market are comprised in net liabilities.
Hence, the key element of liability is collective, uniform market activity that joins separate legal persons with one economic entity. In that context, the group pyramid is impertinent. This conducts (more or less pronouncedly) to the deduction that the faultless related entity or daughter company is to hold liability for the cartel offence of another related entity or of the holding

[394] Kersting, C. (2020). Liability of sister companies and subsidiaries in European competition law. European Competition Law Review, 41(3), 125-136.

company. It seems that joint and several liability is to be the heavy effect of the concept of undertaking (that becomes understood as the economic entity). The economic entity is subject to antitrust law provisions and hence holds liability. Insofar as the economic entity as such is not deemed to be a legal person, its liability must be read as the one of all legal persons constituting the economic entity. The liability of all the legal persons joint with the economic entity, forming the economic entity, then involves all assets of the economic entity, comprising it in net liabilities. Therefore, in antitrust law, the notion of group liability can be recapitulated by arguing that collective liability results from collective, uniform activity in the market (i.e. "joint action triggers joint liability").

1.2.1.2. Decisive influence

Yet, the tribunals have generally linked the attribution of the liability of the daughter company to the holding company to the idea of the reliance of the daughter company on the guidance of the holding company, in other words, the decisive influence exerted by the holding company on the daughter company.[395] In this scenario, it can be asserted that the holding company's liability for its daughter company is not related to the aspect that the holding company and the daughter company make up joint action but instead on the idea that decisive influence is exerted by the holding company on the daughter company. In such situation, liability would be related to decisive influence instead of joint action. Therefore, where liability implies decisive influence, the faultless related entity could not hold liability since (or when) it does not exert decisive influence on the offending company. This would be also true for the faultless daughter company which does not have decisive influence on the holding company, and would consequently not hold liability for the offence of the latter.

[395] Akzo Nobel v Commission EU:C:2009:536, ([55]). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62008CJ0097. [Accessed: December 12, 2022].

1.2.1.3. Judicial precedent

Consequently, the issue posed is on what grounds does the ECJ justify group liability.
Pursuant to Christian Kersting, assertions in the judgments of the ECJ do not solve this issue clearly. For instance, for one thing, the ECJ asserts in its Akzo decision that "the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company […]".[396]
Hence, the ECJ grounds the liability of the holding company for its daughter company on the factor of decisive influence exerted by the holding company on the daughter company. This would imply that liability relies on the presence of decisive influence. Therefore, the factor of decisive influence would happen to constitute grounds for liability. Thus, the faultless related entity or daughter company which is free of decisive influence on the offending company could not hold liability for the acts of its related entity or holding company.
For another thing, the ECJ does not formulate this deduction in this decision but instead indicates subsequently that "in such a situation, the parent company and its subsidiary form a single economic unit and therefore form a single undertaking for the purposes of the case-law mentioned in paragraphs 54 and 55 of this judgment".[397]
Hence, liability is based on the fact that the holding company and the daughter companies are joint legal persons, which connotes that unitary liability derives from unity of action. Therefore, the faultless related entity or daughter company would actually hold liability. Such apparently inconsistent assertions can be paired, dispelling the inconsistency, when one appreciates the criterion of decisive influence as a simple condition for the presence of the economic entity and distinguishes this from the issue of liability in a present economic entity.[398] The economic entity could therefore be grounded on joint action.

[396] Ibid., ([58]).

[397] Ibid., ([59]).

[398] Sainsbury's Supermarkets v Mastercard [2016] CAT 11 1241/5/7/15 (T), ([363(20)]).

Nevertheless, this cannot really be paired with the following assertion of the ECJ that: "Even if the parent company does not participate directly in the infringement, it exercises, in such a case, a decisive influence over the subsidiaries which have participated in it. It follows that, in that context, the liability of the parent company cannot be regarded as strict liability".[399]

Thus, against this background, the holding company's liability is read as tort liability as the holding company has exerted decisive influence on its daughter company. Thus, with no decisive influence, there would not be tort liability. Nevertheless, since art.23 of regulation 1/2003[400] demands negligent or intentional conduct to levy fines, the presence of decisive influence would hence be a condition for liability.

Furthermore, the legal theory of the ECJ on joint liability is regularly censured by scholars for its transgression of the doctrine of culpability or the concept of individual responsibility. However, tort or individual responsibility of a single legal person is not a condition for levying fines. The ECJ frequently stresses that the concept of individual responsibility is linked to the undertaking in itself, in other words, to the economic entity.[401] This is equally true for art.23 of regulation 1/2003 which fines undertakings for negligent or intentional conducts. Thus, there isn't (as well from the perspective of the ECJ) any requirement to base the holding company's tort on the factor of decisive influence. This isn't also demanded by statutes nor by the legal theory of the ECJ. It is enough that the economic entity as a whole (via the offending company) commited a tortious act.

According to Christian Kersting, even if the ECJ's assertions can be explained otherwise, there are further motives to consider grounds for liability in joint action, that then results in joint liability ("joint action triggers joint liability"). The ECJ's assertions, that ostensibly say the opposite, are not at odds with this, but can be consistently aligned with this principle. As a consequence, the natural result of this perspective is the faultless related entity's or daughter company's liability.

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[399] Akzo Nobel v Commission EU:C:2009:536, ([77]).

[400] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02003R0001-20090701&from=EN. [Accessed: December 12, 2022].

[401] Akzo Nobel v Commission EU:C:2009:536, ([56]).

Advocate General Kokott's assertions in the Akzo judgment are somehow more precise. For one thing, she emphasizes that from her point of view the "[…] fact that the parent company which exercises decisive influence over its subsidiaries can be held jointly and severally liable for their cartel offences does not in any way constitute an exception to the principle of personal responsibility, (78) but is the expression of that very principle […]".[402]

As the ECJ in its decision,[403] she relates liability to the factor of decisive influence. Nevertheless, more accurately, her assertion is clearer than the one of the ECJ. The Advocate General does not describe the holding company's liability as a tortious one, but only points out that the unity of liability of a holding company and its daughter company is a manifestation of the concept of individual responsibility. This is completely consistent with the ruling that the concept of individual responsibility alludes to the undertaking in itself and hence to the economic entity composed of the holding company and its daughter company. The Advocate General justifies as well her assertion in the very part: "That is because the parent company and the subsidiaries under its decisive influence are collectively a single undertaking for the purposes of competition law and responsible for that undertaking".[404]

Generally, she asserts that from her point of view the parent-daughter joint and several liability derives from the occurrence that the holding company and its daughter company are the legal personification of the economic entity. She makes it crystal clear in the subsequent paragraph: "This form of parent company responsibility under antitrust law also has nothing to [do] with strict liability. On the contrary, as mentioned, the parent company is one of the principals of the undertaking which negligently or intentionally committed the competition offence. In simplified terms, it could be said that it is (together with all the subsidiaries under its decisive influence) the legal embodiment of the undertaking which negligently or intentionally infringed the competition rules".[405]

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[402] Opinion of Advocate General Kokott in Akzo Nobel NV v Commission of the European Communities (C-97/08 P) EU:C:2009:262, ([97]). Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=ecli:ECLI:EU:C:2009:262. [Accessed: December 12, 2022].

[403] Akzo Nobel v Commission EU:C:2009:536, ([77]).

[404] Opinion of Advocate General Kokott in Akzo Nobel NV v Commission of the European Communities (C-97/08 P) EU:C:2009:262, ([97]).

[405] Ibid., ([98]).

As direct as her opinion may sound, she still asserts that the holding company exerts a decisive influence over its daughter companies and heads within the corporate group. The holding company could not easily transfer liability for cartel offences perpetrated in this group of companies to single daughter companies.[406] This, one more time, denotes a greater effect of the decisive influence factor as the principal basis for liability.

In the Siemens Austria lawsuit, Advocate General Mengozzi asserts that "in the case of an undertaking made up of various legal persons, the persons who have participated in the cartel, as well as the ultimate parent company which exercises a decisive influence over them, may be regarded as legal entities collectively constituting a single undertaking for the purposes of competition law which may be held responsible for the acts of that undertaking".[407]
This is also an equivocal assertion. For one thing, Mengozzi aims to incorporate solely the legal persons engaged in the cartel and the legal entities exercising decisive influence on them into a single economic entity. As such, the factor of decisive influence would be of greater significance for imposing liability, to the effect that, then, there could not be liability of faultless related entities and daughter companies for their holding company. For another thing, still, he does not base the unity of liability of those companies on the exertion of decisive influence by the holding company, but on the reasoning that they can be deemed liable for each other "as legal entities collectively constituting a single undertaking". This would lead to the deduction that liability is based on joint action in a market ("joint action triggers joint liability") and establish liability of the faultless related entity or daughter company as well.
Upon careful analysis, this argument will effectively have to exist. Pursuant to Christian Kersting, first of all, it should be recorded that his prime assertion, that solely the legal persons engaged in the cartel and the entities who have exerted a decisive influence on them can be consolidated in an economic entity, is irrelevant. Besides the holding company, the economic entity covers all entities that do not independently decide on their actions in the market and that

[406] Ibid., ([99]).

[407] Opinion of Advocate General Mengozzi. European Commission v Siemens AG Österreich (C-231–233/11 P) EU:C:2013:578, ([80]). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62011CC0231. [Accessed: December 12, 2022].

act jointly in the market under the control of the holding company.[408] Besides the participant daughter company which has offended antitrust law, the economic entity not solely covers legal entities that have a decisive influence on the offending company, but as well all other entities on which decisive influence is exerted.[409] This also comprises related entities. Consequently, if the group of companies related to the economic entity is adequately expanded to cover related entities and if the second assertion of Mengozzi is as well observed, that is the unity of liability of the legal persons making up the economic entity, thus, the related entity's liability must as well be established.

The ECJ, in the Aristrain lawsuit,[410] excluded a related entity's liability; and the General Court, in the Jungbunzlauer lawsuit,[411] upheld a related entity's liability. However, none of the lawsuits is pertinent to the issue at stake concerning faultless related entities' or daughter companies' liability.

The ECJ found, in the Aristrain lawsuit, that the presence of a common proprietor family does not affirm imputation of the conduct of one sister company to another and hence does not result in unity of liability.[412] This does not represent a general exclusion of the liability of the related entity. The ECJ did not ground this ruling on the absence of a decisive influence of one related entity on another. Hence, it did not regard decisive influence as essential for demonstrating liability. Relatively, there was basically not one economic entity in any way. Consequently, the entities at stake were not related entities affiliated to the identical economic entity. Hence, the

[408] Manufacture française des pneumatiques Michelin v European Commission (T-203/01) EU:T:2003:250, ([290]). Available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62001TJ0203. [Accessed: December 12, 2022].

[409] Opinion of Advocate General Kokott in Akzo Nobel NV v Commission of the European Communities (C-97/08 P) EU:C:2009:262, ([98]).

[410] Siderurgica Aristrain Madrid SL v Commission of the European Communities (C-196/99 P) EU:C:2003:529. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=ecli%3AECLI%3AEU%3AC%3A2003%3A529. [Accessed: December 12, 2022].

[411] Jungbunzlauer AG v Commission of the European Communities (T-43/02) EU:T:2006:270. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62002TJ0043. [Accessed: December 12, 2022].

[412] Siderúrgica Aristrain Madrid SL v Commission of the European Communities (C-196/99 P) EU:C:2003:529, ([98] et seq.).

issue of a faultless related entity's liability for the cartel offenses of another related entity was not posed in any way.
The General Court, in the Jungbunzlauer lawsuit,[413] imputed liability to one related entity for the cartel offence another related entity. Nevertheless, this does not lead to the deduction that the General Court has established related entities' liability by basing the latter on the fact that the related entity was a member of one economic entity. In this particular lawsuit, the related entity which held liability oddly had a decisive influence on the related entity which had perpetrated the offence. This signifies that besides the factor of being a member of the economic entity, the factor of decisive influence of the faultless related entity on the offending related entity was found as well.

Accordingly, both the factor of decisive influence and the factor of joint action, in other words of jointly making up one undertaking, are of considerable importance in the legal theory of the ECJ to impose joint liability in virtue of antitrust law. However, it is not patently obvious what is eventually the grounds of the doctrine for the liability of group companies which did not participate in the offence. On this point, the former study of the judicial precedent precisely emphasizes the factor of jointly making up one undertaking. Nevertheless, there is yet no justification regarding why the judicial precedent as well resorts to the factor of decisive influence. Furthermore, the link among both factors necessitates to be analysed.
A careful analysis demonstrates that the factor of decisive influence is only a prerequisite for liability. The ECJ traverses a plurality of stages to affirm liability "hermeneutically".[414] The primary stage is a theoretical outside perspective of the undertaking as economic entity. Hereby, the abstract basis for imposing duties and liability in virtue of antitrust law on the undertaking in itself is prescribed. As a second stage, a particular internal perspective determines, by resort to company relationships, context and extent of the undertaking on which duties and liability are to be imposed. The factor of decisive influence is paramount merely for this definition of the

[413] Jungbunzlauer AG v Commission of the European Communities (T-43/02) EU:T:2006:270, ([102] et seq., on the group structure, at [123] et seq.).

[414] Kersting, C. (2020). Liability of sister companies and subsidiaries in European competition law. European Competition Law Review, 41(3), 125-136.

context and extent of the undertaking. As a third stage (directly adopting a definite outside perspective) duties and liabilities are imposed on the undertaking, that is actually clearly determined as regards context and extent. Eventually, as a fourth stage, the legal persons which jointly form the undertaking or the economic entity are tackled so as to impose liability. In reality, this is of particular interest merely when the undertaking is composed of a number of separate legal persons, for the issue of which of those legal persons hold liability waxes pertinent merely in this situation.

In a primary stage, the ECJ considers a theoretical outside perspective. The ECJ observes the market from a theoretical external view for, so as to safeguard competition, the practical concept of undertaking only observes business practice as it is the latter that forms and impacts on competition. Consequently, an undertaking is described as any company that is collectively and unitarily involved in business practice. In virtue of antitrust law, duties are assigned to the undertaking and it is the undertaking that holds liability for offences to antitrust law. Accordingly, an outside view is considered. The "stage" (i.e., the market) is analysed externally. This outside perspective is theoretical and prescribes the abstract background for the legal duties of the undertaking and its liabilities as an economic entity. Nevertheless, such theoretical perspective cannot identify or describe the undertaking, as a comprehensive perspective on the stage, that identifies joint action, in other words detects a consolidation of resources operating jointly, is possible solely abstractly, but not factually. An outside perspective cannot precisely perceive the undertaking in itself but can at most foresee outlines. It is impracticable to precisely determine externally which market actors relate to which undertaking. Consequently, it is hence impracticable to state which legal persons relate to which undertaking. The semblance may merely be identified, but not the form of the undertaking. Consequently, the outside perspective with its emphasis on the unitary, collective picture in the stage is inevitably unclear as the context of the jointly operating entity is ambiguous: as an illustration, it is vague if entities 1, 2, 3 form the undertaking or if the latter is instead composed of entities 2, 4 and 5 whilst 1 and 3 constitute a separate undertaking.

Accordingly, as a second stage, a less abstract inside view is considered to define the context and extent of the economic entity. Therefrom, the ECJ mentions the formational affiliations in virtue

of company law. The ECJ determines the economic entity in terms of its joint action on the stage and presumes the presence of an economic entity among holding company and daughter company when the latter does not independently decide on its actions on the stage.[415] This eventually permits an absence of independence to be affirmed if there is conformity to guidance which is offered grounded on "economic, organisational and legal links" among holding company and daughter company.[416] The ECJ is then observing "behind the stage" to define the form of the economic entity acting on such stage, resorting to the factor of decisive influence. It then becomes precise, as an illustration, if entities 1, 2, 3 form the undertaking or if the latter is instead composed of entities 2, 4 and 5 whilst 1 and 3 form a separate undertaking.

Following the specific determination of the economic entity employing the factor of decisive influence, an additional alteration of view comes about. As a third stage, the ECJ it takes an outside view once more and adopts another, then refined, observation of the market. Then, duty, violation of duty and liability can be imposed on the economic entity, that is then clearly determined in its context and extent as an undertaking. Solely this third stage permits the duties that abstractly resulted from the concept of undertaking (and liability for an offence as well) to be brought to bear by concretely perceiving the economic entity and rendering it legally substantial via its members, in other words the legal (and conceivably physical) entities which constitute the undertaking.

As a fourth stage, the ECJ lifts the corporate veil by "looking behind" the undertaking and returning to its emphasis on the members of the undertaking. The context and extent of the economic entity have then been perceived. Duty, violation of duty and liability are imposed on the concretely determined economic entity. The liability touching the economic entity as a whole must then be imposed on a particular legal person. In this context, questions are posed solely when the economic entity is composed of a number of legal persons. In such situation, liability must be imposed on each of the separate legal persons of the economic entity. The liability of the separate legal persons correlates with that of the economic entity merely then. When liability was

[415] Akzo Nobel v Commission EU:C:2009:536, ([55]).

[416] Ibid.

not held by every legal person in the economic, as, for instance, faultless related entities were denied, a portion of the assets would not be included in liability. Nevertheless, in antitrust law, all the assets are regularly regarded. Against this background, the group pyramid is impertinent, the inside perspective merely shoulders the aim of defining the context and extent of the economic entity without restricting liability of the separate legal persons in the economic entity. Pursuant to Christian Kersting, as initial findings, it can be asserted at this moment that the ECJ actually as well points out the factor of decisive influence exercised by the holding company on the daughter company when appraising joint liability in the light of antitrust law. This is inconsistent with the perspective that the faultless related entity or daughter company holds liability as well for offences to antitrust law as these lack decisive influence on the offending related entity or holding company.

Yet, on the other hand, the ECJ bases the holding company's liability for its daughter company on the concept of undertaking. Accordingly, liability derives from the idea that the holding company and its daughter company are, jointly, members of an economic entity.[417] This backs the perspective that the faultless related entity or daughter company holds liability for the offences of the holding company as they are both, jointly, members of a single economic entity. This presumed inconsistency can be settled when one acknowledges that the factor of decisive influence heralds the effective issue of liability and merely attends to determine the economic entity. Solely a concrete determination of the economic entity permits to establish the liability of the separate legal persons. Therefore, the liability of the legal persons jointly forming the economic entity derives only from the concept of undertaking, by virtue of which duties and liabilities are assigned to the economic entity in its entirety.

This outcome is not contested by the occurrence that the ECJ uses the factor of decisive influence so as to establish that the liability of the holding company is not assigned to the daughter company regardless of tort. In fact, from the perspective of the ECJ, it is even not required to establish this as the concept of individual responsibility is anyway relevant to the undertaking as such and not the separate legal persons. Finally, the modus operandi of the ECJ is no more than a contraction of this simple reasoning; yet its phrasing can be confusing.

[417] Akzo Nobel NV EU:C:2017:314, ([59]).

1.2.2. Repeated offence

An additional reasoning that backs the perspective that joint liability in virtue of antitrust law derives from the concept of undertaking and the legal form as one economic entity can be gathered from the judicial precedent regarding the attribution of prior offences so as to affirm a repeated offence.

The holding company, in the Michelin lawsuit,[418] owned over 99 per cent of shares in two daughter companies. In 1981, the first daughter company had been sanctioned for a cartel offence. The second daughter company was involved in a cartel in 2001. It was asserted by the General Court that "[…] the applicant confirmed that the company referred to by the NBIM decision […] and the company referred to by the contested decision are subsidiaries […] owned […] by the same parent company, […]. Since Community competition law recognises that different companies belonging to the same group form an economic unit and therefore an undertaking within the meaning of Articles 81 EC and 82 EC if the companies concerned do not determine independently their own conduct on the market […] and since, in accordance with the case-law, the Commission, had it so wished, could have imposed the fine on the same parent company in both decisions […], the Commission was entitled to consider in the contested decision that the same undertaking had already been censured in 1981 for the same type of infringement".[419]

On this basis, the second daughter company was sanctioned in 2001 for its conduct in repeating an offence.

In such situation, it is consistent with the aforementioned recognized concepts that the holding company holds liability for the offence of the first daughter company in 1981 and for the offence of the second daughter company in 2001. The attribution of the offence of the second daughter

[418] Manufacture française des pneumatiques Michelin v European Commission (T-203/01) EU:T:2003:250. Available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62001TJ0203. [Accessed: December 12, 2022].

[419] Michelin EU:T:2003:250, ([290]).

company to the holding company in 2001, after the holding company had held liability for the offence perpetrated by the first daughter company in 1981, signifies that the holding company then holds liability for a repeated offence. This kind of imputation can yet be aligned with the factor of decisive influence.
Nevertheless, in the lawsuit in question an imputation was as well made in the opposed side. The repeated offence of the holding company had an adverse impact on the heretofore innocent second daughter company. The conduct of the second daughter company was regarded as a repeated offence, even if this had been its prime cartel offence. This is no more consistent with the factor of decisive influence for the daughter company lacked decisive influence on the holding company, which could account for the attribution of the repeated offence by the holding company to it. This imputation can merely be explained by the occurrence that the holding company constituted a single undertaking besides its two daughter companies. The General Court advanced literally this argument.

The ECJ reasons in a relatively identical manner. It requires in the Versalis lawsuit that "in order to establish the aggravating circumstance of repeated infringement on the part of the parent company, it is not necessary for that company to have been the subject of previous legal proceedings giving rise to a statement of objections and a decision. For that purpose, what matters is an earlier finding of a first infringement resulting from the conduct of a subsidiary with which the parent company involved in the second infringement formed, already at the time of the first infringement, a single undertaking for the purpose of Article 81 EC".[420]
Pursuant to Christian Kersting, contrary to how it might ostensibly sound, the decision is not restricted to the attribution of an offence of the daughter company EniChem SpA to its holding company ENI SpA. Instead, the decision is grounded on a "double" repetition of the offence. For one thing, there had been earlier in 1994 a Commission judgment against *EniChem SpA* for a cartel offence. For another thing, in 1986, the Commission had sanctioned Anic SpA.[421] EniChem SpA[422] and *Anic SpA* are two daughter companies of the ENI Group, and Anic

[420] Versalis EU:C:2015:150, ([91]). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=ecli:ECLI%3AEU%3AC%3A2015%3A150. [Accessed: December 12, 2022].

[421] Ibid., ([20]).

[422] Ibid., ([3]).

SpA did not have participated in the cartel concerning the ECJ decision. However, the former offence of Anic SpA (1986) is as well used so as to account for the inflation in mulcts for the undertaking as a whole, in other words specifically for Polimeri Europa SpA[423] as the other daughter company which holds joint and several liability.[424] Hence, at any rate, this lawsuit is as well a one concerning an imputation of the offence of the related entity (Anic SpA) to another related entity (Polimeri Europa SpA) and not solely to the holding company (ENI SpA).
This is mentioned by the ECJ in its judgment, where it as well mentions the concept of undertaking, and comprises (more precisely) related entities: "The objective of suppressing conduct that infringes the competition rules and preventing its reoccurrence by means of deterrent penalties […] would be jeopardised if an undertaking encompassing a subsidiary concerned by a first infringement were able, by altering its legal structure through the creation of new subsidiaries against which proceedings could not be brought on the basis of the first infringement, but which are involved in the commission of the new infringement, to make impossible or particularly difficult, and therefore avoid, a penalty for repeated infringement".[425]
Although the ECJ does not directly emphasize that the two daughter companies are as well regarded as having repeated the offence besides the holding company, it as well does not restrict its reasoning to the establishment that the holding company is the only one having repeated the offence.
The comprising of the related entities eventually is also a result of implementing the concept of undertaking. According to Christian Kersting, even if it does seem that the ECJ principally resorts to the principle of effective judicial protection in the Versalis judgment, it is not the case. The ECJ considers as a transgression of the principle of effective judicial protection, the conceivability to impose fines for repeated offence by reform, merely as the holding company and the two daughter companies, in other words, the formerly offending daughter company and the daughter company involved in the recent offence, constitute a single undertaking. Modifying

[423] Chloroprene-Rubber COMP/38629 C(2007)5910 final [2007], ([445]-[456]). Available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/38629/38629_1056_4.pdf. [Accessed: December 12, 2022].

[424] Ibid., ([540]).

[425] Versalis EU:C:2015:150, ([92]).

the legal form of this undertaking should not influence the issue of a repeated offence (normally), for the target is the undertaking as a whole and not its affiliated separate legal persons.
This is completely consistent with the idea that the ECJ does not require that "the legal person must have been able, in the proceedings conducted on the basis of a first infringement, to dispute that it formed a single economic unit with other entities against which proceedings were also brought. What matters is simply that that legal person must be able to defend itself at the time when the repeated infringement is alleged against it".[426]
Put differently, the ECJ describes undertakings according to substantive law. The clincher is the relation to the single undertaking, in other words, being a member of the economic entity. This results in an imputation of the prime offence earlier, that is then "updated" by the second offence insofar as a daughter company not sanctioned for the prime offence can be sanctioned for a second offence for repeated offence. The sole condition is that the legal person must be permitted to evidence that it was not a constituent part of the economic entity during the prime offence.
Pursuant to Christian Kersting, since the common legal personification of the economic entity, in other words the uniform, collective action on the stage by the holding company and the daughter companies, opens the way to the attribution of the conduct of the holding company (or rather, of the economic entity) in repeating an offence to a blameless daughter company, there are then no grounds not to impute the cartel offence of the holding company also to a blameless daughter company. If this results in liability of the blameless daughter company for the holding company, then the blameless related entity must also hold liability. The liability of the blameless related entity derives yet from the liability of the holding company for the cartel offence of a different daughter company. Therefore, the liability of the daughter company is attributed (through the holding company) also to the other related entities.
The occurrence that in the Michelin lawsuit, the daughter company penalized for the second infringement was seemingly not penalized in the prime cartel case and, reciprocally, the daughter company penalized for the prime infringement did not hold liability for the penalty levied in the

[426] Ibid., ([93]).

second cartel case,[427] derives from the discretion of the Commission in levying penalties.[428] It is not inconsistent with the establishment that the economic entity as such repeated the offence. Through its discretionary power, the Commission does not establish the ambit of the economic entity or the liability for an offence in terms of substantial legislation, but only clarifies whom it penalizes for the economic entity's cartel offence.

2. "Adjustment" of the corporate veil in European jurisdictions

2.1. The principles of limited liability and separate corporate personality

According to Paul Hughes,[429] the concept of separate legal entity has been a vital element in the evolution of company law in common law jurisdictions, with the legal status of limited liability providing safeguard for shareholders. The development of limited liability firms as a channel of investment has been often regarded as promoting contemporary economic expansion.[430] "All companies, whether they are large or small, multinational or local, play a fundamental, multidimensional and evolving role in promoting economic growth …", said Keay.[431]
Some economic arguments for limited liability have been presented by certain scholars. For instance, Easterbrook and Fischel have stressed the effectiveness of limited liability, as it

[427] NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities (322/81) EU:C:1983:313 Slg. 1983, 3466). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61981CJ0322. [Accessed: December 12, 2022]; Michelin EU:T:2003:250, ([290]).

[428] Erste Group Bank AG, formerly Erste Bank der österreichischen Sparkassen AG v Commission of the European Communities (C-125/07 P, C-133/07 P, C-135/07 P, C-137/07 P) EU:C:2009:576, ([82]). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62007CJ0125. [Accessed: December 12, 2022].

[429] Hughes, P. (2014). Competition law enforcement and corporate group liability - adjusting the veil. European Competition Law Review, 35(2), 68-87.

[430] Micklethwait, J., & Wooldridge, A. (2005). The Company: A Short History of a Revolutionary Idea. Phoenix.

[431] Keay, A. R. (2011). The Corporate Objective. Edward Elgar, (p. 3).

minimizes shareholders' necessity to supervise directors' wealth.[432] Thereby, it decreases the expenses related to such supervision for shareholders. Moreover, it actuates directors to run their business effectively, for shareholders will sanction any ineffectiveness by selling their stock. Limited liability expedites such stock transfer, by safeguarding future shareholders and permitting them to appraise the firm's value on grounds of its performance, instead of on grounds of other shareholders' equity (which wouldn't be the case without limited liability). Portfolio diversification becomes facile with limited liability for shareholders, as against restricting investment to a small number of firms that requires meticulous supervision. Limited liability as well permits shareholders to require reduced financial returns, for they do not necessitate personal risk-taking compensation. Ultimately, limited liability permits directors to undertake riskier activities, for instance new product development "without exposing the investors to ruin".[433] This is effective capital deployment and simultaneously beneficial for the community.

It has been stipulated by Blumberg[434] and Muscat[435] that the expansion of limited liability from the "one-man company situation" apparent in Salomon v A. Saloman and Co Ltd[436] to a controlling holding company was simultaneously casual and inadvertent.[437] According to them, it was less effective to assign limited liability to non-human shareholders, for human shareholders within a holding company would be secured by limited liability, when encouraging

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[432] Easterbrook, F. H., & Fischel, D. R. (1996). The Economic Structure of Corporate Law. Harvard University Press, (pp. 41-44).

[433] Easterbrook, F. H., & Fischel, D. R. (1996). The Economic Structure of Corporate Law. Harvard University Press, (p. 44).

[434] Blumberg, P. I. (1993). The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality. Oxford University Press.

[435] Muscat, A. (1996). The Liability of the Holding Company for the Debts of Its Insolvent Subsidiaries. Dartmouth.

[436] Salomon v A. Saloman and Co Ltd [1897] A.C. 22.

[437] Muscat, A. (1996). The Liability of the Holding Company for the Debts of Its Insolvent Subsidiaries. Dartmouth, (pp. 155 and 156); and Blumberg, P. I. (1993). The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality. Oxford University Press, (pp. 58-59).

investment.[438] The "absence of control justifies limited liability", while the existence of control will guarantee that holding companies are not discouraged from investing in their daughter companies, as stated by Muscat.[439] It has been contended by Dignum and Lowry that permitting groups of companies to take advantage of limited liability "represents an enormous extension of the Salomon principle", which should be verified by judges.[440]

Hence, the question arises of whether human shareholders might make up undertakings. From a legal perspective,[441] this is evidently tenable. The CJEU ruled, in Hydrotherm Geratebau GmbH v Andreoli for example,[442] that an economic entity can amount to a number of physical or fictitious persons. In that litigation, a limited partnership controlled by a personally liable engineer, was regarded as a single economic unit with the view of the consequently relevant "block exemption regulation" concerning exclusive dealership.[443]

Nevertheless, nothing suggests that the EU Commission is intending to address human shareholders. This was confirmed by the judgment in the Pre-insulated Pipe Cartel lawsuit,[444] where the Henss family exercised control over several firms producing bonded pipes. Isoplus and the Henss firms were heavily implicated in a substantial cartel. The EU Commission was not capable of finding a parent company for the group, even if it asserted that the Henss/Isoplus firms made up a single undertaking. It was at least an option that the EU Commission might have

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[438] Muscat, A. (1996). The Liability of the Holding Company for the Debts of Its Insolvent Subsidiaries. Dartmouth, (pp. 62-176); and Blumberg, P. I. (1993). The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality. Oxford University Press, (pp. 123-124).

[439] Muscat, A. (1996). The Liability of the Holding Company for the Debts of Its Insolvent Subsidiaries. Dartmouth, (p. 164).

[440] Dignam, A., & Lowry, J. (2012). Company Law (7th ed.). Oxford University Press, (p. 50).

[441] See for example, Case IV/28.996 Reuter/BASF [1976] OJ L254/40, that shows that individuals can as well constitute undertakings when they undertake independent economic activities.

[442] Hydrotherm Geratebau GmbH v Andreoli (170/83) [1984] E.C.R. 2999.

[443] Regulation No 67/67/EEC of the Commission of 22 March 1967 on the application of Article 85 (3) of the Treaty [now art.101(3) TFEU] to certain categories of exclusive dealing agreements, that was solely relevant to exclusive dealership contracts between no more than two undertakings (see art. 1(1)(a)).

[444] Commission Decision of 21 October 1998 relating to a proceeding under Article 85 of the EC Treaty (Case No IV/35.691/E-4: - Pre-Insulated Pipe Cartel) (Notified under number C(1998) 3117). Available at: http://data.europa.eu/eli/dec/1999/60(1)/oj. [Accessed: December 12, 2022]. It upheld on appeal in LR AF 1998 A/S (formerly Logstor Ror A/S) v Commission (T-23/99). 132 IV/35.691/E-4:-Pre-Insulated Pipe Cartel, ([15]).

endeavoured to regard as undertakings the principal stockholders of Henss, assuming the core function assumed by the shareholders in the management of the Henss firms. The EU Commission stated in its judgment that:

"It is apparent from the fact that it was Dr. W. Henss who always attended the directors' club meetings that he was the person who exercised management and control over Isoplus and that the Henss and Isoplus companies together formed a de facto group. It was common knowledge in the industry that Henss was the power behind Isoplus".[445]

However, the EU Commission was reluctant to draw this deduction and did not regard W. Henss as constituting an undertaking liable to mulcts.

Direct engagement by a stockholder in control can cause the stockholder in question becoming regarded as indirectly engaged in commercial activities and hence as such constituting an undertaking, in the light of the Hydrotherm lawsuit.[446] In the Cassa di Risparmio di Firenze lawsuit[447] (a lawsuit covering "State aid"), the CJEU found that: "… it must be pointed out that the mere fact of holding shares, even controlling shareholdings, is insufficient to characterise as economic an activity of the entity holding those shares, when it gives rise only to the exercise of the rights attached to the status of shareholder or member, as well as, if appropriate, the receipt of dividends, which are merely the fruits of the ownership of an asset".[448] It went on to say that: "On the other hand, an entity which, owning controlling shareholdings in a company, actually exercises that control by involving itself directly or indirectly in the management thereof must be regarded as taking part in the economic activity carried on by the controlled undertaking".[449]

Hence, the controlling stockholder must simultaneously be directly or indirectly engaged in the management of the company so as to be regarded as constituting an undertaking. The controlling stockholder can as well constitute a single economic entity with the firm over which he has such control.

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[445] Ibid., ([157]).

[446] Hydrotherm Geratebau GmbH [1984] E.C.R. 2999.

[447] Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze (C-222/04) [2006] E.C.R. I-289.

[448] Ibid., ([111]).

[449] Ibid., ([112]).

When stockholders do not make up undertakings, they may be addressed less directly, by subjecting the firm where they have made investment and its group to mulcts, thereby occasioning a drop in stock prices. This brought Neelie Kroes (Former European Commissioner for Competition) to view this drop in stock prices as an adequate motive to improve stockholders monitoring of corporate management. She once said, when declaring the judgement by the EU Commission, that: "Cartels are a scourge. I will ensure that cartels will continue to be tracked down, prosecuted and punished. With this latest decision, I am sending a very strong message to company boards that cartels will not be tolerated, and to shareholders that they should look carefully at how their companies are being run".[450]
Regarding minority shareholders (whose stock prices will fall due to the imposed mulcts), the principal-agent problem will last. This is why, as per Paul Hughes, priority should be given to guaranteeing good governance and to the achievement of the related goal of regulatory compliance.

2.2. The concept of the single economic entity

2.2.1. The perspective of EU Member States

Two or more enterprises can, as aforementioned, be considered as one enterprise when they "form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market".[451] Every contract that such a corporation and its majority shareholder conclude will not be prone to review as per art.101 TFEU[452] (even though it may still be prone to the prevention provided for in art. 102 TFEU). The GCEU, In Viho Europe BV v Commission,[453] dealt with a holding company and its wholly owned subsidiary as a single unit

[450] European Commission. (2005, December 21). Competition: Commission fines four firms €75.86 million for rubber chemical cartel. [Press release]. Available at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/05/1656&format=PDF&aged=1&langage=EN&guiLanguage=en. [Accessed: December 12, 2022].

[451] Bodson [1988] E.C.R. 2479, ([19]).

[452] Bodson [1988] E.C.R. 2479, ([21]).

[453] Viho Europe BV v Commission of the European Communities (T-102/92) [1995] E.C.R. II-17.

on grounds of antitrust law, as follows: "… for the purposes of the application of the competition rules, the unified conduct on the market of the parent company and its subsidiaries takes precedence over the formal separation between those companies as a result of their separate legal personalities".[454]

Concerning lower interests, affiliates to a corporate group have been considered to make up single economic unit solely when it can be demonstrated that: "… the undertakings pursue the same market strategy, which is determined by the parent company … The mere fact that [companies] belong to the same group of undertakings is not decisive in that regard. Account must be taken of the nature of the relationship between the undertakings belonging to that group".[455]

Considerable minority contributions have been assumed not to make affiliates to a group part of a single economic entity. The Commission, in Gosmel/Martell-DMP,[456] did not find that the 50 per cent interest that Martell had in DMP made Martell and DMP members of a single economic entity. Whereas all of Martell and Piper-Heidsieck held 50 per cent of the capital stock of DMP and could nominate half its supervisory committee, Martell was not capable of controlling DMP's commercial activities.

The Commission, in Irish Sugar v Commission,[457] was reticent to accept that a 51 per cent share portfolio by Irish Sugar in the parent company Sugar Distribution (Holding) Ltd (in which there was as well no direction control on its commercial daughter company Sugar Distributors Ltd) was enough to exert control. This impelled the Commission to argue that the three companies involved in the production and sale of sugar were in a situation of joint vertical dominance (instead of constituting an undertaking with single dominance) so as to prevent the vertical foreclosure acts that they were undertaking according to art. 102 TFEU.

Conversely, the CJEU ruled, in the Commercial Solvents litigation[458] that if a holding company enjoyed a 51 per cent share portfolio in the subsidiary (that was categorized as its subsidiary in

[454] Viho Europe BV [1995] E.C.R. II-17, ([50]).

[455] Bodson [1988] E.C.R. 2479, ([20]).

[456] [1991] OJ L185/23.

[457] Irish Sugar v Commission of the European Communities (T-228/97) [1999] E.C.R. II-2969; upheld on appeal by the CJEU in (C-497/99 P) [2001] E.C.R. I-5333.

[458] Istituto Chemioterapico Italiano SpA v Commission of the European Communities (6/73) [1974] E.C.R. 223.

the audited balance sheet of the holding company) and if 5 out of 10 of the managers of the subsidiary were top executives of the holding company (comprising the president and chief executive of the holding company), that was enough to make them members of the very economic entity and thus one "undertaking". Therefore, the holding company was jointly and severally liable for the withholding of its subsidiary to provide an indispensable ingredient to a client in the context of a vertical foreclosure plan which breached art. 102 TFEU.

Pursuant to Paul Hughes,[459] the mentioned legislation as well necessitates to be interpreted in view of the application of the concept of a single economic entity within the framework of liability for mulcts levied by the Commission.

The CJEU ruled, in the two of Stora[460] and Akzo Nobel[461] litigations, that there is a praesumptio iuris tantum that a holding company and a subsidiary where it has a wholly owned share portfolio are members of a single economic entity. In the last litigation, subsidiaries 100 per cent held by Akzo Nobel had all been engaged in a cartel in the choline chloride market. The group has been deemed jointly and severally liable for the violation, with the mulcts being computed by mention of group gross revenue. The CJEU referred to long sections of the decision of the GCEU[462] (whose decision was validated) arguing, in almost identical terminology: "In the specific case where a parent company has a 100 per cent shareholding in a subsidiary which has infringed the Community competition rules, first the parent company can exercise a decisive influence over the conduct of the subsidiary … and, second, there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary …

In those circumstances, it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent company exercises decisive

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[459] Hughes, P. (2014). Competition law enforcement and corporate group liability - adjusting the veil. European Competition Law Review, 35(2), 68-87.

[460] Stora Kopparbergs Bergslags AB v Commission of the European Communities (C-286/98 P) [2000] E.C.R. I-9925.

[461] Akzo Nobel NV v Commission of the European Communities (C-97/08 P) [2009] E.C.R. I-8237.

[462] In Akzo Nobel NV v Commission of the European Communities (T-112/05) [2007] E.C.R. II-5049.

influence over the commercial policy of the subsidiary. The Commission will be able to regard the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market (see, to that effect, Stora, paragraph 29)".

This mention of presumable control of the commercial strategy of a subsidiary, founded on group form, has been qualified by Joshua et al. as rendering the burden of the Commission of establishing the presence of decisive influence (and thus a single economic entity for antitrust law aims) as a "walkover".[463] Indeed, this presumption will be rebuttable with great difficulty for a share portfolio of this size, assuming the importance given by the CJEU to economic and legal relationships in its decision.

Several critics[464] have censured the evident aspect of strict liability comprised, a series of censure that the CJEU pursued to dismiss when rendering its decision in the Akzo Nobel litigation, on the basis that the ability to impact on the subsidiary generated the required degree of fault when that influence was not exerted in order to guarantee compliance: "… Community competition law is based on the principle of the personal responsibility of the economic entity which has committed the infringement. If the parent company is part of that economic unit … the parent company is regarded as jointly and severally liable with the other legal persons making up that unit for infringements of competition law. Even if the parent does not participate directly in the infringement, it exercises, in such a case, a decisive influence over the subsidiaries which have participated in it. It follows that, in that context, the liability of the parent company cannot be regarded as strict liability".

According to Paul Hughes, the Advocate General was commensurably harsh in her approach, asserting that parental liability did not involve strict liability and did "not in any way constitute an exception to the principle of personal responsibility, but [was] the expression of that

[463] Joshua, J., Botteman, Y., & Atlee, L. (2012). 'You can't beat the percentage' — The Parental Liability Presumption in EU Cartel Enforcement. European Antitrust Review, 3, (p. 5).

[464] See for example, Thomas, S. (2012). Guilty of a Fault that one has not Committed: The Limits of the Group-Based Sanction Policy Carried out by the Commission and the European Courts in EU-Antitrust Law. Journal of European Competition Law and Practice, 3(1), 11-28; and Jones, A. (2012). The Boundaries of an Undertaking in EU Competition Law. European Competition Journal, 8(2), 301-331.

principle…".[465] She added a compelling consideration of the two companies as intrinsically a single one in that regard, imputing fault to the holding company as "mere membership of a group may influence"[466] the activity of a daughter company, stressing the holding company's ability to impact on the daughter company "to such an extent that the two must be regarded as one economic unit"[467] and that the holding company and its 100 per cent held daughter companies were "the legal embodiment of the undertaking which negligently or intentionally infringed the competition rules".[468] The "premise [is] that it is the undertaking that commits the infringement, not its individual component companies …", as asserted by some scholars.[469]

It has been firmly contended by Thomas that the line of reasoning of the Commission (that he considers unlogical) should conduct it to inquire the impact of all these constituencies, such as the personnel and managers, that constitute an "undertaking".[470] Nonetheless, as part of this section it is enough to record that a holding company of a wholly-owned subsidiary will strive to rebut the presumption that both make up a single economic entity. This would necessitate the holding company to act towards its subsidiary with such distance that it would undercut the profits of enjoying a controlling interest.

The notion of a single economic entity has been expanded to cover joint, and also unique, control as part of imputation of liability. The GCEU deduced, in Avebe,[471] that Akzo and Avebe, as firms that all held a 50 per cent share portfolio in a jointly-controlled subsidiary and that controlled collectively the marketing strategy, made up a single economic entity with the

[465] Akzo Nobel NV [2009] E.C.R. I-8237, ([97]).

[466] Akzo Nobel NV [2009] E.C.R. I-8237, ([92]).

[467] Akzo Nobel NV [2009] E.C.R. I-8237, ([93]).

[468] Akzo Nobel NV [2009] E.C.R. I-8237, ([98]).

[469] Joshua, J., Botteman, Y., & Atlee, L. (*2012).* 'You can't beat the percentage' — The Parental Liability Presumption in EU Cartel Enforcement. *European Antitrust Review, 3, (*p. 5); Council Regulation (EC) No 1/2003 of 16 December 2002, (art. 23(2)).

[470] See Thomas, S. (2012). Guilty of a Fault that one has not Committed: The Limits of the Group-Based Sanction Policy Carried out by the Commission and the European Courts in EU-Antitrust Law. Journal of European Competition Law and Practice, 3(1), 11-28, (pp. 14 and 15).

[471] Cooperatieve Verkoop- en Productievereniging van Aardappelmeel en Derivaten Avebe BA v Commission of the European Communities (T-314/01) [2006] E.C.R. II-3085.

subsidiary on which they had control. It argued that: "… joint management power and the fact that Akzo and Avebe each held a 50% stake in Glucona and, therefore, controlled all of its shares jointly … is analogous to that in Case T-354/94 Stora Kopparbergs Bergslags v Commission, in which a single parent company held 100% of its subsidiary, for the purpose of establishing the presumption that that parent company actually exerted a decisive influence over its subsidiary's conduct".

The GCEU, in the Dow litigation,[472] resorted to the Commission Consolidated Jurisdictional Notice[473] linked to the then implementable Merger Regulation[474] so as to deduce that the holding companies of a jointly controlled JV (Dow and Du Pont),[475] that exerted decisive influence on the JV firm's practice on chloroprene rubber industry, were jointly and severally liable for its practice. The capacity to exert (and the factual exertion) of influence consisting of joint control signified that the holding companies and their jointly-controlled subsidiary made up a single economic entity.

The Commission, in the Dow[476] litigation, had resorted to the nomination of senior executives of the holding companies to the Members Committee of the JV as per rights exclusive to the holding companies in an arrangement linked to the JV corporation. A supplemental criterion signaling the exertion of control was that the employees in question had contributed to a JV's resolution to shut down a manufacture site in UK. The Commission had as well resorted to the occurrence that the holding companies had commanded that an examination should occur to explore if the JV had contributed to the cartel for which it was eventually mulcted.

The GCEU has expanded the concept of the single economic entity over the enjoyment of positive control to the capacity to pre-empt damaging anticompetitive practices. It argued that the

[472] Dow Chemical [2012] 4 C.M.L.R. 19.

[473] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52008XC0416%2808%29. [Accessed: December 12, 2022].

[474] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings; Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation). Available at: http://data.europa.eu/eli/reg/2004/139/oj. [Accessed: December 12, 2022].

[475] EC Merger Regulation in Case IV/M.663; see as well, GCEU's decision, ([83]).

[476] Dow Chemical [2012] 4 C.M.L.R. 19.

joint control essential to demonstrate joint and several liability could be deficient, as the relevant holding company could simply prohibit, in lieu of urge, the subsidiary from/to follow some business resolution.[477] The Commission's deduction that the holding company "must have been aware of the existence of the cartel" was an additional aspect (yet not "an essential factor") signaling that it exercised decisive influence on its subsidiary.[478] When the holding company could "by reason of the intensity of its influence … direct the conduct of the subsidiary", this made them members of the very economic entity. The question was if it had the ability to issue "specific instructions or guidelines on individual elements of commercial policy".[479] Wils had second-guessed this legal perspective,[480] he considered the volition permitted to daughter companies as "just another way of exercising" the "power of control" of the holding company, a perspective that admits that the fundamental right, instead of its usual exertion, is enough.

The GCEU accorded a great importance to compliance with European antitrust law, instead of with domestic regulations of corporate governance. It repudiated the defence of the claimant that the holding company could not be deemed jointly and severally liable for the subsidiary's violations, if its conduct had adhered to United States legislation on corporate governance.[481] The GCEU explicitly attached the notion of control to compliance. It considered the imputation of liability to a holding company as only, acknowledging the prospect for shareholder profit from earnings realized illicitly owing to slack supervision of a portfolio company: "Moreover, the Court considers that as a result of the parent company's power of supervision, the parent company has a responsibility to ensure that its subsidiary complies with the competition rules. An undertaking which has the possibility of exercising decisive influence over the business strategy of its subsidiary may therefore be presumed, in the absence of proof to the contrary, to have the possibility of establishing a policy aimed at compliance with competition law and to

[477] Dow Chemical [2012] 4 C.M.L.R. 19, ([92]).

[478] Dow Chemical [2012] 4 C.M.L.R. 19, ([105]).

[479] Dow Chemical [2012] 4 C.M.L.R. 19, ([107]).

[480] Wils, W. P. J. (2000). The undertaking as subject of EC competition law and the imputation of infringements to natural or legal persons. European Law Review, 25(2), 99-116, (p. 103).

[481] Dow Chemical [2012] 4 C.M.L.R. 19, ([102]).

take all necessary and appropriate measures to supervise the subsidiary's commercial management. Mere failure to do so by the shareholder with a power of supervision over such matters cannot in any event be accepted as a ground on which he can decline his liability. Accordingly, since any gains resulting from illegal activities accrue to the shareholders, it is only fair that that those who have the power of supervision should assume liability for the illegal business activities of their subsidiaries".

In the Fuji litigation,[482] Fuji held a 30 per cent share portfolio in a JV firm (JAEPS), with Hitachi Ltd having 50 per cent and Meidensha Corporation having 20 per cent. Fuji as well had powers as per a Master Agreement and was deemed jointly and severally liable with Hitachi for JAEPS' contribution to a cartel. On top of its equity contribution and contractual powers, the executive management of Fuji and JAEPS conjoined and these management employees were "a conduit of information" to Fuji "on matters discussed" at JAEPS' assemblies and which concerned the affairs of JAEPS.[483] It was evidenced that Hitachi had in fact enjoyed management rights on JAEPS and had exercised a decisive influence on its market conduct. On the other hand, the 20 per cent shareholding of Meidensha in JAEPS was too little to precipitate joint and several liability.

In the Siemens Austria lawsuit, Siemens and its daughter companies lodged an appeal which was as well an opportunity for the tribunal to return on the requirements of the performance of the solidary obligation to pay the mulcts.

The tribunal reminded that companies which were autonomously involved in an infringement and which followingly became controlled by another firm, were only liable for the illicit behaviour within the time preceding the acquisition. Then, liability can be conferred from the subsidiary to its holding company, solely when the acquirer pursued in complete awareness of the facts the illicit behaviour of the new subsidiary.

The tribunal went on to say that this principle is implementable likewise in the situation in which, before its acquisition, a corporation "was involved in the offence not independently but as

[482] Fuji Electric Co Ltd v European Commission (T-132/07) [2011] 5 C.M.L.R. 21.

[483] Fuji Electric [2011] 5 C.M.L.R. 21, ([199]).

a subsidiary of another group".[484] Put differently, the acquirer will solely be deemed liable for the behaviour of the subsidiary at the time the acquisition took effect. This separation of liabilities has repercussions for joint and several liabilities concerning settlement of mulcts. Even though personal liability induced by multiple firms for contributing to the same infringement may be distinct, this does not prevent levying of a mulct jointly and severally due, however, as reported by the tribunal, it is yet essential that this solidarity be firmly restricted to the offence duration when the enterprises in question were a single economic entity by virtue of antitrust legislation. Actually, this signifies that every firm severally sentenced should be capable of defining, from the judgement levying the fine, the share it must assume "in relation to its joint and several codebtors" for a certain duration.

Pursuant to some scholars, an especially exclusive duty of argumentation is actually left in the hands of the Commission for joint and several sentences for the settlement of mulcts.[485] The tribunal stressed as well as a prompt that calculation of this portion is its exclusive competence and as a result, it cannot hand it on to domestic tribunals.[486]

The GC, in a finding from the 13 ones treated in 2013 (regarding bathroom equipment producers that harmonized the sale price of bathroom fittings and fixtures), agreed to Roca's request to apply a mulct reduction to the holding company which demanded to profit from any discount granted to the daughter companies, in virtue of the 2002 communication regarding cooperation, considering that the liability of the holding company was "purely derivative, secondary and dependent on that of its subsidiary".[487]

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[484] Siemens AG Osterreich et VA Tech Transmission & Distribution GmbH & Co. KEG, Siemens Transmission & Distribution Ltd et Siemens Transmission & Distribution SA et Nuova Magrini Galileo SpA c./ European Commission (T-122/07 to T-124/07) march 3, 2011 (GCEU), ([140]).

[485] Tercinet, A., Bermond, J-C., Amiel, F., Fourquet, J., Jalabert-Doury, N. (2011). Competition policies. International Business Law Journal, 3, 301-320.

[486] Siemens AG Osterreich et VA Tech Transmission & Distribution GmbH & Co. KEG, Siemens Transmission & Distribution Ltd et Siemens Transmission & Distribution SA et Nuova Magrini Galileo SpA c./ European Commission (T-122/07 to T-124/07) march 3, 2011 (GCEU), ([157]).

[487] Bathroom Fittings and Fixtures, case (T-364/10, T-368/10), Joint cases (T-373/10, T-374/10, T-382/10 and T-402/10), case (T-375/10, T-376/10, T-378/10, T-380/10, T-386/10), Joint cases (T-379/10 and T-381/10, case T-396/10, T-408/10, T-411/10, T-412/10).

2.2.2. The UK perspective

There has been an ancient inclination by UK corporations to benefit from the notion of separate legal personality so as to organize their group business in order to assign liability. The Court of Appeal in Adams v Cape Industries Plc,[488] asserted that UK corporate law is definitely welcoming a corporation to organize its group business in order that business liability is borne by a daughter company instead of a holding company. "… Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to such separate legal entities", deduced Slade L.J.[489]

UK tribunals will lift the corporate veil and thereby make the "veiled" investors hold liability for the conduct of the corporation in very few cases, for example when the daughter company is a channel of fraud or a simple sham.[490] The decision of the Court of Appeal in Adams v Cape Industries Plc[491] harshly delimited the cases where it would be accurate to conduct this practice, that is when the tribunal is elucidating a statute, on the basis that the firm is a screen or cover, or when it can be proven that the subsidiary is the direct or indirect agent of the holding company. Agency will be difficult to prove, as evident from Adams v Cape Industries Plc. The Court of Appeal, in Millam v Print Factory (London) 1991 Ltd,[492] ruled that both the simple absence of autonomy of a subsidiary (qualified as being characteristic of a subsidiary link), and the occurrence that the affairs of both firms were directed in a tightly interconnected manner, were not sufficient to lift the corporate veil.

The plaintiff, in Adams v Cape Industries Plc, did not claim its holding company was directly liable in tort. Nevertheless, the UK Court of Appeal was requested to accept the single economic

[488] Adams v Cape Industries Plc [1990] Ch. 433.

[489] Adams [1990] Ch. 433, ([536]).

[490] Jones v Lipman [1962] 1 W.L.R.832; and Trustor v Smallbone (No.2) [2001] 2 B.C.L.C. 436.

[491] Adams [1990] Ch. 433.

[492] Millam v Print Factory (London) 1991 Ltd [2007] EWCA Civ 322.

entity principle in establishing if Cape Industries Plc was existent in the US (as part of an enforcement action connected with compensation assigned to employees exposed to asbestosis) via corporations domiciled in the US where it owned a stake. "There is no general principle that all companies in a group of companies are to be regarded as one. On the contrary, the fundamental principle is that 'each company in a group of companies … is a separate legal entity possessed of separate legal rights and liabilities': The Albazero [1977] A.C. 774, 807, per Roskill L.J", as argued by Slade L.J.[493]

The plaintiff's counsellor at law had requested the Court of Appeal to follow the perspective adopted by the Advocate General in the litigation of Commercial Solvents[494] when observing if a holding company and its daughter company were separate "undertakings" according to arts 85 and 86 EC Treaty (currently arts 101 and 102 TFEU). The Court of Appeal refused to do so. The litigation of Commercial Solvents was identified by Slade L.J. as having been read on grounds of a specific provision of the Treaty. From his point of view, Lord Denning had resorted to a similar perspective (based on a particular statutory provision) to pierce the corporate veil in DHN Food Distributors Ltd v Tower Hamlets LBC.[495] Hence, the concept of the single economic entity was found not to be relevant, notwithstanding that "a degree of overall supervision and, to some extent control, was exercised by Cape" on the companies domiciled in the US, as was "common in the case of any parent-subsidiary relationship". Nevertheless, as part of civil actions against corporate groups for European antitrust law infringements, the signification of an "undertaking" in virtue of arts 101 and 102 TFEU is certainly a "statutory" and particular one, whose reading is bound by the CJEU's exclusive jurisdiction.[496] This perspective of the Court of Appeal has generated issues for tribunals dealing with civil law actions for antitrust law violations, as stipulated by Paul Hughes.

[493] Adams [1990] Ch. 433; ([532]).

[494] Istituto Chemioterapico Italiano SpA [1974] E.C.R. 223.

[495] DHN Food Distributors Ltd v Tower Hamlets LBC [1976] 1 W.L.R. 852; Land Compensation Act 1961; Lord Denning M.R. ruled ([860]) that "[t]hey should not be treated separately so as to be defeated on a technical point…".

[496] Pursuant to TEU, (art. 19(1)), the CJEU has the charge "in the interpretation and application of the Treaties" to guarantee that "the law is observed".

3. The regime in the United States

Contrarily to the EU courts, US tribunals abide by the principle of separateness, comprising in competition lawsuits, and "lift the corporate veil" solely in circumstances in which the corporate form is a fiction or a mechanism constituting an abuse of the corporate structure.

In its 1998 judgement in Bestfoods, the US Supreme Court admitted unanimously that "[i]t is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation […] is not liable for the acts of its subsidiaries".[497]

Neither the US organizations nor the tribunals have contravened that basic assumption in competition suits.

As such, contrarily to the EU, where penalties may be levied on holding companies only owing to company control, the US federal competition organizations and prosecuting attorneys solely levy penalties on holding companies as far as the holding company was somehow implicated in the competition law transgression.

Furthermore, tribunals are reticent to admit compensation allegations against holding companies in private enforcement cases. They do so solely when the holding company is explicitly implicated in the anti-competitive practice or if the requisites to "lift the corporate veil" are answered as established by state law.

The principle of separateness has been customarily enforced in private enforcement cases in the US. The US District Court for the Eastern District of New York, in Arnold Chevrolet LLC v Tribune Co, for instance, recapitulated that "in the antitrust context, courts have held that absent allegations of anticompetitive conduct by the parent, there is no basis for holding a parent liable for the alleged antitrust violation of its subsidiary".[498]

Moreover, in Sherman v British Leyland Motors, Ltd, a lawsuit regarding the claimed anti-competitive impact of the closing of a franchise contract transgressing the Sherman Act,[499] the Ninth Circuit Court of Appeals ruled that the link between defendant British Leyland and its US

[497] United States v Bestfoods, 524 U.S. 51, 61 (1998).

[498] Arnold Chevrolet LLC v Tribune Co, 418 F. Supp. 2d 172, 178 (E.D.N.Y. 2006).

[499] Sherman Act 15 U.S.C., (ss. 1-7).

daughter company implicated in the claimed infringement did not suffice to bring an action against British Leyland. The Court argued that

"[w]hile [British Leyland] actually was a manufacturer, it did not […] have anything to do with […] any alleged conspiracy in restraint of trade or any monopoly or attempt to monopolize" and "[a]ny relationship of parent and subsidiary between it and others that may have done so is not enough".[500] Correspondingly, in Greene County Memorial Park v Behm Funeral Homes, Inc, a lawsuit covering claims of illicit tying agreements and embargoes, the claimant's claim that equity ownership occasions the presumption that a shareholder was implicated in the anti-competitive practice of the firm where it owns a stake was dismissed by the Pennsylvanian federal district court.[501]

The main extraordinary case where the organizations and tribunals may deviate from the principle of separateness is if the daughter company is actually a "sham" company which is indiscernible from its holding company. This deviation is named doctrine of alter ego, and permits imputation of liability to holding companies through "lifting the corporate veil". While the implementation of the doctrine of alter ego is a concern characteristic of state law, there are two overall conditions for its implementation. Firstly, the daughter company should be indiscernible from its holding company in all material regards as that the firms have a comprehensive accord of interests. Assuming that "lifting the corporate veil" is esteemed as an "extreme remedy" which is "sparingly used",[502] a party resorting to the doctrine of alter ego must effectively demonstrate an abuse of the corporate structure. Determinants that may evidence accord of interest comprise, for instance, the combination of funds and additional assets of the holding company and its subsidiary, or the usage of the identical quarters or personnel.[503] Second, greeting the holding company's and the daughter company's separate legal personality in that case would lead to an unfair or unlawful outcome.[504] This chapter of the examination exacts an evidence of mala fides or other aspects authenticating some kind of fraud.

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[500] Sherman v British Leyland Motors, Ltd, 601 F.2d 429, 441 (9th Cir. 1979).

[501] See Greene County Memorial Park v Behm Funeral Homes Inc, 797 F. Supp. 1276, 1292 (W.D. Pa. 1992).

[502] Sonora Diamond Corp v Superior Court, 99 Cal. Rptr. 2d 824, 836 (Cal. Ct. App. 2000).

[503] See, e.g., ibid., ([836]).

[504] See, e.g., Automotriz Del Golfo De California v Resnick, 47 Cal. 2d 792, 796 (Cal. 1957).

The In re Catfish Antitrust Litigation includes an instructive debate of corporate veil lifting through a US civil antitrust litigation. Food wholesalers stated a claim against catfish producers claiming a price-fixing plot regarding catfish vended to the wholesaler claimants. Hormel (the defendant) shifted to summary disposition for claimants claimed liability against it for the conduct of its daughter company Farm Fresh in the claimed plot.

The tribunal rejected Hormel's request for summary disposition, judging that claimants' proof necessitated observation by a jury to decide if Farm Fresh was "merely a bogus shell for Hormel to seek protection behind while operating in the catfish industry". However, while the tribunal accorded the question to be submitted to the jury, it as well listed 12 elements to be observed, literally if: "1) the parent and the subsidiary have common stock ownership; 2) the parent and the subsidiary have common directors and officers; 3) the parent and the subsidiary have common business departments; 4) the parent and the subsidiary file consolidated financial statements and tax returns; 5) the parent finances the subsidiary; 6) the parent caused the incorporation of the subsidiary; 7) the subsidiary operates with grossly inadequate capital; 8) the parent pays the salaries and other expenses of the subsidiary; 9) the subsidiary receives no business except that given to it by the parent; 10) the parent uses the subsidiary's property as its own; 11) the daily operations of the two corporations are not kept separate; and 12) the subsidiary does not observe the basic corporate formalities, such as keeping separate books and records and holding shareholder and board meetings".[505]

Those elements would sound as though pushing a jury to rule that the holding company is rather improbably liable. The lawsuit was resolved before the hearing.

Civil procedure of the United States allows holding companies as defendants to solicit premature discharges from cases where they have been appointed due to their subsidiary's claimed competition law violation. In its Twombly judgement, the US Supreme Court asserts that claimants evidencing factual particulars concerning claimed competition law violations will be entitled to invoke legal remedy over the "speculative level".[506] Claimants will lack success in greeting that charge lacking the holding company's personal implication in illicit anti-competitive practice or abuse of the corporate structure of the offending subsidiary. In fact,

[505] In re Catfish Antitrust Litigation, 908 F. Supp. 400, 417 (N.D. Miss. 1995).

[506] See Bell Atlantic Corp v Twombly, 550 U.S. 544, 558 (2007).

critics have mentioned that "Twombly, coupled with the corporate separateness rule, should allow corporate defendants to obtain early dismissals from cases in which they have been named defendants simply because of their relationship to or ownership of another company".[507] Holding companies obtained premature discharge in In re Digital Music Antitrust Litigation, a lawsuit regarding a claimed internet music price-fixing plot. The district court upheld that "[t]he unadorned invocation of dominion and control is simply not enough" to attribute liability to a holding company. Assuming that there was no claim that holding companies Sony Corporation of America, Bertelsmann, and Time Warner held liability for the claimed antitrust violation, nor any other claimed grounds to lift the corporate veil, the tribunal conceded the request of the holding companies to dismiss the case.[508]

According to some scholars, the regime of liability of the parent company in European antitrust law should solely be implemented, as in the United States, in circumstances where the holding company had at a minimum a cognition of anti-competitive practice, or in which the relatively firm conditions to lift the corporate veil conform to domestic company law.[509] They went on to say that, at the present time, the European regime of liability of the parent company may be inconsistent with fundamental principles; is conceivably incompatible with its very principle of ensuring effectual deterrence; and should be revised in consideration of the Private Damages Directive.

[507] See Miller, S. R., & Sandrock, R. M. (2009). Parental Liability For a Subsidiary's Antitrust Violations Under U.S. Law. CPI Antitrust Chronicle, 09(1), 2.

[508] In re Digital Music Antitrust Litigation, 812 F. Supp. 2d 390, 417-419 (S.D.N.Y. 2011).

[509] Leddy, M., & Van Melkebeke, A. (2019). Parental liability in EU competition law. European Competition Law Review, 40(9), 407-416.

III. LIABILITY IN CORPORATE GROUPS FROM CONTRACTUAL AND TORTIOUS PERSPECTIVES

1. Contracts and liability in corporate groups in civil law and common law jurisdictions

1.1. The French approach

The French legal perspective on corporate groups has effects on liability. The holding company cannot hold liability for the acts of its daughter companies, and reciprocally. This is owing to the fact that affiliates to a group are each separate corporate persons, and thus, one cannot be held liable for illegitimate acts by the others.

As the group comprises a "clique" of separate business companies. Every entity has its personal customers. It is impracticable to associate the debts of the daughter company to the holding company with the debts of the latter to the daughter company. Similarly, guarantees given to an entity do not include its daughter companies. An engagement by a holding company cannot be imposed on its daughter company.[510] A holding company does not owe a duty to support its daughter company to help it satisfy its duties and carry on its affairs.[511]

Since a holding company is not the manager of the personnel of its daughter company; it cannot hold liability for a duty to retrain the personnel that has been downsized by the daughter company.[512] This would certainly not be the case where the holding company is a co-manager. Eventually, a group's holding company cannot hold legal liability on behalf its daughter companies.[513] Situations where the holding company can hold liability for its daughter companies are relatively scarce.

Nevertheless, under the "theory of appearance" ("théorie de l'apparence" in french), the holding company can hold liability for the payment of its daughter company's debts where the lender,

[510] Montpellier Appeal Court of December 14, 2010: BRDA 2/2011, n° 7.

[511] Cour de Cassation of September 28, 2011, RJDA 1/ 2012, n° 57.

[512] Cour de Cassation, chambre sociale on January 13, 2010, n° 08-15776; JCP E 2010, 46, note by P. Mélin.

[513] Versailles Appeal Court on September 11, 2008; RJDA 3/2009, n° 226.

that actually closed an agreement with a certain daughter company, thought it was as well closing this agreement with the holding company of this daughter company (or reciprocally).[514] Such legal theory is implemented by French and Belgian tribunals. It is applied to impose legal effects on an event based on its appearance, although what appeared was not what occurred in fact. It is mainly used in terms of contracts, and intends to protect dealings and safeguard bona fide third-parties that faced misrepresentation.

A holding company which pretends it is a member of the agreement, for instance through active participation to the closing, the performance and perhaps even the ending of the agreement, holds liability to the other contracting party although the agreement was in fact firmed by the daughter company.[515]

The resort to the theory of appearance is solely efficient where the third-party can evidence that it legally thought that the holding company was as well a co-contracting party. The Court of Cassation is very stringent as to this requirement.[516]

1.2. The approach in the UK

"All contractual liability [is] voluntarily undertaken".[517]

According to Ali Imanalin,[518] the central issue is if the existing UK system of liability is fair enough in permitting the holding company of a group of companies to avoid liability for its insolvent daughter company's debts. For one thing, a holding company manages its daughter company, or is empowered to do it. Hence, one could state that the relation among the firms in a group of companies is a one of integration where they make up, jointly, a single economic

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[514] Rabagny-Lagoa, A. (2001). Théorie générale de l'apparence en droit privé (Publication No. 36644) [Doctoral thesis, Panthéon-Assas University Paris II]. Atelier National de Reproduction des Thèses.

[515] Cass. Com, February 5, 1991; Bull Joly Sociétés 1991, (p. 391).

[516] Cass. Com., June 12, 2012, n°11-16.109; RJDA 11/2012, n°968.

[517] Lord Hoffmann in Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas) [2008] UKHL 48, Times, July 10, 2008.

[518] Imanalin, A. (2011). Rethinking limited liability. Cambridge Student Law Review, 7(1), 89-99.

unit.[519] Moreover, not every argument based on allocative efficiency could be relevant to groups of companies.[520] In principle, firms may have conflicting interests, but in fact, a shared interest in the group may well be detected. Creditors of a daughter company cannot challenge infringements of obligations if approved by its holding company or other firms which made equity investment in the daughter company, whose managers proceeded in the interests of the group in its entirety and at the expense of the creditors at stake.[521] The veil which parts the firms consists of a twofold protection of limited liability.[522] Every tier company constitutes an extra coat of limitation of liability. As this effect was not predicted when this legal structure was initially formulated, it has been long asserted that the legal status of limited liability should not be provided for groups of companies. Lifting the veil among a holding company and its daughter company will not entirely eject limited liability, because the holding company's stockholders will yet be safeguarded against actions brought by corporate creditors.[523]

For another thing, it has been mentioned by several legal scholars that preserving limited liability in groups of companies increases risk-taking by management, which is crucial to forward economic expansion.[524] A firm's efficiency as well relies on enticing shareholders. Where the veil parting firms in a group of companies is lifted, corporate creditors have to analyse the balance sheets of every single firm within the group. Corporate creditors, in the case of limited liability, acknowledge that every company is liable for its individual responsibilities and assets and cut their deals that being the case. Some as well argue that stockholders have a legitimate

[519] Lord Denning MR in DHN Food Distributors Ltd v. Tower Hamlets London Borough Council [1976] 1 W.L.R. 852.

[520] Ibid.

[521] Ibid.

[522] Muchlinski, P. T. (2007). Multinational Enterprises and the Law (2nd ed.). Oxford University Press, (pp. 309-313).

[523] Re Polly Peck International plc [1996] 2 All ER 433, (p. 34).

[524] Ibid.

interest in venturing a little percentage of shares in a specific corporate sector.[525] The corporation "may have even incorporated for the purpose of escaping liability".[526]

Pursuant to Ali Imanalin, courts are usually extremely reticent about lifting the corporate veil in groups of companies comprising a holding company and its daughter company that make up a single unit. However, there are further means to assign liability to a holding company for its insolvent daughter company's debts. At the outset, he contends that a daughter company was a simple servant of the holding company. Moreover, an obligee could be given a guarantee from a holding company engaging to settle any debts unsettled by a daughter company.[527] Furthermore, the new English statutes in the eighties have entitled corporate creditors to prosecute managers infringing sections 213 and 214 of the Insolvency Act 1986.[528] The judiciary could hold that a holding company as such has infringed the said sections when the judiciary is convinced that there was shadow or de facto directorship. On top of that, the Insolvency Act 1986 in its sections 238 and 239 prohibits any undervalue transfer of business assets.

The existing English system seems flawed as per Ali Imanalin, which was recognized by both the UK courts[529] and the Report of the Review Committee on Insolvency Law and Practice (the "Cork Report").[530] The report, having investigated the legislation, was a set of recommendations for the reform of English insolvency law. The committee emphasized the complexity, in the said law, of the enforcement of the doctrine of enterprise liability and abstained from giving any specific recommendations in that matter. Conversely, the Company Law Review Steering Group (CLRSG) deduced that the reformed legislation would be less adaptable and not easy to apply and hence, proposed the preservation of the existing system.[531]

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[525] Hansmann, H., & Kraakman, R. (2000). The Essential Role of Organizational Law. Yale Law Journal, 110, 387, (p. 423).

[526] Sayers v. Navillus Oil. Co., 41 S.W. 2d 506 (Tex. Civ. App. 1931).

[527] Kleinwort Benson Ltd. v. Malaysia Mining Corp. [1989] 1 W.L.R. 379.

[528] Re Continental Assurance Company of London Plc. (Signer v. Beckett) [2007] B.C.L.C. 287.

[529] Re Southard & Co. Ltd. [1979] 1 W.L.R. 1198.

[530] Report of the Review Committee on Insolvency Law and Practice (1982) Cmnd 8558, Ch. 51.

[531] Company Law Review Steering Group. (2000). Modern Company Law For a Competitive Economy: Completing the Structure. Department of Trade and Industry. It shall be recorded that the final report of the Group of June 2001 did not address groups of companies.

1.3. Liability for the procurement of a contractual breach in common law

As per Professor Pearlie Koh,[532] when a contractual breach is decided by a firm, it is automatically done for its account by at least one physical person. Even if it may be thought that the pertinent deciders have induced the infringement of the firm, it is argued (although with criticism)[533] that such persons do not have to hold liability for the wrong of procuring contractual breach, given they proceeded in bona fide and as part of their powers.[534] Since contractual breach resolutions are essentially related to business, the wrong is generally considered to be a resolution by the management of the firm. The question brought by Bumi Armada Offshore Holdings Ltd v Tozzi Srl[535] to the Court of Appeal of Singapore regarded, conversely, a claim that the holding company (majority shareholder) of a group of companies, had procured the contractual breach of its daughter company. The tribunal admitted, in a decision issued by Lord Neuberger, that there is an essential distinction among shareholders and managers, despite their shared status of vital members of the firm, and instituted a customized review for the liability of the holding company. Even if the tribunal was cognizant of the prospects for the Lumley v Gye[536] breach of contract to allow remedy for lenders of a subsidiary in a state of insolvency against its solid parent company, it stayed keenly regardful of the fact that, except if properly contained in the scope of groups of companies, a fruitful cause of action would successfully lift the corporate veil. At the moment, this was an outcome the tribunal was not inclined to permit. The conflict emerged from an agenda for an Indonesian offshore field development. A public company from Malaysia (the holding company) and its 100 per cent held daughter company (the

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[532] Koh, P. (2020). Holding company's liability for inducing its subsidiary's contractual breach. Law Quarterly Review, 136(Jan), 30-35.

[533] See Welsh Development Agency v Export Finance Co Ltd [1992] B.C.L.C. 148; [1992] B.C.C. 270.

[534] Said v Butt [1920] 3 K.B. 497.

[535] Bumi Armada Offshore Holdings Ltd v Tozzi Srl (formerly known as Tozzi Industries SpA) [2018] SGCA(I) 5; [2019] 1 S.L.R. 10, an appeal by the SICC. Available at: https://www.sicc.gov.sg/docs/default-source/modules-document/judgments/bumi-armada-offshore-holdings-ltd-and-anor-v-tozzi-srl-(formerly-known-as-tozzi-industries-spa).pdf. [Accessed: December 12, 2022].

[536] Lumley v Gye (1853) 2 El. & Bl. 216; 118 E.R. 749.

respondents), suggested to make a pitch for the agenda on the behalf of the daughter company. Tozzi (the claimant) was asked to back this offer by providing the needed gas processing means. The claimant claimed that the respondents gave to it a right of first refusal (ROFR) regarding the supply agreement, and, as an infringement of that right, had eventually assigned the supply agreement to a different party. The claimant, in the Singapore International Commercial Court (SICC)**,**[537] was successful in its action against the daughter company for contractual breach and as well against the holding company in the wrong of procuring contractual breach. However, the judgement regarding the procurement of the breach of contract was vacated by the appeal of the holding company.

The commercial court had discerned a pair of essential basic points for the attribution of liability for wrong: the respondent must have ample cognition of the presence of the agreement of the claimant, and then have worked deliberately on inducing or convincing the other signatory to infringe it. The court of appeal recognized that the commercial court had "rightly identified [the] two basic ingredients"[538] that demonstrate the "intentional causative participation"[539] of the respondent in the contractual breach (essential as to liability for wrong). Nonetheless, as the claimant was looking for the liability of a parent company for procuring the contractual breach of its daughter company, the tribunal saw the need in concentrating less on the cognition and intent of the involved persons, and further on if the parent company had effectively procured the infringement, and afterwards if it was the case, if the facts were so that the parent company could "properly be held liable".[540]

The question of the inducement of the breach of contract constrained the tribunal to be persuaded that by causing such a wrong, the persons involved, were in effect making it on behalf of the parent company. Taking into account this circumstance was required by the occurrence that the respondents had acted via the similar persons, and that the decisions that caused the breach of the contract of the daughter company were in fact made by the holding company's management. This occurrence drove the commercial court to rule that the holding company had contributed to

[537] [2017] SGHC(I) 8; [2017] 5 S.L.R. 156.

[538] Ibid., ([41]).

[539] OBG Ltd v Allan [2007] UKHL 21; [2008] 1 A.C. 1, ([191]).

[540] Ibid., ([41]).

the contractual breach of the daughter company enough to be held liable. This ruling was vacated by the court of appeal. Since the company that gave the ROFR to the claimant was the daughter company not the holding company, then, in depriving the claimant from its ROFR, the persons involved were clearly operating on behalf of the daughter company.[541] The judge would necessitate "cogent additional evidence to show that the individuals … were also acting for [the Parent]".[542] Thus, the holding company could not have effectively procured the infringement, and given this, the contractual breach claim of the claimant against the holding company must not succeed.

The various findings reached by the tribunals underline the importance of the atmosphere of groups of companies where the question surfaced, and highlight the necessity to give enough importance to the organizational behavior within the group at stake. There are a pair of key group features: the commonness of mutual board members, managers and personnel, and the trend of company resolutions to be bound by an intra-group strategy executed via a system of power prescribed by the parent company. On this point, two remarks can be made.

At the outset, these features' prevalence justifies why the judge saw the need in concentrating on whose behalf the mutual personnel were operating, instead of focusing on demonstrating the responsibility of the parent company, notwithstanding the fact that the Lumley v Gye wrong was evidently maliciously intended. Yet, the point is that resolutions in groups of companies are usually taken by the very persons that dictate a certain main group strategy. In view of this, Lord Neuberger might not have seen the need in over-elaborating the story, indirectly welcoming the pragmatic fact of a "common corporate mind" among the daughter company and its parent company.[543] Definitely, there isn't any general rule that a firm is to be attributed the cognizance of each of its managers, no matter how taken, a lot would rely on the specific legal question's background.[544] As regards a mutual manager of various firms, notice received in one character (that of the manager of one firm) will be attributed to the other firm solely if he is obligated not

[541] Ibid., ([51]).

[542] Ibid., ([52]).

[543] See as well LMI Australasia Pty Ltd v Baulderstone Hornibrook Pty Ltd [2001] NSWSC 886; (2002) 18 B.C.L. 57, ([79]).

[544] Watts, P. G., & Reynolds, F. M. B. (Eds.). (2017). Bowstead & Reynolds on Agency (21st ed.). Sweet & Maxwell, (para. 8-209).

solely to give that notice, but as well to take it in its other character (that of the manager of the other firm).[545] Against the background of the current, provided the eventual interest of the holding company in the agenda and the functions of all of the personnel of the holding company in expediting that project, it should be fairly clear that all of the managers participating in the agenda, even when operating for the account of the daughter company, would be obligated to give such notice as was material to that agenda to the holding company. All the other deductions would "disregard the realities of the wholly-owned group structure",[546] as noted by Barrett in an identical scene.

Moreover, for one thing, the existence of such features could have forwarded a ruling that the parent company had explicitly procured the contractual breach of its daughter company, and for another thing, as well curiously explained the final judgement of the tribunal that the wrong was not established. Even if it seems conventional that every firm in a group of companies has a separate legal personality and interests which may be different from its parent's and sister companies' ones, the truth is that the control exercised by the parent company on the group in its entirety will effect that the daughter companies will operate exactly as prescribed by it. In Atlas Maritime Co SA v Avalon Maritime Ltd,[547] Staughton noticed that "[t]he creation … of a subsidiary company with minimal liability, which will operate … on the parent's directions … is extremely common". If this core strategy is put into effect via mutual managers, the resolutions of a mutual manager could, by the principles of imputation, likely have a double impact: as a resolution not to execute the agreement by the daughter company; and as an inducement of this contractual breach by the parent company. Against such a backdrop, resolutions by the managers, although specifically for the account of the daughter company for the dealing at stake regards exclusively that daughter company, may as well be considered as being made for the account of the holding company in effecting that core strategy. Thus, in the litigation at stake, the resolutions of the personnel of the holding company might very well have constituted,

[545] Re Hampshire Land [1896] 2 Ch. 743; (1896) 75 L.T. 181; Re Fenwick, Stobart & Co, Ltd; Deep Sea Fishery Co's (Ltd) Claim [1902] 1 Ch. 507; [1902] 86 L.T. 193; Belmont Finance Corp v Williams Furniture Ltd (Nº2) [1980] 1 All E.R. 393.

[546] LMI Australasia Pty Ltd v Baulderstone [2001] NSWSC 886, ([93]).

[547] Atlas Maritime Company SA v Avalon Maritime Ltd (The Coral Rose) (No.1) [1991] 4 All E.R. 769, (779); [1991] 1 Lloyd's Rep. 563, (571).

simultaneously, resolutions of both the holding company and its daughter company. From this perspective, the condition of Lord Neuberger for effective procurement would, by opposition to his deduction, have been met.

Nevertheless, his Lordship specified[548] that, although there was "cogent evidence" to uphold the ruling of the commercial court of effective procurement, the holding company didn't yet hold liability for the wrong. His Lordship justifed this by two motives. At the outset: "it is a little difficult to see how the same individual doing the same thing on behalf of the contract-breaking company and a third party can lead to the third party doing anything to induce the contract-breaking company to breach its contract".[549]

Lord Neuberger is not the only one sharing this opinion. For his part, Barrett had as well asserted in LMI Australasia Pty Ltd, that: "there is a distinct air of unreality about the proposition that one wholly-owned subsidiary within and subject to the framework of authority acts intentionally to cause another wholly-owned subsidiary within and subject to the same framework of authority to behave in a certain way when both are actuated by and subject to the common authority".[550]

On this matter, this legal unanimity is reasoned. The nature of the Lumley v Gye wrong is an intended procurement by a *third party* to the agreement.[551] As developed by Jordan in the New South Wales judgement of O'Brien v Dawson,[552] this implies that the wrong had to be done by third parties: "in the position of *outsiders* who are influencing the independent volition of a contracting party who is capable of exercising volition for himself".[553]

If the parent company exercises decisive control on its crew of 100 per cent held daughter companies (just like in LMI Australasia and in the litigation at stake), resolutions taken by the parent company, and spreading to the daughter companies, are not resolutions which are made by the parent company as a third party impacting on the daughter companies' discretion. These

[548] Ibid, ([52]).

[549] Ibid., ([56]).

[550] [2001] NSWSC 886, ([96]).

[551] OBG Ltd v Allan [2008] 1 A.C. 1, ([168]).

[552] O'Brien v Dawson (1941) 41 S.R. (N.S.W.) 295, affirmed (1942) 66 C.L.R. 18.

[553] Ibid., (307-308).

daughter companies, would not, or effectively could not, have taken any resolution whatsoever without those resolutions of the competent member. It is not easy to identify how the parent company could be held to have exercised "actionable intervention",[554] in a case like this.

In Stocznia Gdanska SA v Latvian Shipping Co,[555] an identical reasoning conducted to the decision by Thomas. The respondent parent-daughter firms in Stocznia did not have mutual managers, by contrast to the litigation at stake. Despite this, the control exercised by the holding company on the daughter company was equally decisive, in all respects. Certainly, the objective of the incorporation of the 100 per cent held daughter company was for the latter to close an agreement with the claimant. The holding company's lawyer had stipulated that, although the tribunal had ruled on the grounds that this firm had induced the contractual breach of its daughter company's managers, that action of inducement, notwithstanding whether or not the managers had merely conformed to it, was carried on by the holding company as the daughter company's shareholder.[556] This was an action of the daughter company as such, and could not consist of litigable procurement. This was seen as a "powerful" reasoning by Thomas.[557] According to him, the holding company could have rightly resolved, under its office of member of the daughter company, that the latter would not execute the agreement in question. In this instance, the parent company could not hold liability for procurement of contractual breach for its resolution was not an autonomous action and hence, did not arise from a certain "outsider". This logic is similar to the one that supported the nonliability of managers and servants in Said v Butt,[558] as reported by Thomas.

In the litigation at stake, the judge had expressly asserted[559] that it would be "dangerous" to have recourse to Said v Butt and also judgements such as the one of the Court of Appeal of Singapore in PT Sandipala Arthaputra v ST Microelectronics Asia Pacific Pte Ltd[560] to exempt the holding

[554] Ibid., ([98]).

[555] Stocznia Gdanska SA v Latvian Shipping Co [2001] EWHC 500 (Comm); [2001] 1 Lloyd's Rep. 537.

[556] Ibid., ([239]).

[557] Ibid., ([244]).

[558] Said v Butt [1920] 3 K.B. 497.

[559] Ibid., ([42]).

[560] PT Sandipala Arthaputra v ST Microelectronics Asia Pacific Pte Ltd [2018] SGCA 17; [2018] 1 S.L.R. 818.

company from liability, since these litigations did not regard shareholders but managers instead. Pursuant to Pearlie Koh,[561] this was certainly a sound foundation for differentiation assuming the definite separation of capacities among the members. However, it is advanced that the reticence of Lord Neuberger to assign liability to the holding company is actually supported, and in effect explained, by a comparable logic: the holding company could not be held liable for procurement of the contractual breach of its daughter company although its personnel had been identified to have operated for its account, since this resolution was one of the daughter company as such. His Lordship presented an additional motive for not assigning liability for the wrong to the holding company. He asserted that:[562] "the owner of, or indeed any shareholder in, a company cannot be held to be liable for inducing breach of contract by that company if the actions said to give rise to its liability merely involved the owner or shareholder pursuing in good faith its own interest in its capacity as the owner of, or shareholder in, that company".

Since there wasn't proof indicating that the challenged acts had been made for another objective than that of the pursuance in good faith of the interests of the holding company as the daughter company's only shareholder, the deduction of the court of commerce could not remain valid. This basis (that might even be the actual ground of the judgement) sounds more connected with a certain type of the justification defense. This type of defense had been raised in OBG Ltd v Allan by Lord Nicholls;[563] a respondent would be excused for the inducement of a contractual breach when operating for the protection of "an equal or superior right of his own". Even if litigations where the defense worked had leaned towards encompassing "a higher moral purpose, justifying as a matter of public policy what would otherwise be a tortious interference with contract relations",[564] the defense of justification isn't that limited. For instance, in Edwin Hill & Partners v First National Finance Corp,[565] a mortgage bank that secured a first legal

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[561] Koh, P. (2020). Holding company's liability for inducing its subsidiary's contractual breach. Law Quarterly Review, 136(Jan), 30-35.

[562] PT Sandipala Arthaputra v ST Microelectronics Asia Pacific Pte Ltd [2018] SGCA 17; [2018] 1 S.L.R. 818, ([45]).

[563] OBG Ltd v Allan [2008] 1 A.C. 1, ([193]).

[564] Lictor Anstalt v MIR Steel UK Ltd [2011] EWHC 3310 (Ch); [2012] 1 All E.R. (Comm.) 592 at [55]; Edwin Hill & Partners v First National Finance Corp Plc [1989] 1 W.L.R. 225; [1988] 3 All E.R. 801.

[565] Edwin Hill & Partners v First National Finance Corp Plc [1989] 1 W.L.R. 225; [1988] 3 All E.R. 801.

mortgage on the property of the borrower, had laid a requisite to provide further funds to the borrower. The conformity of the borrower to that requisite led to an infringement of the agreement of the borrower with the claimants. The action of the claimants against the bank for inducement of the contractual breach was rejected being that the bank was excused in laying the requisite to protect and vindicate its comparable or greater right in virtue of the first legal mortgage. Nonetheless, Stuart-Smith specified that such a right, needed to be a legal one, whether stemmed from agreement or from property. The pursuance of simple economic or other benefits would not be enough to justify inducement of a contractual breach. However, the specific limits of the defense as per the English common law system (on which is based the legal system of Singapore) are left mainly indeterminate.[566]

The decision of the judge on the litigation at stake stipulates that the pursuance by a shareholder of its benefit as the firm's only or majority shareholder is sufficient to justify an action of procurement, a suggestion that is considerably more beneficent than the regular justification defense. Even if a shareholder does have property rights in respect of its shares in the firm, execution of the agreement of the firm could very well not obstruct or challenge such rights.[567] At the same time, if the suggestion of the judge is used to expand the concept of excuse to protect those shares price, it could signify that the interference of a shareholder with the agreements of the firm is *generally* excused, assuming solely that it had done it bona fide. According to Pearlie Koh, it appears evident that this was not the objective of the judge, for the latter had explicitly welcomed the probability that tortious liability could be ascribed to shareholders.[568]

The Court of Appeal of Singapore, in its ultimate inquiry, attached more importance to the preservation of the Salomon Principle. Ascribing tortious liability, as aforementioned, would divest the shareholder of the limited liability advantage. As stated by his Lordship:[569] "If the sole, or majority, shareholder in a company formed the view that the company would be better

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[566] See Zhu v Treasurer of New South Wales (2004) 218 C.L.R. 530; (2004) 211 A.L.R. 159.

[567] Edmundson, P. (2006). Sidestepping Limited Liability in Corporate Groups Using the Tort of Interference with Contract. Melbourne University Law Review, 30(1), 62-87, (p. 83).

[568] Bumi Armada Offshore Holdings Ltd v Tozzi Srl (formerly known as Tozzi Industries SpA) [2018] SGCA(I) 5; [2019] 1 S.L.R. 10, ([44]).

[569] Ibid., ([45]).

off (or its shares would therefore be worth more) if the company breached a contract, and summoned a shareholder's meeting, or persuaded the directors, to give effect to that view, it would seem wrong that the injured party should be able to proceed against the shareholder for inducing or procuring the company's breach of contract".

1.4. Related-party transactions

In France for instance, corporate law provides that any contract among a manager, a chief executive, a ten percent shareholder, and its daughter company, its managing shareholder or another firm of which a manager or chief executive is the owner, is to be bound by "the prior authorization of the board of directors".[570] An agreement without such authorization is considered as invalid. Indeed, the contract should be subject to the "autorisation préalable"[571] of the directorate, excluding the vote of the interested party. When the board of directors validates a contract, it should justify how the latter serves the company's interests. A statutory auditor should compile a special report for the annual meeting. The contract is then presented to the annual meeting, the interested party not having the right to vote. The board of directors should review every year, in the light of an up-to-date auditor's report, contracts validated in anterior years. Contracts that have not been validated by the annual meeting will stay effective, but the detrimental effects may be assigned to the interested party or to other members of the board, resulting in directorial liability, except if the annual meeting resolves that the manager is not liable. The provision is not relevant to usual transactions and at regular transaction costs, or among a firm and its wholly owned subsidiary, but apart from that all contracts are bound by the provision.

On the other hand, the UK has as well a significant regulatory framework for conflict of interest resulting from transactions or arrangements, established by the tribunals and then laid down in the Companies Act 2006 in its ss. 175, 177 and chapter 4 of Part 10. Nevertheless, the main

[570]French Code de commerce, (art. L225-38 to L225-42; art. L225-102-1).

[571] In English, "prior authorization".

target of these provisions has been transactions among the manager and the firm. Conversely, as regards a groupinternal transaction, the other party to the dealing will ordinarily not be a manager of the daughter company but a stockholder in the daughter company (the holding company or another group firm as regards an indirect daughter company). Following a preliminary discussion, it was expressed in 2015[572] that such rules are as well relevant to shadow directors, in other words to the person that manages and directs the managers of the daughter company in the ordinary course of business. Nevertheless, the significance of this revision against the background of intragroup dealings was considerably decreased by a lack of revision of the description of shadow directorship in s. 251 of the Companies Act. The section asserts that a "body corporate is not to be regarded as a shadow director of any of its subsidiary companies […] by reason only that the directors of the subsidiary are accustomed to act in accordance with its directions and instructions". According to some academics, the general idea appears to be that the legislative body seemingly did not support the applicability of directorial liability to shadow directorship to prevent the enforcement of groupwide policy.[573]

Concerning Spain, it has during the last years, revised its corporate law as regards the rules on conflict of interests between company members, expressing that company members with conflicting interests should not be entitled to vote on specific matters referred to in the legislation.[574] Regarding conflicting interests which are not prescribed by the legislation, the conflicting company members may be entitled to vote, but regarding trials, the firm or the conflicting company member will have to demonstrate that the policy was in the interest of the firm. For some questions, such as resolutions regarding the dismissal or the liability of a member of the board and other equally important matters, the conflicting company member will not be

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[572] Companies Act 2006, (s. 170(5)).

[573] Böckli, P., Davies, P. L., Ferran, E., Ferrarini, G., Garrido Garcia, J. M., Hopt, K. J., Opalski, A., Pietrancosta, A., Skog, R., Soltysinski, S., Winter, J. W., Winner, M., & Wymeersch, E. (2016). A proposal for reforming group law in the European Union - Comparative Observations on the way forward. Available at: http://dx.doi.org/10.2139/ssrn.2849865. [Accessed: December 12, 2022].

[574] España. Ley 31/2014, de 3 de diciembre, por la que se modifica la Ley de Sociedades de Capital para la mejora del gobierno corporativo. (BOE, núm. 293, 4-12-2014, pág. 99793 a 99826), (art. 190). <https://www.boe.es/eli/es/l/2014/12/03/31>.[Accessed: December 12, 2022].

entitled to vote, as the burden of proof applies to the members which object to the policy. For a long time, the concurrent listing of the holding company and its daughter companies has been problematic in Spain, the Good Governance Code of Listed Companies of 2015 (revised in 2020) advises that, in such situations, the holding company and its daughter company should report publicly their separate business spheres and their possible mutual commercial transactions (and the ones of the daughter company and other group companies), anticipating procedures to settle conflicting interests among them.[575] This recommendation has to be applied via the formulation of protocols by listed holding companies and their daughter companies.

1.5. Letters of Intent

Anne Schollen studied a certain case where a letter of intent (LOI) could be resorted to within corporate groups.[576] Such case arises as part of close ties in a corporate group, in which the bank wishes to guarantee that there are operative contributions from the holding company to the daughter company and that those contributions are maintained over the lending relationship.[577] Those contributions can be shaped in many ways, maybe of more or less importance than they seem and count in three parties: the bank, the holding company and the daughter company. The LOI, an actual will assumed by the holding company, is unavoidable in such cases.

The LOI, in effect, can come into play in contracts, in the shape of a single act, reaffirming the unilateral duty of assurance, engaging three parties. The most commonly met situation is that of the holding company that presents, on paper, the assurance of capacity and willingness of its daughter company (the letter's beneficiary) with regard to the latter's contractual obligations

[575] Good Governance Code of Listed Companies (2015, Revised June 2020), (Recommendation 2). Available at: https://www.cnmv.es/DocPortal/Publicaciones/CodigoGov/CBG_2020_ENen.PDF. [Accessed: December 12, 2022].

[576] Schollen, A. (1994). Do letters of intent systematically have good intentions? International Business Law Journal, 7, 793-804.

[577] Comm. Dinant, May, 26 1987, Rev. banque 3/1988, (p. 29).

towards the bank (the third-party). Hence, the LOI is issued to guarantee that the subsidiary's duties will eventually be performed.

From a wording angle, the term comfort letter appears to be further adequate in this case for the letter manifests as an assurance towards the bank, and is particularly comparable to a surety bond.

Nevertheless, a comfort letter and a surety can be differentiated through the scope and individuality of the assurance offered, as asserted by Baillod. The guarantor has the single duty to replace the main borrower in case of lack of payment of the debt by the latter.

The substance of the comfort letter can differ based on the scope of the duties assumed. There lies the real individuality of the comfort letter. The duty of the holding company to pay the debts of a comforted third-party can be met otherwise than the classic means of direct payment by the holding company to the lender. For the holding company to do that, it must assure that the borrower can assume those duties by various means: the holding company may, for instance, grant loans, or may make seasoned equity offering and so on.[578]

Those means' individuality is justified by the special relationships among the borrower and the guarantor of the main assured duty.

Where the letter of comfort engages three parties, the impact of those relations slowly differ based on the legal duties which it engenders. Commercial reality has demonstrated that there are mainly four kinds of letters of comfort: the ones which do not include binding provisions; the ones in which the issuer is solely liable to an obligation of means; the ones in which the issuer liable to an obligation of result, and ultimately, the ones which include a legal duty of payment instead of the borrower.

As a first scenario, the LOI does not include binding provisions. Out of the purely legal sphere, there are texts that substantially release their signatories from any kind of liability. The text's denomination should not have any effect on the actual kind of the ultimate duties provided for in the text in question.[579]

Thereby, the receipt of a letter or a LOI does not generate a legal duty.

[578] Ibid., (pp. 554-555).

[579] Ibid., (p. 550).

Nevertheless, it must be noted that it is not always easy to distinguish legislation from acts. Thus, as part of giving loans to a group's daughter companies, a letter issued from the management of this group, which clarifies by any means, soi-disant support from the holding company to the different daughter companies, can carry duties. The appraisal of the level of commitment relies on the variations of the employed wording.

It can be presumed that tribunals may only negligibly appraise the level of liability that the parent company intends to carry. A simple declaration couched in plural wording would never bargain the legal and economic autonomy of a corporate group's daughter company. The interpretation of the judicature must be founded principally on such autonomy. Such letters should be regarded as strictly instructive for third-parties, except if a fairly straightforward provision can delimit the level of liability.

At the same time, a letter issued by a holding company, or by any other firm, usually brings word. The complexity in the burden of the judicature lies exactly in its ability to amalgamate the interpretation of a detached letter with the one of a letter in the context of the negotiations which have already taken place among the parties.

Whilst elaborating its analysis, the judicature will certainly wonder what is a moral commitment worth. This issue is couched distinctly under French or UK legislation.[580]

In UK legislation, a LOI represents a moral commitment whenever it is indicated that the issuer intends to dispense with legal bonds.

Conversely, tribunals in France adopt a more conventional perspective. They see that the parties'couched willingness to act out of regular judicial proceedings, does not impede the judicature from interpreting a moral commitment as a legal one.[581]

Thus, the interpretation presented by the parties is overridden by the analysis given by the french judicature. By contrast, english law grants higher consideration for freedom of contract.

Anyway, a letter that could not generate legal effects, could, yet, entail financial penalties on its issuer.

[580] Ibid., (p. 552).

[581] Cass. Fr., January, 15, March, 19 and July 6, 1991, Rec Dalloz-Sirey, Jur., 1992, col. 53.

As a first level of liability, the issuer of the letter is solely liable to an obligation of means. The primary step of analysis will situate the duty on its legal context, a second step will conduct the judicature to deliver a judgment founded on the duty included in the letter, and thus, its effects. Hence, an interpretation of the used wording, the situation in which the letter was settled on, and the parties' will permits determination of the legal duty.

The first level of liability in a LOI is an obligation of means.

An economic commitment of a holding company, through the daughter company, could as well be established, to the extent that the holding company formerly consented to exert itself to assure the backing of its daughter company, without clarifying the means and scope of its engagement. This is not an assurance of backing from the holding company.

An obligation of means must not be analysed as a one-sided legal act. It is a contractual obligation as it forms part of multipartite relations.

This obligation of means entails the holding company to make its best efforts to reach a specific objective.

Seemingly, the holding company may, as a result, free itself from its duty by providing mere evidence of its fulfilment of its obligation of means (thus that its efforts were sound enough in the light of the predicted objective), or yet, by instancing a force majeure clause.

Regarding the kind of penalties that are implementable to this class of duty, financial compensation for loss could be awarded whenever misconduct is evidenced, and the relation among the loss occasioned and the misconduct must be demonstrated.

Where there are economic and tight structural relations among the holding company and the daughter company, the obligation of means could be substituted by an obligation of result.

Such an analysis necessitates the capacity by the judicature to examine and not solely properly analyse the issued letter but as well to appraise the financial and legal relations prevailing among both companies. The burden of the judicature will be trickier to the extent that the question may bear international aspects, necessitating the judicature to direct a deep evaluative review. This allows it to analyse, for instance, the level of independence of the daughter company regarding its relationship with its holding company.

When the particular result sought by a letter can be achieved solely with the support of the holding company, the judicature will certainly deliver a judgement resorting to the factors that define which obligation of means should be changed into an obligation of result.

As a third scenario, there are letters including an obligation of result. In this situation, there is a LOI carrying a legal duty to reach a result that must achieve an anticipated objective.
When the party has committed itself to reach a particular objective, it is questionable that it will be capable of avoiding this foregoing mandatory objective. Different kinds of duties can be assumed such as that of the third-party beneficiary for instance.
As regards the breach of contract, the issue of proof will emerge and also that of the presumption of liability of the holding company of the party.
The holding company would not be able to alter this presumed liability neither by evidencing that it carried out its duty or by instancing a force majeure clause.
For instance, the country risk is covered by force majeure and is mentioned by several LOIs. The country risk factor covers facts which are totally extrinsic to the activities and to the type of the firm. In such circumstances, the holding company can restrict its liability to the financial standing of the daughter company without covering the country risk affecting the latter.
Hence, if no extrinsic facts can make the holding company liable, the non-fulfilment of its duties, which engendered loss will conduct to the award of financial compensation as regards the presumption of contract liability. In such a scenario, in contrast with the second scenario, the proof of the instrumental relation among the fault and incurred loss, from the failure to execute the contract by the daughter company, is more simple to establish.
Usually, the financial compensation equates the amount of the duty to which the daughter company is precisely liable.
Assuming the essence of the guarantee assured by the holding company, this kind of LOI is very identical to surety bonds, as laid down in article 2015 of the French Civil Code; the sole disparity is that such a surety must be explicitly invoked.

As a forth scenario, there are letters including a legal duty of payment instead of the borrower.
The shift from an obligation of result to a surety bond provided by the holding company relies on the wording of the letter and on the clauses invoked by the two parties.

This kind of LOIs, the most utter, necessitates the straightforward and express manifestation of the willingness to carry out the duty of the borrower.[582]

This consent of payment instead of the borrower is a camouflaged surety and stays effective insofar as the main duty remains non-performed.

As a result, all the legal consequences of the surety must be conferred on the letter stipulating the contents of such a surety.

This scenario could ultimately carry further duties than the ones carried by a surety. Actually, a commitment by the holding company to provide financial backing for its daughter company corresponds, definitely, to an undefined duty during the commitment. Conversely, a surety gives rise to a less constraining obligation.

Without any doubt, this kind of LOIs necessitates approval from the board of directors of the company issuing the letter, and the substance and duties provided in the letter must be annexed to the statement of financial position of the firm.

As concerns interpretation, this kind of LOIs includes various median levels of liability that can fit among the two extremities of a mere obligation of means and the obligation of result (the payment).

In virtue of German legislation,[583] there is a widespread trend of presumption that a commitment among a holding company and its daughter company is legitimate. By contrast, it is demanded to fulfill all the stipulated duties, so as to circumvent bankruptcy.[584]

1.6. Alternative Dispute Resolution Proceedings

In terms of transnational liability of group companies in the arena of private international law (PIL), the question arises as to the way a non-contracting party to an arbitration contract can become involved in the alternative dispute resolution procedure, more specifically, the

[582] Antoine, M. F. (1990). La lettre de patronage: enseignement jurisprudentiel récent. Revue De Droit Des Affaires Internationales, 6, 771-781, (p. 775).

[583] Wissum, C. H., (1987). Comfort Letters Under Danish Law. International Financial Law Review, 6, 23, (p. 24).

[584] Ibid.

arbitration process. Litigants are not usually informed of those risks in which normal contract law and the implementation of some doctrinal principles accepted in certain overseas states may simultaneously have unexpected effects. The question is posed when the arbitration contract was firmed by a group company and can have legal effects on other non-contracting parties, as emphasized earlier by Sandrock.[585] Disputes do not solely as to the decisions of the judicature and the arbitral tribunal, but basically with regard to the perspectives espoused by common and civil law legal theories.

An arbitration procedure is submitted by an agreement between the parties. The basis is that solely a member of an arbitration contract can take advantage of this contract by submitting the conflicts contained in the contract to arbitration. This contract excludes or prevents the entitlement of the members to take legal action before the tribunals. However, there are cases in which a member who did not firm an arbitration contract including a "Scott v. Avery clause" may be liable, regardless of such circumstances, to the ordinary contract law (such as in the case of a guarantee, or a principal-agent problem for example).[586] As detailed by Born,[587] there are as well additional problems such as veil lifting, the "group of companies" doctrine and the power occasionally conferred on managers and business officers in the United States of referring to the Scott v. Avery clause. In virtue of these doctrines, a third-party or non-contracting party may become a party to the arbitration process even if it had not firmed an arbitration contract. At the same time, this may be beneficial in bringing all engaged participants to a jurisdiction and settling all concerns, as stated by Michael Reynolds.[588] However, according to him, it contradicts the general notion of consent, which is a basic principle of dispute settlement methods under which freedom of contract is granted to participants.

[585] Sandrock, O. (1993). Arbitration Agreements and Groups of Companies. International Lawyer, 27(4), 941.

[586] See Born, G. (2012). International Arbitration: Law and Practice. Kluwer Law International, 93.

[587] Ibid.

[588] Reynolds, M. (2016). Non-signatory issues: all for one and one for all. Company Lawyer, 37(6), 189-192.

Several French International Chamber of Commerce (ICC) arbitrations have acknowledged that a number of the civil law doctrines such as the one of group of companies are polemical. At the same time, this has been denied by some other courts in Europe (in the Netherlands for example), with the consequence that the stance is undetermined. In the UK, the tribunals do not accept it as a legal doctrine. Still and all, the question is posed in numerous international arbitration and in execution proceedings in which decisions vary.

As accepted in a number of civil law states, the group of companies doctrine stipulates that non-contracting parties to the agreement may be participants in the light of a Scott v. Avery clause in which the entity is a member of the group of companies controlled by a group company which has performed the agreement and participated in the discussions or execution of the agreement. Such an entity may take advantage of the Scott v. Avery clause or become involved in the arbitration as a participant, despite the fact that it is not a performed agreement.

Sandrock asserts that one can find three essential cases.[589] The primary case is when a holding company or a natural entity owning the shares of and managing at least one daughter company firms an arbitration contract. Is it possible to prosecute the daughter companies or granddaughter companies? Otherwise, can the group company that is a daughter company or granddaughter company prosecute the other signatory as such or together with the holding company? The second case is when the daughter company (a group company) firms the arbitration contract and the other participant prosecutes in virtue of it or the holding company does. The third case is when a related entity firms the arbitration contract and again the issue is posed as to if other group companies can prosecute or be prosecuted.[590]

The quandary for the arbitral tribunal is then, according to circumstances, if the holding company or the daughter company has standing to bring the action.

Several international arbitrations have raised this polemical matter. It was found in a certain ICC arbitration that "the security of international commercial relations requires that account should be taken of its economic reality and that all the companies of the group should be held liable one for

[589] Sandrock, O. (1993). Arbitration Agreements and Groups of Companies. International Lawyer, 27(4), 941, 942-943.

[590] ICC cases Nº 4131 of 1982; and Nº 1510 of 1980.

all and all for one for the debts of which they either directly or indirectly have profited at on this occasion".[591]

By comparison with that award, in a certain ICC matter[592] it was found that two entities of the very group or ownership as such by one stockholder never represents grounds for veil lifting. In the C.A. Fisser v International Bank litigation of the US, it was found that the entity that did not firm an arbitration contract might still be considered as a participant in the arbitration under the law of contracts doctrines.[593] One of these doctrines was the concept of piercing the corporate veil that was enforced so that the conduct of one was considered as the conduct of everyone. The adoption of the doctrine helps in reading international arbitration contracts, even if they are bound by "strict construction" in the light of the "law of the place where the contract is made" and the "law of the place where arbitration is to take place". Disparity can arise among substantive law and adjective law within the framework of the lex loci contractu and the lex loci arbitri when there is likely scope for dispute as among the legislations of distinct jurisdictions. This applies in particular apropos of the group of companies doctrine.

In virtue of common law, the aspect of non-signatories being liable to an arbitration contract transgresses fundamental tenets of law, in particular the one of "meeting of the minds" and the application the doctrine of privity. Whilst the rule of privity is constrained by some principles, for instance, the alter ego doctrine, UK lawyers do not admit such doctrines and would generally deny their adoption. Pursuant to Michael Reynolds,[594] the issue with the French acceptance of the group of companies doctrine is that it is short of reliability, and a non-signatory would not be informed of its likely involvement in procedures, which might conduct to unfairness. At the same time, civil law might provide that the "economic reality" may be an influential factor and prefer its adoption. It might as well provide that power may be regarded as present even if it has actually never been given either directly or implicitly (in the light of the aforementioned "theory

[591] ICC Arbitration Nº 5103 (1988) 115 J. du Droit Int'l 1206, annotations by G.A. Alvarez.

[592] ICC Matter Nº 5721 (1990) 117 J. du Droit Int'l 1019, annotation by Yves Derains.

[593] C.A. Fisser v International Bank 282 F. 2d 231, 233 (2d Cir. 1960).

[594] Reynolds, M. (2016). Non-signatory issues: all for one and one for all. Company Lawyer, 37(6), 189-192.

of appearance"). Pursuant to Sandrock, this case may occur when the principal is liable to an entity to which the power has never been issued, and when the pretended principal and the pretended agent drive third-parties acting in good faith to think that authority was present. In the United Kingdom, the legislation is more vigilant since the agent must make a statement of fact as holding power in order that the agent is empowered to operate as so. Thereby, the principal is liable to the agent, with the third-party drawing on such statement. Sandrock eventually deduced that it is irrelevant to draw on the vague concepts of merchant law and preferable for the arbitrator to establish the national substantive law provisions implementable to the third-party beneficiary contract. In fact, the issue may be a lot more complex than asserted by scholars, in particular when the contract lacks any choice of law clause and the arbitral tribunal has to choose such law.

Therefore, the group of companies doctrine has been endorsed by French tribunals, that observe that when several group entities agree that a Scott v. Avery clause has legal effects on everyone according to the consensus ad item of the signatories, then these group entities are all liable. Besides the French Courts of Cassation, numerous influential arbitral tribunals implementing French legislation as well assert this. Nevertheless, this concept is as well disapproved by other Member States. For instance, the Federal Supreme Court of Switzerland ruled that an overseas country would not be a participant in an arbitration where the contract had not been firmed by that country.[595] German tribunals prefer the petitions of third-party beneficiaries having the power for arbitration of their dispute.

The root of this specific imbroglio seems to have grown from the Dow Chemicals litigation,[596] even if some academics deny the view that Dow Chemicals brought about the group of companies doctrine.[597] Hanotiau suggests that this concept alone is rather not enough, and that action is merely considered in establishing consent when the presence of a corporate group may be pertinent.

[595] SGTM v Bangladesh, 6 May 1976, ATF 102 Ia, (p. 582).

[596] Dow Chemicals case, Paris CA, 21 October 1983; ICC Interim Award, 23 September 1982 in case Nº4131, (1983) 110 Journal de Droit International (Clunet) 899 and Collection of ICC Awards 1974-1985, note by Yves Derains.

[597] See e.g., Hanotiau, B. (2011). Consent to Arbitration: Do we share a Common Vision? Arbitration International, 27(4), 539-554.

Nonetheless, in this litigation, Dow Chemical Company and Dow Chemical France did not firm an arbitration contract, but the arbitrator observed the façade. He went on to name the Scott v. Avery clause concerning "the common intention of the parties […] from the circumstances that surround the conclusion and characterised performance and later the termination of the contracts in which they appear".

Thereby, the tribunal considered "the needs of international trade, in particular, in the presence of a group of companies […] [which] […] irrespective of the distinct juridical identity of its members … constitutes one and the same economic reality".

This was a pioneering award for international arbitration by which the tribunal recognized that some group entities could render other entities liable, in view of their part in the closing, execution or ending of agreements including the very clause true to the intent of every participant in the process. In fact, this signified that the contracting daughter companies of Dow Chemical Group and Dow Chemical France, that was a non-contracting party, were all parties to the closing, execution and ending of the contracts. Actually, neither the vendors or suppliers have had appreciation for the selection of an entity in the Dow Group. Within the Dow Group, every company participating in the supply acknowledged that it was engaged with the French supplier, and hence, it was within the corporate structure of those companies that the predecessors of the respondent acknowledged that they were themselves engaged. The tribunal was seemingly mainly fixated on the concept of the mutual intent of the participants, intuited from the carrying out of the group economic structure. Certainly, the world commerce praxis as well did its share. The decision was confirmed by the Court of Appeal of Paris, which upheld the award of the tribunal forasmuch as it was found in the "intention common to all the companies involved". The Court of Cassation validated the Court of Appeal's finding, and this was carried on in the Dalico litigation.[598]

The tribunal asserted in Dow Chemicals that "the existence and effectiveness of the arbitration agreement has to be assessed, subject to the mandatory rules of French law and international public policy on the basis of the parties common intention there being no need to refer to any national law".

[598] Municipalité de Khoms El Mergeb v Soc. Dalico, 20 December 1993 [1994] Rev. Arb. 116.

This precise assertion by the French legal theory paved the path for the ensuing discussion in Peterson Farms Inc v C&M Farming Ltd.[599] Its key element was the part of the non-contracting participant in the execution of the agreement in as much as it can be stipulated that understanding and execution of the agreement by a non-contracting party suggested agreement to all the clauses in the agreement, comprising the Scott v. Avery clause. Pursuant to Michael Reynolds, although this would seem as a sea change from the UK common law perspective, it is definitely entirely accurate in the light of French civil law.

Derains[600] remarked that there is no provision in the French law on international arbitration,[601] that allows for non-contracting participants which are affiliates to the same corporate group being liable to a Scott v. Avery clause. "What is relevant", he asserts, "is whether all parties intended non-signatory to be bound by the arbitration clause". The formula is the participants' actual intent and if the non-contracting participants had the intention to be liable. Accordingly, the arbitrator's understanding founded on French legislation in the Peterson dispute could definitely be justified if his argument was accurate. The sole issue was that the UK tribunal found that the implementable legislation to the arbitration contract was the legislation of Arkansas in the United States and not the French legislation.[602]

Therefore, in Peterson, the court held that it was competent to treat other companies not identified as participants in the arbitration contract. The court argued that it was competent as per the Dow Chemicals dispute that inaugurated the concept, and that the respondent had concluded the contract as an agent for the other companies. The agreement at stake, in addition to the arbitration contract were concluded among Peterson and C&M. Pursuant to the latter, the other entities were "an integrated and inseparable part of the group". The arbitrator held that "an arbitration agreement signed by one company in a group of companies entitles (or obliges)

[599] Peterson Farms Inc v C&M Farming Ltd [2004] EWHC 121 (Comm); [2004] 1 Lloyd's Rep. 603, Langley J.

[600] Derains, Y. (2010). Is There a Group of Companies Doctrine? In B. Hanotiau, & E. A. Schwartz (Eds.), Multiparty Arbitration (Dossier VII, p. 131). ICC Institute of World Business Law, (p. 136).

[601] French Law, New Code of Civil Procedure, French Decree of 13 January 2011 reforming the law governing arbitration. Available in english at: http://www.parisarbitration.com/wp-content/uploads/2014/02/French-Law-on-Arbitration.pdf. [Accessed: December 12, 2022].

[602] Michael Reynolds wondered what would would have been the situation if that legislation was the one of Louisiana, that is founded on French civil legislation.

affiliate non-contracting companies if the circumstances surrounding negotiation, execution or termination of the agreement show that the mutual intention of all the parties was to bind the signatories".

Hence, according to Michael Reynolds, it appears that under French legislation, and as reported by Derains, this was an accurate implementation of the group of companies doctrine, if, naturally, the implementable legislation was the French one. Nevertheless, such an opinion, is maybe problematic insofar as Hanotiou believes that the adoption of such a concept is "merely a shortcut to avoid legal reasoning". He might as well not rather credit what the court found to be the applicable law, and actually raised doubts, considering its adoption there as incomprehensible.[603]

The Peterson court deduced that a corporate group formed one "economic reality", which once more seems to emanate from the Dow Chemicals judgement. It moved forward to deduce that one affiliate to a group could render the others liable to a contract "if such conforms to the mutual intentions of all parties and reflects the good usage of international commerce". Pursuant to Michael Reynolds, this mirrors the argument in Dow Chemicals and is well consonant with those who consider international arbitration as developing an international mercantile law. Conversely, a UK domestic tribunal, the Commercial Court, revised the award of the arbitral tribunal.[604] This tribunal, unacquainted with such arbitration doctrines, voided the section of the decision which treated of other damages to the C&M group entities. It held that the implementable legislation was the one of Arkansas. It as well held that this state does not admit the group of companies doctrine.[605] Hence, as the legislation of Arkansas was similar to UK common law in this regard, the arbitral tribunal was unsound in defining the proper law pursuant to a mutual intent of the participants, whereas there was no proper law clause in the arbitration contract. The Commercial Court setting aside the decision dealing with the other entities of the group, as well dismissed additional assertions founded on the principal-agent problem and estoppel.

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[603] Hanotiau, B. (2011). Consent to Arbitration: Do we share a Common Vision? Arbitration International, 27(4), 539-554, (p. 550).

[604] Peterson Farms [2004] EWHC 121 (Comm); [2004] 1 Lloyd's Rep. 603.

[605] Pursuant to the submissions on Arkansas legislation consented among the parties' lawyers.

This decision and the one of the court, which are antithetical, provide intellectual nourishment, just as the contradictory perspectives of the civil law of France and the common law of UK. Overall, as advanced by Hanotiau, a precise interpretation of the legislation is necessary but it could still be that, occasionally, the fine distinction that could be key is lost, as a consequence of translations.

2. Tort and liability in corporate groups in civil law and common law jurisdictions

2.1. The English regime

In the UK, the system adopted by the well-known decision of the House of Peers in Salomon v. Salomon Ltd.[606] has been the matter of bitter critique for engendering inadequate effects for involuntary creditors, such as tort claimants. The unjust situation in which tort claimants are put is more dilated in groups of companies.
Successively, there has been a movement in the debate from sorting out the effects of insolvency to avoiding it and stimulating business restructuring and recovery. Corporate law is silent regarding the unjust situation in which tort claimants find themselves. Pursuant to Ali Imanalin, the Salomon principle on corporate groups should not have set out twofold protection of liability, for this contradicts the essence of the concept of limited liability as such.[607] He added that besides the fact that shareholders' limited liability generates economic unefficiency in respect of tort actions, it is as well unethical not to award adequate compensation to the most deserving claimants of tort who were victims of personal injuries or wrongful death due to the tort of a daughter company in a state of insolvency.

It is certain that not every creditor is capable of coming to terms about limited liability. Actually, it is practically inconceivable for involuntary creditors, such as sufferers of tort, to prosecute the

[606] Salomon v Salomon & Co Ltd [1897] A.C. 22; [1896] 11 WLUK 76 (HL).

[607] Imanalin, A. (2011). Rethinking limited liability. Cambridge Student Law Review, 7(1), 89-99.

shareholders of a firm in a state of insolvency.[608] As part of groups of companies, a holding company may hold joint liability for its daughter company's torts when the plaintiff can build a case on the customary elements of tort law, and hold several liability when the holding company has deluded a party to deal with the daughter company by spreading incorrect information, or was the daughter company's de facto director with a duty of care to individuals impacted on by its acts or omissions.[609] Although the daughter company is 100 per cent held by its controlling holding company, the tribunals are reticent about ruling that the holding company exercised control over its daughter company insofar as it can establish a duty of care to a third-party.[610] The elements of vicarious liability are not relevant to hold tortious liability for lawsuits against other firms of the group.[611] Therefore, the existing options to pierce the corporate veil in the UK have very limited reach, decreasing the probability to file a lawsuit.

The main cause for prohibiting involuntary creditors from prosecuting a holding company inheres in the notion that business assets shall not be exploited for the payment of third-parties as that would unfavourably impact on corporate creditors. Hence, it is no wonder that limited liability is execrated for its severity with regard to tort claimants who are in the most detrimental situation when a firm is in difficulty.[612] Actually, it is frequent that when a business fails, unsecured creditors obtain nought. Hence, it is unfair to adopt the legal status of limited liability to evade legal remedies for tort victims. As noted previously, daughter companies may undertake high-risk ventures and the incorporation of such firms is generally made in developing countries, rendering the issue more complex.[613] A holding company, so as to limit its liability for

[608] Prentice, D. (1993). Some Comments on the Law Relating to Corporate Groups. In J. McCahery, S. Picciotto, & C. D. Scott (Eds.), Corporate Control and Accountability: Changing Structures and the Dynamics of Regulation (p. 371). Clarendon Press.

[609] Lubbe v. Cape plc. [2000] 4 All. E.R. 268, HL.

[610] Stocznia Gdanska SA v. Latvian Shipping Co Latreefer Inc. [2002] 2 Lloyd's Rep. 436, CA.

[611] Kuwait Asia Bank EC v. National Mutual Life Nominees Ltd [1991] 1 A.C. 187, PC.

[612] Hansmann, H., & Kraakman, R. (2000). The Essential Role of Organizational Law. Yale Law Journal, 110, 387, (pp. 431-432).

[613] Muchlinski, P. (2002). Holding Multinationals to Account: Recent Developments in English Litigation and the Company Law Review. Company Lawyer, 23, 168, (pp. 168-169).

infringements of law of tort, might usually under-capitalize the subsidiaries conducting such risky operations.[614]

In the Adams *v.* Cape Industries plc lawsuit,[615] the Court of Appeal, qualifying the DHN Food Distributors lawsuit,[616] and confining it to its facts, clearly ruled that the group concept of corporations is not the concern of UK corporate law. The lawsuit regarded a collective proceeding brought by tort sufferers, who were victims of personal injury as a consequence of subjection to asbestos, against a UK firm which extracted asbestos from South Africa and exported it to other countries. The plaintiffs attempted to implement the US decision rendered against the UK firm, yet the Court of Appeal did not take the stance of the plaintiffs. Lord Slade asserted that: "[We] do not accept as a matter of law that the court is entitled to lift the corporate veil as against a defendant company which is a member of a corporate group merely because the corporate structure has been used to ensure that the legal liability (if any) in respect of future activities of the group … will fall on another member of the group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this manner is inherent in our corporate law. [Counsel] urged us that the purpose of the operation was in substance that [Cape Industries plc] would have the practical benefit of the group's asbestos trade in the US, without the risks of tortious liability. This may be so. However, in our judgment [Cape Industries plc] was entitled to organise the group's affairs in that manner and … to expect that the court would apply the principle of Salomon *v* Salomon in the ordinary way".[617]

As there was ensuing settlement of the lawsuit, the basic issue in the lawsuit, that is whether or not a group of companies is liable in its entirety for the tort of its foreign daughter companies to plaintiffs in the foreign jurisdiction, had still not been resolved. Therefore, even plaintiffs with the highest deservingness such as tort sufferers in the Adams lawsuit,[618] who were affected by chronic lung disease caused by wrongful acts (or omissions) of a daughter company in a state of

[614] Ibid.

[615] Adams v. Cape Industries plc. [1990] Ch. 433.

[616] Lord Denning MR in DHN Food Distributors Ltd v. Tower Hamlets London Borough Council [1976] 1 W.L.R. 852.

[617] Adams v. Cape Industries plc [1990] Ch. 433, at p. 544.

[618] See as well Sithole and others v. Thor Chemicals Holdings Ltd and another [1999] All. E.R. (D) 102.

insolvency, may lose after seeking the lifting of the corporate veil by the tribunal to evidence the liability of the group as a whole.

The CLRSG deduced that it had not met much resistance to abstain from putting forward recommendations on the modernization of group liability as regards torts perpetrated by the (foreign) daughter company.[619] Actually, the debate has moved from "promoting rescue, rather than sorting out the consequences of financial failure".[620] This movement does not settle the issue, as it only eludes addressing the main question. Insofar as there is a gap in the legislation, deserving claimants are submissive to settlement and dealings with solid firms within a group of companies.

Pursuant to Ali Imanalin, the existing approach does not tackle the changes in the operation of corporations and has boosted demands for a drastic regulatory modification, comprising the revocation of the theory, notwithstanding that it is "the distinguishing characteristic of corporate form".[621] The safeguard of sufferers of tort could be reached both at local and global dimensions if the judiciary were less reluctant to lift the corporate veil. This readiness could be reached if UK judges begin to enforce the provisions of the Human Rights Act 1998 to counteract the exploitation of business corporations, that "insulate" holding companies from liability for civil wrongs resulting from their daughter companies' conducts.[622] Drawing on the speculation that limited liability is a mechanism engineered to minimize transaction costs to which the members would have been liable in other respects, limited liability implies a haggle before the incorporation of the limited company. This is contrary to the real aim of limited liability that is to insulate parties from liability to involuntary creditors of a firm in insolvency. Moreover, the *Salomon* ruling doesn't make any reference to the applicability of limited liability to tort. On this account, Ali Imanalin sees that limited liability shouldn't have been applied to it. However,

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[619] Company Law Review Steering Group. (2000). Modern Company Law For a Competitive Economy: Completing the Structure. Department of Trade and Industry, (paras. 10.58-10.59).

[620] Ferran, E. (2008). Principles of Corporate Finance Law. Oxford University Press, (pp. 42-48).

[621] Kraakman, R., Armour, J., Davies, P., Enriques, L., Hansmann, H. B., Hertig, G., Hopt, K. J., Kanda, H., & Rock, E. (2009). The Anatomy of Corporate Law: A Comparative and Functional Approach (2nd ed.). Oxford University Press, (p. 121).

[622] Muchlinski, P. (2002). Holding Multinationals to Account: Recent Developments in English Litigation and the Company Law Review. Company Lawyer, 23, 168, (p. 174).

since it has already been done, he believes that there is actually a need to fill the gaps in corporate law.

2.2. Liability in tort for antitrust law infringements in the UK

Most of the controversy regarding limited liability, as per Muscat, has identified with its validity on the ground of the capacity of outsiders to secure themselves through contracts when negotiating with a firm. Yet, he argues that "[l]imited liability … conflicts with some fundamental objectives of tort law …" via the subversion of the remedies and prevention provided by the latter as it permits a firm to "… externalize the risks of its more hazardous ventures by establishing subsidiaries".[623] Risks are wrongly transferred from the company (with the necessary judicial relief for the tort) to consumers. Blumberg adopts the same position, and states that having recourse to limited liability as part of a tort is ineffective, for it can result in higher risk-taking and can generate insupportable external costs.[624]
It has been asserted by Henderson[625] that policing founded on social welfare is "pre-economic"[626] and ill-considered. He argues that countries that base policies regarding firms on public interest intend to "internalise externalities" and that the profitability of a company is due to, and the principal sign of the efficiency of that company. He acknowledges the part played by rivalry in the situation (his perception of profit recognizes the presence of competition and the scope for expansion into new markets). However, risk externalization by groups of companies for the sake of effectiveness must as well be restricted. Whereas corporations serve public interest via the promotion of investment and, as showed by Coase,[627] internal crossing (instead of

[623] Muscat, A. (1996). The Liability of the Holding Company for the Debts of Its Insolvent Subsidiaries. Routledge, (pp. 180-181).

[624] Blumberg, P. I. (1993). The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality. Oxford University Press, (pp. 134-135).

[625] Henderson, D. (2004). The Role of Business in the Modern World: Progress, Pressures and Prospects for the Market Economy. Institute of Economic Affairs.

[626] Ibid., (p. 176).

[627] Coase, R. H. (1937). The Nature of the Firm. Economica, 4(16), 386.

trade execution) will be endeavoured solely when it is effective, the exploitation of limited liability unfairly transfers expenses towards society. As regards anticompetitive behaviour, tort undermines competitiveness and allocative efficiency. Pursuant to Paul Hughes,[628] besides the safeguard of involuntary creditors as tort creditors,[629] it makes sense that antitrust law should as well provide for the safeguard of voluntary creditors that have incurred risks involuntarily, for example consumers facing cartels, since those consumers are victims of the disadvantages of information associated with dealings with a company involved in a price fixing conspiracy. Pursuant to Paul Hughes, the perspective embraced by Muscat is comparable to the one followed by the single economic entity theory in EU competition law, especially for the sake of guaranteeing the prevention and sanction of anticompetitive practices undermining competitiveness and allocative efficiency.[630] UK tribunals, whereas coping with the dissolution of limited liability demanded by the single economic entity theory, have however been initiated into imposing direct tortious liability on holding companies by statute. Liability imposed by law based on custom (also known as common law liability or liability for damages) may as well be caused by the control by a holding company of the decision-making process of its daughter company, considering that there has been breach of a statutory duty. This perspective is not founded on the reasoning of effectiveness, but instead on courts recognizing that risk externalization via the resort to limited liability should be restrained.

Corporate governance intends to tackle the presumption by the principal-agent problem that, shareholders are not solely deprived of control upon daily decision-making, but the advantages of limited liability deter them from performing a more significant supervisory function. Managers possess "a comparative advantage in decision making" and shareholders "in risk-

[628] Hughes, P. (2014). Competition law enforcement and corporate group liability - adjusting the veil. European Competition Law Review, 35(2), 68-87.

[629] See for instance, Peterson, C. W. (2017). Piercing the Corporate Veil by Tort Creditors. Journal of Business & Technology Law, 13(1), (Article 4); Ben-Ishai, S., Lubben, S. (2012). Involuntary Creditors and Corporate Bankruptcy. UBC Law Review, 45(2), 253-282; Leebron, D. W. (1991). Limited Liability, Tort Victims, and Creditors. Columbia Law Review, 91(7), 1565-1650.

[630] Hughes, P. (2014). Competition law enforcement and corporate group liability - adjusting the veil. European Competition Law Review, 35(2), 68-87.

taking", denoted Wittman.[631] So as to counterbalance the risk of any disadvantageous price action when investing, investors may resort to stock portfolio diversification, instead of confronting managers, notwithstanding shareholders famous votes against "excessive" executive compensation in annual meetings, as for instance through Britain's "shareholder spring" movements (that seemed to be only a "myth").[632]

In the UK, the Commission and the United Kingdom Office of Fair Trading (OFT)[633] were simultaneously entitled to levy sanctions on undertakings (most frequently firms)[634] in violation of antitrust law extending to 10 per cent of the group's total revenues.[635]
On top of the levying of administrative mulcts by the Commission or OFT, by virtue of UK legislation any breach of arts 101 and 102 TFEU[636] would be considered as a statutory tort.[637]
In Garden Cottage Foods Ltd v Milk Marketing Board,[638] the House of Lords found that a relief by an award of damages is accessible for the compensation of those persons who were victims of loss under an EU antitrust law violation. This standard was upheld in Crehan v Inntrepreneur Pub

[631] Wittmann, D. (2006). Economic Foundations of Law and Organization. Cambridge University Press, (p. 314).

[632] See for instance, Peston, B. (2012, June 12). The myth of a shareholder spring. BBC. Available at: https://www.bbc.com/news/business-18407587. [Accessed: December 12, 2022]; Sullivan, R. (2012, August 26). 'Shareholder spring' muted. Financial Times. Available at: https://www.ft.com/content/0a1e41c4-ed42-11e1-95ba-00144feab49a. [Accessed: December 12, 2022]; and for a more up-to-date review see, Hodgson, P. (2016, May 10). Is this U.K. Shareholder Spring III? Compliance Week. Available at: https://www.complianceweek.com/is-this-uk-shareholder-spring-iii/3036.article. [Accessed: December 12, 2022]; and/or for the situation in the US see, Subramanian, R. (2017). Shareholder spring and social activism: a study of 2013-2015 proxy filings. Corporate Governance, 17(3), 560-573.

[633] See Enterprise Act 2002, (s.1); repealed by the Enterprise and Regulatory Reform Act 2013, (Pt 4).

[634] See for example, Case IV/28.996 Reuter/BASF [1976] OJ L254/40.

[635] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, (art. 23); Competition Act 1998, (ss. 36 and 38). Available at: https://www.legislation.gov.uk/ukpga/1998/41/contents. [Accessed: December 12, 2022].

[636] Belgische Radio en Televisie v SABAM SV (127/73) [1974] E.C.R. 313.

[637] London Passenger Transport Board v Upson [1949] A.C. 155; R. v Secretary of State for Transport Ex p. Factortame Ltd (No.7) [2001] 1 W.L.R. 942; X (Minors) v Bedfordshire CC [1995] 2 A.C. 633.

[638] Garden Cottage Foods Ltd v Milk Marketing Board [1983] 3 W.L.R. 143.

Co CPC[639] and in Provimi Ltd v Aventis Animal Nutrition SA (a following High Court decision).[640]

Articles 101 or 102 TFEU attribute immediately effective rights to persons[641] and in its decision in Courage Ltd v Crehan,[642] the CJEU upheld that damages must be accessible for EU antitrust law violations. In Manfredi v Lloyd Adriatico[643] (mentioning its judgement in Crehan v Courage), the CJEU ruled that art.101(1) TFEU has immediate effect and generates rights for persons harmed by any of its provisions' breach, that a domestic tribunal must protect. The CJEU contemplated in the Manfredi litigation that art.101(2) TFEU makes any arrangements prevented under art.101 systematically of no legal effect, and that the interdiction on anticompetitive arrangements is decisive.[644] Hence, any person can hinge on a violation of art.101 TFEU before a domestic tribunal and pursue compensation for harm occasioned by an anticompetitive arrangement, comprising economic harm,[645] when the arrangement limits intra-EU trade by object or by effects and does not justify the exception of art. 101(3).

Additionally, the Competition Act 1998 in its section 60[646] demands UK tribunals to implement EU legal principles (comprising the one of the single economic entity) when implementing the same interdictions concerning anticompetitive arrangements or abuse of dominant position (having a geographical effect confined to the UK) included in Chs I and II of the Competition Act 1998.[647] An additional impact of Section 60 is to bring in the right to damages of the EU to the English antitrust law system.

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[639] Crehan v Inntrepreneur Pub Co CPC [2004] EWCA Civ 637, ([156]).

[640] Provimi Ltd v Aventis Animal Nutrition SA [2003] E.C.C. 29, ([23]).

[641] Belgische Radio en Televisie [1974] E.C.R. 313.

[642] Courage Ltd v Crehan (C-453/99) [2001] E.C.R. I-6297.

[643] Manfredi v Lloyd Adriatico Assicurazioni SpA (C-295/04) [2006] E.C.R. I-6619.

[644] Ibid., ([56] and [57]).

[645] Ibid., at [58]-[60].

[646] Competition Act 1998, (s. 60).

[647] Competition Act 1998, , (s. 60).

Pursuant to Paul Hughes, UK civil actions have been, thus far, comparatively limited in quantity, with the majority of private damages litigations[648] constituting "follow-on" ones, i.e., litigations brought in the backwash of a judgement by the Commission or OFT.[649] An illustration is the one of Devenish Nutrition v Sanofi-Aventis,[650] where damages were pursued in a follow on action following the ruling of the Commission that a breach of art. 101(1) TFEU had happened (in its judgment in the vitamins cartel litigation).[651] The UK High Court[652] and Court of Appeal[653] upheld, in Devenish, that compensations assigned for breaches of EU antitrust law are compensatory damages founded on tort that should recover the applicant to the situation in which it would have been "but for" the breach. The UK High Court asserted in Arkin v Borchard Lines (Nº4),[654] when observing claims that a shipping conference had ran a price fixing cartel in violation of art. 101 TFEU, that the question of causality should be tackled: "…on the basis of commonsense, there being … an overarching concept that the chain of causation can be broken only if it is concluded that the claimant's own conduct displaced that of the defendant as the predominant cause of the claimant's loss".[655]

According to Paul Hughes, the legal fees, information asymmetry, procedural obstacles and risks that applicants must overcome are considerable,[656] elements recognized by the Commission, that

[648] See Waelbroeck, D., Slater, D., & Even-Shoshan, G. (2004). Study on the conditions of claims for damages in case of infringement of EC competition rules (Ashurst study). European Commission, (p. 1). Available at: https://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf. [Accessed: December 12, 2022]; and Renda, A., Peysner, J., Riley, A. J., Rodger, B. J., Van Den Bergh, R. J., Keske, S., Pardolesi, R., Camilli, E. L., & Caprile, P. (2007). Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios. European Commission. Available at: https://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf. [Accessed: December 12, 2022].

[649] Competition Act 1998, (ss. 58A and 47A).

[650] Devenish Nutrition v Sanofi-Aventis [2008] EWCA Civ 1086.

[651] EU Commission decision of 10 January [2003] OJ L6/1.

[652] Devenish Nutrition v Sanofi-Aventis [2007] EWHC 2394 (Ch).

[653] Devenish [2008] EWCA Civ 1086.

[654] Arkin v Borchard Lines (No.4).

[655] Arkin v Borchard Lines (No.4) [2003] EWHC 687 (Comm), ([536]).

[656] See, the weaknesses in the judicial procedures of Member States identified in the study by Buccirossi, P., Carpagnano, M., Ciari, L., Tognoni, M., & Vitale, C. (2012). Collective Redress in Antitrust. European Parliament's Committee on Economic and Monetary Affairs. Available

has been pursuing to stimulate a wider utilization of private actions by third-parties whose interests have been damaged by EU antitrust law breaches.[657] Actually, antitrust law proceedings are generally brought by huge corporations which have been harmed by being invoiced cartelized prices by their providers. Notwithstanding present procedural complications, civil actions are rising. Hence, an offending subsidiary firm can subject its group of companies to considerable regulatory penalties and the possibility of civil claims, financial risks that managers of UK corporations have an obligation to circumvent.[658]

As stipulated by Paul Hughes, those risks may become further accentuated henceforward, since the English Government has issued, for instance in 2013, a draft Consumer Rights Bill crafted to support users and enterprises, in lodging antitrust law actions.[659] Whether those evolutions will procure the wished effect and extend the quantity of UK civil claims brought by less well-financed applicants is, according to Paul Hughes, unsure until now.

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at: https://ec.europa.eu/competition/antitrust/actionsdamages/study_legislative_action_collective_redress.pdf. [Accessed: December 12, 2022].

[657] See De Smijter, E., Stropp, C., & Woods, D. (2006). Damages actions for breach of the EC antitrust rules [Green paper]. European Commission. Available at: https://ec.europa.eu/competition/speeches/text/2006_1_1_en.pdf. [Accessed: December 12, 2022]; European Commission. (2008). Damages actions for breach of the EC antitrust rules [White paper]. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0165:FIN:EN:PDF. [Accessed: December 12, 2022]; and Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013PC0404&from=EN. [Accessed: December 12, 2022].

[658] See Companies Act 2006, (s. 174), as per their statutory obligation of care.

[659] Department for Business, Innovation and Skills. (2013). Draft Consumer Rights Bill. The Stationery Office. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/274926/bis-13-925-draft-consumer-rights-bill.pdf. [Accessed: December 12, 2022]; and Department for Business, Innovation and Skills. (2013). Private Actions in Competition Law: A consultation on options for reform - government response. Crown. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/70185/13-501-private-actions-in-competition-law-a-consultation-on-options-for-reform-government-response1.pdf. [Accessed: December 12, 2022].

2.2.1. Parental liability

Paul Hughes questioned whether UK common law subjects a holding company to possible tort liability grounded on its control of affiliates to a group of companies. Moreover, he wondered if when it is the case, it is on grounds of a distinct level of control and influence from that**,** which is able to produce a single economic entity as per arts 101 and 102 TFEU. Furthermore, he analysed the context of such a common law liability and whether a holding company, in pursuing to enforce a compliance program (but one that is tortious), might be liable for any loss occasioned by its faults.

Chandler v Cape Plc[660] regarded the question of if Cape, the holding company of the manager of Mr Chandler, Cape Products Ltd, had produced an express duty of care to Mr Chandler via a handling of liability, deduced in legislation. The Court of Appeal ruled that the holding company was expressly tortiously liable to the personnel of the subsidiary for the loss occasioned by a deficient safety policy of the group.

Prior to analyzing the litigation in depth, Paul Hughes emphasized the basis on which a tortious obligation has been deemed to emerge via an acceptance of liability. He noted that the concept of tortious liability via acceptance of liability, as Banakas has specified,[661] was primarily elaborated as part of economic deficit. Lord Morris of Borth-y-Gest asserted, in Hedley Byrne v Heller,[662] where a bank communicated an information as to the solvability of a client to the creative agency of the latter, that: "… if someone possessing special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise …".[663]

Lord Goff, in Henderson v Merrett Syndicates Ltd,[664] expanded on the notion of acceptance of liability: "Where the plaintiff entrusts the defendant with the conduct of his affairs, in general or

[660] Chandler v Cape Plc [2012] EWCA Civ 525.

[661] Banakas, S. (2009). Voluntary Assumption of Tort Liability in English Law: a Paradox? InDret, 4. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1499089. [Accessed: December 12, 2022].

[662] Hedley Byrne v Heller [1964] A.C. 465.

[663] Hedley Byrne [1964] A.C. 465, ([502]-[504]).

[664] Henderson v Merrett Syndicates Ltd [1994] 3 All E.R. 506.

in particular, the defendant may be held to have assumed responsibility to the plaintiff, and the plaintiff to have relied on the defendant to exercise due skill and care, in respect of such conduct".[665]

Lord Goff deduced that the notion of a "special skill" (a requisite of Hedley Byrne) "must be understood broadly, certainly broadly enough to include special knowledge". Acceptance of liability "in a situation 'equivalent to contract'" would be defined as implementing objective tests and that, where a litigation was classified "as falling within the Hedley Byrne principle, there should be no need to embark upon any further inquiry whether it is 'fair, just and reasonable' to impose liability for economic loss …".[666]

Steele has contemplated that: "… Hedley Byrne has been extended to cases that involve one or more party, including some that do not rely on the statement at all … liability has been found outside the area of negligent statements, including cases of professional services more generally …".[667]

Steele has stated that the notion of acceptance of liability is ambiguous and interplays with the "broader idea of proximity"[668] utilized in Caparo Industries Plc v Dickman Plc,[669] a litigation covering the potential liability of accountants for audited balance sheets realized for the firm and on which depended a bidding. The House of Lords, in Caparo, resorted to the ternary foreseeability test, propinquity and the justice, fairness and logic of attributing liability in rejecting the allegation.

UK tribunals' perspective on acceptance of liability was qualified by Banakas as "lurking behind … the threefold test of the Duty of Care, and the incremental approach …" to extending tort liability[670] and as being able to process "claims arising out of direct dealings between the parties"

[665] Henderson [1994] 3 All E.R. 506, ([520]).

[666] Henderson [1994] 3 All E.R. 506, ([521]).

[667] Steele, J. (2007). Tort Law: Text, Cases, and Materials (4th ed.). Oxford University Press, (p. 342).

[668] Ibid.

[669] Caparo Industries Plc v Dickman Plc [1990] 2 A.C. 605.

[670] Banakas, S. (2009). Voluntary Assumption of Tort Liability in English Law: a Paradox? InDret, 4. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1499089. [Accessed: December 12, 2022].

justly.[671] For example, in Williams v Natural Life Health Foods Ltd,[672] it was admitted that a potential franchisee, aiming to establish a health food shop, may have been capable of lodging an action against a manager, if the latter had shouldered direct liability for the correctness of financial data provided to the franchisee by the respondent company franchisor.

Going back to Chandler v Cape, the actual framework of the litigation was that Mr Chandler had been appointed by Cape Products, the subsidiary of Cape, at a plant in which asbestos was manufactured. His subjection to asbestos and following disease were a direct effect of asbestos dust moving to his working zone.

In 1945, Cape had purchased most of Cape Products' shares. Cape Products was eventually incorporated to the Cape corporate group, with at least one Cape manager being as well a board member in Cape Products at hours of operation as part of the request of Mr Chandler. The directorate of Cape engaged in direction matters at Cape Products, pursuing to assist settle manufacturing issues of Cape Products. Health and welfare difficulties were faced simultaneously at subsidiary and holding company dimension. Whereas Cape Products engaged its proper works doctor, Cape employed a medical advisor for the group that was in charge of the health and safety of all firms in the group where Cape was the holding company and who studied the relation among asbestos and lung illness.

The respondent holding company's counsellor at law stated that in defining if there had been an acceptance of liability for the tortious group safety and health policy enforced by the holding company, the tribunal should solely take account of practice and of concerns "not being normal incidents of the relationship between a parent and subsidiary company" (comprising the occurrence that "the parent controlled certain aspects of the subsidiary's activities"),[673] a reasoning vehemently denied by Arden L. J.. The latter denied the concept that the tribunal must assess in depth the distinct manners in which parent- daughter links were structured.[674]

She noted that the assumption of liability for harm related to control. Hence, "the court had to be satisfied that there was relevant control of the subsidiary's business" and it was "necessary to

[671] Ibid., (p. 3).

[672] Williams v Natural Life Health Foods Ltd [1998] 1 W.L.R. 830.

[673] Chandler [2012] EWCA Civ 525, ([44] and [45]).

[674] Chandler [2012] EWCA Civ 525, ([67]).

look at the scope of the policy to see the extent of any intervention".[675] Arden L.J. mentioned[676] Smith v Littlewoods[677] and Lord Goff's appreciation that, whereas there is no general obligation to stop third-parties (for instance, a subsidiary) occasioning damage to others, there were anomalies, for example when there is "a relationship between the parties which gives rise to an imposition or assumption of responsibility …".[678]

Arden L.J. noted that the issue was "whether what the parent did amounted to taking on a direct duty to the subsidiary's employees".[679] This was not always an open and discretionary acceptance, however it was a legal issue of "'attachment' of responsibility".[680] She asserted that, in judging Cape liable for the damage occasioned to Mr Chandler, the tribunal did not become involved in: "… piercing the corporate veil. A subsidiary and its company are separate entities. There is no imposition or assumption of responsibility by reason only that a company is the parent company of another company".

Assuming the awareness Cape had of the plant where Mr Chandler was working and admitting "its superior knowledge about the nature and management of asbestos risks", Cape had "assumed a duty of care" to guide Cape Products on the measures it should take so as to accomodate the personnel of the latter with a Safe System of Work (SSoW).[681]

Her decision specified the cases where a holding company would be held liable for the safety and health of the personnel of the daughter company. The pertinent cases covered a fact, such as the one at stake, in which: "(1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have

[675] Chandler [2012] EWCA Civ 525, ([46]).

[676] Chandler [2012] EWCA Civ 525, ([63]).

[677] Smith v Littlewoods [1987] A.C. 241.

[678] Smith [1987] A.C. 241 at 270.

[679] Chandler [2012] EWCA Civ 525, ([70]).

[680] Chandler [2012] EWCA Civ 525, ([65]).

[681] Chandler [2012] EWCA Civ 525, ([78]).

foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection. For the purposes of (4) it is not necessary to show that the parent is in the practice of intervening in the health and safety policies of the subsidiary. The court will look at the relationship between the companies more widely. The court may find that element (4) is established where the evidence shows that the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issues".[682]

Arden L.J. identified that, by its exercise of control on the welfare of the group, Cape had accepted a legal liability for the safe function of that strategy by its daughter company. Where the personnel had been injured by the tortious group welfare strategy it was liable to them for their linked bodily harm.

Arden L.J. did not define the question of liability by resort to the dangerous proximity test (employed for the enforcement of liability in Caparo Industries Plc v Dickman Plc)[683] but rather used the "assumption of liability" test, connecting it with company control. This preserves the plausibility of an acceptance of liability by holding companies in larger series of cases. It could be that liability is accepted expressly, according to Williams v Natural Life Health Foods Ltd,[684] or it could be attributed by the tribunal via the existence of control by the parent company, appearing via intrusions in the decisions of the daughter company.

This test of presumption of liability grounded on control was particular to its circumstances, namely the area of personal injuries. The question arises of whether this could cover larger number of issues, similar to the competition compliance strategies and arrangements of groups. Whereas this would be economic harm, instead of personal injuries such as the one covered by Chandler v Cape, there is considerable case law in tort legislation for such economic deficit actions to be successful when a liability has been accepted.

An additional issue is that of if third-parties, such as clients, prejudiced by the antitrust law infringements resulting from ineffective compliance across the group, might be capable of taking legal action against a holding company that had determined an ineffective compliance arrangement at common law across the group. It is complex to find how such deficits might have

[682] Chandler [2012] EWCA Civ 525, ([80]).

[683] Caparo Industries [1990] 2 A.C. 605, ([166]).

[684] Ibid., ([169]).

been dodged, assuming that any cartel will have been directed secretly and it must be most effective for the compliance duty and any tort action to be the responsibility of the noncompliant group of companies.

When the holding company had exercised "decisive influence" on its daughter company, then the two should be considered by UK tribunals as making up a single economic entity that has perpetrated a statutory tort. Lacking this degree of control, the concern would rely on the level of "intervention" of the holding company in the institution of the policy of the daughter company and on if tort notions of justice (implying the notion of the acceptance of liability) require the application of this principle to these third-parties that have done business directly with the daughter company based on the strategy of the group, but when it is improbable that the subsidiary could be capable of satisfying their requets. This would demand UK tribunals to implement the legal concept of "control" and expand the category of claimants capable of taking legal actions at common law such that it fosters the notion of group liability associated with the single economic entity doctrine implementable by statute. For the sake of uniformity, patently, degrees of control that have been exerted (by way of group strategy making) generate a common law action against the holding company of the group. Pursuant to Paul Hughes, the attribution of responsibilities in a group and the resort to group skill should give rise to tort liability when these inner tasks are executed in a way that conducts to third-party harm via the damaging market subversion.

2.2.2. Shareholders' or directors' liability

A different question is that of the possible liability in tort of an investor or director (de facto or de jure) that exerts illegitimate control on a corporation. For a long time, UK tort legislation has admitted the plausibility of joint liability in tort when a faulty practice has been executed as part of a "concerted enterprise"[685] and these are the grounds on which investors and managers, behaving illicitly, have become subject to civil actions.

[685] Brooke v Bool [1928] 2 K.B. 578.

The Court of Appeal[686] has admitted the notion of joint tortious liability when the tort is not the consequence of separate negligent acts, but comprised in "a concerted action to a common end".[687] It was found, in Said v Butt,[688] that a manager claimed to have incurred a breach of contract, but who was evidently behaving in good faith and in the context of his power, did not hold personal liability. McCardie J. abstained from presenting any observation regarding the situation should a manager be incurred tort liability for procuring a breach of contract when proceeding "wholly outside the range of his powers".[689] Lord Buckmaster observed, in Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd,[690] that a manager will not regularly be liable for the torts of the firm, simply by being a manager. Nonetheless, he found that there may be liability where the ones in control directly manage that a tort be perpetrated.[691] He considered this liability as being tortious in essence and a type of liability which did not cover lifting the corporate veil.

The situation of liability of cotortfeasors has been considered as part of several intellectual property (IP) litigations. A breach of UK copyright law is recognized as generating a tortious action and thus the plausibility of cotortfeasors liability.[692] MCA, in MCA Records Inc v Charly Records Inc,[693] alleged to have the right to the copyright in some tapes being traded illicitly by Charly Records Ltd (CRL). CRL, a UK firm, had been established by Charly Holdings Inc (Holdings), a Panamanian firm, whose investors identification was vague. Mr Young had supported Holdings in instituting CRL and was a manager of Holdings.

CRL had not challenged the allegation of MCA and, having waxed in a state of insolvency, had appointed an administrative receiver. The grossness of its infringement of copyright and the

[686] The Koursk [1924] P 140.

[687] The Koursk [1924] P 140, ([156]), per Scrutton L. J., citing Wyatt-Paine, W. (Ed.). (1921). Clerk and Lindsell on Torts (7th ed.). Sweet & Maxwell.

[688] Said v Butt [1920] All E.R. Rep 232; [1920] 3 K.B. 497.

[689] Said [1920] All E.R. 232, ([241]).

[690] Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd [1921] 2 A.C. 465.

[691] Ibid., ([475], [476]).

[692] See for example, Morton-Norwich Products Inc v Intercen Ltd [1978] R.P.C. 501.

[693] MCA Records Inc v Charly Records Inc [2001] EWCA Civ 1441.

deceptive quality of its pleading drove Jacob J. to deduce that supplemental damages[694] should be awarded in the original jurisdiction where MCA had pursued remedy against CRL.[695] After CRL's administrative receivership, the applicant brought a claim against Mr Young, counting him as a respondent to the action. It was claimed by the applicant that Mr Young had "personally authorised, procured and directed" the tortious practices of CRL and that he should be "personally liable for" its practices.[696] Regarding the liability of Mr Young, Rimer J. ruled,[697] at first instance: "… Mr Young … was, I find, Holdings' nominee director of CRL, albeit only a de facto or shadow director. There is, in my judgment, no doubt that he was part of the corporate governance of CRL and that he exercised the ultimate influence over it. I fully accept that CRL was run on a day to day basis by its managing directors. But I do find that decisions as to strategy and policy — and the overall ultimate control of the company — were his and that it was those decisions which ultimately carried the day. In this context it matters not whether or not Mr Young was the beneficial owner of Holdings. Even assuming that he was not, he was Holdings' man in ultimate charge of CRL".

The judge found, in the appeal brought to the Court of Appeal, that: "… in order to hold Mr Young liable as a joint tortfeasor for acts of copying, and of issuing to the public, in respect of which CRL was the primary infringer and in circumstances in which he was not himself a person who committed or participated directly in those acts, it was necessary and sufficient to find that he procured or induced those acts to be done by CRL or that, in some other way, he and CRL joined together in concerted action to secure that those acts were done".

On grounds of the expansive implication of Mr Young in the transgression of copyright by CRL and the control he exercised as the nominee director of Holdings, that "was not exercised through the constitutional organs of CRL",[698] the Court of Appeal ruled that he held personal liability as a joint tortfeasor with CRL and rejected his appeal. As asserted by Chadwick L.J.: "If the judge's

[694] As per the Copyright, Designs and Patents Act 1977, (s. 97). Available at: https://www.legislation.gov.uk/ukpga/1988/48/contents. [Accessed: December 12, 2022].

[695] MCA Records Inc v Charly Records Inc unreported, April 18, 1996.

[696] MCA Records unreported, April 18, 1996, ([16]).

[697] MCA Records Inc v Charly Records Inc [2000] All E.R. (D) 370.

[698] MCA Records [2001] EWCA Civ 1441, per Chadwick L. J., ([55]).

findings of fact are accepted, Holdings and Mr Young chose to exercise control over CRL otherwise than through its constitutional organs".

An analogous litigation is the one of Boegli-Gravures SA v Darsall-ASP Ltd,[699] where the High Court judged that a manager held personal liability for a patent violation by his corporation. He had orchestrated the violation (by discussing the sale of offending products being aware that this infringed the rights of the plaintiff) whereas proceeding out of his legitimate function and thereby made himself liable as a cotortfeasor.

2.3. Liability in tort for environmental or human rights infringements

The European Parliament and the European Council came to terms, in 2004, with possibly the most contentious environmental policy instruments in the record of the EU: the Directive 2004/35 on Environmental Liability with Regard to the Prevention and Remediation of Environmental Damage.[700]

The starting point for the Directive can be affixed to the issue in 1993 by the Commission of The Green Paper on Remedying Environmental Damage,[701] succeeded by the White Paper on Environmental Liability in 2000,[702] and then by the "brand new" Communication From The Commission To The European Parliament, The Council And The European Economic And Social Committee in 2022.[703] In 2002, after lengthy debate and conference, the Commission

[699] Boegli-Gravures SA v Darsall-ASP Ltd [2009] EWHC 2690 (Pat).

[700] Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02004L0035-20190626&from=EN. [Accessed: December 12, 2022].

[701] European Commission. (1993). Remedying Environmental Damage [Green paper]. Office for Official Publications of the European Communities. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51993DC0047&from=ET. [Accessed: December 12, 2022].

[702] European Commission. (2000). Environmental liability [White paper]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52000DC0066&from=EN. [Accessed: December 12, 2022].

[703] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on decent work worldwide for a global just transition and a sustainable recovery. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022DC0066&from=EN. [Accessed: December 12, 2022].

submitted the proposal[704] which eventually conducted to the Directive. The endorsement of the Directive represented a progress in respect of the rehabilitation of harm to the environment in Europe. Although being underemphasized throughout the lengthy and labyrinthine conference and legal processes, the Directive aimed to frame the environmental regulation of the EU market.

The Directive's purpose was setting up "a framework of environmental liability based on the 'polluter-pays' principle, to prevent and remedy environmental damage".[705] This tool represents the most sensible adoption of the polluter pays principle laid down in Article 174 of the Treaty establishing the European Community (TEC).[706] The Directive envisages in that context that: "an operator who has caused environmental damage or the imminent threat of such damage is to be held financially liable, in order to induce operators to adopt measures and develop practices to minimise the risks of environmental damage so that their exposure to financial liabilities is reduced".[707] Pursuant to Bernat Mullerat,[708] even if the endorsement of an EC environmental liability policy is an effective instrument for the application of the polluter pays principle, it has yet to be seen if this is adequately rationalized in virtue of the principles of proportionality and subsidiarity.[709]

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[704] Proposal for a Directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002PC0017&from=EN. [Accessed: December 12, 2022].

[705] [2004] O.J. L143, (Art. 1).

[706] Treaty establishing the European Community. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12002E/TXT&from=EN. [Accessed: December 12, 2022]; see as well Rio Declaration on Environment and Development (1992), (principle 16). Available at: https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf. [Accessed: December 12, 2022].

[707] [2004] O.J. L143, (Recital (2)).

[708] Mullerat, B. (2005). European environmental liability: one step forward. International Company and Commercial Law Review, 16(6), 263-268.

[709] See Farnsworth, N. (2004). Subsidiarity - A Conventional Industry Defence. Is the Directive on Environmental Liability with regard to Prevention and Remedying of Environmental Damage Justified under the Subsidiarity Principle? European Energy and Environmental Law Review, 13(6), 176-185.

The main focus for defining the extent of implementation of the Directive is the eventuality of harm to the environment or the impending risk of that.

In the light of the Directive, liability for harm to the environment or the impending risk of that is assigned to the operator. Nevertheless, the latter is not only the entity that has direct connection with the harmful behaviour, but a far more comprehensive notion. It refers to: "any natural or legal, private or public person who operates or controls the occupational activity or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorisation for such an activity or the person registering or notifying such an activity".[710]

Among the essential features of the notion of operator is the exertion of control upon the harmful operation. The operator is not merely the licensee to an operation but as well the entity exerting control upon such operation. The expression "controls the occupational activity" sounds as though entailing control upon the operation in its entirety, instead of only the environmental activity. This could be pertinent to the extent that liability may be imputed to a general director in virtue of the Directive, whilst those in charge of the environmental strategy and direction would be excluded from that liability.

The factor of control as well permits holding companies and group companies that exert direct control on the harmful amenity to be held liable. In that context, the factor of control intends to impede corporations from conferring the most environmentally damaging operations on tiny or undercapitalized corporations so as to circumvent or, at a minimum, minimize, the remediation cost. The White Book did not actually observe parental liability or the ways to lift the corporate veil so as to attain the liable entity, even if it acknowledged that some businesses confer high-risk manufacture operations on small entities that might well be short of adequate funds to meet environmental liability. The factor of control surely supports the application of the polluter pays principle, as it permits the entity whose activities or guidance occasion harm to the environment, to be held liable. Nevertheless, it may deter the provision for environmental strategies, as is usually the case in big companies, because of the concern of liability threatening the head office. Several big companies may revisit their perspective on environmental strategies and land up

[710] [2004] O.J. L143, (Art. 2.6).

miniaturizing their environment outlooks and, thus, produce incompatible environmental direction strategies.[711]

The operator concept is not restricted to group entities, but extends to any third-party exerting control, whether as customer or lender. The factor of control may well generate significant issues and proof questions, especially as the competent authority usually disregards the pecking order and will, accordingly, lean towards imputing liability to the licensee. The description laid down for the operator concept provides the ability to establish liability for different entities, for example, when, besides the licensee there is an entity exercising control over the business activities and an entity behind the registration of the material produced by such activities. In this situation, possibly liable entities will try to circumvent their liability by signaling other operators or even third-parties still not determined by public authorities.

It is remarkable that the Directive has selected a system in which different liable entities may coincide, as specifically this is one of the main downsides of the Superfund in the United States. In fact, cases of operators held jointly and severally liable have given rise to considerable legal action, with abundant funding allowed for legal claims instead of for rehabilitation.

Hence, according to Bernat Mullerat, the possibility for parental liability would conduct companies, especially big industry groups, to scrupulously decide which group entity will be given responsibility for risky operations with regard to the environment.

After the institution of the corporate separateness of corporations and their limited liability in the 1800s, there have been efforts by voluntary and involuntary creditors of the insolvent or wound up daughter company to receive reliefs from the holding company. The canonical perspective is that the holding company is neither liable for the actions and the inactions of the daughter company nor holds liability for the payment of its debts. In David Thompson v The Renwick Group plc,[712] the Court of Appeal upheld that the deviations from this perspective are solely implementable in really extraordinary situations. Pursuant to Uglješa Grušic, the significance of this decision could have obstructed the then prevailing attempts in the EU to establish adequate

[711] Bergkamp, L. (2002). The Proposed Environmental Liability Directive. European Environmental Law Review, 305.

[712] David Thompson v The Renwick Group plc [2014] EWCA Civ 635.

legal reliefs for abuses by companies.[713] In Thompson v Renwick, the circumstances were such that Mr. Thompson was employed by two corporations which were members of the Renwick Group. Mr. Thompson had direct contact with unprocessed asbestos in exercising his functions. Pursuant to the judge of the Court of Appeal, "the conditions in which Mr. Thompson was expected to work are really quite shocking and should be a cause for shame".[714] Consequently, Mr. Thompson suffered from severe injury. As none of his managers was financially sound nor had liability insurance, Mr. Thompson brought legal actions against the Renwick Group plc, the group's parent company. The claim of Mr. Thompson was grounded on the amalgamation of the activities of his managers with the ones of the other group entities and their combined assets. The pertinent issue before the tribunal was if the holding company had direct due care to Mr. Thompson with regard to him being exposed to asbestos in exercising his functions. In the Manchester County Court, the judge ruled approving of the plaintiff. He found that the respondent had ran the day to day activities of one of the managers of Mr. Thompson to an adequate limit to generate due care to Mr. Thompson. The grounds of this ruling were the circumstance that the parent company had entrusted a middle manager with safety and health concerns by means of which it exerted control. This was rejected by the Court of Appeal. The manager, in controlling the daily activities of the manager of Mr. Thompson, was not operating in the name of the holding company. He was operating according to his fiduciary obligations due to the corporation of which he was a manager. The Court of Appeal, after having rejected the grounds of the decision of the judge, moved to the issue of if the totality of the circumstances was still enough to ground the allocation of a duty of care to the holding company in virtue of Caparo v Dickman's "three-fold test",[715] that is founded on reasonably foreseeable harm, propinquity and justice. The Court of Appeal, so as to solve this issue, considered the prior significant Chandler v Cape[716] litigation. This lawsuit as well treated the due care of a holding company to safeguard the daughter company's personnel from the hazard of harm caused by

[713] Grušić, U. (2015). Responsibility In Groups of Companies and the Future Of International Human Rights And Environmental Litigation. The Cambridge Law Journal, 74(1), 30-34.

[714] Ibid., (para. [1]).

[715] Caparo v Dickman [1990] 2 A.C. 605.

[716] Chandler v Cape [2012] EWCA Civ 525; [2012] 1 W.L.R. 3111; A. Sanger [2012] C.L.J. 478.

asbestos fibers. Chandler v Cape was the one true lawsuit where a holding company was deemed liable for violation of its direct due care for the safety and health of the personnel of its daughter company. Nevertheless, in Thompson v Renwick, the Court of Appeal set apart Chandler v Cape being that the circumstances of both lawsuits were "far removed".[717] There was a pair of important distinctions. At the outset, the holding company in Chandler v Cape did not solely take care of the safety and health of all the personnel in the group, but as well a number of points of the process of manufacture at the daughter company were negotiated and permitted by the holding company. Conversely, the holding company in Thompson v Renwick simply took care of the safety and health at the daughter company. Moreover, in Chandler v Cape, the holding company had better skill for safety and health concerns. In Thompson v Renwick, the holding company didn't have better skill for such concerns. In sum, in Thompson v Renwick, the Court of Appeal disagreed to disregard the corporate separateness of corporations and their limited liability by allocating direct due care to the holding company to safeguard its daughter company's personnel from the hazard of harm caused by asbestos fibers. The Court of Appeal, by asserting at two occasions that the circumstances of Chandler v Cape were "far removed",[718] confined it to its own particular facts and upheld that the deviations from the canonical perspective are solely implementable in really extraordinary situations.

As aforementioned, Thompson v Renwick could interfere with the attempts in the European Union to establish adequate legal reliefs for human rights violations and environmental damage by corporations, as asserted by Uglješa Grušic.[719] According to him, a major challenge of global governance is how to hold transnational corporations liable for the human rights violations and environmental damage perpetrated by their daughter companies in the third world. The answer to this question must be many-sided and comprise a large number of corporate constituencies and operators. Global litigation is regarded as a part of the answer. This is upheld, inter alia, by the

[717] David Thompson v The Renwick Group plc [2014] EWCA Civ 635, (para. [29]).

[718] Ibid., (paras [29] and [36]).

[719] Grušić, U. (2015). Responsibility In Groups of Companies and the Future Of International Human Rights And Environmental Litigation. The Cambridge Law Journal, 74(1), 30-34.

UN Guiding Principles on Business and Human Rights,[720] of which the European Union and its Member States have asseverated the enforcement.[721]

Pursuant to Uglješa Grušic, the entitlement to adequate legal reliefs in the European Union relies on numerous determinants, comprising, among others, the relevant provisions of the jurisdiction to adjudicate and the governing law, and the scope of the substantive law implementable to the human rights and environmental breaches. Academics, militants and lawmakers that promote a better part of European tribunals in regulating transnational corporations suggest the English tort law as a corpus juris providing effective answers. Chandler v Cape is usually referred to as a model or as a "source of inspiration" for the allocation of a duty of care to the parent company of a transnational corporation domiciled in the European Union for the safety and health of the personnel and others impacted on by the actions and inactions of its cross-border daughter company.[722] The impact of Chandler v Cape transcends academic and legal writings. The District Court of The Hague in the Netherlands delivered, in 2013, a decision in Akpan and others v Royal Dutch Shell and Shell Petroleum Development Co of Nigeria Ltd,[723] where it debated and set apart Chandler v Cape so as to find that, in virtue of the legislation in Nigeria, due care should not be allocated to Royal Dutch Shell for the safety and health of all persons impacted on by the actions and inactions of the daughter company in Nigeria. Chandler v Cape was an auspicious judgement which gave rise to a discussion on the effectiveness of global human rights

[720] United Nations. Office of the High Commissioner for Human Rights. (2011). Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework. United Nations, (see, in particular, principle 25). Available at: https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf. [Accessed: December 12, 2022].

[721] European Commission. (2011). A Renewed EU Strategy 2011-14 for Corporate Social Responsibility. European Commission. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0681&from=EN. [Accessed: December 12, 2022].

[722] For example, Enneking, L. F. H. (2012). Foreign Direct Liability and Beyond - Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability. Eleven International Publishing. Available at: https://ssrn.com/abstract=2206836. [Accessed: December 12, 2022]; Lindsay, R., McCorquodale, R., Blecher, L., Bonnitcha, J., Crockett, A., & Sheppard, A. (2013). Human rights responsibilities in the oil and gas sector: applying the UN Guiding Principles. The Journal of World Energy Law & Business, 6(1), 2-66. Available at: https://doi.org/10.1093/jwelb/jws033. [Accessed: December 12, 2022].

[723] Akpan and others v Royal Dutch Shell and Shell Petroleum Development Co of Nigeria Ltd (2013) L.J.N. BY9854.

and environmental cases within the United Kingdom and the European Union all in all. In Thompson v Renwick, the Court of Appeal, having confined the case to its own particular facts, challenged the sanguineness manifested by the contributors to this discussion. The Court of Appeal, after its recognition that the deviations from the corporate separateness and limited liability principles of corporations are solely relevant in really extraordinary cases, upheld as well actually that the claimants of human rights and environmental breaches by corporations could very well not receive reliefs from the holding company (except for litigations manifesting the identical main facts as Chandler v Cape). The Akpan v Royal Dutch Shell litigation signals that every litigation on human rights and environmental breaches by corporations is unique, and that it will be difficult to find litigations adequately comparable to Chandler v Cape. The recognition of their small probability of prevailing on their claims as well signifies that claimants of breaches by corporations will find it more complicated to be defended on grounds of a conditional fee arrangement which, at a minimum within the United Kingdom for example, is the sole manner of subsidizing global human rights and environmental cases. Besides the ambiguities existing in the questions of private international law posed by this kind of cases and the reforms to the regime of legal fees inaugurated by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, handicaping victims, Thompson v Renwick renders the United Kingdom for example an unwelcoming venue for global human rights and environmental cases. Pursuant to Uglješa Grušic, assuming the marked sanguineness kindled by Chandler v Cape, there are grounds to consider that Thompson v Renwick would have broad effect on the limits of the English tort law as regards the award of legal reliefs for breaches by transnational corporations.[724]

Eventually, pursuant to Uglješa Grušic, the chain of events in Thompson v Renwick and Chandler v Cape demonstrates that global attempts to establish adequate legal reliefs for breaches by corporations cannot depend on peculiar local answers. He considers that a Europe that is truly engaged in the application of UN Guiding Principles on Business and Human Rights should look for the establishment of effectively global and efficient principles of duty of care

[724] Grušić, U. (2015). Responsibility in Groups of Companies and the Future of International Human Rights and Environmental Litigation. The Cambridge Law Journal, 74(1), 30-34.

that EU transnational corporations should consider in their national and cross-border activities.[725] Indeed, "Doing business around the world, global trade – all that is good and necessary. But this can never be done at the expense of people's dignity and freedom... Human rights are not for sale – at any price".[726]

2.4. Corporate Social Responsibility

A substantial part of the discussion concerning corporate social responsibility rests on the approach to the part of the corporate existence in community. There is an underlying difference among the social and economic approaches to the corporate existence. The "concession" theory is one of the first principles of the corporate powers. It stipulates that the corporation is a concession given by governments and its activities are hence warrantably policed by the legislation. Nevertheless, corporations have "no soul to be damned and no body to be kicked", as reported by Thurlow.[727] A different principle of corporate law is the "contractarian" theory, that posits that the business corporation is a collection of incomplete contracts among private parties instead of a real entity with rights and liabilities.[728] In virtue of this approach, a corporation is simply a medium which simplifies the effective arrangement of voluntary agreements between private parties. As against this theory, the "communitarian" perspective reflects the social

[725] See e.g., European Commission. (2022). Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937. European Commission. Available at: https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC_1&format=PDF. [Accessed: December 12, 2022].

[726] President of the European Commission Ursula von der Leyen State of the Union Address, 15 September 2021. See European Commission. (2022). On decent work worldwide for a global just transition and a sustainable recovery. European Commission. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022DC0066&from=EN. [Accessed: December 12, 2022].

[727] Poynder, J. (1844). Literary Extracts From English and Other Works; Collected During Half a Century: Together With Some Original Matter. J. Hatchard & son, (p. 268). A quotation ascribed to Lord High Chancellor of Great Britain (1731-1806).

[728] Easterbrook, F. H., & Fischel, D. R. (1991). The Economic Structure of Corporate Law. Harvard University Press; and for an interesting "philosophical critique of contractarian-based corporate social responsibility", see Woermann, M. (2011). In corporations we trust? A critique of contractarian- based corporate social responsibility models. African Journal of Business Ethics, 5(1), 26-35. Available at: https://doi.org/10.15249/5-1-48. [Accessed: December 12, 2022].

aspirations of a corporation. The latter is of considerable social importance and its prosperity or collapse influences community in its entirety. Hence, since companies are components of the community (as legal entities), company law should be capable of assigning liabilities to corporations to adopt socially responsible behaviour.[729] The main focus of CSR is that the legislation should shield all the corporate constituencies, not solely stockholders.

In the James Hardie group, the firms were involved in the production and supply of asbestos. Three firms were the main participants: the holding company, JHIL,[730] that was an asbestos' importer but waxed a producer in the Twenties and carried on till 1937 when production was pursued by its daughter company, Coy,[731] which stopped producing asbestos in 1987, and the third firm was Hardy Ferodo that manufactured friction and brake linings materials.[732]
Asbestos was utilized in Australia throughout a long period in the twentieth century in the production of building and many other products. Asbestos exposure can cause severe deseases.[733] Asbestosis was widespread in the Twenties and the Thirties. The relationship among asbestos fibres breathing in and mesothelioma was determined in 1960.[734]
Even if the breach of due care and diligence by the James Hardie group in the production or supply of the asbestos materials was terminated some years back, the liability ensuing from such breach of duty was accumulating, and would carry on accumulating, over the years.[735] In the end of the Ninetieth, the James Hardie group used risk assessment by actuaries of its liabilities in relation with asbestos. The liabilities related to asbestos were detached from the ones of the

[729] Parkinson, J. E. (1993). Corporate Power and Responsibility: Issues in the Theory of Company Law. Clarendon Press, (pp. 260-261).

[730] Which became known as ABN 60 Pty Ltd.

[731] Which became known as Amaca Pty Ltd.

[732] Hardie Ferodo then became known as James Hardie Brakes Pty Ltd, and later as Jsekarb Pty Ltd before becoming Amaba Pty Ltd.

[733] Special Commission of Inquiry into the Medical Research and Compensation Foundation. (2004). Report (James Hardie Inquiry), (Vol.1, Part 1, p. 17). Available at: https://webarchive.nla.gov.au/awa/20041019002540/http://pandora.nla.gov.au/pan/45031/20041019-0000/Volume1.pdf. [Accessed: December 12, 2022].

[734] Ibid., (footnote 4., p.18).

[735] Ibid., (p. 19).

James Hardie group in its entirety, through a trust. The structure of the trust was such that the daughter companies, Coy and Hardy Ferodo, would keep liable to plaintiffs as regards liabilities related to asbestos, in range of their actual assets, but the holding of Coy and Hardy Ferodo would be turned over from JHIL to a new firm independent from the latter, that would act as a trustee, whose main aim was to meet claims for damages.[736]

The board of directors of JHIL decided to carry on restructuring in 2001. JHIL declared the restructuring besides the report of its third-quarter performance. JHIL asserted that: "James Hardie Industries Limited (JHIL) announced today that it had established a foundation to compensate sufferers of asbestos-related diseases with claims against two former James Hardie subsidiaries and fund medical research aimed at finding cures for these diseases. The Medical Research and Compensation Foundation (MRCF) will be completely independent of JHIL and will commence operation with assets of $293 million. The Foundation has sufficient funds to meet all legitimate compensation claims anticipated from people injured by asbestos products that were manufactured in the past by two former subsidiaries of JHIL. JHIL CEO Mr Peter Macdonald said that the establishment of a fully-funded Foundation provided certainty for both claimants and shareholders. […] In establishing the Foundation, James Hardie sought expert advice from a number of firms, including PricewaterhouseCoopers, Access Economics and the actuarial firm, Trowbridge. With this advice, supplementing the company's long experience in the area of asbestos, the directors of JHIL determined the level of funding required by the Foundation. "James Hardie is satisfied that the Foundation has sufficient funds to meet anticipated future claims", Mr Macdonald said".

The main aim of such substantial restructuring was to allow the James Hardie group afterwards to be provided with capital funds or to use its capital stock for prospect accessions without the trace of foreseeable prospect asbestos liabilities.[737] The tremendous inconsistency among the commencing funds of the MRCF and the risk assessment by actuaries of the liabilities occasioned public outrage effecting the institution of the James Hardie Inquiry in 2004.

[736] Ibid., (p. 25).

[737] Ibid., (p. 8).

A substantial part of the debate about CSR has focused on the interplay between the "shareholder primacy" theory in corporate governance (in other words, shareholder wealth maximization) and the effects of corporate behaviour on the society and the environment. Pursuant to Shirley Quo,[738] it seems that the James Hardie group's board and direction followed the neoclassical economics theory as to its social liabilities. It had a short term orientation in respect of quarterly results to the detriment of long term goals such as environmental protection. Firms which espouse CSR outgrow the compact objective of short term profitability to consider modifying social outlook for CSR based on a policy on long-termism and risk management.

Even if it has been stipulated that the rules on the liabilities of managers allow the latter to observe the interests of non-shareholding constituencies,[739] it is feared that it may clash with the liabilities of managers to behave for the benefit of the corporation. According to Shirley Quo, whilst it may be inadequate to enact CSR into the rules regarding liabilities of managers, some sort of CSR reports might permit managers to observe the interests of non-shareholding constituencies.[740]

As reported by the James Hardie Inquiry, there may have been no legal duty upon JHIL for funding Coy's and Hardie Ferodo's liabilities merely for they were its daughter companies, yet if it was regarded to be for the benefit of JHIL to be segregated from the latter due to the smirch of liabilities related to asbestos they conveyed with them, there has been a failure to understand why it would not have been for the benefit of JHIL to fund such restructuring efficiently.[741] This is the commercial perspective on philanthropic responsibility or the "enlightened self-interest" philosophy: in other words, besides the liability of firms to abidance by legislations, it might well be for the business benefit of corporations, as concerns long-termism and risk management, to

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[738] Quo, S. (2011). Corporate social responsibility and corporate groups: the James Hardie case. Company Lawyer, 32(8), 249-253.

[739] McConvill, J. (2005). Directors' Duties to Stakeholders: A Reform Proposal Based on Three False Assumptions. Australian Journal of Corporate Law, 18, 88; Purcell, J., & Loftus, J. (2007). Corporate Social Responsibility: Expanding Directors' Duties or Enhancing Corporate Disclosure. Australian Journal of Corporate Law, 21, 135.

[740] Purcell, J., & Loftus, J. (2007). Corporate Social Responsibility: Expanding Directors' Duties or Enhancing Corporate Disclosure. Australian Journal of Corporate Law, 21, 135.

[741] James Hardie Inquiry, 2004, (Vol.1, Part 1, p. 12).

observe sustainability in its actions.[742] The philosophy of enlightened self-interest acknowledges that CSR is vital to profitability and societal goals. Businesses which do not take into account the longer-term effect of their actions may put their economic future at risk. A great illustration of such businesses is the James Hardie Group.

There is as well a commercial reflection that advances an ethical reasoning that corporations in a situation comparable to that of the James Hardie Group should not reject the claims for damages against its previous daughter companies.[743] A reason for this is that JHIL and JHI NV, as the beneficiary of its funds, have obtained considerable advantages from the commercial operations of its previous daughter companies, comprising operations at the time when these corporations were trading in asbestos such that it occasioned the losses or harms that generated tortious liability.[744] Furthermore, "The notion that the holding company would make the cheapest provision thought "marketable" in respect of those liabilities so that it could go off to pursue its other more lucrative interests insulated from those liabilities is singularly unattractive. Why should the victims and the public bear the cost not provided for?",[745] "JHI NV still has in its pockets the profits made by dealing in asbestos, and those profits are large enough to satisfy most, perhaps all, of the claims of victims of James Hardie asbestos",[746] as asserted in the James Hardie Inquiry.

Just as English corporate law, Australian company law has allowed limited liability for companies limited by shares, and this resolution can be explained by economic arguments. The theories of corporate separateness[747] and shareholder primacy are key to the evolution of corporate law in common law countries. The James Hardie Inquiry reported that, as an overall principle, JHIL, Coy or Hardie Ferodo would not hold liability for tortious claims against any of

[742] Australia. Corporations and Markets Advisory Committee. (2006). The Social Responsibility of Corporations: report, (p. 40).

[743] James Hardie Inquiry, 2004, (Vol.1, Part 5, p. 555).

[744] Ibid.

[745] James Hardie Inquiry, 2004, (Vol.1, Part 1, p. 13).

[746] James Hardie Inquiry, 2004, (Vol.1, Part 5, p. 555).

[747] Salomon v Salomon & Co Ltd [1897] A.C. 22 HL.

the three other entities as affiliates to the group. This was the stance although JHIL was the holding company of Coy and Hardie Ferodo. In Walker v Wimborne,[748] *the judge* of the High Court of Australia *asserted that:*

"To speak of the companies as being members of a group is something of a misnomer which may well have led his Honour into error. The word "group" is generally applied to a number of companies which are associated by common or interlocking shareholdings, allied to unified control or capacity to control. In such a case the payment of money by company A to company B to enable company B to carry on its business may have derivative benefits for company A as a shareholder in company B if that company is enabled to trade profitably or realize its assets to advantage. Even so, the transaction is one which must be viewed from the standpoint of company A and judged according to the criterion of the interests of that company".

Accordingly, a holding company may hold liability for tortious claims against its daughter companies on grounds of implied authority among the latter and the holding company due to its exercise of control over the group.[749] Nevertheless, tribunals in Australia have specified that the exercise of control by the holding company over a daughter company is not enough for the corporate veil to be be pierced. The judge indicated in Briggs v James Hardie & Co Pty Ltd[750] that:

"As the law presently stands, in my view the proposition advanced by the plaintiff that the corporate veil may be pierced where one company exercises complete dominance and control over another is entirely too simplistic. The law pays scant regard to the commercial reality that every holding company has the potential and, more often than not, in fact, does exercise complete control over a subsidiary".

The James Hardie Inquiry debated additional grounds for piercing the corporate veil. It made the strong point that JHIL was Coy's shadow director in the period in question, for the management of Coy was used to operate pursuant to the guidance of JHIL on the distribution of dividends and

[748] Walker v Wimborne (1976) 137 C.L.R. 1, (para. [11]). Available at: https://staging.hcourt.gov.au/assets/publications/judgments/1976/056--WALKER_v._WIMBORNE--(1976)_137_CLR_1.html. [Accessed: December 12, 2022].

[749] Smith Stone & Knight Ltd v Birmingham Corp [1939] 4 All E.R. 116. Available at: https://www.thelawlane.com/smith-stone-and-knight-ltd-v-mayor-of-birminghamfull-text/. [Accessed: December 12, 2022].

[750] Briggs v James Hardie & Co Pty Ltd (1989) 16 N.S.W.L.R. 549.

on management fees' payment, on James Hardie group's reorganization strategies, and on Coy's assets purchases.[751] If it could be determined that JHIL, Coy's shadow director, infringed its obligations as a manager, a tribunal might rule that there should be compensation by JHIL of the harm inflicted on Coy due to such infringement. Nevertheless, this route was not followed by Australia's national corporate regulator. On this point, it must be stressed that tribunals in Australia are usually disinclined to pierce the corporate veil.

A revision of the Cth was proposed by the James Hardie Inquiry in order to hinder the adoption of the theory of limited liability as regards compensation claims for personal injuries and wrongful death to affiliates to the eventual holding company.[752] The recommended revision would not exclude all investors from limited liability, but solely holding companies.[753] Thus, it wouldn't have any impact on non-corporate shareholders' liability and should not impact on their incentives to group their assets by getting incorporated.[754] The Inquiry recorded that general revision was denied by the Corporations and Securities Advisory Committee (CASAC), that had contemplated the issue of limited liability for tort in 2000 as part of its review of groups of companies.[755] Nevertheless, CASAC did tolerate particular "see through" liability law piercing the corporate veil and holding parent companies or other group entities directly liable for the negligence of their daughter companies when doing the latter was "desirable in the public interest".[756]

[751] James Hardie Inquiry, 2004, (Vol.1, Part 3, p. 98).

[752] James Hardie Inquiry, 2004, (Vol.2, Annexure T: The Concept of Limited Liability -- Existing Law and Rationale, p. 424).

[753] Ibid., (p. 573).

[754] Ibid.

[755] Australia. Companies and Securities Advisory Committee. (2000). Corporate groups : final report / Companies & Securities Advisory Committee. The Committee, (para.4.22).

[756] Ibid., (paras 4.16, 4.20).

2.5. Filling the gaps of common law as a template for other jurisdictions

Several means to solve the existing issues have been proposed by a number of illustrious corporate law academics. According to Ali Imanalin,[757] academics advocating limited liability's allocative efficiency consent that it can conduct to a case in which tort claimants aid a firm to undertake increased risk ventures, and suggest that there should not be limited liability for tortious debts.[758] This suggestion is advocated for stockholders are best placed to counterbalance risks, as in opposition to a tort claimant, a stockholder of a big publicly listed company is more destined to portfolio diversification, and therefore it is less disadvantaged when it is in a position to offset the deficit caused by the tortious act or omission (by means of its assets).[759] A number of academics as well profess that it is unethical to admit the capacity of a corporation to be formed such that tort claimants are not entitled to collect against the assets of the other firms in the group of companies.[760] Pursuant to Ali Imanalin, the main handicap of this perspective is that it will undoubtfully be detrimental to the capital markets systems. Rather, tort claimants may be granted priority in the soi-disant "entitlement ladder" under applicable insolvency laws, receiving preferential right to payment along with preferred creditors.[761] The downside of this perspective is that it presents an incomplete answer to the question.[762] A different doctrine contends that corporate social irresponsibility cases might be settled by adopting the corporate social responsibility form.[763] The main flaw of this thesis is that corporate social responsibility[764]

[757] Imanalin, A. (2011). Rethinking limited liability. Cambridge Student Law Review, 7(1), 89-99.

[758] Hansmann, H., & Kraakman, R. (1991). Toward Unlimited Shareholder Liability for Corporate Torts. The Yale Law Journal, 100, 1879.

[759] Leebron, D. (1991). Limited Liability, Tort Victims, and Creditors. Columbia Law Review, 91, 1565, (p. 1603).

[760] Pettet, B. (1995). Limited Liability - A Principle for the 21 st Century? Current Legal Problems, 48, 125, (p. 154).

[761] Ibid., (p. 120-121).

[762] Ibid., (p. 157).

[763] Ireland, P. (2010). Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility. Cambridge Journal of Economics, 34, 837, (p. 853).

[764] The International Chamber of Commerce described "corporate social responsibility" as "the voluntary commitment by businesses to manage their roles in society in a responsible way".

would keep discretionary and with no legal force, even as a reinforced strategy. Yet, the ambiguity of corporate social responsibility should not dissuade one from accepting an invitation from a company to run its business in a manner that contributes to social interests.

Ali Imanalin sees that within the framework of groups of companies, an "imperative rule" prohibiting a holding company from excluding liability for the tort of its insolvent daughter company is sensible if the loss or harm caused is personal injuries or wrongful death. For a long time, personal injuries and wrongful death have been considered as specific claims due to their severe effects on their sufferers, their family members, and community at large. Numerous states prohibit limiting or excluding liability for negligence causing personal injuries or wrongful death via a contract clause.[765] Business organization law should as well tackle the relevance of such harm, at a minimum in terms of liability for groups of companies. The most impacted on claimants should be authorized to prosecute a holding company, although it clashes with the basic assumption that the assets of the firm shall only be resorted to for the payment of corporate creditors. A holding company stockholders would still be secured by limited liability regardless of whether or not the holding company is near insolvency after the action against its assets is brought. Such "imperative rule" of law would not interfere with business growth, for the adage "the riskier the activity, the more profit it generates" would still get along. Investment firms will still be attracted by investment in risky markets, but will monitor their daughter companies more efficiently. Lenders should be capable of assimilating expanded supervision and review costs linked to the investments of the holding company. Such lenders could be given a period of adaptation to adjust to the transitions. Nevertheless, questions will be posed regarding the apportionment, the allocation and the limit of liability (albeit questions of less complication). Pursuant to Ali Imanalin, the "imperative rule" is not really broad, but it gives the most deserving victim a legal basis to bring a claim against the holding company of a group of companies. The circumvention of insolvency and nurture of responsible business in a group of companies are efficient means, yet they do not fill the main gap in business organization law. The revised perspective will strive to counteract the unfairness faced by tort claimants. The legal structure of limited liability, which is founded on the principles of microeconomics, cannot be

[765] See for instance, the Unfair Contract Terms Act 1977, (s. 2 para.1). Available at: https://www.legislation.gov.uk/ukpga/1977/50. [Accessed: December 12, 2022].

exploited to shield a corporate shareholder from liability for tort. It is irrational to deprive victims from legal remedies, and rationalize it by the advantage presented to society in general by limited liability. Personal injuries or wrongful death should be considered as actionable claims, at a minimum in groups of companies, which would provide the tort claimant with a cause of action to sue other firms in a group of companies.

CONCLUSION

The group of companies, the relationship of at least two separate legal persons forming one operative business entity, is a global, time-honored actuality of the "big bad world".
As regards the regulation of groups of companies, within civil law countries for instance (such as France), commercial codes cannot be flawless for mercantile law is such a broad discipline.[766] Moreover, corporate groups are yet somewhat dismissed by the legislation, and by the judiciary. In this regard, the legislation seems more conform to practice than the judicature of commercial tribunals that are reluctant to accept the group as a legal person, and put very limitative requirements to the liability of the holding company for the debts of its daughter company.[767]

In corporate groups, the safeguard of creditors materializes through the resort to present tools which are provided for single corporations' creditors also. Their implementation to the group scope solely broadens the scope of the relief to other group companies and their managers. Creditors are also frequently implicitly safeguarded by virtue of the regulations regarding the safeguard of investors.[768]
Lenders safeguard via lifting the corporate veil regulations, requires to be placed side by side with the entailed attenuation of limited liability. Pursuant to some academics, lifting the corporate veil should be allowed solely in particular cases, in other words, apropos of assets combination between affiliates to a corporate group.[769] Nevertheless, attributing liability to a holding company may be complicated in situations in which the latter is domiciled overseas, except if it holds assets in the state in which the daughter company is domiciled.

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[766] See Stolowy, N., & Brochier, M. (2018). Reflections on the concept of norms and sources of law in commercial matters. Journal of Business Law, 3, 255-277.

[767] Ass. plén., October 9, 2006, D.2006.2525, note by X. Delpech.

[768] Böckli, P., Davies, P. L., Ferran, E., Ferrarini, G., Garrido Garcia, J. M., Hopt, K. J., Opalski, A., Pietrancosta, A., Skog, R., Soltysinski, S., Winter, J. W., Winner, M., & Wymeersch, E. (2016). A proposal for reforming group law in the European Union - Comparative Observations on the way forward. Available at: http://dx.doi.org/10.2139/ssrn.2849865. [Accessed: December 12, 2022].

[769] See Hopt, K. J., & Pistor, K. (2001). Company groups in transition economies: a case for regulatory intervention? European Business Organization Law Review, 2(1), 1-43.

An additional suggestion for European group legislation is special liability regulations for the holding company for its action if a daughter company is encountering financial distress.[770] The aim of such wrongful trading regime as implemented to corporate groups is to prompt the holding company to resort to winding-up or restructuring of the daughter company when insolvency strikes. If the direction does not do so, it will hold liability to the lenders of the daughter company. Pursuant to some scholars,[771] successful implementation necessitates the elucidation of such periods of distress, which is a complex endeavour in a milieu where most of corporations are fighting for business viability. Furthermore, a revision of the regime may be necessitated to tackle the fairly frequent situation where a reattribution of viable activities jeopardizes the holding company instead of the daughter company in a period of distress.
At the same time, integration within corporate groups involves mutual concessions between its affiliates. The legislation may impose sufficient compensation in every instance. On the other hand, pursuant to some scholars,[772] the mutual concessions may be analysed in a comprehensive way, considering the fruits of the cooperation that the group affiliates collect. Nonetheless, they consider that such an adaptable definition of indirect and direct compensation generates demanding requirements upon tribunals when awarding "sufficient" compensation.

In several litigations, personal liability of the holding company's managers may as well be observed. Nevertheless, this should be limited to acts of abuse, in other words, to resolve conflict of interest among corporate direction for one thing, and interests of lenders for another. Regarding the intra-group structure, the legislative body has the possibility to let the parties at stake choose it or to present a template. Concerning the European Union, it has been suggested to grant the holding company a possibility to bind group affiliates by its direct direction and control. Some scholars see that this might improve effectiveness of group direction.[773] Insofar as the holding company can hold complete liability for abuse with regard to investors of affiliated

[770] Ibid.

[771] Ibid.

[772] Hopt, K. J., & Pistor, K. (2001). Company groups in transition economies: a case for regulatory intervention? European Business Organization Law Review, 2(1), 1-43.

[773] Ibid.

entities, they see that such an action does not inevitably prejudice them. Yet, as part of transitional economies, this possibility could strengthen trends of centralized direction and administration. It might as well fasten group relationships and hence could eventually withstand the purpose of hindering irrevocable market concentration. According to them, for centralized administration to actually be more effective, the holding company has yet the possibility of buying out minority partners.[774]

According to Irit Mevorach,[775] the UK wrongful trading provisions, which have been celebrated as the most valuable approach globally, could be extended to make room for the group scenario. The condition that managers make efforts to attenuate or circumvent insolvency could comprise conduct for the sake of the interests of the group when this was a fair effort in the light of the group circumstances. Suchwise, entity law is honoured whilst regard is paid to group cases. Moreover, the duty to take measures to circumvent insolvency or attenuate its effects, which is allocated to directors (comprising shadow and factual directorship), should be developed to touch on group companies and their management that was able to affect the business of the company such that it prejudiced the lenders. Such impact might not essentially cover guiding the directors of the daughter company in a sustained and persistent way. The models should as well make allowances for particular cases of group misconduct, that should generate a group wrongful trading presumption.[776]

Hence, pursuant to Irit Mevorach, the place assigned to enterprise law here is quite confined. Enterprise law does not surpass entity law to order particular reliefs. Certainly, this would compromise limited liability purposes. She considers that there should be a vigilant perspective, that honours the corporate structure. However, the group circumstances should be recognized so as to forward the objectives of management work policing in the scope of insolvency, especially when it regards the diversified cases of affecting and controlling other group companies and the backgrounds of misconduct vis-à-vis companies in financial distress. Certainly, in a group

[774] Ibid.

[775] Mevorach, I. (2013). The role of enterprise principles in shaping management duties at times of crisis. European Business Organization Law Review, 14(4), 471-496.

[776] Ibid.

background, it could be hard to define clearly the limits of a company, and in certain group patterns, directorial liability may be obscure over the directors of the companies. As a result, notions such as shadow directors may not suit perfectly groups financial structures, and group compensations[777] might be central in illuminating who should hold liability for mismanagement in the vicinity of insolvency and what advantages are brought about to lenders by seeking the interests of the group.

Still, it has to be said that as the global models (and their application to groups as suggested by Irit Mevorach) are postulated on an adaptable realistic perspective, opening procedures under the system would stay somehow risky. The global models do not list the particular efforts which managers should make during crisis,[778] and they do not indicate clear timelines. Identically, a general examination of the group reality would be needed so as to confirm the possible liability of managers and affiliated companies. The direct consideration of the group context, though, would assist in higher precision in this matter whilst preserving the adaptability necessary for recovery support and the equilibrium among limited liability and group financial structures. Tackling the concern on the international dimension would as well bring the benefit of serving coordination in this domain. This is especially significant given that numerous groups act at a transnational level and as groups could have recourse to forum shopping in immediate vicinity of the opening of insolvency procedures.[779] Coordination of the policing of group directorial liability could guarantee that reliefs for group mismanagement are accessible, no matter where insolvency procedures against group companies are initiated.

Contemporary academics recognize that "the autonomy of the legal person is a principle which has become inadequate to the evolving economic reality … and which cannot be taken as an

[777] As provided for example in Germany, by Konzernrecht in the Aktiengesetz (Stock Corporation Act) 1965, (para. 291 et seq.).

[778] See United Nations Commission on International Trade Law. (2013). Insolvency Law: Directors' Obligations in the Period Approaching Insolvency, (Recommendation 2); cf. English Insolvency Act 1986, (s. 214).

[779] See Re Hellas Telecommunications (Luxembourg) II SCA [2009] EWHC 3199 (Ch) [2010] B.C.C. 295; Re European Directories (DH6) BV [2010] EWHC 3472 (Ch).

absolute".[780] Indeed, "Perhaps it were better in some cases to say a legal persona, for the Latin word in one of its senses means a mask: Eripitur persona, manet res".[781]
However, the corporate veil is not necessarily pierced, as in the UK for example, the judicature judges not solely resorting to the factor of financial dependence but as well the close direction by the holding company of the operations of the daughter companies.[782]
Legal theory was based on substantial proof which pays regard not solely to the criterion of control but as well to a set of additional factors enlightening the judicature on the actual kind of the relation between the holding company and its daughter company. The level of autonomy or control of the daughter company in its direction is as well considered. Excluding the concept of a mandate to pierce the corporate veil and "strike" the holding company, UK judges follow the principle of single economic entity in the corporate group. The objective of this principle is to safeguard minority partners.[783] In addition to the keenness of countries to police more or less stringently the operation of multinational corporate groups, the European Commission has strived to create rules on the operation of corporate groups against the backdrop of the European Union.

Pursuant to the ECJ, the factor of the legal separateness of corporations is not a decisive criterion in determining the presence of a corporate group: "often, economic subordination is merely an

[780] Mondange, C. (1980). La transparence de la personnalité morale dans le droit anglais des sociétés anonymes. Revue internationale de droit comparé, 32(3), 573-600, (p. 584).

[781] Before stating that, the judge explained: "A proprietary company, controlled by one man, has to-day taken the place of John Doe, William Roe and others who at an earlier time came out of ink-wells in attorneys' offices to do acts in the law of which law-abiding citizens might have the benefit while avoiding disadvantageous consequences. By incantations by typewriter, the obtaining of two signatures, payment of fees and compliance with formalities for registration, a company emerges. It is a new legal entity, a person in the eye of the law". See Peate v Federal Commissioner of Taxation (1964) 111 CLR 443 (HC, McTiernan, Kitto, Taylor, Windeyer and Owen JJ), ([478]).

[782] Ibid., (in particular, pp. 590-591, notes nº 87 to 90).

[783] Scottish Cooperative Wholesale Society Ltd v Meyer [1959] A.C. 324. In this suit, the shareholders brought a claim against the manager of the holding company for a business strategy contrary to their interests. In the same vein, a decision of 1976 lifted the corporate veil for reasons of equity: DHN Food Distributors Ltd v Tower Hamlets LBC [1976] 3 AII E.R. 462.

extension of legal subordination, which prevents the subordinate from being regarded as a separate enterprise".[784]

In virtue of a strictly economic factor, considering the level of independence of the daughter companies and a specific examination of the position of the daughter company in relation to the holding company, the Luxembourgish judiciary for instance, concludes that the group represents a single entity or, by contrast, a multitude of entities administering to the same goals.[785]

Moreover, in default of a partition of work in a group, there could exist a subservience relation among the group entities once there is actual control exerted by the holding company. A nod of the presence of a corporate group with a common interest would be the absence of rivalry among the corporations. The principal factor for the ECJ is the one of actual independence of operation in the stage, which can be evidently restricted or impacted on by the holding company. The ECJ found in the Hydrotherm litigation[786] that "the concept of an undertaking in a context of competition law must be understood as designating an economic entity from the point of view of the agreement in question even if, from a legal point of view, that economic unit is made up of several natural or legal persons".

As a result, when one of a group's daughter companies offences antitrust law, the European Commission can in fact bring on the liability of the corporation. So as to protect the freedom of movement of corporations but as well to safeguard the European common market against any breach of free competition, the ECJ has notably supervised the operation of corporate groups in order to determine and denounce any anticompetitive activities.

In the light of this theory, the ECJ had to regard the issue of the presence of a direct arrangement among the group entities. There is an actual contention among the legislation, that does not determine the concept of a corporate group as a single entity, and the economic theory, that

[784] Gavalda, C., & Parléani, G. (2010). Droit des affaires de l'Union Européenne (6th ed.). LexisNexis, (p. 583, see in particular, p. 281, nº 425 et seq).

[785] For the theory of a group constituting in reality a single company: CJEU, 24 october 1996, "Viho Europe c/ Commission", aff. C-73/ 95 P, Rec. CJEU 1996, p. 1-5482. In this case, the Court of Justice concluded that the subsidiary was only a simple distribution of tasks within the same company; for the existence of a group of companies: CJEU, 12 july 1979, "BMW Belgium", aff. 32, 36, 82 and 78, Rec. CJEU 1979, I, p. 2435.

[786] CJEU, 22 july 1984, «Hydrotherm Gerâtebau», aff. 170/83, Rec. CJEU 1984, I, p. 2999. It is the case "if one of the parties to the agreement is made up of undertakings having identical interests and controlled by the same natural person, who also participates in the agreement". Indeed, "in those circumstances competition between the persons participating together, as a single party, in the agreement in question is impossible".

recognizes the group's economic entity.[787] The ECJ, in establishing if a corporation participates in an anticompetitive activity, undertakes the review of each specific case and mentions specifically the factor of a policy-making heart.

In default of policy-making independence, the daughter company operating together with the holding company is not regarded as breaching free competition.[788] Pursuant to Rabai Bouderhem, in cases where a couple of daughter companies of a group conclude an agreement, one must consider the level of control and independence of such daughter companies. When one of the daughter companies is not subservient to another daughter company (this applies to corporate groups with a hierarchical form), its conduct cannot be imputed to the other daughter company.[789] At the same time, when a daughter company concludes an agreement with a corporation out of the group, the holding company may hold liability in case the examination of the real circumstances of the daughter company divulges that it has no independence in policy-making.[790] There is no doubt that the policing of corporate groups is a highly sensitive mission against the backdrop of the European Union and international law in general.

Regarding the liability of the parent company, it was asserted once by the European Commission's executive vice-president that "[w]e do not trust in a society if the prizes are handed out before the contest begins".[791] Likewise, pursuant to some academics, no one can have

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[787] Gavalda, C., & Parléani, G. (2010). Droit des affaires de l'Union Européenne (6th ed.). LexisNexis, (p. 583, see in particular, p. 281, at nº 474, p. 307).

[788] See endnote CJEU, "Viho Europe BV", 24 october 1996, aff. C-73/95 P, Rec. CJEU 1996, p. I-5482. In the event that the subsidiary does not have autonomy in the decision-making process, article 101 TFEU prohibiting illegal agreements (ex. art. 81 EC) cannot be implemented to a corporate group as it is regarded as a single company within the meaning of EU law. On the other hand, the corporate group can still be answerable for abuse of a dominant position as provided for in article 102 TFEU.

[789] TPI, 6 july 2000, "VW et Audi", aff. T-62/98, Rec. CJEU 2000, II, p. 2707; TPI, 30 october 2002, "Nintendo", JOUE nº L 255, 8 october 2003; CJEU, 2 october 2003, "Aristrain", aff. C-196/99 P, Rec. CJEU 2003, I, p. 11005.

[790] CJEU, "KNP c/ Commission" ("Carton"), 16 november 2000, Rec. CJEU 2000, 1, p. 9641.

[791] Vestager, M. (2017, September). The new age of corporate monopolies [Video]. TED Conferences. Available at: http://www.ted.com/talks/margrethe_vestager_the_new_age_of_corporate_monopolies. [Accessed: December 12, 2022].

faith in a community where penal punishments are issued to entities that did not commit the wrongful act.[792]

By expanding liability to a holding company (comprising a holding company established in the European Union), antitrust provisions are granted higher influence. At a time in which notions such as justice figure prominently in antitrust law within the European Union, some scholars consider that it sounds timely to reform the regime of liability of the parent company.[793] It sounds indeed unjust or unreasonable to deem a holding company liable for its daughter companies' competition law offences notwithstanding any effective contribution or knowledge from the holding company. It sounds as well particularly ill-considered when it does not in fact promote the theory of deterrence in virtue of the Private Damages Directive,[794] and when it overlooks the defendants' fundamental rights.[795] On that account, some scholars consider that it seems commonsensical for the European Commission and the European tribunals to reconsider the regime of liability of the parent company as regards competition law.[796]

With respect to the liability of related entities and daughter companies in virtue of EU antitrust law, clarification was sought as to if a blameless related entity would as well hold liability for the antitrust law offence perpetrated by a different related entity. The issue of if the blameless daughter company holds liability for the cartel offence of its holding company is as well tightly linked to this. The settlement of those issues relies on the basis of liability in virtue of antitrust law. Where its basis from the doctrine is contemplated in the factor of decisive influence and where liability is derived from control, the holding company holds liability for the daughter

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[792] Leddy, M., & Van Melkebeke, A. (2019). Parental liability in EU competition law. European Competition Law Review, 40(9), 407-416.

[793] Ibid.

[794] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104&from=EN. [Accessed: December 12, 2022].

[795] See Leddy, M., & Van Melkebeke, A. (2019). Parental liability in EU competition law. European Competition Law Review, 40(9), 407-416.

[796] Ibid.

company, yet the latter's liability for its holding company or the related entity's liability for a different related entity must be excluded. Nevertheless, where the foundation of group liability in virtue of antitrust law is derived from the occurrence that a number of separate legal persons act unitarily on the stage and jointly constitute an economic entity, and hence form the collective legal personification of the economic entity, to the effect that "joint action triggers joint liability", this would result in the liability of the blameless daughter company for its holding company and of the blameless related entity for the offending related entity.
According to some academics, such hindmost is accurate.[797] The grounds for group liability in virtue of antitrust law is the unitary façade, the joint operation on the stage. The joint liability between all legal persons forming the undertaking as an economic entity derives from the joint operation ("joint action triggers joint liability"). Even if the legal theory regularly resorts to both the factor of decisive influence and the factor of belonging to the economic entity, a meticulous examination reveals that liability is eventually merely based on the factor of belonging to the economic entity. The factor of decisive influence is only employed to establish the economic entity in a primary stage and to define the physical or moral entities related to the particular undertaking as an economic entity. After this has been determined, by resort to the company relationships in virtue of corporate law and the factor of decisive influence, liability emerges autonomously from this factor. All companies that jointly make up the undertaking as an economic entity, accordingly hold joint and several liability.

This appreciation must as well be observed bearing on the reading of European secondary legislation. Hence, the ECN Plus-Directive should be read as not merely requiring Member States to consolidate the EU concept of undertaking into domestic law for the sake of levying penalties on holding companies,[798] but as well as imposing its general application.[799] Hence, pursuant to some scholars, Article 13(5) of the Directive should be read in view of Article 13(1) and be interpreted as merely underlining the most significant element of group liability and as

[797] Ibid.
[798] See Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, (art. 13 para. 5). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0001&from=EN. [Accessed: December 12, 2022].

[799] Ibid., (art.13 para.1).

not rejecting the liability of the blameless daughter company or related entity.[800] This might anyway already be demanded by the principle of effective judicial protection.[801] Christian Kersting asserts as well that it should as well be recorded in that respect that the Cartel Damages Directive (2014/104/EU) regards, without reservation, the EU concept of undertaking as a principle for domestic laws as part of the legislation ruling cartel damage claims.[802] Pursuant to him, the domestic law on penalties should not "trail behind" those principles. Anyway, the ECJ in its Skanska judgment regarded the issue of liability as being explicitly answered by Article 101 TFEU.[803] Although this does not always signify that European secondary legislation tackling this issue would have to be regarded as overridden by Article 101 TFEU, it indeed calls into question whether any residual extent of implementation for secondary legislation would provide for a deviation that "deforms" the undertaking and denies the liability of related entities. Furthermore, regarding the occurrence that eventually the offence was perpetrated by an economic entity, related entities should hold liability as well from a regulatory approach. When an offence is perpetrated by a number of companies operating unitarily on the stage, in other words, by an economic entity, the latter must hold liability as a whole. According to Christian Kersting, limiting liability to the holding company signifies limiting the entitlement of the lenders to collect against the assets of the daughter company**,** to the assets (i.e. shares) of the holding company in the daughter company at stake. He considers that this is inconsistent with the reality that the daughter company belongs to the offending economic entity. Ultimately, if the entitlement of the lenders to collect against the assets of the daughter company is restricted to the shares held by the holding company, this would lead to subordinate liability as against the liability to the lenders of the daughter company. Moreover, if the daughter company is not 100 per cent owned by the holding company, the entitlement of the lenders to collect against the assets of the daughter company would be more restricted. Hence, eventually, the liability of the blameless related entity is not merely the effect of some interpretation of the doctrine, but as well

[800] See Kersting, C. (2020). Liability of sister companies and subsidiaries in European competition law. European Competition Law Review, 41(3), 125-136.

[801] Versalis EU:C:2015:150, (para. [92]).

[802] Kersting, C. (2020). Liability of sister companies and subsidiaries in European competition law. European Competition Law Review, 41(3), 125-136.

[803] Vantaan kaupunki v Skanska Industrial Solutions Oy and Others (C-724/17) EU:C:2019:204, (para. [28] et seq.).

demanded for significant causes. The settlement of the issue was, for example, requested to the ECJ through a preliminary reference from Barcelona .[804] As an answer, the ECJ literally advanced in its judgement that "[…] the victim of an anticompetitive practice by an undertaking may bring an action for damages, without distinction, either against a parent company who has been punished by the Commission for that practice in a decision or against a subsidiary of that company which is not referred to in that decision, where those companies together constitute a single economic unit […]".[805]

From a contractual angle, Anne Schollen had recorded, regarding LOIs enactement in the group scenario, the ambiguity connected with the interpretation of such letters.[806] This could be due to the fact that the majority of comfort letters are not written by professional lawyers.
Hence, when an issue emerges from these letters, the task of interpretation by the judicature seems to be key. The judge would have to adjudicate on the scope of the liability of the signatory by detecting pointers in the letter. Such pointers would enable it to incorporate a comfort letter in the proper legal context. A fruit of this interpretation might be the definition of the sanctions applicable to the non-execution of the duties laid down in the comfort letter by the signatory. Anyway, allowances should be made for international agreements, in addition to the marked tendency of some legislations to safeguard the financially distressed party. Undoubtedly, the significance of the comfort letter shall be underpined, in particular because of its manifold nature

[804] Audiencia Provincial de Barcelona, s.15a, order of 24 October 2019, Rollo nº775/2019—Sumal v Mercedes Benz Trucks España. A comprehensive review of this request can be found at Heinrich Heine University's competition and antitrust law blog D'Kart, Wagener, H. M. (2019, November 15). And Again: Liability for Cartel Damages. D'Kart. Available at: https://www.d-kart.de/en/blog/2019/11/15/auf-ein-neues-haftung-von-konzerngesellschaften/. [Accessed: December 12, 2022].

[805] Judgment of the Court (Grand Chamber) of 6 October 2021, Case C-882/19 Sumal, S.L. v Mercedes Benz Trucks España, S.L., Reference for a preliminary ruling, (para. [76]). Available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62019CJ0882. [Accessed: December 12, 2022]; For a review of the answer of the ECJ, see de la Vega García, F. (2022). Concepto de «Empresa» en el Derecho de la Competencia y Extensión a las Filiales de la Responsabilidad de la Sociedad Matriz Participante en un Cartel. Ars Iuris Salmanticensis, 10, 416-420. Available (in Spanish) at: https://gredos.usal.es/bitstream/handle/10366/150538/Sentencia_del_TJUE_%28Gran_Sala%29%2C_Asunto_C.pdf?sequence=1&isAllowed=y. [Accessed: December 12, 2022].

[806] Schollen, A. (1994). Do letters of intent systematically have good intentions? International Business Law Journal, 7, 793-804.

that can serve parties embarking on the negotiations of the pre-contractual phase conducting to the conclusion of a contract.[807]

UK business practice entails nowadays that a holding company which is truly preoccupied with its brand name and the beneficence of its group would make every effort to impede the failure of its daughter company or, at least, assume the payment of the insolvent firm's debts. It is certain that limited liability brings ample economic efficiency to corporations ran in the interest of all the stakeholders that benefit from the growth of the firm. It minimizes numerous costs, improves risk-taking by management, expedites share transfer, effectuates the separate legal entity and offers prospects to rescue a company from the brink of insolvency. Nonetheless, as soon as there is limitation of stockholders' liability, they might be further disposed to push directors to act expediently by undertaking more risky ventures to maximize the profitability of the firm, which will successively lead to shareholder wealth maximization. Moreover, the issue with groups of companies is that every firm is a separate legal entity, and limited liability is shielded in every tier company. The legislation does not provide for the single undertaking principle even where it might promote injustice. The provision is especially severe concerning involuntary creditors such as tort claimants. According to Ali Imanalin,[808] the movements in the debate regarding limited liability in the UK appear to divert from the main issue: inaccurate remedy by the business organization law of the situation in which tort claimants find themselves vis-à-vis corporate insolvency. Actually, since limited liability requires bargaining, the concept shouldn't have been applied to debts incurred for tort. Hence, it appears reasonable and just to restrict the context of the concept at a minimum in the framework of groups of companies, when the legislation should permit personal injuries and wrongful death victims caused by a daughter company in a state of insolvency to prosecute the holding company. This perspective would not erase all issues attached to piercing the corporate veil, but it would award, pursuant to Ali Imanalin, fair and reasonable damages to the most deserving victims.

[807] Ibid.

[808] Imanalin, A. (2011). Rethinking limited liability. Cambridge Student Law Review, 7(1), 89-99.

As concerns the tort liability of managers or investors for antitrust law infringements in common law juridictions, Paul Hughes[809] considers that there is as well a level of confluence among the standards provided in virtue of common law and European Union antitrust law in this domain. Any stockholder that is involved in direction (and that, failing that, might not have been considered as an undertaking) may see that this involvement qualifies the stockholder as an undertaking (pursuant to the Cassa di Risparmio di Firenze litigation[810]) with unpleasant effects simultaneously in respect of possible liability to any sanctions which may eventually be induced and in terms of statutory tort liability's civil actions.

Concerning the notion of decisive influence exercised by a holding company which makes it and the daughter company on which such influence is exerted a single economic entity, espouses the negative control provisions.

Hence, a holding company which either does not even try to achieve group compliance or tries to do the latter, but applies a patently faulty strategy, either will hold statutory tort liability for the infringements of the daughter company as a single economic unit or should hold direct tort liability under common law (according to Chandler v Cape) to those to which it was liable for the efficiency of the compliance strategy.

This reflects the somehow varied paths by which European and UK tribunals for example have imposed liability on controlling non-human shareholders (in virtue of Articles 101 and 102 TFEU), holding companies with the capacity of making group strategies which happen to be faulty (Chandler v Cape) and investors, maybe not forming undertakings failing this (MCA Records v Young and the Cassa di Risparmio di Firenze litigations) and human shareholders (MCA Records v Young) intervening in the direction who overrule legal steps to incur the statutory tort's perpetration. According to Paul Hughes, those situations are defended on the basis of justice and strategy and put forward the requirement of efficient antitrust law compliance. The tribunals have admitted by means of various notions of influence and control that, in some situations, the principles of corporate separateness and limited liability will be deficient justifications to tort actions.

[809] Hughes, P. (2014). Competition law enforcement and corporate group liability - adjusting the veil. European Competition Law Review, 35(2), 68-87.

[810] Cassa di Risparmio di Firenze [2006] E.C.R. I-289.

Furthermore, Paul Hughes asserts that it would never be effective to carry out compliance differently from at group level grounds. Nevertheless, the right that a group has to be arranged as it deems appropriate, and the effectiveness that this in-house assignment of group responsibilities symbolizes, must give a rationale for compliance with antitrust law so as to effect the efficiency presented by an efficient market, unadulterated by anticompetitive practices.
Eventually, it is common ground that, so that compliance systems become really efficient (and hence circumvent liability), managers should instore an organizational culture of compliance. Compliance from on high of this kind necessitates the inception and engagement of directors. Certainly, admitting that in Chandler v Cape Plc and in the MCA Records litigations, the Court of Appeal did not confine liability for tort to facts such that control is exerted by a UK holding company, and that in the Dow litigation, the GCEU denied compliance with the corporate governance regulations of the United States, there are possibilities for a great number of governance regulations to be influenced simultaneously by the principle of single economic entity and UK tortious liability. Paul Hughes stipulates that corporate constituencies whose well-being is central to antitrust law should hence see that their interests echo round the meetings of directors henceforward.

With regard to CSR in the scope of corporate groups, the James Hardie lawsuit may be perceived as a try by the affiliates to the James Hardie group to circumvent their social responsibility by striving to transfer their long tail liabilities to the tort claimants as such (and implicitly to taxpayers) through an instrumental daughter company. Even if JHIL had no legal duty to present further funding to its previous daughter companies, after the restructuring, its reorganization was eventually counterproductive for it didn't succeed in taking account of its future liabilities. The James Hardie Inquiry specified that, lack of provision of effective funds led to "adverse results to the public standing" of the James Hardie group.[811]
As stated by Paul Hughes, the James Hardie lawsuit reflects that, from a CSR view, companies require to outgrow the short term profitability strategy and embrace the great "enlightened self-

[811] James Hardie Inquiry, 2004, (Vol.1, p. 12).

interest" philosophy, in other words, the commercial perspective on CSR that permits companies to appreciate the interests of non-shareholding constituencies.[812]

Before "dropping the curtain" of this thesis, it seems timely to "give the show away" on some key points. All in all, it is crystal clear that, in the majority of jurisdictions, there is a "chronic" reluctance to regulate corporate groups stringently. Such reluctance does not seem to be comparable to the reluctance of "old dogs to learn new tricks", but rather to a fait accompli, a legal gap to which jurisdictions turn (voluntarily, or perhaps, coercively) a blind eye.[813] In such a globalized world, and given the ease to access input, not espousing the various answers presented by the different legislations for corporate groups within pioneer jurisdictions, seems to be a choice not "kismet". Indeed, in this context, jurisdictions that provide customized regulations for corporate groups happen to be very few, and Germany seems to be the flagbearer, the role model,[814] although the German system implies distinct constraints in its implementation, comprising the absence of stimulus for groups to lean towards it. However, it is still a model that could originally inspire many others.

Therefore, the first step forward is the definition of corporate groups by domestic laws, otherwise, it is complicated to police an uncategorized entity, moreover, as German law, such groups should be recognized as such as legal entities.

On the other hand, owing to the principles of corporate separateness and limited liability, the corporate veil seems to be too heavy or dense to be lifted or pierced, thus, it might be that the factors taken into consideration, that is, the exercise of decisive influence or abuse are

[812] For an interesting exposition of the "lessons" to learn from the James Hardie case, see Poczman, M., & Henry, P. (2009). Learning the hard way – lessons from the James Hardie case. Piper Adelmarn E – Bulletin. Available at: https://www.piperalderman.com.au/__files/f/3979/PB007%201109.pdf. [Accessed: December 12, 2022].

[813] Ouassini Sahli, M. (2014). La responsabilité de la société mère du fait de ses filiales (Publication No. tel-01249559) [Doctoral thesis, Paris Dauphine University]. HAL theses. Available at: https://theses.hal.science/tel-01249559/document. [Accessed: December 12, 2022]. The author of this doctoral thesis asserts in her conclusions that the reason might be that the economy might be controlling the law and not the opposite, she asserts that, indeed, policing corporate groups severely might make the countries doing so less attractive for the incorporation of such groups, and hence affect their economic growth.

[814] Stolowy, N. (2014).The concept of the group of companies: the specificity of the French model. Journal of Business Law, 8, 635-650.

immaterial.[815] As accurately asserted by Rogers AJA in Briggs v James Hardie & Co Pty: "As the law presently stands, […] the proposition […] that the corporate veil may be pierced where one company exercises complete dominance and control over another is entirely too simplistic. The law pays scant regard to the commercial reality that every holding company has the potential and, more often than not, in fact, does exercise complete control over a subsidiary".[816]

When comparing the existing different approaches to corporate groups of the reviewed branches of law in respect of liability, the approach of competition law appears to be the most appropriate one. This is because it observes the economic reality (through the concept of the single economic unit), which is crucial in relation to corporate groups whose actions or omissions are generally driven by economic incentives. Moreover, the factor of benefit (whether other group entities have "silently"[817] benefited from the breach of the law) is also well judged.[818] Indeed, where there are shared interests, it sounds fair enough that there should be shared liability for "liability […] places us at the forefront of efficient decision-making".[819]

In sum, many answers for the different questions posed can be found in the other branches of law, some of such answers are for instance: in terms of contracts within corporate groups, the application of the French and Belgian "theory of appearance" to some cases to impose liability on the parent company for the payment of the debts of its subsidiary; as regards insolvency agaisnt the background of corporate groups, the UK "wrongful trading"[820] and the French "action

[815] As they seem to serve the "bad man" not the "good one". Indeed, if " you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience". Holmes, O. W. (1897). The Path of the Law. Harvard Law Review, 10, 457.

[816] Briggs v James Hardie & Co Pty Ltd (1989) 16 N.S.W.L.R. 549, (para. [577]).

[817] Wagener, H. M. (2019, November 15). And Again: Liability for Cartel Damages. D'Kart. Available at: https://www.d-kart.de/en/blog/2019/11/15/auf-ein-neues-haftung-von-konzerngesellschaften/. [Accessed: December 12, 2022].

[818] Judgment of the Court (Grand Chamber) of 6 October 2021, Case C-882/19 Sumal, S.L. v Mercedes Benz Trucks España, S.L., (para. [15(2)]).

[819] Translated from the original phrasing in French: "La responsabilité demande du courage parce qu'elle nous place à la pointe extrême de la décision agissante". Vladimir Jankélévitch (1967).

[820] United Nations Commission on International Trade Law. (2013). Insolvency Law: Directors' Obligations in the Period Approaching Insolvency, (Recommendations 1-3).

en comblement de passif"[821] (applicable to de jure or de facto directors in case of mismanagement) are great regimes that should be attuned to the group framework besides the ingenious New Zealand contribution order,[822] moreover, the doctrine of substantive consolidation of UNCITRAL[823] is also strategic (although it applies only in extraordinary circumstances). At the same time, concerning directorial liability generated by related-party transactions for example, Spain presents a great solution based on prior public disclosure of group companies separate and common business activities that is full of insight.[824]

Therefore, a multilateral international treaty determining a uniform framework for corporate groups could be an apropos step towards the regulation of the latter, the application of the treaty as an alternative to deficient domestic laws could be choosen by the parties via choice of law clauses. Such treaty could group all the fitting provisions for corporate groups, and eventually, serve as a template to national laws for prospective approaches to corporate groups.
Nevertheless, one has to bear to bear in mind that treating liability within the framework of corporate groups is still no tea party, it is indeed all easier said than done. Overall, one should keep in mind that before reaching the stage of dealing with the imposition of liability, groups could make efforts to prevent such liability through compliance programs as we have seen within this thesis. Hence, as against the background of corporate groups, as the principles of limited liability and corporate separateness are bedrocks in corporate law, daughter companies must operate with some independence at the direction and directorate dimensions to shield the holding company from liability for the debts of its daughter companies.
These are all points deducted from the prevailing approaches to liability in the "atmosphere of groups of companies" by the different branches of law. Although such approaches might not be

[821] French Code de commerce, (Articles L651-1 et seq.).

[822] New Zealand Companies Act 1993, (ss. 271, 272).

[823] United Nations Commission on International Trade Law. (2010). Legislative Guide on Insolvency Law. Part three: Treatment of enterprise groups in insolvency, (Recommendations 220-231).

[824] Spanish Good Governance Code of Listed Companies, (Recommendation 2).

flawless, they still seem propitious and might pave the way for more balanced answers to the remaining questions in this scope.[825]

[825] When all is said and done, as properly asserted by the French author Georges Bernanos, "Je ne suis pas un prophète, mais il arrive que je vois ce que les autres voient comme moi, mais ne veulent pas voir. Le monde moderne regorge aujourd'hui d'hommes d'affaires et de policiers, mais il a bien besoin d'entendre quelques voix libératrices. Une voix libre, si morose qu'elle soit, est toujours libératrice. Les voix libératrices ne sont pas des voix apaisantes, des voix rassurantes. Elles ne se contentent pas de nous inviter à attendre l'avenir comme on attend le train. L'avenir est quelque chose qui se surmonte. On ne subit pas l'avenir, on le fait", in English: "I am not a prophet, but sometimes I see what others see like me, but do not want to see. The modern world today is full of businessmen and policemen, but it does need to hear some liberating voices. A free voice, no matter how gloomy it is, is always liberating. Liberating voices are not soothing voices, reassuring voices. They do not content themselves with inviting us to wait for the future as we wait for the train. The future is something to be surmounted. We do not undergo the future, we make it". Bernanos, G. (1953). La liberté pour quoi faire? Gallimard.

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