Journal of Civil Law Studies

Volume 14
Number 1 *2021-2022*

Article 6

12-16-2022

The Doctrine of Veil-Piercing Liability in Poland and Selected Countries: A Comparative Law Study

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THE DOCTRINE OF VEIL-PIERCING LIABILITY IN POLAND AND SELECTED COUNTRIES: A COMPARATIVE LAW STUDY

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ABSTRACT

The separation of a company from its members, based on legal personality, is recognized as one of the fundamental principles of corporate law. It expresses the legal distinction between the two entities. A consequence of the separateness principle is that members are not liable for the debts of their companies, and companies cannot be held liable for the debts of their members. However, such consequences of the principle of mutual autonomy of companies and their members are in sharp contrast with commercial reality, in which intertwined corporate groups operate as a single economic entity. In market transactions, a subsidiary often becomes a tool in the hands of its controlling partner—the parent company—trading on its own behalf but in the interest of the parent enterprise or the entire corporate group. Consequently, the subsidiary rather than the

* Professor, University of Silesia. This contribution was written in the framework of the Research Project 2020/39/B/HS5/02631, funded by the National Science Centre in Poland.

controlling company is liable to third parties when harm is caused to them. In such situations, the application of the principle of corporate separateness gives rise to an unjustified privilege to the parent company—the member of the subsidiary—while parties contracting with the subsidiary are at risk. Many legal systems react by mitigating the separateness principle, using devices such as as "piercing (lifting) the corporate veil," "disregarding (avoiding) corporate identity," "intrusion beyond the barrier" (Durchgriff) or "de facto management" (gestion de *fait). The purpose of this study is to present the terms and preconditions of different veil-piercing liability mechanisms in selected jurisdictions such as Poland, Germany, Switzerland, Austria, Italy, and the United States. The need to analyse the construction of veil-piercing liability in the Italian and Polish legal systems is a consequence of discussion on the methods of protection available to creditors of a limited liability company.*

Keywords**:** Poland, Austria, Germany, Switzerland, United States, piercing (lifting) the corporate veil, disregarding (avoiding) corporate identity, intrusion beyond the barrier, capital companies, subsidiary, parent company, protection of company creditors, commercial law

I. INTRODUCTION

The separation of a company from its members based on legal personality[1] is recognized as one of the fundamental principles of corporate law. It is expressed in terms of the legal distinctiveness between the two[2] and extends to include corporate group operations in which a parent company is the controlling member of a subsidiary. The parent/dependence relationship in this regard does not serve to lift the principle of separation. While not expressly stated in Polish law, the principle is inferred from the construction of the legal personality of group members.

In the present paper, it is argued that discussions on reforming the capital structure of the limited liability company have exposed

1. *See* M. Pazdan, *in* 1 KODEKS CYWILNY. KSIĘGA DRUGA. WŁASNOŚĆ I INNE PRAWA RZECZOWE. KOMENTARZ 139 (K. Pietrzykowski ed., C.H. Beck 2013).
2. In Polish literature, *see, e.g.*, J. Frąckowiak, *Podmioty stosunków cywilnoprawnych – Zagadnienia ogólne*, *in* 1 SYSTEM PRAWA PRYWATNEGO, CZĘŚĆ OGÓLNA 1016 (M. Safjan ed., C.H. Beck 2007).

deficiencies in protecting the creditors of such companies. These shortcomings may be removed by strengthening the protection of creditors and including the company's shareholders in the group of entities that are liable towards the creditors. This does not preclude the development of other protective instruments such as the motion of liability of management-board members. In the context of the above, the present research utilizes as its basic method the comparative method of analysis.

The purpose of this study is to present the terms and preconditions of different veil-piercing liability mechanisms in selected jurisdictions, that is in Polish, German, Swiss, Austrian, Italian, and American laws. The American system is the departure point and the adopted benchmark. The choice of the United States stems from the fact that it was the first jurisdiction to identify and address the abuse of corporate identity.[3] Currently, the notion of veil-piercing liability seems to most widespread in the US where most of the judgements regarding this matter are issued. German legislation and doctrine provide the most comprehensive conceptualization of veil-piercing liability. Austrian and Swiss legislations, benefitting from the legacy of German literature, introduce certain distinctions in the understanding of veil-piercing liability. As to Italy, it is one of the few European countries where substantive law provides for a special mechanism of the dominating company's private law liability towards the creditors of the daughter companies. The need to analyse the doctrine of veil-piercing liability in the Polish legal system is a consequence of a discussion of the means of protection available to the creditors of a limited liability company.[4] German law having introduced and developed the notion of veil-piercing liability in the context of a civil-law jurisdiction, it may also be adopted in Polish law, another continental legal system.

3. R. SZCZEPANIAK, NADUŻYCIE PRAWA DO POSŁUGIWANIA SIĘ FORMĄ PRAWNĄ OSOBY PRAWNEJ 20 (TNOIK 2009); BELLAMY & CHILD: EUROPEAN UNION LAW OF COMPETITION (D. Bailey & L. E. John eds., Oxford U. Press 2014); B. Cortese, *Piercing the Corporate Veil in EU Competition Law: The Parent Subsidiary Relationship and Antitrust Liability*, *in* EU COMPETITION LAW. BETWEEN PUBLIC AND PRIVATE ENFORCEMENT ch. 4 (B. Cortese ed., Wolters Kluwer 2013); S. Demeyere, *Liability of Mother Company for Its Subsidiary in French, Belgian and English Law*, 23 EUR. REV. PRIV. L. 385 (2015).

4. Judgements of the Supreme Court, September 18, 2014, III PK 136/13, OSNP 2016, no. 2, item 17; March 17, 2015, I PK 179/14, OSNP 2016, no. 11, item 140; Court of Appeal, February 7, 2007, I ACa 1033/06.

The objective of the current paper is thus to discuss the notion of veil piercing liability in selected countries in order to analyze the existing legal solutions. This will allow for assessment of the effects of adopting particular legal solutions and the advantages, as well as difficulties that selected jurisdictions face when tackling the difficult issue of veil-piercing liability.

In broad terms, the essence of separating the two entities is that members are not liable for the debts of their companies, and companies cannot be held liable for the debts of their members.[5] A company's assets are to satisfy the claims of its creditors, who may not seek redress from the company's members,[6] regardless of the impact they may have on the company's operation.

However, the aforementioned consequence of the principle of mutual autonomy of companies and their members is in sharp contrast with commercial reality, in which corporate groups operate as a single economic entity, regardless of the existence of parent and daughter companies. In market transactions, a subsidiary often becomes a tool in the hands of its controlling partner—the parent company—acting in commercial reality on its own behalf but in the economic interest of the parent enterprise or the entire corporate group.[7] The consequence of such acts is the emergence of the subsidiary's liability to third parties when harm is caused to them. In such situations—as it is claimed—the application of the principle of corporate separateness gives rise to an unjustified privilege to the benefit of the parent company—the member of the subsidiary[8]—while placing those who contract with the subsidiary in a risky position. Incidents of a parent company's control over a subsidiary company that lead to harm being caused to the subsidiary and its creditors are not uncommon. Typically, this results from managerial and/or financial restrictions imposed by the parent company which, in a worst-case scenario, can bring the subsidiary to a position where it can no

5. Arts. 151 § 4 & 301 § 5, Code of Commercial Partnerships and Companies; Act of September 15, 2000, Code of Commercial Partnerships and Companies (CCPC), Dz.U. no. 94, poz. 1037, as amended.
6. Frąckowiak, *supra* note 2.
7. A. Szumański, *Spór wokół roli interesu grupy spółek i jego relacji w szczególności do interesu własnego spółki uczestniczącej w grupie*, 9 PRZEGLĄD PRAWA HANDLOWEGO 9 (2010).
8. A. OPALSKI, PRAWO ZGRUPOWAŃ SPÓŁEK 476 (C.H. Beck 2012).

longer satisfy its debts. This raises the following question: when this occurs, why not shifting the liability of the subsidiary to the parent company? It should be liable for the damage sustained by the subsidiary or directly liable towards parties injured by the by acts of the subsidiary for which the parent company was ultimately responsible.

Many legal systems are making such a move, primarily in the jurisprudence of their courts,[9] by mitigating the separateness principle with various legal constructions referred to, in most general terms, as "piercing (lifting) the corporate veil," "disregarding (avoiding) corporate identity," "intrusion beyond the barrier" (*Durchgriff*) or "de facto management" (*gestion de fait*).

The theory of separateness of companies from their members is recognized in German legislation. § 13(2) of the Limited Liability Companies Act (GmbHG)[10] introduces the principle of corporate separateness, which means that members are not liable for the company's debts (*Trennungsprinzip*).[11] As in the Polish legal system, corporations are independent entities and constitute legal subjects separate from their members. The separateness of a company from its members is the case not only in corporate relationships but also in non-corporate relationships, in which members act with the company as equal parties to civil law relationships, entering into contracts with the company.

In the face of incompatibility of the corporate separateness theory with the economic reality in which commercial companies operate, German, Austrian and Swiss legal systems permit its mitigation by adopting the theory of veil-piercing liability (*Durchgrijfshaftung*) and, in consequence, exclusion of the principle of members' limited responsibility for the company's liabilities. Although in German doctrine there is no independent and homogenous legal construction of veil-piercing liability, such liability must be identified with the liability of a member of a company under specific legal

9. A. Szumański, *Regulacja prawna holdingu w polskim i europejskim prawie spółek (zagadnienia pojęciowe)*, 8 PRZEGLĄD PRAWA HANDLOWEGO (1996).

10. Gesetz betreffend die Gesellchaften mit beschränkter Haftung, April 20, 1892 (BGB1. I S. 2586).

11. M. LUTTER & P. HOMMELHOFF, GMBH-GESETZ: KOMMENTARHON 142 (14th ed., Otto Schmidt 1995).

provisions or in a situation of a member's accession to debt.[12] The purpose of the liability is to set aside or mitigate the principle of separateness.[13] Italian law also provides for restrictions on the principle of legal separateness by affording legal protection to parties contracting with subsidiary companies. Finally, veil-piercing liability is also associated with the English concept of piercing (lifting) the corporate veil, drawn from the terminology adopted in American law.[14]

In contrast, Polish legislation does not envisage any construction allowing to limit or mitigate the principle of corporate separateness. Despite the heterogeneity of the concept and vague boundaries of piercing liability, there have been many attempts to define the notion in Polish academic literature. Certain authors indicate that it is an exception to the principle under which company members incur no personal liability for the company's debts, implying "either suppression of the separation principle or, possibly, only of the limited liability principle."[15] Other scholars define it as avoidance or mitigation of the legal separateness of corporations, leading to an attribution of certain legal norms, contractual provisions or liability to another entity,[16] or more broadly, as a legal instrument intended to afford protection to the company's creditors or creditors of a subsidiary. This protection may serve as a basis to disregard the legal personality of a given company, to avoid the separateness of several companies with capital connections and treat them as a single economic entity, or even to question specific transactions or contracts concluded between a member and the company.[17] It is also indicated in the literature that the theory involves the direct accountability of

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12. O. Sztejnert, *Odpowiedzialność przebijająca" i przesłanki jej stosowania w niemieckim prawie handlowym*, PALESTRA 41/9-10 (477-478), 124 (1997).
13. W. Popiołek, *Odpowiedzialność spółki dominującej za szkodę "pośrednią" wyrządzoną przez spółkę zależną*, *in* ROZPRAWY Z PRAWA PRYWATNEGO ORAZ NOTARIALNEGO. KSIĘGA PAMIĄTKOWA DEDYKOWANA PROFESOROWI MAKSYMILIANOWI PAZDANOWI 306 (A. Dańko-Roesler, A. Oleszko & R. Pastuszko eds., 2014).
14. M. Zmysłowska, *Odpowiedzialność przebijająca w prawie amerykańskim i włoskim*, IWS 1 (2017).
15. T. TARGOSZ, NADUŻYCIE OSOBOWOŚCI PRAWNEJ 138 (Kraków Zakamycze 2004).
16. A. Opalski, *Problematyka pominięcia prawnej odrębności spółek kapitałowych*, 8 PPH 10 (2012).
17. Zmysłowska, *supra* note 14, at 2.

members for the company's debts by avoiding two principles: legal separateness of a company from its members and liability of members for the company's debts.[18]

II. Principle of Legal Corporate Separateness

Under the Polish legal system, both partnerships and companies are characterized by legal separateness from their members. Partnerships were given legal subjectivity by the legislator, which means the capacity to be a subject of rights and obligations and, consequently, the capacity to incur such rights and obligations (Art. 8 of the Code of Commercial Partnerships and Companies (CCPC). In the same way, beside natural and legal persons, the legislator introduced a third category of subjects,[19] the so-called imperfect legal persons, statutory subjects or non-personal subjects.[20] As a result, partnerships have no legal personality as such and enjoy legal subjectivity only insofar as legal provisions afford them legal capacity. Thus, affording legal personality to partnerships implies their organizational and legal separation from the members who formed them.[21]

As opposed to partnerships, companies were afforded legal personality, which means that they obtained the most extensive attributes of personality.[22] A company acts through its governing bodies, its members are not liable for its debts (subject to Art. 13 § 2 CCPC), and benefits transferred from the company's assets to its members require a legal basis in the form of a statutory provision or company action. In addition, there exists a special corporate relationship between the company and its members.[23]

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18. M. Wiórek, *Kilka uwag o teorii nadużycia prawa jako koncepcji uzasadniającej tzw. odpowiedzialność przebijającą*, *in* WPŁYW EUROPEIZACJI PRAWA NA INSTYTUCJE PRAWA HANDLOWEGO 237 (J. Kruczalak-Jankowska ed., LexisNexis 2013).
19. *See* W.J. Katner, *Podwójna czy potrójna podmiotowość w prawie cywilnym?*, *in* ROZPRAWY PRAWNICZE. KSIĘGA PAMIĄTKOWA PROFESORA MAKSYMILIANA PAZDAN 1031 (Kraków Zakamycze 2005).
20. Regarding terminology, *see also* M. WACH, STATUS UŁOMNYCH OSÓB PRAWNYCH W POLSKIM PRAWIE CYWILNYM 89 (Warszawa 2008); M. TARSKA, SPÓŁKA Z O.O. ISTOTA. USTRÓJ. FUNKCJONOWANIE 145 (Warszawa 2003); J. Frąckowiak, *in* SYSTEM PRAWA PRYWATNEGO. TOM I. PRAWO CYWILNE – CZĘŚĆ OGÓLNA 1202 (M. Safjan ed., Warszawa 2012).
21. *See* IV CK 13/03 Supreme Court, July 8, 2003, Legalis no. 61171.
22. Opalski, *supra* note 16, at 10.
23. *Id*.

Corporate separateness (*Trennungsprinzip*) performs an important function in the German legal system. The legal personality of joint-stock companies stems from the provision of the first sentence of § 1(1) AktG,[24] and in the case of limited liability companies, it is defined in the provision of § 13(1) GmbHG, under which a company so incorporated independently exercises its own rights and obligations.[25] This refers both to corporate and non-corporate relationships, in which members act with the company as equal contracting parties.[26] The legal personality granted, also means that the claims of creditors can only satisfied from the company's assets.[27]

As in German law, Austrian legislation grants legal personality to limited liability companies[28] and joint-stock companies[29] which, in turn, allows to adopt the legal principle of separateness of a company from its members (§ 61(2) öGmbHG[30] in the case of limited liability companies and § 8 öAktG[31] in that of joint-stock companies). In the United States[32] and in the Italian Republic,[33] the attribution of legal personality to companies gave rise to development of the concept of veil-piercing liability.

In Poland, under the principle of non-liability of members for their company's debts (Art. 151 § 4 CCPC and Art. 301 § 5 CCPC), which accompanies the principle of corporate separateness, companies are independently liable for their own debts, and their creditors may not seek satisfaction from the personal assets of their

24. Aktiengesetz v. 06.09.1965, (BGB1. I 1965 p. 1089), https://perma.cc/27C3-XQQS (Last accessed: June 30, 2022).

25. A. Krawczyk, *Przebicie przez przypisanie w koncernie*, 1 Przegląd Prawa Handlowego 34 (2016).

26. *See* LUTTER & HOMMELHOFF, *supra* note 11 at 142.

27. The German legislator excluded the possibility to assert claims for a company's debts directly against its shareholders (§ 13(2) GmbHG), which also refers to stockholders of joint stock companies (sentence 2 of § 1(1) AktG).

28. § 61(1) öGmbHG.

29. § 1 öAktG.

30. Österreichisches Strafgesetzbuch (Budesgesetz v. January 23, 1974 über die mit gerichtlicher Strafe bedrohten Handlungen; BGBI. Nr. 60), https://perma.cc/8ZRH-KRDQ (Last accessed: June 30, 2022).

31. Österreichisches Aktiengesetz (ÖBGBI. S. 98) (CHB) https://perma.cc/A4H9-9CBU (Last accessed: June 30, 2022).

32. W. M. FLETCHER, 1 CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS 334 § 41.77 (2015).

33. *See also* P. Moskała, *Konstrukcja odpowiedzialności cywilnoprawnej we włoskim prawie grup spółek*, *in* 1 STUDIA PRAWA PRYWATNEGO 32 (2016).

members.[34] Authors are divided as to whether the exclusion of personal liability of company members for its debts constitutes a characteristic of corporations or whether it is a natural consequence of such entities being vested with legal personality.[35] The majority view is that the first opinion should prevail, i.e. that it represents a corporate characteristic.[36]

The principle of legal separateness seems a natural solution that best suits the interests of companies. By contrast, in German law, the general rule is that corporate members incur personal and unlimited liability, and its mitigation or exclusion constitutes an exception to that rule.[37] As a result, only the combination of the principle of separateness and the liability incurred by members of a company permits the conclusion that in civil law the general rule is personal liability of members, or their solidary liability, even though such persons are not parties to legal relationships.

The assumption of full separation between the actions and assets of a company and its members serves as basis for the legislative regimes in Swiss law (*Trennung zwischen dem Rechtsträger und seine Mitgliedern*),[38] American law[39] and Italian law.[40]

The arguments for excluding corporate members from liability include: encouraging initiative, promoting creativity and achieving greater objectivity in decision making processes; all attributes that lead to optimizing an undertaking's economic growth.[41] Conversely, not just the economic growth but also the efficiency of an undertaking can suffer when the actions and decisions of members

34. *See* VI ACa 1561/14, Legalis No. 1392962, Court of Appeal of Warsaw, October 23, 2015; I ACa 854/14, Court of Appeal of Białystok, March 5, 2015; V CK 411/02, Supreme Court, October 23, 2003, MONITOR PRAWNICZY no. 9, 2004, at 417.

35. Opalski, *supra* note 16, at 11.

36. A. Szajkowski & M. Tarska, *in* 2 KODEKS SPÓŁEK HANDLOWYCH. KOMENTARZ DO ARTYKUŁÓW 151-300 Art. 151, no. 65 (P. Sołtysiński ed., C.H. Beck 2014).

37. T. Raiser, *Die Haftungsbeschränkung ist kein Wesensmerkmal der juristischen Person, in* FESTSCHRIFT FÜR MARCUS LUTTER ZUM 70. GEBURTSTAG. DEUTSCHES UND EUROPÄISCHES GESELLSCHAFTS-, KONZERN- UND KAPITALMARKTRECHT 637 (U.H. Schneider 2000).

38. A. BINDER, T. GEISER & V. ROBERTO, EINFÜHRUNG INS PRIVATRECHT. OBLIGATIONENRECHT ALLGEMEINER TEIL, OBLIGATIONENRECT BESONDERER TEIL, GESELLSCHAFTSRECHT 15 (U. St. Gallen 2008).

39. FLETCHER, *supra* note 32, at 334.

40. *See also* Moskała *supra* note 33, at 32.

41. Raiser, *supra* note 37, at 649.

are influenced solely by the potential risk to their personal assets should the business fail.[42] Notwithstanding, it has to be acknowledged that corporate separateness effectively shifts the liability and risk of a company's insolvency to its creditors.

However, the concept of veil-piercing liability must not be regarded as depriving members of a company of the privilege of exclusion of their liability or even as a rule. Such liability is just one of the aspects involved in the subject of "piercing."

III. VEIL-PIERCING LIABILITY

A. Characteristics of Veil-Piercing Liability

1. Germany

In German law, the term "veil-piercing liability" has no legal definition. Sharing the opinion expressed in legal doctrine, the concept may refer to situations in which members incur personal, unlimited, solidary liability for the company's debts towards its creditors.[43] Following the broadest of the definitions proposed in the literature, it should be indicated that, in such situations, the liability regime under § 13(2) GmbHG is stricken out, resulting in the external liability of members towards the company's creditors or materialization of the obligation to reimburse to the company, as a part of the internal relationship, all losses suffered by the latter. The point is to afford to the company's creditors a possibility of indirect satisfaction of their claims.[44] The cited definition is valuable inasmuch as it accounts for both external and internal liability of company members. However, its drawbacks also need to be recognized. It does not account for the legal nature of veil-piercing liability and

42. TARGOSZ, *supra* note 15, at 72 et seq., M. WIÓREK, OCHRONA WIERZYCIELI SPÓŁKI Z O.O. POPRZEZ OSOBISTĄ ODPOWIEDZIALNOŚĆ JEJ WSPÓLNIKÓW. KONCEPCJA ODPOWIEDZIALNOŚCI PRZEBIJAJĄCEJ I NADUŻYCIA FORMY PRAWNEJ SPÓŁKI W PRAWIE POLSKIM I NIEMIECKIM 272 (Wrocław 2016).

43. *See* K. HEIDER, MÜNCHENER KOMMENTAR ZUM AKTIENGESETZ: AKTG, commentary to § 1 AktG, nb. 63 (M. Habersack & W. Goette eds., C.H. Beck 2015).

44. T. Raiser, *in* GESETZ BETREFFEND DIE GESELLSCHAFTEN MIT BESCHRÄNKTER HAFTUNG (GMBHG). GROßKOMMENTAR. BAND I. EINLEITUNG §§ 1 BIS 28, § 13, nb 52 (P. Ulmer, M. Habersack & M. Winter eds., Mohr Siebeck 2005).

does not specify the legal basis for the company's claims against its members. Finally, it does not take into consideration other situations that might arise.

In German law, veil-piercing liability does not cover situations in which members are liable towards the company's creditors for delicts of their own making or when the source of their obligations were legal acts in which they pledged to assume liability for the company's debts (*unechte Durchgriffshaftung*). At the same time, German authors assume the existence of so-called reverse veil-piercing liability (*Umgekehrter Haftungsdurchgriff*), which excludes the possibility of personal creditors of a company's members to be satisfied from the company's assets.[45]

In seeking to provide a wider characterization of veil piercing, it needs to be understood that in German doctrine there is no independent legal construction of veil-piercing liability. Due to the various ways in which it is possible to impose liability on company members for the company's debt, systematization and comparison was set forth to address the multitude of situations presented.

In German academic literature, one can distinguish between liability piercing (namely, *Durchgriffshaftung*, *Haftungsdurchgriff*) and attributive piercing (*Zurechnungsdurchgriff*). The latter consists in the application and interpretation of legal provisions or contractual clauses so that, by disregarding the separateness of entities, the consequences of certain events are attributed to a specific entity.[46] Attribution may proceed in two directions, meaning attribution of the company's actions to a member and the other way round. Along these lines, authors distinguish various types of "piercing," namely the type where the member is charged, the other type with the company being charged and two other types: to the benefit of the member or to the benefit of the company.[47]

Shortcomings of the proposed definition have been identified in the literature on the subject. Authors distinguish between proper (*echte Durchgriffslehren*) and improper veil-piercing liability. The first of the two relates to the principle of separateness and gives rise to the external liability of members of a limited liability company

45. HEIDER, *supra* note 43 at commentary to § 1 AktG, no. 63.
46. TARGOSZ, *supra* note 15, at 138.
47. K. SCHMIDT, GESELLSCHAFTSRECHT 221(4th ed., Heymanns 2002).

for the company's debts, which is effective directly to the company's creditors and based on company law.[48] In the same way, such theories question the legal independence of companies, and their attribution with the feature of legal personality. It is assumed that such liability is legitimate only in situations involving violation of obligations which are intended to afford protection both to the company or its members and to the company's creditors.[49] Among theories of proper piercing liabilities, one should point to the subjective (*subjektive Mißbrauchslehre*) and objective theory of abuse, as well as the institutional theory and theory of the norm's purpose (classical norm's purpose theory).

On the other hand, improper veil-piercing liability (improper piercing of liability, *unechter Haftungsdurchgriff*) is the case when the liability of members of a limited liability company towards its creditors, is based on the general regime of liability envisaged in civil law, thus outside company law, and principally moulded as external liability.[50] Other authors indicate that improper veil-piercing liability also covers situations of internal liability towards the company and those in which member liability is grounded in company law.[51]

In German literature, veil-piercing liability is substantiated by the following theories: abuse theory (*Mißbrauchslehren*), institutional theories (*institutionelle Lehren*) and norm application theories (*Normanwendungslehren*).[52]

According to the abuse theory, veil-piercing liability may apply in situations of abuse of the corporate form (subjective theory).[53] This concept is based on the assumption that the exploitation of corporate separateness by a member in any way that is contrary to its purpose and use, may result in such member being held liable for the company's debts, regardless of whether or not he acted with intent to injure creditors or circumvent the law. Since proponents of

48. Raiser, *supra* note 44 at § 13, no. 54.
49. *Id*.
50. *Id*., § 13, no. 90.
51. G. Bitter, *in* SCHOLZ. KOMMENTAR ZUM GMBH-GESETZ § 13, nb. 90 (11th ed., Otto Schmidt 2012).
52. SCHMIDT, *supra* note 47, at 221.
53. TARGOSZ, *supra* note 15, at 122.

this concept invoke the construction and function of a company as a corporation, an independent legal subject, objective abuse of the corporate form is also referred to as the "institutional theory."

On the other hand, the alternative concept[54] focuses on the purpose and role of provisions which, by restricting a member's liability for company debts, affords that member a liability privilege (*Haftungsprivileg*). The analysis of purpose of such norm, considering the circumstances of a specific matter, allows establishing if the given norm is applicable or if it should be disregarded.[55] This theory had an important influence on the shape of the contemporary so-called teleological reduction[56] of legal provisions setting out limited liability of the members for their company's debts. This notion is based on the presumption that the limitation of members' liability is not a characteristic of a corporate body but rather a consequence of a legislative choice. Therefore, only fulfilment of the appropriate preconditions and minimum conditions allows for the exclusion of members' liability for the company's debts and, where such conditions are not complied with, a member will incur personal and unlimited liability.[57]

The criterion for another division of the piercing theory is either reference to the principle of corporate separateness or development of veil-piercing liability in isolation from that principle. Theories invoking the principle of separateness render veil-piercing liability as opposing that principle and put emphasis on independence and separateness of members and their assets from the company. From this point of view, theories involving the principle of separateness include both abuse theories and institutional theories.[58]

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54. W. Müller-Freienfels, *Zur Lehre vom sogenannten "Durchgriff" bei juristischen Personen im Privatrecht: Rechtsform und Realität juristischer Personen. Ein rechts-vergleichender Beitrag zur Frage des Durchgriffs auf die Personen oder Gegenstände hinter der juristischen Person by Rolf Serick*, 156 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 522 (1958).
55. *See also* T. Fock, *commentary to § 1 AktG*, *in* AKTIENGESETZ no. 45 (G. Spindler & E. Stilz eds., Munich 2015).
56. M. Grochowski, *Reguła de minimis non curat praetor w prawie prywatnym*, *in* SINE IRA ET STUDIO. KSIĘGA JUBILEUSZOWA DEDYKOWANA SĘDZIEMU JACKOWI GUDOWSKIEMU 882 (T. Ereciński, P. Gregorczyk & K. Weitz eds., Wolters Kluwer Polska 2016).
57. WIÓREK, *supra* note 42, at 112.
58. Bitter, *supra* note 51 at § 13, no. 117.

2. Switzerland and Austria

In the Swiss and Austrian legal systems, the concept of veil-piercing liability has not been so amply and comprehensively developed as in German law. Swiss legislation considers that the corporate form may be abused by members of legal persons, and therefore provides legal solutions offering more protection to creditors.[59]

Austrian law provides mechanisms protecting the assets of a company's creditors against disloyal behaviour of its members.[60] However, in fear of insufficient creditor protection, jurisprudence allows, in exceptional cases, to derogate from the principle of separateness.[61] Because of the judiciary's significant role in the development of the concept of veil-piercing liability, such jurisprudence lacks homogeneity and covers not only members' liability for the company's debts but also their delictual liability for acts that harm its creditors.[62]

In a 1983 decision, the Austrian Supreme Court held that the concept of veil-piercing liability may not be compatible with the Austrian legal system.[63] At a later time, the concept was admitted although its practical application remained insignificant.[64] In 1986, the Austrian Supreme Court defined the scope of liability regarding a member managing the company's operations vis-a-vis the company's creditors. This decision was delivered in a case where the controlling member, a bank, exerted considerable influence on matters handled by a daughter company. The daughter company, with its managers acting under the member's instructions and guidelines, subsequently became insolvent and filed for bankruptcy. The Supreme Court, when examining claims submitted by the creditors of the bankrupt company against the controlling member, held that due to the influence of the member on the controlled entity, the shareholder had a special duty of care in the exercise of its corporate

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59. Binder, Geiser & Roberto, *supra* note 38 at 15.
60. F. WÜNSCHER, DIE DURCHGRIFFSHAFTUNG WEGEN SPHÄRENVERMISCHUNG IM DEUTSCHEN UND ÖSTERREICHISCHEN GMBH-RECHT 4 (U. Graz 2014).
61. OGH June 16, 1983, 6 Ob 579/83, SZ 56/101.
62. OGH April 12, 2001, 8 ObA 98/00 w, SZ 74/65.
63. OGH June 16, 1983, *supra* note 61.
64. Judgements of the OGH July 14, 1986, 1 Ob 571/86, JBl 1986, 713; April 29, 2004, 6 Ob. 313/03 B, GeS 2005 no. 1.

rights and exertion of influence on the management of the controlled company. In consequence and without any direct reference to veil-piercing liability, it was concluded that the member of the bankrupt company was liable for negligently driving the company towards insolvency as per § 159 öStGB.[65] In the cited ruling, the risk relating to participation in the company was found to exceed the value of capital invested by the member, which accounts for and points to the ruling's affinity with veil-piercing liability theory.

In this regard, Austrian law shows many similarities with German legislation. Just as the German legal system, it permits the use of the interpretation method of legal norms and contractual provisions which recognizes that they relate not only to a member but also to the company (piercing by attribution, *Zurechnungsdurchgriff*). The jurisprudence of the Austrian Supreme Court offers many examples for relativization of the legal separateness of the company and its members through piercing by attribution, including consideration of the member's state of awareness while evaluating if the company acted in good faith or charging the company with the consequences of breach of a contractual prohibition of competition (namely, *vertragliches Wettbewerbsverbot*) binding on the member controlling the company. Moreover, the corporate separateness of an entity from its members may be avoided by way of mutual attribution of their features. As a result, an error as to the characteristics of a company's controlling member may serve as a basis for the avoidance of consequences of a legal agreement with the company. Finally, as in the German legal system, the construction of piercing by attribution works in both directions as, on the one hand, it allows to burden the company with circumstances relating to a member and, on the other to shift to members some liability that would otherwise be on the company.[66]

3. *United States*

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65. Österreichisches Strafgesetzbuch (federal law of January 23, 1974 *über die mit gerichtlicher Strafe bedrohten Handlungen*; BGBI. Nr. 60). *See also* OGH July 14, 1986, 1 Ob 571/86, JBl 1986, 713. Cf. OGH April 12, 2001, 8 ObA 98/00 w, SZ 74/65.

66. OGH April 12, 2001, *supra* note 65. *See also* P. Mazur, *Odpowiedzialność przebijająca w prawie niemieckim, austriackim i szwajcarskim*, IWS 49 (2017).

Under American law, the mechanism of veil-piercing liability is intended to prevent crime and promote equity in some specific factual situations.[67] However, though there is a multitude of cases, state and federal courts have not yet developed a uniform understanding and a consistent case law on veil-piercing liability.[68]

In American law, the concept applies to both tort and contract liability claims. However, a mere breach of contractual provisions is insufficient to establish a basis for the application of veil-piercing liability mechanisms.[69]

Despite the absence of a uniform definition of veil-piercing liability in American law, the judiciary has developed many theories substantiating the concept under which, in certain circumstances, members are liable towards their company's creditors and, consequently, may be held accountable against such creditors for the company's debts. Among the classical theories of veil-piercing liability, one can distinguish the doctrine of instrumental treatment of a company (instrumentality doctrine), the *alter ego* doctrine and the identity doctrine.

In academic literature and judicial practice, the most widespread theory allowing bypassing the corporate identity of a company is the instrumentality doctrine, admissible in situations where a company is a mere instrument in the hands of another entity.[70] Once approved by the courts in the State of New York, this doctrine became widely used.[71] The theory assumes the existence of three factors: entity exercising such control over a subsidiary that the subsidiary becomes a tool in the hands of the controlling entity (mere instrumentality); cases of fraud, injustice, unlawful behaviour or any other act

67. B. Jankowski, *Nadużycie formy prawnej spółki w prawie amerykańskim*, 2 PIP 70 (1996).
68. *See also* Davis v. Professional Business Services, Inc., 109 Idaho 810, 712 P.2d 511 (1985).
69. Zmysłowska, *supra* note 14 at 12.
70. M. Wormser, *Piercing the Veil of Corporate Entity*, 12 COLUM. L. REV. 496 (1912), FLECHTER, *supra* note 32, at 167-195.
71. Lowendahl v. Baltimore & Ohio Railroad, 287 N.Y.S. 62, 76 (N.Y. App. Div. 1936).

prohibited by law; and a causal link between the act and the resulting damage.[72]

The *alter ego* doctrine applies in situations where the convergence of interests between a member and the company is such that the latter may be considered an "alter ego" of the member. On analysis, one cannot help but agree with the opinion that instrumentality doctrine and *alter ego* doctrine amount to one and the same thing.[73] Nevertheless, contrary views can also be found.[74]

Among the theories of veil-piercing liability, one should also mention single factor theories (single factor piercing). This includes the use of sham or shell corporations, use of the corporate form for fraudulent, unjust or unlawful purposes, situations involving matters regulated by federal law and the practice of presenting a group of companies as a single business enterprise. These are referred to as equitable theories because American courts apply them when the collected evidence allows proving one of the factors indicated in the classical compensatory liability theories. However, the case must involve a gross violation of the corporate form.[75]

These solutions differ from the regime of veil-piercing liability as introduced in Italian law. The Italian Republic is a country where, since 2004, legal provisions expressly set out the liability of a controlling company in relation to the creditors of its subsidiaries.[76]

4. Italy

Under the Italian legislative framework, companies or entities which, in the course of management and coordination of other companies, act in their own interest or in the interest of a third party, in violation of the principles of sound corporate management and business operations in relation to the companies subject to management and coordination, incur direct liability to the members of such companies for damage arising from the lowering of the company's

72. P.I. BLUMBERG, K. A. STRASSER, N.L. GEORGAKOPOULOS & E.J. GOUVIN, BLUMBERG ON CORPORATE GROUPS 11-3—11-4 (Wolters Kluwer, Supplement 2014-1).
73. *Id.*, 11-01 to 11-04.
74. Carte Blanche (Singapore) Pte., Ltd. V. Diners Club International, Inc. 802 F. Supp. 1006 (S.D.N.Y. 1992).
75. *See also* Zmysłowska, *supra* note 14 at 23 et seq.
76. Art. 2497 et seq. of the Italian cod. civ., https://perma.cc/KJ2E-SEWE (Last accessed: June 29, 2022).

profitability and the value of shares or stocks held by such members, and for the damage caused to creditors by compromising the company's assets. However, liability does not arise when there is no actual damage in light of the totality of consequences of the management and coordination exercised, or when actual damage has been redressed by subsequent actions undertaken as a part of the management or coordination exercise. Other persons incurring solidary liability alongside those previously identified, are the person or persons who participated in the commission of a harmful act and, within the limits of the benefits obtained, the person or persons who knowingly reaped benefits from such act. Finally, members and creditors of the coordinated company may sue the managing and coordinating company or entity only as far as they have not been satisfied by the company under the management and coordination exercise. This legislative reform was to be based on two basic presumptions, namely: transparency of relationships within a group (*trasparenza*) and equilibrium of interests of the entities affected by the existence of a corporate group (*contemperamento degli interessi coinvolti*).[77] However, it must be remembered that, since the beginning of the 1990s, the courts have not handled the problems of veil-piercing liability in Italian law.[78]

5. *Poland*

In Polish doctrine, no uniform definition of veil-piercing liability has been developed.[79] Moreover, Polish law, in light of the mandatory nature of Art. 151 § 4 CCPC and Art. 301 § 5 CCPC, does not offer an instrument of any description that would allow to exclude corporate separateness. In addition, no comprehensive regime has been introduced that, following along the lines of the German model, would govern the rights of corporate groups and provide a basis for expanding the liability of a controlling entity. Provisions

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77. *See* Moskała, *supra* note 33, at 32.
78. *See* for more details V. Cariello, *The 'Compensation' of Damages with Advantages Deriving from Management and Coordination Activity (Direzione e Coordinamento) of the Parent Company (Article 2497, paragraph 1, Italian Civil Code) – Italian Supreme Court 24 August 2004, no. 16707*, 3 EUROPEAN COMPANY AND FINANCIAL LAW REVIEW 330 (2006).
79. *See* TARGOSZ, *supra* note 15 at 138; Wiórek, *supra* note 18 at 237.

of the Code of Commercial Partnerships and Companies merely contain rules defining the concepts of a controlling and subsidiary company, imposing disclosure obligations on companies in relation to the control relationship, and a number of provisions expanding the legal regime governing a given parent company to its subsidiaries. Nevertheless, in the conditions of everyday Polish market practice, there are attempts to formulate claims based on the doctrine of veil-piercing liability.

B. The Scope of Veil-Piercing Liability

To continue with the topic of the nature of veil-piercing liability, it must be reminded that one of the traditionally important roles in the structure of a limited liability company and joint-stock company is the part played by their nominal capital. Both in Polish law and legislations of other EU Member States, it is a foundation for the operation of corporations.[80] Under the current legislative framework, the construction of nominal capital requirements may be characterized as being both dysfunctional and inadequate regarding the protection of creditors' interests.

In response to the shortcomings of nominal capital, there are voices in Polish literature that propose legislative reform or, more radically, the abandonment of nominal capital and its replacement by an alternative system based on a so-called solvency test.[81] In the German legal system, it was judicial practice that played an important role in the correction and supplementation of the construction of nominal capital, and existing jurisprudence was then taken into consideration by the legislator.[82] The amendments introduced, which were a compromise, streamlined the operation of German

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80. A. Radwan, *Sens i nonsens kapitału zakładowego – przyczynek do ekonomicznej analizy ustawowej ochrony wierzycieli spółek kapitałowych*, *in* 2 EUROPEJSKIE PRAWO SPÓŁEK, INSTYTUCJE PRAWNE DYREKTYWY KAPITAŁOWEJ 59 (3rd ed., M. Cejmer, J. Napierała & T. Sójka eds., Zakamycze 2005).

81. *See also* K. Oplustil & P. Wiórek, *Aktualne tendencje w europejskim prawie spółek – orzecznictwo ETS i planowane działania prawodawcze*, 5 PPH 4 (2004).

82. *See also* BGH "November"-Urteil BGH November 24, 2003, I ZR 171/01, BGHZ 157, 72-79; T. DRYGALA, M. STAAKE & P. SZALAI, KAPITALGESELLSCHAFTSRECHT. MIT GRUNDZUGEN DES KONZERN- UND UMWANDLUNGSRECHTS 114 (Springer 2012).

limited liability companies and made them an attractive platform for conducting business activity.

However, criticism of the protective function of nominal capital questions its tenet and justifies the pursuit of alternative protection of creditors.[83] Still, regardless of the drawbacks of the discussed construction, there are many situations in the laws of European countries where the provisions implementing the guarantee function of nominal capital do not apply.

Among such situations, one can mention the existence of undercapitalized companies,[84] which lack the means to participate in business transactions, engage in the due management of funds or the preparation of long-term financial plans considering their business profile. Undercapitalization may be primary or subsequent, depending on whether from the outset the company had not been equipped with a capital base sufficient to meet the scope of its operation, or if the capital was subject to certain reduction in the course of the company's business. Undercapitalization may also be divided into nominal (*nominelle Unterkapitalisierung*)[85] and substantive (*materielle Unterkapitalisierung*).[86] That said, in the case of undercapitalization, the legitimacy of asserting claims directly against members, although commonly supported in the doctrine, has not been accepted by German courts.[87]

Another problem is to determine which of the assets are the property of a company and which are the property of a member; a dilemma posing a threat to the principle of separateness. A peculiar "confusion" of patrimonies arises when a member of a limited liability company conducts matters of the company as his own business, treating the company's assets as part of his own patrimony, or keeps accounts in a non-transparent or unreliable manner.[88]

83. *Act of July 13, 2006 on the protection of employee claims in case of employer's insolvency (Dz.U. 2006 no. 158 poz. 1121).*
84. *See also* Opalski, *supra* note 16, at 17-18.
85. T. ECKHOLD, MATERIELLE UNTERKAPITALISIERUNG. ZUR GESELLSCHAFTERVERANTWORTLICHKEIT IN DER GESELLSCHAFT MIT BESCHRÄNKTER HAFTUNG 8 (Heymanns 2002); WIÓREK, *supra* note 42, at 53-54.
86. *Id.* at 9; WIÓREK, *supra* note 42, at 54.
87. BGH April 28, 2008, II ZR 264/06, NJW 2008, 2437.
88. K. WAPPLER, DIE HAFTUNG VON GESELLSCHAFTERN EINER GMBH AUF GRUND VON EINFLUSSNAHMEN AUF DIE LEITUNG DER GESELLSCHAFT. VOM QUALIFIZIERT FAKTISCHEN KONZERN ÜBER DURCHGRIFFSHAFTUNG WEGEN

Undoubtedly, such behaviour may harm the creditors' interests and this is why, both in doctrine and in jurisprudence, it creates an indisputable situation that renders the application of veil-piercing liability admissible. On such occasions, the legal basis is § 128 HGB. A similar situation is the failure to scrupulously maintain the company's documentation, which repeatedly precludes identification and elimination of the negative influence exerted by a member regarding the financial situation and operations of a limited liability company.[89] On the other hand, a company's failure to keep proper accounts departs from the principle of nominal capital protection (§ 30 GmbHG).

The need to separate the patrimonies belonging to the company and to its members is accentuated in the judicial practice of the Federal Court of Justice. For example, in its judgement of November 12, 1984,[90] it was held that clear and substantiated separation of the company's assets from the assets of its stockholders, in accounting entries and financial documents, is one of the necessary conditions for affording company members the privilege of limiting their liability for the company's debts. Similar conclusions can be reached upon analysis of the decision of the Federal Court of Justice of October 14, 2005, which allowed the concept of veil-piercing liability to be applied because the relevant company kept non-transparent accounts, thus precluding the review of compliance with the provisions on nominal capital. Actual coverage of the nominal capital was found necessary for the limitation of liability of the company's members. At the same time, the Federal Court of Justice concluded that the liability of members is a derivative of their behaviour (*Verhaltenshaftung*) and not a consequence of a specific state of affairs (*Zustandshaftung*).[91]

Among other situations posing a threat to a company's creditors, one can point to the loss of financial liquidity, the deprivation of assets necessary to conduct business activity, the transfer of assets

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EXISTENZVERNICHTUNG ZUR DELIKTRECHTLICHEN HAFTUNG GEM. § 826 BGB 262 (Nomos 2010).

89. *Id.* at 276.

90. The Federal Court of Justice also emphasized that the provisions on the maintenance of capital, intended to protect the interests of corporate creditors, are based on a clear distinction between the company's assets and personal assets of company members. *See* BGH November 12, 1984, II ZR 250/83, NJW 1985, 740.

91. BGH October 14, 2005, II ZR 178/03, NJW 2006, 1344.

contrary to trading principles, situations related to securing the members' interests (their receivables) and engaging in high-risk transactions.

Another problem that recently aroused much controversy in the judicial practice of the Federal Court of Justice, was liability for the members' actions leading to termination of the company (*Existenzvernichtung*). Such possibility was admitted for the first time in a judgement of 2001.[92] However, this line of jurisprudence was abandoned by the Federal Court of Justice six years later.[93] The relevant ruling excluded the possibility of veil-piercing liability where a member undertook actions that could lead to termination of a corporation. Indeed, the Court pointed to the possibility, open for the company and its creditors, to file claims in damages against the members who took such actions based on delictual or tort liability (§ 826 BGB[94]).

The Austrian Supreme Court, in a judgement of 2004,[95] making reference to German doctrine, ruled that it was generally possible to hold members liable for the company's debts by means of teleological reduction of the provisions granting members the privilege of limited liability (§ 61(2) öGmbHG and § 48 öAktG). The Court found that the doctrine of veil-piercing liability may be applied in four situations. First, excluding the limitation of a member's liability for the company's debts would be possible if the company is an *alter ego* of the member. This is the case when the member exercises *de facto* management of the company's operations, acting as a member of the management board. Second, as in the German legal system, imposition on a member of liability for the company's debts was admitted in case of confusion of the patrimonies of the company and its members (*Sphärenvermischung*). Third, the corporate veil could be pierced in case of an abuse, on the part of a member, of the corporate form (*missbrauch der Organisationsfreiheit*). Fourth and finally, it was considered admissible to charge members with veil-

92. *See* BGH June 17, 2001, II ZR 178/99, DNOTI-REPORT 2001, 182.
93. BGH Juy 16, 2007, II ZR 3/04, IBRRS 2007, 3886.
94. Bürgeliche Gesetzbuch (BGBI. I S. 42, ber. S. 2909, ber. 2003 I S. 738), https://perma.cc/HM7V-GC5P (Last accessed: June 30, 2022).
95. OGH April 29, 2004, 6 Ob 313/03 B, GeS 2005/1.

piercing liability for the company's debts in case of substantive undercapitalization of the company (*materielle Unterkapitalisierung*).

The Italian legislator recognized the need for a special protection to be afforded to creditors of subsidiary companies participating in holding structures.[96] However, this did not lead to the enactment of norms introducing direct personal liability of the controlling company for debts of its subsidiaries, which would be an exception to the principle of a member's non-liability for corporate debts.

In Italian law, the burden of proof is with minority stockholders and creditors of the company, who should demonstrate that (1) a specific act of management violated the terms of proper management; (2) the controlling entity acted in its own interest or in the economic interest of third parties; (3) the company's income or the value of its shares have decreased and, that as a consequence of the actions undertaken, damage was caused to their assets.[9799] The solutions introduced in Italian holding law are to protect the interests of creditors of subsidiary companies by affording them a claim against the controlling company for the recovery of damages. A circumstance found to justify the liability of the controlling entity towards creditors of subsidiary companies was the management of the subsidiary and coordination of the subsidiary's activities by the controlling company.[98] It follows that the limitation of autonomy of a subsidiary company by the controlling company should give rise to special liability of the controlling entity which makes decisions and gives instructions relating to the daughter company. However, such a solution also protects the position of the parent company, as its liability may only materialize when some specific conditions are met. Nonetheless, because of the mechanisms enabling the controlling company to be discharged of liability to the creditors of subsidiary companies, coupled with the lack of means to relax the burden

96. K. PYZIO, ODPOWIEDZIALNOŚĆ SPÓŁKI DOMINUJĄCEJ WZGLĘDEM WIERZYCIELI KAPITAŁOWYCH SPÓŁEK ZALEŻNYCH s. 23-24, (C.H. Beck 2015); R. Truffi & S. Straneo, *Groups of Companies Under the New Italian Company Law*, JONES DAY COMMENTARIES 1 (March 2004).

97. Art. 2359 (2) Italian Civ. Code; PYZIO, *supra* note 96 at s. 23-24.

98. A. Daccò & T. Tatozzi, *in* COMMENTARIO BREVE AL CODICE CIVILE 3099 (10th ed., G. Cian & A. Trabucchi eds., Cedam 2011); G. Alessi, *L'azione di responsabilità nei gruppi di imprese*, *in* SOCIETÀ. IL DIZIONARIO DELLA RIFORMA 392 (M. de Tilla, G. Alpa & S. Patti eds., 2003).

of proof creditors are required to provide, this solution is understandably subject to criticism in Italian literature.[99]

IV. CRITICISM OF THE CONCEPT OF VEIL-PIERCING LIABILITY

Although the literature reveals shortcomings in the protection of creditors due to the existence of gaps in legislative protection, voices can be heard questioning judicial developments trying to fill those gaps. Certain authors deploy methodological[100] or constitutional[101] arguments. Others criticize the doctrine of veil-piercing liability on a dogmatic level, with two lines of arguments: first, a general dogmatic criticism that does not refer to the methodological legitimacy and the need for developing the piercing concept, and second, a general dogmatic criticism recognizing the need for judicial law-making albeit to the exclusion of veil-piercing liability.

As far as the methodological criticism of veil-piercing liability is concerned, its precursor was U. Ehricke.[102] The author points to the chaos and uncertainty caused by the veil-piercing liability theory. Moving beyond dogmatic and factual levels, he shifted the discourse to the most important level, that of methodology.

First, one wonders whether, from a methodological perspective, the piercing concept is necessary. Second, upon determination of the methodological admissibility of legal veil-piercing liability, one may search to justify the obligation of company members to incur liability for their company's debts. On the dogmatic level, one may consider a limitation to the exclusion of member liability for the company's debts in case of malpractice and abuse of the corporate construction and the need to expand liability for the company's debts to its members. Lastly, on the level of facts, one should consider specific situations which substantiate the use of the piercing construction.[103]

99. Truffi & Straneo, *supra* note 96 at s. 1; Daccò & Tatozzi, *supra* note 98 at s.3099; G. Alessi, *supra* note 98 at s. 392.
100. U. Ehricke, *Zur Begründbarkeit der Durchgriffshaftung in der GmbH, insbesondere aus methodischer Sicht*, 199 ACP 225 (1999).
101. W. Nassall, *Der existenzvernichtende Eingriff in die GmbH: Einwendungen aus verfassungs- und insolvenzrechtlicher Sicht*, ZIP 969 (2003).
102. H.C. GRIGOLEIT, GESELLSCHAFTERHAFTUNG FÜR INTERNE EINFLUSSNAHME IM RECHT DER GMBH, (C.H. Beck 2006).
103. Ehricke, *supra* note 100, at 262.

Other authors criticize the concept of veil-piercing liability from the methodological and constitutional perspective. W. Nassall, when criticizing a decision of the Federal Court of Justice, concluded that the Court supplemented, in an unjustified manner, the provision excluding liability of company members for their company's debts.[104] In the opinion of the Court, this rule will not apply if members deprive the company of its assets or consent to an intervention or if the damage so inflicted to the company may not be entirely remedied or if the company, as a result of an intervention, has lost its capacity to pay debts. In Nassall's opinion, in such situations, there is no need nor ground for any judicial development of the law. Indeed, such legal developments do require careful and constitutional justification and can only take place when overall, the law appears to be incomplete as initially planned or subsequently amended.[105] There are no sufficient arguments to conclude that there is a legislative gap to be filled since the system of nominal capital was intended to, and to some extent does, afford sufficient protection to creditors.

To go further, veil-piercing liability places emphasis on insolvency law rather than company law because it refers to the loss by a company of its capacity to pay debts. If so, the remedies should be sought in the provisions of insolvency law. The protective mechanism in insolvency law is composed of two basic elements: liquidation and restructuring. The first obligates managers to file for bankruptcy within a specific deadline calculated from the date of emergence of the grounds for bankruptcy, i.e. insolvency or indebtedness. On the other hand, the restructuring aspect relates to the possibility of contesting the acts of the insolvent debtor and the managers' obligation to return any payments from the company's assets, which were made after the emergence of grounds for bankruptcy.

Further, criticism of the piercing concept on the dogmatic level is voiced by J. Wilhelm, who questions the grounds for distinguishing proper and improper theories of veil-piercing liability.[106] The author claims that veil-piercing liability has no precise boundaries or grounds backing up its support by judicial opinions. At the same

104. Nassall, *supra* note 100, at 970.
105. *Id*. at 971.
106. J. WILHELM, RECHTSFORM UND HAFTUNG BEI DER JURISTISCHEN PERSON 310-314 (Heymann 1981).

time, he recognized the risk of legally ungrounded and equitable resolutions being assigned the force of a legal principle based on completely arbitrary argumentation. Theories of abuse, institutional theories and theories involving a norm's purpose, refer to objective criteria whose ascertainment is problematic even for proponents of such theories. In addition, conceptions of a norm's purpose reach beyond the application of existing rules and move on to the level of legal policy or *de lege ferenda* comments. In Wilhelm's opinion, those conceptions may indicate that the remedies intended to protect creditors are insufficient, however, they allow for actions that are not supported by legislative provisions.[107]

Others, recognizing the shortcomings of nominal capital, signal the need for judicial development of law by creating concepts other than veil-piercing liability, which could enhance the scope and effectiveness of creditor protection. One such possibility is to associate company members' liability with the principle of dispositional freedom of such members and its boundaries. This is the case since the provisions on contributing and maintaining nominal capital specify situations in which members of a limited liability company are liable to the company. In particular, they incur compensatory liability for overstatement of the value of non-monetary contributions (§ 9 GmbHG, c.f. Art. 175 CCPC) and in the case of receipt of payments constituting the return of the entirety or part of their contribution, or payments from the company's assets needed to fully cover the nominal capital (§ 30 et seq GmbHG, c.f. Art. 198 in conjunction with Art. 189 CCPC). As a consequence, provisions specifying the scope of members' leeway in the management of the company and disposal of the company's assets set the boundaries of their accountability for internal influence on the company (*gesellschaftsinterne Einflussnahme der Gesellschafter*). As long as company members do not overstep their discretion, they are not liable to the company.

107. *Id*. at 314.

V. CONCLUSION

The problems with seeking the liability of company members using the concept of veil-piercing liability—considering the solutions developed in several legal systems—should be assessed as heterogeneous and multithreaded. Even in German or American doctrine,[108] where the theories justifying such a liability have been extensively discussed and developed, there is no uniform and consistent concept of veil-piercing liability, both on the theoretical and methodological level.

On the other hand, the principle of corporate separateness, which has such rigid foundations from the axiological and normative perspective, may be limited to achieve greater creditor protection.

Nevertheless, the undertaken analyses allow the establishment of preconditions justifying the use of the discussed concept and the depiction of the basic theories that substantiate veil-piercing liability. These include the objective abuse theory (theory of institutional abuse) and the theory of teleological reduction, which was also based on objective criteria. However, developing veil-piercing liability based on objective criteria, as a mechanism intended to prevent gross abuses of the legal corporate form, gave it a character of absolute liability. In consequence, it is for the courts to assess the extent of abuse of the corporate entity, thus depriving members of the possibility to escape liability by proving that they had not been guilty of the abuse. Such views give rise to criticism of the construction of veil-piercing liability and to its mitigation by bringing it closer to compensatory liability.

At the same time, in the German, Austrian, and Swiss legal systems, one can identify tendencies to replace veil-piercing liability with mechanisms assuming that company members are liable for their own acts. Such a liability may be based on general terms or

108. M.J. Gaertner, *Reverse Piercing the Corporate Veil: Should Corporation Owners Have It Both Ways*?, 30 WM. & MARY L. REV. 667 (1989); L. Fastrich, A. Baumbach & A. Hueck, *in* L. MICHALSKI, A. HEIDINGER ET AL., KOMMENTAR ZUM GESETZ BETREFFEND DIE GESELLSCHAFTEN MIT BESCHRÄNKTER HAFTUNG (GMBH-GESETZ), komentarz do § 13 ust. 2 GmbHG, no. 5 &335 (3rd ed., C.H. Beck 2017); H. G. Bamberger & H. Roth, *Beck'scher Online-Kommentar GmbHG*, komentarz do § 13 GmbHG, no. 55 Beck-online (2017); H. MERKT, H. FLEISCHER ET AL., MÜNCHENER KOMMENTAR ZUM GESETZ BETREFFEND DIE GESELLSCHAFTEN MIT BESCHRÄNKTER HAFTUNG (GMBHG), komentarz do § 13 GmbHG, no.332. (3rd ed., C.H. Beck 2015).

consist in the imposition on the controlling company of specific duties stemming from the influence the parent entity may have on the decisions of a daughter company. At English law, where the discussed concept was not met with wide approval, it is admitted that in some cases, a controlling company may be held liable to the creditors of its subsidiary.

Criticism of the veil-piercing liability concept in German doctrine and jurisprudence is much more extensive and multifaceted when compared to the corresponding criticism of the concept and construction of abuse of the legal corporate form in the Polish legal system. Indeed, Polish doctrine has not developed a concept of abuse of the legal corporate form leading to consequences similar to the German *Durchgriffshaftung*, especially providing for the consequence of piercing.

More importantly, from a comparative law perspective, it would be impossible to conclude that the Polish legal system offers a wider and more comprehensive system of creditor protection, which justifies a rare application of the piercing concept or its exclusion. It must be remembered that the remedies envisaged in Art. 299 CCPC[109] are known also in other legal systems, which does not preclude the application of veil-piercing liability or alternative grounds of company members' liability.

109. Under art. 299 CCPC,

> § 1. [i]f execution against the company proves ineffective, members of the management board shall be solidarily liable for the company's liabilities.
>
> § 2. A member of the management board may be discharged from liability referred to in § 1 above if he proves that the petition in bankruptcy was timely filed or, at the same time, decision was delivered on the commencement of a restructuring procedure or approving a composition in a procedure for the approval of a composition, or that a failure to file the petition in bankruptcy occurred through no fault on his part, or that despite the failure to file the petition or non-delivery of a decision commencing a restructuring procedure or non-approval of a composition in a procedure for the approval of a composition, the creditor suffered no damage.
>
> § 3. The provisions of § 1 and 2 above shall not prejudice the provisions whereby further liability of members of the management board is envisaged.
>
> § 4. The persons specified in § 1 shall not be liable for a failure to file the petition for bankruptcy in the course of execution by administrative receivership or through sale of an enterprise, under the provisions of the Code of Civil Procedure, if the obligation to file the petition for bankruptcy arose during the execution.

From this, it must be concluded that an acceptable and legitimate solution for creditors of a subsidiary company would be to seek compensatory liability against the controlling company based on the general law. In its judgement of 24 November 2009,[110] the Polish Supreme Court expressed the opinion that there are no grounds for exclusion of direct and personal liability of a member of a limited liability company for damages caused to third parties. However, in the opinion of the Court, the company member always holds personal liability for his own culpable behaviours causing damage to third parties but is not personally liable for the company's debts.

In the relationship between a company and its member (the controlling corporation), the compensatory liability of the latter may materialize as a consequence of such member's violation of the loyalty obligation. Such a duty is generated by the obligational relationship it has with the company.[111] Its violation may give rise to contractual liability (Art. 471 et seq. of the Civil Code).[112] However, the only currently available legislative basis[113] for claims by creditors of a subsidiary against the controlling company—as a member of the subsidiary—is the regime of delictual liability.[114] If the controlling member acts to the detriment of creditors of the subsidiary, this may allow these creditors to sue the controlling member in compensatory damages. On such occasions, the damage may be a detriment suffered by the subsidiary's creditor in consequence of non-performance of the subsidiary's obligations.[115] Of course, all conditions of delictual liability must be met.

When considering the Skanska judgment of the Court of Justice of the European Union (CJEU)[116], it is a justifiable conclusion that the court accepted veil-piercing liability within the private law realm of competition law, because it was allowed to direct claims against

110. Supreme Court, November 24, 2009, V CSK 169/09, LEX 627248.
111. D. WAJDA, OBOWIĄZEK LOJALNOŚCI W SPÓŁKACH HANDLOWYCH 132 (C.H. Beck 2009).
112. S. WŁODYKA, PRAWO KONCERNOWE 176 (Zakamycze 2003).
113. P. Wąż, *Cywilnoprawna odpowiedzialność uczestników koncernu*, 4 PRAWO SPÓŁEK 12 (2008).
114. T. Targosz, *Odpowiedzialność wspólnika wobec wierzycieli spółki*, 4 PRZEGLĄD PRAWA HANDLOWEGO 27 (2003), WŁODYKA, *supra* note 112, at 1572.
115. WŁODYKA, *supra* note 112, at 1573.
116. C-724/17, Court of Justice of the European Union, March 14, 2019, ECLI:EU:C:2019:204.

entities who, according to national laws, are separate persons, independent of the entity that caused damage. It seems, however, that another explanation is also admissible, namely that the CJEU, by accepting the liability of an enterprise, did not refer to the notion of veil-piercing liability, but rather concentrated on the concept of the enterprise and concluded that the liable party is one enterprise, which is composed of various entities.