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Tomas STUNDYS

Doctoral Dissertation

REGULATORY MODELS CONCERNING THE ATTRIBUTION OF DUTIES AND CIVIL LIABILITY IN GROUPS OF COMPANIES (AND THEIR VALUE CHAIN EXTENSIONS)

SOCIAL SCIENCES,
LAW (S 001)
VILNIUS, 2025

GHENT UNIVERSITY

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Mykolas Romeris University

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This doctoral dissertation was prepared during the period of 2020-2025 at Mykolas Romeris University and Ghent University, under the right of doctoral studies granted to Mykolas Romeris University and Vytautas Magnus University by the Order No. V-160 of the Minister of Education, Science and Sport of the Republic of Lithuania on 22nd of February, 2019.

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The doctoral dissertation will be defended in the public meeting of the Legal Science Council at 9:30 am on 22 September 2025 at Mykolas Romeris University, room I-414.

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GENTO UNIVERSITETAS

Tomas Stundys

REGULIAVIMO MODELIAI, SUSIJĘ SU PAREIGŲ PASISKIRSTYMU IR CIVILINE ATSAKOMYBE BENDROVIŲ GRUPĖSE (IR TIEKIMO GRANDINĖSE)

Mokslo daktaro disertacija
Socialiniai mokslai, teisė (S 001)

Vilnius, 2025

Mokslo daktaro disertacija rengta 2020-2025 metais Mykolo Romerio universitete ir Gento universitete pagal Mykolo Romerio universitetui su Vytauto Didžiojo universitetu Lietuvos Respublikos švietimo, mokslo ir sporto ministro 2019 m. vasario 22 d. įsakymu Nr. V-160 suteiktą doktorantūros teisę.

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INTRODUCTION

Problem analysed in the doctoral thesis. It could easily be argued that law, as a set of legal rules, shall work in a way that reflects the actual economic and social relations between the parties. This is particularly important in business relationships, as they evolve rapidly and, in turn, significantly impact the economies of various societies, whether countries or unions. The fact that legal rules should reflect and co-exist with *de facto* relationships between different market participants also presupposes that the law should adapt to various changes that occur in the market. Such changes can be influenced by various factors, such as other legal rules that impact the rights and obligations of the parties. However, possible tensions may arise when legal rules do not necessarily correspond with *de facto* economic relationships between the parties, and this is even more pronounced when there is a conflict between past and new legal rules. Even though such intersections or conflicts may not always be apparent, once one takes a closer look at the doctrinal roots of particular legal rules, it may be at least arguable that we face paradigmatic changes in a way that some classic legal principles are being applied to reflect new both economic and political realities. According to the author of the thesis, the topic analysed herein is capable of demonstrating that this is indeed the case. In this regard, the thesis analyses the implications for the civil (tort) liability of limited liability companies regarding harmful actions occurring within their supply chains. In particular, the thesis focuses on liability within the supply chain for environmental and/or human rights (also known as ESG matters). Currently, some of the most developed legal systems, Germany, the UK and France – being the "front-runners", have witnessed increased attention to the issues of sustainability, human rights and climate change. The author specifically chose the mentioned jurisdictions because of their advanced legal systems, evolving statutory frameworks, and growing jurisprudence that hold corporations accountable for ESG-related harms—especially those arising from global supply chains, environmental degradation, and human rights violations. Attention to ESG, *in itself,* is not a new phenomenon and litigation concerning the latter has already garnered considerable attention from both legal scholars and the public. However, the author argues that both recent changes in statutory law and corresponding case law addressing ESG liability present some fundamental shifts in understanding traditional tort law principles and their coexistence with corporate law principles.

To comprehensively address the problematic issues analysed in the thesis, it is necessary to describe the two main legal principles traditionally attributed to corporate law and companies *in general*. The first one – legal separability - implies that each company, even within the corporate group, is legally separate from other companies (whether parent or subsidiaries) and manages its activities.[1] Few implications stem from

1 Martin Winner, "Group Interest in European Company Law: an Overview", *Acta Univ. Sapientiae, Legal Studies* 5, 1 (2016): 87, http://www.acta.sapientia.ro/acta-legal/C5-1/legal51-06.pdf.

this principle. *First*, the parent company is generally[2] not liable for the actions (debts) of its subsidiaries and *vice versa*. *Second*, the management of each company, according to the general rule, shall act solely in the best interest of the managed company and cannot override the interests of such company for the benefit of another company, e.g., the parent company. *Third*, following the two former principles and according to the division of powers between shareholders and management bodies, the parent company generally[3] cannot legally manage the subsidiaries or intervene in their decision-making. The principle of limited liability foresees that shareholders do not risk more than their contribution (investment) to another legal entity, and they cannot be held liable for their subsidiaries' debts.[4] The principle, established by the famous UK precedent of *Salomon v. Salomon,*[5] provides that a shareholder of a company is separate from the latter and cannot be liable for financial difficulties beyond what was initially invested. Principles of legal separability and limited liability are considered traditional and are generally applicable, with some exceptions, to most modern states, including the United Kingdom, France, and Germany, on which the thesis focuses primarily. The general rule would seem relatively straightforward – companies are separate legal entities and are not responsible for anything that is beyond their own interests. Even though, as described above, shareholders of limited liability companies, according to the general rule, enjoy limited liability, different legal regimes provide particular exceptions to this rule, foreseeing that companies may be held liable for the actions that happened at the level of other companies.

The most common exception to limited liability, attributable to the legal regimes of the countries analysed in the thesis, is the so-called "lifting of the corporate veil" or "veil piercing". According to the doctrine of "veil piercing", a shareholder (natural or legal person) may be held liable for its subsidiary's debts despite the rules of limited liability and separate personality.[6] UK legal precedents in this regard are among the most comprehensive and provide a detailed legal implication of the general exception of limited liability. With the "veil" of corporation being established by the mentioned *Salomon v. Salomon, Adams v. Cape*[7] later approved it in the corporate group situation, indicating that court cannot lift the "corporate veil" against a parent company, which was a member of a corporate group, "[…] simply on the is that the corporate structure had been used to ensure that legal liability in regards to the particular future activities of the group would fall on another member of the group rather than on the defendant

2 As provided further in the Thesis, there are some legal exceptions to this principle.

3 As provided further in the Thesis, several legal regimes such as German *Konzernrecht* provide exceptions to this rule.

4 Karen Vanderkerckhove, *Piercing the Corporate Veil*, European Company Law Series, v. 2 (Alphen aan den Rijn: Kluwer Law International, 2007), 71.

5 *Salomon v Salomon & Co Ltd* [1897] AC 22.

6 Vandekerckhove, *op. cit.*, 11.

7 *Adams v. Cape Industries plc.* [1990] Ch 433.

company."[8] However, further UK cases such as *Smith, Stone & Knight v. Birmingham Corp.*[9] *DHN Food Distributors v. Tower Hamlets LBC*[10] established that where the subsidiary company is a mere façade or acts as an agent of another (parent) company, the corporate "veil" should be lifted and the privilege of limited liability cannot be applicable.[11] In other words, the mentioned cases suggest that if another company is used solely for the benefit of another company, for instance, to limit its risk, *e.g.* by engaging in legitimate economic activities with the subsidiary while acting fraudulently, the parent company cannot benefit from the limited liability. In this regard, the element of will is vital since it should be established that such a "scheme" or "facade" is construed intentionally. In France, for instance, certain aspects of "veil piercing" are covered by statutory law and correspond to similar conditions as under UK precedents, i.e. fraud or sham agency.[12] In Germany, "veil piercing" is also recognised; however, considering relatively sophisticated law on corporate groups, the exact boundaries of the latter in Germany are not clear – some authors consider "veil piercing" as a "[…] rest category consisting of cases of shareholder liability that do not resort under group law or common civil law or company law."[13]

Another exception to the limited liability, recognised in the analysed countries, provides that the parent company may be held liable for the actions that happen at the level of another separate company (mostly a subsidiary) if it acts as a so-called "de facto director".[14] The essence of this doctrine is that the company[15] could be held liable as de jure (legally appointed) director of the company if it is shown that the actions of the former are attributable to the latter, *i.e.* they acted as the de jure directors. Under the French legal regime, a person is deemed to act as a "de facto director" if it is first demonstrated that this person performed, directly or through other entities, independent affirmative acts of management.[16] As S. Demeyere summarises, French law allows a parent company to be considered the "de facto director" of a subsidiary due to the exercise of influence over the latter's management.[17] In such a case, the tort liability of the parent company is based on the fact that it assumed responsibility for the damage caused at the level of the subsidiary, taking into account the fact that the subsidiary

8 *Ibid.*

9 *Smith, Stone & Knight v. Birmingham Corp.* [1939] 4 All E.R. 116.

10 *DHN Food Distributors v. Tower Hamlets LBC* [1976] 1 WLR 852.

11 Vandekerckhove, *supra note*, 4:71.

12 Vandekerckhove, *supra note*, 4:40.

13 Vandekerckhove, *supra note*, 4:63.

14 Klaus J. Hopt, "Groups of Companies. A Comparative Study on the Economics, Law and Regulation of Corporate Groups", *ECGI Working Paper* 286, 215 (2015): 21, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2560935.

15 As well as natural person *i.e.* shareholder.

16 Decision of Paris Court of Appeal of 7 October 2008 in civil case no. 07/13617.

17 Siel Demeyere, "Liability of the Mother Company for Its Subsidiary in French, Belgian and English Law", *European Review of Private Law* 23, 3 (2015): 390, https://doi.org/10.54648/erpl2015028.

was essentially controlled by the parent company.[18] In one of its rulings, the French Court of Appeal provided that in order for a parent company to be considered the "de facto director" of a subsidiary, it is necessary to show that the parent company has substantially disregarded the group structure and exercised active and repetitive management functions and substantially dominated the decisions of the subsidiary, thus controlling the latter's financial and economic decisions.[19] In other cases, the French courts detailed that the recognition of the parent company as the "de facto director" of the subsidiary depends on whether, in a specific case, the management actions of the parent company can be considered of an absolute subordinate nature.[20] In another case, Court of Appeal of Lyon distinguished the characteristics of the actions of the parent company towards the subsidiary company, which is a specific case could collectively indicate the existence of subordination: *(i)* the financial director of the parent company is authorized to decide on the disposal of the finances of the subsidiary company, *(ii)* the subsidiary company auditors are directly accountable to the parent company, *(iii)* the "survival" of the subsidiary company depends exclusively on the parent company, *(iv)* loans to the subsidiary company are issued only taking into account the creditworthiness of the parent company (in other words, the parent company is a guarantor/guarantor in relation to the subsidiary company), *(v)* meetings of the subsidiary company's management bodies are held at the parent company's registered office.[21] On a separate note, the liability of "de facto directors" is also prescribed by French statutory law.[22] The latter provides liability of "de facto directors" who engaged in specific acts of mismanagement resulting in an excess of liabilities over assets of the underlying company.

It is worth noting that, although in practice, shareholders (e.g. a parent company) are usually considered as "de facto directors", French courts allow legal persons who are not shareholders to be recognized as "de facto managers" when dominance can be proven on another basis - e.g. contractual. For example, the French Court of Cassation has decided on the question of whether a car manufacturer could, in a specific case, be recognized as the "de facto director" of a car distribution company.[23] The institute of "de facto director" is also attributable to the banks when they dominate debtors through financing conditions, etc.

Companies could be deemed "de facto directors" in Germany and the UK as well. In Germany, however, this institute is mainly limited to a specific case – the parent company's civil liability for failing to initiate the subsidiary's bankruptcy. In the case of

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18 Z. GALLEZ, *Les multinationals – Statut et réglementations*: 163 in Siel Demeyere, "Liability of the Mother Company for Its Subsidiary in French, Belgian and English Law", *European Review of Private Law* 23, 3 (2015): 393, https://doi.org/10.54648/erpl2015028.

19 Decision of Paris Court of Appeal of 7 October 2008 in civil case no. 07/13617.

20 Decision of Aix-en-Provence Court of Appeal of 4 June 2004 in civil case no. 02/20731.

21 Decision of Lyon Court of Appeal of 2 July 1999 in civil case no. 98/7888.

22 L. 651-2, French Commercial Code.

23 Decision of the Court of Cassation of 26 October 1999, no. 97-19.026

German private limited liability companies, the bankruptcy process must be initiated by the director of the latter. However, case law has clarified that this duty also applies to the "de facto director" – the person who actually controls the management of the company.[24] In this sense, German law also recognizes parent companies as "de facto directors" with such a duty, and the latter shall compensate for the losses caused by the breach of this duty.[25] The functional equivalent of the "de facto director" in the UK is the so-called "shadow director", directly defined in the Companies Act, as a person whose instructions the company's "de jure" management bodies act on.[26] However, the Companies Act does not allow the parent company to be considered a "shadow manager" solely because the members of the subsidiary's management bodies act on the instructions of the latter.[27] Considering this, the parent company could be held liable similarly to that in Germany, *i.e.* in cases related to the subsidiary's insolvency, once it is established that the parent company was not acting prudently to intercept this.

Other, more rare exceptions of the limited liability of the company include "fictitious corporation" and "commingling of assets", "wrongful trading", etc.[28] Those indicate cases where it can be shown that the sole purpose of the company is to serve the interests of shareholders, or it is no longer possible to distinguish between the assets of different companies accordingly. If those cases succeed to be proven, the court may hold the (parent) company liable for the debts of the subsidiary.

However, examples of exceptions to the company's limited liability are provided as a helpful context for the main topic of the thesis – the company's liability in tort (specifically, the tort of negligence) for environmental and human rights abuses. Thus, the author does not provide an extensive legal analysis of the "lifting of the corporate veil", "de facto directorship", "wrongful trading", or other commonly found exceptions to the limited liability of a company that could easily constitute a separate topic for the doctoral thesis. The analysis of the mentioned institutes is provided by describing particular legal implications for the civil liability of the companies in order to, *inter alia,* evaluate the main conditions for civil liability under these institutes and whether it is comparable to the liability for the tort of negligence.

The UK has historically provided the most developed case law on the liability of companies for environmental and human rights abuses in the tort of negligence. However, to understand the implications of such liability, it is essential to comprehend the nature of the tort of negligence. According to the English tort of negligence description, a person is liable for negligence when *(i)* he/she owes a *duty of care* to the victim, *(ii)* he/she has breached that duty, *(iii)* the victim's damage is not so unforeseeable as to be too remote, and *(iv)* there is a causal connection between the careless conduct

24 Comparative Analysis on Legal Regulation of the Liability of Members of the Management organs of Companies, *ECGI Law Working Paper* 103/2008 (2008): 139, http://ssrn.com/abstract=1001990

25 *Ibid.*

26 251 (1), Companies Act.

27 251 (3), Companies Act.

28 Vandekerckhove, *supra note*, 4:42.

and the damage.[29] Thus, to apply tortious liability, it shall be established that the person to whom such liability is initiated has an existing *duty of care* towards other persons, the breach of which would lead to the emergence of liability.[30] *Duty of care* as such presupposes the existence of a particular relationship between the claimant and the defendant before the harm.[31] The mentioned relationship is described in *Donoghue v Stevenson*[32], comparing it to one of the neighbours in terms of proximity. According to this "neighbour" relationship, a person owes a duty of care to everyone who, by negligent conduct, can suffer foreseeable damage, provided that the requirement of sufficient proximity between the wrongdoer and the victim exists.[33] Such a classical concept of tortious liability was adapted to the cases of corporate wrongdoing related to environmental and human rights.

However, the application of tort law in this regard evolved over time. Initially, the tortious liability of the corporation based on the existence of its *duty of care* to third parties, where the harmful actions occurred at the level of subsidiaries, was seen as a novel application of the traditional *duty of care*. House of Lords created the so-called „*Caparo*" test[34] in order to establish a novel duty of care: *(i)* the harm must be foreseeable, *(ii)* there shall be proximity between the claimant and the defendant, and *(iii)* imposing a duty of care shall be fair, just, and reasonable.[35] To understand the sensitivity of establishing a *duty of care* for corporations regarding the actions at the level of their subsidiaries, it is inevitable to consider that in common law countries, including the UK, a person does not have a general duty to ensure that third parties do not harm others.[36] Thus, even though applying traditional tort law principles, UK courts were cautious in establishing a *duty of care* for the parent company. After a few landmark cases that were either stuck on limitation grounds or settled, such as *Connelly v. RTZ Corp plc.* and *Lubbe & Others v. Cape Plc.*, the UK Court of Appeal provided its substantial viewpoint on the duty of care of the parent companies for the environment and human rights abuses that happened at the level of subsidiaries in *Chandler v. Cape plc.*[37] As Petrin states, "Chandler is situated at the hazy intersection of company and tort law, where bedrock principles such as limited liability, separate corporate personality, and

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29 Anthony M. Dugdale et al., *Clerk & Lindsell on Torts 19th edn.* (London: Sweet & Maxwell, 2006), 383 *in* Siel Demeyere, "Liability of the Mother Company for Its Subsidiary in French, Belgian and English Law", *European Review of Private Law* 23, 3 (2015): 402, https://doi.org/10.54648/erpl2015028.

30 Cees van Dam, *European Tort Law* (New York: Oxford University Press, 2006), 93.

31 Basil Markesinis, Simon Deakin, *Markesinis and Deakin's Tort Law 5th edn.* (New York: Oxford University Press, 2003), 75-76 in Cees van Dam, *European Tort Law* (New York: Oxford University Press, 2006), 93.

32 *Donoghue v Stevenson* [1932] AC 562, 580.

33 Van Dam, *op. cit.*

34 *Caparo Industries Plc v Dickman* [1990] 2 AC 605.

35 *Ibid.*

36 *Smith v. Littlewoods Organisation Ltd.* [1987] AC 241, at 270.

37 *Chandler v Cape plc* [2012] EWCA Civ 525.

traditional principles of negligence collide."[38] Court highlighted four factors of proximity that shall be proved to accept a *duty of care* of the parent for its' subsidiaries' employee's health issues: *first*, overlapping business operations; *second*, parent company have or ought to have superior knowledge about relevant aspects of health and safety in that particular industry; *third*, subsidiary's system of work is unsafe as the parent company knows or ought to know; *fourth*, parent company knows or ought to foresee that subsidiary or its employees rely on it to use that superior knowledge for the employee's protection.[39] What could be seen as an indication from *Chandler v. Cape plc* is that the parent company is considered to have a *duty of care* for the actions at the level of the subsidiary when it directly or indirectly intervenes, at least to a certain extent, in the relevant activities of the subsidiary. Therefore, the relevant dictum from these types of UK precedents is that the parent company may owe a *duty of care* in a particular situation, where particular intervention into the activities of subsidiaries could be established. However, another relatively important feature is that the application of the *duty of care* was generally very cautious, considering that recognising such a *duty of care*, unless very carefully defined, would undermine the prevailing principle that there is no general duty to prevent third parties from causing harm to others as well as cornerstone principles of limited liability and legal separability.[40]

In France, the application of tort to parent companies was primarily theoretical. Even though provisions of statutory law generally would not preclude the application of tortious liability for the actions at the level of subsidiaries[41], proof of the fault of the parent company might be much more complicated,[42] as the damage, in most cases, is caused by the subsidiary.[43] On a theoretical basis, it can be concluded that, for example, if a parent company has made a statement concerning corporate social responsibility, the parent exposes some implications of *duty of care,* and it could be accepted more

38 Martin Petrin, "Assumption of Responsibility in Corporate Groups: Chandler v Cape plc.", *The Modern Law Review* 76, 3 (2013): 603, https://www.jstor.org/stable/41857488.

39 *Chandler v Cape plc* [2012] EWCA Civ 525.

40 James Goudkamp, "Duties of Care Between Actors in Supply Chains", *Journal of Personal Injury Law* 205*, Oxford Legal Studies Research Paper* 61/2017 (2017): 3, https://ssrn.com/abstract=2960624.

41 Art. 1240 and 1241 of the French Civil Code.

42 Under French civil liability rules, as a general principle, a person is not liable for the harm caused by another person.

43 P. Malinvaud, D. Fenouillet P. *Droit des obligations* (Paris: LexisNexis, 2012), 456 in Siel Demeyere, "Liability of the Mother Company for Its Subsidiary in French, Belgian and English Law", *European Review of Private Law* 23, 3 (2015): 395,https://doi.org/10.54648/erpl2015028.

easily that it is liable for its subsidiary's acts or negligence.[44] However, to date, no landmark precedents have been detected in France. Under German law, traditionally, the liability of parent companies for damage caused by their subsidiaries has traditionally been unenforceable as German tort law only recognises duties of care concerning one's own behaviour[45], and the legal separability principle in company law prevents imposing duties on parent companies *vis-à-vis* subsidiaries.[46] In the thesis, such coexistence between traditional corporate law principles, i.e. legal separability and limited liability and its exceptions, the most notable being "lifting of the corporate veil" and liability in tort, being the core focus of the research, are called "classical approach" to the liability of the parent company. However, recent case law, particularly in the UK and the Netherlands, has revived the question of tortious liability of corporations not only for their subsidiaries but also for their business partners, exemplified by notable examples of so-called supply chain liability (SCL).

The increasing power of multinational corporations has sparked a debate on whether the exceptions to general limited liability are sufficient for tort victims. Hereto, the thesis focuses on the notion of corporate social liability (CSL) and supply chain liability (SCL). Both concepts generally present the idea that corporations should address all the harmful deficiencies that are covered by their corporate structure and supply chain respectfully. Initiatives of supply chain responsibility/liability were raised by various international documents, inter alia, UN Sustainable Development Goals[47], OECD Guidelines for Multinational Enterprises[48], and UN Guiding Principles on Business and Human Rights[49] – which oblige companies to ensure respect of human rights "within their sphere of influence". The apparent tension to hold corporations liable for harmful

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44 Y. Queinnec, M.C. Caillet, "Quels outils juridiques pour une régulation efficace des activités des sociétés transnationales?" *in Responsabilité sociale de l'entreprise transnationale et globalisation de l'économie*, ed. I. Daugareilh (Brussels: Bruylant, 2010), 654 *in* Siel Demeyere, "Liability of the Mother Company for Its Subsidiary in French, Belgian and English Law", *European Review of Private Law* 23, 3 (2015): 393, https://doi.org/10.54648/erpl2015028.; A. Bergkamp, "Models of Corporate Supply Chain Liability", *Jura Falc.* 55, 2 (2018-2019): 184, https://www.law.kuleuven.be/apps/jura/public/art/55n2/bergkampsupplychainliability.pdf.

45 Gerhard Wagner, "Haftung für Menschenrechtsverletzungen", *The Rabel Journal of Comparative and International Private Law* 80,4 (2016) 757-759 in Cees van Dam, "Breakthrough in Parent Company Liability. Three Shell Defeats, the End of an Era and New Paradigms" *European Company and Financial Law Review* 18, 5 (2021), 736, https://www.degruyter.com/document/doi/10.1515/ecfr-2021-0032/html.

46 *Ibid.*

47 https://www.undp.org/sustainable-developmentgoals?utm_source=EN&utm_medium=GSR&utm_content=US_UNDP_PaidSearch_Brand_English&utm_campaign=CENTRAL&c_src=CENTRAL&c_src2=GSR&gclid=Cj0KCQiAkMGcBhCSARIsAIW6d0Bv2189Jr6a338IPgZOymt0rIyHJaxaeSge1n9ai9cySULcwnMUBTUaAuVkEALw_wcB.

48 OECD, *OECD Guidelines for Multinational Enterprises, OECD Publishing*, 2023, http://dx.doi.org/10.1787/9789264115415-en.

49 United Nations, *Guiding principles on business and human rights: Implementing the United Nations "Protect, Respect and Remedy" framework*, 2011.

effects within their groups of companies or supply chains led to paradigmatic precedents. The neo-classical approach, as singled out by the author of the thesis, is presented by five landmark cases: *(i) AAA v Unilever plc, (ii) Lungowe v Vedanta Resources plc, (iii) Okpabi and others* v Royal Dutch Shell Plc and *(iv) Hamida Begum v. Maran LTD* in UK and *(v) Fidelis Ayoro Oguru v Shell plc* in the Netherlands. These cases were highly analysed (and criticised) as presenting a novel kind of corporate liability that goes way beyond traditional liability, as presented in the first part of the thesis. In all the cases, claimants argued that defendants[50] owed a duty of care to third parties for various human rights and environmental abuses. Among all the cases, *Lungowe v Vedanta Resources plc* is the most precedential, as the following cases were significantly influenced by the former. In this case, where the liability of the parent company was being tried due to the alleged harm to the environment and human health caused by the subsidiary, the UK Supreme Court presented several important arguments. *First of all*, the liability of parent companies concerning the activities of their subsidiaries is not, of itself, a distinct or novel category of liability in common law negligence.[51] *Second*, whether or not it could be considered that the parent company owns a duty of care depends on "[…] the extent to which, and how, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary."[52] *Finally*, the court explains that as such, duty of care is not specifically attributed to the parent-subsidiary relationship, as the legal principles are the same as would apply in relation to the question of whether any third party (such as a consultant advising the subsidiary) was subject to a duty of care in tort.[53] Therefore, the company's duty of care is grounded in its intervention in the subsidiary's activities. In *Okpabi* and *Oguru*, the Vedanta's dictum was approved. *Maran*,[54] on the other hand, is unique in that the liability of the business partner was tried. The claimant (widow of the deceased) sued Maran Ltd., the company that, through various contractual arrangements, *de facto* controlled the sale of the ship, which was finally placed for demolition, where the claimant died due to unsafe working conditions.[55] Therefore, the court was faced with a situation where the company and the one in which supervision of the fatal accident occurred were completely legally independent. As mentioned, Maran Ltd. sold the ship to an intermediary company, which later resold it for demolition. Therefore, the defendant did not even have a contractual relationship with the final owner of the ship. However, it was not a blocker for the court to consider that a *duty of care* may exist even in such a situation. In doing so, the court relied on the so-called "creation of danger" doctrine,

50 Parent companies, except in *Hamida Begum v. Maran LTD,* where defendant was not parent company, but indirect business partner.

51 *Lungowe v Vedanta Resources plc* [2019] UKSC 20 at 49.

52 *Ibid.*

53 *Ibid*., 36.

54 *Hamida Begum v. Maran LTD* [2021] EWCA Civ 326

55 *Ibid.,* 6-7.

established in a few notable UK precedents.[56] In the court's view, Maran created the danger by choosing that the vessel should be demolished in Bangladesh, known for unsafe working conditions and in these circumstances, that death was "not a mere possibility but a probability."[57] Therefore, in terms of relevant proximity, *Maran* may be seen as ground-breaking case, in fact fully approving SCL. One of the most obvious messages that emerges from *Vedanta*, *Okpabi,* and *Maran* is that supply chain liability is not merely a theoretical concept, especially in terms of the parties involved. While *Vedanta* and *Okpabi* carefully limited the application to parent-subsidiary relationships, *Maran* concluded that established tort law precedents apply to such sophisticated relationships. However, even though the mentioned cases could be considered as disrupting the traditional principles of corporate law as well as tort law by some, the thesis provides an in-depth analysis that is eager to show that the mentioned case law does not necessarily provide a deviation from the classic tort of negligence based on the establishment of one's *duty of care.* In this regard, the notion of the parent's own breach, even though the harm may have been caused at the level of the subsidiary, was welcomed as a safe option to avoid breaching the principle of legal separability, i.e., not to hold the parent company liable for the actions of another company. Parent company or non-parent business partner, according to analysed cases, may owe the *duty of care* only if they intervene in the relevant activities of another company (being the subsidiary or business partner. Therefore, according to general principles of corporate law, parent companies cannot intervene in the activities of their subsidiaries; however, they may intentionally do so, and depending on the circumstances, may be liable in tort.

However, the main issue analysed in the thesis is the change in the application of civil liability for companies based on the breach of so-called due diligence obligations. While tortious liability addresses the abuses occurring in supply chains retrospectively, making companies liable for the actual harm that has already occurred, the French Duty of Vigilance Act[58], the German Supply Chain Act[59] and the Directive on Corporate Sustainability Due Diligence (CSDDD[60]) provide a unique approach. They impose positive due diligence obligations on large companies, *i.e.,* to prevent serious human rights violations and significant environmental damage throughout their entire supply

56 *AG of the BVI v Hartwell, Mitchell and Another v Glasgow City Council, Michael and Another v Chief Constable of South Wales Police, Robinson v Chief Constable of West Yorkshire Police, Poole Borough Council v G N and Another.*

57 *Hamida Begum v. Maran LTD* [2021] EWCA Civ 326

58 Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des enterprises donneuses d'ordre (Loi de Vigilance) JORF n° 0074, adopted on 21 February 2017, entered into force on 28 March 2017.

59 Gesetz über die unternehmerischen Sorgfaltspflichten zur Vermeidung von Menschenrechtsverletzungen in Lie- ferketten (Lieferkettensorgfaltspflichtengesetz – LkSG)

60 Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 (Text with EEA relevance), https://eur-lex.europa.eu/eli/dir/2024/1760/oj/eng

chains. Therefore, from a legal standpoint, due diligence laws create a duty for parent companies to intervene in specific aspects of their subsidiaries' activities in order to prevent potential environmental or human rights abuses. If we examine this from the perspective of the traditional application of liability discussed above, it presents a substantial shift in the parent's role across its supply chain. While discussed, landmark precedents show that parent companies may be liable in cases where they intervene in the activities of another company within the supply chain. Due diligence laws *oblige* them to intervene and foresee liability for failing to do so. The recent Dutch precedent versus Shell may also spark this discussion.[61] The court, relying on general tort norms and the UN Guiding Principles (soft law), ruled that the parent company's influence over the entire Shell group justified an obligation of result to reduce the group's net emissions by 45% by 2030, encompassing both suppliers and end-users. Even though the appellate court overruled the decision,[62] the shift in how tort law is applied to corporate misconduct related to ESG is apparent. The tension between traditional corporate law and tort law is evident in the above evaluation. Even from the single perspective of tort law, it can be seen that the standard of the parent company's intervention in the activities of another company is evolving – *i.e.,* the standard of care from tort law (negligence) is being transformed into a duty to behave in a particular way. In this regard, the thesis analyses the legal implications of such a changed application of civil liability, e.g. whether it is compatible with both corporate law and tort law principles. Considering this, the main ***problem*** analysed in the thesis is the shift in the application of tort law for making companies liable for ESG matters. The author argues that we face significant changes in the application of liability. According to the traditional rules of the tort of negligence (*duty of care*), parent companies or non-parent companies are liable for their active intervention. In contrast, due diligence legislation creates a duty to manage and intervene throughout the entire supply chain, providing liability for insufficient intervention.

The ***object*** of the thesis, respectfully, is the application of civil (tortious) liability for limited liability companies for ESG matters within their supply chains. In particular, the object of the thesis is the application of the tortious liability related to the breach of respective duties set for corporations. As the thesis demonstrates, such duties may range from the classic duty of care (negligence), traditionally found in common law, to the positive duties to act in a particular manner, i.e., due diligence duties. The addressee of the respective duties, within the scope of the thesis, is most commonly understood as parent companies (direct or indirect majority shareholders). However, in particular cases, respective duties, *i.e.* duty of care, are also extended to non-parent business partners. In terms of scope, the thesis focuses on limited liability companies, as liability in tort is primarily applicable to these entities due to the legal separation between the company and its owners (shareholders or members). This separation

61 District Court in the Hague, 26 May 2021, ECLI:NL:RBDHA:2021:5337 (Milieudefensie e.a./Royal Dutch Shell).

62 Judgement of the Court of Appeal in the Hague of 12 November 2024, in the case No. 200.302.332/01

affects how liability is assigned when a tort (such as negligence) occurs. For the thesis, the respective duties of the companies are understood as limited to environmental and human rights externalities. Thus, throughout the thesis, the exact externalities can be loosely categorised as a breach of ESG duties and corporate social responsibility/liability (CSR, CSL) duties. The object is analysed by providing a thorough analysis of the changes in the application of tortious liability for corporate abuses *per se,* i.e. the author divides the thesis into three parts, corresponding to "classical", "neo-classical", and "modern" approach where "classical" approach reflects traditional corporate law principles – legal separability and limited liability and its coexistence with tortious liability, "neo-classical" approach analyses the changes in the recent landmark case law, mainly in UK, where parent companies and non-parent business partners are held liable in tort for ESG matters, and, finally, "modern" approach corresponds to the recent statutory law developments both at national (France, Germany, UK) and EU level, i.e. due-diligence laws. As indicated, the thesis focuses on three main jurisdictions, namely – the UK, France and Germany, for multiple reasons – first of all, those jurisdictions have emerged as the most comprehensive legal jurisdictions in developing statutory law and case law precedents around the tortious liability of parent corporations for the abuses committed by their subsidiaries, particularly in the context of ESG harms.

Second, the mentioned jurisdictions are also pioneers in developing corporate due-diligence legislations that are vital to the main problematic aspects analysed in the thesis. Finally, the works of legal scholars from Germany, France, and the United Kingdom are the most comprehensive and influential in the discussion of the tortious liability of parent companies for the conduct of their subsidiaries. This prominence stems from the advanced legal systems, rich doctrinal traditions, and the early and active academic engagement in these jurisdictions with the evolving challenges of corporate accountability. While this thesis primarily focuses on the legal frameworks and scholarly contributions of France, Germany, and the United Kingdom, it also incorporates important aspects of Dutch case law, most notably the Milieudefensie et al. v. Royal Dutch Shell decision. However, it should be noted that Dutch law is not analysed as a standalone jurisdiction within the thesis. Instead, the relevance of the Milieudefensie case lies in the innovative approach taken by the Dutch court to corporate liability, particularly its application of soft law instruments—most significantly, the UN Guiding Principles on Business and Human Rights (UNGPs)—as a standard of care. Thus, the Dutch precedent serves as a comparative and illustrative reference that supports the thesis's broader argument regarding the legal relevance of soft law and evolving standards of corporate due diligence, but without engaging in a complete doctrinal analysis of Dutch tort law.

Considering the above, the thesis analyses the regulatory models concerning the attribution of duties and civil liability in groups of companies (and value chains) to determine how tortious liability is applied in each of them.

Originality/Value of the thesis. Changes in the application of civil liability to corporations for ESG matters inevitably correspond to realities at both political and economic levels. The increasing power of multinational corporations and the level of

exposure their activities within the entire supply chains eventually raised awareness of their liability. In this regard, tension is apparent between corporate law and tort law. C. A. Witting states that the problem of uncompensated victims of corporate torts reveals a clash of values between tort law and company law.[63] P. Muchlinski explains such tension in more detail: "[f]irst, the need to ensure sufficient certainty in the law to permit the efficient allocation of risk in the corporate group, whether through the creation of subsidiaries or the contractual allocation of rights and duties; secondly, the need to ensure that the resulting allocation of risk in the group does not fail to compensate third parties for losses caused by activities of groups members."[64] For a certain period, the tension between corporate law and tort law was mitigated by implying so-called direct or primary liability on the company based on its own duty of care. Recent landmark cases such as *Vedanta*, *Okpabi,* and later *Maran* confirmed that both parent companies and non-parent business partners can be held liable in tort based on the same principle. However, recent due diligence laws might have substantially shifted the approach, as described above. The originality of this research is based on the fact that the author provides a broader viewpoint on the possible changes in corporate liability, *i.e.* the topic is not isolated on particular aspects of ESG liability but instead looks at it from the perspective of how it could be considered as changing the whole fundamental principles of corporate liability (based on legal separability and limited liability principles). Particular aspects related to the topic are already widely discussed in the scholarly. B. J. Clarke and P. Blumberg, along with L. A. Sørensen, discuss the duties of parent companies. C. van Dam thoroughly researches the tortious liability of parent companies for the externalities at the level of subsidiaries. P. Bergkamp provides an in-depth analysis of the models of corporate supply chain liability, among others. However, the *originality* of the thesis is based on the fact that the author researches the evolution of tortious liability of the corporations, from the traditional tort of negligence to so-called supply chain liability, in order to analyse whether the recent developments in tortious liability are compatible with both company law principles as well as tort law principles. More precisely, the author presents the viewpoint that we are currently witnessing a shift in the way tort law is used to hold companies liable for the reckless behaviour in their supply chains that raises environmental or human rights concerns. In this regard, the thesis aims to understand the boundaries of such changes and to determine whether these developments are compatible with other principles of corporate and tort law. In this regard, the originality and novelty of the thesis are inevitably grounded in the fact that the EU Directive on Corporate Sustainability Due Diligence, which shapes the landscape of the EU's due diligence legislation, entered into force on 25 July 2024. Thus, the analysis of the implications for corporate civil liability based on the latter is timely. The analysis of the tortious liability of corporations is of critical importance

63 Christian A. Witting, *Liability of Corporate Groups and Networks* (Cambridge: Cambridge University Press, 2018), 348.

64 Peter T. Muchlinski, *Multinational Enterprises and the Law 2nd edn* (New York: Oxford University Press, 2007), 321.

for legal scholarship at both the EU and national levels for several reasons, primarily because it addresses the intersection of corporate activity, legal accountability, and societal protection. Corporations play a significant role in modern economies, and their actions can cause harm to individuals, other businesses, or public interests. Tort law, which deals with civil wrongs, serves as an essential mechanism for holding corporations liable for damages caused by their wrongful conduct. Analysing tortious liability ensures a clear understanding of how corporate actions are subject to legal scrutiny and the extent of their responsibility for harm. However, even though tortious liability may serve as a natural remedy for victims of corporate behaviour, it generally does not impose positive duties on corporations to act in a particular way. However, recent due diligence legislation, both at the national and EU level, can change this perception. Therefore, the *value* of the thesis, *inter alia,* is grounded by the fact that it analyses the application of tortious liability of the corporations, with the particular importance given to recent due-diligence legislation, intending to display co-existence between tort law and corporate law in the context of so-called supply chain liability, giving rise to due-diligence legislation both at national and EU level.

The ***purpose of this thesis*** is to provide a conceptual viewpoint on the current legal changes in the liability of corporations for the so-called – environmental and/or human rights abuses in their supply chains. The author's premise is that supply chain liability is shifting in a way that can radically alter our understanding of fundamental corporate law principles, particularly the liability of corporations. To achieve the purpose of the research, the following ***objectives*** are set:

1. Analyse the implications for civil (tortious) liability of the corporations for the actions happening at the level of their subsidiaries related to human rights and environmental abuses in the designated countries – France, Germany and the United Kingdom in order to dilute the general principles for tortious liability;
2. Analyse the recent case law precedents, in particular, *(i) AAA v Unilever plc* ("**Unilever**"), *(ii) Lungowe v Vedanta Resources plc* ("**Vedanta**"), *(iii) Okpabi and others* v Royal Dutch Shell Plc ("**Okpabi**"), *(iv) Hamida Begum v. Maran LTD* ("**Maran**") and *(v) Fidelis Ayoro Oguru v Shell plc* ("**Oguru**") that target the tortious liability of the corporations for the externalities in their supply chains in order to answer:
    2.1. Is there a specific theory (model) or set of it that could explain cases where corporations were (or were not) held liable for the externalities at the level of subsidiaries or business partners;
    2.2. What conditions of tortious liability are set in these cases;
    2.3. To what extent (if any) do these cases represent a departure from the classical approach of corporate liability? If it is established that recent case law represents a departure from traditional rules of corporate liability, analyse to what extent it is compatible with existing UK, German and French law and corporate law doctrines.
3. Analyse due diligence law, in particular, Germany's Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Global

Supply Chains, France's Corporate Duty of Vigilance Act and Corporate Sustainability Due Diligence Directive in order to answer:

3.1. What conditions of civil liability are set in due diligence legislation;
3.2. Whether due-diligence legislation presents a departure in a way tortious liability is being applied to corporations for the harm that occurred within their supply chain;
3.3. Whether due-diligence legislation is compatible with traditional corporate law principles of legal separability and limited liability.

Considering the value and novelty of the thesis, the ***defence statements*** are as follows:

1. Analysis of the selected jurisdictions, where the UK has the most precedents, provide that parent companies may be held liable in tort for the harmful actions at the level of their subsidiaries, based on the classic tort of negligence, by establishing the *duty of care*. Such a *duty of care* may be established by the parent company's intervention in the relevant activities of its subsidiaries, which ultimately implies operational control.
2. The latest UK and Dutch precedents, namely *Unilever*, *Vedanta*, *Okpabi*, *Oguru*, and *Maran*, from a strictly legal perspective, are based on the traditional tort of negligence rules by establishing the *duty of care*. Even though recent case law is based on the traditional tort of negligence, it presents an evolvement of so-called supply chain liability. Supply chain liability is broader in the sense that it extends beyond group (parent company) liability, enabling non-parent companies (such as business partners in *Maran*) to be held liable based on the tort of negligence.
3. Liability, based on the company's duty of care, does not contradict legal separability and limited liability principles as they are grounded on the corporation's own behaviour. Thus, legal separability is not addressed; instead, the latter is approved. In terms of the principle of limited liability, the company's liability for the breach of duty of care may be understood by a side approach as *(i)* one of the exceptions to the limited liability (such as corporate veil piercing scenarios) or *(ii)* liability separate from one of the actions of the subsidiary.
4. Due diligence laws, both at the national and EU level, present a substantial shift in the application of tort liability for harmful actions within the supply chain. While the tort law precedents described above consider companies liable in tort for their intervention into the relevant activities of companies within the supply chain, due diligence laws oblige parent companies to oversee and manage human rights and environmental-related matters throughout the entire supply chain.

Structure of the thesis. The thesis is divided into three connected parts that follow each other in a logical sequence to explain the change in the implications for tortious

liability of corporations for the harmful actions happening at the level of their subsidiaries/supply chain members. The *first* part of the thesis reflects the so-called classical approach of a company's liability for the actions at the level of another separate company. Herein, focusing on three jurisdictions – France, Germany, and the United Kingdom - the author provides a general analysis of cornerstone corporate law principles, namely legal separability and limited liability, as these are relevant to understanding the implications of liability *per se,* as they provide general limitations on it. After that, the chapter focuses on the most common exceptions to the company's limited liability. Irrespective of the fact that separate countries may have specific exceptions to limited liability, the author focuses on the most common ones, attributable to all analysed countries, namely "*lifting of the corporate veil*" and "*de facto directorship*", but eventually turn the main analysed exception of limited liability – liability in tort. Following this, the conditions of tortious liability of the parent company for the harmful actions at the level of the subsidiary are analysed separately in all mentioned countries. The United Kingdom, which has the most fruitful precedents on the topic, enables the author to distil some general conditions of tortious liability of the parent company that corresponds to the "classical approach" used later in the thesis for comparative purposes. In the *second* part of the thesis, the author focuses on recent case law precedents, particularly in the United Kingdom, as they have attracted considerable attention for allegedly reshaping the civil liability of parent companies. First, the author provides an in-depth legal analysis of a separate case, explaining the implications of civil liability in that case. After that, the thesis turns to specific related questions, aimed to explain *(i)* is there a specific theory (model) or set of it that could explain cases where corporations were (or were not) held liable for the externalities at the level of subsidiaries or business partners, *(ii)* to what extent do these cases represent a departure from the classical approach of corporate liability. If it is established that recent case law represents a departure from traditional rules of corporate liability, analyse to what extent it is compatible with existing UK, German, and French tort law and corporate law principles. After providing an analysis of these institutes, the author draws some general conclusions and disclaims possible paradoxes that stem from these cases, considering the latter as a "neo-classical" approach to tortious liability of companies for actions occurring at the level of group or supply chain companies. The *third* part of the thesis analyses the due diligence laws both at the national (France, Germany) and EU (CSDDD) levels. The author, first of all, provides a general overview of the mentioned laws, detailing the roots of their emergence*, which* in turn leads to an examination of the implications for civil liability and the conditions under which it applies. Finally, the author provides a comparison between this "modern" approach to the tortious liability of corporations for actions occurring at the level of their group or supply chain companies and the mentioned "classical" and "neo-classical" approaches. This way, the author illustrates the shift in how tort law is being used to hold companies liable for the torts of other legally separate entities.

DEFINITIONS

Duty of care - the standard of care that a reasonable person would exercise in the same situation or under similar circumstances. This standard of care is used in a tort action to determine whether a person was negligent.

Corporate social responsibility (CSR) - a business model in which companies integrate social and environmental concerns in their business operations and interactions with their stakeholders instead of only considering economic profits.

Environmental, Social and Governance (ESG) – standards used to assess corporate behaviour and ethical values, which can include factors such as climate change, labour practices, diversity and inclusion, and community engagement.

ESG liability – legal liability that companies face for failing to adequately address ESG factors in their operations, disclosures, or decision-making. ESG liability arises from harm to the environment (e.g. pollution, deforestation, carbon emissions).

Tortious liability - a legal obligation that arises when a person or entity commits a tort—a wrongful act or omission that causes harm to another person and for which the injured party may seek compensation through a civil lawsuit.

Parent company - a company that owns and controls another company, known as a subsidiary, by holding a majority of its voting shares or having significant influence over its operations and management.

A subsidiary is a company that is owned or controlled by another company, known as the parent company. Control is typically achieved when the parent owns more than 50% of the subsidiary's voting shares.

Value chain - the entire series of activities and relationships that a business engages in, which contribute to the creation, production, distribution, and sale of a product or service. At each stage of the value chain, businesses must manage various legal considerations and obligations, including contracts, compliance, intellectual property (IP) protection, liability, and risk management.

Supply chain - the sequence of activities involved in getting a product or service from raw material sourcing to the final consumer. It focuses primarily on the logistics and flow of goods from suppliers to consumers.

Methods of the research

To thoroughly and comprehensively investigate the issues considered in the thesis, the research employs the tools and procedures of scientific knowledge, specifically the methods of scientific research. The following methods are used in the thesis: historical, comparative, document analysis, and generalisation methods.

The *historical* method is employed to research the development of tortious corporate liability in the analysed countries, namely Germany, the United Kingdom, and France, particularly concerning environmental or human rights violations. The historical research method is essential for explaining the application of company liability in tort for harmful actions committed by other companies (e.g., subsidiaries), as it provides context and an understanding of the evolution of legal principles governing liability. This method examines how legal doctrines, case law, and statutory frameworks have evolved over time, detailing why certain liability principles exist and how they are applied in modern contexts. The historical research method helps reveal the origins of fundamental liability principles, such as vicarious liability (holding one party responsible for another's actions) and piercing the corporate veil (holding parent companies liable for the actions of their subsidiaries). Understanding these roots helps explain why specific liability rules apply to companies for harmful actions indirectly caused by other entities, whether subsidiaries or unrelated companies. Historical analysis, *among other things*, reveals how case law (especially in more developed markets, such as the United Kingdom) has, over time, expanded or restricted the scope of corporate liability in tort cases, particularly concerning environmental and human rights abuses. Examining landmark cases shows how courts have interpreted and shaped liability doctrines. Ultimately, historical research situates liability within broader socioeconomic shifts, including corporate expansion. In this regard, one could argue that such a process inevitably increased interactions between companies, making it more relevant to hold companies accountable for one another's harmful actions. The historical method also enables us to demonstrate how modern liability frameworks are influenced by historical legislation aimed at protecting public interests and regulating business practices. In this regard, the evolution from classic tort law liability to modern constructs, i.e., due diligence laws, is evident.

The *comparative* research method is used to examine and contrast the application of company tortious liability for environmental and human rights abuses in France, Germany, and the United Kingdom. The thesis selects France, Germany, and the United Kingdom as the core jurisdictions for analysis due to their leading roles in the legal development of parent company liability and their pivotal contributions to the emerging framework of corporate due diligence obligations. These three legal systems offer complementary perspectives—both statutory and jurisprudential—on how tort law is evolving to respond to the challenges posed by complex corporate structures and transnational ESG risks. France is a global pioneer in the field of corporate due diligence. The Duty of Vigilance Law was the first in the world to establish a mandatory corporate duty of care applicable to a parent company's operations, subsidiaries,

and supply chains. Germany represents a highly developed civil law system with a detailed statutory approach to corporate due diligence. Its Supply Chain Due Diligence Act, in force since 2023, mandates companies to conduct human rights and environmental risk assessments throughout their value chains. Germany played a leading role in shaping EU-level legislative initiatives, such as CSDDD. The United Kingdom offers the most developed case law on the tortious liability of parent companies. Landmark decisions by the UK Supreme Court, including *Vedanta* and *Okpabi*, have clarified the circumstances under which a parent company may be held liable for harms caused by its foreign subsidiaries. Although the UK does not have a comprehensive statutory due diligence regime (apart from the Modern Slavery Act 2015), its common law framework provides a flexible and evolving legal basis for liability grounded in the assumption of responsibility and proximity. UK jurisprudence has had a profound impact on transnational law, particularly in Commonwealth jurisdictions.

This method is valuable because it systematically highlights differences and similarities across legal systems, offering insights into how each country addresses corporate liability for torts in specific cases analysed in the thesis. By comparing the statutory and common law principles that govern company liability in tort across these jurisdictions, the thesis identifies distinctive legal doctrines and how each country's legal system approaches concepts such as vicarious liability, duty of care, and the corporate veil. Comparative analysis explains how courts in France, Germany, and the UK interpret and apply tortious liability principles. This approach clarifies the influence of case law precedents and reveals varying judicial attitudes toward holding companies' liability for harms associated with other separate companies. By evaluating how each country's approach impacts corporate accountability and legal certainty, the thesis assesses which aspects of each legal framework are most effective or offer insights for reform in other jurisdictions. The comparative research method ultimately enables a comprehensive, cross-jurisdictional understanding of corporate tortious liability.

The *document analysis* method is used to systematically examine and interpret various legal documents to describe the application of company tortious liability for environmental and human rights abuses. This method involves analysing both statutory and case law from selected jurisdictions, i.e., Germany, the United Kingdom, and France, as well as international legal acts (e.g., EU). By examining statutory and case law, the thesis interprets foundational legal doctrines, including vicarious liability, duty of care, and others. Document analysis helps uncover how these doctrines have been applied in practice across different countries and how they influence corporate liability in tort cases. Notably, the analysis of historical statutory and case law reveals the evolution of tortious liability principles over time, moving, in particular, to the direction of due diligence legislation. This historical aspect provides insights into how and why specific liability standards have been reinforced or altered, showing trends in judicial attitudes toward corporate liability. Naturally, document analysis allows for the examination of similar liability cases across different jurisdictions, facilitating a comparison of how France, Germany, and the United Kingdom interpret and enforce tortious liability standards for companies. Differences and similarities identified through

document analysis enable the thesis to assess each jurisdiction's approach to the topic.

Finally, the *generalization* method in this thesis is applied to summarize the principles in the application of tortious liability of companies by identifying commonalities across cases, legal doctrines, and jurisdictional approaches. By distilling complex legal rules and case law, this method provides a broader understanding of how tortious liability is applied to companies for harmful actions related to environmental and human rights abuses. By applying generalisation, the thesis summarises the ways different jurisdictions—such as France, Germany, and the United Kingdom—handle similar tortious liability issues. This method captures broader trends, such as the inclination of courts to hold parent companies liable in specific scenarios, making it easier to identify general tendencies rather than focusing on isolated rulings.

N.B. *"Grammarly Pro" application (https://www.grammarly.com) was used to correct the grammar and linguistic style of the dissertation, since the author is not a native EN speaker.*

REVIEW OF THE RESEARCH OF THE TOPIC

In the legal science of the Republic of Lithuania, the institute of tort liability of a company for damage caused by other independent companies (subsidiaries or business partners), particularly related to human rights and environmental externalities, has not been comprehensively examined. Particular aspects related to the thesis are addressed by Lithuanian scholars, e.g. L. Mikalonienė analysed aspects of civil liability of a shareholder of a closed stock company towards the company, its creditors and other shareholders[65], or the subsidiary nature of shareholder's liability.[66] V. Papijanc analysed the application of the „lifting the corporate veil" doctrine under Lithuanian law,[67] and A. Tikniūtė provided a comprehensive analysis of the limited liability of the legal entity.[68] A recent study by E. Bakanauskas, to some extent, analysed the topic of the interest of the group.[69]

While the works of Lithuanian scholars are referenced in the thesis, their relevance is confined to specific and narrowly defined aspects of the analysis, particularly concerning the conceptual underpinnings of limited liability, the subsidiary nature of a legal entity with its shareholders, and the doctrine of the lifting of the corporate veil. These contributions provide a valuable context for understanding these traditional corporate law principles. However, the broader objective of the thesis extends beyond these foundational concepts. It explores how the application of tortious liability to parent companies not only redefines the contours of the tort law itself but also poses significant challenges to the established doctrines of corporate law, such as legal separability and limited liability. The thesis presents an integrated perspective that situates these traditional principles within the evolving legal and theoretical landscape, shaped by the changing realities of corporate group structures and accountability.

Foreign scholars offer a more comprehensive discussion on the topic, and the literature is also more extensive, encompassing the separate topics addressed in the thesis. Regarding the applicability of general tort law principles, the discussion is divided by country. For France, the author heavily relies on the works of K. Vanderkerckhove, S. Demeyere, P. Malinvaud, and D. Fenouillet. For Germany, this institute is discussed by G. Wagner, S. Mock, M. Casper, and P. Blumberg, L.B.C. Gower, and A. Sanger

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65 L. Mikalonienė, Uždarosios akcinės bendrovės akcininko teisės ir jų gynimo būdai (Vilnius: VĮ „Registrų centras", 2015).

66 L. Mikalonienė, "Subsidiari akcininko atsakomybė", *Teisė*, 76 (2010), doi:10.15388/Teise.2010.0.217.

67 Vitalij Papijanc, "Patronuojančios įmonės atsakomybė prieš dukterinės įmonės kreditorius" (Doctoral thesis, Mykolas Romeris University, 2008), https://www.lituanistika.lt/content/14462.

68 Agnė Tikniūtė, "Juridinio asmens ribotos atsakomybės problema: teisiniai aspektai (Doctoral thesis, Mykolas Romeris University, 2006), https://www.lituanistika.lt/content/9218.

69 Egidijus Bakanauskas, "Grupės intereso pripažinimas, dukterinės uždarosios akcinės bendrovės smulkiųjų akcininkų teisių apsauga: probleminiai bendrovių teisės aspektai" (Doctoral thesis, Vilnius University, 2023), https://is.vu.lt/pls/pub/ivykiai.ivykiai_prd?p_name=1233396A744E38C627E0E0FAC8DF08EE/BAKANAUSKAS%20Edvinas.pdf.

provided an extensive analysis of the UK approach. Moving to the next chapter of the thesis, namely, the analysis of the so-called "neo-classical" approach, re-inforced by recent tort law cases, Cees van Dam is a prominent scholar in European tort law, with a significant focus on the liability of parent companies for actions of their subsidiaries. His work critically examines the application of tort law in holding parent companies accountable for harm caused at the level of their subsidiaries, particularly in the context of human rights violations and environmental damage. Penelope A. Bergkamp critically examines the evolving concept of corporate supply chain liability, particularly in the context of European tort law. Her research examines how multinational corporations can be held accountable for harm caused by their subsidiaries and business partners, particularly in developing countries. In addition to these scholars, Kenneth E. Sørensen and Andrea Zerk have made significant contributions to the discourse on corporate liability in supply chains, each from a distinct disciplinary perspective.

The analysis presented by the aforementioned landmark scholars, as well as many others, collectively provides a multidimensional foundation for the research, enabling a comprehensive and structured analysis of the complex issue of corporate liability within supply chains. The analysis enabled the author to naturally transition to the final chapter of the thesis, the so-called "modern" approach to the tortious liability of corporations within their supply chains, as enforced by recent due diligence legislation. The scholarly contributions of Alessio Pacces, Silvia Ciacchi, and Nicolas Bueno have significantly enriched the thesis' legal discourse on corporate sustainability due diligence. A. Pacces provides a law and economics perspective on the EU's Corporate Sustainability Due Diligence Directive (CSDDD), analyzing the civil liability rules and assessing their effectiveness in internalizing negative externalities. S. Ciacchi provides a comprehensive overview of the CSDDD, detailing the legislative process and analysing the final text of the directive. Her research provides insights into the legislative journey of the CSDDD, examining the compromises and considerations that shaped its current form. Nicolas Bueno, along with co-authors, examines the CSDDD as a political compromise among EU member states, analyzing its main elements and implications beyond Europe.

1. CLASSICAL APPROACH TO THE LIABILITY OF THE PARENT COMPANY

Traditionally, corporate groups stand on two cornerstones – one of the basic features is that companies within the group have separate legal personalities.[70] Another aspect is that the liability of a parent company towards the acts of its subsidiary is regulated under the basic concept of limited liability. The following implication is that in groups composed of several companies with limited liability, shareholders do not risk more than their contribution and cannot be held liable for the debts of their corporations or subsidiaries.[71] As K. Vandekerckhove states: "[...] it would seem unthinkable today to deny the benefit of limited liability to multinational groups whose organization is entirely based on this rule."[72]

However, limited liability has exceptions, and in particular cases, parent companies can be held liable for actions at the level of subsidiaries. As discussed below, depending on the jurisdiction, this issue is typically addressed by the doctrine of "lifting the corporate veil" or the tortious liability of the parent company, depending on the specific factual circumstances.

1.1. United Kingdom

1.1.1. "Lifting the corporate veil" as the main exception to the limited liability of the parent company

As P. Blumberg concludes, through "[…] piercing of the corporate veil, two separate entities are collapsed into one and deemed to be one solely for the matter at hand."[73] Therefore, the shareholder may be held liable for its subsidiary's debts despite the rules of limited liability and separate personality.[74] It is of particular importance to understand the nature of this doctrine, as it reveals the key features by which corporations can lose the benefits of limited liability.

Salomon v. Salomon & co. as a general "test"

In terms of shareholder liability for actions at the level of the owned company, *Salomon v. Salomon*[75] is the British cornerstone case. The facts of the case are straightforward: Mr Salomon decided to convert his manufacturing business into a limited liability corporation, where he held a vast majority of the shares. Subsequently, the company encountered financial difficulties and entered liquidation.

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70 Winner, *supra note*, 1:87.

71 Vanderkerckhove, *supra note,* 4: 1.

72 *Ibid.*, 9.

73 Phillip Blumberg et al., *Blumberg on Corporate Groups. 2nd edn.* (Aspen: Aspen Publishers, 2006), 10.

74 Vandekerckhove, *supra note*, 4:11.

75 *Salomon v Salomon & Co Ltd* [1897] AC 22.

A simple yet particularly relevant "test" to shareholder's liability that stems from *Salomon v. Solomon* judgement is that even if one shareholder holds the majority of the shares in a company, the company is not to be regarded as a mere shadow of that individual. In the words of Lord Macnaghten, "[t]he company is at law a different person altogether from the subscribers to the memorandum of association; and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor shareholders are liable in any shape or form, except to the extent and in the manner provided by the Act."[76]

Even though the *Salomon v. Salomon* case presents the company with a single shareholder – a natural person, as stated by Gower - it cannot be ruled that it did not form a principle of separate personality and limited liability of shareholders *vis-à-vis* the company.[77] In essence, the application of this principle is not different in corporate groups.[78] Therefore, in the case where the company is incorporated correctly, it is a separate, independent entity with its own rights and liabilities, and the motives of those who participated in the company's promotion are irrelevant.[79] Thus, the "corporate veil" between the company and its shareholders originally stems from the case of *Salomon v. Salomon*. This corporate "fiction" was developed to enable market actors to pursue an economic benefit as a single unit without exposure to risks or liabilities in one's capacity.[80]

Adams v. Cape Industries Plc.

The principle of legal separability between shareholder and company, established in *Salomon v. Salomon,* was applied in the context of a group of companies in *Adams v. Cape*.[81] Cape Industries, a UK-domiciled company, was involved in mining asbestos in South Africa, while its products were marketed in the United States through a network of subsidiaries and associated companies. In the US, Cape also had a subsidiary. Several US factory workers got sick of asbestos-related diseases. Eventually, they sued Cape in US court. A couple of hundred claimants had been awarded damages by the US; however, the company in the US was not financially able to remedy all the claimants, and consequently, they decided to enforce the judgment in the UK. The first instance court found that the corporate veil could not be lifted. The Court of Appeal in *Adams v. Cape* was also strict. It ruled that it was not entitled to lift the *"corporate veil"* against a parent company, which was a member of a corporate group, "[…] simply on

76 *Ibid.*, at 51.

77 L.B.C. Gower*, Principles of Modern Company Law, 5th edn.* (London: Sweet & Maxwell, 1992), 85 in Vandekerckhove, *supra note*, 4:66.

78 The Albazero, [1975] 3 WRL 491,521 cited in *Adams v. Cape Industries plc* [1990] 2 WLR 657, at 697.

79 *Salomon v Salomon & Co Ltd* [1897] AC 22 at 30-31; https://www.lawteacher.net/cases/salomon-v-salomon.php.

80 *Ayton Ltd. v Popely*, 2005 EWHC 810 (Ch)., https://www.lawteacher.net/cases/salomon-v-salomon.php.

81 *Adams v. Cape Industries plc.* [1990] Ch 433.

the is that the corporate structure had been used to ensure that legal liability in regards to the particular future activities of the group would fall on another member of the group rather than on the defendant company."[82] What is the most important part of the reasoning of the court? By dismissing the contention that a corporate veil should be pierced merely because a group of companies operated as a single economic entity, the court acknowledged the benefits of managing business activity through group structure without losing the benefit of limited liability.

In both these landmark cases, the court permitted the corporate entities to take maximum advantage of their structure. Further cases in the UK have limited the applicability of the doctrine of *"corporate veil"* fundamentally to three situations, which are: (i) where the court is interpreting a statute or document, (ii) where the company is a mere facade, (iii) where the subsidiary is an agent of the company.[83]

The movement towards exceptions of limited liability

The Salomon v. Salomon and *Adams v. Cape Industries* cases, although accepting a general limited liability rule, framed a path to the exceptions to it. Later case law shows a more detailed approach to the latter. For example, in the case of *Smith, Stone & Knight v. Birmingham Corp*.,[84] an exception regarding agency relationships was accepted. The exception of groups as a single economic entity was developed in *DHN Food Distributors v. Tower Hamlets LBC*.[85] In *Adams v. Cape Industries Plc*, grounds were put forward for disregarding the so-called separate entity by piercing the corporate veil.[86] It can be concluded that the main exceptions to limited liability, where UK courts tend to "lift the corporate veil" and disregard limited liability of the parent company, are sham or fraud exception and agency.[87] However, as Wright indicates, veil piercing as such has rarely been a stable concept and, in the words of Thompson,[88] has been called "[t]he most litigated issue in corporate law and remains uncommon in practice.[89] Therefore, its value for briefing the general pattern for parental liability cannot be overstated. As Petrin argues, after *Adams* provided very narrow possibilities for piercing the veil to succeed, the focus shifted to direct parental liability in tort.[90]

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82 *Ibid.*

83 Vandekerckhove, *supra note*, 4:71.

84 *Smith, Stone & Knight v. Birmingham Corp.* [1939] 4 All E.R. 116.

85 *DHN Food Distributors v. Tower Hamlets LBC* [1976] 1 WLR 852.

86 "Liability of Parent Company for actions of Subsidiary." All Answers Ltd. 11 (2022), https://www.lawteacher.net/free-law-essays/business-law/liability-of-parent-over-subsidiary-company-actions-business-law-essay.php?vref=1

87 Glen Wright, "Risky Business: Enterprise Liability, Corporate Groups and Torts", *Journal of European Tort Law* 8, 1 (2017): 61, https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jetl8&section=7.

88 Robert B. Thompson, "Piercing the Corporate Veil: An Empirical Study", *Cornell Law Review* 76,5 (1991): 1036, https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=3501&context=clr

89 Wright, *op. cit.*

90 Martin Petrin, and Barnali Choudhury, "Group Company Liability", *European Business Organisation Law Review* 20 (2018): 4, https://ssrn.com/abstract=3284380. Petrin, *supra note*, 38: 604.

1.1.2. The tort of negligence: the "duty of care"

"Lifting of the corporate veil" is a general term for disregarding corporate separability and limited liability and is more commonly applied in business relationship-type cases. However, the parent company might also be held liable for the externalities at the level of subsidiaries, based on the tort, especially where the interest of involuntary creditors is at stake. Wright argued that general tort law being used in some of the following landmark cases (*Lubbe & Others v. Cape Plc*., *Chandler v. Cape Plc,* etc.) might be the response to the ineffectiveness of veil piercing.[91]

C. A. Witting accurately states that the problem of uncompensated victims of corporate torts reveals a clash of values between tort law and company law.[92] P. Muchlinski details what contradictions arise in this particular situation: "[f]irst, the need to ensure sufficient certainty in the law to permit the efficient allocation of risk in the corporate group, whether through the creation of subsidiaries or the contractual allocation of rights and duties; secondly, the need to ensure that the resulting allocation of risk in the group does not fail to compensate third parties for losses caused by activities of groups members."[93]

According to the English tort of negligence description, a person is liable for negligence when *(i)* he/she owes a duty of care to the victim, *(ii)* he/she has breached that duty, *(iii)* the victim's damage is not so unforeseeable as to be too remote, and *(iv)* there is a causal connection between the careless conduct and the damage.[94] Thus, to apply tortious liability, it shall be established that the person to whom such liability is initiated has an existing duty of care towards other persons, the breach of which would lead to the emergence of liability.[95] Duty of care implies the existence of a relationship between the claimant and the defendant before the infliction of the harm.[96] If one does not take such care, one may be liable to pay damages to a party who suffers such injury or loss.

The cornerstone rule governing this duty of care is established in the landmark *Donoghue v Stevenson,*[97] namely, that one would take reasonable care to avoid acts or omissions which are reasonably foreseeable to injure the neighbour. Therefore, according to this "neighbour" principle, a person owes a duty of care to everyone who,

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91 *Wright*, *op. cit*., 62.

92 Witting, *supra note*, 63: 348.

93 Muchlinski*, supra note*, 64: 321.

94 Anthony M. Dugdale et al., *Clerk & Lindsell on Torts 19th edn*. (London: Sweet & Maxwell, 2006), 383 in Siel Demeyere, "Liability of the Mother Company for Its Subsidiary in French, Belgian and English Law", *European Review of Private Law* 23, 3 (2015): 402, https://doi.org/10.54648/erpl2015028.

95 Van Dam, *supra note,* 30: 93.

96 Basil Markesinis, Simon Deakin, *Markesinis and Deakin's Tort Law 5th edn.* (New York: Oxford University Press, 2003), 75-76 in Cees van Dam, *European Tort Law* (New York: Oxford University Press, 2006), 93.

97 *Donoghue v Stevenson* [1932] AC 562, 580.

by negligent conduct, can suffer foreseeable damage, provided that the requirement of sufficient proximity between the wrongdoer and the victim exists.[98] As Witting explains, proximity "informs" what is foreseeable, i.e., what reasonably can be foreseen by a person is best determined by reference to how the actual defendant has situated *vis-à-vis* the claimant before their harmful interaction.[99]

C. van Dam concludes that a *duty of care* is the most characteristic and most disputed element of the tort of negligence.[100] This conclusion by Van Dam is of particular importance to this Thesis, as the existence of the *duty of care* of the parent company towards third parties, in terms of externalities at the level of subsidiaries, is an emerging phenomenon in recent case law and legislation.[101] The identification of parental *duty of care* is exceptionally relevant when examining three-party cases involving parent companies and their subsidiaries. Traditional piercing conditions are not helpful in such cases, as A. Sanger states that tortious liability has nothing in common with the former and thus can be called – "crossing the corporate veil."[102] Mares explains that the key aspect of the duty of care is not that the parent company controlled the subsidiary to such an extent that it became a mere instrumentality (a typical veil-piercing situation) but rather that the parent's own conduct contributed to the harm.[103] Even though the outcome has the same effect, i.e., imposing liability upon a parent company despite the principle of legal separability.[104] Enneking also agrees that "[v]eil piercing or other theories lifting limited liability should be distinguished from direct liability of the parent company."[105] Direct liability means that the parent is liable due to its failure to adequately control the subsidiary. Therefore, the focus is on the parent company's own obligations. Irrespective of the subsidiary's liability, the direct liability of the parent company entails an independent duty of care of the parent company.[106] Wouters and Ryngaert explain that parental duty of care is the one that "[…] that may be traced back to corporate headquarters [of the Multinational…where…the] programs of

98 Van Dam, *op. cit*.

99 *Witting*, *supra note*, 63: 357.

100 *Ibid.*

101 Part 2 of the Thesis.

102 Andrew Sanger, "Crossing the Corporate Veil: The Duty of Care Owed by a Parent Company to the Employees of its Subsidiary", *The Cambridge Law Journal* 71, 3 (2012): 478-481, http://www.jstor.org/stable/41819920.

103 Radu Mares, "Liability within corporate groups: Parent company's accountability for subsidiary human rights abuses", *forthcoming in S. Deva (ed.) Research Handbook on Human Rights and Business* (Edward Elgar, 2020): 11, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3481052.

104 *Wright*, *supra note*, 87: 62.

105 L. F. H. Enneking, "Foreign Direct Liability and Beyond - Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability", *Eleven International Publishing* (2012), https://ssrn.com/abstract=2206836.

106 Penelope A. Bergkamp, „Models of Corporate Supply Chain Liability: Are the Foundations Being Laid for A New Type of Vicarious Liability Regime?", *European Company Law Journal* 16, 5 (2019): 161, https://kluwerlawonline.com/journalarticle/European+Company+Law/16.5/EUCL2019023.

"care" are devised [and the] control [over] the corporate group is exercised, and […] subsequently applied to the worldwide activities of the [Multinational]."[107]

To establish a novel *duty of care* in the UK, the so-called „*Caparo*" test is applicable,[108] set in another landmark UK case.[109] In this case, the House of Lords created three hurdles to be taken before a *duty of care* can be established: *(i)* the harm must be foreseeable, *(ii)* there shall be proximity between the claimant and the defendant, and *(iii)* imposing a duty of care shall be fair, just, and reasonable.[110]

The most relevant condition is the third one, namely, to establish whether, in a particular case, it is fair, just, and reasonable to impose a duty of care. In the following chapters, we will assess whether recent case law, by imposing a *duty of care* on the parent company, deviates from these established principles or not. Traditionally, apart from the following exceptions, in common law countries, including the UK, a person does not have a general duty to ensure that third parties do not harm others.[111] A parent company, therefore, has no duty to prevent its subsidiary from harming employees or third parties through its business activities.[112] As a general rule, we will examine some landmark case law examples where this cornerstone rule regarding the *duty of care* has been challenged. However, as we will see, only occasionally have successful claims been made against parent companies for injuries suffered by third parties interacting with subsidiaries (mainly subsidiary employees).

In *Connelly v. RTZ Corp plc*.[113] , a claim was brought in UK courts against the parent company by an employee of the subsidiary company who worked in a mine in Africa. The basis for the claim was the alleged negligence of the parent company, which was said to have caused the claimant serious illness. The claim was based on the tort of negligence, trying to establish that the parent company had devised its Namibian

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107 Jan Wouters, Cedric Ryngaert, "Litigation for Overseas Corporate Human Rights Abuses in the European Union: The Challenge of Jurisdiction", *The George Washington International Law Review* 40, 4 (2009), 949-950, https://kuleuven.limo.libis.be/discovery/fulldisplay?docid=lirias1854179&context=SearchWebhook&vid=32KUL_KUL:Lirias&lang=en&search_scope=lirias_profile&adaptor=SearchWebhook&tab=LIRIAS&query=any,contains,lirias1854179.

108 It is worth noting that criteria for the establishment of a duty of care in UK courts changed over time: in *Anns v Merton London Borough Council*, it was acknowledged that, generally, a duty of care exists *unless* there was a good reason not to, while *Caparo* principle restricts the approach to the cases *if* there is a good reason to do so, in Van Dam, *op. cit*., 94; Lucas Roorda, and Daniel Leader, "Okpabi v Shell and Four Nigerian Farmers v Shell: Parent Company Liability Back in Court", *Business and Human Rights Journal* 6 (2021): 369, https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/okpabi-v-shell-and-four-nigerian-farmers-v-shell-parent-company-liability-back-in-court/1C70BB759342BA69A723E86AF209906E.

109 *Caparo Industries Plc v Dickman* [1990] 2 AC 605.

110 *Ibid.*

111 *Smith v. Littlewoods Organisation Ltd.* [1987] AC 241, at 270.

112 A. Bergkamp, "Models of Corporate Supply Chain Liability", *Jura Falc*. 55, 2 (2018-2019): 180-181, *https://www.law.kuleuven.be/apps/jura/public/art/55n2/bergkampsupplychainliability.pdf.*

113 *Connelly v RTZ Corporation plc* [1999] CLC 533.

subsidiary's policy on health, safety, and environmental protection at the mine operated by the latter. Therefore, it may be seen that the claim is based on the notion that the parent company influenced the actions of the subsidiary. The judge in the present case was not convinced of this notion and, yet very generally, stated that "there may […] be some other person or persons who owe a duty of care to an individual claimant which may be very close to the duty owed by a master to his servant."[114] Although the case was struck on limitation grounds, as C. Witting concludes, this case opened the way to the argument that a parent company might owe a *duty of care* to at least a specific group – insolvent subsidiary employees affected by health issues.[115]

Another case that illustrates the implications of the parent company's liability for the actions at the level of the subsidiary is *Lubbe & Others v. Cape Plc.*[116] In this case, claims were brought by South Africans who had suffered exposure to asbestos in mines and mills owned and operated by local subsidiaries of Cape, registered in the UK. As in the *Connelly v. RTZ Corp plc*. it was argued that the parent company negligently exercised control of the health and safety of its subsidiaries' operations. Therefore, this notion of parent's intervention, which was at least partly successful in *Connelly v. RTZ Corp plc.,* was also tried in the *Lubbe v. Cape* case. In the latter, Lord Bingham mentioned the responsibility of the parent company to ensure that its foreign subsidiaries maintain proper standards of health and safety.

Regarding the applicability of tortious liability, important *dicta* were made. It was stated that resolution of the issue of parent's responsibility for ensuring observance of proper standards for health and safety "[i]nvolve an inquiry into what part the defendant played in controlling the operations of the group, what its directors and employees knew or ought to have known, what action was taken and not taken, whether the defendant owed a duty of care to employees of group companies overseas and whether, if so, that duty was broken."[117] Such intervention of the parent, according to the court, would be documented, and much of it would be found in the offices of the parent company, including minutes of various management meetings, reports by directors and employees on visits overseas and correspondence.[118] Therefore, this cautious change in the court's approach to the liability of the parent company is also evident in this case. However, *Lubbe v. Cape* was settled, so the court did not have the opportunity to decide on Cape's liability in this case definitively.

Probably the most famous tort case[119]regarding the parent company's duty of care for the actions at the level of subsidiaries is *Chandler v. Cape plc.*[120] As Petrin states,

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114 Demeyere, *supra note,* 17:403.

115 Witting, *supra note*, 63:360.

116 *Lubbe v Cape Plc* [2000] UKHL 41.

117 [2000] 1 WLR 1545, 1556, at 20.

118 *Ibid*., 21.

119 That the Thesis attributes to Classical approach.

120 *Chandler v Cape plc* [2012] EWCA Civ 525.

"Chandler is situated at the hazy intersection of company and tort law, where bedrock principles such as limited liability, separate corporate personality, and traditional principles of negligence collide."[121] This is the only English direct liability case that was successful for claimants after a full trial of the facts.[122] The case, similarly, includes an employee exposed to asbestos dust.[123] The claimant, as in the previous cases, alleged that the parent company had owed him a duty of care when he was the subsidiary's employee. Even though the fact that Chandler's counsel argued that such imposition of a duty of care would *"collapse the principle of limited liability",*[124] the court was not convinced. However, as Goudkamp rightly points out, the court was concerned that recognising such a duty of care, unless very carefully defined, would undermine the prevailing principle that there is no general duty to prevent third parties from causing harm to others.[125] This is the reason why, in this case, the court established a narrow test for determining when the duty arises. Court highlighted four factors of proximity that shall be proved to accept a duty of care of the parent for its' subsidiaries' employee's health issues: *first*, overlapping business operations in respect to injury-causing activity between the parent company and subsidiary; *second*, parent company have or ought to have superior knowledge about relevant aspects of health and safety in that particular industry; *third*, subsidiary's system of work is unsafe as the parent company knows or ought to know; *fourth*, parent company knows or ought to foresee that subsidiary or its employees rely on it to use that superior knowledge for the employee's protection.[126]

Therefore, as Witting indicates,[127] the *"test"* for the parent's duty of care, according to *Chandler v. Cape,* stems from *(i)* overlapping industrial activity, *(ii)* parent company interventions into the affairs of the subsidiary, *(iii)* knowledge or risk to health and safety and *(iv)* reliance upon the parent company by subsidiary employees. However, the Court of Appeal also indicated that it is not always necessary to show that the parent intervened in the specific aspect of the subsidiary's operation – such as managing employee health and safety, as in this case – instead, "[t]he court will look at the relationship between the companies more widely."[128] A practice of intervening in the subsidiary's trading operations, for instance, may be sufficient, provided that the parent

121 Petrin, *supra note*, 38: 603,

122 Rachel Chambers, "Parent Company Direct Liability for Overseas Human Rights Violations: Lessons from the UK Supreme Court", *University of Pennsylvania Journal of International Law* 42, 3 (2021): 555, https://ssrn.com/abstract=3682273.

123 Witting, *supra note*, 63:360.

124 Blanaid J. Clarke, "The Duties of Parent Companies", *Nordic & European Company Law Working Paper* 16, 10 (2016): 243, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2876574 .

125 Goudkamp, supra note, 40: 3.

126 *Chandler v Cape plc* [2012] EWCA Civ 525.

127 Witting, *supra note*, 63: 360.

128 *Chandler v Cape plc* [2012] EWCA Civ 525, at 80.

company has superior knowledge on the topic concerned.[129]

It may be argued that the dictum provided in *Chandler v. Cape plc* is partially taken from *Smith v. Littlewoods.*[130] According to the ruling in *Smith v. Littlewoods*, one of the exceptions to the lack of general duty to prevent damage to another is a relationship between the parties that gives rise to an imposition or assumption of responsibility on the part of the defendant.[131]

If we examine *Chandler v. Cape plc's* approach to the application of the parental duty of care more closely, several important implications arise. *First*, as legal scholars have put it, „[...] the emphasis is on what the mother company ought to have known and not on what it actually knows. This means that the ability to control the subsidiary is important and not the actual control."[132] Apparently, this has a broad implication and the answer to the question of what the parent company "ought to have known" depends on the specific facts of the case. *Second*, it is not required that the parent company has complete control over its subsidiary before it can be liable[133]. *Third*, the parent company need not voluntarily assume responsibility.[134]

One feature that can be observed in *Chandler v. Cape plc* is that the parent company is considered to have a *duty of care* for the actions of the subsidiary when it directly or indirectly intervenes, at least to a certain extent, in the subsidiary's relevant activities. Therefore, the logical implication is that parent's non-intervention in these matters would reduce the risk. This is, however, one of the main point of criticism to *Chandler v. Cape plc „test"* for the existence of a parental duty of care, as Bullimore or Goudkamp states, namely, that conclusions in this case reduces the incentives for parent companies to take a hands-on approach to the organization and monitoring of risk-creating activity undertaken by subsidiary and parent companies probably will reduce the number of intervention into health and safety matters of the subsidiary.[135] Therefore, one could ask whether the approach taken in *Chandler v. Cape plc.* does not contradict the goals of tort liability by having this adverse effect where corporations are discouraged from supervising their subsidiaries. As A. Witting states, "[s]uch a change in parent company management strategy might well add to the number of employees and others who are injured by negligently conducted risky activities – so that, in the result, the law of negligence would undermine itself in its task for setting proper standards of conduct."[136]

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129 *Ibid.;* Bergkamp*, supra note,* 112: 190.

130 *Smith v Littlewoods Organisation Ltd* [1987] UKHL 18.

131 *Ibid.*

132 Ewan McGaughey, "Donoghue v. Salomon in the High Court", *Journal of Personal Injury Law* 4 (2011): 5, https://www.academia.edu/25420060/Donoghue_v_Salomon_in_the_High_Court.

133 *Chandler v Cape plc* [2012] EWCA Civ 525, at 80.

134 *Ibid.*, 64.

135 Tim Bullimore, "Sins of the father, sins of the son", *P.N.* 28, 3 (2012): 212-215; Goudkamp, *supra note*, 43: 7.

136 Witting, *supra note*, 63:363.

Even though it might be considered that *Chandler v. Cape plc* opened the „floodgate" for parental *duty of care,*[137] later case law – for example, *Thompson v. The Renwick Group plc*[138] shows that courts do not go far from general principles of corporate separability. The facts of this case are similar to those of the former one, as a subsidiary of Renwick Group plc employed Mr Thompson, and his work involved handling raw asbestos, which subsequently caused him health issues. He, therefore, brought proceedings against the parent company for alleged infringement of the *duty of care*. Even though the High Court judge accepted this duty of care, the Court of Appeal overturned the decision. The court stated that the following facts: *(i)* the appointment of the director of the subsidiary by the parent company, *(ii)* increased collaboration with other companies of the group, *(iii)* the parent's involvement in the day-to-day control[139] are not sufficient to find a parental *duty of care.*[140] In this regard, *Chandler's* "test" was not positive for claimants, as the businesses of the parent and subsidiary were relatively different, with the parent being a typical holding company.[141] The court once again highlighted the importance of the "*Caparo*" test. In this case, it was not fulfilled.

Support for a positive answer might come from UK court precedents, such as *Margereson v. JW Roberts Ltd.*[142] A factory occupied by the defendant deposited substantial amounts of asbestos dust outside its perimeters. The claimant, as a child, had played in the factory's loading bay, where there was very significant asbestos contamination, which caused serious illness a few decades later. Court of Appeal stated that, regarding the *duty of care*, no distinction should be made between employees working in the factory and children playing there. Thus, as the defendant could reasonably foresee that its conduct would expose the claimant to the risk of personal injury,[143] the *"neighbour"* standard of *Donoghue v Stevenson*[144] was in place.

Although this case does not directly address the corporate group issue, it has a relevant implication for the expanded *duty of care.* As will be shown in Chapter 2, similar ideas found their place in the latest case law.

1.2. France

In French law, the general principle is that each legal person is autonomous, even

137 As explained by Chambers, "[t]here has been a steadily growing trickle of tort cases against transnational corporations in the English courts, boosted by Chandler […], *in* Rachel Chambers, "Parent Company Direct Liability for Overseas Human Rights Violations: Lessons from the UK Supreme Court", *University of Pennsylvania Journal of International Law* 42, 3 (2021): 556, https://ssrn.com/abstract=3682273.

138 *Thompson v Renwick Group plc* [2014] EWCA Civ 635.

139 *Ibid*., 35.

140 Demeyere, *supra note,* 17: 405.

141 Goudkamp, supra note, 40: 4.

142 *Evelyn Margereson v J W Roberts Ltd.* [1996] EWCA Civ 1316.

143 *Ibid.*, 309.

144 *Donoghue v Stevenson* [1932] AC 562, 580.

when legal persons form a group.[145] The company has its own assets, and shareholders are not liable for more than their contribution.[146] French law does not have specific rules on corporate groups or piercing the corporate veil, despite several attempts to enact such a law in France (*the Cousté proposals*).[147] As a result, general contract and tort law are applied to hold the shareholders of a company liable.[148]

1.2.1. Veil piercing

Although France does not have specific group law, the implications of corporate "veil piercing" are covered by statutory rules.[149] The most popular and widely accepted principle for shareholder liability is the institute of "de facto" directors, found in the French Commercial Code:[150]

"Where the rescission of a safeguard or of a reorganization plan or the liquidation of a legal entity reveals an excess of liabilities over assets, the court may, in instances where management fault has contributed to the excess of liabilities over assets, decide that the debts of the legal entity will be borne, in whole or in part, by all or some of the de jure or **de facto managers**, who have contributed to the management fault. […]".

Other statutory exceptions to the parent company's limited liability in bankruptcy regulations include "fictitious corporation" and "commingling of assets."[151] Those indicate cases where it can be shown that the sole purpose of the company is to serve the interests of shareholders, or it is no longer possible to distinguish between the assets of different companies accordingly. If those cases are proven, the court may hold the parent company liable for the subsidiary's debts.

However, as P. H. Conac indicates, cases show a strong reluctance on the part of French courts to pierce the corporate veil in cases involving relationships within a group. According to the Supreme Court, veil-piercing requires the existence of "abnormal financial relationships."[152] Thus, "veil piercing", being relatively restrictive under French law, requires, for example, "systematic" transfers of assets without any counterparty.[153] This can be seen in the case law, for instance, in the cases of cash-pooling, exchange of employees, long long-term loans with payment extension within

145 Demeyere, *supra note*, 17: 391; Vandekerckhove, *supra note*, 4: 39.

146 Art. L 223-1 French Code de Commerce.

147 *Proposition de loi sur les groupes de sociétiés et la protection des actionnaires et du personnel*, submitted to Parliament on 19 Feb. 1970 (no. 1055) and on 12 Apr. 1973 (no. 52).

148 Demeyere, *supra note,* 17: 392.

149 Vandekerckhove, *supra note*, 4: 40.

150 Art. L. 651-2.

151 Vandekerckhove, *supra note,* 4: 42.

152 Pierre Henri Conac "National Report of France" from *Groups of Companies. Comparative Law Overview* Rafael Mariano Manóvil, (Springer, 2020) p. 101.

153 *Ibid*.

the groups as not being regarded as "veil piercing" situations.[154] In similar intra-group transactions, *Cour de Cassation* does not abandon such reluctance.[155]

Therefore, as P.H. Conac concludes, the Cour de Cassation is pragmatic when it comes to the group relationship and considers that the group is the standard form of doing business. In contrast, usual organisation and relationships within groups, according to management principles, are not abnormal.[156] Apart from the following cases, the parent company's liability, similarly to that discussed in the UK above, can arise from concealment, fraud, or the creation of false appearances.[157]

1.2.2. Parent company's liability in tort

In terms of tort liability for the parent company, the French approach relies on the general rule. According to Article 1240 of the French Civil Code ("**French CC**"), "[a]ny human action whatsoever which causes harm to another creates an obligation in the person by whose fault it occurred to make reparation for it". Article 1241 provides the same notion for negligence causing damage. To apply liability, three conditions shall be proved: *(i)* fault, *(ii)* damage and *(iii)* a causal link between the *(i)* and *(ii)*.[158] Analysis of Article 1240 reveals that it does not impose any *a priori* limitation on the class of protected persons. Therefore, every claimant who can prove fault, damage and causation has a stand under this provision. In this regard, the notion of "general tort" in French law differs from that in English and German law, as the former does not impose any specific limitations on the persons covered.

The fault is traditionally understood as a violation of *(i)* statutory law or *(ii)* general duty of care.[159] To determine whether there was a "fault", the alleged wrongdoer's behaviour will be compared to the behaviour of a "reasonably careful and forward-looking person under the same circumstances" (the so-called *bonus pater familias*).[160] As Bergkamp explains, where a *bonus pater familias* can foresee damage resulting from

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154 Cass. Com., 19 avr. 2005, n 05-10.094, Bull. civ. V, n 92; D. 2005. 1225, obs. A. Lienhard; Rev. sociétés 2005. 897, note D. Robine et J. Marotte.

155 Cass. Com. 10 janvier 2006, M. Gilles Pellegrini, mandataire judiciaire c/ Société Holco, B. Grelon et C. Dessus-Larrivé, La confusion des patrimoines au sein d'un groupe, Rev. Sociétés 2006, p. 281; Ph. Roussel-Galle, Rev. Sociétés 2006, p. 629.

156 Conac, *supra note*, 152: 102.

157 Demeyere, *supra note,* 17: 399.

158 *Ibid*.

159 P. Malinvaud, D. Fenouillet P. *Droit des obligations* (Paris: LexisNexis, 2012), 456 *in* Siel Demeyere, "Liability of the Mother Company for Its Subsidiary in French, Belgian and English Law", *European Review of Private Law* 23, 3 (2015): 395, https://doi.org/10.54648/erpl2015028.

160 T. Vansweevelt & B. Weyts, *Handboek aansprakelijkheidsrecht*, (Antwerp: Intersentia, 2009), 127 *in* Penelope A. Bergkamp, "Models of Corporate Supply Chain Liability", *Jura Falc.* 55, 2 (2018-2019): 182, https://www.law.kuleuven.be/apps/jura/public/art/55n2/bergkampsupplychainliability.pdf.

his behaviour, he takes the necessary precautionary measures to prevent it:[161] an act or omission that falls short of this standard constitutes a fault.[162]

In terms of corporate groups, proof of the fault of the parent company might be much more complicated,[163] as argued by Demeyere, because the damage, in most cases, is caused by the subsidiary.[164] In this regard, Bergkamp tries to show the complexity of the establishment of fault in the case of the supply chain by asking, for example: *(i)* when is a prudent and forward-looking EU corporation able to foresee damage resulting from its act or omission; and, if it can foresee such damage *(ii)* what measures should it take to prevent this damage?[165] As supported by other authors, it can be concluded that, for example, if a parent company has made a statement concerning corporate social responsibility, the parent exposes some implications of its *duty of care,* and it could be accepted more easily that it is liable for its subsidiary's acts or negligence.[166] Some authors also suggest an opinion, as seen in *Chandler v. Cape*, namely that when the parent company is aware of the unacceptable acts of its subsidiary and ignores them, it may be concluded that the parent company is liable because it did not exercise its ability to control and end the unacceptable practices. Whether this would be the case if the parent company was unaware of such cases remains an open question. However, such examples under French law are rather theoretical as the parent's liability in tort is not common, and no relevant precedents could be detected.

As Houwen indicates, for parent corporations, shareholder liability based on tort may, at least theoretically, be applied in the cases when the shareholder *(i)* managed operations of a company that went bankrupt, *(ii)* when the shareholder gave harmful instructions to the company and *(iii)* when it gave a false appearance of the

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161 As P. Bergkamp explains: *"An equivalent standard of care was developed by common law to determine whether the alleged wrongdoer has breached its duty. In the English landmark ruling of Blyth v Birmingham Waterworks Co., the EWHC held that "[n]egligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."* in Penelope A. Bergkamp, "Models of Corporate Supply Chain Liability", *Jura Falc.* 55, 2 (2018-2019): 182, https://www.law.kuleuven.be/apps/jura/public/art/55n2/bergkampsupplychainliability.pdf.

162 Bergkamp, *supra note*, 112: 182.

163 Under French civil liability rules, as a general principle, a person is not liable for the harm caused by another person.

164 P. Malinvaud, D. Fenouillet P. *Droit des obligations* (Paris: LexisNexis, 2012), 456 *in* Siel Demeyere, "Liability of the Mother Company for Its Subsidiary in French, Belgian and English Law", *European Review of Private Law* 23, 3 (2015): 395, https://doi.org/10.54648/erpl2015028.

165 Bergkamp, *supra note*, 112: 182.

166 Y. Queinnec, M.C. Caillet, "Quels outils juridiques pour une régulation efficace des activités des sociétés transnationales?" *in Responsabilité sociale de l'entreprise transnationale et globalisation de l'économie*, ed. I. Daugareilh (Brussels: Bruylant, 2010), 654 in Demeyere *op. cit.,* 91:393.; A. Bergkamp, "Models of Corporate Supply Chain Liability", *Jura Falc.* 55, 2 (2018-2019): 184, https://www.law.kuleuven.be/apps/jura/public/art/55n2/bergkampsupplychainliability.pdf.

creditworthiness to its company.[167] However, as mentioned above, the applicability of tort law to parent's liability is rare after the French Supreme Court excluded its coexistence with *action ed complement du passif* in 1995.[168]

Some authors also suggest that, according to Article 1242 of the Civil Code, parent companies could be liable for their subsidiaries, thereby incurring a form of vicarious liability for their employees.[169] This would be the case when the parent company "closely follows up all activities of its subsidiary."[170] However, currently, this could be only theoretical because, so far, French courts act in a strict sense and no similar case law could be detected.[171]

1.3. Germany

Similar to the UK and French legal systems, German company law does not impose liability on shareholders of limited liability companies for the debts of their subsidiaries.[172] Thus, the assets of the company and its shareholders remain separate. The same rule applies to corporate groups,[173] Therefore, there is generally no liability of a controlling enterprise for the debts of the subsidiary nor vice versa. However, as a general rule, to evaluate the conditions of the parent company's liability, we must examine the types of corporate groups in Germany more closely.

The German *Konzernrecht* is widely regarded as the most sophisticated legislation on group liability, providing specific conditions for the liability of the parent company.[174] Therefore, the parent company's liability should be analysed by two sources: *(i)* statutory rules for groups and *(ii)* veil-piercing doctrines developed by courts and scholarly.

1.3.1. German Konzernrecht

In Germany, company groups can be formed in two ways: *(i)* formally, by

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167 L.G.H.J. Houwen, *A.P. Schoonbrood-Wessels, J.A.W. Schreurs, Aansprakelijkheid in concernverhoudingen. Een rechtsvergelijkende studie naar de positie van crediteuren ca concernafhankelijke ven nootschappen in Duitsland, Frankrijk, Engeland en Nederland* (Deventer: Kluwer, 1993), 439. *in* Karen Vanderkerckhove, *Piercing the Corporate Veil*, European Company Law Series, v. 2 (Alphen aan den Rijn: Kluwer Law International, 2007), 71.

168 Cass. Com. 20 June 1995 (1995) Rev. Soc. 766.

169 N. Mathey, "La responsabilité sociale des entreprises en matière de droits de l'homme', *JCP E* 3, 13, 2.A.1. (2010) in Demeyere *supra note,* 91:396.

170 *Ibid.*

171 Demeyere, *supra note*, 17: 396.

172 Vandekerckhove, *supra note*, 4: 45.

173 *Ibid.*

174 Linn Anker-Sørensen, "Parental Liability for Externalities of Subsidiaries", *Eleven Journals* 3 (2014): 102, https://www.elevenjournals.com/tijdschrift/doqu/2014/3/DQ_2211-9981_2014_002_003_003.pdf.

concluding an enterprise agreement, or *(ii) de facto*, where no specific agreement is concluded between group members. The former can be formed as a control agreement (*Beherrschungsvertrag*) or as a profit transfer agreement (*Gewinnabführungsvertrag*). In contrast, the German Law on the Closed Corporation (**"GLCC"**) does not provide a separate set of rules for groups of companies, although, in legal practice, the closed corporation (GmbH) is by far the most usual form of company that is found as a part of a group of companies. So far, it is generally accepted that the majority of provisions of German Stock Corporation Law (**"GSCL"**) on enterprise agreements can be applied analogously to the groups combined of closed corporations.[175]

The general idea of these enterprise agreements is that the relationships between companies within a group are explicitly outlined in a contract.[176] The primary implication of the enterprise (or control) agreement is that it empowers the management board of the controlling enterprise to issue directives to the management board of the controlled enterprise, and the latter is then obligated to comply with these directives.[177] In the *de facto* group of companies, the parent company directly or indirectly[178] controls a stock corporation[179] , which is usually the case when the enterprise is the majority shareholder of the stock corporation.[180] The idea behind this concept is that companies involved in the group do not explicitly form their relations through contracts.[181] In a *de facto* group of enterprises, the power of the parent company is limited – it can only exercise its influence to cause the controlled enterprise to undertake or refrain from undertaking a disadvantageous transaction or act unless this disadvantage is compensated.[182] The understanding of the parent company's power over the subsidiary's activities is crucial for this thesis to evaluate whether the parent company can take responsibility for the externalities at the subsidiary level. Under German law, types of corporate groups also determine rules of parent liability.

1.3.2. The statutory liability of the parent company

The mere conclusion of an enterprise agreement does not establish liability for the controlling shareholder for the debts of the controlled enterprise. The controlling shareholder is only obligated to subsidize the annual net loss of the controlled

175 Sebastian Mock "National Report of Germany" from *Groups of Companies. Comparative Law Overview* Rafael Mariano Manóvil, (Springer, 2020) p. 328.

176 *Ibid*., 306.

177 Art. 308 GSCL

178 Art. 17 subs. 1 GSCL.

179 Art. 311 ff. GSCL.

180 Art. 17 subs. 2 GSCL.

181 Mock, *op. cit.*, 308.

182 *Ibid*., 333.

enterprise. The same also applies to a stock corporation.[183] In the case of a *de facto* group of enterprises, the (separate) personal liability of the controlled or controlling enterprise remains untouched. However, the controlling shareholder can be held liable[184] if the disadvantageous influence on the controlled enterprise that was not compensated was made.[185]

A particularly crucial point is that, under German law, statutory liability in corporate groups is strictly focused on the notion that it applies only to parent-subsidiary relationships. As Sørensen concludes, the statutory liability approach foresees a *duty of care* for the parent to compensate the subsidiary company, but not necessarily third parties such as tort creditors: "[s]uch internal and intragroup liability schemes will only take consideration of tort creditors after they have succeeded in achieving a claim against the tortfeasor (subsidiary), which, in turn, provides them with a legal claim against the subsidiary that can be considered part of that particular subsidiary's debt."[186]

1.3.3. Veil piercing

"Piercing of the corporate veil" in Germany is known by the name *Durchgriffshaftung* (literally translated as "pierce through responsibility"). However, considering sophisticated law on groups, the exact boundaries of the "true veil piercing" in Germany are not clear – some authors consider *Durchgriffshaftung* as a "[…] rest category consisting of cases of shareholder liability that do not resort under group law or common civil law or company law."[187] E. Rehbinder, for example, states that when a shareholder creates a false appearance of being a party to a contract or when it commits a tort, the rules of contract and tort law should be applied respectively, and there is no question of applying a "corporate veil lifting" doctrine.[188] Therefore, it can be concluded that Germany rarely pierces the corporate veil in its "true" manner. As shown below, courts are reluctant to undermine the privileges afforded by the principles of limited liability and legal personality to companies.[189]

Historically, the doctrine of "corporate veil" was used particularly where the

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183 *Ibid*, 369.

184 Art. 317 GSCL.

185 Mock, *supra note,* 175: 370.

186 Sørensen, *supra note*, 174: 107.

187 Vandekerckhove, *supra note*, 4:63.

188 E. Rehbinder, *Das auf multionationale Unternehmen anwendbare Recht in X., Deutsche zivil -und kollisionsrechtliche Beitrage zum IX. Internationalen Kongress fur Rechtsvergleichung in Teheran* (1974) *in* Karen Vanderkerckhove, *Piercing the Corporate Veil*, European Company Law Series, v. 2 (Alphen aan den Rijn: Kluwer Law International, 2007), 62.

189 Lydia Chao, "VEIL-PIERCING UNDER AMERICAN, GERMAN, AND TAIWANESE COMPANY LAW", *Institute for European Integration, Study paper* 1, 21 (2021), 31, https://europa-kolleg-hamburg.de/wp-content/uploads/2021/07/Lydia-Chao_-Study-Paper_01_21.pdf.

company in question is a limited liability company (GmbH), as the latter does not have a separate group law. Until 2001, the German Supreme Court (Bundesgerichtshof (**"BGH"**)) held a controlling shareholder of GmbH group liable for the debt of a company within the group, based on the notion of "liability within a qualified de facto group" through an analogous application of the above-mentioned GSCL provisions.[190] This notion was severely criticised for lacking a precise definition[9]. Therefore, in *Bremer Vulkan's* case,[191] BGH completely abandoned this analogous application, which was subsequently changed to a new ground for shareholder liability – *Existenzvernichtungshaftung* (liability arising from a withdrawal that destroys the economic basis of a company).[192] Vulkan Verlag AG, in this case, was both the sole shareholder of MTW GmbH and the controlling company of a corporate group. MTW had received a sum of money from the State. Rather than keeping this money within the assets of MTW, Bremer Vulkan stashed this sum into the central treasury of the company group under its control. Both the company group and MTW then became insolvent. The claimant, a state agency, then sued the members of the management board of *Bremer Vulkan*. The Court observed *obiter dictum* that MTW should be protected *neither* through an analogous application of rules on contractual stock corporation groups *nor* rules of *de facto* groups.[193] In the court's view, such protection should be based on the doctrine of capital maintenance and the company's right to continue existence.

The company's right to continuance requires that the controlling shareholder should pay consideration to the company's interests when interfering with the company's assets or business opportunities. Such consideration will be lacking if the company becomes unable to meet its obligations because the shareholder interferes with its assets.[194]

Following the first milestone in the adjudication, with the *Bremer Vulkan case*[195], a first specification occurred in another – KBV Decision.[196] The Court's ruling was based on two concurrent doctrinal bases. The first is the liability for company destruction,

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190 BGH judgment of 23 September 1991, BGHZ 115, 187; BGH judgment of 29 March 1993, BGHZ 122, 123.

191 BGH judgement of 17 September 2001, BGH Neue Juristische Wochenschrift 2001 3622.

192 Matthias Casper, "Liability of the Managing Director and Shareholder in the GmbH (Private Limited Company) in Crisis", *German Law Journal* 9,9 (2008), 1132, https://www.cambridge.org/core/journals/german-law-journal/article/liability-of-the-managing-director-and-the-shareholder-in-the-gmbh-private-limited-company-in-crisis/7C89AD8D17791363CEEFD1A60BF2C79F.

193 Ahl Björn, „Lowering the Corporate Veil in Germany: a case note on BGH 16 July 2007 (Trihotel)" *Oxford University Comparative Law Forum* 4 (2008), https://ouclf.law.ox.ac.uk/lowering-the-corporate-veil-in-germany-a-case-note-on-bgh-16-july-2007-trihotel/.

194 Michael Shilling, "The Development of a New Concept of Creditor Protection for German GmbHs", *The Company Lawyer* 27, 11 (2006), 348, https://kclpure.kcl.ac.uk/portal/en/publications/the-development-of-a-new-concept-of-creditor-protection-for-german-gmbhs(3a12ceb8-cd08-453d-9670-2c46fa87d9ed).html.

195 BGH judgement of 17 September 2001, BGH Neue Juristische Wochenschrift 2001 3622.

196 BGHZ 151, 181 = NJW 3024 (2002).

and the second is the delict of intentional infliction of loss in violation of good morals (*contra bonos mores*) under Art. 826 *Bürgerliches Gesetzbuch*, the German Civil Code ("**BGB**"). On the first ground, the Court ruled that the privilege of limited liability granted to the shareholders of a private company was subject to the precondition that the company's assets must be committed to the preferential satisfaction of company creditors for as long as the company exists.[197] Regarding tort liability for violating good morals, the Court held that shareholders had deliberately and, *contrary to good morals,* harmed the interest of the claimant, who was a creditor of the company. The harmful action of the shareholders was *contrary to the principles of good morals* because it constituted an abuse of the legal form of a company.[198]

However, it was not long before when the approach of BGH turned around again in 2007, concentrating explicitly on tort liability. Regarding veil piercing in Germany, the current situation is that German courts mostly apply *Durchgriffshaftung* when shareholders commingle their assets with the company's assets.[199] BGH defines "commingling of assets" as the situation in which corporate assets become indistinguishable from those of the shareholders.[200] This case represents a true "veil piercing" in the sense that shareholders (parent companies) may be held directly liable to creditors.

1.3.4. Tortious liability of the parent company

In terms of shareholder liability for intervention in the subsidiary, *Trihotel* is a landmark case.[201] In the present case, the defendant was the managing director of three GmbH companies and was not a shareholder in any of them, whereas the defendant's relatives held shares in the companies. In subsequent events, where intra-group loans were made, the company's financial situation deteriorated, and insolvency proceedings followed. Moving away from previous case law, the BGH decided that the liability of shareholders in such cases is considered tortious liability under Art. 826 BGB.[202] The *contra bonos mores* rule in Art. 826 BGB establishes liability for damages if a person wilfully causes damage to another in a manner contrary to good morals. The types of situations that have been litigated under this provision include *(i)* misstatements, *(ii)* obtaining court decisions by fraud, inducing *(iii)* breach of contracts, *(iv)* malicious falsehood, *(v)* abuse of rights, *(vi)* passing off, *(vii)* wrongful use of monopoly power, and other underhand activities.[203] To establish this liability under Art. 826 BGB, the claimant must prove four elements: *(i)* the claimant has suffered damage; *(ii)* the

197 BGH Neue Juristische Wochenschrift 2002, 3024.

198 BGH Neue Juristische Wochenschrift 2002, 3024, 200.

199 Oliver Wasmeier, Martin Schulz, *The law of business organizations: A concise overview of German corporate law* (Heidelberg: Springer Berlin, 2012), 106.

200 *Ibid.*

201 BGH, judgment of 16 July 2007, GmbHRundschau 2007, 930.

202 Casper, *supra note*, 192: 1133.

203 Björn, *supra note*, 193.

conduct of the defendant caused this damage; *(iii)* that conduct was *contra bonos mores*; and *(iv)* the defendant intended to cause the damage.

However, the main implication in *Trihotel* was that tampering with the company's assets shall be considered a breach of shareholders' duties owed to the company itself, but not directly to the creditor. Thus, this represents a shift from the previous veil-piercing approach; since the tort is committed against the company, it means that only the company can invoke tortious liability under this BGB. Creditors can only do it indirectly by suing the company. Therefore, we observe a noticeable reluctance on the part of courts to stretch the principle of separability of companies within a group, even in cases of shareholders' harsh and detrimental intervention. The same approach was later reaffirmed in other cases.[204]

However, within the scope of the Thesis, it is crucial to understand whether, under German law, the parent company can be directly liable for the actions of its subsidiaries, for example, to tort creditors.

L. A. Sørensen states that "[w]eakness of the domestic judicial approach is the prevalence of entity theory governed by principles of limited liability and recourse to the piercing of the corporate veil. The latter, in turn, without precise criteria, thereby leads to a lack of predictability for the corporate actors and affected parties.[205] Thus, "[b]arrier constituted by the [claimant's] burden of proof for providing evidence of the corporate structure and the intragroup relations leads to an almost illusory path for tort creditors to be compensated by a parent company."[206] As a result, according to Sørensen, such type of judicial approach is only partially sufficient for tort creditors.[207] This might seem the case in terms of German law – Wagner concludes that under German law, the liability of parent companies for damage caused by their subsidiaries is *inconceivable* for two reasons. First, German tort law only recognizes duties of care (*Sorgfaltspflichten*) concerning one's own behaviour.[208] Second, the *Rechtsträgerprinzip* (legal entity principle) in company law prevents the imposition of duties on parent companies *vis-à-vis* their subsidiaries.[209] Thus, according to Wagner, the parent company's liability for damage related to the subsidiaries would throw overboard the differentiated attribution of property rights and liabilities in the group.[210] Wright agrees by concluding that the German approach is not beneficial to tort victims but only for

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204 See for ex. BGH II ZR 264/06. Apr. 28, 2008 (*GAMMA*), 2008 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2437.

205 Sørensen, *supra note*, 174: 111.

206 *Ibid.*

207 *Ibid*.

208 Wagner, *supra note*, 45: 757-759 *in* Cees van Dam, "Breakthrough in Parent Company Liability" *European Company and Financial Law Review* 18, 5 (2021), 736, https://www.degruyter.com/document/doi/10.1515/ecfr-2021-0032/html.

209 *Ibid.*

210 *Ibid*., 759-761.

intra-group relations.[211] However, this approach, in the opinion of the present author, remains questionable, as recent case law, based on the establishment of a duty of care, does not deny the principle of corporate separability.[212]

211 Wright, supra note, 86: 61.

212 See chapter 2.4.1.

2. NEO-CLASSICAL APPROACH TO PARENT COMPANY'S LIABILITY

In the first part of the Thesis, it was established that in all four jurisdictions, the liability of the parent company is based on two traditional cornerstones: *(i)* limited liability and *(ii)* legal separability of the companies. It was also identified that the main exceptions to the limited liability of the parent are *(i)* veil-piercing doctrines or *(ii)* tortious liability in cases of personal injury. *Chandler v. Cape*[213] and a few other examples also showed that courts in the UK at times used to establish that parent company may have a tort-based duty of care for third parties (namely – subsidiary's employees). However, such a practice is not common in either France[214] or Germany.[215]

However, recent case law discussed in detail in this chapter reaffirms the approach that corporations may have a duty of care for the actions at the level of subsidiaries or even business partners. This necessitates a precise evaluation of whether these implications are compatible with the principles of limited liability and corporate separability. In addition, important questions arise as to whether the company can have a *duty of care* over the actions of its subsidiary, given that the ground principle of corporate law, with some specific exceptions[216], stated in the countries analysed is that the parent company cannot directly manage the subsidiary. How does this affect the duties of the management of parent companies? Notwithstanding these questions, on what basis can a non-parent corporation be responsible for the actions at the level of another business partner (supplier, etc.)?

First, the Thesis will present recent case law examples where the parent company's duty of care has been discussed and recognised. In the scope of the analysis, we will discuss 5 cases, namely, *(i) AAA v Unilever plc* ("**Unilever**") *(ii) Lungowe v Vedanta Resources plc* ("**Vedanta**"), *(iii) Okpabi and others* v Royal Dutch Shell Plc ("**Okpabi**") and *(iv) Hamida Begum v. Maran LTD* ("**Maran**") in UK and *(v) Fidelis Ayoro Oguru v Shell plc* ("**Oguru**") in the Netherlands. Analysis intentionally begins with *Unilever* because the latter case significantly influenced the arguments presented by the parties in the subsequent cases. As decisions from different cases predate or supersede each other, it will be crucial to observe how the court's legal arguments evolve.[217]

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213 *Chandler v Cape plc* [2012] EWCA Civ 525.

214 P. Malinvaud, D. Fenouillet P. *Droit des obligations* (Paris: LexisNexis, 2012), 456 *in* Siel Demeyere, "Liability of the Mother Company for Its Subsidiary in French, Belgian and English Law", *European Review of Private Law* 23, 3 (2015): 395, https://doi.org/10.54648/erpl2015028.

215 Wagner, *supra note*, 45: 757-759 in Cees van Dam, "Breakthrough in Parent Company Liability" *European Company and Financial Law Review* 18, 5 (2021), 736, https://doi.org/10.1515/ecfr-2021-0032.

216 German contractual groups.

217 Please see further analysis of the following landmark cases.

2.1. Analysis of court cases

2.1.1. Unilever

In this case, the claim was brought to an English court by employees (both present and former) of Unilever Tea Kenya Limited ("**UTKL**") and residents living on a tea plantation operated by UTKL – against UTKL, as well as against its UK-registered parent company, Unilever Plc ("**Unilever**"). Claimants argued that they were the victims of violence at the time of the 2007 presidential election in Kenya when they were targeted by mobs which came onto the tea plantations operated by UTKL where they worked and lived.[218] The legal basis of the claim is the alleged duty of care in the tort of both Unilever and UTKL to take practical steps to protect claimants from the said violence.[219] The appellants claimed that both the foreign subsidiary and its parent company failed to have in place adequate crisis management plans to protect them against post-election violence of this kind, which, according to them, was foreseeable.[220] As this was an interlocutory proceeding,[221] to be able to sue UTKL in England, the appellants must show that they have a good arguable claim against the defendants and could further proceed on merits.

The judge, in the first instance, ruled that claimants had no arguable claim against either Unilever or UTKL as no *duty of care* was owed by either of those companies.[222] Judge made this conclusion by applying the *Caparo* test,[223] stating that *(i)* the damage suffered by the appellants was not foreseeable by either UTKL or Unilever (first condition under *Caparo*)[224] since nothing comparable had ever before happened, and it was not foreseeable that law and order would break down generally in Kenya and that the police would be unable to protect the inhabitants of the plantation; and *(ii)* that it would not be fair, just and reasonable to impose a duty of care (third condition under *Caparo*), since the duty alleged required, in effect, that Unilever should act as a "surrogate police force" to maintain law and order, whereas Unilever had been entitled to rely on the Kenyan authorities to do that.[225] However, the judge indicated that there was a sufficient degree of connection between the activities of Unilever, as the parent company of UTKL, and the damage suffered by the claimants to satisfy the

218 *AAA v Unilever plc* [2018] EWCA Civ 1532, 2.

219 *Ibid.*

220 *Ibid*., 12.

221 Pursuant to the UK Civil Procedure Rules (Article 3.1 (3) of Practice Direction 6B and Part 11 of the Civil Procedure Rules), for the case to go to trial on merits, there must be "a real issue" between the claimant and the defendant. The existence of "a real issue" is construed as a "realistic prospect of succeeding on the merits" of the claim.

222 *AAA v Unilever plc* [2017] EWHC 371 (QB).

223 *Caparo Industries plc. v. Dickman* [1990] 2 AC, 605.

224 *AAA v Unilever plc* [2017] EWHC 371 (QB), 93-94.

225 *Ibid*., 107.

test of proximity, as per the guidance given by this court in *Chandler v Cape Plc.*[226]

Judgement of the Court of Appeal

While the claimants appealed the judge's finding that there was no duty of care on the part of both the subsidiary and parent companies, the latter additionally argued that there was no proximity between Unilever and the appellants in respect of the damage suffered by them, following the guidance in *Chandler v Cape Plc.*[227] To evaluate possible proximity, the Court of Appeal provided a detailed analysis concerning the management structure of the Unilever group of companies and to what extent Unilever was (or was not) guiding its subsidiary regarding crisis management as the one in place.

The Court of Appeal begins its analysis by confirming that, to a certain extent, Unilever was indeed coordinating the activities of UTKL, at least in terms of group-wide guidelines. In particular: *(i)* Group accounts stated that the boards of the joint parent companies in the group had "ultimate responsibility for the management, general affairs, direction and performance of the business as a whole";[228] *(ii)* "The Governance of Unilever" stated that the group was in effect a single economic entity with a Group Chief Executive and Executive Team. These were responsible for the operational running of the Unilever Group, including "Managing Risk and Corporate Reputation", implementing and managing the policy and processes on Risk Management", and "Implementing and managing compliance with all Unilever Policies";[229] *(iii)* Unilever issued "Unilever's relevant crisis management policy", that, among other things, provided Crisis Escalation Procedure that referred to the potential for assistance from crisis management experts in Unilever;[230] *(iv)* Unilever's Corporate Risk Management policy also contained an Annual Positive Assurance procedure up through the group structures to, ultimately, the Group Chief Executive[231] etc.

However, at the same time, the Court of Appeal acknowledged that material separability of UTKL's activities was always in place *(i)* UTKL's accounts presented that UTKL has a distinct governance structure,[232] *(ii)* UTKL prepared its own "Crisis and Emergency Management" policy.[233] According to the evidence, the Court of Appeal was persuaded that neither in drafting its crisis management policy, its occupational health and safety policy, nor in training its staff for crisis management was it subject to

226 *Chandler v Cape Plc* [2012] EWCA Civ 525; *AAA v Unilever plc* [2017] EWHC 371 (QB), 107; *AAA v Unilever plc* [2018] EWCA Civ 1532, 3.

227 *AAA v Unilever plc* [2018] EWCA Civ 1532, 4.

228 *AAA v Unilever plc* [2018] EWCA Civ 1532, 17.

229 *Ibid*., 18.

230 *Ibid*., 20

231 *Ibid*., 22.

232 *Ibid*., 26.

233 *Ibid*., 27.

the direction or any specific or detailed advice from Unilever.[234] Particular importance was also given to the witness statement of the subsidiary's management at the time, who indicated that "[…] UTKL management team never had any cause to refer to anybody else within the Unilever group for advice regarding the running of the plantation or its relations with the local community in Kenya. In 2007, there was no one in the group outside of UTKL with relevant expertise or experience, as the Unilever group had become almost exclusively a consumer goods business by then. Unilever did not have superior knowledge or expertise about local political or ethnic matters."[235]

Claimants also relied on reports from external risk consultants, part of which was retained by the parent company.[236] However, the Court of Appeal could not base the parent's material intervention on the latter as such advice was particularly general (for ex., position in Kenya at the national level) and was neither directed to give the management of UTKL any precise information, let alone instructions, regarding how the general risk of election violence in Kenya might impact upon UTKL, the plantation or persons residing there, nor how UTKL should respond.[237] Based on these considerations, the Court of Appeal further proceeds to evaluate the proximity issue. The court starts its reasoning by acknowledging that there is no special doctrine in the law of tort of legal responsibility on the part of a parent company concerning the activities of its subsidiary, *vis-à-vis* persons affected by those activities.[238] It follows from this that "[p]arent company will only be found to be subject to a duty of care in relation to an activity of its subsidiary if ordinary, general principles of the law of tort regarding the imposition of a duty of care on the part of the parent in favour of a claimant are satisfied."[239] Therefore, to establish a parental duty of care, the Court of Appeal makes no distinction to the general test applicable to any actor.

In this regard, the Court of Appeal also clarifies the influence of the dictum provided in *Chandler v Cape Plc,* which is described as "helpful guidance" rather than a separate test distinct from the general principle for imposing a duty of care on a parent company.[240] Even though relying on general principles to establish a parental *duty of care,* the court decides to provide a sample list of cases, in particular, where the parent company intervenes in the activities of the subsidiary to a greater extent, allowing the establishment of a duty of care on the part of the parent. Those cases, according to the court, would fall under two main categories: *(i)* where the parent company takes over the management of the relevant activity of the subsidiary (alone or jointly with the subsidiary's own management), or *(ii)* where the parent company has provided

234 *Ibid*., 28.

235 *Ibid*., 14.

236 *Ibid*., 31-33.

237 *Ibid.*

238 *Ibid*., 36.

239 *Ibid.*

240 *Ibid.*

relevant advice to the subsidiary on how it should manage relevant risk.[241] The court relies on the decisions of the Court of Appeal in *Vedanta* and *Okpabi* to affirm this type of case.[242]

Unilever was the case where *(i)* management of the affairs of UTKL, according to the evidence, was conducted by the subsidiary itself. As for the *(ii)* type of cases, the court was nowhere near being persuaded, as all the evidence "[…] shows that UTKL did not receive relevant advice from Unilever about such matters […] [and] […], UTKL understood that it was responsible itself for devising its own risk management policy and for handling the severe crisis which arose in late 2007 and that it did so."[243] Therefore, the Court of Appeal, contrary to the judge in the first instance, dismissed the appeal solely on the proximity issue, as the claimant was unable to prove an arguable case against the UK-based Unilever.[244] Thus, the court did not provide its argumentation on other issues, affirming the jurisdiction of Kenyan courts.[245]

2.1.2. Vedanta

Vedanta litigation arose from alleged toxic emissions from the Copper Mine in Zambia. Claimants in Vedanta are a group of 1,826 Zambian citizens who claimed that both their health and their farming activities have been damaged by repeated discharges of toxic matter from the Copper Mine into those watercourses. The owner of the Mine is Konkola Copper Mines plc ("**KCM**"), a company incorporated in Zambia. Vedanta Resources plc. ("**Vedanta plc.**") is the ultimate parent company of KCM.[246] Both KCM and Vedanta plc. were sued by claimants in UK courts. The case concerned a pre-trial procedure in which a claim can be rejected without going to court on merits if it is manifestly unfounded.

The claim was based on two grounds: *(i)* common law negligence and *(ii)* breach of statutory duty under Zambian law. Those causes of action are pursued against KCM on the basis that it is the operator of the Mine. As against Vedanta, the exact causes of action are said to arise because of the "very high level of control and direction that the first defendant exercised at all material times over the mining operations of the second defendant and its compliance with applicable health, safety and environmental standards."[247] As Zambian statutory environmental law falls outside the scope of this

241 *Ibid*., 37.

242 *Ibid*., 37-38. For the first type of case, the Court of Appeal cites *Okpabi v Royal Dutch Shell Plc* [2018] EWCA Civ 191 at 196: "[…] *Such a case might include the situation, for example, where a parent required its subsidiaries or franchisees to manufacture or fabricate a product in a particular way, and actively enforced that requirement, which turned out to be harmful to health*".

243 *AAA v Unilever plc* [2018] EWCA Civ 1532, 40.

244 *Ibid*., 5.

245 *Ibid*.

246 *Lungowe v Vedanta Resources plc* [2019] UKSC 20, 1.

247 *Ibid*., 3

thesis, we will focus on the implications of UK law.

High Court surprisingly held that the claimants could bring their case in England, even though the alleged tort and harm occurred in Zambia, where both the claimants and KCM are domiciled. This was re-affirmed by the Court of Appeal in 2017.[248]

Judgement of the Court of Appeal

In the claim, Vedanta's alleged duty of care is based on:

"[…] assumption of responsibility for ensuring that [KCM]'s mining operations do not cause harm to the environment or local communities, as evidenced by the very high level of control and direction that [Vedanta] exercise at all material times over the mining operations of [KCM] and [KCM's] compliance with applicable health, safety and environmental standards."[249]

Following that, claimants rely on the dictum provided in *Chandler v. Cape* by stating that *(i)* the businesses of Vedanta and KCM are in a relevant respect the same, *(ii)* Vedanta knew or ought reasonably to have known that KCM's operations Mine were unsafe and were discharging harmful effluent into the waterways and local environment, *(iii)* Vedanta had or/ought reasonably to have had superior expertise, knowledge and resources about the relevant aspects of health, safety and environmental protection in the mining industry and, finally *(iv)* Vedanta knew and/or ought to have foreseen that KCM would rely on Vedanta's superior expertise, knowledge and resources in respect of health, safety and environmental protection in the mining industry.[250]

With regards to the existence of a duty of care, the Court of Appeal starts its reasoning on the *Caparo* test by stating that in the present case, it is clear that Vedanta is a holding company of a group which includes the operator of the mine, KCM; and it is also clear that this fact alone would not make it arguable that Vedanta owed a duty of care to the claimants, and that it would be necessary to identify additional circumstances before a properly arguable claim could be established.[251] Therefore, the Court of Appeal provided that such duty *may* arise.

Further, giving reference to *Connelly v. RTZ Corporation Plc,*[252] *Lubbe and others v. Cape Plc,*[253] *Chandler v. Cape Plc*[254] and *Thompson v. The Renwick Group Plc,*[255] the Court of Appeal summarizes the dictum in all the cases to establish the existence of a parental duty of care: "(1) The starting point is the three-part test of foreseeability, proximity, and reasonableness. (2) A parent company may owe a duty to the employee of a subsidiary or a party directly affected by the operations of that subsidiary in

248 [2017] EWCA Civ 1528.

249 *Ibid*., 20; statement of claim, 79.

250 *Ibid*., 80.

251 *Ibid.,* 69.

252 *Ibid.,* 73

253 *Ibid*., 75-76.

254 *Ibid*., 77-80.

255 *Ibid*., 81-82.

certain circumstances. (3) Those circumstances may arise where the parent company (a) has taken direct responsibility for devising a material health and safety policy, the adequacy of which is the subject of the claim, or (b) controls the operations which give rise to the claim. (4) Chandler v. Cape Plc and Thompson v. The Renwick Group Plc describe some of the circumstances in which the three-part test may or may not be satisfied to impose on a parent company responsibility for the health and safety of a subsidiary's employee. (5) The first of the four indicia in Chandler v. Cape Plc requires not simply that the businesses of the parent and the subsidiary are in the relevant respect the same, but that the parent is well placed because of its knowledge and expertise to protect the employees of the subsidiary. If both the parent and subsidiary have similar knowledge and expertise, and they jointly make decisions about mine safety that the subsidiary implements, both companies may (depending on the circumstances) owe a duty of care to those affected by those decisions. (6) Such a duty may be owed in analogous situations, not only to employees of the subsidiary but to those affected by the operations of the subsidiary."[256]

The applicability of the said criteria is entirely reliant on the facts. In *Vedanta*, claimants provided such evidence to fulfil prove the existence of Vedanta's duty of care: *(i)* Vedanta report entitled "Embedding Sustainability", which stresses that the oversight of all Vedanta's subsidiaries rests with the Board of Vedanta itself and expressly refers to problems with discharges into water, *(ii)* a "Management and Shareholders Agreement" by which Vedanta was under a contractual obligation to provide KCM with various consulting services (including directly related to the activities of the mine) while under the KCM Shareholder Agreement, Vedanta was required amongst other things to undertake or procure feasibility studies into various large-scale mining projects, *(iii)* Vedanta's provision of environmental and technical information and Health Safety and Environmental training "across the Group" on a range of health, safety and environmental issues, including, "training on specific topics such as health and safety management, environmental incidents", *(iv)* Vedanta's financial support for KCM, *(v)* Vedanta's various public statements regarding its commitment to address environmental risks and technical shortcomings in KCM's mining infrastructure *(vi)* evidence (witness statement) from a former KCM employee about the extent of Vedanta's control of KCM – C level employee gave a witness statement in which he gives evidence of the high degree of control Vedanta exercised over KCM's operational affairs (interlocking directorship etc.).[257]

Although the parent stated that it *(i)* neither owned the mining licence, *(ii)* nor controlled the "*material operation*" of the mine, it was held that the claimant's case on duty of care was arguable and could be tried on merits.[258]

Judgement of Supreme Court

The UK Supreme Court starts its reasoning by confirming that the critical question

256 *Ibid.,* 83.

257 *Ibid*., 84.

258 *Ibid*., 90.

is whether Vedanta "sufficiently intervened" in the management of the mine owned by its subsidiary KCM to have incurred, itself, not vicariously, a common law duty of care.[259] Further in its analysis, Supreme Court challenges the statements of Vedanta and KCM, namely, that "this case involves the assertion of a new category of common law negligence liability arises from the fact that, although the claimants chose to plead their case by seeking to fit its alleged facts within a series of four indicia given by the Court of Appeal in Chandler v Cape plc […], it was submitted that this was by no means a Chandler type of case."[260]

Supreme Court presents strict reasoning regarding those arguments, stating that the present case may "[…] loosely be categorised as a claim that a parent company has incurred a common law duty of care to persons (in this case neighbours rather than employees) harmed by the activities of one of its subsidiaries."[261] However, the liability of parent companies concerning the activities of their subsidiaries, according to the court's view, is not, in itself, a distinct or novel category of liability in common law negligence.[262] Particularly interesting is the court's reasoning regarding the grounds of such duty – it can be seen that the court does not want to confront the general principles of legal separability between the companies, as well as the limited liability – it concludes that direct or indirect ownership by one company of all or a majority of the shares of subsidiary (which is the essence of such relationship) may enable the parent to "take control" of the management of the operations of the business owned by the subsidiary, but "[i]t does not impose any duty upon the parent to do so", whether owed to the subsidiary or anyone else.[263] Following this reasoning, the Supreme Court provides probably the most important *dicta,* in this case, is that the fact whether the parent company might have a duty of care for the externalities at the level of subsidiaries depends on "[…] the extent to which, and how, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary."[264]

This reasoning, according to the court's view, does not contradict the reasoning in *Unilever,*[265] where it was highlighted that taking into account the principle of legal separability, "[…] parent company will only be found to be subject to a duty of care in relation to the activity of its subsidiary if ordinary, general principles of the law of tort regarding the imposition of a duty of care on the part of the parent in favour of a claimant are satisfied in the particular case. The legal principles are the same as would apply to the question of whether any third party (such as a consultant advising the

259 *Lungowe v Vedanta Resources plc* [2019] UKSC 20, 44.

260 *Ibid*., 49.

261 *Ibid*.

262 *Ibid*.

263 *Ibid.*

264 *Ibid*.

265 *AAA v Unilever plc* [2018] EWCA Civ 1532.

subsidiary) was subject to a duty of care in tort owed to a claimant dealing with the subsidiary."[266] The Supreme Court in Vedanta later provides a position on the dicta in *Unilever,* where the court managed to show particular "scenarios" in which the duty of care of the parent company would arise: *(i)* where the parent has materially taken over the management of the relevant activity of the subsidiary (individually or jointly); *(ii)* where the parent has given relevant advice to the subsidiary about how it should manage relevant risk.[267]

In *Vedanta*, the Supreme Court was not convinced of putting cases into specific categories by giving a reasonable distinction to possible scenarios in terms of group management: "[…] no limit to the models of management and control which may be put in place within a multinational group of companies. At one end, the parent may be no more than a passive investor in separate businesses carried out by its various direct and indirect subsidiaries. At the other extreme, the parent may carry out a thorough-going vertical reorganisation of the group's businesses so that they are, in management terms, carried on as if they were a single commercial undertaking."[268]

Then, the Court explains the importance that group-wide policies may have. The Court gives a particular reference to the reasoning of Vedanta's attorney, who tried to show that there is a general principle, allegedly set in *Unilever* and *Okpabi v Royal Dutch Shell plc cases,*[269] namely that a parent could never incur a duty of care merely by laying down group-wide policies and guidelines and "expecting" the management of each subsidiary to comply with them.[270] The court rejects this argument by stating that group guidelines in themselves can be deficient – for instance, group guidelines about minimising the environmental impact of dangerous activities (such as mining in the case) may contain serious flaws which, when implemented by the subsidiary, then cause harm to third parties.[271] By taking this into account, the Court refers to the *Chandler* case and concludes that the same reasoning would be appropriate if the dust had escaped onto neighbouring land where third parties lived.[272]

Following this notion, the Court finally clarifies the importance of group-wide policies as the parent's form of intervention to establishing a parental duty of care. Thus, even though group-wide policies do not *per se* give rise to such a duty of care to third parties, they might give such effect if: *(i)* parent company "[d]oes not merely proclaim them, but takes active steps, by training, supervision and enforcement, to see that they are implemented"[273] by relevant subsidiaries and/or *(ii)* in the published materials,

266 *Ibid*., at 36.

267 *Lungowe v Vedanta Resources plc* [2019] UKSC 20, 51.

268 *Ibid.*

269 *HRH Emere Godwin Bebe Okpabi v Royal Dutch Shell plc* [2018] EWCA Civ 191.

270 *Lungowe v Vedanta Resources plc* [2019] UKSC 20, 52.

271 *Ibid.*

272 *Ibid.*

273 *Ibid*, 53

parent company "[h]olds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not do so."[274] In the latter situation, according to the court's reasoning, the omission of the parent in itself may show the renunciation of a responsibility which the latter has publicly undertaken.[275]

An important conclusion from the court in this regard is that the establishment of a parental duty of care in this particular case is not novel or any different from the "classic" cases such as *Dorset Yacht Co Ltd v Home Office,*[276] where the negligent discharge by the Home Office of its responsibility to supervise minors constituted a situation where they escaped and caused material damage to property in the vicinity.[277] This means that the parent company's duty of care is not governed by *Caparo,*[278] which provides a test only for novel situations, where, as Van Dam states, "there is no precedent, no established relationship and no applicable general principle."[279]

Finally, as regards the evidence provided by claimants that allegedly proves the existence of Vedanta's duty of care, the Supreme Court was not convinced of the weight of the management services agreement between Vedanta and the subsidiary as well as by the testimony of the subsidiary's executive, however, regarded the published materials in which Vedanta "[m]ay fairly be said to have asserted its own assumption of responsibility for the maintenance of proper standards of environmental control over the activities of its subsidiaries, and in particular the operations at the Mine"[280], and not merely to have laid down but also implemented those standards by *(i)* training, *(ii)* monitoring and *(iii)* enforcement.[281] Therefore, Vedanta's precedent established the principle that, under English law, companies that make public commitments to safeguard communities and the environment *may,* depending on the factual circumstances, be held legally responsible in tort for harm arising from the failure to implement those commitments.

Although the case could have proceeded to trial on its merits after the Supreme Court's decision, the parties settled in January 2021.

2.1.3. Okpabi

In the present case, approximately 40,000 Nigerian claimants sued Royal Dutch Shell Plc (**RDS**), the UK parent company and its Nigerian subsidiary – Shell Petroleum Development Company of Nigeria Ltd (**SPDC**), for oil pipeline leaks that allegedly

274 *Ibid.*

275 *Ibid.*

276 *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004.

277 *Ibid.*, 54.

278 *Caparo Industries plc. v. Dickman* [1990] 2 AC, 605.

279 Van Dam, *supra note*, 45: 734.

280 *Lungowe v Vedanta Resources plc* [2019] UKSC 20, 61.

281 *Ibid.*

caused environmental and health damage to the claimants.[282] As in *Vedanta*, the claim is based on the argument that RDS owed the claimants a common law duty of care, as it allegedly exercised significant control over the substantial aspects of SPDC's management and/or assumed responsibility for SPDC's operations, including "[b]y the promulgation and imposition of mandatory health, safety and environmental policies, standards and manuals"[283] which allegedly failed to protect the claimants against the risk of foreseeable harm arising from SPDC's operations.[284] On the hand of SPDC, it is claimed that as a pipeline operator, it acted negligently.

As it was a pre-trial procedure like in *Vedanta*, the position of the courts was significantly different: the judge of the court of the first instance concluded that there was no arguable case that RDS owed the claimants a duty of care and eventually dismissed the claim,[285] the Court of Appeal's majority had sided with Shell as well,[286] while the Supreme Court did not uphold such reasoning, regarding the existence of Shell's duty of care.

Judgement of the Court of Appeal

The claimants base their case for the existence of RDS duty of care, traditionally on the *Caparo*, by stating that as a result of RDS's alleged knowledge of and control over SPDC's operations and their foreseeable effect on the environment and communities, there was a relationship of proximity between RDS and the claimants; and that it is fair, just and reasonable to impose such a duty.[287] This stems from the allegation that RDS had (or ought reasonably to have had) superior expertise, knowledge, and resources in health and safety and environmental protection and knew (or ought reasonably to have foreseen) that SPDC would rely on its superior expertise, knowledge, and resources in those respects.[288]

To support this notion, the claimants provided extensive evidence: *(i)* the establishment of the RDS Executive Committee, comprising the CEO, CFO, and heads of each of RDS's global businesses. RDS's Annual Report describes this committee as 'responsible for RDS's overall business and affairs and it implements all Board resolutions and supervises all management levels at RDS'; *(ii)* The Shell Control Framework, that is, as presumed, RDS' overall framework for control of all the companies within the Shell Group, and includes for example, general business principles; *(iii)* the establishment of RDS's Corporate and Social Responsibility Committee, made up of a number of RDS directors, which role was to assist RDS main board in reviewing policies and the conduct of the Shell Group in relation to, among other things: *(a)* the Shell General

282 *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3, 4.

283 *Ibid*., 7

284 *Ibid*.

285 *Okpabi and others v. Royal Dutch Shell Plc and another* [2017] EWHC 89 (TCC).

286 *Okpabi and others v Royal Dutch Shell Plc and another* [2018] EWCA Civ 191.

287 *Ibid*., 36; statement of claim, 86.

288 Statement of claim, 89-95.

Business Principles, *(b)* the Shell's Health, Safety, Security, Environment and Social Performance and *(c)* the Shell Code of Conduct; *(iv)* the Shell's Sustainability Reports, that the latter published for a number of years and which addressed environmental issues and *(v)* the Shell's HSSE & SP Control Framework that set out mandatory requirements for all Shell Group companies, defined standards and established processes and procedures.[289]

Based on these documents, the claimants conclude that the parent company – RDS, "[…] exerts significant control and oversights over [SPDC's] compliance with its environmental and regulatory obligations and has assumed responsibility for ensuring observance of proper environmental standards by [SPDC] in Nigeria. [RDS] carefully monitors and directs the activities of [SPDC] and has the power and authority to intervene if [SPDC] fails to comply with the Shell Group's global standards and/or Nigerian law."[290] Therefore, the reasoning is based on *Chandler v. Cape Plc* "test" again, as the *Vedanta*, on which reasoning in the appeal, claimants do rely in *Okpabi*.

The influence on the reasoning of the parties in *Vedanta* is apparent as both sides accepted that the general statement in *Vedanta's* judgement of the Court of Appeal[291] on the criteria for the establishment of a duty of care was correct.[292] However, respondents argued that when one wishes to establish a duty of care, it should be shown that *(i)* a duty of care was assumed or *(ii)* a degree of control was exercised at a prominent level within the Shell group towards "the particular individuals bringing the claims."[293] Following this, the claimants conclude that "[…] in no case had the English courts found that a parent company owed a duty of care to those affected by the operations of a subsidiary", highlighting that *Chandler v. Cape Plc* is the only precedent in which a *duty of care* by a parent company was found to exist in favour of an employee of its subsidiary.[294] However, according to the claimants, the latter case demonstrates a clear nexus for the assumption that the parent company, Chandler plc, employed a doctor whose specific function was to protect the employees of the subsidiary, and no such relationship exists in the present case.[295]

Lord Justice Simon grounds his reasoning extensively on *Caparo* as the judge in the first instance. The court started its reasoning that the foreseeability condition presents sufficient information in the documents about the frequency, location, and scale of oil spills from the pipeline and infrastructure operated by SPDC and, therefore, the further analysis shall concentrate on *(i)* proximity and *(ii)* whether it was fair, just, and reasonable that a duty of care is imposed on RDS.[296]

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289 *Okpabi and others v Royal Dutch Shell Plc and another* [2018] EWCA Civ 191, 39-44.

290 *Ibid*., 47, statement of claim, 90.

291 [2017] EWCA Civ 1528, 83.

292 *Okpabi and others v Royal Dutch Shell Plc and another* [2018] EWCA Civ 191, 23.

293 *Ibid*., 26.

294 *Ibid.*

295 *Ibid.*

296 *Ibid*., 84.

(i) *Proximity*

In regards to proximity requirement, the Court of Appeal firstly concludes that the claimants rely on five primary factors to demonstrate RDS's alleged control of SPDC's operations: *(i)* the issue of mandatory policies, standards and manuals relevant to SPDC, *(ii)* the mandatory design and engineering practices, *(iii)* the system of supervision and oversight of the implementation of RDS's standards, *(iv)* the financial control over SPDC *(v)* a high level in the direction and oversight of SPDC's operations.[297]

Before diving deeply into the evidence, the court makes an important implication that, as we have seen, later would be elaborated differently by the Supreme Court in *Vedanta*, namely, that "[…] issuing of mandatory policies plainly cannot mean that a parent has taken control of the operations of a subsidiary (and, necessarily, every subsidiary) such as to give rise to a duty of care in favour of any person or class of persons affected by the policies."[298]

After systematically analysing all the extensive evidence provided by the claimants in this regard, namely *(i)* Shell Sustainability Reports, *(ii)* Oil Spill Emergency Response, *(iii)* the establishment of a special Executive, whose tasks included "review" of 'the standards, policies and conduct of RDS relating to a safe condition and environmentally responsible operation of RDS's facilities and assets, *(iv)* the Shell Control Framework, *(v)* the establishment of the new business division of parent company, to centralise the mandatory design and engineering practices, (*vi*) the Shell HSSE & SP Control Framework, *(vii)* depositions of employees and other evidence that allegedly supports RDS's influence over, its subsidiary, the Court of Appeal gives a relatively strict view on the existence of proximity.

According to the court's view, provided evidence might constitute high-level guidance. However, it "[d]oes not indicate the exercise of any degree of control or amount to control."[299] Even though the court generally admits RDS's intervention in the subsidiary's activity: "[…] there was a desire to ensure that proper systems were put in place to reduce such losses and environmental damage; and there was the establishment of an overall system which was there to ensure best uniform practices", in any way, it cannot be concluded that RDS controlled SPDC's operations.[300]

(ii) *Fair, just, and reasonable*

Claimants case whether is it fair, just and reasonable to impose a duty of care to RDS relies on five arguments: *(i)* the importance of multi-national parent companies conducting themselves consistently with international standards, including those relating to corporate social responsibility and oil production; *(ii)* there is only limited enforcement of environmental regulations in Nigeria; *(iii)* the recognition of a duty of care owed by RDS would not subvert or compromise the Nigerian statutory scheme; *(iv)* there is a current claim against RDS and one of its Nigerian subsidiaries in respect

297 *Ibid*., 86.

298 *Ibid*., 89.

299 *Ibid*., 124-125.

300 *Ibid*., 127.

of an off-shore oil spill, in respect of which the Nigerian state body claimants do not perceive policy obstacles to the pursuit of such a claim against RDS' and *(v)* in circumstances where RDS has exercised significant control over SPDC's operations and has made billions of pounds of profit from those operations, it is neither unreasonable nor unfair to require RDS to take reasonable care to mitigate the foreseeable risks of harm that arise from those operations to individuals affected by them.[301] However, the court was not persuaded by any of these arguments and found this is not a case in which the claimants can demonstrate a properly arguable case that RDS owed them a duty of care on the basis either *(i)* of assumed responsibility for devising a material policy the adequacy of which is the subject of the claim, or *(ii)* on the basis that it controlled or shared control of the operations.[302]

Lord Justice had an opposing opinion and was in favour of allowing the appeal and, after a detailed analysis of the evidence, concluded that appellants had shown "[…] a good arguable case that RDS gave directions to SPDC regarding important aspects of the management of the pipeline and facilities, specifically about controlling the risk of oil spills, which RDS sought to implement and enforce. It is well arguable that the claimants, or some of them, are in a proximate relationship with whoever controlled the operation of the pipeline and facilities."[303]

Therefore, the outcome of the case was decided by the Chancellor, who upheld the position of Justice Simon discussed above[304] while on slightly different arguments and stating that it would be "[…] surprising if a parent company were to go to the trouble of establishing a network of overseas subsidiaries with their own management structures if it intended itself to assume responsibility for the operations of each of those subsidiaries. The corporate structure itself tends to militate against the requisite proximity."[305]

In addition, the Chancellor managed to give detailed insights on the factual difference between the present case and *Vedanta*:[306]

(i) Vedanta was the majority shareholder in the subsidiary that operated the mine, which caused the damage, while SPDC operates the pipeline under a joint venture between itself, the Nigeria National Petroleum Corporation and two other parties, and SPDC does not have a majority interest.

(ii) In Vedanta, the documentary evidence included (a) a report which stressed that Vedanta's board had oversight of all its subsidiaries, (b) a management and shareholders' agreement by which Vedanta agreed to provide KCM with geographical and mining services, employee training services etc. (c) Vedanta's

301 *Ibid*., 130.

302 *Ibid*., 132.

303 *Ibid*., 172.

304 *Ibid*., 205-209.

305 *Ibid*., 196.

306 *Ibid*., 197.

investment of some $3 billion in the subsidiary; and (d) Vedanta's public commitment to address particular health and safety risk in the process of operation of the mine. According to Chancellor, none of these factors is present to the same degree, if at all, in this case.

(iii) The witness evidence in Vedanta specifically explained how the parent company had discarded the operational policies of the subsidiary and implemented its own policies and management.

Particularly interesting is the level of reluctance the Chancellor expressly showed in his pleading, stating that: "I became increasingly convinced as the argument progressed that the ultimate claim against RDS could simply never succeed."[307] However, as we will see further, this notion was not supported by the Supreme Court's decision, which is probably not surprising, given that it came after *Vedanta's* final judgment.

Judgement of the Supreme Court

As Vedanta's Supreme Court Judgement predated the judgement of the Supreme Court in *Okpabi*, claimants' legal argumentation has accordingly changed to match Vedanta's approach. Claimants stated that duty of care arises by what they describe as *Vedanta* "routes": *(i)* RDS taking over the management or joint management of particular activities SPDC, *(ii)* RDS providing faulty advice and/or imposition of faulty groupwide safety/environmental policies later implemented by SPDC, *(iii)* RDS establishing group-wide safety/environmental policies and taking active steps to ensure their implementation by SPDC, *(iv)* RDS declaring that it exercises a particular degree of supervision and control of SPDC.[308] However, the Supreme Court highlights that even those *"routes"* cannot be understood as any novel or separate parental duty of care tests as in *Vedanta,* it was made clear that there is no special test applicable to the tortious responsibility of the parent company for the activities at the level of its subsidiary.

The court emphasised that pre-trial proceedings are designed to determine whether the pleaded case presents an arguable claim. The Court of Appeal's majority had overstepped this mark by accepting evidence from RDS witnesses in a mini-trial based on limited disclosure without giving the claimants the opportunity for cross-examination.[309] Following the established error of the Court of Appeal, the Supreme Court provides further substantial implications, which are heavily based on *Vedanta*.

First, the Court denies the argument that imposition of group-wide policies or standards can never in itself give rise to a duty of care, as this is inconsistent with *Vedanta* precedent, namely, that "[…] [g]roup guidelines […] may be shown to contain systemic errors which, when implemented as of course by a particular subsidiary, then cause harm to third parties."[310] Therefore, *Okpabi* further approves that group-wide policies cannot merely be understood as a soft, non-binding instrument in terms of establishing parental liability.

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307 *Ibid*., 208.

308 *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3, 26.

309 *Ibid*., 120-125.

310 *Ibid*., 143; *Lungowe v Vedanta Resources plc* [2019] UKSC 20, 52.

Second, the court notes that the Court of Appeal placed too much emphasis on the parent's control.[311] Giving reference to *Vedanta*, the Supreme Court indicated that control is just a "starting point", and the legally relevant issue is the extent to which the parent did take over or share with the subsidiary the management of the relevant activity.[312] Hereto, the Supreme Court, again, by the reference to *Vedanta*, tries to balance the legal and economic rationale of group management by stating that there may be particularly different situations in group management, where on the one hand – the subsidiary is independent, on the other hand – *de facto* controlled by the parent.[313] The reasoning of *Vedanta* clearly shows that duty of care might arise regardless of control as such, for example, in the cases where in "[…] published materials, [parent company] holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not, in fact, do so. In such circumstances, its very omission may constitute the abdication of a responsibility which it has publicly undertaken."[314] Therefore, the exercise of control is not in itself a sole decisive factor in establishing a parental duty of care.

Third, the Supreme Court made clear that establishing parental liability for externalities at the subsidiary level does not require any special doctrine. This was also stated in *Vedanta*.[315]

Finally, the Supreme Court entirely abandons the *Caparo* threshold in establishing the parent company's duty of care. The Supreme Court stated that the liability of parent companies concerning the activities of their subsidiaries is not a distinct or novel category of liability in common law negligence as shown in *Vedanta*[316] and thus does not require establishing the *Caparo* criteria (applicable only to the novel duty of care).

After discussing the errors in law made by the Court of Appeal, the Supreme Court concluded that there was a genuine issue to be tried. The court has not provided an in-depth analysis of all the evidence, according to prior critics, who have noted how lower courts have dealt with this issue. These critics have concluded that the management and operational structure in practice, as well as the extent to which RDS involved itself in and exercised control over concerning decisions by the subsidiary, are disputable, and full disclosure is needed.[317]

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311 *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3, 124-125, 127, 205.

312 *Ibid.,* 147.

313 *Ibid.*

314 *Lungowe v Vedanta Resources plc* [2019] UKSC 20, 53.

315 *Ibid.*, 54.

316 *Ibid.*, 49-60; *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3, 151.

317 *Ibid.,* 158.

2.1.4. Maran

Maran case[318] in the UK courts differs from *Vedanta* and *Okpabi* as the case where a UK-based company was held liable for torts committed not at the level of the subsidiary but one of the business partners. The deceased, whose widow filed a claim, had worked in the shipyards in Bangladesh on the demolition of an oil tanker when he fell to his death. Maran Ltd., through various contractual arrangements, controlled the sale of the ship, which was finally placed for demolition, where the claimant died.[319]

The claim against the Maran was based, again, on a duty of care arising out of the Maran's alleged control of the sale of the vessel and the alleged knowledge that, because of that sale, the ship would be broken up in the demolishing yard (in Bangladesh) with notorious hazardous working conditions.[320] To establish this liability, claimants used two legal grounds or "tests": one was based on the general principles of *Donoghue v Stevenson,* and the alternative one – alleged *"creating a danger"* by Maran, which then put demolishing workers at risk due to the conduct of third parties. The judge found that it could not be said that the duty of care alleged on behalf of the Respondent would indeed fail and that it should be allowed to proceed to trial.[321]

Judgement of the Court of Appeal

The Court of Appeal starts its reasoning by the statement that this is "an unusual basis of claim."[322] An important fact, approved by the respondent itself, was that Maran knew that the ship would be broken up in Bangladesh instead (this was indirectly indicated by the price of the ship and the quantity of fuel oil left on the vessel when it was delivered)[323] and that it in fact controlled the sale of the ship.[324]

The claimant bases his claim to establish Maran's duty of care on two routes. For the *first* one, the claimant provided a general notion that: "At all material times, the Defendant owed the deceased a common law duty of care. The duty of care required the Defendant to take all reasonable steps to ensure that its negotiated and agreed end-of-life sale and the consequent disposal of the Vessel for demolition would not and did not endanger human health, damage the environment and/or breach international regulations for the protection of human health and the environment."[325] As of this route, the claimant tried to show that the case at hand falls under the classic *Donoghue v Stevenson* case, where foreseeability and proximity are the key features. The judge of the first instance court clearly distinguished this case from the one at hand because the

318 *Hamida Begum v. Maran LTD* [2021] EWCA Civ 326.

319 *Ibid*., 6-7.

320 *Ibid*., 14.

321 *Hamida Begum v. Maran LTD* [2020] EWHC 1846 (QB).

322 *Hamida Begum v. Maran LTD* [2021] EWCA Civ 326, 14.

323 *Ibid.*

324 *Ibid*.,19.

325 Statement of claim, 88.

former had no intervening action of any sort by a third party.[326]

The Court of Appeal, in this regard, acknowledged that the claimant may prove foreseeability. However, the requirement for proximity as from *Smith v Littlewoods* shall also be proved, namely, that Maran ought to have had the deceased reasonably in contemplation at the time of choosing to sell the vessel.[327] The claimant's reliance on *Donoghue v Stevenson,* in this case, is adapted in two questions: *(i)* if Maran had sold a dangerous product directly to the yard with full knowledge of its unsafe practices, was its relationship with the deceased sufficiently proximate to establish a duty of care? and *(ii)* whether that duty could then be negated as a result of the involvement of third parties.[328] The answer to the former being Yes, and to the latter – No.

Regarding the first one, the Court of Appeal believed that it assumed that the vessel was a dangerous product just because its demolition was an inherently dangerous activity. According to the Court, this implication simply cannot fall under *Donoghue v Stevenson* because such activity in itself "[…] arranged, supervised or performed […]" by Maran.[329] The Court of Appeal generally accepted that the existence of a duty could not be extinguished by the involvement of third parties,[330] however, the Court of Appeal was not persuaded of Claimant's reliance on *Home Office v Dorset Yacht Co Limited.*[331]

In the latter, as we already discussed before, the basis for the finding of liability against the Home Office was that the trainees who caused the damage were "[…] under the supervision and control of three Borstal officers."[332] Therefore, the main criteria were supervision and control of the third parties that did the harm, which cannot be established in the present case. Therefore, the court noted that the *Donoghue v Stevenson* principles would not be the most appropriate legal basis for the claim. However, the claimant's two questions mentioned before are not in itself fanciful or unconnected and could not be tried at trial.

For the *second* route, the claimant argues that the exception to the general rule that "there is no liability in tort for the harm caused by the intervention of third parties" should be applied to Maran because it is responsible for or has created the danger that the demolishing yard exploited, which led to his death.[333]

The Court of Appeal provided a particularly detailed analysis of this so-called "creation of danger exception", relying on recent case law that shall be considered carefully. The first example where this exception was established in *Smith v Littlewoods,* where it

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326 *Hamida Begum v. Maran LTD* [2020] EWHC 1846 (QB), 37.

327 *Hamida Begum v. Maran LTD* [2021] EWCA Civ 326, 41.

328 *Ibid*., 42.

329 *Ibid*., 43

330 *Ibid*., 46.

331 *Home Office v Dorset Yacht Co Limited* [1970] AC 1004.

332 *Ibid.,* 48.

333 *Hamida Begum v. Maran LTD* [2021] EWCA Civ 326, 51.

was described as such: "This may occur where the defender negligently causes or permits to be created a source of danger, and it is reasonably foreseeable that third parties may interfere with it and, sparking off the danger, thereby cause damage to persons in the position of the pursuer."[334] Recent case law where this exception is elaborated is *AG of the BVI v Hartwell,*[335] *Mitchell and Another v Glasgow City Council,*[336] *Michael and Another v Chief Constable of South Wales Police,*[337] *Robinson v Chief Constable of West Yorkshire Police,*[338] *Poole Borough Council v G N and Another.*[339]

In *Hartwell*, the duty of care was established for police authority to the public because a police officer fired at his partner, indirectly hurting the tourist. It was because the officer was not mentally fit to carry a gun, and police authority had to oversee this.[340] In *Mitchell,* in circumstances where one local authority tenant was killed by another one, having mental problems, the duty of care of local authority was not established. It was tried to prove before the court that due to the circumstances where, without informing one of the tenants, the local authority met another and warned that continued behaviour could mean his expulsion that led to a killing just after the meeting, the local authority was responsible. The court, relying on *Dorset Yacht Co Ltd v Home Office* and *Smith v Littlewoods Organisation Ltd.,* concluded that[341] *(i)* foreseeability of harm is not of itself enough for the imposition of a duty of care,[342] *(ii)* law generally does not impose a duty on a person to protect others[343] and *(iii)* "[l]aw does not impose a duty to prevent a person from being harmed by the criminal act of a third party based simply upon foreseeability."[344] In *Michael,* the duty of care of police was not established in the case where the person was killed after a call to the police and information about threats from the partner. The call was given a lower priority level; thus – the police did not reply in time accordingly.[345] The court, relying on *Smith v Littlewoods Organisation Ltd* as well, concluded that common law does not generally impose liability for "pure omissions."[346] However, the court highlighted two exceptions to this rule: *(i)* where the person was in a position of control over another and

334 *Smith v Littlewoods Organisation Ltd* [1987] UKHL 18.

335 *AG of the BVI v Hartwell* [2004] UKPC 12.

336 *Mitchell and Another v Glasgow City Council* [2009] UKHL 11.

337 *Michael and Another v Chief Constable of South Wales Police* [2015] UKSC 2.

338 *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4; [2018] AC 736.

339 *Poole Borough Council v G N and Another* [2019] UKSC 25.

340 *AG of the BVI v Hartwell* [2004] UKPC 12, 38-39.

341 *Mitchell and Another v Glasgow City Council* [2009] UKHL 51.

342 *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, 1037 – 1038; *Smith v Littlewoods Organisation Ltd* [1987] SC (HL) 37, 59.

343 *Smith v Littlewoods Organisation* Ltd, at 76.

344 *Ibid*., 77- 83.

345 *Michael and Another v Chief Constable of South Wales Police* [2015] UKSC 2, 97.

346 *Ibid.*

should have foreseen the likelihood of the latter causing damage to somebody stemming from Dorset Yacht, and *(ii)* where one person assumes a positive responsibility to safeguard another under the *Hedley Byrne* principle.[347] However, in *Robinson,* the Supreme Court found that police officers have a duty of care to passengers who are injured while attempting to arrest a suspect on the street.[348] Even though confirming the dicta in *Smith v Littlewoods Organisation Ltd*, *Mitchell* and *Michael,* the court indicated that *duty of care* may arise when a person "[…] has created a danger of harm which would not otherwise have existed or has assumed a responsibility for an individual's safety on which the individual has relied […]."[349]

The claimant argued that Maran created the danger by deciding to demolish the vessel in Bangladesh, where working practices were notoriously unsafe. He argued that Maran's brought about the deceased's death because, in the circumstances, death was "not a mere possibility but a probability."[350] With reference to the above-mentioned cases, the court of appeal concluded that situations in which the defendant will be liable in tort for damage caused by the intervention of a third party are very restricted, particularly where there is a clear "creation of danger."[351] However, according to the Court's view, the present case is capable of triggering this exception as Maran "[…] arguably played an active role by sending the vessel to Bangladesh, knowingly exposing workers (such as the deceased) to the significant dangers which working on this large vessel in Chattogram entailed."[352] The court concluded that it may be an unusual extension of an existing category of cases where a duty has been found, but it would not be an entirely new basis of tortious liability.

2.1.5. Oguru and Dooh

Oguru represents a chain of connected cases where the Shell group of companies was sued for environmental issues in Nigeria. In 2008, four Nigerian farmers and environmental NGO *Milieudefensie* sued the current parent company Royal Dutch Shell (**RDS**) and predecessor parent companies, and Shell Petroleum Development Company (**SPDC**) for oil spills in Niger, two from underground pipelines in Oruma (case A), Goi (case B), and one form Ikot Ada Udo (case C).[353] These cases involved both interlocutory proceedings and proceeded to trial on the substance. Both the District

347 *Ibid*., 97-99.

348 *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4; [2018] AC 736, 37.

349 *Ibid*., 97.

350 *Hamida Begum v. Maran LTD* [2021] EWCA Civ 326, 62.

351 *Ibid*., 63.

352 *Ibid*., 64.

353 Van Dam, *supra note*, 45: 720.

Court[354] and the Court of Appeal[355] ruled that claimants have a standing and that claims are subject to Nigerian law.[356]

In material proceedings, the District Court dismissed all claims against the parent companies and in cases A and B, against SPDC. The district court considered that the claimants failed to contest Shell's defence that the leak was caused by sabotage and that the SPDC effectively stopped and remedied the leak as quickly as possible. Thus, it cannot be stated that Shell's response was factually inadequate.[357] However, claimants won cases A and B in the appeal. The Thesis addresses only judgments in cases A and B because, in those judgments, the Court of Appeal gave final decisions. The third judgment is merely an interim judgment at this point.[358] The proceedings stand out because they are being conducted in the Netherlands, not only against Shell's subsidiary in Nigeria but also against the former UK and Dutch parent companies of the Shell group, as well as against the current group holding company RDS. The latter has a registered office in London but has its principal place of business in The Hague.[359] The Court of Appeal's decisions in Cases A and B relate to the liability of both parents and subsidiaries for the spills. Thus, we need to analyse the court's arguments in more detail.

Judgements of the Court of Appeal

The court in *Oguru* and *Dooh* starts its reasoning by stating that claims against the parent companies are not based on a direct piercing of the corporate veil (where the separation of legal personalities between the parent company and the subsidiary is disregarded) but on what is also known as an "indirect piercing of the corporate veil" – liability of the parent company for its own acts or omissions concerning third parties that were/are affected by the acts or omissions of its subsidiary – based on the negligence/breach of a duty of care.[360] However, since there was no precedent for this liability of the parent company under Nigerian law, the UK law, which has authority in the UK, was considered. The court established that relevant recent UK case law

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354 District Court the Hague, 30 December 2009, ECLI:NL:RBSGR:2009:BK8616 (*Dooh-Akpan-Oguru-Efanga-MD/Shell*).

355 Court of Appeal the Hague, 17 December 2015, ECLI:NL:GHDHA:2015:3588 (*Oguru/Shell*); Court of Appeal the Hague, 17 December 2015, ECLI:NL: GHDHA:2015:3586 (*Dooh/Shell*); Court of Appeal the Hague, 17 December 2015, ECLI:NL:GHDHA:2015:3587 (*Shell/Akpan*).

356 Van Dam, *supra note*, 45, at 721.

357 District Court the Hague, 30 January 2013, ECLI:NL:RBSGR:2013:BY9850 (*Oguru/ Shell*), 4.20, 4.27, 4.53, 4.60., District Court the Hague, 30 January 2013, ECLI:NL:RBSGR:2013:BY9854 (*Dooh/Shell*), 4.21, 4.25, 4.51. 4.58.

358 Steef M. Bartman, Cornelis De Groot, "The Shell Nigeria Judgments by the Court of Appeal of the Hague, a Breakthrough in the Field of International Environmental Damage? UK Law and Dutch Law on Parental Liability Compared", *European Company Law* 18, 3 (2021): 97, https://kluwerlawonline.com/journalarticle/European+Company+Law/18.3/EUCL2021012

359 *Ibid.*

360 Court of Appeal the Hague, 29 January 2021, ECLI:NL:GHDHA:2021:132 (*Oguru/ Shell*), 3.26; Court of Appeal the Hague, 29 January 2021, ECLI:NL:GHDHA:2021:133 (*Dooh/Shell*), 3.27, hereinafter *Oguru* or *Dooh*.

precedents are *Chandler v Cape*, *Okpabi* and *Vedanta.*[361]

In this regard, the court gives the greatest importance to *Vedanta* and cites extensive paragraphs of the latter, where the UK Supreme Court provided that *(i)* the critical question is whether the parent company sufficiently intervened in the management of the subsidiary's activities,[362] *(ii)* the liability of the parent companies concerning the activities at the level of subsidiaries is not a novel or distinct category of negligence and "[e]verything depends on the extent to which, and how the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary",[363] *(iii)* there is no special doctrine in the law of tort of legal responsibility on the part of the parent company concerning the activities of its subsidiary, vis-à-vis persons affected by those activities.[364] After this consideration, the Court of Appeal provides its interpretation that, according to *Vedanta*, *(i)* duty of care shall be assessed in light of the *Caparo* test[365] , *(ii)* the parent's liability requires the subsidiary's negligent conduct[366] , *(iii)* if the parent company knows or should know that its subsidiary unlawfully inflicts damage on third parties in an area where the parent company involves itself in the subsidiary, the parent company has a duty of care in respect of the third parties to intervene.[367] In terms of control of the parent companies over the subsidiaries of the group, the Court of Appeal established that *(i)* leadership of the group – the parent company adopts the policy in the areas that are relevant for the group as a whole, including health, safety and security requirements,[368] *(ii)* the standards and manuals are drawn up and published by specially set up service companies while the parent company follows that the service companies detail the policy determined by the Shell leadership for implementation by the group companies.[369] However, as negligence on the part of SPDC was not demonstrated as the cause of the leaks in both cases, no duty of care was established.[370]

On the contrary, in *Oguru,* the Court of Appeal found SPDC negligent for not installing a proper lead detection system (LDS), which would have enabled a faster response to the leak. Therefore, the court ordered SPDC to install the system.[371] In terms of RDS, the court ruled that RDS was aware of a lack of LDS and that, based on

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361 *Oguru,* 3.28, *Dooh,* 3.29.

362 *Lungowe v Vedanta Resources plc* [2019] UKSC 20, 44

363 *Ibid*., 49.

364 *Ibid.,* 50-52.

365 *Oguru,* 3.30, *Dooh*, 3.19.

366 *Oguru*, 3.30 and 5.31, *Dooh*, 3.30 and 5.31.

367 *Oguru*, 3.31.

368 *Ibid.,* 7.6.

369 *Ibid*., 7.7.

370 *Oguru*, 3.30 and 5.31, *Dooh*, 3.30 and 5.31., Van Dam, *supra note*, 45: 722.

371 Van Dam, *supra note*, 45: 723.

Vedanta, it had a duty of care.[372] The court ordered RDS to establish LDS, subject to a penalty of €100,000 per day in the event of non-compliance. As Van Dam highlights, "[t] this was the first time a parent company had been held responsible for its subsidiary's operational activities abroad."[373] In case B, parental liability was not found as LDS had already been installed a few years before.

As *Oguru*[374] is a Dutch case where the court relied on UK precedent in *Vedanta*, it is of particular importance to take a deeper look at how *Oguru* interpreted the reasoning in *Vedanta*. This is important because it helps to understand whether the specific legal reasoning is being followed as a pattern or whether courts base their reasoning on different implications. *First*, as Van Dam points out, the Court of Appeal considered that *Vedanta* meant relying on the *Caparo* test.[375] Following this reasoning, the court further relied on *Chandler v Cape*, namely that the parent company knew or should have known about the risk. Following this, the Court of Appeal formulated such a rule: "[…] if the parent knows or should know that its subsidiary is unlawfully causing damage to third parties in an area in which the parent interferes with the subsidiary, the starting point is that the parent owes third parties a duty of care to intervene."[376] *Second*, relying on *Vedanta*, the Court of Appeal indicated that the establishment of the parent company's duty of care requires the subsidiary's negligent conduct. As this had not been demonstrated, no duty of care was owed by the RDS.[377]

According to Van Dam and other authors, the interpretation of *Vedanta* is erroneous for multiple reasons.[378] *First*, *Caparo* is only intended for the establishment of a duty of care in novel cases, while according to *Vedanta*,[379] the parent company liability is not in itself a new category of liability.[380] Reluctance to apply *Caparo* is, indeed, bold and clear under *Vedanta*: "This was not a case of the assertion, for the first time, of a novel and controversial new category of the case for the recognition of a common law duty of care, and it, therefore, required no added level of rigorous analysis […];[381] therefore, interpreting the latter on the contrary, does not seem correct. *Second*, Van Dam argues that Oguru was, like *Vedanta*, not a *Chandler-type* case.[382] In *Chandler v.*

372 *Oguru*, 7.1.

373 Van Dam, *supra note*, 45: 723.

374 and *Dooh.*

375 Van Dam, *supra note*, 45, 739.

376 *Oguru*, 3.30-3.31, Van Dam, *supra note*, 45: 739.

377 *Oguru*, 3.30 and 5.31, *Dooh*, 3.30 and 5.31.

378 Lucas Roorda, and Daniel Leader, "Okpabi v Shell and Four Nigerian Farmers v Shell: Parent Company Liability Back in Court", *Business and Human Rights Journal* 6 (2021): 373, https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/okpabi-v-shell-and-four-nigerian-farmers-v-shell-parent-company-liability-back-in-court/1C70BB759342BA69A723E86AF209906E.

379 *Lungowe v Vedanta Resources plc* [2019] UKSC 20, 54.

380 Van Dam, *supra note*, 45: 739.

381 *Lungowe v Vedanta Resources plc* [2019] UKSC 20, 54, 56, 60.

382 Van Dam, *supra note*, 45: 739.

Cape, the Court of Appeal held that the parent company was liable to the employee of a subsidiary for harm caused by asbestos exposure, as the parent company had assumed responsibility for preventing the risk of asbestos exposure and controlled the mechanisms intended to monitor and mitigate that risk. The court observed that the parent company had *(i)* actual knowledge of the working conditions and risk of asbestos exposure and *(ii)* had employed a scientific and medical officer to be responsible for health and safety issues. By doing so, the parent company took responsibility for ensuring that the employees were not harmed and owed them a duty of care if they were.[383] In *Vedanta*, the parent's duty of care to outsiders (not employees of the subsidiary, as in *Chandler*) was based on its supervision over the subsidiaries' operations. The Supreme Court in Vedanta indicated that Chandler *indicia* "[…] are no more than particular examples of circumstances in which a duty of care may affect a parent"[384] and not some kind of limiting principle or general test. *Third*, according to Vedanta, negligence on the part of the subsidiary is not a precondition for the parent company's liability, whereas, in Oguru, the Court of Appeal interpreted Vedanta as establishing this principle.[385] However, as Bartman and De Groot indicate, it is unclear on what basis the Court of Appeal establishes that rule as no further substantiation is given.[386] It is a crucial factor if understood erroneously, as SPDC's lack of negligence as such could mean that RDS does not have a duty of care either. With regards to the claim, where RDS' duty of care was established – namely for installing LDS (where SPDC's lack of action was negligent), Van Dam concludes that the same result could have been reached if the Court of Appeal had applied *Vedanta* correctly. As the court based its ruling on the facts that *(i)* RDS was specifically and intensely involved in the question of whether the pipelines should be LDS equipped and that *(ii)* the number of oil spillages was linked to the Executive Committee's remuneration and on this basis, concluded that the parent company's management was highly involved in SPDC's management (including LDS issue),[387] Van Dam argues that on this basis, the court, indeed, could have established that the safety of this matter was jointly managed by the parent and the foreign subsidiary[388] and that former owed the claimants a duty of care to ensure that relevant equipment would be installed.[389]

The same reasoning, according to Van Dam, could have been followed for establishing the duty of care of the previous parent companies– the Court of Appeal held

383 Jindan-Karena Mann, "The UK Vedanta Case and Parent Company Liability" *Rethinking SLICK*, https://rethinkingslic.org/blog/tort-law/47-the-uk-vedanta-case-and-parent-company-liability.

384 *Lungowe v Vedanta Resources plc* [2019] UKSC 20, 56.

385 *Oguru*, 3.30.

386 Bartman, De Groot, *supra note*, 358: 103.

387 *Oguru*, 7.18–7.21.

388 This is also known as the first Vedanta route - based on the *Donoghue v Stevenson* principle, a parent may owe a duty of care if it (a) takes over the management of a subsidiary's activity or exercises it jointly with the subsidiary.

389 Van Dam, *supra note*, 45: 740.

that the parent companies that headed Shell Group before 2005 did not owe a duty of care for the cause of the spills in 2004 and 2005, because SPDC had not acted unreasonably or negligently.[390] If the court had applied *Vedanta* correctly, it would have been logical that the old parents owed a duty of care regardless of SPDC's negligent behaviour as well, particularly if it proved that involvement in subsidiaries is that intense that it would be equal to joint management[391] (*Vedanta* first route), as it was, according to the Court of Appeal's reasoning.[392]

2.2. Nature of liability

Since the extensive background of the cases has been provided, the Thesis now turn to analyse some fundamental legal questions that stem from it. The author will further attempt to explain the nature of parent company or non-parent business partner liability to understand better and possibly predict the outcomes of similar cases in the future. To be more precise, this chapter Thesis focuses on the following questions:

(i) Is there a specific theory (model) or set of it that could explain cases where corporations were (or were not) held liable for the externalities at the level of subsidiaries or business partners?
(ii) What conditions of corporate liability are set from the case law analysed in chapter 2.1. of the Thesis?
(iii) To which extent (if any) does this represent a departure from the classical approach of corporate liability, discussed in Chapter 1 of the Thesis? If it is established that recent case law, analysed in chapter 2.1. of the Thesis, represents a departure from traditional rules of corporate liability, to what extent is it compatible with existing UK, German, French law, and corporate law doctrines?

Therefore, this Thesis now turns to the analysis of established legal theories and models that could explain the case law analysed. The thesis begins with the general premise that the liability of the parent company or non-parent business partner falls under a broad category known as supply chain liability.[393] Thus, we analyse and evaluate theories and models that tackle the application of the latter. After the following analysis of existing theories and modes, the Thesis provides observations on whether relevant cases may be explained under particular theories (models) or whether some type of novel liability is being established under the case law. This analysis is crucial for evaluating *(i)* the conditions of liability that stem from case law and *(ii)* whether the case law represents a deviation from the existing theories and both statutory and case law of the analysed jurisdictions, accordingly.

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390 *Oguru*, 3.33 and 5.31.

391 Van Dam, *supra note*, 45: 740.

392 *Oguru*, 7.6-7.9.

393 Bergkamp, *supra note*, 112: 162-163.

2.2.1. Supply chain liability

All the landmark cases discussed above, at least from first sight, tackle the ordinary understanding of principles of legal separability and limited liability. In all cases, the central question arose as to whether the parent company or a non-parent business partner could be held responsible for actions that occurred at the subsidiary or another business partner level. One then might wonder, is there a single basis for such liability? Logical implication, supported by academics, is that this type of liability can be generally referred to as "supply chain liability."[394] Bergkamp argues that this theory[395] holds that if particular conditions are present, the company can be held liable for damage-causing events in the whole supply chain.[396] Enneking highlights that supply chain liability presents that "[f]ocus is widening from parent company liability for activities carried out locally by subsidiaries to the liability of – for instance, retailers, […] (sub-)contractors […]" etc.[397] The basis for this liability is a failure of the company to prevent the damage in violation of a duty to refrain from causing harm or a duty to prevent harm.[398]

A corporation's supply chain liability can be triggered based on both contractual (such as supply and employment) and non-contractual relationships (for example, the impact of the company's operations on the local community, its influence on the environment, and health damage to third parties).[399] As Bergkamp points out, all these relationships can cause claims, both by so-called voluntary creditors (based on contracts) and involuntary creditors – for example, victims of an oil spill in the Niger Delta – they do not have a contract with the corporation but may have claims against it based on laws such as civil liability (tort) law as we have seen in case law examples.[400] The foundations of the legal theory of supply chain liability stem from the doctrines of *supply chain responsibility* and *corporate social responsibility*, which require a brief definition before exploring the rationale behind supply chain liability.

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394 Carolijn Terwindt, Sheldon Leader, Anil Yilmaz-Vastardis, and Jane Wright, "Supply Chain Liability: Pushing the Boundaries of the Common Law?", *Journal of European Tort Law* 8, 3 (2017): 8, https://doi.org/10.1515/jetl-2017-0011.

395 The contours of this type of liability might well be seen in terms of the "Bhopal" disaster in 1984 when due to a chemical leak an estimated 15,000 to 20,000 people were killed - at the time, it was the worst industrial accident in history. After dismissal in UK courts, the case was then brought before the Indian courts, resulting in a settlement.

396 Bergkamp, *supra note*, 111: 161.

397 Liesbeth Enneking, "Paying the Price for Socially Irresponsible Business Practices? Corporate Liability for Violations of Human Rights and the Environment Aborad", *Aktuelle Juristische Praxis / Pratique Juridique Actuelle* 26, 8 (2017): 990, https://repub.eur.nl/pub/112984/06_Enneking.pdf.

398 Bergkamp, *supra note*, 112: 162.

399 *Ibid*., 163.

400 *Ibid*., 163.

2.2.1.1. Corporate social responsibility and supply chain responsibility

As Ward pointed out, "[e]conomic globalization – the linked processes of trade and investment liberalization, privatization, and deregulation – has brought huge increases in movements of capital, goods, and services. Multinational corporations are the vehicles for much of this globalized economic activity, and in turn, foreign direct investment by multinational corporations accounts for an increasing proportion of global economic activity."[401] This situation provoked a demand to reconsider rules on the boundaries of corporate activity.[402] There, the theory of "corporate social responsibility" comes into play.

Zerk defines corporate social responsibility as "[…] notion that each business enterprise, as a member of society, has a responsibility to operate ethically and under its legal obligations and to strive to minimise any

adverse effects of its operations and activities on the environment, society and human health."[403] This notion is the opposite of, for a long time – the dominant view that corporations do not have a social responsibility – the primacy of shareholder benefit being the "one and only one" social responsibility of the business.[404] Other authors view the coalition between these interests and argue that, in reality, proper financial management of the company and corporate social responsibility go "hand in hand."[405] What cannot be denied is that at least over the last several decades, due to the influence of the largest enterprises, their role in society is being considered more carefully.[406] The primary concept is that companies should address all deficiencies that are within their corporate structure. This is particularly important in groups of companies. Zerk argues that one crucial legal issue related to corporate social responsibility is the principle of limited liability and the concept of separate corporate personality. The author describes this as the greatest legal obstacle to multinational accountability.[407] However, in the author's opinion, it is arguable whether cases like *Vedanta* contradict those principles, as will be detailed in further analysis.[408]

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401 Halina Ward, "Governing Multinationals: The Role of Foreign Direct Liability", *RIIA, Briefing Paper New Series* 18 (2001): 1, https://www.iatp.org/documents/governing-multinationals-the-role-of-foreign-direct-liability

402 as Ward rightly indicates, the question of "[..] how best to manage the environmental and social impacts of foreign direct investment by these multinationals, transnationally coordinated economic networks" became as relevant as ever, *ibid*., 1.

403 Jennifer A. Zerk, *Multinationals and Corporate Social Responsibility. Limitations and Opportunities in International Law* (New York: Cambridge University Press, 2006), 32.

404 Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962), 133.

405 M. Hopkins, *The Planetary Bargain: Corporate Social Responsibility Matters* (London: Earthscan Publications, 2003).

406 Bergkamp, *supra note*, 112: 164.

407 Zerk, *supra note*, 403: 26.

408 Chapter 2.4.

The general debate on corporate social responsibility initially centred on whether it is mandatory or voluntary.[409] In other words – can companies be held liable for not being "socially responsible"? As it may be concluded, at least till recent legislative developments that we discuss in later chapters, corporate social responsibility was understood as a voluntary action of corporations.[410] Sheehy adds that holding multinational enterprises liable for misconduct at the level of their supply chain was traditionally relatively complex, as their regulatory framework is largely based on self-regulation by businesses.[411]

However, Zerk concludes that this debate is misguided, as *(i)* it overlooks the fact that many CSR-related issues (such as work, health safety, etc.) are already regulated, and companies that operate negligently are liable to their victims under tort rules *(ii)* this debate only reflects a very simplistic view of how law guides and manages human behaviour and *(iii)* it has an implicit assumption that mandatory legal requirements would lead to higher standards of corporate behaviour.[412] Therefore, the author concludes that corporate social responsibility is not purely "voluntary" and cannot be separated from matters of legal compliance – it encompasses all aspects of corporate decision-making.[413]

Therefore, under the theory of corporate social responsibility, corporations have a social responsibility to society "within its sphere of influence,"[414] and their purpose is not limited to traditional shareholder primacy.

On the other hand, supply chain responsibility can be viewed as an extension of corporate social responsibility. Bergkamp points out that there is no "official" or legal definition of "supply chain responsibility."[415] However, the diverging point is the scope of the application. Supply chain responsibility, in this regard, is a company's responsibility across its entire supply chain for a broad scope of matters, including social, ecological, and economic consequences of the chain's activities.[416] As Bergkamp rightly points out, the doctrine of supply chain liability "[…] attempts to address the problem that not all companies have the same level of information, expertise, and resources when it comes to managing environmental and social issues. Thus, if the

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409 Zerk, *supra note*, 403: 32.

410 Zerk, *supra note*, 403: 30.

411 Benedict Sheehy, "Defining CSR: Problems and Solutions", *Journal of Business Ethics* 131 (2015): 625-648, https://link.springer.com/article/10.1007/s10551-014-2281-x in Michael Bader, Miriam Saage-Maaß and Carolijn Terwindt, "Strategic Litigation against the Misconduct of Multinational Enterprises: An anatomy of Jabir and Others v KiK", *Verfassung und Recht in Übersee* 52 (2019): 159, https://www.nomos-elibrary.de/10.5771/0506-7286-2019-2-156.pdf.

412 Zerk, *supra note*, 403: 35.

413 *Ibid*., 58.

414 S. Wood, "Four Varieties of Social Responsibility: Making Sense of the 'Sphere of Influence' and 'Leverage' Debate Via the Case of ISO 26000", *Osgoode CLPE Research Paper* 14 (2011).

415 Bergkamp, *supra note*, 106: 165.

416 *Ibid*., 166.

stronger companies in the supply chain take the lead and assist, they can help all entities in the chain improve."[417] This is evident if we look at public commitments on the supply chain responsibility of the biggest corporations, for example – "General Motors"[418] or "Apple."[419] Therefore, it can be concluded that supply chain responsibility is a company's responsibility across its entire supply chain.

From a regulatory perspective, we can find both soft law and hard law instruments that address supply chain responsibility.[420] UN Sustainable Development Goals,[421] OECD Guidelines for Multinational Enterprises – government-backed recommendations on responsible business conduct to encourage sustainable development,[422] UN Guiding Principles on Business and Human Rights – which oblige companies to ensure respect of human rights "within their sphere of influence",[423] are just a few initiatives, linked to supply chain responsibility. Hard law instruments also govern particular matters of supply chain responsibility. At the EU level, for example, we have a proposal for the Corporate Sustainability Reporting Directive, which requires large companies to report on how they address risks of social and environmental impacts linked to their operations,[424] while on the national level, UK Modern Slavery Act requires businesses to publish confirmation on the steps taken to that slavery and related issues are not present in the supply chain,[425] or Dutch Child Labour Due Diligence Bill regulates child working issues in the same fashion,[426] and French *Loi Sapin II* – issues

417 *Ibid*.

418 https://www.gm.com/supply-chain-responsibility.

419 https://www.apple.com/supplier-responsibility/#:~:text=Our%20Supplier%20Code%20of%20Conduct,verification%2C%20which%20we%20audit%20regularly.

420 Bergkamp, *supra note*, 112: 166.

421 The Sustainable Development Goals, also known as the Global Goals, were adopted by the United Nations in 2015 as a universal call to action to end poverty, protect the planet, and ensure that by 2030 all people enjoy peace and prosperity.

422 OECD, *OECD Guidelines for Multinational Enterprises, OECD Publishing*, 2023, http://dx.doi.org/10.1787/9789264115415-en.

423 United Nations, *Guiding principles on business and human rights: Implementing the United Nations "Protect, Respect and Remedy" framework*, 2011.

424 The EU Non-Financial Reporting Directive requires European companies with more than 500 employees to publish sustainability reports in each EU member country and specifies that the reports must include information relating to "environmental matters, social and employee aspects, respect for human rights, anticorruption and bribery issues, and diversity in their board of directors". Directive 2014/95/EU.

425 Among other things, Modern Slavery act has "Transparency in Supply Chains" clause, according to which - *"big business will be forced to make public its efforts to stop the use of slave labour by its suppliers"*, Section 54, Part 6 of the UK Modern Slavery Act of 2015.

426 Child Labour Due Diligence Law, which obliges companies operating in the Dutch market to conduct due diligence related to child labour and to submit a statement to a public authority, declaring that they have investigated risks of child labour in their activities and supply chains.

related to corruption.[427] It can be concluded that these legal instruments show the pattern of, as Bergkamp points out, "[t]rend towards the "hardening" of soft law supply chain responsibility."[428] In the third chapter of the Thesis, we analyse in detail recent developments in supply chain responsibility (or liability) regulation both at the national[429] and EU level.

2.2.1.2. Responsibility or liability?

It has already been noted that the debate over whether corporate social responsibility and supply chain responsibility are voluntary mechanisms or mandatory rules has been ongoing for a considerable time. However, one might argue that recent case law examples discussed above give a clear implication of supply chain liability rather than responsibility. In the *Vedanta*, *Okpabi*, *Oguru,* and *Maran* cases, EU companies were found to be failing to prevent environmental harm and human rights violations at the level of subsidiaries or business partners in foreign countries (usually developing), where regulations and standards may be inadequate.[430] Crucial, as Bergkamp points out, is that claimants seeking compensation for their harms do not pursue claims against the local subsidiaries, which may be undercapitalized and are subject to a legal environment that lacks proper enforcement of, for instance, tortious claims, but prefer to assert claims against the parent companies (business partners) based in jurisdictions, where legal argumentation may be more persuasive to judges.[431] Hartmann and Moeller add that consumers do not differentiate between members of the supply chain when it comes to unsustainable behaviour – instead, they hold the focal firm responsible for everything that occurs in the supply chain, which creates a "chain liability effect."[432] Van Dam and Gregor argue that seeking recourse from parent companies rather than local subsidiaries is often the only option for victims of corporate human rights abuses to access remedy for the reasons already indicated.[433] Therefore,

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427 *Loi n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique ("Loi Sapin II 2016")*, https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033558528&categorieLien =id.

428 Bergkamp, *supra note*, 112: 167.

429 French and German supply chain due diligence legislation (*Loi de vigilance*; *Lieferkettensorgfaltspflichtgesetz*).

430 J. Hartmann and S. Moeller, "Chain liability in multitier supply chains? Responsibility attributions for unsustainable supplier behavior", *Journal of Operations Management* 32, 5 (2014): 281—294, https://reader.elsevier.com/reader/sd/pii/S0272696314000060?token=5007260393BE7BF2F5DDE46B40DD4B3E46CD8F5CBD42AFF0CF99A5B8AFA7AB2F7365F3A8E4BACD5A93A2DA27F7D650FD&originRegion=eu-west-1&originCreation=20221206181413.

431 Bergkamp, supra note, 112: 168.

432 J. Hartmann and S. Moeller, *op. cit*., 281.

433 Cees van Dam, and Filip Gregor, "Corporate responsibility to respect human rights *vis-à-vis* legal duty of care", in *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union,* Juan José Álvarez Rubio, and Katerina Yiannibas (Oxon: Routledge, 2017), 121.

according to the theory of supply chain liability, a company can be held liable for damage caused by its subsidiaries and/or business partners because it *(i)* failed to prevent damage caused by others, where it *(ii)* had a duty to do so. However, one feature of supply chain liability shall be addressed here – if one could argue that the parent liability for the actions at the level of the subsidiary may be one logical step further from a general "separability" principal within the group, supply chain liability in a broad sense[434] – might present more obstacles. As scholars highlight, the question of whether companies can be liable for their business partners' misconduct is complex and requires, at least, establishing *(i)* a *de facto* connection between parties and *(ii)* a certain extent of dependence of the supplier on the business partner[435]. Those conditions briefly highlight potential legal obstacles that may be present when establishing this type of liability.

Even though one might distil some general implications of supply chain liability, in the author's view, supply chain liability as such is no more than a general definition of all the legal instruments that may be used in order to make the company liable for externalities at the level of the subsidiary or business partner if certain conditions are present. Therefore, further, we analyse legal theories (models) of supply chain liability to understand the nature and application of the latter. Later, we attempt to determine whether recent case law, in which parent companies and non-parent business partners are considered to have a duty of care regarding the actions of their subsidiaries or business partners, can be viewed as an application of one (or several) of the discussed theories and models.

2.2.2. Theories (models) of supply chain liability

Supply chain liability can arise from various legal relationships – it may stem from statutory law, contract, or an extra-contractual relationship (tort).[436] This Thesis is limited to the analysis of the extra-contractual liability implications. As extra-contractual liability gains substantially more attention from legal scholars and is also used as a legal basis in all the cases that are discussed in this thesis, the author does not discuss the implications of contractual and statutory liability. The differences in possible variations of liability are also at stake, as parties can address specific liabilities through the contract. Therefore, the detailed analysis of all the possible scenarios of supply chain liability that fall outside the scope of extra-contractual liability does not give much

434 Including liability of the company for the externalities of its business partners.

435 Michael Bader, Miriam Saage-Maaß and Carolijn Terwindt, "Strategic Litigation against the Misconduct of Multinational Enterprises: An anatomy of Jabir and Others v KiK", *Verfassung und Recht in Übersee* 52 (2019): 164, https://www.nomos-elibrary.de/10.5771/0506-7286-2019-2-156.pdf.

436 Bergkamp, *supra not*e, 112: 169.

help to the Thesis.[437]

Zerk, notably, provided theories of parental liability before the cases discussed in Chapter 2, which would enable us to explain the rationale behind the imposition of such liability. Noting that the legal separability of the companies[438] by no means can be an overwhelming of the parental liability, Zerk distinguished four groups of theories that be of help to establish extra-contractual parental liability, namely: *(i)* "primary" liability (the liability of the party for its own conduct), *(ii)* "vicarious" liability (the liability of the party for acting on its behalf), *(iii)* "secondary" liability (the liability of the party for the particular form of participation or contributions towards, a tort committed by another party) and *(iv)* "enterprise" liability (the liability of a party for the activities of another on the basis that they considered a single unit).[439] Therefore, the Thesis now analyses the conditions and boundaries of each legal theory, how they may vary across jurisdictions, and whether particular patterns can be distilled.

2.2.2.1. Primary liability of the parent company

This theory originated in English law, where the parent company may be considered a party primarily responsible for a tort, even if the incident occurred at the subsidiary level.[440] From the point of legal scrutiny, as Petrin explains, the liability is not actually based on the parent company's wrongs directly *vis-à-vis* a third party, "[b]ut on the presence of actions or omissions that allegedly constitute a fault on the part of the parent company because they, in turn, resulted in actions or omissions at a subsidiary that harmed a third party."[441] It was already established in the previous chapters, that under English tort law, there is no general obligation to prevent a third party from causing damage.[442] However, "primary" liability theory is one of the exceptions to this principle. This is based on the legal consideration that the parent company directly owed a duty of care to third parties that were harmed by the activities at the level of the subsidiary. Thus, as Giliker and Beckwith point out, in cases where it can be proved that the parent company has to exercise a particular level of care, for example, provide supervision of its subsidiary but failed to do the following and due to this omission, people or the environment was harmed, it may be found liable in the tort

437 As Bergkamp indicates, statutory, contractual, and tort-based supply chain liability in certain situations may have strong interactions – for example, through a contract, a company may exonerate itself from potential extra-contractual liability (or possibly statutory) *vis-à-vis* its business partner, *ibid*., 170. However, for the reasons already explained, the interactions fall outside the scope of the thesis.

438 Meaning that the parent company will not be liable for the actions of the subsidiary just because it has shares in the latter.

439 Zerk, *supra note*, 403: 216.

440 *Ibid.*

441 Martin, Choudhury, supra note, 90: 7-8.

442 Mares, *supra note*, 103: 11-12.

of negligence.[443] In this case, it would be considered that the parent itself breached its duty of care. As Mares explains, the key aspect here is not that the parent company controlled the subsidiary to such an extent as to render it an instrument but instead that the parent's own conduct contributed to the harm.[444]

This type of extraterritorial judicial liability, stemming from the existence of a parental duty of care, is also commonly referred to as "foreign direct liability" (**FDL**).[445] As Enneking describes, FDL cases typically involve corporate accountability for violations of norms related to human rights, health and safety, the environment, and labour issues.[446] As these cases deal with the parent's own actions (or omissions), claims are generally formulated as the parent's failure to exercise sufficient care in the scope of the mentioned fields.[447]

Sørensen describes FDL as cases where *(i)* tort-based claims are being filed against *(ii)* the foreign parent company, *(iii)* in their home jurisdiction, and *(iv)* for environmental or human rights violations at the level of the subsidiary. [448] It is worth noting that Sørensen has provided its own "liability" matrix, where he argues that both statutory and judicial extraterritorial liability can be either direct (non-fault based) or indirect (fault-based),[449] where under the indirect liability approach, parental liability is found within the concept of duty of care, while under the direct liability approach – liability can be invoked by a formal relationship between the parent and the subsidiary.[450] Considering these models, Sørensen clears up confusion related to the definitions, that "[r]egardless of its characterization as a "direct liability", an FDL case is an example of an extraterritorial judicial indirect parental liability, holding the foreign parent company liable for its own wrongdoings (breach of a duty of care)."[451] Two cumulative criteria that shall be present in the FDL claim are distilled: *(i)* violation of an existent duty of care and *(ii)* the parent company's direct involvement in the violation and control over the acts of the subsidiary.[452] Therefore, as Zerk poetically points out, through FDL claims, not subsidiaries but the parent companies are targeted as the apparent "orchestrators" of company-wide standards and policies.[453]

However, Zerk rightly points out that even after establishing the possible existence of a parental duty of care, features that would allow concluding that the latter

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443 P. Giliker and S. Beckwith, *Tort, 4th Edition* (London: Sweet & Maxwell, 2011) 1-002.

444 Mares, *supra note*, 103: 11.

445 Ward, supra note, 401: 1.

446 Enneking, *supra note*, 397: 989.

447 *Ibid.*, 991.

448 Sørensen, supra note, 174: 113.

449 *Ibid*, 106.

450 *Ibid*, 105-106.

451 *Ibid*, 113.

452 Enneking, *supra note*, 105: 175.

453 Zerk, *supra note*, 403: 198.

was, in fact, apparent, moreover – breached, are not clear – for instance, the following questions could be asked: *(i)* what is the test to prove that the parent was sufficiently involved in imposing liability? *(ii)* to what extent a parent has to supervise?[454] Accordingly, under the time-relevant case law, Zerk concludes that under the "primary" liability model, victims of the harm would need to base an FDL claim on three elements:

1. Establishing a duty of care either *(i)* by focusing on the actions of the parent company, showing it as a creator of harmful activities at the level of the subsidiary, or *(ii)* establishing the general duty of the parent companies to control its subsidiaries adequately.[455]
2. Proving that the parent company's conduct has "fallen short of legal standards."[456]
3. Proving causation.[457]

For the first element, relying on the general test of *Donoghue v. Stevenson*, Zerk concludes that parental duty of care would generally be present in the cases where "[…] the possibility of injury or harm is (or ought to have been) foreseeable by the parent company and the claimants are sufficiently "proximate" to the parent company to justify the imposition of liability."[458] However, one may argue that taking into account the *sui generis* nature of corporate groups (and supply chains), where legal separability and limited liability of companies are still the "heart" of legal reality, this general definition that stems from 90-year-old precedent may not be of significant help. Following the aforementioned reasoning, Zerk provides a few general examples that foreseeability and proximity might be sufficient in cases where, for instance, the parent company is aware of the subsidiary's activities and the health and safety risks they may pose and thus exercises control over those activities.[459] Therefore, it might be concluded that *(i)* actual involvement and *(ii)* control over the activities of the subsidiary are criteria for primary liability. Nevertheless, then again – what are the boundaries?

Zerk discusses *Lube v. Cape* as an example of a "primary" liability case, where claims were brought by South Africans who had suffered exposure to asbestos in mines and mills owned and operated by local subsidiaries of Cape, registered in the UK. It was argued that the parent company negligently exercised control of the health and safety of its subsidiaries' operations. The court was relatively cautious in *Lube v. Cape* but generally did not deny the probability of such duty of care and provided the *dicta*[460] as a reaction to claimants' arguments on a high degree of involvement of Cape

454 *Ibid*., 216.

455 *Ibid.*

456 *Ibid*., 220.

457 *Ibid.*, 221.

458 *Ibid*. 217.

459 *Ibid.*

460 It was stated that resolution of the issue of parent's responsibility for ensuring observance of proper standards for health and safety "[…] *involve an inquiry into what part the defendant played in controlling the operations of the group, what its directors and employees knew or ought to have known, what action was taken and not taken, whether the defendant owed a duty of care to employees of group companies overseas and whether, if so, that duty was broken" in Lubbe v. Cape plc.* [2000] 1 WLR 1545, 1556, at 20.

plc. in its subsidiary's operations.[461] However, as mentioned, *Lubbe v. Cape* was settled, so the court did not have the opportunity to definitively decide on Cape's liability in this case. In this regard, it is crucial that Zerk acknowledges that, in principle, such a duty of care shall not be limited to the formal corporate structure but shall extend to the supply chain (including employees of contractors, etc.).[462] This suggests that the "primary" liability theory could also apply to the general public, for example, in cases where their living conditions were affected by hazardous corporate activities.

For the second element, related to the parent company's failure to act under proper standards, the appropriate standard of care is determined by a "reasonable man" test, i.e., it must be established what a reasonable parent company would do in the particular situation to avoid any related risk in its corporate (or supply) chain.[463] The test of a "reasonable man" comes from the landmark *Blyth v Birmingham Waterworks Co.* judgement precedent.[464] It is apparent that this consideration will be completely fact-dependent, and the parent's reasonableness will be valued in the background of the parent's actual knowledge about the risks (and foreseeability of risks[465]) and how to control them. In addition to *Lubbe v. Cape,* Lord Bingham also emphasised the responsibility of the parent company to ensure that its overseas subsidiaries adhere to proper standards of health and safety.[466]

The third element – causation - would require proving that the harm was a reason for the parent company's actions (or omissions), thereby constituting a breach of duty of care.[467] As Hart indicates, common law causation requirement is based on "proximity", namely that only an event that is sufficiently related to the damage is deemed to be the cause of thereof,[468] "intervening acts" of another person may break the chain of

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461 *"Whether a parent company which is proved to exercise de facto control over the operations of a (foreign) subsidiary and which knows, through its directors, that those operations involve risks to the health of workers employed by the subsidiary and/or persons in the vicinity of the factory or other business premises owes a duty of care to those workers and/or other persons in relation to the control which it exercises over and the advice which it gives to the subsidiary"* in *Lubbe v. Cape plc.* [2000] 1 Lloyds Law Reports 139 (Court of Appeal), 146.; Zerk, *supra note*, 218.

462 *Ibid.,* 219.

463 *Ibid.*, 220.

464 "[n]egligence is the omission to do something which a reasonable man […] would do or doing something which a prudent and reasonable man would not do" *Blyth v Birmingham Waterworks Company* [1856] EWHC Exch J65.

465 Whether the parent ought to have known about specific risks.

466 *Lubbe v. Cape plc.* [2000] 1 WLR 1545, 1556, at 20.

467 Zerk, *supra note*, 403: 221.

468 H. L. A. Hart and A. M. Honoré, *Causation in The Law, 2 nd edition* (Oxford: The Clarendon Press, 1985) *in* A. Bergkamp, "Models of Corporate Supply Chain Liability", *Jura Falc.* 55, 2 (2018-2019): 181, *https://www.law.kuleuven.be/apps/jura/public/art/55n2/bergkampsupplychainliability.pdf.*

causation between the defendants' carelessness and the damage.[469] Therefore, to establish proximity, claimants generally need to prove that actions related to the harm at the subsidiary level are related to the parent company's negligence, either in the form of commission or omission. The level of knowledge on the part of the parent company about the risks associated with the subsidiary's activities and the level of *"de facto"* control exerted by the parent are the primary factors in establishing a causal link.[470]

So far, almost all the landmark court judgments in cases relating to parental liability (or, more broadly – supply chain liability) have been decided under common law,[471] implying a duty of care. Therefore, the "primary" liability theory as such has not yet been properly tested under French and German law either. As we already discussed,[472] French tort law relies on a general definition of a tort, namely that any act which causes damage to another shall oblige the person by whose fault it occurred to repair it[473] and provides the same notion for negligence.[474] In addition, under a general principle, a person is not liable for the harm caused by another person.[475] Bergkamp notes that conditions for liability to arise in common law are "almost identical"[476] to the civil law conditions and proposes that FDL claims under civil law might also be feasible.[477] Other scholars also suggest that, at least under French tort law, FDL could be applicable. For example, if a parent company has made a statement concerning corporate social responsibility – it could be accepted more easily that it is liable for its subsidiary's acts or negligence.[478] Under German law, the notion of "primary" liability would be more complicated. Since German law has sophisticated rules for contractual corporate groups, where the liability of the parent is statute settled, it could be concluded that, for now, room for discussion in terms of tort liability is only left for GmbH corporate

469 *Ibid*.; *Smith v. Littlewoods Organisation Ltd.* [1987] AC 241. In *Smith v. Littlewoods Organisation Ltd* it was ruled law is unwilling to impose liability for the deliberate act of a third party (*novus actus interveniens*) – in this case – persons who fired the cinema. Whilst they did owe a duty of care they were not in breach of duty. However, there may be exceptions, as set in *Dorset Yacht v Home Office* [1970] AC 1004. In the latter, the basis for the finding of liability against the Home Office was that the trainees who caused the damage were *"under the supervision and control of three Borstal officers."*

470 Zerk, *supra note*, 403: 221

471 Bergkamp, supra note, 112: 181. N.b.

472 Chapter 1.2.2.

473 Art. 1240, French CC.

474 Art. 1241, French CC.

475 Bergkamp, *supra note*, 112: 184.

476 Under common law, liability arises if there is (1) a duty of care, (2) a breach of said duty, and (3) a causal link between the breach of the duty and the harm that occurred.

477 Bergkamp, *supra note*, 111: 182.

478 Y. Queinnec, M.C. Caillet, "Quels outils juridiques pour une régulation efficace des activités des sociétés transnationales?" *in Responsabilité sociale de l'entreprise transnationale et globalisation de l'économie*, ed. I. Daugareilh (Brussels: Bruylant, 2010), 654.

groups. After *Trihotel*[479] and other landmark cases, however, the reluctance for FDL is really apparent as supported by Wagner, who states that liability of the parent companies for damage caused at the level of subsidiaries is *inconceivable* mainly because tort law only recognises duties of care concerning one's own behaviour.[480] However, as it is argued further, in *Vedanta* and other cases analysed in Chapter 2, liability was, indeed, based on the company's own behaviour.

A more important German precedent in terms of FDL is *Jabir v KiK*.[481] In this case, the German court of first instance dismissed the first case concerning supply chain liability brought before the German courts, even though applying Pakistani (common) law.[482] In this case, survivors of a fire in a Pakistani textile factory sued German company KIK as the "main retailer" of the merchandise produced on the Pakistani premises. Therefore, this is a clear example of a "supply chain liability" case, as the textile factory in Pakistan was not a subsidiary of KiK but rather a supplier. As Reinke and Zumbansen argue, "[t]he crux of supply-chain liability rests upon a central dichotomy in the relationship between MNCs and their suppliers […]: while suppliers are generally kept independent in a legal sense, they are often economically and procedurally dependent on the corporations in a factual sense."[483]

Therefore, the case is more like *Maran* than *Vedanta* or *Okpabi*. Relying on UK cases, claimants argued that KiK breached its duty of care towards its business partner's employees to ensure proper working conditions.[484] The alleged foreseeability of the fire was based on the fact that KiK's representatives visited the factory. Therefore, KiK was aware of its defects[485]. Proximity was based on the alleged assumption of responsibility of KiK for the whole supply chain – this alleged responsibility, according to claimants, stems from KiK's sustainability report where the following was mentioned: "We are responsible for more than 20,000 employees in Europe, people whom we employ directly, as well as those workers involved in producing goods ordered by us in their respective countries. […] It is therefore logical and economically prudent

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479 p. 44-45 of the Thesis.

480 Wagner, *supra note,* 45: 757-759 in Cees van Dam, "Breakthrough in Parent Company Liability. Three Shell Defeats, End of an Era and New Paradigms" *European Company and Financial Law Review* 18, 5 (2021), 736, https://www.degruyter.com/document/doi/10.1515/ecfr-2021-0032/html.

481 *Jabir and others v KiK Textilien und Non-Food GmbH* [2019] Case No. 7 O 95/15.

482 Bergkamp, *supra note*, 112: 204; Because Pakistani tort law is based on English common law, claimants relied on English case law.

483 Benedikt Reinke, and Peer C. Zumbansen, "Transnational Liability Regimes in Contract, Tort and Corporate Law: Comparative Observations on 'Global Supply Chain Liability", *King's College London Law School Research Paper No.* 2019, 18 (2019): 11, https://ssrn.com/abstract=3312916.

484 The claim is not based upon an allegation that their positive negligent act caused death and personal injury; rather the claim is that KiK failed to do its share to prevent the harm suffered by employees in breach of a legal obligation to secure a healthy and safe working environment. In "Legal Opinion on English Common Law Principles on Tort: Jabir and Others v Textilien und Non-Food GmbH", https://www.ecchr.eu/fileadmin/Juristische_Dokumente/Legal_Opion_Essex_Jabir_et_al_v_KiK_2015.pdf.

485 Bergkamp, *supra note*, 112: 204.

for us to design processes that make the best possible use of resources, to define social and ecological standards, and adhere to them, and also to assume social responsibility above and beyond our core business activities."[486] As well as from the fact that *(i)* KiK implemented its own Code of Conduct in every contract of sale with the factory[487] and *(ii)* e 75% of the factory's output was destined for KiK, the latter being the main beneficiary of production.[488] However, on the basis that the claims were statute-barred due to the expiration of the limitation period, the first instance court rejected the claim and did not rule on the merits of the case. The claimants applied for legal aid to appeal the decision but were unsuccessful.[489]

As Bader and others point out, *Jabir v KiK* is not a typical case but instead is construed as part of a broader campaign to attach legal responsibility to all actors contributing to the harmful events and to make visible the workers hidden in global production chains.[490] Authors argue that KiK's behaviour represents "[…] standard practice of multinational enterprises' activity across borders."[491] Therefore, even though common law was applicable in the case, one may consider the KiK case the first attempt to test the traditional reluctance of German courts to accept supply chain liability claims. Unfortunately, this opportunity failed due to the more procedural questions.

Therefore, "primary" liability represents the liability of the company for the externalities at the level of subsidiaries or business partners (in the broader understanding of supply chain liability) and is construed as a breach of the company's own duty of care. This type of liability is primarily based on common law, and civil law jurisdictions traditionally do not follow this concept. However, some theoretical implications, at least under French law, might be possible.

2.2.2.2. Vicarious liability

As Giliker explains, the definition of "vicarious liability" stems from the common law, and in civil law systems, the same institute would be called "liability for the acts of others".[492] In this Thesis, the term "vicarious liability" will be used to encompass

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486 "Legal Opinion on English Common Law Principles on Tort: Jabir and Others v Textilien und Non-Food GmbH", 8, https://www.ecchr.eu/fileadmin/Juristische_Dokumente/Legal_Opion_Essex_Jabir_et_al_v_KiK_2015.pdf.

487 Carolijn Terwindt, Sheldon Leader, Anil Yilmaz-Vastardis, and Jane Wright, "Supply Chain Liability: Pushing the Boundaries of the Common Law?", *Journal of European Tort Law* 8, 3 (2017): 11, https://doi.org/10.1515/jetl-2017-0011.

488 *Ibid*., 9.

489 *Jabir and others v KiK Textilien und Non-Food GmbH* Appellate Court of Hamm, Verditct of 21 May 2019, Az. 9 U 44/19.

490 Michael Bader, Miriam Saage-Maaß and Carolijn Terwindt, "Strategic Litigation against the Misconduct of Multinational Enterprises: An anatomy of Jabir and Others v KiK", *Verfassung und Recht in Übersee* 52 (2019): 156, https://www.nomos-elibrary.de/10.5771/0506-7286-2019-2-156.pdf.

491 *Ibid.*

492 Paula Giliker, *Vicarious Liability in Tort* (Cambridge: Cambridge University Press, 2010), 5.

both common law and civil law. Vicarious liability, as such, represents not a tort but a rule of responsibility which renders the defendant liable for the torts committed by another.[493] Traditionally, vicarious liability holds that the employer (the company) is responsible and, therefore, liable for the negligent acts of its employees.[494] Therefore, liability is imposed on the employer, not because of his own wrongful act, but due to his close (control) relationship with the tortfeasor (employee).[495] From this notion, it is evident that vicarious liability is an exception to the general understanding that a person can be found liable only for his own wrongdoings (individual responsibility).[496] Neither is it consistent with the core principles of fault found in France and Germany – as already discussed. Article 1240 French CC imposes liability based on proof of fault by the defendant, while 828 BGB foresees liability in damages on "[…] a person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person." However, both German and French statutory law provides a form of vicarious liability. French CC states that "[o]ne is liable not only for the harm which one causes by one's own action, but also for that which is caused by the action of persons for whom one is responsible, or of things which one has in one's keeping"[497], while German BGB foresees that "[a] person who uses another person to perform a task is liable to make compensation for the damage that the other unlawfully inflicts on a third party when carrying out the task."[498]

As Rott and Ulfbeck indicate, the rationale of vicarious liability may be twofold: *first*, if the employer benefits from the actions of an employee for the same reason, he should be responsible for the harm that latter may possess; *second*, the employer usually has a better financial position that employee to cover the factual damage to the victim.[499] Therefore, originally, vicarious liability is based on formal employment. In this sense, vicarious liability is an exception to the general principle that a person

493 Giliker, *op. cit*., 1.

494 Peter Rott, Vibe Ulfbeck, "Supply Chain Liability of Multinational Corporations?", *European Review of Private Law* 23, 3 (2015): 425, https://kluwerlawonline.com/journalarticle/European+Review+of+Private+Law/23.3/ERPL2015029.

495 Giliker, *op. cit*., 1.

496 *Ibid*.

497 Art. 1242 (1) French CC.

498 Art. 831 BGB, Giliker, *supra note*, 506: 26. In Germany, however, the fault in question is that of the employer, not the employee. 831 BGB provides that the employer is presumed to be at fault when his employees unlawfully inflict harm on a third party when carrying out their duties unless he can show otherwise.

499 *Ibid.* As Markesinis and Deakin state: "[t]he employer is richer so he should pay; which also suits the victim since the employer is invariably in a better position to pay than his employee. Economic and moral considerations also seem to be satisfied by those who advocate that the person who derives a benefit from the activity of another should also bear the risk of damage inflicted by those acts. Yet another economic variant is that the employer is in a better position to spread the loss through insurance or the price of his products." in B. Markesinis and S. Deakin, *Tort Law, 4th Edition* (Oxford: Clarendon Press, 1999), 532.

is not liable for the actions of another. However, the concept of vicarious liability can also serve as a legal basis for holding companies liable. The decisive factor is the actual subordination, dependency, and control.[500] Zerk highlights that the doctrine of "vicarious" parental liability is inter-connected with the "agency" doctrine.[501] More flexible language of the civil law does not render the contract of employment less important – the latter provides the primary example of liability under Article 1384 French CC and 831 BGB.[502]

Generally, Giliker sees three main factors of vicarious liability in all three systems: *(i)* the need for a specific type of relationship[503], *(ii)* a wrongful act and *(iii)* harm of the victim during a specific task or in the course of employment.[504]

Under English law, the parent company may be considered "vicariously" liable for the actions of the subsidiary if it is established that the latter was acting as an "agent" of the parent company.[505] Bowstead and Reynolds describe the agency as "[…] fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf to affect his relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to that manifestation."[506] However, this can occur in minimal circumstances where control is at a sufficiently high level. As Zerk points out, "[…] the control relationship would have to be so close that the subsidiary could not really be regarded as carrying its own business."[507] Therefore, the line between "vicarious" liability, originally construed on formal employment and "agency" is not clear. A tendency that can be traced back is that the UK courts have found the master or principal *vicariously* liable for the torts of their *agents*.[508] However, Giliker proposes that, from the point of legal scrutiny, liability for the agency is primary, not vicarious, as the principal is held accountable based on their own personal fault.[509] Therefore, the power of the agent is entirely determined by the principal – in the same fashion, the principal's liability is limited by the

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500 Jaap Spier, Francesco Donato Busnelli, *Unification of Tort law: Liability for Damage Caused by Others* (Aalphen aan den Rhin: Kluwer Law International, 2003), 300.

501 Zerk, *supra note*, 403: 223.

502 Giliker, *supra note*, 492: 27.

503 Usually, equal to employment.

504 Giliker, *supra note*, 492: 22.

505 Zerk, *supra note*, 403: 223. Giliker explains that historically, "Doubts as to the principled basis of the doctrine led the courts to consider other means – the introduction of non-delegable duties or reliance on agency principles – in order to legitimise the imposition of liability for the acts of another." *in* Giliker, *supra note*, 492: 13.

506 F. M. B. Reynolds, *Bowstead & Reynolds on Agency*, 18th edn. (London: Sweet and Maxwell, 2006), 1-001.

507 *Ibid.*

508 Giliker, *supra note*, 492: 109.

509 *Ibid.,* 102.

scope of the agent's authority given to the agent.[510] Even though it might be argued that the concept of agency has been used by the courts to expand vicarious liability outside the pure employment situations, and taking into account the evident similarities[511], conceptually, agency is different from vicarious liability as such. However, it shall also be considered that in some cases, the broad term "agent" is sometimes used by the courts as a general definition, independent from the strict legal nature of doctrine *per se,* in order to apply vicarious liability for a broader scope of factual relationships.[512]

The argument of the agency was raised in *Adams v. Cape*, namely that the subsidiaries were merely agencies making contracts on behalf of their principal, the holding company. In this case, agency arguments failed, as the Court of Appeal, following *Solomon v Solomon,* found that on grounds it was not entitled to lift the corporate veil against a defendant company, which was a member of a corporate group, simply because the corporate structure had been used to ensure that legal liability in regards to the particular future activities of the group would fall on another member of the group rather than on the defendant company.[513] Even though the rationale of "vicarious" liability may have some positive implications on parental liability, Zerk and Petrin conclude that the UK courts are generally reluctant to "vicarious" liability.[514] Mardirossian also suggests that because the subsidiary and the parent company have separate legal statuses, parents are generally not held liable for the actions of their subsidiaries.[515] Therefore, the application of vicarious liability for parent-subsidiary situations remains highly theoretical.

Although the French legal system, like the UK's, has adopted a strict liability principle and demonstrates an increasing willingness to apply concepts of vicarious liability, particularly in the context of parental liability, there are no clear precedents. Following a famous *Blieck* precedent,[516] proposals were made to expand vicarious liability, including the liability to persons who organise and profit from the activities

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510 Reynolds, *op. cit.*

511 Practically, it considers one person liable for the tortious acts of another.

512 Stoljar proposes that the word 'agent' is being used in this context to extend the tort doctrine of vicarious liability beyond employees to those working gratuitously for the defendant. S. J. Stoljar, *The law of agency* (London: Sweet and Maxwell, 1961).

513 All Answers ltd, 'Adams v Cape Industries' (Lawteacher.net, December 2022), https://www.lawteacher.net/free-law-essays/business-law/adams-v-cape.php?vref=1>.

514 Zerk, *supra note*, 403: 224; Petrin, *supra note*, 38: 612.

515 Nora Mardirossian, "Direct Parental Negligence Liability: An Expanding Means to Hold Parent Companies Accountable for the Human Rights Impacts of Their Foreign Subsidiaries" (2015): 12, https://dx.doi.org/10.2139/ssrn.2607592.

516 *Association des centres e´ducatifs du Limousin et autre c/ Consorts Blieck Ass* ple´n 29 March 1991 D 1991.324 note C, where Cour de Cassation found an association, caring for mentally handicapped adults, strictly liable for the acts of one of their charges, who had set fire to a forest in which he had been working.

of another person,[517] covering the parent-subsidiary relationship as well.[518] However, they were not supported.[519] Mathey also proposes that according to Article 1242 of the French Civil Code,[520] the parent companies could be liable for its subsidiary, this being as vicarious liability for employees.[521] However, the French courts act in a strict sense and no similar case law could be detected.[522]

The German system, on the other hand, statutorily rejects vicarious liability in favour of fault-based principles.[523] In the opinion of Wagner, vicarious liability in tort would impose a considerable burden on, in particular, small businesses and private households.[524] In this regard, the German Federal Court of Justice (BGH) has established a precedent,[525] which states that: "[q]ualification as a vicarious agent requires dependency and being bound by instructions, which is generally not the case with independent companies, irrespective of a group relationship."[526] Other authors criticize BGB, framed on fault-based primary liability in the context of large business enterprises, "permitting the main employer to exempt himself from liability by showing that the lower intermediate employee, who in fact selected and was supervising the tortfeasor, had been properly chosen and supervised", thus, possibly leaving tort victim with a

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517 P. Catala, *Avant-projet de re´forme du droit des obligations et de la prescription* (Paris: La Documentation franc¸aise, 2006); translation by S. Whittaker and J. Cartwright, www.justice.gouv.fr/art_pix/rapportcatatla0905-anglais.pdf at 190.

518 Proposed Art. 1360 stated: "Similarly, 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 dependant where the victim shows that the harmful action relates to the first person's exercise of control. This is the case as regards parent companies in relation to harm caused by their subsidiaries or as regards those granting a concession in relation to harm caused by a person to whom the concession is granted."

519 Giliker, *supra note*, 492: 139.

520 "One is liable not only for the harm which one causes by one's own action, but also for that which is caused by the action of persons for whom one is responsible, or of things which one has in one's keeping."

521 N. Mathey, "La responsabilité sociale des entreprises en matière de droits de l'homme', *JCP E* 3, 13, 2.A.1. (2010) *in* Siel Demeyere, "Liability of the Mother Company for Its Subsidiary in French, Belgian and English Law", *European Review of Private Law* 23, 3 (2015): 396, https://doi.org/10.54648/erpl2015028.

522 Demeyere, *supra note*, 17: 396.

523 Giliker, *supra note*, 492: 4. As it was already discussed, Wagner highlights that liability of parent companies for damage caused by their subsidiaries is inconceivable under German tort law as the latter only recognizes duties of care in relation to one's own behaviour, in Cees van Dam, "Breakthrough in Parent Company Liability. Three Shell Defeats, End of an Era and New Paradigms**"** *European Company and Financial Law Review* 18, 5 (2021), 736.

524 MunchKommBGB/Wagner, 5th edition (Munich: C. H. Beck, 2009),} 831, 4.

525 BGH Urt., 6 November 2012 – VI ZR 174/11, NJW 2013, 1002.

526 Jan Lieder, Sarah Meyer, "Supply chain act and liability under German law", *European Company Case Law* 1,1 (2023): 63, https://doi.org/10.5771/2752-177X-2023-1.

worthless claim against another actor, who may be incapable of paying.[527] Markesinis and Unberath describe this particularity under German law as "[u]ndesirable both economically and in terms of labour–management relations."[528]

2.2.2.3. Difference between primary and vicarious liability

From both theoretical and practical basis, the difference between primary and vicarious liability is self-evident. In the former case, liability is imposed directly, meaning that the company has committed a tort *itself*, even though the factual actions were made at the level of the subsidiary or business partner. In this case, as we have already acknowledged, the inappropriate execution of a duty of care (i.e., supervision, management) would constitute a tort, not a *de facto* actions of another that caused harm. In comparison, vicarious liability indicates that the company is responsible for the actions of the *other*, thereby eliminating the need to establish negligence on the part of the former. From a legal scrutiny perspective, the claims are distinct and based on different duties of care. However, as highlighted by Giliker, "[w]hile, on a theoretical level, the primary/vicarious distinction is relatively clear, applying this division to the law has proven, in practice, to be more difficult."[529]

The author uses the precedent in *Wilsher v Essex AHA*,[530] where a premature baby received negligent treatment from doctors, to show the practical division: the claims can be based both on *(i)* primary liability, where the particular health authority will be liable for failure to provide doctors of sufficient skill and experience and *(ii)* vicarious liability where the same authority will be directly liable when doctors who work under the supervision, are found personally to be at fault.[531] Therefore, the author of the Thesis agrees with Giliker that primary liability can be used to overcome the limitations of vicarious liability.[532]

2.2.2.4. Secondary/accessory liability

Zerk distinguishes "secondary" liability, stemming from a party's participation in or a contribution towards a tort committed by another actor.[533] Davies highlights that

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527 G. Eörsi, "Private and governmental liability for the torts of employees and organs" in *International encyclopedia of comparative law*, A. Tunc (Tübingen: Mohr, 1983), 4-56 *in* Paula Giliker, *Vicarious Liability in Tort* (Cambridge: Cambridge University Press, 2010), 5.

528 B. S. Markesinis and H. Unberath, *The German law of torts: a comparative treatise,* 4th edition (Oxford: Hart, 2002), 700.

529 Giliker, *supra note*, 492: 18.

530 [1987] QB 730, CA (not raised in HL: [1988] AC 1074).

531 Giliker, *supra note*, 492: 16.

532 *Ibid.,* 18.

533 Zerk, *supra note*, 403: 216.

accessory liability is formed on the principle of deliberate participation.[534] This liability is called "secondary" or "accessory" because it is contingent upon a wrong being committed by the primary wrongdoer.[535] As Lee defines, "[a] person who participates (by authorising, procuring or assisting in another's tort) is liable with the primary wrongdoer as a joint tortfeasor if such participation is made pursuant to a common design."[536] Therefore, secondary liability is applied for an actor not for the fact that he made a tort himself but for deliberately procuring or assisting the latter.[537]

In other words, "[c]ould a parent company be liable for the negligence of a foreign affiliate on the grounds that it has 'aided and abetted' the commission of a tort?"[538] The theoretical legal basis for this theory also stems from English law.[539] Cooper points out that the latter recognises, at any rate, four possible legal bases for secondary liability for tort, these being *(i)* assistance, *(ii)* inducement, *(iii)* encouragement and authorisation and *(iv)* conspiracy.[540] In his regard, assistance would equal supplying the means to commit the initial wrong, inducement – to exercise particular influence over the primary tortfeasor to commit wrong, encouragement and authorisation could be found in the case where support and/or approval is given after the initial wrong and conspiracy could be defined as an agreement to commit the initial wrong, which is committed following this particular agreement.[541] Therefore, it follows from the analysis of all four scenarios that liability is based on "knowing contribution" to the tort and control over the latter.[542] Sales also agrees that secondary liability is grounded on two main principles: *(i)* liability may be imposed on a person in the commission of a civil wrong against the claimant by a third party, and *(ii)* liability may be imposed on a person, who assists a third party to commit a civil wrong.[543] It is essential to understand how these scenarios can be applied to the parent/subsidiary relationship.

Zerk argues that, for example, in the cases where the foreign subsidiary is the party that committed a tort, the secondary liability of the parent company could be established in multiple scenarios under all four cases: *(i)* it could be established that the

534 Paul S. Davies, *Accessory Liability* (Oxford: Hart, 2017), 2.

535 Pey Woan Lee, "Accessory Liability in Tort and Equity", *Singapore Academy of Law Journal* 27 (2015): 853, https://ink.library.smu.edu.sg/sol_research/1597.

536 *Ibid.,* 853; Phillip Sales, "The Tort of Conspiracy and Civil Secondary Liability", *The Cambridge Law Journal* 49, 3 (1990): 502, https://www.jstor.org/stable/4507456.

537 *Ibid*., 854. As Lee describes, "[t]he liability that is imposed upon a defendant, D, who has participated in a wrong committed by a primary wrongdoer, PW, against a claimant, P, with a culpable state of mind."

538 Zerk, *supra note*, 403: 225.

539 Phillip Sales, "The Tort of Conspiracy and Civil Secondary Liability", *The Cambridge Law Journal* 49, 3 (1990): 502, https://www.jstor.org/stable/4507456.

540 D. Cooper, "Secondary Liability for Civil Wrongs", PhD thesis, University of Cambridge (1995).

541 Zerk, *supra note*, 403: 226.

542 *Ibid*.

543 Sales, *supra note*, 539: 503.

parent company was aware and assisted in the commission of a tort.[544] However, in this case, it would be mandatory to prove that the parent company was aware of the subsidiaries' wrongful behaviour and that the tort would not have been committed without the parent company's assistance.[545] It is evident that such type of burden would be extremely high; *(ii)* it could be tried that the parent company has encouraged or authorised the tort by the subsidiary. This case is of great relevance as Zerk provides an example of social and environmental "dumping", i.e. when the parent companies establish subsidiaries in third countries to take advantage of lower health and safety or environmental standards;[546] *(iii)* argument of assistance could be raised in a situation where the parent company has relevant control over the activities of the subsidiary and fails to take steps to prevent a tort;[547] while *(iv)* in cases where an agreement could be found between the parent and the subsidiary to commit the tort, an argument of conspiracy may be sufficient.[548]

Even though there is a clear doctrinal basis for accessory liability, it is not generally relied on in the parent-subsidiary type of cases. Notwithstanding the fact that some of the arguments may be placed to establish parental liability for externalities at the level of subsidiaries, they are not found in FDL cases in the states covered by the thesis.[549]

2.2.2.5. Secondary liability vs primary liability and vicarious liability

Even though one might argue that the factual basis to prove secondary liability would usually overlap with the ones of primary liability and vicarious liability (for ex., sufficient control), there are a lot of legal differences between those theories. More substantial ones lie between primary and secondary liability for tort. The most important one is that while the primary liability of the parent company is based on the parent's own duty of care towards the victim of the tort, secondary liability does not require proof of the parent's duty of care.[550] Instead, as Zerk points out – liability is based on a "knowing contribution" to the commission of a tort.[551] From the perspective of the parent companies, this is a conceptual difference that would substantially affect the burden of proof on the claimant's side, as the parent's own duties are outside the scope. Even though the liability might be proved on both grounds, i.e., the parent company may have a standing duty of care over the victim, and at the same time – the actions

544 As Zerk argues, for example, by supplying the necessary technology and resources *in* Zerk, *supra note*, 403: 225.

545 Cooper, *supra note*, 540: 8.

546 Zerk, *supra note*, 403: 227.

547 Cooper, *supra note*, 540: 10-11.

548 *Ibid.,* 11-12.

549 Zerk, *supra note*, 403: 227.

550 Davies, *supra note*, 534: 56.

551 Zerk, *supra note*, 403: 226.

of the latter may suffice accessory liability – both legal grounds are strictly distinct.[552] Davies uses the *Home Office v Dorset Yacht Co. Ltd* precedent to state that the argument of self-standing duty of care is more "straightforward" than a possible secondary liability, taking into account that negligence requires a much lower proof of intention (mental element).[553] At the same time, Davies clarifies the obstacles to the co-existence of both types of liabilities[554] and states that in most cases of accessory liability, it would be impossible to consider the party to have a primary duty of care over the victim.[555]

According to Zerk, for all scenarios except "assistance", the main feature of secondary liability for tort is the amount of control that the parent company uses over the subsidiary.[556] While in the case of "assistance, liability is based on a causal relationship between the assistance given by the secondary party and the tort itself.[557] Therefore, while primary liability refers to an obligation for which a party is directly responsible, secondary liability refers to an obligation that is the responsibility of another party if the directly responsible party fails to satisfy the obligation. The difference between the doctrines, therefore, lies in the very foundations since accessory liability requires a higher degree of fault, and negligence is not sufficient as accessories act knowingly and deliberately.[558]

On the other hand, the primary legal difference between secondary and vicarious liability lies in the fact that, as Cooper concludes, "[v]icarious liability arises by virtue of the relationship between the tortfeasor and the 'secondary' party, whereas 'secondary' liability arises because the secondary party 'has knowingly participated in the primary wrong."[559] As clarified by Davies, vicarious liability is not dependent upon the employer's culpable participation in committing a civil wrong; rather, it stems entirely from the employer-employee relationship.[560] In this case, employment as such is not a determinant and does not have a direct causal effect on the civil wrong.[561] Sales confirm this distinction.[562] According to him, vicarious liability is grounded in principles that have developed in a particular context and have been greatly influenced by policy, taking into account that some claims may be faced against the employer, who

552 Davies, *supra note*, 534: 57, 182.

553 *Ibid.,* 57.

554 *Ibid.,* 182.

555 *Ibid.,* 57. Davies argues that, for instance, there would be no "proximity" between the defendant and the claimant, or it would not be "fair, just and reasonable" (*Caparo* test) to establish such duty.

556 Zerk, *supra note*, 403: 226.

557 Cooper, *supra note*, 540: 6-8.

558 Davies, *supra note*, 534: 182.

559 Cooper, *supra note*, 540: 3.

560 Davies, *supra note*, 534: 59.

561 J. Gardner, "Complicity and Causality", *Criminal Law and Philosophy* 127 (2007), reprinted in J. Gardner, "Offences and Defences: Selected Essays in the Philosophy of Criminal Law (Oxford: Oxford University Press, 2007), ch. 3.

562 Sales, *supra note*, 539: 502.

has benefited from the actions of those under their supervision and has better financial resources.[563] While secondary liability is generally established where one party induces or assists another in a civil wrong.[564] Even though the legal basis for both types of liabilities is indeed separate, the employer could be considered accessory liable if it assisted or induced civil wrong by the employee – in this case, it would be crucial to show that the employer authorised the wrong itself.[565] However, as discussed above, the rationale of vicarious liability, which primarily applies to employer-employee situations, is generally not applied to parent-subsidiary situations in the UK, France, and Germany.[566]

2.2.2.6. Enterprise liability

Another, more generic legal theory that might be applied to the parent company liability is enterprise liability. Enterprise liability, unlike primary, vicarious, and secondary liability, directly tackles the principle of legal separability. As Zerk points out, enterprise liability theory is the only one that actually asks the court to disregard legal separation between companies within the group.[567] When we discussed both primary, vicarious, and secondary liability, we either analysed liability for the parent's own actions at the level of subsidiaries (or business partners) or its liability for the actions of the same actors; however, the legal separability of different companies was never at stake. Therefore, enterprise liability as a theory has different foundations and legal implications. However, it is not the same as piercing the corporate veil. While the latter focuses on the subsidiary being a fraud or a sham, which is relatively difficult to prove in practice, enterprise liability utilises the parent-subsidiary relationship to allocate liability.[568] Therefore, as Wright indicates, "[r]ather than creating sporadic and incomplete exceptions to the corporate form, enterprise analysis tackles the problem at the critical juncture."[569]

The doctrine is grounded on the notion that legal separability and limited liability, by no means, can give the parent company general immunity for the actions of other companies it controls. Hansmann and Kraakman generally highlight that limited liability in tort was the prevailing rule in most countries for more than a century.[570] This, however, is "[g]enerally acknowledged to create incentives for excessive risk-taking

563 *Ibid.*

564 *Ibid.,* 503.

565 Davies, *supra note*, 534: 59.

566 *Ibid.,* 41.

567 Zerk, *supra note*, 403: 233.

568 Wright, *supra note*, 87: 61.

569 *Ibid.*

570 H. Hansmann, and R. Kraakman, "Toward Unlimited Shareholder Liability for Corporate Torts", *The Yale Law Journal* 100, 7 (1991): 1879, https://www.jstor.org/stable/796812.

by permitting corporations to avoid the full costs of their activities."[571] In this regard, the principle of separation *per se* is considered unfair to tort victims and encourages companies within the group to engage in hazardous activities.[572] Indeed, as grounded in several studies, enterprises operating in particular sectors, such as hazardous waste or chemicals, typically expand by insulating their most risky activities in subsidiaries to avoid potential liability.[573] Landmark case law precedents, such as Vedanta and Okpabi, among others, support this phenomenon. Therefore, one would be correct to say that this situation is not a mere coincidence but rather the outcome of legal separability and limited liability, which remain the cornerstones and incentives for corporations to manage their business through complex legal structures.

Witting, for example, argues that traditional concepts of legal separability and limited liability evolved in the context of a stand-alone company and were not intended to allow the company to own shares in another one.[574] In this regard, Blumberg argues that "[w]ith the application of traditional entity law to corporate groups, the older concept of legal entity no longer matches the reality of economic entity. The traditional law no longer reflects the society that it seeks to order, and implementation of the underlying policies in the law inevitably is gravely impaired."[575] Mares agrees and points out that these widespread principles of corporate law may affect the most vulnerable ones (for example – tort victims).[576] Antunes argues that, as a result, by extending traditional concepts of legal separability and limited liability to groups (parent companies), legislators and the courts proceeded "[w]ithout any apparent recognition of the vitally different considerations involved in the regulation of the liabilities of sole independent corporations and of mere parts of multi-corporate groups […]", that actually act under the parent's coordination.[577]

According to the general approach, enterprise theory advocates treating the parent company and the subsidiary as a single entity.[578] Therefore, enterprise liability would mean that both the subsidiary and the parent company could be liable for tort because they form a common enterprise.[579] The concept of enterprise liability can be traced back to Berle, who proposed in 1947 that the parent company would be liable by

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571 *Ibid.*

572 Mares, *supra note*, 103: 17; Henry Hansmann and Reinier Kraakman, "The End of History of Corporate Law", *NYU Law and Economics Working Paper* (2000): 31, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=204528.

573 José Engrácia Antunes, "New Avenues on Intragroup Liability" (2017): 4, https://ssrn.com/abstract=2925129.

574 *Witting*, *supra note*, 63: 174.

575 Philip I. Blumberg, *The Multinational Challenge to Corporation Law* (Oxford: Oxford University Press, 1993), 9.

576 Mares, *supra note*, 103: 17; Antunes, *supra note*, 587: 5.

577 Antunes, *supra note*, 573: 4-5.

578 Zerk, *supra note*, 403: 229.

579 Wright, *supra note*, 87: 63.

default due to exercising control, having the ability to control, and receiving benefits from the subsidiary's operations.[580] Blumberg presented its own model of enterprise liability, based on "economic integration and proposed six factors that would evidence the latter: control, capital raising, outside appearance, administrative interdependency and personnel management.[581] The roots of the wider recognition of this theory may be traced back to the EEC proposal for the Ninth Company Law Directive, which proposed accepting "group personality". Thus, the parent would have been responsible for the liabilities of its subsidiaries, given unified management and control.[582]

Enterprise liability theory proposes that group liability should be determined based on the economic reality of group management – thus, the parent company should be liable for the acts of its subsidiaries because it controls them.[583]

In a factual situation, this would mean that a parent company could be strictly[584] liable for the activities of its subsidiary purely based on belonging to the group (control relationship).[585] In practical terms, enterprise liability would let, for example, victims of the tort access the "deepest pocket" – the parent company or even the group as a whole entity. However, being the most radical opposition to the prevailing "entity" principle, pure enterprise theory is not met in any of the jurisdictions analysed.[586] In the UK, the most known precedent where arguments of the enterprise ("single economic unit") were raised was *DHN*.[587] However, the case was not related to liability in any way. The question raised was whether a group could be treated as a whole entity in terms of receiving compensation for the compulsory purchase of groups' property – the answer was positive.[588] As it was welcomed as a precedent for a new approach and was used in the following cases,[589] it has not spilt out to company law. Therefore, even though *DHN* is a helpful case in terms of an enterprise approach, its value in terms of liability issues, as analysed in the Thesis, cannot be overstated.

The argument was also raised in *Adams v. Cape*. However, the Court of Appeal

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580 A. A. Berle, "The Theory of Enterprise Entity", *Columbia Law Review* 47, 3 (1947): 343, https://www.jstor.org/stable/pdf/1118398.pdf.

581 Philip I. Blumberg, "The Transformation of Modern Corporation Law: The Law of Corporate Groups", *Conn. L. Rev. 605* (2005): 610, 613, https://opencommons.uconn.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1191&context=law_papers.

582 Wright, *supra note*, 87: 66.

583 Antunes, *supra note*, 573: 5-7.

584 Douglas Brodie, *Enterprise Liability and Common Law* (Cambridge: Cambridge University Press, 2010), 149.

585 Zerk, *supra note*, 403: 229.

586 Antunes, *supra note*, 573: 8; Zerk, *supra note*, 403: 230.

587 DHN Food Distributors Ltd. v Tower Hamlets London Borough Council [1976] 1 Weekly Law Reports, 852.

588 *Ibid*, 860; Wright, *supra note*, 87: 66.

589 See for ex. Lewis Trusts v Bambers Stores Limited [1983] Fleet Street Reports (FSR), 453.; Woolfson v Strathclyde Regional Council (1978), SC 90.

acknowledged the distinction between the legal and economic aspects of company law, as separability prevails in the former.[590] Antunes argues that Germany is an example of a "dualistic" approach, i.e., in terms of contractual groups – parental control over subsidiaries is enabled[591], while for "factual groups" – the autonomy of the subsidiary, according to the classical "cannons" of corporate law, is preserved.[592] In France, the interest of the group is acknowledged by case law. However, it does not affect the general "entity" approach. Wright summarises the possible reasons for inaction in terms of enterprise liability.[593] He argues that, in the eyes of legislators and the courts, risks may be perceived as remote, meaning that the imposition of enterprise liability would not make a substantial difference.[594] And, *second* – on the part of the courts – predisposition of deference to the legislature.[595] Hansmann and Krakmaan add that markets and politics, in general, poorly represent the interests of tort victims.[596] One may ask whether mass torts do not provide additional grounds for reevaluating the concept of legal separability and limited liability. Most probably, exactly those situations (i.e., environmental disasters, mass torts) give rise to a new wave of cases that we analyse in the Thesis.

However, one should be cautious about rushing to conclusions that enterprise liability is an effective tool to address these issues. Our analysis has shown that even though enterprise theory finds its place in competition law, providing such landmark case law examples as *Akzo Nobel* or tax law, company law still stands on legal separation and limited liability.[597] Thus, structuring a group of companies to minimise legal liability is not regarded as a misuse of the corporate form.[598] Therefore, the fact that enterprise liability theory has not yet found its place in group law may be well explained by the foundational nature of the theory, which is the exact opposite of the traditional entity approach.

2.2.3. Models of SCL

Supply chain liability can also be explained by analysing so-called models. Models, to some extent, reflect the theories of supply chain (or parent company) liability and are used to explain the legal basis on which this liability is applied and grounded. To understand the pattern of supply chain liability and provide a comprehensive explanation

590 Zerk, *supra note*, 403: 230.

591 Antunes, *supra note*, 573: 9.

592 *Ibid.*

593 Wright, *supra note*, 87: 75.

594 *Ibid.*

595 *Ibid.*

596 Hansmann and Kraakman, *supra note*, 572: 31.

597 Wright, *supra note*, 87: 76.

598 Zerk, *supra note*, 403: 228.

of the landmark precedents discussed in Chapter 2.1, we shall analyse possible models of SCL. We will provide a more detailed analysis of the models currently prevailing in the relevant case law and briefly discuss those that are more theoretical in nature.

Bergkamp, who provided probably the most extensive study on this topic, distinguishes seven models of supply chain liability: *(i)* the civil liability (open norms) model, *(ii)* the operator model, *(iii)* the legitimate expectations model, *(iv)* the agency model, *(v)* the company law model, *(vi)* the stakeholder model, and *(vii)* the public trust model[599]. As will be seen, the interactions of those models are strong, and sometimes the boundaries are blurred. While some of the models seem to be more widely recognized in the case law already analysed (in particular – the civil norms model[600]), others at least currently remain more theoretical, as legal implications around them would cause drastic changes in some cornerstone company law principles. Therefore, now we analyse the conditions and boundaries of each legal model, how they may vary across jurisdictions, and whether we can distil patterns.

2.2.3.1. Civil liability: open norms model

According to this model, the parent company can be held liable in tort for *(i)* not exercising sufficient care or supervision in its supply chain or *(ii)* not doing enough to prevent harm from arising.[601] Therefore, the model is construed on negligence, fault, and breach of duty of care. Van Dam also acknowledges this coalition between supply chain liability and tort-based duty of care, stating that "[b]reach of the corporate responsibility to respect human rights can, therefore, amount to a breach of duty of care"[602] Therefore, the civil liability (open norms) model legally reflects the primary (direct) liability of the parent company. Bergkamp argues that this model of SCL is the most common by the parties in SCL claims.[603] Duty of care, as Bergkamp argues, is a broad concept that encompasses multiple, more specific duties aimed at preventing harm, such as a duty to seek information, investigate, monitor, and control.[604] This open concept allows for the argumentation of multiple factual scenarios to establish that the parent company is liable for failing to act prudently.

As previously discussed, in terms of SCL, common law is leading the way, while German and French law, for different reasons based on their respective legal traditions and subsequent legislation, does not substantially address supply chain liability. Therefore, the analysis of the open norms model will focus on the application of common law.

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599 Bergkamp, *supra note*, 112: 173.

600 *Ibid.*

601 *Ibid*., 180.

602 Van Dam, Gregor, *supra note*, 433: 122.

603 Bergkamp, *supra note*, 112: 180.

604 *Ibid.*

Bergkamp begins the analysis of the application of the open norms model, not surprisingly, with the *Caparo* test as a foundational argument in most of the SCL cases that we analysed before. The application of Caparo is self-evident, as prior to *Vedanta*, it was assumed that the parent company's duty of care was novel.[605] Discussing the open norms SCL model, Bergkamp provides *examples of its application, citing Chandler, Unilever, Okpabi,* and *Vedanta*. In all those cases, the claimants' reasoning was based on establishing a duty of care owed by parents. In *Chandler*, the relevant connection giving rise to the parent's duty of care was that the latter employed a medical officer to ensure the health and safety of the subsidiary's employees, one of whom was the claimant.[606] In this regard, it was considered that Cape Plc. undertook the responsibility for the health of the subsidiary's employees.[607] It is essential that the Court of Appeal consider the establishment of a duty of care in a broad manner. As Bergkamp points out, the Court of Appeal specified that it is not mandatory *by default* for the parent company to intervene in a specific aspect of the subsidiary's operation – instead, the court would consider the relationship very broadly.[608] As we have already analysed, the Court of Appeal even provided a unique test for identifying a duty of care.[609] In *Unilever,* arguments of the claimants – current and former employees of the subsidiary against the parent company were also grounded on the alleged duty of care of the latter. The claimants argued that the parent company failed to have in place adequate crisis management plans to protect them against post-election violence. The basis for such duty is the parent's management and control of the subsidiary's material activities. Even though the arguments failed in both instances in the court, the case was decided entirely on the arguments of parental duty of care and (non)existence of it. The Court of Appeal held that the evidence presented was insufficient to establish a level of control on the part of the parent that would be sufficient to impose a duty of care.[610] At the same time, the Court of Appeal managed to provide, in a particularly wide fashion, circumstances that may give rise to the parent's duty of care.[611] As we have seen, parts of the court's reasoning were later widely cited by defence attorneys in other landmark cases. *Vedanta*, on the contrary, is a successful example of the

605 To establish a novel duty of care and consider the party liable for the breach of the latter, the court has to apply so- called *Caparo* test.

606 Bergkamp, *supra note*, 112: 190.

607 *Chandler v Cape plc* [2012] EWCA Civ 525, 80.

608 Bergkamp, *supra note*, 112: 190

609 *Ibid.*

610 *Ibid*., 194-195.

611 *AAA v Unilever plc* [2018] EWCA Civ 1532, at 37. "(i) [w]here the parent has ins substance taken over the management of the relevant activity of subsidiary in place of (or jointly with) the subsidiary's own management; or (ii) where the parent has given relevant advice to the subsidiary about how it should manage a particular risk."

reasoning of the parent's negligence.[612] Vedanta's duty of care was based on its actual control over the subsidiary's environmental issues. Proof of such control and assumption of responsibility in this regard is provided by the published materials of the parent, which outline standards of environmental control.[613] Notably, the reasoning of the Supreme Court in Vedanta clarified the possible scope of such a duty – this reasoning is universal and not limited to share-based relationships (formal groups of companies) but is also applicable to business partners.[614] Therefore, Vedanta applauded SCL as grounded on the parent's duty of care (negligence). *Okpabi* has a similar background and legal reasoning, i.e., based on the parent company's negligence. As *Vedanta's* Supreme Court Judgement predated the judgement of the Supreme Court in *Okpabi*, the claimants' legal arguments have accordingly been modified in the light of Vedanta. Reaffirming the reasoning of Vedanta in its full scope, the Supreme Court allowed the case to proceed to trial on its merits. Duty of care was also the primary legal basis in *Maran*[615] and *Oguru*.[616]

2.2.3.2. Legitimate expectations model

Another SCL model, from a theoretical perspective, that is akin to the open norms model is the legitimate expectations model. As Bergkamp describes, this SCL model posits that parent liability can arise from the assumption of responsibility to comply with CSR issues that have been made public.[617] In this regard, if the parent company, for example, publicly claims that it implements measures throughout the entire supply chain, it creates "legitimate expectations" among others.[618] Relevant sources for providing such information may include corporate sustainability reports, etc.[619] Bergkamp argues that these "promises" can even be implicit, i.e. liability would be possible if it can be established that the company manages the supply chain.[620] It is evident that, although the argument of legitimate expectations is not directly present in the SCL claim, its rationale is present in many cases. It is clear from the UK Supreme Court decision in *Vedanta*, where the court specifically mentioned the effect that public declarations can have: "[t]he parent may incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of supervision and

612 As it was already established, Vedanta is the first ever example where the parental duty of care was found against persons other than the subsidiary's employees.

613 p. 67 of the Thesis.

614 Bergkamp, *supra note*, 112: 196.

615 Chapter 2.1.4.

616 Chapter 2.1.5.

617 Bergkamp, *supra note*, 112: 205.

618 Bergkamp, *supra note*, 112: 205.

619 *Ibid.*

620 *Ibid.*

control of its subsidiaries, even if it does not, in fact, do so. In such circumstances, its very omission may constitute the abdication of a responsibility which it has publicly undertaken."[621] Therefore, as Bergkamp rightly points out – it is the rising expectations that trigger the duty of care.[622]

Thus, the legitimate expectations model is also based on establishing a duty of care for the parent company or non-parent business partner. Even though it does not have a separate specific statutory ground in either of the jurisdictions to imply liability, the "heart" of the argument of this model is self-evident. It was not only raised in *Vedanta* but both in *Unilever*[623] and *Okpabi*[624], tackling group-wide policies.

2.2.3.3. Other models of SCL

Other models that are construed to explain SCL are, to a certain extent, more theoretical – some of them overlap with others, and some are hardly applicable in practice at all. Hereto, *(i)* agency, *(ii)* company law, *(iii)* operator, *(iv)* stakeholder and *(v)* public trust models are explained briefly. According to the SCL agency model, the parent company or non-parent business partner may be liable for the actions of the subsidiary or a business partner if the latter can be deemed an agent of the former.[625] Bergkamp suggests that this model could be applied in cases of environmental torts, among others. However, the application of this model depends on national regulation of agency as such, i.e., under what conditions a company can be considered an agent of another company.[626] Under the UK case, the pioneering precedent for the agency as a basis for parental liability is *Smith, Stone and Knight Ltd. v. Birmingham,* where features of agency relationship were considered.[627] If these conditions are proven, the parent company, under UK law, may potentially be liable for the actions of the subsidiary acting as its agent.

The company law model presupposes that SCL liability, as such, could be an exception to limited liability. In its extreme form, it would mean that the parent companies could be liable for the externalities at the level of subsidiaries based on *(i)* being a dominant shareholder or *(ii)* forming a single economic unity (where the parent's control

621 *Lungowe v Vedanta Resources plc* [2019] UKSC 20, 53.

622 Bergkamp, *supra note*, 112: 196.

623 Chapter 2.1.1.

624 Chapter 2.1.3.

625 Bergkamp, *supra note*, 112: 208.

626 Bergkamp, *supra note*, 112: 209.

627 *Smith, Stone, and Knight Ltd. v. Birmingham* [1939] 4 All ER 116. The agency relationship is present where: *(i)* the subsidiary's profits are the parent company's profits, *(ii)* the parent company appoints the subsidiary's management, *(iii)* the parent company is the "head and brain" of the business, *(iv)* the parent company controls subsidiary's activity, *(v)* the parent company's skill and business decisions led subsidiary to make a profit, *(vi)* the parent company is "incessantly" in control of the affiliate.

over the subsidiary's activities is a key factor).[628] Therefore, this model of SCL liability is, to a certain extent, a mimic of enterprise liability. As established previously, due to its significant divergence from established legal principles in all the jurisdictions analysed in the Thesis, namely legal separability and limited liability, enterprise liability, and in this regard, the company law SCL model is not endorsed by the courts.[629]

The operator model has also focused on factual control that the parent company exercises over its subsidiary and presupposes that the former can be held responsible if it is shown to be the operator of the latter.[630] Bergkamp argues that the legal implications of the operator model are close to the parent's negligent liability based on its duty of care.[631]

The most theoretical ones are the stakeholder and public trust models. Both are grounded on relatively similar legal arguments. However, both are radical deviations from the traditional principles of corporate separability and limited liability. It can even be concluded that both models present essential deviations from a common understanding of corporate purpose. As Magill elaborates, under the stakeholder model, the corporation shall please a variety of stakeholder interests, including those of employees, suppliers, and others.[632] Therefore, liability may arise when it is established that the parent company disregarded the mentioned interests and caused harm as a result. However, as Bergkamp points out, it is unclear who can be defined as stakeholders and how to properly establish a causal link between the harm and the action itself.[633] The public trust model goes even further, proposing that companies act in the best interest of the general public.[634] Therefore, it is evident that neither the stakeholder nor the public trust models are the ones shaping the recent case law on SCL liability.

2.2.4. Duty of care – the prevailing explanation

The previous chapter aimed to understand whether existing legal theories and models can explain the recent cases exclusively decided under common law – *Unilever, Vedanta, Okpabi, Maran, and Oguru.* As these cases are highly discussed as pioneering examples of possible changes in SCL liability understanding, analysing them may help us predict future outcomes of similar litigation. Thus, to predict, one shall be able to understand the legal rationale of the court's reasoning.

In all the cases, the parent company's liability or one of the business partners (in *Maran*) was based on the alleged duty of care. As it was shown, the reasoning was

628 Bergkamp, *supra note*, 112: 212.

629 *Ibid.,* 213.

630 *Ibid.,* 214.

631 *Ibid.,* 215.

632 M. Magill, M. Quinzii, and J.-C. Rochet, "A Theory of the Stakeholder Corporation", *Econometrica* 83, 5 (2015): 1685, https://www.jstor.org/stable/43616987.

633 Bergkamp, *supra note*, 112: 215.

634 *Ibid.*

relatively similar – in each case except for *Maran*, the *Caparo* test, aimed to establish the novel duty of care, was tried. Even though it was abandoned entirely in *Vedanta* and following cases, it shows that establishing a duty of care was the core legal ground for liability. As well as indicia of *Chandler*, which, at least in the current century, opened the floodgate for this reasoning. Cases that we discussed in the 2.1. Chapter such as *Smith v Littlewoods Organisation Ltd*, *Dorset Yacht v Home Office, Connelly v RTZ Corp plc,* and *Lubbe & Others v Cape Plc,* were widely cited as precedents for the imposition of a duty of care on a parent company or business partner. Therefore, there might not be much room to neglect that in all cases, the liability of the parent company or business partner was primary (direct), i.e., based on establishing the corporation's duty of care. However, a distinction shall be made in this regard. In *Vedanta*, *Oguru* and *Okpabi,* the duty of care was based on intervention into the subsidiary's activities, while in *Maran,* this duty stems from knowingly doing business with a partner (irrespective – of the subsidiary or not), which creates unacceptable risks. Therefore, it is, again – liability for the company's own tort (primary). However, the basis of this liability is the intentional choice of inappropriate business partners that later lead to harm.

Chambers agrees, stating that direct parent company liability, as evidenced by the aforementioned litigation, is the "key" to empowering the vindication of corporate tort victims.[635] In the scope of Bergkamp's models of SCL – applying the civil liability (open norms) model and establishing the company's tort (negligence). If *Vedanta* is indicative in that sense, such a conclusion is relatively straightforward.[636] It is also worth noting that a comparative study[637] that analysed corporate social responsibility cases in the UK, France and Germany showed that at least from the early 1990s till 2014 (when the study was made), company law was rarely used as a legal basis for such claims – none of the cases was based primarily on statutory or judicial veil piercing.[638]

Once we establish that primary (tort-based) liability in those cases prevails, a crucial discussion ensues regarding whether such a duty of care is novel or merely an application of tortious liability to different factual contexts. In *Unilever*, which predated *Vedanta*, the parent company's liability was rejected as *Caparo* was not satisfied.[639] *Caparo* test was still relevant for the Court of Appeal in *Okpabi*[640] since this decision predated the one of the Supreme Court in *Vedanta*. However, the Supreme Court in

635 Chambers, *supra note*, 122: 523.

636 *Lungowe v Vedanta Resources plc* [2019] UKSC 20, 50.

637 Dutch Ministry of Foreign Affairs, National Action Plan on Business and Human Rights (2014): 28, https://businesshumanrights.org/sites/default/files/documents/netherlands-nationalaction-plan.pdf.

638 From the identified 35 cases in 6 states (Netherlands, Belgium, France, Germany, Switzerland, and the UK), only a few, for ex. *Chandler v Cape*, was decided on merits in Liesbeth Enneking, "Paying the Price for Socially Irresponsible Business Practices? Corporate Liability for Violations of Human Rights and the Environment Abroad", *Aktuelle Juristische Praxis / Pratique Juridique Actuelle* 26, 8 (2017): 991, https://repub.eur.nl/pub/112984/06_Enneking.pdf.

639 Chapter 2.1.1.

640 Chapter 2.1.3.

Vedanta demonstrated strong reluctance to make any specific categories[641] of parental liability and applauded classic test, traced back to *Dorset Yacht Co Ltd v Home Office*, stating that it is nothing novel or special – in the words of the court: "[t]he legal principles are the same as would apply concerning the question whether any third party […] was subject to a duty of care in tort owed to a claimant dealing with the subsidiary."[642] Applying this notion means that *Caparo* is not useful in SCL cases.[643] This reasoning was later repeated in *Okpabi*[644] and *Oguru*.[645] Therefore, following this principle in *Vedanta*, it would be wrong to approach the issue of whether a duty of care is owed by reference to any generalised assumption or presumption. It appears conclusive that *Unilever, Vedanta, Okpabi, Maran, and Oguru*, although raising considerable attention as allegedly controversial or completely novel, are guided by established principles of the common law tort of negligence. Here, the establishment of a duty of care is key, and following *Vedanta*, it does not require any specific test. What is crucial in this regard is that Vedanta does not draw any distinction between the parent company's duty of care and that of the business partners.[646] Therefore – the shareholding relationship is not indicative *per se.* Evidently, this provides strong support for the broad application of SCL, as was apparent in *Maran*.

Van Dam distinguishes three avenues to a duty of care that conceivably describe all current cases: *(i)* the parent's own behaviour (*Donoghue v Stevenson* principle), *(ii)* assumption of responsibility *vis-à-vis* third parties (*Hedley Byrne* principle) and *(iii)* the parent's failure to prevent the subsidiary from causing harm, despite its control over it (*Dorset Yacht* principle).[647] The first one describes situations in which the parent company causes foreseeable damage by an act, the second – situations where the parent company assumes responsibility for the subsidiary's activities, and the third – cases where the parent company exercises control over its subsidiary and could have prevented it from causing damages if it acted with reasonable care.[648] Although such a distinction is not eager to create specific categories of duty of care that would not align with *Vedanta*, it is helpful to understand the pattern generally. As conditions of liability are analysed in the following chapter,[649] it is evident that those general scenarios described above accurately reflect reasoning in recent case law.

However, primary (direct) liability and the establishment of a duty of care is the

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641 "I would be reluctant to seek to shoehorn all cases of the parent's liability into specific categories […]" *in Lungowe v Vedanta Resources plc* [2019] UKSC 20, 51.

642 *Lungowe v Vedanta Resources plc* [2019] UKSC 20, 50.

643 Van Dam, *supra note,* 45: 736.

644 Chapter 2.1.3.

645 Chapter 2.1.5.

646 Bergkamp, *supra note*, 112: 196.

647 Van Dam, *supra note,* 45: 735.

648 Van Dam, *supra note,* 45: 745-746.

649 Chapter 2.3.

prevailing legal theory in the cases discussed in 2.1. chapter,[650] analysis of SCL theories and models shows that in such litigation, arguments from different theories and models play. However, the one that has persuaded the courts so far is primary liability based on the corporation's own negligence.[651] In this regard – duty of care can be considered the main legal „instrument" used to establish liability. The reason for relying on tortious liability and the concept of duty of care is rightly tackled by Bergkamp: „[a]s the duty of care in a particular case is influenced by legal, ethical, and societal principles and norms about harm prevention and compensation, it allows for a large scope for argument and can accommodate new legal theories. Hence, the claimants often choose to sue based on this model."[652] According to Bergkamp's own distinction of SCL models, the establishment of a duty of care is inherent in multiple of them, such as the "legitimate expectations model."[653] Wright and others agree with this phenomenon by arguing that many of the decided tort cases have developed the law in explicit recognition of changed social conditions, different commercial practices and "changed social perceptions of right and wrong."[654] It leads to that "[w]here special circumstances of a supply chain relationship coincide with the circumstances of past negligence cases […], it should be possible to find a duty."[655] The same opinion is supported by Glinski, who argues that the openness and flexibility of the standard of care have specific potential, as companies can be held liable for their own misconduct. At the same time, corporate self-regulation reflects a standard of what is considered necessary to prevent damage.[656]

Van Dam argues that the main message from analysed case law is that "[p]arent company liability is nothing special and can be based on the parent's own behaviour or on failing to prevent the damage caused by the subsidiary."[657] In the author's opinion, this conclusion may be persuasive from a theoretical perspective, i.e., that the legal theories (models) on which SCL was grounded are not novel. However, to understand whether legal argumentation provided in those cases might change some patterns in

650 Chambers, *supra note*, 122: 523.

651 As it was established, in neither of the jurisdictions vicarious, secondary or enterprise liability are relatively successful to establish SCL.

652 Bergkamp, *supra note*, 112: 180.

653 Bergkamp, *supra note*, 112: 207.

654 Carolijn Terwindt, Sheldon Leader, Anil Yilmaz-Vastardis, and Jane Wright, "Supply Chain Liability: Pushing the Boundaries of the Common Law?", *Journal of European Tort Law* 8, 3 (2017): 14, https://doi.org/10.1515/jetl-2017-0011.

655 *Ibid*.

656 C. Glinski UN-Leitprinzipien, Selbstregulierung der Wirtschaft und Deliktsrecht: Alternativen zu verpflichtenden Völkerrechtsnormen für Unternehmen? (2018) In: Krajewski M (ed) Staatliche Schutzpflichten und unternehmerische Verantwortung für Menschenrechte in globalen Lieferketten. FAU University Press, Erlangen, 43–96, in Peter Gailhofer, et. al, *Corporate Liability for Transboundary Environmental Harm. An International and Transnational Perspective* (Springer Swtizerland, 2023), 226, https://link.springer.com/book/10.1007/978-3-031-13264-3.

657 Van Dam, *supra note,* 45: 747.

understanding SCL, we shall further analyse what conditions for the parent company's or non-parent business partner's liability can be distilled from those cases.

2.3. Conditions of the supply chain liability

Even though we conclude that the theoretical explanation of a corporation's liability for the actions at the level of the subsidiary's or business partners is grounded on classic tortious liability (negligence), based on the establishment of a duty of care, one cannot disregard the fact that cases like *Vedanta* or *Maran* are not typical.[658] And especially those that tackle pure supplier-buyer relationships. As Terwindt and others point out: "[t]hough there has been a wave of lawsuits filed against parent companies for human rights harm caused by their subsidiaries, lawsuits to hold purchasers liable for harm caused by their suppliers have not been commonplace."[659]

This is evident from the significant attention it has garnered from both legal scholars and businesses, as well as the recent controversy it has attracted. Rott and Ulfbeck conclude that, in many cases, such as *Connelly v. RTZ Corp plc,* traditional legal principles of corporate separation prevailed to reject the liability of the parent company.[660] In addition, until *Chandler v. Cape*, there were no precedents of liability being imposed on the parent company for traditional torts on the level of the subsidiary – such as injury.[661]

Even though cases like *Chandler v. Cape* and *Thompson v Renwick Group plc.* were the "first swallows" in terms of parental duty of care, they presented a restrictive approach. Chandler's "test", which was later applied in similar litigations, was relatively strict, "in order to "diplomatically" get around the general principle that no one has to prevent third parties from causing harm to others. This led to similar litigations that followed *Chandler*,[662] such as *Thompson v Renwick Group plc.,* it was not satisfied. Thus, the conditions to establish a duty of care were changed accordingly. The most recent precedent that is the most indicative currently is *Vedanta*. However, as it was established above, before the Supreme Court decision in *Vedanta*, *Chandler* was considered the prevailing precedent and tried both in *Unilever* as well as in Shell Nigerian cases. Unilever later provided a new "test" for establishing a duty of care, which was also rejected in *Vedanta*. In the opinion of the author, thus, in order to understand what conditions of SCL stem from recent cases, i.e., *Vedanta*, *Okpabi*, *Oguru*, and *Maran*, "pre-*Vedanta*" SCL conditions shall first be discussed in order to understand the rationale of change. The most important precedents in this regard are mentioned in

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658 Petrin, *supra note*, 38: 603.

659 Carolijn Terwindt, Sheldon Leader, Anil Yilmaz-Vastardis, and Jane Wright, "Supply Chain Liability: Pushing the Boundaries of the Common Law?", *Journal of European Tort Law* 8, 3 (2017): 6, https://doi.org/10.1515/jetl-2017-0011.

660 Rott, Ulfbeck, *supra note*, 494: 417.

661 *Ibid*, at 431.

662 Chambers, *supra note*, 122: 556.

Chandler v. Cape and *Unilever*. Later, conditions of SCL stemming from *Vedanta* and subsequent case law are discussed in detail.

2.3.1. Chandler v. Cape and Unilever: too strict?

Although *Chandler v Cape* is a domestic UK case, its value in terms of tortious parental liability is evident. As Chambers points out, this is the only English direct liability case in which the duty of care was found, following a full-scale trial on the merits.[663] Apparently, this success was later cited as a general precedent in other FDL cases. Considering a possible "floodgate", the case provided particular conditions for parental duty of care. The main factor for liability is the parent's "**superior knowledge**" over particular activities of the subsidiary. This "superior knowledge" criteria are then foreseen in four criteria that indicate liability: *(i)* the business of both companies are particularly the same, *(ii)* the parent company has, or ought to have, superior knowledge on some aspects of health and safety in the particular industry, *(iii)* the subsidiary's system of work is unsafe and the parent knows or ought to know that, and, finally *(iv)* the parent company knew or ought to have known that the subsidiary relies on such superior knowledge of the parent company.[664] How this "superior knowledge" is proved – is, of course, dependent on facts. In this regard, it does not give a clear answer. In *Chandler*, the relevant connection was the fact that the parent employed a medical officer to ensure the health and safety of the subsidiary's employees.[665] Thus, Cape Plc. undertook the responsibility for the health of the employees.[666] What is crucial, as well, is that the Court of Appeal specified it is not mandatory for the parent company to intervene in a specific aspect of the subsidiary's operation – such as managing health and safety issues in the subsidiary. Instead, the court would consider the relationship very widely.[667] However, the parent's intervention in other matters of the subsidiary's management would indicate the parent's "superior knowledge."[668] If *Chandler* precedent provides that actual intervention is not required, what shall the parent company do to act prudently? The Court of Appeal argued that considering that "superior knowledge" about possible risks is in place, the parent company has two options: either *(i)* advise the subsidiary on what steps it must take to provide employees with a safe system of work, or *(ii)* to ensure that such steps were taken.[669]

However, Petrin provides substantial criticism for the court's legal reasoning in *Chandler*. First, according to the author, it is not entirely clear what type and level of

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663 *Ibid.*, 555.

664 *Chandler v. cape*, at 80.

665 Bergkamp, *supra note*, 112: 190.

666 *Chandler v Cape plc* [2012] EWCA Civ 525, 80.

667 *Ibid.*

668 *Ibid.*

669 *Ibid.*, 78.

"control" are relevant to establish such a duty. More precisely, considering the court's reasoning that involvement in the subsidiary's trading operations is sufficient (irrespective of whether the harm was made in this field), it presents intervention practices that are, according to Petrin, common in most corporate groups.[670] Second, following the court's reasoning, the parent's failure to exercise control would disqualify the claims against it, which is not a welcome outcome.[671] Third, Petrin calls it "surprising" that it is not necessary to show that control/intervention was related to health and safety policies; i.e., a parent's involvement in areas unrelated to health and safety questions may be sufficient to establish such a duty of care.[672]

Therefore, according to the author, *Chandler* creates uncertainty, particularly regarding the issue of "relevant control."[673] As shown below, similar arguments can also be applied to *Vedanta*. However, in the opinion of Lo, such criticism is overstated, as such a question would be present in any case where a duty of care is said to have existed to the employees by the third party – in this regard, according to the author, whether the company is part of the group or not is not decisive.[674]

Unilever is the case, the claimants heavily relied on in *Vedanta*. Following *Chandler, Unilever* presented itself as following precedent to try the arguments stated in the former. Notably, as the Court of Appeal judgement in *Unilever* came after judgements of the same court in *Vedanta* and *Okpabi*, it was shaped by the latter.

The court initially indicated that there is no special doctrine in the law of torts regarding the legal responsibility of a parent company for the activities of its subsidiary, *vis-à-vis* persons affected by those activities.[675] Following this, the Court of Appeal evaluated *Chandler v Cape Plc* as guidance, but not a unique test or distinct from a general principle, for the imposition of a duty of care concerning a parent company.[676] However, by evaluating what was important for the Court of Appeal in *Vedanta* and *Okpabi*, the court provided examples of cases where the parent company intervenes in the activities of the subsidiary to a greater extent that allows establishing a duty of care of the parent company, in particular: *(i)* where the parent has in substance taken over the management of the relevant activity of the subsidiary in place of or jointly with the subsidiary's own management, or *(ii)* where the parent has given relevant advice to the subsidiary about how it should manage a particular risk.[677] Notably, the concept of giving "advice" as a feature of taking responsibility was established in *Chandler v.*

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670 Petrin, Choudhury, *supra note*, 90: 8.

671 *Ibid.*

672 Petrin, *supra note*, 38: 613.

673 Petrin, Choudhury, *supra note*, 90: 9.

674 Stefan H. C. Lo, "A Parent Company's Tort Liability to Employees of a Subsidiary", *Journal of International and Comparative Law* 117 (2014): 12, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2592923.

675 *AAA v Unilever plc* [2018] EWCA Civ 1532., 36.

676 *Ibid.*

677 *Ibid.,* 37.

Cape.[678] Evidently, the court gave considerable weight to the actual group structure and its management in understanding the extent to which Unilever was guiding its subsidiary. An important conclusion made by the Court of Appeal, which was heavily applauded by the claimants in *Vedanta* and *Okpabi,* was that even though the parent company to some extent coordinated the subsidiary's activities (through group-wide policies), its separateness was present (i.e., the subsidiary was still managing its own actions).[679] The claimants in Vedanta and Okpabi presented this argument as a general rule that group-wide policies do not establish control on the part of the parent. As we will see, this argument completely failed. Thus, one might ask whether Unilever provided any new insights regarding the conditions for establishing the parent's duty of care. It is evident that the Court of Appeal was reluctant to create any new duties; however, an attempt was made to provide some clarity with the mentioned two "scenarios."[680] Therefore, according to *Unilever*, the parent company's duty of care is established based on the general principles of tort law. However, it gives separate importance to the parent's actual intervention into the subsidiary's management, either directly or by assuming responsibility while advising the latter.

Rott and Ulfbeck rightly argue that these cases demonstrate that the courts have cautiously moved away from a strict separation of responsibilities between parent companies and subsidiaries towards a tort-based liability (negligence) based on control.[681] However, even though precedents such as *Chandler v. Cape*, *Thompson v Renwick Group plc.* and *Unilever* were welcomed as progressive in the light of tortious parent liability, they were rather strict. While *Caparo* still had its influence, trio barriers of the latter were an obstacle for the claimants. In terms of broader – supply chain liability, including not only share-based but, for example – contractual relationships (as *Maran*), those cases were not "panacea" as well. Goudkamp agrees, stating that "[…] Chandler renders unpromising any argument that a duty of care ought to be recognised in the supply chain context."[682] Vedanta filled the gap.

2.3.2. Vedanta: novelty or "back to basics"?

In terms of the neo-classical approach as named in this Thesis, *Vedanta* provides the most relevant approach in terms of conditions for SCL, while later cases detail the latter. As established below, *Vedanta* focuses on *(i)* operational control, which involves the company's intervention in another entity's activities. Such operational control (intervention) is demonstrated by specific evidence, such as corporate policies and codes of conduct. Another possible scenario to establish the relevant duty of care is the *(ii)*

678 *Chandler v Cape plc* [2012] EWCA Civ 525, 78.

679 *AAA v Unilever plc* [2018] EWCA Civ 1532., 27-28.

680 *Ibid.,* 37

681 Rott, Ulfbeck, *supra note*, 494: 415.

682 Goudkamp, *supra note*, 40: 5.

assumption of responsibility – according to *Vedanta*, it can be evident from public statements of the company where the latter affirms its intervention in relevant matters (such as health and safety issues). *(iii)* The knowledge of risks *per se* as a trigger for SCL after *Vedanta* remains more obscure, as analysed below.

2.3.2.1. Operational control/De facto management

Vedanta provided a universal approach to the tortious liability of corporations. As in *Chandler*, it was evident that the court explains liability heavily based on the shareholding relationship between the parent company and the subsidiary; the Supreme Court in *Vedanta* showed that circumstances under which a company (irrespective of whether the parent company or non-parent business partner) is, as Bergkamp states, liable are a function of the degree of actual control that company exercised over another company.[683] The court expressly indicated that share-ownership may enable the parent company to control the management of the subsidiary, but it does not create such duty (i.e., to manage), "[…] whether owed to the subsidiary, or a fortiori, to anyone else."[684] In this regard, everything depends on the extent to which and the way in which "[…] the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations [...]."[685] Therefore, the court treats actual control and management, rather than shareholding or the opportunity to control *in itself, as the relevant factors*.[686] Thus, as the main criterion is *de facto* control, there is no difference between the parent company and the non-parent business partner.

Evidently, precedent stands firmly in favour of the broad application of SCL. Such a switch in the reasoning may be perfectly illustrated by Rott and Ulfbeck: "[…] to the extent that the 'traditional' approach can be described as a requirement of ownership combined with control […] of the subsidiary, then this approach seems to have been replaced by a 'pure' tort law thinking that is entirely independent of company law thinking. Thus, rather than focusing on ownership, the court focuses on the concept of control."[687] However, "control" as a condition may not give too much clarification on whether the latter is established. Nevertheless, is it possible to define it, then? The Supreme Court in *Vedanta* was not in a position to set any standards either, as "[t]here is no limit to the models of management and control which may be put in place within multinational groups."[688] Therefore, it is left for case-by-case evaluation. The four-step *dictum* from *Chandler v Cape* is just an example where a duty of care may or may not

683 Bergkamp, *supra note*, 112: 218.

684 *Lungowe v Vedanta Resources plc* [2019] UKSC 20, 49.

685 *Ibid.*

686 Bergkamp, *supra note*, 112: 196

687 Rott, Ulfbeck, *supra note*, 494: 417

688 *Lungowe v Vedanta Resources plc* [2019] UKSC 20, 51.

be established[689], while two scenarios from *Unilever* are unwished "shoehorning" of all possible cases.[690]

The Supreme Court in *Okpabi* also highlighted control as a "starting point" in evaluating the relevant duty. However, it indicated that control *per se* is not a decisive factor and the legally relevant issue is the extent to which the parent taken over (or shared with the subsidiary) the management of the relevant activity, as "[c]ontrol of a company and de facto management of part of its activities are two different things. A subsidiary may maintain de jure control of its activities but nonetheless delegate de facto management of part of them to emissaries of its parent."[691] In *Okpabi,* such de facto management on the part of the parent company over the health and safety practices of the foreign subsidiary was shown by the HSSE Control Framework and the subsidiary's accountability to a special committee in the parent company[692]. In *Oguru*, it was established that bonus rules for the latter committee were linked to the number of oil spills in Nigeria.[693] It would be conclusive to argue that "de facto management" in *Okpabi* is equivalent to the operational control described by the Supreme Court in *Vedanta*.

At the same time, it is clear that the Supreme Court in *Vedanta* was eager to provide a universal test that would not get stuck on a formal understanding of control (such as legal control) that the parent companies usually have by default, as highlighted in *Okpabi*.[694] This is evident, as the court states that everything depends on the extent to which the parent availed itself to control, take over, supervise or advise and, in particular – **intervene in** the management of particular operations at the level of the subsidiary. As Chambers argues, this "[…] careful use of the terminology of intervention […] is striking.[695] Chambers argues that, in this sense, Vedanta represents a clear move forward, as, for example, in *Unilever*, the claimants failed to prove that the parent company had sufficient control over the subsidiary.[696]

Oguru, even though erroneously to a particular extent[697] – strongly affirmed *Vedanta*. The court concluded that the parent company, through the Executive Committee, intervened in particular activities of the Nigerian subsidiary. On this basis, the Court of Appeal found that safety issues related to pipelines were jointly managed by the parent company and the subsidiary, thereby creating a duty of care on the part of

689 *Ibid.,* 56.

690 *Ibid.,* 51.

691 *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3, 147.

692 *Ibid.,* 55-56.

693 *Oguru,* 7.16.

694 *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3, 147.: "[…] In a sense, all parents control their subsidiaries."

695 Chambers, *supra note*, 122: 559.

696 *Ibid.*

697 Chapter 2.1.5.

the former.[698]

Maran presents a different type of control (intervention) in this regard – the claim is based on the fact that Maran (indirect business partner) knew that the ship would be broken up in Bangladesh, where working conditions are relatively poor (this was indirectly indicated by the price of the ship and the quantity of fuel oil left on the vessel when it was delivered)[699] and that it **controlled** the sale of the ship.[700] In this way, it was at least arguable that Maran "created a danger", as it "[…] played an active role by sending the vessel to Bangladesh, knowingly exposing workers (such as the deceased) to the significant dangers which working on this large vessel in Chattogram entailed."[701] Therefore, as it was already established, the Court of Appeal grounded its reasoning on the so-called "creation of danger exception." It was argued that the company created the danger by deciding to demolish the ship in a country where the working practices were unsafe.[702] In this regard, it would be helpful to provide at least a brief examination of the application of this exception in a *Maran*-type situation. Therefore, one could argue that this case presents a pure business relationship where one party cannot be directly liable for such, at first glance – far-reaching harm. If we take *Maran's* situation to an extreme – even though one is aware that possible business transactions may indirectly lead to harm for a third party – can the former be liable if the harm was caused by a different party, which does not even have a direct contractual relationship? In *Mitchell*, on which the Court of Appeal relies, the Supreme Court clarified that according to *Dorset Yacht Co Ltd v Home Office* and *Smith v Littlewoods Organisation Ltd.*,[703] foreseeability of harm is not of itself enough for the imposition of a duty of care.[704] In *Michael*, the Supreme Court affirmed that the party is not responsible for purse omission. However, where the person was in a position of **control over another** and should have foreseen the likelihood of the latter causing damage to somebody (*Dorset Yacht* principle), liability may arise.[705] Therefore, according to *Maran*, to establish the exception of "creation of danger", a sufficient level of control is required, and according to the court's view, Maran played an active role by sending the vessel to Bangladesh.[706] Thus, it is clear that with this type of reasoning, the Court of Appeal tries to find an appropriate legal basis to establish liability in situations where a corporation's *de facto* control over possibly harmful activities would otherwise be

698 *Oguru*, 7.18-7.21.

699 *Hamida Begum v. Maran LTD* [2021] EWCA Civ 326, 14.

700 *Ibid*., 19.

701 *Ibid*., 64.

702 Chapter 2.1.4. of the Thesis.

703 *Mitchell and Another v Glasgow City Council* [2009] UKHL 15.

704 *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, 1037 – 1038; *Smith v Littlewoods Organisation Ltd* [1987] SC (HL) 37, 59

705 *Michael and Another v Chief Constable of South Wales Police* [2015] UKSC 2, 97.

706 *Hamida Begum v. Maran LTD* [2021] EWCA Civ 326, 64

missed out. And even though the *Maran* type of situation, at first glance, would hardly be comparable to a negligent policeman using the gun in a harmful way,[707] the court relied on established precedents such as *Dorset Yacht Co Ltd v Home Office* and *Smith v Littlewoods Organisation Ltd.* Therefore, the court acknowledged that even though it may be an unusual extension of an existing category of cases where a duty has been found, it shall not create any new specific category of tortious liability.

Since it has been established that to tackle the "creation of danger" exception, control over it should be established, it is worthwhile to understand how such control is proven. The Court of Appeal relied on two pieces of evidence: *(i)* the price of the ship and *(ii)* the amount of fuel left in the Ship's tanks. In this regard, the price for the ship was considered high, showing that the demolition cash buyer would not use a safe demolition facility. Additionally, while the ship was docked in Singapore with a low fuel level in its tanks, it was likely to end up in a shipyard in Bangladesh, the closest possible location. The Court of Appeal argued that this type of control over the sale is evident, and Maran could (and should) have been appropriately managed, insisting on the sale to a "green" yard where proper working conditions are in place.[708] This could have been done in a contract, for instance, by linking interparty payments to the delivery of the ship to an appropriate yard. Another crucial element is that the sales contract itself had a provision stating that the buyer would confirm they would sell to a yard that would perform ship demolition following good health and safety practices.[709] Thus, as the Court of Appeal indicated, the inclusion of provisions mandatory requiring safe demolition "[w]as well within the reasonable control […]"[710] of Maran. However, such a contract clause was, in fact, inactive and ignored by Maran.

Evidently, the level of intervention in *Maran* is entirely different than in *Vedanta* or *Okpabi.* The same corporate structure in any way indicates coherent and, possibly, permanent relations between the subsidiary and the parent company. In this regard, as established, group-wide guidelines and group-level officers (through various committees) come into play, etc. In this regard, one cannot deny that, even though equity-based relationships are not *per se* criteria for the imposition of a duty of care as explained in *Vedanta,* these scenarios probably give the courts more factual "substance" to establish such duty as more straight-forward examples of operational control and intervention may be demonstrated. In *KiK*, sufficient level control was tried to be demonstrated by KiK's own Code of Conduct implemented in every contract of sale with the factory[711] and the fact that the vast majority (around 75%) of the factory's output

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707 *AG of the BVI v Hartwell* [2004] UKPC 12. The Court of Appeal relied on this case in *Maran*.

708 *Hamida Begum v. Maran LTD* [2021] EWCA Civ 326, 67.

709 *Ibid.,* 68.

710 *Ibid.*

711 Carolijn Terwindt, Sheldon Leader, Anil Yilmaz-Vastardis, and Jane Wright, "Supply Chain Liability: Pushing the Boundaries of the Common Law?", *Journal of European Tort Law* 8, 3 (2017): 11, https://doi.org/10.1515/jetl-2017-0011.

was destined for *KiK*, the latter being the primary beneficiary of production.[712] In this regard, indirect control of the factory was argued.

Therefore, these cases suggest that operational control and management, as well as such types of intervention into another company's particular activity, are important indicators for the imposition of a duty of care. This conclusion is even more straightforward in intra-group situations. Van Dam ironically calls subsidiaries "dogs on the leash" that, in vertical groups such as *Vedanta* and *Shell*, merely rubber-stamp and implement the parent company's decisions.[713] Even though such conclusions should not be taken for granted and are not universally applicable, *Vedanta* and other similar cases indeed indicate that where operational control and supervision are apparent, the duty of care on the part of the parent company or non-parent business partner may well be established. Multiple triggers could show such intervention. As Plater points out, nowadays, "[n]ormal oversight of subsidiary […] include appointing a subsidiary's officers and directors, monitoring its performance, supervising the subsidiary's finances, approving budgets and capital expenditures, and even articulating general policies and procedures for the subsidiary."[714] However, cases differ from one another, and operational control/de facto management and intervention will equal different situations. To understand patterns, it is helpful to examine the specific determinants of corporate duty of care in the analysed cases.

2.3.2.2. Corporate policies/codes of conduct

Particular importance is given to group-wide guidelines, codes of conduct, or similar evidence of corporate intervention in cases. In *Vedanta*, the claimants, erroneously relying on *Unilever,* attempted to argue that group-wide policies and guidelines cannot give rise to a duty of care. As Bergkamp indicates, following from *Vedanta* group-wide policies and similar guidelines can lead to liability in two ways. *First*, such policies may be defective and cause damage.[715] The Supreme Court uses the example of *Chandler v Cape,* stating that if the unsafe system of work, i.e., the manufacture of asbestos in open-sided factories, had been formed as part of a group-wide policy, this would be a sufficient indication of a duty of care.[716] *Second*, group-wide policies are much more indicative, "[i]f the parent does not merely proclaim them, but takes active steps, by training, supervision and enforcement, to see that they are implemented by relevant

712 *Ibid*., 9.

713 Van Dam, *supra note*, 45: 733.

714 Zygmunt Plater et al., *Environmental Law and Policy: Nature, Law, and Society* (Aspen Publishers, 2016), 72.

715 Bergkamp, *supra note*, 112: 219., *Lungowe v Vedanta Resources plc* [2019] UKSC 20, 52: "Group guidelines about minimising the environmental impact of inherently dangerous activities, such as mining, may be shown to contain systemic errors which, when implemented as of course by a Page 20 particular subsidiary, then cause harm to third parties."

716 *Ibid.,* 52.

subsidiaries."[717] As Van Ho indicates, it is clear that the Supreme Court did not intend for this to be an exhaustive list, but rather a representative example of how a parent company might assume a duty of care distinct from, yet related to, its subsidiaries.[718]

Therefore, the parent's intervention in this regard is decisive, and the parent's involvement with the application or implementation of policy can trigger a duty of care.[719] As Bergkamp argues, this might indicate that where group-wide policies are not in themselves defective, and the company does not actively implement them, it would not be subject to liability.[720] This conclusion may be indicative; however, it is not straightforward, as it can be inferred that the corporation assumed responsibility, along with other facts, as will be shown below. However, what is clear from Vedanta is that group-wide policies *per se* do not of themselves give rise to a duty of care to third parties.[721]

In Shell's situation,[722] several types of similar guidelines were analysed, including General Business Principles, Health, Safety, Security, Environment and Social Performance, Code of Conduct as well as Sustainability Reports.[723] The reasoning would be similar regarding KiK's Code of Conduct, which is implemented in every contract of sale with the factory.[724] However, Reinke and Zumbansen argue that for the particular declarations in such codes of conduct to be sufficient ground to show a duty of care, "[i]t has to be established that these standards make it explicit that the company intended but also was able to exercise such a duty."[725] Therefore, intentions should be evaluated objectively. According to the authors, the fact that KiK, as a major buyer, had a very detailed commitment in its code of conduct to ensure that its suppliers comply with safety standards proves that it assumed actual responsibility for the mentioned commitments.[726]

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717 *Ibid.,* 53.

718 Tara Van Ho, "Vedanta Resources Plc and Another v. Lungowe and Others", *American Journal of International Law* 114, 1 (2020): 111, https://www.cambridge.org/core/journals/american-journal-of-international-law/article/vedanta-resources-plc-and-another-v-lungowe-and-others/E73B51B86B0EFF9434CF9E2FFBD69B68.

719 Bergkamp, *supra note*, 112: 196.

720 Bergkamp, *supra note*, 112: 219.

721 *Lungowe v Vedanta Resources plc* [2019] UKSC 20, 53.

722 *Okpabi and Oguru.*

723 *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3, 39-44.

724 Carolijn Terwindt, Sheldon Leader, Anil Yilmaz-Vastardis, and Jane Wright, "Supply Chain Liability: Pushing the Boundaries of the Common Law?", *Journal of European Tort Law* 8, 3 (2017): 11, https://doi.org/10.1515/jetl-2017-0011.

725 Reinke, Zumbansen, *supra note*, 483: 20.

726 *Ibid*, 21.

2.3.2.3. Advice

In *Unilever*, the parent company's advice to the subsidiary in terms of relevant activities (such as health and safety) was considered a relevant trigger for the establishment of a duty of care.[727] Advising the management of another company was also mentioned by the Supreme Court in the *Vedanta case*.[728] Therefore, while group-wide policies or codes of conduct provide more coherent evidence of intervention, advice to a subsidiary or business partner that is defective may also trigger SCL.[729] However, it is still not carefully tested whether such advice could create duties for third parties (such as employees or the general public affected by the subsidiary or business partner).[730] Bergkamp argues that in this case, the corporation's liability could be based on operational control, with advice being merely the outcome of the control relationship.[731] However, the nature of advice *per se* remains particularly unclear. For instance, the parent company or non-parent business partner may not be liable if it provides defective advice that the subsidiary fails to follow. As such, a clear distinction exists between advice and instruction. Even though advice presents apparent obstacles (not to mention the possible burden of proving it), as seen in *Vedanta* and following cases, it remains a possible trigger for the duty of care. However, the exact scope of the application is yet to be determined in future cases.

Therefore, the following analysis suggests that, according to *Vedanta* and other cases, particularly concerning corporate groups, operational control or *de facto* management is, as Bergkamp calls it, the "linchpin" of SCL.[732] *Maran* and *KiK* demonstrated that a certain level of control is sought in situations where companies have no equity relationship. What is crucial in this regard is that according to *Vedanta*, the opportunity to control the subsidiary or business partner does not create a duty to control.[733] What does that mean in practical terms? It proposes a rule that a **parent company or non-parent business partner may owe the duty of care only *if* they intervene in the relevant activities of another company (being the subsidiary or business partner)**. In terms of the parent companies, as Meeran explains, such direct liability of the latter is not based on the parent's mere shareholding or voting power, as each majority shareholder would have by law, but rather on the sufficient involvement in or control over the subsidiary.[734] Such involvement, therefore, should not be understood as a general

727 *AAA v Unilever plc* [2018] EWCA Civ 1532., 37.

728 *Lungowe v Vedanta Resources plc* [2019] UKSC 20, 49.

729 Bergkamp, *supra note*, 112: 220.

730 *Ibid.*

731 *Ibid.,* 219.

732 *Ibid.,* 197.

733 *Lungowe v Vedanta Resources plc* [2019] UKSC 20, 47.

734 Richard Meeran, "Litigation of Multinational Corporations: A Critical Stage in the UK", in *Liability of Multinational Corporations Under International Law*, Menno T. Kamminga, Saman Zia Zarifi eds. (2021), 261.

share-based activity of major shareholders, as mandated by law, but instead requires a higher level of intervention in the subsidiary's activities.[735]

However, as it is analysed further, the same case law also suggests that duty of care may also be established regardless of the exercise of control.

2.3.2.4. Assumption of Responsibility

The assumption of responsibility principle is not new and may be traced back to the famous *Hedley Byrne* precedent[736] as well as *Smith v. Littlewoods.*[737] *Hedley Byrne* opened a cause of action for loss based on reliance on a statement. As Goudkamp indicates, according to *Hedley Byrne*, an assumption of responsibility would be established particularly when the relationship between parties is equivalent to a contract, i.e., there is an assumption of responsibility where. However, for the absence of consideration, a contract would exist.[738] In *Smith v. Littlewoods*, a relationship between the parties which gives rise to an imposition or assumption of responsibility on the part of the defendant was developed. *Customs and Excise Commissioners v Barclays Bank plc.* precedent provides for the general consideration that the assumption of responsibility test is sufficient to impose a duty of care in cases where two cumulative conditions are present: *(i)* the defendant voluntarily assumed responsibility for the claimant, and *(ii)* the claimant relied upon the assumption of responsibility.[739]

In *Vedanta*, the Supreme Court considered that a corporation might assume responsibility[740] if "[…] in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not, in fact, do so. In such circumstances, its very omission may constitute the abdication of a responsibility which it has publicly undertaken."[741] The Supreme Court regarded Vedanta's sustainability report in which, as the court argued, Vedanta "[h]ave asserted its own assumption of responsibility for the maintenance of proper standards of environmental control at the mine."[742] The assumption of responsibility is closely related to the legitimate expectations model discussed above, which states that the parent company or non-parent business partners assume responsibility if they have raised expectations by, for

735 Nora Mardirossian, "Direct Parental Negligence Liability: An Expanding Means to Hold Parent Companies Accountable for the Human Rights Impacts of Their Foreign Subsidiaries" (2015): 24, https://dx.doi.org/10.2139/ssrn.2607592.

736 *Hedley Byrne & co Ltd. v. Heller & Partners Ltd*, [1964], AC 465.

737 *Smith v Littlewoods Organisation Ltd* [1987] UKHL 18.

738 Goudkamp, supra note, 40: 10.

739 *Customs and Excise Commissioners v Barclays Bank plc.* [2006] UKHL 28; [2007] 1 AC 181 (HL) 210 [73].

740 Gerhard Wagner, "Tort Law and Human Rights" (2021): 16, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3792036.

741 *Lungowe v Vedanta Resources plc* [2019] UKSC 20, 53.

742 *Ibid.,* 61.

example, making public statements about compliance with CSR in the supply chain.[743] Therefore, it is the raising of expectations that triggers the duty of care.[744] However, one should not overrate the assumption of responsibility as a lenient basis for establishing a duty of care. For example, Goudkamp, notably – prior to *Vedanta*, argued that only an evident representation by the company that it actually accepts the duty to look out for interested parties (such as the subsidiary's employees) would suffice to establish the duty of care.[745] Whether Vedanta represents such a route is not precisely clear. However, published materials may point in that direction.

Therefore, after *Vedanta,* SCL not only includes cases where the parent company or non-parent business partner actually exercises control[746] but also when it sets defective group-wide policies or assumes responsibility by holding itself out to exercise sufficient control over third parties but fails to do so.[747]

2.3.2.5. Knowledge of the risks

As Bergkamp rightly points out, even though the exercise of particular control is a trigger of SCL after Vedanta, there is much less clarity as to whether (and under which conditions) the parent companies or non-parent business partners might have a **duty** to exercise such control in the case of possible risky activities.[748] In particular, does knowledge of problems on the side of the business partner or the subsidiary trigger the duty of care? It is not straightforward and clear. In other words, it would likely be a long shot to imply liability solely on the basis that the parent company or non-parent business partner was aware of possible risks, unless no other intervention is evident. However, knowledge as such clearly plays some role in establishing such a duty.

The Supreme Court in *Vedanta* referred to the plaintiff's claim on "[…] sufficient knowledge of the propensity of those activities to cause toxic escapes into surrounding watercourses[749] and Vedanta's public report that made particular reference to problems arising at the mine in Zambia.[750] The Supreme Court, however, did not provide any other guidelines, and one might argue that this is merely a relevant context to strengthen other arguments of SCL. Bergkamp argues that knowledge of unacceptable risks *per se* may trigger a duty of care. However, in the author's opinion, such a conclusion has

743 Bergkamp, *supra note*, 112: 207

744 Bergkamp, *supra note*, 112: 196

745 Goudkamp, *supra note*, 40: 11.

746 As proposed in *Chandler.*

747 Lucas Roorda, and Daniel Leader, "Okpabi v Shell and Four Nigerian Farmers v Shell: Parent Company Liability Back in Court", *Business and Human Rights Journal* 6 (2021): 369, https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/okpabi-v-shell-and-four-nigerian-farmers-v-shell-parent-company-liability-back-in-court/1C70BB759342BA69A723E86AF209906E.

748 Bergkamp, *supra note*, 112: 205.

749 *Lungowe v Vedanta Resources plc* [2019] UKSC 20, 55; Bergkamp, *supra note*, 111: 220.

750 *Lungowe v Vedanta Resources plc* [2019] UKSC 20, 58.

not yet been adequately tested. In *Vedanta*, it was indicated that the parent company or business partner does not, *per se,* have a duty to manage; therefore, it might seem that knowledge alone could not be the sole basis for a duty of care.

On the other hand, *Maran* shows that knowingly doing business with a partner (even indirectly) that has a risky reputation in terms of health and safety requirements may trigger liability. Of course, one could argue that in *Maran,* the liability was primarily grounded in intervention and *de facto* control of the transaction; however, the outcome remains the same – Maran knew what probable risks were ahead. The Maran case may be a proper example of a situation where a corporation possesses knowledge and expertise concerning managing the risks – in this regard, as Bergkamp indicates, the company may be exposed to SCL "[…] if it does not deploy that knowledge to remedy problems that may be present […]."[751]

Additionally, it is crucial to determine whether actual knowledge is the sole factor or whether foreseeability also plays a role in determining liability. The traditional test, starting from *Donoghue v. Stevenson,* is foreseeability – a person owes a duty of care to everyone who, by negligent conduct, can suffer **foreseeable** damage provided that the requirement of sufficient proximity between the wrongdoer and the victim exists.[752] Therefore, the logical implication would be that it is not only important what was known, but also – what should have been known. In *Vedanta*, this reasoning is supported by the term "propensity."[753] As Bergkamp points out, this means that ignorance of the risks does not preclude the existence of a duty of care.[754]

In *Chandler v. Cape,* the parent company's actual or imputed superior knowledge of relevant aspects of health and safety in a particular industry, as well as its knowledge about the subsidiary's unsafe working environment, formed the core basis for finding a duty of care. Even though Vedanta did not *per se* affirm this reasoning as a "test", it stated that in these situations, the parent company *may* have a duty of care.[755] Therefore, it remains unclear whether the foreseeability of the risks could trigger a duty of care. Bergkamp believes that companies with superior knowledge may also have a duty to monitor and assist their subsidiaries or business partners, whether they are already intervening in the activities of the latter or if risks require intervention.[756] As *Vedanta* and the following cases did not provide a more detailed analysis of the issue of knowledge, one must rely on the prevailing condition, namely, the control of the relevant activities of the subsidiary or business partner. However, as Zerk indicates, **the level of knowledge** on the part of the parent company about the risks associated with the subsidiary's activities and the level of *"de facto"* control exerted by the parent are the

751 Bergkamp, *supra note*, 112: 220.

752 Van Dam, supra note, 45: 735.

753 *Lungowe v Vedanta Resources plc* [2019] UKSC 20, 55.

754 Bergkamp, *supra note*, 112: 221.

755 *Lungowe v Vedanta Resources plc* [2019] UKSC 20, 56.

756 Bergkamp, *supra note*, 112: 222.

main factors in proving a causal link.[757] Therefore, it is evident that knowledge will play a substantial role in establishing a duty of care. Whether it can be a sole ground still needs to be tested.

On the other hand, if such knowledge is demonstrated, for example, in published materials, it could be concluded that the parent or non-parent business partner assumed responsibility, as mentioned in the previous chapter.

2.3.2.6. Conclusions and possible outcomes

As the Supreme Court indicated in *Vedanta*, following approval of this reasoning in *Okpabi*, the parent company did not owe a duty of care merely because it was the parent company – in particular, a specific relationship provided an opportunity for the parent company to exercise oversight, and the parent company's intervention created the duty of care.[758] In addition, the parent's liability was also acknowledged in cases where the company publicly assumed responsibility. *Maran* confirmed that such a type of reasoning is not limited to share-based relationships. Two SCL triggers, i.e., *(i)* the actual intervention and *(ii)* the public assumption of responsibility being the primary outcome of Vedanta[759] and following cases, questions about what that means to the parent companies or business partners remain open.

Probably the most discussed concern after *Vedanta* was that it may increase the risk that the parent companies may decide not to take any actions that indicate any link between them and their subsidiaries in any decision-making.[760] Wagner argues that if a parent company's responsibility for harm at the subsidiary level is contingent on the parent issuing guidelines and ensuring their implementation, then the parent's efforts to ensure human rights protection across the group will be sanctioned rather than rewarded.[761] Witting also agrees with this notion and adds that potential limitations arise in the application of the tort of negligence, particularly when control is used as a decisive criterion for parent company liability, as the latter may not exercise sufficient control over the relevant subsidiary activities to owe a duty of care.[762] In this regard, Witting argues that "[c]ontrol-based liability discourages the exercise of beneficial control, as much as it discourages the exercise of harm-inducing control."[763]

More specifically, when liability is primarily based on the intervention of the parent company or non-parent business partner, it may serve as a disincentive for the

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757 Zerk, *supra note*, 403: 221.

758 Van Ho, *supra note*, 718: 115.

759 *Ibid.,* 116.

760 Bergkamp, *supra note*, 112: 197; Vedanta v. Lungowe Symposium: Duty of Care of Parent Companies (2019), http://opiniojuris.org/2019/04/18/symposium-duty-of-care-of-parent-companies/.; Van Ho, *supra note*, 718: 114; Mares, *supra note*, 102: 19.

761 Wagner, *supra note*, 740: 16.

762 Witting, *supra note*, 63: 380.

763 *Ibid.*

latter to implement group-wide policies on health and safety, labour, environment, and other human rights issues.[764] For example, if group-wide policies are widely implemented within the group after *Vedanta,* it may be an effective way to trigger a duty of care. On the contrary, it may appear that passive investors or business partners do not have such a duty. Even though non-intervention might be much worse.[765] Wagner points out that *Vedanta's* reasoning might then be even more evident regarding independent contractors (as in *Maran* or *KiK*), where incentives from business partners to intervene at any level would likely be significantly lower.[766] In this regard, it may be argued that if the duty of care is primarily based on active intervention, then tort law and cases like *Vedanta* create incentives not to engage in risk management.[767]

Therefore, what conditions does *Vedanta* actually propose for market players? Whether companies are encouraged to let subsidiaries "live their life" and not bother with health and safety requirements? Van Dam argues that stopping interfering with the subsidiaries' operations or maintaining that they operate independently may not be a proper message after *Vedanta*.[768] However, this argument is mainly based on business logic, as the parent company cannot afford to create the impression that the group is acting in a deficient manner. In this regard, Van Dam argues that the parent companies simply have two choices: either allow subsidiaries to function sub-optimally or intervene and run the risk that this might imply a duty of care.[769] To Van Ho, it also seems unlikely that after *Vedanta*, the parent companies may divest themselves of any responsibility for the operations of their subsidiaries, as *(i)* many institutional investors demand their investees adopt and disclose their policies and practices, *(ii)* businesses in inherently dangerous industries, such as mining or oil and gas extraction, rely on their group-wide experiences and policies to secure licenses for new operations. By divesting from environmental and social oversight, businesses in their fields risk undermining their bids for new opportunities.[770] However, even from a business-decision perspective, it might be true; nevertheless, it cannot be said that *Vedanta* confirmed the principle that one would only be liable **if** one creates a special control (intervention)-based relationship. As knowledge of the risks *per se* as a trigger for the duty of care remains highly unclear, it may seem that tort-based liability of the parent company or non-parent business partner stands firmly on proof of the latter's active involvement.

As will be shown in Chapter III, the possible inadequacy of the tort-based approach, focusing on a duty of care based on intervention, led to a shift in technique, creating a positive duty to manage the supply chain.

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764 *Ibid.*

765 Wagner, *supra note*, 740: 16,

766 *Ibid.*

767 *Ibid.*

768 Van Dam, *supra note*, 45: 741.

769 *Ibid.*

770 Van Ho, *supra note*, 718: 115.

2.4. Neoclassical vs. Classical Approach: Is It Really the Case?

In 1 chapter, it was established that the classical approach of the parent company's liability is based on two legal cornerstones: *(i)* legal separability and *(ii)* limited liability. It was also demonstrated that, according to the traditional understanding of the division of powers between shareholders and management bodies, the parent company, with some statutory exceptions under the German *Konzernrecht*, cannot legally manage its subsidiaries or intervene in their decision-making processes. In previous chapters, it was also detailed that the liability of the parent companies and non-parent business partners in recent cases[771] was primarily based on the establishment of a duty of care. In this regard, the legal basis is not a novelty as such.

However, even though the tortious liability of the corporation, based on its duty of care, is not new, as we will see further, particular scholars suggest that the application of it in cases such as *Chandler v. Cape plc.* and later – *Vedanta*, *Okpabi* and others may be contradictory to said principles, especially ones of separability and limited liability. Therefore, the Thesis now turns to tackle this question, i.e., whether the application of the duty of care in the said litigation contradicts the mentioned institutes.

2.4.1. Legal separability and limited liability v. duty of care

The legal principle that shareholders, as separate entities, are not liable for the acts of a company in which they invest poses a particular challenge for victims, for whom the direct cause of the harm is usually a local subsidiary.[772] At the same time, it is evident that corporate law and the entire commercial practice stand on the principle of legal separability. Therefore, the debate on the exact relationship between the duty of care of parent companies or non-parent business partners and the principle of legal separability is at the very centre of corporate tortious liability. Some authors view this type of liability as a denial of legal separability. Wagner, for instance, acknowledges that the duty of care is broad and flexible enough, however in his understanding, the imposition of a duty of care that cuts across corporate boundaries and reaches businesses that are incorporated as separate legal entities, as in Vedanta, "[e]ats away at the entity principle that is not only the basis of corporate law but also of the law of torts."[773] In this regard, corporate liability for externalities at the level of subsidiaries "would throw overboard" the differentiated attribution of "[…] liabilities in the group."[774]

However, this conclusion does not precisely align with the concept of the tort of negligence. As Witting explains, "[t]he recognition of a duty of care is in no way

771 See Chapter 2.1. of the Thesis.

772 Gwynne Skinner, "Rethinking the Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law", *WASH.&LEE L. REV.* 72, 4 (2015): 1769, https://scholarlycommons.law.wlu.edu/wlulr/vol72/iss4/5/.

773 Wagner, *supra note*, 740: 15.

774 Van Dam, *supra note*, 45: 741., giving reference to Wagner's arguments.

derivative from the subsidiary; rather, it is an element going to prove that the parent company itself committed a tort, irrespective of any failures in the subsidiary."[775] This conclusion is also confirmed directly in the case law. In *Chandler v Cape, the* judge indicated: "I would emphatically reject any suggestion that this court is in any way concerned with what is usually referred to as 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."[776] Therefore, Chandler was not a case in which the independent legal personality of the subsidiary was disregarded.[777] No veil was pierced, and this was not even considered. The same reasoning was strictly followed in *Unilever,*[778] *Vedanta,*[779] *Okpabi*,[780] and *Oguru.*[781] Van Dam responds to Wagner's reasoning by reiterating that the duties of care of the parent company are based on its own behaviour (such as active intervention); thus, none of these situations concern integrating the behaviour of several independent legal entities.[782] On the contrary, as Sanger highlights, such cases demonstrate courts' willingness to find that the separation of legal personality between companies *per se* cannot preclude the possibility of legal liability.[783] In this regard, as Witting correctly points out, the imposition of a duty of care upon the parent company itself surely admits, not denies, its existence as a separate legal entity capable of bearing responsibility in tort law.[784]

What is crucial is that a share-based relationship is not even indicative in this regard, as in *Vedanta,* the Supreme Court acknowledged that the same rules would apply to business partners. *Maran* and *KiK* cases are evident examples of why the argument of intervention into the legal separability principle is not correct. As targets of liability

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775 Witting, *supra note*, 63: 363.

776 *Chandler v Cape* [2012] EWCA (Civ) 525, at 69.

777 Goudkamp, *supra note*, 40: 3.

778 *AAA v Unilever plc* [2018] EWCA Civ 1532., 36: "Parent and subsidiary are separate legal persons, each with responsibility for their own separate activities. A parent company will only be found to be subject to a duty of care in relation to an activity of its subsidiary if ordinary, general principles of the law of tort regarding the imposition of a duty of care on the part of the parent in favour of a claimant are satisfied in the particular case."

779 *Lungowe v Vedanta Resources plc* [2019] UKSC 20, 50.

780 *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3, 65.

781 *Oguru*, 3.26: "These claims are not based on a direct piercing of the corporate veil (where the separation of legal personalities between the parent company and subsidiary is disregarded), but on what is also known as an indirect piercing of the corporate veil, namely the liability of the parent company for its own acts or omissions with respect to third parties that were/are affected by the acts or omissions of its subsidiary."

782 Van Dam, *supra note*, 45: 737.

783 Andrew Sanger, "Crossing the Corporate Veil: The Duty of Care Owed by a Parent Company to the Employees of its Subsidiary", *The Cambridge Law Journal* 71, 3 (2012): 478-481, http://www.jstor.org/stable/41819920.

784 Witting, *supra note*, 63: 364.

are either indirect business partners who do not have a proximate relationship with the party in which the harm occurred or the main buyer of the production, respectively, the legal separability argument cannot come into play. Companies are evidently separate.

Even though, as shown, this argument of "risk" to entity principle is not well grounded, it shows directly why such tension exists in this regard. For decades, the principles of legal separability and limited liability have been recognised by courts as fundamental principles not only in company law but also in tort law.[785] As Witting argues, this led to "[…] repeated, often unthinking applications of rules of separate legal personality and limited liability of shareholders."[786] In such a restrictive approach, viewing each intervention to boundaries of parental liability as denial of legal separability[787] could have created situations where tort claimants might be uncompensated, even when the injuring companies are part of viable corporate groups, and tort could be triggered.[788] Thus, taking into consideration legal background, *Chandler* and later – *Vedanta* were greeted by some, as a big "novelty", "breakthrough", and "significant development"[789] that arguably put the entity principle at risk and affirmed that the company is responsible for the acts of others.[790] However, as established, in neither case was legal separability triggered, as liability was based on the corporations' own misconduct (breach of their own duty of care).

The relationship between a duty of care and the principle of limited liability shall also be discussed briefly. Hansmann and Kraakman acknowledge that limited liability is a "fundamental principle of corporate law" and is generally deemed to be necessary to create incentives for investments in corporations.[791] However, as Leebron explains, issues associated with applying limited liability in the context of tort creditors were not considered at the time when limited liability was gaining credence.[792] Such background led to that pioneering case law, where this question was raised in terms of the corporate group, reaffirming the strict application of limited liability.[793] However, further cases where the parent company's liability was based on the tort of negligence

785 Wagner, *supra note*, 740: 15.

786 Witting, *supra note*, 63: 348.

787 Daniel Augenstein, "Torture as Tort? Transnational Tort Litigation for Corporate-Related Human Rights Violations and the Human Right to a Remedy", *Human Rights Law Review* 18, 3 (2018): 4, https://doi.org/10.1093/hrlr/ngy023.

788 Witting, *supra note*, 63: 348.

789 Lucas Roorda, and Daniel Leader, "Okpabi v Shell and Four Nigerian Farmers v Shell: Parent Company Liability Back in Court", *Business and Human Rights Journal* 6 (2021): 368, https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/okpabi-v-shell-and-four-nigerian-farmers-v-shell-parent-company-liability-back-in-court/1C70BB759342BA69A723E86AF209906E.

790 What would be the exact opposite of a general principle.

791 Hansmann, Kraakman, *supra note*, 572.

792 Leebron (1991) 91 Colum L Rev 1565, 1566.

793 *Adams v Cape Industries Plc.* [1990] Ch 433.

clearly affirm that tortious liability provides an exception to this principle. A straightforward rationale for this exception is illustrated by Wright, who compares tort creditors and contractual creditors, noting that the former cannot foresee the harm and therefore cannot negotiate exceptions to limited liability, whereas the latter can.[794] In this logic, limited liability, applied without any exceptions, would unduly prejudice tort victims.[795]

On the contrary, it could also be argued that a limited liability argument cannot even be raised in this regard, as a corporation's tortious liability is based on its own wrongdoings. Therefore, it neither expands nor limits the company's liability for the actions of its subsidiary as it is not based on the latter. This approach is perfectly illustrated by Lo, who argues that limited liability as such was never intended to protect persons from their own (personal) torts and in this regard – there is no ground why the parent company should not be "[s]ubject to its own liabilities as a result of its own conduct, notwithstanding that the conduct occurred in the context of its subsidiary's business."[796]

Such reasoning is clear when one tries to compare such liability with traditional veil piercing.[797] As Bergkamp shows: "Irrespective of the subsidiary's liability, direct liability of the parent company entails an independent duty of care of the parent company – no "veil piercing" is necessary."[798]

2.4.2. Duty of care v. (no) right to give instructions (manage) to the subsidiary

Next, the Thesis establishes how cases discussed in Chapter 2, based on finding a relevant duty of care, fit into the traditional understanding of whether the parent company can intervene in the activities of the subsidiary and manage it. As the central issue of this chapter is to analyse whether these cases deviate from the traditional approach to parent liability, analysed in Chapter 1, the division of powers between the parent company (as a shareholder) and its subsidiary shall also be considered. More specifically, as *Vedanta* and the following cases propose that the establishment of a duty of care is based on identifying the relevant control, it is of significant relevance to understanding whether these conditions for tortious liability align with company law's understanding of parental rights related to a subsidiary's management.

As Conac highlights, traditionally, national company law is based on the premise that a company is an autonomous legal entity separate from others, even if the same

794 Wright, *supra note*, 87: 60.

795 *Ibid.*, Petrin, Choudhury, *supra note*, 90: 4.

796 H. C. Lo, *supra note*, 674: 16.

797 Enneking, *supra note*, 105: 175.

798 Bergkamp, *supra note*, 112: 213.

company controls them.[799] Meaning, in general terms, that parents do not manage subsidiaries. Therefore, in most countries, the legal existence of the parent's instructions is not recognised, as traditional concepts of the subsidiary's legal autonomy prevail.[800]

Of course, in this regard, one should not forget that, in terms of group management, and particularly concerning parents' rights to manage subsidiaries, *de facto* commercial practices and legal rules are not always in line. European Model Company Act ("EMCA") describes group regulation in terms of company law as a "[…] difficult, disparate and mostly unsolved issue."[801] At the same time, it highlights, in particular, the management of the group as the issue at the heart of group reality.[802] In this regard – the ability to instruct (manage) subsidiaries is of key importance. EMCA acknowledges that in groups, "[a]s a matter of fact, subsidiaries receive instructions, whether oral or written, from the management of the parent company because subsidiaries are usually managed according to business lines."[803] For instance, as Conac proposes, the Chief Financial Officer of the parent company may instruct the Chief Financial Officer of the subsidiary, and so on.[804]

There can be many possible scenarios – some of them were seen in cases discussed in Chapter 2. In this regard, the scope of instruction or management may also be different. For example, the parent may manage the subsidiary in terms of health and safety issues or, for instance, instruct on financial aspects (such as providing a loan, etc.). Winner and Conac also highlight that within the groups, decisions are usually not taken in the interest of the subsidiary but in the interest of the group – which usually means the interest of the parent company. These decisions are not made by the subsidiary's management but by the parent company, which then communicates them as group guidelines or outright instructions to the subsidiary's management.[805] Indeed, this was the case, for example, in *Vedanta*. However, for this chapter, legal rules are important to us. And from the legal point of view, the *status quo* is that in the statutory law of most countries, including the ones analysed in the Thesis as shown below, this reality is not recognized due to the prevailing concept of the legal separability of the subsidiary (and its management)."[806]

Germany, in this regard, presents a more comprehensive approach. As it was

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799 Pierre-Henri Conac, "Director's Duties in Groups of Companies – Legalizing the Interest of the Group at the European Level", *European Company and Financial Law Review* 10, 2 (2013): 195, https://www.degruyter.com/document/doi/10.1515/ecfr-2013-0194/html?lang=en.

800 Pierre-Henri Conac, "The Chapter of Groups of Companies of the European Model Company Act (EMCA), *European Company and Financial Law Review* 13, 2 (2016): 309, https://www.degruyter.com/document/doi/10.1515/ecfr-2016-0301/html?lang=en.

801 *EMCA*, 371.

802 *EMCA*, 373.

803 *EMCA*, 379.

804 Conac, *op cit.,* 309.

805 Winner, *supra note*, 1: 86; Conac, *supra note*, 800: 195.

806 *EMCA*, 379.

established in the 1 chapter, if a contractual group is formed, the parent company may issue instructions to the subsidiary[807] , which the latter shall follow without regard to the subsidiary's separate interests.[808] This approach requires detailed settling between the parent and subsidiary at the end of the accounting year. In the case of a contractual group, the subsidiary's management may refuse to comply with instructions from the parent company if they are manifestly not in the interests of the parent company or its affiliated companies.[809] In a *de facto* group of enterprises, the parent company only exercise its influence to cause the controlled enterprise to undertake or refrain from undertaking a disadvantageous transaction or act unless this disadvantage is compensated.[810]

In France, the legal separation between the parent company and subsidiary and its management is clearly divided. The parent company cannot, *per se,* manage the subsidiary, and, according to Article L. 651-2 of the French Commercial Code, may be considered a *de facto* director if it acts as a *de jure* director, i.e., controls the company's activities. From a strictly legal perspective, a person is considered to be a *de facto* director if it is demonstrated that this person, in substance, performed managerial activities. Under French law, directors are formally and regularly appointed with a duty to manage only their own company. In this regard, *de jure* directors owe their duties to the company itself and do not report to any "superior" in the corporate hierarchy.[811] Therefore, parent companies shall avoid taking any action or decision that could be qualified as management acts at the company's level.

However, in certain conditions, subsidiary management can take into account the so-called "interest of the group" – *Rozenblum* doctrine foresees such conditions.[812] Therefore, in France, the issue is more related not to the issue of the parent's ability to give instructions[813] but to the management of the subsidiary being able to take into consideration the interest of the group when making a decision that causes an immediate disadvantage to the subsidiary, provided all of the following conditions are

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807 GmbH or AG.

808 Informal Company Law Expert Group, *Report on the recognition of the interest of the group* (2016): 24, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2888863; However, the parent must by the end of the relevant fiscal year compensate the subsidiary's annual loss.

809 Conac, *supra note*, 799: 195.

810 *EMCA*, 333.

811 Lasserre-Kiesow V., "L'ordre des sources ou le renouvellement des sources du droit", 33, 7262 (2006), https://signal.sciencespo-lyon.fr/article/427165/L-ordre-des-sources-ou-le-renouvellement-des-sources-du-droit.

812 *EMCA*, 395: "[…] First, there must be a group characterized by capital links between the companies. Second, there must be strong, effective business integration among the companies within the group. Third, the financial support from one company to another company must have an economic quid pro quo and may not break the balance of mutual commitments between the concerned companies. Fourth, the support from the company must not exceed its possibilities. In other words, it should not create a risk of bankruptcy for the company."

813 Winner, *supra note*, 1: 86, 92.

satisfied. The management of the subsidiary may refuse to comply with instructions from the parent company if those conditions are not satisfied. Therefore, under the French legal system, parent companies, as shareholders, generally do not manage subsidiaries. However, the latter, in some cases referred to as *Rozenblum* situations, may disregard the subsidiary's own interests and act following the interests of the group.

UK legal system also acts on the general assumption that each company is a separate legal entity. Directors have a fiduciary duty to act in the best interest of the company they manage.[814] However, there are some exceptions, quite similar to French Rozenblum. Directors of a subsidiary may consider the interests of the group in making their decisions. However, as Conac indicates, "[t]he risk of unduly favouring the parent is mitigated by the risk of the subsidiary director's personal liability for wrongful trading."[815]

Therefore, in the opinion of the present author, the logical implication after this comparison is that the application of a duty of care does not contradict the general principle[816] in all the jurisdictions analysed that parent companies (shareholders) cannot control the management (provide instructions) of their subsidiaries. This general rule stems from the strict separation of powers between shareholders and management bodies of the company, which are required to act in the best interest of their company and are not bound by shareholders' instructions. Shareholders, in this regard, shall not intervene in the management of the company. The establishment of a duty of care then presents a situation in which corporations are held liable **if** they fail to intervene. And only due to this deliberate intervention into the activities of the subsidiary that otherwise would be in full control of the subsidiary itself, the parent company become "vulnerable" for establishing the duty of care to ensure avoidance of particular risks. To put it simply, the legal rule can be described as follows: parent companies generally cannot intervene in the activities of their subsidiaries. However, if they do so, they may be liable for the risks.

In terms of companies that are not equity-related, such as *Maran* or *KiK, the* rule is even simpler, as the question of division of powers is not relevant. Thus, if a particular control relationship is proved, liability may follow.

2.5. Conclusions

Interactions between the duty of care, which was the main legal instrument for the

814 Christoph Teichmann, "Corporate Groups within the Legal Framework of the European Union: The Group-Related Aspects of the SUP Proposal and the EU Freedom of Establishment", *European Company and Financial Law Review* 12, 2 (2015): 210-211, https://www.degruyter.com/document/doi/10.1515/ecfr-2015-0202/html?lang=en Report of the Reflection Group on the Future of EU Company Law (2011): 61, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1851654.

815 Conac, *supra note*, 799: 195.

816 Considering some exceptions under German *Konzernrecht*.

parent company's liability in all the cases presented in Chapter 2, and *(i)* principles of legal separability and limited liability, and *(ii)* parent's company's (in)ability to manage the subsidiaries were intentionally picked to discuss whether mentioned cases, from a strictly legal point, deviate from the classical approach provided in chapter 1.

In the author's opinion, the above analysis supports the idea that *Vedanta* and other cases do not actually present such a strict deviation or contradiction. All of the landmark cases analysed are based on the tort of negligence, whose cornerstone is the establishment of a duty of care. *Vedanta*, in this regard, affirmed that the test for the establishment of the latter does not require applying *Caparo,* which means that case law does not discuss any novelty in the scope of tort. Thus, before *Vedanta*, SCL claims were considered more difficult under common law, as the hurdle of establishing a novel duty of care had to be passed, and in many cases, it was too great an obstacle. This, therefore, might be considered one of the main achievements under *Vedanta*.

However, notwithstanding that the legal ground for corporate liability, at least under common law, which was mostly applied in the analysed case law, is clear, the conditions for such tortious liability are rather lenient and may create considerable legal uncertainty for market players. As the application in *Vedanta* and the following cases focuses on operational control over the third party (either a subsidiary or business partner) and intervention in the latter's particular activities, it remains highly unclear which test is sufficient. After *Vedanta*, it is left for the judges, having an open and wide one.[817] Arguments of whether such reasoning does not create disincentives to control the health and safety issues, as mentioned above, also remain unclear. In addition, it remains unclear whether the knowledge of possible risks in the supply chain is sufficient to ground tortious liability. However, even though conditions for a corporation's liability after *Vedanta* could be considered as relatively broad and open for case-by-case valuation, especially – giving a substantial reference to the Supreme Court's approach that such duty of care applies in the same fashion both to equity-based relationships and the ones with business partners,[818] in the opinion of the author, they are not contradictory to the classical approach to negligence. Bergkamp agrees by stating that "[t]hese concepts fit into the existing tort law categories, even though they may have to be stretched, and are therefore easier to accept for judges."[819]

The analysis of the cases also showed that, notwithstanding the opinion of some scholars, such as Wagner, they do not present liability for a third party's actions. Instead, they are grounded in the corporation's own behaviour. In this regard, legal separability is not tackled; quite contrary – the latter is approved. In terms of the principle of limited liability, the company's liability for the breach of duty of care may be understood by a side approach as *(i)* one of the exceptions to the limited liability (such as corporate veil piercing scenarios), or *(ii)* liability separate from one of the actions of subsidiary (therefore, having no influence on the principle of limited liability).

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817 *Lungowe v Vedanta Resources plc* [2019] UKSC 20, 49.

818 *Lungowe v Vedanta Resources plc* [2019] UKSC 20, 49.

819 Bergkamp, *supra note*, 112: 226.

From the perspective of the division of powers between shareholders and management of the company, the tortious liability of the parent, as evidenced by cases discussed in Chapter 2, is also in line. As the traditional understanding in all four jurisdictions[820] is that parent companies cannot manage their subsidiaries (i.e., give instructions or intervene in management), tortious liability may emerge in situations when parent companies intentionally do this. Regarding non-parent business corporations, this rule is even more straightforward.

2.6. Possible paradox

So far, the Thesis has managed to show the following conclusions concerning corporate's supply chain liability. First, corporate law remains firmly grounded in the principles of legal separability and limited liability. This follows that according to the traditional division of powers, shareholders legally cannot undertake the management of the subsidiaries. In the scope of liability, these principles mean that one company cannot be responsible for the actions of another. However, it is well established that in situations where legal separability is used for unjust purposes, i.e., sham or fraud, it can be disregarded by lifting the corporate veil. However, these cases are rare for the same reason – the court's unwillingness to disregard the mentioned cornerstones of corporate law.

On the other hand, the establishment of a duty of care stands on the notion that in certain circumstances, the parent company may be liable for the actions at the level of the subsidiary but because of its own misconduct. Therefore, as it was established, the principle of legal separability is not disregarded in such cases.[821] However, a possible paradox may be apparent when examining the conditions under which such a duty of care is established. After *Vedanta*, operational control of the subsidiary[822] is the main factor of the parent's duty of care. This means that if the parent company sufficiently intervened in the activities of its subsidiary, it might expose itself to liability. That is the price. One might argue, however, that this situation reveals an apparent contradiction between the legal rules and *de facto* business activity, particularly within groups of companies. Macey calls the legal regulation of the parent-subsidiary relationship one of the "myths" of corporate law.[823] This is particularly so, as shareholders, even the majority ones, by the law, do not dominate, control, and manage the subsidiaries.[824] Even though the author analyses why this "gulf" between myth and reality is apparent

820 Considering German *Konzernrecht.*

821 See chapter 2.4.1.

822 Or business partner.

823 Jonathan R. Macey, "The Central Role of Myth in Corporate Law", European Corporate Governance Institute -*Law Working Paper* 519, 2020 (2020): 33,
https://dx.doi.org/10.2139/ssrn.3435676

824 *Ibid.*

in veil-piercing situations,[825] the same notion may give some food for thought in the establishment of the duty of care. If we agree that, after *Vedanta*, parent companies are liable when they *de facto* control their subsidiaries, while at the same time such control might be argued to be an ordinary business practice within the groups, whether control as a ground for a duty of care is sufficient? To put it simply, one could argue that the court actually states an obvious fact of parental control over the subsidiary and uses it as a basis to establish a duty of care. Discussing the veil-piercing situation, Macey argues "[t]hat the myths begin with a factual description of the parent-subsidiary relationship, move to a description of the benign, ordinary and customary manner in which parent companies operate their subsidiaries, and the claim that this relationship and manner of operating a subsidiary provides a justifiable legal basis for piercing the corporate veil."[826] If one applies the same notion in situations of the establishment of a duty of care, it could be argued that control of the subsidiary, that is, *de facto* reality – creates a duty of care. However, in the author's opinion, such a conclusion would not be evident, considering the arguments in *Vedanta and Okpabi*. First, the Supreme Court, in both cases, clearly noted that the duty of care cannot be based solely on mere shareholding and acknowledged the fact that parent companies, to some extent, legally control their subsidiaries. Therefore, even though there is considerable criticism of the court's vague interpretation of "control", in the author's opinion, after *Vedanta* and the subsequent cases, courts will not be persuaded to establish a duty of care based on ordinary intervention that most controlling shareholders engage in. This is evident, for example, by the reasoning of the Court of Appeal in Unilever, which, although acknowledging the parent's intervention in the subsidiary's activities, did not establish a duty of care as the separateness of the subsidiary was not affected (decisions were made independently).[827] Therefore, it might be concluded that the mentioned cases do not *per se* deny that the parent-subsidiary relationship presents a closer connection; however, they tackle situations where the parent's intervention in the particular activities of a subsidiary forms the basis for considering it liable when possible, harm is done to third parties. At the same time – without interfering with the legal separability.

However, the general discussion of whether the principle of legal separability is logical and compatible with *de facto* business practice in parent-subsidiary situations is not provided. Although the arguments (both pro and against) are well known to the author, the Thesis analyses the implications of corporate liability, considering that company and tort law in the jurisdictions analysed are based on the principles of legal separability and limited liability.

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825 *Ibid.*, 36.

826 *Ibid.*

827 *AAA v Unilever plc* [2018] EWCA Civ 1532, 26.

3. MODERN APPROACH TO THE CORPORATE LIABILITY

The analysis in Chapter 2 showed that, according to the current common law approach in recent SCL litigation, corporate groups *per se* do not present a separate test for establishing the corporation's duty of care. As cases, starting with *Vedanta* acknowledged the expansive supply chain liability, particular control-based relationships and intervention were the leading indicators of such duty. Therefore, as it was already established, it could have been concluded that the mentioned litigation created a principle: if a company actively intervenes in another company (subsidiary or business partner) to a sufficient level where control is evident, it might expose itself to liability. At the same time, such liability in all the cases was based on well-established common law duty of care.

However, at the same time, much criticism was attributed to the fact that such reasoning could create unwelcomed incentives for corporations not to control health and safety issues, which, are the most important to all third parties who could be exposed to such risks (as employees or local inhabitants). Therefore, the possible argument was raised as to whether the law of negligence would not undermine itself in its task of setting proper standards of conduct.[828] In addition, control as a condition *per se* was heavily criticised as a vague and deficient basis for imposing liability. And even though *Vedanta* was particularly clear that the imposition of the duty of care requires something more than ordinary intervention, in the author's opinion, it would be hard to deny that the mentioned case law left some uncertainties regarding the imposition of the duty of care. As it was established, such confusion was hard to avoid[829] as courts tried to imply liability for the evident beneficiary and "deepest pocket" (parent company), at the same time – not undermining the legal separability and not creating any actual duties for companies unless the sufficient control relationship is present. As established, courts succeeded in fitting their reasoning into existing tort law principles.[830] However, this possible "vicious circle" situation raises the question of whether traditional tortious liability is the best option for making corporations liable for deficiencies in their supply chains. At the same time, is it possible to present a more precise remedy mechanism without making some changes to the traditional understanding of the corporation's duties?

While the cases, which either were decided in the UK courts or other national courts but applying the common law, showed exclusive reliance on the tort of negligence, France recently presented a substantially different approach, followed by Germany – corporate sustainability due diligence obligation. Affected by those national developments, the EU issued a directive on the same matter. Thus, the Thesis now analyses the recent developments of SCL, which, according to the author, may loosely be described as a shift from the duty of care to the active duty to manage.

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828 Witting, *supra note*, 63: 363.

829 Chapter 2.1.

830 *Ibid.*

3.1. Supply chain due diligence – roots and causes

As with most famous case-law precedents, described in Part II of the Thesis presented, multinational enterprises are businesses that include numerous subsidiaries and subcontractors, usually incorporated all over the world, especially in emerging states. However, the liability of each company is generally regulated by national rules – therefore, in terms of possible human/environmental rights abuses, the application might be highly complicated. This way, as some scholars suggest, the law is insufficient to capture the fundamental aspect of multinational conglomerates – even though the companies under the same supply chain are legally separate, they usually form a unified entity from the economic perspective.[831] This ultimately affects the application of liability to parent companies, which are typically the ultimate beneficiaries of such activities. Corporations may utilise these different legal regimes to their advantage and potentially abuse human rights in countries where victims are unable to defend themselves due to various reasons.[832]

The burden of complaints to defend their rights under the traditional tort-based liability regime is apparent for multiple reasons. *First*, as an intra-group relationship and, even more – the one between company and contractor (supplier, etc.) is based both on legal separability and limited liability, while parent companies generally cannot be liable for the actions of another company. As Vacaflor rightly summarises: "National law for the most part governs the separate legal entities, not the single economic enterprise of parent and daughter companies, subsidiaries, and entities controlled by the parent firm."[833]

As Palombo rightly indicates, limited liability in these situations is "[o]ne of the tools allowing multinational enterprises to avoid liability for extraterritorial torts, because it transfers the potential losses from the shareholder (i.e., the parent company), to the creditors, including tort victims."[834] As it was established before, even though tortious liability generally does not conflict with legal separability[835], the power of the latter principle is so strong that, in some cases, courts do not even consider applying any liability for the parent company. Here, the general "duty of care" comes into play, allowing the application of tortious liability to the parent company in particular cases

831 Joseph E Stiglitz, "Multinational Corporations: Balancing Rights and Responsibilities" (2007) 101 Proceedings of the ASIL Annual Meeting 3; Muchlinski, *supra note*, 64. Surya Deva, "Human Rights Violations by Multinational Corporations and International Law: Where from Here, Connecticut Journal of International Law 1, 19 (2003) *in* Dalia Palombo, "The Duty of Care of the Parent Company: A Comparison between French Law, UK Precedents and the Swiss Proposals." *Business and Human Rights Journal* 4, 2 (2019): 266, https://doi.org/10.1017/bhj.2019.15.

832 *Ibid*., 267.

833 A. Schilling-Vacaflor, "Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?" *Human Rights Rev* 22 (2021): 110, https://doi.org/10.1007/s12142-020-00607-9

834 *Ibid.*

835 Chapter 2.4.1.

based on conditions that are far from consistent and clear.

Second, when a parent company abuses environmental standards or human rights in a developing country, there is no international cause of action available to the victims.[836] Therefore, based on the territoriality principle, victims must sue parent companies applying the regulatory regime of the country where the harm arises.

However, it is crucial that the standards set in national tort law for making parent companies liable would typically differ across multiple jurisdictions. Consequently, under some national laws, parent companies could be liable, while another national tort law would not find the same scenario sufficient.[837] In the previous chapters, it was established that courts tried to overcome this obstacle by applying the national tort law of more established countries, considering these countries as more closely related to the tortious activity, etc.

If the application of tortious liability against the parent company fails, the subsidiary, in most cases, is already under-capitalized, leaving victims with no remedies. This way, corporations can simply "forum shop" through different jurisdictions and "play poker" in those countries where victims are unable to defend themselves.

This being the reality of the application of tortious liability based on companies' failure to act as a prudent "neighbour", the need for different standards became evident since it became apparent that corporations could abuse this legal rule. Hereby, the switch from retrospective tortious liability to positive duties to act prudently began.

As it was already established in chapter 2.2.1. of the Thesis, the idea of corporate liability, related to human rights and environmental issues, was already enshrined both in UN Guiding Principles on Business and Human Rights[838] as well as OECD Guidelines for Multinational Enterprises.[839] On the corporate level, both international instruments are not binding, and, as M. Platise describes, the responsibility of the corporations is interpreted as "[b]inding in a sociological, rather than a legal sense".[840] This is evident when we consider that the UN Guiding Principles refer to a corporate

836 Palombo, *supra note*, 831: 268.

837 Van Dam, *supra note,* 30:173.

838 As described by M. Platise, "[m]ost important novelty is the introduction of the corporate responsibility to respect, which sets out the expectation that companies should carry out human rights due diligence and, to that end, identify, address, remedy and report on any adverse human rights impacts that may arise from their own operations as well as those of their suppliers and business partners in their supply chains." *in* Mateja Steinbrück Platise, "From Social to Legal Responsibility: The Rise of Due Diligence Laws and their Limits", *Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper* No. 2023-20 (2023): 3, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4597829.

839 Corporate's due diligence obligations cover identifying and addressing any adverse impacts that their operations, supply chains and other business relationships may have on individuals, the environment and the society; OECD, *OECD Guidelines for Multinational Enterprises* (OECD Publishing 2023).

840 *Ibid.*

responsibility, rather than a duty, to respect human rights.[841] In terms of state's obligations – the outcome is two-fold – UN Guiding Principles on Business and Human Rights, not being legally binding for the states, basically affirmed states' obligation[842] to protect human rights, which also covers establishing preventive mechanisms and sanctions for businesses by which the state ensures that the latter comply with due diligence requirements and provide redress for potential victims.[843] OECD Guidelines, on the other hand, are legally binding for their signatory states.[844]

Therefore, the mentioned international soft-law instruments primarily encouraged companies to respect human rights standards, albeit in a voluntary and non-binding manner. As C. Bright points out, "[..] main limitation lies in their non-binding nature, which means that they do not create new obligations for states or businesses."[845] However, it became evident that voluntary "modus operandi" simply does not serve its purpose. In 2019, the Corporate Human Rights Benchmark evaluated 200 of the world's largest publicly traded companies.[846] The results of the latter research are evident, stating: "In aggregate, the 200 companies are painting a distressing picture. Most companies are scoring poorly, and the UN Guiding Principles on Business and Human Rights (UNGPs) are not being implemented."[847] As M. Platise highlights, "[h]alf of the [...] companies did not fulfil a single human rights due diligence criterion by 2019."[848] Such evident lack of sufficient control over corporate actions in terms of their harm to human rights and the environment led several European states – in particular, France and Germany, which we analyse in more detail below, to start implementing the UNGP and the OECD Guidelines, turning soft-law based recommendations to companies under international law into legally binding obligations under national law, i.e. governments mandating (and not merely encouraging) companies to exercise due diligence. As scholars describe, there was a shift from soft law to hard law in the field

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841 According to Guiding Principle 15 of the UNGPs: "In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including: (a) a policy commitment to meet their responsibility to respect human rights; (b) a human rights due-diligence process to identify, prevent, mitigate and account for how they address their impact on human rights; (c) processes to enable the remediation of any adverse human rights impact they cause or to which they contribute."

842 Foreseen in legally binding international treaties to which countries are parties to, UNGP with commentary (n 5), Principle No 1.

843 *Ibid.*

844 OECD, *OECD 50th Anniversary Vision Statement* (25 May 2011) C/MIN(2011)6.

845 Claire Bright, "Creating a Legislative Level Playing Field in Business and Human Rights at the European Level: Is the French Law on the Duty of Vigilance the Way Forward", MWP 2020.01 (2020): 5, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3262787.

846 Corporate Human Rights Benchmark (CHRB), '2019 Key Findings - Across sectors: Agricultural Products, Apparel, Extractives & ICT Manufacturing', https://www.corporatebenchmark.org/sites/default/files/2019-11/CHRB2019KeyFindingsReport.pdf.

847 *Ibid.,* 3.

848 Platise, *supra note*, 838: 12; Bright, *op cit.*, 6.

of business and human rights.[849] In the words of Pietrancosta: "we have come to know that CSR norms of conduct no longer lie outside the law, but here they have made a significant breakthrough in our company law."[850]

As we will see, the core idea of due diligence obliges companies to prevent, mitigate and redress adverse effects that their operations and those of their suppliers may have on human rights and the environment. Thus, positive legal obligations are being created, rather than solely relying on a tort-based approach, which retrospectively applies liability once the damage is done.

3.2. National approach

3.2.1. French Due Diligence Law

Within the EU, France was the first country to adopt mandatory human rights due diligence obligations with the enactment of French Law no. 2017-399 of 27 March 2017 on Duty of Vigilance.[851] The French Commercial Code since then includes two new articles, L 225-102-4 and L 225-102-5.

As scholars describe, the French DD Act is considered as "[t]he best known and most far-reaching"[852] regime of mandatory human rights due diligence, and actually the only law to be "both enacted and implemented that incorporates such due diligence into domestic law".[853] In fact, as described by Polombo, the due diligence obligation as such "[..] is the first ever duty established by a law of general application requiring multinational enterprises to monitor the human rights abuses of their supply

849 *Ibid.*, 6.

850 A. Pietrancosta, "Codification in Company Law of General CSR Requirements: Pioneering Recent French Reforms and EU Perspectives", *ECGI Law Working Paper* No 639/2022 (2022): 1, https://ssrn.com/abstract=4083398or http://dx.doi.org/10.2139/ssrn.4083398.

851 Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (Loi de Vigilance) JORF n° 0074, adopted on 21 February 2017, entered into force on 28 March 2017.

852 OHCHR, 'UN Human Rights "Issues Paper" on legislative proposals for mandatory human rights due diligence by companies' (June 2020): 3, https://www.ohchr.org/Documents/Issues/Business/MandatoryHR_Due_Diligence_ Issues_Paper.pdf); see also Lise Smit, Claire Bright, Robert McCorquodale, Matthias Bauer, Hanna Deringer, Daniela Baeza-Breinbauer, Francisca Torres-Cortés, Frank Alleweldt, Senda Kara, Camille Salinier and Héctor Tejero Tobed for the European Commission DG Justice and Consumers, Study on Due Diligence Requirements Through the Supply Chain (24 February 2020): 19, https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd- 4c83-11ea-b8b7-01aa75ed71a1/language-en.

853 Elsa Savourey, Stephane Brabant, "The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption", *Business and Human Rights Journal* 6,1 (2021): 141, https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/french-law-on-the-duty-of-vigilance-theoretical-and-practical-challenges-since-its-adoption/0398716B2E8530D9A9440EEB20DB7E07.

chains."[854] Pietrancosta adds that "[f]or a number of years, France has concentrated intensely on this topic of increasing interest to the rest of the world and has become for many an important CSR jurisprudential model."[855] As it was described above, since SCL as a concept was not, in principle, defined by law before, France basically took the pioneering step to foresee this concept into legislation and distinguished itself as the first country to "[..] experiment with such broad and general mandatory legal requirements."[856] The pricipal outcome that should be mentioned is that French DD Act does not make companies directly liable for human rights violations – instead, it imposes an obligation on certain large corporations to set up, implement and publish a "vigilance plan".

3.2.1.1. Scope of application (rationae personae)

In order to scope which legal companies are triggered by the French DD Act, we must rely on three criteria: the company shall (i) be registered in France (this criterion includes French subsidiaries even if the group itself is foreign), (ii) have a prescribed corporate form, and (iii) have a certain number of employees.[857] More specifically, the law applies only to French companies that cover the following parameters: *(i)* the company and its direct or indirect subsidiaries established in France employ 5,000 or more employees, or *(ii)* the company and its direct or indirect subsidiaries established anywhere in the world employ 10,000 or more employees.[858] As Barsan points out, in terms of application, if the parent itself complies with the law on a duty of vigilance, the subsidiaries that individually exceed the above-mentioned thresholds are deemed to also comply with their obligations.[859] Meaning that "[t]he law adopts a group approach towards the duty of vigilance."[860]

Regarding the types of companies, it is worth noting that French DD law does not specifically mention which corporate forms are covered. As scholars conclude, they can only be identified based on the location of the vigilance law's provisions in the French commercial code.[861] Therefore, due diligence obligations are generally applicable only to large corporations. As Platise indicates, the most probable rationale

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854 Palombo, *supra note*, 831, 275.

855 Pietrancosta, *supra note*, 850: 3.

856 *Ibid*, 4.

857 Savourey, Brabant, *supra note*, 853: 142

858 Penelope Bergkamp, "Supply Chain Liability: The French Model", *Corporate Finance Lab Legal Aspects of Corporate Finance and Insolvency* (2017), https://corporatefinancelab.org/2017/03/11/supply-chain-liability-the-french-model/.

859 I. M. Barsan, "Scope and private enforcement of corporate sustainability due diligence requirements - a comparative approach", *European Company Case Law* 1,1 (2023): 35, https://doi.org/10.5771/2752-177X-2023-1.

860 *Ibid.*

861 *Ibid.,* 144.

for such legislative decision is a belief has prevailed that large companies have more resources and capacity to comply with due diligence requirements and can bring about widespread social change, whereas small and mid-sized companies with little market power may be at risk of losing access to foreign suppliers if the latter are unwilling to accept the new due diligence requirements.[862] In terms of jurisdiction, it is evident that the French DD Act applies to companies that fall under France's territorial jurisdiction, *i.e.*, the company's seat is the prevailing criterion.[863]

What is crucial in terms of the scope of application is that the due diligence obligation covers not only the ownership-based "circle", i.e., subsidiaries, but also the entire supply chain. Therefore, it applies not only when the parent company outsources its production or services through an establishment in other countries, but also when the same parent company has established a business relationship with another unrelated company abroad.[864] Therefore, in this regard, as Brasan elaborates, the scope of application is relatively broad and extends well beyond French territory, covering non-French subsidiaries and supply chains located outside of France as well.[865]

3.2.1.2. Specific due diligence obligations (rationae materiae)

Generally speaking, the French DD Act imposes a duty of *vigilance* on large companies to **prevent** serious violations of both *(i)* human rights and fundamental freedoms and *(ii)* serious environmental damage in their supply chains. For that aim, the French DD Act requires that companies take all steps in their power to reach a particular result (*obligation de moyens*) rather than requiring them to reach that particular result (*obligation de résultat*).[866] Therefore, it is a wide-scope SCL, as it was established in the previous chapter.[867] The mechanism of the act is not to impose a direct liability for corporations for the violations at the level of certain companies within the supply chain, as it would seem under tortious liability analysed in Chapter 2 of the Thesis, but to enforce the latter to produce and implement so-called "vigilance plan".[868]

Therefore, it can be described that the *first* obligation is to establish the vigilance plan. The scope of this plan is specified in Art. 1 of the French DD Act – the latter shall indicate: *(i)* a mapping that identifies, analyses and ranks risks, *(ii)* procedures to regularly assess, following the risk mapping, the situation of subsidiaries, subcontractors or suppliers with whom the company maintains an established commercial relationship, *(iii)* appropriate action to mitigate risks or prevent serious violations, *(iv)* an alert

862 Platise, *supra note*, 838: 15-16.

863 Under certain circumstances, French DD Act may be applicable also to foreign companies operating in France (territorial principle).

864 Palombo, *supra note*, 831, 275.

865 Barsan, *supra note,* 859.

866 Savourey, Brabant, *supra note*, 853: 151.

867 Chapter 2.2.1 of the Thesis.

868 Bergkamp, *supra note,* 858: 4.

mechanism that keeps track of existing or actual risks, which is to be developed in partnership with the trade union representatives of the company concerned and *(v)* a monitoring scheme to follow up on the measures implemented and assess their effectiveness.[869] Thus, as Pietrancosta rightly points out, "French duty of vigilance is more than a simple duty of care, i.e. a duty not to harm, but includes a procedural requirement to take proactive and demonstrable steps."[870] In this regard, it is essential to note that, to manage their risks, the French DD Act requires parent companies to include specific provisions in agreements entered into with suppliers and subcontractors.[871]

Secondly, companies affected shall implement vigilance plans, formulated through stakeholder participation, for their own operations, as well as the operations of all subsidiaries or companies they control. As Bright concludes, such obligation "[…] represents an ex-ante prevention plan (rather than a mere ex-post reporting plan), whereby the company must 'know and show' how they go about respecting human rights in their activities and throughout their supply chain."[872] However, the French DD Act is silent on how companies are to implement the vigilance plan as well as how any such implementation is supposed to be evaluated.[873]

In practice, it remains rather unclear what constitutes sufficient implementation, and it would be safe to assume that this is a case-by-case situation. Some guidance of varying comprehensiveness has been prepared by certain stakeholders presenting their interpretation of the French DD Act – one of the more established guidance is "Vigilance Plans Reference Guidance" prepared by "SHERPA" NGO.[874] As scholars identify, the implementation obligation is likely to fuel debates, especially in front of the courts, which will have to assess whether a vigilance plan has been effectively implemented.[875]

The *third* obligation for triggered companies is to publish a vigilance plan and a report on its effective implementation. This, according to French DD Law, essentially means that a plan and report on its effective implementation should be made public (in the sense of being made accessible to the public) and included in the company's annual management report.[876]

3.2.1.3. Sanctions for breach of due diligence obligation: liability mechanism

French DD Act presents different outcomes that parent companies might face for

869 Art. 1 of French DD Act.

870 Pietrancosta, *supra note*, 850: 28.

871 Barsan, *supra note,* 859*:* 36.

872 Bright, *supra note*, 845: 10.

873 Bergkamp, *supra note*, 858: 5.

874 Sherpa, 'Vigilance Plans Reference Guidance' (2019).

875 Savourey, Brabant, *supra note*, 853: 146.

876 *Ibid.*

non-compliance with the latter. First, parent companies that are triggered may be put under formal notice to establish, publish, and implement a vigilance plan by any interested parties if they have not yet complied with this obligation. It is evident that such a measure could be considered precautionary, yet unrelated to possible damages that may have occurred.

Stakeholders may also seek injunctive relief in the scope of summary proceedings if their formal notice is left unanswered for a specified period, with the possibility of applying a fine to parent companies due to continued non-compliance. The requisite of presenting a formal notice before initiating legal proceedings in court presents the legislator's eagerness to keep the "dialogue phase" as it gives a chance for parent companies to evaluate their activities and possible negative consequences and address them. The French DD Act also provides for a remediation mechanism, consisting of a civil liability action, in the event of damage.

Different from other mentioned due diligence mechanisms[877] , which are primarily based on reporting obligations, thus having a generally limited effect, the French Due Diligence Act goes forward and foresees the imposition of a civil liability regime for companies when they fail their due diligence obligations and the latter results in harm. Generally, it is understood that the triggered company will be required to remedy the damage that could have been prevented by the execution of its due diligence obligations.[878]

Art. L225-102-5, which reflects Art. 2 of the French DD Law, foresees that a company can incur civil liability under the conditions of Art. 1240 and 1241 of French CC, in case its failure to comply with the due diligence obligations[879] causes damage. Thus, the liability of the company is based on general tort norms (that reflect both faulty actions and negligence). Strictly speaking, this means that a company subject to due-diligence obligations can be liable if the non- or poor execution of the latter results in damage to particular persons. Since the norm refers to general liability rules, three conditions —fault, damage, and a causal link —shall be established for each case. In this respect, failing to design or proceeding with an inadequate vigilance plan could be constitutive of a fault if claimants can prove that it was the cause of the damage. However, if the company made the best endeavours to prepare and implement a vigilance plan, taking every reasonable step to avoid causing or contributing to possible damage, and the latter still occurred, the company, in principle, should not be liable.[880]

From an enforcement perspective, such a liability mechanism creates additional opportunities for victims of harm that have occurred, while also leaving some classic burdens that often lead to parent companies escaping liability in most cases.

First, the French DD Act civil liability mechanism enables lifting the corporate

877 Such as UK Modern Slavery Act or Dutch Child Labour Due Diligence Act.

878 Savourey, Brabant, *supra note*, 853: 151.

879 Art. 1 of the French DD Act; Art. L225-102-4 of French Commercial Code.

880 Bright, *supra note*, 845: 15.

veil,[881] that is, as it was discussed in previous chapters, is a rare exception in most jurisdictions. Since, according to the general corporate law principle of separability, each entity within the group is considered an individual, the parent company is generally excluded from liability for adverse human rights or environmental impact that arose at the level of the subsidiary. Even more – when the damage occurs at the levels of suppliers or other players in the same chain.

In this regard, the corporate due-diligence obligation and civil liability for non- or poor implementation of the latter extend beyond. Since parent companies have legal duties, the parent's liability is based on its actions in the same regard. Thus – the basis to "lift the veil" stems directly from the statutory law. Such civil liability mechanism, as C. Bright describes, "[..] circumvents the obstacle of the corporate veil and captures the economic reality of the multinational corporation."[882]

Secondly, unlike any tort law duty that a parent company may owe to third parties, the French DD Act obligation explicitly refers to extraterritorial human rights and environmental abuses.[883] Thus, it means that statutory law creates an explicit supervisory duty of a parent company over the entire supply chain, which is of an extraterritorial nature. Therefore, it evidently tackles possible legal obstacles related to different national tort law provisions for making a parent liable.[884]

On the other hand, however, under this liability regime, claimants would still face huge burden to prove parent's insufficient actions – they will have to, first, ground the applicability of French DD Act for that particular case and, second, they will need to establish all three liability conditions under general tort law, *i.e.* claimant will have to, *first*, show that parent company breached its obligations under French DD Act, *second*, prove that precisely because of such a mentioned breach of due-diligence obligations, subsidiary or business partner its supply chain was able to abuse health and/or environmental rights and, *third*, establish that the first two resulted in damage suffered. To put it simply, claimants must demonstrate that they suffered damage directly as a result of a fault on the part of the parent company.[885] However, there are particular uncertainties in the practical application of such burden of proof, considering the scope of due diligence obligations. As scholars state, for example, it is not explicitly clear under which conditions, non or poor execution of monitoring plan would contribute to the perpetration of human rights or environmental abuses or, for instance, if a parent company that complies with its general obligation to have a monitoring plan, could be liable for failure to ensure its application in the supply chain if affiliates disregard it.[886]

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881 S. Brabant and E. Savourey, «Loi sur le devoir de vigilance, pour une approche contextualisée», 50 *Revue Internationale de la Compliance et de l'Ethique des Affaires* (2017): 6, https://www.erudit.org/fr/revues/mi/2020-v24-n2-mi05593/1072645ar/.

882 Bright, *supra note*, 845: 15.

883 Palombo, *supra note*, 831: 276,

884 See, for example, chapter 1.2.2.

885 *Ibid.*

886 Savourey, Brabant, *supra note*, 853: 152.

In terms of causal link, scholars also remain sceptical, highlighting the lack of difference from tort law cases as *Vedanta* by stating that "it may be almost impossible"[887] for the victims of particular human or environmental rights victims to prove the causal link between a parent company's failure to monitor due diligence requirements of its supply chain affiliates and the damage suffered. Reasons for this are rather simple and already established in cases described in Chapter 2, the main one being that victims are usually unable to access sensitive information that would establish a relevant causal link. Of course, considering that parent companies under the French DD Act have active obligations towards their supply chain affiliates creates a higher connection between them by default; however, difficulties then arise when trying to show that specific situations meet the criteria to consider parent liable.

In general, as Savourey and Brabant rightly point out: "The more remote in the supply chain the damage, the harder it may be for the claimant to prove that the damage has occurred as a result of a breach of the Vigilance Obligations and that there is a causal link between such breach and the damage." (marked by the author).[888]

The argument was raised that the French DD Act "[c]onstitutes a missed opportunity with regards to effective access to justice in this respect"[889], comparing the level of burden of proof similar to tort cases in the field of corporate human rights abuses that, apart from recent famous precedents discussed in the previous chapter, present very limited opportunities for victims. Other scholars also agree with this approach – for example, D. Palombo states that even though the French DD Act could be considered as one of the most advanced examples of applying liability for corporate abuse of human and environmental rights, it nevertheless fails "[..] to guarantee effective remedies, because victims have to overcome an extremely high burden of proof to hold multinational enterprises to account."[890] Palombo also agrees with this approach by stating that: "Although it is theoretically possible to hold a parent company accountable for the extraterritorial human rights abuses committed by its foreign subsidiaries in France [..], the burden of proof on the victims is so high that, so far, in no transnational case has a parent company been held liable."[891]

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887 Delpech Xavier, 'Bientôt Un Devoir de Vigilance à La Charge Des Sociétés Mères et Des Donneurs d'ordre' (2015) Dalloz Actualité.

888 Savourey, Brabant, *supra note*, 853: 152.

889 C. Bright, 'The Civil Liability of the Parent Company for the Acts or Omissions of Its Subsidiary: The Example of the Shell Cases in the UK and in the Netherlands', in A. Bonfanti (ed.), *Business and Human Rights in Europe* (2018):212, https://www.academia.edu/36926658/The_Civil_Liability_of_the_Parent_Company_for_the_Acts_or_Omissions_of_Its_Subsidiary_The_Example_of_the_Shell_Cases_in_the_UK_and_in_the_Netherlands.

890 Palombo, *supra note*, 831: 266.

891 *Ibid*., 276.

3.2.1.4. Nature of liability

What shall also be addressed here is the nature of such liability regime, i.e. whether it should be understood as a primary liability of the parent company (for its own actions/omissions) or as a liability for the actions of the third parties (subsidiaries, suppliers, etc.). German scholar A. Vacaflor, describing the French DD Act, states that it can "[..] contribute to harden corporate accountability by challenging the "separation principle" of transnational companies."[892] Once the French DD Act came into force, opponents also raised an argument that the French DD Act established a new principle of vicarious liability for the parent company that would be held liable for damages caused by a separate entity (subsidiary, subcontractor or supplier)[893], indirectly implying that this law would interrupt into the core principle of legal separability between companies. However, the French Constitutional Council provided clarification[894] and rejected such reasoning, stating that the principle of liability that forms the basis of civil liability, negligence and tort regime is in itself very broad and unspecific.

Thus, the fact that French DD act specifically forwards to Art. 1240 and 1241 of French CC, prove that such liability regime is not vicarious but rather presents a primary liability of the parent company. This means that the latter itself will incur personal liability whenever the failure to comply with their *own* obligations under the French DD Act can be linked to the harm suffered by the victim.[895] Therefore, the extraterritorial liability of the French DD Act is based on a duty of care and a due diligence obligation that parent companies owe concerning the torts committed by their affiliates (subsidiaries, contractors, etc.).

3.2.1.5. Notorious precedents

As previously described, the French DD Law provides for a civil liability regime, according to which companies that fail to comply with this law can be sued and ordered to compensate for the loss retrospectively, i.e., the loss that could have been avoided if the obligations under French DD Law had been fulfilled. To date, several

892 Schilling-Vacaflor, *supra note*, 833: 109.

893 S. Cossart, J. Chaplier and T. Beau de Loménie, 'The French Law on Duty of Care: a Historic Step Towards Making Globalization Work for All' (2017) *Business and Human Rights Journal*, 2 (2017): 319, https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/french-law-on-duty-of-care-a-historic-step-towards-making-globalization-work-for-all/7C85F4E2B2F7DD1E1397FC8EFCFE9BDD.

894 Décision no. 2016-741 DC du 8 Décembre 2016 Loi relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2016741DC2016741dc.pdf.

895 S. Cossart, J. Chaplier and T. Beau de Loménie, "The French Law on Duty of Care: a Historic Step Towards Making Globalization Work for All", *Business and Human Rights Journal*, 2 (2017): 321, https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/french-law-on-duty-of-care-a-historic-step-towards-making-globalization-work-for-all/7C85F4E2B2F7DD1E1397FC8EFCFE9BDD.

cases have been brought to court based on this legal basis; however, no decisions have been rendered.[896] As an alternative, the French DD Act also provides for an injunctive relief mechanism by which the court can order companies falling under the obligation to comply with their respective duties. To satisfy the burden for such a mechanism, the plaintiff shall first send the relevant company a formal notice demanding that it complies with its obligations (i.e., to correctly establish and implement a vigilance plan. Only in the case when a said company does not comply within a dedicated three-month period, the notifying party can then file an injunction request.

The first famous company in France to be sued for non-compliance with the French DD Act was the international oil and gas company "Total". The first litigation was started in 2019 by French and Ugandan NGOs.[897] As the first-ever case against a transnational company under the newly adopted French DD Act, the case received much public attention – for example, up until this day, over 25 000 people signed the online "See you in Court, Total!" petition, although being a symbolic gesture, but calling international community into action.[898]

The target of this case was Total's plans to drill many oil wells in Western Uganda, many of them in a national park, and to construct a 1445-km-long pipeline from Uganda to Tanzania. Thus, NGOs argued that such activity would expose up to 50,000 (local inhabitants), putting in danger their health as well as resulting in loss of their livelihoods and biodiversity.[899] Before initiating legal proceedings, the claimants issued Total a formal demand to revise its vigilance plan and to implement that plan for the oil project in Uganda. Total rejected the charges after a three-month legal deadline, allowing the complainants to take Total to court. Total's response in this case was not surprising – the parent company relied on the separation principle, claiming that its subsidiary within the group, responsible for relocating rural communities in Uganda, is an autonomous entity. On 28 February 2023, the Paris Civil Court[900] dismissed a fast-track lawsuit, indicating that the case should be examined in depth in a standard trial. Court had found that the company had established a so-called vigilance plan "[..] comprising the five items required by the duty of vigilance law, in sufficient detail so as not to be considered purely summary."

Another case based on French DD Law against "Total" was brought to court in 2020 – here, several French NGOs, along with more than a dozen French local governments, tried to seek a court order forcing "Total" to implement a proper due diligence strategy that 1) identifies the risks resulting from gas emissions resulting from the use of goods and services that Total produces, 2) properly acknowledges the risks of

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896 See: "Duty of vigilance radar" https://vigilance-plan.org/court-cases-under-the-duty-of-vigilance-law/.

897 Friends of the Earth (23 October 2019) Oil company Total faces historic legal action in France for human rights and environmental violations in Uganda. https://www.foei.org/news/total-legal-action-france-human-rights-environment-uganda.

898 https://www.totalincourt.org.

899 Schilling-Vacaflor, *supra note*, 833: 117.

900 Paris Civil Court, Feb. 28, 2023, No 22/53942.

serious climate-related harms and 3) undertakes action to ensure the company's activities align with climate goals of the Paris Agreement. As in the first case, plaintiffs provided the company with a formal notice, which included a timeline for implementing a proper vigilance plan. According to the claim that followed, the plaintiffs state that "Total" did not provide sufficiently detailed information in its vigilance plan for reducing emissions. After a few years of battle on jurisdiction, in July 2023[901], the pre-trial judge dismissed the lawsuit for procedural reasons. The Paris First Instance Court also refused to examine the impact of Total's activities on climate change.

Another two examples where the Paris Civil Court dismissed a call for injunction – "EDF" case[902] and "Suez" case[903] present mostly identical legal reasoning - because no prior formal notice had been sent to the company, targeting vigilance plan, relevant for the moment when the decision is being rendered. In simple terms, such decisions might create paradoxical consequences. Given the time it usually takes between filing an injunction request and the hearing, the Paris court will most likely never decide on an injunction request before the defendants decide to amend their vigilance plan and publish it. In this regard, plaintiffs are essentially put in a position where they are required, in principle, to send a new notice that targets the most recent vigilance plan, thereby restarting the entire proceedings. As one would suggest, such an approach taken by the French Civil Court so far in all 4 cases where the decision was rendered signals that the aim of French DD Law is not to give a legal basis for litigation but rather to enforce companies and their stakeholders to work collaboratively in preparing the vigilance plan that would adequately address human rights and environmental challenges.

At the same time, all four decisions demonstrate a high reluctance on the part of the courts to interfere in companies' decision-making processes. This way, the court attempts to balance the cornerstone principle of corporate autonomy with the new obligation of the latter to prevent adverse human rights and environmental impacts associated with their business, in the form of due diligence, i.e., in a proactive and not retrospective manner (as with tortious liability). High interest remains for cases based on civil liability, i.e., for losses that could have been avoided if the obligations under the French DD Act had been fulfilled.

The apparent conclusion from these precedents is that the application of the French DD Act remains vague. As for injunction proceedings, as already established, in all current cases, the court decided that the claimants' injunction requests failed because they did not trigger the same issues (covered by vigilance plans) that were relevant to the proceedings. If appellate courts were to approve such reasoning, it would hardly be questionable whether such a mechanism is favourable for the plaintiffs. Regarding civil liability applications, no court decisions have been made yet. Thus, the interpretation of such liability remains unclear.

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901 Paris Civil Court, July 6, 2023, No 22/03403.

902 Paris Civil Court, Nov. 30, 2023, No 20/10246.

903 Paris Civil Court, June 1, 2023, No 22/07100.

3.2.2. German due diligence law

Another country to adopt due diligence regulation was Germany – in 2021, after more than a 10-year public debate[904], the Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Global Supply Chains, also known as the Supply Chain Due Diligence Act (**German DD Act**).[905] The act entered into force on 1 January 2023. As J. Lieder and S. Meyer highlight, "[w]hile [..] traditional risk management addresses foremost economic and legal risks, the new Supply Chain Due Diligence Act [..] causes a shift in paradigm by installing duties to manage environmental and human rights risks.[906] To add a bit of context, as Zumbansen states, the German DD Act "[g]rew out of the acknowledgement that only a fraction of German companies – between 13% and 17% – were making efforts to scrutinize the human rights impacts of their global networks."[907] As described below, this monumental, especially considering Germany's conservative corporate law approach, regulation in principle follows the French example – the law establishes mandatory due diligence obligations for corporations and requires German companies to protect human rights and the environment in the entire supply chain.[908] At the same time, in terms of scope, as Barsan points out, the German DD Act is a bit different as it does not impose due diligence obligations in a group context but imposes a due diligence obligation for the supply chain.[909]

3.2.2.1. Scope of application (rationae personae)

Originally, the German DD Act triggered companies, irrespective of their legal form, that trigger two criteria: *first*, they shall have their central administration,

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904 The background of adopting German DD Law is greatly summarized by M. Krajewski, K. Tonstad and F. Wohltmann, see Markus Krajewski, Kristen Tonstad and Franziska Wohltmann, "Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?", *Business and Human Rights Journal* 6,3 (2021): 552-553, https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/mandatory-human-rights-due-diligence-in-germany-and-norway-stepping-or-striding-in-the-same-direction/85815FE5F1D1F64208B0068B7FBBECF8.

905 Gesetz über die unternehmerischen Sorgfaltspflichten zur Vermeidung von Menschenrechtsverletzungen in Lie- ferketten (Lieferkettensorgfaltspflichtengesetz – LkSG), BGBl. I, 2959 ff., https://www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supply-chains.pdf.

906 Lieder, Meyer, supra note, 526: 45.

907 P. Zumbansen, "Global Value Chain Legislation, Modern Slavery, Climate Change and Finance: Lessons from the European Corporate Sustainability Due Diligence Directive ('CSDDD), *McGill SGI Research Papers in Business, Finance, Law and Society Research Paper* 2024, 8 (2024): 9, https://ssrn.com/abstract=4784608 or http://dx.doi.org/10.2139/ssrn.4784608.

908 Giesela Rühl, "Cross-border Protection of Human Rights: The 2021 German Supply Chain Due Diligence Act**"** (2022), https://ssrn.com/abstract=4024604.

909 Barsan, *supra note,* 859*:* 38.

principal place of business, their administrative headquarters or statutory seat in Germany and *second*, they employ at least 3,000 employees.[910] The same rules apply to foreign companies that have a branch in Germany.[911] As of 1 January 2024, the threshold of 3,000 employees was lowered to 1,000, as per the German DD Act. In this regard, The German DD Act does not apply to foreign companies without a main seat or domestic branch office in Germany, even if they supply goods and services on the German market.[912] Therefore, the element connecting a company to the state is required, as in France. In terms of numbers, the German DD Act offers a more flexible approach, as the number of employees required to trigger it is significantly lower than in France, especially since 2024. According to relevant data, since 2024, the German DD Act has applied to approximately 5,000 companies, compared to up to 1,000 before the latest changes.[913] Another flexibility of the German DD Act, compared to the French one, is that the former also covers branches of non-German companies. In terms of the types of legal entities covered, the German DD Act is also more flexible than its French counterpart. As Barsan rightly compares, the German DD Act uses the term "undertaking" (*Unternehmen*) and not "company" (*Gesellschaft*), which in principle means that all legal entities that match the above-mentioned criteria are triggered, irrespective of legal form,[914] while French DD Act is only applicable to joint-stock corporations.[915]

The same as in France, the German DD Act is applicable to the whole supply chain – the latter defines supply chain as including "[..] all steps in Germany and abroad that are necessary to produce the products and provide the services, starting from the extraction of the raw materials to the delivery to the end customer [..]".[916] That includes direct and indirect suppliers. In essence, the whole due diligence mechanism is two-level – *first*, subsidiaries shall implement the due diligence obligations due to the extended scope of their own business based on the obligation of the parent company[917] and *second*, directly affected companies within the supply chain shall enforce the requirements of German DD also concerning their suppliers in the supply chain.[918]

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910 Art. 1, German DD Act.

911 *Ibid.*

912 Markus Krajewski, Kristen Tonstad and Franziska Wohltmann, "Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?", *Business and Human Rights Journal* 6,3 (2021): 7, https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/mandatory-human-rights-due-diligence-in-germany-and-norway-stepping-or-striding-in-the-same-direction/85815FE5F1D1F64208B0068B7FBBECF8.

913 Federal Ministry for Economic Cooperation and Development, 'Supply Chain Law FAQs', https://www.bmz.de/ resource/blob/60826/89631a44cf2ac8ca0d7dc45c6b0ed197/supply-chain-law-faqs.

914 Lieder, Meyer, *supra note*, 526: 56.

915 Barsan, *supra note,* 859*:* 39.

916 Art. 2 (5), German DD Act.

917 Art. 2(6)(3), German DD Act.

918 Lieder, Meyer, *supra note*, 526: 57.

However, Krajewski and Tonstad argue that the German DD Act's coverage of subsidiaries and supply chains is problematic considering international standards since it is not clear whether the act covers the activities of subsidiaries that are not part of the parent company's supply chain, i.e. when they do not contribute to the production of the goods and supply of services of the parent company.[919]

In terms of the substantive scope of application of the German DD Act, it provides a broad definition of human rights risk. Section 2 essentially defines it as a situation that may, with a sufficient probability, result in a violation of internationally recognised human rights.[920] By directing the scope of application to international conventions, the act describes various possible violations of human rights, including illegal labour, workplace discrimination, and unsafe working conditions.[921] In terms of environmental risks, the German DD Act provides for a limited scope – the relevant risk is only triggered when it is related to the Minamata Convention on Mercury (2013), the Stockholm Convention on Persistent Organic Pollutants (2001), or the Basel Convention on Hazardous Wastes (1989).[922]

3.2.2.2. Specific due diligence obligations (rationae materiae)

In comparison to the French DD Act, the German one is more detailed and, at the same time – narrower. While the German DD Act triggers human rights and environmental risks, the French one, as mentioned, generically refers to violations of human rights and fundamental freedoms, bodily injury, environmental damage or health risks.[923] Even though, in terms of implementation, as provided below, the act requires relatively similar things as the French one.

As G. Rühl rightly points out, the German DD Act[924] foresees two main goals: firstly, to minimize human rights-related and environmental risks and, secondly, to end violations of human rights-related and environmental obligations.[925] Following

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919 Markus Krajewski, Kristen Tonstad and Franziska Wohltmann, "Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?", *Business and Human Rights Journal* 6,3 (2021): 553, https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/mandatory-human-rights-due-diligence-in-germany-and-norway-stepping-or-striding-in-the-same-direction/85815FE5F1D1F64208B0068B7FBBECF8.

920 Art. 2, German DD Act.

921 *Ibid*., Markus Krajewski, Kristen Tonstad and Franziska Wohltmann, "Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?", *Business and Human Rights Journal* 6,3 (2021): 3, https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/mandatory-human-rights-due-diligence-in-germany-and-norway-stepping-or-striding-in-the-same-direction/85815FE5F1D1F64208B0068B7FBBECF8.

922 Art. 2 (3), German DD Act.

923 Barsan, *supra note,* 859: 39.

924 Art. 3 (1), German DD Act.

925 Rühl, *supra note*, 908: 2.

this aim, the act foresees specific obligations for triggered enterprises.[926] Those are as follows: *(i)* establishing a risk management system[927], *(ii)* designating the responsible person(s) in the enterprise[928], *(iii)* performing regular risk analysis[929], *(iv)* issuing a policy statement[930], *(v)* laying down preventive measures in enterprise's own is an area of business[931] as well as vis-à-vis direct suppliers[932], *(vi)* taking remedial action[933], *(vii)* establishing a complaints procedure[934], *(viii)* implementing due diligence obligations with regard to risks at indirect suppliers[935] and (ix) documenting[936] and reporting[937] As it is clear from the scope itself, German DD Act, at least from the first glance, very extensive obligations. For instance, if we analyse Art. 2(5), defining the scope of application, "supply chain" as such covers "[..] all products and services of an enterprise" and "[..] includes all steps in Germany and abroad that are necessary to produce the products and provide the services" – in simple terms, the act aims to trigger the process from extracting the materials to the customer using the end product/service, while some of these actions are covered by direct/indirect suppliers. Thus, German enterprises are required to "[..] watch out for what other, legally independent companies are doing."[938] The idea, from the perspective of the conservative German approach to corporate separability, is already groundbreaking.

A more detailed analysis is required for particular due diligence obligations. *First*, the law indicates that an appropriate risk management system shall be established across the supply chain[939] and following this – risk analysis concluded regularly. Although of a particularly generic nature, risk management obligation is aimed to ensure that corporations triggered by the law can, first of all – *identify* relevant human rights and environmental risks, and second – once the latter are identified – *end* or *minimise* the possible exposure of such risks if the enterprises under that supply chain are responsible for it.[940] Such an obligation naturally entails establishing a relevant operational system to dedicate monitoring of possible risks – for instance, appointing a

926 Articles 4-10, German DD Act.

927 Art. 4 (1), German DD Act.

928 Art. 4 (3), German DD Act.

929 Art. 5, German DD Act.

930 Art. 6 (2), German DD Act.

931 Art. 6 (1) and 6 (3), German DD Act.

932 Art. 6 (4), German DD Act.

933 Art. 7 (1) – 7 (3), German DD Act.

934 Art. 8, German DD Act.

935 Art. 9, German DD Act.

936 Art. 10 (1), German DD Act.

937 Art. 10 (2), German DD Act.

938 Rühl, *supra note*, 908: 3.

939 Art. 4 (1), German DD Act.

940 Art. 4 (2), German DD Act.

human rights officer.[941]

The broad scope of risk management is evident, as enterprises are obligated to give due consideration to everyone "[..] who may otherwise be directly affected" by the economic activities of the supply chain.[942] Risk analysis obligation, stemming directly from risk management, essentially requires corporations to dedicate sufficient resources to understanding which activities might create negative exposure. The criteria for risk analysis are foreseen by the act itself, stating that enterprises shall determine their risk analysis according to *(i)* the nature and extent of business activities, *(ii)* the ability of that enterprise to directly influence the company, that is primarily responsible for the risks[943], *(iii)* severity, reversibility and the probability of the risks and *(iv)* nature of the causal contribution of enterprises within the supply chain to possible risks. Risk analysis presupposes that enterprises evaluate both existing business processes (e.g., production lines) and, especially, new ones to identify potential negative exposures.[944]

Second, once the relevant risks are identified, preventive measures shall be established in accordance with the German DD Act.[945] The first obligation under this article is establishing a policy statement – a somewhat identical obligation to the French vigilance plan. Such a policy statement shall outline the relevant strategy, as well as a procedure for handling human rights and environmental risks across the supply chain.[946] Preventive measures shall cover both the parent company's business and direct suppliers. What is interesting, in terms of obligations related to direct suppliers, the act foresees that specific processes shall be set on how the supplier shall be selected[947], as well as indicates that contractual assurances from a direct supplier, indicating that the latter will comply with the human rights-related and environment-related standards required by the enterprise shall also be present.[948] Thus, contractual assurances and policy statements that were used to show the proximity of KiK – the contractual buyer

941 Art. 4 (3), German DD Act.

942 Art. 4 (4), German DD Act.

943 As it will be analysed in later chapters of the Thesis, such intervention into the activities of another separate legal entity is critical feature in showing a switch of understanding legal separability and shareholder intervention when it comes to due diligence obligations *i.e.* the author argues that due diligence obligations as such create a premise for parent companies to give instructions to legally separate legal entities.

944 Art. 3 (2), German DD Act.

945 Art. 6, German DD Act.

946 Art. 6 (2), German DD Act.

947 Art. 6 (4)(1), German DD Act.

948 Art. 6 (4)(2) – 6 (4)(4), German DD Act.

of textiles,[949] to its suppliers' operation[950] and allegedly imply KiK's duty of care towards its business partner's employees to ensure proper working conditions become a qualifying feature under German DD Act.

In simple terms, if before the German DD Act, the company's involvement in supplier's activities by relevant procedures related to human rights (i.e. working safety, etc.) or environmental rights could be used as a basis for tortious liability, since such intervention is not required, and – actually – might create additional risk of liability for companies, engaging with such suppliers, witch new law, enterprises triggered are actually obliged to "control" their supply chain members.

Third, one of the main obligations, at least the one that is relevant to the Thesis, is the obligation to proceed with remedial action.[951] Art. 7 foresees that once the enterprise discovers that a violation of human rights or environmental rights due diligence obligation has already occurred or is imminent both at its own operational level or at the direct supplier's level, it shall (i) prevent (if possible), (ii) end or (iii) minimise the exposure of such violation. What is important in this regard is that the law directly foresees exceptions related to an indirect supplier as well – if it is established that the enterprise developed a relationship with a direct supplier in an "improper" manner or has engaged in a particular transaction in order to bypass particular due diligence obligations concerning a direct supplier, and the indirect supplier is also considered as direct one.[952] Obviously, this situation implicates an unfair practice at the level of the parent company and would probably be hardly applicable in cases where it is hard to establish an intentional avoidance of obligations. At the same time, such a rule is progressive and, at least to some extent, closes the gap for apparent unfair practices, for instance, using indirect suppliers to avoid potential liability.

Article 7, in its preface, is relatively generic and indicates that a corporation, triggered by a due diligence obligation, shall terminate it once established.[953] More specific remedies are foreseen when violations occur at the level of direct suppliers – if they cannot be ended immediately, the enterprise, together with the supplier, must prepare a plan (with dedicated deadlines) on how the violation will be resolved.[954] Interestingly, Article 7 foresees that enterprises should consider cooperating with other enterprises to have the greatest influence over offenders or even suspend business relationships

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949 *Jabir and others v KiK Textilien und Non-Food GmbH* [2019] Case No. 7 O 95/15t

950 KiK's sustainability report stated: "We are responsible for more than 20,000 employees in Europe, people who we employ directly, as well as those workers involved in producing goods ordered by us in their respective countries. […] It is therefore logical and economically prudent for us to design processes that make the best possible use of resources, to define social and ecological standards, and adhere to them, and also to assume social responsibility above and beyond our core business activities." In addition, KiK implemented its own Code of Conduct in every contract of sale with the factory.

951 Art. 7, German DD Act.

952 Art. 5 (1), German DD Act.

953 Art. 7 (1), German DD Act.

954 Art. 7 (2), German DD Act.

with them until the exposure of potential violations is minimised. Therefore, the Act suggests a straightforward intervention by the company in the activities of a separate, distinct legal entity. From the perspective of a corporate relationship, this would mean that the parent company, in principle, could order a subsidiary to terminate a business relationship with its supplier if there is a risk of human rights or environmental rights violation. However, the suspension of the business relationship is provided as an *ultima ratio,* i.e., where no other means are deemed sufficient to remedy the situation.

Fourth, Art. 9 foresees liability for indirect suppliers. Besides the implementation of complaints procedure[955], German DD Act provides that if the company triggered has sufficient indications that there are human rights-related or environmental rights-related violations at the level of indirect supplier, it shall: (i) carry out risk analysis[956], (ii) proceed with appropriate preventive measures *vis-à-vis* responsible party (i.e. implementation of control measures, prevention and mitigation of the risk occurred etc.), (iii) draw up and implement prevention, cessation or minimisation concept and (iv) if necessary, update its policy statement.[957] Therefore, it is clear that the German DD Act aims to trigger both levels of the supply chain, i.e. direct and indirect supplies, that basically widens the possible circle of affected parties to an undefined scope.

Art. 10, *finally* foresees the obligation to document the implementation of due diligence obligations. The enterprise shall prepare and publish the annual due diligence report, which basically identifies human rights and environment-related risks or violations of relevant obligations and what actions it takes to fulfil its obligations under the act.[958]

In this regard, some authors argue that the German DD Act has limited applicability in terms of scope – even though, on the premise that the act triggers the whole supply chain, in essence, due diligence obligations are mainly applicable to the company's own activities and its direct suppliers.[959] However, as it was established, "[w]hen it comes to indirect suppliers, companies are merely required to conduct a risk-analysis if they obtain 'substantiated knowledge' indicating the possibility of a human rights violation or environmental damage."[960]

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955 Art. 8, German DD Act.

956 Art 5 (1) – 5 (3), German DD Act.

957 Art. 6 (2), German DD Act.

958 Art. 10 (2), German DD Act.

959 Markus Krajewski, Kristen Tonstad and Franziska Wohltmann, "Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?", *Business and Human Rights Journal* 6,3 (2021): 7, https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/mandatory-human-rights-due-diligence-in-germany-and-norway-stepping-or-striding-in-the-same-direction/85815FE5F1D1F64208B0068B7FBBECF8

960 *Ibid.*

3.2.2.3. Sanctions for breach of due diligence obligation: (no) liability mechanism

The liability mechanism of the German DD Act is unique in that, *first*, the act itself does not contain any liability provisions, and *second*, unlike the French DD Act, it does not draw any reference to civil liability rules.[961] According to Art. 3(3) any "[v]iolation of the obligations under this Act does not give rise to any liability under civil law."[962] Therefore, as Rühl points out, this provision makes clear that the German DD Act itself does not provide a basis for damages claims.[963] The following sentence of Art. 3(3), in addition, states that any civil liability which is not related to the German DD Act remains unaffected. Therefore, in essence, this means that, first, violation of a provision of the German DD Act alone does not establish civil liability, and second, that pre-existing liability (not based on the German DD Act) is not waived.

Therefore, a breach of the German DD Act as a basis for tortious liability under BGB Art. 823 is eventually excluded as well. As it was already established, as a general tort norm, Art. 823(1) allows victims to claim damages if another person, intentionally or negligently, unlawfully injures the life, body, health or other values of another person.[964] However, as Rühl states, Art. 3(3) "leaves no room for doubt that violations of the due diligence obligations established by the Supply Chain Act shall not result in any civil liability."[965] In this sense, in terms of Art. 823(1) BGB, exclusion of liability is not that straightforward, e.g. there is an argument that while general tortious liability under 823(1) BGB is *per se* triggered in the event of injury to certain legally protected interests, such as *life*, health, freedom and property etc., as well as "other subjective rights", human rights (protected by German DD Act) *as a whole* are neither such a legal interest named in Art. 823(1) BGB, nor they are "other subjective rights", as "[t]hey function primarily as defensive rights against public intervention".[966] Therefore, the possible debate is whether due-diligence duties (in this respect – as duties of care) could be understood as giving rise to liability of the parent based on the breach of tortious duties (Art. 823 (1) BGB), in a way that misconduct of subsidiary or supplier could be relevant to attribute liability for the parent.[967] However, even

961 Lieder, Meyer, *supra note*, 526: 59.

962 Art. 3 (3), German DD Act.

963 Rühl, *supra note*, 908: 5.

964 Art. 823 (1) BGB.

965 Rühl, *supra note*, 908: 6.

966 Lieder, Meyer, *supra note*, 526: 60.

967 Koch, Raphael, Das Lieferkettensorgfaltspflichtengesetz Compliance, Sorgfaltspflichten und zivilrechtliche Haftung, MDR 2022, 1 (4) in Jan Lieder, Sarah Meyer, "Supply chain act and liability under German law", *European Company Case Law* 1,1 (2023): 60, https://doi.org/10.5771/2752-177X-2023-1.

though arguments have been made regarding the application of Art. 823(1) BGB is being raised[968]; the prevailing position is that Art. 3(3) excludes civil liability *in corpore* and irrespective of legal basis. Otherwise – if Art. 823(1) would still be applicable, the wording of Art. 3(3) becomes purposeless.

The same logic also excludes the application of BGB Art. 823 (2), which states that the victim may claim damages if the tortfeasor violates a statute (legal act) intended to protect another person.[969] As Wagner explains, provision enables damages claims for the breach of obligations established outside civil law.[970] Therefore, theoretically, the German DD Act could be ideally in line with this provision as another legal act "[i]ntended to protect another person" as it is its primary function, therefore giving the "green light" for claims for the violation of the human rights due diligence obligations. However, Art. 3(3) abandons such possibility in the very essence.[971] Therefore, the German DD Act does not, as far as the French equivalent, constitute violations of due diligence obligations as a basis for the liability under general tort norms.

Even though the German DD Act does not provide for a civil liability mechanism and, in fact, explicitly excludes relying on the violations of the act as a basis for such liability, there are some procedural elements that are novel and could lead to some developments in human rights-related or environmental rights-related litigation. Art. 11 of the act provides for a special litigation status ("Prozessstandschaft") – meaning that any person who believes that their rights were violated may authorise a domestic trade union or non-governmental organisation to bring legal proceedings in its capacity.[972]

Therefore, the group of those who can claim the violation of rights under the German DD Act is expanded. In this regard, according to the author, the argument might be that even though such a "special transfer of procedural authority" is relevant to the scope of the German DD Act and due diligence obligation therein, it could be actioned when raising claims based on, for example, general tort (Art. 823 BGB).[973] This way, even though the civil liability is not extended in substantive legal terms,[974] it is in procedural terms. As it was established, the second sentence of Art. 3(3) constitutes that civil liability on other legal basis remains unaffected. The resolution recommendation

968 For example, please see Aefgen, Walter, Haftung für die Verletzung von Pflichten nach dem neuen Lieferkettensorgfaltspflichtengesetz, ZIP (2021), 2011; Koch, Raphael, Das Lieferkettensorgfaltspflichtengesetz Compliance, Sorgfaltspflichten und zivilrechtliche Haftung, MDR (2022), 39 *in* Jan Lieder, Sarah Meyer, "Supply chain act and liability under German law", *European Company Case Law* 1,1 (2023): 60, https://doi.org/10.5771/2752-177X-2023-1.

969 Art. 823 (2) BGB.

970 Wagner, in: MünchKommBGB, Vol. 7, 8. ed. 2020, § 823 BGB, para. 532 *in* Giesela Rühl, "Cross-border Protection of Human Rights: The 2021 German Supply Chain Due Diligence Act" (2022), https://ssrn.com/abstract=4024604.

971 Spindler (fn. 2), p. 94 f.; Resolution recommendation and report of the Committee for Labour and Social Affairs, BT-Drs. 19/30505, 39.

972 Art. 11, German DD Act.

973 Lieder, Meyer, *supra note*, 526: 61.

974 Considering the imperative fashion of Art 3(3) of German DD Act.

and report of the Committee for Labour and Social Affairs details the meaning of this part of Art. 3(3): "Insofar as civil liability is already established under the current legal situation, irrespective of the newly created due diligence obligations, it is to continue unchanged and, in particularly serious cases, to be facilitated in its enforcement."[975] Thus, the act does not exclude civil liability based on the violation of human rights due diligence obligations that follow from other provisions of German law – namely general tort and contract law.[976]

A more relevant question, however, as raised by Rühl, is whether there are currently legal means to hold companies liable for environmental or human rights violations under German law.[977] As it was established before, German law, and in particular – tort law, is generally reluctant to apply liability for the harm made at the level of subsidiaries – not to mention – suppliers.[978] As Lieder and Meyer elaborate on this, "[t]aking into account the legal entity principle under corporate law [..] and the principle of trust under liability law [..] there is little room for trans-subjective tort liability."[979] Therefore, the liability of the parent company would be limited to its own behaviour. Even though it could be argued that the tortious liability of the parent company based on the German DD Act would eventually be the liability for its own behaviour, i.e. improper management of its subsidiaries.

In this regard, the German DD Act and direct abolishment of civil liability application (Art. 3 (3)) would seem like a logical follow-up of the classic German approach. However, the clash between general company law, based on legal separability, and due diligence law is evident, as the former implies that the behaviour of third parties does not have to be controlled, while the latter establishes *de facto* duties to control, albeit with a limited scope – specifically, the environmental and human rights spheres. Thus, the prevailing opinion among German scholars is that, currently, German companies are not liable for such violations in their value chains under German law.[980] The same restrictive approach is also approved by German courts, which have been reluctant to establish human rights due diligence obligations that might serve as the basis for damages claims.[981] In this regard, the question could be raised whether the German DD Act, if not applied as a basis for tortious liability, is capable of realising its full potential.

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975 Resolution recommendation and report of the Committee for Labour and Social Affairs, BT-Drs. 19/30505, 39 *in* Jan Lieder, Sarah Meyer, "Supply chain act and liability under German law", *European Company Case Law* 1,1 (2023): 62, https://doi.org/10.5771/2752-177X-2023-1.

976 Rühl, *supra note*, 908: 6.

977 *Ibid.*

978 Ruhl, *supra note*, 908: 6.

979 Lieder, Meyer, *supra note*, 526: 62.

980 For a detailed discussion of the state of the discussion with further references, in: Unternehmensverantwortung und Internationales Recht (fn. 23), 89 (114 f.). *in* Giesela Rühl, "Cross-border Protection of Human Rights: The 2021 German Supply Chain Due Diligence Act**"** (2022): 6, https://ssrn.com/abstract=4024604.

981 *Ibid.*

Even though Art. 11 of the German DD Act would seem like the conservative procedural step to creating conditions for such type of litigation (stemming from Art. 3(3)), without actual acknowledgement of such claims under tort law, this would basically remain an unenforceable tool. The argument of potential liability is even weaker in terms of suppliers.[982] As it was established in the earlier chapters, German law, in general, is not supportive of any duties of care with regard to the conduct of independent third parties. And in this respect, even though there might be some room for argument that the subsidiary is not a completely independent party, for independent contractors, this "connection" is substantially departed from in most cases. Therefore, at least now, it can be safely concluded that, although the German DD Act prescribes due diligence duties not only against subsidiaries but also against suppliers, civil liability regarding the actions of third parties does not appear to have potential application in supply relationships, unless extraordinary conditions are present. As Lieder and Meyer argue, at least in theory, "[t]his may be the case, e.g., through intensive interference in the subcontractor's business or control over the production site, so that the supplier company is practically replaced in its position as guarantor of protection."[983] However, it remains relatively vague to base such "test" on any precedents, since, as it was established in previous chapters, they hardly exist.[984] The same argument applies to the potential application of vicarious liability – since suppliers, in general, do not demonstrate the necessary integration into the contractors' sphere of control (management), they cannot be qualified as vicarious agents.

Therefore, the relevant question, addressed in the next chapter, is whether the German DD Act, *in itself,* alters the application of tort liability to parent companies for the actions that occur at the level of their supply chain (subsidiaries, partners).

The liability mechanism of the German DD Act itself is mainly administrative. If a company triggered by the act is not complying with the due diligence obligations under provides the following sanctions: (i) periodic penalty payments of up to EUR 50,000 in administrative enforcement proceedings and/or fines,[985] (ii) upon violation, companies can be excluded from winning public tenders in Germany for up to three years.[986] Therefore, as Barsan points out, one of the main differences between French and German due diligence acts is their enforcement, where "[..] France opted exclusively for private enforcement, Germany excluded any private enforcement and opted exclusively for public enforcement."[987]

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982 Wagner, Gerhard, Haftung für Menschenrechtsverletzungen, RabelsZ 80 (2016), 773 *in* Jan Lieder, Sarah Meyer, "Supply chain act and liability under German law", *European Company Case Law* 1,1 (2023): 69, https://doi.org/10.5771/2752-177X-2023-1.

983 Lieder, Meyer, *supra note*, 526: 68-69.

984 KiK, even though based on common law, for instance, failed on procedural arguments and German courts could not provide decision on merits.

985 Art. 23-24, German DD Act.

986 Art. 22, German DD Act.

987 Barsan, *supra note,* 859: 40.

3.2.2.4. Nature of liability

Even though the German DD Act does not in itself provide a liability regime, as it is established above, it provides certain sanctions mechanisms (either a fine or exclusion from certain public procurements). Irrespective of the specifics of the type of liability itself,[988] it is important to evaluate the nature of the liability of the parent company *per se*. As well as the French equivalent, the German DD Act provides for primary, not vicarious liability, i.e. enterprises triggered are sanctioned for their own actions, in this regard – not sufficient control of supply chain actors in terms of environmental and human rights issues.[989]

3.3. EU approach - directive on corporate sustainability due diligence

The context and narrative in which the need for international regulation of ESG matters arose are very interesting. Corporate abuses of environmental and human rights are not a new topic, as established above. The latter abuses, especially their exposure in particular instances, have demonstrated that previous regulatory approaches, both at national and international levels, based on voluntary standards, rarely allowed corporations to be held responsible when harm occurred.[990] This eventually led to the conclusion that an international legal framework is needed to obligate corporations to respect human and environmental rights, while failure to achieve this may lead to actual liability.[991] Pacces, in this regard, describes CSDDD as an attempt "[..] to cope with the under-deterrence of negative externalities on human rights and the environment depending on the strategic use of limited liability by corporate groups."[992]

French and German due diligence acts were pioneers in this regard and showed an example by establishing positive duties for companies *vis-à-vis* their supply chain members. Even though the example may have been set for other similar legislative proposals across Europe[993], most importantly – the initiative was raised at the supranational (EU) level. In April 2020, the European Commission (**Commission**) proposed the adoption of a directive with the main objective – to force companies to undertake

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988 As German DD Act excludes possibility of applying civil liability on a basis of the breach of the act, it cannot preclude application of administrative or criminal liability. In addition, it is also important that liability (including civil one) can arise based on other legal acts, even though – for *de facto* environmental or human rights violations.

989 Barsan, *supra note,* 859: 33.

990 Pietrancosta, *supra note,* 850: 17.

991 *Ibid.*

992 A. M. Pacces, "Civil Liability in the EU Corporate Sustainability Due Diligence Directive Proposal: A Law & Economics Analysis", *European Corporate Governance Institute - Law Working Paper* 691/2023 (2023): 268, https://ssrn.com/abstract=4391121 or http://dx.doi.org/10.2139/ssrn.4391121

993 Apart from Germany and France, Netherlands, for example, has introduced a more targeted law on child labour (Wet zorgplicht kinderarbeidm 2019).

mandatory human rights and environmental due diligence across their supply (value) chains.[994] After prolonged preparations, research and consultations with experts and other relevant parties,[995] official proposal for directive on corporate sustainability due diligence (**CSDDD proposal**), which, as one could conclude, is most ground-breaking and comprehensive since the notorious proposal for ninth company law directive[996] was proposed 2 years later – in February 2022[997] at the time described by Commissioner for Justice Didier Reynders as "[r]eal game changer in the way companies operate their business activities throughout their global supply chain."[998] Since, at the time, both French and German due-diligence acts were already either adopted or proposed, the Commission wanted to ensure a "level playing field" for companies operating across the union.[999] The influence of national examples of corporate due diligence legislation, especially the French DD Act, is evident.[1000]

The directive survived multiple rounds of discussions and substantial amendments by all EU institutions and, in addition, raised intense discussions between EU Member States. For this reason, the CSDDD proposal was (and still is) possibly the most debatable topic of corporate law. On 24 April 2024, the CSDDD proposal passed the

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994 See: European Commission, Sustainable corporate governance.

995 S. Ciacchi, C. W. and F. Barge, "The Proposed Directive on Corporate Sustainability Due Diligence: A Critical Analysis" (2022): 3, https://ssrn.com/abstract=4739062 or http://dx.doi.org/10.2139/ssrn.4739062.

996 in 1985 The European Commission prepared the so-called 9th directive, which was specifically intended to regulate the issues of groups of companies. The draft directive treated groups of companies as single business entities and they were based on the principle that the parent company must be responsible for the debts of the subsidiary, unless it is proven that the loss was incurred through the implementation of actions or influence that is contrary interests of the parent company. However, the EU member states did not find a consensus and the directive was ultimately not adopted.

997 Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071.

998 Didier Reynders, Commissioner for Justice, A. Pietrancosta, *supra note*, 871: 9.

999 Gibson Dunn, "Landmark EU "Corporate Sustainability Due Diligence Directive" Imposing Human Rights and Environmental Due Diligence Obligations on EU and Non-EU Companies Approved by European Parliament", https://www.gibsondunn.com/landmark-eu-corporate-sustainability-due-diligence-directive-imposing-human-rights-and-environmental-due-diligence-obligations-on-eu-and-non-eu-companies-approved-by-european-parliament/#:~:text=On%2024%20April%202024%2C%20the,legislative%20process%2C%20after%20four%20years.

1000 As A. Pietrancosta argues, "French model is experiencing an important milestone, as it has largely inspired the European Commission in its directive proposal on Corporate Sustainability Due Diligence", *in* A. Pietrancosta, "Codification in Company Law of General CSR Requirements: Pioneering Recent French Reforms and EU Perspectives", *ECGI Law Working Paper* No 639/2022 (2022): 1, https://ssrn.com/abstract=4083398or http://dx.doi.org/10.2139/ssrn.4083398.

European Parliament (**CSDDD**).[1001] On 24 May 2024, the Council of the European Union approved the political agreement, thereby completing the adoption process.

As Ciacchi, Cerque and Barge describe, "[..] CSDDD proposal enshrines aspects of established international instruments, for example, the United Nations' Guiding Principles on Business and Human Rights [..], into European Union (EU) legislation."[1002] To put it simply, CSDDD, *per se,* represents a shift from soft law to hard law concerning human rights and environmental due diligence obligations.[1003]

Generally, CSDDD, as its national predecessors, establishes mandatory human rights and environmental due diligence obligations.[1004] Since it triggers the entire supply chain, CSDDD obligations apply to both the parent company's operations and one of its subsidiaries or business partners within the supply chain. As per the directive, supply chain or "chain of activities"[1005] generally covers the activities of both the company's upstream and downstream business partners[1006] related to the production of goods or the provision of services by the company, as well as transport and storage of the product, where the business partners carry out those activities for the company or on behalf of the company.[1007] Schwartz rightly illustrates it from the perspective of the "Philips" light bulb: "[a]ll corporate activities and activities by companies in the supply chain for producing the light bulb would be captured. The rule would also capture activities related to disposal of used lightbulbs and any companies engaged in such

1001 European Parliament legislative resolution of 24 April 2024 on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM(2022)0071 – C9-0050/2022 – 2022/0051(COD)), https://www.europarl.europa.eu/doceo/document/TA-9-2024-0329_EN.html.

1002 S. Ciacchi, C. W. and F. Barge, "The Proposed Directive on Corporate Sustainability Due Diligence: A Critical Analysis" (2022): 1, https://ssrn.com/abstract=4739062 or http://dx.doi.org/10.2139/ssrn.4739062.

1003 J. Schwartz, "The Levers of Sustainability: The EU Directive on Corporate Sustainability Due Diligence in Comparison to US Law", *University of Utah College of Law Research Paper No. 555* (2023): 4, https://dx.doi.org/10.2139/ssrn.4489417.

1004 Art. 1 of CSDDD states: "This Directive lays down rules [..] (a) on obligations for companies regarding actual and potential human rights adverse impacts and environmental adverse impacts, with respect to their own operations, the operations of their subsidiaries, and the value chain operations carried out by entities with whom the company has an established business relationship."

1005 The term 'chain of activities' as defined in this Directive is without prejudice to the terms 'value chain' or 'supply chain' as defined in or within the meaning of other EU legislation, (25), CSDDD.

1006 Besides subsidiaries of the relevant non-EU company, persons with whom the company in question has an established business relationship (EBR) according to Commission's Proposal CSDD were also part of value chain. According to compromise text, whole concept of EBR was abandoned, and replaced by a concept of "business partner". A concept of a "value chain" is now replaced with "chain of activities", in E. Čulinović-Herc, Edita, "Navigating the Corporate Sustainability Challenge - Proposal for a Directive on Corporate Sustainability Due Diligence in the EU Regulatory Arena", *Young Universities for the Future of Europe (YUFE) Law Conference Proceedings* No. 01/2022 (2023): 19, https://ssrn.com/abstract=4421152 or http://dx.doi.org/10.2139/ssrn.4421152; Pacces, supra note, 992: 270.

1007 (25), Art. 3(g), CSDDD.

disposal."[1008]

Since CSDDD underwent substantial changes over four years, while explaining the material scope and liability mechanism, the Thesis reflects these changes by showing how the final text of CSDDD evolved.

3.3.1. Scope of application (rationae personae)

CSDDD targets both EU (formed following the legislation of a Member State) and non-EU (formed under the legislation of a third country) companies.[1009]

For the former, due diligence obligations are triggered if it has more than 1,000 employees on average and a net worldwide turnover of more than EUR 450 million in the last financial year.[1010] Art. 2 (1)(b) clarifies that this criteria is also sufficient for the whole group – if the company does not meet the criteria mentioned above, CSDDD obligations are triggered if the company is the ultimate parent company of a group that reached those thresholds in the last financial year.[1011] Additionally, EU companies with (i) EU franchising or licensing agreements for annual royalties that exceed €22.5 million and (ii) an annual net worldwide turnover in excess of €80 million (or ultimate parent companies)[1012] would be triggered.

For non-EU companies generating a net turnover of more than EUR 450 million within the EU, the same criteria apply.[1013] Alternatively, companies with (i) EU franchising or licensing agreements for annual royalties that exceed €22.5 million in the EU and (ii) an annual net turnover of more than €80 million in the EU (or ultimate parent companies)[1014] would fall under CSDDD. Therefore, ss P. Zumbansen points out, "while the direct addressees of the EU Directive are companies operating in the EU, its regulations do have extraterritorial effect for non-EU parent companies of EU-based subsidiaries if the parent crosses the employee/revenue threshold, for non-EU companies within the global value chain of a threshold-crossing European corporation

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1008 Schwartz, *supra note*, 1003: 3.

1009 Art. 2 (1), 2(2), CSDDD.

1010 Art. 2 (1)(a), CSDDD.

1011 CSDDD 2 (1)(c) finally clarifies that obligations are triggered if "[t]he company entered into or is the ultimate parent company of a group that entered into franchising or licensing agreements in the Union in return for royalties with independent third-party companies, where those agreements ensure a common identity, a common business concept and the application of uniform business methods, and where those royalties amounted to more than EUR 22 500 000 in the last financial year for which annual financial statements have been or should have been adopted, and provided that the company had or is the ultimate parent company of a group that had a net worldwide turnover of more than EUR 80 000 000 in the last financial year for which annual financial statements have been or should have been adopted."

1012 Art. 2(1)(c), CSDDD.

1013 N.b. For CSDDD to be triggered, for both EU and non-EU companies, the threshold conditions mentioned in Art. 2 shall be satisfied for at least two consecutive financial years.

1014 Art. 2(2)(c), CSDDD.

and, finally, for non-EU companies whose subsidiaries fall within the ambit of the Directive."[1015] It is worth noting that in the primary proposal of the EC, in terms of EU companies, the relevant criteria were 500 employees on average and a net worldwide turnover of more than EUR 150 million.[1016] Therefore, this is one of the key political compromises, i.e. material scaling back of the number of companies covered by CS-DDD. Alternatively, if the company does not meet the mentioned number, due diligence obligations would also be triggered if it has 250 employees on average and has a net worldwide turnover of more than EUR 40, provided that at least 50% of this net turnover was generated in specific sectors such as manufacture of textiles, agriculture etc.[1017] For non-EU companies, the EUR 150 million, or EUR 40-150 million,[1018] was originally foreseen in the CSDDD proposal. Thus, the European Parliament narrowed down the scope of companies triggered.

It is worth noting that CSDDD provides for a novel exclusion for parent companies, reflecting the *de facto* nature of its involvement in the activities of its subsidiaries – if the parent company "[has as its main activity the holding of shares in operational subsidiaries and does not engage in taking management, operational or financial decisions affecting the group or one or more of its subsidiaries", due-diligence obligations may not be applied.[1019] However, in such cases, relevant due-diligence obligations of the parent company are transferred to one of its subsidiaries that is designated for this matter.[1020] However, even though relevant obligations are transferred to an appointed subsidiary, the ultimate parent company shall remain jointly liable with the designated subsidiary for a failure of the latter to comply with its obligations.[1021]

3.3.2. Specific due diligence obligations (rationae materiae)[1022]

The preamble of the CSDDD, by referencing all primary international documents, including the UN Guiding Principles, OECD Due Diligence Guidance for Responsible Business Conduct, and the UN Sustainable Development Goals, emphasises that "[a]ll businesses have a responsibility to respect human rights." In this regard, the method for tackling this duty is establishing due diligence obligations for parent companies. Preamble further explains the scope and subject matter of such obligations, i.e. that affected companies shall take "[a]ppropriate steps to set up and carry out due

1015 Zumbansen, *supra note*, 907: 8.

1016 Art. 2 (1)(a), CSDDD proposal.

1017 Art. 2 (1)(b), CSDDD proposal.

1018 Provided that at least 50% of its net worldwide turnover was generated in one or more of the sectors listed in paragraph 1, point (b).

1019 Art. 2(3), CSDDD.

1020 Art. 6-16, 22, CSDDD.

1021 Art. 2(3), CSDDD.

1022 (7), CSDDD.

diligence measures, with respect to their own operations, those of their subsidiaries, as well as those of their direct and indirect business partners throughout their chains of activities."[1023] In this regard, it is self-evident that the due diligence obligations of the target companies *themselves* are obligations of means.[1024] Thus, as will be detailed below, the liability of the parent company is applicable for not acting in the most prudent manner possible.

As per CSDDD, such due diligence process is described by six main steps: (i) integrating due diligence into policies and management systems within the value chain; (ii) identifying and assessing adverse human rights and environmental impacts in the sphere of influence of the parent company; (iii) preventing, ceasing or minimising actual and potential adverse human rights and environmental impacts (obligation of mean); (iv) monitoring and assessing the effectiveness of measures; (v) communicating and (vi) providing remediation.[1025] As for the material scope of application, as mentioned, CSDDD tackles the whole supply chain, explicitly indicating that "In order for the due diligence to have a meaningful impact, it should cover human rights and environmental adverse impacts generated throughout **the majority of the lifecycle of production, distribution, transport and storage** of a product or provision of services, at the level of **companies'** own operations, **operations of their subsidiaries and their business partners in their chains of activities**."[1026] The Thesis now turns to analysing all six of the relevant steps of due diligence.

First, Article 7 requires targeted companies to integrate due diligence into their policies and risk management systems, and to have in place a due diligence policy that ensures risk-based due diligence.[1027] Such policies shall include a code of conduct that reflects all the principles related to the activities of the entire supply chain and measures/processes to effectively integrate due diligence.[1028] Therefore, the entire due diligence mechanism operates top-down, where the targeted parent company establishes the relevant standards. Following this, Art. 8 foresees that targeted parent companies shall have a system in place to (i) identify and (ii) assess all actual and potential adverse impacts arising from the operation of the whole supply chain.[1029] Therefore, this obligation requires an in-depth analysis of the activities throughout the entire supply chain, which inevitably necessitates sharing information not only between parent and subsidiaries, but also between business partners, such as suppliers. The general aim of such an obligation is to "spot "the main areas where adverse impacts are most likely to

1023 (19), CSDDD.

1024 Obligation under which the parent company is required to act with prudence and diligence to achieve the agreed result, using all reasonable means, without, however, assuring of the achievement of the result.

1025 (20), CSDDD.

1026 (24), CSDDD.

1027 Art. 7, CSDDD.

1028 Art. 7(2), CSDDD.

1029 Art. 8(1), CSDDD.

occur and which ones are to be most severe. Such intention is evident from the following article, which provides that parent companies shall prioritise the most severe risks when "[i]t is not feasible to prevent, mitigate, bring to an end or minimise all identified adverse impacts at the same time and to their full extent. "[1030] Article 10, foreseeing the prevention mechanism, is one of the key ones concerning due-diligence obligations since it provides an actual mechanism that could eventually affect even contractual relationships with business partners.

Generally, parent companies are required to take appropriate measures to *prevent* or mitigate all potential adverse impacts when prevention *per se* is not possible or not immediately possible.[1031] In this regard, it is important that in order to decide which preventive measures are to be taken, it should be first analysed whose business activities possess risks (i.e., the parent company's own, the one of the subsidiary or business partner) and second, to what extent parent company can influence other companies (i.e. business partners) in order to prevent and mitigate potential risks.[1032] Therefore, it is clear that CSDDD aims to enforce parent companies to actively intervene in the activities of its supply chain members. That is evident from the measures that targeted parent companies shall take throughout the supply chain, including, but not limited to – developing and implementing a "prevention action plan"[1033], seeking contractual assurances from direct business partners[1034] that enforce them to ensure that they will comply with targeted company's code of conduct and mentioned prevention action plan, it is worth noting that this obligation has a domino effect since business partners are as well forced to establish such contractual assurances with its own partners if the activities are part of the company's c activities.[1035]

Probably the most important provision of Article 10 relates to modifying business relationships if the potential adverse impacts cannot be prevented or sufficiently mitigated by the aforementioned routes. In such case, the targeted company is required to refrain from entering into a new business relationship or continuing the present one with a business partner in connection with which, or in the chain of activities of which, the adverse effect has arisen.[1036] Before terminating the business relationship, parent companies are required to implement a specific action plan to cease the harmful activities and, in doing this – temporarily suspend the existing business relationship.[1037] Only if such measures are insufficient to mitigate the adverse effect will the targeted

1030 Art. 9(1), CSDDD.

1031 Art. 10(1), CSDDD.

1032 Art. 10(1), CSDDD.

1033 Art. 10(2)(a), CSDDD.

1034 Art. 10(4) foresees that such assurances could also be established with indirect business partner potential when adverse impacts could not be prevented or adequately mitigated differently.

1035 Art. 10(2)(b), CSDDD.

1036 Art. 10(6), CSDDD.

1037 Art. 10(6)(a), CSDDD.

company terminate the business relationship. Irrespective of the actual technique of preventing adverse effects within the chain of activities, the key factor, as per CSDDD, is that it enforces parent companies to actively intervene in the commercial activities of the whole group (chain) in a way that it can practically decide which company may have a business relationship with group companies. If the former fails to sufficiently show relevant standards of environmental and human rights, the parent company is entitled to disqualify it from business relationships with other companies within the supply chain.

Directly related to the obligation to mitigate and prevent possible adverse effects within the supply chain, Article 11 obliges targeted companies to bring actual adverse impacts to an end.[1038] The principles of ensuring such a goal are identical to the ones named in Article 10, namely, that the targeted company shall firstly evaluate on which level of the supply chain the adverse effect occurred and, following this – take appropriate measures, i.e. neutralising the effects immediately if possible or putting additional measures on other actors of the chain such as contractual assurances where necessary because the adverse impact cannot be immediately brought to an end.[1039] Importantly, Article 11 further develops, creating even higher intra-connection between the targeted company and supply chain members (both direct and indirect business partners), foreseeing that the former may provide administrative and financial support, such as loans or financing, to eliminate the adverse effects as soon as possible.[1040] As a last resort, the targeted company may either temporarily or entirely cease the business relationship with the company at whose level the adverse effect appeared. Finally, Article 12 obliges targeted companies which have caused or jointly caused an actual adverse impact to provide remediation.[1041] What is notable here is that the Article directly foresees that when the adverse effect is caused only by the company's business partner, the "company may also use its ability to influence the business partner that is causing the adverse impact to provide remediation"[1042] or to remediate itself voluntarily.

The core principles of due diligence obligations are consistent with those proposed in previous drafts by the European Commission, the European Council, and the European Parliament. As it was established above, CSDDD obliges targeted parent to, first, establish due diligence policies that shall be accompanied by "appropriate measures" that are directed to identifying/investigating and evaluating potential or existent adverse effects and, second, following this to – prevent them or bring to an end when they occurred. Therefore, the general method of combating adverse effects, as per CSDDD, is based on the parent company's active involvement in the relevant activities of the companies within the supply chain.

1038 Art. 11(1), CSDDD

1039 Art. 11(3), CSDDD

1040 Art. 11(4), CSDDD

1041 Art. 12(1), CSDDD

1042 Art. 12(2), CSDDD

Particular importance shall be given to the fact that CSDDD uniquely addresses the need to combat climate change from a different angle. Article 22 directly requires companies to (i) adopt, (ii) implement and (iii) update annually a *climate transition plan,* the goal of which is to ensure that the targeted company's business model and strategy are compatible with limiting global warming to 1.5 °C in line with the Paris Agreement and the objective of achieving the intermediate and 2050 climate *neutrality*.[1043] Such direct requirement is a novelty, as Zumbansen rightly points out, "as it exemplifies the comparatively rapid evolution of transposing a demand made by environmental advocacy groups into a regulatory obligation."[1044] In this regard, Article 22 is influenced by the Hague District Court's *Milieudefensie* judgment against Royal Dutch Shell, which essentially outlined the same goals.[1045]

3.3.3. Sanctions for breach of due diligence obligations

Influenced by the French DD Act, CSDDD also provides that breach might give rise to civil liability for the targeted company on condition that the company either intentionally or negligently failed to fulfil its due – diligence obligations as, *i.e.* prevent or mitigate potential adverse impacts and/or to bring actual impacts to an end or minimise their extent and, due to this breach, damage was caused to the natural or legal person.[1046] Article 29 sets two conditions for the application of liability: *(i)* the targeted company intentionally/negligently failed to comply with the obligations (Articles 10 and 11) when the right, prohibition or obligation[1047] is aimed at protecting the natural or legal person; and *(ii)* as a result of the said failure to comply with due diligence obligations, damage to the natural or legal person's legal interests that are protected under national law was caused.[1048] CSDDD sets an important rule that a company cannot be held liable if the damage was caused only by its business partners in its chain of activities.[1049] Such an exception aims to isolate cases where the damage is so remote from the parent company that it cannot be held liable. In this regard, when the adverse effects leading to the damage were caused jointly by the targeted company and its chain member (subsidiary, direct/indirect business partner), they are both jointly and severally liable, as per national civil liability rules.[1050]

CSDDD provides a declaimer that civil liability based on the directive is without

1043 Art. 22(1), CSDDD.

1044 Zumbansen, *supra note*, 907: 8.

1045 *Ibid.*

1046 (79), CSDDD

1047 Annex of CSDDD.

1048 Art. 29(1), CSDDD.

1049 Art. 29(2), CSDDD.

1050 Art. 29(5), CSDDD.

prejudice and shall not limit companies' liability under national law.[1051] Important clarification, as per CSDDD, is that the civil liability of a targeted company is without prejudice to the civil liability of its subsidiaries or direct/indirect business partners.[1052] In practical terms, as Barsan explains, this means that liability can be of multiple levels, *i.e.* classic tort liability of the entity that violated one of the protected rights (be it subsidiary or business partner) and the one of the targeted parent company's for the insufficient compliance setup that enabled the wrongful corporate behaviour.[1053] Thus, as Pietrancosta rightly points out, the legal liability of a parent company does not eliminate one of the subsidiaries' "[..] any more than the liability of a subsidiary automatically imposes liability on its parent."[1054]

In this regard, Herc argues that there is a dilemma as to whether the civil liability of target companies, as per CSDDD, is beneficial, considering the existence of tort law rules under national law.[1055] The argument here is based on the fact that since tort law could already provide a solution, exclusion of the additional civil liability under CSDDD, according to Herc, "[w]ould allow companies to focus more on due diligence and not so much on how to protect themselves from the various worst-case enforcement scenarios."[1056] However, according to the opinion of the author, the problem *per se* hides in the fact that the exclusion of the infringement of due diligence obligations as one of the grounds of civil liability, as it was done in Germany, creates an artificial situation where the application of tortious liability for human rights and environmental rights abuses could be impossible under classic tort rules.[1057] That is affirmed by Barsan, who states that both in Germany as well as France, "[..] regular fault-based tort liability does not allow to render the parent company liable for the actions of its subsidiary."[1058] Therefore, the whole essence of establishing civil liability for the breaches of due diligence obligations actually aims to avoid the lack of legal remedy under pre-existing national law. Pietrancosta supports this position with one of the observations to explain the legal context in which CSDDD was adopted: "[…] the absence of provisions relating to civil liability, whereas it is often argued that availability of a remedy is the most neglected of the three UN guiding principles on business and human rights pillars, and the global pattern is that victims of business-related human rights

1051 Art. 29(6), CSDDD.

1052 Art. 29(5), CSDDD.

1053 Barsan, *supra note,* 859: 35.

1054 Pietrancosta, *supra note*, 850: 45.

1055 E. Čulinović-Herc, "Navigating the Corporate Sustainability Challenge - Proposal for a Directive on Corporate Sustainability Due Diligence in the EU Regulatory Arena", *Young Universities for the Future of Europe (YUFE) Law Conference Proceedings* 01/2022 (2023): 28, https://ssrn.com/abstract=4421152 or http://dx.doi.org/10.2139/ssrn.4421152.

1056 *Ibid.*

1057 Chapter 1.3.4. of the Thesis.

1058 Barsan, *supra note,* 859: 44.

abuses in extraterritorial cases do not generally have access to effective remedies."[1059]

Irrespective of the civil liability, CSDDD also foresees that for infringements of the provisions of national law adopted under CSDDD, penalties may also be applied.[1060] Relevant factors for the application of the penalties and their scale shall be dependent on (i) the nature and severity of the impacts of the infringement, (ii) the extent to which the company carried out any remedial action related to the infringement, (iii) previous infringements, etc.[1061] CSDDD provides that at least two types of penalties shall be established under the directive, i.e. (i) pecuniary penalties and (ii) public statement indicating the company responsible for the infringement and the nature of the infringement, provided that pecuniary penalties are not sufficiently effective.[1062] The size of the pecuniary penalty is based on the targeted parent company's net worldwide turnover, while the maximum applicable limit of pecuniary penalties shall be not less than 5 % of the net worldwide turnover of the company in the last financial year before the infringement.[1063]

3.3.4. Nature of liability

As with French and German due diligence acts, the liability of the parent company under CSDDD is primary and direct, *i.e.,* for its own actions (or omissions). As scholars explain, in this case, the existence of a due diligence obligation at the level of the parent company works in a way that it enables victims of subsidiaries or business partner's actions to surpass the offender and directly hold the parent company responsible, therefore, from a legal standpoint - without instituting a group liability.[1064] In this way, the personal liability of the other companies within the chain of activities is not abolished, creating a combined level of play to apply liability on multiple ends and based on different legal grounds. Therefore, the principle of direct liability for personal actions is key under CSDDD.

3.4. French, German and EU due diligence acts compared

Even though the goals of all analysed due-diligence acts might be considered similar, their contents and application exposure differ.

As it has already been established, the primary due diligence obligation under the French DD Act is to provide a "vigilance plan". The "vigilance plan" *shall, in itself,* name and include all reasonable measures to identify potential risks and prevent serious

1059 Pietrancosta, *supra note*, 850: 13.

1060 Art. 27 (1), CSDDD.

1061 Art. 27(2), CSDDD.

1062 Art. 27(3), CSDDD.

1063 Art. 27(4), CSDDD.

1064 Pietrancosta, *supra note*, 850: 45.

harm within the supply chain. Such a plan and its application scope are, in themselves, rather unspecific and, according to this general definition, would encompass all actual and potential risks resulting from the activity of the entire supply chain.[1065] Once the latter are identified, they are subject to either preventive or precautionary measures. In this regard, the French DD Act is primarily based on implementing due diligence obligations throughout the supply chain via a "vigilance plan". The German DD Act, similarly, requires a policy statement and the adoption of particular measures aimed at preventing the violation of protected rights. German DD act, in terms of actual measures, is more precise. As Barsan points out, the obligations of the German duty of diligence are much more detailed than under the French analogue.[1066] Another difference between French and German due diligence acts is the level of detail in which environmental and human rights are detailed, while the French DD Act generically refers to violations of human rights and fundamental freedoms, environmental damage or health risks, *i.e.* leaving vast room for possible interpretation.

As the French model is considered the one that has substantially influenced CSDDD, a more detailed analysis is required for a comparison of the former and the latter. Pietrancosta, who provides an extensive comparison, generally summarises that CSDDD goes "beyond the French model in developing a more inclusive, elaborate and better-enforced legal regime."[1067] Notwithstanding particular differences in the personal scope of application of the acts,[1068] the bigger interest lies in the substantive requirements.

In this regard, while the French DD Act is primarily based on implementing due diligence obligations through the supply chain via a "vigilance plan", CSDDD is more specific, obliging triggered companies to conduct human rights and environmental due diligence.[1069] This goal is being achieved through various specific measures, such as creating and integrating a due diligence policy across the supply chain, identifying potential risks, and mitigating them. Finally, similarly to under the German DD Act, under CSDDD, as an *ultima ratio* measure, the targeted company may temporarily or ultimately cease the business relationship with the company, causing adverse effects. Therefore, concerning actual due diligence obligations and their enforcement, CSDDD is much more specific than the French DD Act. Hereto, a tight connection between the German DD Act and CSDDD may be seen – as Pietrancosta argues, CSDDD "[..] tries to minimise the use of imprecise and open-ended standards and, following the German model rather than the French one, to describe specifically those with

1065 *Ibid*., 26.

1066 Barsan, *supra note,* 859: 44.

1067 Pietrancosta, *supra note*, 850: 22.

1068 As Barsan explains, CSDDD has much wider ratione personae since as the European Union is in a better position to adopt and enforce legislation with an extraterritorial effect, Barsan, *supra note,* 880: 28.

1069 *Ibid*., 29.

which companies must comply."[1070] One particularly important similarity between the German DD Act and CSDDD is that both laws provide that triggered companies may terminate business relationships with its supplier if there is a risk of human rights or environmental rights violation. However, the suspension of the business relationship is provided as an ultima ratio, *i.e.,* where no other means are deemed sufficient to remedy the situation.

Regarding sanctions and enforcement, the most significant similarity between the French DD Act and CSDDD is that a breach of the company's due diligence duties may trigger civil liability and requires the company to remedy any harm that the execution of these duties could have prevented.[1071] In simple terms, a breach of respective obligations under both the French DD Act and the CSDDD constitutes a ground for general tort liability under national law.[1072] As Sherpa rightly noted, "[..] the underlying reason of risk identification is precisely that a company can no longer plead ignorance."[1073] German DD Act, as mentioned in German, foresees that a violation of an obligation under the law does not trigger any civil liability, while general liability rules remain untouched. In terms of the nature of the liability, neither France and Germany nor CSDDD provides for a vicarious liability model since the latter does not fit well within the traditional corporate law principles, *i.e.* personal liability and legal separability.

3.5. Due diligence obligations into perspective – do we see a change in the understanding of corporate law principles?

Barsan provides a good introductory statement that summarises the question of whether due – diligence obligations *per se* make us question the traditional corporate law principles and the fashion in which corporate liability is traditionally applied: "Corporate sustainability seems to become the next paradigm of corporate law questioning the traditional corporate purpose of companies and pushing the compass of "shareholderism" towards that of "stakeholderism."[1074] The analysis of this chapter is divided into two parts – first, the Thesis tries to show the difference (if any) between the discussed "neo-classical" vs "modern" approach to the corporate liability and, second, the analysis of whether this "modern" approach is compatible with traditional principles of corporate law is provided.

1070 *Ibid*., 31.

1071 *Ibid*., 40.

1072 C. Bright, A. Marx, N. Pineau and J. Wouters, "Towards a corporate duty for lead companies to respect human rights in their global value chains?", *Business and Politics* 22(4) (2020): 687, https://ssrn.com/abstract=3725038 or http://dx.doi.org/10.2139/ssrn.3725038.

1073 Sherpa, Vigilance Plans Reference Guidance, First edition.

1074 E. Barcellona, Shareholderism versus Stakeholderism. La società per azioni dinanzi al "profitto", Rivista delle società 1 (2022), p. 130 et seq. *in* I. M. Barsan, "Scope and private enforcement of corporate sustainability due diligence requirements – A comparative approach", European *Company Case Law* 1,1 (2023): 31, https://doi.org/10.5771/2752-177X-2023-1.

3.5.1. From "neo-classical" to "modern": what has changed?

If one looks into the perspective of what corporate law witnessed in the last couple of years in terms of corporate liability, it would probably be safe to repeat the analogy made by C. van Dam, i.e. that in many company board rooms, directors may have wondered: "Is this the real life? Is this just fantasy? Caught in a landslide, No escape from reality[1075]."[1076] Whether it is a humorous analogy or not, recent litigations, such as *Vedanta*, *Okpabi*, and *Maran,* as well as legislative initiatives, indicate the pace at which the business and human rights agenda is currently developing, not only through case law but also through regulation.[1077] However, those changes cannot be "blended" because the recent legislative developments, *i.e.* due diligence acts, both at the national and international level, according to the author or the Thesis, present an evident shift in the whole legal rationale of the application of liability.

If we look into the basis of liability that follows from *Vedanta* and other similar cases, it was already established that the parent company did not owe a duty of care just because it was the parent company – in particular, a specific relationship provided an opportunity for the parent company to exercise oversight, and the parent company's intervention created the duty of care.[1078] In addition, the parent's liability was also acknowledged in cases where the company publicly assumed responsibility.[1079] Bright and others detail that in the supply chain, the degree of control and supervision exercised by lead companies are comparable to the one exercised by parent companies over their subsidiaries; therefore, the liability can be triggered on the same basis — *i.e.*, control and direction exercised.[1080]

Maran confirmed that such a type of reasoning is not limited to share-based relationships – *Maran* knew that the ship would be broken up in Bangladesh, where working conditions are relatively poor (this was indirectly indicated by the price of the ship and the quantity of fuel oil left on the vessel when it was delivered)[1081] and that it in fact **controlled** the sale of the ship.[1082] Two SCL triggers, i.e., *(i)* the actual intervention and *(ii)* public assumption of responsibility being the main outcome of *Vedanta*[1083] In this regard, the mentioned cases quite comfortably "juggled "with cornerstone corporate law principles of legal separability and limited liability, acknowledging that while

1075 Queen (Freddy Mercury), Bohemian Rhapsody, in A Night at the Opera (Los Angeles: Nonesuch Records 1975).

1076 Cees van Dam, "Is this the real life? Is this just fantasy? Caught in a landslide, No escape from reality." European Company Law Journal 18, no. 3 (2021): 80, https://doi.org/10.54648/eucl2021010.

1077 *Ibid*., 84.

1078 Van Ho, *supra note*, 718: 115.

1079 Chapter 2.1. of the Thesis.

1080 Bright et. al, *supra note*, 1072: 682.

1081 *Hamida Begum v. Maran LTD* [2021] EWCA Civ 326, 14.

1082 *Ibid*., 19.

1083 Van Ho, *supra note*, 718: 116.

parent companies generally cannot manage the activities of subsidiaries (and even more so – of unrelated companies such as suppliers), **if** they do so, they may be liable for the risks. Therefore, the rationale of tortious liability in this regard is relatively clear, notwithstanding the broad nature of conditions to apply SCL as per *Vedanta*.

However, it should not be ignored that even though the legal ground of a corporation's liability for the actions at the level of the subsidiaries or business partners is based on classic tortious liability (negligence), based on the establishment of a duty of care, cases like *Vedanta* or *Maran* were not "usual".[1084]

Taking this into account, it is important that being comfortably fit within the traditional corporate law principles, *Vedanta* and the following cases could have created an adverse effect, *i.e.*, considering that the intervention into the activities of another company may create risk exposure, companies could have been disincentivised to do it. As Wagner explains, *Vedanta's* reasoning may be even more evident in the case of independent contractors (as in *Maran* or *KiK*), where incentives from business partners to intervene at any level would likely be significantly lower.[1085] One would then ask – whether such an effect is the one that is wanted in terms of how tort law should remedy the victims. Therefore, according to the author, this paradoxical situation and possible inadequacy of the tort-based approach, focusing on intervention, led to a shift in technique, creating a positive duty to manage the supply chain – established under the German DD Act, French DD Act, and later, CSDDD.

Thus, while recent paradigmatic cases such as *Vedanta*, *Okpabi*, *Maran,* etc. hold parent companies liable for their active intervention, stressing that parent companies do not have such duty (and actually – cannot do that), **due diligence legislation on the contrary, creates a duty to manage and intervene the whole supply chain**. Breach of due diligence obligations could lead to liability, *i.e.,* companies shall be held accountable for ESG violations within their supply chains. Notably, under the French DD Act and CSDDD,[1086] civil liability is grounded on traditional tort law rules. Thus, this means that the breach of due diligence obligations is acknowledged as a basis for tortious liability *per se*. The fact that both case law and statutory law suggest a change in the way tort law is used to hold companies liable for the reckless behaviour in their supply chains that triggers environmental or human rights concerns is even more evident in the Dutch first-instance court decision against Shell.[1087] In 2021, the Dutch first-instance court in The Hague ordered oil giant Shell to drastically reduce its CO2 emissions by 2030. What is the most striking – relying on the general tort law, the court established a specific duty not to cause harm to the environment. Therefore, the court basically transformed the standard of care from tort law (negligence) into a duty to behave in a particular way. The Dutch Court of Appeal recently ruled out this decision by stating that while Shell did have a "special responsibility" to cut its emissions

1084 Petrin, *supra note*, 38: 603.

1085 *Ibid.*

1086 German DD Act directly excluded private enforcement.

1087 *Milieudefensie et al. v Royal Dutch Shell plc*, NL:RBDHA:2021:5339),

as a major oil company, this would not be achieved by imposing a specific legal goal.[1088] Even though the appeal court found no solid basis on which to order Shell to cut its emissions by 45% by the end of the decade, It followed the First Instance Court by deciding that Shell has a legal duty of care to curb dangerous climate change, following from Dutch tort law, read in light of international human rights law instruments, as well as EU and international climate law. This is just a single precedent, however, already showing the substantial change in the understanding of corporate liability for ESG matters.

3.6. Civil liability under CSDDD

3.6.1. Nature of the liability

As Pacces suggests, from a legal as well as economic perspective, the CSDDD could be interpreted as an attempt to cope with underdeterrence of environmental and human rights violations stemming from limited liability in corporate groups[1089] or, as Farah and others illustratively call a seeking "to address this unacceptable reality."[1090] As Hijink and de Jongh affirm, "[t]he problem of externalities created by limited liability has become a defining issue of company law itself [..] and [t]he externalities debate is potentially even pushing away the shareholder/stakeholder discourse that has dominated the international corporate governance discussion over the past decades."[1091]

More precisely, while tort liability incentivises tortfeasors (such as corporations in this regard) to internalise the negative externalities of their activities on the victims, limited liability traditionally enables corporations to construe their activities in a way to avoid liability by externalising the most risky activities to subsidiaries or even commercial partners.[1092] In simple terms, it can be concluded that corporations have traditionally used limited liability to avoid tort liability.[1093] As precisely pointed out by Hansmann and Kraakman, limited liability's correlation with tort law is somewhat complicated in corporate tort cases[1094] since it allows corporations to be "judgement

1088 Judgement of the Court of Appeal in the Hague of 12 November 2024, in the case No. 200.302.332/01

1089 Pacces, *supra note*, 992: 271.

1090 Youseph Farah, Valentine Kunuji, Avidan Kent, "Civil Liability Under Sustainability Due Diligence Legislation: A Quiet Revolution?", *King's Law Journal* 34:3 (2023): 499, https://doi.org/10.1080/09615768.2023.2283234.

1091 Steven Hijink, Matthijs de Jongh, "From Company Law to "Value Chain Law": Observations and Dilemmas on the CSDDD Proposal", *Ondernemingsrecht* 2023/29 (2023): 199, https://www.inview.nl/document/idcf3b2cd7f8fa4499808989a38d1d3368/ondernemingsrecht-from-company-law-to-value-chain-law-observations-and-dilemmas-on-the-csddd-proposal?ctx=WKNL_CSL_104&tab=tekst.

1092 Pacces, *supra note*, 992: 271.

1093 *Ibid.*, 276.

1094 Hansmann, Kraakman, *supra note*, 570: 1089.

proof".[1095] Even though, due to apparent political and economic constraints, Hansmann's and Kraakman's proposal on abolishing limited corporate liability in tort was not highly approved either by legislators or courts, it could be concluded that CSDDD clearly corresponds to the same idea of disabling limited liability to the extent that it does not undermine the objectives of tortious liability. Environmental and human rights cases, analysed in Chapter 2, on the other hand, present the complexity of applying general tort law based on the establishment of the *duty of care* for corporations, creating somewhat *ad hoc* legal routes to remedies for tort victims. As we have witnessed, most international human rights litigation has not been decided on the merits, and some have been settled in private.[1096] Such a situation, *in itself, yields* limited fruit for concluding the success of such litigations. As Farah and others acknowledge, possibly "[t]he biggest challenge to civil litigation, whether in the UK [..] or other [..] jurisdictions, is the inability to point to a binding obligation stipulated in law that holds corporations accountable for the violation of internationally recognised human rights."[1097]

In this regard, CSDDD provides such binding obligations as "promising way forward"[1098] – positive duties for corporations, the ignorance of which could lead to actual civil liability. In terms of victims' remedial rights, such legislation works twofold – first, where corporations targeted by due diligence obligations are obliged to publicly disclose their sustainability risks, it will be more challenging for them to justify the lack of effective measures for preventing and mitigating identified harms when faced with litigation.[1099] Secondly, it is accompanied by a civil liability mechanism, which gives direct access to litigation for tort victims.[1100] Such a combination of statutory due diligence obligations with accompanying civil liability regimes is not only attributable to CSDDD but also to national due diligence laws, as discussed in the previous chapters of the thesis.[1101]

In the same fashion, the CSDDD liability mechanism method is unique in the sense that it provides specific liability conditions – as Bueno and Oehm illustrate, "[..] civil liability in mandatory due diligence legislation legally sets conditions of parent company [..] at least for human rights and environmental abuses. This is quite a change after decades of blurry transnational case law on the matter and over a century of

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1095 Steven Shavell, "The Judgment Proof Problem", *International Review of Law and Economics* No. 6(1) (1986): 45-58, http://www.law.harvard.edu/faculty/shavell/pdf/6_Inter_Rev_Law_Econ_45.pdf *in* Alessio M. Pacces, "Civil Liability in the EU Corporate Sustainability Due Diligence Directive Proposal: A Law & Economics Analysis", *ECGI Working Paper No.* 691/2023 (2023) 271, https://ecgi.global/content/working-papers.

1096 Farah, et. al., *supra note*, 1090, 501.

1097 *Ibid.*

1098 *Ibid.,* 511.

1099 *Ibid.*

1100 Art. 29, CSDDD.

1101 For instance, French DD Act and the upcoming legislations in Belgium, the Netherlands etc.

theories of limited liability, corporate veil, and separation of legal entities that benefited corporations."[1102]

The liability mechanism of the CSDDD, distilled in Art. 29, is analogous to tort liability *per se*.[1103] CSDDD introduces civil liability for companies that fail to meet their due diligence obligations, leading to harm. This liability regime aligns with principles of tort law as it requires a link between the company's intentional or negligent failure to fulfil its obligations (a wrongful act) and the harm caused (causation and damage). The harmed party (e.g., individuals or communities impacted by human rights violations or environmental damage) can seek compensation for the harm. Thus, key elements of liability under CSDDD are attributable to tortious liability: (i) duty of care (companies have a duty to conduct due diligence as specified by CSDDD), (ii) breach of such duty (wrongful act, i.e. *intentional* or *negligent* failing to meet the CSDDD's standards constitutes a breach of this duty), (iii) damage (affected party shall demonstrate the damage they suffered as a result) and (iv) causation (the breach must lead to measurable harm). In terms of the latter, CSDDD is specific and requires there to be no break in the causation link; i.e., liability for parent companies is excluded if the damage was caused only by the business partner.[1104] Thus, liability under CSDDD, in essence, is analogous to tort liability, particularly in jurisdictions where tort law governs claims for harm caused by negligence or failure to meet a duty of care, as discussed in the previous chapter.[1105] As Lennarts approves, "[..] alleged violations of [...] CSDDD will undoubtedly give rise to civil litigation based on national tort[1106] law."[1107] However, as Sinnig and Zetzsche state, even though civil liability in its nature (conditions) is analogous to tort, liability for breach of due diligence obligations must be distinguished from tortious liability for violation of legal interests or protective laws beyond supply chain regulation.[1108]

1102 Nicolas Bueno, Franziska Oehm, "Conditions of Corporate Civil Liability in the Corporate Sustainability Due Diligence Directive: Restrictive, but clear?", *VerfBlog,* 2024/5/28 (2024), https://verfassungsblog.de/conditions-of-corporate-civil-liability-in-the-corporate-sustainability-due-diligence-directive/.

1103 Pacces, *supra note*, 992: 270.

1104 Art. 29 (1), CSDDD.

1105 However, the precise categorization depends on national laws, as CSDDD provides flexibility for Member States to align the provisions with their legal traditions, i.e. in legal systems where civil liability for harm caused by negligence is categorized as tort, liability under the CSDDD could be framed as tortious.

1106 Highlighted by the author of the Thesis.

1107 Loes Lennarts, "Civil liability of companies for failure to conduct corporate sustainability due diligence throughout their value chains - Is Art. 22 CSDDD fit for purpose?" *Ondernemingsrecht,* 2023(5) (2023): 260, https://research.rug.nl/en/publications/civil-liability-of-companies-for-failure-to-conduct-corporate-sus.

1108 Julia Sinnig, Dirk A. Zetzsche, "The EU's Corporate Sustainability Due Diligence Directive: From Disclosure to Prevention of Adverse Sustainability Impacts in Supply Chains" (2024): 31, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4865488.

3.6.2. Liability for breach of due-diligence obligations per se or liability for damages caused by others?

A separate discussion is required for the exact object of liability under CSDDD. More precisely, to understand the implications for liability under CSDDD, it is important to determine whether parent companies are liable because of an adverse impact *per se* caused damage or if it is liability for performing an insufficient (intentional or negligent) due diligence. This discussion raises numerous questions, for instance, whether liability under CSDDD can be invoked without damages, *i.e.,* only for "bad" due diligence *per se,* or whether the parent company can avoid liability under CSDDD in cases where it proves that even though damage was done, the due diligence was performed correctly.

Lafarre's viewpoint on this question turns to the latter answer. In her view, "[l]iability under CSDDD is not constructed as tort liability for damages caused by subsidiaries or business partners, [..] but it is rather liability for breach of due diligence obligations in dealing with the subsidiaries and the business partners in scope."[1109] Touw also suggests that "[w]hilst the Commission, European Parliament and the Council all reiterated in their positions that the purpose of civil liability is "to ensure effective compensation for victims", the final text of recital 79 reads that civil liability is "to ensure that victims of adverse impacts have effective access to justice and compensation."[1110] Relying on the explanatory note of the Commission proposal, namely that "[e]ffective enforcement of the due diligence duty is key to achieving the objectives of the initiative"[1111], the author argues that civil liability is, as such, intended for effective enforcement of the due diligence duties *per se*, as it seeks to compensate tort victims.[1112]

Thus, the nature of the wrongful act, as per CSDDD, is the breach (intentional or negligent) of due-diligence obligations *per se* that eventually results in damage to the victims. In this regard, we shall spot an apparent shift from the traditional tort of negligence as a basis for liability in *Vedanta*, *Okpabi* and other cases. In the latter, the liability of the company is based on its actual involvement in the relevant activities of another company, which leads to the consideration of the courts that such intervention proves the existence of the *duty of care.* In other words, companies themselves, by their way of economic activities and interconnections within the corporate group/

1109 Anne Lafarre, "Mandatory Corporate Sustainability Due Diligence in Europe: The Way Forward", *ECGI Blog* (2022): https://ecgi.global/blog/mandatory-corporate-sustainability-due-diligenceeurope-way-forward *in* Alessio M. Pacces, "Civil Liability in the EU Corporate Sustainability Due Diligence Directive Proposal: A Law & Economics Analysis", *ECGI Working Paper No.* 691/2023 (2023): 271, https://ecgi.global/content/working-papers.

1110 Nicky Touw, "The CSDDD: Beyond remedies in civil litigation?", *Academy of European Law European Society of International Law Paper* 2024/25 (2024): 8, https://cadmus.eui.eu/handle/1814/77305#:~:text=The%20Corporate%20Sustainability%20Due%20Diligence,human%20rights%20and%20environmental%20impacts.

1111 Commission proposal, 16.

1112 Touw, *op. cit*.

supply, created such a *duty of care.* In terms of causation, this implies that it must be proved that the *harm was a reason for the company's actions (or omissions)*, therefore – breach of duty of care[1113] if such duty of care exists (!). The existence of the latter is proven by the company's own actions (interventions). Under CSDDD, due-diligence duties are statutory pre-settled and require targeted companies to intervene in the relevant activities of the supply chain members (subsidiaries and business partners). This is evident by the content of due-diligence duties *per se*. As Pacces describes, "[..] due diligence is not a mere standard of care in monitoring, but it means specific statutory obligations. The companies in scope must not only monitor their own operations, their subsidiaries, and the business partners in the supply chain through procedures, policies, and codes of conduct aiming to identify adverse impacts on the environment and human rights [..]."[1114]

Most importantly, targeted companies shall also prevent, or at least adequately mitigate, the potential adverse impacts (Art. 10) and bring to an end, or at least minimise the extent of the actual adverse impacts (Art. 11). Thus, the failing of such actions *per se* are the object of liability as per CSDDD. In this regard, liability under CSDDD is primary, *i.e.,* liability for companies' own actions – breaches of due diligence duties that result in damages to the victims. Parent companies are not liable for the actions of another separate company. Such construction of liability is evidently effective in terms of tort victims, *i.e.* parent companies may be liable for the damages resulting from these adverse impacts, even if these are remote[1115] since the relevant criteria are the parent company's actions. Therefore, parent companies can no longer easily challenge the causation.

Recital 19 of the CSDDD directly states that it does not require companies to guarantee, in all circumstances, that adverse impacts will never occur or that they will be prevented; essentially, it acknowledges that due diligence obligations are obligations of *means* and not *results*. Thus, CSDDD requires companies to take appropriate measures and also following the "degree of severity and the likelihood of the adverse impact."[1116] Relevant factors in considering whether the due diligence obligations are sufficiently implemented are *(i)* the nature and extent of the adverse impact and relevant risk factors, *(ii) the* sector or geographical area in which its business partners operate as well as *(iii)* company's power to influence its business partners. To establish liability for breaching an obligation of *means*, the harmed party must prove that the obligated party *(i)* did not exercise reasonable diligence: the standard is typically based on what a "reasonable person" in the same circumstances would have done. If a company fails to perform the due diligence expected under specific conditions, this could constitute negligence; *(ii)* acting in a negligent manner. Liability arises from a lack of care or effort that falls below the expected standard; *(iii)* causation and damage. There must be

1113 Zerk, *supra note*, 403: 221.

1114 Pacces, *supra note*, 992: 269.

1115 *Ibid.*

1116 Recital 19, CSDDD.

a causal link between the failure to fulfil the obligation and the harm suffered by the claimant.

Thus, addressing due-diligence obligations as obligations of means, CSDDD is construed in a way that liability is applied for insufficient due diligence.[1117] As confirmed by Lennarts, "[..] a company can only be liable for damage caused by an adverse impact that occurred because the company failed to fulfil its due diligence duties."[1118] It is logical, looking from the perspective that in practice, most of the breaches will probably consist of an omission, *i.e.* that parent companies lack sufficient due diligence measures. It affects the causation in a way that it will be hypothetical: "had the company taken the appropriate measure, would the harm have occurred?"[1119] In other words, as Lennarts indicates, "[f]or these companies, not having a CSDD policy will no longer be an option."[1120] In *Oguru's* case situation, for instance, it will no longer be an option for the parent company to plead ignorance of the risk of adverse impact on human rights and the environment if the unstable situation has in the past led to frequent sabotage of pipelines, resulting in oil spills, with serious consequences for the environment and the living conditions of citizens.[1121]

In addition, Art. 29 of CSDDD provides exculpatory for the parent's liability – it cannot be held liable if the damage was caused only by its business partners in its chain of activities.[1122] Looking into this from the perspective of the example given in the OECD Guidelines, company must verify, as a matter of its own due diligence obligations, that no child labour is employed in its upstream and downstream chain of activities and, if it identifies such practices, it shall use its influence to change such practice; however, such parent company could not be sued under CSDDD by parties damaged by the business partner's mentioned practices, but only to sanctions by the public authority in the case of its own inaction to address the adverse impact.[1123] This essentially approves the fact that the basis for liability is the parent company's actions (omissions) in terms of its own due-diligence obligations concerning its supply chain members – if the harm was done only by the business partner, the parent's liability is not purposeful, unless it is established that it breached its due diligence obligations.

3.6.3. Conditions of the liability under Article 29 CSDDD: what needs to be proved, and who has to prove it?

Article 29 of CSDDD states that a targeted company can be held liable for damage caused to a natural or legal person if that company *intentionally* or *negligently* failed

1117 Pacces, *supra note*, 992: 263.

1118 Lennarts, *supra note*, 1107: 259.

1119 Bueno, Oehm, *supra note*, 1102.

1120 Lennarts, *supra note*, 1107: 259.

1121 *Ibid.*

1122 Art. 29, CSDDD.

1123 OECD (2018), 71.

to comply with respective due diligence obligations (Art 10-11) when the right, prohibition or obligation listed in the Annex to this Directive is aimed at protecting the natural or legal person; and as a result of the failure, damage to the natural or legal person's legal interests that are protected under national law was caused.[1124] Thus, liability conditions include (i) a breach of duty, (ii) damage, and (iii) causality that establishes and fills in liability.

For the first condition, a *breach of due diligence duties* shall be established. Such breach, as mentioned, is limited in scope – respective duties are only restricted by Articles 10 (Preventing potential adverse impacts) and 11 (Bringing actual adverse impacts to an end) of the CSDDD. The mentioned clauses outline the necessary measures that targeted companies must take to prevent, mitigate, or address adverse human rights and environmental impacts.[1125] Moreover, the right, prohibition or obligation shall be listed in the Annex of CSDDD and aimed at protecting the natural or legal person. In other words, the infringement of the CSDDD must have caused damage to the person. As explained by Sinnig and Zetzsche, if, for instance, there is a violation of prevention obligations regarding environmental standards, damages suffered by claimants due to human rights violations (e.g., deprivation of liberty) would not be sufficient for a successful claim.[1126] Another important notice is that CSDDD tries to balance access to remedy for victims with the excessive burden of companies to perform its due diligence in a way that CSDDD requires that priority be given to adverse impacts – "[a]s the adverse impacts should be prioritised according to their severity and likelihood and addressed gradually, if it is not possible to address at the same time to the full extent all adverse impacts it has identified, a company should not be liable under this Directive for any damage stemming from any less significant adverse impacts that were not yet addressed."[1127] As Bueno and others conclude, such allocation is aimed, among other things, to discourage companies' check-box compliance of targeted companies and rather to enforce a risk-based approach to due diligence.[1128] This way, by prioritising the most severe and likely risks, targeted companies can at least to some extent foresee their actions and avoid automatic liability for any damage within the supply chain. In this regard, CSDDD specifies that "[c]ompany should take appropriate measures which are capable of achieving the objectives of due diligence by effectively addressing adverse impacts."[1129] Such requirements, at least theoretically, should

1124 Art. 29, CSDDD

1125 Bueno et al., *supra note*, 1102.

1126 Sinnig, Zetzsche, *supra note*, 1108: 33.

1127 Recital 80, CSDDD, highlighted by the author of the Thesis.

1128 Nicolas Bueno, Nadia Bernaz, Gabrielle Holly, Olga Martin-Ortega, "The EU Directive on Corporate Sustainability Due Diligence (CSDDD): The Final Political Compromise," *Business and Human Rights Journal* 9, 2 (2024): 299, https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/eu-directive-on-corporate-sustainability-due-diligence-csddd-the-final-political-compromise/9731DFA73A2D98D2B8B71BEDF68CEDD1.

1129 Recital 19, CSDDD.

encourage targeted companies to address specific impacts rather than being focused solely on compliance.[1130] There, it is important to note that the notion of what would be considered a breach of due diligence requirements changed if one takes a closer look at liability exclusions and how they have changed through different versions of CSDDD drafts. In the Commission's initial proposal,[1131] the targeted company could escape liability for indirect partners on two occasions – first, the presence of 'contractual cascading' by which those business partners themselves have contractual assurances from their own contract partners with regards to compliance with the company's code of conduct and, as necessary, preventive action plans.[1132] The second – similar one was that the contractual cascades be accompanied by appropriate measures of "compliance verification", such as independent third-party verification.[1133] However, liability rule in Commission's proposal clarified that such exculpatory provisions would not work if "[..] it was unreasonable, in the circumstances of the case, to expect that the action actually taken, including as regards verifying compliance, would be adequate to prevent, mitigate, bring to an end or minimise the extent of the adverse impact."[1134] European Parliament's[1135] stand on exculpatory provisions was different – the parliament removed contractual cascading as liability exclusion, potentially avoiding "tick-boxing" approach, but reinstated that targeted company could escape liability for the actions done by indirect partner, if it complied with due diligence obligations in general, unless "[..] it was unreasonable [..] to expect that the action actually taken [..] would be adequate [..].[1136]

Article 29 of CSDDD waives reliance on both contractual cascading and compliance with due diligence requirements as safe harbour provisions. The only clear and direct exclusion of liability for the targeted company is related to the fact that the damage was caused solely by the business partner.[1137] Aside from that, focus should be made on the mentioned criteria for companies' actions, namely – "severity" and "likelihood" of an adverse impact. Following this, it is most likely considered that a company is in breach of Art. 10-11,[1138] the failure must concern adverse impacts on human rights or the environment that are considered as a priority, with regards to the

1130 Nicolas Bueno et. al, *supra note*, 1102.

1131 Commission's Proposal for a Directive of the European Parliament and of the Council on the Duty of Business Diligence for Sustainability and amending Directive (EU) 2019/1937, No. 2022/0051 COD of 23 February 2022.

1132 Art. 22(1), 7(2)(4), Commission proposal; Pacces, *supra note*, 992: 236.

1133 Art. 22(1), 8(3)(5), Commission proposal.

1134 Art. 22(2) Commission proposal.

1135 Draft Report on the proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 of 7 November 2022 (Wolters Report)

1136 Amendment 142, Wolters Report.

1137 Art. 29(1), CSDDD.

1138 Foreseen in Art. 29, CSDDD.

mentioned criteria, provided that, as Pacces states, "[..] it is 'unfeasible' for the particular company to address all adverse impacts at the same time."[1139] Such "prioritisation" essentially means that the targeted company should not be responsible for any damage stemming from any less significant adverse impacts.[1140] As Lennarts points out, prioritisation obliges companies to identify – and, where necessary, act concerning risks throughout the value chain as well as to develop a plan to address potential adverse impacts that are inherent to these risks.[1141] This way, liability under Article 29 is not an automatic effect of a violation of CSDDD duties. As Pacces concludes, "[w]hen an adverse impact on human rights or the environment may not be considered a priority, the company is not in breach of due diligence obligations."[1142]

As CSDDD directly provides, "[..] correctness of the company's prioritisation of adverse impacts should, however, be assessed when determining whether the conditions for the company's liability were met."[1143] Such, to some extent, general or even vague standard leaves much room for discussion – but it is definitely clear that it could be used as an instrument for targeted companies to escape liability if it is proved that adverse effects were not "priority" at the time they occurred. The "devil" most likely lies in the question of who has to prove/rebut the breach of due diligence obligations. This question is analysed at the end of this chapter.

In terms of *causality* requirement, CSDDD "washes its hands", explicitly stating that it is not regulated thereto.[1144] The only direct requirement for causality in CSDDD is that the targeted company cannot be liable for damages caused only by its business partners in its chain of activities.[1145] As Corgatelli interestingly points out, the fact that CSDDD excluded only the damages caused solely by the business partner and not by the subsidiary might suggest "[..] that such 'independent' causation, without any 'contribution' from the parent company, cannot even be hypothesised."[1146]

With causality conditions being left to national systems, the teleological analysis of due diligence obligations and liability for the breach of the latter enables the conclusion that causality under CSDDD essentially means that damages to the victims shall be the reason for the targeted company's *intentional* or *negligent* action or omission in terms of due diligence obligations. Thus, the company will only be liable if it wilfully or negligently fails to take steps to prevent and mitigate the adverse impact, and if the damage is caused as a result of this failure to act. In this regard, not only the fact

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1139 Pacces, *supra note*, 992: 270.

1140 Recital 80, CSDDD.

1141 Lennarts, *supra note*, 1107: 259.

1142 Pacces, *supra note*, 992: 275.

1143 *Ibid.*

1144 Recital 79, CSDDD.

1145 Art. 29(1), CSDDD

1146 Michele Corgatelli, "The Corporate Sustainability Due Diligence Directive: Outstanding Issues" (2024): 47, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4887184.

that the targeted company knew about the adverse impact is important, but also the fact that it should have known and foreseen that. Thus, negligent omission does not suffice. As Farah and others explain, "[..] where the risks have been identified as part of the due-diligence process, it should not be difficult to establish that the [company] was aware of its operation causing them and of its obligation to prevent them."[1147] In practice, targeted companies could not base their defence on unawareness of the adverse effects if they should have been identified, considering all the circumstances of the specific case.[1148] Let's take an example of oil leakage cases discussed in chapter 2 of the Thesis. As Lennarts points out, under CSDDD's logic, it will certainly not be an option for the parent company to plead ignorance on human rights and the environment if the unstable situation has in the past led to the sabotage of pipelines.[1149] The important point is that ignorance *per se* is no longer an excuse – however, liability is not automatic – everything depends on the circumstances of the case, the measures that the targeted company took, etc.

The more complex issue on which CSDDD is, again, silent is a causality between the acts (omissions) of the targeted company and the impacts occurring in the activities of the subsidiary or partner.[1150] In this regard, Corgatelli provides some interesting practical examples of causality here. With regard to business partners, company liability is excluded if the damage is caused only by the former. In such a case, one could go even further – if adverse effects were identified via due diligence done by the targeted company, the partner could potentially be in breach of contract against the parent company for failure to comply with contractual guarantees itself.[1151] If we remember the *Maran* case as an illustrative example, the court relied on the fact that *Maran* knew about notorious working practices in the ship demolishing market in Bangladesh in the first place and the factual circumstances of the sale itself, namely, the price of the ship and level of the fuel let Maran know that the ship will end up exactly there. Finally, the contract itself did lack contractual safeguards. In the light of Articles 10-11 of CSDDD, *Maran* could probably rely on the exclusion that damage was caused solely by the business partner, but considering the generic nature of Article 29 itself, it could also be concluded that *Maran* contributed to the damage, by failing to have appropriate measures in place to reduce the potential risk.

The causality between the parent and the subsidiary is different. It is already apparent as CSDDD directly states that "[i]t can be expected that a company can bring to an end actual adverse impacts in its own operations and those of its subsidiaries."[1152] Here, one practical difference in terms of proving causality is that the parent-subsidiary

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1147 Farah, et. al., *supra note*, 1090: 529.

1148 Recital 19, CSDDD.

1149 Lennarts, *supra note*, 1107: 260.

1150 Besides the exception in Art. 29(1).

1151 Corgatelli, *supra note*, 1146: 46. Art. 10(2)(*b*), CSDDD.

1152 Recital 53, CSDDD.

relationship is usually much closer than that of business partners. As it was established in Chapter 2 of the Thesis, such a connection between the operations of subsidiaries and the parent was usually the key factor in establishing the parent company's duty of care. However, at the same time, since causality issues are not regulated in CSDDD, there may be various practices across member states. As Corgatelli rightly points out, the legislators could, for instance, require stringent proof of the contribution to the infringement by the parent while placing a burden on proving the causal link between the conduct not only of the subsidiary but also of the parent company and the damage.[1153] Alternatively, it could be established that having proved that the adverse impact was caused by the subsidiary, the causal link with the parent's action is presumed – this way, the parent could avoid liability if it has established preventive measures or if it failed to do so without negligence.[1154] Such an approach would be in line with the current exculpatory nature of CSDDD provisions. CSDDD finally foresees that when the targeted company causes damage jointly with its subsidiary or business partner, it should be jointly and severally liable with that subsidiary or business partner, as per national law.[1155]

With regards to the final condition of "triad" – damages, CSDDD again leaves everything for national laws. CSDDD only states that deterrence through damages (punitive damages) or any other form of overcompensation should be prohibited.[1156]

The most important element, in terms of civil liability under CSDDD, is the burden of proof. Although the conditions for liability can be inferred from Article 29 and the supporting recitals of CSDDD, the implementation of liability *per se* and access to remedies for victims depend on who must prove them. However, the burden of proof is not regulated under CSDDD and is left to the member states.[1157] The importance of regulating the burden of proof is evident when examining different versions of CSDDD. As established in the Commission's proposal, the liability of the targeted company could have been excluded in cases of contractual cascading and compliance verification, unless the mentioned measures are considered inadequate. However, the Commission left the question of who should prove the reasonable adequacy of the measures to the national laws.[1158] Let's assume that national laws provide that inadequacy of the measures to achieve the goals of due diligence with regards to indirect business partners is left for claimants – tort victims. It is apparent that in most cases, it would be almost impossible to prove it and, as Pacces concludes, "[..] the liability for actions by indirect partners is effectively muted because the victim does not know or

1153 Corgatelli, *supra note*, 1146: 47.

1154 *Ibid.*

1155 Recital 87, CSDDD.

1156 Recital 79, CSDDD, Art. 29(2).

1157 "The liability regime does not regulate who should prove the fulfilment of the conditions for liability under the circumstances of the case [..]", Recital 81, CSDDD.

1158 Recital 58, Commission proposal.

cannot easily learn about the company's procedures."[1159] Especially taking into account that due diligence obligations are obligations of means, *i.e.* companies are not required to guarantee in all circumstances that adverse impacts will never occur or that they will be stopped.

In EP's proposal, the question arises as to who must prove the appropriateness of the actions taken to achieve due diligence goals. Therefore, the same question in terms of the burden of proof distribution is also relevant. However, EP's version provides an addition that the company will be responsible for producing evidence to prove it complied with the Directive.[1160] Even though it does not define the distribution of the burden of proof, it at least presupposes that in case it lies with the claimant, the targeted company will be obliged to rebut, providing respective evidence.

The CSDDD is different in this sense since the liability rule *per se* is constructed in a way to mimic the traditional civil liability conditions that usually lie on the claimant, *i.e.* i) a breach of duty, ii) a company's fault, iii) a damage; and iv) the causal link between the breach and the damage. While exculpatory provisions are removed[1161], liability stands on (claimant's) ability to prove the breach of duty of care and that the damage was caused because of that. Here, the "prioritisation" defence might arise, *i.e.,* targeted companies, if they are the ones to prove it under national law, might claim that particular adverse effects were not a priority in terms of "severity" and "likelihood." It would be extremely hard for tort victims to fight this, especially when the criteria of this "prioritisation" remain relatively vague.

Even though the CSDDD does not allocate the burden of proof, recitals of the latter imply that it lies on the shoulders of the claimant – Recital 81 clearly states that "[w]hen a claimant presents a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages [..]", national laws should ensure that courts can order that evidence, indicated by the claimant, be disclosed by the company.[1162] Thus, it is clear that *prima facie* evidence of the alleged breach of CSDDD lies with the claimant. However, exact rules on how civil liability shall be proved are left to member states. Pacces calls the lack of allocation of the burden of proof a "fatal mistake"[1163]; other authors, for instance, Lennarts, seem to agree with this.[1164] The main argument for this is the potential creation of jurisdictional arbitrage, as companies would select to operate in countries where the burden of proof is reversed. However, it remains unclear which method of distribution of the burden of proof would be balanced. Even though it is well appreciated that implying the burden of proof solely on claimants may be too harsh, as Touw states, "[..] reversal or shift in

1159 Pacces, *supra note*, 992: 259; Lennarts, *supra note*, 1107: 261.

1160 Amendment 43, Wolters report.

1161 Except for Art. 29(1) with regards to situation where the damage is caused only by the business partner.

1162 Recital 83, CSDDD.

1163 Pacces, *supra note*, 992.

1164 Lennarts, *supra note*, 1107: 265.

the burden of proof should [..] not become an unintended form of strict liability."[1165] It is clear that the adopted version of CSDDD chose to avoid the responsibility of distributing the burden to prove the breach of due diligence duties. Irrespective of the fact that forwarding rules on the burden of proof to national laws could create an uneven playing field and jurisdictional "shopping", according to the opinion of the author, the burden of proof should not lie with the victim due to apparent lack of information, needed to prove the actual breach of due diligence duties. Thus, it would seem much more sensible to oblige claimants (victims) to provide prima facie evidence of such breach, implying parent companies to rebut such claim by providing evidence to the contrary.

3.7. From actual knowledge to "duty to know"

In terms of the premises for the liability under CSDDD and how it is different from previous applications of tort (*duty of care*), particular importance should be given to the "knowledge" element. In this regard, the analysis of this element shall be reinforced by the previously discussed infamous tort cases. In *Chandler v. Cape plc.,*[1166] the court considered the so-called "superior knowledge" of the parent company over the activities of the subsidiary as the requisite for its *duty of care*. Such "superior knowledge" criteria, according to *Chandler v. Cape plc.,* are then foreseen in four criteria that indicate liability: *(i)* the business of both companies are particularly the same, *(ii)* the parent company has, *or ought to have superior knowledge* on some aspects of health and safety in the particular industry, *(iii)* the subsidiary's system of work is unsafe and the parent *knows or ought to know* that, and, finally *(iv)* the parent company *knew or ought to have known* that the subsidiary relies on such superior knowledge of the parent company.[1167]

Therefore, as, for example, Witting indicates,[1168] under *Chandler v. Cape,* one of the requisites for the parent company's *duty of care* is its knowledge of risk to health and safety issues at the level of subsidiaries. An interesting point is that the court considers that particular risks are known or should be known to the parent company ("ought to have known"). The following question then might arise – how could one consider that the parent company ought to know particular aspects of the subsidiary's activity? As McGaughey points out ", in *Chandler v. Cape* "[...] the emphasis is on what the mother company ought to have known and not on what it actually knows. Eventually, this means that the ability to control the subsidiary is important and not the actual control."[1169] Even though the answer to what parent company "ought to have known" is certainly dependant on a case-by-case basis, particular features could generally be

1165 Touw, *supra note*, 1110: 8.

1166 *Chandler v Cape plc* [2012] EWCA Civ 525.

1167 *Chandler v. cape*, at 80.

1168 Witting, *supra note*, 63: 360.

1169 McGaughey, *supra note*, 132: 5.

drawn – for instance, a practice of intervening in the subsidiary's operations may be sufficient to establish that parent company has superior knowledge on the topic concerned.[1170] In *Chandler v. Cape, inter alia*, the fact that the parent employed a medical officer to ensure the health and safety of the subsidiary's employees was used as proof of the alleged "superior knowledge."[1171]

Knowledge of the potential risks within the particular activities in the group was also triggered in *Vedanta*. The Supreme Court in *Vedanta* made reference to the claimant's argument on "[…] sufficient knowledge of the propensity of those activities to cause toxic escapes into surrounding watercourses[1172] and Vedanta's public report that made particular reference to problems arising at the mine in Zambia."[1173] However, in *Vedanta*, it was clearly indicated that the parent company or business partner does not, *per se,* have a duty to manage the activities of the subsidiary; therefore, it might seem that knowledge alone could not be the sole basis for the duty of care.

In *Maran*, however, the court gave much more credit to the alleged knowledge of the risks within the supply chain. *Inter alia*, the claim against the Maran was based, again, on a *duty of care* arising out of the Maran's alleged knowledge that, because of the particular conditions of the sale (price and the level of fuel at the time of the sale), the ship would be broken up in demolishing yard (in Bangladesh) with hazardous working conditions.[1174] In simple terms, this implies that Maran, as the initial seller, knew or talking in *Chandler v. Cape plc.* Dicta, ought to have known that the ship would be demolished in poor working conditions, where employees are constantly risking their life. The court was able to rule on the so-called "creation of danger" exception, based on other notorious precedents, where the harm was made by the intervention of the third party. In *Smith v Littlewoods*, the court concluded that duty of care could be established when the party "[..] negligently causes or permits to be created a source of danger, and it is reasonably foreseeable that third parties may interfere with it and, sparking off the danger, thereby cause damage to persons in the position of the pursuer."[1175] In this regard, even though under *Dorset Yacht Co Ltd v Home Office* and *Smith v Littlewoods Organisation Ltd.*[1176] *(i)* foreseeability of harm is not of itself enough for the imposition of a *duty of care*,[1177] *(ii)* law generally does not impose a duty on a person to protect others[1178] and *(iii)* "[l]aw does not impose a duty to prevent

1170 Bergkamp*, supra note,* 112: 190.

1171 *Ibid.*

1172 *Lungowe v Vedanta Resources plc* [2019] UKSC 20, 55; Bergkamp*, supra note,* 112: 220.

1173 *Lungowe v Vedanta Resources plc* [2019] UKSC 20, 58.

1174 *Ibid*., 14.

1175 *Smith v Littlewoods Organisation Ltd* [1987] UKHL 18.

1176 *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, 1037

1177 *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, at 1037 – 1038; *Smith v Littlewoods Organisation Ltd* [1987] SC (HL) 37, 59

1178 *Smith v Littlewoods Organisation* Ltd, 76.

a person from being harmed by the criminal act of a third party based simply upon foreseeability"[1179], the court in *Maran* concluded that *duty of care* may arise when a person "[…] has created a danger of harm which would not otherwise have existed or has assumed a responsibility for an individual's safety on which the individual has relied […]."[1180] In this regard, it was ruled that Maran played an active role by sending the vessel to Bangladesh, *knowingly* exposing workers of the demolishing yard to danger. Thus, *Maran* confirmed that *knowingly* doing business with a partner (even indirectly) that has a risky reputation in terms of health and safety requirements may trigger liability.

One of the implications that stem from the above cases is that not only the actual knowledge *per se* can play a strong part in establishing the duty of care, but foreseeability (i.e., what the party should know) is also vital. Thus, ignorance of foreseeable harm cannot rebut the liability. As established in *Chandler v. Cape,* the parent company's actual or inputted superior knowledge of relevant aspects of health and safety in a particular industry, as well as its knowledge about the subsidiary's unsafe working environment, was one of the main grounds for establishing a *duty of care*. Even though *Vedanta* did not *per se* affirm this reasoning as a "test", it stated that in these situations, the parent company *might* have a *duty of care*.[1181] *Maran,* in this regard, resurfaced the argument that knowledge of the risks could lead to the "creation of danger", *i.e.* knowingly acting negligently.

Even though considering the influence of the foreseeability or the actual knowledge of the harm as the condition for establishing a *duty of care*, it is relatively apparent that knowledge alone (actual or inputted) is not enough to establish the latter. Zerk indicates that the level of knowledge on the side of the parent company about the risks of the subsidiary's activity *and* the level of *"de facto*" control of the parent are the main factors to prove a causal link relevant to establishing the *duty of care*.[1182] Therefore, even though in *Chandler v. Cape, Vedanta* and especially in *Maran,* the *duty of care* of the company was grounded, *inter alia*, on the factor that the latter knew or ought to have known about the particular risks, its actual intervention[1183] into the relevant activities of other company is the vital condition. In the cases analysed in the Thesis, such "intervention" was grounded on different factual circumstances. In *Vedanta,* it was, *inter alia*, group-wide policies as the court indicated it could trigger the *duty of care* "[i]f the parent does not merely proclaim them, but takes active steps, by training, supervision and enforcement, to see that they are implemented by relevant subsidiaries."[1184] In *Okpabi,* such de facto management/intervention on the part

1179 *Ibid*., 77- 83.

1180 *Ibid*., 97.

1181 *Lungowe v Vedanta Resources plc* [2019] UKSC 20, 56.

1182 Zerk, *supra note*, 403: 221.

1183 Term "intervention" was intentionally proposed by the Supreme Court in *Vedanta*.

1184 *Lungowe v Vedanta Resources plc* [2019] UKSC 20, 53.

of the parent company over the health and safety practices of the foreign subsidiary was shown by the Control Framework and the subsidiary's accountability to a special committee in the parent company[1185]. In *Oguru*, it was established that bonus rules for the latter committee were linked to the number of oil spills in Nigeria.[1186] *Maran*, as described above, presents a different type of control (intervention) in this regard as Maran (indirect business partner), according to the court's view, knew that the ship would be broken up in Bangladesh, where working conditions are relatively poor (this was indirectly indicated by the price of the ship and the quantity of fuel oil left on the vessel when it was delivered)[1187] and that it in fact controlled the sale of the ship.[1188] In this regard, the price for the ship was considered high, showing that the demolition cash buyer would not use a safe demolition facility. Also, while the ship was docked in Singapore and had a low amount of fuel in its tanks, it was likely to end up in a shipyard in Bangladesh, the closest possible location. The Court of Appeal argued that this type of control over the sale is evident, and Maran could (and should) have managed it properly, insisting on the sale to a "green" yard where proper working conditions are in place.[1189] According to the court, this could have been done in a contract, for instance, by linking interparty payments to the delivery of the ship to an appropriate yard. In this way, according to the court's view, Maran allegedly "created a danger", as it "[…] played an active role by sending the vessel to Bangladesh, knowingly exposing workers (such as the deceased) to the significant dangers which working on this large vessel in Chattogram entailed."[1190]

Another ground to establish the *duty of care* considered by the courts in the cases analysed in the Thesis is the "assumption of responsibility" under *Hedley Byrne*[1191] as well as *Smith v. Littlewoods* precedents.[1192] This doctrine found its place in *Vedanta*, where the Supreme Court considered that a corporation might assume responsibility[1193] if "[…] in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not, in fact, do so. In such circumstances, its' very omission may constitute the abdication of a responsibility which it has publicly undertaken."[1194] For this issue, the Supreme Court considered Vedanta's sustainability report in which, as the court argued, Vedanta allegedly asserted its own assumption of responsibility for the maintenance of proper standards of

1185 *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3, 55-56.

1186 *Oguru,* 7.16.

1187 *Hamida Begum v. Maran LTD* [2021] EWCA Civ 326, 14

1188 *Ibid*., 19.

1189 *Ibid*., 67.

1190 *Ibid*., 64.

1191 *Hedley Byrne & co Ltd. v. Heller & Partners Ltd*, [1964], AC 465.

1192 *Smith v Littlewoods Organisation Ltd* [1987] UKHL 18.

1193 Wagner, *supra note*, 740:16.

1194 *Lungowe v Vedanta Resources plc* [2019] UKSC 20, 53.

environmental control at the mine.[1195]

A single, common, yet crucially important feature for the following analysis can be distilled from the above. To establish the *duty of care*, courts evaluate whether the companies knew or ought to have known about the potential risks. This is particularly apparent in *Maran,* where the court, apparently lacking the "hard" evidence to prove the control of the selling of the ship, used indirect circumstances, *i.e.* fuel level price of the ship, to actually show that Maran "knew" that vessel will be demolished in unsafe conditions. Even though, in other cases, the element of the knowledge was not necessarily directly evaluated, the fact that responsible companies were aware of the possible risks was proved by the fact that they actively intervened in the relevant activities of companies within the chain. In simple terms – companies were considered liable in tort for the harm that happened at the level of the subsidiary or business partner because they knew about potential dangers, and that knowledge is evident from the fact that there is intervention in the relevant activities of the mentioned companies. However, in *Vedanta*, it was clearly indicated that the parent company or business partner does not *per se* have a duty to manage – Supreme court concluded that direct or indirect ownership by one company of all or a majority of the shares of subsidiary (which is the essence of such relationship) may enable the parent to "take control" of the management of the operations of the business owned by the subsidiary, but "[i]t does not impose any duty upon the parent to do so", whether owed to the subsidiary or to anyone else.[1196]

A few legally important implications for liability should be discussed here. In the cases of corporate groups, *i.e.* share-ownership present (*Vedanta*, *Okpabi*, *Oguru,* etc.), to establish the *duty of care, the* court relied on various circumstances that are characteristic of parent-subsidiary relationship such as group-wide policies, codes of conduct etc. In *Maran*, however, since the relationship between Maran and the demolishing yard is evidently distant or even non-existent, the court relied on the evidence that allegedly show that Maran "knew" about the potential dangers in the yard. But even if this is *de facto* true, what if Maran had not known about such dangers? It is worth noting that *Maran* was an agent who acted on behalf of the owner of a tanker and sold it to a third-party intermediary – a buyer. Under the contract, the buyer was the party who was required to find a breaking yard to dispose of the ship 'in safe conditions'. The Court of Appeal argued that control of the sale is evident, and Maran could (and should) have been appropriately managed, insisting on the sale to a "green" yard where proper working conditions are in place.[1197] Court of Appeal considered the inclusion of these provisions, mandatory requiring safe demolition, as proof that selling the vessel "[w]as well within the reasonable control […]"[1198] of Maran. However, even though the court considered that such a contract clause was, in fact, inactive and ignored – why

1195 *Ibid.,* 61.

1196 *Ibid.*

1197 *Hamida Begum v. Maran LTD* [2021] EWCA Civ 326, 67.

1198 *Ibid.,* 68.

such alleged ignorance was only disadvantageous to Maran? The claimant sued only the shipping agent, Maran, and did not sue the buyer, who was the legal owner of the ship, the yard, or the employer. Therefore, what are the legal implications for liability if the vessel price and fuel level at the moment of sale is a mere coincidence and does not reflect the fact that the vessel would end up in Bangladesh? Could it really be concluded that Maran "created the danger" by selling the vessel to another commercial entity that finally sold the ship to its final demolishing when the buyer itself ignored the duty to demolish the vessel in safe conditions?

Such a comparison is not aimless. In essence, the *Maran* case is particularly important in terms of newly established due diligence obligations within the value chains both at national and international levels. Being atypical in the sense that it does not reflect a corporate group (share-based) relationship, it helps to witness the potential evolution of SCL as such. As some would argue, the *Maran* case chimes with regulatory and policy developments globally, in particular concerning supply chain/value chain due diligence. However, at the same time, even though being a far-reaching precedent in terms of *how* the control and foreseeability and control were established by the court, *Maran*, in essence, shares similar logic as *Vedanta* or the following cases, *i.e.* Maran Ltd, Vedanta Ltd, as Royal Dutch Shell Plc were considered to have a *duty of care* **because** they had intervened.[1199] Therefore, there is a *retrospective* element attributable to liability in tort, *i.e.* someone is held liable in tort only when the actual damage occurred if there is sufficient proximity between the defendant's actions and the damage itself.

Newly established due-diligence legislation, both at the national[1200] level and especially under CSDDD, actually creates a positive duty (directed to the future) for legal entities covered. As presented above, the CSDDD requires businesses to *(i)* carry out supply chain or value chain due diligence and *(ii)* identify and assess human rights infringements and/or environmental risks flowing from their operations. In simple terms, the CSDDD creates a "duty to know" what is happening in the supply chain and, after assessing all the possible risks, intervene and mitigate them. Thus, the legal implications for liability under CSDDD are completely different, in essence, than the ones used in *Maran*. Under CSDDD, the breach of due diligence duties may result in tortious liability for the companies covered.

Thus, as Hans De Wulf argues, in this fashion, tort law is invoked to create a duty of care that can be enforced as such without entering the debates about damages or causation.[1201] However, the central argument made in this regard is that *duty of care, per se*, is a legal standard to judge one's behaviour (retrospectively), but it cannot create a positive duty to act carefully. Of course, it could be argued that tortious liability for the companies covered under CSDDD is applicable as a sanction for non-completion

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1199 As mentioned, the level of intervention as well as supporting evidence in each case was different.

1200 In France and Germany.

1201 Presentation of Hans De Wulf "The Doubtful Legitimacy of Emissions Reduction Litigation Against Companies", ECCL Conference, Ghent, 31 May 2024.

or insufficient completion of respective due diligence duties. However, this is only a limited part of this debate. It could be argued, then, why one could be liable in tort for not carrying out due diligence within the supply chain when the latter duty itself is not attributable to tort law standards. Such positive due diligence duties and their (non) alignment with tort law could be greatly presented by the example of the dangerous car driver.[1202] Consider the road (such as German autobahns) where there is no speed limit. In such cases, everyone can drive as fast as they want, and no liability can be applied for speeding significantly above the average driver. Tort law in this example could only be invoked if the driver's dangerous driving creates actual harm, e.g., a car crash happens where pedestrians are killed – there is no *enforceable* duty to drive in a particular (safe) way. If one considers a company whose supply chain is working in a notoriously dangerous sector where the danger to the environment or human health is highly probable, for e.g. mining as in *Vedanta*, it could not be generally enforced to act in a particular way based on tort law. However, it could be held liable if its actions imply the existence of a *duty of care,* but only once actual damage is present.

Thus, the switch in legal implications for civil liability from *Vedanta*, *Okpabi, Oguru* and *Maran* to CSDDD is evident and apparent. In the former, the liability of the company (be it a parent company or business partner)[1203] is based on its actual involvement in the relevant activities of another company, which leads to the consideration that such intervention proves the existence of the *duty of care.* What this means, in particular, is that causation is the key element that courts analyse, and only in case it is considered sufficient, *duty of care* could be implied. Causation requires proving that the *harm was a reason of the company's actions (or omissions)*, therefore – a breach of duty of care.[1204] Therefore, as Hart explains, the causation requirement is based on "proximity", namely that only an event that is sufficiently related to the damage is deemed to be the cause of thereof,[1205] Thus, to show proximity, claimants would generally need to prove that actions related to the harm at the level of the subsidiary, are related to the parent company's negligence either in the form of commission or omission. Under CSDDD, liability implications are generally reversed. Liability in tort is implied for breach of due diligence obligations *per se*. Therefore, it could be concluded that causality between the companies covered and the potential harm that might happen in the supply chain is somewhat pre-settled. Since companies now have positive duties to intervene in the entire supply chain, if the harm occurs at the level of a particular company, the one that has due-diligence obligations is an automatic "target". But what is the role of causality in such a case? Does the fact that companies within the

1202 *Ibid.*

1203 After *Vedanta*, it could be considered that parent-subsidiary relationship is not legally decisive in order to establish a duty of care, *Lungowe v Vedanta Resources plc* [2019] UKSC 20, 61. *Maran* approves this approach.

1204 *Zerk*, *supra note*, 403: 221.

1205 H. L. A. Hart and A. M. Honoré, *Causation in The Law, 2 nd edition* (Oxford: The Clarendon Press, 1985) in *Bergkamp*, supra note, 112: 181.

supply chains have due diligence duties mean that their omission is, *per se,* enough to be liable? These questions present a clear distinction between analysed paradigmatic cases and CSDDD in terms of implications for liability. In the author's opinion, such a "switch" also presents some paradoxes – under *Vedanta* or *Maran*, intervention in another company's activities could lead to liability. However, this would presuppose that if respective companies had not intervened in those cases, they would have avoided liability. Under CSDDD, covered companies now shall intervene and basically do not have a choice. Thus, legal implications for liability are somewhat reversed – companies either comply or are liable for non-compliance.

3.8. Due Diligence Obligations – Where to Draw the Line?

It has already been established that the creation of due-diligence law is a vital step in transitioning from voluntary to mandatory obligations of corporations concerning ESG matters. As Bright and others point out, "[t]he shift from a "soft law" (i.e., non-binding) corporate responsibility to respect human rights to a "hard law" (i.e., legally binding) duty to respect human rights constitutes an attempt to adjust for the negative consequences of unregulated global trade.".[1206] Farah and others believe that "[u]nder the unassuming and somewhat technocratic title of 'due diligence', quietly hides a revolutionary legal instrument that will transform the access to justice and remedy for [..] victims."[1207] The author of the thesis fully supports this statement, which was repeatedly highlighted in multiple times in this research.

However, even if the aim of the regulation is clear and justified, its compatibility with traditional corporate law principles shall be carefully evaluated. Therefore, the author further provides some general remarks on the compatibility between due diligence obligations and general corporate principles.

3.8.1. Legal separability v. due diligence obligations

Barsan proposes that from a more general corporate law standpoint, there is a tendency and a risk that due diligence obligations, as such, might create a situation where the corporate veil of parent companies is being gradually lifted, until we question the relevance of legal personality and limited liability.[1208] Sørensen supplements this discussion by stating that "[i]t wouldn't be surprising if one of the next ambitions of EU company law were the resurrection of the proposal for a ninth directive on groups of companies."[1209]

1206 Bright et. al., *supra note*, 1072: 670.

1207 Farah, et. al., *supra note*, 1090, 511.

1208 Barsan, *supra note,* 859: 54.

1209 K. E. Sørensen, Recognising the Interests of the Group – Another Attempt to Harmonise the Rules Regulating Groups of Companies in the EU (March 24, 2020). Nordic & European Company Law Working Paper No. 20-02, Available at: https://ssrn.com/abstract=3560123.

Under the principle of legal separability, each separately incorporated legal entity within a corporate group is treated as having a separate existence from its owners, *i.e.* they are autonomous in their decision-making as well. As Bright explains, "[a]s a result, a parent company cannot normally be held liable for adverse human rights or environmental impact caused overseas by its subsidiaries, and even less so when they caused by suppliers or subcontractors."[1210]

As it was already established, neither in *Vedanta* nor in other cases based on the establishment of a duty of care was legal separability triggered, as liability was based on the corporations' own misconduct (breach of their own duty of care). If we look at due-diligence obligations, probably, from a strictly legal sense, it could also be concluded that the legal separability of companies within the supply chain is not triggered as the mentioned obligations are dedicated to targeted companies and liability is grounded on the corporation's own behaviour, *i.e.* breach of due-diligence obligations. Such "wiggle" practically means that the parent company can be held directly liable for its *own* acts or omissions concerning the harms resulting from the activities of its subsidiaries. However, this is just one perspective on this topic. If one considers that, under due-diligence legislation, targeted companies are obliged to ensure that their entire supply chain is compliant with human rights and environmental standards, requiring them to establish vigilance plans and adapt contractual terms to ensure compliance, legal separability is evidently triggered. To be more precise, separate companies within the supply chain are obliged to be compliant under the direction of the parent company. Hereto, another aspect of the division of powers between corporate bodies is inseparable. As it has already been established, the principle of legal separability also entails that, generally, parent companies cannot control or manage their subsidiaries.[1211] This general rule stems from the strict separation of powers between shareholders and management bodies of the company, which are required to act in the best interest of their company and are not bound by shareholders' instructions. Shareholders, in this regard, shall not intervene in the management of the company. In the case of classic tortious liability, based on the establishment of the "duty of care", it was established that the application of a duty of care does not contradict the general principle. The establishment of a duty of care, under the classic tort rules, reflects a situation where corporations are held liable **if** they intervene. And only due to this deliberate intervention into the activities of the subsidiary that otherwise would be in full control of the subsidiary itself, the parent company become "vulnerable" for establishing the duty of care to ensure avoidance of particular risks.

However, due diligence regulation, both at the national and EU levels, obliges targeted companies to intervene and foresees liability for non-intervention or insufficient intervention. Such a phenomenal change in the legal technique for tackling the reckless behaviours of multinational corporations then leads to many fundamental questions in corporate law. In fact, it is not clear where to draw the line. Of course, it could

1210 Bright, *supra note*, 845: 5.

1211 Chapter 2.4.1. of the Thesis.

be concluded that such a shift has a limited scope and does not contradict corporate law principles *per se,* but according to the opinion of the author – supervision and management of human-rights and environmental-rights related issues in the whole corporate group (supply chain), actually presents the management of business activities of other separate companies. It could hardly be concluded otherwise when CS-DDD stipulates that the company can terminate the business relationship with another company in the event of non-compliance. Therefore, whether this can be that through the "keyhole" of due diligence in the allegedly limited scope of ESG, we are witnessing a change in cornerstone corporate law principles, the way tort law is used to hold companies liable for the reckless behaviour in their supply chains that trigger environmental or human rights questions or what other authors would call a "quiet revolution".[1212] The paradox[1213] described by the author becomes even more apparent here.

The conclusion that one can draw here is that due-diligence regulation both at the national and international level, and recent paradigmatic cases such as *Vedanta,* and *Maran*, not only highlighted the need to reconsider the methods in which tort law is being applied for reckless corporate behaviour but also re-surfaced the need to possibly re-evaluate the traditional principles of legal separability and limited liability in corporate groups/supply chains. To be more precise, the author considers that while it is not legally admitted that parent companies, at least in the scope of ESG matters, not only can but actually shall intervene in the activities of another separate company, may lead to the admittance of parent's ability to instruct subsidiaries in other matters - the business reality that not recognised due to the prevailing concept of the legal separability of the subsidiary (and its management)."[1214] Otherwise, only admitting such right (obligation) to intervene in the activities of another separate company only in limited matters could create additional uncertainty. Such an idea was greatly reflected by Sørensen, stating that, "[a] harmonisation that allows subsidiaries to be managed in the interest of the group should be accompanied by a regulation of the duties of the management of the parent company when they do so, a reconsideration of the position of stakeholders in the parent company, and possibly the introduction of a duty to oversee subsidiaries."[1215] According to the opinion of the author, it could claimed that the current world, where business activities collide with the emerging need to tackle environmental and human rights abuses, requires a move from soft law to hard law – direction, which is already manifest as confirmed by novel CSDDD obligations. At the same time, while this requires some flexible approach to traditional corporate principles (legal separability, limited liability), legal rules cannot operate as "cherry-picking" i.e. ignore corporate law principles for some limited areas such as

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1212 Farah, et. al., *supra note*, 1090: 511.

1213 Chapter 2.6. of the Thesis.

1214 *EMCA*, 379.

1215 K. E. Sørensen, "The Legal Position of Parent Companies: A Top-Down Focus on Group Governance", *Nordic & European Company Law Working Paper No.* 19 (2019): 35, https://ssrn.com/abstract=3495023 or http://dx.doi.org/10.2139/ssrn.3495023.

environmental due diligence, enabling parent companies to, essentially, intervene into the business activities of subsidiaries, but deny such right elsewhere, hiding behind legal separability. Thus, consistency is needed, and it seems that admitting the parent company's right to intervene in the activities of subsidiaries, implying the duties of parent companies when they do, as proposed by Sørensen, is a possible way forward. Otherwise, CSDDD alone, even though serving a noble purpose, may fall out of the context of corporate law.

CONCLUSIONS

The analysis conducted in the thesis enables us to state that the research purpose, as indicated in the introduction, has been achieved, the set objectives have been implemented, and the defence statements have been justified. The following conclusions substantiate this:

1. The analysis of both statutory and case law of selected jurisdictions – UK, France, and Germany confirm that (parent) companies may be held liable in tort for the harmful actions at the level of subsidiaries based on ordinary tort rules. While, under French and German law, such tortious liability is rare in essence, the UK provides extensive precedents on the tortious liability of parent companies.
2. The vital element of tortious liability is the establishment of the *duty of care*. In this regard, the parent company is liable if it is established that *(i)* it owes a *duty of care* to the victim, *(ii)* it has breached that duty, *(iii)* the victim's damage is not so unforeseeable as to be too remote, and *(iv)* there is a causal connection between the careless conduct and the damage. *The duty of care per se* presupposes the existence of a particular relationship between the claimant and the defendant before the harm, as first described in *Donoghue v Stevenson*, which compares it to a relationship akin to that of neighbours. The classical concept of tortious liability, as described in Chapter 1 of the thesis, was adapted to cases of corporate wrongdoing related to environmental and human rights, such as *Connelly v. RTZ Corp plc.* and *Lubbe & Others v. Cape Plc. Chandler v. Cape plc.* and others.
3. On the merits, the *duty of care* is traditionally established based on the parent company's intervention in the activities of its related companies. Such intervention of the parent company is *case by case* based, for instance, establishing that the parent company was responsible for ensuring the supervision of proper standards of health and safety by its foreign subsidiaries. A relevant dictum from these types of precedents is that the parent company may owe a *duty of care* in very specific situations where particular intervention into the activities of subsidiaries can be established. However, the application of tortious liability by the parent company was originally very cautious, considering that recognising such a *duty of care* too broadly would undermine the prevailing principle that there is no general duty to prevent third parties from causing harm to others, as well as cornerstone principles of limited liability and legal separability.

These conclusions approve the ***first defence statement*** that under the classical approach[1216] to the liability of the parent company, parent companies may be held liable in tort for the harmful actions at the level of their subsidiaries, based on the classic tort of negligence, by establishing the *duty of care.* Such *duty of care* may be proved by the parent company's intervention in the relevant activities of its subsidiaries that

1216 Author's expression used to define the application of liability in chapter 1 of the Thesis.

eventually presupposes operation control.

4. *Vedanta* resurfaced the notion of tortious liability of the parent company for the actions happening at the level of subsidiaries based on its own *duty of care* towards third parties. *Vedanta* and the following cases confirmed that the tortious liability of the parent company does not require any specific tests attributable to these scenarios. The same notion was also approved in other UK precedents, following *Vedanta*, i.e., *Okpabi*, *Oguru,* and others.
5. The vital element for the parent company's tortious liability, according to *Vedanta* and the following cases, is its ability to take over, intervene in, control, supervise, or advise the management of the relevant operations of the subsidiary, *i.e.,* operational control. Such intervention/operation control could be established differently, starting from active intervention, such as appointing relevant officers to oversee the subsidiary's activity, to public statements, showing the parent's apparent commitment over particular activities of the subsidiary.
6. While *Vedanta* and the subsequent cases endorsed the existing notion of parent company tortious liability, the *Maran* case established supply chain liability in its widest sense, i.e., the company's liability for the actions of an indirect business partner. The underlying notion of this reasoning is that the company could "create danger" by its indirect actions that later led to harmful activities of indirect business partners. *Maran* differs from cases involving corporate groups (*Vedanta*, *Okpabi*, *Oguru,* etc.) in that they present characteristics attributable to parent-subsidiary relationships, such as group-wide policies and codes of conduct. In *Maran*, the court relied on evidence that allegedly showed the company was aware of the potential dangers associated with its business partners.
7. Company liability, based on its *duty of care,* does not *per se* contradict legal separability and limited liability principles. It does not present the liability for a third party's actions as it is grounded on the corporation's own behaviour.

These conclusions approve the ***second and third defence statements***, in particular showing that according to this neo-classical[1217] approach to company tortious liability, the liability of the parent companies is based on the traditional tort of negligence. However, *Maran* presents an evolution of supply chain liability that enables liability beyond the group (parent company) and allows non-parent companies (such as business partners in *Maran*) to be liable based on the tort of negligence.

8. Due diligence, both at the national (e.g., France, Germany) and international levels (e.g., CSDDD), creates due diligence obligations for parent companies over their supply chain members. In this regard, due diligence laws create positive duties for parent companies, which is a novelty in the context of the classic separation of legal entities.
9. With respect to the civil liability of the parent companies, due diligence laws drastically shift the conditions of the latter. I.e. while *Vedanta*, *Okpabi,* or even *Maran* make companies liable if they intervene in the respective activities of

1217 Author's expression used to define the application of liability in Chapter 2 of the Thesis.

their subsidiaries or business partners, civil liability under due diligence laws (CSDDD in particular) is triggered for non-sufficient intervention or non-intervention into relevant activities of supply chain members (i.e. environmental and human rights issues). Thus, under classic tort rules, the liability of the company is based on its actual involvement in the relevant activities of another company, which leads to the consideration that such intervention proves the existence of the *duty of care.* Under due diligence laws, more precisely the CSDDD, liability implications are generally reversed. Liability in tort is implied for breach of due diligence obligations *per se*. Therefore, we witness a paradigmatic change in the way tort law is being applied to human rights or environmental rights-related abuses.

10. Supervision and management of human-rights and environmental-rights-related issues in the whole corporate group (supply chain) presents management of business activities of other separate companies. Therefore, even though the scope of such management is limited to ESG matters, it could eventually be concluded that due-diligence laws present a contradiction with classic corporate law principles such as legal separability.
11. Emergence and acceptance of due diligence laws present a need to re-evaluate the traditional principles of legal separability and limited liability in corporate groups/supply chains. While it is admitted that parent companies, at least in the scope of ESG matters, not only can but actually shall intervene in the activities of another separate company, may lead to the admittance of the parent's ability to instruct subsidiaries in other matters - the business reality that not recognised due to the prevailing concept of the legal separability of the subsidiary. Otherwise, only admitting such right (obligation) to intervene in the activities of another separate company only in limited matters could create additional uncertainty.

These conclusions approve the ***fourth defence statement***, i.e. that due-diligence laws, both at the national and EU level, present a substantial shift in the application of tort liability for harmful actions within the supply chain. While the tort law precedents described above consider companies liable in tort for their intervention into the relevant activities of companies within the supply chain, due diligence laws oblige parent companies to oversee and manage human rights and environmental-related matters throughout the entire supply chain.

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REGULATORY MODELS CONCERNING THE ATTRIBUTION OF DUTIES AND CIVIL LIABILITY IN GROUPS OF COMPANIES (AND THEIR VALUE CHAIN EXTENSIONS)

Summary of Doctoral Dissertation
Social Sciences, Law (S 001)

Vilnius, 2025

This doctoral dissertation was prepared during the period of 2020-2025 at Mykolas Romeris University and Ghent University, under the right of doctoral studies granted to Mykolas Romeris University and Vytautas Magnus University by the Order No. V-160 of the Minister of Education, Science and Sport of the Republic of Lithuania on 22nd of February, 2019.

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REGULATORY MODELS CONCERNING THE ATTRIBUTION OF DUTIES AND CIVIL LIABILITY IN GROUPS OF COMPANIES (AND THEIR VALUE CHAIN EXTENSIONS)

SUMMARY

Problem analysed in the doctoral thesis. It could easily be argued that law, as a set of legal rules, shall work in a way that reflects the actual economic and social relations between the parties. This is particularly important in business relationships, as they evolve rapidly and, in turn, significantly impact the economies of various societies, whether countries or unions. The fact that legal rules should reflect and co-exist with *de facto* relationships between different market participants also presupposes that the law should adapt to various changes that occur in the market. Such changes can be influenced by various factors, such as other legal rules that impact the rights and obligations of the parties. However, possible tensions may arise when legal rules do not necessarily correspond with *de facto* economic relationships between the parties, and this is even more pronounced when there is a conflict between past and new legal rules. Even though such intersections or conflicts may not always be apparent, once one takes a closer look at the doctrinal roots of particular legal rules, it may be at least arguable that we face paradigmatic changes in a way that some classic legal principles are being applied to reflect new both economic and political realities. According to the author of the thesis, the topic analysed herein is capable of demonstrating that this is indeed the case. In this regard, the thesis analyses the implications for the civil (tort) liability of limited liability companies regarding harmful actions occurring within their supply chains. In particular, the thesis focuses on liability within the supply chain for environmental and/or human rights (also known as ESG matters). Currently, some of the most developed legal systems, Germany, the UK and France – being the "front-runners", have witnessed increased attention to the issues of sustainability, human rights and climate change. The author specifically chose the mentioned jurisdictions because of their advanced legal systems, evolving statutory frameworks, and growing jurisprudence that hold corporations accountable for ESG-related harms—especially those arising from global supply chains, environmental degradation, and human rights violations. Attention to ESG, *in itself,* is not a new phenomenon and litigation concerning the latter has already garnered considerable attention from both legal scholars and the public. However, the author argues that both recent changes in statutory law and corresponding case law addressing ESG liability present some fundamental shifts in understanding traditional tort law principles and their coexistence with corporate law principles.

To comprehensively address the problematic issues analysed in the thesis, it is necessary to describe the two main legal principles traditionally attributed to corporate law and companies *in general*. The first one – legal separability - implies that each company, even within the corporate group, is legally separate from other companies

(whether parent or subsidiaries) and manages its activities.[1218] Few implications stem from this principle. *First*, the parent company is generally[1219] not liable for the actions (debts) of its subsidiaries and *vice versa*. *Second*, the management of each company, according to the general rule, shall act solely in the best interest of the managed company and cannot override the interests of such company for the benefit of another company, e.g., the parent company. *Third*, following the two former principles and according to the division of powers between shareholders and management bodies, the parent company generally[1220] cannot legally manage the subsidiaries or intervene in their decision-making. The principle of limited liability foresees that shareholders do not risk more than their contribution (investment) to another legal entity, and they cannot be held liable for their subsidiaries' debts.[1221] The principle, established by the famous UK precedent of *Salomon v. Salomon,*[1222] provides that a shareholder of a company is separate from the latter and cannot be liable for financial difficulties beyond what was initially invested. Principles of legal separability and limited liability are considered traditional and are generally applicable, with some exceptions, to most modern states, including the United Kingdom, France, and Germany, on which the thesis focuses primarily. The general rule would seem relatively straightforward – companies are separate legal entities and are not responsible for anything that is beyond their own interests. Even though, as described above, shareholders of limited liability companies, according to the general rule, enjoy limited liability, different legal regimes provide particular exceptions to this rule, foreseeing that companies may be held liable for the actions that happened at the level of other companies.

The most common exception to limited liability, attributable to the legal regimes of the countries analysed in the thesis, is the so-called "lifting of the corporate veil" or "veil piercing". According to the doctrine of "veil piercing", a shareholder (natural or legal person) may be held liable for its subsidiary's debts despite the rules of limited liability and separate personality.[1223] UK legal precedents in this regard are among the most comprehensive and provide a detailed legal implication of the general exception of limited liability. With the "veil" of corporation being established by the mentioned *Salomon v. Salomon, Adams v. Cape*[1224] later approved it in the corporate group situation, indicating that court cannot lift the "corporate veil" against a parent company, which was a member of a corporate group, "[…] simply on the is that the corporate

1218 Martin Winner, "Group Interest in European Company Law: an Overview", *Acta Univ. Sapientiae, Legal Studies* 5, 1 (2016): 87, http://www.acta.sapientia.ro/acta-legal/C5-1/legal51-06.pdf.

1219 As provided further in the Thesis, there are some legal exceptions to this principle.

1220 As provided further in the Thesis, several legal regimes such as German *Konzernrecht* provide exceptions to this rule.

1221 Karen Vanderkerckhove, *Piercing the Corporate Veil*, European Company Law Series, v. 2 (Alphen aan den Rijn: Kluwer Law International, 2007), 71.

1222 *Salomon v Salomon & Co Ltd* [1897] AC 22.

1223 Vandekerckhove, *op. cit*.

1224 *Adams v. Cape Industries plc.* [1990] Ch 433.

structure had been used to ensure that legal liability in regards to the particular future activities of the group would fall on another member of the group rather than on the defendant company."[1225] However, further UK cases such as *Smith, Stone & Knight v. Birmingham Corp.*[1226] *DHN Food Distributors v. Tower Hamlets LBC*[1227] established that where the subsidiary company is a mere façade or acts as an agent of another (parent) company, the corporate "veil" should be lifted and the privilege of limited liability cannot be applicable.[1228] In other words, the mentioned cases suggest that if another company is used solely for the benefit of another company, for instance, to limit its risk, *e.g.* by engaging in legitimate economic activities with the subsidiary while acting fraudulently, the parent company cannot benefit from the limited liability. In this regard, the element of will is vital since it should be established that such a "scheme" or "facade" is construed intentionally. In France, for instance, certain aspects of "veil piercing" are covered by statutory law and correspond to similar conditions as under UK precedents, i.e. fraud or sham agency.[1229] In Germany, "veil piercing" is also recognised; however, considering relatively sophisticated law on corporate groups, the exact boundaries of the latter in Germany are not clear – some authors consider "veil piercing" as a "[…] rest category consisting of cases of shareholder liability that do not resort under group law or common civil law or company law."[1230]

Another exception to the limited liability, recognised in the analysed countries, provides that the parent company may be held liable for the actions that happen at the level of another separate company (mostly a subsidiary) if it acts as a so-called "de facto director".[1231] The essence of this doctrine is that the company[1232] could be held liable as de jure (legally appointed) director of the company if it is shown that the actions of the former are attributable to the latter, *i.e.* they acted as the de jure directors. Under the French legal regime, a person is deemed to act as a "de facto director" if it is first demonstrated that this person performed, directly or through other entities, independent affirmative acts of management.[1233] As S. Demeyere summarises, French law allows a parent company to be considered the "de facto director" of a subsidiary due to the exercise of influence over the latter's management.[1234] In such a case, the

1225 *Ibid.*

1226 *Smith, Stone & Knight v. Birmingham Corp.* [1939] 4 All E.R. 116.

1227 *DHN Food Distributors v. Tower Hamlets LBC* [1976] 1 WLR 852.

1228 Vandekerckhove, *supra note*, 4:71.

1229 Vandekerckhove, *supra note*, 4:40.

1230 Vandekerckhove, *supra note*, 4:63.

1231 Klaus J. Hopt, "Groups of Companies. A Comparative Study on the Economics, Law and Regulation of Corporate Groups", *ECGI Working Paper* 286, 215 (2015): 21, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2560935.

1232 As well as natural person *i.e.* shareholder.

1233 Decision of Paris Court of Appeal of 7 October 2008 in civil case no. 07/13617.

1234 Siel Demeyere, "Liability of the Mother Company for Its Subsidiary in French, Belgian and English Law", *European Review of Private Law* 23, 3 (2015): 390, https://doi.org/10.54648/erpl2015028.

tort liability of the parent company is based on the fact that it assumed responsibility for the damage caused at the level of the subsidiary, taking into account the fact that the subsidiary was essentially controlled by the parent company.[1235] In one of its rulings, the French Court of Appeal provided that in order for a parent company to be considered the "de facto director" of a subsidiary, it is necessary to show that the parent company has substantially disregarded the group structure and exercised active and repetitive management functions and substantially dominated the decisions of the subsidiary, thus controlling the latter's financial and economic decisions.[1236] In other cases, the French courts detailed that the recognition of the parent company as the "de facto director" of the subsidiary depends on whether, in a specific case, the management actions of the parent company can be considered of an absolute subordinate nature.[1237] In another case, Court of Appeal of Lyon distinguished the characteristics of the actions of the parent company towards the subsidiary company, which is a specific case could collectively indicate the existence of subordination: *(i)* the financial director of the parent company is authorized to decide on the disposal of the finances of the subsidiary company, *(ii)* the subsidiary company auditors are directly accountable to the parent company, *(iii)* the "survival" of the subsidiary company depends exclusively on the parent company, *(iv)* loans to the subsidiary company are issued only taking into account the creditworthiness of the parent company (in other words, the parent company is a guarantor/guarantor in relation to the subsidiary company), *(v)* meetings of the subsidiary company's management bodies are held at the parent company's registered office.[1238] On a separate note, the liability of "de facto directors" is also prescribed by French statutory law.[1239] The latter provides liability of "de facto directors" who engaged in specific acts of mismanagement resulting in an excess of liabilities over assets of the underlying company.

It is worth noting that, although in practice, shareholders (e.g. a parent company) are usually considered as "de facto directors", French courts allow legal persons who are not shareholders to be recognized as "de facto managers" when dominance can be proven on another basis - e.g. contractual. For example, the French Court of Cassation has decided on the question of whether a car manufacturer could, in a specific case, be recognized as the "de facto director" of a car distribution company.[1240] The institute of "de facto director" is also attributable to the banks when they dominate debtors through financing conditions, etc.

Companies could be deemed "de facto directors" in Germany and the UK as well.

1235 Z. GALLEZ, *Les multinationals – Statut et réglementations*: 163 in Siel Demeyere, "Liability of the Mother Company for Its Subsidiary in French, Belgian and English Law", *European Review of Private Law* 23, 3 (2015): 393, https://doi.org/10.54648/erpl2015028.

1236 Decision of Paris Court of Appeal of 7 October 2008 in civil case no. 07/13617.

1237 Decision of Aix-en-Provence Court of Appeal of 4 June 2004 in civil case no. 02/20731.

1238 Decision of Lyon Court of Appeal of 2 July 1999 in civil case no. 98/7888.

1239 L. 651-2, French Commercial Code.

1240 Decision of the Court of Cassation of 26 October 1999, no. 97-19.026

In Germany, however, this institute is mainly limited to a specific case – the parent company's civil liability for failing to initiate the subsidiary's bankruptcy. In the case of German private limited liability companies, the bankruptcy process must be initiated by the director of the latter. However, case law has clarified that this duty also applies to the "de facto director" – the person who actually controls the management of the company.[1241] In this sense, German law also recognizes parent companies as "de facto directors" with such a duty, and the latter shall compensate for the losses caused by the breach of this duty.[1242] The functional equivalent of the "de facto director" in the UK is the so-called "shadow director", directly defined in the Companies Act, as a person whose instructions the company's "de jure" management bodies act on.[1243] However, the Companies Act does not allow the parent company to be considered a "shadow manager" solely because the members of the subsidiary's management bodies act on the instructions of the latter.[1244] Considering this, the parent company could be held liable similarly to that in Germany, *i.e.* in cases related to the subsidiary's insolvency, once it is established that the parent company was not acting prudently to intercept this.

Other, more rare exceptions of the limited liability of the company include "fictitious corporation" and "commingling of assets", "wrongful trading", etc.[1245] Those indicate cases where it can be shown that the sole purpose of the company is to serve the interests of shareholders, or it is no longer possible to distinguish between the assets of different companies accordingly. If those cases succeed to be proven, the court may hold the (parent) company liable for the debts of the subsidiary.

However, examples of exceptions to the company's limited liability are provided as a helpful context for the main topic of the thesis – the company's liability in tort (specifically, the tort of negligence) for environmental and human rights abuses. Thus, the author does not provide an extensive legal analysis of the "lifting of the corporate veil", "de facto directorship", "wrongful trading", or other commonly found exceptions to the limited liability of a company that could easily constitute a separate topic for the doctoral thesis. The analysis of the mentioned institutes is provided by describing particular legal implications for the civil liability of the companies in order to, *inter alia,* evaluate the main conditions for civil liability under these institutes and whether it is comparable to the liability for the tort of negligence.

The UK has historically provided the most developed case law on the liability of companies for environmental and human rights abuses in the tort of negligence. However, to understand the implications of such liability, it is essential to comprehend the nature of the tort of negligence. According to the English tort of negligence description,

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1241 Comparative Analysis on Legal Regulation of the Liability of Members of the Management organs of Companies, *ECGI Law Working Paper* 103/2008 (2008): 139, http://ssrn.com/abstract=1001990.

1242 *Ibid.*

1243 251 (1), Companies Act.

1244 251 (3), Companies Act.

1245 Vandekerckhove, *supra note*, 4:42.

a person is liable for negligence when *(i)* he/she owes a *duty of care* to the victim, *(ii)* he/she has breached that duty, *(iii)* the victim's damage is not so unforeseeable as to be too remote, and *(iv)* there is a causal connection between the careless conduct and the damage.[1246] Thus, to apply tortious liability, it shall be established that the person to whom such liability is initiated has an existing *duty of care* towards other persons, the breach of which would lead to the emergence of liability.[1247] *Duty of care* as such presupposes the existence of a particular relationship between the claimant and the defendant before the harm.[1248] The mentioned relationship is described in *Donoghue v Stevenson*[1249], comparing it to one of the neighbours in terms of proximity. According to this "neighbour" relationship, a person owes a duty of care to everyone who, by negligent conduct, can suffer foreseeable damage, provided that the requirement of sufficient proximity between the wrongdoer and the victim exists.[1250] Such a classical concept of tortious liability was adapted to the cases of corporate wrongdoing related to environmental and human rights.

However, the application of tort law in this regard evolved over time. Initially, the tortious liability of the corporation based on the existence of its *duty of care* to third parties, where the harmful actions occurred at the level of subsidiaries, was seen as a novel application of the traditional *duty of care*. House of Lords created the so-called „*Caparo*" test[1251] in order to establish a novel duty of care: *(i)* the harm must be foreseeable, *(ii)* there shall be proximity between the claimant and the defendant, and *(iii)* imposing a duty of care shall be fair, just, and reasonable.[1252] To understand the sensitivity of establishing a *duty of care* for corporations regarding the actions at the level of their subsidiaries, it is inevitable to consider that in common law countries, including the UK, a person does not have a general duty to ensure that third parties do not harm others.[1253] Thus, even though applying traditional tort law principles, UK courts were cautious in establishing a *duty of care* for the parent company. After a few landmark cases that were either stuck on limitation grounds or settled, such as *Connelly v. RTZ Corp plc.* and *Lubbe & Others v. Cape Plc.*, the UK Court of Appeal provided its substantial viewpoint on the duty of care of the parent companies for the environment and human rights abuses that happened at the level of subsidiaries in *Chandler v. Cape*

1246 Anthony M. Dugdale et al., *Clerk & Lindsell on Torts 19th edn.* (London: Sweet & Maxwell, 2006), 383 *in* Siel Demeyere, "Liability of the Mother Company for Its Subsidiary in French, Belgian and English Law", *European Review of Private Law* 23, 3 (2015): 402, https://doi.org/10.54648/erpl2015028.

1247 Cees van Dam, *European Tort Law* (New York: Oxford University Press, 2006), 93.

1248 Basil Markesinis, Simon Deakin, *Markesinis and Deakin's Tort Law 5th edn.* (New York: Oxford University Press, 2003), 75-76 in Cees van Dam, *European Tort Law* (New York: Oxford University Press, 2006), 93.

1249 *Donoghue v Stevenson* [1932] AC 562, 580.

1250 Van Dam, *op. cit.*

1251 *Caparo Industries Plc v Dickman* [1990] 2 AC 605.

1252 *Ibid.*

1253 *Smith v. Littlewoods Organisation Ltd.* [1987] AC 241, at 270

plc.[1254] As Petrin states, "Chandler is situated at the hazy intersection of company and tort law, where bedrock principles such as limited liability, separate corporate personality, and traditional principles of negligence collide."[1255] Court highlighted four factors of proximity that shall be proved to accept a *duty of care* of the parent for its' subsidiaries' employee's health issues: *first*, overlapping business operations; *second*, parent company have or ought to have superior knowledge about relevant aspects of health and safety in that particular industry; *third*, subsidiary's system of work is unsafe as the parent company knows or ought to know; *fourth*, parent company knows or ought to foresee that subsidiary or its employees rely on it to use that superior knowledge for the employee's protection.[1256] What could be seen as an indication from *Chandler v. Cape plc* is that the parent company is considered to have a *duty of care* for the actions at the level of the subsidiary when it directly or indirectly intervenes, at least to a certain extent, in the relevant activities of the subsidiary. Therefore, the relevant dictum from these types of UK precedents is that the parent company may owe a *duty of care* in a particular situation, where particular intervention into the activities of subsidiaries could be established. However, another relatively important feature is that the application of the *duty of care* was generally very cautious, considering that recognising such a *duty of care*, unless very carefully defined, would undermine the prevailing principle that there is no general duty to prevent third parties from causing harm to others as well as cornerstone principles of limited liability and legal separability.[1257]

In France, the application of tort to parent companies was primarily theoretical. Even though provisions of statutory law generally would not preclude the application of tortious liability for the actions at the level of subsidiaries[1258], proof of the fault of the parent company might be much more complicated,[1259] as the damage, in most cases, is caused by the subsidiary.[1260] On a theoretical basis, it can be concluded that, for example, if a parent company has made a statement concerning corporate social responsibility, the parent exposes some implications of *duty of care,* and it could be

1254 *Chandler v Cape plc* [2012] EWCA Civ 525.

1255 Martin Petrin, "Assumption of Responsibility in Corporate Groups: Chandler v Cape plc.", *The Modern Law Review* 76, 3 (2013): 603, https://www.jstor.org/stable/41857488.

1256 *Chandler v Cape plc* [2012] EWCA Civ 525.

1257 James Goudkamp, "Duties of Care Between Actors in Supply Chains", *Journal of Personal Injury Law* 205*, Oxford Legal Studies Research Paper* 61/2017 (2017): 3, https://ssrn.com/abstract=2960624.

1258 Art. 1240 and 1241 of the French Civil Code.

1259 Under French civil liability rules, as a general principle, a person is not liable for the harm caused by another person.

1260 P. Malinvaud, D. Fenouillet P. *Droit des obligations* (Paris: LexisNexis, 2012), 456 in Siel Demeyere, "Liability of the Mother Company for Its Subsidiary in French, Belgian and English Law", *European Review of Private Law* 23, 3 (2015): 395, https://doi.org/10.54648/erpl2015028.

accepted more easily that it is liable for its subsidiary's acts or negligence.[1261] However, to date, no landmark precedents have been detected in France. Under German law, traditionally, the liability of parent companies for damage caused by their subsidiaries has traditionally been unenforceable as German tort law only recognises duties of care concerning one's own behaviour[1262], and the legal separability principle in company law prevents imposing duties on parent companies *vis-à-vis* subsidiaries.[1263] In the thesis, such coexistence between traditional corporate law principles, i.e. legal separability and limited liability and its exceptions, the most notable being "lifting of the corporate veil" and liability in tort, being the core focus of the research, are called "classical approach" to the liability of the parent company. However, recent case law, particularly in the UK and the Netherlands, has revived the question of tortious liability of corporations not only for their subsidiaries but also for their business partners, exemplified by notable examples of so-called supply chain liability (SCL).

The increasing power of multinational corporations has sparked a debate on whether the exceptions to general limited liability are sufficient for tort victims. Hereto, the thesis focuses on the notion of corporate social liability (CSL) and supply chain liability (SCL). Both concepts generally present the idea that corporations should address all the harmful deficiencies that are covered by their corporate structure and supply chain respectfully. Initiatives of supply chain responsibility/liability were raised by various international documents, inter alia, UN Sustainable Development Goals[1264], OECD Guidelines for Multinational Enterprises[1265], and UN Guiding Principles on Business and Human Rights[1266] – which oblige companies to ensure respect of human rights "within their sphere of influence". The apparent tension to hold corporations

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1261 Y. Queinnec, M.C. Caillet, "Quels outils juridiques pour une régulation efficace des activités des sociétés transnationales?" *in Responsabilité sociale de l'entreprise transnationale et globalisation de l'économie*, ed. I. Daugareilh (Brussels: Bruylant, 2010), 654 *in* Siel Demeyere, "Liability of the Mother Company for Its Subsidiary in French, Belgian and English Law", *European Review of Private Law* 23, 3 (2015): 393, https://doi.org/10.54648/erpl2015028.; A. Bergkamp, "Models of Corporate Supply Chain Liability", *Jura Falc.* 55, 2 (2018-2019): 184, https://www.law.kuleuven.be/apps/jura/public/art/55n2/bergkampsupplychainliability.pdf.

1262 Gerhard Wagner, "Haftung für Menschenrechtsverletzungen", *The Rabel Journal of Comparative and International Private Law* 80,4 (2016) 757-759 in Cees van Dam, "Breakthrough in Parent Company Liability. Three Shell Defeats, the End of an Era and New Paradigms" *European Company and Financial Law Review* 18, 5 (2021), 736, https://www.degruyter.com/document/doi/10.1515/ecfr-2021-0032/html.

1263 *Ibid.*

1264 https://www.undp.org/sustainable-development goals?utm_source=EN&utm_medium=GSR&utm_content=US_UNDP_PaidSearch_Brand_English&utm_campaign=CENTRAL&c_src=CENTRAL&c_src2=GSR&gclid=Cj0KCQiAkMGcBhCSARIsAIW6d0Bv2189Jr6a338IPgZOymt0rIyHJaxaeSge1n9ai9cySULcwnMUBTUaAuVkEALw_wcB.

1265 OECD, *OECD Guidelines for Multinational Enterprises, OECD Publishing*, 2023, http://dx.doi.org/10.1787/9789264115415-en.

1266 United Nations, *Guiding principles on business and human rights: Implementing the United Nations "Protect, Respect and Remedy" framework*, 2011.

liable for harmful effects within their groups of companies or supply chains led to paradigmatic precedents. The neo-classical approach, as singled out by the author of the thesis, is presented by five landmark cases: *(i) AAA v Unilever plc, (ii) Lungowe v Vedanta Resources plc, (iii) Okpabi and others* v Royal Dutch Shell Plc and *(iv) Hamida Begum v. Maran LTD* in UK and *(v) Fidelis Ayoro Oguru v Shell plc* in the Netherlands. These cases were highly analysed (and criticised) as presenting a novel kind of corporate liability that goes way beyond traditional liability, as presented in the first part of the thesis. In all the cases, claimants argued that defendants[1267] owed a duty of care to third parties for various human rights and environmental abuses. Among all the cases, *Lungowe v Vedanta Resources plc* is the most precedential, as the following cases were significantly influenced by the former. In this case, where the liability of the parent company was being tried due to the alleged harm to the environment and human health caused by the subsidiary, the UK Supreme Court presented several important arguments. *First of all*, the liability of parent companies concerning the activities of their subsidiaries is not, of itself, a distinct or novel category of liability in common law negligence.[1268] *Second*, whether or not it could be considered that the parent company owns a duty of care depends on "[…] the extent to which, and how, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary."[1269] *Finally*, the court explains that as such, duty of care is not specifically attributed to the parent-subsidiary relationship, as the legal principles are the same as would apply in relation to the question of whether any third party (such as a consultant advising the subsidiary) was subject to a duty of care in tort.[1270] Therefore, the company's duty of care is grounded in its intervention in the subsidiary's activities. In *Okpabi* and *Oguru*, the Vedanta's dictum was approved. *Maran*,[1271] on the other hand, is unique in that the liability of the business partner was tried. The claimant (widow of the deceased) sued Maran Ltd., the company that, through various contractual arrangements, *de facto* controlled the sale of the ship, which was finally placed for demolition, where the claimant died due to unsafe working conditions.[1272] Therefore, the court was faced with a situation where the company and the one in which supervision of the fatal accident occurred were completely legally independent. As mentioned, Maran Ltd. sold the ship to an intermediary company, which later resold it for demolition. Therefore, the defendant did not even have a contractual relationship with the final owner of the ship. However, it was not a blocker for the court to consider that a *duty of care* may exist even in such a situation. In doing so, the court relied on the so-called "creation of

1267 Parent companies, except in *Hamida Begum v. Maran LTD,* where defendant was not parent company, but indirect business partner.

1268 *Lungowe v Vedanta Resources plc* [2019] UKSC 20 at 49.

1269 *Ibid.*

1270 *Ibid.*, 36.

1271 *Hamida Begum v. Maran LTD* [2021] EWCA Civ 326

1272 *Ibid.,* 6-7.

danger" doctrine, established in a few notable UK precedents.[1273] In the court's view, Maran created the danger by choosing that the vessel should be demolished in Bangladesh, known for unsafe working conditions and in these circumstances, that death was "not a mere possibility but a probability."[1274] Therefore, in terms of relevant proximity, *Maran* may be seen as ground-breaking case, in fact fully approving SCL. One of the most obvious messages that emerges from *Vedanta*, *Okpabi,* and *Maran* is that supply chain liability is not merely a theoretical concept, especially in terms of the parties involved. While *Vedanta* and *Okpabi* carefully limited the application to parent-subsidiary relationships, *Maran* concluded that established tort law precedents apply to such sophisticated relationships. However, even though the mentioned cases could be considered as disrupting the traditional principles of corporate law as well as tort law by some, the thesis provides an in-depth analysis that is eager to show that the mentioned case law does not necessarily provide a deviation from the classic tort of negligence based on the establishment of one's *duty of care.* In this regard, the notion of the parent's own breach, even though the harm may have been caused at the level of the subsidiary, was welcomed as a safe option to avoid breaching the principle of legal separability, i.e., not to hold the parent company liable for the actions of another company. Parent company or non-parent business partner, according to analysed cases, may owe the *duty of care* only if they intervene in the relevant activities of another company (being the subsidiary or business partner. Therefore, according to general principles of corporate law, parent companies cannot intervene in the activities of their subsidiaries; however, they may intentionally do so, and depending on the circumstances, may be liable in tort.

However, the main issue analysed in the thesis is the change in the application of civil liability for companies based on the breach of so-called due diligence obligations. While tortious liability addresses the abuses occurring in supply chains retrospectively, making companies liable for the actual harm that has already occurred, the French Duty of Vigilance Act[1275], the German Supply Chain Act[1276] and the Directive on Corporate Sustainability Due Diligence (CSDDD[1277]) provide a unique approach. They impose positive due diligence obligations on large companies, *i.e.,* to prevent serious human rights violations and significant environmental damage throughout their

1273 *AG of the BVI v Hartwell, Mitchell and Another v Glasgow City Council, Michael and Another v Chief Constable of South Wales Police, Robinson v Chief Constable of West Yorkshire Police, Poole Borough Council v G N and Another.*

1274 *Hamida Begum v. Maran LTD* [2021] EWCA Civ 326.

1275 Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des enterprises donneuses d'ordre (Loi de Vigilance) JORF n° 0074, adopted on 21 February 2017, entered into force on 28 March 2017.

1276 Gesetz über die unternehmerischen Sorgfaltspflichten zur Vermeidung von Menschenrechtsverletzungen in Lie- ferketten (Lieferkettensorgfaltspflichtengesetz – LkSG).

1277 Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 (Text with EEA relevance), https://eur-lex.europa.eu/eli/dir/2024/1760/oj/eng.

entire supply chains. Therefore, from a legal standpoint, due diligence laws create a duty for parent companies to intervene in specific aspects of their subsidiaries' activities in order to prevent potential environmental or human rights abuses. If we examine this from the perspective of the traditional application of liability discussed above, it presents a substantial shift in the parent's role across its supply chain. While discussed, landmark precedents show that parent companies may be liable in cases where they intervene in the activities of another company within the supply chain. Due diligence laws *oblige* them to intervene and foresee liability for failing to do so. The recent Dutch precedent versus Shell may also spark this discussion.[1278] The court, relying on general tort norms and the UN Guiding Principles (soft law), ruled that the parent company's influence over the entire Shell group justified an obligation of result to reduce the group's net emissions by 45% by 2030, encompassing both suppliers and end-users. Even though the appellate court overruled the decision,[1279] the shift in how tort law is applied to corporate misconduct related to ESG is apparent. The tension between traditional corporate law and tort law is evident in the above evaluation. Even from the single perspective of tort law, it can be seen that the standard of the parent company's intervention in the activities of another company is evolving – *i.e.,* the standard of care from tort law (negligence) is being transformed into a duty to behave in a particular way. In this regard, the thesis analyses the legal implications of such a changed application of civil liability, e.g. whether it is compatible with both corporate law and tort law principles. Considering this, the main ***problem*** analysed in the thesis is the shift in the application of tort law for making companies liable for ESG matters. The author argues that we face significant changes in the application of liability. According to the traditional rules of the tort of negligence (*duty of care*), parent companies or non-parent companies are liable for their active intervention. In contrast, due diligence legislation creates a duty to manage and intervene throughout the entire supply chain, providing liability for insufficient intervention.

The ***object*** of the thesis, respectfully, is the application of civil (tortious) liability for limited liability companies for ESG matters within their supply chains. In particular, the object of the thesis is the application of the tortious liability related to the breach of respective duties set for corporations. As the thesis demonstrates, such duties may range from the classic duty of care (negligence), traditionally found in common law, to the positive duties to act in a particular manner, i.e., due diligence duties. The addressee of the respective duties, within the scope of the thesis, is most commonly understood as parent companies (direct or indirect majority shareholders). However, in particular cases, respective duties, *i.e.* duty of care, are also extended to non-parent business partners. In terms of scope, the thesis focuses on limited liability companies, as liability in tort is primarily applicable to these entities due to the legal separation between the company and its owners (shareholders or members). This separation affects

1278 District Court in the Hague, 26 May 2021, ECLI:NL:RBDHA:2021:5337 (Milieudefensie e.a./Royal Dutch Shell).

1279 Judgement of the Court of Appeal in the Hague of 12 November 2024, in the case No. 200.302.332/01.

how liability is assigned when a tort (such as negligence) occurs. For the thesis, the respective duties of the companies are understood as limited to environmental and human rights externalities. Thus, throughout the thesis, the exact externalities can be loosely categorised as a breach of ESG duties and corporate social responsibility/liability (CSR, CSL) duties. The object is analysed by providing a thorough analysis of the changes in the application of tortious liability for corporate abuses *per se,* i.e. the author divides the thesis into three parts, corresponding to "classical", "neo-classical", and "modern" approach where "classical" approach reflects traditional corporate law principles – legal separability and limited liability and its coexistence with tortious liability, "neo-classical" approach analyses the changes in the recent landmark case law, mainly in UK, where parent companies and non-parent business partners are held liable in tort for ESG matters, and, finally, "modern" approach corresponds to the recent statutory law developments both at national (France, Germany, UK) and EU level, i.e. due-diligence laws. As indicated, the thesis focuses on three main jurisdictions, namely – the UK, France and Germany, for multiple reasons – first of all, those jurisdictions have emerged as the most comprehensive legal jurisdictions in developing statutory law and case law precedents around the tortious liability of parent corporations for the abuses committed by their subsidiaries, particularly in the context of ESG harms.

Second, the mentioned jurisdictions are also pioneers in developing corporate due-diligence legislations that are vital to the main problematic aspects analysed in the thesis. Finally, the works of legal scholars from Germany, France, and the United Kingdom are the most comprehensive and influential in the discussion of the tortious liability of parent companies for the conduct of their subsidiaries. This prominence stems from the advanced legal systems, rich doctrinal traditions, and the early and active academic engagement in these jurisdictions with the evolving challenges of corporate accountability. While this thesis primarily focuses on the legal frameworks and scholarly contributions of France, Germany, and the United Kingdom, it also incorporates important aspects of Dutch case law, most notably the *Milieudefensie* et al. v. Royal Dutch Shell decision. However, it should be noted that Dutch law is not analysed as a standalone jurisdiction within the thesis. Instead, the relevance of the *Milieudefensie* case lies in the innovative approach taken by the Dutch court to corporate liability, particularly its application of soft law instruments—most significantly, the UN Guiding Principles on Business and Human Rights (UNGPs)—as a standard of care. Thus, the Dutch precedent serves as a comparative and illustrative reference that supports the thesis's broader argument regarding the legal relevance of soft law and evolving standards of corporate due diligence, but without engaging in a complete doctrinal analysis of Dutch tort law.

Considering the above, the thesis analyses the regulatory models concerning the attribution of duties and civil liability in groups of companies (and value chains) to determine how tortious liability is applied in each of them.

Originality/Value of the thesis. Changes in the application of civil liability to corporations for ESG matters inevitably correspond to realities at both political and economic levels. The increasing power of multinational corporations and the level of

exposure their activities within the entire supply chains eventually raised awareness of their liability. In this regard, tension is apparent between corporate law and tort law. C. A. Witting states that the problem of uncompensated victims of corporate torts reveals a clash of values between tort law and company law.[1280] P. Muchlinski explains such tension in more detail: "[f]irst, the need to ensure sufficient certainty in the law to permit the efficient allocation of risk in the corporate group, whether through the creation of subsidiaries or the contractual allocation of rights and duties; secondly, the need to ensure that the resulting allocation of risk in the group does not fail to compensate third parties for losses caused by activities of groups members."[1281] For a certain period, the tension between corporate law and tort law was mitigated by implying so-called direct or primary liability on the company based on its own duty of care. Recent landmark cases such as *Vedanta*, *Okpabi,* and later *Maran* confirmed that both parent companies and non-parent business partners can be held liable in tort based on the same principle. However, recent due diligence laws might have substantially shifted the approach, as described above. The originality of this research is based on the fact that the author provides a broader viewpoint on the possible changes in corporate liability, *i.e.* the topic is not isolated on particular aspects of ESG liability but instead looks at it from the perspective of how it could be considered as changing the whole fundamental principles of corporate liability (based on legal separability and limited liability principles). Particular aspects related to the topic are already widely discussed in the scholarly. B. J. Clarke and P. Blumberg, along with L. A. Sørensen, discuss the duties of parent companies. C. van Dam thoroughly researches the tortious liability of parent companies for the externalities at the level of subsidiaries. P. Bergkamp provides an in-depth analysis of the models of corporate supply chain liability, among others. However, the *originality* of the thesis is based on the fact that the author researches the evolution of tortious liability of the corporations, from the traditional tort of negligence to so-called supply chain liability, in order to analyse whether the recent developments in tortious liability are compatible with both company law principles as well as tort law principles. More precisely, the author presents the viewpoint that we are currently witnessing a shift in the way tort law is used to hold companies liable for the reckless behaviour in their supply chains that raises environmental or human rights concerns. In this regard, the thesis aims to understand the boundaries of such changes and to determine whether these developments are compatible with other principles of corporate and tort law. In this regard, the originality and novelty of the thesis are inevitably grounded in the fact that the EU Directive on Corporate Sustainability Due Diligence, which shapes the landscape of the EU's due diligence legislation, entered into force on 25 July 2024. Thus, the analysis of the implications for corporate civil liability based on the latter is timely. The analysis of the tortious

1280 Christian A. Witting, *Liability of Corporate Groups and Networks* (Cambridge: Cambridge University Press, 2018), 348.

1281 Peter T. Muchlinski, *Multinational Enterprises and the Law 2nd edn* (New York: Oxford University Press, 2007), 321.

liability of corporations is of critical importance for legal scholarship at both the EU and national levels for several reasons, primarily because it addresses the intersection of corporate activity, legal accountability, and societal protection. Corporations play a significant role in modern economies, and their actions can cause harm to individuals, other businesses, or public interests. Tort law, which deals with civil wrongs, serves as an essential mechanism for holding corporations liable for damages caused by their wrongful conduct. Analysing tortious liability ensures a clear understanding of how corporate actions are subject to legal scrutiny and the extent of their responsibility for harm. However, even though tortious liability may serve as a natural remedy for victims of corporate behaviour, it generally does not impose positive duties on corporations to act in a particular way. However, recent due diligence legislation, both at the national and EU level, can change this perception. Therefore, the *value* of the thesis, *inter alia,* is grounded by the fact that it analyses the application of tortious liability of the corporations, with the particular importance given to recent due-diligence legislation, intending to display co-existence between tort law and corporate law in the context of so-called supply chain liability, giving rise to due-diligence legislation both at national and EU level.

The ***purpose of this thesis*** is to provide a conceptual viewpoint on the current legal changes in the liability of corporations for the so-called – environmental and/or human rights abuses in their supply chains. The author's premise is that supply chain liability is shifting in a way that can radically alter our understanding of fundamental corporate law principles, particularly the liability of corporations. To achieve the purpose of the research, the following ***objectives*** are set:

1. Analyse the implications for civil (tortious) liability of the corporations for the actions happening at the level of their subsidiaries related to human rights and environmental abuses in the designated countries – France, Germany and the United Kingdom in order to dilute the general principles for tortious liability;
2. Analyse the recent case law precedents, in particular, *(i) AAA v Unilever plc* ("**Unilever**"), *(ii) Lungowe v Vedanta Resources plc* ("**Vedanta**"), *(iii) Okpabi and others* v Royal Dutch Shell Plc ("**Okpabi**"), *(iv) Hamida Begum v. Maran LTD* ("**Maran**") and *(v) Fidelis Ayoro Oguru v Shell plc* ("**Oguru**") that target the tortious liability of the corporations for the externalities in their supply chains in order to answer:
    2.1. Is there a specific theory (model) or set of it that could explain cases where corporations were (or were not) held liable for the externalities at the level of subsidiaries or business partners;
    2.2. What conditions of tortious liability are set in these cases;
    2.3. To what extent (if any) do these cases represent a departure from the classical approach of corporate liability? If it is established that recent case law represents a departure from traditional rules of corporate liability, analyse to what extent it is compatible with existing UK, German and French law and corporate law doctrines.

3. Analyse due diligence law, in particular, Germany's Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Global Supply Chains, France's Corporate Duty of Vigilance Act and Corporate Sustainability Due Diligence Directive in order to answer:
   3.1. What conditions of civil liability are set in due diligence legislation;
   3.2. Whether due-diligence legislation presents a departure in a way tortious liability is being applied to corporations for the harm that occurred within their supply chain;
   3.3. Whether due-diligence legislation is compatible with traditional corporate law principles of legal separability and limited liability.

Considering the value and novelty of the thesis, the ***defence statements*** are as follows:

1. Analysis of the selected jurisdictions, where the UK has the most precedents, provide that parent companies may be held liable in tort for the harmful actions at the level of their subsidiaries, based on the classic tort of negligence, by establishing the *duty of care.* Such a *duty of care* may be established by the parent company's intervention in the relevant activities of its subsidiaries, which ultimately implies operational control.
2. The latest UK and Dutch precedents, namely *Unilever*, *Vedanta*, *Okpabi*, *Oguru*, and *Maran*, from a strictly legal perspective, are based on the traditional tort of negligence rules by establishing the *duty of care*. Even though recent case law is based on the traditional tort of negligence, it presents an evolvement of so-called supply chain liability. Supply chain liability is broader in the sense that it extends beyond group (parent company) liability, enabling non-parent companies (such as business partners in *Maran*) to be held liable based on the tort of negligence.
3. Liability, based on the company's duty of care, does not contradict legal separability and limited liability principles as they are grounded on the corporation's own behaviour. Thus, legal separability is not addressed; instead, the latter is approved. In terms of the principle of limited liability, the company's liability for the breach of duty of care may be understood by a side approach as *(i)* one of the exceptions to the limited liability (such as corporate veil piercing scenarios) or *(ii)* liability separate from one of the actions of the subsidiary.
4. Due diligence laws, both at the national and EU level, present a substantial shift in the application of tort liability for harmful actions within the supply chain. While the tort law precedents described above consider companies liable in tort for their intervention into the relevant activities of companies within the supply chain, due diligence laws oblige parent companies to oversee and manage human rights and environmental-related matters throughout the entire supply chain.

STRUCTURE OF THE THESIS

Structure of the thesis. The thesis is divided into three connected parts that follow each other in a logical sequence to explain the change in the implications for tortious liability of corporations for the harmful actions happening at the level of their subsidiaries/supply chain members. The *first* part of the thesis reflects the so-called classical approach of a company's liability for the actions at the level of another separate company. Herein, focusing on three jurisdictions – France, Germany, and the United Kingdom - the author provides a general analysis of cornerstone corporate law principles, namely legal separability and limited liability, as these are relevant to understanding the implications of liability *per se,* as they provide general limitations on it. After that, the chapter focuses on the most common exceptions to the company's limited liability. Irrespective of the fact that separate countries may have specific exceptions to limited liability, the author focuses on the most common ones, attributable to all analysed countries, namely "*lifting of the corporate veil*" and "*de facto directorship*", but eventually turn the main analysed exception of limited liability – liability in tort. Following this, the conditions of tortious liability of the parent company for the harmful actions at the level of the subsidiary are analysed separately in all mentioned countries. The United Kingdom, which has the most fruitful precedents on the topic, enables the author to distil some general conditions of tortious liability of the parent company that corresponds to the "classical approach" used later in the thesis for comparative purposes. In the *second* part of the thesis, the author focuses on recent case law precedents, particularly in the United Kingdom, as they have attracted considerable attention for allegedly reshaping the civil liability of parent companies. First, the author provides an in-depth legal analysis of a separate case, explaining the implications of civil liability in that case. After that, the thesis turns to specific related questions, aimed to explain *(i)* is there a specific theory (model) or set of it that could explain cases where corporations were (or were not) held liable for the externalities at the level of subsidiaries or business partners, *(ii)* to what extent do these cases represent a departure from the classical approach of corporate liability. If it is established that recent case law represents a departure from traditional rules of corporate liability, analyse to what extent it is compatible with existing UK, German, and French tort law and corporate law principles. After providing an analysis of these institutes, the author draws some general conclusions and disclaims possible paradoxes that stem from these cases, considering the latter as a "neo-classical" approach to tortious liability of companies for actions occurring at the level of group or supply chain companies. The *third* part of the thesis analyses the due diligence laws both at the national (France, Germany) and EU (CSDDD) levels. The author, first of all, provides a general overview of the mentioned laws, detailing the roots of their emergence*, which* in turn leads to an examination of the implications for civil liability and the conditions under which it applies. Finally, the author provides a comparison between this "modern" approach to the tortious liability of corporations for actions occurring at the level of their group or supply chain companies and the mentioned "classical" and "neo-classical" approaches. This way, the author illustrates

the shift in how tort law is being used to hold companies liable for the torts of other legally separate entities.

DEFINITIONS

Duty of care - the standard of care that a reasonable person would exercise in the same situation or under similar circumstances. This standard of care is used in a tort action to determine whether a person was negligent.

Corporate social responsibility (CSR) - a business model in which companies integrate social and environmental concerns in their business operations and interactions with their stakeholders instead of only considering economic profits.

Environmental, Social and Governance (ESG) – standards used to assess corporate behaviour and ethical values, which can include factors such as climate change, labour practices, diversity and inclusion, and community engagement.

ESG liability – legal liability that companies face for failing to adequately address ESG factors in their operations, disclosures, or decision-making. ESG liability arises from harm to the environment (e.g. pollution, deforestation, carbon emissions).

Tortious liability - a legal obligation that arises when a person or entity commits a tort—a wrongful act or omission that causes harm to another person and for which the injured party may seek compensation through a civil lawsuit.

Parent company - a company that owns and controls another company, known as a subsidiary, by holding a majority of its voting shares or having significant influence over its operations and management.

A subsidiary is a company that is owned or controlled by another company, known as the parent company. Control is typically achieved when the parent owns more than 50% of the subsidiary's voting shares.

Value chain - the entire series of activities and relationships that a business engages in, which contribute to the creation, production, distribution, and sale of a product or service. At each stage of the value chain, businesses must manage various legal considerations and obligations, including contracts, compliance, intellectual property (IP) protection, liability, and risk management.

Supply chain - the sequence of activities involved in getting a product or service from raw material sourcing to the final consumer. It focuses primarily on the logistics and flow of goods from suppliers to consumers.

REVIEW OF THE RESEARCH OF THE TOPIC

In the legal science of the Republic of Lithuania, the institute of tort liability of a company for damage caused by other independent companies (subsidiaries or business partners), particularly related to human rights and environmental externalities, has not been comprehensively examined. Particular aspects related to the thesis are addressed by Lithuanian scholars, e.g. L. Mikalonienė analysed aspects of civil liability of a shareholder of a closed stock company towards the company, its creditors and other shareholders[1282], or the subsidiary nature of shareholder's liability.[1283] V. Papijanc analysed the application of the „lifting the corporate veil" doctrine under Lithuanian law,[1284] and A. Tikniūtė provided a comprehensive analysis of the limited liability of the legal entity.[1285] A recent study by E. Bakanauskas, to some extent, analysed the topic of the interest of the group.[1286]

While the works of Lithuanian scholars are referenced in the thesis, their relevance is confined to specific and narrowly defined aspects of the analysis, particularly concerning the conceptual underpinnings of limited liability, the subsidiary nature of a legal entity with its shareholders, and the doctrine of the lifting of the corporate veil. These contributions provide a valuable context for understanding these traditional corporate law principles. However, the broader objective of the thesis extends beyond these foundational concepts. It explores how the application of tortious liability to parent companies not only redefines the contours of the tort law itself but also poses significant challenges to the established doctrines of corporate law, such as legal separability and limited liability. The thesis presents an integrated perspective that situates these traditional principles within the evolving legal and theoretical landscape, shaped by the changing realities of corporate group structures and accountability.

Foreign scholars offer a more comprehensive discussion on the topic, and the literature is also more extensive, encompassing the separate topics addressed in the thesis. Regarding the applicability of general tort law principles, the discussion is divided by country. For France, the author heavily relies on the works of K. Vanderkerckhove, S. Demeyere, P. Malinvaud, and D. Fenouillet. For Germany, this institute is discussed by G. Wagner, S. Mock, M. Casper, and P. Blumberg, L.B.C. Gower, and A. Sanger

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1282 L. Mikalonienė, Uždarosios akcinės bendrovės akcininko teisės ir jų gynimo būdai (Vilnius: VĮ „Registrų centras", 2015).

1283 L. Mikalonienė, "Subsidiari akcininko atsakomybė", *Teisė*, 76 (2010), doi:10.15388/Teise.2010.0.217.

1284 Vitalij Papijanc, "Patronuojančios įmonės atsakomybė prieš dukterinės įmonės kreditorius" (Doctoral thesis, Mykolas Romeris University, 2008), https://www.lituanistika.lt/content/14462.

1285 Agnė Tikniūtė, "Juridinio asmens ribotos atsakomybės problema: teisiniai aspektai (Doctoral thesis, Mykolas Romeris University, 2006), https://www.lituanistika.lt/content/9218.

1286 Egidijus Bakanauskas, "Grupės intereso pripažinimas, dukterinės uždarosios akcinės bendrovės smulkiųjų akcininkų teisių apsauga: probleminiai bendrovių teisės aspektai" (Doctoral thesis, Vilnius University, 2023), https://is.vu.lt/pls/pub/ivykiai.ivykiai_prd?p_name=1233396A744E38C627E0E0FAC8DF08EE/BAKANAUSKAS%20Edvinas.pdf.

provided an extensive analysis of the UK approach. Moving to the next chapter of the thesis, namely, the analysis of the so-called "neo-classical" approach, re-inforced by recent tort law cases, Cees van Dam is a prominent scholar in European tort law, with a significant focus on the liability of parent companies for actions of their subsidiaries. His work critically examines the application of tort law in holding parent companies accountable for harm caused at the level of their subsidiaries, particularly in the context of human rights violations and environmental damage. Penelope A. Bergkamp critically examines the evolving concept of corporate supply chain liability, particularly in the context of European tort law. Her research examines how multinational corporations can be held accountable for harm caused by their subsidiaries and business partners, particularly in developing countries. In addition to these scholars, Kenneth E. Sørensen and Andrea Zerk have made significant contributions to the discourse on corporate liability in supply chains, each from a distinct disciplinary perspective.

The analysis presented by the aforementioned landmark scholars, as well as many others, collectively provides a multidimensional foundation for the research, enabling a comprehensive and structured analysis of the complex issue of corporate liability within supply chains. The analysis enabled the author to naturally transition to the final chapter of the thesis, the so-called "modern" approach to the tortious liability of corporations within their supply chains, as enforced by recent due diligence legislation. The scholarly contributions of Alessio Pacces, Silvia Ciacchi, and Nicolas Bueno have significantly enriched the thesis' legal discourse on corporate sustainability due diligence. A. Pacces provides a law and economics perspective on the EU's Corporate Sustainability Due Diligence Directive (CSDDD), analyzing the civil liability rules and assessing their effectiveness in internalizing negative externalities. S. Ciacchi provides a comprehensive overview of the CSDDD, detailing the legislative process and analysing the final text of the directive. Her research provides insights into the legislative journey of the CSDDD, examining the compromises and considerations that shaped its current form. Nicolas Bueno, along with co-authors, examines the CSDDD as a political compromise among EU member states, analysing its main elements and implications beyond Europe.

METHODS OF THE RESEARCH

To thoroughly and comprehensively investigate the issues considered in the thesis, the research employs the tools and procedures of scientific knowledge, specifically the methods of scientific research. The following methods are used in the thesis: historical, comparative, document analysis, and generalisation methods.

The *historical* method is employed to research the development of tortious corporate liability in the analysed countries, namely Germany, the United Kingdom, and France, particularly concerning environmental or human rights violations. The historical research method is essential for explaining the application of company liability in tort for harmful actions committed by other companies (e.g., subsidiaries), as it

provides context and an understanding of the evolution of legal principles governing liability. This method examines how legal doctrines, case law, and statutory frameworks have evolved over time, detailing why certain liability principles exist and how they are applied in modern contexts. The historical research method helps reveal the origins of fundamental liability principles, such as vicarious liability (holding one party responsible for another's actions) and piercing the corporate veil (holding parent companies liable for the actions of their subsidiaries). Understanding these roots helps explain why specific liability rules apply to companies for harmful actions indirectly caused by other entities, whether subsidiaries or unrelated companies. Historical analysis, *among other things*, reveals how case law (especially in more developed markets, such as the United Kingdom) has, over time, expanded or restricted the scope of corporate liability in tort cases, particularly concerning environmental and human rights abuses. Examining landmark cases shows how courts have interpreted and shaped liability doctrines. Ultimately, historical research situates liability within broader socioeconomic shifts, including corporate expansion. In this regard, one could argue that such a process inevitably increased interactions between companies, making it more relevant to hold companies accountable for one another's harmful actions. The historical method also enables us to demonstrate how modern liability frameworks are influenced by historical legislation aimed at protecting public interests and regulating business practices. In this regard, the evolution from classic tort law liability to modern constructs, i.e., due diligence laws, is evident.

The *comparative* research method is used to examine and contrast the application of company tortious liability for environmental and human rights abuses in France, Germany, and the United Kingdom. The thesis selects France, Germany, and the United Kingdom as the core jurisdictions for analysis due to their leading roles in the legal development of parent company liability and their pivotal contributions to the emerging framework of corporate due diligence obligations. These three legal systems offer complementary perspectives—both statutory and jurisprudential—on how tort law is evolving to respond to the challenges posed by complex corporate structures and transnational ESG risks. France is a global pioneer in the field of corporate due diligence. The Duty of Vigilance Law was the first in the world to establish a mandatory corporate duty of care applicable to a parent company's operations, subsidiaries, and supply chains. Germany represents a highly developed civil law system with a detailed statutory approach to corporate due diligence. Its Supply Chain Due Diligence Act, in force since 2023, mandates companies to conduct human rights and environmental risk assessments throughout their value chains. Germany played a leading role in shaping EU-level legislative initiatives, such as CSDDD. The United Kingdom offers the most developed case law on the tortious liability of parent companies. Landmark decisions by the UK Supreme Court, including *Vedanta* and *Okpabi*, have clarified the circumstances under which a parent company may be held liable for harms caused by its foreign subsidiaries. Although the UK does not have a comprehensive statutory due diligence regime (apart from the Modern Slavery Act 2015), its common law framework provides a flexible and evolving legal basis for liability grounded in the

assumption of responsibility and proximity. UK jurisprudence has had a profound impact on transnational law, particularly in Commonwealth jurisdictions.

This method is valuable because it systematically highlights differences and similarities across legal systems, offering insights into how each country addresses corporate liability for torts in specific cases analysed in the thesis. By comparing the statutory and common law principles that govern company liability in tort across these jurisdictions, the thesis identifies distinctive legal doctrines and how each country's legal system approaches concepts such as vicarious liability, duty of care, and the corporate veil. Comparative analysis explains how courts in France, Germany, and the UK interpret and apply tortious liability principles. This approach clarifies the influence of case law precedents and reveals varying judicial attitudes toward holding companies' liability for harms associated with other separate companies. By evaluating how each country's approach impacts corporate accountability and legal certainty, the thesis assesses which aspects of each legal framework are most effective or offer insights for reform in other jurisdictions. The comparative research method ultimately enables a comprehensive, cross-jurisdictional understanding of corporate tortious liability.

The *document analysis* method is used to systematically examine and interpret various legal documents to describe the application of company tortious liability for environmental and human rights abuses. This method involves analysing both statutory and case law from selected jurisdictions, i.e., Germany, the United Kingdom, and France, as well as international legal acts (e.g., EU). By examining statutory and case law, the thesis interprets foundational legal doctrines, including vicarious liability, duty of care, and others. Document analysis helps uncover how these doctrines have been applied in practice across different countries and how they influence corporate liability in tort cases. Notably, the analysis of historical statutory and case law reveals the evolution of tortious liability principles over time, moving, in particular, to the direction of due diligence legislation. This historical aspect provides insights into how and why specific liability standards have been reinforced or altered, showing trends in judicial attitudes toward corporate liability. Naturally, document analysis allows for the examination of similar liability cases across different jurisdictions, facilitating a comparison of how France, Germany, and the United Kingdom interpret and enforce tortious liability standards for companies. Differences and similarities identified through document analysis enable the thesis to assess each jurisdiction's approach to the topic.

Finally, the *generalization* method in this thesis is applied to summarize the principles in the application of tortious liability of companies by identifying commonalities across cases, legal doctrines, and jurisdictional approaches. By distilling complex legal rules and case law, this method provides a broader understanding of how tortious liability is applied to companies for harmful actions related to environmental and human rights abuses. By applying generalisation, the thesis summarises the ways different jurisdictions—such as France, Germany, and the United Kingdom—handle similar tortious liability issues. This method captures broader trends, such as the inclination of courts to hold parent companies liable in specific scenarios, making it easier to identify general tendencies rather than focusing on isolated rulings.

CONCLUSIONS

The analysis conducted in the thesis enables us to state that the research purpose, as indicated in the introduction, has been achieved, the set objectives have been implemented, and the defence statements have been justified. The following conclusions substantiate this:

1. The analysis of both statutory and case law of selected jurisdictions – UK, France, and Germany confirm that (parent) companies may be held liable in tort for the harmful actions at the level of subsidiaries based on ordinary tort rules. While, under French and German law, such tortious liability is rare in essence, the UK provides extensive precedents on the tortious liability of parent companies.
2. The vital element of tortious liability is the establishment of the *duty of care*. In this regard, the parent company is liable if it is established that *(i)* it owes a *duty of care* to the victim, *(ii)* it has breached that duty, *(iii)* the victim's damage is not so unforeseeable as to be too remote, and *(iv)* there is a causal connection between the careless conduct and the damage. *The duty of care per se* presupposes the existence of a particular relationship between the claimant and the defendant before the harm, as first described in *Donoghue v Stevenson*, which compares it to a relationship akin to that of neighbours. The classical concept of tortious liability, as described in Chapter 1 of the thesis, was adapted to cases of corporate wrongdoing related to environmental and human rights, such as *Connelly v. RTZ Corp plc.* and *Lubbe & Others v. Cape Plc. Chandler v. Cape plc.* and others.
3. On the merits, the *duty of care* is traditionally established based on the parent company's intervention in the activities of its related companies. Such intervention of the parent company is *case by case* based, for instance, establishing that the parent company was responsible for ensuring the supervision of proper standards of health and safety by its foreign subsidiaries. A relevant dictum from these types of precedents is that the parent company may owe a *duty of care* in very specific situations where particular intervention into the activities of subsidiaries can be established. However, the application of tortious liability by the parent company was originally very cautious, considering that recognising such a *duty of care* too broadly would undermine the prevailing principle that there is no general duty to prevent third parties from causing harm to others, as well as cornerstone principles of limited liability and legal separability.

These conclusions approve the ***first defence statement*** that under the classical approach[1287] to the liability of the parent company, parent companies may be held liable in tort for the harmful actions at the level of their subsidiaries, based on the classic tort of negligence, by establishing the *duty of care.* Such *duty of care* may be proved by the parent company's intervention in the relevant activities of its subsidiaries that

1287 Author's expression used to define the application of liability in chapter 1 of the Thesis.

eventually presupposes operation control.

4. *Vedanta* resurfaced the notion of tortious liability of the parent company for the actions happening at the level of subsidiaries based on its own *duty of care* towards third parties. *Vedanta* and the following cases confirmed that the tortious liability of the parent company does not require any specific tests attributable to these scenarios. The same notion was also approved in other UK precedents, following *Vedanta*, i.e., *Okpabi*, *Oguru,* and others.
5. The vital element for the parent company's tortious liability, according to *Vedanta* and the following cases, is its ability to take over, intervene in, control, supervise, or advise the management of the relevant operations of the subsidiary, *i.e.,* operational control. Such intervention/operation control could be established differently, starting from active intervention, such as appointing relevant officers to oversee the subsidiary's activity, to public statements, showing the parent's apparent commitment over particular activities of the subsidiary.
6. While *Vedanta* and the subsequent cases endorsed the existing notion of parent company tortious liability, the *Maran* case established supply chain liability in its widest sense, i.e., the company's liability for the actions of an indirect business partner. The underlying notion of this reasoning is that the company could "create danger" by its indirect actions that later led to harmful activities of indirect business partners. *Maran* differs from cases involving corporate groups (*Vedanta*, *Okpabi*, *Oguru,* etc.) in that they present characteristics attributable to parent-subsidiary relationships, such as group-wide policies and codes of conduct. In *Maran*, the court relied on evidence that allegedly showed the company was aware of the potential dangers associated with its business partners.
7. Company liability, based on its *duty of care,* does not *per se* contradict legal separability and limited liability principles. It does not present the liability for a third party's actions as it is grounded on the corporation's own behaviour.

These conclusions approve the ***second and third defence statements***, in particular showing that according to this neo-classical[1288] approach to company tortious liability, the liability of the parent companies is based on the traditional tort of negligence. However, *Maran* presents an evolution of supply chain liability that enables liability beyond the group (parent company) and allows non-parent companies (such as business partners in *Maran*) to be liable based on the tort of negligence.

8. Due diligence, both at the national (e.g., France, Germany) and international levels (e.g., CSDDD), creates due diligence obligations for parent companies over their supply chain members. In this regard, due diligence laws create positive duties for parent companies, which is a novelty in the context of the classic separation of legal entities.
9. With respect to the civil liability of the parent companies, due diligence laws drastically shift the conditions of the latter. I.e. while *Vedanta*, *Okpabi,* or even *Maran* make companies liable if they intervene in the respective activities of

1288 Author's expression used to define the application of liability in Chapter 2 of the Thesis.

their subsidiaries or business partners, civil liability under due diligence laws (CSDDD in particular) is triggered for non-sufficient intervention or non-intervention into relevant activities of supply chain members (i.e. environmental and human rights issues). Thus, under classic tort rules, the liability of the company is based on its actual involvement in the relevant activities of another company, which leads to the consideration that such intervention proves the existence of the *duty of care.* Under due diligence laws, more precisely the CSDDD, liability implications are generally reversed. Liability in tort is implied for breach of due diligence obligations *per se*. Therefore, we witness a paradigmatic change in the way tort law is being applied to human rights or environmental rights-related abuses.

10. Supervision and management of human-rights and environmental-rights-related issues in the whole corporate group (supply chain) presents management of business activities of other separate companies. Therefore, even though the scope of such management is limited to ESG matters, it could eventually be concluded that due-diligence laws present a contradiction with classic corporate law principles such as legal separability.
11. Emergence and acceptance of due diligence laws present a need to re-evaluate the traditional principles of legal separability and limited liability in corporate groups/supply chains. While it is admitted that parent companies, at least in the scope of ESG matters, not only can but actually shall intervene in the activities of another separate company, may lead to the admittance of the parent's ability to instruct subsidiaries in other matters - the business reality that not recognised due to the prevailing concept of the legal separability of the subsidiary. Otherwise, only admitting such right (obligation) to intervene in the activities of another separate company only in limited matters could create additional uncertainty.

These conclusions approve the ***fourth defence statement***, i.e. that due-diligence laws, both at the national and EU level, present a substantial shift in the application of tort liability for harmful actions within the supply chain. While the tort law precedents described above consider companies liable in tort for their intervention into the relevant activities of companies within the supply chain, due diligence laws oblige parent companies to oversee and manage human rights and environmental-related matters throughout the entire supply chain.

LIST OF SCIENTIFIC PUBLICATIONS AND CONFERENCES

SCIENTIFIC PUBLICATIONS:

1. Tomas Stundys, "Bendrovės kaip De Facto Vadovo Atsakomybė Lietuvos Teisėje", *Jurisprudencija* 31(1) (2024): 143-159, https://ojs.mruni.eu/ojs/jurisprudence/article/view/8173
2. Tomas Stundys, "From Corporate Social Responsibility to Supply Chain Liability: Do We See a Change in Liability of Corporations?", *STICS* 2024 (12), https://stics.mruni.eu/annual-journal-2024/

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1. "International Network for Doctoral Studies in Law" conference "The Good, the Bad and the Legal: Balance between Stability and Disruptions of Law", topic: "Supply Chain Liability: Are We Witnessing a Change in Understanding of Corporate Liability?" (18 May 2023, Vilnius Lithuania)
2. "International Scientific Conference for Young Researchers" conference "Social Transformations in Contemporary Society 2024", topic: "From Corporate Social Responsibility to Supply Chain Liability: Do We See a Change in Liability of Corporations?" (7 June 2024, Vilnius, Lithuania)

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Mokslo daktaro disertacijos santrauka
Socialiniai mokslai, teisė (S 001)

Vilnius, 2025

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REGULIAVIMO MODELIAI, SUSIJĘ SU PAREIGŲ PASISKIRSTYMU IR CIVILINE ATSAKOMYBE BENDROVIŲ GRUPĖSE (IR TIEKIMO GRANDINĖSE)

SANTRAUKA

Tyrimo problematika. Būtų nesunktu teigti, kad teisė, kaip normų visuma, turėtų veikti taip, kad atspindėtų faktinius ekonominius ir socialinius santykius tarp šalių. Tai ypač svarbu verslo santykiuose, nes jie sparčiai vystosi ir savo ruožtu daro didelę įtaką šalių ar sąjungų – ekonomikai. Tai, kad teisės normos turėtų atspindėti ir egzistuoti kartu su *de facto* santykiais tarp skirtingų rinkos dalyvių, taip pat suponuoja, kad teisė turėtų prisitaikyti prie įvairių rinkoje vykstančių pokyčių. Tokiems pokyčiams įtakos gali turėti įvairūs veiksniai, pavyzdžiui, kitos - naujos teisės normos, turinčios įtakos šalių teisėms ir pareigoms. Tačiau gali kilti tam tikra įtampa, ar kontradikcija, kai teisės normos nebūtinai atitinka *de facto* ekonominius santykius tarp šalių, ir tai dar labiau išryškėja, kai kyla konfliktas tarp ankstesnių ir naujų teisės normų. Nors tokie susikirtimai ar konfliktai ne visada akivaizdūs, atidžiau pažvelgus į konkrečių teisės normų doktrinines šaknis, galima teigti, kad susiduriame su paradigminiais pokyčiais, kai privalu naujai adaptuoti kai kuriuos klasikinius teisės principus, siekiant atspindėti naujas ekonomines ir politines realijas. Pasak disertacijos autoriaus, šiame darbe analizuojama tema būtent tai ir atskleidžia. Šiuo atžvilgiu disertacijoje analizuojamos ribotos atsakomybės bendrovių civilinės (deliktinės) atsakomybės už žalingus veiksmus, atliekamus jų tiekimo grandinėse, pasekmės. Visų pirma, disertacijoje daugiausia dėmesio skiriama atsakomybei tiekimo grandinėje už aplinkosaugos ir (arba) žmogaus teisių (dar vadinamus ESG), pažeidimus. Šiuo metu kai kurios teisinių sistemų – Vokietija, Jungtinė Karalystė ir Prancūzija, kurios yra „pirmtakės“ šioje temoje, – atspindi padidėjusį dėmesį tvarumo, žmogaus teisių ir klimato kaitos klausimams. Autorius pasirinko būtent minėtas jurisdikcijas dėl jų pažangių teisinių sistemų, gausios teismų praktikos, susijusios su ESG pažeidimais. Dėmesys tokio pobūdžio deliktinei atsakomybes savaime nėra naujas reiškinys, o tokio pobūdžio bylinėjimasis jau sulaukė didelio tiek teisės mokslininkų, tiek visuomenės dėmesio. Vis dėlto, autorius teigia, kad tiek naujausi teisės aktų pakeitimai, tiek teismų praktika, sprendžianti ESG atsakomybės klausimus, rodo esminius tradicinių deliktų teisės principų ir jų sambūvio su įmonių teisės principais supratimo pokyčius.

Siekiant išsamiai išspręsti disertacijoje analizuojamas mokslines problemas, pirmiausia būtina aptarti du pagrindinius teisės principus, tradiciškai priskiriamus įmonių teisei ir bendrovėms apskritai. Pirmasis – teisinis atskirumas – reiškia, kad kiekviena bendrovė, net ir įmonių grupės viduje, yra teisiškai atskirta nuo kitų bendrovių

(tiek patronuojančių, tiek dukterinių bendrovių) ir vykdo savo veiklą savarankiškai.[1289] Iš šio principo kyla kitos pasekmės. *Pirma*, patronuojanti bendrovė paprastai[1290] neatsako už savo dukterinių bendrovių veiksmus (skolas) ir atvirkščiai. *Antra*, kiekvienos bendrovės valdymo organai, pagal bendrą taisyklę, veikia tik vadovaujamos bendrovės interesais ir negali pažeisti tokios bendrovės interesų kitos bendrovės, pvz., patronuojančios bendrovės, naudai. *Trečia*, vadovaujantis dviem pirmaisiais principais ir pagal akcininkų bei valdymo organų įgaliojimų pasidalijimą, patronuojanti bendrovė paprastai[1291] negali teisiškai valdyti dukterinių bendrovių ar kištis į jų sprendimų priėmimą. Ribotos atsakomybės principas numato, kad akcininkai nerizikuoja daugiau nei jų įnašas (investicija) į kitą juridinį asmenį ir negali būti atsakingi už savo dukterinių bendrovių skolas.[1292] Šis principas, nustatytas garsiajame Jungtinės Karalystės precedente *„Salomon prieš Salomon"*,[1293] numato, kad bendrovės akcininkas yra atskiras nuo pastarosios ir negali būti atsakingas už finansinius sunkumus, viršijančius tai, kas buvo iš pradžių investuota. Teisinio atskirumo ir ribotos atsakomybės principai laikomi tradiciniais ir, išskyrus tam tikras išimtis, paprastai taikomi daugumoje šiuolaikinių valstybių, įskaitant Jungtinę Karalystę, Prancūziją ir Vokietiją, kurioms darbe skiriama daugiausia dėmesio. Bendroji taisyklė atrodytų gana paprasta – bendrovės yra atskiri teisiniai subjektai ir neatsako už nieką, kas peržengia jų pačių interesų ribas. Nors, kaip aprašyta aukščiau, ribotos atsakomybės bendrovių akcininkai pagal bendrąją taisyklę naudojasi ribota atsakomybe, skirtingi teisiniai režimai numato tam tikras šios taisyklės išimtis, numatydami, kad bendrovės gali būti laikomos atsakingomis už veiksmus, atliktus kitų bendrovių veikloje.

Dažniausia ribotos atsakomybės išimtis, priskiriama darbe analizuojamų šalių teisinėms sistemoms, yra vadinamasis „korporatyvinio šydo pakėlimas". Pagal „šydo pakėlimo" doktriną akcininkas (fizinis ar juridinis asmuo) gali būti laikomas atsakingu už savo dukterinės bendrovės skolas, nepaisant ribotos atsakomybės ir atskiro subjektiškumo taisyklių.[1294] Jungtinės Karalystės teismų precedentai šiuo klausimu yra vieni išsamiausių ir pateikia bendrosios ribotos atsakomybės išimties teisinę reikšmę. Nors korporatyvinis „šydas" buvo nustatytas minėtoje byloje *„Salomon prieš Salomon"*, vėliau byloje *„Adams prieš Cape"*[1295] tai patvirtino įmonių grupės atveju, nurodydamas, kad teismas negali panaikinti „korporatyvinio šydo" prieš patronuojančiąją bendrovę, kuri yra įmonių grupės narė, „[...] vien dėl to, kad įmonių struktūra buvo naudojama

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1289 Martin Winner, "Group Interest in European Company Law: an Overview", *Acta Univ. Sapientiae, Legal Studies* 5, 1 (2016): 87, http://www.acta.sapientia.ro/acta-legal/C5-1/legal51-06.pdf.

1290 Kaip toliau nurodoma disertacijoje, egzistuoja šios taisyklės išimtys.

1291 Kaip toliau nurodoma disertacijoje, kai kurios teisinės sistemos, kaip antai Vokietijos grupių teisė (*Konzernrecht)* numato šios taisyklės išimtis.

1292 Karen Vanderkerckhove, *Piercing the Corporate Veil*, European Company Law Series, v. 2 (Alphen aan den Rijn: Kluwer Law International, 2007), 71.

1293 *Salomon prieš Salomon & Co Ltd* [1897] AC 22.

1294 Vandekerckhove, *op. cit.*, 11.

1295 *Adams prieš Cape Industries plc.* [1990] Ch 433.

siekiant užtikrinti, kad teisinė atsakomybė už konkrečią būsimą grupės veiklą tektų kitam grupės nariui, o ne bendrovei atsakovei."[1296] Tačiau kitose JK bylose, tokiose kaip „*Smith, Stone & Knight prieš Birmingham Corp.*"[1297], "*DHN Food Distributors prieš Tower Hamlets LBC*"[1298] nustatyta, kad kai dukterinė bendrovė tėra fasadas arba veikia kaip kitos (patronuojančios) bendrovės agentas, įmonės „šydas" turėtų būti panaikintas ir ribotos atsakomybės privilegija negali būti taikoma.[1299] Kitaip tariant, minėti atvejai rodo, kad jei kita bendrovė naudojama tik kitos bendrovės naudai, pavyzdžiui, siekiant apriboti jos riziką, pvz., vykdant teisėtą ekonominę veiklą su dukterine bendrove, tačiau veikiant nesąžiningai, patronuojanti bendrovė negali pasinaudoti ribota atsakomybe. Šiuo atžvilgiu valios elementas yra gyvybiškai svarbus, nes reikia nustatyti, kad tokia „schema" arba „fasadas" yra tyčia sukonstruotas. Pavyzdžiui, Prancūzijoje tam tikri „šydo pakėlimo" aspektai yra reglamentuojami įstatymų ir atitinka panašias sąlygas kaip ir Jungtinės Karalystės teismų precedentuose, t. y. sukčiavimas arba fiktyvus atstovavimas.[1300] Vokietijoje „šydo pakėlimas" taip pat pripažįstamas; tačiau, atsižvelgiant į gana išsamų įmonių grupių teisinį reglamentavimą, tikslios pastarojo instituto ribos Vokietijoje nėra aiškios – kai kurie autoriai „šydo pakėlimą" laiko „[...] paskutine kategorija, kurią sudaro akcininkų atsakomybės atvejai, nereglamentuojami įmonių grupių teisės, bendrosios civilinės teisės ar įmonių teisės."[1301]

Kita ribotos atsakomybės išimtis, pripažįstama analizuojamose šalyse, numato, kad patronuojanti bendrovė gali būti laikoma atsakinga už veiksmus, kurie įvyksta kitos atskiros bendrovės (dažniausiai dukterinės įmonės) lygmenyje, jei ji veikia kaip vadinamasis „de facto vadovas."[1302] Šios doktrinos esmė yra ta, kad bendrovė[1303] gali būti laikoma atsakinga kaip *de jure* (teisiškai paskirtas) bendrovės vadovas, jei įrodoma, kad pirmojo veiksmai yra priskirtini pastarajam, t. y. patronuojanti bendrovė veikė kaip *de jure* vadovas. Pagal Prancūzijos teisę, asmuo laikomas veikiančiu „de facto vadovas", jei, pirmiausia, įrodoma, kad šis asmuo tiesiogiai arba per kitus subjektus atliko savarankiškus valdymo veiksmus.[1304] Kaip apibendrina S. Demeyere, Prancūzijos teisė leidžia patronuojančią bendrovę laikyti dukterinės įmonės „de facto direktoriumi" dėl įtakos pastarosios valdymui.[1305] Tokiu atveju patronuojančios bendrovės deliktinė

1296 *Ibid.*

1297 *Smith, Stone & Knight prieš Birmingham Corp.* [1939] 4 All E.R. 116.

1298 *DHN Food Distributors prieš Tower Hamlets LBC* [1976] 1 WLR 852.

1299 Vandekerckhove, *supra note*, 4:71.

1300 Vandekerckhove, *supra note*, 4:40.

1301 Vandekerckhove, *supra note*, 4:63.

1302 Klaus J. Hopt, "Groups of Companies. A Comparative Study on the Economics, Law and Regulation of Corporate Groups", *ECGI Working Paper* 286, 215 (2015): 21, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2560935.

1303 Taip pat ir fizinis asmuo, akcininkas.

1304 Paryžiaus Apeliacinio teismo 2008 m. spalio 8 d. 7 sprendimas civilinėje byloje Nr. 07/13617.

1305 Siel Demeyere, "Liability of the Mother Company for Its Subsidiary in French, Belgian and English Law", *European Review of Private Law* 23, 3 (2015): 390, https://doi.org/10.54648/erpl2015028.

atsakomybė grindžiama tuo, kad ji prisiėmė atsakomybę už dukterinės įmonės lygmeniu padarytą žalą, atsižvelgiant į tai, kad dukterinę įmonę iš esmės kontroliavo patronuojanti bendrovė.[1306] Viename iš savo sprendimų Prancūzijos apeliacinis teismas nurodė, kad norint, jog patronuojanti bendrovė būtų laikoma dukterinės įmonės „de facto direktore", būtina įrodyti, kad patronuojanti bendrovė iš esmės nepaisė grupės struktūros, vykdė aktyvias ir pasikartojančias valdymo funkcijas ir iš esmės dominavo dukterinės įmonės sprendimams, taip kontroliuodama pastarosios finansinius ir ekonominius sprendimus.[1307] Kitais atvejais Prancūzijos teismai išsamiai nurodė, kad patronuojančios bendrovės pripažinimas dukterinės įmonės „de facto direktore" priklauso nuo to, ar konkrečiu atveju patronuojančios bendrovės valdymo veiksmai gali būti laikomi absoliučiai pavaldiniais. Kitoje byloje Liono apeliacinis teismas išskyrė patronuojančiosios bendrovės veiksmų dukterinės bendrovės atžvilgiu ypatybes, kurios, kaip konkretus atvejis, kartu galėtų rodyti pavaldumo egzistavimą: (i) patronuojančiosios bendrovės finansų direktorius yra įgaliotas spręsti dėl dukterinės bendrovės finansų disponavimo, (ii) dukterinės bendrovės auditoriai yra tiesiogiai atskaitingi patronuojančiai bendrovei, (iii) dukterinės bendrovės „išlikimas" priklauso tik nuo patronuojančiosios bendrovės, (iv) paskolos dukterinei bendrovei išduodamos tik atsižvelgiant į patronuojančiosios bendrovės kreditingumą (kitaip tariant, patronuojanti bendrovė yra garantas/laiduotoja dukterinės bendrovės atžvilgiu), (v) dukterinės bendrovės valdymo organų posėdžiai vyksta patronuojančiosios bendrovės registruotoje buveinėje.[1308] Atskirai paminėtina, kad „de facto direktorių" atsakomybė taip pat numatyta Prancūzijos įstatymuose.[1309] Pastarieji numato „de facto direktorių", kurie vykdė konkrečius netinkamo valdymo veiksmus, dėl kurių bendrovės įsipareigojimai viršijo turtą, atsakomybę.

Verta paminėti, kad nors praktikoje akcininkai (pvz., patronuojanti bendrovė) paprastai laikomi „de facto direktoriais", Prancūzijos teismai leidžia juridinius asmenis, kurie nėra akcininkai, pripažinti „de facto direktoriais", kai dominavimas gali būti įrodytas kitu pagrindu, pvz., sutartiniu. Pavyzdžiui, Prancūzijos kasacinis teismas sprendė klausimą, ar automobilių gamintojas konkrečiu atveju galėtų būti pripažintas automobilių platinimo įmonės „de facto direktoriumi".[1310] „De facto direktoriaus" institutas taip pat priskirtinas bankams, kai jie dominuoja skolininkų atžvilgiu finansavimo sąlygomis ir pan.

Vokietijoje ir Jungtinėje Karalystėje bendrovės taip pat galėtų būti laikomos „de facto direktoriais". Tačiau Vokietijoje šis institutas daugiausia apsiriboja konkrečiu

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1306 Z. GALLEZ, *Les multinationals – Statut et réglementations*: 163 in Siel Demeyere, "Liability of the Mother Company for Its Subsidiary in French, Belgian and English Law", *European Review of Private Law* 23, 3 (2015): 393, https://doi.org/10.54648/erpl2015028.

1307 Paryžiaus Apeliacinio teismo 2008 m. spalio 8 d. 7 sprendimas civilinėje byloje Nr. 07/13617.

1308 Aikseno Provincijos Apeliacinio teismo 2004 m. birželio 4 d. sprendimas civilinėje byloje Nr. 02/20731.

1309 L. 651-2, Prancūzijos komercinis kodeksas.

1310 Prancūzijos kasacinio teismo 1999 m. spalio 26 d. sprendimas civilinėje byloje Nr. 97-19.026

atveju – patronuojančiosios bendrovės civiline atsakomybe už dukterinės bendrovės bankroto nepradėjimą. Vokietijos uždarųjų akcinių bendrovių atveju bankroto procesą turi inicijuoti pastarosios direktorius. Tačiau teismų praktika išaiškino, kad ši pareiga taikoma ir „de facto direktoriui" – asmeniui, kuris faktiškai kontroliuoja bendrovės valdymą.[1311] Šia prasme Vokietijos teisė taip pat pripažįsta patronuojančias bendroves „de facto direktoriais", turinčiais tokią pareigą, o pastarieji privalo atlyginti nuostolius, patirtus dėl šios pareigos pažeidimo.[1312] Funkcinis „de facto direktoriaus" atitikmuo Jungtinėje Karalystėje yra vadinamasis „šešėlinis direktorius", tiesiogiai apibrėžtas Bendrovių įstatyme kaip asmuo, kurio nurodymais veikia bendrovės „de jure" valdymo organai.[1313] Tačiau Įmonių įstatymas neleidžia patronuojančiąją bendrovę laikyti „šešėline vadove" vien dėl to, kad dukterinės bendrovės valdymo organų nariai veikia pagal pastarosios nurodymus.[1314] Atsižvelgiant į tai, patronuojančiajai bendrovei galėtų būti taikoma panaši atsakomybė kaip Vokietijoje, t. y. su dukterinės bendrovės nemokumu susijusiais atvejais, kai nustatoma, kad patronuojanti bendrovė nesielgė apdairiai, kad užkirstų tam kelią.

Kitos, retesnės ribotos įmonės atsakomybės išimtys yra „fiktyvi korporacija", „turto sumaišymas", „neteisėta prekyba" ir kt.[1315] Jos atspindi atvejus, kai galima įrodyti, kad vienintelis įmonės tikslas yra tarnauti akcininkų interesams arba kad atitinkamai nebeįmanoma atskirti skirtingų įmonių turto. Jei šie atvejai yra įrodomi/pagrindžiami, teismas gali pripažinti (patronuojančią) bendrovę atsakinga už dukterinės įmonės skolas.

Tačiau pateikiami bendrovės ribotos atsakomybės išimčių pavyzdžiai yra skirti tik iliustratyviai geriau suprasti pagrindinę disertacijos temą – bendrovės deliktinę atsakomybę (konkrečiai, aplaidumo deliktą) už aplinkosaugos ir žmogaus teisių pažeidimus. Todėl autorius nepateikia išsamios teisinės „korporacijos šydo panaikinimo/pakėlimo", „de facto direktoriaus", „neteisėtos prekybos" ar kitų dažnai sutinkamų ribotos atsakomybės išimčių analizės, kurios galėtų lengvai sudaryti atskirą daktaro disertacijos temą.

Jungtinė Karalystė istoriškai turi labiausiai išvystytą teismų praktiką dėl bendrovių deliktinės atsakomybės už aplinkosaugos ir žmogaus teisių pažeidimus. Tačiau norint suprasti tokios atsakomybės pagrindus, būtina suprasti neatsargumo/aplaidumo delikto pobūdį. Pagal Jungtinės Karalystės neatsargumo delikto apibrėžimą, asmuo yra atsakingas už neatsargumą, kai (i) jis / ji turi rūpestingumo pareigą nukentėjusiojo atžvilgiu, (ii) jis / ji pažeidė tą pareigą, (iii) nukentėjusiojo žala nėra tokia nenumatyta, kad būtų pernelyg nutolusi, ir (iv) yra priežastinis ryšys tarp neatsargaus elgesio ir

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1311 Comparative Analysis on Legal Regulation of the Liability of Members of the Management organs of Companies, *ECGI Law Working Paper* 103/2008 (2008): 139, http://ssrn.com/abstract=1001990.

1312 *Ibid.*

1313 251 (1), Bendrovių įstatymas.

1314 251 (3), Bendrovių įstatymas.

1315 Vandekerckhove, *supra note*, 4:42.

žalos.[1316] Taigi, norint taikyti deliktinę atsakomybę, reikia nustatyti, kad asmuo, kuriam taikoma tokia atsakomybė, turi rūpestingumo pareigą kitų asmenų atžvilgiu, kurios pažeidimas lemtų atsakomybės atsiradimą.[1317] Rūpestingumo pareiga suponuoja konkretų ryšį tarp ieškovo ir atsakovo iki žalos atsiradimo.[1318] Toks santykis, kaip minėta, apibūdintas „*Donoghue prieš Stevenson*"[1319], lyginant jį kaimynu, artumo požiūriu. Pagal šį „artimo" santykį asmuo privalo rūpintis kiekvienu, kuris dėl neatsargaus elgesio gali patirti numatomą žalą, su sąlyga, kad egzistuoja pakankamo artumo tarp pažeidėjo ir nukentėjusiojo reikalavimas. Tokia klasikinė deliktinės atsakomybės samprata buvo pritaikyta įmonių pažeidimų, susijusių su aplinkosaugos ir žmogaus teisėmis, atvejams. Pagal šį „kaimyno" ryšį, asmuo privalo rūpintis kiekvienu asmeniu, kuris dėl neatsargaus elgesio gali patirti numatomą žalą, su sąlyga, kad egzistuoja pakankamas priežastinis ryšys tarp pažeidėjo ir nukentėjusiojo.[1320] Tokia klasikinė deliktinės atsakomybės samprata buvo pritaikyta bendrovių pažeidimų, susijusių su aplinkosaugos ir žmogaus teisėmis, atvejams.

Tačiau deliktinės teisės taikymas šiuo atžvilgiu laikui bėgant keitėsi. Iš pradžių bendrovės deliktinė atsakomybė, pagrįsta jos rūpestingumo pareiga trečiosioms šalims, kai žalingi veiksmai įvyko dukterinių bendrovių lygmenyje buvo laikoma nauju tradicinės rūpestingumo pareigos taikymu. Lordų Rūmai sukūrė vadinamąjį „*Caparo*" testą,[1321] siekdami nustatyti naują rūpestingumo pareigą: (i) žala turi būti numatoma, (ii) tarp ieškovo ir atsakovo turi būti „artumas" ir (iii) rūpestingumo pareigos nustatymas turi būti sąžiningas, teisingas ir pagrįstas.[1322] Norint suprasti, koks „jautrus" klausimas nustatyti korporacijų rūpestingumo pareigą, susijusią su veiksmais jų dukterinių įmonių lygmeniu, neišvengiamai reikia atsižvelgti į tai, kad bendrosios teisės šalyse, įskaitant Jungtinę Karalystę, asmuo neturi bendros pareigos užtikrinti, kad trečiosios šalys nepadarytų žalos kitiems.[1323] Taigi, net ir taikydami tradicinius deliktų teisės principus, Jungtinės Karalystės teismai atsargiai nustatydavo rūpestingumo pareigą patronuojančiai bendrovei. Po kelių bylų, tokių kaip *„Connelly prieš RTZ Corp plc."* ir *„Lubbe ir kiti prieš Cape Plc."*, kurios nebuvo nagrinėtos dėl procesinių kliūčių arba buvo baigtos taikiai, Jungtinės Karalystės apeliacinis teismas pateikė svarbių išaiškinimų apie patronuojančių bendrovių pareigą rūpintis aplinkosauga ir žmogaus

1316 Anthony M. Dugdale et al., *Clerk & Lindsell on Torts 19th edn.* (London: Sweet & Maxwell, 2006), 383 *in* Siel Demeyere, "Liability of the Mother Company for Its Subsidiary iš French, Belgian and English Law", *European Review of Private Law* 23, 3 (2015): 402, https://doi.org/10.54648/erpl2015028.

1317 Cees van Dam, *European Tort Law* (New York: Oxford University Press, 2006), 93.

1318 Basil Markesinis, Simon Deakin, *Markesinis and Deakin's Tort Law 5th edn.* (New York: Oxford University Press, 2003), 75-76 iš Cees van Dam, *European Tort Law* (New York: Oxford University Press, 2006), 93.

1319 *Donoghue prieš Stevenson* [1932] AC 562, 580.

1320 Van Dam, *op. cit.*

1321 *Caparo Industries Plc prieš Dickman* [1990] 2 AC 605.

1322 *Ibid.*

1323 *Smith prieš Littlewoods Organisation Ltd.* [1987] AC 241, 270

teisių pažeidimais, kurie įvyko dukterinių bendrovių lygmeniu, byloje *„Chandler prieš Cape plc“*.[1324] Kaip teigia Petrin, „Chandler“ yra miglotoje bendrovių ir deliktų teisės sankirtoje, kur susiduria tokie pamatiniai principai kaip ribota atsakomybė, juridinio asmens savarankiškumas ir tradiciniai neatsargumo delikto principai.“[1325] Teismas minėtoje byloje pabrėžė keturis priežastingumo veiksnius, kurie turi būti įrodyti, siekiant nustatyti patronuojančios bendrovės rūpestingumo pareigos dukterinių bendrovių darbuotojų sveikatos atžvilgiu, egzistavimą: *pirma*, sutampančios verslo operacijos; *antra*, patronuojanti bendrovė turi arba turėtų turėti esminių žinių apie atitinkamus sveikatos ir saugos aspektus toje konkrečioje veiklos šakoje; *trečia*, dukterinės bendrovės darbo/veiklos aplinka/sąlygos yra nesaugios, o patronuojanti bendrovė žino arba turėtų tai žinoti; *ketvirta*, patronuojanti bendrovė žino arba turėtų numatyti, kad dukterinė bendrovė ar jos darbuotojai pasikliauja ja, kad ji panaudotų tas pranašesnes žinias darbuotojų apsaugai.[1326] Taigi, pagal *„Chandler prieš Cape plc“*, patronuojanti bendrovė laikoma turinčia pareigą rūpintis dukterinės bendrovės veiksmais, kai ji tiesiogiai ar netiesiogiai kišasi, bent jau tam tikru mastu, į atitinkamą dukterinės bendrovės veiklą. Todėl aktuali išvada iš šių Jungtinės Karalystės precedentų yra ta, kad patronuojanti bendrovė gali būti laikoma turinčia rūpestingumo pareigą, kai galima nustatyti konkretų kišimąsi į dukterinių bendrovių veiklą. Tačiau kita gana svarbi ypatybė yra ta, kad rūpestingumo pareiga paprastai buvo taikoma labai atsargiai, atsižvelgiant į tai, kad tokios rūpestingumo pareigos pripažinimas, nebent ji būtų labai kruopščiai apibrėžta, pakenktų vyraujančiam principui, kad nėra bendros pareigos užkirsti kelią trečiosioms šalims daryti žalos kitiems, taip pat kertiniams ribotos atsakomybės ir teisinio atskiriamumo principams.[1327]

Prancūzijoje deliktinės atsakomybės taikymas patronuojančioms bendrovėms yra daugiau teorinis. Nors statutinės teisės nuostatos iš esmės netrukdytų taikyti deliktinės atsakomybės už veiksmus dukterinių įmonių lygmeniu,[1328] patronuojančios bendrovės kaltės įrodymas gali būti daug sudėtingesnis,[1329] nes žalą daugeliu atvejų padaro dukterinė bendrovė.[1330] Teoriškai galima daryti išvadą, kad, pavyzdžiui, jei patronuojanti bendrovė padarė pareiškimą dėl įmonės socialinės atsakomybės, egzistuoja tam tikros rūpestingumo pareigos atsiradimo prielaidos ir gali būti lengviau pripažinta, kad ji

1324 *Chandler prieš Cape plc* [2012] EWCA Civ 525.

1325 Martin Petrin, “Assumption of Responsibility in Corporate Groups: Chandler v Cape plc.”, *The Modern Law Review* 76, 3 (2013): 603, https://www.jstor.org/stable/41857488.

1326 *Chandler prieš Cape plc* [2012] EWCA Civ 525.

1327 James Goudkamp, “Duties of Care Between Actors in Supply Chains”, *Journal of Personal Injury Law* 205*, Oxford Legal Studies Research Paper* 61/2017 (2017): 3, https://ssrn.com/abstract=2960624.

1328 1240, 1241 str., Prancūzijos civilinis kodeksas.

1329 Pagal Prancūzijos civilinės atsakomybės taisykles, paprastai asmuo neatsako už kito asmens padarytą žalą.

1330 P. Malinvaud, D. Fenouillet P. *Droit des obligations* (Paris: LexisNexis, 2012), 456 in Siel Demeyere, “Liability of the Mother Company for Its Subsidiary in French, Belgian and English Law”, *European Review of Private Law* 23, 3 (2015): 395, https://doi.org/10.54648/erpl2015028.

yra atsakinga už savo dukterinės įmonės veiksmus ar neatsargumą.[1331] Tačiau iki šiol Prancūzijoje nebuvo aptikta jokių svarbių precedentų. Pagal Vokietijos teisę, patronuojančių bendrovių atsakomybė už jų dukterinių bendrovių padarytą žalą tradiciškai buvo neįmanoma, nes Vokietijos deliktų teisė pripažįsta tik rūpestingumo pareigą, susijusią su savo elgesiu,[1332] o teisinio atskiriamumo principas bendrovių teisėje neleidžia nustatyti patronuojančioms bendrovėms pareigų dukterinių bendrovių atžvilgiu.[1333] Disertacijoje toks tradicinių bendrovių teisės principų, t. y. teisinio atskiriamumo ir ribotos atsakomybės, bei jų išimčių, iš kurių svarbiausios yra „šydo pakėlimas" ir deliktinė atsakomybė, kuri yra pagrindinis tyrimo objektas, sambūvis, vadinamas „klasikiniu požiūriu" į patronuojančiosios bendrovės atsakomybę. Tačiau pastaruoju metu teismų praktika, ypač Jungtinėje Karalystėje ir Nyderlanduose, atgaivino bendrovių deliktinės atsakomybės klausimą ne tik už savo dukterines bendroves, bet ir už savo verslo partnerius, ką iliustruoja žymūs vadinamosios tiekimo grandinės atsakomybės pavyzdžiai.

Didėjanti tarptautinių korporacijų galia sukėlė diskusiją, ar ribotos atsakomybės išimtys yra pakankamos deliktų aukoms. Todėl disertacijoje didelis dėmesys skiriamas bendrovių socialinės atsakomybės ir tiekimo grandinės atsakomybės institutams. Abu institutai paprastai numato, kad korporacijos turėtų išspręsti visus žalingus veiksnius, kuriuos apima jų bendrovių struktūra ir/ar tiekimo grandinė. Tiekimo grandinės atsakomybės iniciatyvos buvo iškeltos įvairiuose tarptautiniuose dokumentuose, be kita ko, JT Darnaus Vystymosi Tiksluose,[1334] EBPO Gairėse Daugiašalėms Įmonėms[1335] ir JT Verslo ir Žmogaus Teisių Principuose,[1336] kurie įpareigoja bendroves užtikrinti pagarbą žmogaus teisėms „savo įtakos sferoje". Akivaizdus spaudimas laikyti korporacijas

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1331 Y. Queinnec, M.C. Caillet, "Quels outils juridiques pour une régulation efficace des activités des sociétés transnationales?" *in Responsabilité sociale de l'entreprise transnationale et globalisation de l'économie*, ed. I. Daugareilh (Brussels: Bruylant, 2010), 654 iš Siel Demeyere, "Liability of the Mother Company for Its Subsidiary in French, Belgian and English Law", *European Review of Private Law* 23, 3 (2015): 393, https://doi.org/10.54648/erpl2015028.; A. Bergkamp, "Models of Corporate Supply Chain Liability", *Jura Falc.* 55, 2 (2018-2019): 184, https://www.law.kuleuven.be/apps/jura/public/art/55n2/bergkampsupplychainliability.pdf.

1332 Gerhard Wagner, "Haftung für Menschenrechtsverletzungen", *The Rabel Journal of Comparative and International Private Law* 80,4 (2016) 757-759 iš Cees van Dam, "Breakthrough in Parent Company Liability. Three Shell Defeats, the End of an Era and New Paradigms" *European Company and Financial Law Review* 18, 5 (2021), 736, https://www.degruyter.com/document/doi/10.1515/ecfr-2021-0032/html.

1333 *Ibid.*

1334 https://www.undp.org/sustainable-development goals?utm_source=EN&utm_medium=GSR&utm_content=US_UNDP_PaidSearch_Brand_English&utm_campaign=CENTRAL&c_src=CENTRAL&c_src2=GSR&gclid=Cj0KCQiAkMGcBhCSARIsAIW6d0Bv2189Jr6a338IPgZOymt0rIyHJaxaeSge1n9ai9cySULcwnMUBTUaAuVkEALw_wcB

1335 OECD, *OECD Guidelines for Multinational Enterprises, OECD Publishing*, 2023, http://dx.doi.org/10.1787/9789264115415-en.

1336 United Nations, *Guiding principles on business and human rights: Implementing the United Nations "Protect, Respect and Remedy" framework*, 2011.

atsakingomis už žalingą poveikį grupėse ar tiekimo grandinėse lėmė paradigminius teismų precedentus. „Neoklasikinis požiūris“, kurį išskiria disertacijos autorius, pristatomas penkiomis svarbiomis bylomis: (i) *AAA prieš Unilever plc*, (ii) *Lungowe prieš Vedanta Resources plc*, (iii) *Okpabi ir kt. prieš Royal Dutch Shell Plc* ir (iv) *Hamida Begum prieš Maran LTD* Jungtinėje Karalystėje ir (v) *Fidelis Ayoro Oguru prieš Shell plc* Nyderlanduose. Šios bylos buvo plačiai analizuojamos (ir kritikuojamos) kaip tarimai naujos rūšies bendrovių atsakomybė, kuri gerokai peržengia tradicinę atsakomybę, kaip pristatyta pirmojoje disertacijos dalyje. Visose bylose ieškovai teigė, kad atsakovai (bendrovės) privalo rūpintis trečiosiomis šalimis dėl įvairių žmogaus teisių ir aplinkosaugos pažeidimų. Iš visų bylų *Lungowe prieš Vedanta Resources plc* yra precedentiškiausia, nes ja buvo remiamasi visose sekančiose bylose. Šioje byloje, kurioje buvo nagrinėjamas patronuojančiosios bendrovės atsakomybės klausimas dėl tariamos dukterinės bendrovės padarytos žalos aplinkai ir žmonių sveikatai, Jungtinės Karalystės Aukščiausiasis Teismas pateikė keletą svarbių išaiškinimų. *Pirma*, patronuojančių bendrovių atsakomybė už savo dukterinių įmonių veiklą pati savaime nėra atskira ar nauja atsakomybės kategorija pagal deliktų teisę.[1337] *Antra*, ar galima laikyti, kad patronuojančiai bendrovei taikoma rūpestingumo pareiga, priklauso nuo „[...] kiek ir kaip patronuojanti bendrovė pasinaudojo galimybe perimti, įsikišti, kontroliuoti, prižiūrėti ar patarti dukterinės bendrovės atitinkamų operacijų [..] valdymui.“[1338] Galiausiai teismas paaiškino, kad rūpestingumo pareiga nėra specifiškai priskiriama patronuojančiosios ir dukterinės bendrovės santykiams, nes teisiniai principai yra tokie patys, kokie būtų taikomi sprendžiant klausimą, ar bet kuriai trečiajai šaliai (pvz., dukterinę bendrovę konsultuojančiam konsultantui) taikoma rūpestingumo pareiga.[1339] Todėl patronuojančios bendrovės rūpestingumo pareiga grindžiama jos įsikišimu į dukterinės bendrovės veiklą. Bylose *„Okpabi“* ir *„Oguru“* buvo patvirtinti *„Vedanta“* išaiškinimai. Kita vertus, *„Maran“*[1340] byla yra unikali tuo, kad joje buvo nagrinėjamas verslo partnerio atsakomybės klausimas. Ieškovė (mirusiojo našlė) padavė į teismą bendrovę „Maran Ltd.“, kuri įvairiais sutartiniais susitarimais *de facto* kontroliavo laivo, kuris galiausiai buvo sunaikintas (utilizuotas), pardavimą, o ieškovės vyras žuvo dėl nesaugių darbo sąlygų utilizavimo teritorijoje.[1341] Todėl teismas susidūrė su situacija, kai laivą pardavusi bendrovė ir ta, kurios nuosavybėje įvyko tragedija, buvo teisiškai visiškai nepriklausomos. Kaip minėta, „Maran Ltd.“ pardavė laivą tarpininkaujančiai bendrovei, kuri vėliau jį perpardavė utilizavimui. Todėl atsakovas net neturėjo sutartinių santykių su galutiniu laivo savininku. Tačiau teismui tai nebuvo kliūtis manyti, kad rūpestingumo pareiga gali egzistuoti net ir tokioje situacijoje. Taip darydamas teismas rėmėsi vadinamąja „pavojaus sukūrimo“ doktrina, nustatyta keliuose žymiuose Jungtinės

1337 *Lungowe prieš Vedanta Resources plc* [2019] UKSC 20, 49.

1338 *Ibid.*

1339 *Ibid.*, 36.

1340 *Hamida Begum prieš Maran LTD* [2021] EWCA Civ 326

1341 *Ibid.*, 6-7.

Karalystės precedentuose. Teismo nuomone, „Maran“ sukūrė pavojų pasirinkdama, kad laivas turėtų būti sunaikintas Bangladeše, žinomame dėl nesaugių darbo sąlygų, ir tokiomis aplinkybėmis mirtis buvo „ne tik galimybė, o tikimybė“.[1342] Todėl „Maran“ byla gali būti laikoma novatoriška, iš tikrųjų visiškai pritariančia tiekimo grandinės atsakomybei. Viena akivaizdžiausių žinučių, kylančių iš *„Vedanta“*, *„Okpabi“* ir *„Maran“* bylų, yra ta, kad tiekimo grandinės atsakomybė nėra tik teorinė sąvoka, ypač kalbant apie dalyvaujančias šalis. Nors *„Vedanta“* ir *„Okpabi“* kruopščiai apribojo taikymą patronuojančiosios ir dukterinės bendrovės santykiais, *„Maran“* atskleidė, kad nusistovėję deliktų teisės precedentai taikomi ir tokiems sudėtingiems santykiams. Tačiau, nors minėtas bylas kai kurie galėtų laikyti tradicinių bendrovių teisės ir deliktų teisės principų pažeidimu, disertacijoje pateikiama išsami analizė, kuria siekiama parodyti, kad minėta teismų praktika nebūtinai nukrypsta nuo klasikinės delikto sampratos, pagrįstos rūpestingumo pareigos nustatymu. Šiuo atveju idėja, kad žala laiko pačios patronuojančios bendrovės, net jei net jei ji galėjo būti padaryta dukterinės bendrovės lygmeniu, buvo palankiai vertinama kaip saugi galimybė išvengti teisinio atskiriamumo principo pažeidimo, t. y. nelaikyti patronuojančiosios bendrovės atsakinga už kitos bendrovės veiksmus. Remiantis analizuotais atvejais, patronuojančioji bendrovė arba verslo partnerė gali turėti rūpestingumo pareigą tuo atveju, jei jie kišasi į atitinkamą kitos bendrovės veiklą.

Tačiau pagrindinė disertacijoje analizuojama problema yra bendrovių civilinės atsakomybės taikymo pasikeitimas, pagrįstas vadinamųjų tvarumo patikrinimo (*due-diligence*) pareigų pažeidimu. Jeigu deliktinė atsakomybė sprendžia tiekimo grandinėse vykstančius piktnaudžiavimus retrospektyviai ir bendrovės yra atsakingos už jau patirtą realią žalą, Prancūzijos,[1343] Vokietijos[1344] teisės aktai, numatantys pareiga bendrovėms atlikti patikrinimus tiekimo grandinėse bei Europos Parlamento ir Tarybos direktyva (ES) 2024/1760, dėl įmonių tvarumo išsamaus patikrinimo (CSDDD) siūlo unikalų požiūrį. Pastarieji nustato aktyvias pozityvias pareigas didelėms bendrovėms, t. y. užkirsti kelią žmogaus teisių pažeidimams ir žalai aplinkai visoje jų tiekimo grandinėje į ateitį. Todėl teisiniu požiūriu išsamaus tvarumo patikrinimo įstatymai sukuria patronuojančioms bendrovėms pareigą įsikišti į konkrečius savo dukterinių įmonių veiklos aspektus, siekiant užkirsti kelią galimiems aplinkosaugos ar žmogaus teisių pažeidimams. Jei tai šias pareigas nagrinėsime iš aukščiau aptarto tradicinio atsakomybės taikymo perspektyvos, tai rodo esminį patronuojančios bendrovės vaidmens visoje jos tiekimo grandinėje pasikeitimą. Pastarieji teisės aktai *įpareigoja* jas įsikišti ir numato atsakomybę už to nepadarymą. Nyderlandų precedentas prieš „Shell“ taip

1342 *Hamida Begum prieš Maran LTD* [2021] EWCA Civ 326

1343 Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des enterprises donneuses d'ordre (Loi de Vigilance) JORF n° 0074.

1344 Gesetz über die unternehmerischen Sorgfaltspflichten zur Vermeidung von Menschenrechtsverletzungen in Lie- ferketten (Lieferkettensorgfaltspflichtengesetz – LkSG).

pat gali paskatinti šią diskusiją.[1345] Teismas, remdamasis bendrosiomis deliktų normomis ir JT Principais („minkštąja“ teise), nusprendė, kad patronuojančiosios bendrovės įtaka visai „Shell“ grupei pateisina prievolę iki 2030 m. 45 % sumažinti grupės grynąjį išmetamųjų teršalų kiekį, apimantį tiek tiekėjus, tiek galutinius vartotojus. Nors apeliacinis teismas panaikino sprendimą,[1346] tai akivaizdus deliktų teisės taikymo bendrovėms pokytis. Vien deliktų teisės perspektyvos matyti, kad patronuojančiosios bendrovės įsikišimo į kitos įmonės veiklą standartas kinta, t. y. rūpestingumo standartas iš deliktų teisės (neatsargumo) transformuojasi į pareigą elgtis tam tikru būdu. Šiuo atžvilgiu disertacijoje analizuojamos tokio pasikeitusio civilinės atsakomybės taikymo teisinės prielaidos ir pasekmės, pvz., ar jis suderinamas tiek su bendrovių teise, tiek su deliktų teisės principais. Atsižvelgiant į tai, pagrindinė disertacijoje analizuojama ***problema*** yra deliktų teisės taikymo pokytis nustatant bendrovių atsakomybę už ESG pažeidimus.

Autorius teigia, kad susiduriame su reikšmingais atsakomybės taikymo pokyčiais. Pagal tradicines neatsargumo delikto (rūpestingumo pareigos) taisykles, bendrovės yra atsakingos už savo aktyvų įsikišimą. Priešingai, tvarumo patikrinimo teisės aktai sukuria pareigą valdyti ir įsikišti į tiekimo grandinę, numatydami atsakomybę už nepakankamą įsikišimą.

Atitinkamai, disertacijos ***objektas***, yra civilinės (deliktinės) atsakomybės taikymas ribotos atsakomybės bendrovėms už ESG pažeidimus jų tiekimo grandinėse. Konkrečiau, disertacijos objektas yra deliktinės atsakomybės, susijusios su bendrovėms nustatytų atitinkamų pareigų pažeidimu, taikymas. Kaip atskleidžiama disertacijoje, tokios pareigos gali būti klasikinės rūpestingumo (nerūpestingumo/neatsargumo) pareigos, tradiciškai aptinkamos bendrojoje teisėje, tiek pozityvios pareigos veikti tam tikru būdu, t. y. tvarumo patikrinimo pareigos. Atitinkamų pareigų adresatas, disertacijos taikymo srityje, dažniausiai suprantamas kaip patronuojančios bendrovės (tiesioginiai arba netiesioginiai daugumos akcininkai). Tačiau konkrečiais atvejais atitinkamos pareigos, t. y. rūpestingumo pareiga, taikomos ir verslo partneriams. Kalbant apie taikymo sritį, disertacija daugiausia dėmesio skiria ribotos atsakomybės bendrovėms, nes deliktinė atsakomybė pirmiausia taikoma šiems subjektams dėl teisinio bendrovės ir jos savininkų (akcininkų ar narių) atskyrimo. Šis atskyrimas turi įtakos tam, kaip priskiriama atsakomybė, kai įvyksta deliktas. Disertacijoje atitinkamos bendrovių pareigos suprantamos kaip apsiribojančios aplinkosaugos ir žmogaus teisių sritimis. Taigi, visame darbe konkrečius išorinius veiksnius galima kategorizuoti į ESG pareigų pažeidimą ir įmonių socialinės atsakomybės / įsipareigojimų pareigų pažeidimą. Objektas analizuojamas pateikiant išsamią deliktinės atsakomybės už bendrovių padarytą žalą, analizę, t. y. autorius darbą suskirsto į tris dalis, atitinkančias „klasikinį“, „neoklasikinį“ ir „modernų“ požiūrį, kur „klasikinis“ požiūris atspindi tradicinius bendrovių teisės principus – teisinį atskiriamumą ir ribotą atsakomybę bei jų sambūvį su deliktine

1345 Hagos apygardos teismo 2012 m. gegužės 26 d. sprendimas ECLI:NL:RBDHA:2021:5337 (Milieudefensie e.a./Royal Dutch Shell).

1346 Hagos apeliacinio teismo 2024 m. lapkričio 12 d. sprendimas 200.302.332/01

atsakomybe, „neoklasikinis“ požiūris analizuoja pastarojo meto svarbios teismų praktikos pokyčius, daugiausia Jungtinėje Karalystėje, kur patronuojančios bendrovės ir verslo partneriai yra laikomi atsakingais už ESG pažeidimus pagal deliktinės teisės normas, ir galiausiai „modernus“ požiūris atitinka naujausius įstatymų pokyčius tiek nacionaliniu (Prancūzija, Vokietija, JK), tiek ES lygmeniu, t. y. deramo tvarumo patikrinimo teisės aktus. Kaip nurodyta, disertacijoje daugiausia dėmesio skiriama trims pagrindinėms jurisdikcijoms – Jungtinei Karalystei, Prancūzijai ir Vokietijai, dėl daugelio priežasčių. Pirma, šios jurisdikcijos turi išsamiausius įstatymus ir teismų praktikos precedentus dėl patronuojančiųjų bendrovių deliktinės atsakomybės už žalą, padarytą dukterinių bendrovių lygmenyje.

Antra, minėtos jurisdikcijos taip pat yra pradininkės kuriant tvarumo patikrinimo teisės aktus, kurie yra gyvybiškai svarbūs pagrindiniams disertacijoje analizuojamiems probleminiams aspektams. Galiausiai, Vokietijos, Prancūzijos ir Jungtinės Karalystės teisės mokslininkų darbai yra išsamiausi ir įtakingiausi diskusijose apie patronuojančiųjų bendrovių deliktinę atsakomybę už žalą, padarytą dukterinių bendrovių lygmenyje. Ši svarba kyla iš pažangių teisinių sistemų, turtingų doktrinos tradicijų ir ankstyvo bei aktyvaus akademinio įsitraukimo, sprendžiant besikeičiančius bendrovių atsakomybės klausimus. Nors šioje disertacijoje daugiausia dėmesio skiriama Prancūzijos, Vokietijos ir Jungtinės Karalystės teisinėms sistemoms ir moksliniam indėliui, joje taip pat analizuojami svarbūs Nyderlandų teismų praktikos aspektai, ypač sprendimas byloje *„Milieudefensie ir kt. prieš „Royal Dutch Shell“*. Vis dėlto, pažymėtina, kad disertacijoje Nyderlandų teisė nėra analizuojama kaip atskira jurisdikcija. Vietoj to, *Milieudefensie* bylos aktualumas slypi novatoriškame Nyderlandų teismo požiūryje į bendrovių deliktinę atsakomybę. Taigi, Nyderlandų precedentas yra lyginamasis ir iliustracinis šaltinis, pagrindžiantis platesnį disertacijos argumentą dėl besivystančių bendrovių tvarumo patikrinimo standartų teisinės reikšmės, tačiau neatliekant išsamios doktrininės Nyderlandų deliktinės teisės analizės.

Atsižvelgiant į tai, kas išdėstyta pirmiau, disertacijoje analizuojami reguliavimo modeliai, susiję su pareigų ir civilinės atsakomybės priskyrimu bendrovių grupėse (ir tiekimo grandinėse), siekiant nustatyti, kaip deliktinė atsakomybė taikoma kiekvienoje iš jų.

Disertacijos originalumas ir aktualumas. Civilinės atsakomybės taikymo korporacijoms už ESG klausimus pokyčiai neišvengiamai atspindi tiek politinio, tiek ekonominio lygmens realijas. Didėjanti tarptautinių korporacijų galia bei jų veiklos skaidrumas visoje tiekimo grandinėje lėmė augantį suvokimą apie jų atsakomybę. Šiuo aspektu pastebima įtampa tarp bendrovių teisės ir deliktų teisės. C. A. Witting pažymi, kad nekompensuotų korporacijų padarytų deliktų aukų problema atskleidžia vertybių konfliktą tarp deliktų teisės ir bendrovių teisės.[1347] P. Muchlinski šią įtampą paaiškina detaliau: „Pirma, būtinybė užtikrinti teisinį apibrėžtumą, leidžiantį efektyviai paskirstyti riziką įmonių grupėje – tiek kuriant dukterines įmones, tiek sutarčių

1347 Christian A. Witting, *Liability of Corporate Groups and Networks* (Cambridge: Cambridge University Press, 2018), 348.

būdu paskirstant teises ir pareigas; antra, būtinybė užtikrinti, kad toks rizikos paskirstymas neužkirstų kelio trečiųjų asmenų patirtų nuostolių kompensavimui dėl grupės narių veiklos."[1348] Tam tikrą laikotarpį įtampa tarp bendrovių teisės ir deliktų teisės buvo švelninama taikant vadinamąją tiesioginę arba pirminę bendrovės atsakomybę, grindžiamą jos pačios pareiga elgtis atidžiai (*duty of care*). Naujausios bylos, tokios kaip *Vedanta*, *Okpabi* bei vėliau *Maran*, patvirtino, kad tiek patronuojančios įmonės, tiek ir ne patronuojantys verslo partneriai gali būti laikomi atsakingais pagal deliktų teisę remiantis tuo pačiu principu. Vis dėlto nauji išsamios tvarumo patikros teisės aktai galėjo reikšmingai pakeisti šį požiūrį, kaip jau aptarta ankstesniuose skirsniuose.

Šio tyrimo originalumas grindžiamas tuo, kad disertacijos autorius pateikia platesnę perspektyvą apie galimus pokyčius korporacinėje atsakomybėje – nagrinėjama ne tik tam tikri ESG atsakomybės aspektai, bet žvelgiama plačiau: kaip šie pokyčiai galėtų keisti fundamentalius korporatyvinės atsakomybės principus, grindžiamus juridinio asmens atskirtumo ir ribotos atsakomybės doktrinomis. Tam tikri su tema susiję aspektai jau yra plačiai aptarti akademinėje literatūroje. Pavyzdžiui, B. J. Clarke ir P. Blumberg bei L. A. Sørensen nagrinėja patronuojančių bendrovių pareigas; C. van Dam išsamiai tyrinėja patronuojančių bendrovių deliktinę atsakomybę už dukterinių bendrovių veiklos padarinius; P. Bergkamp analizuoja korporatyvinės tiekimo grandinės atsakomybės modelius. Tačiau šios disertacijos *originalumas* slypi tame, kad autorius tiria bendrovių deliktinės atsakomybės raidą – nuo tradicinio nerūpestingumo delikto iki vadinamosios tiekimo grandinės atsakomybės – siekiant įvertinti, ar pastarojo meto pokyčiai deliktinėje atsakomybėje yra suderinami tiek su bendrovių teisės principais, tiek su deliktų teisės principais. Tiksliau tariant, autorius teigia, jog šiuo metu stebimas esminis pokytis, kaip deliktų teisė taikoma bendrovių atsakomybei už jų tiekimo grandinėje pasireiškiantį neatsargų elgesį. Šiuo požiūriu disertacijoje siekiama nustatyti tokių pokyčių ribas ir įvertinti jų suderinamumą su kitais korporatyvinės ir deliktų teisės principais.

Šios disertacijos originalumas ir naujumas neatsiejamai susijęs su tuo, jog 2024 m. liepos 25 d. įsigaliojo Europos Sąjungos Direktyva dėl įmonių tvarumo patikros (*Corporate Sustainability Due Diligence*), kuri iš esmės keičia ES patikros (*due-diligence*) teisės aktų sistemą. Todėl civilinės atsakomybės analizė šios direktyvos pagrindu yra itin aktuali. Bendrovių deliktinės atsakomybės analizė yra ypač svarbi tiek ES, tiek nacionaliniu mastu, nes ji atskleidžia sąveiką tarp korporatyvinės veiklos, teisinės atskaitomybės ir visuomenės apsaugos. Bendrovės atlieka reikšmingą vaidmenį šiuolaikinėse ekonomikose, o jų veiksmai gali sukelti žalą asmenims, kitoms įmonėms ar viešajam interesui. Deliktų teisė, reguliuojanti civilinius pažeidimus, yra esminis mechanizmas siekiant priversti bendroves atsakyti už žalą, kurią jos sukėlė savo neteisėtais veiksmais. Deliktinės atsakomybės analizė leidžia aiškiai suprasti, kaip korporatyvinė veikla vertinama teisiškai ir kokia yra bendrovių atsakomybės už padarytą žalą apimtis.

Vis dėlto, nors deliktinė atsakomybė gali būti laikoma natūraliu teisiniu pagrindu

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1348 Peter T. Muchlinski, *Multinational Enterprises and the Law 2nd edn* (New York: Oxford University Press, 2007), 321.

nukentėjusiųjų interesams ginti, ji paprastai neįtvirtina pozityvių pareigų bendrovėms elgtis tam tikru būdu. Tačiau pastaroji nacionalinio ir ES lygmens tvarumo patikros teisėkūra gali pakeisti šį požiūrį. Todėl viena iš šios disertacijos vertės dedamųjų – išsami bendrovių deliktinės atsakomybės analizė, ypatingą dėmesį skiriant naujiesiems patikros teisės aktams. Disertacijoje siekiama atskleisti deliktų ir bendrovių teisės koegzistavimo galimybes tiekimo grandinės atsakomybės kontekste, kuris ir lemia tiek nacionalinės, tiek ES teisės lygmeniu formuojamą tvarumo patikrinimo teisės aktų sistemą.

Šios disertacijos ***tikslas*** – pateikti konceptualų požiūrį į esamus teisinius pokyčius dėl bendrovių atsakomybės už aplinkosaugos ir (ar) žmogaus teisių pažeidimus jų tiekimo grandinėse. Disertacijos autoriaus prielaida – tiekimo grandinės atsakomybė keičiasi taip, kad tai gali iš esmės transformuoti mūsų supratimą apie fundamentalius bendrovių teisės principus dėl bendrovių atsakomybės taikymo. Siekdamas įgyvendinti tyrimo tikslą, autorius išsikelia šiuos uždavinius:

1. Išanalizuoti civilinės (deliktinės) atsakomybės taikymo bendrovėms už jų dukterinių įmonių veiklą, susijusią su žmogaus teisių ir aplinkos pažeidimais, prielaidas pasirinktuose jurisdikcijose – Prancūzijoje, Vokietijoje ir Jungtinėje Karalystėje – siekiant išskirti bendruosius deliktinės atsakomybės principus.
2. Išanalizuoti naujausią teismų praktiką, konkrečiai šiuos precedentus: *(i) AAA prieš Unilever plc („Unilever"), (ii) Lungowe prieš Vedanta Resources plc („Vedanta"), (iii) Okpabi ir kiti prieš Royal Dutch Shell Plc („Okpabi"), (iv) Hamida Begum prieš Maran LTD („Maran"), (v) Fidelis Ayoro Oguru prieš Shell plc („Oguru"),*kuriuose nagrinėjama bendrovių deliktinė atsakomybė už žalą jų tiekimo grandinėse, siekiant atsakyti į šiuos klausimus:
   2.1. Ar egzistuoja specifinė teorija (modelis), galintis paaiškinti atvejus, kai bendrovės buvo (ar nebuvo) laikomos atsakingomis už žalą, atsiradusią dukterinių įmonių ar verslo partnerių veiklos lygmenyje?
   2.2. Kokios deliktinės atsakomybės sąlygos nustatomos šiose bylose?
   2.3. Kiek (jeigu išvis) šie precedentai nukrypsta nuo klasikinio korporatyvinės atsakomybės taikymo modelio? Jei nustatoma, kad nagrinėjami precedentai reiškia nukrypimą nuo tradicinių taisyklių, analizuojama, kiek toks nukrypimas yra suderinamas su galiojančia Junginės Karalystės, Vokietijos ir Prancūzijos teise bei bendrovių teisės doktrinomis.
3. Išanalizuoti tvarumo patikrinimo teisės aktus, konkrečiai Vokietijos, Prancūzijos tvarumo patikrinimo aktus ir CSDDD, siekiant atsakyti:
   3.1. Kokios civilinės atsakomybės sąlygos numatytos šiuose teisės aktuose?
   3.2. Ar patikros teisėkūra reiškia pokytį, kaip deliktinė atsakomybė taikoma bendrovėms dėl žalos, padarytos tiekimo grandinėje?
   3.3. Ar tvarumo patikrinimo teisės aktai yra suderinami su tradiciniais bendrovių teisės principais – juridinio asmens atskyrimo ir ribota atsakomybe?

Atsižvelgiant į tyrimo aktualumą ir naujumą, disertacijoje formuluojami šie ***ginamieji teiginiai***:

1. Atlikus pasirinktų jurisdikcijų analizę, ypatingą dėmesį skiriant Jungtinės Karalystės, kurioje susiformavusi gausi teismų praktika, precedentams, matyti, kad patronuojančios bendrovės gali būti laikomos atsakingomis už jų dukterinių bendrovių lygmenyje atsiradusią žalą, pagal klasikines deliktų teisės taisykles t.y. jei įrodoma egzistuojant pastarųjų rūpestingo pareigai (*duty of care*). Tokios pareigos nustatymas siejamas su patronuojančios bendrovės įsikišimu į atitinkamas dukterinės bendrovės veiklos sritis, kas dažniausiai atspindi kontrolę.
2. Naujausi Jungtinės Karalystės ir Nyderlandų teismų precedentai – *Unilever*, *Vedanta*, *Okpabi*, *Oguru* ir *Maran* teisiškai yra paremti remiasi tradicinėmis delikto taisyklėmis, nustatant rūpestingumo pareigos egzistavimą. Nepaisant to, kad šie precedentai pagrįsti tradicinio nerūpestingumo (*negligence*) delikto principais, jie atspindi ir tiekimo grandinės atsakomybės pripažinimą. Ši atsakomybės forma platesnė, nes taikoma ne tik patronuojančioms bendrovėms, bet ir ne grupės bendrovėms (pvz., verslo partneriams byloje *Maran*).
3. Deliktinė atsakomybė, grindžiama bendrovės rūpestingumo pareigos pažeidimu, neprieštarauja juridinio asmens atskirumo ar ribotos atsakomybės principams, nes ji kyla iš pačios bendrovės veiksmų. Taigi, juridinis atskirumas nepažeidžiamas, o veikiau patvirtinamas. Kalbant apie ribotos atsakomybės principą, tokia deliktinė atsakomybė gali būti suprantama kaip (i) viena iš ribotos atsakomybės išimčių (kaip pvz., įmonės šydo praskleidimo atvejis), arba (ii) atskira pačios bendrovės atsakomybė, nesusijusi su dukterinės bendrovės veiksmais.
4. Tvarumo patikrinimo aktai (*due diligence*) tiek nacionaliniu, tiek ES lygmeniu žymi reikšmingą pokytį taikant deliktinę atsakomybę už žalingus veiksmus tiekimo grandinėje. Jei pirmiau aptarti deliktų teisės precedentai numato atsakomybę už įsikišimą į tiekimo grandinės subjektų (pvz. dukterinių bendrovių veiklą), tvarumo patikrinimo teisės aktai nustato aktyvią pareigą patronuojančioms bendrovėms aktyviai stebėti ir valdyti su žmogaus teisėmis ir aplinkos apsauga susijusius klausimus visoje tiekimo grandinėje.

DISERTACIJOS STRUKTŪRA

Disertacija suskirstyta į tris tarpusavyje susijusias dalis, kurios išdėstytos logine seka, siekiant paaiškinti, kaip keičiasi deliktinės atsakomybės taikymas bendrovėms už žalą, atsiradusią tiekimo grandinės/grupės bendrovių lygmenyje. Pirmojoje dalyje atspindimas vadinamasis klasikinis požiūris į bendrovės atsakomybę už žalą, padarytą kitų savarankiškų bendrovių lygmenyje. Remiantis trijų jurisdikcijų – Prancūzijos, Vokietijos ir Jungtinės Karalystės – pavyzdžiais, pateikiama pagrindinių bendrovių teisės principų – juridinio asmens atskirumo bei ribotos atsakomybės, analizė. Šie principai yra esminiai siekiant suprasti pačias atsakomybės taikymo prielaidas, kadangi jie nubrėžia bendras jos taikymo ribas. Toliau skyriuje dėmesys skiriamas dažniausiai

pasitaikančioms išimtims iš ribotos atsakomybės principo. Nepaisant to, kad kiekviena šalis turi specifinių išimčių, disertacijoje akcentuojamos labiausiai paplitusios ir visoms analizuojamoms šalims būdingos – tai korporatyvinio šydo praskleidimas/pakėlimas (*lifting of the corporate veil*) bei „de facto vadovas/direktorius" (*de facto directorship*). Galiausiai, pagrindine nagrinėjama išimtimi pasirenkama deliktinė atsakomybė. Šiame kontekste atskirai analizuojamos patronuojančių bendrovių deliktinės atsakomybės sąlygos už žalingus veiksmus, vykdomus jų dukterinių įmonių lygmeniu kiekvienoje iš trijų pasirinktų valstybių. Jungtinė Karalystė, kurioje susiformavusi gausiausia ir išsamiausia teismų praktika šiuo klausimu, leidžia autoriui išskirti tam tikras bendrąsias patronuojančių bendrovių deliktinės atsakomybės sąlygas. Šios sąlygos vėliau naudojamos kaip klasikinio požiūrio pagrindas lyginamajai analizei. *Antrojoje* **dalyje** dėmesys sutelkiamas į naujausius teismų precedentus, ypač Jungtinėje Karalystėje, kurie pastaruoju metu sulaukė didelio dėmesio dėl galimo esminio patronuojančių bendrovių civilinės atsakomybės modelio pokyčio. Pirmiausia pateikiama išsami teisinė konkrečių bylų analizė, paaiškinant jų reikšmę civilinės atsakomybės kontekste. Vėliau disertacijoje keliami konkretūs tyrimo klausimai, skirti nustatyti, (i) ar egzistuoja specifinė teorija ar modelių visuma, galinti paaiškinti atvejus, kai bendrovės buvo (arba nebuvo) laikytos atsakingomis už žalingą veiklą, vykdytą jų dukterinių įmonių ar verslo partnerių lygmeniu, (ii) kiek tokie atvejai nukrypsta nuo klasikinio korporatyvinės atsakomybės taikymo modelio? Jei nustatoma, kad bylos reikšmingai nukrypsta nuo tradicinių korporatyvinės atsakomybės principų, toliau analizuojama, kiek tokie nukrypimai yra suderinami su galiojančia Jungtinės Karalystės, Vokietijos ir Prancūzijos deliktų bei bendrovių teise**.** Atlikus šių institutų analizę**,** autorius pateikia bendrąsias išvadas ir atskleidžia tam tikrus paradoksus**,** kylančius iš aptartų bylų, vertindamas šią plėtotę kaip „neoklasikinį" požiūrį į korporacijų deliktinę atsakomybę**,** kai žala padaroma grupės ar tiekimo grandinės bendrovių lygmenyje**.** *Trečiojoje* dalyje analizuojama tvarumo patikrinimo teisėkūra **(***due diligence acts***)**, tiek nacionaliniu (Prancūzijos ir Vokietijos), tiek Europos Sąjungos lygmeniu (CSDDD). Pirmiausia pateikiama šių teisės aktų bendra apžvalga, aptariamos jų atsiradimo priežastys ir prielaidos, kurios leidžia gilintis į civilinės atsakomybės taikymo sąlygas. Galiausiai pateikiama šiuolaikinio („moderniojo") deliktinės atsakomybės modelio, taikomo žalingiems veiksmams tiekimo grandinėje, palyginamoji analizė su anksčiau apibrėžtais „klasikiniu" ir „neoklasikiniu" požiūriais. Tokiu būdu autorius parodo, kaip deliktų teisė palaipsniui transformuojasi, taikant atsakomybę bendrovėms už kitų savarankiškų tiekimo grandinės bendrovių lygmenyje padarytą žalą.

SĄVOKOS

Rūpestingumo pareiga (*duty of care*) – tai rūpestingumo standartas, kurio būtų laikomasi panašioje situacijoje ar esant panašioms aplinkybėms protingo asmens požiūriu. Šis standartas taikomas deliktinėje atsakomybėje siekiant nustatyti, ar asmens elgesys buvo neatsargus (t. y. ar buvo padarytas pažeidimas dėl aplaidumo).

Bendrovių socialinė atsakomybė (*corporate social responsibility, CSR*) – verslo

modelis, kuriame įmonės integruoja socialinius ir aplinkosauginius aspektus į savo veiklą ir santykius su suinteresuotaisiais subjektais, neapsiribodamos vien tik ekonominiu pelnu.

Aplinkosaugos, socialiniai ir valdysenos kriterijai (*Environmental, Social and Governance, ESG*) – standartai, skirti vertinti bendrovių elgseną ir etines vertybes. Jie apima tokius veiksnius kaip klimato kaita, darbo santykiai, įvairovės ir įtraukties politika, bendruomenių įtraukimas.

ESG atsakomybė (*ESG liability*) – teisinė atsakomybė, kuri kyla įmonėms, jei jos tinkamai neatsižvelgia į ESG veiksnius savo veikloje, atskaitomybėje ar sprendimų priėmimo procesuose. ESG atsakomybė gali kilti dėl žalos aplinkai (pvz., tarša, miškų naikinimas, anglies dioksido emisijos).

Deliktinė atsakomybė (*tortious liability*) – teisinė prievolė, kylanti dėl delikto – neteisėto veiksmo ar neveikimo, kuris padaro žalą kitam asmeniui ir už kurį nukentėjęs asmuo gali reikalauti žalos atlyginimo.

Patronuojanti bendrovė (*parent company*) – įmonė, kuri valdo kitą įmonę (vadinamąją dukterinę įmonę), turėdama jos balsų daugumą arba reikšmingą įtaką valdymui ir veiklai.

Dukterinė bendrovė (*subsidiary*) – įmonė, kurią valdo kita įmonė – patronuojanti bendrovė. Valdymas paprastai pasiekiamas patronuojančiai įmonei turint daugiau kaip 50 % dukterinės įmonės balsavimo teisių.

Vertės grandinė (*value chain*) – visas verslo veiklų ir santykių ciklas, kuris prisideda prie produkto ar paslaugos sukūrimo, gamybos, paskirstymo ir pardavimo. Kiekviename vertės grandinės etape įmonės turi valdyti įvairius teisinius aspektus – sutartinius santykius, atitiktį teisės aktams, intelektinės nuosavybės apsaugą, atsakomybę ir rizikos valdymą.

Tiekimo grandinė (*supply chain*) – procesų seka, kuri apima produkto ar paslaugos kelią nuo žaliavų tiekimo iki galutinio vartotojo. Ji daugiausia susijusi su logistikos ir prekių ar paslaugų srauto valdymu tarp tiekėjų ir vartotojų.

TYRIMŲ APŽVALGA

Lietuvos teisės moksle bendrovės deliktinės atsakomybės už žalą, padarytą kitų nepriklausomų bendrovių (dukterinių įmonių ar verslo partnerių), ypač susijusią su žmogaus teisėmis ir aplinkosauga, institutas iki šiol nebuvo nuosekliai ir visapusiškai išnagrinėtas. Tam tikri su disertacijos tema susiję aspektai yra nagrinėti Lietuvos mokslininkų, pavyzdžiui, L. Mikalonienė analizavo akcininko civilinės atsakomybės uždarajai akcinei bendrovei, jos kreditoriams ir kitiems akcininkams aspektus[1349] bei akcininko atsakomybės subsidiarumo pobūdį.[1350] V. Papijanc nagrinėjo „korporaty-

1349 L. Mikalonienė, Uždarosios akcinės bendrovės akcininko teisės ir jų gynimo būdai (Vilnius: VĮ „Registrų centras“, 2015).

1350 L. Mikalonienė, "Subsidiari akcininko atsakomybė", *Teisė*, 76 (2010), doi:10.15388/Teise.2010.0.217.

vinio šydo praskleidimo“ doktrinos taikymą Lietuvos teisėje,[1351] o A. Tikniūtė pateikė išsamią juridinio asmens ribotos atsakomybės analizę.[1352] Naujausiame E. Bakanausko tyrime tam tikru mastu nagrinėta įmonių grupės intereso samprata.[1353]

Nors Lietuvos mokslininkų darbais yra remiamasi disertacijoje, jų aktualumas apsiriboja konkrečiais ir siauriau apibrėžtais analizės aspektais, visų pirma susijusiais su ribotos atsakomybės doktrinos teoriniu pagrindu, juridinio asmens ir akcininko subsidiaria prigimtimi bei „korporatyvinio šydo praskleidimo“ doktrina. Šie darbai sudaro vertingą kontekstą suprasti tradicinius bendrovių teisės principus. Vis dėlto, platesnis disertacijos tikslas peržengia šias pamatines sąvokas – siekiama išnagrinėti, kaip deliktinės atsakomybės taikymas patronuojančioms bendrovėms ne tik iš naujo apibrėžia pačios deliktų teisės ribas, bet ir kelia esminių iššūkių nusistovėjusioms bendrovių teisės doktrinoms, tokioms kaip juridinis atskirumas ir ribota atsakomybė. Disertacijoje pateikiamas integruotas požiūris, kuriame šie tradiciniai principai vertinami platesniame, besikeičiančios teisės ir teorijos kontekste, atspindinčiame kintančią bendrovių grupių struktūrą ir atskaitomybės sampratą.

Užsienio mokslininkai šią temą analizuoja plačiau, o literatūra yra kur kas išsamesnė ir apima atskirus disertacijoje nagrinėjamus aspektus. Kalbant apie bendrųjų deliktų teisės principų taikymą, diskusija struktūruojama pagal šalis. Prancūzijos atžvilgiu autorius remiasi K. Vanderkerckhove, S. Demeyere, P. Malinvaud ir D. Fenouillet darbais. Vokietijos kontekste institutas analizuojamas G. Wagner, S. Mock, M. Casper bei P. Blumberg. L.B.C. Gower ir A. Sanger pateikia išsamią Jungtinės Karalystės teisės analizę. Pereinant prie kito disertacijos skyriaus – vadinamojo „neoklasikinio“ požiūrio, kuris grindžiamas naujausiomis deliktų teisės bylomis, išskirtini keli mokslininkai. Cees van Dam laikytinas vienu ryškiausių Europos deliktų teisės specialistų, ypatingą dėmesį skiriančiu patronuojančių bendrovių atsakomybei už dukterinių bendrovių veiksmus. Jo darbai iš esmės analizuoja, kaip deliktų teisė taikoma patronuojančių bendrovių atsakomybei už dukterinių bendrovių lygmeniu padarytą žalą, ypač žmogaus teisių ir aplinkosaugos kontekste. Penelope A. Bergkamp pateikia kritinę korporatyvinės atsakomybės tiekimo grandinėje analizę, ypač Europos deliktų teisės kontekste. Jos tyrimai atskleidžia, kaip multinacionalinės bendrovės gali būti laikomos atsakingomis už dukterinių bendrovių ar verslo partnerių veiksmus, ypač besivystančiose šalyse. Be minėtų autorių, Kenneth E. Sørensen ir Andrea Zerk taip pat reikšmingai prisidėjo prie diskusijos apie bendrovių atsakomybę tiekimo grandinėje, kiekvienas iš skirtingų disciplininių pozicijų.

1351 Vitalij Papijanc, “Patronuojančios įmonės atsakomybė prieš dukterinės įmonės kreditorius” (Doctoral thesis, Mykolas Romeris University, 2008), https://www.lituanistika.lt/content/14462.

1352 Agnė Tikniūtė, “Juridinio asmens ribotos atsakomybės problema: teisiniai aspektai (Doctoral thesis, Mykolas Romeris University, 2006), https://www.lituanistika.lt/content/9218.

1353 Egidijus Bakanauskas, “Grupės intereso pripažinimas, dukterinės uždarosios akcinės bendrovės smulkiųjų akcininkų teisių apsauga: probleminiai bendrovių teisės aspektai” (Doctoral thesis, Vilnius University, 2023), https://is.vu.lt/pls/pub/ivykiai.ivykiai_prd?p_name=1233396A744E38C627E0E0FAC8DF08EE/BAKANAUSKAS%20Edvinas.pdf.

Minėtų, taip pat ir kitų reikšmingų autorių analizė sudaro daugiamatį pagrindą disertacijos tyrimui, leidžiantį atlikti visapusišką ir struktūruotą bendrovių atsakomybės tiekimo grandinėse problematikos analizę. Ši analizė natūraliai leidžia pereiti prie paskutinio disertacijos skyriaus – vadinamojo „modernaus“ deliktinės atsakomybės požiūrio, kurį lemia naujausia tvarumo patikros (*due diligence*) teisėkūra. Moksliniai A. Pacces, S. Ciacchi ir N. Bueno darbai reikšmingai prisidėjo prie teisinės disertacijos diskusijos apie bendrovių tvarumo patikros klausimus. A. Pacces savo darbuose taiko teisės ir ekonomikos analizės perspektyvą vertindamas CSDDD, analizuodamas civilinės atsakomybės taisykles ir jų veiksmingumą siekiant internalizuoti neigiamas išorines pasekmes. S. Ciacchi pateikia išsamią CSDDD apžvalgą, aptardama teisėkūros procesą bei analizuodama galutinį direktyvos tekstą. Jos tyrimas atskleidžia teisėkūros raidą, kompromisus ir aspektus, kurie nulėmė dabartinę direktyvos redakciją. Nicolas Bueno kartu su bendraautoriais nagrinėja CSDDD kaip politinį kompromisą tarp ES valstybių narių, analizuodami jos pagrindinius elementus ir pasekmes už Europos ribų.

TYRIMO METODAI

Norint išsamiai ir visapusiškai ištirti disertacijoje nagrinėjamas problemas, tyrime taikomos mokslinio pažinimo priemonės ir procedūros, t. y. mokslinio tyrimo metodai. Disertacijoje naudojami šie metodai: istorinis, lyginamasis, dokumentų analizės ir generalizavimo metodai.

Istorinis metodas taikomas siekiant ištirti korporatyvinės deliktinės atsakomybės raidą analizuojamose šalyse — Vokietijoje, Jungtinėje Karalystėje ir Prancūzijoje – ypač susijusią su aplinkosaugos ir žmogaus teisių pažeidimais. Istorinė analizė būtina aiškinant bendrovių deliktinės atsakomybės taikymą už žalą, padarytą kitų bendrovių lygmenyje, nes suteikia kontekstą ir leidžia suprasti, kaip keitėsi atsakomybės principai. Šis metodas tiria, kaip laikui bėgant evoliucionavo teisės doktrinos, bylinėjimosi praktika ir teisės aktų Sistema. Istorinė analizė padeda paaiškinti, kodėl tam tikri atsakomybės taikymo modeliai yra taikomi bendrovėms už kito juridinio asmens sukeltą žalą. Be to, ji atskleidžia, kaip laikui bėgant — ypač Jungtinėje Karalystėje — teismų praktika plėtė arba susiaurino korporatyvinės atsakomybės taikymo ribas deliktų bylose, ypač susijusiose su žmogaus teisėmis ar aplinkosauga. Teisminių bylų analizė atskleidžia, kaip teismai interpretavo ir formavo atsakomybės doktrinas. Istorinis tyrimas suteikia galimybę atskleisti atsakomybę platesniuose socioekonominiuose pokyčiuose, įskaitant korporacijų plėtrą. Istorinis metodas taip pat parodo, kaip šiuolaikines civilinės atsakomybės sistemas paveikė ankstesni teisės aktai, skirti visuomenės interesų apsaugai bei verslo reguliavimui, ypač pereinant nuo klasikinių deliktinės atsakomybės rėmų prie modernių konstrukcijų, tokių kaip tvarumo patikros teisės aktai.

Lyginamasis metodas naudojamas tiriant ir palyginant bendrovių deliktinės atsakomybės taikymą už žmogaus teisių bei aplinkos pažeidimus Prancūzijoje, Vokietijoje ir Jungtinėje Karalystėje. Šios trys jurisdikcijos pasirinktos dėl jų lyderystės patronuojančių bendrovių atsakomybės normų, teisminių precedentų bei korporatyvinės

tvarumo patikros (*due diligence*) teisėkūros formavimo srityse. Prancūzija laikoma pasauline tvarumo patikros teisės aktų pradininke – pastarosios *due diligence aktas* buvo pirmasis pasaulyje, nustatęs privalomą patronuojančios bendrovės atsakomybę dėl veiksmų dukterinėse įmonėse ir tiekimo grandinėje. Vokietija atstovauja išplėtotą civilinį teisinį modelį su detalizuotu tiekimo grandinės tvarumo patikros reguliavimu, kuriuo bendrovės įpareigojamos atlikti žmogaus teisių ir aplinkos rizikos vertinimus visoje grandinėje. Vokietija taip pat aktyviai dalyvavo ES lygmens iniciatyvų rengime, tokių kaip CSDDD. Jungtinė Karalystė pasižymi turtinga bylinėjimosi praktika, apibrėžiančia, kada patronuojančios bendrovės gali būti laikomas atsakingos už kitų savarankiškų bendrovių lygmenyje padarytą žalą. Nors JK neturi išplėtotų tvarumo patikros teisės aktų (išskyrus Modern Slavery Act 2015), jos teisinė sistema suteikia lankstų pagrindą tokiai atsakomybei atsirasti.

Lyginamasis metodas sistemingai parodo skirtumus ir panašumus tarp teisinių sistemų ir atskleidžia, kaip kiekviena šalis sprendžia korporatyvinės deliktinės atsakomybės taikymo iššūkius. Lyginamoji analizė, be kita ko, padeda suprasti, kaip teismai taiko deliktinės atsakomybės principus, atskleisti skirtingus požiūrius į atsakomybę už kitų bendrovių veiksmus, ir įvertinti, kurios taisyklės/išaiškinimai užtikrina teisinį tikrumą ar gali būti naudingi kitų jurisdikcijų reformoms. Galiausiai, šis metodas suteikia visapusišką tarpjurisdikcinį supratimą apie bendrovių deliktinę atsakomybę.

Dokumentų analizės metodas taikomas sistemingai nagrinėti ir interpretuoti teisės aktus bei bylinėjimosi praktiką, siekiant atskleisti bendrovių deliktinės atsakomybės taikymą už žmogaus teisių ir aplinkos pažeidimus. Analizuojami tiek statusiniai teisės aktai, tiek teismų praktika Prancūzijoje, Vokietijoje ir Jungtinėje Karalystėje bei tarptautiniai aktai (ES teisės aktai). Šis metodas padeda interpretuoti pagrindines teisines doktrinas ir atskleisti, kaip jos taikomos praktikoje skirtingose jurisdikcijose. Dokumentų analizė taip pat atskleidžia deliktinės atsakomybės normų raidą, ypač judant link tvarumo patikros teisės normų, ir leidžia identifikuoti tendencijas bei teismų požiūrį į bendrovių atsakomybę. Tokiu būdu galima palyginti, kaip Prancūzijoje, Vokietijoje ir Jungtinėje Karalystėje taikomi ir aiškinami deliktinės atsakomybės principai.

Generalizavimo metodas taikomas siekiant apibendrinti deliktinės atsakomybės taikymo principus, identifikuojant bendrąsias tendencijas tarp teisminių precedentų ir skirtingų doktrinų. Šis metodas suteikia platesnį supratimą apie tai, kaip bendrovės atsako už žmogaus teisių ar aplinkos pažeidimus. Generalizavimo dėka disertacija sistemingai apibendrina, kaip Prancūzijoje, Vokietijoje ir Jungtinėje Karalystėje sprendžiami panašūs korporatyvinės deliktinės atsakomybės klausimai. Šis metodas leidžia atpažinti tendencijas ir identifikuoti bendrąsias kryptis, o ne koncentruotis į pavienes teismines bylas.

IŠVADOS

Disertacijoje atlikta analizė leidžia konstatuoti, kad nurodytas tyrimo tikslas pasiektas, iškelti uždaviniai įgyvendinti, o ginamieji teiginiai pagrįsti. Tai patvirtina šios išvados:

1. Statutinės teisės ir jurisprudencijos trijose pasirinktos jurisdikcijose – Jungtinėje Karalystėje, Prancūzijoje ir Vokietijoje, analizė, patvirtinta, kad (patronuojančioms) bendrovėms gali būti pritaikyta deliktinė atsakomybė už žalingus veiksmus dukterinių bendrovių lygmenyje, remiantis įprastinėmis delikto taisyklėmis. Nors Prancūzijos ir Vokietijos teisėje tokia deliktinė atsakomybė yra pritaikoma retai, Jungtinė Karalystė turi gausią teismų praktiką dėl patronuojančių bendrovių deliktinės atsakomybės.
2. Deliktinės atsakomybės esminis elementas – rūpestingumo pareigos (*duty of care*) nustatymas. Šiuo atžvilgiu patronuojanti bendrovė gali būti atsakinga pagal deliktą, jeigu nustatoma, kad (i) ji turi rūpestingumo pareigą nukentėjusiojo atžvilgiu, (ii) ta pareiga buvo pažeista, (iii) nukentėjusiojo žala nėra pernelyg nenumatoma (t. y. ne per daug nutolus), ir (iv) egzistuoja priežastinis ryšys tarp pareigą turinčio asmens elgesio ir žalos. Rūpestingumo pareigos konceptas savaime numato tam tikro santykio tarp ieškovo ir atsakovės buvimą prieš pat žalos padarymą – tai pirmą kartą aptarta byloje *Donoghue prieš Stevenson*, kurioje toks santykis prilyginamas santykiui su kaimynu. Klasikinė deliktinės atsakomybės samprata, aprašyta disertacijos 1 skyriuje, buvo pritaikyta bylose, susijusiose su aplinkosauga ir žmogaus teisių pažeidimais, kurie įvyko dukterinės bendrovės lygmenyje, paminint *Connelly prieš RTZ Corp plc, Lubbe & Others prieš Cape Plc, Chandler prieš Cape plc* ir kt.
3. Rūpestingumo pareiga tradiciškai nustatoma remiantis tuo, jog patronuojanti bendrovė kišasi į dukterinių bendrovių veiklą. Toks įsikišimas vertinamas atskirai kiekvienu atveju, pavyzdžiui, kai nustatoma, kad patronuojanti bendrovė buvo atsakinga už sveikatos ir saugos standartų priežiūrą savo dukterinėse bendrovėse. Tačiau ilgą laiką deliktinė atsakomybė buvo taikoma atsargiai, mat plačios atsakomybės pripažinimas galimai nustumtų į šalį pamatinį principą, jog nėra bendros pareigos užkirsti kelią trečiųjų asmenų padarytai žalai, bei kertinius ribotos atsakomybės ir juridinio asmens atskirumo principus.

Šios išvados patvirtina ***pirmąjį ginamąjį teiginį***, jog pagal „klasikinį" požiūrį, patronuojančios bendrovės gali būti pripažintos atsakingomis už dukterinių bendrovių lygmenyje kilusią žalą pagal nerūpestingumo deliktą, t.y. nustačius rūpestingumo pareigos pažeidimą. Rūpestingumo pareigos egzistavimas, savo ruožtu, gali būti pagrįstas patronuojančios bendrovės įsikišimu į dukterinės bendrovės veiklą, rodančiu egzistuojančią kontrolę.

4. *Vedanta* atgaivino idėją apie patronuojančios bendrovės deliktinę atsakomybę, remiantis pačios patronuojančios bendrovės rūpestingumo pareigos trečiųjų asmenų atžvilgiu, egzistavimu. *Vedanta* ir vėlesnės bylos patvirtino, kad tokios deliktinės atsakomybės nustatymui nereikia taikyti specialių testų. Šie

išaiškinimai pripažinti ir vėlesniuose Jungtinės Karalystės teismų precedentuose t.y. *Okpabi*, *Oguru* ir kt.

5. Esminis patronuojančios bendrovės deliktinės atsakomybės elementas pagal *Vedanta* ir vėlesnes bylas – gebėjimas daryti įtaką, kontroliuoti, prižiūrėti ar konsultuoti dukterinės bendrovės veiklą, kitaip tariant, operacinė/veiklos kontrolė. Toks įsikišimas gali būti nustatomas įvairiai: nuo aktyvių veiksmų, pavyzdžiui, paskiriant dukterinės bendrovės veiklą prižiūrintį asmenį, iki viešų pareiškimų, rodančių patronuojančios bendrovės įsipareigojimus dukterinės bendrovės veiklos saugumo atžvilgiu ir kt.
6. Nors *Vedanta* ir vėlesnės bylos patvirtina klasikinį deliktinės atsakomybės modelį, byla *Maran* nustatė tiekimo grandinės atsakomybę plačiausia prasme, t. y. bendrovės atsakomybę už netiesioginį verslo partnerį. Šios logikos esmė – bendrovė galėjo „sukurti pavojų" savo netiesioginiais veiksmais, vėliau paskatinusiais netiesioginių verslo partnerių žalingą veiklą. *Maran* šia prasme ženkliai skiriasi nuo bylų, kuriose figūruoja bendrovių grupės (pvz. *Vedanta*, *Okpabi*, *Oguru*), nes jos atspindi tam tikras charakteristikas, būdingas tik bendrovių grupės santykiams t. y. grupės politikos, elgesio/veiklos kodeksai ir kt. *Maran* byloje teismas rėmėsi įrodymais, rodančiais, kad bendrovė galėjo žinoti apie potencialų pavojų, susijusį su jos verslo partnerio veikla.
7. Bendrovės atsakomybė, grindžiama rūpestingumo pareiga, savaime nepriešarauja juridinio asmens atskirumo ar ribotos atsakomybės principams. Ji nereiškia atsakomybės už trečiojo asmens veiksmus, kadangi grindžiama pačios bendrovės pareigų pažeidimu.

Šios išvados patvirtina ***antrąjį ir trečiąjį ginamuosius teiginius*** – remiantis „neoklasikiniu" požiūriu, patronuojančių bendrovių atsakomybė grindžiama tradiciniu nerūpestingumo deliktu. Vis dėlto *Maran* byla žymi tiekimo grandinės atsakomybės išplėtimą už grupės ribų bei įgalina deliktinės atsakomybės taikymą bendrovėms, nesusijusios akcininkystės ryšiais, pvz. – verslo partneriams.

8. Tvarumo patikros (*due diligence*) teisės aktai, tiek nacionaliniu (pvz., Prancūzija, Vokietija), tiek tarptautiniu (pvz., CSDDD), lygiu nustato patronuojančioms bendrovėms tvarumo patikrinimo pareigas visų tiekimo grandinės narių atžvilgiu. Tokiu būdu, tvarumo patikros teisės aktai sukuria pozityvias pareigas patronuojančioms bendrovėms, kitų savarankiškų bendrovių atžvilgiu. Tai, autoriaus nuomone, laikytina naujove klasikinio juridinio asmens atskirumo/savarankiškumo kontekste.
9. Tvarumo patikros teisės aktai ženkliai keičia civilinės atsakomybės taikymo sąlygas ir prielaidas. Jei *Vedanta*, *Okpabi*, ar net *Maran* laikė bendroves atsakingomis už įsikišimą į dukterinių bendrovių ar verslo partnerių veiklą, civilinė atsakomybė pagal tvarumo patikros teisės aktus (ypač CSDDD) kyla dėl nepakankamo įsikišimo į tiekimo grandinės subjektų veiklą. Taigi, pagal klasikines deliktų taisykles bendrovės atsakomybė grindžiama faktiniu įsikišimu, kuris lemia rūpestingumo pareigos sukūrimą. Tuo tarpu pagal tvarumo patikros aktus (ypač CSDDD), atsakomybė taikoma dėl pareigos nevykdymo.

10. Žmogaus teisių ir aplinkos priežiūra bei valdymas visoje bendrovių grupėje (tiekimo grandinėje) savo esme prilygsta įsikišimui į kitų savarankiškų juridinių asmenų valdymo sprendimus. Nors šis valdymas apribotas ESG klausimais, galima daryti išvadą, kad tvarumo patikros teisės aktai prieštarauja klasikiniams bendrovių teisės principams, tokiems kaip juridinio asmens atskirumas.
11. Tvarumo patikros teisės aktų atsiradimas ir paplitimas skatina tradicinių juridinio atskirtumo ir ribotos atsakomybės principų persvarstymą bendrovių grupėse/tiekimo grandinėse. Pripažinimas, kad patronuojančios bendrovės, bent ESG klausimų atžvilgiu, gali ir turi įsikišti į atskirų įmonių veiklą, galėtų atverti kelią pripažinimui, jog patronuojančios bendrovės turėtų teisę priimti valdymo sprendimus kitų bendrovių atžvilgiu ir platesniame kontekste – ši galimybė šiuo metu nėra plačiai pripažįstama dėl vyraujančio teisinio juridinio asmens atskirumo koncepto ribotumo. Sukuriant teisę/pareigą kištis į bendrovių (dukterinių/tiekimo grandinės bendrovių) tik tam tikra apimtimi (pvz. ESG klausimuose), gali sukurti papildomą teisinį netikrumą.

Šios išvados pagrindžia ***ketvirtąjį ginamąjį teiginį*** — tvarumo patikros teisės aktai tiek nacionaliniu, tiek ES lygmeniu žymi reikšmingą deliktinės atsakomybės taikymo pokytį tiekimo grandinėje. Jei ankstesni precedentai laikė bendroves atsakingomis deliktine atsakomybe už įsikišimą į kitų savarankiškų bendrovių valdymą, tvarumo patikros teisės aktai nustato aktyvią pareigą patronuojančioms bendrovėms įmones prižiūrėti ir valdyti atitinkamus klausimus (žmogaus, aplinkos saugą) visoje tiekimo grandinėje.

MOKSLINIŲ PUBLIKACIJŲ IR KOFERENCIJŲ SĄRAŠAS

MOKSLINĖS PUBLIKACIJOS:

1. Tomas Stundys, „Bendrovės kaip De Facto Vadovo Atsakomybė Lietuvos Teisėje“, *Jurisprudencija* 31(1) (2024): 143-159, https://ojs.mruni.eu/ojs/jurisprudence/article/view/8173
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MOKSLINĖS KONFERENCIJOS:

1. „International Network for Doctoral Studies in Law“ konferencija „The Good, the Bad and the Legal: Balance between Stability and Disruptions of Law“, su pranešimu: „Supply Chain Liability: Are We Witnessing a Change in Understanding of Corporate Liability?“ (2023 m. gegužės 18 d., Vilnius, Lietuva);
2. „International Scientific Conference for Young Researchers” konferencija „Social Transformations in Contemporary Society 2024, su pranešimu: „From Corporate Social Responsibility to Supply Chain Liability: Do We See a Change in Liability of Corporations?” (2024 m. birželio 7 d., Vilnius, Lietuva).

CURRICULUM VITAE

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Išsilavinimas

2014-2019 m.	Teisės magistro studijos Vilniaus universitetas (Teisės fakultetas, Privatinės teisės katedra)
2020-2025 m.	Teisės krypties doktorantūros studijos Mykolo Romerio universitetas (Teisės mokykla, Privatinės teisės institutas) Gento universitetas (Teisės ir kriminologijos fakultetas)

Darbo patirtis

2017-2019 m.	Advokatų kontora „Sorainen ir partneriai“
2019-2020 m.	UAB „VISAS” (N. Numa Family Office)
2020-2023 m.	Advokatų kontora „Ellex Valiūnas ir partneriai“
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REGULATOIRE MODELLEN BETREFFENDE DE TOEREKENING VAN VERPLICHTINGEN EN CIVIELRECHTELIJKE AANSPRAKELIJKHEID BINNEN CONCERNSTRUCTUREN (EN HUN UITBREIDINGEN IN DE WAARDEKETEN)

SAMENVATTING

De dissertatie analyseert het zich ontwikkelende juridische landschap rond de buitencontractuele aansprakelijkheid van moedermaatschappijen voor schadelijke handelingen die plaatsvinden op het niveau van hun dochterondernemingen en, in bredere zin, bij leden van hun toeleveringsketen. De studie is geworteld in vergelijkend juridisch onderzoek, doctrinaire analyse en kritische reflectie op recente rechtspraak en wetgevende trends. De dissertatie is gestructureerd in drie hoofdcapitels. Elk hoofdstuk onderzoekt kritisch een afzonderlijke benadering van de toerekening van aansprakelijkheid, waarbij het evenwicht wordt afgewogen tussen de traditionele principes van juridische gescheidenheid binnen concernstructuren en de beperkte aansprakelijkheid van aandeelhouders enerzijds, en de opkomende kaders van ouderlijke verantwoordelijkheid anderzijds.

Het eerste hoofdstuk biedt een fundamenteel overzicht van de traditionele juridische doctrines inzake de aansprakelijkheid van moedermaatschappijen in Duitsland, Frankrijk en het Verenigd Koninkrijk. Aan de hand van een vergelijkende analyse van wettelijke bepalingen en jurisprudentie onderzoekt het hoofdstuk in hoeverre moedermaatschappijen aansprakelijk kunnen worden gehouden voor buitencontractuele schade die is veroorzaakt door hun dochterondernemingen. Tevens wordt onderzocht of de traditionele juridische kaders, die gebaseerd zijn op juridische gescheidenheid en beperkte aansprakelijkheid, ruimte laten voor of impliciet uitgaan van een zorgplicht van de moedermaatschappij ten aanzien van derden, met name wanneer de schade het gevolg is van activiteiten op het niveau van de dochteronderneming. Hoewel de overheersende opvatting binnen de rechtsstelsels een strikte naleving van concernscheiding handhaaft, wordt de zorgplicht (de onrechtmatige daad wegens nalatigheid) erkend als een grondslag voor ouderlijke aansprakelijkheid in gevallen waarin sprake is van excessieve controle of frauduleuze praktijken.

Voortbouwend op de fundamenten die in het eerste hoofdstuk zijn gelegd, introduceert het tweede hoofdstuk wat wordt aangeduid als een "neoklassieke" benadering van de ouderlijke zorgplicht. Dit hoofdstuk richt zich voornamelijk op een reeks baanbrekende rechterlijke uitspraken, waaronder *Vedanta Resources Plc v Lungowe*, *Okpabi v Shell* en soortgelijke onrechtmatige daadzaken, die mogelijk wijzen op een verschuiving van een rigide toepassing van concernscheiding naar een meer inhoudelijke beoordeling van de relatie tussen moeder- en dochtermaatschappij. De analyse stelt de vraag of rechters, door in bepaalde feitelijke omstandigheden een zorgplicht van de moedermaatschappij te erkennen, de gevestigde beginselen van het vennootschapsrecht ondermijnen, met name de doctrines van beperkte aansprakelijkheid en

juridische separatie. Een centraal punt van onderzoek is of dergelijke uitspraken de moedermaatschappij rechtstreeks aansprakelijk stellen voor haar eigen tekortkomingen (bijvoorbeeld in toezicht, beleidsimplementatie of controle), dan wel indirect voor het autonome handelen van haar dochteronderneming. Het hoofdstuk stelt dat deze neoklassieke benadering weliswaar kan worden opgevat als een ruime toepassing van traditionele aansprakelijkheidsregels, maar dat de aansprakelijkheid van moedermaatschappijen strikt juridisch verankerd blijft in klassieke leerstukken van het onrechtmatige daadsrecht. De auteur wijst er echter op dat bepaalde uitspraken, zoals *Hamida Begum v Maran*, bevestigen dat deze beginselen niet alleen van toepassing zijn op moeder-dochterrelaties, maar ook op relaties binnen de toeleveringsketen.

Het laatste hoofdstuk onderzoekt de opkomst van een moderne benadering van de aansprakelijkheid van moedermaatschappijen, beïnvloed door recente ontwikkelingen in zogeheten due diligence-wetgeving, zowel op nationaal als op EU-niveau, met name de *Corporate Sustainability Due Diligence Directive*. Het hoofdstuk laat zien hoe regelgevers en rechters beginnen met een herinterpretatie van de rol van moedermaatschappijen, vooral in het kader van milieu-, sociale en mensenrechtenschendingen. Volgens de auteur gaat deze benadering verder dan het traditionele aansprakelijkheidsrecht en begeeft zij zich op het terrein van regelgeving en governance-gerelateerde verplichtingen. Het hoofdstuk analyseert due diligence-wetgeving en beoordeelt in hoeverre deze het potentieel hebben om de beginselen inzake ouderlijke aansprakelijkheid te herdefiniëren. Tevens wordt onderzocht in welke mate deze normen de juridische autonomie van dochterondernemingen ondermijnen en een nieuwe verwachting creëren dat moedermaatschappijen actief het gedrag beheren van de gehele toeleveringsketen, dus niet alleen van dochterondernemingen, maar ook van zakenpartners. Uiteindelijk betoogt het hoofdstuk dat dit moderne paradigma een bredere verschuiving weerspiegelt in het ondernemingsrecht — een verschuiving die de fundamentele doctrines van het vennootschapsrecht kan herijken ten gunste van meer beleidsgerichte modellen van verantwoordelijkheid.

Met haar driedelige structuur biedt deze dissertatie een omvattend en kritisch overzicht van de juridische ontwikkeling inzake de aansprakelijkheid van moedermaatschappijen voor schade die zich voordoet binnen concernstructuren en toeleveringsketens. De studie toont een duidelijke ontwikkeling van een strikt vasthouden aan concernscheiding, via een behoedzaam ontwikkelende jurisprudentie inzake ouderlijke zorgplichten, naar een normatieve heroriëntatie gedreven door duurzaamheidsoverwegingen.

Stundys, Tomas

REGULATORY MODELS CONCERNING THE ATTRIBUTION OF DUTIES AND CIVIL LIABILITY IN GROUPS OF COMPANIES (AND THEIR VALUE CHAIN EXTENSIONS): daktaro disertacija. – Vilnius: Mykolo Romerio universitetas, 2025. 275 p.

Bibliogr. 199-216 p.

Šioje disertacijoje nagrinėjamos patronuojančių ribotos atsakomybės bendrovių deliktinė atsakomybė už žalą, padarytą kitų nepriklausomų bendrovių (dukterinių bendrovių, verslo partnerių) lygmenyje. Disertacijoje, kuri tyrimo tikslais yra suskirstyta į tris dalis, atspindinčias, autoriaus įvardinamus, „klasikinį“, „neo-klasikinį“ ir „modernų“ požiūrį į patronuojančios bendrovės deliktinę atsakymybę, autorius atskleidžia, kad deliktinės atsakomybės taikymas minėtoms bendrovėms laikui bėgant kinta. Pagal „klasikinį“ ir „neo-klasikinį“ požiūrį, bendrovės gali būti atsakingos už kitų savarankiškų benrovių lygmenyje atsiradusią žalą pagal tradicines aplaidumo/nerūpestingumo (angll. Negligence) delikto taisykles, pripažįstant rūpestingumo pareigos egzistavimą, tačiau autoriaus įvardinamas „modernusis“ požiūris atspindi dabar vykstančius pokyčius teisiniame reguliavime, konkrečiai – tvarumo patikros teisės aktų įsigalėjimą. Pastarieji numato aktyvias pareigas patronuojančioms bendrovėms prižiūrėti visos tiekimo gradinės veiklą, siekiant užkirsti kelią neigiamų rizikų žmonių sveikaita ar gamtai, atsiradimą. Autoriaus teigimu, šie teisės aktai žymi esminius pokyčius deliktinės atsakomybės taikyme bendrovėms. Dar daugiau, autoriaus manymu, tvarumo patikros teisės aktai galimai lemia ir pamatinių bendrovių teisės principų, tokių kaip teisinio savarankiškumo, pažeidimą.

This dissertation examines the tortious liability of parent limited liability companies for harm caused at the level of other independent entities, such as subsidiaries or business partners.The dissertation is structured, for research purposes, into three parts, which reflect what the author terms the "classical," "neo-classical," and "modern" approaches to parent company tortious liability. The author demonstrates that the application of tort law to such companies has evolved over time. According to the "classical" and "neo-classical" approaches, companies may be held liable for harm occurring at the level of other independent companies based on traditional negligence tort principles, which recognize the existence of a duty of care. However, what the author refers to as the "modern" approach reflects ongoing changes in legal regulation, in particular, the introduction of corporate sustainability due diligence legislation. These new legal instruments impose active duties on parent companies to monitor the operations of their entire supply chain in order to prevent risks of harm to human health or the environment. According to the author, such legislation marks a fundamental shift in the application of tortious liability to companies. Moreover, the author suggests that these due diligence obligations may even result in the erosion of foundational principles of company law, such as the principle of legal autonomy and separability.

Tomas Stundys

REGULATORY MODELS CONCERNING THE ATTRIBUTION OF DUTIES AND CIVIL LIABILITY IN GROUPS OF COMPANIES (AND THEIR VALUE CHAIN EXTENSIONS)

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