Conceptualising Transnational Corporate Groups for International Criminal Law

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Schriften zum Internationalen und Europäischen Strafrecht

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Preface

This book is a product of research undertaken at Bremen University and the European University Institute, Florence. It was accepted as a PhD thesis in law in the winter semester 2015/2016.

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Bremen, February 2017

Marie Kuntz
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List of Abbreviations

ATS  Alien Tort Statute  
BGH  Bundesgerichtshof  
BIT  Bilateral Investment Treaty  
CA  Her Majesty's Court of Appeal in England, Civil Division  
CEO  Chief executive officer  
CJEU  Court of Justice of the European Union (consisting of the ECJ and GC)  
Commission  Commission of the European Union  
EU  European Union  
ECJ  European Court of Justice  
ECHR  Convention for the Protection of Human Rights and Fundamental Freedoms  
ECtHR  European Court of Human Rights  
et al.  and other, and others  
et seq.  and following  
GC  General Court of the European Union  
HC  High Court of Justice of England and Wales  
HL  House of Lords (United Kingdom)  
ICC  International Criminal Court  
ICJ  International Court of Justice  
ICTY  International Criminal Tribunal for the former Yugoslavia  
ICSID  International Centre for Settlement of Investment Disputes  
ILO  International Labour Organisation  
NAFTA  North American Free Trade Agreement  
OECD  Organisation for Economic Co-operation and Development  
OJ C  Official Journal of the European Union Information and Notice  
OJ L  Official Journal of the European Union Legislation  
p.  page, pages  
para  paragraph  
paras  paragraphs  
PC  Privy Council of the United Kingdom  
UDHR  Universal Declaration of Human Rights  
UK  United Kingdom, British  
UN  United Nations  
UNCITRAL  United Nations Commission on International Trade
List of Abbreviations

<table>
<thead>
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<th>Abbreviation</th>
<th>Full Form</th>
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<tr>
<td>US</td>
<td>United States of America, United States of American</td>
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<td>US SC</td>
<td>United States Supreme Court</td>
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<tr>
<td>US CA</td>
<td>United States Courts of Appeals</td>
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<tr>
<td>US DC</td>
<td>United States District Court</td>
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<tr>
<td>SC</td>
<td>Supreme Court of the United Kingdom</td>
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Introduction

IG Farben was heavily involved in the Nazi crimes. IG Farben, a stock corporation, merged corporations including BASF, Hoechst, Bayer and Agfa in 1925 to form the largest corporate group in Europe. Initially, their merger aimed at merging capital and reducing competition amongst them. Each corporation within the group specialised in different areas. IG Farben became gradually involved with the Nazi Regime. For example, Carl Krauch, a member of the board of IG Farben, was also member of an armament staff in Göring’s ministry of aviation, since 1938 he was Wehrwirtschaftsführer and since 1939 head of the Reichsamtes für Wirtschaftsausbau (Reich Office for Economic Expansion). IG Farben was further involved in Hitler’s Four Year Plan of 1936 and benefitted from guaranteed sales and prices. IG Farben provided the Nazi Regime with...
with huge amounts of explosives and other chemicals such as synthetic fuels and rubber that were used in the Second World War.\textsuperscript{5} DEGESCH,\textsuperscript{6} an IG Farben subsidiary, supplied the gas Zyklon B that was used to carry out mass murders in the concentration camps. IG Farben held 42.5\% and was represented in the DEGESCH’s supervisory council. Moreover, IG Farben’s medicines were tested in medical experiments with concentration camp inmates.\textsuperscript{7} IG Farben’s corporate group structure facilitated its involvement in international crimes. Firstly, IG Farben acquired numerous corporations in foreign countries occupied by the German Reich, which amounted to the war crime of plundering of foreign property.\textsuperscript{8} Secondly, IG Farben heavily employed slave workers in its factories. It built a plant in the immediate proximity of Auschwitz that used concentration camp inmates for forced labour.\textsuperscript{9} In order to quickly construct the plant, IG Farben’s...
ben demanded several times further slave workers. For example, it supplied the Nazi regime with construction materials for an extension of the concentration camp in order to receive more concentration camp inmates as workers. Upon request of IG Farben, the SS agreed to select and replace »unproductive« workers immediately. From 1942 onwards, inmates working for IG Farben also lived in overcrowded camps at the plant. IG Farben exploited its prisoners heavily by long working hours, physically hard work, maltreatment, malnutrition, poor clothing and sanitary conditions. In 1948, the US Military Tribunal sitting in Nuremberg convicted IG Farben’s top management strata. These »generals in grey suits« were found guilty of war crimes and crimes against humanity. IG Farben itself, however, was not and could not have been accused, even


13 Wagner, IG Auschwitz. Zwangsarbeit und Vernichtung von Häftlingen des Lagers Monowitz 1941-1945 p. 125 et seq. and with regard to »disciplinary measures« 228 et seq.

Oil production in Nigeria heavily affected the Nigerian population, notably the Ogoni people living in the Niger delta, while oil revenues went to the central government. The Ogoni people’s protest against the pollution and destruction of their livelihoods was met with harsh and brutal violence from Nigeria’s military and police. The Ogoni people formed the Movement for Survival of Ogoni People (MOSOP), which was headed by the reknown writer Ken Saro-Wiwa. They formulated the Ogoni Bill of Rights demanding unsuccessfully, inter alia, political rights, the right to protect their environment and a fair share of revenues from the oil production. Mr. Saro-Wiwa and eight other prominent protestors were arrested, sentenced to death by an unfair special military tribunal for the alleged murder of four Ogoni chiefs and were executed on 10 November 1995 by the Nigerian state authorities. The oil production site that polluted the area was operated by Shell Petroleum Development Company of Nigeria Ltd. (»Shell Nigeria«). Shell Nigeria is a wholly owned subsidiary of the Shell Petroleum Company, which in turn is ultimately today owned by Royal Dutch Shell plc., a corporation incorporated in England and Wales and headquartered in the Netherlands. Royal Dutch Shell plc., is the head of »a vast, international, vertically integrated network of affiliated but formally independent oil and gas companies.« Shell Nigeria and its parent corporations allegedly gave monetary and logistical support to the Nigerian police and military, bribed witnesses to produce false testimonies and worked with the Nigerian military regime. In sum, they allegedly aided and abetted state violence against the Ogoni people, including summary execution, crimes against humanity, torture, inhumane treatment, arbitrary

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18 For a graphic representation of the relevant corporate group structure, see below Chapter VII B.
arrest and wrongful death. In 1996, the Center for Constitutional Rights with co-counsel from EarthRights International filed a lawsuit on behalf of relatives of the executed activists in the US against Shell Nigeria, Royal Dutch Shell plc. and Shell Nigeria’s CEO. They claimed compensation for the families under the Alien Torts Statute, the Torture Victim Protection Act and Racketeer Influenced and Corrupt Organizations Act. The case was settled in 2009 and Shell paid $15.5 million to the plaintiffs. Additionally, in September 2002 twelve other Ogoni activists sued Shell Nigeria and its parents with similar claims. This case was finally dismissed for lack of jurisdiction by the US Supreme Court in 2013.

A. Research Question and State of Research

The examples given above illustrate that economic organisations have been and are still involved in the commission of international crimes. However, international criminal law does not apply to economic organisations. The Rome Statute of the International Criminal Court (ICC Statute) only provides for jurisdiction for natural persons. Juridical or legal persons, and thus corporations, are outside the realm of the ICC (1.). De lege ferenda, many international criminal law scholars propose to include corporations in the ICC Statute. But the question of who precisely should be


23 For a description of different forms of involvement see e.g.: F. Meyer, Multinationale Unternehmen und das Völkerstrafrecht, ZStrR 2013, 56, 63 et seq.

Introduction

held responsible is barely ever raised. Authors either make no mention of the details concerning the object of regulation or they simply refer to national corporate law (2.).

The examples above also illustrate that economic actors often form transnational corporate groups. Transnational corporate groups are characteristically active in multiple countries. Their production unit might be located and incorporated in one country; their distribution and marketing unit in a second country; and their headquarters, defining the overall corporate group strategy, in a third country. National corporate law however, does not perceive the corporate group as a legal person. Thus, referring to national corporate law for a definition would exclude transnational corporate groups from the ICC Statute (3.). It would exclude an economic actor that, as the examples have shown, has participated in international crimes. Moreover, it would exclude an economic actor that is factually an important international actor.\(^{25}\) Not only do some transnational corporate


groups have larger turnovers than many states, they also often take on state-like functions in developing countries. With the help of their corporate group structure, transnational corporate groups can act globally and transcend national borders. Hence, there is an important argument for including transnational corporate groups as potential objects of regulation in international criminal law. In general, it is a prerequisite to have a concept of the potential object of regulation in order for a discussion on the inclusion of economic organisations in the ICC Statute to take place. This thesis will try to fill that gap and provide such a concept of transnational corporate groups. This concept has to pay due regard to the specific needs of international criminal law. These needs favour a concept that is independent from national law and that includes transnational corporate groups as addressees in their own right (4.).

1. Status Quo in International Criminal Law

*Cassese* defines international criminal law as

»a body of international rules designed both to proscribe certain categories of conduct (war crimes, crimes against humanity, genocide, torture, aggression, in-

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ternational terrorism) and to make those persons who engage in such conduct criminally liable.\textsuperscript{28}

It comprises substantive and procedural law.\textsuperscript{29} It is a body of public international law that directly enshrines criminal responsibility for individuals.\textsuperscript{30} These concern so-called »core crimes«, meaning those crimes that are directly criminal under international law and that are also prosecuted on an international level.\textsuperscript{31} Legal sources of international criminal law are those of international law in general,\textsuperscript{32} namely the ICC Statute as the main source\textsuperscript{33} as well as customary international criminal law.\textsuperscript{34} The ICC is competent to hear cases concerning genocide (Article 6), crimes against

\textsuperscript{28} A. G. Cassese, Paola, Cassese's International Criminal Law, 3rd ed., 2013 p. 3. For a narrower definition, see G. Werle and F. Jeßberger, Principles of International Criminal Law, para 89: »all norms that establish, exclude or otherwise regulate responsibility for crimes under international law« and paras 125 et seq.; Meyer, ZStrR 2013, 58 et seq. For the present project there is no need to decide on one of the concepts, as the definition of corporate groups would be usable both for core crimes as well as for so-called treaty-crimes that are not punishable on the international level. See also G. W. B. Thurner, Internationales Unternehmensstrafrecht. Konzernverantwortlichkeit für schwe- re Menschenrechtsverletzungen, 2012 p. 232.

\textsuperscript{29} Cassese, Cassese's International Criminal Law p. 3.

\textsuperscript{30} Werle and Jeßberger, Principles of International Criminal Law, para 93. Sanctions are imprisonment or fines.

\textsuperscript{31} For the evolution, see Cassese, Cassese's International Criminal Law p. 19 et seq. He argues that proper international crimes violate (i) rules of customary international law or treaty provisions, (ii) which are intended to protect values of the whole international community and (iii) whose repression is of universal interest.


\textsuperscript{33} Werle and Jeßberger, Principles of International Criminal Law, para 155.

humanity (Article 7), war crimes (Article 8), and, from 2017 onwards, cases concerning the crime of aggression (Article 8 bis).  

According to Article 25 (1) ICC Statute, the ICC only has jurisdiction over natural persons. Thus, while individual employees or corporate directors might be prosecuted before the ICC, the ICC cannot hold the corporation itself liable. Government actors as well as private persons can commit international crimes. A quotation frequently cited against corporate responsibility is the statement from the Nuremberg Tribunal that «crimes against international law are committed by men, not by abstract legal entities«. This quotation has to be seen in its context; it meant that individuals could not hide behind the state bureaucracy. Rather than excluding corporate criminality, it has to be seen as «a victory over the Act of State doctrine». As a consequence, this statement does not negate the possibility of corporate criminal liability for international crimes.

Individual responsibility is one of the foundations of international criminal law. It creates the framework within which criminal responsibility can be legitimately attributed. The principle of individual criminal re-

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35 For the Kampala Conference leading to a definition of the crime of aggression, see C. Kreß and L. von Holtzendorff, The Kampala Compromise on the Crime of Aggression, Journal of International Criminal Justice 8 (2010), 1179 et seq.
36 Article 1 ICC Statute only talks of «persons» without the attribute «natural».
39 Trial of the Major War Criminals before the International Military Tribunal, Nurnberg, 1947, p. 223.
41 K. Ambos, Treatise on International Criminal Law, 2013 p. 84.
Introduction

Responsibility is rooted in the national criminal law traditions and contains two basic elements: (i) personal fault, for (ii) one’s own conduct. Van Sliedregt has shown that the principle of individual responsibility can adapt to the demands of a changed society where collective actors interact like individuals and crime is highly organised and carried out on a large scale. International crimes are prime examples of large-scale and organised crime. This collective context in connection with individual criminal responsibility leads to peculiar structures of imputation of international crimes: On the one hand, a person must have committed a concrete action of a person that leads to a concrete crime. On the other hand, this action has to take place within a supra-individual criminal context. This so-called contextual element, for example the widespread attack in crimes against humanity, mirrors the collective nature of international crimes.

2. Discussion on Corporations

While international criminal law is *de lege lata* restricted to natural persons, there is a widespread debate as to whether corporations should be included in the realm of international criminal law. No decision was reached on this issue at the Rome Conference (a.). Since then it has attracted academic attention, with arguments against the inclusion of corporations mainly coming from German criminal law tradition (b.). The discussion focusses solely on international and criminal law aspects and neglects to define its potential object of regulation (c.).

a. Origins: The Rome Conference

The French delegation to the diplomatic conference establishing the ICC in Rome proposed to include »juridical persons« in the realm of the ICC Statute. This proposal was discussed in the first Committee of the Whole and the response was divided. 48 Some states 49 expressed support for the proposal; others 50 opposed the proposition right from the beginning; and a third group 51 saw it necessary to amend the proposition. The proposal was sent to the Working Group on General Principles and France, a civil law country, with the help of the Solomon Islands, a common law country, held informal consultations to negotiate a new formulation. 52


49 Jordan, Tunisia, Tanzania, Algeria and South Korea.

50 Australia, China, Argentina, Sweden, Lebanon, Mexico, Thailand, Venezuela, Denmark, Syria, Greece, Portugal, Egypt, Poland, Slovenia, El Salvador and Yemen.

51 Ukraine, Cuba, Japan, Kenya and Singapore.

weeks of negotiation, despite many different propositions and circulating texts, no consensus was reached.\textsuperscript{53} The final proposal was rather restrictive - it suggested prosecuting corporations only accessorially. Before prosecuting a corporation, a natural person that has been »in a position of control within the juridical person under the national law of the State where the juridical person was registered at the time the crime was committed«\textsuperscript{54} must be prosecuted for crimes that were committed »on behalf of, and with the explicit consent of, the corporation«.\textsuperscript{55}

There are some aspects relevant for the thesis to be taken from the discussions that were had during the Rome Conference. Firstly, scholars have embraced the proposed nexus of individual and corporate responsibility. According to Kamminga, principles of fairness and effectiveness require that a corporation be held responsible if its acts would amount to a conviction if those acts were carried out by a natural person.\textsuperscript{56} For van der Wilt, this nexus would help to draw a fair line limiting the responsibility for »normal and seemingly legitimate corporate activity«.\textsuperscript{57}

\begin{itemize}
\item \textit{van der Wilt}, Chinese Journal of International Law 12 (2013), 67.
\end{itemize}
Secondly, for Clapham, the lengthy discussions of the proposals »demonstrated how far the concept had developed«. Similarly, Ruggie still sees room for development in corporate criminal responsibility. On a national level, in addition to common law countries, major civil law countries such as France and Spain now include corporations in their national criminal laws. Despite Ambos still claiming that there was no international consensus on corporate criminal liability amongst »all major criminal law systems«, there has been a major shift towards holding corporations criminally liable. There seems to be widespread consensus on corporate criminal liability nowadays. Germany is one of the few states


60 Ambos, Treatise on International Criminal Law p. 144.

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that still does not hold corporations criminally liable. There, the Code on Administrative Infractions (Gesetz über Ordnungswidrigkeiten OWiG) basically fulfils the criminal law functions of corporate responsibility. The OWiG assigns financial responsibility to corporations for acts either carried out by their agents or, in the case of failure of supervision, by employees. Under specific circumstances, namely tight control of the subsidiary, some authors extend the parent’s duty of supervision to the whole corporate group. Then, the parent corporation would be responsi-


63 Weigend, Journal of International Criminal Justice 6 (2008), 931. See also B. Swart, International Trends towards Establishing some Form of Punishment for Corporations, Journal of International Criminal Justice 6 (2008), 947, 950: »a well developed and effective system for imposing repressive sanctions other than criminal on corporations«.

64 See Section 30 OWiG.

65 See Section 130 (1) OWiG.

66 Left open in BGH Ruling Transportbeton-Vertrieb [1981] WuW/E 1871, 1876. Pro (an economic point of view is warranted): BKartA Decision Case B1-200/06 Etex Holding [2009]. This part was explicitly not reversed in 2012 (see case report available at: http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2012/B1-200-06.html, last visited: 16.01.2017); N. Bunting, Konzernweite Compliance. Pflicht oder Kür?, ZIP 2012, 1542, 1545 et seq.; M. Mansdörfer and S. Timmerbeil, Zurechnung und Haftungsdurchgriff im Konzern - Eine rechtsgebietsübergreifende Betrachtung, WM 2004, 362, 368; KölnKomm OWiG-K. Rogall4 § 130 OWiG para 27 with further references. Contra (The parent is not the owner (Inhaber) of the under-
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...ble for failing to prevent the subsidiary’s infraction. Section 30 (4) OWiG allows for the prosecution of legal persons without identifying a specific individual person.

b. Focus on National Criminal Law Theory

On an international level, corporate responsibility is still widely discussed. The arguments put forward are developed on the basis of the writers’ respective national backgrounds. They are exchanged with strong reference to the theoretical concepts that underpin the rationale of their national criminal laws. Little attention is given to the concept of a corporation or the question of whether transnational corporate groups should be included.

For example, critics mainly argue that in fact only natural persons, and not legal entities, can act. On the contrary, many legal orders acknowledge corporate acts. In international criminal law (Article 25 (3)...


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(a) third alternative ICC Statute) the theory of Tatherrschaft (organizational dominance)\textsuperscript{70} is used to prosecute as perpetrators those that act in the background - planning the crime and deciding whether and how it is going to be executed.\textsuperscript{71} This theory paves the way to perceiving corpora-

van den Herik (eds.), Future Perspectives on International Criminal Justice, p. 168, 364; Kremnitzer, Journal of International Criminal Justice 8 (2010), 913. For the dynamics with a collective entity in general and corporations in particular, see Punch, Why Corporations Kill and Get away With it. The Failure of Law to Cope With Crime in Organizations, in: Nollkaemper/van der Wilt (eds.), System Criminality in International Law, p. 42 et seq. For a philosophical point of view, see P. A. French, Collective and Corporate Responsibility, 1984 p. 40 et seq. For a brief overview on the individualist and collectivist standpoint, see P. Q. Saunders, Rethinking Corporate Human Rights Accountability, Tulane Law Review 89 (2015), 603, 634. Todarello, New York Law School Journal of Human Rights 19 (2003), 486 argues that criminal acts by employees are ultra vires and cannot be attributed to the corporations. The concept of ultra vires is rooted in English corporate law where corporations need to name a specific purpose in their statutes to be incorporated. Acts outside this aim are then deemed as ultra vires. Without going into a detailed rebuttal of this argument, its rooting in English corporate law prevents a transposition to international criminal law. Furthermore the author does not elaborate on this argument beyond this brief statement.


tions as capable of acting through natural persons. Additionally, some authors refer to national criminal law traditions and argue that corporations cannot be held culpable as they cannot be morally blamed. In international criminal law, however, there is a tendency towards a pragmatic approach concerning the moral blameworthiness of corporations. Hold-


ing corporations accountable could contribute to the fight against impunity and enhance the effectiveness of international criminal law through punishing those who profited from the crime.\textsuperscript{75}

c. No Definition of the Object of Regulation

The discussion on the inclusion of corporations only concerns criminal law aspects of the problem.\textsuperscript{76} In their discussions, the authors do not address the different corporate forms. When they define the new object of regulation at all, they only discuss whether to include state entities, including state-owned corporations, in the definition of corporations. The Working Group on General Principles of Criminal Law at the Rome Conference proposed to define a »juridical person« as

> a corporation whose complete, real or dominant objective is seeking private profit or benefit, and not a State or other public body in the exercise of State authority, a public international body or an organization registered, and acting under the national law of a State as a non-profit organization.«\textsuperscript{77}

\begin{itemize}
\item \textsuperscript{76} See also van den Herik, Corporations as Future Subjects of the International Criminal Court. An Exploration of the Counterarguments and Consequences, in: Stahn/van den Herik (eds.), Future Perspectives on International Criminal Justice, p. 368 who deems the questions »how do we define a legal person, or a corporation? How do we determine the nationality of a corporation?« as »complex questions that are in need of further exploration«.
\end{itemize}
No one actually discusses different definitions of corporations and whether or not to include transnational corporate groups. Some do briefly touch upon the question of how to define corporations. But in these cases, unfortunately, the authors do not provide a concept of corporations that would fit international criminal law; they simply revert to national law. According to them, a corporation is what is defined as a corporation in national law. Whose national law should be decisive in front of the ICC, however, is not answered or, indeed, even asked. Although even Weigend sees the merit in »extending the Court’s reach to international corporations [...] because national states are sometimes unwilling or powerless to properly sanction corporations for fear of negative economic consequences«, even he does not develop any concept of an »international corporation«.

Similarly, Stoitchkova acknowledges the group dimension of corporations while not giving the subject sufficient treatment. She postulates that, in certain circumstances, there should be »culpability beyond the confines of the corporate form«. She draws on the concept of command responsibility and some selected US tort cases under the Alien Tort Statute that will be discussed in Chapter IV. She proposes to hold the parent corporation responsible in the case of a »failure to intervene and raise awareness combined with a failure to exercise control over the subsidiary« that causes the subsidiary to commit an international crime. According to her, parent corporations have a duty to intervene if they have the authority to do so and if they are aware, to a certain extent, of the subsidiary’s criminal actions. Liability of the parent arises if this duty is combined with the power to intervene. This power requires control over the subsidiary (similar to effective control under command responsibility: legal and de facto ability to manage) and causality in the sense that »the control breakdown contributed to the subsidiary involvement in an international crime.« At least two aspects merit criticism. Firstly, her approach does not truly es-

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78 See e.g. recently Adam, Die Strafbarkeit juristischer Personen im Völkerstrafrecht p. 225 et seq.
80 Stoitchkova, Towards Corporate Liability in International Criminal Law p. 139 Heading of Chapter 6.
81 Stoitchkova, Towards Corporate Liability in International Criminal Law p. 145.
82 Stoitchkova, Towards Corporate Liability in International Criminal Law p. 155.
establish liability beyond the confines of the corporate form. Rather, she tries to construe a new crime for the parent corporation. She stipulates new international criminal law duties (»duty to intervene«) or a concept of criminal conduct through omission for parent corporations. Secondly, her description remains rather superficial. She neither pays sufficient attention to the corporate law implications nor takes into account the diversity of corporate groups. She merely assumes a duty to intervene or rather postulates «substantial due diligence expectations” for the parent corporation «where the separate legal personality of the foreign affiliate is merely a facade behind which the parent exercises dominant control over the subsidiary’s management and decision-making”. As a consequence, this duty is postulated without the necessary examination of corporate law principles and the diverse reality of corporate groups.

3. Regulation Gap in National Law

Authors often suggest reverting to national corporate law to decide the scope of application of the ICC Statute. For the purposes of personal jurisdiction of the ICC, they propose to consider as corporations those economic organisations that are incorporated under national law as legal persons. In this case, not all economic organisations would be part of the group of addressees. Namely corporate groups will not be included. The corporate group is not seen as a legal person in national law. National (corporate) law is built on the premise of separate legal personalities within the corporate group. De lege lata only a few exceptions, if any, are made. This will be shown in greater detail with regard to the doctrine of piercing the corporate veil in UK and US law. Indeed, some authors take these exceptions as a starting point to argue for acknowledging corporate groups as a single entity that is subject to rights and duties.83 This change,

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83 E.g. for Germany U. Bälz, Einheit und Vielfalt im Konzern, Festschrift für Ludwig Raiser zum 70. Geburtstag 1974, p. 287-338, 320 et seq.; U. Bälz, Verbundene Unternehmen, AG 1992, 277, 303 et seq. who considers the corporate group established through a contract of subordination as its own subject of rights, which he calls »polykorporatives Unternehmen«. For the US, see especially the oeuvre of Blumberg. For the UK, see especially the jurisprudence of Lord Denning discussed below Chapter III C. and D. See from a general
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however, has not reached academic consensus. The corporate group as such is still not seen as a legal person in national law.

Even in Germany, which has a codified corporate group law, the corporate group is not seen as a legal person of its own. Rather, the corporate group is seen as a group of legal persons formed either factually by actual influence (faktischer Konzern) or contractually by agreement (Vertragskonzern). This may be either on an equal footing (Gleichordnungskonzern) or with a subordinating element (Unterordnungskonzern), meaning that the parent corporation exercises decisive influence over its subsidiaries. These distinctions have consequences for the classification of corporate forms in the German system. In German corporate law, the Gleichordnungskonzern is seen as a civil law partnership (Gesellschaft bürgerlichen Rechts) if it is established on a contractual basis. The Unterordnungskonzern, with which this thesis is mostly concerned, has no legal personality or legal form of its own. Even those arguing that the corporate group can be seen as a civil law partnership acknowledge that it is a mere Innengesellschaft. However, only those civil law partnerships en-


84 See §§ 15 to 22 and §§ 291 to 328 Aktiengesetz (AktG). For a brief description, see A. Cahn and D. C. Donald, Comparative Company Law. Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA, 2010 p. 682 et seq.

85 § 18 I AktG.

86 § 18 II AktG. For the criterion of subordination see in general, Emmerich/Habersack/V. Emmerich7 § 17 AktG para 26 et seq.; KölnKomm AktG-H.-G. Koppensteiner3 § 17 AktG para 14 et seq.


88 Emmerich/Habersack/Emmerich7 § 18 AktG para 29; Soergel/Hadding and Kießling13 Vor § 705 BGB para 50; C. Kirchner, Ökonomische Überlegungen zum Konzernrecht, ZGR 1985, 214, 217; KölnKomm AktG-Koppensteiner3 § 18 AktG para 10 with further references.

89 See already J. Wilhelm, Rechtsform und Haftung bei der juristischen Person, 1981 p. 225. See also Koch and Harnos, Der Konzern als Außengesellschaft bürgerlichen Rechts?, in: Eisele et al (eds.), Der Sanktionsdurchgriff im Unternehmensverbund, p. 178 and 186 et seq. with further references who argue against Kersting. Kersting considers the corporate group as civil law part-
gaged in outward dealings with third parties (so-called *Außengesellschaft bürgerlichen Rechts*) have been recently granted the quasi status of a legal person by jurisprudence.\(^9\) Thus, in any case, the corporate group is not seen as a legal person in German corporate law. Due to the restrictive construction methods in criminal law, the status of civil law partnerships engaged in outward dealings with third parties would probably not be a sufficient legal basis for jurisdiction of the ICC. Moreover, German law aside, corporate groups from other countries would escape the scope of application, as their national laws do not view them as legal persons nor grant them a legal form of their own. Hence, if international criminal law defines corporations as national legal persons, transnational corporate groups would escape the jurisdiction of the ICC. In order to include transnational corporate groups in the scope of application of the ICC Statute, a separate concept, rather than a referral to national law, is necessary.

This thesis attempts to fill that gap. It will develop a concept that can be used as the starting point to discuss whether to extend the ICC Statute to economic organisations. This concept will establish the basis for a discussion on whether and how the ICC Statute should be extended. The assumption thereby is that a clear and well-founded idea of the object of regulation is a necessary prerequisite for any further discussion to take place.

4. General Premises for Definition

Initially, some brief, general premises for such a concept will be established. In doing so, sufficient attention shall be given to the specific features of international criminal law as an international legal regime and as part of criminal law. These aspects have so far been neglected in the discussion. Only a concept that is independent from national law, encompassing partnerships engaged in outward dealings with third parties for the purposes of EU competition law: C. Kersting, Wettbewerbsrechtliche Haftung im Konzern, Der Konzern 2011, 445, 450 et seq., for all other purposes, Kersting also concurs with the general opinion in academia (452).

\(^{9}\) See BGH II ZR 331/00 [2001] BGHZ 146, 341; BGH II ZR 385/99 [2003] BGHZ 154, 88; Soergel/W. Hadding and E. Kießling 13 § 718 BGB paras 3 et seq.
passes transnational corporate groups and is able to depict the economic reality is suitable for international criminal law.

a. Independence from National Law

Simply applying international criminal law to legal persons as defined by national law is not an adequate solution. As has been demonstrated, corporate groups would fall outside the scope of application. Additionally, it carries considerable risks that would be avoided with a concept that is uncoupled from the national legal person. Firstly, detachment from national law enhances the independence of the international legal order and thereby decreases the risk of states trying to circumvent international law obligations. In fact, the situation of legal persons is fundamentally different from natural persons and merits special attention. On the one hand, states could exclude certain economic organisations from the realm of international criminal law in order to protect their national champions or because they are dependent on the economic activities (jobs, tax revenues) of that organisation. States are free to decide to which economic organisations they confer legal personhood. Thus, if international criminal law refers to legal personhood in national law to define its object of regulation, the states could decide and alter which economic organisations are to be subjected to the ICC Statute. On the other hand, transnational corporate groups can easily escape the jurisdiction of international criminal law by establishing a «bad corporation” in a jurisdiction that has not implemented the ICC Statute and then act through this corporation. Secondly, an autonomous concept guarantees the uniform and equal application of international criminal norms. Thereby, economic organisations will be subjected to the ICC Statute no matter where they are incorporated.

b. Principle of Complementarity

The principle of complementarity favours the concept of a corporation as a potential addressee of international criminal law that includes transnational corporate groups. According to this principle, in short, a case before the ICC is only admissible when »a state which has jurisdiction over [the
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case]« is »unwilling or unable genuinely to carry out the investigation or prosecution«. Complementarity can be seen as part of the sovereignty of the Member States. It is first and foremost a right and a duty of the territorial state to prosecute the alleged crime. Moreover, it can be seen as a form of subsidiarity. A similar principle is also known in EU law or the constitutional laws of federal states. In international criminal law, it signifies that the state in which the crime occurred will normally be best placed to prosecute the international crimes. The principle of complementarity is relevant in two regards.

Firstly, some claim that including corporations in the ICC’s personal scope of application would violate the principle of complementarity. They argue that those states that do not allow for the criminal liability of corporations would automatically find themselves »unable to prosecute« in the sense of Article 17 (1) ICC Statute. Other authors maintain that this quasi-automatic admissibility of claims concerning corporations is not contrary to the international criminal law system as Article 17 (3) ICC Statute shows. Moreover, van den Herik convincingly argues for an autonomous interpretation of the criterion of criminal proceedings, analogous to the jurisprudence of the ECtHR. Thereby proceedings deemed administrative under national law could be seen as criminal proceedings, and thus fulfilling the complementarity conditions at the ICC level.

91 Article 17 (1) (a) ICC Statute.
95 See e.g B. Broomhall, International Justice and the International Criminal Court. Between Sovereignty and the Rule of Law, 2004 p. 89; Kyriakakis, Criminal Law Forum 19 (2007), 126. According to Cassese, Article 17 (3) ICC Statute shall include inter alia »legislative impediments«, which would include criminal laws with limited (i.e. excluding legal persons) scopes of application: Cassese, Cassese's International Criminal Law p. 297.
Secondly, actions of the ICC in this area can be regarded as complementing national criminal law. They would fill the regulatory gaps left by the inability and ineffectiveness of national regulations and the lack of international regulation in human rights treaties. The regulatory gap is especially critical in the case of transnational corporate groups. Transnational corporate groups, as explained above, are split into different national corporations. Many authors speak in this context of «home state» and «host state». Home state denominates the state in which the parent or headquarters of the transnational corporate group is incorporated. A host state is the state in which the production unit is incorporated and where the violation of international (criminal) law takes place or where its consequences materialise. The home state is unable to regulate the subsidiary in a third country: it only has jurisdiction over the parent corporation. To a certain and recently further limited extent, the US Alien Tort Statute (ATS) is an exception to this general finding, as will be shown in Chapter IV. Host...
states may want to impose stricter standards on corporations acting on their territory. More often than not, host states seem to be afraid of a retreat of corporations that would cause loss of taxes and jobs or they may be unable to provide the necessary legal infrastructure to regulate. As a result, national law does not provide an adequate legal framework for the transnational activities of these corporate groups. It neither perceives the corporate group as a legal person (see above 3.), nor does it regulate their transnational activities. As a result, there is an important argument for regulation on an international level. Hence, in the case of transnational corporate groups, the requirement of subsidiarity is fulfilled. Moreover, it would be difficult if not impossible in the case of transnational corporate groups to identify whose states’ inability to prosecute should matter as transnational corporate groups transcend, by definition, national borders. This highlights the necessity to include transnational corporate groups as such in the realm of the ICC Statute.

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c. Criminal Law Premises

The objectives of criminal law support the quest for a functional concept that grasps economic reality. Slye sums up the objectives of criminal sanctions as to »express societal disapproval, deter future such harms, and re-habilitate the wrongdoer.«\(^{102}\)

For criminal law purposes, an integrated approach that comes closer to reality is important. This approach needs to ensure that the rules are applied to and enforced upon those who acted and controlled the criminal actions and who can thus alter their behaviour.\(^{103}\) Thereby, attaching responsibility for acts to a legal person often does not depict reality. Particularly in transnational corporate groups, the responsibilities are not allocated along the borders of national legal persons, but more along economic exigencies. Hence, such an approach risks being unfair by targeting the wrong entities or, in fact, no entity at all. In addition, this would considerably limit the effectiveness of international criminal law.

d. Summary

A functional definition serves two purposes: it makes international criminal law autonomous from national legal orders and prevents circumvention both by states and corporations. It enhances the effectiveness of international criminal law by punishing the economic entity that is responsible for the wrongdoing. Therefore, a definition of the corporate group that is

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102 Slye, Brooklyn Journal of International Law 33 (2008), 963. See also ICTY Trial Chamber Judgment Case IT-95-16 Kupreškić et al. [2000] para 848 »retribution and deterrence are the main purposes [...]« This is well-established case law. See Werle and Jeßberger, Principles of International Criminal Law, para 106 for further references; Preamble (5) ICC Statute: »Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes«.

independent from national law and at the same time reflects the factual structure of corporate groups beyond the legal fictions of national corporate law needs to be developed. Analysing different legal orders that already deal with similar situations will provide the blueprint for developing a well-founded concept of economic organisations that is suitable for international criminal law.

B. Structure

The above-mentioned general premises will help guide the search for suitable criteria to define the potential new addressee of international criminal law. As has been shown, the definition should be able to denominate the entity that is responsible for the act, irrespective of whether it consists of different legal entities or is subject to different national legal orders. In short, it should potentially be able to include transnational corporate groups. The quest for such a definition will be driven by an analysis of existing legal concepts of transnational corporate groups (1.) and will be reassessed with the help of economic and management theory (2.). Lastly, the result, a concept of transnational corporate groups for international criminal law that uses economic criteria will be applied in a brief case study (3.).

1. Links to Existing Legal Concepts

a. International Law

This thesis sets out by analysing how international law approaches transnational corporate groups. As a source of international criminal law, international law is the natural starting point. Unfortunately, there is no concise concept of transnational corporate groups in particular - or indeed even of corporations in general.

So far, international law also does not hold corporations accountable for violations of international law.\textsuperscript{104} Corporations are not (yet) subjects of international law and at the same time reflects the factual structure of corporate groups beyond the legal fictions of national corporate law needs to be developed. Analysing different legal orders that already deal with similar situations will provide the blueprint for developing a well-founded concept of economic organisations that is suitable for international criminal law.

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international law. Even authors discussing whether corporations are or should be subjects of international law do not provide a concise concept of the (potential) subject of international law. They are hardly ever mentioned in international treaties, which also do not directly regulate corporate behaviour. Nonetheless, there is a strong urge to regulate corporations in the international arena.\textsuperscript{105} While »soft law« acknowledges the importance of economic actors for international law and has addressed especially economic organisations in a wide variety of documents, it remains vague not only with regard to its concept of economic organisations.\textsuperscript{106}

International investment law offers some insights. As international investment law deals with foreign investment, it is often concerned with transnational corporate groups. Both the Convention establishing the International Centre for Settlement of Investment Disputes and Bilateral Investment Treaties partly acknowledge the transnational corporate group structure as legally relevant particularly in determining the nationality of the investment. Investment tribunals frequently deal with transnational corporate groups in various aspects of their arbitration awards, although their approach remains highly fragmented.

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\textsuperscript{106} This is especially true with regard to human rights and corporations: \textit{Gatto}, Multinational Enterprises and Human Rights. Obligations under EU Law and International Law p. 28. For further details, see below Chapter I D.
b. EU Competition Law

EU competition law offers a far more advanced concept. It is well suited as a point of reference for international criminal law. EU competition law has installed a functioning system of (quasi-)criminal\textsuperscript{107} penalties for undertakings that violate commonly set rules (Articles 101 and 102 TFEU, Regulation 139/2004 on Merger Control). EU competition law is one of the most effectively enforced areas of EU law and has often been mentioned as a success story on the journey towards a single market. Furthermore, it is one of the most coherently regulated areas in EU law: it has not only set the applicable rules at a European and hence inter-state level; the Commission in conjunction with the national competition authorities also enforces EU competition law. These features presuppose a common, European, definition of its object - the «undertaking» - that is autonomous from the laws of Member States. Otherwise, EU competition law and its enforcement would lose much of its coherency and strength. Emancipation from national law has been set as one premise for international criminal law as well. In short, EU competition law structures - internationally agreed norms, attribution of liability and (criminal) enforcement by the national authorities in conjunction with an inter/supranational institution – are mirrored in international criminal law.

EU competition law offers a functional definition of undertakings that can describe transnational corporate groups as a single economic entity. The basic definition was given in the well-known Höfner ruling: «every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed».\textsuperscript{108} A single economic entity

«consist[s] of a unitary organisation of personal, tangible and intangible elements, which pursue a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in [Article 101 TFEU]».\textsuperscript{109}

These basic descriptions of undertakings have been refined in a large body of Commission decisions, European Court of Justice judgments and academic oeuvres on which this thesis can build.

\textsuperscript{107} See ECtHR Complaint No 43509/08 Menarini Diagnostics v. Italy [2011].
c. UK Law

UK (tort) law has been cited by the European Court of Justice and many academics as the counterapproach with regard to EU competition law’s functional view of corporate groups. UK law has a profoundly more restrictive approach. It starts from the principle of separate legal personalities coupled with the concept of limited liability. These foundational principles of corporate law have been established in the famous Salomon case.\(^\text{110}\) Since then, they have been extended to corporate groups. As a result, a shareholder will not be liable for the corporation’s debts, no matter whether he is a natural person or a legal person. This rule is subject to some narrow exceptions, often summarised under the heading »piercing the corporate veil«. The exact scope of this concept is difficult to delineate, as it is subject on a case-by-case basis to »the judges’ somewhat subjective perception of fairness or policy«.\(^\text{111}\) Contrary to EU competition law, »piercing« in UK law normally requires a fraudulent element. Similar to international investment law, the approach in UK law is rather fragmented and not very concise. This is due to two main reasons. Firstly, the argumentation in piercing the corporate veil cases is often not adapted to corporate group specificities. Secondly, the focus in most cases is on the subjective, fraudulent element and not on the objective aspects.

In addition to this reliance on a fraudulent element, two more differences to EU competition law exist. Firstly, UK law is willing to acknowledge corporate group structures only in exceptional cases and not as a rule. Secondly, the theoretical concept is different. Whereas EU competition law sees the addressee i.e. the corporate group in the form of the single economic entity - as one undertaking, in UK law the problem is seen as one of attributing responsibility from one entity to another. After having pierced the corporate veil, the actions and features of the subsidiary are attributed to the parent. This is even more evident in agency cases. The corporate group is never seen as a legal person of its own nor as the addressee of a norm. Notwithstanding this conceptual difference, the lan-

\(^{110}\) HL Salomon v A. Salomon and Co [1897] AC 22.

\(^{111}\) A. Hicks and S.-h. Goo, Cases and Materials on Company Law, 6th ed., 2008 p. 103. Also admitted by Slade LJ in CA Adams et al. v Cape Industries et al. [1990] Ch. 433 at 503, 543: »From the authorities cited to us we are left with rather sparse guidance as to the principles which should guide the court«. See also A. J. Dignam and J. P. Lowry, Company Law para 3.10.
guage in UK cases sometimes resembles the EU competition law approach.

Besides the fraudulent element, similar material criteria are used to decide in which cases the veil should be pierced in corporate group cases. The analysis of the UK’s approach towards (transnational) corporate groups will reveal that some criteria, most notably control within the corporate group, are used in EU competition law but also in international investment law and UK law.

d. US Alien Tort Statute

The United States of America (US) Alien Tort Statute offers de lege lata a possibility to legally assess corporate involvement in international criminal law. Its wording is simple:

»The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.«

This statute is a mixture of international and national law. Violations of international law are seen as torts in US law and treated in US courts.

This fits the thesis particularly well. Firstly, its content - violations of human rights - matches the aim of creating a definition of corporate groups for international criminal law. Most cases dealing with corporations and corporate groups, as will be shown, concern violations of international criminal law. Secondly, many cases involve transnational corporate groups. Courts, as the analysis will show, often have to decide whether they have personal jurisdiction over non-US parts of the corporate group and whether violations of international law can be attributed to these parts as well. To answer these questions, they revert to general US law principles such as piercing the corporate veil and agency. Therefore, this chapter can also complement the picture of how common law deals with (transnational) corporate groups. In fact, apart from its reliance on

112 G. Wagner, Haftung für Menschenrechtsverletzungen, RabelsZ 2016, 717, 751, 759 et seq. even argues that national tort laws all depict certain common basic structural elements including allowing only in exceptional circumstances for liability of corporate groups or parent corporations.
a fraudulent element, also in ATS cases, similar criteria for the assessment of corporate groups are used.

In order to complete the picture, a brief overview of the approach adopted by US antitrust law towards corporate groups will be given. Since a shift in US Supreme Court jurisprudence, US antitrust law considers corporate groups as a single actor with regard to conspiracy, thus there is no intra-group conspiracy in US antitrust law.

e. Comprehensive Analysis of Criteria

The analysis of the different legal orders will allow some features of transnational corporate groups to be compiled that are important in all cases. Most notably, parental control over the subsidiary is frequently mentioned. Additionally, the factual elements that evidence parental control are similar throughout the legal orders.

In an intermediary summary chapter, the aim will be to bring together all these factors in order to define a transnational corporate group as a single economic entity in international criminal law. The entity shall be defined in such a way as to legitimately attach responsibility for an act and to be able to embrace various legal persons and countries to effectively target the perpetrator. Corporations should not be able to outsource their illegal behaviour to »bad corporations« in jurisdictions that do not enforce international criminal law, nor should these legal orders blindly attach responsibility to legal persons who have not acted, who had no influence on the behaviour of the actual actor, and who could therefore not have prevented the violation. In a nutshell, the definition should be both fair and effective.

2. Economic Analysis

To ensure this aim, the criteria extracted from the different legal orders will be reassessed in light of economic and management theory. There, different areas will be used to understand the economic rationale for transnational corporate group building and for specific corporate group architecture. This understanding will allow the criteria found in the different legal orders to be refined. Thereby the aim is to achieve a concept of the transnational corporate group that does not neglect economic rationales. Additionally economic arguments for limited liability will be scrutinized.
to show that they do not upset the envisioned definition of transnational corporate groups as an economic entity.

3. Case Study

The developed concept allows international criminal law to perceive, if the criteria are fulfilled, transnational corporate groups as an economic entity. This will be shown by taking up the Royal Dutch Shell case and applying the set of criteria elaborated in the thesis to the case.

C. Possible Use of the Concept

First and foremost, this concept will be of relevance for international criminal law – or, more precisely, for the discussion on the application of the latter to corporations. A functional definition can provide a new impulse for the debate. This approach tackles the problem at its very source. It offers a well-defined and realistic description of the object of attribution. At this early stage, it can already be determined which actions can be attributed to the corporate group, rather than addressing this as part of the process of defining the modes of perpetration. The complex structure, decision and control mechanisms can be adequately reproduced. In that way, the aim of prevention is much better served. A realistic description that pays due regards to the actual chains of control makes it easier for the transnational corporate group to predict potential criminal liability. This, in turn, helps to convince transnational corporate groups to change their behaviour in order to prevent committing crimes. It also serves legal certainty. As a result, concerns regarding fundamental criminal law principles and safeguards can be met. Thus, van den Herik’s quest to consider corporations as a player on their own rather than »a collectivity of natural persons«\textsuperscript{113} can and should be expanded to see the economic entity, the transnational corporate group, as a player on its own.

Additionally, the findings of the analysis will be of use for other fields of international law, notably human rights law. They draw attention to the shortcomings of international law as described above and can also contribute to solve some problems frequently mentioned in the debate on corporate accountability. Especially for those authors that consider economic organisations as subjects of international law, this concept of transnational corporate groups will help to strengthen the line of argumentation. It offers a concept for the preliminary point of the discussion and a way to link the discussion to existing concepts in international and national (corporate) law. It can also shed light on the concept of transnational corporate groups implicit in international investment law. There, it will contribute to a reassessment of the loose, and often divergent, ideas of transnational corporate groups.
Chapter I: Transnational Corporate Groups in International Law

International criminal law is part of international law. The latter, therefore, is the first place to look for a concept of transnational corporate groups that can be used in international criminal law. In fact, academic scholars widely discuss whether corporations or corporate groups are already de lege lata subjects of international law. This discussion is linked to the debate in international criminal law. The goal behind viewing economic organisations as subjects of international law is to expose them to international law – notably to international human rights law. Furthermore, similar premises to the ones mentioned in the introduction would apply to economic organisations if they were subjects of international law. Unfortunately, there is little written on the definition of the object of regulation. (A.).

The remaining part of this chapter will analyse how different areas of international law deal with corporations, with a view to finding a usable concept of transnational corporate groups. International treaty law is still state-centred and generally does not address private entities. Thus, international treaty law does not provide a concept of corporations or transnational corporate groups (B.). International investment law applies to – or, more specifically, benefits – corporations. Transnational corporate groups are often involved in international investment disputes. International investment law offers some insight into how transnational corporate groups are dealt with in international law. While international investment law reverts to national law for some aspects of corporate nationality, it provides its own approach towards transnational corporate groups for certain points. In these instances, the notion of control within the corporate group plays a pivotal role (C.). International »soft law«, contrary to interna-

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114 Shaw describes soft law as »instrument or provision [that] is not of itself ‘law’, but its importance within the general framework of international legal development is such that particular attention requires to be paid to it.« M. N. Shaw, International Law, 7th ed., 2014 p. 83 with further reference. Similarly, Cassese defines soft law as a »body of standards, commitments, joint statements, or declaration of policy or intention, resolutions adopted by the UN
tional treaty law, deals extensively with economic organisations, including transnational corporate groups. Many documents have been adopted after the entry into force of the ICC Statute. However, an analysis of these documents reveals that the concepts of transnational corporate groups used are, at best, imprecise, rendering them unsuitable for the attribution of criminal responsibility (D.).

A. Transnational Corporate Groups as Subjects of International Law

The discussion on whether economic organisations are, or should be, subjects of international law could be very fruitful for this thesis. If economic organisations are subjects of international law, they will be obliged to not commit international crimes. The definition of economic organisations as subjects of international law could be also used in international criminal law. There is widespread consensus that entities other than states – i.e. corporations and therefore also transnational corporate groups – can theoretically be (derivative) subjects of international law. Some authors ar-

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115 The conditions necessary to gain international legal personality are controversial: E. A. Duruigbo, Multinational Corporations and International Law, 2003 p. 195; H. Geldermann, Völkerrechtliche Pflichten multinationaler Unternehmen, 2009 p. 160. Okeke’s three criteria are often cited. According to him, an entity must (1) possess duties as well as responsibility for violating those duties, (2) have the capacity to benefit from legal rights as a direct claimant and not as a mere beneficiary, and (3) in some capacity, be able to enter into contractual or other legal relations with other subjects of the system: C. N. Okeke, Controversial Subjects of Contemporary International Law, 1974 p. 19. See e.g. Duruigbo, Multinational Corporations and International Law p. 190; R. F. Hansen, The International Legal Personality of Multinational Enterprises. Treaty, Custom and the Governance Gap, Global Jurist Advances 10 (2010), 1 et seq.; Karavias, Corporate Obligations under International Law p. 16.

A. Transnational Corporate Groups as Subject of International Law

gue that (certain) economic organisations are already subjects of international law. They mainly revert to the role of these economic organisations in international investment law or, more generally, to the factual importance that transnational corporate groups in particular play in global society and in international law (1.). Unfortunately, the discussants do not provide a thorough concept of their object of discussion. Most importantly, they do not provide a concept of transnational corporate groups, despite often using transnational corporate groups in their examples (2.).

1. Arguments Concerning a *de lege lata* International Legal Personality

Some authors point to the role that economic organisations (most of them transnational corporate groups) play on the international scene as evidence for a *de lege lata* corporate international legal personality. Furthermore, those authors put forward that fundamental international law norms, notably *jus cogens*, also apply to corporations.117 For example, Nowrot postulates a presumption for *de facto* powerful actors as subjects of international law.

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This approach, of course, is not undisputed. So far, neither states nor international institutions nor economic organisations have given this idea any serious consideration or recognition. Advancing the role of economic organisations rather fosters the wish to more realistically depict the role of economic organisations in international law *de lege ferenda*.¹¹⁹

Other authors point more specifically to the role of economic organisations in international investment law. In international investment law, one must differentiate between bilateral investment treaties (BITs), concluded between states to encourage and protect foreign investment, and foreign investment contracts, concluded between a state and a foreign investor – either a natural person or a corporation setting the terms of the individual investment.¹²⁰


¹¹⁹ Geldermann, Völkerrechtliche Pflichten multinationaler Unternehmen p. 294; U. Fastenrath, Die Verantwortlichkeiten transnationaler Unternehmen und anderer Wirtschaftsunternehmen im Hinblick auf die Menschenrechte, in: von Schorlemer (ed.), »Wir, die Völker (...)« - Strukturwandel in der Weltorganisation, 2006, p. 69-94, 81, 88 et seq. For Nowrot, corporate legal personality is necessary to safeguard the effectiveness and aims of international law: Nowrot, Philippine Law Journal 80 (2006), 574: »the need for a close conformity of this legal order to the changing sociological circumstances on the international scene, a rebuttable presumption arises – already on the basis of a *de facto* influential position in the international system – in favour of the respective actor being subject to applicable international legal obligations.«

Firstly, some argue that the BITs have created a customary international law rule that acknowledges economic actors as subjects of international law. The BITs, according to Hansen, all grant international law rights to transnational corporate groups. A web of BITs has been created through their sheer number, the use of similar wording, and the use of most-favoured nation clauses. As a result, international customary law would attribute »MNEs« the status of international law subjects.

Secondly, the internationalisation of foreign investment treaties is seen as a proof that (contracting) economic organisations are (partial) subjects of international law. Foreign investment contracts usually provide spe-
cial clauses that are said to «internationalise» these contracts. Firstly, they usually include a stabilisation clause stipulating that the state may not alter relevant parts of its legislation within a specific time frame. Legislation that is contrary to the original situation will not be applicable to the contracting economic organisation. Secondly, most foreign investment contracts include a choice-of-law clause. Whether the international law of contracts should be able to be chosen is a controversial topic. As far back as 1929, the Permanent Court of International Justice had to make a

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128 See already Okeke, Controversial Subjects of Contemporary International Law p. 213; now e.g.: Duruiğbo, Multinational Corporations and International Law p. 198 et seq.; Geldermann, Völkerrechtliche Pflichten multinationaler Unternehmen p. 75 et seq. In these cases, the ICJ would have jurisdiction to interpret the foreign investment contract.
A. Transnational Corporate Groups as Subject of International Law

decision on this issue. It upheld that ‘any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country.’

Somewhat distinctively, Lord Asquith decided that, in cases where no municipal law exists, principles rooted in the good sense and common practice of the generality of civilised nations – a sort of ‘modern law of nature’ – should apply to the foreign investment contract. The applicable law or principles of good sense, in turn, influence the definition of transnational corporate groups, as will be shown below at C. Thirdly, foreign investment contracts contain an arbitration clause that gives jurisdiction to international arbitration – notably to the International Centre for Settlement of Investment Disputes (ICSID) – for disputes arising from the contract. Fourthly, in many

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130 In his opinion this was the case for Abu Dhabi: ‘The Sheikh administers a purely discretionary justice with the assistance of the Koran; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments.’ Ad Hoc Tribunal Award Petroleum Development v Sheikh of Abu Dhabi [1951] reprinted in part in R. D. Bishop, J. Crawford and W. M. Reisman, Foreign Investment Disputes, 2005 p. 662 et seq.


132 M. Renner, Zwingendes transnationales Recht. Zur Struktur der Wirtschaftsverfassung jenseits des Staates, 2011 p. 132 et seq. The Convention on the Settlement of Investment Disputes between States and Nationals of Other States initiated by the World Bank in 1965 created the ICSID. Its tribunal is now frequently used to solve investment disputes.

cases, so-called »umbrella clauses« in the BIT tie the BIT and the foreign investment contract together.\textsuperscript{134} For example, the German Model BIT states that

\textit{»each Contracting State shall fulfil any other obligations it may have entered into with regard to investments in its territory by investors of the other Contracting State.\textbf{«}}\textsuperscript{135}

Thereby, all contractual claims related to an investment also constitute a breach of treaty and hence of international law.\textsuperscript{136} Likewise, BITs nowadays usually include an arbitration clause.\textsuperscript{137} These internationalised foreign investment treaties would align contracting economic organisations sufficiently with other international law subjects for these organisations to


\textit{Dumberry}, International Investment Contracts, in: Gazzini/De Brabandere (eds.), International Investment Law. The Sources of Rights and Obligations, p. 238. The contract must be concluded with the state and not, for example, a state owned corporation.

be considered as subjects as well. 138 The scope of the economic organisation’s status as subjects is unclear. Some argue that corporations are full subjects of international law, 139 others argue for a derivative and limited subjectivity. 140

2. No Definition of the Object of Regulation

With regard to defining the object of their discussion, authors in this area resemble those in international criminal law, with many failing to propose their own concept of corporations. They refrain from deciding whether

138 Geldermann analysed non-state entities (pirates, belligerents and de facto states) that have been considered subjects of international law and that have been vested with obligations. In all cases, three cumulative conditions were fulfilled, which are also fulfilled by corporations that are parties to foreign investment contracts: (1) the duty in question must be important; (2) the state must also be unable to influence the entity and (3) holding the state responsible instead of the corporation would be no alternative: Geldermann, Völkerrechtliche Pflichten multinationaler Unternehmen p. 82 et seq., 294. If these conditions are met, the actor will be original subjects of international law. Similarly, see Dumberry, International Investment Contracts, in: Gazzini/De Brabandere (eds.), International Investment Law. The Sources of Rights and Obligations, p. 220. However, he considers corporations derivative subjects.

139 Geldermann, Völkerrechtliche Pflichten multinationaler Unternehmen p. 82, 86; Hansen, Global Jurist Advances 10 (2010), 4 et seq.

transnational corporate groups as such are included, referring instead to national law. The fragmented nature of international law would call for such a referral. As has been shown for international criminal law in the introduction, this approach is counterproductive.

Other authors clearly have transnational corporate groups in mind or limit the subject of their writing to transnational corporate groups. These authors show some sensitivity to the specific features of transnational corporate groups. For example, Amao at least recognises the risks in reverting to national law and calls on the UN to develop a framework for providing international corporate personality and a regime of liability, including parent-subsidiary liability. This UN framework shall define international corporations (IC) as a distinct and separate personality from other ICs and companies but not from its subsidiaries.

Nowrot limits his presumptions of international legal personhood to those corporations that are sufficiently influential. Unfortunately, the concept of sufficiently influential corporations is not explained in detail. Nowrot claims that this concept can be determined by largely objective criteria. The potential factors he lists are the extent of direct or indirect participation in the international law-making and law-enforcement processes, economic power, the de facto ability to positively contribute to the realization of community interests as well as the possible negative effects of the actor’s activities on the promotion and protection of global public goods.

While transnational corporate groups can easily fulfil these criteria, the criteria do not take into account the specific features of transnational corporate groups as a group of legal entities economically active in different countries. In fact, Nowrot considers his object of research those transna-
tional undertakings« (Transnationale Unternehmen) that have multiple corporations or branches in at least two states, while being bound together by the parent’s possibility to exercise a centralised control.\footnote{Nowrot, Normative Ordnungsstruktur und private Wirkungsmacht. Konsequenzen der Beteiligung transnationaler Unternehmen an den Rechtssetzungsprozessen im internationalen Wirtschaftssystem p. 94.} Geldermann also focusses his study on multinational corporations. Apparently, he has transnational corporate groups in mind as he describes multinational corporations as conglomerates of parent corporations and subsidiaries that are incorporated in their respective home states.\footnote{Geldermann, Völkerrechtliche Pflichten multinationaler Unternehmen p. 35: »[Das multinationale Unternehmen] ist ein Konglomerat aus Mutter- und Tochtergesellschaften, errichtet nach den jeweiligen Gesetzen von Heimat- und Gaststaaten«. See also Malanczuk, Multinational Enterprises and Treaty-Making, in: Gowlland-Debbas (ed.), Multilateral Treaty-Making. The Current Status of Challenges to and Reforms Needed in the International Legislative Process, p. 58.} Unfortunately, he fails to provide a definition.\footnote{Geldermann, Völkerrechtliche Pflichten multinationaler Unternehmen p. 35: »Dies zeigt bereits, dass es ‘das’ multinationale Unternehmen nicht gibt, vielmehr jedes multinationale Unternehmen eine ganz eigene Struktur aufweist, die es unvergleichlich macht.«}

Hansen pays more attention to defining his object of research and to transnational corporate groups. He claims that a definition needs to be flexible enough to comprise the different legal constructions of corporate groups in different national legal orders. In order to ensure effective enforcement, transnational corporate groups need to be prevented from shirking responsibility through dividing their activities between different legal persons. Thus, a definition must be able to describe them as a single entity.\footnote{Hansen, The Public Policy Dimensions of MNE Legal Personality. Is it Time to Unveil the Masters of Globalization?, in: Byrnes et al (eds.), International Law in the New Age of Globalization, p. 259.} Hansen explicitly departs from the national concepts of separate legal personalities and argues that international law should grant, as he calls it, »multinational enterprise (MNE)« legal personality. He offers a rough concept of MNEs. Firstly, he admits that he will use different terms interchangeably.\footnote{Hansen, Global Jurist Advances 10 (2010), 8.} Secondly, he cites Dunning’s economic, and not legal, definition that points to the fact that MNEs own and control income-generating assets in different states. Organisationally, MNEs would be
corporate networks, thus requiring central parental control either through equity ownership or other forms. As a definition he proposes: »international business enterprises, centrally controlled, usually but not exclusively organized in the form of equity ownership networks.« 150 While Hansen points to different important aspects, his definition is too vague to attach international criminal law responsibility to transnational corporate groups. At least, however, he demonstrates the importance of being able to consider transnational corporate groups as a single entity and the role that parental control plays in this context.

In summary, the discussion on corporations as subjects of international law focusses frequently on transnational corporate groups without providing a sufficiently developed definition for use in international criminal law.

B. Transnational Corporate Groups in International Treaty Law

International treaties are binding and create legal obligations for those who adhere to them. 151 Classically, international treaties concern interstate relations. They are drafted by states and addressed to states. 152 In the second half of the 20th century, this state-centric approach gradually began


B. Transnational Corporate Groups in International Treaty Law

to change.\textsuperscript{153} Human rights law was developed as a mechanism for individual protection against states.\textsuperscript{154} International criminal law directly obliges natural persons not to violate certain human rights, as described in the introduction. In the same vein, Jessup pointed to developments in international law that evidence an opening-up towards non-state actors, including corporations.\textsuperscript{155} The growing importance of transnational corporate groups has, albeit rather slowly, triggered the attention of international institutions.\textsuperscript{156} In reality, however, international treaties do not address corporations and usually only regulate states.

This chapter will analyse international human rights treaties, because international criminal law sanctions violations of certain human rights (1.). Employers, and thus corporations, are part of the treaty-making body at the International Labour Organisation (ILO), which makes international labour law an interesting subject of examination (2.). International environmental treaties are meaningful for the thesis as they establish responsibility for violations of international environmental law. There, at least in some places, »juridical persons« are mentioned and some general obligations are postulated. Unfortunately, however, the treaties revert back to national law for a concept of corporations (3.). In summary, international


\textsuperscript{154} D. Kinley and J. Tadaki, From Talk to Walk. The Emergence of Human Rights Responsibilities for Corporations at International Law, Virginia Journal of International Law 44 (2004), 932, 945.

\textsuperscript{155} P. C. Jessup, A Modern Law of Nations, 1950 p. 15 et seq. He concludes that »corporations […] may also be subjects of international law« (p. 20).

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treaty law remains largely silent about corporate behaviour, and therefore does not provide a usable concept of transnational corporate groups (4).

1. Human Rights Treaties

After the Second World War, individuals became the beneficiaries of international law through human rights treaties. These treaties are drafted by states, now also with some involvement of civil society. Corporations do not have any treaty-making power. Content-wise, these human rights treaties concern the relations of states vis-à-vis natural persons. States are obliged to not violate, to respect and to protect human rights. This obligation includes a duty to apply human rights to relations of private entities. The addressee of the obligation is still the state. No international human rights law treaty assigns legally binding responsibility to corporations, let alone transnational corporate groups.

Despite this general finding, some references to non-state actors have been made in human rights treaties. In their preambles, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights hint at the role of individuals. They stipulate


160 Preamble: »Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant«.
»that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant.«

Unfortunately, neither Covenant further elaborates on these duties in their material parts. Likewise, the Universal Declaration of Human Rights (UDHR) proclaims itself a

»common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society […] shall strive […] to promote respect for these rights and freedoms.«\(^{161}\)

While the UDHR is not legally binding, its content served as the blueprint for the Covenants.\(^{162}\) Referring to these general provisions, some authors argue that the instruments or some of the provisions also apply to private entities and thus to corporations.\(^{163}\) Stephens maintains that these treaties »define international law obligations that specifically apply to corporations.«\(^{164}\) According to her, the vagueness of the obligations – especially the fact that it is not specified to whom exactly the obligations apply – is not a problem. She claims that this is a question of the enforcement of human rights, which is decided on a national level.\(^{165}\)

However, it is questionable whether these mere references in the preambles are sufficient. If carried through, they would establish wide-reaching international obligations for individuals, which would be a fun-

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161 Preamble of the Universal Declaration of Human Rights.
162 See their preambles: »Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights»; Köster, Die völkerrechtliche Verantwortlichkeit privater (multinationaler) Unternehmen für Menschenrechtsverletzungen p. 56.
damental change in international law. As a consequence, the scope of application of human rights would be substantially enlarged.\textsuperscript{166} For now, however, the formulation remains more of a request (»shall strive«) in comparison to the state duties proclaimed in the material part.\textsuperscript{167} These state duties, in turn, only oblige states to alter their national laws; they do not confer any obligation or responsibility on corporations. It might be true that »these treaties make clear that the international legal system is capable of defining international legal standards applicable to corporations.«\textsuperscript{168} Nevertheless, this does not change the fact that these treaties do not address corporations directly, let alone transnational corporate groups.

In summary, these international human rights treaties cannot be seen to directly commit private entities to upholding comprehensive human rights protection. Rather, the state is still the clear addressee of international obligations.\textsuperscript{169} Even less so does the formula »every organ of society« justify considering corporations as addressees of the treaties. There is no further description of the term »organs of society«. Thus, the concrete addressee – and whether, for example, transnational corporate groups are to be includ-

\begin{align*}
\text{\textsuperscript{168} Stephens, Berkeley Journal of International Law 20 (2002), 70.}
\text{\textsuperscript{169} Köster, Die völkerrechtliche Verantwortlichkeit privater (multinationaler) Unternehmen für Menschenrechtsverletzungen p. 57.}
\end{align*}
ed as a single entity – is left unspecified. Consequently, international human rights law treaties do not convey a concept of corporations or transnational corporate groups.

2. International Labour Law

ILO Conventions are the prime legal source of international labour law.\(^{170}\) The ILO was established in 1919 and seeks to »create decent work for all«.\(^{171}\) The Conventions are addressed to members of ILO, thus to states\(^{172}\) and not to corporations. The efficiency of the Conventions is often called into question. If the Conventions are ratified at all, their implementation poses major problems.\(^{173}\) Interestingly, they are adopted through a tripartite conference made up of representatives of employees, employers and government groups.\(^{174}\) Corporations as employers thus form part of the Convention-making bodies. Nonetheless, the Conventions are neither directly applicable to them\(^{175}\) nor are they addressed to employers directly.\(^{176}\) Even the term »employer« is not defined or described

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175 As they need ratification and often also implementation by the Member States: Swepston, International Labour Law, in: Blanpain (ed.), Comparative Labour Law and Industrial Relations in Industrialized Market Economies, p. 156 et seq.
176 See e.g. M. Torres, Labor Rights and the ATCA. Can the ILO’s Fundamental Rights be Supported Through ACTA Litigation?, Columbia Journal of Law and Social Problems 37 (2004), 447, 448: »Thus far, international efforts to
in the ILO Constitution. With regard to transnational corporate groups, at least one author acknowledges that they can pose specific problems as employers.\textsuperscript{177} The topic, however, is not subject to specific regulation on an international level. As a result, no concept of corporations, let alone transnational corporate groups, can be taken from international labour law. The non-binding Tripartite Declaration, discussed below, at least addresses corporations.\textsuperscript{178}

3. International Environmental Law

International environmental law does exhibit some attempts to codify corporate duties. Three international treaties make reference, at least, to corporations. Firstly, Article 9 of the Convention on Transboundary Movements of Hazardous Wastes deems illegal any unauthorised movement of hazardous wastes committed by any legal and natural person (Article 2 No. 14).\textsuperscript{179} However, the Convention does not proclaim any direct consequences for natural or legal persons.\textsuperscript{180} Rather, paragraph 2 obliges the state of export to ensure that the waste is taken back. Thus, the state remains at the core of the Convention and is the sole obligor in all its Articles. The preamble reinforces this impression, maintaining that »States are responsible for the fulfilment of their international obligations […] and are liable in accordance with international law.«

\textsuperscript{177} Bronstein, International Labour Law. Current Challenges p. 66: »But it is much more difficult to address the relationship between workers and employees within a group of enterprises where the controller company transfers to its subsidiaries the risks that an employer must normally assume for its employees«.

\textsuperscript{178} See below D. 3.

\textsuperscript{179} Stephens, Berkeley Journal of International Law 20 (2002), 70.

\textsuperscript{180} The additional Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal providing for strict liability for any damages resulting from the hazardous waste has not yet entered into force: http://www.basel.int/Countries/StatusofRatifications/TheProtocol/tabid/1345/Default.aspx (last visited: 16.01.2017). Again, the protocol relies on the implementation by the state parties into their national laws with regard to the enforceability of the liability (see especially Articles 10, 17 and 19).
Secondly, the International Convention on Civil Liability for Oil Pollution Damage from 1992\footnote{For more information see: http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-on-Civil-Liability-for-Oil-Pollution-Damage-%28CLC%29.aspx (last visited: 16.01.2017).} proclaims that »the owner of a ship at the time of an incident [...] shall be liable for any pollution damage caused by the ship as a result of the incident.«\footnote{Article 3 para 1 of the International Convention on Civil Liability for Oil Pollution Damage.} The owner is defined in Article 1 and explicitly includes corporations. The definition of persons in Article 1 No. 2 covers an »individual or partnership or any public or private body, whether corporate or not«.\footnote{See Article 1 no. 3: »'Owner' means the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship. However in the case of a ship owned by a State and operated by a company which in that State is registered as the ship’s operator, 'owner' shall mean such company.« And no. 2: »'Person' means any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions.«} Theoretically, as has been shown in the introduction, unincorporated private bodies can comprise transnational corporate groups. However, Article 1 (3) reverts back to national property law and national registries to determine the owner. As a consequence, the Convention relies on national law to determine the addressee of its obligation. It does not provide any concept of corporate ownership.

Furthermore, it depends on national concepts of legal personhood that may not be apt for the international context, as shown above in the introduction. The only exception to this dependence on national juridical persons concerns ships owned by the state but operated by a »company«. There, the operation of the ship, thus the ownership in material terms, is decisive. This pays account to the specific relationship of a state with its sovereign rights and a corporation. While it is a first hint that international (environmental) law is capable and willing to consider economic realities as decisive, it remains a small exception. Thus, it is too little to conclude that transnational corporate groups can be seen as owners of the ship under the Convention, especially as further articles on the details of the liability and damage are clearly addressed to states.\footnote{A. d. Jonge, Transnational Corporations and International Law, 2011 p. 148; Thurner, Internationales Unternehmensstrafrecht. Konzernverantwortlichkeit für schwere Menschenrechtsverletzungen p. 46.}
Lastly, juridical persons are mentioned in the United Nations Convention on the Law of the Sea (UNCLOS). Article 137 UNCLOS claims that »no State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof« and that »no State or natural or juridical person shall claim, acquire or exercise rights with respect to the minerals recovered from the Area except in accordance with this Part.« However, besides this specific prohibition of acquisition, UNCLOS is a typical international treaty that attributes responsibility to the state parties (and international organisations) for violations caused by their subjects – be they natural or juridical persons. Furthermore, it does not go beyond mentioning juridical persons; there is no further description of who constitutes a juridical person and whether corporate groups are to be included or not.

These three international treaties show that the international community can attach responsibility to corporations in order to protect (global) public goods. However, this has yet to go beyond a rather general and underdeveloped statement of abstract liability. The specific conditions to be fulfilled are either unclear or left to national law. Of particular importance for the present project is the fact that the treaties lack any description of the corporation as an addressee of the obligation, let alone reveal any concept of transnational corporate groups. Thus it might be said that the idea of holding transnational corporate groups legally accountable has gained «wide support» in environmental law, but that this support has not been translated into detailed international law obligations. As has been ex-

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185 Article 137 para 1 UNCLOS.
186 Article 137 para 3 UNCLOS.
188 See Article 139 UNCLOS for this specific part of the Convention.
plained in the introduction, reverting back to national law for a concept of juridical persons can be disastrous in international environmental law as well.¹⁹¹

4. Summary

In most cases, private actors, including corporations, are completely absent in international treaties – both as treaty-making parties and addressees.¹⁹² Corporations are at most indirectly regulated through obligations of the contracting states to ensure that »their« corporations comply with internationally agreed standards.¹⁹³ Thus, despite the saying »with power should come responsibility«,¹⁹⁴ international treaties provide no system of

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¹⁹¹ Additionally, also in international environmental law, enforcement of agreed norms such as follow-up procedures and accountability for violations is often unsuccessful: Schwartz, Corporate Activities and Environmental Justice. Perspectives on Sierra Leone's Mining, in: Okowa/Ebbesson (eds.), Environmental Law and Justice in Context, p. 441 et seq. Glinski therefore calls for private regulation of corporations. In corporate groups this is to be done group wide, the parent corporation would be liable for breaches of these regulations by daughter corporations: Glinski, Die rechtliche Bedeutung der privaten Regulierung globaler Produktionsstandards p. 299 et seq.

¹⁹² A recent example is the UN Arms Trade Treaty, A/CONF.217/2013/L.3, adopted on 27 March 2013. It establishes only duties of states and none for the trading corporations. Indeed, corporations are not mentioned at all, even though corporations produce and sell arms. The preamble only points to the role of civil society including »industry« to raise awareness of arms control.


corporate responsibility, let alone one that applies to transnational corporate groups. As a consequence, international treaties do not provide a concept of transnational corporate groups.

C. Transnational Corporate Groups in International Investment Law

International investment law is more promising in this regard, as it frequently deals with transnational corporate group cases. The definition of foreign investment offers a point of reference from which a concept of transnational corporate groups can be inferred. The term is usually defined in BITs to delimit the scope of application of these treaties. Moreover, arbitral tribunals need to define their personal jurisdiction. Many arbitration awards, not at least due to the construction of BITs and foreign investment contracts as described above at A. 1., include some — albeit sometimes conflicting — considerations about transnational corporate groups.

Transnational corporate group specificities materialise during the proceedings and throughout the different stages of the award. One major area is jurisdiction. Arbitral tribunals only have jurisdiction in case of a foreign investment. Often, transnational corporate groups conduct these investments (1.). However, international investment law does not uniformly approach transnational corporate groups as one entity. The adopted approach varies from a very formalistic to a rather functional point of view. The nationality of corporations is mostly determined in a formalistic way using classical concepts, with no regard to the economic realities. Similarly, which state is entitled to exercise diplomatic protection is decided separately for each corporation within the corporate group (2.). On the contrary, Article 25 (2) b ICSID Convention allows the nationality of an investment to be determined according to the nationality of its controller. For the concept of transnational corporate groups, this exception to the classical concept of corporate nationality is important. The tribunals have developed — albeit not without some contradiction — a concept of control within transnational corporate groups. This concept of control enables the tribunals to take a functional approach and, in some cases, to decide whether to acknowledge corporate group specificities or not (3.) Similarly, and partly as a reaction to the formalistic approach, some BITs explicitly demand that the corporate group structure be taken into account. They require certain levels of shareholding or control or a specific nationality of the parent corporation to limit the protection of international investment law.
Acknowledging corporate group structures can also result in the opposite—namely an extension of the protection (4.). As a flip side to this functional approach, international investment law will deny such an extension in the case of abuse (5). This analysis provides a description of at least some traits of the concept of transnational corporate groups in international investment law (6.)

1. Investments of Transnational Corporate Groups

The concept of investment, especially how narrow or broad its definition, can vary from one BIT to another. This varying concept determines to a large extent the treatment of transnational corporate groups, especially concerning the question of which entity or entities within the group have *locus standi*. A commonly used approach is the so-called »Salini test«, which established the following criteria as relevant: contributions involved, certain duration of performance and risk-taking.\textsuperscript{195} The test results in a broad concept of investment that includes shareholdings and rights of participation.

Only foreign investments are protected under international investment law. For transnational corporate groups, this raises the question of whether a locally incorporated subsidiary itself can be deemed a foreign investment. In isolation, the subsidiary would be considered a corporation of the host state and thus a national corporation. The foreign element only becomes visible if the subsidiary is seen as part of the transnational corporate group. In most cases, international investment law acknowledges this corporate group structure. The foreign parent’s shares in the local subsidiary are seen as an investment of the parent. This is a rather straightforward application of the broad concept of investment, which is substance rather

than form-oriented. In AMT v Zaire, for example, the ICSID tribunal concluded that the local subsidiary should be deemed an investment of its foreign parent. Hence, the foreign parent can pledge in its own right a breach of the foreign investment contract or BIT in case of an umbrella clause.

Typically, transnational corporate groups consist of several subsidiaries, established in different states and arranged in a pyramidal fashion, with intermediate parent corporations and varying degrees of ownership. They are perceived differently depending on the terms of the BIT and/or the foreign investment contract. Mostly, however, indirect shareholdings are sufficient for them to qualify as an investment in international investment law. This has a special relevance for transnational corporate groups. Here, the ultimate parent often does not hold the shares in the local subsidiary directly, but via intermediate holdings and parent corporations. To take the case of Siemens v Argentina as an example, here the claimant Siemens AG had established and funded an Argentine corporation through a wholly owned subsidiary. This, according to the tribunal, was an indirect investment in the sense of international investment law, because it was an investment »by an investor through interposed companies«. These interposed corporations would not alter the ius standi of Siemens AG. Similarly, Article 1139 NAFTA, a multilateral investment treaty, defines »investment of an investor of a Party [as] an investment owned or controlled directly or indirectly by an investor of such Party«. Hence, the nationality of the investor is decisive.

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197 ICSID Award ARB/93/1 AMT v Zaire [1997] para 5.12 et seq.
199 ICSID Decision on Jurisdiction ARB/02/8 Siemens v Argentina [2004] paras 23 et seq.
201 ICSID Decision on Jurisdiction ARB/02/8 Siemens v Argentina [2004] para 144.
202 ICSID (Additional Facility) Award ARB(AF)/00/3 Waste Management v Mexico [2004] para 83.
State corporations would not hamper the jurisdiction, as long as the »beneficial ownership […] is with a NAFTA investor«.\textsuperscript{203}

2. Determining the Investor’s Nationality

As well as the contracting state, only a »national of another Contracting State« (Article 25 (1) ICSID Convention) can be a party of an investment dispute in front of the ICSID tribunal. Thereby »national« means either a natural person or a juridical person (Article 25 (2) ICSID Convention). The latter is of most relevance for the current project. Contrary to its preliminary draft, the final ICSID Convention requires incorporation and legal personality of the entity in question.\textsuperscript{204} As a result, the transnational corporate group as such cannot be a party to the investment dispute because the group is not, as is shown in the introduction, considered to have a legal personality of its own in national law. The ICSID tribunal establishes the nationality of the juridical person according to the terms of the BIT in question. Whether the corporate group structure is taken into account thus depends on the BIT (a.). In cases of diplomatic protection, where the investor’s home state initiates proceedings against the state of investment in front of the International Court of Justice (ICJ), the ICJ establishes the corporation’s nationality and thus the appropriate state in which to initiate proceedings with no regard to corporate group structures (b.).

a. Bilateral Investment Treaties

In most BITs, the nationality of corporations is determined according to the law of the state of incorporation. There, the argumentation is rather formalistic: Only the nationality of the corporation at issue – meaning its incorporation – is of relevance. In these cases, the transnational corporate group is not seen in its entirety, but rather in its parts. The ICSID tribunal

\textsuperscript{203} ICSID (Additional Facility) Award ARB(AF)/00/3 Waste Management\textsuperscript{v} Mexico [2004] para 80.

case *Tokios Tokelės v Ukraine* illustrates this point. The claimant was a Lithuanian corporation that had established a wholly owned Ukrainian subsidiary in which it invested heavily. Moreover, Ukrainians possessed 99% ownership of the claimant and 2/3 of the management were Ukrainians. The question was thus whether the claimant was a foreigner or a Ukrainian corporation that had maintained its Lithuanian holding to appear foreign. The tribunal emphasised the fact that it is bound by the definition of corporate nationality given in the BIT («any entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations«), which it interprets according to the ordinary meaning of the terms «a thing of real legal existence that was founded on a secure basis in the territory of Lithuania«). After reviewing the incorporation of the claimant in Lithuania, the tribunal concluded that the claimant was indeed a Lithuanian corporation. Consent to apply Article 25 (2) b ICSID Convention, discussed below 3. a., which introduced the test of control in determining the nationality, could not alter the result. It was clearly meant to extend the protection to those corporations that are controlled by Lithuanians or Ukrainians respectively and not to deny the BIT’s protection. Hence, with regard to this type of BIT, a control test – important in order to consider a transnational corporate group in its entirety – cannot be used to restrict the scope of application, but only to enlarge it. The tribunal concluded that the ICSID Convention, especially Article 25, uses a classical concept of corporate nationality based on the laws of incorporation or social seat, generally paying no regard to the nationality of the controller. Hence, in this area, little regard is paid to the economic factors and

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206 ICSID Decision on Jurisdiction ARB/02/18 *Tokios Tokelės v Ukraine* [2004] paras 28 et seq.

207 ICSID Decision on Jurisdiction ARB/02/18 *Tokios Tokelės v Ukraine* [2004] paras 40 et seq. referring to ICSID Decision on Jurisdiction ARB/81/1 *Amco Asia v Indonesia* [1983]. See also ICSID Decision on Jurisdiction ARB/82/1 *SOABI v Senegal* [1984] para 29. See already ICJ Judgment *Barcelona Traction* [1970] ICJ Reports 3 para 70.
powers of control. Recently, the tribunal has reinforced its approach. It argued that, if the BIT did not foresee any special test, »neither corporate control, effective seat nor origin of capital has any part to play in the ascertainment of nationality [...].« The tribunal’s approach is formalistic and adheres to the national law concepts of incorporated entities. This had been to the benefit of the transnational corporate group, who remained under the protection of the BIT even though it focussed its activities heavily on the contracting state.

b. Diplomatic Protection

Diplomatic protection differs from foreign investment arbitration. Firstly, the investor’s home state and not the investor itself initiates the proceedings. Secondly, the investor’s home state accuses the host state of violating international law by breaching the BIT. Thirdly, it is the ICJ and not an arbitral tribunal that deals with these cases. Notwithstanding these differences, cases of diplomatic protection do also deal with specific problems of transnational corporate groups. In the well-known Barcelona Traction case, the ICJ took a restrictive approach towards personal jurisdiction with regard to diplomatic protection for transnational corporate groups. It emphasised the importance of national law in corporate law matters. There, a »firm distinction« between the legal personality and the shareholders would be drawn. International investment law has to re-

208  ICSID Decision on Jurisdiction ARB/06/3 The Rompetrol Group v Romania [2008] para 110. See also ICSID Award ARB/03/16 ADC Affiliate and ADC & ADMC Management v Hungary [2006] para 360: »Tokios Tokelés still represents good international law.«


spect, in particular, the different property rights of the corporation and its shareholders. The latter have no property rights in the existing corporation as a corollary of their limited liability. Hence, damage done to the corporation has to be distinguished from damage done to the shareholders.\footnote{ICJ Judgment \textit{Barcelona Traction} [1970] ICJ Reports 3 para 44; ICJ Preliminary Objections Judgment \textit{Case concerning Ahmadou Sadio Diallo} [2007] ICJ Reports 582 paras 63 et seq.}

This has consequences for the possibilities of diplomatic protection. In general, it is the state of incorporation that can claim diplomatic protection for the corporation and that has legal standing in front of the ICJ. On the contrary, a claim of diplomatic protection from the national state of the (main) shareholder is inadmissible. In most cases, a violation of corporate rights will only affect the shareholder’s interests but not the shareholder’s rights. Introducing a diplomatic right for shareholders would lead to insecurity and confusion, especially for corporations that act internationally like transnational corporate groups, because their shares are »widely scattered«.\footnote{ICJ Judgment \textit{Barcelona Traction} [1970] ICJ Reports 3 para 96.}

As a consequence, if concerned with transnational corporate groups, the right to diplomatic protection is granted to each state of incorporation of each corporation within the group.\footnote{Materially, only damage to the specific corporation can be claimed and not damage to the corporate group as a whole or to a different subsidiary.}

The ICJ thus sticks to the concept of national juridical persons. It examines each corporation in isolation and does not consider the corporate group as an entity. Moreover, according to the ICJ, national law is relevant for questions of abuse and piercing the corporate veil. These concepts are acknowledged in international law; national law determines their content.\footnote{ICJ Judgment \textit{Barcelona Traction} [1970] ICJ Reports 3 paras 56 et seq. For both concepts in common law, see below Chapter III C. and Chapter IV A. 3.}


In international investment disputes, the approach is often more flexible.
3. Article 25 (2) b ICSID Convention

Article 25 (2) b ICSID Convention broadens the personal scope of jurisdiction to nationally incorporated subsidiaries in cases where nationals of another contracting state control the subsidiary. In these cases, the locally incorporated subsidiary has standing in front of the ICSID tribunal and can initiate proceedings against its country of incorporation.216 Here, the functional approach towards transnational corporate groups becomes visible. Article 25 (2) b ICSID Convention allows the relation of parent and subsidiary within a corporate group to be acknowledged. Its application firstly requires that the parties have agreed upon the application. This consent also shapes the material application (a.). Many ICSID tribunal awards have dealt with the question of how to define control in the sense of Article 25 (2) b ICSID Convention. Over the years, some general criteria for control have emerged (b.). In detail, many awards dealt with control within the transnational corporate group. The nationality of the local subsidiary depends on the decisive layer within the corporate group structure. The criteria developed become especially relevant in the case of transnational corporate group restructuring that might change the nationality of the controller (c.). In general, the tribunals have shown a functional and very broad approach when it comes to finding control of a parent within the corporate group structure. However, some limits to the notion of control can be detected (d.).

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216 In general, control is not a necessary prerequisite for an investment. Most BITs also protect minority and non-controlling shareholdings. If the local corporation is not considered as foreign, its foreign shareholders will have independent legal standing, provided that the other criteria are met: UNCITRAL Rules Partial Award *Saluka Investment v Czech Republic* [2006] paras 243 et seq.; ICSID Decision on Jurisdiction ARB/01/8 *CMS Gas Transmission v Republic of Argentina* [2003] para 48; ICSID Decision on Jurisdiction ARB/97/6 *Lanco International v Argentina* [1998] para 10; Schreuer, Shareholder Protection in International Investment Law 606 et seq.; Sornarajah, The International Law on Foreign Investment p. 324. See Kriebbaum, The Nature of Investment Disciplines, in: Douglas et al (eds.), The Foundations of International Investment Law. Brining Theory into Practice, p. 56 et seq. with further reference.
Consent to Apply Article 25 (2) b ICSID Convention

The tribunal will give great discretion to the criteria mentioned in the consent to apply Article 25 (2) b ICSID Convention as long as they are reasonable. Along with a written agreement that a corporation shall be considered as foreign, an ICSID arbitration clause in the foreign investment contract concluded by the state and the foreign investor is sufficient to establish the jurisdiction of the ICSID tribunal. In *SOABI v Senegal*, SOABI was able to initiate proceedings at the ICSID tribunal despite being incorporated in Senegal, because the foreign investment contract between SOABI and Senegal provided an arbitration clause. The tribunal argued that this clause showed that while the parties were conscious that SOABI was considered Senegalese according to Senegalese law, they wanted to submit disputes arising from the contract to ICSID tribunal jurisdiction. For these purposes, therefore, they regarded SOABI, which was controlled by nationals of contracting parties of the ICSID Convention, as a foreign corporation in the sense of Article 25 (2) b ICSID Convention.

Similarly, in a NAFTA case, the UNCITRAL tribunal argued that the formal corporate structure mattered little. Instead, a functional approach was warranted because the arbitration clause also included indirect investment.

While there will be a strong presumption that the subsidiary is foreign controlled if that is agreed upon, the tribunal can nevertheless find other-
wiser. Indeed, in Vacuum Salt v Ghana a tribunal found that Vacuum Salt’s (foreign) technical director did not control the local subsidiary. Although he held 20% of its shares, had a post on the directors’ board and carried considerable weight in technical decision, he was, according to the tribunal, not in charge of the local subsidiary Vacuum Salt. As a consequence, the tribunal had no jurisdiction ratione personae. Besides the consent to apply Article 25 (2) b ICSID Convention to the corporation at hand, objective foreign control is necessary.

b. General Criteria for Control

Control is not defined in Article 25 (2) b ICSID Convention. During the negotiations of the ICSID Convention, different thresholds have been suggested while, predominantly, a case-by-case analysis has been favoured. According to the ICSID tribunal, control is an objective notion that justifies a diversion from the classical concepts of corporate nationality described above, and marks the outer limits of the exception. Control does not require a fixed percentage of shareholding. Rather, whether a foreign corporation controls the local subsidiary is examined on a case-by-case basis. In this examination, all relevant factors have to be taken into account to decide whether the parent corporation at issue had a »reasonable

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221 ICSID Award ARB/05/5 TSA Spectrum de Argentina v Argentina [2008] para 147. See also ICSID Decision on Jurisdiction ARB/00/5 Autopista Concesionada de Venezuela v Venezuela [2001] para 116: In the case of reasonable criteria being used to consider the local subsidiary as foreign in the consent, the Tribunal will consider the subsidiary as foreign; Amerasinghe, Jurisdiction of Specific International Tribunals p. 439, 463, 479 et seq.


223 ICSID Award ARB/92/1 Vacuum Salt Products v Ghana [1994] para 43; Amerasinghe, Jurisdiction of Specific International Tribunals p. 479.

224 ICSID Award ARB/05/5 TSA Spectrum de Argentina v Argentina [2008] para 139; ICSID Decision on Jurisdiction ARB/00/5 Autopista Concesionada de Venezuela v Venezuela [2001] para 109. See also Acconci, Journal of World Investment & Trade 5 (2004), 154 et seq. Moreover it is »an exception to the rule that a national cannot initiate ICSID proceedings against its own state«: ICSID Decision on Jurisdiction ARB/00/5 Autopista Concesionada de Venezuela v Venezuela [2001] para 102.
amount of control«. The awards give some indication of the relevant factors. For example, complete foreign ownership »almost certainly would result in foreign control«. Direct shareholding can be evidence of control as it »confers voting right, and, therefore, the possibility to participate in the decision-making of the company.« For example, the tribunal saw no problem in attributing the parent’s (foreign) nationality to the subsidiary in Banro v Congo. In cases where only a small percentage of ownership exists, other factors must counterbalance the lack of formal ownership. Those factors include participation in management, voting rights, and directorial posts. Additionally, an »understanding« attached to the Energy Charter Treaty – a multilateral investment treaty including an ICSID arbitration clause – enumerates relevant factors for control

»(a) financial interests, including equity interest, in the Investment; (b) ability to exercise substantial influence over the management and operation of the Investment; and (c) ability to exercise substantial influence over the selection of members of the board of directors or any managing body.«

c. Pyramidal Transnational Corporate Groups

Article 25 (2) b ICSID Convention permits »to pierce the corporate veil and reach for the reality behind the cover of nationality.« This is especially relevant and far-reaching in cases of pyramidal transnational corporate groups. As has been shown above, interposed corporations generally do not prevent the local subsidiary from being classified as a foreign in-

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226 ICSID Award ARB/92/1 Vacuum Salt Products v Ghana [1994] para 43.
227 ICSID Decision on Jurisdiction ARB/00/5 Autopista Concesionada de Venezuela v Venezuela [2001] para 121.
229 ICSID Award ARB/92/1 Vacuum Salt Products v Ghana [1994] para 44.
232 ICSID Award ARB/05/5 TSA Spectrum de Argentina v Argentina [2008] paras 140, 147.
233 See e.g. the chart in ICSID Decision on Jurisdiction ARB/02/3 Aguas del Tunari v Bolivia [2005] para 218 Figure 2.
vestment of the ultimate parent. Hence, international investment law sees through the different layers within the corporate group from the parent to the ultimate subsidiary. In complex pyramid-structured transnational corporate groups there is not only one interposed corporation, but many different layers.\textsuperscript{234} There, the ultimate parent might be rather remote to the local subsidiary. This raises the question of whether the whole corporate group should be seen as one entity and thus one investor, or only a part of the corporate group. The answer has consequences for the nationality of the investment. In transnational corporate groups, investments occur at different levels in the group structure. These different corporate group levels often have different nationalities. Hence, the nationality of the investment changes depending on which layer of the corporate group is considered decisive. The nationality of the investment determines, in turn, the application of the BIT and the jurisdiction of the arbitral tribunal. BITs do not only vary with regard to the rights protected and their concepts of investment and nationality. Besides, some states have no BIT concluded between themselves at all. Which BIT is applicable is, in turn, answered with the help of a broad concept of control. It seems that the claimant has wide discretion and can pick and choose one of the corporations within the pyramidal corporate group structure in order to establish jurisdiction or the application of the preferred BIT.\textsuperscript{235}

Certain factors can alter which BIT is applicable, especially a restructuring of the transnational corporate group known as »migration of corpo-


\textsuperscript{235} Hansen, Global Jurist Advances 10 (2010), 36 et seq.; McLachlan, Shore and Weininger, International Investment Arbitration, International Investment Arbitration. Substantive Principles para 5.81; Schill, The Multilateralization of International Investment Law p. 209, 218; Wisner, Derivative Actions and Indirect Claims, in: Ortino et al (eds.), Investment Treaty Law. Current Issues II, p. 75. Whether this is still within the purpose of the bilateral investment treaty has been questioned. See Sornarajah, The International Law on Foreign Investment p. 327 et seq. who invokes a denial of jurisdiction due to an abuse. However, in that specific case, the holding chosen had a special place in the pyramid structure of the group. Indeed, it was a holding of an Italian and another Dutch corporation. Only the Dutch holding, in turn, was owned to 100% by a US corporation. Hence, the Tribunal concluded that the claimant was not a mere shell, but rather fulfilled an important role as a joint venture: ICSID Decision on Jurisdiction ARB/02/3 Aguas del Tunari v Bolivia [2005] paras 318 et seq.
ration«. Alternatively, as was the case in *Aguas del Tunari v Bolivia*, it can lead to a decision on whether a BIT is applicable at all.\(^{236}\) In this case, after an investment in Bolivia by the Bolivian subsidiary, the corporate holdings were restructured. As a result, the immediate parent of the Bolivian subsidiary became Dutch. Overall, the pyramidal corporate group structure consisted of corporations of the contracting nationality (Dutch), as well as non-Dutch corporations. The ultimate parent and some intermediate parents of the subsidiary were non-Dutch. Hence, the question was whether the Bolivian-Dutch BIT was applicable. This would confer jurisdiction to the ICSID tribunal.

For the tribunal, interpreting the phrase »directly or indirectly controlled by a national of a contracting party« was the key element in this case.\(^{237}\) The dispute boiled down to whether actual exercise of control is necessary, or if it is sufficient to merely possess the power of control. The tribunal, alongside the Vienna Convention,\(^{238}\) analysed the ordinary meaning of the term as well as its different legal definitions. It concluded that the formula used did not require any proof of actual exercise of control.\(^{239}\) Rather, for the tribunal’s majority, »directly or indirectly controlled« means that the entity (directly or indirectly with an intermediary entity) possesses the legal capacity to control the other entity, which can be inferred, in the absence of special voting requirements, from the amount of shares. The parent does not need to control day-to-day management.\(^{240}\) In the absence of fraud, according to the tribunal, additional requirements would only apply if enshrined in the BIT. Firstly, this result would be in accordance with many national legal orders. Secondly, the concept of actual control is too vague and hence unmanageable. For the tribunal, it is impossible to draw the line and decide which actions of a parent are nec-

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237  ICSID Decision on Jurisdiction ARB/02/3 *Aguas del Tunari v Bolivia* [2005] paras 221 et seq.


239  See also ICSID Decision on Jurisdiction ARB/00/5 *Autopista Concesionada de Venezuela v Venezuela* [2001] paras 112 et seq; Amerasinghe, *Jurisdiction of Specific International Tribunals* p. 477.

240  ICSID Decision on Jurisdiction ARB/02/3 *Aguas del Tunari v Bolivia* [2005] para 264.
necessary in order to consider them as possessing actual control. Thirdly, and as a result, this uncertainty would frustrate the BIT’s purpose – namely to enhance economic cooperation.

In this particular case, the claimant successfully relied on an intermediary Dutch parent for jurisdictional purposes. The fact that the ultimate parent who indirectly controlled the Bolivian subsidiary was a US corporation did not alter the result. According to the tribunal, the phrase »directly or indirectly« indicates that the BIT acknowledges the possibility that two corporations could control the local subsidiary and thus have *locus standi*. It would »not limit the scope of eligible claimants to only the ‘ultimate controller’«.241 Thus the tribunal opted for a pro-jurisdictional interpretation of Article 25 (2) b ICSID Convention. The approach can be seen as pragmatic or functional because the tribunal gave discretion to the transnational corporate group to point to the most suitable layer of the group structure for jurisdictional purposes rather than determine abstractly one decisive layer of the corporate group structure.

The case of *Banro v Congo* dealt explicitly with the question of whether to pursue a functional approach that takes the corporate group structure into account. While the case was not decided on that point,242 there was a clear tendency towards the functional approach. The case was again concerned with group restructuring. A US and a Congolese subsidiary of a transnational corporate group headed by a Canadian parent filed the request. The Canadian parent had established the wholly owned US subsidiary immediately before the filing and had transferred its shares in the Congolese subsidiary to the US subsidiary, thereby changing the nationality of the investing corporation. The (former) parent could not initiate proceedings itself as, at the time, Canada, unlike the US, was not a contracting state of the ICSID Convention. In its award, the tribunal reviews and explains approaches towards corporate groups in former arbitral tribunal cases. It stipulates that the tribunal has been willing to go beyond formalities. It based its awards on a »review of the circumstances surrounding the case, and, in particular, the actual relationships among the companies in-

241 ICSID Decision on Jurisdiction ARB/02/3 *Aguas del Tunari v Bolivia* [2005] para 237.

242 The Tribunal did not decide this point, as the claim failed on the international public law point of the relationship of international investment disputes to diplomatic protection, discussed below at 5.
volved.« In detail, the arbitrators have been »willing to work their way from the subsidiary to the parent company rather than the other way round«. In cases where the subsidiary was a mere instrumentality of the parent, actions of the subsidiary were seen as actions of the parent as well. For example, the subsidiary’s consent to the tribunal’s jurisdiction can be seen as consent of its parent as well. Thus, the corporate group structure is acknowledged and the transnational corporate group is either seen in its entirety or, at least, acts and features such as contractual rights are attributed to the various parts of the corporate group.

d. Limits to Corporate Group Structure Arguments

However, this possibility is not boundless. In international investment law, there are also limits to the claims of indirect investors. The tribunal in *Enron v Argentina* claimed that the extent of the host state’s consent to arbitration marks the »cut-off point« beyond which claimants are too remote from the local subsidiary. This depends on the circumstances surrounding the foreign investment, such as the host state’s knowledge of the investor’s corporate structure. The tribunal in *AMCO v Indonesia* had hinted at that point. In this case, it claimed that »for political or economic reasons« the controller’s nationality might be decisive for the host state’s consent.

With regard to the question of whether indirect investors can play any role at all in determining the nationality of the local subsidiary, the argumentation used in *AMCO v Indonesia* was different and is no longer applied. The tribunal there expressly denied »taking care of a control at the

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243 ICSID Award ARB/98/7 *Banro v Congo* [2000] para 11.
244 ICSID Award ARB/98/7 *Banro v Congo* [2000] para 12.
246 ICSID Decision on Jurisdiction ARB/01/3 *Enron and Ponderosa Assets v Argentina* [2004] para 52; ICSID Decision on Jurisdiction ARB/00/5 *Autopista Concesionada de Venezuela v Venezuela* [2001] paras 114 et seq.
247 ICSID Decision on Jurisdiction ARB/01/3 *Enron and Ponderosa Assets v Argentina* [2004] paras 55 et seq.
248 ICSID Decision on Jurisdiction ARB/81/1 *Amco Asia v Indonesia* [1983] para 14; *Amerasinghe*, Jurisdiction of Specific International Tribunals p. 473.
second, and possibly third, fourth, or xth degree. It argued that the ICSID Convention did not allow for consideration of the nationality of the ultimate controller in the case of pyramidal corporate group structures. According to Article 25 (2) b ICSID Convention, the local subsidiary has the same nationality as the person, legal or natural, who controls it. This particular argument claimed, on the contrary, that the nationality of the controlling person is determined according to the classical concept described above at 2. This determination would thus not allow any piercing of the corporate veil, as Article 25 (2) b ICSID Convention does not apply for such a determination. This approach seems to be outdated and no longer applied. In fact, in SOABI v Senegal the tribunal relied on the ultimate controller to establish its jurisdiction.

Some authors suggest a pragmatic approach with regard to this point. They consider SOABI v Senegal and Amco v Indonesia as reconcilable. SOABI v Senegal declared that a mere holding corporation would not be considered a controller of the locally incorporated subsidiary. On the contrary, as AMCO v Indonesia had shown, the tribunal would stop its examination at an interposed parent corporation pursuing activities in the jurisdiction in which they are incorporated. Accordingly, they suggest that the parent corporation within the corporate group structure that has the nationality of a contracting state should be decisive for determining the local subsidiary’s controller in the sense of Article 25 (2) b ICSID Convention. As long as, of course, the consenting parties have agreed on a specific definition of control or a specific decisive layer within the corporate structure. The control of this corporation needs not be exclusive or dominant,

250 ICSID Decision on Jurisdiction ARB/81/1 Amco Asia v Indonesia [1983] para 14.
253 Amerasinghe, Jurisdiction of Specific International Tribunals p. 470 et seq.; C. F. Amerasinghe, Jurisdiction Ratione Personae under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, British Yearbook of International Law 47 (1974), 227, 258 et seq.;
as long as »some element or control [is] exercised by nationals of a contracting state«. 254

This seems to be a one-sided approach; the approach of recent ICSID tribunal awards is more balanced. 255 It takes the functional approach seriously, looking at the economic reality of the transnational corporate group. If the nationality of the controlling corporation is decisive under Article 25 (2) b ICSID Convention, its nationality has to be decisive in all cases. Hence, this functional approach might also lead to denying the tribunal’s jurisdiction in cases where the true controller has the nationality of a non-contracting state. 256 The tribunal in TSA Spectrum de Argentina v Argentina argued that, while Article 25 (2) b ICSID Convention allows the tribunal to pierce the corporate veil, it would also oblige it to search for the »real source« of control. It claimed that it cannot »stop short at the second layer it meets«, but must use the control test until it finds the objective controller. 257 In that case, the real controller was a national of the host state and thus the tribunal denied having jurisdiction. The interposed Dutch corporation could not alter this result, as it was not the real source of control. 258 Nonetheless, it is still unclear exactly how to go about finding the »real controller«, particularly if, for example, the immediate parent actually exercises the control and the ultimate parent has the power to control both the immediate parent and the subsidiary.

4. Special Requirements in Bilateral Investment Treaties

Alongside the application of Article 25 (2) b ICSID Convention, special requirements in the BIT may oblige the corporate group structure to be

254 Amerasinghe, Jurisdiction of Specific International Tribunals p. 481.
255 ICSID Award ARB/05/5 TSA Spectrum de Argentina v Argentina [2008] para 153.
257 ICSID Award ARB/05/5 TSA Spectrum de Argentina v Argentina [2008] para 147.
258 ICSID Award ARB/05/5 TSA Spectrum de Argentina v Argentina [2008] para 162. See also Schill, The Multilateralization of International Investment Law p. 232 et seq.
taken into account. The formalistic determination of the corporation’s nationality can lead to an extension of protection, as shown above. As a reaction, states have inserted limitations in their BITs. Contrary to Article 25 (2) b ICSID Convention, these special requirements limit the scope of jurisdiction. These limitations require taking into account the corporate group structure and considering the transnational corporate group rather than merely the single corporation. They can also prevent the »forum shopping« that the awards in migration of corporation cases discussed above at 3. c. have fostered.

For example, foreign investments made by subsidiaries that are wholly owned by a foreigner, (e.g. the parent heading the transnational corporate group) may be excluded from the BIT.\(^259\) In general, the BITs of the state of (formal) incorporation protect foreign investments made by these subsidiaries. However, home states can, and have been known to, limit the protection granted to those corporations that are both nationally incorporated and controlled, or in which nationals hold a specific amount (e.g. 50%) of shares. Here, the protection of a BIT depends on the corporate group structure. Hence, the BITs do not consider the corporations in isolation. On the contrary, these BITs explicitly perceive the locally incorporated subsidiaries in their integration in a transnational corporate group. Some BITs also only protect corporations that have both their effective management and incorporation in the contracting state.\(^260\) In transnational corporate groups, the effective management of a subsidiary can theoretically be located at the head office of the parent, at subsidiary level, or at some intermediate level.

Denial-of-benefits clauses are a more flexible option in this regard.\(^261\) These clauses give states the possibility to deny protection if the corporation is not controlled from its state of incorporation. Article 1113 NAFTA is a good example. According to Article 1113 (1) NAFTA, a party may deny the benefits of NAFTA to corporations that are owned or controlled

by investors from »inappropriate countries«. Article 1113 (2) NAFTA allows, after consultation, to deny the benefits to those (state party) corporations that are owned by non-state party investors and that have no substantial business in their state of incorporation. In both cases, the nationality of the controller is relevant and the tribunal is allowed to pierce the corporate veil. On the other hand, these detailed provisions prevent additional requirements being read into other NAFTA clauses.

5. Abuse in International Investment Law

The functional approach in many awards has led to a very broad application of international investment law. As a counterbalance, some BITs include special nationality requirements, as described above 4. The concept of abuse is another way to limit the application of international investment law or to exclude the application of a specific BIT. This concept is generally acknowledged in international investment law.

ICSID tribunals described circumstances that allowed piercing the corporate veil as those of abuse. It postulated that situations are necessary where the real beneficiary of the business misused corporate formalities in order to disguise its true identity and therefore to avoid liability. Similarly, the ILC Draft Articles on Diplomatic Protection postulate that

»when the corporation is controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the seat of

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263 ICSID (Additional Facility) Award ARB(AF)/00/3 Waste Management v Mexico [2004] para 85.

264 ICSID Award ARB/03/16 ADC Affiliate and ADC & ADMC Management v Hungary [2006] para 358. Similarly, the UNCITRAL tribunal showed »sympathy« for the argument that a corporation »which has no real connection with a State party to a BIT, and which is in reality a mere shell company controlled by another company which is not constituted under the laws of that State, should not be entitled to invoke the provisions of that treaty.« UNCITRAL Rules Partial Award Saluka Investment v Czech Republic [2006] para 240.
management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality.«

The threshold for abuse seems to be high.

If the BIT does provide any special requirements concerning the nationality of the investment, the tribunal will mostly not find an abuse. For example, in *Saluka Investment BV v Czech Republic*, the claimant was a Dutch subsidiary of

»a major international provider of banking and financial services, operate[d] through a complex of associated and subsidiary companies, and it [was] not always easy to distinguish the separate capacities in which they act«. The subsidiary was a special-purpose vehicle, solely and expressly established to hold shares in a Czech bank and to exercise the rights conferred by such a shareholding in accordance with instructions of its parent and other subsidiaries. The respondents claimed that due to these close ties, the real, or »bona fide«, investor was the English parent, who could not sue under the Dutch-Czech BIT. The tribunal agreed that the relationship was very close, but claimed that the BIT lacked any means to pierce the corporate veil due to its broad language. Similarly, the broad definition of investment used in the BIT did not allow for the corporate group construction to be viewed as an abuse. In *Autopista v Argentina*, in order to exclude an abuse, the tribunal reverted to the fact that the ultimate parent was incorporated in a non-tax haven state, that it facilitated the acqui-

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266 Hansen, Global Jurist Advances 10 (2010), 36 et seq.
267 UNCITRAL Rules Partial Award *Saluka Investment v Czech Republic* [2006] para 42.
268 UNCITRAL Rules Partial Award *Saluka Investment v Czech Republic* [2006] paras 70 et seq.
270 For this concept, see below Chapter III C. UNCITRAL Rules Partial Award *Saluka Investment v Czech Republic* [2006] paras 228 et seq.; ICSID Award ARB/03/16 *ADC Affiliate and ADC & ADMC Management v Hungary* [2006] paras 358 et seq.; Schill, The Multilateralization of International Investment Law p. 227.
sition of capital for the project, and that it actually exercised its voting rights.\textsuperscript{271}

In \textit{Banro v Congo}, however, the tribunal found an abuse.\textsuperscript{272} There, the parent of the locally incorporated subsidiary pursued both alleys: diplomatic protection from Canada and arbitration through its US subsidiary. The ICSID tribunal denied having jurisdiction. According to the tribunal, the corporate group was not allowed to rely on both diplomatic protection and arbitration as this would go against the aim of the ICSID Convention. The tribunal postulated that the corporate group as an investor could not

\textquote{»play […] on the fact that one of the companies of the group does not have the nationality of a Contracting State party to the Convention, and can therefore benefit from diplomatic protection by its home State, while another subsidiary of the group possesses the nationality of a Contracting State to the Convention and therefore has standing before an ICSID tribunal.«}

Interestingly, the tribunal considered the corporate group as a unity in declaring that the group was estopped using both avenues.

6. Summary

Contrary to general international law, international investment law applies to – or rather benefits – corporations. There are a considerable number of awards that deal with transnational corporate groups. In general, both BITs and arbitral tribunals take into account the specific connections within transnational corporate groups. As has been shown, the concept of control within the transnational corporate group is used to establish the tribunal’s jurisdiction and the applicable BIT. As a result, the concept of control within the transnational corporate group is quite well developed in international investment law. In most awards, power of control is sufficient. There, this power is either conveyed by ownership or specific circumstances such as special voting rights, the right to influence the management, or the right to select members in high management positions.

\textsuperscript{271} ICSID Decision on Jurisdiction ARB/00/5 \textit{Autopista Concesionada de Venezuela v Venezuela} [2001] paras 123 et seq. See also Wisner and Gallus, Journal of World Investment & Trade 5 (2004), 938.

While tribunals acknowledge interrelations within the corporate group, they examine the parent’s and the subsidiary’s standing separately.\textsuperscript{273} Similarly, the interrelations within a transnational corporate group are not always taken into account in substantive matters. If shareholders – including parent corporations – claim compensation, they must prove state interference in their shares. Or, in cases where the state action concerned the local subsidiary, the parent must prove that this state action also interfered with its property rights. Likewise, the recoverable damages are connected to the interference and are hence different for the corporation/subsidiary and its shareholders/parent.\textsuperscript{274} On the contrary, the fair and equitable standard is owed identically to shareholders as it is to direct investors.\textsuperscript{275} Thus, the picture is mixed. While, in some aspects, the corporate group is taken as a whole and inequitable treatment to the subsidiary can be compensated to the parent corporation, in general the separation of legal entities is upheld. Hence, international investment law practice is more ambiguous than Hansen suggests. He concluded that international investment law practice has recognised transnational corporate groups as one actor and not – as is the case in traditional international law – as several legal persons subject to their respective national laws.\textsuperscript{276} Indeed, in most case the parent can initiate arbitration proceedings as soon as one of its subsidiaries is affected.\textsuperscript{277} On the contrary, the transnational corporate group is not seen as an entity. Instead, acts and features of one corporation within the group will often be attributed to other corporations of the group.

Furthermore, notwithstanding the importance of transnational corporate groups in international investment law, there is no unified transnational corporate group concept in international investment law or a fixed set of criteria to decide on the decisive level of control.

\textit{D. Transnational Corporate Groups in Soft Law}

To counterbalance the lack of corporate accountability in international treaty law, many international actors have developed »soft law« docu-
ments, such as guidelines, declarations or norms. These »soft law« documents are not enforceable through courts, neither national nor international, but they often directly address corporations. They have also played a non-negligible role in fostering the debate on corporate social responsibility. However, the fact that the international community encounters economic actors and especially organisations, often implicitly including transnational corporate groups, only through non-enforcing soft law is seen as a proof that they owe no international law duties de lege lata. Additionally, the documents still rely heavily on the assistance of states – particularly for their implementation and enforcement. Importantly, none of those instruments include a fully developed definition of their object of regulation. Many documents do not address the question at all, while others do not elaborate any further than a short statement.

Three examples – the Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights, the OECD Guidelines and the ILO Tripartite Declaration – illustrate that point. As the list of codes of conduct, guidelines, or other recommenda-

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279 With regard to environmental law and product liability, see e.g. Glinski, Die rechtliche Bedeutung der privaten Regulierung globaler Produktionsstandards.

280 See in detail above C. Geldermann, Völkerrechtliche Pflichten multinationaler Unternehmen p. 310. Later on (315, 317) he accepts that transnational corporations have international law duties with regard to jus cogens but also customary international law.

281 Deva, Regulating Corporate Human Rights Violations. Humanizing Business p. 8. For a study of initiatives by two Canadian mining corporations to adopt their own human rights standards, see H. S. Dashwood, Canadian Mining Companies and Corporate Social Responsibility. Weighing the Impact of Global Norms, Canadian Journal of Political Science 40 (2007), 129 et seq. The study points out that corporations do not merely react to societal pressures, but also try to proactively shape (inter)national corporate social responsibility norms. For an analysis of the Core Standards for Corporate Responsibility by the World Development Movement, which directly addresses corporations while states still »own the agreement«, see Woodroffe, Regulating Multinational Corporations in a World of Nation States, in: Addo (ed.), Human Rights Standards and the Responsibility of Transnational Corporations, p. 134 et seq.

282 The Global Compact is not treated because it is not regulative. In that sense, see also Glinski, Die rechtliche Bedeutung der privaten Regulierung globaler
tory, non-binding documents concerned with corporate social responsibility or with the interaction of corporations with human rights, labour or environmental law is ever-growing, a selection had to be made. The selected documents reflect the wide range of actors involved: a UN institution, an international economic organisation and forum for governments, and an organisation bringing together governments and workers’ and employers’ associations. Moreover, the three documents are widely discussed and have thus gained the greatest influence in academic literature and international fora. The focus, parallel to the focus of the whole project, is not on the content of the instruments,283 but on their concepts of transnational corporate groups – or lack thereof.

1. UN Norms and the Special Representative

The first example is the »Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights« (UN Norms) adopted by the UN Economic and Social Rights Committee. They have been described as a »singularly important contribution«,284 a »first step towards international law«285 and the »most compre-


hensive proposed outline of human rights duties for TNCs [transnational corporations].\textsuperscript{286} However, they have been received with mixed response\textsuperscript{287} The document can be divided in four parts: (1) a long preamble including an extensive list of human rights documents; (2) a substantive part; (3) a part concerning implementation and (4) a part defining the four most important terms used in the UN Norms.\textsuperscript{288}

Remarkably, the UN Norms are not only addressed to states; they also contain obligations for corporations.\textsuperscript{289} Even though Weissbrodt in partic-

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289 Jonge, Transnational Corporations and International Law p. 36; Kinley, Company Lawyer 25 (2004), 302; Koenen, Wirtschaft und Menschenrechte -
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ular has claimed that the UN Norms can be seen as «the first nonvoluntary initiative accepted at the international level»,\textsuperscript{290} these duties are legally non-binding.\textsuperscript{291}

The UN Norms at least acknowledge the particularity of transnational corporations and provide a basic definition. Unfortunately, in their final version, they do not pay sufficient attention to the specificities of corporate groups. The definition was, in fact, more sophisticated in an earlier draft, which defined a «transnational corporation» as

»an enterprise, whether of public, private or mixed ownership, comprising entities in two or more countries, regardless of the legal form and fields of activity of these entities, which operates under a system of decision-making, permitting coherent policies and a common strategy through one or more decision-making centres, in which the entities are so linked, by ownership or otherwise, that one or

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Staatliche Schutzpflichten auf der Basis regionaler und internationaler Menschenrechtsverträge p. 28.
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\textsuperscript{290} Weissbrodt and Kruger, American Journal of International Law 97 (2003), 903. According to Weissbrodt and Kruger, the legal authority of the UN Norms is derived from their reference to human rights treaties that are themselves legally binding (913, see Preamble para 4 of the UN Norms). However, other soft law instruments also refer extensively to human rights treaties without any consequences for their legal status. It is thus far from clear as to why this reference only enhances the legal force of the UN Norms. See also Geldermann, Völkerrechtliche Pflichten multinationaler Unternehmen p. 122.

\textsuperscript{291} The implementation provisions and the mechanisms for submitting information about non-complying enterprises do not alter the finding. They can also be found in other soft law documents, such as the OECD Guidelines. Additionally, while the language resembles that of international treaties (for this argument, see C. F. Hillemanns, UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, German Law Journal 2003, 1065, 1069), no state has ratified the UN Norms as an international treaty. See also Köster, Die völkerrechtliche Verantwortlichkeit privater (multinationaler) Unternehmen für Menschenrechtsverletzungen p. 89, who doubts that corporations are already legally bound by international human right law treaties or soft law instruments. Similarly, Ruggie heavily criticised the aim of the UN Norms »to impose on companies, directly under international law, the same range of human rights duties that states have accepted for themselves under treaties they have ratified«. J. G. Ruggie, The Construction of the UN »Protect, Respect and Remedy« Framework for Business and Human Rights. The True Confessions of a Principled Pragmatist, European Human Rights Law Review (2011), 127 et seq. He aimed to »device a smart mix of reinforcing policy measures« »beyond the mandatory-vs.-voluntary dichotomy« Ruggie, Just Business. Multinational Corporations and Human Rights p. xxiii.
more of them [maybe able to] exercise a significant influence over the activities of others, and, in particular, to share knowledge, resources and responsibilities with the others.«

Thus, although using the term »transnational corporation«, the drafters seem to mainly have had transnational corporate groups in mind. The draft definition included a higher degree of differentiation because it described the group structure as well as the mechanisms of control and influence.

The final version lacks this level of complexity, defining a »transnational corporation« merely as

»an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively«.

The term »cluster of economic entities« might include transnational corporate groups. It hints at the possibility of considering a cluster of economic entities, and thus a transnational corporate group, as a single entity, which would allow attribution of responsibility to the group and not merely to its components. Nevertheless, the concept remains very vague. This can also be seen in the remaining part of the description of addressees. The UN Norms also apply to so-called »other business enterprises«, including pure national ones.

Cited according to Weissbrodt and Kruger, American Journal of International Law 97 (2003), 908 et seq.; emphasis added.


In a similar vein, see also McBeth, International Economic Actors and Human Rights p. 279. Apparently, the UN Guiding Principles shall also apply to corporate groups, see Commentary to Principle 14 of the UN Guiding Principles.

During the deliberations, some argued for limiting the scope of application to transnational corporations: Deva, ILSA Journal of International and Comparative Law 10 (2004), 502; Hillemanns, German Law Journal 2003, 1072; Jonge, Transnational Corporations and International Law p. 36; Nowrot, Normative Ordnungsstruktur und private Wirkungsmacht. Konsequenzen der Beteiligung transnationaler Unternehmen an den Rechtssetzungsprozessen im internatio-
»include […] any business entity, regardless of the international or domestic nature of its activities, including a transnational corporation, contractor, subcontractor, supplier, licensee or distributor; the corporate, partnership, or other legal form used to establish the business entity; and the nature of the ownership of the entity«.296

This concept is very broad and goes far beyond the borders of corporate groups. Rather, it tries to include all economic relationships of a corporation. For example, it (non-bindingly) obliges corporations to ensure that their contracting partners respect human rights. Ruggie criticises this, claiming that »companies cannot be held responsible for the human rights impacts of every entity over which they may have some influence« especially in cases of mere supply chains and remote control.297

The notion of enterprises was chosen instead of the notion of corporations. Enterprises would be more inclusive compared to corporations that only describe legal entities.298 In that vein, Weissbrodt emphasises the need for

nalen Wirtschaftssystem p. 67; Weissbrodt and Kruger, American Journal of International Law 97 (2003), 909 et seq.

296 Article 21 UN Norms. A similar, albeit shorter, version is used in the UN Guiding Principles, see Principle 14: »The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise’s adverse human rights impacts.«

297 Ruggie, Protect, Respect and Remedy. A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, A/HRC/8/5, 7 April 2008, para 69. Likewise, see Jonge, Transnational Corporations and International Law p. 39, who argues that this would assume that »can implies ought«. The UN Guiding Principles use a slightly attenuated concept and acknowledge that the possibilities of »business enterprises« to respect human rights vary according to the specific relationships (see Principle 14.). Nonetheless, the UN Guiding Principles generally apply in any »business relationships«, including supply chains and including scenarios where the »business enterprise« has not contributed to the human rights violation (see Principle 13 and corresponding Commentary). Two attenuations are made: First only those human rights impacts that are »directly linked« are addressed. Second, »business enterprises« are (only) required to »seek to prevent or mitigate adverse human rights impacts« in this area.

Chapter I: Transnational Corporate Groups in International Law

a broad definition of transnational corporations to limit the risk of evading the UN Norms. Otherwise, according to him, corporations could artificially disguise their transnational nature.299 The aim of the UN Norms is thus to create a level playing field through an inclusive definition. It does not refer, unlike in most other documents and literature, to the criteria of control, but simply refers to the concept of »economic entity«.300 Weissbrodt claims that the UN Norms nonetheless

»establish a system of relative application based on the strength, size, and other varying factors of a business that bear on its ability to affect human rights. This nuanced approach does not lower the standards for any business; it simply ensures that those with greater power and influence will also have greater responsibilities.«301

All these features are deduced from the simple phrase, »Within their respective spheres of activity and influence«.302 No further explanation is given. Firstly, the concept of »economic entity«, a concept of essential relevance for transnational corporate groups, is neither defined nor further illustrated in the UN Norms themselves nor in their commentary. This broad and short definition has its downsides. Economic organisations will not be able to know in advance which specific duties apply to them.

Secondly, the phrase »spheres of influence« is not explained further; it only provides vague and general indications for the relevant scope of addressees.303 In the aftermath, the »Special Representative on the Issue of Human Rights and Transnational Corporations and other Business Enterprises« Ruggie tried to »clarify the Concepts of ‘Sphere of influence’ and

301 Weissbrodt and Kruger, American Journal of International Law 97 (2003), 911.
302 Article 1 UN Norms. The notion »sphere of influence« is not used in the UN Guiding Principles. They use a slightly more levelled approach as described in footnote 288.
'Complicity'«. The concept of the sphere of influence, used first in the Global Compact, embraces not only the responsibility of corporations in their workplace but also, more broadly, suppliers, the marketplace, the community and governments. This concept might point to the possible actions and influence of corporations with regard to human rights. However, even after the clarifications, it is too imprecise to be used to attach legal responsibility to corporations. Indeed, even Ruggie warns that these notions are more metaphors and that a more rigorous approach is needed to define legal responsibilities.

If the UN Norms are to attribute specific responsibility to corporations for their violations of human rights, it is not only the content of the responsibility that must be clear; the specific addressee of the obligation must also, importantly, be determined in advance. Both areas are intertwined. If the group of addressees is vague, the actual scope of obligations also remains unclear. Even the Special Representative’s further explana-


305 Jonge, Transnational Corporations and International Law p. 38. The term »sphere of influence« has been erased from most parts of the global compact website, notably from the overview of the 10 principles. Instead, the term »wherever they [i.e. businesses] have a presence« (https://www.unglobalcompact.org/what-is-gc/mission/principles, last visited: 16.01.2017) is used, an own website for sustainable supply chains (http://supply-chain.unglobalcompact.org/, last visited: 16.01.2017) has been created and it is assumed that if the parent corporation adheres to the Global Compact, all subsidiaries participate as well (answer to Question »What if my company chooses to no longer participate in the UN Global Compact?« at: https://www.unglobalcompact.org/about/faq, last visited: 16.01.2017).


309 See also Thurner, Internationales Unternehmensstrafrecht. Konzernverantwortlichkeit für schwere Menschenrechtsverletzungen p. 184 et seq.
tions have not solved this problem. He identified three dimensions – protect, respect and remedy – that states and corporations have to fulfil jointly. Corporations have to conduct due diligence to ensure the respect of (potentially all) human rights. »Social expectations«, according to Ruggie, define the exact scope of the duty. In order to be effective, it should include a human rights policy, an impact assessment, integration throughout the corporation and a tracked performance for sustainable changes.

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312 The exact scope of this due diligence depends on the circumstances, on the special situation of the territory in which the corporation is working, and the specific risks of the pursued activities and the relationships (e.g. supply chain) connected to the activities: Ruggie, Protect, Respect and Remedy. A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, A/HRC/8/5, 7 April 2008, paras 54 et seq. See similarly Weissbrodt, Minnesota Journal of International Law 23 (2014), 143.

The state, on the other hand, can use »a company’s policies, rules and practices to determine criminal liability and punishment«.314

These elements depict a rather substantive approach towards corporations as the object of regulation. However, Ruggie does not elaborate his concept of corporations any further, thus he does not offer a comprehensive definition of his object of research. Instead he uses a variety of terms such as »company«, »corporation«, »business« and »firm« interchangeably. Although it seems he is mostly concerned with transnational corporate groups, he neither uses the term »transnational corporate group« nor makes any explicit reference to the group structure. Materially, Ruggie’s own propositions rely heavily on national law or corporate self-regulation – although he himself emphasises the deficits of these measures.315 His procedural propositions seem to neglect the possibilities that international criminal law, in particular, offers.316

In summary, an obligation to »do the best you can« – which seems to be, in a nutshell, the approach of the UN Norms and also that of the UN Guiding Principles – admittedly has the advantage of being an inclusive, catchall phrase. However, it remains particularly vague and provides no guidance for economic organisations – especially for transnational corporate groups acting in different jurisdictions and through various subsidiaries that are controlled to differing degrees. Instead, it gives greatest discretion to the UN Norms’ enforcer to determine ex post what would have been feasible for the economic organisation. Additionally, a clearer definition of who has which duty also has a preventive function. While many of these issues were debated during the drafting of the UN Norms,317 these


317 Weissbrodt and Kruger, American Journal of International Law 97 (2003), 908 et seq.
nuances did not enter into the final version, being instead »resolved« by a catchall definition.

2. OECD Guidelines

The OECD Guidelines for Multinational Enterprises (OECD Guidelines) were first drafted in 1976 as a «tool for maximizing the benefits of foreign investments” without giving any consideration to human rights. They are embedded in the wider OECD framework as they constitute one element of the 1976 OECD Declaration on International Investment and Multinational Enterprises. In the meantime, obligations to adhere to human rights have also been included. An extensive consultation process with businesses, trade unions, NGOs, international organisations and OECD bodies, as well as non-adhering countries, preceded the last update in 2011. As a result, more detailed provisions on business and human rights were inserted. For example, the new version calls on the economic organisation to perform a risk-based due diligence procedure to identify and address human rights issues and to avoid complicity with human right violations. Importantly, the scope of responsibility has been expanded to include supply chains and business relations. Additionally, an improved enforcement mechanism based on National Contact Points was

322 Chapter IV OECD Guidelines.
added in 2000 and refined in the latest update. These contact points are primarily responsible for the implementation of the OECD Guidelines. They are required to be followed up at national level. Santer argues that they have proven effective in changing the corporate culture. According to him, the OECD as an »international economic organization […] is uniquely suited to tackle cross-cutting issues«. However, the OECD, contrary to the UN, only comprises part of the world. Even though some of the non-member states adhere to the OECD Guidelines, the OECD Guidelines in general »only relat[e] to operations within 32 of the wealthiest nations«. The OECD complaint procedures at the national contact points might allow for a further development of the duties enshrined in the OECD Guidelines. However, as Clapham points out, the OECD Guidelines do »not represent a judicial or even quasi-judicial finding«. They are still non-binding standards of conduct.

More importantly, the OECD Guidelines expressly refuse to provide a comprehensive definition of its object of regulation. They do not, how-


331 Clapham, Human Rights Obligations of Non-State Actors p. 207.


ever, remain completely silent on that point. Rather, they depict an incoherent concept of corporate groups. They loosely describe the different forms of economic organisations and claim that the guidelines are to be enforced according to the »actual distribution of responsibilities«. While the OECD Guidelines are addressed to enterprises in general, hinting at an economic instead of legal concept, the commentary distinguishes obligations of parent corporations and those of subsidiaries. Horn claims that the broad concept and the fact that the OECD Guidelines rely on the actual distribution of responsibilities »includes a responsibility of a parent company for its subsidiary«. Nonetheless, even he contends that the exact scope of liability remains unclear. The loose description leaves it open as to what extent corporate groups – or, as Stockmann calls them, »multinational enterprises in toto« – are addressees of the OECD Guidelines. An analysis of the OECD Guidelines reveals that they apply more to the different (legal) entities than to the corporate group as an entity. They pay attention to the group character only via the concept of »responsibility« of the parent, as a subsidiary »controlled« by its parent is not responsible for its conduct. While this interpretation sounds plausible, it merely shifts the problem from the concept of economic entity or enterprise – where the UN Norms had located the corporate group element – to that of economic organisation.

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335 OECD Guidelines Commentary Chapter II paras 8 et seq.

336 N. Horn, International Rules for Multinational Enterprises: The ICC, OECD, and ILO Initiatives, American University Law Review 30 (1980), 923, 934. For Schmalenbach this is the strength of the description as it is »plain and thus convincing«, while she neglects that this plain description simply describes the usual case and thus does not embrace, as she notes herself, the complexity and different forms of transnational corporations: Schmalenbach, Archiv des Völkerrechts 2001, 59. It remains unclear as to why a description that needs two pages of explanation and illustration should be convincing instead of – not least for the sake of legal clarity – including these elements in the description to make it a definition, as this project will try to do.


responsibility without much gain. Moreover, it is questionable how far the element of control, a very important element in the context of transnational corporate groups, is still relevant. According to Blanpain, the element of control had made the description appropriate as this element is »the backbone of the multinational enterprise«.\textsuperscript{340} Since the amendments in 2000, however, the description relies less on the notion of control. This is said to pay due regard to the shift towards decentralised corporate governance.\textsuperscript{341} As a detrimental side-effect, it only serves to make the definition more fuzzy.

Additionally, cases in which the OECD Guidelines have been invoked do not provide a concise concept of corporations or transnational corporate groups. The OECD Guidelines have a long tradition as an international soft law document. Many implementation cases that concern transnational corporate groups and obligations of parent corporations towards their subsidiaries stemming from the OECD Guidelines have been invoked ever since. A prominent example is the \textit{Badger} case.\textsuperscript{342} There, Badger, a transnational corporate group, closed its Belgian subsidiary without paying its debt – including indemnities for dismissal.\textsuperscript{343} In 1976, it was seen to be a successful\textsuperscript{344} test case for the OECD Guidelines.\textsuperscript{345} In the end, discussions of the case on the OECD level led Badger to settle with the Belgian workers.\textsuperscript{346} One should bear in mind that this case, like others that followed, relied on the voluntary implementation of the Guidelines: The parent corporation was induced to adhere to the legally non-binding OECD Guidelines by public opinion. These processes did not deal in detail with the question of the boundaries of imputing responsibility to parent corporations or their exact legal grounds. Thus, the »cases« are of little

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\textsuperscript{341} Koenen, Wirtschaft und Menschenrechte - Staatliche Schutzpflichten auf der Basis regionaler und internationaler Menschenrechtsverträge p. 45.
\textsuperscript{342} Horn, American University Law Review 30 (1980), 931; A. F. Lowenfeld, International Litigation and the Quest for Reasonableness, 1996 p. 94.
\textsuperscript{343} Horn, American University Law Review 30 (1980), 931.
\textsuperscript{344} Blanpain, The Badger Case and the OECD Guidelines for Multinational Enterprises p. 128.
\textsuperscript{345} Horn, American University Law Review 30 (1980), 932.
\textsuperscript{346} For a detailed description and analysis of the case, see Blanpain, The Badger Case and the OECD Guidelines for Multinational Enterprises.
help in clarifying the concept of enterprises, let alone transnational corporate groups.

3. ILO Tripartite Declaration

The Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (ILO Tripartite Declaration) of the ILO considers itself as »social policy guidelines in a sensitive and highly complex area of activities«.\textsuperscript{347} Amao calls it »the first effort by the international community to set corporate responsibility standards for [multinational corporations]«.\textsuperscript{348} Remarkably, three types of actors – employees, corporations and government groups – drafted the document.\textsuperscript{349} Its scope is limited to »all of the areas of ILO concern which relate to the social aspects of the activities of multinational enterprises«.\textsuperscript{350} On the other hand, it has a wider target group: »in addition to multinationals, the Declaration is addressed to governments and employers’ and workers’ organizations.«\textsuperscript{351} In 1981, a mechanism was installed to help to solve »disputes concerning the application« of the Declaration.\textsuperscript{352} A body of experts, the Officers of the Committee on Multinational Enterprises,\textsuperscript{353} can be called on to interpret the Declaration’s provisions. This body, parallel to the OECD guidelines, is not a quasi-judicial body but its role is »limited to clarifications of the interpretation of the instrument«.\textsuperscript{354} The Sub-Committee on Multinational Enterprises conducts a survey on the implementation of the Declaration. These surveys remain on a general or superficial level. In particular, no

\begin{thebibliography}{99}
\bibitem{347} ILO Tripartite Declaration, 4th ed. 2006, p. v.
\bibitem{348} \textit{Amao}, International Company and Commercial Law Review 21 (2010), 279.
\bibitem{349} \textit{Amao}, International Company and Commercial Law Review 21 (2010), 279; \textit{Anderes}, Fremde im eigenen Land. Die Haftbarkeit transnationaler Unternehmen für Menschenrechtsverletzungen an indigenen Völkern p. 121.
\bibitem{350} Article 1 ILO Tripartite Declaration, 4th ed. 2006.
\bibitem{351} \textit{Clapham}, Human Rights Obligations of Non-State Actors p. 212.
\bibitem{352} \textit{Clapham}, Human Rights Obligations of Non-State Actors p. 217.
\bibitem{354} \textit{Kinley and Tadaki}, Virginia Journal of International Law 44 (2004), 950.
\end{thebibliography}
names are given and the report tries to be as balanced as possible.\textsuperscript{355} As a result the Declaration is »non-binding and unenforceable« with lesser legal value than the ILO Conventions discussed above.\textsuperscript{356}

Again, this ILO Declaration explicitly refuses to give a definition of »multinational corporations« and thus also of transnational corporate groups.\textsuperscript{357} The reason for this seems to be that the authors of the Declaration are confident that corporate groups will designate the responsible entity internally. The Declaration thus uses the same vague and inadequate concept as the OECD Guidelines and the UN Norms.

4. \textbf{Summary}

The soft law instruments analysed do not provide a concept of transnational corporate groups for international criminal law. At the very least, they do address economic organisations. Some soft law instruments offer a kind of definition of transnational corporate groups. However, as shown, these definitions are not elaborated on and remain too vague to be used for attaching legal responsibility. Many soft law documents merely predispose a vague concept of the »multinational enterprise«. Different terms such as »multinational enterprise«, »transnational corporation«, »company«, »firm« and »business2 are used, sometimes interchangeably, without any clear distinction or explanation. This lack of clarity is partly a result of the focus of soft law instruments, which are constructed to trigger a debate and conscience in »global society“ about these topics. In that sense, soft law instruments aim to hold transnational corporations socially rather than legally responsible.\textsuperscript{358} The focus of this project, however, is to find a defi-

\begin{itemize}
\item \textsuperscript{355} \textit{Clapham}, Human Rights Obligations of Non-State Actors p. 216 et seq. See also \textit{Jonge}, Transnational Corporations and International Law p. 30: »at best, a weak and ineffective instrument«.
\item \textsuperscript{356} \textit{Jonge}, Transnational Corporations and International Law p. 29. For the ILO Conventions, see above A. 2.
\item \textsuperscript{357} ILO Tripartite Declaration, 4th ed. 2006, para 6; \textit{Clapham}, Human Rights Obligations of Non-State Actors p. 212.
\item \textsuperscript{358} \textit{Joseph}, Netherlands International Law Review 46 (1999), p. 183 argues that soft law instruments cannot be relied on to hold corporations accountable for human rights abuses, for example, as soft law instruments are not legally binding. For the (constitutional) function of soft law from a systems theory point of view and its interrelations with corporate codes of conducts see G. \textit{Teubner},
\end{itemize}
nition that can be used to hold transnational corporate groups criminally responsible on an international level. As a consequence, the soft law terminology used is of little help.

E. Summary

The analysis of international law has shown that, so far, no unified concept or definition of transnational corporate groups exists. Not one of the documents discussed contains a stringent concept of transnational corporate groups. Similarly to the discussion in international criminal law, the overwhelming majority – and with it the corresponding literature – do not address this question at all. Nonetheless, some relevant points can be taken from those authors that do address the question – particularly from international investment law. First of all, the discussion on corporations as subjects of international law shows that considering transnational corporate groups as a single entity would enhance the effective enforcement and equal application of international law. Secondly, control within transnational corporate groups is an important factor. As arbitral practice in international investment law illustrates, control can take different forms and magnitudes. It can vary from mere power to control to control of the actual day-to-day business of corporate entities within the corporate group. Mostly, it will be conferred through ownership or special voting or other decision making rights.

More generally, the analysis of international law has shown the importance of having a thorough concept of transnational corporate groups. While international law currently offers no concept of transnational corporate groups for international criminal law, it would in turn certainly profit greatly from such a concept.

Chapter II: Transnational Corporate Groups in EU Competition Law

Compared to international law, EU competition law offers a well-developed concept of transnational corporate groups. Additionally, as has been mentioned in the introduction, it is well suited for deducting general criteria that can be used to define the economic organisation that should be held responsible in international criminal law. For this thesis, it is thus taken as the main legal order of reference.


This chapter will analyse the treatment of corporate groups in EU competition law. Criteria will be extracted that show under which circumstances and to what extent corporate groups should be held liable for the conduct of their members. Hence, only those parts of EU competition law that deal with corporate groups and their inner structure are of relevance. The focus will be solely on Commission decisions and Court of Justice of the European Union (CJEU) judgments. Even though both Member States and the Commission enforce EU competition law,\footnote{So-called parallel enforcement system, introduced by Regulation 1/2003.} it is almost exclusively the Commission that deals with transnational corporate group cases. Transnational corporate groups are by definition active in more than one
Chapter II: Transnational Corporate Groups in EU Competition Law

state. In turn, the Commission assumes responsibility as soon as trade between more than three Member States is affected.\(^\text{361}\) Trade between Member States being affected, traditionally interpreted broadly,\(^\text{362}\) is a necessary prerequisite for the application of EU competition law and the Commission’s jurisdiction.\(^\text{363}\)

EU competition law has developed an autonomous concept of economic organisations called »undertakings«. This concept can perceive corporate groups as one single economic entity (A.). Corporate groups are seen as a single economic entity if the parent has the power to control and also actually exercises decisive influence over its subsidiaries. Over the years, a detailed set of factors for establishing parental control has emerged from different areas of EU competition law (B.). Thereby, EU competition law has managed to develop a concept that can deal with problems specific to transnational corporate groups on all relevant levels of attribution and en-

\(^{361}\) Commission, Notice on Cooperation within the Network of Competition Authorities, [2004] OJ C 101/43 para 14. The Member States focus on competition law infringements within national borders because they are closer to the facts. For the close-to-the-citizen (Bürgernähe) approach, see in general Article 1 II Treaty on the European Union (TEU).


A. Corporate Groups as one Undertaking

Undertakings are the sole addressee of EU competition law. The term is not defined in EU primary law; its basic definition was given in the Höfner judgment: »every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed«.364 This definition reveals an autonomous, European and functional understanding of undertakings. The focus is on the action in question,365 little attention is paid to the national classification of the actor.

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The »entity engaged in economic activity« described in the Höfner ruling can consist of various national legal persons and thus a corporate group. This single economic entity does not need to have a legal personality of its own. According to well-established case law, a single economic entity consists of a unitary organisation of personal, tangible and intangible elements, which pursue a specific economic aim on a long-term basis. The European Court of Justice (ECJ) has expressly detached EU competition law from national corporate law, where parent and subsidiary are seen as separate legal entities. In corporate groups, the formal separation between members of the corporate group would often not outweigh the unity of their conduct on the market [...] Hence, in EU competition law, the parent and the subsidiary are considered a single economic entity if the subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links which tie those two legal entities.  

B. Control as a Decisive Criterion

Decisive influence over the subsidiary, or parental control, is the core criterion in EU competition law for a corporate group to be perceived as a single economic entity. Over the years, a considerable amount of case law has established a set of factors describing parental control. These general criteria can be traced back to secondary legislation as well. The Merger Regulation uses the same set of criteria to decide whether a change of control occurred.\textsuperscript{371} Due to its forward-looking nature,\textsuperscript{372} it focuses on the parent’s effective possibility of decisive influence.\textsuperscript{373} Hence, the standardised concept of power to control in the Merger Regulation can be used with the first part of the concept of undertaking (power to control) as well.\textsuperscript{374} This attaches further legitimacy and credibility to the concept of

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\textsuperscript{371} The Commission describes a \textit{(de facto)} merger as a combination of »activities of previously independent undertakings« that result in the creation of a single economic unit.\textit{« Commission, Jurisdictional Notice on the Control of Concentrations between Undertakings, [2008] OJ C 95/1 para 10. The notion of single economic entity is the same as in Articles 101 and 102 TFEU cases: I. Kokkoris and H. A. Shelanski, EU Merger Control. A Legal and Economic Analysis, para 4.12. Hence, a ‘merger’ of dependent corporations is considered as mere »internal restructuring within the group« outside the application of the Merger Regulation: \textit{Commission, Jurisdictional Notice on the Control of Concentrations between Undertakings, [2008] OJ C 95/1 para 10 footnote 9.}

\textsuperscript{372} \textit{Whish and Bailey, Competition Law p. 817.}

\textsuperscript{373} \textit{Commission, Jurisdictional Notice on the Control of Concentrations between Undertakings, [2008] OJ C 95/1 para 16; J. Cook and C. Kerse, EC Merger Control, para 2-014; L. S. Morais, Joint Ventures and EU Competition Law, 2013 p. 149. The power of decisive influence can be established »by rights, contracts or any other means«: Article 3 (2) EUMR. See also A. Jones and B. Sufrin, EU Competition Law, 4th ed., 2011 p. 869.}

\textsuperscript{374} \textit{N. I. Pauer, The Single Economic Entity Doctrine and Corporate Group Responsibility in European Antitrust Law, 2014 p. 174. The notion of control in the EUMR also comprises, under specific circumstances, licenses, leases and very long-term supply agreements if coupled with structural links conferring control over the management and resources. Hence, it might concern situations that go beyond forming a corporate group: \textit{Whish and Bailey, Competition Law p. 834 et seq. See also Commission, Jurisdictional Notice on the Control of Concentrations between Undertakings, [2008] OJ C 95/1;}
undertakings in EU competition law. Firstly, the Merger Regulation was elaborated and adopted by all Member States. Thus, all EU Member States have sanctioned the criteria used as determining the parent’s power to control. Secondly, the criteria were elaborated beforehand on an abstract level. They were designed to cover all possible cases rather than be subject to a case-by-case interpretation. Thirdly, it shows the widespread use of economic criteria to deal with corporate groups. It provides further evidence that the functional notion is workable and leads to acceptable and fair results. Consequently, the analysis of the concept of parental control in EU competition law will rely on cases concerning Articles 101 and 102 TFEU as well as the Merger Regulation.

The corporate group is not always seen as a single economic entity. Only if the parent was able to exercise decisive influence over the policy of the subsidiary and in fact used this power, will the parent and those subsidiaries over which the parent exercised decisive influence form a single economic entity. Parental ownership is, in this context, the most visible evidence of power to control. Additionally, in the case of sole ownership, the actual exercise of decisive influence will be presumed (1.). In other cases, the specific structure of and relationships within the corporate group will be used to prove that decisive influence has been exercised.

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C. Heinichen, Unternehmensbegriff und Haftungsnachfolge im Europäischen Kartellrecht, 2011 p. 58 et seq.

375 See also G. Scassellati-Sforzolini and L. Garzaniti, Liability of Successor Undertakings for Infringements of EC Competition Law Committed Prior to Corporate Reorganisations, European Competition Law Review 16 (1995), 348, 349 who summarise as indicia against decisive influence: the entity has its own management and personnel, annual operating budgets, strategic plans, financial statements, price lists, letterhead; that it holds itself out to customers and competitors and is perceived by them as a separate unit; that it has its own sales force and sales offices; and that it participates in industry groups in its own name. Similarly, the Commission considered the parents of a joint venture as separate economic entities because they did not belong to the same group, they were not controlled by a single person and each determined its conduct on the market independently: Commission Decision Case IV/32.732 Ijsselcentrale and others [1991] paras 24.

B. Controll as a Decisive Criterion

(2.). The parent of a wholly owned subsidiary will, in turn, use these indicia to rebut the presumption. The parent needs to show that the subsidiary acted in complete autonomy (3.). Thus, the indicia used are not merely competition law specific. Rather, they can serve as a blueprint for international criminal law (4.).

1. Control via Shareholdings

Shareholdings are the most obvious structural link between parent and subsidiary. These shareholdings need not be vested in one legal or natural person, but might also be held by several natural persons (e.g. a family).377

In general, structural links through shareholdings will be evidence for the parent’s power to exercise decisive influence. However, shareholdings do not evidence the second part of the concept – the actual exercise of decisive influence.

a. Presumption for Wholly Owned Subsidiaries

Establishing whether the parent has in fact exercised its decisive influence over the subsidiary requires in-depth findings and a thorough analysis of the specific economic situation and *de facto* structure of the corporate group in question. In general, it will be a case-by-case evaluation of different interrelating factors as explained below at 2. In many cases, internal documents and procedures need to be evaluated. Especially if confronted with a ramified transnational corporate group that is active in a variety of countries and branches, collecting evidence concerning the group’s inner structure may be difficult – not to mention costly and time-consuming – for enforcement authorities. The corporate group, on the contrary, is nor-

377 In the *Knauf* case, the Knauf family owned all corporations of the Knauf group. The family contract explicitly considered the different corporations of the Knauf group as one undertaking and stipulated that the group was to be managed and directed in a unified way. For these reasons, the Commission considers the Knauf group as a single economic entity. Commission Decision Case COMP/E-1/37.152 *Plasterboard* [2005] para 496; upheld by Case T-52/03 *Knauf Gips v Commission* [2008] paras 342 et seq. and Case C-407/08 *Knauf Gips v Commission* [2010] paras 66 et seq.
mally in possession of these relevant documents, knows best its own internal structures, and can easily produce the necessary evidence. This is a dilemma faced not only in EU competition law; it also occurs in international criminal law if a similar approach is used.

In EU competition law, the presumption of wholly owned subsidiaries addresses this dilemma. It presumes the exercise of parental control if the parent wholly owns the subsidiary.\(^{378}\) Thus, 100% ownership of a subsidiary shows that the parent is, in general, able to exercise decisive influence over the subsidiary (power to control) and likewise presumes that the parent has in fact exercised decisive influence.\(^{379}\) No recourse to any substantial criteria, such as the influence over commercial policy, is necessary.\(^{380}\)

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\(^{379}\) Case C-97/08 P *Akzo Nobel et al. v Commission* [2009] para 61: »In those circumstances (i.e. a wholly owned subsidiary), it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent exercises a decisive influence over the commercial policy of the subsidiary. The Commission will be able to regard the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market.«

\(^{380}\) ECJ Case 107/82 *AEG-Telefunken v Commission* [1983] para 50; Case C-97/08 P *Akzo Nobel et al. v Commission* [2009] para 62. The ECJ also explained that, in the *Stora* case (Case C-286/98 P *Stora Kopparbergs Bergslags v Commission* [2000] para 27), it cited the additional circumstances »for the sole purpose of identifying all the elements on which the Court of First Instance had based its reasoning and not to make the application of the presumption […] subject to the production of additional indicia relating to the actual exercise of influence by the parent company.« Before the ECJ’s judgment in *Akzo Nobel*, it was unclear whether the Commission needed to make recourse to additional circumstances to hold wholly owned subsidiaries and parents

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Das Erstellen und Weitergeben von Kopien dieses PDFs ist nicht zulässig.
In the aftermath of the Akzo Nobel judgment, the presumption was extended to almost wholly owned subsidiaries. In pyramidal corporate group structures, the ultimate parent is also presumed to exercise decisive influence over the subsidiary. In these cases, the ultimate parent, the intermediate corporation(s) and the ultimate subsidiary form one single economic unit unless the (ultimate) parent can rebut the presumption of control over the intermediate parent or over the subsidiary.
Holdings also fall under the presumption. The GC defines a holding as »a company which has shareholdings in one or more companies with a view to controlling them« and the holding’s task as »to ensure that they are run as one.« According to the ECJ, this wording is »difficult to reconcile with the case-law« when it comes to rebutting the presumption. Seen in its context, however, the statement has to be read as meaning that even a non-operative holding can exercise decisive influence due to its coordinating function. The parent does not need to qualify as an undertaking of its own to fall under the presumption. Holdings, therefore, do not rebut the presumption per se. Rather, holding constructions are frequently used and thus are not proof of the genuine autonomy of the subsidiary.


387 Case C-440/11 P Commission v Stichting Administratiefonds Portielje et al. [2013] para 45. The General Court argued that the parent needs to be an undertaking itself – in that case, economically active. The presumption would not include this aspect: Joined Cases T-208/08 et al. Gosselin Group et al. v Commission [2011] paras 39 et seq.

388 Case C-520/09 Arkema v Commission [2011] paras 45 et seq. Furthermore, the holding is economically active and thus an undertaking if it is involve directly or indirectly in the management of the subsidiary Case C-222/04 Ministero dell’Economia e delle Finanze v Cassa di Risparmio di Firenze et al. [2006] paras 112 et seq.

However, the presumption does not apply in the context of sister corporations\(^\text{390}\) or for joint ventures.\(^\text{391}\) The latter are, by definition, not wholly owned by one parent but at least have two parents.\(^\text{392}\)

The presumption is now an integral part of the functional notion of undertakings. It shifts the burden of proof to the parent, who can rebut the presumption and show that its subsidiary acted autonomously (see below 3.). The Commission is not obliged to make use of the presumption.\(^\text{393}\) Also, in the case of wholly owned subsidiaries, the Commission can use the indicia described below at 2. to consider the corporate group as a single economic entity (the so-called dual basis method). Of course, this discre-

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\(^{390}\) Case C-196/99 P Siderúrgica Aristrain Madrid v Commission [2007] para 99: »the simple fact that the share capital of two separate commercial companies is held by the same person or the same family is insufficient, in itself, to establish that those two companies are an economic unit with the result that, under Community competition law, the actions of one company can be attributed to the other and that one can be held liable to pay a fine for the other.«


tion must not be exercised arbitrarily; the Commission must stick to one method for all addressees.\textsuperscript{394}

b. Other Shareholdings

Apart from the presumption of wholly owned subsidiaries, shareholdings are an important indication of the power to exercise decisive influence. More than 50% ownership of the subsidiary’s share is a strong indicator for the power to control.\textsuperscript{395} In instances of 50% ownership, only ownership in combination with voting rights and similar control mechanisms confer the power to decisively influence the subsidiary.\textsuperscript{396} For example, if two parents each have 50% shares in a joint venture, they will be both considered to have the power to decisively influence the joint venture in the case of negative control.\textsuperscript{397} If the parent holds less than 50% of shares


\textsuperscript{395} See e.g. Case T-104/13 \textit{Toshiba v Commission} [2015] para 96.

\textsuperscript{396} See recently the statement of the ECJ in Case C-179/12 P \textit{The Dow Chemical v Commission} [2013] para 58 and in Case C-172/12 P \textit{El Du Pont de Nemours v Commission} [2013] para 47: »Where two parent companies each have a 50% shareholding in the joint venture which committed an infringement of the rules of competition law, it is only for the purposes of establishing liability for participation in the infringement of that law and only in so far as the Commission has demonstrated, on the basis of factual evidence, that both parent companies did in fact exercise decisive influence over the joint venture, that those three entities can be considered to form a single economic unit and therefore form a single undertaking for the purposes of Article [101 TFEU].« See recently also Case T-91/13 \textit{LG Electronics v Commission} [2015] para 39.

\textsuperscript{397} Case T-77/08 \textit{Dow Chemical v Commission} [2012] paras 89, 92. Critically M. Bennet, F. E. G. Diaz, H. Leupold, A. Vernet and D. Woods, Horizontal Cooperation Agreements, in: Faull/Nikpay (eds.), \textit{The EU Law of Competition}, 2014, p. 883-1022, para 3.66; Ahrens, EuZW 2013, 900 et seq. On the contrary, see the older Commission Decision Case IV/32.186 \textit{Gosme/Martelli-DMP} [1991] para 30. Even though each parent had 50% ownership, half of the voting rights and was represented equally on the supervisory board, the parent and the joint venture were separated undertakings. The joint venture also distributed third-party products and negotiated and concluded its contracts on its
in the subsidiary, there needs to be a high majority voting rule or the parent must have special vetoing rights to have the power to decisively influence over the subsidiary.\textsuperscript{398} Shareholdings are not, however, a necessary precondition for several legal persons to form a single economic entity.\textsuperscript{399}

2. Indicia for Decisive Influence

If the parent holds less than (almost) all shares of its subsidiary, it needs to enjoy (corresponding) actual control power over its subsidiary to be considered a single economic entity. The origin of the control power is irrelevant as long as the factual circumstances show that the parent did in fact exercise decisive influence over its subsidiaries. Similarly, if the parent of a wholly owned subsidiary wants to rebut the presumption, it needs to show that its subsidiary acted autonomously, and thus that the parent did not exercise any influence over its subsidiary. In both cases, a number of aspects can evidence parental decisive influence, or lack thereof. This part aims to provide a structured overview of the complex decision-making practices and CJEU judgements in this area. In doing so, both scenarios – establishing decisive influence over a subsidiary and rebutting the presumption – will be addressed.


a. Involvement in Day-to-Day Business

Involvement in day-to-day management is the strongest indication for the actual exercise of decisive parental influence. In detail, involvement in the operational business means »specific instructions, guidelines or rights of co-determination in terms of pricing, production and sales activities or similar aspects essential to market conduct«. Its absence, however, is not an indicator of independence. It is also not enough to rebut the presumption, nor will it prevent other factors from establishing the exercise of decisive influence.

b. Strategic Control

Strategic control over the subsidiary is probably the most common form of exercising decisive influence. Contrary to day-to-day business control, it focusses on the subsidiary’s overall business strategy. Strategic commercial decisions are those that concern the budget, business plan, appointment of senior managers or major investments. For example, the

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parent exercises decisive influence if it intervenes «significantly [...] into certain essential aspects of [the subsidiary’s] policy», such as authorising sales of shareholding and real property.\textsuperscript{405} Similarly, deciding on the subsidiary’s organisational structure (e.g. change from regional management to central management) evidences the exercise of decisive influence.\textsuperscript{406} According to EU competition law, already the possibility to veto important decisions determines the business policy, even if these vetoing rights are not exercised.\textsuperscript{407} Strategic control is not linked to the market in question, instead it focusses on the general corporate group structure. Thus, as long as the parent has influenced the overall strategy (e.g. by giving instructions in infringement-unrelated business areas), it can be seen as


exercising decisive influence. In these cases, the presumption is not rebutted.\textsuperscript{408}

A decentralised corporate strategy might hint at the subsidiary’s autonomy. However, division of tasks is a normal business strategy within a corporate group.\textsuperscript{409} Hence, while the subsidiary might have its own local management and own resources, it may still not act with autonomy on the market.\textsuperscript{410} Moreover, even delegating the maximum of powers to the subsidiary has been seen as an exercise of parental control because it is considered the implementation of a management strategy. The parent can withdraw this delegation of power at its sole convenience. Hence, similarly to negative control, the subsidiary is not independent.\textsuperscript{411}

The power to influence or control the subsidiary’s business strategy can come from various sources. It might result from a control contract between the parent and the subsidiary\textsuperscript{412} or emerge from national law.\textsuperscript{413} It

\begin{footnotesize}
\begin{enumerate}
\item[411] Case T-190/06 \textit{Total et al. v Commission} [2011] para 73. In the Commission Decision Case COMP/38710 \textit{Bitumen Spain} [2007] para 422, the Commission held that the presumption was not rebutted, even though the parent did not change the subsidiary’s corporate structures – including the subsidiary’s »different working conditions, pension funds, headquarters internal organisation, professional associations, research and development centre, intellectual property rights« – when acquiring sole ownership.
\item[412] Case T-104/13 \textit{Toshiba v Commission} [2015] para 100; Commission Decision Case COMP/39.406 \textit{Marine Hoses} [2009] para 354 b); \textit{Heinichen}, Unternehmensbegriff und Haftungsnachfolge im Europäischen Kartellrecht p. 89. See also the catalogue in Article 3 (2) (b) Merger Regulation, which lists ownership, the right to use all assets of the corporation or »rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking«.
\end{enumerate}
\end{footnotesize}
might also result from more informal sources, such as controlling the body that takes the strategic decisions, factual dependence or personnel links.

c. Integrated Business

An integrated business strategy can enable the parent to exercise decisive influence over the integrated parts of the corporate group. It is thus used as an indicator for the actual exercise of control. This strategy will often lead to a division of tasks. Specific subsidiaries will be solely responsible for group-wide tasks (e.g. research and development). These subsidiaries do not generate revenue on their own, but depend on the corporate groups for revenue. The parent might be also the sole or main customer or supplier of the subsidiary. Profit will be made on a group-wide basis "to the detriment of the individual profits of its various components." In order to benefit from synergies and added value within the corporate group, the

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417 Case T-11/89 Shell International Chemical v Commission [1992] para 312. Similarly, criteria to establish a de facto merger can be »internal profit and loss compensation or a revenue distribution as between the various entities within the group, and their joint liability or external risk sharing«: Commission, Jurisdictional Notice on the Control of Concentrations between Undertakings, [2008] OJ C 95/1 para 10.
parent has a »specific interest«\(^418\) in establishing a corporate culture and a certain degree of uniformity of management.\(^419\) Thus, group-wide arrangements such as compliance programmes,\(^420\) insurance schemes\(^421\) and the consolidation of financial results\(^422\) hint at the exercise of decisive influence.

If the wholly owned subsidiary takes into account a group-wide interest, the parent will not be able to rebut the presumption, even though it may hold more than 80 subsidiaries and »does not exercise any industrial or commercial activity«.\(^423\) More generally, being active in different business areas does not rebut the presumption.\(^424\)


\(^{421}\) Case T-54/06 Kendrion v Commission [2011] para 57. In this case, it was seen as evidence against the rebuttal of the presumption.


d. Personnel Links

Senior staff play a pivotal role in practically implementing group-wide strategies and in exercising strategic control. The parent can exercise decisive influence in this area in three regards.

Firstly, it can install its own employees in the subsidiary’s top positions. This is the strongest form of influencing the subsidiary’s strategic decisions through personnel. These overlapping management positions allow for the smooth running of corporate groups. According to the GC, such overlap

»necessarily places the parent company in a position to have a decisive influence on its subsidiary’s market conduct since it enables members of the parent company’s board to ensure, while carrying out their managerial functions within the sub-

are dependent on a corporate centre for the basic orientation of their commercial strategy and operations, for their investments and finances, for their legal affairs and for their leadership cannot be considered to constitute an economic unit in their own right.« For a critique that this is too far-fetched as it would allow only pure financial holdings to rebut the presumption, see Skoczylas, Verantwortlichkeit für kartellrechtliche Verstöße im Konzern im schweizerischen und europäischen Recht p. 83 et seq.


In the case of overlapping members on the boards of directors, the presumption will not be rebutted even if the board of directors did not meet during the time of infringement. Case C-440/11 P Commission v Stichting Administratiekantoor Portielje et al. [2013] paras 80 et seq. overruling Joined Cases T-208/08 et al. Gosselin Group et al. v Commission [2011] para 56.
sidiary, that the subsidiary’s course of conduct on the market is consistent with the line laid down at management level by the parent company.\textsuperscript{427}

Even subsidiary managers that were former parent employees can fulfil this task and thus evidence parental control. These managers »necessarily had thorough knowledge of [the parent’s] policy and its commercial objectives and were in a position to cause [the subsidiary]’s policy and the interests of the [parent] to converge.\textsuperscript{428}

While overlapping management is a very strong indicator for actual parental control, its absence is not sufficient to rebut the presumption.\textsuperscript{429}

Secondly, appointing staff for key management positions in the subsidiary (CEO, chief financial officer, chief operating officer, chief sales officer) is a strategic decision. It can thus evidence decisive influence over

\textsuperscript{427} Case T-104/13 Toshiba v Commission [2015] para 100, see also para 115. They do not need to have authority to act as the parent’s agents. See, similarly, Commission Decision Case COMP/39165 Flat glass [2007] para 446; Commission Decision Case COMP/F/38.899 Gas Insulated Switchgear [2007] para 354.

\textsuperscript{428} Case T-104/13 Toshiba v Commission [2015] para 100.

the subsidiary. A decision to maintain the subsidiary’s management can be also considered an exercise of control.

Thirdly, supervising the recruitment of the subsidiary’s top management is an, albeit weaker, indicator for the exercise of decisive influence.

e. Unified Appearance

A corporate group presenting itself to third parties such as trading partners and customers as an integrated group – for example by using the same label, address or stationery – can be one relevant factor when it comes to proving single economic entity. Common internet presence, where the

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430 Case C-90/09 P General Química et al. v Commission [2011] paras 105 et seq.; Case T-91/13 LG Electronics v Commission [2015] paras 46 et seq.; Commission Case AT.39612 Perindopril [2014] para 3017; Solek and Wartinger, Journal of European Competition Law & Practice 6 (2015), 80. Hence, changing the management of a newly acquired subsidiary is a proof of exercising power over the latter: Case T-41/05 Alliance One International v Commission [2011] para 133 upheld by Case C-679/11 P Alliance One International v Commission [2013]; Case IV/M.397 Ford/Hertz [1994] paras 5 et seq.; Jones and Sufrin, EU Competition Law p. 869; Rosenthal and Thomas, European Merger Control p. 31. If the management consists of personnel from majority and minority shareholders, the Commission must show that the new managers sent by the majority shareholder have the power to decide the subsidiary’s business alone: Case T-64/06 FLS Plast v Commission [2012] paras 41 et seq. In that case, the court decided that the Commission failed to prove the influence of the parent, as the Commission did not provide enough concrete evidence.


corporate group is portrayed as an integrated entity that follows a common strategy, points in the same direction.\textsuperscript{434} Other cartel participants’ perceptions and presentation at cartel meetings is also relevant. It is a sign of acting as a single economic entity if the whole group is represented by one employee and is allocated one quota.\textsuperscript{435} Additionally, the Commission will be more likely to hold the parent responsible for infringement of its subsidiaries if several subsidiaries were involved in the cartel.\textsuperscript{436} The contrary perception, however, is not sufficient to rebut the presumption.\textsuperscript{437}

f. Reporting Obligations

Reporting obligations can be seen as a preliminary but necessary requirement for the parent to exercise strategic control rights. Rather than influencing the subsidiary’s business strategy directly, reporting obligations allow the parent to follow the activities of its subsidiary on a regular basis. Such a flow of information on »sales, production and financial results« as well as on the »implementation stage of strategic and commercial plans« is important for the parent to exercise its influence,\textsuperscript{438} as it allows the parent to have »a coordinating role«\textsuperscript{439} with respect to the corporate group units. As a result, reporting obligations on financial and strategic matters have been used to prove a subsidiary’s dependency.\textsuperscript{440} Thus, drafting
board minutes also in the parent’s language can hint at parental control.\textsuperscript{441} While reporting requirements are an element for rebuttal, not implementing a group-specific information policy is not seen as sufficient to rebut the presumption.\textsuperscript{442} Likewise, the absence of information or a reporting system beyond the legal requirements is not decisive as the »independence of a subsidiary is not to be assessed solely by reference to the operational aspects of the undertaking«.\textsuperscript{443}

3. Rebuttal

Also in cases of wholly owned subsidiaries, the specific economic relationships within the corporate group can be taken into account. This is done in the rebuttal, where the parent corporation can show that, in reality, it did not exercise any decisive influence over the subsidiary (a.). The criteria enumerated above at 2. are used, but in the opposite direction. They concern inner corporate group control mechanisms, which are easier to prove for the parent than for the Commission.\textsuperscript{444} In the case of a successful rebuttal, the subsidiary and the parent emerge as separate undertakings.

\begin{itemize}
  \item \textsuperscript{443} Case T-190/06 Total et al. v Commission [2011] para 73.
  \item \textsuperscript{444} Case T-39/06 Transcatab v Commission [2011] para 100; Case C-521/09 Elf Aquitaine v Commission [2011] para 70. For this argument, see also J. Bourke, Parental Liability for Cartel Infringements, GCP Antitrust Chronicle 2009, 1, 5 et seq.
\end{itemize}
The concept of a rebuttable presumption of decisive influence over wholly owned subsidiaries tries to achieve a balance between effective enforcement and fundamental rights protection.\(^{445}\) The presumption reflects the economic reality of most corporate groups. A realistic rebuttal preserves adherence to economic reality in all cases and prevents violations of the fundamental rights applicable to the enforcement procedure.

Relevant in this context are especially the principle of *nullum crime sine lege*,\(^{446}\) *in dubio pro reo* and the principle of personal liability. These principles are applicable to EU competition law due to the quasi-criminal nature of the proceedings.\(^{447}\) The practical difficulties in rebutting the presumption are criticised in particular.\(^{448}\) As has been already indicated in the analysis of the different criteria (see above 2.), a successful rebuttal is very difficult. There are only few examples of such in case law (b.). Some authors argue that these factual difficulties would lead to an objective liability violating the principle of personal liability and guilt,\(^{449}\) or at least not


\(^{446}\) Some critics argue that the vague and broad notion of undertakings violates the principle of *nullum crime sine lege*: Heinichen, Unternehmensbegriff und Haftungsnachfolge im Europäischen Kartellrecht p. 103 et seq. with further references.

\(^{447}\) These principles are general principles of EU law and also enshrined in Articles 47 to 49 Charter of Fundamental Rights of the EU and Articles 6 and 7 (1) ECHR.: Joined Cases C-189/02 P et al. *Dansk Rørindustri et al. v Commission* [2005] paras 215 et seq.; Case C-266/06 P *Evonik Degussa v Commission* [2008] paras 38 et seq.; Case C-521/09 *Elf Aquitaine v Commission* [2011]. See also ECtHR Complaint No 43509/08 *Menarini Diagnostics v. Italy* [2011]; Hackel, Konzerndimensionales Kartellrecht. Grundsatzfragen der Zurechnung und Haftung bei Bußgeldbescheiden gegen verbundene Unternehmen p. 124 et seq.; Heinichen, Unternehmensbegriff und Haftungsnachfolge im Europäischen Kartellrecht p. 49, 86, 105; T. Papakiriakou, Das Europäische Unternehmensstrafrecht in Kartellsachen. Beitrag zur materiellrechtlichen Ausgestaltung eines rechtsstaatlichen und effektiven Verwaltungs- bzw. Unternehmensstrafrechts, 2002 p. 11 et seq.

\(^{448}\) *S. Thomas*, Guilty of a Fault that One Has Not Committed. The Limits of the Group-Based Sanction Policy Carried out by the Commission and the European Courts in EU-Antitrust Law, Journal of European Competition Law & Practice 3 (2012), 11, 20 points to procedural problems such as the page limits of application and rebuttal as well as the fact that the GC hardly ever hears witnesses in antitrust cases.

sit well with the fundamental procedural principle of in dubio pro reo.\textsuperscript{450} With regard to the principle of personal liability, the crucial point is to decide to whom the principle is addressed. According to some critics, each addressee of the Commission’s decision, i.e. each legal person, is a »person« within the meaning of the principle of personal liability and thus its beneficiary.\textsuperscript{451} On the contrary, Advocate General Kokott, confirmed by the ECJ, argued that the undertaking as such is the relevant »person«. Thus, the single economic entity doctrine, including the presumption, is merely an expression of the principle rather than its violation.\textsuperscript{452} The ECJ has frequently pointed to the fact that the parent has the possibility to provide evidence concerning the subsidiary’s autonomy, which the Commission is then obliged to take into consideration (a.). Thus, although a rebuttal will often be unsuccessful, the presumption is, according to the ECJ, proportionate, not a probatio diabolica, and in line with the principle of personal responsibility.\textsuperscript{453}

\begin{thebibliography}{99}
\item Heinichen, Unternehmensbegriff und Haftungsnachfolge im Europäischen Kartellrecht p. 105 et seq.; Scordamaglia-Tousis, The Competition Law Review 7 (2010), 39. See also Opinion of AG Butt in Joined Cases C-201/09 P et al. ArcelorMittal Luxembourg v Commission et al. [2011] paras 210 et seq. who argues that a rebuttal must be realistically possible and simpler than has often been the case so far and critically Papakiriakou, Das Europäische Unternehmensstrafrecht in Kartellsachen. Beitrag zur materiellrechtlichen Ausgestaltung eines rechtsstaatlichen und effektiven Verwaltungs- bzw. Unternehmensstrafrechts p. 73 et seq.
\end{thebibliography}
a. General Criteria

The parent needs to provide evidence relating to the organisational, economic and legal links between its subsidiary and itself which are apt to demonstrate that they do not constitute a single economic entity.\(^\text{454}\) The CJEU expressly refused to provide an exhaustive list of criteria for the rebuttal.\(^\text{455}\) The threshold of non-interference in the subsidiary’s business in order to rebut the presumption is high. The subsidiary must have behaved autonomously, or it must be proven that the parent did not exercise any decisive influence on commercial policy – understood in broad terms. This does not mean that the subsidiary must be completely detached from the corporate group. Here, the general criteria that need to be met for a corporate group to be considered a single economic entity (listed above) serve as points of reference for the rebuttal. The parent needs to show, backed up with concrete and convincing evidence, that it would not form a single economic entity with the acting subsidiary had it not been for the presumption. In that case, the parent has shown that it did not exercise its decisive influence over the subsidiary according to the standards of EU competition law.\(^\text{456}\)

The Commission is obliged to give reason for its decision if it wants to refuse the rebuttal. This obligation directly flows from the rebuttable nature of the presumption. Thus, the Commission has to adopt a reasoned


\(^{456}\) See recent case law, e.g. Case T-197/06 FMC v Commission [2011] para 109: »where the parent company adduces a body of evidence to establish that its subsidiary was independent […], by demonstrating that the subsidiary does not, in essence, comply with the instructions which it issues and, as a consequence, acts independently on the market […], the Commission will not be able to impute to it the conduct of the subsidiary unless the Commission rebuts that evidence.«
B. Controll as a Decisive Criterion

position with regard to relevant evidence put forward in the rebuttal.\textsuperscript{457} For example, in \textit{L’Air Liquide}, and similarly in \textit{Edison}, the parent brought forward a multitude of facts backed up by concrete evidence to prove the independence of its subsidiary. These facts concerned

\begin{quote}
\textit{the lack of overlap in the directors and employees of the companies concerned, the widely defined powers of the subsidiary’s directors, the fact that it had its own departments relating to commercial activities, and the fact that it acted independently in the preparation of strategic projects.}\textsuperscript{458}
\end{quote}

The GC considered these facts significant in assessing the subsidiary’s independence.\textsuperscript{459} Accordingly, the Commission failed in its obligation to state reasons, as it merely rejected the parent’s evidence by pointing to the parent’s right to appoint members on the subsidiary’s board.\textsuperscript{460} Referring to additional facts cannot, the GC continued, \textit{remedy the inadequacy of the reasons for the rejection of the contrary arguments.}\textsuperscript{461} Evidence concerning the possibility of decisive influence are not adequate to rebut the parent’s rebuttal. The Commission can only challenge the evidence that

\textsuperscript{457} See e.g. Case T-185/06 \textit{L’Air liquide v Commission} [2011] para 79.


\textsuperscript{459} Case T-185/06 \textit{L’Air liquide v Commission} [2011] para 71.

\textsuperscript{460} Case T-185/06 \textit{L’Air liquide v Commission} [2011] para 74. See, in general, the critique of \textit{Leupold}, European Competition Law Review 34 (2013), 574 et seq. that the Commission’s arguments usually do not refer to the actual exercise of decisive influence but merely its possibility.

\textsuperscript{461} Case T-185/06 \textit{L’Air liquide v Commission} [2011] para 78. See also Case T-196/06 \textit{Edison v Commission} [2011] paras 78 et seq.; Case T-234/07 \textit{Koninklijke Grolsch v Commission} [2011] ECR II-6169 paras 84 et seq.: the GC annulled the Commission’s decision because it had not differentiated between the parent and the subsidiary and merely talked about ‘Grolsch’ having participated in the cartel, whereas it was clear that the subsidiary’s employees had participated.
the parent did not exercise its influence, or produce evidence itself that the subsidiary did not, in reality, act autonomously on the market.

b. Successful Rebuttals

So far, the presumption has only been successfully rebutted in a few cases.\textsuperscript{462} The first case, \textit{BMW Belgium}, concerns somewhat particular circumstances. In that case, BMW Munich asked its wholly owned Belgian subsidiary, BMW Belgium, to make sure that its Belgian dealers were sticking to the dealership agreement and not selling to unauthorised resellers, following instances to the contrary. BMW Belgium, however, reacted by ordering its dealers to refrain from exporting anything out of Belgium, even though BMW Munich explicitly stressed on several occasions that it was only reselling to unauthorised dealers abroad that was not allowed within the dealership agreement. It was hence only BMW Belgium, and not its parent BMW Munich, who was the addressee of the decision and party to the subsequent judicial proceedings. BMW Belgium tried to argue that, as a wholly owned subsidiary, it could not have a will of its own. Instead, it claimed, BMW Munich’s will (acting within the block exemption for distribution agreements) was to be seen as its will also, despite evidence to the contrary. The court rejected this argument and concluded that, although BMW Belgium might be economically dependent on BMW Munich, their conduct and interests could still diverge.\textsuperscript{463}

Secondly, the Commission considered several »functionally separate« subsidiaries as solely responsible for the competition law infringement in

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{463} ECJ Joined Cases 32/78 et al. \textit{BMW Belgium et al. v Commission} [1979] para 24. If, however, the parent and the subsidiaries form a single economic entity, it is impossible for the subsidiaries to act independently in the areas controlled by the parent: Commission Decision Case IV/24.055 \textit{Kodak} [1970] para 12. See also \textit{Burnley}, World Competition Law and Economic Review 33 (2010), 606.
\end{itemize}
\end{footnotesize}
its *Vitamins* decision. Unfortunately, it provided little reasoning for its conclusion besides repeating the formula of »a functionally separated entity from its parent« or »separately managed« subsidiary.\(^{464}\)

Thirdly, in its *Spanish Raw Tobacco* decision, the Commission decided not to address the decision to the parent of a wholly owned subsidiary who was involved in the cartel. Although it relied on the presumption in the first place,\(^ {465}\) it saw no »indication in the file of any material involvement of [the parent] in the facts« at stake. This is an unusual formulation. It suggests that the parent did not produce any evidence for its non-involvement and that no evidence collected by the Commission pointed to a material involvement. However, this seems to be merely an unclear formulation. In fact, at a different stage of the decision, the Commission concluded that the evidence produced by the parent showed that the parent was not controlling the subsidiary,\(^ {466}\) its investment was »purely financial.«\(^ {467}\) As a result, the parent successfully rebutted the presumption and was not seen to form an economic entity with its subsidiaries.\(^ {468}\)

Fourthly, the Commission ruled in *Austrian banks* that the presumption had been successfully rebutted after reviewing the evidence provided. There, the »minutes of cartel meetings and internal [subsidiary] documents, particularly in connection with its internal decision-making« evidenced that the subsidiary acted independently, on its own responsibility and interest and without influence from its parent.\(^ {469}\)

Lastly, the GC claimed in *Gosselin Group* that the parent successfully rebutted the presumption. According to the GC, the parent exercised no


\(^{465}\) Skoczylas, Verantwortlichkeit für kartellrechtliche Verstösse im Konzern im schweizerischen und europäischen Recht p. 76 et seq. considers the decision as a successful rebuttal of the presumption.


\(^{468}\) Skoczylas, Verantwortlichkeit für kartellrechtliche Verstösse im Konzern im schweizerischen und europäischen Recht p. 76 et seq.

\(^{469}\) Commission Decision Case COMP/36.571/D-1 *Austrian banks* [2002] para 479. See also Skoczylas, Verantwortlichkeit für kartellrechtliche Verstösse im Konzern im schweizerischen und europäischen Recht p. 77 et seq.
decisive influence over its subsidiary. Decisively for the GC, the parent’s board only met two years after the infringement terminated.\(^{470}\) Moreover, the parent could not exercise its only means of influence — voting in the shareholder’s meeting — as no such meeting was held during the infringement’s period.\(^{471}\) The ECJ overturned the judgment. The GC would err in law in relying solely on the lack of formal management decisions. On the contrary, in EU competition law, the notion of undertakings incorporates all »economic, organisational and legal links«.\(^{472}\) Rather than referring the case back to the GC, the ECJ decided the case itself: first, the Commission was entitled to rely on the presumption; and second, the parent could not rebut the presumption. Rather, the parent as a holding corporation exercised decisive influence over its subsidiary through personnel links and submission to a group-wide strategy.\(^{473}\) The case shows that the CJEU considers the different elements of the single economic entity in detail, including the particularities of the corporate group at hand.

Pure financial holdings will most likely be able to rebut the presumption.\(^{474}\) This will only be the case if a corporation invests in another corporation merely for the sake of return, and would divest as soon as another


\(^{472}\) Case C-440/11 P Commission v Stichting Administratiekantoor Portielje et al. [2013] para 67.


B. Controll as a Decisive Criterion

corporation would promise better return.\textsuperscript{475} The investor must refrain from «any involvement in [the subsidiary’s] management and in its control» in order to rebut the presumption.\textsuperscript{476} Financial holdings are also exempted from the application of the Merger Regulation. In Article 3 (5) (a) Merger Regulation, credit institutions, financial institutions and insurance corporations who normally deal in securities are exempted if they hold the assets or shares in the corporation only temporarily and do not exercise their voting rights »with a view to determining the competitive behaviour of that undertaking«, or only to dispose of the assets or shares within one year.\textsuperscript{477} However, these exceptions are narrowly construed and hardly ever applied in practice.\textsuperscript{478} This is further indication that EU competition law sees purely financial holdings as not exercising relevant control.

4. Summary

It has been shown that EU competition law has developed its own autonomous concept of undertakings that is able to embrace corporate groups. In detail, it needs to be shown that the parent had the power to exercise decisive influence and actually used this power. Over the years, a set of criteria to establish parental control has evolved through the Commission’s decision practice and CJEU jurisprudence. In cases of sole ownership, the actual exercise of decisive influence is legitimately presumed. The parent is then able to rebut the presumption and show that the subsidiary did not follow the parent’s instructions in all material elements. Evidence must prove that the subsidiary acted autonomously in important aspects of its business. Here, the set of criteria serves as points of reference for the rebuttal. These criteria take into account the specific economic situation and allow for a flexible and realistic definition of corporate groups.

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\textsuperscript{475} Hackel, Konzerndimensionales Kartellrecht. Grundsatzfragen der Zurechnung und Haftung bei Bußgeldbescheiden gegen verbundene Unternehmen p. 173 et seq.


\textsuperscript{478} Whish and Bailey, Competition Law p. 838 et seq.; Rosenthal and Thomas, European Merger Control p. 50 et seq.
as a single economic entity, while paying due regard to the concerns of fundamental rights.

C. Consequences

This part will illustrate how the concept works in practice and how it influences different areas of application and enforcement. Thereby, the focus will be on those areas of application and enforcement that have a specific connection to transnational corporate groups. These areas are not specific to competition law but will rather play a role in international criminal law as well.

The autonomous concept of undertakings in EU competition law allows a corporate group to be considered as one undertaking if it constitutes a single economic entity. As shown above, this will be only the case if the corporate group – connected through economic, organisational and legal links – acts unitarily on the market. In these cases, the different legal persons within the corporate group are not seen as independent actors, but as one single undertaking (1.). In the context of transnational corporate groups, jurisdictional questions often play a vital role. As will be shown in the following chapters, national law often struggles to find jurisdiction over torts committed by transnational corporate groups. Similarly, the International Criminal Court (ICC) is, in general, only competent if the crime is committed within the territory or by a national of a state party. 479

Here, the single economic entity doctrine confers personal jurisdiction over the single economic entity (i.e. the whole corporate group) if there is some corporate group activity in the relevant jurisdiction (2.). The composition of transnational corporate groups will often have changed between the infringement’s termination and the enforcement proceedings. These cases carry the risk of either no entity being held liable at all, or an entity being held liable that had no connection to the infringement. The single economic entity doctrine offers a different solution (3.). The autonomous-

479 Article 12 (2) ICC Statute. According to Article 12 (3) ICC Statute, a state that has accepted the court’s jurisdiction for a particular case will be treated alike: Werle and Jeßberger, Principles of International Criminal Law, para 270 with further references. Likewise, the UN Security Council can refer a situation to the ICC under Chapter VII of the UN Charter.
C. Consequences

notion of an undertaking including the single economic entity doctrine can also be used to determine the appropriate level of fine imposed. Many criteria used in this context are not competition law specific. Rather, these aspects concern general fining issues and transnational corporate group specificities that will be also encountered at the ICC (4.). Lastly, some procedural implications of the autonomous concept of undertakings will be described. Here, a brief overview of the possibilities to investigate infringements and to enforce fines against corporate groups will be given. Moreover, it will be shown that the autonomous concept encounters limits as soon as it becomes necessary to involve national authorities. Nonetheless, EU competition law has found ways to reconcile both approaches, which can also be used for the ICC (5.).

1. A Corporate Group as a Perpetrator

Under the circumstances described above at B., corporate groups are considered as one undertaking in EU competition law. This functional approach creates a new entity that is an addressee of EU competition law.\textsuperscript{480} This was first acknowledged for agreements within one corporate group (so called intra-enterprise conspiracies). They do not fall under the prohibi-

bition of anticompetitive agreements between competitors, now Article 101 TFEU. In fact, the court announced that today’s Article 101 TFEU is not concerned with agreements or concerted practices between undertakings belonging to the same concern and having the status of parent company and subsidiary if the undertakings form a economic unit within which the subsidiary has no real freedom to determine its course of action on the market.«

This exclusion also applies to sister corporations. The most prominent example is the distribution system of Parker Pen. Even though, substan-


483 Commission, Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, [2011] OJ C 11/1, para 11; Whish and Bailey, Competition Law p. 94. As a consequence, joint venture agreements between sister corporations fall outside the application of Article 101 TFEU. To the extent that sister corporations are under the same decisive influence, they cannot be considered competitors but rather one undertaking. For a discussion of the Commission Guide-
C. Consequences

tially, the integrated system of Parker and its subsidiaries »partition[ed] national markets by means of absolute territorial protection«, the Commission, the General Court and the ECJ could not find any competition law infringement. Parker and its subsidiaries would form a single economic unit, hence there is no agreement between undertakings. As a consequence, EU competition law can be addressed to the corporate group and not only to its components – the different legal persons.

The corporate group, if considered a single economic entity, is also the perpetrator to be fined. It is the entity that has acted and not its components – the legal persons. There is no need to show any involvement of the management or specific employees of each legal person to prove that the corporate group had acted (at least) negligently. Importantly, and contrary to critics, the parent – or, more specifically, the employees of the

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485 C-73/95 P Viho Europe v Commission [1996] para 51: »Where, as in this case, the subsidiary, although having a separate legal personality, does not freely determine its conduct on the market but carries out the instructions given to it directly or indirectly by the parent company by which it is wholly controlled, Article [now: 101] does not apply to the relationship between the subsidiary and the parent company with which it forms an economic unit.«


488 In general, the Commission does not need to pinpoint the individual employee who infringed competition law, nor must the management of the undertaking have been involved. Case C-338/00 P Volkswagen v Commission [2003] paras 96 et seq.; K. Hofstetter and M. Ludescher, Fines against Parent Companies in EU Antitrust Law. Setting Incentives for ‘Best Practice Compliance’, World Competition 33 (2010), 55, 61.

parent corporation – does not need to have acted negligently. It is irrelevant whether the parent furthered the infringement of the subsidiary or was directly involved. Thus, the single economic entity doctrine does not postulate or rely on a duty of care on the side of the parent to prevent infringements within the corporate group. Nor is the doctrine a form of strict liability. Rather, the simple fact that the subsidiary and the parent form one undertaking is sufficient to consider the corporate group as the perpetrator. In most cases, it will be the employees of one or more subsidiaries that have actively infringed EU competition law. Likewise, actions of different branches within the same undertaking, i.e. of sister corporations, may be cumulated. These actions are seen as actions of the undertak-

Ausgestaltung eines rechtsstaatlichen und effektiven Verwaltungs- bzw. Unternehmensstrafrechts p. 231 et seq. Burnley, World Competition Law and Economic Review 33 (2010), 612 is less extreme and limits himself to suggesting ways to improve to the current system. To enhance legal security, he recommends introducing a clear set of guidelines for the group liability rule, covering the type of evidence that is relevant, the standard of proof, and the key factors in the exercise of the Commission’s discretion.«

491 Case C-90/09 P General Química et al. v Commission [2011] paras 38, 102; Case C-521/09 Elf Aquitaine v Commission [2011] para 55; Case T-24/05 Alliance One International et al. v Commission [2010] para 127; Case T-41/05 Alliance One International v Commission [2011] para 93; Joined Cases T-141/07 et al. General Technic-Otis et al. v Commission [2011] para 77. See recently Case T-104/13 Toshiba v Commission [2015] para 105: »In order to impute to a parent company the acts undertaken by its subsidiary, it is not necessary to prove that that parent company was directly involved in, or was aware of, the offending conduct. […] [I]t is not because of a relationship between the parent company and its subsidiary in instigating the infringement or, a fortiori, because the parent company is involved in the infringement, but because they form part of the same undertaking for the purposes of Article 101 TFEU that the Commission is able to address the decision imposing fines to the parent company.« And similarly Case T-91/13 LG Electronics v Commission [2015] para 33, 57, 65.
492 Case T-11/89 Shell International Chemical v Commission [1992] paras 280 et seq., 312; Case T-156/94 Siderúgica Aristrain Madrid v Commission [1999] paras 59 et seq. reversed by Case C-196/99 P Siderúrgica Aristrain Madrid v Commission [2007] paras 94 et seq. for lack of justifying the imputation of responsibility to only one sister corporation. Nonetheless, the court acknowledges the possibility to attribute actions of one sister corporation to the other in cases where the latter completely controls the former. See also Commission Decision Case COMP/38710 Bitumen Spain [2007] para 450.
ing. They are seen as actions of the parent as much as of the subsidiaries whose employees acted.

This has prompted some criticism. In Germany, Petra Pohlmann has suggested only considering legal persons as subjects of EU competition law. However, in corporate group cases (or what she calls Unternehmensverbund), she suggests considering those shareholders as undertakings who have (indirectly) the power to dispose of the undertaking through their rights over the legal person owning the undertaking (Unternehmensträger). Ultimately, her approach merely further complicates the determination of the correct addressee of EU competition law. She unnecessarily adds exceptions in corporate group cases to her general premise that only legal persons are addressees of EU competition law. This does not significantly increase legal security for corporate groups. In fact, in corporate group cases, she takes into account similar criteria to the ones discussed above at B. 2. to identify the relevant shareholders – namely the power to decide important commercial decisions. Thus her proposal should be rejected and has rightly not been taken up by EU institutions.

493 See e.g. Case 30/87 Bodson and Pommes funèbres des régions libérées [1988] para 21; Commission Decision Case IV/30.979 et al. Decca Navigator System [1988] para 82. See also Heitzer, Konzerne im Europäischen Wettbewerbsrecht unter vergleichender Berücksichtigung ihrer wettbewerbsrechtlichen Behandlung durch Aufsichtsbehörden und Gerichte in den USA p. 171 et seq. who draws upon the power of control of the mother corporation and only excludes liability if the subsidiary is consciously overstepping the set boundaries.

494 P. Pohlmann, Der Unternehmensverbund im Europäischen Kartellrecht, 1999 p. 49 et seq. Pohlmann suggests that her approach is in line with economic reality. Due to market economic ownership rights, the power over production facilities needs to be regulated. This regulation should hence be addressed to the holders of ownership and user rights. However, it is not self-evident as to why regulation should not address the economic activity as such – as is often done in German law where the undertaking (Unternehmen) rather than the legal owner (Unternehmensträger) are addressed. See also S. M. Orlikowski-Wolf, Rechtsnachfolge von Unternehmen im europäischen Kartellrecht. Ein Lösungsvorschlag aus deutscher Sicht, 2003 p. 57 et seq.: and, for the same argumentation that legally only legal persons can be addressees of obligations and thus only legal persons can infringe them and be punished for that, see Thomas, Journal of European Competition Law & Practice 3 (2012), 14 et seq.

495 Pohlmann, Der Unternehmensverbund im Europäischen Kartellrecht p. 54 et seq.

496 She also agrees that corporations with mere unincorporated branches and corporate groups should be treated equally in competition law. Nonetheless, re-
2. Jurisdiction

Given the global scale of many undertakings and markets, the question often arises as to whether – and, if so, to what extent – the Commission can enforce EU competition law beyond European borders. In this context, the single economic entity doctrine expands the territorial scope of EU competition law. The Commission will have jurisdiction if the single economic entity is situated in the EU. In EU competition law, this will be the case as soon as part of the undertaking is active in the EU. Thus, if a foreign parent and its dependent EU subsidiary are seen as one undertaking, they will be situated within the EU for the purposes of EU competition law. In this way, EU competition law can be applied to foreign parent corporations without the need to relying on the more contested «effects» doctrine.\(^{497}\) Generally, the infringement must have an appreciable effect on the commerce between Member States to enter into the territorial scope of application.\(^{498}\) As the ECJ established, non-EU Member State corporations can also infringe Article 101 TFEU if they, for example, participate in a cartel through EU subsidiaries and control these subsidiaries\(^{499}\) or if the agreement is implemented in the EU.\(^{500}\)
C. Consequences

3. Succession

As part of the principle of personal liability, liability will be attached to the legal entity that has committed the infringement. In general, changes to the corporate structure or business of the legal entity after the termination of the infringement will not be taken into account. Subsequent changes will only be taken into account if the entity that has committed the infringement has ceased to exist, either in law or economically. Otherwise, EU competition law could not be enforced effectively as no entity would be (effectively) held accountable.


For an analysis of succession cases more generally, see Scordamaglia-Tousis, EU Cartel Enforcement. Reconciling Effective Public Enforcement with Fundamental Rights p. 325 et seq.; and critically Orlikowski-Wolf, Rechtsnachfolge von Unternehmen im europäischen Kartellrecht. Ein Lösungsvorschlag aus deutscher Sicht p. 20 et seq.


Case C-280/06 Autorità Garante della Concorrenza e del Mercato v ETI et al. [2007] para 40.

The single economic entity doctrine prevents an evasion of liability in cases of corporate group restructuring after the termination of the infringement. Due to the single economic entity doctrine, the parent will still be liable even if the acting subsidiary no longer belongs to the single economic entity.\textsuperscript{505} This is part of the principle of personal liability called legal continuity.\textsuperscript{506} In the case of organisational and structural links between the selling and acquiring corporations, the acquirer of the cartel-related business can also be held liable. Instead of »two existing and functioning undertakings«, there is only a group restructuring within a single economic entity.\textsuperscript{507} The ECJ expressly made the link to parent liability.\textsuperscript{508} Beyond cases of restructuring within a single economic entity, the economic continuity doctrine will be used only in restrictive circumstances.\textsuperscript{509}
The Polypropylene case illustrates the different consequences of the single economic entity doctrine. There, the Commission found that the infringing entity, SAGA Petrokjemi, did not form a single economic entity with its former parent, SAGA Petroleum. Hence, SAGA Petroleum was not held liable for the infringements. On the contrary, the new parent, Statoil, was deemed responsible for paying the fine. This was explained with the concept of economic continuity. As Statoil itself stressed, the merger with SAGA Petrokjemi and the integration into the group structure lead to SAGA Petrokjemi losing its separate legal personality, while the business of SAGA Petrokjemi, its management, products and customers stayed the same. Hence, liability for the infringement remained with the economic entity SAGA Petrokjemi. However, the decision could no longer be addressed to SAGA Petrokjemi, as it lost its legal personality. Thus, the Commission addressed the decision solely to Statoil.510
4. Fines

The Commission has the power to impose fines, Article 23 Regulation 1/2003, both for procedural infringements during the investigation as well as for substantial infringements of EU competition law.\footnote{For an empirical analysis of the development of the level of deterrence under the new Fining Guidelines from 2007-2009, see J. Connor, Has the European Commission Become More Severe in Punishing Cartels? Effects of the 2006 Guidelines, European Competition Law Review 1 (2011), 27 et seq. For a recent overview of »the Law on Fines«, see É. Barbier de La Serre and E. Lagathu, The Law on Fines Imposed in EU Competition Proceedings. Fifty Shades of Undertakings, Journal of European Competition Law & Practice 6 (2015), 530 et seq.} If, materially, a corporate group is seen as one undertaking, this will also be reflected in the calculation of the fine. The fine is composed of a basic amount that is adjusted either upwards or downwards depending on the aggravating or extenuating circumstances.\footnote{Aggravating factors include continuous infringements, refusal to cooperate, and being the leader. Mitigating factors are direct termination of the infringement after the investigation commenced, substantially limited involvement, effective cooperation outside the realm of the Leniency Notice and authorisation or encouragement by the state: Commission, Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No 1/2003 [2006] paras 27 et seq. For an empirical overview, see C. Veljanovski, Deterrence, Recidivism, and European Cartel Fines, Journal of Competition Law & Economics 7 (2011), 871, 888 et seq.} The basic amount consists of a proportion of the value of sales.\footnote{The proportion will be determined according to the »degree of gravity of the infringement, multiplied by the number of years of infringement«: Commission, Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No 1/2003 [2006] para 19. The factors determining the gravity of the infringement on a case-to-case analysis are described in paras 20 et seq. See also Colombani, Kloub and Sakkers, Cartels, in: Faull/Nikpay (eds.), The EU Law of Competition paras 8.561 et seq.} It is set according to the turnover of the undertaking—including a corporate group, if it is seen as a single economic entity. The Commission adds up the turnovers of the different legal persons involved.\footnote{Heinichen, Unternehmensbegriff und Haftungsnachfolge im Europäischen Kartellrecht p. 82.} This can, and often does, amount to figures many times higher than the turnover of the acting corporation. The following two general,
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non-competition law specific fining aspects will illustrate the use of the single economic entity doctrine in calculating the appropriate fine.

Firstly, one of the important goals of a fine is deterrence. The fines should »take into consideration the size and overall resources of the undertaking«, and thus group-wide figures, in order to be a deterrent.\(^{515}\) The Commission uses a so-called »specific deterrence increase« when calculating the fine.\(^{516}\) Often, the mere size of the undertaking warrants an increase, as otherwise the fine would be too low to be a deterrent. Additionally, the infrastructure of large undertakings usually allows for the easier and quicker detection of infringements.\(^{517}\) This rationale implicitly criticises the fact that the corporate group was not adequately structured to prevent, or detect early on, competition law infringements.\(^{518}\) Here, compliance programmes that have so far been neglected by the Commission can play an important role.\(^{519}\) For example Hofstetter and Ludescher sug-

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518 It seems theoretically difficult to perceive how an undertaking can be deterred – in the sense of it learning and changing its behaviour – if it is fined despite the fact it could not have done anything differently in the specific case. In these cases, only general deterrence is achieved.

gest that the Commission should impose fines only to the extent that the undertaking has not implemented »Best Practice Compliance«. 520

Secondly, recidivism can be an aggravating factor in the calculation of the fine. The Commission has to establish that the same undertaking has repeatedly infringed EU competition law. 521 Again, the decisive entity to decide whether there has been a repeated infringement is the undertaking – thus the corporate group, if considered a single economic entity. In these cases, however, it is necessary that the first infringement decision already established the existence of the single economic entity. 522 Thus, if the first infringement decision was only addressed to, for example, one subsidiary,

520 For this argument, see also Thomas, Journal of European Competition Law Practice 3 (2012), 17. This Best Practice Compliance should involve clear, basic compliance rules that cover the specific risks of the corporation; be well known by the managers who monitor its implementation and, through training, be made known, instructed and applied to the specific circumstances of all employees; be considered during recruitment; be periodically checked; and have its implementation ensured through whistle-blower protection and through the right incentives and sanctions of (non)obedience: Hofstetter and Ludescher, World Competition 33 (2010), 64 et seq. Group-wide compliance programmes shall be treated the same if the parent has intervened in the operational business areas. Through the intervention, the parent would voluntarily assume the role of guardian and thus be held liable if it fails to fulfil this role. They propose that in those cases, the parent would be obliged to prove that it had implemented Best Practice Compliance even if the infringement occurred in a different business area from that controlled. Firstly, it might be impossible to pinpoint the infringement to one business area and secondly, the cost for the parent to expand its compliance programme to non-centralised areas is marginal. On the contrary, less concrete intervention shall not trigger an obligation to introduce Best Practice Compliance group wide. According to Hofstetter and Ludescher, merely laying down strategic plans and financial targets is not enough, as a connection to competition law infringements would be too remote.

521 Commission, Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No 1/2003 [2006] para 28: »an undertaking [that] continues or repeats the same or a similar infringement after the Commission […], has made a finding that the undertaking infringed Article [now: 101 or 102].«

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only this subsidiary and not its parent or other parts of the corporate group can be subjected to an augmented fine due to recidivism.\textsuperscript{523} Otherwise, the parent would be unable to challenge the finding of a single economic entity.\textsuperscript{524} Furthermore, the parent cannot be deterred from repeatedly infringing competition law and, more importantly, cannot improve its group-wide mechanisms to prevent illegal behaviour if it was unaware of the first infringement. Only then, the sword of Damocles of a substantial increase in fine will induce higher efforts of prevention and early detection.

As will be shown below at 5., the decision to impose fines needs to be addressed to legal persons. In the case of corporate groups, the Commission has discretion whether to address all legal persons within the single economic entity.\textsuperscript{525} If it wants to impose the fine on the whole corporate group, it will hold the parent and subsidiaries jointly and severally liable. If the parent’s liability is »purely derivative of that of its subsidiary and in which no other factor individually reflects the conduct for which the parent company is held liable,« the parent’s fine cannot be higher than that of its subsidiary.\textsuperscript{526}


5. Procedure

Generally, the functional approach to undertakings also prevails in procedural law. The undertaking, including corporate groups if considered a single economic entity, will be the object of investigation. For example, investigation measures such as a request for information will be sent out to the »undertaking«, be that a legal person or not. In corporate group cases, the corporate group’s owner or representatives, usually an employee of the parent corporation, will be responsible for answering the request. Additionally, settlement proceedings are adapted to corporate groups as a single economic entity. In settlement proceedings, those undertakings are rewarded that admit their participation in the infringement and liability


528 The undertaking is obliged »to provide all necessary information concerning such facts as may be known to it and to disclose to it, if necessary, such documents relating thereto as are in its possession [...]«: Case T-112/98 Mannesmannröhren-Werke v Commission [2001] para 65. See also Case 374/87 Orkem v Commission [1989] para 34; Joined Cases T-71/03 et al. Tokai Carbon et al. v Commission [2005] para 403. The exact boundaries of information that falls under the right to remain silent are difficult to draw. It has been ruled that the Commission is not allowed to ask the undertaking to explain the »purpose« of identified meetings with competitors, whereas questioning the subject matter was deemed to be in accordance with the right against self-incrimination: Case T-112/98 Mannesmannröhren-Werke v Commission [2001] paras 71 et seq.; Case T-48/02 Brouwerij Haacht v Commission [2005] para 113. Likewise, the GC had ruled that asking for the object and the conclusion/result of meetings and documents of proof invites self-incrimination and is thus forbidden: Joined Cases T-71/03 et al. Tokai Carbon et al. v Commission [2005] paras 407 et seq. overruled by Case C-301/04 P Commission v SGL Carbon et al. [2006] paras 39 et seq. For the distinction between factual information and admissions, see critically A. MacCulloch, The Privilege Against Self-Incrimination in Competition Investigations. Theoretical Foundations and Practical Implications, Legal Studies 26 (2006), 211, 232 et seq. In general, existing documents and factual information, even though they might prove an infringement, need to be handed out to the Commission as part of the duty to cooperate actively. Case 374/87 Orkem v Commission [1989] paras 27, 37 et seq.; Case T-112/98 Mannesmannröhren-Werke v Commission [2001] paras 62, 70, 77 et seq.; Joined Cases T-71/03 et al. Tokai Carbon et al. v Commission [2005] para 406: the undertaking can still show that the facts have a different meaning from the one attached to them by the Commission.
during the investigation phase.\textsuperscript{529} During this procedure, »parties within the same undertaking«, meaning corporations of the same corporate group, shall designate a joint representative to represent the undertaking. For this purpose, the Commission will indicate to the parties when setting the time limit for the procedure that it views them as belonging to one undertaking.\textsuperscript{530}

Sometimes, such as in the case of inspections, the corporate group will be only partially treated as a single economic entity. Fundamental rights protection\textsuperscript{531} requires that the inspection decision identifies the legal persons to be inspected.\textsuperscript{532} In order to nonetheless inspect the whole undertaking, i.e. the corporate group, the Commission will normally name the parent of the corporate group and generally all corporations directly or indirectly controlled by the parent. Then, for further steps of the inspection, it can revert to the functional and autonomous approach. For example, it can notify the decision to one legal entity belonging to the undertaking, even if that entity is not explicitly mentioned in the decision.\textsuperscript{533} Furthermore, the Commission does not need to correctly distinguish the personnel

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\bibitem{531} Namely the protection of the personal sphere: Case C-94/00 Roquette Frères v Directeur général de la concurrence, de la consommation et de la répression des fraudes [2002] paras 27 et seq. following the change in jurisprudence of the ECtHR in ECtHR Complaint No. 37971/97 Société Colas Est v France [2002] overruling ECJ Joined Cases 46/87 and 227/88 Hoechst v Commission [1989] paras 13 et seq.
\bibitem{532} Colombani, Kloub and Sakkers, Cartels, in: Faull/Nikpay (eds.), The EU Law of Competition para 8.335.
\end{thebibliography}
and premises of the different corporations within one undertaking. Who the premise belongs to in civil law terms is irrelevant for the undertaking’s obligation to cooperate with the Commission in its inspection.\textsuperscript{534} Named premises and subsidiaries in the decision are rather an indication, as «in case of large undertakings with a complex structure, it is frequently impossible to check beforehand where all business premises of relevance to the investigation might be situated.»\textsuperscript{535}

The functional approach has its limitations when it comes to enforcing EU competition law. Some execution measures, such as collection of the fine, might need to be enforced if the undertaking does not pay voluntarily. According to Article 299 TFEU, the Commission’s decision is an executory title. If necessary, national authorities can then enforce the Commission’s decision within their national procedures. However, only legal persons can be addressees of negative decisions and debtors of enforceable fines.\textsuperscript{536} According to Article 299 TFEU, decisions that impose a pecuniary obligation need to be addressed to natural or legal persons. Likewise, national execution normally requires a natural or legal person as an addressee.\textsuperscript{537} In these cases, the Commission needs to revert back to the different legal persons within the undertaking. In corporate group cases, the decision is usually addressed either to the parent and the subsidiary jointly, or solely to the parent.\textsuperscript{538} If the Commission addresses the decision

\textsuperscript{537} \textit{Hackel}, Konzerndimensionales Kartellrecht. Grundsatzfragen der Zurechnung und Haftung bei Bußgeldbescheiden gegen verbundene Unternehmen p. 119; P. Kienapfel, Europäisches Unionsrecht, VO (EG) 1/2003 Artikel 23 Geldbußen para 20; M. Mansdörfer and S. Timmerbeil, Das Modell der Verbandshaftung im europäischen Kartellbußgeldrecht, EuZW 2011, 214, 217; Wachs, Flucht aus der kartellrechtlichen Bußgeldverantwortung? Unternehmensrestrukturierung und Haftungsnachfolge im deutschen und europäischen Bußgeldrecht p. 174, 178. For Germany, see §§ 750 (1) s. 1, 166 (1) ZPO.  
\textsuperscript{538} Opinion of \textit{AG Kokott} in Case C-97/08 P \textit{Akzo Nobel et al. v Commission} [2009] para 98; Immenga/Mestmäcker/G. Dannecker and J. Biermann5
to different legal persons within the corporate group, they are joint and several debtors. Each debtor is liable to pay the whole of the fine; their payment settles the fine for all addressed legal persons. The intra-group delimitation of payment is not a matter of EU law. Rather, it is subject to any contractual agreements between the joint and several debtors or subject to the national law applicable to the dispute. In case German law applies, § 426 BGB regulates the intra-group allocation of the fine imposed. There, the specific circumstances of the case determine the internal allocation rather than a general pro rata distribution. The German Federal Court of Justice recently decided that in the absence of a contractual allocation, notably the individual responsibility, role in and economic

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Vorbemerkungen zu Art. 23 f.: Unionsrechtliche Geldbußen und Zwangsgelder paras 82, 103; Hackel, Konzerndimensionales Kartellrecht. Grundsatzfragen der Zurechnung und Haftung bei Bußgeldbescheiden gegen verbundene Unternehmen p. 126 et seq. with further references; Wachs, Flucht aus der kartellrechtlichen Bußgeldverantwortung? Unternehmensrestrukturierung und Haftungsnachfolge im deutschen und europäischen Bußgeldrecht p. 178.

539 Immenga/Mestmäcker/Dannecker and Biermann 5 Vorbemerkungen zu Art. 23 f.: Unionsrechtliche Geldbußen und Zwangsgelder paras 103 et seq.; Kienapfel, Europäisches Unionsrecht, VO (EG) 1/2003 Artikel 23 Geldbußen paras 26, 34.


gains from the competition law violation as well as the facts material for the calculation of the fine shall determine the internal allocation.\textsuperscript{544} On the contrary, the mere position as a parent corporation shall not be decisive.\textsuperscript{545}

These limitations do not render the functional approach invalid. Rather, they demonstrate that an autonomous definition can also successfully interact with other legal regimes with their own concepts. The examples show that the single economic entity doctrine can solve many problems when it comes to attributing and enforcing legal rules to transnational corporate groups – problems that international criminal law will face as well.

\textbf{D. Summary}

As has been shown throughout this chapter, the functional approach explicitly disregards national corporate law. It considers corporate groups, under certain circumstances, as single addressees and actors. In detail, it needs to be shown that the parent had the power to exercise decisive influence and actually used this power to consider the corporate group a single economic entity. For this two-step analysis, a set of criteria concerning the »economic, organisational and legal links«\textsuperscript{546} within the corporate group has been carved out from the vast case law. In the case of a wholly owned subsidiary, the possibility of influence is evident and its actual exercise can be presumed. In turn, the undertaking, mostly the parent, can rebut this presumption. The parent needs to show that it actually did not influence the subsidiary in its important business decisions, using the set of criteria in the opposite direction.

International criminal law could adopt this concept as well. Two specific advantages merit special attention – both concern premises mentioned in the introduction. Thus, these advantages would apply to international criminal law as well. Firstly, the functional approach takes account of the


\textsuperscript{545} KZR 15/12 \textit{Calciumcarbid-Kartell II} [2014] BGHZ 203, 193, 199, 202 paras 32, 46 et seq.

\textsuperscript{546} Case C-90/09 \textit{P General Química et al. v Commission} [2011] para 37.
economic reality and structure of economic organisations. It tries to attach responsibility and punishment to those entities that acted and those that controlled the actor, and not to legal persons.\textsuperscript{547} Not only the acting subsidiary shall be deterred from infringing (EU competition) law; its controlling parent shall also be induced to put more effort into preventing infringements, to generate a law-abiding corporate culture through effective corporate compliance systems, and to use its powers of control in that direction. Especially with regard to compliance systems, some caution has to be articulated. They should not be able to exclude the corporate group’s liability. Empirical studies have shown that »management’s commitment to corporate ethics, organizational culture, and institutional incentive structure«\textsuperscript{548} play a pivotal role in crime prevention. On the contrary, various empirical studies conclude that ethic codes, an element of most compliance systems, do not alter employees’ behaviours.\textsuperscript{549} More generally, legally required internal compliance systems or structures can be easily mimicked and thus for example be used to disguise management involvement and to limit or evade legal consequence of corporate misbehaviour.\textsuperscript{550} The concept of a single economic entity also allows the group-wide profits from the infringement through higher turnovers to be taken into account when setting the fine. To conclude, the approach provides a considerable amount of flexibility and allows due account to be taken of different economic structures while not hindering effective enforcement by complex corporate structures. Paying due regard to economic realities and close connections between corporations within one corporate group likewise enhances effective enforcement in international criminal law. Thoroughly applying functional criteria to establish whether a corporate

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\textsuperscript{547} Heinichen, Unternehmensbegriff und Haftungsnachfolge im Europäischen Kartellrecht p. 76. See also C. Kohlhoff, Kartellstrafrecht und Kollektivstrafe, 2003 p. 244 et seq., who concludes that a mixed approach of both economic and juristic elements is necessary for an adequate definition of the subject.
\textsuperscript{549} Krawiec, Washington University Law Quarterly 81 (2003), 511 et seq. with further references; McKendall, DeMarr and Jones-Rikkers, Journal of Business Ethics 37 (2002), 376 et seq.
\textsuperscript{550} Krawiec, Washington University Law Quarterly 81 (2003), 491 et seq.
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group has, in reality, worked closely enough together to consider it as one entity will allow a fair enforcement that punishes those entities that committed and profited from the infringement.

Secondly, the notion of an undertaking including the single economic entity doctrine is independent from national law. This autonomous concept enables an effective, coherent and equal enforcement of EU competition law throughout the Member States. It precludes the risks of evasion and unequal application mentioned in the introduction. Moreover, the solution adopted does not simply transpose one national concept of legal personhood to supranational EU level – which, in return, would imply that all other solutions are rejected. Rather, EU competition law has found its own European solution. Likewise, international criminal law could adopt an autonomous concept of corporate groups as single economic entities.

The analysis of EU competition law has shown that an autonomous notion independent from national law is both feasible and necessary for coherent enforcement. The autonomous concept of an undertaking also allows a functional approach to be implemented, and thus enables the effective and realistic handling of corporate groups.
Chapter III: UK Law as a Counterapproach to EU Competition Law

The broad approach taken in EU competition law stands in stark contrast to many national law concepts, where legal personalities within the corporate group are treated as separate.

AG Warner emphasised this point in the early *Commercial Solvent* case. He explicitly took the UK approach developed in *Salomon v A. Salomon & Co.* as a contrasting approach to that of EU competition law. According to him, the principle of separate legal personalities, as exemplified in the UK approach, would «serve only to divorce the law from reality.»

In reality, for him, there is barely any difference between a branch and a subsidiary that is under the control of its parent. Hence, as has been shown in chapter II, EU competition law usually views the corporate group as a single economic entity. On the contrary, as will be shown in this chapter, the UK approach mentioned by AG Warner generally perceives the different legal entities within a corporate group separately. The approach is therefore profoundly different and stands in opposition to a unified view of corporate groups. It can be seen as the other extreme on the scale in comparison to EU competition law, adding another, complementary component to the picture of corporate groups in different legal orders.

In contrast to EU competition law, the UK approach starts from the principle of separate legal personalities coupled with the concept of limited liability. These well-established principles have been introduced to common law in order to shield shareholders from claims of corporation creditors. These principles have since been transposed to corporate groups, where they apply both to the parent corporation and to the ultimate shareholders of the parent. As a consequence, and in contrast to EU competition law, corporate groups are, in the vast majority of cases, seen in their parts and treated as separate legal entities (B.). Deviations from the principle of

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separate legal personalities and limited liability are rare. This chapter will focus on cases concerning corporate groups. Initially, the approach is the same as that of more general corporate cases. The corporate group structure – or, more broadly, the fact that a corporation is part of a corporate group – can be taken into account in various aspects of a case and lead to different outcomes. Hence, relevant cases come from different areas of law with different focuses and terminology. In general, the corporate group is either seen as a single entity or the court attributes certain features or actions of the subsidiary to the parent. These different means are only adopted very rarely. While the case law is often not explicit – and even sometimes contradictory – about which means it employs, this chapter will nevertheless try to systemise the arguments and different ways of dealing with corporate group structures (C.).

The common law jurisdiction of the UK will be taken as a legal order of reference together with EU competition law. The treatment of corporate group aspects will be analysed in comparison to EU competition law. There, the extent to which the aspects found to be relevant in EU competition law do or might also play a role in UK law will be tested, allowing the UK approach to be evaluated in comparison to the EU competition law approach (D.). To set the framework, the chapter will begin with a brief explanation of how acts and knowledge are attributed to corporations in UK law (A.).

A. Attribution of Acts and Knowledge to Corporations

The attribution of legal personality to corporations triggers various successive legal problems. In most cases, the question of whether the (legal or natural) person acted, had knowledge or ought to have had knowledge about certain facts plays a crucial role. However, fictive entities prima facie can neither act nor know something; they need human beings to function as their minds and hands. This is a question of primary responsibility of corporations instead of vicarious liability. Whereas in the case of

552 This seems to be true for most jurisdiction: Thompson, Ramasastry and Taylor, Washington International Law Review (2009), 873 (reviewing 16 countries).
vicarious liability the corporation is made responsible for acts or states of mind of employees, thus of other persons,\textsuperscript{554} in the case of primary responsibility, acts and states of mind of a certain group of persons are seen as acts and states of mind of the corporation. Unfortunately, the distinction is not always clarified in UK statutes and corresponding case law.

UK jurisprudence calls those who act as the corporation its «directing mind and will».\textsuperscript{555} Here, a distinction is made between those who control the company and those who are »mere servants and agents.«\textsuperscript{556} Only the former »speak and act as the company«,\textsuperscript{557} only their state of mind is »the state of mind of the company and is treated by the law as such«.\textsuperscript{558} The latter only »carry out orders from above«\textsuperscript{559} and are »nothing more than hands to do the work and cannot be said to represent the mind or will«.\textsuperscript{560} Nevertheless, the directing mind and will – most notably the directors of a corporation – can delegate some part of their responsibility to employees. Such delegations will only extend the pool of persons belonging to the directing mind and will if those delegates have »full discretion to act independently of instructions«.\textsuperscript{561} Considering the acts of the directing mind and will as those of the company has far-reaching consequences. For example, according to the House of Lords, the rule \textit{ex turpi causa non oritur}

\textsuperscript{554} Independently from whether the employer is a natural or legal person: \textit{J. Murphy and C. Witting}, Street on Torts, 13th ed., 2012 p. 661. See also \textit{Davies and Worthington}, Gower and Davies' Principles of Modern Company Law para 7-36.

\textsuperscript{555} See Lord Viscount Haldane in HL Lennard’s Carrying v Asiatic Petroleum [1915] AC 705, 713: »a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation«.

\textsuperscript{556} CA \textit{H. L. Bolton v T. J. Geaham & Sons} [1957] 1 QB 159, 172.


\textsuperscript{558} CA \textit{H. L. Bolton v T. J. Geaham & Sons} [1957] 1 QB 159, 172. See also PC \textit{Meridian Global Funds Management Asia v Securities Commission} [1995] BCC 942, which emphasises the need to construct the rules of attribution for primary responsibility of corporations according to the purposes of the substantive rules.

\textsuperscript{559} HL \textit{Tesco Supermarkets v Nattrass} [1972] AC 153, 171.

\textsuperscript{560} CA \textit{H. L. Bolton v T. J. Geaham & Sons} [1957] 1 QB 159, 172.

\textsuperscript{561} HL \textit{Tesco Supermarkets v Nattrass} [1972] AC 153, 171.
actio (an action does not arise from a bad cause) also applies to cases in which a corporation sues its auditors for negligently not having discovered the fraud of the only person interested in the shares of the corporation who was seen as its directing mind and will. The judges argued that the fraudster would have been stopped from suing the auditor had he committed the fraud without using a corporation. Therefore, the result has to be the same if he used a corporation that he fully controlled.

The exact boundaries of who is to be considered the directing mind and will depend on the nature of the matter under consideration, the relative position of the officer or agent and the other relevant facts and circumstances of the case. As has often been seen in English law, whether an action of an employee is sufficient to trigger the responsibility of the corporation or whether an action of the directing mind and will is necessary depends on the particular statute or contract, which has to be interpreted and thus decided on a case-by-case basis. For example, in Tesco Supermarket v Nattrass the action of a store manager who was seen as mere employee was not imputed on Tesco. On the contrary, it was considered an action of another person and hence used as defence for Tesco. In the successive case Tesco Stores v Brent London Borough Council, the negligent sale of an video classified «18» to a 14-year-old boy by a shop assistant was imputed on Tesco. Tesco could not excuse itself by invoking that its directing mind and will, meaning the board of directors, neither knew nor had reasonable grounds to believe that the person concerned had not attained that age as they were not involved in the transaction.

562 HL Stone & Rolls v Moore Stephens [2009] 3 WLR 455, 495 para 134. See also Davies and Worthington, Gower and Davies' Principles of Modern Company Law para 7-35, which points to the fact that the corporation was directly and not vicariously liable.

563 Lord Phillips of Worth Matravers in HL Stone & Rolls v Moore Stephens [2009] 3 WLR 455, 473 para 51 »Where those managing the company are using it as a vehicle for fraud, or where there is only one person who is managing all aspects of the company's activities, there is no difficulty in identifying the fraud as the fraud of the company.« French, Mayson and Ryan, Company Law p. 644.


In *Pioneer Concrete*, the House of Lords expanded the range of persons belonging to the directing mind and will\(^{567}\) to include »specific individuals who exercised management and control over the activity constituting the wrong«.\(^{568}\) However, the case was concerned with competition law and with the question of whether a prohibited agreement was concluded, hence whether the consent of an employee could be regarded as the consent of the accused corporation to the agreement. In that case, the action of an employee »in the course of his employment«\(^{569}\) was considered the action of the corporation. In summary, while it is necessary to attribute the actions and mental state of employees to the corporation, the decision as to whose actions and state of mind is relevant is decided on a case-by-case basis.

B. The Rule: Separate Legal Personalities

1. The Salomon Principle

It is a well-accepted principle that, as separate legal entities, corporations are liable for their conduct separately from their shareholders.\(^{570}\) This rule of the separate legal personality of corporations, as exemplified in the *Salomon* case,\(^{571}\) is upheld in almost all cases.\(^{572}\) Overturning the rather moralistic preceding judgment of the Court of Appeal,\(^{573}\) Lord Macnaghten famously stated that »the company is at law a different person altogether.

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568 *Murphy and Witting*, Street on Torts p. 661.
569 HL *Director General of Fair Trading v Pioneer Concrete (UK)* [1995] 1 AC 456, 475.
571 HL *Salomon v A. Salomon and Co* [1897] AC 22. For a brief description of the facts of the case, see e.g. *Dignam and Lowry*, Company Law para 2.14.
573 CA *Broderip v Salomon* [1895] 2 Ch. 323.
from the subscribers to the [company’s] memorandum«.574 The motives of shareholders are completely irrelevant as long as they do not amount to fraud.575 Hence, even if all shares belong to one person, that person »is not the corporation«.576 It is the corporation (and not its members) that owns the corporation’s property, conducts the corporation’s business and enters into contracts.577 Thus, it is also the corporation, and not the shareholders, that is liable. The shareholders are only liable to the extent of their participation (principle of limited liability).578 This allows the shareholders »as investors, to allocate some of the risks of doing business to third parties.«579

2. Transfer to Corporate Groups

This principle applies irrespective of the owner of the corporation, be it a natural or legal person. Hence, each corporation is seen as a separate legal entity, including in cases where a corporate group is involved. The corporate group as such is not taken into consideration at all – neither in addition nor as an alternative to the separate legal entities.580 Instead, the courts emphasise that the degree of independence the subsidiary enjoys in relation to the parent corporation is irrelevant. Thus, even in the case of

575 Dignam and Lowry, Company Law para 2.22.
578 For the origins of limited liability, see P. Ireland, Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility, Cambridge Journal of Economics 34 (2013), 837 et seq.
B. The Rule: Separate Legal Personalities

»small paid-up capital and a board of directors all or most of whom are also directors or executives of the parent company«, the subsidiary and the parent corporation are considered separate entities and their liability is therefore also examined separately.

This strict separation can be seen as part of the general prevalence of legal substance over economic substance. Justice Templeman famously described the strictness of the Salomon principle, which deserves a lengthy citation:

»English company law possesses some curious features, which may generate curious results. A parent company may spawn a number of subsidiary companies, all controlled directly or indirectly by the shareholders of the parent company. If one of the subsidiary companies […] turns out to be the runt of the litter and declines into insolvency to the dismay of its creditors, the parent company and the other subsidiary companies may prosper to the joy of the shareholders without any liability for the debts of the insolvent subsidiary.«

The separateness of legal personalities has a variety of consequences. The holding corporation is not liable for the debt of its subsidiaries. Contractual and tortious duties are only owed to the contracting or acting corporation, and neither to other members of the corporate group nor to the parent. In court proceedings, corporations of a group are seen as distinct legal entities and, generally, only the corporation who sued or was sued is party to the proceedings. Hence, substituting the holding corporation in actions against a subsidiary is not possible; this would amount to introducing a new claim. The different corporations are also treated as separate jurisdictionally, causing a number of practical problems to arise in cases

583 CA In re Southard & Co [1979] 1 WLR 1198, 1208.
584 Hicks and Goo, Cases and Materials on Company Law p. 102.
586 CA Bank of Tokyo v Karoon et al. [1987] AC 45, 54 and 64 et seq.
involving transnational corporate groups. With regard to the interpretation of statutes, the general presumption is that Parliament wants to retain the principle of separate legal entities and only treat the corporate group as one entity in specific and explicit cases.

Applying the *Salomon* principle in group cases leads to a duplication of limited liability. The parent corporation will not be liable for the debt of its subsidiary, even though it may hold all shares in it. Furthermore, even if – contrary to most ordinary shareholders – parents often monitor the risks of liability of their subsidiaries, have the necessary information at hand and enforce an integrated business strategy, parent and subsidiary will still be examined separately.

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588. *P. Muchlinski*, Limited Liability and Multinational Enterprises. A Case for Reform?, Cambridge Journal of Economics 34 (2010), 915, 920. For a detailed analysis of the problems arising from the transnationality of corporate groups, see *M. Eroglu*, Multinational Enterprises and Tort Liabilities - An Interdisciplinary and Comparative Examination, 2008 p. 97 et seq. See, for example, the case *CA Adams et al. v Cape Industries et al.* [1990] Ch. 503 discussed below C.


591. *Eroglu*, Multinational Enterprises and Tort Liabilities - An Interdisciplinary and Comparative Examination p. 84; *P. Muchlinski*, Holding Multinationals to Account. Recent Developments in English Litigation and the Company Law Review, Company Lawyer 23 (2002), 168, 173. *Muchlinski* rightly points to a connection to classical agency theory: Corporate managers have to further (only) the shareholders’ best interests and are not even allowed to take into account social obligations and, more specifically, the interests of potential tort victims in, for example, well-capitalised subsidiaries. As tort victims are involuntary creditors of the corporation, they have a contractual relation to the cor-
C. The Exceptions

Even though the principle of separate legal personalities is very important in UK law, exceptions to the principle are frequently discussed. In most cases, courts turn down propositions to disregard the principles of separate legal personalities and limited liability. However, under certain circumstances, UK courts are willing to acknowledge the group dimension and even to consider the various corporations within a corporate group as a single entity. These cases are often discussed under the heading of »piercing the corporate veil«. However, the terminology is not strictly defined. This is partly due to the fact that both the principle and its exceptions are case law and different judges use different terminology. Additionally, the question of whether and to what extent the group dimension of the corporation concerned should be acknowledged becomes relevant at different stages of the proceedings and at different material points of law. Often, the decisive point of law in a case is not one that is specific to corporate groups – and indeed often not a corporate law question at all. For example, in the important Adams et al. v Cape Industries et al. case, the relevant point was whether a US judgment was enforceable in the UK.

This section will concern itself solely with cases involving corporate groups. Of course, the case law is wider. In general, there are many cases, including the classical Salomon v A. Salomon & Co. case, that concern questions of liability of natural persons as (sole) corporate shareholders. With regard to corporate groups, other members of the group besides the one who acted directly are seldom held responsible for the wrongdoing.


593 The thesis will thus use this term in other Chapters to describe the UK law approach and to summarise the different methods used.
594 CA Adams et al. v Cape Industries et al. [1990] Ch. 503.
595 Murphy and Witting, Street on Torts p. 662; Hannigan, Company Law para 3-44; Hicks and Goo, Cases and Materials on Company Law p. 110. See recently

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The aim is to collect those factors that judges take into consideration in deciding whether to acknowledge the group dimension as a matter of law. Furthermore, the extent to which the corporate dimension is acknowledged shall be evaluated. Here, the case law can be roughly divided into six parts. The *Adams et al. v Cape Industries et al.* case will be taken as a point of departure for this division. In its judgment, the Court of Appeal distinguished three arguments with regard to the question of whether to acknowledge the close relationship of parent corporation and subsidiary as a relevant factor in law. The first question to be addressed was whether and under which circumstances parent and subsidiary can form a single economic entity. As well as the *Adams et al. v Cape Industries et al.* case, cases of compensation for compulsory purchase of land where one member of the corporate group owned the land and another member of the corporate group conducted the business also belong to this category. Under such circumstances, most cases stick to the general principle of separate legal entities, while some consider the corporate group as one entity and thus grant full compensation (1.). The court then considered whether to pierce the corporate veil. Piercing the corporate veil is generally only possible if objectively unusual facts and subjectively fraudulent behaviour justify disregarding the general principle of separated legal personalities (2.). Thirdly, the question often arises as to whether one member of the corporate group can be seen as the agent of another member, usually the parent corporation. While in *Adams et al. v Cape Industries et al.* the court was very cautious in applying agency law to corporate groups, other judgments have been more liberal. In general, however, subsidiaries are not seen as agents and judges will only decide otherwise under specific circumstances (3.). Similarly to agency cases, the question often arises as to whether a subsidiary holds property as a beneficial owner for the parent. This question has been a side issue in some compensation claim cases. In other compensation cases, the issue of whether the parent can claim damages for disturbance of its subsidiary’s property has been solved by taking into account the corporate group structure. In the case of tight control over the subsidiary and whole ownership, the courts will likely consider the

Justice *Eady* expressing great scepticism about treating a mother corporation and a subsidiary as a single entity to allow them to recover losses in libel damages: HC Queen’s Bench Division *Adelson et al. v Associated Newspapers* [2007] EWHC 3028.
parent as the beneficial owner (4.). Courts have also used specific corporate group structures and control mechanisms to impose a direct duty of care on parent corporations for their subsidiaries’ employees. Such a duty of care, however, will only be imposed under specific, exceptional circumstances that evidence sufficient proximity between the parent and the subsidiary employee (5.). Courts have generally been more willing to consider the group dimension when interpreting contracts and statutes. Here, the parties’ and legislature’s intentions have a special weight. This might lead to an interpretation of a clause or term that disregards the principle of separate legal personalities. Employees’ covenants illustrate this point very well. Employment contracts often include a clause that forbids the employee to work for a competitor for a certain period of time after the employment contract ends. In this case, the question arises as to whether the clause can, and should, be interpreted as including all or just parts of the competitor’s corporate group (6.).

1. Single Entity

Whereas the single economic entity doctrine is well established in EU competition law, it is frequently rejected in UK law. The most prominent and often-cited case here is Adams et al. v Cape Industries et al. Cape Industries Plc., an English company, was involved in asbestos mining in South Africa, where workers became ill through inhaling asbestos. Some of those workers sued Cape Industries Plc. in the US for damages and won their case. Subsequently, the English courts were asked to enforce the US judgment against Cape Industries Plc. According to English law, the judgment was only enforceable if Cape Industries Plc. had been a proper party to the dispute in the US. 596 This, in turn, would only have been the case had Cape Industries Plc. been present in the US. 597 Cape Industries Plc. was established in the UK and had no US branch. For their asbestos sales in the US, they used a complex network of subsidiaries. Thus, the claim could only have been successful if the parent corporation, Cape Industries Plc., and its US subsidiaries were able to be considered together,

596 See the authorities discussed by Lord Justice Slade in CA Adams et al. v Cape Industries et al. [1990] Ch. 503, 513 et seq.
597 For this concept in more detail, see below Chapter IV A. 3. a.
as then Cape Industries Plc. could be said to have been present on the US market. Justice Scott dismissed all claims of the plaintiffs and ruled that the US judgment could not be enforced in the UK. A year later, the Court of Appeal affirmed the judgment and Justice Scott’s reasoning by refusing to consider the parent corporation and the subsidiaries as a single economic entity. Lord Justice Slade for the Court of Appeal postulated that there existed »no general principle that all companies in a group of companies are to be regarded as one.« Even though the Court of Appeal acknowledged that, for a layman, the distinction between subsidiaries and branches »may be a slender one«, the court upheld the formal legal separation within corporate groups. These legal separations, not economics, were the point of reference for the court. Lord Slade stressed that »the fundamental principle is that ‘each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate legal rights and liabilities’«. This principle can only be set aside under limited circumstances:

»the court is not free to disregard the principle of Salomon v Salomon merely because it considers that justice so requires. Our law, for better or worse, recognises the creation of subsidiary companies, which, though in one sense the «creatures” of their parent companies, will nevertheless be treated as separate legal entities under general law with all the rights and liabilities that would normally be attached to separate legal entities.«

In UK law, contrary to EU competition law, there is no presumption that the subsidiary is the parent corporation’s alter ego. In this particular

598 Lord Justice Slade in CA Adams et al. v Cape Industries et al. [1990] Ch. 503, 532.
599 Lord Justice Slade in CA Adams et al. v Cape Industries et al. [1990] Ch. 503, 536.
600 Lord Justice Slade in CA Adams et al. v Cape Industries et al. [1990] Ch. 503, 538 citing Lord Justice Goff in CA Bank of Tokyo v Karoon et al. [1987] AC 45, 64: »But we are concerned not with economics but with law. The distinction between the two is in law fundamental and cannot be bridged«.
601 Lord Justice Slade in CA Adams et al. v Cape Industries et al. [1990] Ch. 503, 532 citing The Albazero (1977) A.C. 774 at p. 807 per Lord Justice Roskill. See also Justice Scott in High Court Chancery Division Adams et al. v Cape Industries et al. [1990] Ch. 433, 477.
602 Lord Justice Slade in CA Adams et al. v Cape Industries et al. [1990] Ch. 503, 536.
603 Lord Justice Slade in CA Adams et al. v Cape Industries et al. [1990] Ch. 503, 537.
case, the parent was perfectly entitled to structure its group in such a way that its activities in the US were conducted as businesses of its subsidiaries and not as those of the parent. Slade LJ concurred with Scott J that this overall supervision and control was normal and, indeed, «the very nature of a parent-company-subsidiary relationship». Even the fact that the corporate group «ran a single integrated mining division with little regard to corporate formalities» was immaterial, since the general corporate forms were observed. Moreover, he stressed that, within general policy limits, «the day-to-day running of [the subsidiary] was left to [the subsidiary’s director]».  

Similar questions are discussed in compensation cases for compulsory purchase of land. UK compensation schemes differentiate between those who merely own land and those owners or long-term tenants who also conduct business on their land. The latter will receive considerably higher compensation for disturbance of business than the former. This leads to difficulties for corporate groups, as they usually divide tasks between subsidiaries. Often, therefore, one subsidiary runs the business while another owns the land on which business is conducted. In such instances, corporate groups try to argue that the two subsidiaries form one single economic entity. In most cases, this argument has been unsuccessful.  

However, in *DHN Food Distributors v Tower Hamlets London Borough Council* the argument was successful and Lord Denning considered the corporate group a single economic entity. He argued that the law often takes the corporate group together «as one concern», for example for the «purpose of general accounts, balance sheet, and profit and loss account». The fact that they were three separate legal personalities was, for

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604 Lord Justice Slade in CA Adams et al. v Cape Industries et al. [1990] Ch. 503, 537.
605 Lord Justice Slade in CA Adams et al. v Cape Industries et al. [1990] Ch. 503, 538.
606 Lord Justice Slade in CA Adams et al. v Cape Industries et al. [1990] Ch. 503, 537.
607 Lord Justice Slade in CA Adams et al. v Cape Industries et al. [1990] Ch. 503, 538.
him, a mere »technical provision of [UK] company law.«\textsuperscript{610} He argued that the subsidiaries and the mother corporation were similar to a partnership,\textsuperscript{611} as they all exercised the same business. As the parent corporation, DHN held all shares in the two subsidiaries and the directors of all three corporations within the group were the same. The parent, therefore, had control over »every movement of the subsidiaries«.\textsuperscript{612} Lord Denning thus concluded that they were a single economic entity. Similarly, Lord Justice Shaw concluded in his concurring opinion that these features showed that the three corporations within the group were of complete identity and should thus be considered a single economic entity.\textsuperscript{613} Furthermore, he re-interpreted the license of the parent corporation as an irrevocable license. Due to the control that the parent exercised over its subsidiary and the fact that the directors were the same, the subsidiary could not unilaterally stop or change the license. Rather, the parent was able to rent the land for as long as, and under whatever conditions, it desired.\textsuperscript{614} Lord Goff concurred, claiming that the facts of the case warranted piercing the corporate veil.\textsuperscript{615} He mentioned, as relevant facts, that the subsidiaries were wholly owned and had no business of their own. He explicitly refused to make any general statement about whether corporate groups should always be considered as single economic entities.\textsuperscript{616} Similarly, Lord Justice Shaw stressed that the facts were »of an exceptional and unusual character«.\textsuperscript{617} He claimed that the owning subsidiary »had no business, no capital and no function.«\textsuperscript{618} Furthermore, Lord Goff argued that the parent corporation

\textsuperscript{610} CA DHN Food Distributors v Tower Hamlets London Borough Council [1976] 1 WLR 852, 858, see also at 860: »technical point«.

\textsuperscript{611} See s 1 (1) Partnership Act 1890.

\textsuperscript{612} CA DHN Food Distributors v Tower Hamlets London Borough Council [1976] 1 WLR 852, 860.

\textsuperscript{613} CA DHN Food Distributors v Tower Hamlets London Borough Council [1976] 1 WLR 852, 867.

\textsuperscript{614} CA DHN Food Distributors v Tower Hamlets London Borough Council [1976] 1 WLR 852, 859.

\textsuperscript{615} CA DHN Food Distributors v Tower Hamlets London Borough Council [1976] 1 WLR 852, 861.

\textsuperscript{616} CA DHN Food Distributors v Tower Hamlets London Borough Council [1976] 1 WLR 852, 859.

\textsuperscript{617} CA DHN Food Distributors v Tower Hamlets London Borough Council [1976] 1 WLR 852, 861.

\textsuperscript{618} CA DHN Food Distributors v Tower Hamlets London Borough Council [1976] 1 WLR 852, 866.
C. The Exceptions was the equitable owner of the property and should thus be entitled to compensation.619

Two years later, the House of Lords refused to award full compensation for compulsory purchase to a corporate group. In *Woolfson v Strathclyde Regional Council* the premises in question were partly owned by Mr Woolfson and partly by a corporation that, in turn, was owned by Mr and Mrs Woolfson. The business was run by Campbell, a corporation in which Mr Woolfson held 999 shares and Mrs Woolfson 1 share. Mr Woolfson was the sole director of Campbell; his wife also worked for Campbell. There was no formal lease for the premises. The applicants claimed that the corporate group should be considered a single entity.620 Lord Keith of Kinkel argued that the principle of separate legal entities can only be disregarded if specific circumstances allow it. Although this might well have been the case in *DHN Food Distributors v Tower Hamlets London Borough Council*, according to Lord Keith of Kinkel the facts in *Woolfson v Strathclyde Regional Council* were not sufficient to view the corporate group as a single economic entity. He argued that the *DHN Food Distributor* case had to be distinguished from the *Woolfson* case, and was thus of no assistance to the appellants.621 In *DHN Food Distributor*, the corporation that carried out the business had full control over the subsidiary that owned the land. Campbell, however, had no control over the owner of the premises. Moreover, the corporation that partly owned the premises had no interest in Campbell. Woolfson only suffered loss as a principal shareholder of Campbell and not as an owner of the land.622 Hence, he was not entitled to compensation. The corporate group, according to the House of Lords, could not be considered a single economic entity.

Furthermore, Lord Keith of Kinkel expressed his doubts that, in considering the corporate group as a single economic entity, »the Court of Appeal properly applied the principle that it is appropriate to pierce the corporate veil only where special circumstances exist indicating that a mere

620  HL *Woolfson v Strathclyde Regional Council* 1978 S.C. (H.L.) 90, 94.
façade concealing the true facts.« 623 As a result, subsequent courts have generally distinguished the DHN Food Distributors case and hardly ever apply it as a precedent. 624 Mostly, courts argue that the corporate group was only considered a single economic entity in the DHN Food Distributors case because the whole group was involved in one single business. This cannot be said to be characteristic of most corporate groups – particularly huge transnational corporate groups, 625 which are often active in different and distinct industries and branches. However, the criterion of control was relevant in both judgments. The court in DHN Food Distributors relied on the criterion of complete control over the subsidiary, as well as the fact that the directors of all three corporations were the same, to justify treating the corporate group as a single economic entity. In Woolfson, the House of Lords pointed to the fact that the business-conducting corporation lacked control over the owner of the premises in order to distinguish the cases and to be able to treat the corporations within the corporate group separately.

2. Piercing the Corporate Veil

Secondly, the Court of Appeal in Adams et al. v Cape Industries et al. dealt with the argument that the court should pierce the corporate veil. The applicants argued that the court should acknowledge that the US subsidiary is, in reality, part of the parent corporation and that the latter must, therefore, be seen to have a presence in the US.


624 French, Mayson and Ryan, Company Law p. 146. Lord Justice Slade considers the DHN Food Distributors v Tower Hamlets London Borough Council case a case of statutory interpretation in order to distinguish from it: »The relevant parts of the judgments in D.H.N. must, we think, likewise be regarded as decisions on the relevant statutory provisions for compensation, even though these parts were somewhat broadly expressed, and the correctness of the decision was doubted by the House of Lords in Woolfson v. Strathclyde Regional Council«: Lord Justice Slade in CA Adams et al. v Cape Industries et al. [1990] Ch. 503, 536. Likewise, see Lord Justice Hobhouse in CA Ord & Anor v Belhaven Pubs [1998] BCC 607, 615.

625 French, Mayson and Ryan, Company Law p. 145. See also Blumberg, The Multinational Challenge to Corporation Law p. 80.
In general, piercing the corporate veil concerns situations where the judiciary or the legislature have decided that the separation of the personality of the company and the members is not to be maintained. The exact scope of this concept is difficult to predict. The judges will only lift the corporate veil in rare cases, and to do so requires a high standard of proof and material elements. Additionally, a fraudulent or abusive element is necessary to justify diverting from the rule of separate legal entities. Lord Justice Diplock in *Snook v London and West Riding Investments* stressed the necessity of an improper or disguised intention. He describes them as acts done or documents executed by the parties to the ‘sham’ which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create.

Whether the corporation has been used for an improper purpose is down to the facts at hand and to be decided for the time on the material facts of the case. Thus, a corporation can be a mere façade even though it was once

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626 Dignam and Lowry, Company Law para 3.1.
628 Hicks and Goo, Cases and Materials on Company Law p. 103. For a discussion of the cases, concepts and literature in German, see J. Mühlens, Der so genannte Haftungsdurchgriff im deutschen und englischen Recht, 2006 p. 98 et seq.; Lord Sumption in SC Prest v Petrodel Resources [2013] 3 WLR 1 SC paras 28 et seq. distinguished cases of concealment, where the real actor is concealed by the interposition of a corporation and cases of evasion. These are true cases of piercing the corporate veil, where the separate legal personality defeats or frustrates the enforcement of a legal right that exists independent from the corporation. For a description of this concept, see P. W. Lee, The Enigma of Veil-Piercing, International Company and Commercial Law Review 26 (2015), 28, 28 et seq.
629 This is the major difference to the enterprise theory: Strasser, Connecticut Law Review 37 (2005), 646.
630 Lord Justice Diplock in CA Snook v London and West Riding Investments [1967] 2 QB 786, 802.
incorporated for a perfectly legitimate purpose.\textsuperscript{631} In \textit{Jones et al. v Lipman et al.}\textsuperscript{632} the defendant had bought a corporation and conferred his land to the corporation for the sole purpose of avoiding having to execute the contract made with the applicant – namely to transfer the land to the latter. This was seen to be using the corporation as a mere façade. The corporation at the material time had no other purpose than to be the proprietor of the land.\textsuperscript{633} The defendant and a clerk of his solicitor were both the sole shareholders and directors of the corporation and the corporation was »under the complete control« of the defendant.\textsuperscript{634} In the dramatic words of Justice Russell, this made the corporation »a device and a sham, a mask which [the defendant] holds before his face in an attempt to avoid recognition by the eye of equity.«\textsuperscript{635}

In corporate group cases, judges usually stress the formal separation within the corporate group. Many cases concern group-restructuring issues that lead, for example, to a loss of the subsidiary’s assets in question. In those cases, the question arises as to whether the restructuring was a »legitimate business transaction«\textsuperscript{636} or whether it was »a mere façade concealing the true facts«\textsuperscript{637} in order to avoid liability. In general, in the absence of any fraudulent or improper motive, such restructuring is seen as perfectly legitimate and does not justify disregarding the principle of separate legal personalities.\textsuperscript{638}

In \textit{Adams et al. v Cape Industries et al.}, both the High Court and the Court of Appeal rejected piercing the corporate veil. Justice Scott for the High Court situated Cape Industries’ wholly owned subsidiary between a mere branch of Cape Industries Plc. and an independent US corporation. The US subsidiary was, »if the Cape group of companies is viewed as a

\begin{itemize}
\item \textsuperscript{631} C.-A. Png, Lifting the Veil of Incorporation. Creasey v. Breachwood Motors, Company Lawyer 20 (1999), 125.
\item \textsuperscript{632} HC Chancery Division \textit{Jones et al. v Lipman et al.} [1962] 1 WLR 832.
\item \textsuperscript{633} Also admitted by the defendant: HC Chancery Division \textit{Jones et al. v Lipman et al.} [1962] 1 WLR 832, 835.
\item \textsuperscript{634} HC Chancery Division \textit{Jones et al. v Lipman et al.} [1962] 1 WLR 832,835.
\item \textsuperscript{635} Justice Russell in HC Chancery Division \textit{Jones et al. v Lipman et al.} [1962] 1 WLR 832, 836.
\item \textsuperscript{636} Dignam and Lowry, Company Law para 3.30. See also A. Dähnert, Der Eiserne Vorhang der Gesellschaft – Zum Haftungsdurchgriff im englischen Recht, NZG 2015, 258, 263.
\item \textsuperscript{637} HL \textit{Woolfson v Strathclyde Regional Council} (1978) 1978 SC (HL) 96.
\item \textsuperscript{638} CA Ord & Anor v Belhaven Pubs [1998] BCC 607, 615.
\end{itemize}
whole, part of the selling organisation of the group and Cape’s agent in the United States«.639 Each corporation within the Cape Industries’ corporate group had its »well-defined commercial function designed to serve the over-all commercial purpose«.640 This was, in Scott’s opinion, not enough to conclude that Cape Industries Plc. was present in the US.641 Rather, it amounted to no more than normal circumstances within a corporate group. Cape Industries Plc. only controlled the corporate, not the commercial, activities of the US subsidiary.642 The subsidiary was taxed in the US, it paid its own dividends and all corporate formalities were observed.643 Its offices were theirs and could not be seen as an office, and thus a presence, of Cape Industries Plc. Importantly, the US subsidiary was not allowed to conclude any contracts in the name of Cape Industries Plc.644

In the appeal, the Court of Appeal discussed the precedents for and against piercing the corporate veil at length. It concluded that they were of little practical guidance645 and did not justify a piercing in the case at hand. The corporate group structure was not fraudulent. Even though the corporate structure was designed to shield the parent from liability claims arising from asbestos mining and trading, this was not illegal in and of itself. Rather, it was a corporate group business structure inherent to UK corporate law and thus perfectly legitimate.646 According to the Court of Appeal, Cape Industries Plc. very much intended to reduce its appearance

639 Justice Scott in HC Chancery Division Adams et al. v Cape Industries et al. [1990] Ch. 433, 473.
640 Justice Scott in HC Chancery Division Adams et al. v Cape Industries et al. [1990] Ch. 433, 483.
641 Justice Scott in HC Chancery Division Adams et al. v Cape Industries et al. [1990] Ch. 433, 483.
642 Justice Scott in HC Chancery Division Adams et al. v Cape Industries et al. [1990] Ch. 433, 473 et seq.
643 Justice Scott in HC Chancery Division Adams et al. v Cape Industries et al. [1990] Ch. 433, 474.
644 Justice Scott in HC Chancery Division Adams et al. v Cape Industries et al. [1990] Ch. 433, 477.
645 See Lord Justice Slade in CA Adams et al. v Cape Industries et al. [1990] Ch. 503, 543: »From the authorities cited to us we are left with rather sparse guidance as to the principles which should guide the court in determining whether or not the arrangements of a corporate group involve a façade«.
646 Lord Justice Slade in CA Adams et al. v Cape Industries et al. [1990] Ch. 503, 544. See already Justice Scott in HC Chancery Division Adams et al. v Cape Industries et al. [1990] Ch. 433, 476.
in the US. Specifically, it aimed to reduce «by any lawful means available» the risk for itself or its subsidiaries to be taxed or subject to court proceedings in the US.\textsuperscript{647} This, however, did not justify piercing the corporate veil.\textsuperscript{648} For the Court of Appeal, the crucial point was that the scheme was not intended to «deprive anyone of their existing rights», which would have been illegitimate.\textsuperscript{649} The mere possibility that third parties might be unable to acquire certain rights is insufficient to pierce the corporate veil. As a result, «Cape [Industries Plc.] was in law entitled to organise the group's affairs in that manner and [...] to expect that the court would apply the principle of \textit{Salomon v. A. Salomon & Co. Ltd.} [...] in the ordinary way.»\textsuperscript{650} Thus, although the subsidiary was wholly owned by the parents and was part of the scheme put in place to limit potential liability of the parent in the US, the subsidiary was seen as an independent corporation, carrying out its own business instead of that of its parent.\textsuperscript{650} In the end, the lack of a fraudulent element was the decisive argument against piercing the corporate veil. Even though the corporate group structure was chosen simply for its advantageous consequences in tort cases, such as the one under discussion, it was not fraudulent. No facts were concealed, the subsidiary was not a dead shell, and only future liabilities were affected.

In \textit{Wallersteiner v. Moir}, the circumstances were exceptional and Lord Denning, unlike in other cases, stressed the fraudulent elements. In that case Mr. Moir circulated a letter accusing Mr. Wallersteiner amongst others things of fraudulent dealings. Mr. Wallersteiner had, inter alia, acquired 80% of the shares of a corporation through a trust owned by him and his mother. To pay the shares, he used the funds of the acquired corporation. Mr. Wallersteiner sued for libel and Mr. Moir, a minority shareholder, made a counterclaim on behalf of the corporation. The first instance dismissed the claim for libel and found Mr. Wallersteiner guilty of

\textsuperscript{647} Lord Justice Slade in \textit{CA Adams et al. v Cape Industries et al.} [1990] Ch. 503, 541.
\textsuperscript{648} Lord Justice Slade in \textit{CA Adams et al. v Cape Industries et al.} [1990] Ch. 503, 544.
\textsuperscript{650} \textit{Davies and Worthington}, Gower and Davies' Principles of Modern Company Law paras 8 et seq.
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fraud. Lord Denning, on appeal upheld the judgement. He highlighted the fact that Mr. Wallersteiner held full control over the corporations in question; no other person was necessary for any action of the corporations or consulted by Wallersteiner. Furthermore, Wallersteiner used their [the corporations’] moneys as if they were his own.651 Lord Denning acknowledged that the concerns were distinct legal entities. However, the above-mentioned elements showed that the corporations set up and run by Wallersteiner were merely his puppets.652 It is not entirely clear which legal path Lord Denning took to arrive at his conclusion that Wallersteiner should be held responsible for the actions of his corporate group and that the corporate group’s funds should be seen as Mr. Wallersteiner’s funds. While Lord Denning claimed that, in legal terms, this was a question of agency, he discussed the question under the heading corporate veil. Moreover, he did not refer to agency cases nor deal with the established criteria for agency, such as an agency agreement. On the contrary, his language (puppets, façade) resembled the language of piercing the corporate veil. In any event, the other two members of the Court of Appeal – Lord Justice Buckley and Lord Justice Scarman – were more cautious and less general in their conclusions. While they concurred with Lord Denning’s conclusion, they were not prepared to pierce the corporate veil. According to them, the court had not been able to gather the necessary evidence to do so, as the Court of Appeal was concerned with a judgment by default and an interlocutory judgment. Thus, no cross-examination was held and full evidence was not gathered.653

In general, two criteria have to be fulfilled to allow the corporate veil to be pierced. Firstly, there need to be circumstances that show that in reality, it is the person behind the company, rather than the company, which is

653 For the cautious approach, see Lord Justice Buckley in CA Wallersteiner v Moir [1974] 1 WLR 991, 1017, 1027: but, with the greatest deference to Lord Denning M.R., I do not think we are justified in identifying Dr. Wallersteiner with I.F.T. in respect of the £50,000 on the ground that I.F.T. was merely the puppet of Dr. Wallersteiner or on any other ground. And Lord Justice Scarman in CA Wallersteiner v Moir [1974] 1 WLR 991, 1017, 1030: I entertain grave doubts as to the bona fides and honesty of Dr. Wallersteiner […] in the financial dealings. And, at 1032: I am not prepared at this stage to tear away ‘the corporate veil’ and say that the loan to I.F.T. was in truth a loan to Dr. Wallersteiner.«
the relevant actor or recipient«.\textsuperscript{654} Mostly, sole ownership or control over the corporation will indicate this objective element. The second prerequisite is a subjective or fraudulent element. The above-mentioned »true facts« need to have been concealed. The emphasis in cases is usually on the fraudulent element. In EU competition law the subjective fraudulent element is completely absent. There, the focus is on objective elements.\textsuperscript{655} These objective elements are mostly neglected in piercing the corporate veil cases. While, in the abstract, the objective criteria of control, ownership, interrelated businesses and overlapping directors are similar, in practice, the UK cases hardly ever elaborate on that point, focussing instead on the fraudulent element. In contrast, as has been shown in chapter II, EU competition law cases have elaborated extensively on the relevant objective criteria.

3. Agency within Corporate Groups

A third option when considering corporate group aspects, also discussed in the *Adams et al. v Cape Industries et al.* case, is to perceive a subsidiary as the agent of its parent corporation. Only in rare cases are corporations considered to be agents of their members.

Agency is not a specific corporate law concept. Rather, the common law figure of principal and agent applies in the same way to cases involving natural as well as juridical persons.\textsuperscript{656} Nonetheless, even here »the starting point […] is the decision of the House of Lords in *Salomon v. A. Salomon and Co. Ltd.*«\textsuperscript{657} Hence, neither membership in a corporation nor control over a corporation makes the corporation an agent of the member or controller.\textsuperscript{658} An explicit or implicit agency agreement, i.e. consent between agent and principal, is necessary. This agreement is generally ab-

\begin{itemize}
  \item \textsuperscript{654} SC *VTB Capital v Nutritek International et al.* [2013] UKSC 5 para 142.
  \item \textsuperscript{655} Chapter II B.
  \item \textsuperscript{656} *Dignam and Lowry*, Company Law para 3.21.
  \item \textsuperscript{657} HC Queen’s Bench Division *Yukong Line v Rendburg Investments et al.* [1998] 1 WLR 294, 303.
  \item \textsuperscript{658} HC Queen’s Bench Division *Yukong Line v Rendburg Investments et al.* [1998] 1 WLR 294, 304: »something quiet different would need to be established«; *French, Mayson and Ryan*, Company Law p. 133.
\end{itemize}
sent between a corporation and its members.\textsuperscript{659} Even sole ownership cannot be a substitute for a lacking agency agreement.\textsuperscript{660} The subsidiary is thus generally not considered to be the agent of the parent. Corporations in a corporate group are perceived as separate legal entities and are not agents of their parent corporation as controlling shareholders, in the same way as in the case of individual shareholders.\textsuperscript{661} It is only in exceptional circumstances that the parent will be seen as the principal of the subsidiary and thus be held liable for the actions of its subsidiary.

In \textit{Adams et al. v Cape Industries et al.}, both the concept of agency in general and its application to the facts of the case were discussed. A relationship of agency between the parent and the subsidiary was not found; the relevant subsidiary was conducting business on its own account. The Court of Appeal listed several factors to underline its finding. The US subsidiary was the lessee of the premises, had its own employees with pension schemes, its own office furniture and paid its own taxes in the US. More importantly, it contracted in its own name and not in the name of Cape Industries Plc. It sometimes also bought asbestos from the US government itself and leased warehouses for storage. It had only limited power to act as a representative for Cape Industries Plc. Likewise, the US subsidiary could only bind its parent and the other subsidiaries to any contractual obligations in rare circumstances – and, in fact, never did so.\textsuperscript{662} The subsidiary had a somewhat coordinating role between Cape Industries Plc. and the US customers. Interestingly, the inward and outward appearance of the US subsidiary as an integral part in the corporate group was immaterial. The US subsidiary was not considered as Cape Industries Plc.’s agent, even though it reached out to many customers as part of Cape Industries Plc.’s selling organisation and was perceived as such by these

\begin{itemize}
\item \textsuperscript{659} HC Queen’s Bench Division \textit{Yukong Line v Rendburg Investments et al.} [1998] 1 WLR 294, 304; \textit{French, Mayson and Ryan}, Company Law p. 133. See also Lord \textit{Mance} in \textit{PC La Générale des Carrières et des Mines v F.G. Hemisphere Associates} [2012] UKPC 27 para 29: »It will […] take quite extreme circumstances to displace this presumption.«
\item \textsuperscript{660} \textit{Hannigan}, Company Law paras 3-9; 3-40 et seq.; HC King’s Bench Division \textit{Smith, Stone and Knight v Lord Mayor et al.} [1939] 4 All ER 116.
\item \textsuperscript{661} CA \textit{Ebbw Vale Urban District Council v South Wales Traffic Area Licensing Authority} [1951] 2 K.B. 366, 370; \textit{French, Mayson and Ryan}, Company Law p. 133; \textit{Hannigan}, Company Law para 3-42.
\item \textsuperscript{662} Lord Justice \textit{Slade} in CA \textit{Adams et al. v Cape Industries et al.} [1990] Ch. 503, 545 et seq.
\end{itemize}
customers. Likewise, the fact that Cape Industries Plc. referred to its US subsidiary as its «US office», and vice versa, was deemed irrelevant.663 This illustrates the general tendency of the courts to be reluctant to accept agency relationships in corporate groups.664

A different, more open approach was taken in Smith, Stone and Knight v Lord Mayor et al. There, the Court of Appeal held that the subsidiary was carrying out the business for its parent. Hence, the subsidiary was considered to be the agent of the parent corporation, even after the parent had outsourced certain activities to the subsidiary. Lord Atkins for the Court of Appeal, however, stressed that this case did not disregard the principle of separate legal entities. Instead, he distinguished Salomon v A. Salomon & Co. Contrary to the Salomon case, in Smith, Stone and Knight v Lord Mayor et al. the business was never formally transferred to the subsidiary.665 Lord Atkins gave six cumulative criteria to determine whether a subsidiary is the agent of its parent corporation:

»The first point was: Were the profits treated as the profits of the company? – when I say 'the company' I mean the parent company – secondly, were the persons conducting the business appointed by the parent company? Thirdly, was the company the head and the brain of the trading venture? Fourthly, did the company govern the adventure, decide what should be done and what capital should be embarked on the venture? Fifthly, did the company make the profits by its skill and direction? Sixthly, was the company in effectual and constant control?« 666

This test, however, seems to no longer be in use. The courts have shown great reluctance to accept agency and have confined themselves to cases of explicit agency agreements.667 Nonetheless, the criteria are relevant for the present project, as they provide a number of decisive factors for establishing the existence of parental control over its subsidiary. They also re-

663 Lord Justice Slade in CA Adams et al. v Cape Industries et al. [1990] Ch. 503, 546 et seq.
664 Dignam and Lowry, Company Law para 3.21; Hicks and Goo, Cases and Materials on Company Law p. 103. See CA J. H. Rayner v Department of Trade and Industry [1989] Ch. 72 or HC Chancery Division Re Polly Peck International [1996] BCC 486, 495, where such an agreement was lacking.
665 HC King’s Bench Division Smith, Stone and Knight v Lord Mayor et al. [1939] 4 All ER 116, 119; French, Mayson and Ryan, Company Law p. 133.
666 Lord Atkins in HC King’s Bench Division Smith, Stone and Knight v Lord Mayor et al. [1939] 4 All ER 116, 121.
667 See e.g. HC Queen’s Bench Division Yukong Line v Rendburg Investments et al. [1998] 1 WLR 294, 304: »somewhat broadly expressed«.
semblé the criteria used in EU competition law to describe a single economic entity.

4. Beneficial Ownership

In some cases, the courts have been willing to acknowledge the close relationship within a corporate group. They have considered the parent to be the beneficial owner even when, formally, the subsidiary was the owner. While these judgments do not represent mainstream reasoning in UK law, they are examples of a different approach in some parts of UK law— one that stresses the economic realities of corporate groups.

The question of beneficial ownership and compensation of losses in corporate group cases played a decisive role in the recent case of Shell UK et al. v Total UK et al.668 There, the Court of Appeal disregarded the principle of separate legal personalities. Pipelines that belonged solely to the subsidiary were damaged on a site managed and operated by a subsidiary on behalf of three holding corporations. The Court of Appeal ruled that Shell, one of the four parent corporations, was not merely a third party that only had contractual rights in the property damaged. Even though the subsidiary was the owner of the damaged pipelines, Shell had a right to compensation as one of its parents. According to the Court of Appeal, the control and management contract indicated that Shell was their «(co-) beneficial owner» and thus had legal rights to the pipelines.669 Consequently, the Court of Appeal ruled that

> »on the face of things, it is legalistic to deny Shell a right to recovery by reference to the exclusionary rule. It is, after all, Shell who is (along with BP, Total and Chevron) the ‘real’ owner, the ‘legal’ owner being little more than a bare trustee of the pipelines.«670

The fact that the parent is a beneficial owner constitutes sufficient proximity to avoid an undefined number of claims.

Unfortunately, the court did not provide a detailed reasoning as to why they saw Shell as the beneficiary owner—they merely stated this to be the

668 CA Shell UK et al. v Total UK et al. [2010] EWCACiv 180. See also Murphy and Witting, Street on Torts p. 109.
669 CA Shell UK et al. v Total UK et al. [2010] EWCACiv 180 para 132.
670 CA Shell UK et al. v Total UK et al. [2010] EWCACiv 180 para 132.
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case. Nonetheless, some elements can be inferred to have played a role in the court’s decision. The parent corporations’ tight control over the subsidiary and, in turn, the dependent and non-autonomous role of the subsidiary\(^{671}\) played an important role. The examples and precedents cited did not concern corporate group structures. Rather, the Court of Appeal dealt with precedents concerning general questions of tort. The court addressed, in depth, the question of to whom tort obligations are owed besides the legal owner. They concluded that duties in tort law can also be owed to beneficial property owners. As a result, the defendant owed a duty of care to Shell as a beneficial owner of the pipelines. The Court of Appeal admitted that this view was not particularly enlightened by formalistic corporate law principles. In fact, the Court of Appeal did not address the principle of separate legal personalities at all. For example, the *Salomon v A. Salomon & Co.* case was listed merely as an additional case cited in argument, but not in the actual judgment. Rather than being concerned with the legal structure of the corporate group and their distinct legal personalities, the Court of Appeal was »influenced […] by […] the impulse to do practical justice«.\(^{672}\) It merely stressed that vesting the ownership of the pipelines in a separate legal personality, thus establishing a corporate group structure, »should not be legally relevant« and »would (otherwise) be a triumph of form over substance«.\(^{673}\)

In *Revlon et al. v Cripps & Lee*, a transnational corporate group was seen to be the owner of the trademark that was registered with one of its subsidiaries.\(^{674}\) Lord Justice Buckley for the Court of Appeal argued that, in the end, the trademark was an asset of the parent corporation. All corpo-

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671 CA *Shell UK et al. v Total UK et al.* [2010] EWCACiv 180 paras 121 et seq. Clause 5.1 of the deed enshrined that »the assets in question upon trust absolutely for the participants«. The holding companies established a joined committee which decided on certain matters and made recommendations to WLPS Ltd that, in turn, was obliged »to comply with all such decisions and recommendations unless their implementation would, in the opinion of WLPS Ltd, conflict with their legal obligations or give rise to any breach of contract binding upon the parties.« Furthermore, WLPS Ltd had neither its own employees nor its own funds, nor was it intended to make a profit. The actual management and operation of the pipelines was done by BPA, a specialised corporation jointly owned by Shell and BP.

672 CA *Shell UK et al. v Total UK et al.* [2010] EWCACiv 180 para 143.


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The exceptions involved were wholly owned subsidiaries of the parent. Materially, it was only the parent that benefitted from the trademark. Lord Justice Buckley inferred from the corporate group structure that the owning subsidiary held the trademark for the benefit of its parent. Thus, here again, the fact that the subsidiary is wholly owned justifies considering the parent as the beneficial owner of the trademark. Lord Justice Buckley expressly denied considering this classification as piercing the corporate veil, claiming instead that it recognised «the legal and factual position resulting from the mutual relationship of the various companies.»\(^{675}\) For the case under discussion, this meant that the defendant had not infringed the trademark rights of the subsidiary. The defendant had imported products to the UK that had been labelled by the parent in the US. The subsidiary then claimed that this amounted to an infringement of its trademark rights. The court dismissed the claim. It argued that the subsidiary, as a beneficial holder, had given implicit consent for the parent to use the trademark on its products.\(^{676}\)

In *Littlewoods Mail Order Stores v Inland Revenue Commissioners*, the Court of Appeal interpreted the ownership of the wholly owned subsidiary as beneficial ownership of the parent. The subsidiary acquired the asset in question for its parent. Thus, the Court of Appeal decided that, for the purposes of tax law, the parent was to be seen as the acquirer of the asset. Lord Denning went even further and claimed that the wholly owned subsidiary was a «creature» and mere «puppet» of the parent corporation. This should also be reconstructed in law.\(^{677}\) On these grounds he concluded that the tax authorities were right to uphold that the parent corporation, through their wholly owned subsidiary, acquired the capital asset. The majority did not make any further statements concerning piercing the corporate veil beyond the case specificities.\(^{678}\) They emphasised the limited effects of their judgment.\(^{679}\) Rather than introduce new corporate law stand-

\(^{675}\) CA *Revlon et al. v Cripps & Lee* [1980] FSR 85, 105.

\(^{676}\) *French, Mayson and Ryan*, Company Law p. 140.

\(^{677}\) CA *Littlewoods Mail Order Stores v Inland Revenue Commissioners* [1969] 1 WLR 1241, 1254. See also Lord *Denning* in CA *Wallersteiner v Moir* [1974] 1 WLR 991, 1013: »[…]> danced to his bidding. He pulled the strings«, discussed above.

\(^{678}\) *French, Mayson and Ryan*, Company Law p. 140.

\(^{679}\) Lord Justice *Sachs* in CA *Littlewoods Mail Order Stores v Inland Revenue Commissioners* [1969] 1 WLR 1241, 1255.
ards, they reverted to the necessities of tax law, where it is required to examine the true nature of the transaction to obey the «principles of proper commercial accounting». As a result, and contrary to Lord Denning, they refused to draw any further-reaching consequences for the treatment of corporate groups.

5. Direct Duty of Parent

In recent years, courts have imposed a direct duty of care on parent corporations for their subsidiaries’ employees under specific circumstances. Some authors consider this a step towards establishing a more general liability of parents for their subsidiaries’ wrongdoings. While the extent of this development is still unclear, this line of case law exhibits an interesting argumentation.


Chandler v Cape\textsuperscript{682} is the most prominent case in this regard. A former employee of one of Cape Plc.’s subsidiaries sued the parent, Cape Plc., in tort. The employee had contracted asbestosis due to the systematically deficient health and safety measures in the subsidiary’s asbestos factory. According to the Court of Appeal, the employee was entitled to damages because Caparo Industries\textsuperscript{683} three criteria of proximity, foreseeability and reasonableness were fulfilled. The discussion focused on the question of whether the relationship of the parent corporation and the subsidiary employee had sufficient proximity. According to the Court of Appeal, the parent had taken on responsibility for the health and safety of not only its own employees, but also those of its subsidiaries in asbestos production. Hence, in this particular case, the relation was sufficiently close even though the parent had not employed the claimant. The court gave four circumstances that evidenced the required proximity in the particular case:

> (1) the businesses of the parent and subsidiary are in a relevant respect the same;
> (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary’s system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees’ protection.\textsuperscript{684}

The corporate group structure and parental control over the subsidiary played important roles in the court’s argumentation. Materially, the court mentioned factors that resembled those of the set of criteria used in EU competition law. Firstly, the court stressed the fact that the parent imposed a group-wide health and safety policy for the asbestos production, including group-wide personnel (chemists and medicines) who were responsible in this area.\textsuperscript{685} Secondly, the court pointed to the fact that the parent intervened in strategic decisions concerning the subsidiary, issued instructions and discussed and approved the subsidiary’s decisions.\textsuperscript{686} Thirdly, the court argued that the parent had superior knowledge and resources compared to the subsidiary. In fact, the parent, who had already produced as-

\textsuperscript{682} CA Chandler v Cape [2012] EWCA Civ 525.
\textsuperscript{683} HL Caparo Industries v Dickman et al. [1990] 2 AC 605.
\textsuperscript{684} CA Chandler v Cape [2012] EWCA Civ 525 para 80.
\textsuperscript{685} CA Chandler v Cape [2012] EWCA Civ 525 paras 71, 75 et seq.
\textsuperscript{686} CA Chandler v Cape [2012] EWCA Civ 525 para 73; Wagner, RabelsZ 2016,770.
bestos, instructed the subsidiary to produce asbestos as well and set up the facility.\footnote{CA Chandler v Cape [2012] EWCA Civ 525 paras 75, 78.}

Nevertheless, the court’s argumentation had a narrow focus. It stressed that the mere fact of a parent-subsidiary relationship does not justify imputing a direct duty of care for subsidiary employees.\footnote{CA Chandler v Cape [2012] EWCA Civ 525 para 69.} Doctrinally, instead of disregarding the separate legal entities and relying on a fraudulent element, the court imposed a direct duty of care on the parent corporation towards its subsidiaries’ employees.\footnote{See also Davies and Worthington, Gower and Davies’ Principles of Modern Company Law para 8-7 footnote 38; Sanger, Cambridge Law Journal 71 (2012), 480.} In the end, the specific circumstances of the case – the parent’s superior knowledge in production and the fact that the parent employed experts who were responsible for these matters on a group-wide scale – justified imposing a duty of care. It is therefore questionable whether this line of case law can be transposed to other areas and used more generally. On the one hand, the Court of Appeal stressed in the subsequent Thompson v The Renwick Group case that only exceptional circumstances justify imposing a direct duty of care on the parent corporation for their subsidiaries’ employees.\footnote{CA Thompson v The Renwick Group [2014] EWCA Civ 635 para 29. See also S. Griffin, Establishing the Liability of a Director of a Corporate Director. Issues Relevant to Disturbing Corporate Personality, Company Lawyer 34 (2013), 135, 142; U. Grusic, Responsibility in Groups of Companies and the Future of International Human Rights and Environmental Litigation, Cambridge Law Journal 74 (2015), 30, 31 et seq.} For example, the mere coordination of operations between subsidiaries of the same group and the shared use of resources are not evidence of the parent having assumed responsibility for a subsidiaries’ employees.\footnote{CA Thompson v The Renwick Group [2014] EWCA Civ 635 paras 36, 38.} On the other hand, the House of Lords had already acknowledged the possibility of a direct duty of care before Chandler v Cape. in Connelly v RTZ et al.\footnote{HL Connelly v RTZ et al. [1998] AC 854.} The facts of this case were similar, but concerned a transnational corporate group. The parent was English and the subsidiary was Namibian. The House of Lords only had to decide on the procedural question of whether England was the right forum. They decided that England was the appropriate forum because the case was too complex and costly for proceedings in Namib-
The High Court then decided on the substance, ruling that it was, in theory, possible that the parent corporation also owed a duty of care towards employees of its subsidiaries, but that the claim was time-barred. The argumentation was similar to the Court of Appeal in Chandler v Cape. Whether such a duty did in fact exist, however, was not decided as the claim was time-barred. The facts were also similar, therefore Connelly v RTZ et al. cannot be seen as an extension. Rather, Thompson v The Renwick Group made it clear that superior knowledge and specific involvement in the relevant field are necessary. In any case, corporate group structure arguments played an important role in establishing the necessary proximity.

6. Interpretation of Contracts and Statutes

Courts have been less reluctant to take the corporate group dimension into account when interpreting statutes or contracts. Here, it is the rationale or policy of the statute or intention of the contracting parties that play a more important role and justify more deviation from the principle of separate legal personalities.

In contract cases, this is especially clear with regard to restriction of trade clauses in employment contracts. There, the courts have been willing
to consider the corporate group as conducting an integrated business. The question can become relevant with regard to whose business is protected – only the employing corporation or the whole group – as well as with regard to who the employer is protected against.  

In a recent case, the Court of Appeal had to interpret a restriction of trade clause that literally only referred to the parent corporation. The clause stipulated that, following completion of the contract, the employee had to refrain from providing services that «the company» provided in its ordinary cause of business. The company was defined in another part of the contract as the parent corporation. After some restructuring, however, the parent corporation had no business on its own and acted only as a holding corporation. The judge at first instance concluded that, following the well-established principle of separate legal entities, only the parent corporation was included in the covenant and not any of its subsidiaries. The fact that this rendered the clause senseless was irrelevant. The Court of Appeal emphasised that the parties to the contract were well aware of the corporate structure and the aim of the clause. Hence, Lord Justice Kay for the Court of Appeal constructed the clause to refer to the parent corporation and its subsidiaries. This, according to him was the »only sensible construction«, as otherwise the covenant would be deprived of »all practical utility«.  

Lord Justice Kay explicitly sympathised with a non-purist view on corporate personality, as advanced in theLittlewoods case by Lord Denning.

In Littlewoods Organisation v Harris, the Court of Appeal had to decide whether an employee’s covenant was reasonable and thus enforceable. There, the question was whether the clause was perhaps too broad, as it prohibited employment with the competitor’s entire corporate group. Lord Denning interpreted the clause as referring only to that part of the competitor’s business with which the employee was involved under its former employer. Otherwise the clause would be too broad. On the contrary, the employer was allowed to include the competitor’s parent corporation and its subsidiaries in the covenant. He claimed that the corporate group at hand was under unified control. According to Lord Denning, one

697 See French, Mayson and Ryan, Company Law p. 134 et seq.
698 CA Beckett Investment Management Group et al. v Hall et al. [2007] ICR 1539, 1545.
699 CA Beckett Investment Management Group et al. v Hall et al. [2007] ICR 1539, 1546.
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subsidiary could not be distinguished from the other. Furthermore, the
directors of the group could easily switch employees from one subsidiary to
the other and thereby distribute knowledge and service within the
group.700 This, according to Lord Denning, justified extending the em-
ployee’s covenant to the whole competitor’s corporate group. Interest ing-
ly, Lord Denning did not revert to exceptional circumstances, any particu-
larly tight control within the group, or other unusual aspects of the corpo-
rate group structure.701

The Privy Council in Stenhouse Australia v Phillips702 made a similar
ruling. There, the former employee argued that the covenant on not acting
as an insurance broker for any client of his former employer was too
broad, as it included not only the parent corporation that employed him
but also their subsidiaries. The Privy Council rejected this argument. It
claimed that the corporate group at issue conducted an integrated business.
The relevant factors resembled those that are decisive in EU competition
law when approving a single economic entity. The Privy Council referred
to the fact that the parent controlled and co-ordinated the insurance busi-
ness and bundled all funds. It claimed that the subsidiaries »were merely
agencies or instrumentalities through which the [parent] company directed
its integrated business«.703 As a consequence, the interests of subsidiary
and parent coincided and the subsidiaries’ customers had to be included.
While the Privy Council rejected the claim that this line of argumentation
exhibited a form of group enterprise conception, it nevertheless employed
the same criteria.

Similarly, the legislature, partly induced by EU law obligations, has
been less reluctant to transcend the principle of separate legal personali-
ties.704 Notably in tax matters705 but also in disclosure,166 insolven cy707

700 CA Littlewoods Organisation v Harris [1977] 1 WLR 1472, 1483. On this
point Lord Browne agrees ibid 1491.
701 See similarly Lord Justice Browne in CA Littlewoods Organisation v Harris
[1977] 1 WLR 1472, 1491: »think[s] it also seemed to Lord Denning M.R.,
that the fact that a company operates its business through a number of subsid iary
companies does not really affect the position.«
704 Davies and Worthington, Gower and Davies’ Principles of Modern Company
Law para 8-4.
705 French, Mayson and Ryan, Company Law p. 135. See e.g. HL Reed v Nova
and financial reporting\textsuperscript{708} issues, corporate groups are considered a single entity.\textsuperscript{709} In product liability, the question has arisen as to whether the parent and its subsidiary can be considered as one producer. The \textit{O’Byrne} case, with which the Supreme Court\textsuperscript{710} and – twice, in fact – the ECJ\textsuperscript{711} were concerned, is a good illustrative example. According to the judges, the parent that made the product (a vaccine) and the subsidiary that sold it to the Health Authority formed the joint producer of the defect product in the sense of Article 3 (1) of the Product Liability Directive.\textsuperscript{712} They formed one producer because the subsidiary was »integrated into the manufacturing process and so tightly controlled«\textsuperscript{713} by the parent. Thus, the claimant could substitute the parent as defendant to the proceedings against the subsidiary. This was decisive because the proceedings were brought against the subsidiary within the period but, in general, the period for substitution had expired. This period for substitution, according to the ECJ, could not be decisive in the case of wholly owned and closely controlled subsidiaries, such as the one in place. Furthermore, according to the ECJ, the fact that different legal personalities were involved had to be irrelevant. Instead, the ECJ asked the national courts to consider factual criteria. The question of whether the subsidiary exercised its own task within the production process or whether it was a mere distributor of the parent was to be decisive.\textsuperscript{714} This exhibits traces of the functional approach used in EU competition law.

\textsuperscript{706} See Section 409 Companies Act 2006.
\textsuperscript{707} See Sections 213-215 Insolvency Act 1986. See e.g. CA \textit{In re Southard & Co} [1979] 1 WLR 1198.
\textsuperscript{708} See Section 399 Companies Act 2006.
\textsuperscript{709} \textit{Dignam and Lowry}, Company Law para 3.3. See also Lord Sumption in SC \textit{Prest v Petrodel Resources} [2013] 3 W.L.R. 1 SC para 16.
\textsuperscript{710} SC \textit{O’Byrne v Aventis Pasteur MSD} [2010] 1 WLR 1412.
\textsuperscript{711} Case C-127/04 \textit{O’Byrne v Sanofi Pasteur MSD} [2006]; Case C-358/08 \textit{Aventis Pasteur v OB} [2009].
\textsuperscript{713} Lord Roger of Earlsferry in SC \textit{O’Byrne v Aventis Pasteur MSD} [2010] 1 WLR 1412, 1425.
\textsuperscript{714} Case C-127/04 \textit{O’Byrne v Sanofi Pasteur MSD} [2006] para 30.
This overview has shown that the case law is fragmented; there is no unified approach towards corporate groups. Rather, the case law is divided within the same field of law.\textsuperscript{715} Even cases concerning the same question often arrive at contradictory conclusions. Moreover, the judgments often mix different aspects and patterns of argumentation. The case law is often of limited help, a point even acknowledged by judges themselves, and the decision often depends on »the judges’ somewhat subjective perception of fairness or policy«.\textsuperscript{716} As a result, a systematisation of the cases will always be flawed. Whether the cases discussed under the heading »exceptions« are to be generalised and applied more frequently and broadly is a matter of fierce judicial and academic debate. One can generally trace two different strings: the legal mainstream that favours the restrictive handling of the exception, and the judges and academics around Lord Denning who encourage the more widespread use of acknowledging the economic ties within corporate groups, including in law.

Lately, Lord Justice Neuberger warned in a Supreme Court decision\textsuperscript{717} against the »obvious attraction« of achieving a »just result«\textsuperscript{718} by piercing the corporate veil. Elaborating on this statement, he contended that

\textsuperscript{715} For this argument, see also Strasser, Connecticut Law Review 37 (2005), 641, already Kahn-Freund, The Modern Law Review 7 (1944), 56; Muchlinski, Company Lawyer 23 (2002), 177: »English law still has a long way to go before a comprehensive doctrine of parent company liability for the acts of overseas subsidiaries or affiliates is in place.«; Lee, International Company and Commercial Law Review 26 (2015), 28.

\textsuperscript{716} Antunes, Liability of Corporate Groups. Autonomy and Control in Parent-Subsidiary Relationships in US, German, and EEC Law. An International and Comparative Perspective p. 218; Dignam and Lowry, Company Law para 3.10; Hicks and Goo, Cases and Materials on Company Law p. 103. Also admitted by Lord Justice Slade in CA Adams et al. v Cape Industries et al. [1990] Ch. 433: »From the authorities cited to us we are left with rather sparse guidance as to the principles which should guide the court«; Lord Sumption in SC Prest v Petrodel Resources [2013] 3 WLR 1 SC paras 19 et seq. analysing also case law in family matters.

\textsuperscript{717} SC VTB Capital v Nutritek International et al. [2013] UKSC 5. For an analysis, see D. Vlasov, To Pierce or Not to Pierce. Supreme Court Answers in the Negative in VTB Capital v Nutritek International, Company Lawyer 34 (2013), 248 et seq.
»words such as ‘façade’, and other expressions found in the cases, such as ‘the true facts’, ‘sham’, ‘mask’, ‘cloak’, ‘device’, or ‘puppet’ may be useful metaphors. However, such pejorative expressions are often dangerous, as they risk assisting moral indignation to triumph over legal principle, and, while they may enable the court to arrive at a result which seems fair in the case in question, they can also risk causing confusion and uncertainty in the law.«

To disregard the principle of separate legal personalities in treating the corporate group as a single entity or in attributing acts and features of the subsidiary to the parent is subject to limited conditions. Lord Justice Neuberger warns against broad application in cases »merely where there has been impropriety«. Justice Toulson also warns against these metaphors, as they can be »used as a substitute for analysis and may therefore obscure reasoning«. Another example of the mainstream opinion is the famous Albazero case. There, Lord Justice Roskill calls the principle of separate legal personality in corporate groups a »principle [...] of English law long established and now unchallengeable by judicial decision. [...] It is perhaps permissible under modern commercial conditions to regret the existence of these principles. But it is impossible to deny, ignore or disobey them.«

Another string of case law more favourable to lifting the corporate veil of corporate groups is closely connected to Lord Denning. Contrary to mainstream voices, he stresses that the doctrine of Salomon v A. Salomon & Co. »has to be watched very carefully.« According to him, both courts and the legislature often do pierce the corporate veil in reality. He refers to other fields of law that take corporate groups as one single entity, claiming that »the law to-day has regard to the realities of big business. It takes the group as being one concern under one supreme control. It does not regard

719 Lord Neuberger of Abbotsbury PSC SC VTB Capital v Nutritek International et al. [2013] UKSC 5 para 124. For this point, see also Justice Toulson in HC Queen’s Bench Division Yukong Line v Rendburg Investments et al. [1998] 1 WLR 294, 305.
721 HC Queen’s Bench Division Yukong Line v Rendburg Investments et al. [1998] 1 WLR 294, 305.
723 CA Littlewoods Mail Order Stores v Inland Revenue Commissioners [1969] 1 WLR 1241, 1254.
each subsidiary as being a separate and independent entity.« 724 The legislature would often ignore the separate legal entities within the group, 725 and rightly so. For him, the rules of group accounting are a good example. There, the legislator treats a corporate group as a single entity. This should be taken as a role model for the courts and extended to other fields of law. 726

Some tendencies towards corporate groups can be found in UK law. These tendencies show a reluctance in UK law to acknowledge the corporate group structure in law and treat the corporate group as a single entity. A corporate group will not be seen as a single economic entity if it exhibits normal corporate group structures. In EU competition law, on the contrary, normal corporate group structures have served as justification for a single economic entity and against trying to rebut the presumption of wholly owned subsidiaries. In most UK cases, the restrictive line is upheld and stressed. Furthermore, certain elements have been mentioned in several cases. These elements are not sufficient on their own to pierce the corporate veil, nor can they be said to represent a static list of conditions. The objective elements are rather general and have not been developed in much detail in the cases. The focus is mostly on the subjective element. In the overwhelming majority of cases, fraudulent elements are necessary to justify disregarding the principle of separate legal personalities. Subjective elements, however, do not play a role in EU competition law, where the decision is based on objective criteria. The set of criteria concern elements that are used in UK law as well. Hence, these details can be used to fill the gaps in UK law that arise from focusing on subjective elements. Taking both together enables the similarities in argumentation, but also the differences, to be shown. This will be done with regard to the most frequently used criteria in UK law.

One important element is the parental control exercised over the subsidiary. As has been shown in the chapter on EU competition law, one can distinguish two modes of control. Control can be exercised over the general business strategy on a rather abstract level. In this case, the parent would, for example, draft a group-wide business plan and strategy, fix key

724 CA Littlewoods Organisation v Harris [1977] 1 WLR 1472, 1482.
725 CA Littlewoods Organisation v Harris [1977] 1 WLR 1472, 1482.
business figures with the management of the subsidiary and monitor their fulfilment. Contrary to EU competition law, this control has not been considered a sufficiently close relationship to either pierce the corporate veil or find a relationship of agency. The parent’s control can also affect the day-to-day business of the subsidiary. Then, it will be more detailed and concern concrete business decisions that would usually be made independently by the subsidiary’s management. For example, if the parent were to give instructions concerning particular deals or on employment or safety policy, this would go well beyond a general corporate-wide business strategy. Similarly, the parent could monitor and enforce agreed-upon concrete benchmarks and key figures. These specific measures influence the day-to-day business of the subsidiary and have been taken as a factor in favour of treating the corporate group as a single entity, or of attributing a subsidiary’s features and actions to its parent.

Secondly, common personnel or managers of the parent who also hold senior positions in the subsidiary are a relevant factor. Overlapping personnel plays an important role in EU competition law and, as has been described above at chapter II B. 2. d., can take many forms. In these cases, the parent exercises control and power over the subsidiary via its own personnel. Moreover, the parent and the subsidiary are closely intertwined through the common personnel. Employees that are responsible for group-wide tasks can ensure the imposition of group-wide policies and a constant flow of information. They are an important indication that the parent has assumed responsibility for this task on a group-wide level.

Thirdly, monetary flows and bank accounts can be a relevant factor. If the parent and the subsidiary have a common bank account and/or the parent uses the subsidiary’s money as if it were its own, the courts will be more willing to pierce the corporate veil. There, a connection to the fraudulent element is visible, as has been shown in the Wallersteiner v Moir case. If however, money is lent on normal terms (i.e. with common interest rates and with accounts and billing kept separate), the court will be likely to uphold the separate legal personalities within the group.

Fourthly, whether the corporate group presents itself as a unified entity or as separate entities has often played a role. In this context, sharing the same locations or even offices, letterhead and the like can contribute to evidencing a common appearance. Concluding contracts for other entities in the corporate group or taking over group-wide tasks are also discussed in this area. This, in turn, can also be used for the subjective element. It might confuse contractors and produce a misleading perception about the acting entity.
Lastly, the fact that the parent is the sole owner of the subsidiary is not, like the other factors, enough to pierce the corporate veil in itself. However, it can be a factor to be taken into account together with other indications.

Notwithstanding all factors mentioned, the courts rely heavily on subjective elements, i.e. on the fraudulent motives of the parent. Furthermore, the concept of lifting the corporate veil applies generally to cases involving corporations. The argumentation is not adapted to the specificities of corporate groups. Conveying liability to the owners and controllers of the corporation is done regardless of whether the owner/controller is a natural person or another corporation. Thus, the group structure is not seen as a distinctive factor that should merit special attention.
Chapter IV: US Approaches to Transnational Corporate Groups

US law is not only the other major common law legal order next to UK law; it is also the other main player along with the EU in the area of competition law. This justifies an analysis of the jurisprudence of US courts. In doing so, this chapter will complement the picture of the restrictive common law approach towards legally acknowledging transnational corporate groups as a single economic entity. Special emphasis will be put on the Alien Tort Statute (ATS) (A.).

This statute is a mixture of international law and national law: According to the Statute, violations of international law are seen as torts in US law and treated in US courts. This fits the thesis particularly well. Firstly, its content—violations of human rights—matches the aim of creating a definition of corporate groups for international criminal law. Secondly, the ATS is part of the vertical enforcement of international law and, in particular, human rights law. In fact, private damage claims for international crimes are de lege lata the most promising alternative for holding corporations to account.

Thirdly, transnational corporate groups are often involved in ATS claims. Thus, there are many cases concerning the transnational reach of the ATS. Fourthly, US courts frequently revert to general US law when dealing with (transnational) corporate groups. For example, general US law concepts of piercing the corporate veil, alter ego and agency are used in ATS cases to determine the scope of personal jurisdiction and the attribution of liability. In this analysis, similar criteria are used as in EU competition law and UK tort law, although the threshold for acknowledging corporate group aspects is high-

727 The term Alien Tort Claims Act (ATCA) is also often used.
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er than in EU competition law. Compared to UK law, the threshold is slightly lower.

Moreover, US competition law acknowledges the specific situation of corporate groups and uses similar criteria to the ones used in EU competition law. In the US, intra-group agreements are exempted from the prohibition of conspiracy. Nonetheless, corporate groups are not generally seen as one entity in competition law; instead they are usually perceived as separate legal entities and US competition law is applied to each of them individually. There, the restrictive approach prevails (B.).

A. Alien Torts Statute: Transnational Corporate Group Litigation

The ATS is a US statute that was enacted as early as 1789 by the first session of US Congress. Human rights lawyers have quite recently used it to bring human rights violations committed in third countries to court in the US. Its wording is simple: »The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.« Starting with torture claims against state officials, the range of claims has now


been widened to include private actors such as corporations. These claims can therefore be particularly fruitful for the present project. The corresponding case law depicts an inconsistent picture. While many ATS cases involve corporations – and, in turn, mostly transnational corporate groups – many cases do not end with a definite judgment, but are instead settled at some point of the proceedings. As a result, even though there is a considerable number of ATS cases that deal with transnational corporate groups, many aspects are still either disputed, decided contradictorily by different Circuits of the Court of Appeal, or left open by the US Supreme Court. Notwithstanding these qualifications, the ATS – and especially its relation with international law and tort principles – is a good starting point for exploring the US approach towards (transnational) corporate groups. This will be done step-by-step to show the different aspects of transnational corporate groups and their relevance at different points of ATS cases. Preliminarily, the subject matter of the ATS, international torts and their relation to general US law, will be discussed (1.). This section will show the proximity of the ATS to international criminal law. Secondly, it will be shown that – despite the finding in Chapter I that corporations are not (yet) subjects of international law – corporations can be held accountable for certain violations of international law in the realm of the ATS (2.). Thirdly, this chapter will turn its attention to the group aspects that are discussed in ATS cases. As an analysis of the relevant case law shows, US courts deal with the specificities of corporate groups both when deciding whether they have personal jurisdiction over the defendant at hand and when deciding on the attribution of liability within a corporate group. In both cases it is important to note that, eventually, the corporate group will be neither a party in an ATS claim nor a perpetrator of an international tort. The question is rather whether acts of one entity within the corporate group can be attributed to another entity. This is mostly discussed with regard to personal jurisdiction, where contacts with the forum of one subsidiary can be used to establish jurisdiction over the foreign parent or another foreign subsidiary. This question is decided with the help of general cor-

porate law principles and the concept of agency, which are used in many areas of US law (3.). Fourthly, the ATS is (only) applicable to foreign victims («aliens»). As a result, many cases deal with transnational corporate groups and torts committed in foreign countries. In these cases – along with the aspects of personal jurisdiction discussed in (3.) – the transnational element invokes questions on the ATS’ scope of extraterritorial application and whether US courts should discretionarily limit their jurisdiction. This area is part of a more general debate on the territorial reach of the ATS – for example, it was discussed in the recent US Supreme Court judgment on the ATS, Kiobel, and in corresponding literature. In this part of the chapter, these aspects are only discussed insofar as they are relevant for the treatment of transnational corporate groups (4.). Lastly, common aspects that are discussed in the transnational corporate group context will be summarised and compared to the results of the preceding chapters (5.).

1. Subject Matter

The ATS provides for damages arising from violations of the law of nations done to aliens.\(^{734}\) »Law of nations« thereby denominates international legal norms that are »universal, obligatory and definable«.\(^{735}\) In detail, the tort must violate an international norm in a case where

\[(1) \text{no state condones the act in question and there is a recognizable universal consensus of prohibition against it}; \text{(2) there are sufficient criteria to determine whether a given action constitutes an occurrence of the prohibited act and thus v-\]

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ulates the norm; and (3) the prohibition is non-derogable and thus binding at all
times upon all persons.«

The range of international norms has been expanded and will continue to
expand in the future as – but only insofar as – international consensus
evolves. In Sosa v Alvarez-Machain, the first ATS ruling of the US Su-
preme Court, the US Supreme Court called for a cautious approach in ex-
tending the realm of international norms. As the acts must amount to
violations of the law of nations in order to fall within the scope of the
ATS, the cases mostly focus on infringements of international criminal
law. Thus, the content fits perfectly the major field of application, interna-
tional criminal law, for the definition of corporate groups. In fact, in a
case against Radovan Karadzic, US Courts considered that genocide, war
crimes and crimes against humanity – the so-called core crimes – trigger
the application of the ATS.

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736 Slawotsky, Michigan State Law Review (2005), 1086 et seq. See also US CA
Second Circuit Filártiga et al. v Pena-Irala [1980] 630 F.2d 876, 888: »It is
only where the nations of the world have demonstrated that the wrong is of
mutual, and not merely several, concern, by means of express international ac-
cords, that a wrong generally recognized becomes an international law viola-
tion within the meaning of the statute.«

737 See US CA Second Circuit Filártiga et al. v Pena-Irala [1980] 630 F.2d 876,
881: »Thus it is clear that courts must interpret international law not as it was
in 1789, but as it has evolved and exists among the nations of the world to-
day.« R. T. Marooney and G. S. Branch, Corporate Liability under the Alien
Tort Claims Act. United States Court Jurisdiction over Torts, International
Trade Law Journal 12 (2003), 3, 4; Salazar, Saint John's Journal of Legal
Commentary 19 (2004), 116; Stephens, Corporate Accountability. International
Human Rights Litigation Against Corporations in US Courts, in: Kamminga/
Zia-Zarifi (eds.), Liability of Multinational Corporations under International
Law, p. 214; Stephens, Hastings International and Comparative Law Review


739 For the mutual and indeed somehow paradoxical relationship of ATS and in-
ternational criminal law see K. Gallagher, Civil Litigation and Transnational
Justice 8 (2010), 745, 746.

740 US Court of Appeals Kadic v Karadzic 70 F.3d 232. For example, environ-
mental abuses and cultural genocide are not actionable: US DC E.D. Louisiana
California Sarei et al. v Rio Tinto et al. [2009] 650 F.Supp.2d 1004, 1025;
Stewart, New York University Journal of International Law and Politics 47
(2014), 10; M. Stürner, Transnationale Menschenrechtsverletzungen im inter-
The question of the extent to which international law governs the application of the ATS, and to what extent recourse shall be taken to US law and US principles or to the *lex loci delicti*, is still not solved. Should the group of potential perpetrators (whether corporations are included or not) be determined using international law, US law, or the law of the state where the alleged violation occurred? How should the modes of participation and their conditions be determined? What about the period of limitation and the conditions of causality? For example, with regard to the conditions for aiding and abetting, the US District Court in *Doe v Unocal* held that it »should apply international law as developed in the decisions by international criminal tribunals such as the Nuremberg Military Tribunals for the applicable substantive law« and that »the law of nations is part of federal common law«. The court decided to apply international law as »only jus cogens violations are alleged«. Otherwise, the particularity of ATS claims, namely the »proper characterization of the *kind* of wrongs meant to be addressed […]: those perpetrated by *hostis humani generis* (‘enemies of all humankind’) in contravention of *jus cogens* (peremptory norms of international law)«, would be obliterated.

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742 See also Stephens, Chomsky, Green, Hoffman and Ratner, International Human Rights Litigation in U.S. Courts p. 265 et seq.


745 US CD D. Massachusetts *Xuncax v Gramajo* [1995] 886 F.Supp. 162, 183 »reducing it to no more (or less) than a garden-variety municipal tort«.
However, the US Supreme Court in Sosa stipulated that the ATS »is a jurisdictional statute creating no new causes of action«. There is no consensus on the interpretation of the judgment. Most argue that the US Supreme Court decided that international law determines the substantive violation, while federal choice of law decides which law governs the non-substantive issues – the cause of action. Thereby the US courts will have recourse to a range of laws, namely the lex loci delicti, as well as federal common law instead of choosing one law to govern the whole cause of action.

In the aftermath of Sosa, many of the abovementioned questions have not been answered or have found conflicting answers in different courts. Included in these questions were questions concerning the treatment of corporations. The remaining part of this chapter will analyse judgments dealing with corporations as potential perpetrators of ATS torts. The decisions will be analysed with a focus on transnational corporate groups and


749 See in that sense also Restatement (Second) of Conflict of Laws § 6.
whether, despite conflicting decisions, some general criteria can be extracted that determine whether a transnational corporate group should be seen as a single economic entity, or at least legally acknowledged.

2. Corporations as Potential Perpetrators

Firstly, a mixture of international law and US law determines the circle of potential perpetrators. Even though it is only states that are traditionally subject to international law obligation, as discussed above (chapter I A. and C.), private actors have been acknowledged as being subject to the ATS (a.). Similarly, while there are some contradicting judgments, most decisions acknowledge corporations as potential perpetrators of ATS torts. As a consequence, claims against corporations are within the scope of personal jurisdiction (b.).

a. Private Actors

The range of potential defendants in ATS cases has widened from actual perpetrators of international crimes and commanders to private complicity in state actions, de facto government members\textsuperscript{750} and even sole private actors. The (potentially) violated norm and the form of perpetration or participation establish the extent to which private actors can be perpetrators.\textsuperscript{751} On the one hand, perpetration of ATS torts is possible if the international legal norm includes private actors as perpetrators of the incriminated act.\textsuperscript{752} This is the case for core crimes of international criminal

\textsuperscript{750} US CA Second Circuit Kadic et al. v Karadzic et al. [1995] 70 F.3d 232, 245.
\textsuperscript{752} »We do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.« (US CA Second Circuit Kadic et al. v. Karadzic et al. [1995] 70 F.3d 232, 239 et seq.). See also Joseph,
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Without any state action, violations of \textit{jus cogens} norms are treated as normal violations of international law. Hence, the \textit{jus cogens} norm must allow for being committed by private actors, such as in cases of piracy or aircraft hijacking.\footnote{US DC C.D. California \textit{Doe I et al. v Unocal et al.} [1997] 963 F.Supp. 880, 894; US DC S.D. New York \textit{Presbyterian Church of Sudan et al. v Talisman Energy et al.} [2003] 244 F.Supp.2d 289, 344 et seq. Normally, the international principle of state immunity obliges national courts to grant immunity to current high government officials. (\textit{Shaw}, International Law p. 735 et seq.; see also Articles 2 §1 b), 5 and 6 §1 United Nations Convention on Jurisdictional Immunities of States and Their Property A/RES/59/38 16 December 2004). This is part of the general international obligation »to respect the territorial integrity and political independence of other states« (M. N. Shaw, International Law, 6th ed., 2008 p. 697). Indeed, in \textit{Congo v Belgium} the ICJ has emphasised the immunity of »high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs« in national courts without exceptions, thus even for international crimes (Application Instituting Proceedings \textit{Congo v Belgium (Case Concerning The Arrest Warrant of 11 April 2000)} [2000] ICJ Reports 3, 21 et seq.).}

tional legal norms that require a state action. In those cases, corporations will be liable for their complicity with state actors when they engage in “joint action,” with a government or government officials or conspire with or otherwise act in concert with those officials. Moreover, private actors can be considered state actors if they perform a public function, such as running a detention camp.

b. Corporations

Corporations fall within the category of private actors as potential perpetrators of ATS torts. *Doe I v Unocal* is one of the main corporate cases and is seen as an »important shift in litigation strategy«. There, the Ninth Circuit did not explicitly discuss the issue of whether corporations fall within the scope of personal jurisdiction, but merely presupposed to have personal jurisdiction over Unocal Corp. On a previous occasion, the District Court of New Jersey had already forcefully claimed that »no logical reason exists for allowing private individuals and corporations to escape liability for universally condemned violations of international law.


merely because they were not acting under color of law.« 761 In that case the issue needed no decision, as the defendant acted as a state agent.

Since then, US courts have either concluded that corporations can be perpetrators of ATS torts or that they are beyond the personal scope. In Sosa, the US Supreme Court merely hinted at the problem in one footnote, where it stated that a »related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.« 762 This is a rather ambiguous statement, which does not decide the dispute in either way. 763 The problem is connected to the question of to what extent international law and to what extent US or foreign law determine the elements of ATS claims, as discussed above. With regard to corporations, the case law is divided on whether it is decisive that US law accepts corporations as tort perpetrators, whether it is necessary that the relevant international norm also applies to private actors, or whether corporations need to be subjects of international law.

Some, including the Second Circuit of the Court of Appeals in Kiobel, 764 doubt the applicability of the ATS to corporations. Rather than US or any other national law, customary international law, they say, should decide the question of who is liable under the ATS. 765 They claim that it is necessary to have a »universal and specific acceptance that there is an obligation as a matter of international law to hold corporations directly accountable for violations of human rights abuses.« 766 Here, the dis-

766 K. Sjovoll, If the Shoe Does Not Fit. Why the ATS Does Not Work, George-town Journal of International Law 43 (2012), 1077, 1079. See also US CA
Discussion about corporations as subjects of international law becomes prevalent once again.\textsuperscript{767} According to this opinion, such an international consensus has not been achieved. Quite the contrary, no international tribunal would have ever held a corporation liable and international customary law would have »steadfastly rejected the notion of corporate liability« and never extended the scope of international obligations to corporations.\textsuperscript{768} Hence, corporations would not fall within the ATS group of addressees. It would either be for the international community to accept corporations as subjects of international law or for the US Congress to explicitly broaden the ATS’ scope of application to include corporations.\textsuperscript{769} In its \textit{Kiobel} decision, the Supreme Court did not address this question. Some authors argue that, in not doing so, the Supreme Court tacitly implied the applicability of the ATS to corporations.\textsuperscript{770}

Other courts acknowledge corporate liability for ATS torts. The New York District Court, which is within the Court of Appeals for the Second Circuit, concluded in \textit{Presbyterian Church of Sudan et al. v Talisman Energy et al.}, before the Second Circuit rendered its \textit{Kiobel} judgment, that a »clear and consistent Second Circuit precedent demonstrates that corporations may be held liable for jus cogens violations of international law.«\textsuperscript{771} Additionally, the court continued, other Circuit and District Courts, as well as international legal documents, have expressly held that corporations can violate international \textit{jus cogens} norms and thus fall within the


\textsuperscript{768} US CA Second Circuit \textit{Kiobel et al. v Royal Dutch Petroleum et al.} [2010] 621 F.3d 111, 126. For the discussion, see above chapter I C.

\textsuperscript{769} \textit{K. L. Myles}, Some Thoughts on the Alien Tort Statute as the Supreme Court considers \textit{Kiobel}, Georgetown Journal of International Law 43 (2012), 1087, 1089 et seq.


subject matter jurisdiction of the ATS. \(^{772}\) With regard to international law, the District Court cited instruments analysed above in chapter I that would show »that precedent does exist for holding corporations liable for large-scale torts.« \(^{773}\) Other Circuits departed from the Second Circuit’s Kiobel judgment.

The Court of Appeals’ District of Columbia Circuit in Doe I et al. v Exxon Mobil et al. \(^{774}\) expressly departed from the Second Circuit’s decision in Kiobel v Royal Dutch Petroleum. It claimed that the Second Circuit had misinterpreted the US Supreme Court’s Sosa ruling. \(^{775}\) The District of Columbia Circuit argued that it is not the law of nations that decides on the group of addressees, but rather US law. According to the District of Columbia Circuit, corporate liability as a concept is not a question of the cause of action, which would be a question for international customary law. Rather, the question is one of US agency law: »whether a corporation can be made to pay damages for the conduct of its agents in violation of the law of nations«. \(^{776}\) International law, on the contrary, does not provide any guidance as to how violations shall be nationally remedied and provides no right to sue in general. \(^{777}\) With regard to US law, the historic circumstances, which are of special importance in the case of the ATS and the purpose of the ATS »support[...] the availability of corporate liabil-

\(^{772}\) US DC S.D. New York Presbyterian Church of Sudan et al. v Talisman Energy et al. [2003] 244 F.Supp.2d 289, 314 et seq. See also Koebele, Corporate Responsibility under the Alien Tort Statute. Enforcement of International Law through US Torts Law p. 198 et seq.


\(^{775}\) US CA District of Columbia Circuit Doe VIII et al. v Exxon Mobil et al. [2011] 654 F.3d 11, 41. See also US CA Eleventh Circuit Romero et al. v Drummond et al. [2008] 552 F.3d 1303, 1315. For a discussion of Sosa v Alvarez-Machain et al. see 1.

\(^{776}\) US CA District of Columbia Circuit Doe VIII et al. v Exxon Mobil et al. [2011] 654 F.3d 11, 41.

ity». The text of the ATS would not exclude corporations. Early historic cases and related US statutes were already using agency law, and corporate tort liability was unanimously accepted. Additionally, according to the court, international law would not support corporate immunity.

Similarly, in *Sarei v Rio Tinto*, the Ninth Circuit acknowledged corporate liability for ATS torts and departed from the Second Circuit. There was, it said, no trace in the legislative history or wording of the ATS that would exclude corporations from the application of the ATS. In the end, it conducted »a norm-by-norm analysis« of international law. Thereby, the lack of international decisions on corporate liability is immaterial as long as the underlying international norm is applicable to corporations. Recently, and after the Supreme Court’s decision in *Kiobel*, it reaffirmed this finding. Thus, corporations can be defendants in ATS cases.

3. Corporate Groups as Potential Perpetrators

ATS cases often involve (parts of) transnational corporate groups as alleged perpetrators. The relevant decisions mostly deal with motions to dismiss on the grounds of lack of jurisdiction; some also treat substantial
questions of liability. Materially, many cases concern what Van Detta calls a »triangulation«: the alleged violation is committed by one subsidiary while the foreign parent corporation is sued and jurisdiction is (sought to be) established on the grounds of the activities of another subsidiary in the US.\footnote{787 J. A. Van Detta, Some Legal Considerations For E.U.-Based MNEs Contemplating High-Risk Foreign Direct Investments in The Energy Sector after Kiobel v. Royal Dutch Petroleum and Chevron Corporation v. Naranjo, South Carolina Journal of International Law & Business 9 (2013), 161, 260 et seq.} The cases are decided using the general standards of jurisdiction and attribution of acts to corporations (a.). Within this framework, the courts examine whether the fact that the corporations are part of a (transnational) corporate group allows the subsidiary’s presence or its acts to be attributed to the parent or to another subsidiary within the corporate group. ATS cases use the general US concept of piercing the corporate veil. Here, the case law is fragmented and different standards and tests are sometimes used interchangeably.\footnote{788 P. I. Blumberg, K. A. Strasser, N. L. Georgakopoulos and E. J. Gouvin, Blumberg On Corporate Groups, 2nd ed., 2015 p. 10-7 et seq.} Most courts dealing with ATS cases, however, ask whether the subsidiary can be seen as an agent of the parent (b.) or the alter ego of the parent (c.). The former leads to attributing the subsidiary’s contacts with the forum and acts to the parent, while the latter leads to subsidiary and parent being treated as one entity. Nevertheless, even in alter ego cases, it is not the corporate group as an entity that is seen as the subject of jurisdiction and as the perpetrator, but rather the parent and the subsidiary. The so-called enterprise theory has hardly ever been used in ATS cases. Some statutes, tax law and product liability cases use this theory, which considers the corporate group a single economic entity (d.). Under all three concepts, the courts take similar aspects into account – such as parental control over the subsidiary. Thus, even though the case law is confused and inconsistent in its results, the criteria used are relevant for the present project and can be used to further refine a concept of transnational corporate groups.

a. General Standards

In cases of transnational corporate groups, the question of presence in the US is highly contested if the corporate entity that is being sued or that
committed the tort is located outside the US. 789 In general, a corporation needs to be present in the forum state in order for the court to have personal jurisdiction over the corporation. 790 According to the US Supreme Court, a

court may assert general jurisdiction over foreign [... ] corporations to hear any and all claims against them when their affiliations with the State are so ‘continuous and systematic’ as to render them essentially at home in the forum State.« 791

General jurisdiction is interesting for the present project, as it looks to the general relationship between subsidiary and parent to establish jurisdiction. 792 Moreover, jurisdiction also needs to be established in international criminal law. Factors for determining continuous and systematic contacts in a jurisdiction include, among others, that corporations are registered to do business in that jurisdiction, have a »place of business, employees, or bank accounts«, »design, manufacture, or advertise [their] products«, »solicit business« 793 or sell in the jurisdiction in question. In the standard cor-

789 See, for example, the (ATS unrelated, but tort law) question in US SC Goodyear Dunlop Tires Operations et al. v Brown et al. 131 [2011] SCt 2846, 2850: »Are foreign subsidiaries of a United States parent corporation amenable to suit in state court on claims unrelated to any activity of the subsidiaries in the forum State?« and the detailed overview at L. Brilmayer and K. Paisley, Personal Jurisdiction and Substantive Legal Relations. Corporations, Conspiracies, and Agency, California Law Review 74 (1986), 1 et seq. concerning inter-state cases S. M. Hall, Multinational Corporations’ Post-Unocal Liabilities for Violations of International Law, George Washington International Law Review 34 (2002), 401, 406; and from a general, not US specific view but focus on transnational corporate groups Muchlinski, Multinational Enterprises and the Law p. 140 et seq.

790 See also dissenting the opinion of O’Scannlain in US CA Ninth Circuit Baumann v DaimlerChrysler Corp. [2011] 676 F.3d 774, 777, who points to the constitutional significance (Fourteenth Amendment): »we must not forget that limits on personal jurisdiction have constitutional underpinnings«.


porate case, these are the factors that will be analysed to determine whether the corporation in question has enough contacts in the state in question to consider them continuous and systematic.

In transnational corporate group cases, the picture is more complex. The corporation that committed the tort might not be the same as the one incorporated or doing business in the US, and it might even be that a third corporation within that corporate group is the defendant. In these cases, personal jurisdiction can only be established if corporations within a corporate group are taken together and if the features or actions of one corporation are imputed to the other corporations. Courts are, in fact, willing to take corporate group elements into account to a certain extent. In ATS cases, like in general US law, the rule in principle is that each judicial person in a corporate group enjoys separate legal personality – both in jurisdictional and substantive issues.794 As the US District Court in *Doe I v Unocal* stated, »[t]he existence of a relationship between a parent company and its subsidiaries is not sufficient to establish personal jurisdiction over the parent«.795 Similarly to UK tort law, this principle is subject to exceptions. These are case-specific exceptions that do not follow a concise concept.796 Courts seem to be a little less reluctant to accept an economic entity and sometimes do not require a fraudulent element.797

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796 US CA Third Circuit *Pearson et al. v Component Technology et al.* [2001] 247 F.3d 471, 487: »Given these variations in the methods by which courts determine when corporations shall be liable for the acts of their affiliates, it is not surprising that there has been a good deal of inconsistency«; US DC N.D. California *Bowoto et al. v Chevron Texaco et al.* [2004] 312 F.Supp.2d 1229, 1235: »As these ‘doctrines’ illustrate, the question of when a parent can be held liable for the actions of its subsidiary, and vice versa, has spawned more rhetorical flourish than clear analytical guidance.« US CA Sixth Circuit *Honeywell v
According to the majority of the US Supreme Court in *Daimler v Bauman*, the test to establish presence in transnational corporate group cases is a relative one. The contacts with one state have to be weighed against the parent’s contacts in other jurisdictions. Otherwise, so the argument goes, parents of large transnational corporate groups would be at home in a number of jurisdictions, which would contradict the notion of being at home. Justice Sotomayor concurs, arguing that this approach would give large transnational corporate groups too much of an advantage over smaller corporations; the former would be »too big for general jurisdiction«. She suggests examining the presence of the parent separately from its presence in other jurisdictions. In this analysis, next to the sale figures, the fact that the parent’s subsidiary had »multiple offices and facilities in [the state at hand], including a regional headquarter« would be important. Other factors include whether key files are held at the subsidiary’s office, and whether the subsidiary’s »employees make important strategic decisions or oversee in any manner [the parent’s] activities«.

In order to establish jurisdiction in transnational corporate group cases, close ties must exist between the subsidiary, the corporation and the forum. Thus, for example, the mere fact that some of the foreign subsidi-
ary’s products were sold in the forum state “through the stream of commerce” as a consequence of a highly-organized distribution process involving other [US] subsidiaries was insufficient to establish (general) personal jurisdiction over that corporation. Such contacts with one state are not sufficiently continuous and systematic. Contacts of one subsidiary with the forum can only be imputed to the parent in the case of agency or if the principles of alter ego apply, such as “typified by parental control of the subsidiary’s internal affairs or daily operations”.

In these cases, jurisdiction over a foreign part of the transnational corporate group can be established. In practice, courts will examine both concepts. Often, the arguments for both resemble each other and overlap. Both concepts look at the relationship and structures within the corporate group – notably between the subsidiary and the parent. These elements can provide further assistance in deciding when a corporate group should be considered as a single economic entity.

Materially, the same arguments that are relevant for personal jurisdictions are put forward for substantive liability. In general, however, the standard is higher for substantive liability. Again, the US Supreme Court requires the parent to have exceeded its role as an investor in order to disregard the separate legal personalities and hold the parent liable for actions of its subsidiary – an exercise of shareholder rights cannot be sufficient to pierce the corporate veil.

Here, the problems and lines of argumentation are similar to the question of jurisdictions. In both cases, the courts discuss whether a relationship of alter ego or agency within the corporate group exists and justifies personal jurisdiction and the imputation of liability.

b. Agency

In order to acknowledge the corporate group context, courts can examine whether the relationship within the corporate group, especially that between the parent and the subsidiary, might be one of agency. If the subsidiary acts as the agent of the parent, the acts of the subsidiary will be imputed to the parent. Thus, the legal separation of subsidiary and parent is upheld—which is, in fact, a necessary requirement for an agency relationship.807 Rather than constructing the corporate group as an entity, acts of one entity (notably the subsidiary) will be seen as acts of another corporate group entity (notably the parent).

i. General Agency Test

In general, the subsidiary will be seen as an agent of the parent only if it conducts »activities that, but for the existence of the subsidiary, the parent would have to undertake itself.«808 This is a slightly broader test than the alter ego test. Agency relies on showing the »special importance of the services performed by the subsidiary«.809

In Bauman et al. v DaimlerChrysler et al., the Ninth Circuit interpreted the test broadly.810 It argued that a differentiated treatment of agency and alter ego cases would justify including the additional scenario of another subsidiary performing the task at hand.811 To proceed otherwise »would

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810 It asked whether »the services provided by [the subsidiary are] sufficiently important to [the parent] that, if [the subsidiary] went out of business, [the parent] would continue selling cars in this vast market either by selling them itself, or alternatively by selling them through a new representative?« US CA Ninth Circuit Bauman et al. v DaimlerChrysler et al. [2011] 644 F.3d 909, 920.
make little sense in a complex global economy«, where corporate groups »can delegate most necessary services to other entities to perform on their behalf« while those entities can still be the parent’s agent.812 Thus, the subsidiary’s service was sufficiently important as the parent »simply could not afford to be without a U.S. distribution system«.813 If the US subsidiary did not exist, its task would »almost certainly be performed by [the parent] or by […] a new subsidiary or a non-subsidiary national distributor«.814 The US Supreme Court expressed some doubts about whether this agency test was correct, as it »will always yield a pro-jurisdiction answer«.815 Nonetheless, it declined to pass judgment on this issue.816 In the end, it reversed the Ninth Circuit’s judgment on the grounds that the contacts of the US subsidiaries were too little to make the parent »at home« in California and hence to subject it to US jurisdiction, as explained above.817

ii. Parental Control

Parental control over the subsidiary is an important element in any discussion on the relevance of corporate group elements. It is also important in agency cases.818 The subsidiary will only be considered an agent of its

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*DaimlerChrysler Corp.* [2011] 676 F.3d 774, 777 points to the magnitude of the extension as »[a]nything a corporation does through an independent contractor, subsidiary, or distributor is presumably something that the corporation would do ‘by other means’ if the independent contractor, subsidiary, or distributor did not exist.«


parent if their relationship is more intertwined than, and thus went beyond, an ordinary parent/subsidiary relationship. In US agency law in general, as well as in ATS cases, the standard of control is disputed. On the one hand, some courts distinguish between the agency and alter ego tests by claiming that it is not necessary for the parent to actually control the day-to-day work of its agent and subsidiary. They claim that a right to control, even if it does not comprise the »full range«, is sufficient. On the other hand, many courts require »actual, participatory and total control« of the parent over the subsidiary. Whether a parent exercises sufficient control over its subsidiary will depend on the specific facts of the case. Nevertheless, several factors are mentioned throughout the case law and are indicators for parental control. They resemble the set of criteria used in EU competition law.

Setting the policy of the subsidiary, including »close monitoring [...] well beyond the review of a subsidiary entity which a parent corporation normally performs«, is an indicator for an agency relationship. Importantly, in the case at hand, the monitoring included daily business oper-
ations and close communication between parent and subsidiary. Thus, the level of control was higher than would have been necessary in EU competition law.

Furthermore, a close interrelation between the management of the subsidiary and the parent, especially an overlap of management personnel, can support a case of agency. The District Court in Bowoto v Chevron Texaco\(^{823}\) evaluated the corporate group structure in detail. It stated that through personnel overlap, the parent »functioned as a multinational corporation in which [the subsidiary] played a significant role«,\(^{824}\) which gave the subsidiary the role of an agent for the parent.

The corporate group’s financial structure can also be used to show an agency relationship between subsidiary and parent. For example, if profits of the subsidiary are used to fund other subsidiaries, the parent »benefit[s] in a very direct way«.\(^{825}\) In general, the subsidiary’s dependence on the parent is an indicator for agency. If the subsidiary works solely for the parent (e.g. as its marketing agency), it is fully dependent on the parent and, as the other side of the coin, does work that the parent would otherwise have done itself.\(^{826}\) This test also applies in the case of sister corporations. A subsidiary can be the agent of a foreign subsidiary of the same group if it conducts work for the foreign subsidiary that this subsidiary would otherwise have done itself.\(^{827}\)

Often, courts distinguished between operational and holding subsidiaries. For operational subsidiaries, the above-mentioned test is employed.\(^{828}\)

With regard to subsidiaries that merely hold assets of other operating sub-


\(^{826}\) See e.g. US CA Second Circuit Wiwa et al. v Royal Dutch Petroleum et al. [2000] 226 F.3d 88, 93 et seq. where a subsidiary nominally held an Investor Relations Office in the State at stake which did business solely for, with the approval of, and financed by the parent. For a discussion, see Slawotsky, Michigan State Law Review (2005), 1102; Stephens, Berkeley Journal of International Law 20 (2002), 88.


\(^{828}\) See e.g. US CA Ninth Circuit Doe I et al. v Unocal et al. [2001] 248 F.3d 915, 929.
sidiaries, the argumentation is reversed: they are not performing any service for the parent and thus cannot be called an agent.\textsuperscript{829} This resembles the discussion on pure financial holding corporations in EU competition law described above in chapter II B. 3. b.

In summary, courts in ATS cases revert to agency precedents from various branches of law (e.g. jurisdiction, contract, tort) to examine whether a subsidiary is the agent of its parent. Similar substantive criteria to the ones used in UK and EU competition law play a role. In agency cases, courts, as the Seventh Circuit of the Court of Appeals described it, »look to the economic and commercial realities of this case«\textsuperscript{830} even if they do so more restrictively than in EU competition law.

c. Alter Ego

If the subsidiary is considered the alter ego or instrumentality of the parent, both can be seen as belonging together. In general, this is the case if the parent significantly exceeds its role as an investor in the subsidiary. The so-called alter ego exception requires

\textit{»(1) that there is such unity of interest and ownership that the separate personalities [of the two entities] no longer exist and (2) that failure to disregard [their separate identities] would result in fraud or injustice.«}\textsuperscript{831}

In these cases – unlike in agency cases – courts consider the parent and the subsidiary as one entity.\textsuperscript{832} Nonetheless, the consequences are mostly the same and courts sometimes use both concepts interchangeably.

\begin{itemize}
\item \textsuperscript{830} US CA Sixth Circuit \textit{Honeywell v Metz Apparatewerke} [1987] 509 F.2d 1137, 1144.
\item \textsuperscript{832} \textit{Otto}, Der prozessuale Durchgriff. Die Nutzung forumansässiger Tochtergesellschaften in Verfahren gegen ihre auswärtigen Muttergesellschaften im Recht der USA, der Europäischen Gemeinschaften und der Bundesrepublik Deutschland p. 61.
\end{itemize}
Factors to be included in this analysis are

»gross undercapitalization, failure to observe corporate formalities, non-payment of dividends, insolvency of debtor corporation, siphoning of funds from the debtor corporation by the dominant stockholder, non-functioning of officers and directors, absence of corporate records, and whether the corporation is merely a facade for the operations of the dominant stockholder«833

This is a narrow exception – comparable to the UK law concept of piercing the corporate veil. It is much narrower than the EU competition law single economic entity doctrine, and requires a certain fraudulent, or at least grossly negligent, element. Substantively, neither direct involvement in »financing and macro-management of its subsidiaries«,834 nor »blurring corporate separateness in language of annual report, overlap of boards of directors, parental approval of large capital expenditures, and parental guaranty of third-party loans to subsidiary« 835 are sufficient as such to »suggest such a unity of interest and ownership between [the parent] and its subsidiaries that their separate corporate personalities no longer exist.« 836 Maintaining the corporate formalities, i.e. for loans, is an important factor.837 Additionally, parental control over the subsidiary is decisive. If the parent controls the subsidiary »to such a degree as to render the latter the mere instrumentality of the former«,838 both will be considered a sin-

833 US CA Third Circuit Pearson et al. v Component Technology et al. [2001] 247 F.3d 471, 484 et seq.
gle entity. This, contrary to EU competition law, necessitates parental control over the subsidiary’s day-to-day operations.839

With regard to the substantive claim, the District Court in *Wiwa v Royal Dutch Petroleum* briefly discussed the question of whether the behaviour of the subsidiary can be imputed to the parent. After citing the main arguments of the parties, the court simply agreed with the plaintiffs’ view that »each was the alter ego of the other«.840 Unfortunately no further explanation was given to the concept of alter ego, nor any recourse made to the specific corporate structure in the case at hand. This is partly due to the fact that the court was concerned with a motion to dismiss, and thus had to decide, whether the complaint itself was »legally sufficient, accepting its factual allegations as true«.841

In summary, the instrumentality or alter ego exception is a narrow one. Next to the fraudulent element, close parental control over the subsidiary is a necessary requirement. Here, the same factors as in agency cases are mentioned, albeit constructed more narrowly.


d. Enterprise Theory

There might be a small tendency in ATS jurisprudence towards what is called, in the wider US debate, the enterprise theory. Enterprise liability can be seen as a horizontal form of liability, because it allows the corporate group to be considered as a single enterprise being liable as one entity.\textsuperscript{842} In the famous \textit{Walkovsky v Carlton et al.} case, the US Court of Appeals of New York hinted at the possibility of enterprise liability, meaning to hold »a larger Corporate entity [...] responsible« if the plaintiff can prove that »a corporation is a fragment of a larger corporate combine which actually conducts the business.«\textsuperscript{843} This approach is closely connected to the alter ego test.\textsuperscript{844} For Blumberg, three factors are necessary to apply enterprise principles: parental control over the subsidiary, »highly intertwined operational and economic relationships between parent and subsidiary«,\textsuperscript{845} and furthering of the objectives of the law in question.

In a recent judgment, the US Court of Appeals for the Ninth Circuit put forward a similar argument. It argued that the corporate group acted as a single economic entity on the US market. The court drafted its argument in rather general, non-technical terms, connecting it to the wider field of globalisation discussions. While rather non-legalistic,\textsuperscript{846} the argument is worth citing in full as it captures the transnational corporate group dimension:

»The reality is that in an increasingly complex and globalized economy, international corporations such as [the parent] reap enormous profits from the sale of their goods in the United States. The sales are achieved through the use of major distributors, frequently in the form of subsidiaries. Many international companies organize their corporate structure and establish subsidiaries for the sole purpose of obtaining the maximum benefit from the American market. To the ordinary American, and certainly to us, it would seem odd, indeed, if the manufacturer of Mercedes–Benz vehicles, which are sold in California in vast numbers by its Ameri-

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\textsuperscript{842} Bainbridge, Corporation Law and Economics p. 169.
\textsuperscript{844} Bainbridge, Corporation Law and Economics p. 169 et seq.
\textsuperscript{845} Blumberg, \textit{Strasser, Georgakopoulos and Gouvin}, Blumberg On Corporate Groups p. 6-7 et seq., 63-3 et seq.
\textsuperscript{846} O’Scannlain in US CA Ninth Circuit \textit{Bauman v DaimlerChrysler Corp.} [2011] 676 F.3d 774, 777 et seq. criticises the judgment as a contradiction to the principle of separate legal personalities and to other ATS judgments.
can subsidiary, for use on the state's streets and highways, could not be required to appear in the federal courts of that state. Mercedes–Benz cars are ubiquitous in California, and Mercedes–Benz dealerships, required to display the signage mandated by [the parent], have a highly visible presence.«

The judgment can be seen as introducing, rather subtly, enterprise theory into ATS case law. By pointing to the integrated nature of global economy, the appearance of Mercedes-Benz as a uniform brand, their presence in California and their adaption to Californian laws, the court stressed the economic reality and integrated character of the corporate group rather than its legal form. Unfortunately, the court neither tries to categorise its arguments nor does it try to link its argumentation to existing legal categories. A similar argumentation can be found in product liability cases.

Here, the parent is liable for failures of its (wholly owned) marketing or distributing subsidiary, for example, because »the reliance of a consumer on the integrity of manufacturer is not defeated by a complicated corporate structure«. The consumer’s claim shall not be »legally thwarted through mysteries of business technicalities and complications completely foreign to him.« The court stressed that the parent established and had full control over an integrated financial structure. In this case, the fraudulent element was barely visible. Instead, the intertwined group structures were emphasised. It is questionable, however, whether the extensive approach in product liability will be transposed to ATS cases. Firstly, the enterprise view in product liability cases is expressly linked to, and justified by, consumer protection. In fact, a similar doctrine – the integrated enterprise doctrine, used for vicarious liability – has already been rejected as relevant.

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848 This might be partly due to the fact that it is part of the court’s assessment of the question whether it is »reasonable« to grant personal jurisdiction.
A. Alien Torts Statute: Transnational Corporate Group Litigation

for ATS cases. This doctrine also »focuses on economic realities, rather than corporate formalities«. However, it is a »labor-specific veil-piercing test« that is solely used in employment-related cases, as it only looks at labour-related features of the corporate group. It was therefore deemed unsuitable for ATS cases. Secondly, the Ninth Circuit in *Bauman v DaimlerChrysler* emphasised that this rather lenient test only concerns the question of personal jurisdiction and cannot be used as »governing the test for vicarious liability«. Thirdly, the US Supreme Court reversed the judgment and found that the court lacked personal jurisdiction over the parent. The US Supreme Court ruled that the subsidiary’s contacts with the forum did not change this finding. Fourthly, it seems plausible that the case would have been decided differently after the US Supreme Court decision in *Kiobel*, discussed at 4. a., because the alleged tort, as the Ninth Circuit acknowledged itself, »occurred outside [US] borders«. Thus, the criteria set up by the Supreme Court to rebut the presumption against extraterritoriality were not fulfilled. In any case, the criteria presented bear resemblance to the criteria already mentioned – such as integrated business structures, economic interdependences and task sharing, financial dependence and a uniform group strategy and outer appearance. Thus they show the prevalence of these criteria in different areas of law.

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4. Transnational Reach of Corporate Groups

An important question in ATS litigation is the scope of jurisdiction of US courts. On the one hand, US courts do not want to be a safe haven for those who violate fundamental international norms; on the other hand, they do not want to be the *custos morum* of the whole world and interfere with the US executive’s foreign policy. In the past, courts have solved this dichotomy with the help of discretionary powers such as political question, act of state, international comity or the *forum non conveniens* doctrine. The latter is most interesting with regard to transnational corporate groups. On the one hand, it raises the question once again of imputing conduct of one corporate entity to another entity; on the other hand, the arguments of the transnational reach of corporate groups are presented (b.). In *Kiobel*, the US Supreme Court dealt with the problem in its analysis of the territorial jurisdiction in ATS cases. It postulated a presumption against the extraterritorial reach of the ATS that can be only rebutted if the territory of the US is touched and concerned with sufficient force (a.). As a result, many cases will now not pass the jurisdiction threshold.

a. Territorial Jurisdiction

A controversial topic was whether – and, if so, to what extent – the ATS conveys extraterritorial jurisdiction to the courts. As the ATS only applies to aliens, many of the cases have connections to foreign countries. The perpetrator, for example, might be a foreigner without any residence in or connection to the US, or the incriminated conduct might have occurred in part or entirely outside the US. Thus, connection to the US varies from case to case from strong ties (i.e. plaintiff is a resident of the US, conduct occurred in the US and the defendant is a US national) to little to no connection to the US (i.e. plaintiff is a non-US resident, defendant is neither a US national nor a US resident, conduct occurred outside the US).
i. Presumption Against Extraterritoriality

In *Kiobel v Royal Dutch Petroleum*, the US Supreme Court decided that the ATS did not convey jurisdiction to federal courts for solely extraterritorial cases, diverting from most lower court judgments of the last 30 years. The US Supreme Court unanimously confirmed the judgment of the Court of Appeals for the Second Circuit, already discussed above. The majority held that the ATS has no extraterritorial reach because "[t]he presumption against extraterritoriality applies to claims under the ATS, and nothing in the statute rebuts that presumption". Even though the ATS applied to claims from «aliens», this did not imply that the statute necessarily had extraterritorial reach. According to the US Supreme Court’s majority, aliens could also be restrained to claim damages for vio-
lations that occurred within the US.864 Furthermore, a 1795 opinion of Attorney General William Bradford stating that

»there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a civil suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States«865

was ambiguous and, anyhow, »hardly suffices to counter the weighty concerns underlying the presumption against extraterritoriality.«866

Justice Breyer, concurring, denied the applicability of the presumption against extraterritoriality for ATS cases because, thereby going against the opinion of the majority, Congress certainly had foreign matters in mind when enacting the ATS. This is, according to Justice Breyer, visible in the references to aliens, international treaties and the law of nations.867 Moreover, piracy was extraterritorial and – according to Justice Breyer and contrary to the majority868 – usually occurred within the jurisdiction of a (for-
eign) country, namely of the country whose flag the captured ship was flying. For him, the underlying question for deciding the scope of the ATS is, »Who are today’s pirates?« Like pirates, perpetrators of genocide and other core crimes are also »fair game where they are found« and »common enemies of all mankind and all nations«. For Justice Breyer this would justify universal jurisdiction. For the US Supreme Court’s majority, also in the case of international crimes, the presumption against extraterritorial application needs to be rebutted.

ii. Rebuttal

The presumption against extraterritoriality is difficult to rebut. It needs a claim that »touch[es] and concern[es] the territory of the United States […] with sufficient force to displace the presumption against extraterritorial


870 US SC Kiobel et al. v Royal Dutch Petroleum et al. [2013] 133 SCt 1659, 1671. He sees the answer in a reference to Sosa and to international law. Furthermore, he proposes to »look to international jurisdictional norms to help determine the statute’s jurisdictional scope«, mainly Section 402 and 404 of Restatement (Third) of Foreign Relations Law: US SC Kiobel et al. v Royal Dutch Petroleum et al. [2013] 133 SCt 1659, 1672 et seq.

871 Both citations from US SC Kiobel et al. v Royal Dutch Petroleum et al. [2013] 133 SCt 1659, 1672. See already US CA Second Circuit Filártiga et al. v Pena-Irala [1980] 630 F.2d 876, 890: »Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him hostis humani generis, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.« And, more recently US CA Second Circuit Wiwa et al. v Royal Dutch Petroleum et al. [2000] 226 F.3d 88, 105 et seq.: The ATS »communicate[s] a policy that [torture] suits should not be facilely dismissed on the assumption that the ostensibly foreign controversy is not our business« because »a violation of the international law of human rights is (at least with regard to torture) ipso facto a violation of U.S. domestic law«, which is a strong argument for a US forum.
application.« Unfortunately, the court’s majority did not go on to specify which circumstances have sufficient force to rebut the presumption. The majority merely stated that the fact that corporations might be present does not suffice on its own, as »corporations are often present in many countries«.872

Justice Breyer proposed to affirm territorial jurisdiction in three scenarios:

»(1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind«.873

The third scenario diverts from the majority opinion.

Particularly concerning the third scenario, the majority claimed that the aim of the ATS had not been to »make the United States a uniquely hospitable forum for the enforcement of international norms«874 as, otherwise, third countries might be inclined to »hale [US] citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world.«875 Justice Breyer disagrees that his proposed test would lead to an overload of cases. On the contrary, he says, its application would be rather restrictive given »Sosa’s basic caution (to avoid international friction)«876 and the other defences applicable in ATS cases (»comity, exhaustion, and forum non conveniens, along with its dependence (for its workability) upon courts obtaining, and paying particular

876 US SC Kiobel et al. v Royal Dutch Petroleum et al. [2013] 133 SCt 1659, 1673 et seq.
attention to, the views of the Executive Branch\textsuperscript{877}). Moreover, international law and other national laws also provide for extraterritorial jurisdiction.\textsuperscript{878}

The jurisprudence in the aftermath of \textit{Kiobel} has been rather restrictive. Firstly, the Second Circuit of the Court of Appeals explicitly rejected Justice Breyer’s proposition.\textsuperscript{879} The Second Circuit conducts a two-step analysis:

\textit{»Step one is a determination of whether that `relevant conduct’ sufficiently `touches and concerns’ the United States so as to displace the presumption against extraterritoriality. Step two is a determination of whether that same conduct states a claim for a violation of the law of nations or aiding and abetting another’s violation of the law of nations.«}\textsuperscript{880}

For the Second Circuit, the conduct in question is most important. The act must first constitute an international tort; secondly it must have occurred in the US; and thirdly the defendant must have acted. The Fourth Circuit used a broader interpretation of the US Supreme Court’s judgment. In their opinion, the US Supreme Court stated that it is not the tortious conduct, but rather the underlying claim that needs to sufficiently touch and concern the US.\textsuperscript{881} Thus a »broader range of facts than the location« where the injuries occurred is necessary.\textsuperscript{882}

In any case, a corporate’s US nationality is not sufficient to rebut the presumption.\textsuperscript{883} It can, however, be a factor, as it limits the foreign policy

\textsuperscript{877} US SC \textit{Kiobel et al. v Royal Dutch Petroleum et al.} [2013] 133 SCt 1659, 1674.

\textsuperscript{878} US SC \textit{Kiobel et al. v Royal Dutch Petroleum et al.} [2013] 133 SCt 1659, 1675 et seq. See also Levine, Suffolk Transnational Law Review 30 (2007), 115 et seq. for a case study of national cases focussing on the reception of US cases.

\textsuperscript{879} US CA Second Circuit \textit{Balintulo et al. v Daimler et al.} [2013] 727 F.3d 174, 189.


\textsuperscript{881} US CA Fourth Circuit \textit{Al Shimari et al. v CACI Premier Technology et al.} [2014] 758 F.3d 516, 525 et seq.

\textsuperscript{882} US CA Fourth Circuit \textit{Al Shimari et al. v CACI Premier Technology et al.} [2014] 758 F.3d 516, 529.

concerns and acts of a US national may very well »impact the United States«.884 In cases where the harm occurs abroad, especially for the Second Circuit, there must be a sufficient nexus between the US conduct and violation of international law abroad, which in turn sufficiently touches and concerns the territory of the US.885 The international tort must have been »planned, directed, or executed in the United States.«886 There must be »minimum factual predicate warranting the extraterritorial application of the ATS.«887 Financing violations of international law or purchasing internationally prohibited or sanctioned goods in the US has constituted sufficient specific and domestic conduct to affirm the first step of the touch and concern analysis.888 Thus, decision-making in the US to aid and abet an international tort (committed abroad) is a relevant conduct.889 However, such contacts do not necessarily »outweigh the extraterritorial location of the rest of Plaintiff’s claims« and thus rebut the presumption.890 This finding seems to leave little room for the most common ATS claim against

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887  US CA Eleventh Circuit Baloco et al. v Drummond et al. [2014] 767 F.3d 1229, 1236.
888  US CA Second Circuit Mastafa et al. v Chevron et al. [2014] 770 F.3d 170, 190 et seq.
890  US CA Eleventh Circuit Doe et al. v Drummond et al. [2015] 782 F.3d 576, 598.
corporations – the allegation that a (US) corporation has aided and abetted international torts abroad from its (US) offices. The plaintiffs must at least claim specific, extensive and explicit aiding and abetting acts in the US to stand a chance.\textsuperscript{891} It is not sufficient that the subsidiary of a US parent committed an international tort abroad.\textsuperscript{892} As a consequence, the Second Circuit declined to consider the subsidiary and parent as a single entity or to impute the subsidiary’s conduct to the parent. On the contrary, it examined each corporation within the group separately. Here, again, the principle of alter ego could help to rebut the presumption, as it allows the corporate group to be considered an entity. If the foreign subsidiary is seen as an alter ego of the US parent, the subsidiary’s conduct can be seen as a conduct of the parent as well and thus might »tie[…] the relevant human rights violations to actions taken within the United States.«\textsuperscript{893}

As a result, the corporate group structure will, in future cases, be scrutinised again at this stage of ATS proceedings. Plaintiffs will need to try to present further arguments as to why the court should consider the corporate group as one entity, or at least impute conduct of one group entity to another, in order to affirm jurisdiction. Additionally, corporate decision-making processes – including those within the corporate group, especially between local subsidiaries and US parents – will become more relevant, because in most cases a tortious conduct in the US is necessary to rebut the presumption against extraterritoriality.

b. Forum Non Conveniens

Even if personal jurisdiction is established, the doctrine of \textit{forum non conveniens} further prevents jurisdiction over transnational corporate

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groups.894 The US Supreme Court applies a two-pronged test. First, the court has to decide whether an alternative forum is both available and adequate.895 Then, the consequences both for the defendant and the plaintiff of a trial in both jurisdictions, as well as affected public interests, have to be balanced. Thereby, deference is given to the plaintiff’s choice of forum, especially if the plaintiff has strong ties with the forum (e.g. US citizenship or residency).896

Here, the question of actions against foreign parent or sister corporations, and thus of interpreting the whole corporate group as a defendant, is raised again. For example, in Aguinda et al. v Taxaco et al., the US District Court had to decide whether the public interests of the US would favour proceedings in the US rather than in Ecuador, where the alleged environmental damage took place. One decisive factor that led the court dismissing the claim on grounds of forum non conveniens was the fact that

»no act taken by Texaco in the United States bore materially on the pollution-creating activities of which plaintiffs complain. This is not a case, then, where the United States was specially used as a base from which to direct violations of international law visited on some foreign site. Conversely, the actions in question occurred overwhelmingly in Ecuador«.897

The actor was »a consortium (the ‘Consortium’) in which Texaco held an indirect interest«898 through

its indirect investment in Texaco Petroleum Company [...] a Delaware corporation and fourth-tier subsidiary of Texaco, which initially operated the petroleum concession for the Consortium and held varying interests in the Consortium.«

This complex corporate group structure was seen as too remote contact to the US. The actions of the Ecuadorian subsidiary were not seen as actions of its US parent, Texaco. Hence, there were too few and too remote contacts to the US to favour a US forum. Probably, after Kiobel, the case would have been dismissed using similar arguments on the grounds that the presumption against extraterritoriality was not rebutted.

Other courts have been less reluctant to accept the US as an adequate forum in transnational corporate group cases. For example, the Court of Appeals for the Ninth Circuit decided that the corporate group’s US subsidiaries’ activities, assets and employees counted as a presence of the foreign parent. For the Ninth Circuit, this was proof of US interest in the litigation, and thereby mitigated the conflict arising from US litigation with, in this case, Germany’s sovereignty. This imputation would also not be an infringement of the corporate form. On the contrary, the US Supreme Court concluded that the Ninth Circuit paid little heed to the risks to international comity. Additionally, some courts tend to give little weight to the burden of foreign – i.e. US – litigation for transnational corporate groups. They point to the fact that large corporations [...] routinely litigate cases outside of their home jurisdiction and have vast resources compared to the plaintiffs.

900 See above a.
901 US CA Ninth Circuit Bauman et al. v DaimlerChrysler et al. [2011] 644 F.3d 909, 926 et seq. In this case, the court advanced this argument under the section of reasonableness of the jurisdiction. Due to its close relation to discretionary arguments, normally advanced in forum non conveniens question, this judgment is treated under this heading.
In summary, the picture concerning the threshold of *forum non conveniens* is mixed. While the majority of cases might be dismissed (at least) at this stage, some courts have shown sensibility to the specificities of transnational corporate groups as defendants.

5. Summary

In general, ATS cases respect the concepts of separate legal personality and limited liability. This often precludes holding transnational corporate groups responsible in the US for their violations of international law.\(^\text{906}\) The overview of relevant ATS cases has shown that, unfortunately, many aspects have not been addressed at all – or at least not in sufficient detail. Most judgments deal only with the jurisdictional aspects or motions to dismiss. The former cases are not concerned with imputing liability to (groups of) corporations; in the latter, the judges do not decide on the merits of the case, but take the alleged facts for granted and decide whether a jury might reasonably agree with the allegation. The overwhelming majority of cases are then settled before an actual judgment.\(^\text{907}\) Hence, the judges do not have the possibility to pronounce themselves in detail on the question of responsibility within a complex corporate structure. Moreover, courts do not follow a uniform approach concerning the applied principles and criteria and tend to interpret precedents differently.

As a result, ATS transnational corporate group cases are of a fragmented nature and lack general criteria. Some elements do, nevertheless, recur in most cases. In general, the decisive factor is an abusive or fraudulent element. While a specific group structure is not the sole element that allows a corporate group to be considered a single entity or to impute conduct of the subsidiary to its parent, it is a necessary element. Here, parental


control over the subsidiary plays an important role.\textsuperscript{908} Most cases distinguish between general control, or powers of control, and control in specific cases, or the actual exercise of control. While the former is seen as a normal exercise of shareholder rights, the latter might, together with other factors, allow a parent and subsidiary to be viewed together. An overlap of directors is generally not enough to disregard the separate legal personalities. A group-wide streamlining of general business policies, approval of unusual business decisions and expenditures, and a monitoring of the macro management are usually not sufficient to pierce the corporate veil. Rather, if the parent gives orders to its subsidiary concerning specific situations, sets specific policies, or closely monitors and accompanies the handling of a particular case, both corporations might be considered together. Approving and financing the subsidiary’s business activities can also be an indicator of a close group relationship.\textsuperscript{909} Additionally, a disregard of corporate formalities, especially in accounting matters, favours considering the corporate group as an entity. In summary, control of the parent over the day-to-day business, the mingling of corporate assets, the exercising of business for the parent and a strong influence over the subsidiaries’ personnel can justify considering a corporate group an entity. This resembles the approach taken in UK law. Moreover, for the objective factor, courts will look at the same areas as in EU competition law – namely finance, personnel, public appearance, business strategy, accounting, (common) fields of activity and the exercise of control rights.\textsuperscript{910}

**B. The Notion of Undertaking in US Antitrust Law**

Besides EU competition law, US competition law is one of the most important competition law regimes worldwide. EU competition law is often


compared to its counterpart, or both are taken as role models for the competition laws of smaller countries. This justifies a brief look into the treatment of corporate groups in US competition law.

The main US antitrust law statute, the Sherman Act, applies to legal as well as natural persons.\(^{911}\) § 7 of the Sherman Act defines persons as including «corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.»

1. Group Privilege

The group privilege applies in US law as well.\(^{912}\) Agreements between a parent and its wholly owned subsidiary are exempted from the prohibition of conspiracy.\(^{913}\) The US Supreme Court argued in *Copperweld v Independent Tube* that parent and subsidiary have a «complete unity of interest» and are guided by one consciousness.\(^{914}\) As a consequence, according to the US Supreme Court, there is no justification for antitrust intervention. Here, as in EU competition law, the rationale is a functional one: the application of antitrust law cannot depend on the inner structure of the corporation. It cannot depend on whether the business is organised in mere

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divisions or in an incorporated wholly owned subsidiary. Admittedly, the so-called intra-enterprise conspiracy doctrine, which was reversed by the *Copperweld* judgment, claimed to be functional as well. It stressed the fact that antitrust law should be concerned with substance and not with form. As a result, the US Supreme Court held in former judgments that the mere fact that parent and subsidiary are under common ownership should be irrelevant and not foreclose the application of § 1 of the Sherman Act. However, as the US Supreme Court pointed out in *Copperweld*, the old approach ignored the reality that the parent can fully control the subsidiary. In these cases, there are not two entities colluding and aligning their interests. Rather, parent and subsidiary share a common purpose, and the parent can always ensure that the subsidiary acts in the parent’s best interest. There might be valid economic, tax, regulatory or similar reasons for designing the business in a corporate group structure instead of incorporated divisions. According to the US Supreme Court, antitrust law should acknowledge these business reasons and should not intervene by differentiating between divisions and wholly owned subsidiaries. Antitrust law has no interest in setting an incentive for corporate groups to change their wholly owned subsidiaries to mere divisions as, from the antitrust point of view, there is no difference between the two. Rather, the distinction made in the Sherman Act of unilateral and concerted conduct must be obeyed and any remaining gaps accepted. The US Supreme Court in *Copperweld* suggested that, in the case of wholly owned subsidiaries, control and thereby the single economic entity is irrebuttably presumed. In EU competition law, the presumption is rebuttable – albeit not easily, as explained above.

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920 US Supreme Court *Copperweld Corporation et al. v. Independence Tube Corporation* 467 U.S. 752, 771: »a parent and a wholly owned subsidiary always have a ‘unity of purpose or a common design’.« *Areeda and Hovenkamp*, Antitrust Law. An Analysis of Antitrust Principles and Their Application. Volume VII, paras 1467 et seq.
2. Extension of Copperweld Jurisprudence

The Copperweld jurisprudence has been extended to relationships in which the parent effectively controls the subsidiary, even if it holds less that 100% of its shares, if both have a unitary will. Likewise, it has been applied to sister corporations. For example, in Century Oil Tool v Production Specialties two corporations were jointly owned and controlled, conducted an integrated business and had the same managers. The Court of Appeal for the Fifth Circuit applied the Copperweld jurisprudence and found that § 1 Sherman Act was not applicable.

The case law concerning partially owned subsidiaries is ambiguous. In these cases, the courts have to decide whether the parent had sufficient control over the subsidiary and both had a unitary interest to consider them as a single entity. The necessary standard of control is still disput-

922 See e.g. US CA Sixth Circuit Directory Sales Management v Ohio Bell Telephone [1987] 833 F.2d 606, 611; US CA Fourth Circuit Advanced Health Care Services v Radford Community Hospital [1990] 910 F.2d 139, 146; Blumberg, Strasser, Georgakopoulos and Gouvin, Blumberg On Corporate Groups p. 97-8 et seq.; Broder, U.S. Antitrust Law and Enforcement p. 47 with further references.
923 US CA Fifth Circuit Century Oil Tool et al. v Production Specialties et al. [1984] 737 F.2d 1316 et seq.; Blumberg, Strasser, Georgakopoulos and Gouvin, Blumberg On Corporate Groups p. 97-8.
924 Blumberg, Strasser, Georgakopoulos and Gouvin, Blumberg On Corporate Groups p. 97-10.
925 See e.g. US DC E.D. Pennsylvania Pennsylvania Independent Business Association et al. v Unicorn Marketing et al. [1985] WL 2812 p. 4 »If one person is capable of asserting control over another, the two are not capable of conspiring.«; US DC N.D. Georgia Order Novatel Communications v Cellular Telephone Supply et al. [1986] WL 15507 p. 6 »the 51% ownership retained by Novatel-Canada assured it of full control over Carcom and assured it could intervene at any time that Carcom ceased to act in its best interests.«; US CA Eleventh Circuit St. Joseph's Hospital v. Hospital Corporation of America et al. [1986] 795 F.2d 948, 956; US DC D. New Jersey Re Bascom Food Products et al. v Reese Finer Foods et al. [1989] 715 F.Supp. 616, 629 Fn 19 »when a parent company owns less than all of the stock of a subsidiary, a closer examination must be made to determine whether a unity of interest exists.«; US DC E.D. New York American Vision Centers v Cohen et al. [1989] 711
ed, most notably whether majority ownership or an actual exercise of control are necessary elements.\textsuperscript{926} Areeda has attempted to systemise the criteria used in jurisprudence to assess under which conditions a single economic entity exists.\textsuperscript{927} These criteria and the corresponding reasoning are very similar to EU competition law. Conspiracy among corporations of a pyramid corporate group that are part of the single economic entity do not fall under § 1 Sherman Act.\textsuperscript{928} Under US antitrust law, as much as under EU competition law, joint ventures can be considered a single entity. As a consequence, the parents of the joint venture are not considered competitors on the market served by the joint venture, but are rather seen as joint participants in the market.\textsuperscript{929} Similarly, professional organisations or trade


\textsuperscript{927} Areeda and Hovenkamp, Antitrust Law. An Analysis of Antitrust Principles and Their Application. Volume VII, para 1467.


groups can fall under the group privilege.\textsuperscript{930} The group privilege does not apply, much like in EU competition law, if independent »centers of decisionmaking«\textsuperscript{931} act, which neither »possess […] unitary decisionmaking quality« nor a »single aggregation of economic power« but rather compete with one another.\textsuperscript{932} For example, in the \textit{National Football League} case, the football teams had not pooled their economic activities – the marketing of intellectual property rights – by forming the NFLP, but rather remained competitors, especially for the different team brands.\textsuperscript{933} Thus they were not perceived as a single economic entity.

3. No Single Economic Entity Doctrine

Unlike EU competition law, US antitrust law has not taken the step to generalise the single economic entity doctrine of \textit{Copperweld} to consider a corporate group the addressee of competition law or to attribute responsibility to the parent corporation. Rather, the US courts emphasise the application of corporate law principles such as limited liability.\textsuperscript{934} Parent corporations and their subsidiaries are only taken together in cases where the alter ego or piercing of the corporate veil doctrine, as explained above at A. 3., applies.\textsuperscript{935} Thus, a parent corporation will not be liable »simply be-

\begin{footnotesize}
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  \item \textsuperscript{932} US SC \textit{American Needle v National Football League et al.} [2010] 560 US 183, 196 et seq. See also \textit{Broder}, U.S. Antitrust Law and Enforcement p. 46.
  \item \textsuperscript{934} \textit{Menz}, Wirtschaftliche Einheit und Kartellverbot. Die Stellung des Konzerns im Rahmen des Kartellverbots nach deutschem, europäischem und US-amerikanischem Recht p. 140 et seq.; \textit{Blumberg, Strasser, Georgakopoulos and Gouvin}, Blumberg On Corporate Groups p. 97-7, 97-47.
  \item \textsuperscript{935} US DC N.D. California \textit{Murphy Tugboat v Shipowners & Merchants Towboat} [1979] 467 F.Supp. 841, 854 citing the tort law case US CA Sixth Circuit \textit{Steven v Roscoe Turner Aeronautical} [1963] 324 F.2d 157, 161: »inadequate capitalization, absence of independent activities, action in the interest of the
\end{itemize}
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cause the parent owns all the stock of the subsidiaries and shares common officers and directors.« 936 The conditions of the alter ego exception were seen to be fulfilled in a case where parent and subsidiary had a »close relationship«, evidenced in numerous facts from monitoring, control and overriding rights of the parent in all decision areas – including business, personnel and financial decisions – to selling products under the common trade name. 937 The court concluded that this relationship went beyond a usual relationship »of stock ownership alone«. The subsidiary had an »independent existence in form only«; it was a mere operating division, run according to the parent’s »policies and objectives«. 938 As a result, the parent could be held liable for its subsidiary’s antitrust practices. 939 Similarly, General Electric was held responsible for the anti-competitive practices of its subsidiaries. It was seen as using its subsidiary to install and maintain the cartel while trying to shield itself from liability. 940 The court lifted the corporate veil, amongst other considerations, because the corporations frequently exchanged personnel, they divided their business territorially among themselves, and General Electric was regularly kept informed on

940 US DC D. New Jersey United States v General Electric et al. [1949] 82 F.Supp. 753, 843: »In order to adequately protect its domestic market it employed its wholly owned foreign subsidiaries as the medium to develop an effective cartel system in Europe that would make home territories inviting to foreign manufacturers. […] The gloss of separate corporate entities employed to insulate General Electric from the consequences of these maneuvers avails nothing in the face of the plain intent to monopolize the incandescent electric lamp industry in the United States and protect this dominant position from foreign competition.«
its subsidiaries’ dealings. If the conditions of piercing the corporate veil such as illustrated in these two examples are not fulfilled and the corporations within the corporate group act as separate entities, courts will not impute liability for the subsidiary’s conduct to the parent. According to US courts, these corporate law concepts, discussed above with regard to the ATS, are not to be equated with the antitrust law concept elaborated in *Copperweld*. Critics have pointed out that there is no compelling reason to treat the situations differently, because the factual circumstances and competition law rationale are said to be the same. They argue that corporate groups are granted two advantages that contradict each other: the advantage of the impossibility of intra-enterprise conspiracy and the advantages of separate legal personalities in matters of liability. Moreover, in other areas of competition law such as merger control or abuse of dominant positions, corporate groups are perceived as one entity as well.

To summarise, US antitrust law depicts similar argumentation patterns in dealing with corporate groups. With regard to the group privilege, the US approach is even stricter than EU competition law because in US law


944 *Blumberg, Strasser, Georgakopoulos and Gouvin*, Blumberg On Corporate Groups p. 97-45 et seq.

wholly owned subsidiaries are *per se* seen as forming an entity with their parents. In case of not wholly-owned subsidiaries and in questions of imputing liability for the subsidiaries’ conduct to the parent, the courts will generally assess whether the parent controlled the subsidiary. In this area, however, the control standard is unclear, especially whether the power to control suffices or whether an actual exercise of control is necessary. With regard to questions of liability, the courts apply general corporate law principles and the alter ego, agency and piercing the corporate veil exceptions already discussed at A. 3. In essence, the courts consider the same aspects decisive as EU competition law. The difference is rather a conceptual one. While EU competition law operates with a notion of undertakings that is independent from legal persons, US antitrust law only considers parents and subsidiary one entity in exceptional cases.946

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946 For a similar conclusion with regard to the general enterprise theory, see *Blumberg, Strasser, Georgakopoulos and Gouvin*, Blumberg On Corporate Groups p. 97-65 et seq.
Chapter V: Comprehensive Analysis of Criteria

In certain contexts, courts and scholars perceive a corporate group as an economic entity. The ECJ, for example, considers a corporate group a single economic entity for antitrust matters if it consists of a unitary organisation of personal, tangible and intangible elements, which pursue a specific economic aim on a long-term basis. In US law, in the case of parental control of the subsidiary’s internal affairs or daily operations, courts will evaluate whether to impute the subsidiary’s conduct to its parent. In order to get past the basic corporate law tenet of each member of the group being a separate legal personality, courts and scholars alike rely on economic criteria. Generally speaking, the corporate group is seen as an economic entity if the parent controls the corporate group to a sufficient degree. All legal orders rely heavily on control. Despite differences in detail, there is general consensus with regard to the set of criteria used to identify parental control.

This chapter will bring together the different concepts and aspects found in the legal orders that have been analysed. The aim is to present a preliminary test for deciding whether a corporate group should be seen as a single economic entity. The starting point is the ECJ’s definition that corporate groups form a single economic entity if the subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links which tie those two legal entities.

The test therefore provides a two-step analysis consisting of the following questions: (1) Does the parent have the possibility of decisive influence?

949 Wagner, RabelsZ 2016, 770 similarly argues that controlling the action of the subsidiary is a prerequisite for an attribution of responsibility to the parent corporation both in German and English law.
(2) Has the parent also exercised its power? Control is an important concept in international investment law too, although there it is unclear whether the actual exercise of parental control is a necessary criterion. While Article 25 (2) b ICSID Convention generally only requires the power of control, in pyramid transnational corporate groups it is the parent that is the »true controller« that is decisive, which suggests more than the mere power to control. Indeed, relying solely on the power to control is too formalistic to actually attribute criminal responsibility, as the concept needs to depict economic reality. Therefore, both the power to control and the actual exercise of this parental control is necessary in order to consider a transnational corporate group as a single economic entity. This mirrors the approach used in EU competition law, UK and US law.

Criteria for establishing the parent’s power of control have not only been laid down in EU competition case law and correspond with the control criteria of the Merger Regulation. The same criteria are also used in international investment law. Ownership or holding a high percentage of shares in the subsidiary along with the corresponding voting rights are the most common forms of power to control. A lack in formal ownership rights can be mitigated by specific circumstances. These circumstances include special voting rights, the right to influence the management or select members in high management positions, or, to a lesser extent, the ability to exercise substantial influence over the selection of members in high management positions.

Secondly, the specific structure of and relationships within the corporate group will be used to prove that the parent actually exercised its decisive influence. Here, the analysis of EU competition law in particular produced a set of criteria that provides structure for the evaluation of actual exercise of parental control. These criteria are also used in US competi-
tion law with regard to intra-enterprise agreements.\footnote{Chapter IV B. 2.} In the case of wholly owned subsidiaries, the possibility of influence is self-evident and its actual exercise can be presumed. As a next step, the parent, contrary to US competition law,\footnote{Chapter IV B. 2.} needs to be able to rebut this presumption in order to guarantee a fair attribution of responsibility.\footnote{See above Introduction A. 4.} The parent needs to be able to show — backed up with concrete and convincing evidence — that it would not form a single economic entity with the acting subsidiary had it not been for the presumption. If that is deemed to be the case, the parent has proven that it did not exercise its decisive influence over the subsidiary. As a result, mere ownership is not enough to consider the transnational corporate group as a single economic entity.\footnote{For this requirement, see e.g. CA Adams et al. v Cape Industries et al. [1990] Ch. 503, 532; US DC N.D. California Murphy Tugboat v Shipowners & Merchants Towboat [1979] 467 F.Supp. 841, 854 et seq.; US DC C.D. California Doe I et al. v Unocal et al. [1998] 27 F.Supp.2d 1174, 1186 and Chapter II B. 3.} For the rebuttal, the parent of a wholly owned subsidiary will use the same indicia that are used to establish the exercise of parental control in cases involving subsidiaries that are not wholly owned. This chapter will now go on to describe these indicia.

Involvement in the subsidiary’s day-to-day business is seen as a strong indicator for the exercise of decisive influence.\footnote{For UK law, see above Chapter III C. 2. and 4.; for US law see Chapter IV A. 3. a. and d.} Even UK and US law are more willing to pierce the corporate veil if the parent controls the subsidiary so tightly that it influences its everyday business.\footnote{For this requirement, see e.g. CA Adams et al. v Cape Industries et al. [1990] Ch. 503, 532; US DC N.D. California Murphy Tugboat v Shipowners & Merchants Towboat [1979] 467 F.Supp. 841, 854 et seq.; US DC C.D. California Doe I et al. v Unocal et al. [1998] 27 F.Supp.2d 1174, 1186 and Chapter II B. 3.}

For EU competition law,\footnote{Chapter II B. 2. b.} international investment law\footnote{Chapter I C. 3. c.} and some US courts,\footnote{Chapter IV A. 3. b. ii.} involvement in the day-to-day business is not a prerequisite. Instead, they put forward that strategic control over essential decisions can be enough to perceive the corporate group as a single economic entity. Essential decisions are seen as those that concern the budget, business plan, appointment of senior managers, or major investments. In order to be con-
sidered a single economic entity, the parent needs to be involved in these decisions – either by making them or through the ability to veto such decisions. The latter, also called negative control, has to be seen as a weaker indicator of decisive influence than the former.

A decentralised corporate group structure does not negate the possibility of strategic control. In these cases, it needs to be verified in detail whether the parent is involved in the subsidiary’s essential decisions. If there is an integrated business strategy, this will often be the case and lead to the subsidiary being deemed dependent on the parent or sister corporations, which substantially lowers the subsidiary’s room for manoeuvre. In US agency law,\textsuperscript{968} and more widely in the enterprise theory,\textsuperscript{969} an integrated business strategy leading to the subsidiary’s dependency is a vital element. To a more limited extent, if it leads to the parent’s »complete control«\textsuperscript{970} over the subsidiary, an integrated business strategy is seen as a factor that favours considering a corporate group as one entity in UK and US law for the alter ego exception.\textsuperscript{971} The subsidiary’s managers need to be concerned with group-wide goals and need to align the subsidiary’s strategy to these goals. For the parent, an integrated business strategy signifies that it formulates and enforces a group-wide strategy and thereby influences the subsidiary’s essential decisions.

Personnel links have a double function. They can evidence the possibility of control, as mentioned above. Furthermore, the parent can also exercise decisive influence by using its rights and installing its own employees in the subsidiary’s top positions.\textsuperscript{972} This has also been acknowledged in UK and US law as an important factor.\textsuperscript{973} For example in \textit{Chandler v Cape},\textsuperscript{974} the fact that the parent used its own personnel to implement safety regulations at subsidiary level was one relevant factor. Appointing senior subsidiary staff fulfils a similar function. Supervising the subsidiary’s

\textsuperscript{968} Chapter IV A. 3. b. ii.  
\textsuperscript{969} Chapter IV A. 3. d.  
\textsuperscript{970} HC Chancery Division \textit{Jones et al. v Lipman et al.} [1962] 1 WLR 832, 835.  
\textsuperscript{971} For UK law, see above Chapter III C.; for US law see above Chapter IV A. 3. c.  
\textsuperscript{972} Chapter II B. 2. d.  
\textsuperscript{973} For UK law, see above Chapter III C. 1., 6. and D. and for US law, see above Chapter IV A. 3. b. ii.  
\textsuperscript{974} CA \textit{Chandler v Cape} [2012] EWCA Civ 525.
recruitment process also evidences, albeit to a lesser extent, the exercise of decisive influence.

A unified appearance, while not a decisive factor on its own, can complement the picture and serve as a further indicator of the parent’s exercise of decisive influence.\textsuperscript{975} In UK and US law, the fact that a corporate group appears as one entity on the market or vis-à-vis a contracting partner can indicate fraudulent intention, as it might mislead the public or contracting partners.\textsuperscript{976}

Reporting obligations can be seen as a preliminary but necessary requirement for the parent to exercise strategic control rights. Rather than influencing the subsidiary’s business strategy directly, reporting obligations allow the parent to follow the activities of its subsidiary on a regular basis.\textsuperscript{977}

Holding corporations have been proven to be a difficult case, as they are often rather distant from the subsidiary’s activities. Even in EU competition law discussions have been had on whether they should fall under the presumption.\textsuperscript{978} Regardless, however, financial holding corporations can easily rebut the presumption by showing that they did not exercise decisive influence over their subsidiaries. In merger control, mere financial holding corporations, albeit constructed narrowly, fall outside the scope of application. They are not considered to exercise control in the sense of the Merger Regulation.\textsuperscript{979} For the purposes of this thesis, holding corporations will be judged according to the test just proposed. Thus, rather than simply taking its formal denomination as a holding to be the decisive factor, its actual relationship in the corporate group will be the point of consideration. As a consequence, if the holding corporation does not influence the subsidiary’s business policy in essential parts – for example, because it is not economically active – it will not form part of the single economic entity. This can be seen as a deviation from EU competition law, at least from the majority of cases, and a concession to the reluctant common law approach.\textsuperscript{980}

\begin{itemize}
\item \textsuperscript{975} Chapter II B. 2. e.
\item \textsuperscript{976} For UK law, see above Chapter III C. 6. and for US law, see Chapter IV A. 3. e.
\item \textsuperscript{977} Chapter II B. 2. f.
\item \textsuperscript{978} Chapter II B. 1. a.
\item \textsuperscript{979} Chapter II B. 3. b.
\item \textsuperscript{980} For US law, see Chapter IV A. 3. c.
\end{itemize}
Chapter V: Comprehensive Analysis of Criteria

This proposed test offers a concept of transnational corporate groups that goes beyond the confines of national legal personalities – one that takes into account the legal and economic relationships within the corporate group. A departure from the concept of national legal personality risks increasing legal uncertainty. However, in the international context, reverting back to national law can also lead to uncertainty if it is unclear which national law is to be decisive. Moreover, as has been demonstrated in the introduction, international criminal law risks being applied unequally or evaded entirely if it relies on national law for a definition of its object. The set of criteria that has been developed here enhances legal certainty and foreseeability for the addressees. It will prevent arbitrary results and give guidance both to legal practitioners as well as to economic organisations.
Chapter VI: Transnational Corporate Groups in Economic and Management Theory

This chapter will verify whether the economic criteria used by lawyers and put together in the preceding chapter match those used in economic and management theory. The economic entity approach will be scrutinised under the auspices of the economic theory of the firm. Firstly, the fundamental component of the economic entity approach is parental control over the corporate group’s subsidiaries. While there is no single economic or management theory in the corporate context, authors all revert to some element of control in describing the firm (B.). Secondly, authors provide details on the concept of control that is closely connected to the specific advantages of «firms» over markets. It will be analysed whether these advantages explain the different elements used in the entity approach’s set of criteria, with particular focus on the transnational aspect. In fact, most of the elements can be traced back to the specific needs or characteristics of firms (C.). Critics of the economic entity approach often invoke the economic benefits of the principle of limited liability. This chapter will therefore discuss whether, and to what extent, the proposed definition negates these benefits (D.). Lastly, the findings and their relevance for the thesis will be summarised (E.). Before beginning the analysis, however, some restrictions concerning the transferability of categories and arguments in economic and management theory to law need to be clarified (A.).

A. Methodology and Terminology

In the corporate context, economic and management theory mostly uses the term »firm«. However, the terminology is not consistent. Different terms such as »multinational firm«, »multinational enterprise (MNE)«, or »multinational corporation/company (MNC)« are used interchangeably – often even by the same author. In his section on »multinational enterprise« in ‘The Economic Institutions of Capitalism’, for example, Williamson uses the terms »multinational corporation«, »foreign-based firm« and
»foreign subsidiary« without any differentiation. 981 Jensen and Meckling, in their introductory section on »the definition of the firm«, speak of »the private corporation or firm«. 982 Ghoshal and Bartlett either abstain from using a term entirely or use »company« 983 and »national subsidiaries«. 984 As these examples illustrate, legal terms such as »subsidiary« and »corporation« are often mixed with economic terms of »firm«, »entity« or »enterprise«. The theories do not necessarily delimit firms along legal personality lines. Legal categories play a minor role and firms can neither be equated with a corporation nor a corporate group. Therefore, arguments in economic and management theory cannot be transposed one-to-one to the legal context. These limitations will guide the further analysis.

Moreover, there is not one theory of the firm, but rather a multitude of theories. Some authors mix different approaches. For the most part, the theories of the firm are not contradictory, but rather stress different aspects in order to explain and differentiate firms from markets. For example, property rights theory »is very much in the spirit of the transaction cost literature of Coase and Williamson, but differs by focusing attention on the role of physical, that is, nonhuman, assets in a contractual relationship.« 985 Notwithstanding the different foci of the theories and terminology, similar patterns of argumentation are used. Overarching criteria such as control and monitoring to enable efficient teamwork, the importance of interdependencies within the firm, information impactedness and the problem of transfer of knowledge reoccur, as will be further explained below (B. and C.). Thus, for the present purpose, there is no need to decide for or against one theory of the firm. Rather, the theories will be used cumulatively to evaluate whether the criteria of control established by lawyers have an economic foundation. A distinction between the different theories will be made if the aspect is specific to one theory.

981 O. E. Williamson, The Economic Institutions of Capitalism, 1985 p. 190 et seq.
The discussion on the economic benefits of the corporate law principle of limited liability is strongly influenced by law and economics scholars. In this context, scholars of the entity approach argue for the benefits of limited liability. In law and economics, those who advocate disregarding the separate legal personalities in the corporate group context favour the so-called enterprise approach. This chapter will stick to the EU competition law terminology that has been used throughout the thesis. Thus, the approach that, under certain circumstances, favours considering the corporate group as an economic entity – known as the enterprise approach in law and economics – will be called the economic entity approach.

B. Control as a Decisive Criterion

In economic and management theory, the firm is defined with reference to some form of hierarchy or control exercised within it. First, the approach of transaction cost economics towards firms will be described and analysed with regard to its concept of control within the firm (1.). Secondly, additional theories and their concept of the firm and control within the firm will be presented (2.). In summary, while the different theories start from different points of view and stress different aspects, they all acknowledge that a certain amount and form of control defines firms (3.).

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986 For an overview of the different theories see e.g. P. Garrouste and S. Saussier, The Theories of the Firm, in: Brousseau/Glchant (eds.), New Institutional Economics. A Guidebook, 2008, p. 23-36. Coase already perceived the entrepreneur-coordinator as the central director of production who exercises significant fiat over persons involved in the production process, superseding the price mechanism: R. H. Coase, The Nature of the Firm, Economica 4 (1937), 386, 388, 404: »We thus see that it is the fact of direction which is the essence of the legal concept of ‘employer and employee,’ just as it was in the economic concept which was developed above.«; Blumberg, The Multinational Challenge to Corporation Law p. 234. See also the finding of P. Hagström and G. Hedlund, A Three-Dimensional Model of Changing Internal Structure in the Firm, in: Chandler et al (eds.), The Dynamic Firm. The Role of Technology, Organization, and Regions 1999, p. 166-191, 167: »The smallest common denominator in mainstream theory of the firm has firms to be the institutional extreme that relies on hierarchy in order to achieved control and coordination [...]« and similarly J. H. Dunning and S. M. Lundan, Multinational Enterprises and the Global Economy, 2nd ed., 2008 p. 3.
1. Transaction Cost Economics

Transaction cost economics perceives firms as an »inclusive set of bilateral contracting relations for which the decision is reached to take the transaction out of the market and manage it under unified ownership.«\textsuperscript{987} This management is carried out with the help of administrative control within the firm.\textsuperscript{988} Firms are seen as an instrument to overcome market deficiencies and imperfections. Transaction costs influence the decision to take the transaction out of the market. They are the costs of using the market mechanism. Preventing opportunistic behaviour in particular causes transaction costs. These costs will be high, according to transaction cost theorists, if the transaction involves high asset specificities and incomplete contracts, as both enhance the risk of opportunistic behaviour. In these cases, integrating the transaction can be more cost-efficient (the so called make-or-buy decision).\textsuperscript{989} Firstly, asset specificity arises mainly from the


\textsuperscript{989} See also M. Forsgren, Theories of the Multinational Firm. A Multidimensional Creature in the Global Economy, 2008 p. 42: »Control is an extremely important issue [...]«.

\textsuperscript{989} B. Holmström and J. Roberts, The Boundaries of the Firm Revisited, Journal of Economic Perspectives 12 (1998), 73, 74; G. Jones, Multinationals and Global Capitalism. From the Nineteenth to the Twenty-first Century, 2005 p. 10; O. E. Williamson, The Economics of Governance, American Economic Review 95 (2005), 1, 5. Teece has summarised the following criteria to guide the make-or-buy decision: »(1) whether the technology can be transferred to an unaffiliated entity at higher or lower cost than it can be transferred to an affiliated entity; (2) the degree of intellectual property protection afforded to the technology in question by the relevant statutes and laws; (3) whether a contract can be crafted which will regulate the sale of technology with greater or less efficiency and effectiveness than department-to-department or division-to-division sales can be regulated by internal administrative procedures; and (4)
contractor’s adaptations of his production processes, plant facilities and training of his personnel to fulfill the transaction. They only (efficiently) function with regard to that transaction and cannot be used in other contexts – or at least not without considerable costly changes. In these cases, opportunistic behaviour (i.e. terminating the contract because the product can be purchased cheaper with a competitor) will lead to severe losses for the contracting partner. In the case of integration, an opportunistic termination is impossible and the firm can control the transaction.

Secondly, due to bounded rationality, »all complex contracts are unavoidably incomplete.« Bounded rationality, in short, describes the fact that human beings cannot possess and process all relevant information, especially concerning future events. It is thus impossible to foresee all whether the set of complementary competences possessed by the potential licensee can be assessed by the licensor at a cost lower than alternatives.« D. J. Teece, Design Issues for Innovative Firms: Bureaucracy, Incentives and Industrial Structure, in: Chandler et al (eds.), The Dynamic Firm, 1998, p. 134-165, 145. The make-or-buy decision can be described as »the firm's decision either to acquire some intermediate input by having an employee make it under the employer's direction, using the employer's tools, and usually being paid a fixed wage, or instead to hire an independent contractor who chooses his or her own tools and methods and is paid proportionally to the quantity supplied.« B. Holmström and P. Milgrom, The Firm as an Incentive System, The American Economic Review 84 (1994), 972.


994 Williamson, Transaction Cost Economics, in: Schmalensee/Willig (eds.), Handbook of Industrial Organization, p. 139. Simon, to whom Williamson re-
circumstances in a contract. Then, especially if the contractual elements cannot be easily measured, the contracting partner will be incited to maximise its profit through over-pricing or under-performing – i.e. will be incited to cheat.  

995 Internal organisation attenuates such incentives.  

996 Sequential adaptation provides an effective way of dealing with bounded rationality in internal organisational structures. Rather than trying to consider all possible difficulties in advance, only the present conditions are regulated while possible future problems »are permitted to unfold« 997 within the internal organisation through time. Thus, according to transaction cost economists, firms display a governance structure opposed to the one visible in markets. Administrative involvement, and therefore control, is high and disputes are settled within the firms, as courts usually refuse to hear these »internal« cases.  

998 Transaction cost economists stress the flexibility...
of employment contracts compared to transaction contracts on the market. Employees can be more easily moved into other areas of the corporation if circumstances change. This enables firms to better make comparative adaptations through the efficiency of fiat. However, fiat is difficult to monitor in complex firms. If responsibility is shared within the internal organisation, the efficiency of fiat is impaired. According to transaction cost economists, the firm is at an ideal size when the costs for intra-firm control and administration are not higher than the hypothetical transaction costs on the market. Thus, the possibilities to effectively exercise control define the firm’s boundaries.


1000 Williamson, Journal of Economic Behavior and Organization 17 (1992), 340. See also H. A. Simon, Organizations and Markets, Journal of Economic Perspectives 5 (1991), 25, 42 seeing »key organizational mechanism like authority […] and coordination« as advantages of firms. Coase, Economica 4 (1937), 391 also points to the fact that it may be cheaper to negotiate an employment contract once rather than to negotiate several purchasing or services contracts.

1001 Williamson, Markets and Hierarchies. Analysis and Antitrust Implications p. 125. In general, while the incentive to cheat decreases through the decoupling of the salary from the actual output of the employee, the incentive to work also decreases as the employee does not pay the cost of underperformance. If a firm cannot fully control its employees, it can provide incentives in the form of payment based on measured and monitored performance, asset ownership and a favourable design of the job: Holmström and Milgrom, The American Economic Review 84 (1994), 973. Osterloh, Frey and Frost, ZfB 1999, 1254 argue that, in these cases, intrinsic motivation of the employee needs to be fostered – especially for the transfer of tacit knowledge.

1002 For a description that also pays regard to »multinational firms«, see Forsgren, Theories of the Multinational Firm. A Multidimensional Creature in the Global Economy p. 39 and G.-P. Calliess and J. Mertens, Transnational Corporations, Global Competition Policy, and the Shortcomings of Private International Law, Indiana Journal of Global Legal Studies 18 (2011), 834, 849 et seq. and
Thirdly, transaction cost economists argue that the transfer of information, especially on technology or tacit information, is more cost-efficient in firms. Uncertainty, opportunism and bounded rationality may result in information impactedness. Information cannot be transferred to other parties without costs and losses.\textsuperscript{1004} The piece of information will rarely be transferable at its true value. The seller is in a dilemma: if he describes the piece of information in general terms, the buyer will underestimate its value and only be willing to pay too little. If, on the other hand, the seller reveals the information in detail, the buyer might now fully appreciate its value but not be willing to pay anything for it because he already possesses the information.\textsuperscript{1005} Again, the distinctive structure of internal organisation, especially the availability of fiat, mitigates opportunistic exploitation of information impactedness.\textsuperscript{1006}

These arguments have been developed for firms in general and demonstrate that – and why – control is the decisive factor of firms for transaction cost economists. The underlying argumentation, as will be also detailed throughout part C, also applies – often to an even stronger degree in the transnational context.\textsuperscript{1007}

\textsuperscript{1003} \textit{Williamson}, Markets and Hierarchies. Analysis and Antitrust Implications p. 126: The size of the firm is limited by »bounded rationality, bureaucratic insularity, and atmospheric consequences«. The more costly it is to monitor and control the employee, the more he will be able to shirk: \textit{Hennart}, Theories of the Multinational Enterprise, in: Rugman (ed.), The Oxford Handbook of International Business, p. 131 \textit{Coase}, Economica 4 (1937), 394: »entrepreneurs« will revert to transactions on the market if the costs for organising the task in the firm are too high. \textit{Hagström and Hedlund}, A Three-Dimensional Model of Changing Internal Structure in the Firm, in: Chandler et al (eds.), The Dynamic Firm. The Role of Technology, Strategy, Organization, and Regions p. 170 et seq. broaden this argument to a more general critique of hierarchy as an efficient coordination mechanism today.


\textsuperscript{1005} \textit{Williamson}, The Economic Institutions of Capitalism p. 293. See for this argument also \textit{Caves}, Multinational Enterprise and Economic Analysis p. 4.


B. Control as a Decisive Criterion

2. Other Theories

Even though property rights theorists criticise transaction cost economics, both share the element of control in their definition of the firm. Grossman and Hart define the firm as consisting of «those assets which it owns or over which it has control». Ownership thereby is seen in a non-legalistic way as «the power to exercise control». The common owner or controller is the decisive factor in drawing the boundaries of the firm. For them, the essential difference in terms of contracting is that, in cases of vertical integration, the firm has control over those unforeseeable provisions that were not included in the contract.

Nexus of contract theorists consider the firm as a simple «nexus of a set of contracting relationships among individuals». In nexus of contract theory, the legal personality is mere legal fiction. In detail, the firm is seen as a contractual organisation of inputs.

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1011 See Holmström and Roberts, Journal of Economic Perspectives 12 (1998), 77: «If two different assets have the same owner, then we have a single, integrated firm».

1012 Grossman and Hart, Vertical Integration and the Distribution of Property Rights, in: Razin/Sadka (eds.), Economic Policy in Theory & Practice, p. 507. The owner has the right «to control all actions that have not been explicitly given away by contract.» See also Hart, Firms, Contracts and Financial Structure p. 5: «the question arises: who chooses the unspecified uses?».


with (a) joint input production, (b) several input owners, (c) one party who is common to all the contracts of the joint inputs, (d) who has rights to renegotiate any input’s contract independently of contracts with other input owners, (e) who holds the residual claim, and (f) who has the right to sell his central contractual residual status.«

Contrary to transaction cost economists, they perceive the firm as an organisation without authoritarian control. For them, the firm is essentially a web of contracts, with the conditions of the contractual relationships being constantly renegotiated. Nonetheless, the holder of the residual claim also occupies an elevated position in nexus of contract theory. Its residual claim and right to renegotiate allow for indirect and mitigated control through the process of renegotiation. Transposed to the corporate group setting, the parent is the party common to all contracts in nexus of contract theory. The parent has the right to renegotiate the contracts with its subsidiaries or, more specifically, with the different input owners throughout the corporate group. As a holder of the residual claim, it can decide the circumstances under which it wishes to renegotiate. Thus, even those who stress the mutual relationship between parents and subsidiary grant the parent a superior position. They characterise the parent-subsidiary relation as an exchange relation of various resources embedded in a structured context. The parent’s interests will guide interactions with its subsidiary even in independent interest situations. In this context, nexus of contract theorists stress the shared values within a firm that would differentiate it from the market. Importantly for the thesis, it is the role of the parent to instil these shared values throughout the whole corporate group


1016 Alchian and Demsetz, American Economic Review 62 (1972), 794.


to ensure smooth running.\textsuperscript{1019} According to nexus of contract theory, it is the parent – as the party that is common to all contracts, rather than as the head of a hierarchy – that ensures a certain uniformity and shared values throughout the group. As a result, nexus of contract theorists acknowledge only indirect parental control through the renegotiating of contracts and the instilling of shared values.

Knowledge-based theorists of the firm see the firm as a »community in which there exists a body of knowledge regarding how to cooperate and communicate.«\textsuperscript{1020} Firms create and transform knowledge\textsuperscript{1021} and thereby also create their identity.\textsuperscript{1022} The hierarchical elements and control mechanisms of the firm are necessary to ensure efficient information collection.\textsuperscript{1023} For knowledge-based theorists, the ability to transfer tacit knowledge is the firm’s main advantage, as will be further described below at C.

Business strategists emphasise the coordinating role of firms.\textsuperscript{1024} Seeing the firm from a business strategy perspective, Becerra defines the firm as »a collective subject that holds the responsibility for strategy design and its actual implementation«.\textsuperscript{1025} According to business strategists, merging

\begin{enumerate}
\item[1022] Kogut and Zander, Organization Science 7 (1996), 506.
\item[1025] M. Becerra, Theory of the Firm for Strategic Management, 2009 p. 70. The resources that are part of one strategy define the boundaries of the firm. The
resources and pooling them under one corporate umbrella is most important, as it can enhance the firm’s efficiency and productivity.\textsuperscript{1026} While business strategists stress that the coordination measures must fit the organisational structure and business environment, coordination necessitates a certain amount of the element of control and hierarchy. Especially in the transnational context, the headquarter needs to coordinate and manage different activities across national territories to gain operational flexibility and thus ownership advantages.\textsuperscript{1027}

3. Summary

Even though the different theories of the firm stress different factors that, according to them, explain the emergence and boundaries of firms, they all revert to some form of control. Firms are used when contracts cannot sufficiently regulate market transactions or are more efficient than market transactions to meet the demands of an entrepreneur.\textsuperscript{1028} Transaction cost economists revert most explicitly to control. They stress the role of hierarchies and fiat to prevent opportunistic behaviour. Other theories of the firm, while not stressing opportunism as the essential problem that firms have to solve, still describe control as an important mechanism. For nexus of contract theorists, the advantage of firms lies in the possibility of the residual claimant to monitor team production and to renegotiate contracts. Knowledge-based and strategy approaches stress the coordinating and common-value-creating role of the firm, which would allow for the transfer of tacit knowledge within the firm. Thus, notwithstanding the concept of firms, the »twin concepts of power and authority«\textsuperscript{1029} are essential to understand the firm as a unit.

\begin{itemize}
  \item question of whether the firm with its exact boundaries existed first or whether the strategy existed before is a chicken-and-egg question.
\end{itemize}

\textsuperscript{1026} Becerra, Theory of the Firm for Strategic Management p. 75 et seq.
\textsuperscript{1027} Jones, Multinationals and Global Capitalism. From the Nineteenth to the Twenty-first Century p. 9.
\textsuperscript{1028} See already Coase, Economica 4 (1937), 388 et seq.
C. Criteria of Control

Economic and management theory not only distinguishes firms from markets by attributing a specific ability of control to the firm, it also provides economic reasons for the firm’s organisational settings. These reasons help to understand the specific organisational structures that can be found in many corporate groups. Mostly, different forms of structuring will co-exist within one transnational corporate group, depending on the specific needs and characteristics of the relationship.\(^{1030}\) The economic reasons for the individual structure add further credibility to the criteria mentioned in the legal orders as synthesised in the preceding chapter (1.–6.). However, economic and management theory also provides arguments for the limitation of strategic control that help to set the boundaries for a functional definition of transnational corporate groups (7.).

1. Control via Shareholdings

Shareholdings are frequently mentioned in legal orders as a way to ensure control within the corporate group. Economic and management theory backs up this finding. Property rights theorists in particular stress the importance of the power to exercise control in explaining the emergence of firms.\(^{1031}\) For them, the very foundation of the firm consists of the ownership of assets that give the owner the power of control.\(^{1032}\) The owner has the right »to control all actions that have not been explicitly given away by

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contract.«1033 While factually »the power to exercise control« 1034 suffices for property rights theorists, it will often be a case of legal ownership. Giving ownership rights to the monitoring employee – thus the right to observe input, to be a contracting party for the input contracts, to be able to change membership within the firm and to sell its ownership – will enable efficient monitoring and thus team production.1035 It will increase monitoring efforts of shareholding employees as they will profit from an improved performance of the team they monitor. This reduces the likelihood of free riding or shirking.

Ownership also plays an important role in the transnational context. Reasons for corporations to internationalise their activities via foreign direct investment, including setting up a transnational corporate group, are often summarised as »OLI«: ownership, location and internalisation.1036 Ownership advantages are the »spatially transferable intangible assets of the parent companies.«1037 For example, common ownership of dispersed facilities – either through owning the assets or through owning the subsidiary that owns the assets – allows transnational corporate groups to conduct business more efficiently. These decentralised assets can be coordi-

1033 Grossman and Hart, Vertical Intergation and the Distribution of Property Rights, in: Razin/Sadka (eds.), Economic Policy in Theory & Practice, p. 507. See also Hart, Firms, Contracts and Financial Structure p. 5: »the question arises: who chooses the unspecified uses?«.


1035 Alchian and Demsetz, American Economic Review 62 (1972), 782 et seq. Holmström and Milgrom, The American Economic Review 84 (1994), 987 conclude that if the task is difficult to monitor and activities related to the primary task – such as customer relations and market surveys – are important, firms will more likely integrate the task.


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nated and thus more efficiently managed within a firm than by renting it on the market.\textsuperscript{1038}

In management theory, the function of shareholding – securing control throughout the corporate structure – determines the necessary level of shareholding. Thus, majority shareholding can be sufficient to maintain vertical ties in pyramid corporate group structures. They, among others, enable »a chain of command that runs through a group hierarchically.«\textsuperscript{1039} Through a pyramidal majority ownership structure, less direct investment than in a wholly owned structure can achieve an equal network of control.\textsuperscript{1040} Wholly owned subsidiaries are mostly seen under the aspect of eliminating minority shareholders. The acquisition of 100% of shares would allow the parent to achieve a surplus gain through »economies of scale, centralized management and corporate planning, or economies of information«.\textsuperscript{1041} Similarly, if a parent has to guarantee a subsidiary’s ventures, it incurs higher costs than the subsidiary’s minority shareholders while not gaining any more profit. Through acquiring all shares, this asymmetry is abolished and the parent has greater incentive to start new profitable ventures.\textsuperscript{1042} Additionally, Kogut and Zander calculated that tacit knowledge, which will be discussed in detail below at 3., will be ra-


\textsuperscript{1041} F. H. Easterbrook and D. R. Fischel, The Economic Structure of Corporate Law, 1996 p. 113. Egelhoff, Organizing the Multinational Enterprise. An Information-Processing Perspective p. 149 argues that »outside ownership« decreases the ability of the parent to align the subsidiary to the group-wide goals and to gain sufficient knowledge on the subsidiary.

\textsuperscript{1042} Easterbrook and Fischel, The Economic Structure of Corporate Law p. 113.
ther transferred to wholly owned subsidiaries. In summary, holding the majority of shares in the subsidiaries is also perceived as an instrument of parental control in economic theory.

2. Organisational Structure

Many economists have analysed the firm’s organisational structures. While they focus on different aspects and factors, they all agree that the firm’s organisation might change over time and depend, inter alia, on its environment and strategy. In complex corporate structures, such as found in most transnational corporate groups, multiple layers of auditing and hierarchy complicate communication within the firm. This also leads to an increase in administrative costs, bureaucratic insularity and information impactedness. Shareholders – in the case of corporate groups, the parent – cannot control every move of the (subsidiary’s) management anymore. Here, strategic control is more efficient. In the case of strate-


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gic control, the parent of the transnational corporate group will »enjoy[…] considerable hierarchical authority« that coexists with a certain autonomy of the local subsidiaries. Economic and especially management theory therefore provides sound economic reasons as to why parents of transnational corporate groups limit themselves to strategic control instead of day-to-day control. Likewise, it shows that strategic control is also an efficient form of control. A decentralised organisation structure – as has been conceptualised, among others, in Williamson’s M-form model – represents the corresponding structure for strategic control (a.). Subsequently, specific organisational consequences of strategic control that are discussed in economic theory will be analysed (b.).

a. Decentralisation

A strategy of decentralisation is one response to difficulties of control in complex corporate structures. Managers in the parent’s head office only devote part of their time to their subsidiaries’ interests. Directly influencing the subsidiaries can lead, therefore, to suboptimal decisions and may destroy corporate value. In a decentralised firm structure, the parent or


headquarter will not control the day-to-day management of the subsidiary or division, but rather limit itself to strategic control. It limits opportunism as the managers are removed from the day-to-day business. They can better concentrate on long-term corporate goals, thus their decisions will be less impacted by short-term opportunism.\footnote{1051} Additionally, it prevents an overload of information processing.\footnote{1052} Complex firms in particular, such as transnational corporate groups, are prone to informational overload. In fact, a decentralised structure is generally seen as particularly apt for transnationally active firms.\footnote{1053} They will revert to the method of selective intervention, which means that the parent will »replicate the market mode within the firm in all respects save those where intervention is the source of expected net gains.«\footnote{1054} Decentralisation can also help to spur innovations. In fact, a mimicking of »smallness« through establishing decentralised elements such as teams or business units devoted to inventions are

\begin{itemize}
\item \textit{Williamson}, Transaction Cost Economics, in: Schmalensee/Willig (eds.), Handbook of Industrial Organization, p. 136 et seq. There is, on the other hand, the risk that the parent can no longer control the subsidiary and especially its physical assets: \textit{E. G. Furubotn and R. Richter}, Institutions and Economic Theory. The Contribution of the New Institutional Economics, 2nd ed., 2005 p. 374.
\item \textit{Egelhoff}, Organizing the Multinational Enterprise. An Information-Processing Perspective p. 133; \textit{Forsgren}, Theories of the Multinational Firm. A Multidimensional Creature in the Global Economy p. 82 et seq.: »environmental complexity and the size of the multinational firm.«
\end{itemize}
proposed to provide an innovation-friendly environment.\textsuperscript{1055} Too much centralisation or a strict hierarchy tend to impede entrepreneurship.\textsuperscript{1056} Nonetheless, for an efficient structure, the activities that require extensive and constant coordination and communication need to be centralised.\textsuperscript{1057}

Williamson’s description of the M-form – in his mind the most suitable form for transnational corporate groups\textsuperscript{1058} – gives insight into the economic rationales for parental strategic control instead of day-to-day control. It provides a good illustration of a decentralised corporate structure. There, decisions are subdivided into operational and strategic. Operational decisions, which are the task of the heads of division, concern the day-to-day management. Strategic decisions are taken by the general office. They


\textsuperscript{1057} Foss, Foss and Nell, Journal of International Management 18 (2012), 250. Bartlett and Ghoshal, Managing Across Borders. The Transnational Solution p. 70: »integrated network«. They argue that tighter parental control leads to less sensitivity to local market differences (p. 57 et seq.).

\textsuperscript{1058} Williamson, The Economic Institutions of Capitalism p. 291. Only they could cope with a communicational and bureaucratic complexity as part of bounded rationality that would overburden unitary organisational forms: Williamson, Transaction Cost Economics, in: Schmalensee/Willig (eds.), Handbook of Industrial Organization, p. 170. The M-form matches the description of Bartlett and Ghoshal of transnational corporations that combine hierarchical and market-similar mechanisms to effectively manage their global business environment. Bartlett and Ghoshal differentiate transnational corporations to international corporations that try to transplant the structure in their home base to their foreign subsidiaries s, as well as from to multinational corporations that are very decentralised and focus solely on the local requirements in each country: Bartlett and Ghoshal, Managing Across Borders. The Transnational Solution p. 65 et seq.
determine the overall strategy and define the outer limits of operational decision-making. These divisions contain »quasi-autonomous operating divisions« for example brands, geographic regions or products. Within each division, the tasks may be subdivided along functional lines. Usually, each division has itself a general office that »administers a number of departments«. Departments are each responsible, in turn, »for the administration of a major function – manufacturing, selling, purchasing or producing raw materials, engineering, research, finance, and the like«. A »peak coordinator’s office« takes the strategic decisions. This office has the time and (human) resources to develop, implement and control strategic goals for the whole firm. In short, for Williamson, an optimal divisionalisation between general management and division managers involves:

»(1) the identification of separable economic activities within the firm; (2) according quasi-autonomous standing (usually of a profit center nature) to each; (3) monitoring the efficiency performance of each division; (4) awarding incentives; (5) allocating cash flows to high yield uses; and (6) performing strategic planning (diversification, acquisition, and related activities) in other respects.«

According to Williamson, who refers to Chandler, the M-form combines flexibility and incentive structure with more stringent streamlining, monitoring and control mechanisms.
b. Relationships within Transnational Corporate Groups

In an efficient decentralised structure, both the parent management and the middle management are involved in the decision-making process. This keeps middle management initiatives alive, sets incentives to search for new projects and thus allows for a varied input. Middle management denotates managers in regional headquarters or the top management of national subsidiaries of the transnational corporate group. In management theory, regional headquarters play an important role in transnational corporate groups. Although an additional layer, they can reduce the span of control and may better allocate resources. They can help to shape the regional strategy of the transnational corporate group, while parents will mostly have the (final) decisive say. Regional headquarters help to align national subsidiaries and their branding, advertising and pricing strategies, to share best practices and to bundle activities. In complex


1068 Laudien and Freiling, Overcoming Liabilities of Foreignness by Mode of Structural Coordination. Regional Headquarters and their Role in TNCs, in: Asmussen et al (eds.), Dynamics of Globalization. Location-Specific Advantages or Liabilities of Foreignness?, p. 111; Schütte, Between Headquarters and Subsidiaries. The RHQ Solution, in: Birkhaw/Hood (eds.), Multinational Corporate Evolution and Subsidiary Development, p. 108, 115. Hedlund, Human Resource Management 25 (1986), 21 et seq. argues that the »hyper-modern MNC« that has to respond to both global and local demands will not have one but many centres.

and widespread transnational corporate groups, they therefore help to exercise the parent’s strategic control and to translate it to the regional context.\textsuperscript{1070} They might even have a »formal headquarters mandate« to exercise some of the parent’s functions.\textsuperscript{1071} As a result, management literature illustrates that regional headquarters are part of the group-wide structure and serve the parent’s purpose rather than being autonomous.

The concrete relationship within the corporate group will depend namely on the role of the subsidiaries and the economic environment in which the transnational corporate group is acting.\textsuperscript{1072} Subsidiaries can be a simple instrument of the parent with only little margin of discretion and merely follow the parent’s instructions. Such a high degree of centralisation, and thus parental control, will prevail if the subsidiary has a low level of resources and the environment is not complex.\textsuperscript{1073} At the other extreme, subsidiaries might be free to develop their business and their own strategy within wide parameters defined by the parent. Then, the relationship will depict more cooperative dialogue between parent and subsidiary if environmental changes are frequent or if the subsidiary has control over a high corporate decisions in networked MNCs?, Journal of International Management 2012, 294; Schütte, Between Headquarters and Subsidiaries. The RHQ Solution, in: Birkinshaw/Hood (eds.), Multinational Corporate Evolution and Subsidiary Development, p. 109.

\textsuperscript{1070} Laudien and Freiling, Overcoming Liabilities of Foreignness by Mode of Structural Coordination. Regional Headquarters and their Role in TNCs, in: Asmussen et al (eds.), Dynamics of Globalization. Location-Specific Advantages or Liabilities of Foreignness?., p. 109 et seq. They see the parent as having the role of observer (p. 112 et seq.). See Mahnke, Ambos, Nell and Hobdari, Journal of International Management 2012, 93 et seq. for an empirical study on the role of regional headquarters in deciding on the corporate group’s strategy. They conclude that too much regional headquarter autonomy lessens its possibilities to influence the corporate group structure.

\textsuperscript{1071} Mahnke, Ambos, Nell and Hobdari, Journal of International Management 2012, 294.


\textsuperscript{1073} Ghoshal and Nohria, Strategic Management Journal 10 (1989), 326.
level of resources.\textsuperscript{1074} In these cases, the parent will revert to more formalised control structures and tend to normatively integrate the subsidiary in order to achieve consensus and shared values.\textsuperscript{1075} Most relationships within transnational corporate groups are situated between these extremes. Management theorists argue that, in most cases, parents will restrict their subsidiaries’ margin of manoeuvre.\textsuperscript{1076}

In many transnational corporate groups, each subsidiary has a specific role or task and provides products or services to other parts of the corporate group, as will be detailed below at 3. a. This intra-firm trade is closely connected to the method of selective intervention, mentioned above at B. 1. Even though intra-firm trade introduces some market functions into the firm, the subsidiaries are not free to choose whether to participate or not.\textsuperscript{1077} It is rather the parent that distributes the tasks among the subsidiaries, sets the framework and intra-firm trade rules, and thereby exercises its strategic and coordinating function. Furthermore, in this framework, subsidiaries can hardly influence their market position and thus act independently as a great amount of their services and products are transferred to sister subsidiaries.\textsuperscript{1078}

\begin{thebibliography}{99}
\bibitem{1074} Ghoshal and Bartlett, The Academy of Management Review 15 (1990), 608, 618: The transnational corporate group is an interorganisational network; Ghoshal and Nohria, Strategic Management Journal 10 (1989), 325 et seq.
\bibitem{1075} Ghoshal and Nohria, Strategic Management Journal 10 (1989), 326 et seq.
\end{thebibliography}
In summary, especially management theory illustrates that the parent will vary the specific design of its control according to environmental circumstances and business strategy.\textsuperscript{1079} Thus, even in its various forms, parental control will still constitute efficient strategic control.

3. Integrated Business

Conducting a complex business through various subsidiaries necessitates some form of central coordination and control. In the corporate group context, this means that the parent needs to coordinate its subsidiaries’ activities.\textsuperscript{1080} The parent has to make sure that the linkages between business units or subsidiaries benefit all parts involved in order to bring scale economy efficiencies.\textsuperscript{1081} Economists point out that this is especially true for transnational firms, mostly structured as a transnational corporate group.\textsuperscript{1082} In these cases, hierarchical structures and parental control are

\begin{itemize}
  \item archy MNC would be free to enter into joint ventures and selling and buying contracts with third parties as long as they were not harming the MNC.
  \item See already Hymer, The International Operations of National Firms: A Study of Direct Foreign Investment p. 66: »many kinds of control and [...] many forms which can be used to achieve any one of them.« See for model organigrams and explanations Dunning and Lundan, Multinational Enterprises and the Global Economy p. 240 et seq.
  \item Dunning and Lundan, Multinational Enterprises and the Global Economy p. 6; Hagström and Hedlund, A Three-Dimensional Model of Changing Internal Structure in the Firm, in: Chandler et al (eds.), The Dynamic Firm. The Role of Technology, Strategy, Organization, and Regions p. 171; Porter, California Management Review 28 (1986), 12: »In a global industry, a firm must in some way integrate its activities on a worldwide basis to capture the linkages among countries.« For an overview of the configuration and coordination problems this causes, see p. 18 et seq. M. Goold, A. Campbell and M. Alexander,
\end{itemize}
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necessary.\textsuperscript{1083} Two different aspects of this integrated strategy can be distinguished. Firstly, it can be economically efficient to divide the production between different parts of the transnational corporate group (a.). Secondly, services that are needed group-wide will be conducted centrally (b.).\textsuperscript{1084} In both cases, as the analysis will show, the parent is able to exercise control.

a. Vertical Integration

According to management studies, the transnational firm has developed »an elaborate system of internal division of labor.«\textsuperscript{1085} Often, one subsidiary will be responsible for a specific task within the corporate group.\textsuperscript{1086}

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\textsuperscript{1083} Egelhoff, Management International Review 50 (2010) 413 et seq. and in detail Egelhoff, Organizing the Multinational Enterprise. An Information-Processing Perspective p. 131 et seq.

\textsuperscript{1084} Coase, Economica 4 (1937), 397 et seq. calls it »combination and integration«; Laudien and Freiling, Overcoming Liabilities of Foreignness by Mode of Structural Coordination. Regional Headquarters and their Role in TNCs, in: Asmussen et al (eds.), Dynamics of Globalization. Location-Specific Advantages or Liabilities of Foreignness?, p. 119 call it »differentiation and integration«.

\textsuperscript{1085} S. Hymer, The Efficiency (Contradictions) of Multinational Corporations, American Economic Review. Papers and Proceedings 60 (1976), 441, 442. See also Bartlett and Ghoshal, Managing Across Borders. The Transnational Solution p. 103 et seq. and 121 et seq. for a description of the four roles (strategic leader, contributor, implementer black hole) that national subsidiaries in transnational firms can play; Dunning and Lundan, Multinational Enterprises and the Global Economy p. 206 et seq.; Goold and Campbell, Long Range Planning 35 (2002), 220. Ghoshal and Nohria, after empirically testing their assumptions, call it »internal differentiation«: Ghoshal and Nohria, Strategic Management Journal 10 (1989), 333. The size of most transnational corporate groups often enhances the economies of scale efficiency: Jones, Multinationals and Global Capitalism. From the Nineteenth to the Twenty-first Century p. 8.

\textsuperscript{1086} U. Andersson, I. Björkman and P. Furu, Subsidiary Absorptive Capacity, MNC Headquarters' Control Strategy and Transfer of Subsidiary Competencies,
This leads to high asset specificity, as described above at B. 1. It will also lead to close parental control, as the failure of one subsidiary immediately affects the other subsidiaries further down the production chain.\textsuperscript{1087} For example, a subsidiary might be concerned with exporting raw materials from the host country where they are found or where they can be sourced with particularly attractive conditions to the home country where the knowledge or technology-intensive part of production will take place.\textsuperscript{1088} Then, the parent can exercise tight control without losing the efficiencies of decentralisation if local market particularities or dealings with the local

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{1087} Caves, Multinational Enterprise and Economic Analysis p. 80 et seq.; Ghoshal and Bartlett, The Academy of Management Review 15 (1990), 615; G. Barba Navaretti and A. J. Venables, Multinational Firms in the World Economy, 2004 p. 37 et seq.
\item \textsuperscript{1088} This intra-firm trade (compared to classical inter-firm exports) might also enable tax advantages and other tariff barriers: Jones, Multinationals and Global Capitalism. From the Nineteenth to the Twenty-first Century p. 13; Rugman and Verbeke, Location, Competitiveness, and the Multinational Enterprise, in: Rugman (ed.), The Oxford Handbook of International Business, p. 153. Owning the foreign subsidiary will be less transaction costly than licensing: P. J. Buckley and M. Casson, Strategic Complexity in International Business, in: Rugman (ed.), The Oxford Handbook of International Business, 2009, p. 90-124, 119; Caves, Multinational Enterprise and Economic Analysis p. 6 et seq. This was one of the earliest motivations for foreign direct investment: Bartlett and Ghoshal, Managing Across Borders. The Transnational Solution p. 113; Hedlund, Human Resource Management 25 (1986), 12 et seq.
\end{enumerate}
\end{footnotesize}
government are low. More generally, Egelhoff argues that hierarchies are good for ensuring sufficient subsidiary interdependence when the task requires a firm-wide strategy and has few local varieties. If a firm sets up a foreign subsidiary to seek efficiencies, intra-firm trade will be high as the internationalisation is driven by reasons of rationalisation. The specialisation of the individual subsidiaries within the corporate group leads to high asset specificity. This in turn increases the subsidiaries’ dependence on the corporate group. The subsidiary also becomes important for other parts of the corporate group that can use excess resources or customised products. The parent’s decision on the location of these subsidiaries is an individual and balanced one because the location must match the firm-specific advantages. Lastly, the corporation might seek strategic assets to create synergies with pre-existing assets. This is mainly done through common ownership in joint ventures or acquisition and will mostly include knowledge-intensive assets. If common technologies are extensively shared or complex, the parent’s control will need to be tight.


1090 Egelhoff, Management International Review 50 (2010), 423.


1094 Caves, Multinational Enterprise and Economic Analysis p. 80 et seq.; Ghoshal and Bartlett, The Academy of Management Review 15 (1990), 615; Barba
Division in the production process increases coordination and location costs. Particularly for transnational corporate groups, who are spatially spread out, location costs play an important role. Transportation costs arise in the case of exports, but to a lesser extent if production is bundled in regional centres.\textsuperscript{1095} Larger transnational corporate groups will assemble the product in various countries while centralising production of most of the components in central facilities.\textsuperscript{1096} Transportation costs are usually in a trade-off position with transaction costs. If location costs are reduced by, for example, shutting down national R & D centres, more coordination and linkages between regional or global R & D centres and national subsidiaries will be necessary. As a consequence transaction costs will be higher than in case of local coordination.\textsuperscript{1097} Another transaction cost concerns foreign transnational firms establishing a subsidiary in a third country. These firms will not be acquainted with local customs or legal and social systems and, in contrast to local firms, cannot revert to a local network.\textsuperscript{1098} In turn, physical and cultural distance between subsidiaries and

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\item \textit{Navaretti and Venables}, Multinational Firms in the World Economy p. 37 et seq.
\end{itemize}
the parent might weaken the possibilities of actual parental control.\footnote{Ghoshal and Bartlett, The Academy of Management Review 15 (1990), 607.} If the initial foreignness is eliminated and the subsidiary shares its knowledge within the group,\footnote{More generally, and in a simplified way, the bigger the firm, the greater the impersonality among the parties and the lesser the attachment and loyalty towards the internal organisation: Williamson, Markets and Hierarchies. Analysis and Antitrust Implications p. 128.} the transnational corporate group will be in a better position through its know-how in dealing with political, market or geological specificities in that country.\footnote{The transfer of the underlying information of subsidiary-specific advantages can be difficult even within the corporate group: Rugman and Verbeke, Strategic Management Journal 22 (2001), 244.} Thus, transnational corporate groups tend to adopt a nuanced approach in order to ensure group-wide goals are met, mixing diversification and centralisation depending on their structure, business and wider environment.

b. Horizontal Integration

For a global strategy, the support activities that »provide inputs or infrastructure« for the primary activities are centralised.\footnote{Jones, Multinationals and Global Capitalism. From the Nineteenth to the Twenty-first Century p. 13; Kogut and Zander, Journal of International Business Studies 24 (1993), 625 et seq.} According to Porter, these activities include firm infrastructure, human resource management, technology development and procurement.\footnote{Porter, California Management Review 28 (1986), 14, 33. See also Hedlund, Human Resource Management 25 (1986), 14. M. Goold, D. Pettifer and D. Young, Redesigning the Corporate Centre, European Management Journal 19 (2001), 83 et seq. determine three roles of corporate headquarters: minimum (discharging legal and administrative obligations), value-added (establishing corporate strategy) and shares services. See also Goold and Campbell, Long Range Planning 35 (2002), who elaborate on the minimum and value-added function. Collis, Young and Goold, Journal of International Management 18 (2012), 271 et seq. concluded in their study that corporate headquarters are, in reality, mostly concerned with minimum or obligatory tasks.} Firm infrastructure comprises services such as »general management, accounting, legal, finance, strategic planning, and all the other activities decoupled from specific primary or support activities but that are essential to enable the entire
chain's operation«. In these cases, the corporate group can profit from economies of scope such as lower technology and administration costs.

Centralised activities that concern the firm’s business, such as centralised purchasing, manufacturing or R & D, decrease the national subsidiaries’ autonomy. The parent or headquarter guides and coordinates the specialised subsidiaries in order to fit them into the overall corporate strategy. An integrated business strategy can help to develop innovations if complementarity gains can be achieved. Likewise, some innovation and research requires considerable capital that centralised R & D units are better able to supply. Transnational corporate groups can also use their


1106 Ambos and Mahnke, Management International Review 50 (2010), 410; Egelhoff, Management International Review 50 (2010), 423; Egelhoff, Organizing the Multinational Enterprise. An Information-Processing Perspective p. 150: higher interdependency tends to lead to more centralisation.


know-how to accumulate knowledge and transfer it to other sectors as well as for related organisational capabilities for innovations. Customer relations are also often centralised. Recently, the number of transnational customers who want a central contact entity within the transnational corporate group for all their needs has increased. Thus, individual subsidiaries will still carry out the work but cease to deal with the customer directly, thus losing power vis-à-vis the parent. The parent will centrally coordinate the overlapping customer’s relations to create synergies. This, in turn, will increase parental control over subsidiaries. Similarly, the parent will exercise tight control over its subsidiaries if it wants to market a common brand transnationally.

With regard to integrated business strategies, the findings match those in the decentralised organisational structure. The parent has a number of ways to ensure its control over the subsidiary and to adapt it to changing business environments.

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1110 Bartlett and Ghoshal, Managing Across Borders. The Transnational Solution p. 102; Becerra, Theory of the Firm for Strategic Management p. 180 et seq.: The common interface also has advantages for the customers. It reduces information costs, enhances the availability of different products of the corporate group and might lead to better auxiliary services; Dunning and Lundan, Multinational Enterprises and the Global Economy p. 246.


Chapter VI: Transnational Corporate Groups in Economic and Management Theory

4. Personnel Links

As nexus of contract theorists point out, monitoring and team production play an important role within a firm.\(^{1113}\) The firm is used »as a particular policing device« in the case of joint team production.\(^{1114}\) Team production carries specific monitoring costs and problems. In most cases, it is impossible to calculate and qualify precisely the contribution of each team member. Knowing these difficulties, team members can easily free ride and do less than expected. On the other hand, in many cases team production yields specific advantages that cannot be gained from individual work. In these cases, the sum of the work within the team will be higher than the sum of the individual parts. If these gains prevail over the free-riding costs, a case for the firm can be made.\(^{1115}\) Thus, economic and management theorists have emphasised the importance of personnel links in transnational corporate groups to further group-wide goals, be able to act efficiently on a transnational scale and, especially, to transfer tacit knowledge.

Management theorists often call interlocking or shared board members in corporate groups horizontal ties. They enable control over different parts of the corporate group beyond ownership and facilitate resource-sharing and coordination.\(^{1116}\) These interlocking managers can better create links between the subsidiaries to enhance synergies such as economies of scale, transfer of knowledge and best practices, or cross-selling to common customers.\(^{1117}\) Likewise, they can play a vital role in establishing

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1114 Alchian and Demsetz, American Economic Review 62 (1972), 785. Osterloh, Frey and Frost, ZfB 1999, 1256 criticise such monitoring as being impossible in the case of transfer of tacit knowledge, because then the performance of each employee is not measurable.

1115 Alchian and Demsetz, American Economic Review 62 (1972), 779 et seq.


social ties and creating a group-wide identity. In widespread transnational corporate groups, the regional headquarters’ staff play an important role as intermediaries between the parent and the national subsidiaries. Economic studies have shown that they will mainly come from the region. However, the regional headquarters’ management will tend to be loyal and have ties to the parent corporation – i.e. they are only dispatched for a certain period of time or see their future career at headquarters level. The head of the regional headquarters in particular will usually come from the parent and remain closely integrated with the parent.

Economic and management theorists stress the specific advantages of firms for technology and (tacit) knowledge transfer. Technology transfer is prone to asymmetries of information and the problem of impactedness. Patent systems might be a solution for much know-how, but not


1122 See for the context of transnational corporate groups Teece, Journal of Economic Behavior and Organization 7 (1986), 28 et seq. and in particular Hennart, Theories of the Multinational Enterprise, in: Rugman (ed.), The
for tacit knowledge. In the transnational context, jurisdictional boundaries impede its efficiency. In this area, common employees play an important role. Technology transactions are generally more complex than the mere transfer of information. The new technology must be applied by personnel and integrated into the production process. Management theorists argue that this is easier within a firm than with an outside contractor. An integration of the technology, know-how and employees leads to »better disclosure, easier reconciliation of differences, more complete crosscultural adaptation, more effective team organization and reconfiguration.« Here, common personnel play an important role. For transnational firms, the difficulties attached to transmitting information and knowledge from one social and cultural environment to another is the most important factor, according to Kogut and Zander. Knowledge »regarding how to


1126 Kogut and Zander, Journal of International Business Studies 24 (1993), 629. See also Jones, Multinationals and Global Capitalism. From the Nineteenth to the Twenty-first Century p. 13; Caves, Multinational Enterprise and Economic Analysis p. 3 et seq.; Egelhoff, Organizing the Multinational Enterprise. An Information-Processing Perspective p. 184 et seq.; Lindsay, Chadee, Mattsson and Johnston, Knowledge Flows in International Services Firms: A Concept-
cooperate and communicated defines the boundaries of the firm. This firm’s personnel specialist knowledge and skills distinguishes it from the market and thus marks its boundaries.

In sum, personnel links have been singled out in transnational corporate groups as a means for the parent to exercise control and ensure that strategies are incorporated group wide.

5. Unified Appearance

Nexus of contract theory and business strategy, as explained above at B. 2., consider a unified appearance, or rather a common corporate culture, as a particularly decisive element of firms. Management theorists are concerned with the common corporate culture that establishes unification within the corporate group rather than with the appearance towards third parties. A common corporate culture is important for knowledge transfer and the concept of a transnational corporate group as one entity. Corporate culture means a set of principles communicated through the management to all employees. It allows predicting ex ante, to a certain extent, how the corporation will react – and this reaction will ex post shape the corporate identity. Thus, employees who embrace the corporate culture can better rate their experience to improve future transactions and to discourage misrepresentation in the first place.

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Communication is reduced compared to inter-firm experience rating, as the decision maker will also be the one who rates the experiences and can use the internal code in his or her communication.\footnote{Williamson, The Economic Institutions of Capitalism p. 293; Williamson, Markets and Hierarchies. Analysis and Antitrust Implications p. 25. See also Egelhoff, Management International Review 50 (2010), 419; Kogut and Zander, Organization Science 7 (1996), 503.} The language advantage of internal organisations, especially in hierarchical structures,\footnote{Egelhoff, Management International Review 50 (2010), 419.} also improves the willingness of parties to disclose information through the internally developed code.\footnote{Freiling, On the Firm’s Raison d’Être and Competence-based Nature of the Firm, in: Kersten/Wittmann (eds.), FS Bellmann, p. 32; Hedlund, Human Resource Management 25 (1986), 24 et seq.; Osterloh, Frey and Frost, ZfB 1999, 1249.} Certain assets, such as tacit knowledge and complex technology, are deeply imbedded in the internal structure of the firm. As has already been mentioned above at 3., using the common corporate code allows such assets to be transferred internally.\footnote{M. Yamin, A Critical Re-evaluation of Hymer’s Contribution to the Theory of the Transnational Corporation, in: Pitelis/Sugden (eds.), The Nature of the Transnational Firm, 2000, p. 57-71, 63; Jones, Multinationals and Global Capitalism. From the Nineteenth to the Twenty-first Century p. 13.} Long-term complex and interwoven relationships help to build up and maintain such an organisational culture.\footnote{Furubotn and Richter, Institutions and Economic Theory. The Contribution of the New Institutional Economics p. 376.} Furthermore, in these cases, parent control will tend to be tight in order to safeguard the efficient use of the assets.\footnote{Caves, Multinational Enterprise and Economic Analysis p. 80 et seq.; Ghoshal and Bartlett, The Academy of Management Review 15 (1990), 615; Barba Navarette and Venables, Multinational Firms in the World Economy p. 37 et seq.} It is the parent’s role to instil shared values, a common corporate culture and strategy.\footnote{Hedlund, Human Resource Management 25 (1986), 24 et seq.: »the strategy makers in the center are the brain« (26).} This common corporate culture established within the corporate group than enables a unified appearance towards third parties because it allows the corporate group to speak with ‘one voice’. Additionally, the shared values and corporate culture can be communicated to third parties as distinguishing the corporate group.

On the one hand, this provides an economic explanation as to why transnational corporate groups try to establish many interconnecting links
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throughout the corporate group. On the other hand, it enhances the credibility of the common corporate culture or unified appearance criterion as a sign for the transnational corporate group being a single economic entity.

6. Reporting Obligations

Reporting obligations of the subsidiary and an information sharing system have been mentioned, particularly in EU competition law, as a relevant factor in deciding on a single economic entity. In theories of the firm, in turn, information plays an important role as well. As has already been mentioned, especially management theorists argue that firms can better secure a high quality and quantity of information and thus »a superior capacity of asset deployment«. As has been demonstrated with the specific case of common personnel, guaranteeing an efficient flow of information is essential for a firm to function.

Transnational corporate groups, in turn, are said to have »access to superior technology, information, knowledge and know-how« than local


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In the transnational context, an information system is needed that also allows the parent to compare and monitor the subsidiary’s operations in different countries. Information exchange between the different subsidiaries within a transnational corporate group, as well as with its parent, becomes more prevalent the more the entities are interconnected. Additionally, problems that have a global scale and demand a global answer—crossing divisions, products and national borders—enhance the need for information exchange. However, these communication links are expensive to maintain. If they are not suitable for the specific transnational corporate group, i.e. either too sparse or too extensive, efficiencies will be lost. In some circumstances, information on the subsidiary can replace direct intervention. In any case, reporting obligations create a hierarchical relationship. The entity to whom the subsidiary reports will have the ultimate authority over structural decisions, will monitor performance and will intervene if necessary on grounds of the reports. In fact, in transnational corporate groups, this hierarchical element ensures efficient information collection. This shows the importance of information flows within the corporate group. They prepare decision-making and thus the exercise of parental control.

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1148 Caves, Multinational Enterprise and Economic Analysis p. 85.
1152 Forsgren, Theories of the Multinational Firm. A Multidimensional Creature in the Global Economy p. 113: »Access to information about the environment means power«.
gard, management theorists have shown that reporting obligations are an important prerequisite to the exercise of parental control. In some cases, they can even replace the exercise of direct control. As a consequence, management theory reaffirms that an intra-group information sharing system enables parental control and is a necessary element in conducting business as a single economic entity.

7. Summary and Limitations

The survey has shown that economic and management theory confirms, in most aspects, the set of criteria put together in the preceding chapter. In economic and management theory, it is the specific organisational structure rather than different labels and classifications that is the decisive element. Thereby, the different theories of the firm tend to emphasise different aspects of the organisational structure, while not negating the others. In summary, theorists of the firm stress the advantages of firms in terms of team production, creation and transfer of knowledge and dealing with uncertainty and opportunism through an organisational structure based on control. These qualities also mark the boundaries of the firm in economic theory. This, in turn, can help to re-evaluate the set of criteria established throughout the thesis so far. Hence, if the transnational corporate group does not exhibit the described structural elements, it cannot be considered a single entity.

Economic and management theorists consider decentralisation as a necessary organisational feature for complex firms such as transnational corporate groups. They argue that exercising strategic control is the most efficient way to mitigate the risks of information overload, long lines of communication and insensitivity to local specifics. Parents intervene selectively in the areas that need to be coordinated to further the group-wide goal. This, in turn, marks the boundaries: if the parent does not even selectively intervene to further the group-wide goals, the corporate group cannot be seen as a single entity. For example, there may be no group-wide goal that requires selective intervention. If the businesses are wholly unrelated, there is no need to coordinate the different business sections. In

1153 Becerra, Theory of the Firm for Strategic Management p. 181; Hymer, The International Operations of National Firms: A Study of Direct Foreign Invest-
this instance, the corporate group might simply serve as a »risk-pooling agency«.1154 It, as can be the case in conglomerates1155 or holdings,1156 may rather resemble a miniature capital market.1157 The parent’s sole function in these cases is to reduce the costs for credits and allocate financial resources.1158 In these cases, as and if the parent is not involved in the strategic control,1159 the corporate group cannot be seen as a single entity.1160

However, such aspects must be placed in context. Allocating financial resources can also be an element of strategic control and coordination of subsidiaries. In fact, if economic gains – such as economies of scale or scope or the transfer of knowledge and technology – can be achieved, the parent will exercise coordination and strategic control as this will be economically sound. Then, even «multiproduct firms” will horizontally integrate certain tasks that need coordination or where centralisation is sound as described above at 4.1161 As a result, the fact that subsidiaries of the corporate group are active on different markets can hint at a lack of strate-

1154 Williamson, Markets and Hierarchies. Analysis and Antitrust Implications p. 144 with regard to holdings. In the case of conglomerates, he considers »failures in the capital market« (156) the main reason for their emergence.

1155 R. A. Posner and K. E. Scott, Economics of Corporation Law and Securities Regulation, 1980 p. 196 define conglomerates as »firms which specialize in acquisitions of companies in unrelated lines of business«.

1156 Williamson, Markets and Hierarchies. Analysis and Antitrust Implications p. 143 defines holdings as »a loosely divisionalized structure in which the controls between the headquarters unit and the separate operating parts are limited and often unsystematic.«


1160 For a similar result, see also M. Dearborn, Enterprise Liability. Reaviewing and Revitalizing Liability for Corporate Groups, California Law Review 97 (2009), 195, 254.

gic control. It is not, however, a criterion for exclusion. Rather, management theory and empirical studies have shown that horizontal integration and a common corporate culture are not necessarily linked to presence on a common market.\textsuperscript{1162} With regard to vertical integration, interdependencies within the corporate group and the need for strategic control of the parent are usually even stronger.

Information flows play a vital role in complex firms such as transnational corporate groups and link different criteria. A common corporate culture and a common language code facilitate the dissemination of information. Personnel links are important for this to be achieved. Likewise, the parent plays an important role in economic theory in ensuring a common corporate culture. For this, in turn, the parent needs to have the means it requires to exercise strategic control. Strategic control is also necessary to coordinate and direct the information flow and to determine and implement the corresponding roles of the subsidiaries. In order to exercise this control, the parent has to collect the relevant information through reporting obligations and personnel links. A personnel overlap is a more general indicator for the exercise of parental strategic control. It helps, in a similar way to regional headquarters on an organisational level, to identify the need and to effectively exercise selective intervention. Parental personnel can translate the parent’s corporate strategy to the local context and ensure the subsidiary’s loyalty towards the parent.

As a result, the criteria for considering a transnational corporate group a single entity that were summarised in the preceding chapter have proven to be economically sound. They reflect arguments in economic and management theory for the advantages of firms and the efficient organisation of complex firms. Hence, the concept of the economic entity mirrors the economic advantages of organising the transnational corporate group as an integrated business and exercising strategic control to further common goals. Additionally, the analysis of the economic rationale for organisational structures and relationships within a transnational corporate group will help to evaluate whether the different criteria are fulfilled in specific

\textsuperscript{1162} See the analysis above and Goold, Campbell and Alexander, Long Range Planning 31 (1998), 312 who stress that the important factor is rather the »fit between the business and the parent« – i.e. that the parenting needs and opportunity are homogenous.
cases. It gives further detailed indicia for when to consider a transnational corporate group a single economic entity and shows the interrelation between the different aspects. As shown, these arguments also mark the boundaries of the concept. Those parents – most notably mere financial holdings – that do not exercise coordination and strategic control cannot be considered part of the single economic entity.

D. Corporate Groups and Limited Liability

This thesis proposes a definition of transnational corporate groups for international criminal law as an economic entity, despite the fact that it consists of different national legal personalities. The economic consequences of such an economic entity approach – also called an enterprise approach as explained above at A. – are discussed in law and economics. There, the economic benefits of limited liability for society are widely accepted (1.). With regard to corporate groups, law and economics scholars point to specific economic risks that warrant a more cautious approach towards limited liability within the corporate group (2.). As a result, the proposed concept is not at variance with the fundamental underlying rationale of the principle of limited liability (3.).

1. Limited Liability: A Short Introduction

Limited liability signifies that shareholders will not be held liable for debts of the corporation beyond their investment.\textsuperscript{1163} It is enshrined in corporate laws around the world as one of the fundamental principles of corporate

In common law jurisdiction, as has been shown in chapters III and IV, piercing the corporate veil is the narrow exception to this principle. In this section, the economic rationale for the principle of limited liability will be explored. Limited liability, according to economists, facilitates diversification and passivity, as investors do not have to closely monitor the corporate managers – which would require specific knowledge. In regimes of limited liability, the identity of the shareholder is irrelevant. In the case of liability of each shareholder for the corporation’s entire debt, the wealthier shareholders would bear a greater risk. This would lead to high monitoring costs among the shareholders and difficulties in trading shares. In the case of limited liability, on the contrary, shares of one corporation are fungible as they all have the same value. This puts pressure on the management to perform, as explained by the market for corporate control theory. At least in an ideal world, the share price depicts the value of the corporation, saving investigation cost for investors. Diversification only makes sense if limited liability exists, otherwise each new investment would bear surplus risk for the personal investor’s

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1164 Blumberg, Strasser, Georgakopoulos and Gouvin, Blumberg On Corporate Groups p. 3-3 et seq.
wealth. Investors would therefore invest in only a few corporations, if at all, which in turn would complicate raising capital for corporations. This would be a social loss. For creditors, on the other hand, it is easier to monitor. They are, according to economists, the most efficient risk bearers.

For economists, a real cost of limited liability exists in relation to involuntary creditors. Corporations gain all the benefits of risky activities while only bearing some of the costs, and are thus likely to take excessive

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1171 Because of the obligation to pay back the credits, and thus the need to regularly acquire new credits, the corporation is under regular scrutiny with regard to its risks: Easterbrook and Fischel, The Economic Structure of Corporate Law p. 46; H. Hansmann and R. H. Kraakman, Toward Unlimited Shareholder Liability for Corporate Torts, Yale Law Journal 100 (1991), 1879, 1919 et seq. Woodward, Journal of Institutional and Theoretical Economics 141 (1985), 601 et seq.

1172 Limited liability facilitates credit contracts to the advantage of both the creditors and the investors. Otherwise, the parties would have to negotiate and would agree on limited liability, which would only raise transaction costs Posner, University of Chicago Law Review 43 (1976), 501, 509 et seq. Insurance is not an equally effective alternative, as insurance cover for bankruptcy in particular would create moral hazards, the corporate managers would take excessive risks and investors would stop monitoring managers: Easterbrook and Fischel, The Economic Structure of Corporate Law p. 49. See also Woodward, Journal of Institutional and Theoretical Economics 141 (1985), 605 et seq.

risks.\textsuperscript{1174} Involuntary creditors, such as tort victims, will bear the greater part of the risk. Involuntary creditors, in contrast to voluntary creditors, cannot negotiate for additional securities or for the form of liability. They cannot make informed choices about the risk incurred.\textsuperscript{1175} According to Easterbrook and Fischel, corporations’ incentives to insure greatly diminish the magnitude of these externalities.\textsuperscript{1176}

2. Corporate Groups

The discussion on the economic benefits of limited liability does not tend to focus on corporate groups, but rather on «public corporations” in general.\textsuperscript{1177} Nonetheless, some corporate-group-specific arguments can be found in law and economics. While certain economic benefits in the corporate group context are described (a.),\textsuperscript{1178} law and economics scholars

\begin{itemize}
  \item \textsuperscript{1176} Easterbrook and Fischel, The Economic Structure of Corporate Law p. 53: The corporation has an incentive to insure because it needs to reduce the risk of losses through bankruptcy for its employees. Employees are investors of human capital that is difficult to diversify.
  \item \textsuperscript{1177} Blumberg, Strasser, Georgakopoulos and Gouvin, Blumberg On Corporate Groups p. 5-4; Mendelson, Columbia Law Review 102 (2002), 1206, 1209 et seq. argues that, in corporate group cases, the efficiency gains of limited liability are strongly attenuated: the parent’s information costs are less – indeed, it holds shares in order to be involved in the subsidiary’s management.
  \item \textsuperscript{1178} J. M. Landers, A Unified Approach to Parent, Subsidiary, and Affiliate Questions in Bankruptcy, University of Chicago Law Review 42 (1975), 589 et seq. lists the following reasons why corporate groups might emerge: »to separate functions for administrative ease, to control many businesses with a minimal capital investment, to comply with various legal requirements, to minimize liability or to insulate certain assets from liability for other activities, and,
point to specific risks presented by limited liability within the corporate group (b.).

a. Fostering Innovation

Separate legal personalities and limited liability can facilitate innovation. Firstly, entrepreneurship and innovation are dependent on a willingness to take risks. This willingness is attenuated to the degree that the entrepreneur has to bear the losses of the (ad)venture. Transposed to corporate groups, the willingness to endeavour in innovation is limited by the prospect of bearing the losses that might also affect other parts of the corporation. Thus, «outsourcing» the risky new business to a subsidiary allows the business to be put into practice without creating risk for the other, already established parts of the corporate group. Therefore, the parent needs to be shielded from claims of subsidiary creditors, meaning that limited liability needs to be granted to the parent. Secondly, a separate legal personality prevents the predations of the ubiquitous tax collector».


1180 D. Iacobucci and P. Rosa, The Growth of Business Groups by Habitual Entrepreneurs: The Role of Entrepreneurial Teams, Entrepreneurship Theory and Practice 34 (2010), 351, 362. For Posner, the corporation that invests in a new unrelated businesses venture and thereby creates a corporate group simply shortens the process of giving dividends to its shareholders who would then use the money to invest in the new venture: Posner, University of Chicago Law Review 43 (1976), 511 et seq. The parent might have an interest in limiting the control of administrative agencies only to the part of the business doing business in this area and not to other areas: J. J. White, Corporate Judgment Proofing: A Response to Lynn LoPucki's The Death of Liability, Yale Law Journal 107 (1998), 1363, 1390.

1181 M. Almus and E. A. Nerlinger, Growth of New Technology-Based Firms. Which Factors Matter?, Small Business Economics 13 (1999), 141, 148; Blumberg, Strasser, Georgakopoulos and Gouvin, Blumberg On Corporate Groups p. 5-12 et seq. Corporate groups can also limit their risks by merely fi-
gal personality for the new business may help to raise capital, because it is easier for the investor to make sure to support only a specific innovation.\textsuperscript{1182} Thirdly, a separate legal personality enables the parent to involve former employees in the new subsidiary. Ownership in the new subsidiary, as already mentioned above at C. 1., can enhance interest in the subsidiary and loyalty towards the group. The owner’s specific expertise, competence or contacts with customers might be essential for the success of the new subsidiary.\textsuperscript{1183} Granting ownership rights for a specific »project« can increase employee motivation and availability of time and ensure that someone is focusing their attention solely on the project at hand – unlike the owner of the group, who has to pay attention to other parts of the group as well.\textsuperscript{1184}

b. Specific Risks

According to law and economics scholars, limited liability in corporate group cases exhibits specific risks that are socially undesirable. In these

\begin{footnotesize}
\begin{enumerate}
\item[1182] Hansmann and Kraakman, Yale Law Journal 100 (1991), 1919; Iacobucci and Rosa, Entrepreneurship Theory and Practice 34 (2010), 365. The performance of separate legal personalities is said to be easier to measure: Iacobucci and Rosa, Entrepreneurship Theory and Practice 34 (2010), 365; Posner, University of Chicago Law Review 43 (1976), 513 et seq.; White, Yale Law Journal 107 (1998), 1391. See on the contrary R. Squire, Strategic Liability in the Corporate Group, University of Chicago Law Review 78 (2011), 605, 607 et seq. who argues that intra-group loans heavily reduces these benefits, as creditors then additionally bear the risk of other subsidiaries’ bankruptcies. In these cases, the information costs for the creditors will be higher: Posner, University of Chicago Law Review 43 (1976), 516.
\item[1183] Iacobucci and Rosa, Entrepreneurship Theory and Practice 34 (2010), 363 et seq. White, Yale Law Journal 107 (1998), 1391 argues that managers might also be motivated by the title CEO instead of »division director«.
\item[1184] Iacobucci and Rosa, Entrepreneurship Theory and Practice 34 (2010), 365.
\end{enumerate}
\end{footnotesize}
cases, it can be economically sound to attribute liability to the parent corporation.\textsuperscript{1185} Absolute limited liability – limited liability of the parent with regard to its subsidiary’s creditors – creates incentives for excessively risky activities. Corporate groups can create social losses by setting up a poorly capitalised subsidiary, gaining the benefits and letting it go bankrupt while continuing the activity with a new subsidiary (and the old personnel).\textsuperscript{1186} The parent might be focussed on the overall profitability of the corporate group rather than the single subsidiary’s profitability.\textsuperscript{1187} Additionally, corporate groups can separate their most valuable assets by placing them in a subsidiary different from the one engaged in the risky behaviour.\textsuperscript{1188} This might not be immediately visible. Due to consolidated corporate group-wide figures, the different subsidiaries’ assets and liabilities are not publicly available.\textsuperscript{1189} Rather, the parent might have tax advantages to depress the profits of one subsidiary to the advantage of the corporate group.\textsuperscript{1190} Additionally, Squire argues that strong asset partitioning coupled with intra-group guarantees heightens the risk for unguaranteed creditors in the case of bankruptcy and influences the corporate group

\begin{thebibliography}{1188}
\item Landers, University of Chicago Law Review 42 (1975), 591; Mendelson, Columbia Law Review 102 (2002), 1255.
\end{thebibliography}
structure.\textsuperscript{1191} In these cases, the advantage of separate legal personalities mentioned above at a. is (ab)used to externalise risks. The parent would have no incentive to insure itself or the subsidiary against the risks.\textsuperscript{1192} This creates an asymmetry between benefits and costs and creates moral hazards for the managers who do not have to fear losing their position.\textsuperscript{1193} Thus, even Easterbrook and Fischel, who extensively defend limited liability in general, argue for limitations in corporate groups »when the corporate arrangement has increased risks over what they would be if firms generally were organized as separate ventures«.\textsuperscript{1194}

\begin{itemize}
\item \textsuperscript{1191} They will lead to lower interest rates for the corporate group and dissuade the corporate group from organising subsidiaries along functional lines and keeping track of their distinct assets. Rather, the parent will create an unnecessary amount of subsidiaries. Those who would otherwise request proper track-keeping (i.e. influential creditors) have no incentive to do so because they are protected by intra-group guarantees. In the case of insolvency of one subsidiary, they will lead to insolvency of other corporate group members to the detriment of non-guaranteed creditors. Furthermore, it will be impossible for bankruptcy judges to assign the corporate group’s assets to the separate legal personalities. He calls this shareholder opportunism correlation seeking \textit{Squire}, University of Chicago Law Review 78 (2011), 605 et seq. Similarly \textit{Landers}, University of Chicago Law Review 42 (1975), 576 et seq. For the bankruptcy discussion on substantive consolidation, see the dispute between \textit{Landers}, University of Chicago Law Review 42 (1975), 589 et seq. and Posner, University of Chicago Law Review 43 (1976), 499 et seq.
\item \textsuperscript{1194} \textit{Easterbrook and Fischel}, The Economic Structure of Corporate Law p. 57.
\end{itemize}
3. Summary

The principle of limited liability in general exhibits many economic advantages. These advantages shall not be and are not put at risk by the concept of treating corporate groups as an economic entity under certain circumstances. Individual shareholders are not affected; they still enjoy limited liability. The advantages of limited liability described above (diversification, liquidity, monitoring by capital market) are still valid as the shareholders of the parent corporation themselves enjoy limited liability.\(^\text{1195}\) The economic entity approach only affects liability within the corporate group. As has been demonstrated in this section, the economic advantages for a society of limited liability within a corporate group are few. The proposed definition takes into account instead the specific risk of limited liability in corporate groups. In fact, these risks emerge from the possibility of parental control and integrated businesses – factors that are important criteria for the definition.

Additionally, the definition is proposed to apply to international criminal law. Firstly, it would benefit a specific category of involuntary creditors. With regard to involuntary creditors, as has been elaborated above at 1., limited liability carries fewer economic advantages. Secondly, the intra-group liability is not – or at least should not – be concerned with «normal” business risks or a risk related to the business activity. It only concerns liability for the violation of minimum standards, namely the violation of \textit{jus cogens}.\(^\text{1196}\) Thus, corporate groups are not affected in their normal business activities and will still enjoy the benefits of limited liability for the overwhelming majority of their dealings. Thirdly, other lines of argumentation apart from economic advantages have to be taken into account in international criminal law. In fact, as has been described in the introductory chapter, the need to target and punish the entity that in reality

\(^{1195}\) \textit{Dearborn,} California Law Review 97 (2009), 211; \textit{Easterbrook and Fischel,} University of Chicago Law Review 52 (1985), 111; \textit{Easterbrook and Fischel,} The Economic Structure of Corporate Law p. 56; \textit{Posner,} University of Chicago Law Review 43 (1976), 512, 515: »It may be true that the social interest in limited liability is somewhat attenuated in the case where the shareholder is a large publicly held corporation.«

\(^{1196}\) Similarly \textit{Dearborn,} California Law Review 97 (2009), 251 et seq. proposes corporate group liability for mass torts, human rights violations or environmental harm.
committed or aided and abetted the crimes plays a particularly important role. 1197

E. Summary

Theories of the firm offer explanations for the emergence and organisation of firms. They help to explain why corporate groups, especially in the transnational context, arise. In this context, economic and management theory affirms the central role of control. The different theories of the firm, while emphasising different aspects, all rely on some form of control to differentiate firms from markets.

Moreover, they explain certain organisational patterns of firms. These explanations, in turn, enhance the credibility of the set of criteria summarised in the preceding chapter. Firstly, economic and management theory shows that control criteria and criteria for boundaries of the firm do not correlate with legal personalities. 1198 Secondly, the analysis of economic and management theory has confirmed the criteria to be economically sound. These criteria also define the boundaries of the concept. The concept of the economic entity is economically sound as long as it mirrors the economic advantages of organising the transnational corporate group as an integrated business and exercising strategic control to further common goals. Thus, economic and management theory has helped to refine the set of criteria used in different legal orders (see C. 7.). This, thirdly, gives further credit to the recently nuanced approach in EU competition law that requests more detailed evidence of the parent’s strategic control and gives more room to rebut the presumption of wholly owned subsidiaries. Fourthly, economic and management theory has helped to determine the weight of and interdependencies between the different criteria and will help those that use the set of criteria to make a more informed decision.

1197 For this argument in the context of an economic entity approach for mass torts, see also Dearborn, California Law Review 97 (2009), 251, 255.

1198 See already Berle, Columbia Law Review 47 (1947), 345: »The corporation is emerging as an enterprise bounded by economics, rather than as an artificial mystic personality bounded by forms of words in a charter, minute books, and books of account.«
Lastly, a closer look at the discussion in law and economics concerning the economic benefits of limited liability reveals that a functional definition – one that disregards separate legal personalities – would not negate these benefits. Rather, it would meet the specific risks that corporate groups exhibit and would suit the international criminal law context.
Chapter VII: Concept in Practice: A Brief Case Study

The developed concept allows international criminal law to perceive, if the criteria are fulfilled, transnational corporate groups as an economic entity. This can be shown by taking up the Royal Dutch Shell case in the introduction. After a brief summary of the material allegations (A.) and a presentation of the corporate group structure (B.), the set of criteria elaborated in the thesis will be applied to the Royal Dutch Shell case (C.). The information are mainly taken from the case documents of the different Wiwa et al. v Royal Dutch Petroleum et al.\textsuperscript{1199} and Kiobel et al. v Royal Dutch Petroleum\textsuperscript{1200} cases. For the sake of the case study, the plaintiffs’ and defendants’ allegations are assumed to be true. The allegations included information gained from discovery but were only to a small part reviewed by the different courts involved. They do not cover all the relevant aspects to a sufficient degree. The case study additionally uses publicly available information on the Royal Dutch Shell group, mainly from a three volume history of Royal Dutch Shell and its Annual Report 2014 in order to fill some of the gaps.

A. Material Allegations

Shell Petroleum Development Company of Nigeria, Ltd. (»Shell Nigeria«) aided and abetted state violence against the Ogoni people in Nigeria, including summary execution, crimes against humanity, torture, inhumane treatment, arbitrary arrest and wrongful death. The Ogoni people protested against the pollution and destruction of their livelihoods from Shell Nige-

\textsuperscript{1199} The case was finally settled: US DC S.D. New York Settlement Agreement in Case 96.Civ. 8386, Case 01 Civ. 1909 and Case 04 Civ. 2665 Wiwa et al. v Shell Petroleum et al. [2009].

\textsuperscript{1200} The Court of Appeal dismissed the claims and held that corporations are not addressees of the ATS: US CA Second Circuit Kiobel et al. v Royal Dutch Petroleum et al. [2010] 621 F.3d 111. The Supreme Court ruled that the presumption against extraterritoriality was not rebutted: US SC Kiobel et al. v Royal Dutch Petroleum et al. [2013] 133 SCt 1659.
ria’s oil explorations in that area. Shell Nigeria and its parent corporations gave monetary and logistical support to the Nigerian police and military, bribed witnesses to produce false testimonies and worked with the Nigerian military regime for decades to suppress the demonstrations against the oil exploitation. Furthermore, Shell Nigeria colluded with the Nigerian military in the arrest and execution of the so-called Ogoni 9, a group of activists including Ken Saro-Wiwa and Dr. Barinem Kiobel.\textsuperscript{1201}

\textbf{B. Corporate Group Structure}\textsuperscript{1202}

![Diagram]

\begin{itemize}
  \item Royal Dutch Shell plc.
  \item Shell Petroleum N. V.
  \item Shell Petroleum Company
  \item Shell Petroleum Development Company of Nigeria Ltd
  \item Shell Transport and Trading Company plc.
  \item Shell Finance B.V.
  \item Shell Petroleum Inc.
  \item Shell Oil Company
\end{itemize}


\textsuperscript{1202} The presentation is limited to the part of the corporate group structure that is relevant for the material allegations and that can be deducted from publicly available information.

Another wholly owned subsidiary is Shell Petroleum Company Ltd., which in turn wholly owns Shell Petroleum Development Company of Nigeria Ltd. (»Shell Nigeria«). Shell Petroleum Inc., incorporated and organized under the laws of Delaware and with offices in Huston, Texas. Shell Petroleum Inc. is another wholly owned subsidiary that in turn wholly owns different subsidiaries, inter alia Shell Oil Company, which is incorporated and organized under the laws of Delaware, has offices in Huston, Texas. Shell Oil Company conducts the US business of the group.

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Chapter VII: Concept in Practice: A Brief Case Study

C. Application of Set of Criteria

1. Power to Control

Royal Dutch Shell, as described in B., wholly owns either directly or indirectly all relevant subsidiaries. It had thus the power to control them.\footnote{See also Sluyterman, A History of Royal Dutch Shell. Keeping Competitive in Turbulent Markets, 1973-2007 p. 436.}

2. Exercise of Parental Control

As a next step, the actual exercise of decisive influence is in this case of wholly-owned subsidiaries presumed. Additionally, the specific corporate group structure and relationships with the corporate group, as will be now demonstrated, proof the actual exercise of parental control. Thus, Royal Dutch Shell plc is not able to rebut the presumption.


a. Involvement in Day-to-Day Management

The corporate group exercises mainly strategic control, see b. The operating corporations or units are responsible for the day-to-day manage-
C. Application of Set of Criteria

Nonetheless, connected to the events in the Ogoni region, Royal Dutch/Shell directed and was actively involved in the Nigerian subsidiary’s conduct with regard to the local protestors in Nigeria. For example, the general manager of the group’s eastern division asked Nigerian officials to secure the work on the Shell Nigeria’s pipelines. Likewise, Royal Dutch/Shell provided part of the vehicles for the Nigerian security forces, the other part was provided by Shell Nigeria. Top managers of Royal Dutch/Shell and Shell International Petroleum Inc. discussed the protests in the Ogoni region with Nigerian military officers in London. Additionally, the committee of managing directors of Royal Dutch/Shell wrote a letter to the Nigerian head of state after the conviction of Wiwa and others. Thus the parents influenced part of the day-to-day business of the Nigerian subsidiary.

b. Strategic Control

The Royal Dutch Shell group in general exhibits a decentralised structure, while the overall corporate strategy is decided at the headquarters. The operating corporations or rather the different business sectors, which will be described at c., have the executive authority. The business sectors are defined according to their business and not their nationality. Royal Dutch Shell’s headquarters is the central office of the corporate group

charged to implement a group wide strategy.\textsuperscript{1218} It controls and operates the corporate group.\textsuperscript{1219} The US Court of Appeal’s Second Circuit described the business of Royal Dutch Shell as »the operation of an integrated international oil business.«\textsuperscript{1220}

Firstly, the central office is in charge of the global business sectors. It is concerned with worldwide business responsibility. The headquarters decides on the budgets of the different business sectors.\textsuperscript{1221} It also conducts regular reviews and controls concerning financial reporting risks.\textsuperscript{1222} This »single overall control framework« applies corporate group wide.\textsuperscript{1223} Business committees on the parent’s level represent the regional subsidiaries. They are responsible for »strategic, long-term decisions and those with international implications«.\textsuperscript{1224} For example, the global organisation of the business sectors streamlines the supply chain through standardisation and thus exercises strategic control.\textsuperscript{1225} Thereby the parent exercises strategic control over the various business sectors and country organisa-
C. Application of Set of Criteria

For example, Royal Dutch Shell authorised important decisions of the manager of investor relations of Shell Oil who managed the group’s US investor’s relations.  

Secondly, the headquarters centrally provides essential »business support in the areas of communications, finance, health, human resources, information technology, legal services, real estate and security.« It has elaborated the Shell General Business Principles that apply group wide. They govern how both the parent and the subsidiaries »conduct their affairs«. It is accompanied by a group wide »system of assurance, an internal accounting system to make sure all Shell companies did indeed comply with the business principles.« In sum, as the US Court of Appeal’s Second Circuit put it, Royal Dutch Shell »control[s] a vast, wealthy, and far-flung business empire which operates in most parts of the globe.«


c. Integrated Business

The Royal Dutch Shell group follows an integrated business strategy and is structured as a vertically integrated network.\textsuperscript{1232} The group’s business expands from the exploration of oil and gas, development and extraction, manufacturing and energy production and transport and trading to retail and business to business sales.\textsuperscript{1233} Royal Dutch Shell considers the »management of integrated value chains« one of its strengths.\textsuperscript{1234} The group’s operations are divided along business sectors, namely »Upstream, Integrated Gas, Unconventional Resources, Downstream, and Projects & Technology«\textsuperscript{1235} that each comprise different subsidiaries. For example, the corporate group has a »global lubricants business along the lines of Shell Marine Products, Shell Aviation, and Shell LPG.«\textsuperscript{1236} In the business sector »downstream«, different regional organisations coordinate local restructuring or »process transactions, manage data and produce statutory returns«\textsuperscript{1237} and are themselves integrated in one global organisation, Shell Global Solution.\textsuperscript{1238} The parent decided that Shell Global Solution shall also provide services for third parties to increase the competitiveness of Royal Dutch Shell’s service sector.\textsuperscript{1239}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{1232} US CA Second Circuit \textit{Wiwa et al. v Royal Dutch Petroleum et al. [2000]} 226 F.3d 88, 91. See also \textit{Sluyterman, A History of Royal Dutch Shell. Keeping Competitive in Turbulent Markets, 1973-2007} p. 435: »the company moved […] to a more integrated approach«.
\end{enumerate}
\end{footnotesize}
The different business sectors and corporations in the corporate group collaborate closely. For example, upstream »manages its operations primarily by line of business, with this structure overlaying country organisations.« More than half of their revenues in 2014 concerned »inter-segment sales«, thus intra corporate group sales. Shell Nigeria is responsible for the Nigerian part of the oil exploitation for the corporate group. It sells - at a non-market price - the oil to Shell International Trading Company who then imports a large portion of this oil to the US. This integrated business structure is dominated and controlled by Royal Dutch Shell.

The integrated business structure is also visible in the fact that different subsidiaries are responsible for group wide tasks. Shell insurance subsidi-

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abies provide insurance for various Royal Dutch Shell subsidiaries. The treasury organisation, including »[t]reasury centres in London, Singapore and Rio de Janeiro« is concerned with the contact to the external capital market and »conducts a broad range of transactions – from raising debt instruments to transacting foreign exchange«. Additionally, the »sole business function« of the Shell Oil’s US investor relations office »was to perform investor relation services« for the corporate group.

d. Personnel Links

Next, the Royal Dutch Shell group exhibits many personnel links. Managers of the corporate group are trained group-wide at uniform management courses, enhancing their interrelations and ensuring their adherence to group wide goals. The strategy »enterprise first«, introduced by the parents in 2004, emphasises teamwork »within and between business units and business sectors.« For example, Shell People Services, based in Houston, Texas helps in group wide recruitment processes and coordinates those job applicants that apply to different corporations within the Royal

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Dutch Shell group.\textsuperscript{1253} It operates »as a regional application handling center which processes applications to various arms of the Shell Group.«\textsuperscript{1254} Shell People Services is, for example, listed as a recruitment office for Shell Nigeria.\textsuperscript{1255} Additionally, employees of Shell Nigeria worked in Houston at one of Royal Dutch/Shell’s subsidiaries.\textsuperscript{1256}

Overlapping directorates at the parent’s and subsidiary level are also frequent. For example parent’s senior managers, including the president of Royal Dutch Shell are on the board of Shell Transport and Trading Company Ltd. and hold chief executive posts at the subsidiary.\textsuperscript{1257} The director of the »upstream Americas« business is also president of Shell Oil Company.\textsuperscript{1258} Likewise, the managing director of the Nigerian subsidiary was simultaneously »country chairman of Nigeria for Royal Dutch/Shell«.\textsuperscript{1259} He was responsible for all of Royal Dutch/Shell's »activities in Nigeria and specifically controlled and directed the actions of [Shell Nigeria].«\textsuperscript{1260} At Shell Oil Company, at least in 1997, four of eleven board of directors members were employed at other corporations of the Royal Dutch/Shell group as well.\textsuperscript{1261} Their manager of Investor Relations was paid by and worked only for Royal Dutch/Shell\textsuperscript{1262} and served, according to the district court, as a »constant presence in New York to promote [Royal

\begin{footnotes}
\item 1262 US CA Second Circuit Wiwa et al. v Royal Dutch Petroleum et al. [2000] 226 F.3d 88, 96.
\end{footnotes}
Dutch/Shell’s] interests.«1263 On the other hand Shell Oil Company has its own employees benefits program.1264 In summary, the Royal Dutch Shell group exhibits close interrelationships through common management and other personnel links, which facilitate the exercise of strategic control.

e. Unified Appearance

Next, aspects of a unified appearance are also visible at the Royal Dutch Shell group. They operate the »Shell Centre« in London,1265 have a common internet presence1266 and the yellow-red shell as a common brand for the whole corporate group.1267 Additionally, Royal Dutch Shell provides an annual report for itself and its »subsidiaries«, meaning according to the report, those »over which the Company has control, either directly or indirectly«.1268

f. Reporting Obligations

Little information is available concerning reporting obligations in the Royal Dutch Shell group. However, this criterion only plays an auxiliary role in the concept. In its annual report, Royal Dutch Shell considers »[its] system of risk management and internal control over financial reporting [as] an integral part of the control framework.« In this framework, regular

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1266 http://www.shell.com/

3. Result

Consequently, the transnational corporate group Royal Dutch Shell, notably Royal Dutch Shell plc., Shell Petroleum N.V., Shell Transport and Trading Company Ltd., Shell International Finance B.V., Shell Petroleum Company, Ltd., Shell Petroleum Development Company of Nigeria, Ltd., Shell Petroleum Inc., and Shell Oil Company forms one economic entity. If the concept is employed in international criminal law, international criminal law can apply to this economic entity.
Summary

The discussion on the (international) regulation of economic organisations focusses on transnational corporate groups. The question of whether the ICC Statute should be extended to economic organisation, for example, is widely discussed. There, transnational corporate groups are taken as the prime example of economic organisations whose involvement in international crimes should be regulated by the ICC. Despite this focus, the discussion centres on criminal and international law aspects and neglects to define its object. At most, it suggests reverting to national law and extending the circle of addressees to those economic organisations that are juridical persons according to national law. This, however, would exclude transnational corporate groups. Corporate groups are, as has been detailed in the introduction, not seen as juridical persons in national law. Additionally, national law cannot sufficiently grasp the transnational element of these corporate groups. Thus, there is a regulatory gap in national law with regard to transnational corporate groups. Moreover, reverting back to national law for a definition of addressees risks the unequal application of international criminal law. As a result, there is a strong argument for a regulation of transnational corporate groups at international level. Such an international regulation requires a thorough concept of its object of regulation, particularly in the case of international criminal law. This thesis aims to provide such a concept. As has been detailed in the introduction, this concept needs to be independent from national law and, at the same time, reflect the factual structure of corporate groups beyond the legal fictions of national corporate law. Having these general premises in mind, the thesis first analyses different legal orders with regard to their concept of transnational corporate groups and then scrutinises these findings under the auspices of economic theory.

The thesis initially turns to international law as the prime source of international criminal law, with rather disappointing results. Similarly to the

1270  Introduction A. 2. c.
1271  Introduction A. 3.
1272  Introduction A. 3., 4. a.
1273  Introduction A. 4.
discussion in international criminal law, the overwhelming majority of those discussing the role of corporations in international law do not provide a concept of their object of discussion. International treaty law does not address corporations; in fact, corporations are hardly ever mentioned in international treaties. If corporations are regulated at all, it is done indirectly through obligations of the contracting states to ensure that «their» corporations comply with internationally agreed standards. Corporations are not (yet) subjects of international law. While international soft law documents do address corporations, they do not offer a strict concept of transnational corporate groups. Nonetheless, some relevant points can be taken from international law – particularly from international investment law. First of all, the analysis of international law shows the importance of having a thorough concept of transnational corporate groups. Considering transnational corporate groups as a single entity would enhance the effective enforcement and equal application of international law. Secondly, international investment law offers some points of reference for a concept of transnational corporate groups in international law. It is often concerned with transnational corporate groups and partially depicts a functional concept of them. While it does not consider transnational corporate groups a single actor, it acknowledges interrelations within the corporate group, especially in cases concerning Article 25 (2) b ISCID Convention. There, the concept of control within the transnational corporate group is used to establish the tribunal’s jurisdiction and the applicable BIT. As a result, the concept of control within the transnational corporate group is quite well developed in international investment law. In most cases, power of control is sufficient. This power is either conveyed by ownership or specific circumstances such as special voting rights, the right to influence the management, or the right to select members in high management positions.

EU competition law offers a far more advanced concept and provides a large number of Commission decisions, Court of the European Union judgments and academic oeuvres by detailing the concept of parental con-

1274 Chapter I A.
1275 Chapter I B.
1276 Chapter I D.
1277 Chapter I C.
1278 Chapter I C. 3.
1279 Chapter I C. 3. b.
control. It is well suited for deducting general criteria that can be used to define the economic actor that should be held responsible in international criminal law,\(^{1280}\) and is thus taken as the main legal order of reference. EU competition law offers an autonomous and functional definition of »undertakings« that can describe transnational corporate groups as a single economic entity.\(^{1281}\) A single economic entity »consist[s] of a unitary organisation of personal, tangible and intangible elements, which pursue a specific economic aim on a long-term basis […].«\(^{1282}\) Corporate groups are seen as a single economic entity if the parent has the power to control and actually exercises decisive influence over its subsidiaries. Parental ownership is, in this context, the most visible evidence of power to control.\(^{1283}\) In the case of sole ownership, the exercise of decisive influence will be presumed.\(^ {1284}\) In other cases, the specific structure of and relationships within the corporate group will be used to prove that decisive influence has been exercised.\(^ {1285}\) In this context, a set of criteria has been deducted from the EU competition case law that can be used to either establish the actual exercise of parental control or to rebut a presumption of control if it can be proved these criteria are (totally) lacking.\(^ {1286}\) Influencing the subsidiary’s day-to-day management is the most obvious exercise of decisive influence.\(^ {1287}\) However, it is not a necessary condition. Controlling the subsidiary’s essential decisions such as budget, business plan, appointment of senior managers or major investments is acknowledged in EU competition law as evidencing decisive influence.\(^ {1288}\) Similarly, an integrated business strategy can hint at a unitary organisation and thus a single economic entity.\(^ {1289}\) Personnel links are also often a sign of the exercise of decisive influence. The clearest cases are either the parent installing its own employees or choosing the subsidiary’s top management.\(^ {1290}\) A unified appearance towards third parties, most notably in the cartel and (ex-
tensive) reporting obligations, is frequently used to deduct the actual exer-
cise of parental control and thus to justify considering the corporate group
as a single economic entity in EU competition law.\textsuperscript{1291} This set of criteria
enables problems to be tackled, as detailed in Chapter II C., that are spe-
cific to transnational corporate groups at all relevant levels of attribution
and enforcement. Most importantly, if the transnational corporate group
exhibits the aforementioned features, it forms a single economic entity.
The different legal persons within the corporate group are not seen as in-
dependent actors, but as one single undertaking.\textsuperscript{1292} The concept can also
deal with jurisdiction\textsuperscript{1293} and succession\textsuperscript{1294} issues and help to calculate
the appropriate level of fine.\textsuperscript{1295} Lastly, at procedural level, the concept of
the single economic entity allows for effective investigations into the
business of the whole corporate group and successfully interacts with na-
tional legal orders and their focus on juridical persons.\textsuperscript{1296} As a further ad-
vantage, the approach provides a considerable amount of flexibility and al-
lows due account to be taken of different economic structures, while not
hindering effective enforcement in complex corporate structures. Paying
due regard to the economic realities and close connections between corpo-
rations within one corporate group also enhances effective enforcement in
international criminal law. Applying these functional criteria to establish
whether a corporate group can be considered as one entity will enable
those that committed and profited from the infringement to be punished.

UK law has been cited by the ECJ and many academics as the coun-
terapproach with regard to EU competition law’s functional view of cor-
porate groups. UK law takes a profoundly more restrictive view. It can be
seen as the other extreme on the scale in comparison to EU competition
law, adding another, complementary component to the picture of corporate
groups in different legal orders. UK law starts from the principle of sepa-
rate legal personalities coupled with the concept of limited liability.\textsuperscript{1297}
Deviations from these principles, even in corporate group cases, are rare.
These cases are often discussed under the heading of »piercing the corpo-

\textsuperscript{1291} Chapter II B. 2. e. and f.
\textsuperscript{1292} Chapter II C. 1.
\textsuperscript{1293} Chapter II C. 2.
\textsuperscript{1294} Chapter II C. 3.
\textsuperscript{1295} Chapter II C. 4.
\textsuperscript{1296} Chapter II C. 5.
\textsuperscript{1297} Chapter III B.

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In general, objectively unusual facts and subjectively fraudulent behaviour is necessary to justify disregarding the general principle of separated legal personalities. A corporate group will not be seen as a single economic entity if it exhibits a normal corporate group structure. The objective elements are rather general and have not been developed in much detail in the cases. The focus lies mostly on the subjective element. In the overwhelming majority of cases, such fraudulent elements are necessary to justify disregarding the principle of separate legal personalities. The case law is fragmented; there is no unified approach towards corporate groups. Cases come from different areas of law – from questions of jurisdiction and ownership to attribution of liability. Even within the same field of law the case law is divided. Moreover, the judgments often mix different aspects and patterns of argumentation. Notwithstanding these limitations, UK law also relies, albeit not exclusively, on the criterion of parental control. Control, in line with the generally more restrictive approach, is seen more narrowly as complete control or control of the subsidiary’s day-to-day business. Moreover, UK courts use lines of reasoning that mirror those of EU competition law, such as overlapping senior management posts, a unified appearance and the subsidiary’s financial dependency on the parent.

As the other major common law jurisdiction, US law provides a similar picture. There, the ATS offers de lege lata the possibility to legally assess corporate involvement in international criminal law. It allows foreign nationals to claim damages for violations of international law in US courts. The statute is a mixture of international and national law and fits this thesis particularly well. Aside from its content – most cases concern international criminal law – the circle of addressees also justifies analysing this branch of US law, as many cases have dealt with transnational corporate groups. Additionally, and similarly to UK law, different aspects of transnational corporate groups become relevant at different points of ATS cases. Likewise, courts use general US law principles to solve the

1298 Chapter III C.
1299 Chapter III C. 2. and 4.
1300 Chapter III C. 1. and 2.
1301 Chapter III D.
1302 Chapter IV A. 1.
1303 Chapter IV A. 2. and 3.
issues. In ATS cases, questions of jurisdiction play an important role. There, as well as with regard to material questions, the answers found are very similar to those found in UK law. US courts also rely on the concepts of separate legal personalities and limited liability in these cases, only deviating under specific circumstances – namely objectively unusual tight control within the corporate group and, normally, an additional abusive or fraudulent element. In many cases, the focus of attention is on the abusive element. With regard to the objective factor, some courts consider a right to control as sufficient while others emphasise that tight parental control of the day-to-day management is necessary. Elements taken into consideration resemble those of EU competition law, most notably setting the subsidiary’s business strategy, subsidiary’s dependency and personnel links between parent and subsidiary in agency cases. In the alter ego exception, a unity of interest can be seen as a rather extensive form of an integrated business strategy. Unfortunately, as most cases are settled and few decided by judgment, many points are still disputed and have found varying answers in the different circuits. Lastly, US antitrust law depicts similar argumentation patterns in dealing with corporate groups compared to EU competition law. In essence, they both consider the same aspects decisive. Even though US antitrust law nominally only uses the single economic entity doctrine for intra-group agreement cases, the alter ego concept uses a similar set of criteria.

Next, the analysis of the different legal orders was synthesised in order to define a transnational corporate group as a single economic entity in international criminal law. Most notably, all legal orders rely heavily on control. Generally speaking, the corporate group is seen as an economic entity if the parent controls the corporate group to a sufficient degree. Despite differences in detail, there is general consensus with regard to the set of criteria used to identify parental control. The starting point is the ECJ’s definition of a single economic entity, mentioned above, that requires both (1) the parent’s power to control the subsidiary and (2) the actual exercise of parental control. The parent’s power to control can be easily proven in the case of majority ownership with corresponding voting rights. In the

1304 Chapter IV A. 3. a.
1305 Chapter IV A. 3.
1306 Chapter IV A. 3. c.
1307 Chapter IV A. 5.
case of lack of formal majority ownership, specific circumstances such as special voting rights serve as proof of power to control. The second requirement, the actual exercise of parental control, can either take the form of day-to-day control over the subsidiary or strategic control. Not all legal orders accept strategic control as a decisive form of control. It concerns the parent’s influence over essential decisions at subsidiary level. Essential decisions are seen as those that concern the budget, business plan, appointment of senior managers or major investments. Here, the specific structure of and relationships within the corporate group play an important role. A set of criteria has been established that provides indicia for the actual exercise of parental control. As has been detailed in Chapter V, this set of criteria is comprised of an integrated business strategy, personnel links, a unified appearance and reporting obligations. These aspects – especially an integrated business strategy that requires the different entities in the corporate group to work together to achieve the group-wide corporate goals – leads to the subsidiary being deemed dependent on the parent and leads to the parent being able to enforce a group-wide strategy. Such a strategy is closely linked to presenting a unified appearance to third parties. With regard to personnel links, the parent exercises its decisive influence most obviously by installing its own employees in the subsidiary’s top positions. Reporting obligations can be seen as a preliminary but necessary requirement for the parent to exercise strategic control rights. In the case of a wholly owned subsidiary, the possibility of influence is evident and its actual exercise can be legitimately presumed. As a next step, the parent can rebut this presumption. The parent needs to be able to show – backed up with concrete and convincing evidence – that it would not form a single economic entity with the acting subsidiary had it not been for the presumption. For this, it will use the same indicia just described for cases involving subsidiaries that are not wholly owned to prove that it did not exercise its decisive influence over the subsidiary.

This set of criteria has lastly been scrutinised under the auspices of economic and management theory, including empirical studies. While there is no single or unified theory of the firm concerning corporate groups or corporations, the criteria developed so far reverberate in economics. In detail, transaction cost economics, business strategy, property rights, nexus of contract and knowledge-based theories of the firm are analysed. Despite differences in their respective theoretical frameworks, all authors revert to
some element of control in describing the firm. 1308 This confirms the approach taken in this thesis, which relies on the parent’s power to control and exercise of control to define the boundaries of the economic entity. Secondly, the findings of used empirical studies confirm, in most aspects, the set of criteria put together in Chapter V. Economic and management theory confirms that majority ownership is an important way for the parent to ensure that it has the possibility to control its subsidiaries, even in complex pyramidal corporate group structures. 1309 It also provides plenty of evidence that the exercise of strategic control can be seen as an alternative rather than a weaker form of control. Influencing the subsidiary’s essential decisions is, in fact, an adapted form of parental control for transnational corporate groups. In complex corporate group structures, strategic control will be the only economically sound — or at least the most efficient — way to do business. 1310 Furthermore, especially management literature provides a rich set of examples of different organisational structures used to implement strategic control. In this context, management theory argues that transnational corporate groups in particular will develop a mixture of decentralised and centralised tasks and control structures. Decentralised elements are seen as necessary components for an efficient and successful business strategy. 1311 Nonetheless, these elements are integrated into the group-wide strategy and combined, in different ways according to the specific situation of the corporate group, with centralised elements. Thus, economic and management theory shows that these elements have to be seen as part of the parent’s strategy and not necessarily as evidence of the subsidiary’s autonomy. Such an integrated business strategy will often involve an internal division of tasks that, according to economic literature, will lead instead to close parental control and the subsidiary’s dependency on the parent and the corporate group. 1312 Most notably the knowledge-based theory of the firm strengthens the credibility of the “personnel links” criterion in establishing an economic entity. It argues that personnel links within corporate groups are essential to transfer technology and tacit knowledge. Additionally, nexus of contract theorists argue that the firm’s ability to monitor joint team production constitutes its main advantage.
Management theory stresses that personnel links have been singled out in transnational corporate groups as a means for the parent to exercise control and ensure that strategies are incorporated group-wide. Next, economic and management theory offers additional justification and details for the factor «unified appearance», which it ties closely together with a common corporate culture. Internal language codes and interwoven relationships would, according to economic theorists, facilitate intra-firm communication and allow for knowledge transfer and team production. Finally, economic and management theory has shed further light on the role of reporting obligations in the context of transnational corporate groups. In fact, such intra-group information sharing systems enable parental control and are a necessary element in conducting business as a single economic entity. In sum, the survey of economic and management theory emphasises the need for a concept that only considers corporate groups as an economic entity if the corporate group actually works closely together – i.e. if the parent actually exercises its influence. Economic and management theory thus gives further credibility to the second prong of the test and refines the boundaries of the concept. The different measures that transnational corporate groups can take to ensure that their group-wide goals are met has shown that the concept needs to take into account the actual relationship and specific organisational structure of the corporate group at hand. In summary, the analysis has confirmed that the set of criteria is economically sound. These criteria also define the boundaries of the concept. The concept of the economic entity is economically sound as long as it mirrors the economic advantages of organising the transnational corporate group as an integrated business and exercising strategic control to further common goals. Lastly, a closer look at the discussion in law and economics reveals that a functional definition of transnational corporate groups – one that disregards separate legal personalities – does not negate the benefits of limited liability. Rather, it meets the specific risks that corporate groups exhibit and suits the international criminal law context.
The thesis proposes a concept of business organisations for international criminal law. There, an on-going discussion focuses on criminal law aspects of criminalising corporate behaviour without having a concept of their prospective new addressee of international criminal law responsibilities.

A transnational corporate group can be seen as an economic entity if it consists of a unitary organisation of personal, tangible and intangible elements, which pursue a specific economic aim on a long-term basis. This will be the case if (1) the parent has the power to control its subsidiaries and (2) it also exercised this power. The parent has the power to control if it either owns a majority of the shareholdings in the subsidiary with the corresponding voting rights or if it holds specific voting or similar rights that allow the parent to at least veto the subsidiary’s essential decisions. The parent actually exercises its control if it either influences the subsidiary’s day-to-day business or if it exercises strategic control over the essential decisions, such as those that concern the budget, business plan, appointment of senior managers or major investments. An integrated business strategy, personnel links (especially overlapping directorates), a unified corporate group appearance including a common corporate culture and, to a lesser extent, reporting obligations all indicate the actual exercise of parental control.

The developed concept allows international criminal law to perceive transnational corporate groups as an economic entity, if the criteria are fulfilled. This can be illustrated by taking up the Royal Dutch/Shell case explained in the introduction. There, the parent Royal Dutch Shell has the power to control its either directly or indirectly wholly owned subsidiaries, including Shell Petroleum Development Company of Nigeria, Ltd. The sole ownership also presumes the actual exercise of control, the second criterion of the concept. Additionally, as has been demonstrated in Chapter VII, the parent also exercised decisive influence over the corporate group. This parental control notably concerns the strategic control of its subsidiaries’ essential business decisions. The corporate group is organised along business sectors that comprise different corporations and countries, exhibiting a group wide integrated business strategy. Furthermore, various personnel links between the subsidiaries and the parent and sub-
sidiary level exist. Consequently, the transnational corporate group Royal Dutch Shell forms one economic entity. If the concept was to be employed in international criminal law, international criminal law can apply to this economic entity.

This thesis proposes a definition of transnational corporate groups for international criminal law that is detached from national law. It offers the possibility to apply international criminal law to business entities equally throughout the ICC Statute’s scope of application. Transnational corporate groups, if they act as an economic entity, cannot escape the ICC Statute’s application by ‘outsourcing’ risky activities to a subsidiary that is incorporated in a non-member state. Similarly to European competition law, the territorial scope of application of international criminal law will not depend on the corporation’s nationality but extend to those economic entities that at least partly acted in one of the member states. Furthermore, enforcement will be more effective as the imposed fine can be collected, as in EU competition law, from any of the national legal entities that form the economic entity. Thus the failure of one member state to cooperate with the ICC or the lack of funding of one national legal entity will not lead to impunity.

The transnational corporate group is seen as an entity despite the fact that it consists of different national legal personalities. Thus responsibility will, if the set of criteria is fulfilled, be attached to the transnational corporate group as a whole and hence to different legal persons simultaneously. The addressee in international criminal law would be the transnational corporate group as an entity and not the different national legal personalities within the corporate group. A certain parallel to national corporate law is visible here, where the term »corporation« brings together, under certain conditions, intangible and tangible assets and economic activity as one entity. As much as the corporation consists of different parts that are each addressed by separate parts of law – such as employees, factories, or goods and services – the proposed definition groups together all economic activity pursued by different legal persons if certain conditions are met. Additionally, national tort law perceives acts of its leading employees, at least, as acts of the corporation. Thus even in national law, legal conse-

1317 Chapter II C. 2.
1318 Chapter II C. 4.
quences are sometimes attributed to the entity pursuing the economic activity and sometimes to the owner of the activity, the legal person.

If applied thoroughly, the proposed concept allows international criminal law to attach responsibility to the entity that has acted and controlled the incriminated act in question. Instead of creating a new duty of care for the parent corporation or to try to fit transnational corporate groups in the concept of civilian superiors (Article 28 ICC Statute), the thesis proposes to frame and tackle the problem at its starting point: the question of who should be the addressee of international criminal law obligations. At this early stage, it can already be determined which actions can be attributed to the corporate group, rather than addressing this as part of the process of defining the modes of perpetration. The complex structure, decision and control mechanisms can be adequately reproduced. The set of criteria used in the concept stresses the actual, de facto control within a corporate group as the decisive element. It largely takes into account the economic reality of transnational corporate groups and structures the examination in practice. It only describes those transnational corporate groups as one entity and thus as a potential addressee of international criminal law that in reality act as one entity and are commonly controlled. In turn, actions form an integral part of the individual responsibility as a core concept of (international) criminal law. Moreover, the core element of the proposed concept is actual control. This criterion can be also found in Article 25 (3) (a) third alternative and in the international criminal law concept of organisational dominance. With its emphasis on the actual exercise of control within the corporate group, the proposed concept is tailored to suit the necessities of international criminal law. Substantial and effective control mechanisms are decisive and a prerequisite.

1319 Introduction A. 2. c. For a critical analysis with regard to business leaders, see Schmidt, Crimes of Business in International Law. Concepts of individual and corporate responsibility for the Rome Statute of the International Criminal Court p. 326 et seq.


site for the attribution of responsibility and not mere ownership or nationality. This mirrors the concept of individual criminal responsibility. The boundaries of the addressee are taken from the analysis of the different legal orders as synthesised in Chapter V. Furthermore, these criteria have been scrutinised through the lens of economic theory, including empirical studies, in Chapter VI. The set of criteria proposed are rooted in different legal orders and are economically sound. In that way, the aim of prevention is much better served. A realistic description that pays due regards to the actual chains of control makes it easier for the transnational corporate group to predict potential criminal liability. This, in turn, helps to convince transnational corporate groups to change their behaviour in order to prevent committing crimes. It also serves legal certainty. As a result, concerns regarding fundamental criminal law principles and safeguards can be met.

The proposed concept can serve as a point of departure for further discussion and research in this important field of international criminal law and businesses.\(^\text{1322}\) It adds a company law’s perspective to the discussion that has so far been dominated by criminal and international lawyers. The main part of the thesis provides an in-depth analysis of the treatment of transnational corporate groups in different legal orders. The perspective taken was intentionally a comparative law perspective with a focus on legal orders that are part of supranational/international law or at least concern cases that have an international law connection as notably the Alien Tort Statute\(^\text{1323}\) or the English *Adams et al. v Cape Industries et al.*\(^\text{1324}\) case. This comparative law perspective is especially fruitful for international criminal law. Instead of using one national law concept of corporate groups and transplanting it to international criminal law, the thesis has compiled transnational, overarching structural elements found in all legal orders analysed. This enhances the credibility of the concept. The link to well-known and tested concepts in different legal orders may facilitate the political feasibility of any reform of the ICC Statute. Furthermore, it focuses on the law in action concerned with the attribution of responsibility for corporate action and makes recourse to a vast amount of judgements.

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\(^{1322}\) For the concept of »Wirtschaftsvölkerstrafrecht«, see *F. Jeßberger*, Einführung, in: Jeßberger et al (eds.), Wirtschaftsvölkerstrafrecht, 2015, p. 13 et seq.

\(^{1323}\) Chapter IV A.

\(^{1324}\) CA *Adams et al. v Cape Industries et al.* [1990] Ch. 503. See Chapter III C.
The concept is thus workable and its criteria are widely tested and used in practice. Additionally, the description of how the similar EU competition law conception of transnational corporate groups in practice works (see Chapter II C.) and the case study add further credibility. It thus provides the international criminal discussion with a detailed analysis taking into account the corporate law specificities and boundaries. Additionally, the analysis can be used to guide the necessary and important discussion about whose acts shall be attributed to the potential addressee. The thesis has not focused on this question but treated a preliminary point, which, of course, is closely intertwined with the question of attribution of acts within the corporate group. Here, the cases analysed in the main part as well as the economic theory’s point of view may help to understand the complex structures and rationalities of transnational corporate groups. This, in turn, is a prerequisite to decide whose and which acts shall constitute international criminal behaviour in the business context. Thereby the set of criteria, as explained above, can be used as an illustration and point of departure to define the scope of international criminal law for corporate behaviour. Importantly, the set of criteria describes different ways of exercising actual control and power within an economic organisation.

In summary, the thesis provides a new point of view and input from the corporate law perspective. It also provides arguments for an independent concept and a set of criteria both legally and from an economic theory point of view. The concept might serve as a starting point for further discussion that will refine, weight and further adapt the set of criteria to the needs of international criminal law. At least, the thesis might shed some light to the black box ‘transnational corporate group.'
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\textsuperscript{1325} The European Court of Justice is abbreviated as ECJ in the footnotes before the establishment of the (then) Tribunal and afterwards marked in the case number as »C«. All cases referred to are judgments.
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