

Piercing the Corporate Veil in Public Interest Matters

by

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This paper discusses the concept of piercing the corporate veil in public interest matters. The concept is explored in light of a shift from a business-centred view of company law to a society-centred view of company law. The article identifies a trend towards enterprise liability in public interest matters and that internationally there is a trend in case law in which the norm addressee of enterprise liability is increasingly stretched. The article will set out different enterprise concepts defined as norm addressees in different legislative contexts and explains why these cannot be simply transferred from one to the other.

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I. Introduction

During the last decades there has been a shift in thinking about the role of (multinational) companies in society. This has had an impact on the manner in

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which company law has been viewed: from an *business-centred* view of the law, in which the law serves the functioning of the business, to a *society centred* view of the law, in which law should serve the interests of the wider society. There seems to be a trend towards enterprise liability in public interest matters. The meaning of the term *enterprise* in that respect is not uniform, but context-dependent. The history of the application of the concept of *undertaking* in Article 101 TFEU shows how the content of this concept has expanded over time, how its application has taken hold outside EU competition law and even provided a basis for forum shopping in civil cases. This underscores the diligence legislators should apply when introducing and defining the *enterprise* as subject of obligation and liability, e.g. in the context of ESG. Internationally there is a trend in case law in which the norm addressee of *enterprise liability* is increasingly stretched. This has led and is still leading to continuing legal development in case law. However, the different *enterprise* concepts defined as norm addressees in different legislative contexts cannot be simply transferred from one to the other. To illustrate this, in this Article I will explore the different ways *veil piercing* can be used in public interest matters, particular in the areas of EU competition law, ESG and international investment law.

II. *The use of the corporate veil and piercing in litigation*

Piercing the corporate veil concerns instances in which the limits of the privilege of limited liability which has been granted to legal persons are exceeded – piercing – in cases with a public or societal interest. The term *veil piercing* is often used in the context of liability, but it is also used to look through the legal personality in other ways when applying the law. I will address situations where *piercing* plays a role outside traditional corporate law, and in particular where public or societal interests are involved. There is a range of areas of law other than company law in which *veil piercing* is applied, including state liability, sanctions legislation, tax legislation, mass torts, EU state aid law, data protection law and FDI screening. This article will be limited to lifting a corner of the veil in the areas of EU competition law, ESG and international investment protection, with aspects of jurisdiction being discussed in passing. This article will thus deal with litigation in an international context, where the boundaries of the legal entity privilege of limited liability are crossed – *pierced* – in cases with a public or societal interest.

As a starter, it is important to consider the different ways in which *the corporate veil* and *piercing* can be used in international litigation; both as a sword (by plaintiffs in proceedings) and shield (by defendants in proceedings).

Piercing can be used as a sword:

- To establish liability: by raising a liability ground against a non-primary acting group company to create an additional liable party;
- To create jurisdiction: by raising a cause of action against a group company which will serve as an anchor defendant to create jurisdiction in the country in which that company is domiciled;¹
- Creation of admissibility: for shareholder claims with respect to “derivative damages”;
- To expand recovery possibilities: seeking recourse against property of a non-primarily liable legal person for debts of the primary acting legal person.²

In turn, the *corporate veil* can be used as a shield³:

- To evade jurisdiction: invoking a jurisdictional requirement of nationality (*ratione personae*) or the notion of investment (*ratione materiae*) in a treaty or arbitration agreement to challenge the jurisdiction of an arbitral tribunal on the ground that shareholders of a claimant do not satisfy these requirements⁴, or the invocation by a state-owned enterprise of state immunity from jurisdiction;
- To fend off admissibility: invoking the inadmissibility of claiming derivative damages (*reflective loss*);
- To fend off liability: reliance on the *corporate veil* to avert liability for actions of a primary acting group company;
- To frustrate recourse: reliance on the *corporate veil* to frustrate recourse on assets of the primarily liable legal entity, opposition to recognition and enforcement of arbitral awards due to an alleged lack of an arbitration agreement, inadmissibility of recourse on assets of legal entity that was not a party to the arbitration and invocation by a state-owned enterprise of state immunity of enforcement.

1 See *Branda Katan/Daniël Stein*, De “Onderneming” in het aansprakelijkheidsrecht, in: HHans De Wulf et al, Vereniging voor de vergelijkende studie van het recht van België en Nederland, Preadviezen 2023, Boomjuridisch, 2023, 95.

2 See *Katan/Stein* (fn. 2), 94.

3 On how separate legal personality can be an obstacle to effective remedies in the context of *business human rights*, see also Anil Yilmaz. *Vastardis/Rachel Chambers*, Overcoming the corporate veil challenge: could investment law inspire the proposed business and human rights treaty?, *International and Comparative Law Quarterly* 2018, 395–397.

4 *Yarik Kryvoi*, “Piercing the corporate veil in international arbitration”, *Global Business Law Review*, Vol.1:169, 2011, 170.

III. Ways in which the legal entity privilege of limited liability is challenged

Generally, the legal bases on which the privilege of limited liability of a legal person are challenged in litigation are the following.

Firstly, *Enterprise liability*: *Enterprise liability* is a way of placing liability on a conceptual entity that participates in economic transactions.⁵ According to this concept, the enterprise bears liability for its own actions. In group relationships, an enterprise may be run by several group companies, where breaches by one such group company may automatically lead to liability of such other group company. The *enterprise liability* approach is opposed to the concept of *entity liability*,⁶ where only the legal person (*entity*) is the legal subject, bearer of liability for its own actions.

A second basis is *true veil piercing/alter ego*:⁷ when applying this concept, legal entities are equated with each other in a legal sense.⁸ In terms of liability, what was intended by the abuse is not honoured.⁹ This may result in a legal entity being held liable for the entire claim for which, in the absence of the abuse, only another legal entity would be liable.¹⁰

Thirdly, indirect veil piercing, e.g. *tort liability* and in common law applying principles of *agency* and *trust*: a group company is held liable for its own wrongful acts, which are closely related to conduct or omissions of another group company. This includes the abuse of the identity difference between legal entities, where liability will fall on the person who, by using his control, induced the legal entities concerned to cooperate in that wrongful act, as well as

5 This term is used, among others, by *Adolf Berle Jr.*, *The Theory of Enterprise Entity*, 47 *Colum. L. Rev.* 343, 255 (1947), *Meredith Dearborn*, “Enterprise Liability: Reviewing and Revitalising Liability for Corporate Groups”, *California Law Review* 2009, Vol 97:195, 195, *Martin Petrin/Barnali Choudhury*, “Group Company Liability”, *European business Organisation Law Review*, 2018, 19:785, *Radu Mares*, *Liability within corporate groups: Parent company’s accountability for subsidiary human rights abuses*, in: *Research Handbook on Human Rights and Business*, Surya Deva (ed.), 2020, p. 462, *Gregory Keating*, “Enterprise liability”, *Research Handbook on corporate liability*, Martin Petrin and Christian Witting (eds.), 2023, 330.

6 This term is used, among others, by *Dearborn* (fn. 6), 462.

7 Cf. *Alexander Schall*, *The New Law of Piercing the Corporate Veil in the UK*, ECFR 2016, 552.

8 On alter ego, see i.a. *Gerard van Solinge/Marco Nieuwe Weme Asser 2-II** *De naamloze en besloten vennootschap*, Kluwer 2009/835, *Vino Timmerman*, *Vereenzelviging als strijdmiddel in vennootschapsrechtelijke aansprakelijkheid-proceedings*, *Ondernemingsrecht* 2001, 294 et seq. and *Harold Koster*, “Vereenzelviging,” *MvV* 2018/9, 292 et seq, See *Katan/Stein* (fn. 2), 111–113.

9 See e.g. Dutch Supreme Court 9 June 1995, *NJ* 1996/213, (*Krijger/Citco*), para 3.4.

10 Dutch Supreme Court 13 October 2000, *NJ* 2000/698, cf. *Maeijer* (*Rainbow*), para. 3.5.

the legal entities themselves. Unlike the concept of *alter ego*, there is no automatic liability for the entire claim of the other legal entity, but only for the part that concerns the abuse of the company in question. The tort approach strictly speaking is not a form of *veil piercing*, because it involves liability for one's own actions. It is therefore also called improper, or indirect piercing of liability.

The approaches of *enterprise liability* and *alter ego* are forms of true *veil piercing*, essentially ignoring the legal personality of one of the legal entities involved.

In my view, *enterprise liability* should have an explicit basis in a treaty, regulation or law (legislator-made law). After all, this is about a generally applicable override of one of the core principles of legal personality, with the aim to safeguard public interests usually located outside company law. In the trias politica, the legislator is best placed to decide when such piercing is appropriate.¹¹

This is in contrast to identification or improper breakthrough of liability, which may be based on judge-made law (finding and formation of law in an individual case), always involving abuse – or tort – of the companies involved (not strict liability) and applying these doctrines to an individual case.

IV. *Enterprise liability in EU competition law*

When it comes to public duties imposed on businesses, the concept of *enterprise liability* has taken hold in various fields. The doctrine immediately raises a definitional question: what does the term “enterprise” mean? The meaning of the term “enterprise” is not uniform, but context-dependent. To that extent, it is an “open norm addressee”.

An example of an *enterprise liability* approach can be found in EU competition law, in which the concept of *enterprise* is used as the *norm addressee*. Underlying this is a public interest: the functioning of the free market and integration of the European single market.

It is interesting to zoom in on this as it illustrates how the introduction of the concept of “enterprise” in the context in the law can take on a life of its own; within the legal area in which this norm addressee was introduced, but subsequently also in adjacent legal areas.

11 Along these lines also *Mijke Sinnighe Damsté/Bastiaan Kemp*, “Aansprakelijkheid van aandeelhouders: another view of the cathedral”, *Ondernemingsrecht* 2017/117, no. 8, 667.

First of all, for the cartel prohibition in Article 101(1) TFEU – several decades ago – the “*undertaking*” was introduced as the norm addressee. The treaty history provides little insight into the scope of that autonomous EU law concept.

The concept first took shape in the enforcement practice of the European Commission, through fining decisions. A key driver of the European Commission’s expanding interpretation of the concept of *undertaking* was that fines are imposed based on the turnover of the *undertaking*.¹² That turnover is obviously larger if that *undertaking* is deemed to comprise several legal entities.¹³ The European Commission thereby looked primarily at the parent company, even if it was not the legal entity in which the infringements actually took place, because consolidated turnover provided a basis for a higher fine. In case of repeat offences by (a legal entity within) the *enterprise*, a higher fine basis applies; regardless of which entity within that *enterprise* actually committed the infringements. This contributes to the deterrent effect of the European Commission’s fining practice.

That enforcement practice was subsequently challenged by several companies, after which the European Court of Justice (ECJ) rendered several judgments on how to apply the concept of *undertaking* in different group constellations, including on imputation of infringements by subsidiaries to parent companies.¹⁴ The concept of *undertaking* includes any entity engaged in an economic activity, regardless of its legal form and the way it is financed, and designates an *economic unit*, even if it consists of different legal entities from a legal point of view.¹⁵ The concept of *undertaking/economic unit* gives rise *ipso jure* to joint and several liability of entities comprising the economic unit at the time of the infringement; irrespective of whether these entities have been designated as infringers in a decision of the competition authorities.¹⁶

12 See also Rick Cornelissen/Eline Groen/Ruben van Dijken, “Aansprakelijkheid voor kartelschade: zijn dochterentiteiten het kind van de (toe)rekening?”, Ondernemingsrecht 2021/109, 691.

13 See also Daniël Stein, Regres bij hoofdelijke aansprakelijkheid voor kartelschade, NTBR 2022/26, 210, 211 and Katan/Stein (fn. 2), 123.

14 ECJ 4 July 1972, 48/69, ECLI:EU:C:1972:70 (Imperial Chemical Industries), ECJ 10 September 2009, C-97/08, P, ECLI:EU:C:2009:536 (AkzoNobel c.s.).

15 ECJ 23 April 1991, C-41/90, ECLI:EU:C:1991:161 (Höfner), paragraph 21; ECJ 10 September 2009, C-97/08 P, ECLI:EU:C:2009:536 (AkzoNobel c.s.), paragraph 54; ECJ 14 March 2019, C-724/17, ECLI:EU:C:2019:204 (Skanska), paragraph 36. In the event such undertaking infringes EU competition law, it must bear responsibility for that infringement “*in accordance with the principle of personal liability of the economic unit that infringed that right*”. ECJ 10 September 2009, C-97/08 P, ECLI:EU:C:2009:536 (AkzoNobel c.s.), para. 57.

16 Legal entities within an economic unit can only be held liable if it is proven that at least one legal entity belonging to that economic unit has infringed the cartel prohibition, so

As a subsequent development, with the emergence of so-called *follow-on litigation* – in which customers of cartelists fined by the European Commission claim damages from the cartelists on the basis of private law – this expanded EU competition law concept of *undertaking* has found its way into national damages law. With the implementation of the EU Cartel Damage Directive, the concept of *undertaking* has become part of private law of EU member states. In the *Skanska* judgment (2019), the ECJ ruled that the concept of *undertaking* in Art 101(1) TFEU in the context of the imposition by the European Commission of fines cannot have a different meaning than in the context of private law claims for damages for breach of competition rules.¹⁷ It is also clear that the *undertaking* concept is to be applied depending on the circumstances of the case.¹⁸

Finally, this *undertaking* concept has led to questions of private international law; international jurisdiction. In cartel damages cases certain claimants have seized on the aforementioned ECJ jurisprudence for *forum-shopping* purposes.¹⁹ In particular, litigation funders usually have a preference to bring their cases in certain European jurisdictions. Plaintiffs seek to create jurisdiction by suing group companies that have not themselves participated in a cartel fined by the EC in their home jurisdiction for damages caused by the cartel, alongside foreign defendants who are (group companies of) addressees of the relevant EC decision. On this issue Dutch courts in 2023 referred preliminary questions to the ECJ in three different cases (*MTB/Athenian Brewery*,²⁰ *Smurfit*²¹ and *EWGB et al*²²) in order to clarify how to apply the criterion in Article 8(1) Brussels I bis Regulation of close connection between the claims

that the undertaking formed by that economic unit is deemed to have infringed that provision.

17 ECJ 14 March 2019, C-724/17 (*Skanska*), paras. 32, 35. ECJ 6 October 2021, C-822/19, ECLI:EU:C:2021:800 (*Sumal*) builds on this. The latter judgment was discussed by, among others, *Olga Korneeva/Weijer VerLoren van Themaat*, ‘Het Sumal-arrest: Doorbraak in aansprakelijkheid van de onderneming voor mededingingsinbreuken’, NTER 2022/3&4 68–73.. See also *Tom Hoyer*, ‘Aspecten van civiele aansprakelijkheid wegens een inbreuk op het Europees mededingingsrecht. De stand van zaken na Skanska, Cogeco, Otis en Sumal’, MvV 2021/11,363 et seq.

18 See *Jeroen Kortmann* in his annotation to ECJ 14 March 2019, *NJ* 2020/58, nos 15, 19, 20 and *Frank Kroes*, ‘Rolled into one: de “onderneming” als rechtssubject bij de “privaatrechtelijke handhaving” van het mededingingsrecht’, *MvO* 2022/3&4, 68.

19 See also *Kroes* (fn. 19), 70–72.

20 Supreme Court 23 June 2023, ECLI:NL:HR:2023:965 (*MTB/Heineken*).

21 Amsterdam Court of Appeal 25 April 2023, ECLI:NL:GHAMS:2023:957 (*Smurfit*), pending at the ECJ as case C-673/23.

22 Amsterdam Court of Appeal 25 April 2023, ECLI:NL:GHAMS:2023:961 (*EWGB et al*), pending at the ECJ as case C-672/23.

against multiple defendants in such situations.²³ In the MTB/Athenian Brewery case the ECJ clarified that Article 8 (1) of the Brussels I bis Regulation must be interpreted as not precluding – in claims for a parent company and its subsidiary to be held jointly and severally liable to pay compensation for the damage suffered as a result of an infringement, by that subsidiary, of EU competition rules – the court for the place of residence of the parent company seised of those claims from relying exclusively, in order to establish its international jurisdiction, on the presumption that where a parent company holds directly or indirectly all or almost all of the capital of the subsidiary that infringed the competition rules, it exercises a decisive influence over that subsidiary, provided that the defendants are not deprived of the possibility of relying on firm evidence suggesting either that that parent company did not hold directly or indirectly all or almost all of the capital of that subsidiary, or that that presumption should nevertheless be rebutted.²⁴

The history of the application of the concept of *undertaking* in Article 101 TFEU shows (i) how the content of this legal concept has expanded over time, even without establishing that this corresponds with the intention of the drafters of the treaty provision at the time, (ii) how its application has taken hold outside public economic law and (iii) that this has provided a basis for forum shopping in civil cases. The *undertaking* concept in Article 101 TFEU is like a stone thrown into a pond, with new and wider circles emerging all the time²⁵; within EU competition law and beyond.

In any case, it illustrates that defining the term “*undertaking*” or “*enterprise*” as a norm addressee requires a large degree of diligence on the part of the leg-

23 Those questions include:

- a) How should the consistency requirement be applied in respect of defendant companies from different companies, some of which are addressees of a competition authority’s decision and some of which are not?
- b) Is it foreseeable or not that the relevant co-defendant will be summoned to the court of the anchor defendant?
- c) Is the assignability of the claims against the anchor defendant, or at least an estimate of them at the time the jurisdiction judgment was given, relevant, and if so to what extent?

24 ECJ 13 February 2025, ECLI:EU:C:2025:85, para. 47.

25 *Branda Katan*, Toerekening: wordt “de Onderneming” zelf een open begrip?, in: Vino Timmerman et al (eds.), *De rol van open normen in het Ondernemingsrecht* (Series Instituut voor Ondernemingsrecht, nr. 130), Wolters Kluwer 2023, 26, states that the ECJ has created an “open enterprise concept” and that it will take some time for this to crystallise.

islator.²⁶ Lack of clarity about the scope of the norm addressee can obviously give rise to disputes and litigation.

V. *Piercing in international investment law*

Another area of law in which *piercing* plays a role in various ways is international investment law. States conclude bi- or multilateral treaties that include safeguards to protect investors of one treaty state investing in the other treaty state from unlawful government intervention by the host state. This may include unlawful expropriation and unfair treatment. Under those treaties, foreign investors can usually submit a dispute with the host state about their investment in arbitration. Such independent dispute resolution mechanism was also meant to prevent trade wars. As recently as the beginning of the last century, for instance, a port blockade took place in Venezuela by British, German and Italian forces to force payment of Venezuelan government bond claims to European investors (so-called *gunboat diplomacy*).²⁷ Originally, this protection was provided mainly to protect investors from industrialised countries against unlawful actions of states where legal protection was lower than in their home countries. In the last decade, arbitrations are also increasingly being brought against, for example, Western European countries, such as the cases against Spain in connection with the abolition of subsidies for solar energy²⁸ and the cases brought by RWE and Uniper against the Netherlands in connection with a law banning coal fired power plants.²⁹

Such an investment arbitration tribunal has jurisdiction with respect to a dispute between one treaty state and an “investor” (*ratione personae*) residing in the other treaty state over an “investment” (*ratione materiae*). Both the determination of whether there is an “investment” and “investor” giving access to the arbitral tribunal may involve *piercing*.³⁰

With respect to “investment”, arbitral tribunals have ruled that shares in a company incorporated in the host country fall within the scope of that term.

26 *Branda Katan*, “Verantwoord en duurzaam wetgeven”, NTBR 2023/1 rightly pointed out that the description of the norm addressee in new legislative initiatives on sustainability “requires sustainable and responsible lawmaking”.

27 *Rudolf Dolzer*, History, sources, and Nature of International Investment Law, in: *Principles of International Investment Law* (3rd Edition), Ursula Kriebau, Christoph Schreuer, Rudolf Dolzer (eds.), Oxford University Press, 2022, Chapter I, para. 1(a).

28 Among others, ICSID Case Nos. ARB/21/39, ARB/14/1, ARB 16/18, ARB/13/36, ARB/19/30, ARB/19/30, ARB/18/45, ARB 17/41.

29 ICSID Case Nos. ARB/21/22 (Uniper) and ARB/21/4 (RWE).

30 On this issue, see also *Vastardis/Chambers* (fn. 4), 397–403.

This means that in case an expropriation measure targets property owned by a company incorporated in the host country in which the foreign investor holds shares, the foreign investor can bring a claim based on the treaty. In this way, a foreign investor can thus claim treaty protection thanks to *piercing*³¹, despite the fact that it is only indirectly – through the assets of the local company in which it holds shares – affected by the expropriation measure.³²

Conversely, to fend off such claims, some states actually try to pierce through the legal personality of the foreign “*investor*”.³³ According to an authoritative judgment of the International Court of Justice (ICJ) *Barcelona Traction*, the domicile of the legal entity determines its nationality, irrespective of the nationality of its shareholders, while *veil piercing* may take place under exceptional circumstances, in order to prevent abuse of the limited liability privilege, such as in cases of fraud or abuse or to prevent evasion of legal requirements or obligations.³⁴ This leads to a generous grant of jurisdiction. For example, a Dutch company of which shares are all held by Russians can bring a claim against the Russian Federation under the Russian-Dutch BIT.³⁵ Some states invoke abuse in defence against such claims,³⁶ stating that the bilateral investment treaty was not designed to protect Russian residents from unlawful acts of the Russian Federation.

To prevent abuse by investors, the newer generations of investment treaties provide ever clearer delineations of the terms “*investment*”, “*investor*” and the nationality requirements applicable to them, including so-called “*denial of benefits*” provisions.

31 See also *Kryvoi* (fn. 5), 175, 183–186.

32 Whether there is a derivative damages claim in such cases is also considered by some (but not all) arbitral tribunals as a question of admissibility, particularly on the question whether a damages claim can include derivative damages – actually suffered by the local company – (“*reflective losses*”). See also *Michael Waibel*, Investment Arbitration: Jurisdiction and Admissibility, in: International Investment Law, Marc Bungenberg (ed.), Baden-Baden, 2015, 1273, 1284–1286.

33 See also *Kryvoi* (fn. 5), 175, 179–181.

34 International Court of Justice 24 July 1964, *Barcelona Traction, Light and Power Company, Ltd (Belgium v Spain)*.

35 The outcome of such disputes depends first and foremost on the wording of the relevant treaty provision. In practice, differences can be seen in arbitral awards. Since there is no single supreme court of appeal, this division in jurisprudence will not be easily resolved.

36 On this subject, see also *Waibel* (fn. 32), 1247.

VI. Piercing and ESG

1. Drawing inspiration from investment protection treaties?

In the context of investment treaties, the question of whether foreign investors should be granted not only investment protection rights, but also certain obligations, has emerged more prominently over the past two decades.³⁷ In the context of the discussion on corporate sustainability, it has been pointed out that multinationals tend to use local companies in the host countries in which they invest, while in the case of ESG violations, the foreign parent companies remain unaffected.³⁸

One way to address this is to make investment protection under investment treaties conditional on investors meeting certain (local) ESG obligations. In addition, it has been proposed that the generous *piercing* that applies in the context of jurisdiction and admissibility of foreign investors' claims under investment treaties should also be used in the field of ESG to ensure that treaties provide citizens of the host country the right to sue the foreign (parent) investor in its home state for ESG violations.³⁹ This is now reflected in new generations of investment treaties. For example, the bilateral investment treaty concluded between Morocco and Nigeria in 2016 contains an innovative provision in this regard:

"An investor shall be subject to civil actions for liability in the judicial process of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state."

Art. 7(4) of the Dutch model Bilateral Investment Treaty – which is the basis for negotiations on behalf of the Netherlands with other countries on (amendments to) investment treaties – stipulates in that regard:

"Investors shall be liable in accordance with the rules concerning jurisdiction of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state."

Another type of treaty for which the discussion of liberal *piercing* in the field of ESG and foreign investment may be relevant is the United Nations' proposal for the so called *Legally binding instrument on business human rights*. Con-

37 On this subject, see also Dolzer (fn. 27), Chapter I, para. 3(b), (g).

38 See e.g. Nicolas Bueno/Anil Yilmaz Vastardis/Isidore Djeuga, "Investor Human Rights and Environmental Obligations: The Need to Redesign Corporate Social Responsibility Clauses", *Journal of Work Investment & Trade* 24 (2023), 182.

39 On this issue, see also Vastardis/Chambers (fn. 4), 392, 393, 403–407, 411–422 and Bueno et al (fn. 38), 211–213.

ception of the text of that instrument is still in the working group stage. As part of that process, viewpoints were raised that parent companies should be liable for human rights violations by subsidiaries, subject to proof to the contrary, and NGOs argued for the “abolition” of the *corporate veil*. None of this, incidentally, is reflected in the most recent draft version of this instrument.⁴⁰

2. CSDDD

The idea of the ability to hold the parent company liable for ESG violations is also reflected in various EU and national law legislative initiatives. It is interesting to note that a number of these initiatives do not opt for *enterprise liability*, like the EU Corporate Sustainability Due Diligence Directive (“CSDDD”).⁴¹

The English language version of the CSDDD – which has been the working language during the drafting phase – uses the word *company* (unlike the English version of Article 101 TFEU, i.e. not the word *undertaking*). The German language version uses *Unternehmen*, the French language version the word *enterprise* and the Dutch language *onderneming* as the norm addressee.⁴² Unfortunately, there has been no consistency in the language versions on this point. This may be a point for attention for the announced omnibus Directive, which will combine the CSDDD with the CSRD and the EU taxonomy Regulation. However, the description of the meaning of the term *company* in

40 Update draft UN legally binding instrument (clean version) to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, 13 February 2024.

41 Directive (EU) 2024/1760 of the European Parliament and Council of 13 June 2024 corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859. On 26 February 2025, the European Commission launched two proposals to amend the CSDDD (the so called EU Omnibus Package): the Proposal for a Directive of the European Parliament and the Council amending Directives 2006/43/EC, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting and due diligence requirements and the Proposal for a Directive of a Directive of the European Parliament and of the Council amending Directives (EU) 2022/2464 and (EU) 2024/1760 as regards the dates from which Member States are to apply certain corporate sustainability reporting and due diligence requirements.

42 Incidentally, other European legislative areas in the field of especially the E of ESG opt for different definitions and meaning of the norm addressee. For example, in (EU) Directive 2004/35/EC of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, the norm addressee is “operator”. This is not conducive to the accessibility of the law.

Art. 3(1)(a) CSDDD shows that it refers to specific legal entities, and is not a concept that goes beyond the limits of the legal personality of those entities.⁴³

Moreover, the CSDDD also distinguishes between subsidiaries, parent companies and ultimate parent companies, which terminology indicates that they are always separately legal entities.⁴⁴ The term “group of companies” or “group” to be distinguished from the aforementioned terms are also defined in Article 3 (1)(s) CSDDD. This would not be necessary if a group were considered an “enterprise”.

Art. 29(1) CSDDD provides that member states shall ensure that companies may be held liable for damage caused to a natural or legal person, provided that the company has intentionally or negligently failed to comply with the obligations laid down in Articles 10 and 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 such failure, damage to the natural or legal person’s legal interests that are protected by national law was caused.⁴⁵ Since those obligations can apply to both the parent company and the subsidiary, for purposes of the implementation of Article 29 CSDDD both parent and subsidiary can be liable for their *own* breaches of Articles 10 and 11 CSDDD.⁴⁶ The liability of Article 29 CSDDD is thus intended to be an *entity liability*.⁴⁷

43 *Anne Lafarre and Ger van der Sangen*, “Passende zorgvuldigheid in internationale handelsketens. Een rechtseconomische reflectie op de voorgestelde Corporate Sustainability Due Diligence-richtlijn”, NTER 2022/9/10, 235, mention that the starting point seems to be the legal entity driving the company, *Anne Lafarre*, Mandatory Corporate Sustainability Due Diligence in Global Value Chains: The Long-Awaited European Solution Compared to Existing International Standards”, *Ondernemingsrecht* 2023/33, para 4.2, refers to “CSDDD’s ‘company-by-company’ approach”, 236.

44 Art. 3(1)(e), (q) and (r) CSDDD, respectively.

45 On 26 February 2025, the European Commission launched a Proposal for a Directive of the European Parliament and the Council amending Directives 2006/43/EC, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting and due diligence requirements, which contains the proposal to delete this Article 29(1) of the CSDDD.

46 As regards the position of the parent company, although through the substantive obligations under Articles 7 and 8, the appropriate measures to be taken also relate to negative effects of its subsidiaries’ activities, the assessment on the parent’s liability must be based on what the parent did and should have done in this respect. Thus, in individual cases there may be a difference between the liability position of the parent and the subsidiary.

47 *Katan* (fn. 25), 23 and *Katan/Stein* (fn. 2), 120, conclude that the CSDDD does not apply identification. For practical examples, see also *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* 2023/36, para. 2.2, 259–260.

Article 29(5) CSDDD also explicitly states that this civil liability of a company shall not limit the liability of its subsidiaries under Union or national legal systems. If the damage was caused jointly by the company and its subsidiary, they are jointly and severally liable, without prejudice to national law provisions on the conditions for joint and several liability and rights of recourse. The reference in Article 6(1) CSDDD – pursuant to which Member States must ensure that parent companies falling within the scope of the CSDDD are allowed to fulfil certain obligations under the CSDDD on behalf of their subsidiaries which also fall within the scope of the CSDDD, if this ensures effective compliance – to “*this is without prejudice to such subsidiaries being subject to [...] their civil liability in accordance with Article 29*” also underlines this.

VII. *Synthesis: enterprise liability versus entity liability*

This leads to the question whether the concept of *enterprise liability* will creep into company law. Notably there has clearly been a shift in thinking about the role of (multinational) companies in society.

From:

- ascribing a favourable societal role to business, due to its positive effects on employment, technological development, community development and driving welfare growth;
- the (neoliberal) idea that was dominant from the late 19th into the 20th century of giving room to (freedom of) enterprise and encouraging capital providers to invest in enterprises;
- based on the assumption that companies run a business, which was seen as a private activity – in contrast to things like human rights, which were seen as the exclusive domain of the government;

which underpinned:

- the concept of legal personality and the associated privilege of limited liability;
- the emergence of international investment law in which foreign investors were given ample opportunities to enforce that protection in arbitration;

and which thinking fits into an entrepreneurial (*business-centred*) view of law, in which the law serves the functioning of the business,

to:

- an increasing understanding of:

- negative externalities caused by companies in their home jurisdiction and abroad, without picking up the tab for those;⁴⁸
- abuse of privileges such as limited liability (by private and public actors) and investment protection;
- impairment of foreign states’ *right to regulate*, as these states would be prevented by treaty investment protection from enacting legislation, including in the area of ESG⁴⁹;
- more emphasis on the benefit principle – “*you profit, you pay*”⁵⁰ – : those who profit from economic activity should also bear the costs of its negative externalities⁵¹;
- within their sphere of influence, companies are also held accountable in their home courts for public interest matters, such as the functioning of the market (through competition law) and safeguarding human rights;

which thinking fits into a *society-centred* view of law, in which law (including company law) should serve the interests of the wider society.

This manifests itself not only in a recalibration and introduction of substantive legal standards – duties of care, due diligence obligations – but also in ongoing debates about who should be the legal subject or norm addressee for this purpose. Thereby, two paradigms are contrasted: one sees a group (or the company) as a single organisation, the other sees the group as a collection of separate legal entities, each with its own rights and obligations. The law is not static and when it comes to public interest matters the society centred view thereon seems to become more dominant.

Legislators do not consistently choose one or the other, but always look for the optimal choice when defining the norm addressee for a particular piece of legislation. However, the different *enterprise* concepts used to define norm addressees are not simply transferable from one legislative context to another.⁵²

48 On the externalisation of risks by companies to third parties who have no voluntary relationship with the legal entity and no possibility of controlling or passing on the risk in any way, see also *Cees van Dam*, “Breakthrough in Parent Company Liability. Three Shell defeats, the End of an Era and New Paradigms, ECFR 2021, 748.

49 See also *Dolzer* (fn. 27), Chapter I, para. 1(f).

50 See also *Dearborn* (fn. 6), 200.

51 *Lodewijk Smeehuijzen*, “Aansprakelijkheid van de moeder bij onrechtmatige daden van de Dochter”, *NJB* 2021/8, 3191 and *Van Dam*, 748. cf. *Katan/Stein* (fn. 2), 129.

52 *Vino Timmerman*, ‘De opkomst van de (concern)onderneming in het vennootschapsrecht en daarbuiten’, *MvO* 2023/8&9, 171, appoints that those legal areas always have different goals and therefore a slightly different concept of enterprise is used in them.

A general EU law principle of corporate liability according to which liability is generally attributed to the entire economic unit does not exist.⁵³ The legislators can decide for each individual act of legislation whether or not to apply the *enterprise* concept.⁵⁴ Notably legislators of EU Member States are not limited in this respect by any higher ranking EU law general principle of either *enterprise* or *entity liability*. However, it requires a large degree of diligence on the part of the legislator to consider for a specific legislative proposal whether *entity* or *enterprise liability* is appropriate and, in the case of *enterprise liability*, how exactly the *enterprise* concept is defined. Failing such diligence, the introduction of *enterprise liability* may thus result in inconsistencies, legislation becoming inaccessible due to a confusing conceptual framework and the necessity of prolonged litigation to delineate the boundaries of the norm addressee, resulting in legal uncertainty. This is also risky because the legislator does not know in advance what the courts will do with such open norm addressees.⁵⁵ Its application requires a clear cost-benefit analysis in the legislative process. What are the goals the legislator is trying to achieve with *enterprise liability* in the relevant legislative context? Is using such concept necessary for budgetary reasons (possibility of imposing higher fines), for deterrence or efficiency reasons? Another point of attention is that obligations should lie with the entity that can actually ensure that these can be met.⁵⁶ Legal certainty and foreseeability demand this.

Internationally there is a trend in case law in which the norm addressee of *enterprise liability* is increasingly stretched, following the enforcement practice of regulatory bodies and civil lawsuits innovatively brought by claimants. This has led and is still leading to continuing legal development in case law.

In my view, the significance of the case law relating to the EU competition law *undertaking* concept for liability of group companies in other contexts is limited. All things considered, my conclusion is that one should not try to push a

53 See Marc-Philippe Weller/Victor Habrich/Laura Korn/Anton Zimmerman, Liability of the Economic Unit – A General Principle of EU Law?, ECFR 2023, 761, 784, 793.

54 Weller et al (fn. 52), 793 state that it remains to be decided whether there is a general principle of corporate liability which is based on the specific legal entity or whether there is no general principle of corporate liability at all and, instead, an individual decision must be made for each respective legal act. In their opinion the better arguments speak in favor of a general legal principle based on the specific legal entity.

55 Vito Timmerman, Een paar opmerkingen over open normen in het Ondernemingsrecht oftewel hoe maak je van een open norm een halfopen norm?, in: Vito Timmerman et al (eds.), De rol van open normen in het Ondernemingsrecht (Instituut voor Ondernemingsrecht, nr. 130), Wolters Kluwer 2023, 7.

56 Carsten Koening, The Rise of Corporate Cross-entity Liability: Which Doctrine for What Purpose?, SSRN-paper, November 2023, 23.

square through a circle. The EU competition law concept of *undertaking* assumes a fundamentally different legal concept – namely *enterprise liability* – from the legal entity privilege of limited liability (*entity liability*). The use of that *enterprise liability* had a specific public purpose. Consequently, I do not see how, for example, in a different legal context – e.g. liability of a parent company for contractual creditors of subsidiaries – a national court in an EU members state could and should draw inspiration from it in the absence of a legal basis.⁵⁷

VIII. Conclusion

This *tour d’horizon* shows that in cases involving public interests, the subject matter also affects the application of *corporate veil* and its *piercing*. Public law invades private law and overrides it, under certain circumstances. Looking across the boundaries of corporate law, it can be seen that in several domains, the boundaries on *piercing* are in full swing and are expected to remain so in the coming years.

57 Also Weller (fn. 52) *et al.*, 784–786, 790 and Koenig (fn. 55), 21–22.