

EUROPEAN LAW INSTITUTE

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PIERCING THE CORPORATE VEIL

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Plan

- 1. SOURCES OF LIABILITY
- 2. KIND OF NORMS
- 3. SPECIFIC CASES
 - 3.1. ENVIRONMENT.
 - 3.2. CARTEL.
 - 3.3. BANKRUPTCY.

Plan (foll.)

- 4. IF NEGLIGENCE, DAMAGE?
- 5. HARMONISATION OF EUROPEAN LAW

1.SOURCES OF LIABILITY

- Undercapitalization / deprive the daughter company of its asset
- Abuse of majority (ignorance of the daughter company)
- Daughter company instrument/ conflict of interest
- Comingling of the assets/ companies intertwined
- Operation without consideration
- Fraud intragroup

- Permanently and extensively" involved in the management (Germany) / de facto director

BEHAVIOUR OF THE DIRECTORS

- Breach of duty by the directors appointed by the holding company
- Fiduciary obligations (corporate governance ?)
- Mismanagement

Company or group interest

- Shareholders?
- Other stakeholders??
- For instance, a confort letter?

2.KIND OF NORM IN EUROPEAN LAW (OVERVIEW OF THE NATIONAL LAWS)

- Sometimes precise norms, sometimes more expansive approach
- Sometimes, it is the negligence of the group without possible individualisation of the company

3. SPECIFIC CASES

- 3.1. ENVIRONMENT
- 3.2. CARTEL
- 3.3. BANKRUPTCY

inference that it could effect hazardous waste disposal decisions if it so chose.

3.1. ENVIRONMENT

- SEVESO/ BHOPAL
- LIABILITY OF PARENT COMPANIES
- INTERTWINED (US case law)

its directive that subsidiary-government contacts, including in environmental matters, be funnelled directly through the parent;

inference that it could effect hazardous waste disposal decisions if it so chose.

A contrary result would permit corporations, merely by creating wholly owned subsidiaries, to pollute for profit under circumstances when the legislator intended liability to be imposed.

Environmental (foll)

FRENCH LAW EXPRESSLY FORESEEN This can apply to shareholders holding more than 50% of the subsidiary's share capital when pollution is proven to be the result of the parent entity's gross negligence.

EUROPE case law: legal basis:

- civil law vicarious liability
- Seveso: directors were also constructive officers of Hoffmann-La Roche

3.2. CARTEL

- New directive on private enforcement (liability could be extended to the group in case of infringement of competition law)

3.3.BANKRUPTCY

a) Liability of the mother company when:

- Not filing on due time
- Abnormal acts before the bankruptcy judgement

b) Quid of the reimbursement of the loan given by a mother company in case of financial distress? solutions are diverse in the european legal systems

Bankruptcy (foll.)

- c) New regulation 2015/848 (in force on 26 June 2017)
 - Coordination needed between the bankruptcy procedures in various countries
 - ex : fibre optic cables lying in different european countries; need to sell the cables jointly in case of bankruptcy

Bankruptcy: coordination

- coordination and supervision of proceedings is foreseen by the new regulation
 - cooperation between insolvency practitioners
 - sometimes a general coordinator is appointed
- Exchange of pertinent informations
- Explore the possibility of a global restructuring plan
- Cooperation between courts
 - also coordination of the hearings and approvals of protocols
- Cooperation between courts and insolvency practitioners

A coordinator of the Group proceedings can be appointed

Function of the coordinator

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(b) propose a group coordination plan that identifies, describes and recommends a comprehensive set of measures appropriate to an integrated approach to the resolution of the group members' insolvencies.

Coordinator: Restructuring plan

- In particular, the plan may contain proposals for:
 - (i) the measures to be taken in order to re-establish the economic performance and the financial soundness of the group or any part of it;
 - (ii) the settlement of intra-group disputes as regards intra-group transactions and avoidance actions;
 - (iii) agreements between the insolvency practitioners of the insolvent group members.

4. IF NEGLIGENCE? consequences

- Establish the **damage in causal link** with the negligence or breach of duty

5. HARMONISATION AT EUROPEAN LEVEL?

- Gap between law and economics (group of companies are transnational and an economical fact)
- Difficult to harmonise because the harmonisation goes to the roots of liability and company law but some progress have been made (bankruptcy).
- But some concepts could be harmonised
for instance :Interest of the group? Bankruptcy proceedings

5. Harmonisation: foll.

- Indirect harmonisation through harmonisation of proceedings
(check lists...)