

GROUPS OF COMPANIES AND ENVIRONMENTAL LIABILITY CONFRONTING

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„History warns us ... that it is the customary fate of new truths to begin as heresies and to end as superstitions.”²

Abstract

It's been a long time since markets transcended national borders, corporate law dealing at the beginning of this century with rather complex corporate structures that gradually replace its ordinary subjects, the companies. At the same time, the bases of civil liability for torts were put in a time when damage was only exceptional and had comprehensible dimensions, circumstances that are no longer valid today when we talk of the environmental damage. The ability of the victims of environmental damage, facing the precarious financial condition of a subsidiary, to sue the parent company is theoretically hindered by the independence of the affiliated companies forming the group, as each company retains its legal personality, as well as by the absence of a group regulation in Romanian law. In this context, the aim of our paper is that of seeking solutions that would allow a piercing of the parent company's corporate veil to hold it accountable, considering reality.

Keywords: group of companies, liability, damage caused to the environment, piercing of the corporate veil.

JEL Classification: K22, K32

1. Foreword

Environmental damage³, whether it affects or not our personal interests, is an important challenge to the traditional concepts of tort and corporate law.

On the one hand, the premises of tort liability were laid down in times when such damage was rather unusual and had comprehensible dimensions⁴. In case of the environmental harm, liability should be adapted to the specificity of the damage, beginning with its catastrophic potential, the long-term effects, its dimension, most often collective, and sometimes its lack of impact on the people⁵. On the other hand, corporate law increasingly deals at the beginning of the 21st century with complex corporate structures that gradually replace its ordinary subjects, the companies and, simultaneously, its usual problems and solutions.

Starting from these two assertions, a question raised in practice that we shall try to answer in this paper is - whether and under what conditions, in case of suffering damage arising from

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² T. H. Huxley, *The Coming of Age of the Origin of Species (1880)*, in *Collected Essays (1893)*, Vol. 2, 229.

³ According to most environmental law scholars, the very term "environment" is imprecise. Its meanings oscillate a lot – according to a narrow approach, it refers to our neighbourhood, and, on the other hand, pursuant to a broader approach, it is synonymous with the biosphere. Our law understands the environment as the set of conditions and natural elements of the Earth: air, water, soil, subsoil, the characteristics of the landscape, all layers of the atmosphere, all organic and inorganic materials as well as living beings, interacting natural systems, including the elements listed above, as well as some material and spiritual values, the quality of life and the conditions that can influence human health and welfare (Art. 1 (2) of Government Emergency Ordinance no. 195/2005). International law stresses that the environment is not an abstraction but represents the space where human beings live and which determines their health and quality of life, including those of future generations (International Court of Justice, 25 September 1997 Gabcikovo - Nagymaros project, [http:// www.icj-cij.org](http://www.icj-cij.org)). And, last but not least, under the European law, the environment is composed of "factors" such as people, fauna and flora, soil, water, air, climate and landscape, the interdependence of those factors, property and cultural heritage, site, design and the size of a project (ECJ judgment of May 2, 1996, *Commission v. Belgium*, comm. P. Léger, section 56).

⁴ See, for instance, M. Prieur, *Droit de l'environnement*, 6th edition, Dalloz, Paris, 2011; M. Duțu, *Dreptul mediului*, C. H. Beck Publishing House, Bucharest, 2010

⁵ Environmental law goes far beyond traditional frameworks, requiring the recognition of a new paradigm. The urgency of preserving air, water, soil, biological diversity is the same everywhere around the world, and environmental issues, such as, for example, acid rain, ozone depletion and desertification know no borders.

environmental harm, the victims can turn against the parent company, when faced with the precarious financial condition of the subsidiary?

In search for answers to this question, the paper will be organized as follows: first, a summary of the relevant facts and legislation, then a short look on the groups of companies, after which the interpretation of the relevant laws concerning liability of the parent companies for the environmental damage caused by the subsidiaries and, finally, the concluding section.

2. What is the environmental damage?

Widespread pollution accelerated rapidly in the 1800s, with the start of the Industrial Revolution.

Only in the 1970s, however, people began to become aware of what disasters can be caused by human activities, and this, due to the occurrence of the major ecological disasters that marked the 20th century: from the oil spills - in March 1967, the huge tanker Torrey Canyon hit rocks off the south-west coast of England, letting over 100,000 tons of crude oil into the sea; in March 1978, the super tanker Amoco Cadiz broke apart, spewing most of its load of 220,000 tons of crude oil into the seas of Brittany. The wreck resulted in one of the largest oil spills in history, damaging approximately 180 miles of coastline in one of the most important tourist and fishing regions in France; in March 1989, the super tanker Exxon Valdez ran aground on in Prince William Sound, spilling more than 11 million gallons of crude oil, which severely affected marine ecosystems on an area of 1500 km²; in December 1999 the Maltese tanker Erika broke in two in the Bay of Biscay 60 miles from the coast of Brittany, and over 400 kilometres of shoreline were soiled with its cargo; - to the production of nuclear energy, which also caused some of the largest environmental disasters: starting with the warning of March 28, 1979 when the nuclear reactor at Three Mile Island plant near Harrisburg, U.S.A., partially melted, requiring the evacuation of thousands of families, and up to April 26, 1986, when an explosion occurred at reactor 4 of the Chernobyl Nuclear Power Plant in Ukraine, following which a quantity of radioactive material that exceeds that caused by the Hiroshima and Nagasaki was thrown into the atmosphere. Statistics show that more than 60,000 people died due to radiation and more than two million suffered injuries; - and last but not least, considering the chemical industry, which also massively contributed to such disasters: in 1959 the residents of Minamata, Japan, were poisoned by waste thrown into the water, which contaminated it with significant amounts of mercury and heavy metals. Thousands of residents were affected and died; on July 10, 1976, an explosion at a pesticide factory in northern Italy spread a cloud of dioxin that sat on the city Seveso; at midnight on December 2, 1984, an accident caused by human error occurred at a pesticide factory in Bhopal, India, resulted in the release 45 tons of a compound of cyanide gas in the air. Thousands of people died in a few hours, before anyone could understand what was happening, and a lot others also died in the coming months.

Modern environmental law appeared, accordingly, in the 20th century at a moment when “(...) the economic development of the world reached unknown dimensions”⁶ (from the second half of the century, new risks have been occurring, especially due to the development of modern technologies - genetic engineering, nuclear technology, mobile telephony, risks which were less and less tolerated by the society, which decided to react).

In Romania, environmental protection is currently guaranteed by the Government Emergency Ordinance no. 195/2005. At the same time, due to Romania's membership of the European Union, the provisions of Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage were transposed into our legislation, by the adoption of the Government Emergency Ordinance no. 68/2007, with the same title.

⁶ A. Kiss, J.-P. Beurier, *Droit international de l'environnement*, 3rd edition, Pedone, Paris, 2004, p. 27.

Referring to the two enactments and to the scholars' commentaries on them⁷, we can retain two meanings of the "environmental damage".

Lato sensu, it refers to damage caused to the natural factors (Art. 2 (1) point 50 of the Government Emergency Ordinance no. 195/2005 defines damage as "the cost effect of damage on human health, property or the environment caused by pollutants, harmful activities or disasters), whereas, *stricto sensu*, pure environmental damage (Art. 2 (1) point 22 of Government Emergency Ordinance no. 195/2005) consists in "damaging the environment - altering the physical-chemical and structural features of the natural and human components of the environment, reducing diversity or biological productivity of natural and human ecosystems, damaging the natural environment with effects on life quality, mainly caused by water, soil and atmosphere pollution, overexploitation of resources, their poor management and use, as well as inappropriate land management". This latter meaning is also assigned to the environmental damage by Art. 2 point 12 and 13 of Government Emergency Ordinance no. 68/2007, according to which it is "a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly", and means the damage suffered by the species and natural habitats, water damage and damage to the soil, under the conditions laid down by the enactment.

Both types of damage will have to be repaired, according to the applicable legal provisions: the environmental damage *stricto sensu*, based on Art. 95 of the Government Emergency Ordinances no. 195/2005 and no. 68/2007, whereas the indirect damage, caused to an individual or corporation by an environmental harm, pursuant to the provisions of the general law (given that, according to Art. 3 (4) of the Emergency Ordinance no. 68/2007, "this Government Emergency Ordinance shall not govern the right of individuals or corporations to compensation arising from an environmental damage or the imminent threat of such damage. In such cases the provisions of the general law shall become applicable")⁸.

3. Who can demand prevention or, where appropriate, reparation of the environmental damage?

According to Art. 35 of the Romanian Constitution, "[t]he state recognizes the right of every person to a healthy and ecologically balanced environment. The state provides the legal framework for the exercise of this right. Natural and legal persons have the duty to protect and improve the environment". In addition to this, Art. 5 of Government Emergency Ordinance no. 195/2005 provides that "the state guarantees to everyone the right to a healthy and ecologically balanced environment, ensuring to that end:

- access to environmental information, while observing the confidentiality imposed by the prevailing law;
- the right of association in environmental organizations;
- the right to be consulted in making decisions regarding the development of environmental policy and legislation, issue of regulatory acts in the field, developing plans and programs;
- the right of appeal, directly or through environmental organizations, before the administrative authorities and / or the courts, as appropriate, in case of an environmental issue, whether a damage occurred or not;
- the right to compensation for the suffered damage".

Art. 20 (6) of Government Emergency Ordinance no. 195/2005 provides that "non-governmental organizations promoting environmental protection have the right to legal action in

⁷ L. Pop, I. F. Popa, S. I. Vidu, *Tratat elementar de drept civil, Obligațiile*, Universul Juridic Publishing House, Bucharest, 2012, pp. 538-546.

⁸ For developments of the concept of environmental harm, see also M. Duțu, *Prevenirea și repararea pagubelor de mediu potrivit Ordonanței de Urgență a Guvernului nr. 68/2007*, in "Law Review" journal no. 11/2007; D. Anghel, *Răspunderea juridică privitoare la protecția mediului : privire specială asupra răspunderii civile*, Universul Juridic Publishing House, Bucharest, 2010.

environmental issues, having legal standing in proceedings whose subject matter is the protection of the environment”.

Then articles 20-25 of Government Emergency Ordinance no. 68/2007 further regulate the right of every natural or legal person who is affected or likely to be affected by an environmental damage or who feels that one of his/her rights or legitimate interests was disregarded to submit a application to the competent public authorities, which are required to resolve the complaint or referral according to the settled administrative proceedings. According to Art. 25 (1) of Government Emergency Ordinance no. 68/2007, “the persons referred to in Art. 20 para. (1) may submit the case to the competent administrative court, to challenge, in terms of substantive and procedural law, the acts, decisions or omissions of the competent authorities provided for by this emergency ordinance. (2) The application shall be solved according to the provisions of Law no. 554/2004, as amended”.

Everyone is, accordingly, entitled to submit applications and complaints before the competent administrative authorities, asking for action to be taken in order to assure the prevention or, if necessary, the reparation of an environmental harm, whether they suffered an injury or not. If dissatisfied with the decision of such authority, one is entitled to bring action before the competent administrative courts. This right also belongs to the NGOs that have the mission of protecting the environment.

4. Who is responsible for the environmental damage caused by members of a group of companies?

According to Art. 94 (1) of Government Emergency Ordinance no. 195/2005, “every individual and every company has the duty to protect the environment, and for that purpose: (i) bear the costs necessary to repair the damage and remove the consequences of the damage, restoring the environment to the original condition, according to the “polluter pays” principle”. At the same time, Art. 1 of Government Emergency Ordinance no. 86/2007 states that “this enactment establishes the regulatory framework of environmental liability based on the “polluter pays” principle, for the purpose of preventing and repairing the environmental damage”.

Every individual and every company may, accordingly, be a polluter, but in order to answer our question, we shall focus our attention on the legal regime of the polluter, operator of occupational activities.

According to Art. 2 point 10 of Government Emergency Ordinance no 86/2007, operator means “any natural or legal, private or public person who operates or controls the occupational activity or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorisation for such an activity or the person registering or notifying such an activity”. Article 2 point 1 of Government Emergency Ordinance no. 68/2007 also defines the occupational activity as “any activity carried out in the course of an economic activity, a business or an undertaking, irrespectively of its private or public, profit or non-profit character”.

Article 26 (1) of Government Emergency Ordinance no. 68/2007 provides that “the operator shall bear all the costs of the preventive and remedial actions, including those costs incurred by the county agency for environmental protection”. According to Art. 29 (2) of the same enactment, “in order to ensure recovery of the incurred costs, the county agency for environmental protection holds a mortgage interest and an attachment in the operator's real property, according to the legal provisions in force”.

And, pursuant to Art. 31 of Government Emergency Ordinance no. 68/2007, “(1) If the environmental damage or the imminent threat of such damage was caused by several operators, they are bound to bear jointly the costs of the preventive or remedial measures. (2) The effects of passive solidarity, including the allocation of costs between the debtors, are to observe the legal provisions in force, taking into account the provisions regarding the division of liability between the producer and the user of a product. (3) If the operator that caused the environmental damage or an imminent

threat of such damage is part of a consortium or a multinational company, it shall be held jointly and severally responsible with the respective consortium or company”.

Article 31 (3) of Government Emergency Ordinance no. 68/2007 lays down as such an express case of joint liability for the environmental damage or the imminent threat of such damage caused by the operator which is part of a consortium or a multinational company. It is obvious that the text is having in view groups of companies, namely, the liability of parent companies for the harmful acts of their subsidiaries, in the context in which the subsidiaries are a commonly used means of limiting liability.

Such a provision is not to be found in Directive 2004/35/EC that Ordinance no. 68/2007 actually transposes into our legislation. As we can see, Art. 31 (3) of Government Emergency Ordinance no. 68/2007 only regulates the situation in which “the operator that caused the environmental damage or an imminent threat of such damage is part of a consortium⁹ or a multinational company”, omitting to refer to the cases in which the group is only national.

Although this is a derogatory provision and exceptions must be strictly construed, we consider that, as it was shown in legal literature¹⁰, the text was intended to cover generically all the companies that are part of a group, whether or not a transnational group, there being no reason why we should distinguish between the treatments applied based on the nationality of the parent company. Otherwise, the principle of equal treatment of investors enshrined by the European legislation¹¹ would be undermined.

This provision is particularly important as in our law the group of companies does not enjoy a special legal status, each affiliated company having as such, theoretically, legal personality and, consequently, the autonomy and limited liability arising from it.

In order to clarify things a bit, and to emphasize the particular practical implications of Art. 31 (3) of Government Emergency Ordinance no. 68/2007, we shall next try to make a short explanatory exploration on the concept of group of companies.

The group of companies is an entity made up of legally independent corporations that are related to each other through patrimonial, contractual or personal links and that, usually, come under a common centre of control¹². Any treatise on corporate law will invariably highlight the core of this definition, namely that groups of companies are only economic and not legal entities, as they lack legal personality.

Still, corporate groups have imposed themselves as an imperative fact to be dealt by the law, especially since the 1970s, and starting with the 2008 financial crisis we have been witnessing a new heated public debate concerning the limits of their juridical consequences.

Two elements need to be emphasized for us to get the general picture of the relationship of groups of companies with the law: on the one hand, law’s refusal to recognize groups of companies as legal persons, and, on the other, law’s recognition of certain legal effects of the relationships established between the parent companies and the subsidiaries.

We shall focus a little on the second aspect, showing that, despite the generalized refusal to recognize the legal personality of the groups of companies, nobody can deny the fact that they are playing the leading part today in global economy, international commercial transactions being mostly carried out among companies (*business to business*) and not among states (*state to state*)¹³.

⁹ The consortium is an unnamed contract in Romanian law (M. C. Popa, *Grupurile de societăți*, CH Beck Publishing House, Bucharest, 2011, p. 428)

¹⁰ M. C. Popa, *op. cit.*, p. 429.

¹¹ The general principle of equal treatment, as a general principle of Community law, requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified (see, *inter alia*, Case 106/83 *Sermide* [1984] ECR 4209, paragraph 28; Joined Cases C-133/93, C-300/93 and C-362/93 *Crispoltoni and Others* [1994] ECR I-4863, paragraphs 50 and 51; and Case C-313/04 *Franz Egenberger* [2006] ECR I-6331, paragraph 33).

¹² If the definitions of the groups of companies may vary terminologically, they do all essentially underline the same three elements: the existence of legally autonomous corporations, that are related to each other (usually by way of participations in the share capital), and the existence of a common centre of control.

¹³ N. Roubini, St. Mihm, *Economia crizelor*, Publica Publishing House, Bucharest, 2010.

Of the world's 100 largest economic entities in 2012, 40 (40%) are corporations. Royal Dutch Shell, the largest corporate economic entity in the world, recorded 2012 revenues that exceeded the GDPs of 171 countries making it the 26th largest economic entity in the world. It ranks ahead of Argentina and Taiwan, despite employing only 90,000 people¹⁴. In Europe, especially, groups are fundamental, as the opening of subsidiaries is the very means by which companies exercise the freedom of establishment provided by the EU Treaty, and it also goes without saying that groups of companies are the main instrument of concentrating business in order to face competition¹⁵.

But despite the obvious advantages they present, groups of companies give rise to many problems, as the "pretended" independence of the member companies also allows, usually parent companies, escape their different responsibilities and, eventually, liability.

Scholars¹⁶ show that, especially starting from the 1970s two types of cases have been brought before the courts of law: that of the employees and of the creditors of an affiliated company, who found themselves totally helpless before a subsidiary left without funds; and that of the victims of environmental harms, whose consequences cannot naturally be covered by the subsidiaries alone.

This is how the idea that one can abuse the legal personality of a company by hiding behind the veil of incorporation and by denying facts emerged. And with this, a certain degree of legal recognition of the group, aimed at qualifying the actual links established between the parent company and the subsidiaries.

In what concerns the legal definition of corporate groups, we should retain from the outset that there has not been yet established a unique set of criteria. Legal texts, when they treat links existing between the parent company and its subsidiaries do so very disparately: according to the matter involved, law will either refer to a company's holding of a substantial fraction of the capital of another; its holding of a majority of the voting rights in it; or to its actual exercise of control over the decisions made at the general meetings of another company. In a word, law lets the jurist hesitate in establishing when a company is to be treated as controlling another company¹⁷.

This being said, around eight fields can be indicated as representing important steps in the legal recognition of the groups of companies in Romania. The most developed is antitrust legislation (Romanian Competition Law no. 21/1996¹⁸). Courts admit that parent companies can be jointly and severally liable for antitrust acts committed by their subsidiaries, using to that respect a criterion borrowed from the European law¹⁹.

The concept of parental liability in EU antitrust law was first established in *Imperial Chemical Industries v. Commission*²⁰, where the European Court of Justice held that the separate legal personality of the subsidiary does not exclude the possibility of imputing its conduct to the parent company. The ECJ held further that a company can exercise decisive influence on the conduct of a wholly owned subsidiary and, if it does, it is jointly and severally liable for any antitrust infringement of the subsidiary.

In *Akzo Nobel v. Commission*²¹, the European Court of Justice further clarified that in cases of a 100 per cent subsidiary, first, the parent company can exercise decisive influence over the conduct of the subsidiary and, second, there is a rebuttable presumption that the parent company does in fact exercise decisive influence over the conduct of its subsidiary. The ECJ said that "it is

¹⁴ *Corporate Clout 2013: Time for Responsible Capitalism*, available at http://www.globaltrends.com/reports/?doc_id=500539&task=view_details.

¹⁵ Forum europaeum sur le droit des groupes de sociétés, *Un droit des groupes de sociétés pour l'Europe*, Revue des sociétés 1999, p. 43

¹⁶ J. Rochfeld, *Les grandes notions du droit privé*, Presses Universitaires de France, Paris, 2011, p. 105. See also M. Cozian, A. Viandier, F. Deboissy, *Droit de sociétés*, 26th edition, LexisNexis, Paris, 2013, pp. 779 *et seq.*

¹⁷ *Ibidem*

¹⁸ Published in the Official Journal no. 742/16.08.2005.

¹⁹ See also J. Rochfeld, *op. cit.*, p. 105.

²⁰ ECJ judgment of July 14, 1972 in Case C-48/69

²¹ ECJ judgment of September 10, 2009 in Case C-97/08.

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.”

Accounting statute no. 82/1991²² also provides that, besides their annual financial statements, parent companies have to prepare and to produce consolidated financial statements aimed at offering a true image of the financial position and performance of the group as well as of other relevant data concerning its activity.

The group of companies is also defined in Romania by the legislation on capital market²³, insurance law²⁴, banking legislation²⁵, labour²⁶, bankruptcy laws²⁷, and tax legislation²⁸ but we will refer here only to those laws relevant to withholding liability company acts parent subsidiaries affecting the environment.

What is essential for us to keep in mind is that when more limited liability companies are part of a group, they will remain legally independent from each other, based on the fact that the group is not a legal person. The actual interdependence of the affiliated companies, however, makes intergroup relations rely on ”solidarity”²⁹, which may eventually mean, dependent on the circumstances, to sacrifice a company for the collective well-being of the group and, with it, all the interested third parties in the respective entity.

It would certainly be a solution for group liability to be voluntarily assumed. This happens under a control contract³⁰. The voluntary assumption of group liability through a system of cross-guarantees is familiar in EU member states. Under such a system, the parent and all the subsidiaries in the group may assume liability for each other and the whole group indebtedness³¹.

As, for the rest, comparative law was to have the final say on the matter. It introduced to us American law, the cradle of the piercing of the corporate veil doctrines, technique aimed at re-establishing the reality of the intergroup links that has been embraced by our legal system.

United States v. Bestfoods judgment³² is recognized for its importance as a case of holding the parent company liable for the environmental harm caused by the subsidiaries, by lifting the parent’s corporate veil. In the case, a chemical manufacturing plant developed a significant pollution problem after many years of operation. The companies in charge of operations at the plant were wholly owned subsidiaries of, first, CPC International Inc. (CPC). Following ownership by CPC, the chemical manufacturing plant was owned by Aerojet General Corp (Aerojet). In 1981, the Environmental Protection Agency ordered to have the site cleaned up. To reimburse the cleanup, the federal government filed suit under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). Section 107 grants the federal government permission to seek reimbursement for cleanup costs from “any person who at the time of disposal of any hazardous substance owned or operated any facility”. The question to be answered by the court was - Can the parent corporation that exercised control over the operations of a subsidiary be held liable under CERCLA Section 107(a)(2)?

²² Republished in the Official Journal no. 454/18.06.2008.

²³ Law no. 297/2004 on capital market, published in the Official Journal no. 571/29.06.2004.

²⁴ Law no. 32/2000 on insurance undertakings and insurance supervision, published in the Official Journal no. 148/10.04.2000.

²⁵ Government Emergency Ordinance no. 99 of December 6, 2006 concerning credit institutions and capital adequacy, published in the Official Journal no. 1027/27.12.2006.

²⁶ Law no. 53/2003 on the Labour Code, published in the Official Journal no. 72/05.02.2003.

²⁷ Government Emergency Ordinance no. 91/2013 concerning proceedings for the prevention of bankruptcy and bankruptcy, published in the Official Journal no. 620 of October 4, 2013.

²⁸ Law no. 571/2003 on the Tax Code, published in the Official Journal no. 927 of December 23, 2003.

²⁹ F. Magnus, *Les groupes de sociétés et la protection des intérêts catégoriels - Aspects juridiques*, Brussels, Larcier, 2011.

³⁰ See, for more details, M. C. Popa, *op. cit.*, pp. 449-450.

³¹ See also M. C. Popa, *op. cit.*, pp. 370-375.

³² *United States v. Bestfoods*, No. 97-454 (1998).

According to the Court, “[w]hen (but only when) the corporate veil may be pierced, a parent corporation may be charged with derivative liability for its subsidiary’s actions (...). It is a general principle of corporate law that a parent corporation (so-called because of control through ownership of another corporation’s stock) is not liable for the acts of its subsidiaries. (...). But there is an equally fundamental principle of corporate law, applicable to the parent-subsidary relationship as well as generally, that the corporate veil may be pierced and the shareholder held liable for the corporation’s conduct when, inter alia, the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder’s behalf”.

As regards our law, already before the entry into force of the new Romanian Civil Code on October 1st, 2011, despite the absence of a specific group law in Romania, many issues of piercing of the corporate veil were still covered by legislation³³. And with the entry into force of the new Romanian Civil Code, this theory has been firmly established.

Companies Act no. 31/1990. In 2007 an exception was brought to the Romanian Companies Act no. 31/1990, offering legal support for the application of the doctrine of piercing the corporate veil, under the provisions of Art 237¹, paragraphs 2, 3, 4 of the Act.

Art 237¹ (2) sets out the principle of the separate legal personality of the company and that of the limitation of the shareholders’ liability to their contribution to the company’s share capital. It basically states that when, during a company’s operation, a shareholder is responsible for the company’s debts within the limits of his contribution to the share capital, his liability shall remain limited to such contribution in case of winding up and liquidation of the company.

According to Art. 237¹ (3), the shareholder who, by defrauding creditors, abuses the limited character of his liability and the separate legal personality of the company, shall be held unlimitedly responsible for the outstanding debts of the wound up or liquidated company. To that respect, Art. 237¹ (4) stipulates more exhaustively that the shareholder’s liability becomes unlimited under the provisions of Art. 237¹ (3) in those cases where s/he uses the company’s property as if it were its own or if s/he diminishes the company’s assets for his or her personal benefit or of third parties, though being aware or being supposed to be aware that the company will no more be able as such to pay off its debts.

The doctrine of the piercing of the corporate veil regulated as such may however only be applied in the cases of winding up or liquidation of the company, and not in all those cases in which the company is unable to perform its obligations or does not have enough funds to cover all the losses incurred by its creditors³⁴.

The theory on the creation of false appearances. The piercing of the corporate veil may also be based on the theory on the creation of false appearances (from the French "la théorie de l'apparence"). This theory has been developed by the French courts, has found support in the Romanian legal literature, and it now also has a legal ground in the Romanian new Civil Code (Art. 17).

According to the theory, a third party of good faith that acted upon an appearance that did not conform to reality may under circumstances be allowed to rely on the false appearances as if they were reality³⁵. A false appearance will as such be created, for instance, if affiliated companies act before their clients as a unique entity, using the same logo, the same phone number or registered office³⁶ etc. It is however essential that the third party be able to prove a common and invincible error as, according to art. 17 (3) of the new Civil Code, is not presumed.

³³ See also A. Horváthová, C. Gabriel Stănescu, *Piercing the Corporate Veil Us Lessons for Romania & Slovakia*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2066030.

³⁴ St. D. Căpenaru, S. David, C. Predoiu, Gh. Piperea, *Legea societăților comerciale. Comentariu pe articole*, 4th edition, C. H. BECK Publishing House, Bucharest, 2009, pp. 916-917.

³⁵ K. Vandekerckhove, *Piercing The Corporate Veil: A Transnational Approach*, p. 32 available at <https://lirias.kuleuven.be/bitstream/1979/118/2/Doctor>, p. 33.

³⁶ See, for instance, Judgment of the French Court of Cassation of March 4th, 1997 *apud* M. Cozian, A. Viandier, F. Deboissy, *op. cit.*, p. 789.

Then, in the framework of bankruptcy proceedings, besides the legal grounds aimed at the piercing of the corporate veil³⁷, two other grounds may be recognized in Romania. They are not explicitly laid down by the bankruptcy legislation, but may be the result of court practice.

The first is the theory on the fictitious corporation (inspired from the French theory of "la société fictive")³⁸. A corporation is fictitious when its sole purpose is to serve the interests of the natural or legal person behind it, who engages in high-risk activities under the cover of the corporation³⁹. Concretely speaking, the company is fictitious when it has not got a registered office, or it has no "legal life" in fact, but just on paper.

The second ground is the theory on the commingling of assets (also inspired from the French theory of "la confusion des patrimoines")⁴⁰. This theory is an independent ground for shareholder liability when it is no longer possible to distinguish between the assets of different corporations⁴¹.

When courts establish that a subsidiary is fictitious or that assets of the group member companies are commingled, the court may hold the shareholders liable for the debts of the subsidiary⁴².

The new Romanian Civil Code. The new Romanian Civil Code has introduced a general rule recognizing the doctrine of the piercing of the corporate veil (identical to the one already existing in the Civil Code of Quebec, Art. 317), which literally states that "in no case may a legal person set up juridical personality against a person in good faith if it is set up to dissemble fraud, abuse of right or contravention of a rule of public order" (Art. 193 of the new Romanian Civil Code). At the same time, the Code lays down a new provision, according to which "[w]here several persons have jointly taken part in a wrongful act which has resulted in injury or have committed separate faults each of which may have caused the injury, and where it is impossible to determine, in either case, which of them actually caused it, they are solidarily liable for reparation thereof" (Art. 1370 of the new Civil Code).

In the context of the concurrent existence in Romania of the already mentioned legal mechanisms allowing for the piercing of the corporate veil, the legal texts above are but an attempt from the part of the legislator to put together the composing elements of the doctrine into a coherent regulation. The new regulation thus gives the courts of law an impulse to resort to piercing of the veil and re-establish facts. They make it clear that even though limited liability is still an essential attribute of the corporate form⁴³, it is no more deemed to be an automatic consequence of a company's separate personality.

Returning to the issue of the parent company's liability for the environmental harm caused by the subsidiaries, Art. 31 (3) of Government Emergency Ordinance no. 68/2007 now appears as the legal basis for a special case of piercing of the corporate veil along with the other grounds to which we have referred. This means that, under the positive law concerning environmental protection, despite the autonomy provided by the legal personality to the companies forming a group, courts may hold the parent company, a shareholder or member of its subsidiaries, liable for the former's duties to prevent or repair environmental damage.

The seriousness of environmental harm, in terms of its often irreversible consequences and its reparation, most often exorbitant⁴⁴ require a special, aggravated liability regime⁴⁵.

³⁷ Currently Art. 169 of the Government Emergency Ordinance no. 91/2013.

³⁸ See for instance, St. D. Cârpenaru, S. David, C. Predoiu, Gh. Piperea, *op. cit.*, pp. 31-39.

³⁹ K. Vandekerckhove, *op. cit.*, p. 77.

⁴⁰ St. D. Cârpenaru, S. David, C. Predoiu, Gh. Piperea, *op. cit.*, pp. 39-51.

⁴¹ K. Vandekerckhove, *op. cit.* p. 32.

⁴² If the shareholder is unable to pay, the court may decide to "extend" the bankruptcy proceedings of the subsidiary to the parent and other affiliated corporations. As a result of such an extension of bankruptcy, the bankruptcy of all corporations involved is handled in one single bankruptcy proceeding.

⁴³ R. J. Rhee, *Bonding Limited Liability*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1434558.

⁴⁴ For example, in the famous Erika affair, the four responsible parties, Total SA oil company, the owner and the manager of the vessel and RINA company, have been sentenced to pay more than 200 million euros as compensation (Judgment of the French Court of Cassation of September 25, 2012 available on http://www.courdecassation.fr/IMG///Crim_arret3439_20120925.pdf).

Of course, the parent company may voluntarily assume the subsidiaries' duties related to the environmental protection. It needs in this case great caution, risks arising from the "unpredictability"⁴⁶ of the concept of "corporate interest"⁴⁷, which could provide a cause of action for the abuse of social goods, for example. Or, could a higher interest, as that of protecting the environment, justify certain behaviour on the part of the parent company, for example, thereby removing its abusive character? French courts have already sought answers to such questions as: in case of the existence of a group of companies, can one invoke a higher interest of the group that transcends the interests of the various subsidiaries? And if so, in what does this interest consist? Can such overriding interest justify a certain conduct, thereby removing its abusive character? Courts admit that, under certain conditions, we can speak of an interest of the group⁴⁸. This is how *Rozenblum* judgment⁴⁹ of the French Court of Cassation, of February 4, 1985, was interpreted. Mutual financial support among the companies forming a group is allowed, provided that "it does not take place on a unilateral basis, but that there is a sufficient *quid pro quo* to avoid one of the partners to be always on the losing side", and "that support does not exceed what can reasonably be expected from the supporting partner". In other words, according to the Court, the temporary sacrifices imposed on a subsidiary by the group must be justified by the interest of the group and cannot be devoid of consideration. The interest of the group is defined as the common interest of the affiliated companies. It should not be confused with the parent company's interest (nor with the majority shareholder's interest), and it may exceed, even ignore, the individual interests of the subsidiaries⁵⁰.

5. What are the measures that need to be taken by the operators?

In order to render a complete picture of the legal status of the parent company's liability for the environmental damage caused by the subsidiaries, we shall provide an overview of the remedies regulated by the Romanian law.

Government Emergency Ordinance no. 68/2007 requires polluters to take all measures aimed at preventing and repairing the environmental damage.

Preventive measures

As an expression of preventive responsibility for the environmental damage, the operator is required to prevent the occurrence of an imminent damage of such nature. Thus, if an imminent threat of environmental damage occurs, the operator shall immediately take the necessary preventive measures and within 2 hours as from the moment of becoming aware of the occurrence of the threat, notify the County Agency for Environmental Protection and the county Commissioner of the National Environmental Guard.

⁴⁵ In addition, Annex. 3 of Government Emergency Ordinance no. 68/2007 contains the list of activities carried out by operators which engender strict liability.

⁴⁶ See, also, A. Lienhard, *Responsabilité de la société mère en cas de pollution causée par une de ses filiales*, Dalloz, 2009.

⁴⁷ In the business environment, corporate interest becomes a principle aimed at protecting the company and its members from abuses. Unfortunately, the recognition it enjoys is not completed by a uniform application. Especially due to its "variable geometry" (P. Ledoux, *Le droit de vote des actionnaires*, LGDJ, Paris, 2002, p. 165; C. Ruellan, *La loi de la majorité dans les sociétés commerciales*, Th. Dactyl., Paris II, 1997, n° 491, p. 314), the law maker seized the futility of enchaining it in an unequivocal definition and rather maintained its open character. Its content is, therefore, to be assessed on a case by case basis.

⁴⁸ For instance, R. Kaddouch, *Le droit de vote de l'associé*, Thèse Université de Droit, d'Economie et des Sciences D'Aix Marseille, 2001, p. 94.

⁴⁹ Cass. Crim., February 4, 1985, "Bulletin criminel" No. 54, p. 145, Dalloz, 1985.

⁵⁰ A.-L. Champetier De Ribes-Justeau, *Les abus de majorité, de minorité et d'égalité. Étude comparative des droits français et américain des sociétés*, Dalloz, Paris, 2010, p. 227. Conversely, Paris Commercial Tribunal (Trib. Com. Paris, 29 June 1981, Gaz. Pal 1981, 2, p. 687, note P. de Fontbressin) ignored the existence of a group of companies, and retained the existence of an oppression of the majority shareholder in case of a shareholders' meeting resolution reached to transform a limited-liability company into a limited partnership. Relying on the separate legal personality of the subsidiaries, the tribunal examined the compliance of the operation in question with the sole interest of the company concerned.

Preventive measures (according to Art. 2 point 9 of Government Emergency Ordinance no. 68/2007) means “any measures taken in response to an event, act or omission that has created an imminent threat of environmental damage, with a view to preventing or minimising that damage”.

According to Art. 10 (3) of Government Emergency Ordinance no. 68/2007, preventive measures referred to in para. (1) must be proportional to the imminent threat and lead to avoiding injury, taking into account the precautionary principle in decision-making”.

The Ordinance expressly provides that the Environmental Protection Agency may at any time require the operator to take preventive measures. Moreover, it has the possibility of taking itself the necessary preventive measures in cases provided by law.

Remedial measures

These measures are taken in case of environmental damage. According to Art. 2 point 10 of Government Emergency Ordinance no. 68/2007, remedial measures means “any action, or combination of actions, including mitigating or interim measures to restore, rehabilitate or replace damaged natural resources and/or impaired services, or to provide an equivalent alternative to those resources or services”.

In this respect, according to Art. 14 (1) of Government Emergency Ordinance no. 68/2007, the operator shall be bound to take immediate action to control, isolate, remove, or, otherwise, to manage the pollutants concerned and / or any other contaminant factors, in order to limit or prevent the expansion of environmental damage and its negative effects on human health or further damage services.

The remedies provided in par. (1) must be proportionate to the harm caused and lead to the removal of harmful effects , taking into account the precautionary principle in decision making.

Annex no. 2 to Government Emergency Ordinance no. 68/2007 provides that remediation can be of three types:

- a) "Primary" remediation is any remedial measure which returns the damaged natural resources and/or impaired services to, or towards, baseline condition;
- (b) "Complementary" remediation is any remedial measure taken in relation to natural resources and/or services to compensate for the fact that primary remediation does not result in fully restoring the damaged natural resources and/or services;
- (c) "Compensatory" remediation is any action taken to compensate for interim losses of natural resources and/or services that occur from the date of damage occurring until primary remediation has achieved its full effect.

6. Instead of conclusions

After this brief exposure of the preventive and remedying measures which are, concretely speaking, incurred in cases in which liability for damage to the environment is established, our paper is slowly coming to the concluding section.

Being aware of the fact that the theme of this paper could not be treated exhaustively in just a few pages, we hope we managed to find convincing answers to the question that we actually intended to answer in this article, i.e. whether and under what conditions, upon the occurrence of an environmental damage, victims can turn against the parent company in the presence of the precarious financial state of the subsidiaries?

The analysis of the positive law concerning liability for the environmental damage caused by companies that are part of a group, that we have undertaken, lets us reach encouraging conclusions. There are theoretically the necessary means able to cover the environmental damage even in case of affiliated companies that enjoy limited liability. Practically speaking, the effectiveness of such means cannot be ascertained, due to the lack of case law on the matter.

Summarizing facts, we can say that the analysed law recognizes the primacy of the general interest objective of protecting the environment over the principle of autonomy of legal persons. This is but an application of another principle used in the environmental policy and in the provisions having general application of the Treaty on the European Union, according to which:

“Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development” (Article 11 of the TFEU). The principle of integration of environmental requirements in the other sectorial policies can also be found in the texts of international law⁵¹, of the European law and of the national law⁵².

Given the fact that reparation of the environmental damage is often economically speaking exorbitant, the principle of prevention⁵³ imposes in this field with the utmost evidence. A preventive approach is especially necessary when the damage would be irreversible (as in cases of extinction of species, where it is impossible to restore things to the original condition)⁵⁴.

In fact, one of the most remarkable achievements of the law in recent years has been to create a link between environmental protection and economic development. In 1986, after the Chernobyl disaster, the World Commission on Environment and Development published Brundtland Report, entitled “Our Common Future”, which provided the most frequently cited definition of sustainable development - “sustainable development is the kind of development that meets the needs of the present without compromising the ability of future generations to meet their own needs”. It completed a process that began in the ‘70s, with the gradual internationalization of the environmental policy and the increased participation of developing countries in the development of international environmental law.

In this context, a new concept, of “corporate social responsibility” (CSR), was created to highlight the company's contribution to sustainable development. This approach consists in the companies’ awareness of the social and environmental impact of their activity and their adoption of the best available practices, in order to contribute, accordingly, to improving the society and the environment.

For several years now companies have to adopt responsible practices in relation to their impact on the environment and the society (respecting the environment, workers’ rights, etc.),

⁵¹ Deemed to represent “the essence of the concept of sustainable development” (Y. Petit, *Environnement*, Dalloz, 2010), the integration principle was laid down in Principle 13 of the The United Nations Conference on the Human Environment of 13 June 1972, held in Stockholm, according to which “in order to achieve a more rational management of resources and thus to improve the environment, States should adopt an integrated and coordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve environment for the benefit of their population”. At the second United Nations Conference on Environment and Development, held in Rio de Janeiro, the Declaration of 13 June 1992 laying down twenty-seven principles, also mentioned principle 4 stating that “in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it”. Although neither the 1972 Stockholm Declaration nor the 1992 Rio Declaration is a legally binding legal document, they have both influenced to a large extent attitudes globally and nationally. In these circumstances, all the principles they enshrine, including the principle according to which environmental protection shall constitute an integral part of the development process underpin many other international texts that have inspired them.

⁵² Emergency Ordinance no. 195/2005 distinguishes between, on the one hand, the principles and the strategic elements (understood as having the same general functions and meanings) and, on the other, the means of implementing them. Among the principles, that first is the principle of integration of the environmental requirements into other sectorial policies [art. 3 letter a)].

⁵³ Before becoming principle 21 of the Stockholm Declaration and, then, being laid down by Article 2 of the Rio Declaration, the principle of prevention was recognized in the arbitral award rendered on 11 March 1941 in the Trail Smelter dispute between Canada and the United States. In the European law, the principle of preventive action appears in the Single European Act, which defined environmental policy. Secondary legislation also contributed to the development of this principle. In the field of waste management, waste prevention is the essence of the new Framework Directive of 19 November 2008 on waste. In national law, according to Art. 3 of Government Emergency Ordinance no. 195/2005, “the principles and strategic elements underlying this ordinance are: c) the principle of preventive action”. According to Art. 4 letter a), among the means of implementation of the principles and strategic elements there are “the prevention and the integrated control of pollution through the use of the best available techniques for activities with significant environmental impact”. This logic of prevention thus irrigates the entire sectorial legislation on air, water, soil, waste or hazardous substances.

⁵⁴ “The anticipatory approach” in law has developed due to a disappointment that regards the classical scientific approach. In the field of environmental law, scientific predictability actually faces significant limitations, as modern science raises questions instead of giving answers. A new precautionary approach has thus started to impose itself once environmental damage reached a planetary scale due to: climate change, ozone depletion, biodiversity destruction, overpopulation and desertification. In this context, a new anticipatory approach occurred, stemming from the basic idea of caution. Uncertainty should be treated with prudence or caution – “if people cannot measure the possible negative effects of their activities on the environment, they have the obligation to refrain from undertaking them” (M. Bedjaoui, *L'humanité en quête de paix et de développement (II)*, Cours général de droit international public (2004), RCADI, t. 325, 2006, p. 362). Regulated by Art. 3 letter b) of Government Emergency Ordinance no. 195/2005, this principle has been recently recognized in our country.

which implies that they must obey voluntarily to constraints that exceed their legal duties⁵⁵. In the case of the groups of companies, which are mostly multinational, the importance of the voluntary adoption of such practices of environmental accountability is greatly amplified, as it also allows the avoidance of problems of interpretation regarding the applicable law.

Here we have, then, sufficient body of evidence to allow us contradict the sentiment of Sir Edward Coke, of course, based on the whole context of the 17th century, that “Corporations cannot commit treason, or be outlawed or excommunicated, for they have no souls”⁵⁶. If we really want, we can “ensoul” them.

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⁵⁵ For developments of the concept of corporate social responsibility, see, for example, <http://www.responsabilitatesociala.ro/editoriale/secolul-responsabilitatii.html>. And for a legal analysis of the concept, L. Nurit-Pontier, *L'inscription statutaire, vecteur juridique de RSE ?*, Revue des sociétés 2013, p. 323; Fr. G. Trébulle, *Responsabilité sociale des entreprises (Entreprise et éthique environnementale)*, Répertoire Dalloz.

⁵⁶ *Case of Sutton's Hospital* (1612) 77 Eng. Rep 960.