Parental Liability Doctrine and Environmental Crimes: Limits and Perspectives

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In the context of European Environmental Law, Directive 2008/99/EC mandates Member States to institute corporate criminal liability for environmental offenses. However, there is uncertainty within the Directive regarding whether Member States should ensure that parent companies are held accountable for environmental crimes committed by their subsidiaries and, if so, under what conditions. This matter gains significance as numerous studies indicate that, in the absence of any form of effective parental liability, companies may externalize the risk of penalties by incorporating hazardous activities into separate legal entities. To curb such potentially exploitative practices, the paper scrutinizes the applicability of the "parental liability doctrine" in EU environmental criminal law. Despite this exploration, the author argues against the expansion of this doctrine, advocating instead for a fault-based form of parental liability, as the one outlined in the Proposal for a Directive on Corporate Sustainability Due Diligence. This form of liability is linked to compliance deficiencies and, consequently, aligns with the culpability principle. Furthermore, it would encourage parent companies to institute compliance programs, aiming primarily to prevent subsidiaries from engaging in criminal activities

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1. Introduction.

Under Article 6 of Directive 2008/99/EC on the protection of the environment through criminal law[1] – commonly referred to as the Environmental Crime Directive – Member States are required to ensure that legal persons are held liable for the environmental offences listed in Article 3 and 4 of the same Directive.

Although the Directive mandates Member States to introduce corporate criminal liability for environmental offences, the European law remains largely silent on its regulation, leaving much of the implementation to the discretion of Member States.

Therefore, under Directive 2008/99/EC, it is doubtful if Member States shall ensure parent companies are held responsible for the environmental crimes committed within their subsidiaries, and, if so, under which conditions.

This issue is particularly relevant, since numerous studies have shown that, without any form of parental liability – or any *effective* form of parental liability –, companies may externalize the risk of being subject to penalties, incorporating hazardous activities into separate legal entities.[2]

In essence, companies could abuse their limited liability, by creating separate corporations, directly exposed to penalties and to civil or administrative consequences.[3]

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1 The adoption of the so-called Environmental Crime Directive has had a long history: see G. Van Calster – L. Reins, *EU Environmental law*, Edward Elgar Pub., Gloucestershire, 2017, pp. 157 ss.; F. Comte, *Criminal Environmental Law and Community Competence*, in *Eur. Enery & Envtl. L. R.*, 2003, pp. 147 – 156; F. Comte, *Environmental Crime and the Police in Europe: A Panorama and Possible Paths for Future Action*, in Eur. Envtl. L. R., vol. 15, 2006, pp. 190 – 231; M. Hademann-Robinson, *The Emergence of European Union Environmental Criminal Law: A Quest for Solid Foundations*, in *Environmental Liability*, vol. 16(3), 2008, pp. 71-91; M. Faure, *The Revolution in Environmental Criminal Law in Europe*, in *Virginia Environmental Law. Journal*, vol. 35, 2017, pp. 321-356; H.E. Zeitler, *Strengthening Environmental Protection through European Criminal Law*, in *Journal for European Environmental and Planning Law*, 2007, vol. 4(3), pp. 213-220.

2 Policy Department for Citizens' Rights and Constitutional Affairs, *Environmental liability of companies*, 2020, available at *https://www.europarl.europa.eu/RegData/etudes/STUD/2020/651698/ IPOL_STU(2020)651698_EN.pdf*, p. 56. This issue is related to the well-known question of parent company accountability for infringements of human rights committed by their insolvent subsidiaries, in the field of private suits. See Amnesty International, *Injustice Incorporated: Corporate Abuses and the Human Right to Remedy, Amnesty International Publications*, London, 2014; G. Skinner, *Parent Company Accountability: Ensuring Justice for Human Rights Victims, The International Corporate Accountability Roundtable*, available at http://www.bhrinlaw.org/documents/pcap-report-2015.pdf, 2015; G. Lyson, *Parent Company Liability and the European Convention of Human Rights – An Analysis from the Perspective of English Law*, in *European Business Law Review*, 2020, vol. 31, no. 5, p. 819-844.

3 See H. Hansmann – R. Kraakman, *Toward Unlimited Shareholder Liability for Corporate Tort*, in T*he Yale Law Journal*, 1991, vol. 100, p. 1879 – 1934; G. Skinner, *Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law*, in

In order to limit such abusive conducts, the paper explores the possibility to apply the so-called "parental liability doctrine" in the field of EU environmental criminal law.

The parental liability doctrine, developed under the domain of EU competition law by the European Courts, implies that parent companies are strictly liable for the infringements committed within their subsidiaries.

Ultimately, the Author affirms the extension of this doctrine is not desirable, and it should be preferred a fault-based form of parental liability, as the one embodied in the Proposal for a Directive on Corporate Sustainability Due Diligence.

Specifically, in paragraph 2, the Author will first introduce the parental liability doctrine as developed in the domain of EU competition law.

In paragraph 3, the Author will illustrate how the European Courts could require national authorities to apply the parental liability doctrine in the field of environmental criminal law, especially to ensure full effect to the provisions of the Environmental Crime Directive.

In paragraph 4, the argument will be made that the parental liability doctrine should *not* be applied in the field of environmental criminal law, since it would be inconsistent with the respect of human rights and the specific features of EU environmental law.

In paragraph 5, the Author will illustrate the new form of parental liability emerging under the Proposal for a Directive on Corporate Sustainability Due Diligence, affirming that its application would be desirable in the field of environmental criminal law as well.

2. The "parental liability doctrine" as developed in the field of EU competition law.

As mentioned above, the parental liability doctrine has been developed by European Courts in the domain of competition law, throughout a functional interpretation of the term "undertaking", embodied in Article 101 of the Treaty on the Functioning of the European Union (TFEU).

Article 101 of the Treaty on the Functioning of the European Union (TFEU) states: "The following shall be prohibited as incompatible with the internal market: all agreements between *undertakings*, decisions by associations of *undertakings* and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market" (emphasis added).

Washington & Lee Law Review, 2015, p. 1823-1864; N. Mendelson, *A Control-Based Approach to Shareholder Liability for Corporate Torts*, in *Columbia Law Review*, 2002, vol. 102, p. 1203-1303.

Under this provision, the legal term of undertaking has been interpreted as referred to any "economic unit", defined as "a unitary organization of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision"[4].

The notion of economic unit has been referred to various companies which operate on the market as a single actor. It has been considered decisive "the existence of unity of conduct on the market, without allowing the formal separation between various companies that results from their separate legal personalities to preclude such unity for the purposes of the application of the competition rules"[5].

In the context of group of companies, since the case of *Imperial Chemical Industries v. Commission*, the European Court held that "the fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company. Such may be the case in particular where the subsidiary, although having separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company".[6]

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4 Court of First Instance, Case T-11/89, *Shell International Chemical Company Ltd v Commission of the European Communities*, 10.03.1992, §311.

5 See recently, the judgment of the European Court of Justice (Grand Chamber), Case C882/19, *Sumal SL v. Mercedes Benz Trucks España SL*, 6.10.2021, §41. It is worthy of note that the legal concept of "economic unit" leads to the liability of every companies within the group of corporates; not only the liability of the parent company, but also of the "sister" or the "daughter" of the company who committed the infringement. See C Kersting, *Liability of Sister Companies and Subsidiaries in European Competition Law*, in *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht (ZHR)*, 2018, 182, *8*, p. 1-25.

6 Court of Justice, Case 48-69, *Imperial Chemical Industries Ltd. v Commission of the European Communities*, 14.07.1972, §132. With regard to groups of companies, as B. Cortese, *Piercing the Corporate Veil in EU Competition Law: The Parent Subsidiary Relationship and Antitrust Liability*, in B. Cortese (ed.), *EU Competition Law Between Public and Private Enforcement*, Kluwer Law International, Croydon, 2014, pp. 73-93, noted, the concept of economic unit was first adopted in the case of *Beguelin Import* (1971) as a "shield", in order to "exclude intra-group agreements from the scope of Article 85 EEC when the subsidiary, 'although having separate legal personality, enjoys no economic independence' ".According to the economic unit doctrine, different companies belonging to the same group were allowed to pursue a unitary commercial strategy without committing any infringement of EU competition law. Some years later, in the case of *Imperial Chemical Industries v. Commission*, the European Court started to use the same doctrine in an "offensive way", as a "sword", to recognize the EC Commission's jurisdiction over a parent company which was not established in the European Union, where its subsidiary was established. It is important to note that in case the parent company is responsible for its subsidiary's conduct, the fine can be increased for deterrence and based on the turnover of the entire group, even if only one subsidiary was involved in the infringement. The ten percent limit on the amount of the fine, imposed by Regulation 1/2003, Article 23, is applied to the group turnover, and not to the turnover of the subsidiary, see J. Temple Lang, *How Can the Problem of the Liability of a Parent Company for Price Fixing by a*

Thereafter, the parental liability doctrine was soon adopted in order to impose fines over parent companies, if they exert a decisive influence over the market conduct of their subsidiary, "having regard in particular to the economic, organizational and legal links between those two legal entities"[7].

In the well-known case of *Akzo Nobel v. Commission*, the Court of Justice introduced a presumption "where a parent company has a 100% shareholding in a subsidiary which has infringed the Community competition rules". In this case, since the parent company has the *possibility* to exercise a decisive influence over the conduct of the subsidiary, there is a "rebuttable presumption that the parent company *does in fact* exercise a decisive influence over the conduct of its subsidiary"[8] (emphasis added).

In practice, the "Azko presumption" has never been rebutted upon substantial grounds. However in more recent cases, the European Courts have overruled the contested decision on procedural grounds, finding the Commission had not adequately addressed the arguments put forward by the companies in order to rebut the Azko presumption.[9]

Wholly-owned Subsidiary be Resolved?, in *Fordham International Law Journal*, 2014, vol. 37, issue 5,. p. 1481 – 1524.

Interestingly, M. Bronckers, *No Longer Presumed Guilty: The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law*, in *World Competition: Law and Economics Review*, vol. 34, no. 4, 2011, p. 554, has noted: "it is not obvious that the parental liability presumption is proportionate to the in itself laudable goal of ensuring the effective implementation of competition law. The effects this presumption may have really go quite far: not only piercing the corporate veil but also enabling an increase of the fine as the parent's presumably larger global turnover will now operate as a ceiling.102 Why would a fine imposed on a subsidiary for its infringing conduct normally not be good enough to ensure the effective implementation of EU competition law?".

7 European Court of Justice, Case C-152/19 P, *Deutsche Telekom AG v. European Commission*, 25.03.2021, §74. The existence of such decisive influence can be derived by the instructions the parent company gave to its daughter company or by a body of consistent evidence, as the presence of senior managers of the parent company on its subsidiary's board of directors, the provision of staff of the parent company to its daughter company, or the "regular reporting, by a subsidiary to its parent company, of detailed information relating to its commercial policy"; see V. Ufbeck, *Vicarious Liability in Groups of Companies and in Supply Chains – Is competition Law leading the Way?*, in *Market and Competition Law Review*, 2019, v. III, n. 2, p. 112 – 113.

8 Court of Justice, C-97/08 P., *Akzo Nobel NV and Others v Commission of the European Communities*, 17.09.2009, §60. Therefore, in those circumstances, "it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent exercises a decisive influence over the commercial policy of the subsidiary"; see §61.

9 In the case of Air Liquide, the General Court has recognized the Commission did not address "the arguments put forward by the applicant", failing to "set out the reasons why the Commission is of the view that the matters submitted by the applicant were inadequate to rebut the presumption at issue"; see General Court, Case T185/06, *L'Air liquide, société anonyme pour l'étude et l'exploitation des procédés Georges Claude v. European Commission*, ECLI:EU:T:2011:275, 16.06.2011, §67. In this case, the applicant put forward specific arguments to ground the

Despite several criticism,[10] the European Courts have continued to adopt the parental liability doctrine and the "Azko presumption" in the domain of competition law and, recently, they have expanded the presumption as well.

In the *Goldman Sachs* case,[11] the General Court of the European Union applied the "Azko presumption" whereas the indirect partner's shareholdings was

daughter's company independence; among others: there was not a directory interlocking, since none of the subsidiary's director was a member of the applicant's management board; the subsidiary's board of directors and it managing directors had widely powers; the subsidiary company had its own departments, namely a commercial department, a marketing department, a human resources department, an IT department and an accounts department; the subsidiary company independently managed the shareholding in several other companies; directives and broad guidelines concerning price were issued exclusively by subsidiary's directors, decisions on a price offered to a specific customer were taken by operatives, under the sole control of their directors, which has been demonstrated by internal correspondence and customer visit reports provided to the Commission; there was no evidence the parent company gave any instructions to the subsidiary. In a similar way, in the case of Elf Aquitaine, the Court of Justice overruled the impugned decision since it did not state the reasons for the Commission's position; see European Court of Justice, Case C-521/09, *Elf Aquitaine SA, v. European Commission*, 29.11.2011, §160. It is important to note the Elf Aquitaine judgment followed the Menarini case before the European Court of Human Rights (European Court of Human Rights, 27.9.2011*, A. Menarini Diagnostics Srl v. Italy*), in which the ECHR recognized the Italian competition law as criminal matter. On the reverse, in many case law, the arguments submitted by the parent companies have been considered insufficient to rebut the Azko presumption. For instance, in Servizio Elettrico Nazionale s.p.a. case, the Court held "that the claim that the decentralised decision-making processes within the group resulted in ENEL merely having the role of promoting synergies and best practices among the various companies in the group does not, in any event, appear to be sufficient to rebut that presumption in so far as, inter alia, it does not preclude ENEL representatives from being members of [the subsidiary's] decision-making bodies or even guarantee that members of those bodies were functionally independent of the parent company"; see European Court of Justice, Case C-377/20, *Servizio Elettrico Nazionale SpA and Others v Autorità Garante della Concorrenza e del Mercato and Others*, 12.05.2022, §122. An accurate analysis of the relevant case law is provided by L. Solek – S. Wartinger, *Parental Liability: Rebutting the Presumption of Decisive Influence*, in *Journal of European Competition Law & Practice*, vol. 6, n. 2, 2015, p. 73-84 and in J. Temple Lang, *How Can the Problem of the Liability of a Parent Company for Price Fixing by a Wholly-owned Subsidiary be Resolved?*, cit. The legal concept of parental liability has been heavily criticized as being not rebuttable; see B. Leupold, *Effective Enforcement of EU Competition Law Gone Too Far? Recent Case Law on the Presumption of Parental Liability*, in *European Competition Law Review*, 2013, pp. 570 – 582; J. Temple Lang, *How Can the Problem of the Liability of a Parent Company for Price Fixing by a Wholly-owned Subsidiary be Resolved?*, cit.; J. Joshua – Y. Botteman – L. Atlee, *'You Can't Beat the Percentage': The Parental Liability Presumption in EU Cartel Enforcement*, in *European Anitrust Review*, 2012; J. D. Briggs – S. Jordan, *Presumed Guilty; Shareholder Liability for a Subsiadiry's infringements of Article 81 EC Treaty*, in *Global Competition Litigation Review*, 2009, p. 203–204.

10 Several Authors have pointed out that the parental liability doctrine is inconsistent with the principle of personal liability and the presumption of innocence, as explained in paragraph 4 of this paper.

11 General Court, Case T-419/14, *The Goldman Sachs Group, Inc. v European Commission*, 12.07.2018.

lower than 84.4.% of the equity, recognizing it controlled 100% of the voting rights associated with that company's shares – so that, according to the General Court, the indirect partner was "in a situation similar to that of a sole owner of the […] group".[12]

Moreover, in the *Skanska* case, the Court of Justice affirmed the parental liability doctrine should be applied in the field of *civil labiality* for damage claims based on a competition law infringement.[13]

Ultimately, under Directive (EU) 2019/1, the parental liability doctrine has been extended to national competition authorities, since they "should be able to apply the notion of undertaking to find a parent company liable, and impose

12 *The Goldman Sachs Group, Inc. v European Commission*, cit., §48. According to the European Courts, the presumption of actual exercise of decisive influence should be applied "in the case where a parent company is able to exercise all the voting rights associated with the shares of its subsidiary, since that parent company is in a position to exercise total control over the conduct of that subsidiary without any third parties, in particular other shareholders, being in principle able to object to that control" (see §52). In this case the General Court of the European Union upheld a 7.3 milions fine on Goldman Sachs, which was the indirect partner of Prysmian group of companies, in respect of an infringement committed by the Prysmian group itself.

13 European Court of Justice, Case C-724/17, *Vantaan kaupunki v Skanska Industrial Solutions Oy and Others*, 14.03.2019. See C. Kersting, *Liability of Sister Companies and Subsidiaries in European Competition Law*, in *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht (ZHR) 182,* 2018, 8; B. Freund, *Reshaping Liability – The Concept of Undertaking Applied to Private Enforcement of EU Competition Law*, in *GRUR International*, 2021, vol. 70, issue 8, p. 731–743. As pointed out by V. Ufbeck, *Vicarious Liability in Groups of Companies and in Supply Chains – Is competition Law leading the Way*?, in *Market and Competition Law Review*, 2019, vol. 3, no. 2, p. 144, "prior to the *Skanska* decision, it was uncertain whether the doctrine of the economic unit, as developed with regard to administrative liability, would also apply to civil liability incurred by the subsidiary". It is worthy of note that the Directive 2014/10/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, makes use of the term "undertaking" in the definition of 'infringer' provided by Article 2. See J. L. da Cruz Vilaça – M. M. Pereira, *Parental Liability under the ECN+ Directive and its Extension to Accessory Sanctions*, online version available: https://www.concorrencia.pt/sites/default/files/imported-agazines/CR_42-4304_EN.pdf. In particular, in case of succession of legal entities, the Court affirmed the acquiring corporates are accountable when all the shares of the companies, which have participated in a prohibited cartel, were acquired by other companies, dissolving the former companies and carrying on their commercial activities. In the subsequent *Sumal* case, related to a claims brought against a subsidiary of a parent company that has been found to infringe EU competition law, the Court stated: "actions for damages for infringement of those rules (private enforcement) are an integral part of the system for enforcement of those rules, which are intended to punish anticompetitive behaviour on the part of undertakings and to deter them from engaging in such conduct" and it "follows that the concept of 'undertaking', within the meaning of Article 101 TFEU, which constitutes an autonomous concept of EU law, cannot have a different scope with regard to the imposition of fines by the Commission under Article 23(2) of Regulation No 1/2003 as compared to actions for damages for infringement of EU competition rules"; see European Court of Justice (Grand Chamber), Case C-882/19, *Sumal, S.L. v Mercedes Benz Trucks España*, S.L., 6.10.2021.

fines on it, for the conduct of one of its subsidiaries, where the parent company and its subsidiary form a single economic unit".[14]

3. Corporate and parental liability in the field of EU environmental criminal law.

As seen above, the parental liability doctrine has enjoyed considerable success in the field of EU competition law.

For this reason, it appears important to inquire whether the parental liability doctrine should be applied – or *could* be applied – in the domain of European environmental criminal law.

As previously discussed, under the Environmental Crime Directive, Member States are mandated to ensure that serious infringements of EU law regarding the protection of the environment, as listed in Article 2 and 4 of the Directive, constitute criminal offences.

In this case, the Directive provides both individual and *corporate* criminal liability, since Article 6, paragraph 1, reads as follows: "Member States shall ensure that legal persons can be held liable for offences referred to in Articles 3 and 4 where such offences have been committed for their benefit by any person who has a leading position within the legal person, acting either individually or as part of an organ of the legal person".

Furthermore, under Article 6, paragraph 2, "Member States shall also ensure that legal persons can be held liable where the lack of supervision or control, by a person referred to in paragraph 1, has made possible the commission of an offence referred to in Articles 3 and 4 for the benefit of the legal person by a person under its authority".

In other terms, the Environmental Crime Directive requires Member States to hold corporations liable in the case, among others factors, "the lack of supervision or control" – by a person who has a leading position within the company – have "made possible the commission of an offence […] by a *person* under its authority" (emphasis added).

Notably, under Article 8b of Directive 2009/123/EC amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties

14 According to recital (46). The Directive "sets out certain rules to ensure that national competition authorities have the necessary guarantees of independence, resources, and enforcement and fining powers to be able to effectively apply Articles 101 and 102 TFEU". See Article 1 of the Directive 1/2019 adopted on 11 December 2018 by European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market. In this scenario, Article 13 disciplines "fines on undertakings and associations of undertakings", providing "Member States shall ensure that for the purpose of imposing fines on parent companies and legal and economic successors of undertakings, the notion of undertaking applies".

for infringements, legal persons shall be held liable whether the crime has been committed "by any *natural* person acting either individually or as part of an organ of the legal person, and who has a leading position within the structure of the legal person" or "where lack of supervision or control by a *natural* person referred to in paragraph 1 has made the commission of a criminal offence […] possible for the benefit of that legal person by a *natural* person under its authority" (emphasis added).

Therefore, it is possible to argue that, under the so-called Environmental Crime Directive, Member States shall ensure legal person can be held liable when the crime is committed by either a natural or a *legal* person under its authority.

Throughout this provision, one could consider Member States shall held parent companies liable whether the illicit conduct has been committed within their subsidiaries – if the crime has been made possible by the lack of supervision or control of a person who has a leading position within the legal entity.

In addition, under Article 7, the offences must be punishable by effective, proportionate and dissuasive penalties. Therefore, types and levels of the penalties are not indicated under the Directive.

In this scenario, if a Member State does not ensure any effective form of parental liability, European Courts could consider the national provisions do not satisfy the requirement of EU law that penalties for environmental offences be effective and dissuasive, if parent companies are allowed to use their subsidiaries to externalize hazardous activities and escape criminal liability.

To ensure effective and dissuasive penalties under Article 7 of the Directive, therefore, European Courts could require national courts to apply the parental liability doctrine, as developed in the field of EU competition law.

The application of the parental liability doctrine, as a form of strict liability, could guarantee the full effect of EU environmental law, limiting corporations in abusing their limited liability.

Although the application of parental liability doctrine could serve several desirable purposes – for instance, it could in fact reduce the risk of exploitation of limited liability by multinational companies –, the following arguments suggest the parental liability doctrine may not be applied under the domain of environmental criminal law.

4. Critical issues of the "parental liability doctrine" in the field of EU competition law.

In the field of competition law, many Authors have pointed out that the parental liability doctrine is inconsistent with the fundamental guarantees of criminal law, as it violates the principle of personal liability and the presumption of innocence.

These arguments have been firstly developed under the domain of EU competition law, as it is considered criminal in nature according to the well-established Engel criteria.[15]

(a) The principle of personal liability

As regards the principle of personal liability, many criticisms have been raised about the nature of the parental liability in the field of competition law.

Especially after the Azko case[16], many authors have pointed out that the parent company is held responsible for the infringement committed within its subsidiary solely because it controls or has the possibility of control the daughter company's commercial policy[17].

In other terms, since the European Courts do not require any participation of the parent company in the illicit conduct of its subsidiary, the parental liability, as a control-based liability, is "strict" or "not based on fault".

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15 In the Menarini case, the European Court of Human Rights recognized the Italian competition law as criminal matter; see European Court of Human Rights, 27.9.2011*, A. Menarini Diagnostics Srl v. Italy*.

16 As noted by R. Oliveira – S. Estima Martins, *EU Competition Law and Parental Liability: The Akzo II Case*, in K. Lenaerts, N. Piçarra, C. Farinhas, A. Marciano and F. Rolin (eds), *Building the European Union. The Jurist's View of the Union's Evolution*, Bloomsbury Publishing Oxford, 2021 p. 548 "unlike in early cases where some kind of direct participation of the aren't company seemed to be required in order to impute the infringement to it, in more recent cases, particularly after the *Azko I* and subsequent case law, derive from the possibility of exerting decisive influence over the conduct of the subsidiary in general terms – and not specifically the conduct leading to the infringement – which would be presumed to actually take place in cases where the parent owned 100 per cent of the subsidiaries' shares".

17 The criticism towards the parent company's liability as it is strict, is extensive and unanimous. See, e.g., C. Koenig, *An Economic Analysis of the Single Economic Entity Doctrine in EU Competition Law*, in *J. Comp. L. & Econ.*, 2017, p. 286; B. Leupold, *Effective Enforcement of EU Competition Law Gone Too Far?: Recent Case Law on the Presumption of Parental Liability*, in *Eur. Competition L. Rev.*, 2013, vol. 34, p. 570 – 582; S. Thomas, *Guilty of a Fault that One Has Not Committed: The Limits of the Group-Based Sanction Policy Carried Out by the Commission and the European Courts in EU-Antitrust Law*, *in J. Eur. Competition L. & Prac.*, 2012, p. 11-28; S. Burden – J. Townsed, *Whose Fault Is It Anyway? Undertaking and the Imputation of Liability*, in *Competition L.J.*, 2013, vol. 12, no. 3, p. 294-303; J. Joshua – Y. Botteman – L. Atlee, *'You Can't Beat the Percentage': The Parental Liability Presumption in EU Cartel Enforcement*, in *Eur. Antitrust Rev.*, vol. 13, no. 3, 2012, p. 3-9; M. Bronckers, *No Longer Presumed Guilty: The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law*, in *World Competition: Law and Economics Review*, vol. 34, no. 4, 2011, p. 535-570. V. Ufbeck, *Vicarious Liability in Groups of Companies and in Supply Chains – Is competition Law leading the Way?*, in *Market and Competition Law Review*, vol. 3, no. 2, 2019, p. 112, affirms: "since there is no requirement that the parent company was involved or had knowledge or ought to have had knowledge of the infringements committed by its subsidiary". According to K. Hofstetter – M. Ludescher, *Fines against Parent Companies in EU Antitrust Law. Setting Incentives for "Best Practice Compliance"*, in *World Competition*, 2010, vol. 33, no. 1, p. 2, the parental liability espouses the parent company to a system of "guilt by association".

Therefore, it "does not matter whether the parent company was involved in the antitrust infringement. Neither does it matter whether the parent could have prevented the violation of the competition law, or whether it knew or could have known about the violation. The only point that matters is the parent company's relation to the subsidiary".[18]

The European Court has tackled this criticism, affirming that "it should be borne in mind that, according to settled case-law, the concept of 'undertaking' covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. On that point, the Court has stated that in this context the term 'undertaking' must be understood as designating an economic unit even if in law that economic unit consists of several natural or legal persons, and that if such an economic entity infringes the competition rules, it is for that entity, consistently with the principle of personal liability, to answer for that infringement".[19]

This justification seems to be unsatisfactory, since the Court resolved the issue concerning the violation of the principle of personal liability, referring the infringement to the undertaking itself, as a new legal subject under Article 101 TFEU.

However, as noted by Oliveira and Martins, "only natural or legal persons have personality. Economic entities do not. An infringement is a violation of an obligation established by law; since only natural or legal persons may be bound by obligations, only they can violate them".[20]

For this reason, "placing the expression 'single economic entity' and 'principle of personal liability' in the same sentence seems […] a contradiction difficult to overcome". [21]

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18 C. Koenig, *Comparing Parent Company Liability in EU and US Competition Law*, in *World Competition*, 2017, vol. 41, n. 1, p. 73 – 74.

19 European Court of Justice, Case C-521/09, *Elf Aquitaine SA, v. European Commission*, 29.11.2011, § 53.

20 R. Oliveira – S. Estima Martins, *EU Competition Law and Parental Liability: The Akzo II Case*, cit., p. 147. C. Koenig, *An Economic Analysis of the Single Economic Entity Doctrine in EU Competition Law*, in J. *Comp. L. & Econ.*, 2017, p. 286 notes that "the Court consistently speaks of the conduct of the subsidiary being 'imputed' to the parent company. Furthermore, in recent decisions concerning the reduction of fines, the Court has explained that the parent's liability is 'purely derivative and secondary and thus depends on that of its subsidiary'. Thus, the language used by the European Court is ambiguous. It can be understood as holding the parent company liable for having infringed the antitrust law itself (*direct liability)*, or for simply being the parent of the infringing subsidiary (*indirect, control-based liability*)". J. Temple Lang, *How Can the Problem of the Liability of a Parent Company for Price Fixing by a Wholly-owned Subsidiary be Resolved?*, in *Fordham International Law Journal*, 2014, vol. 37, no. 5, 1481 – 1524, p. 87 argues that the application of human rights "cannot be made dependent on the application of a 'special' approach to legal personality, according to the choice and convenience of the prosecutor".

21 R. Oliveira – S. Estima Martins, *EU Competition Law and Parental Liability: The Akzo II Case*, cit., p. 147.

(b) The presumption of innocence

Almost unanimously, jurists and legal scholarship have criticized the "Azko presumption" as it is in fact not rebuttable, introducing a "*probatio diabolica*" upon the parent company.[22]

In particular, Koening has affirmed that the "Azko presumption is today firmly established, despite allegations that is in fact not rebuttable, and thus infringes upon fundamental procedural rights, such as the presumption of innocence".[23]

On the contrary, the Court of Justice has stated the presumption "does not infringe the right to be presumed innocent that is guaranteed by Article 48(1) of the Charter or the principles of *in dubio pro reo* and *nullum crimen, nulla poena sine lege*. The presumption that a parent company exercises decisive influence over its subsidiary when it holds all or almost all of the capital in the subsidiary does not lead to a presumption of guilt on the part of either one of those companies and therefore does not infringe either the right to be presumed innocent or the principle of *in dubio pro reo*".[24]

In fact, as seen above, in paragraph 2, the European Courts have in some cases annulled the impugned decisions since they did not contain an adequate assessment of the appellant's allegations.

On the other hand, it is important to underline that the "goal of refuting the presumption is reached by demonstrating the complete autonomy of the subsidiary's conduct on the market and not only by proving that the subsidiary was independent as regards the infringing behaviour. It should not be forgotten that the parent company is rebutting the existence of a single undertaking and not its direct participation in the infringement".[25]

Once again, therefore, the critic issue regards the accordance of the parental liability doctrine with the principle of culpability, since the parent company

22 J. Temple Lang, How *Can the Problem of the Liability of a Parent Company for Price Fixing by a Wholly-owned Subsidiary be Resolved?*, cit.; J. Joshua, Y. Botteman, L. Atlee, *'You Can't Beat the Percentage': The Parental Liability Presumption in EU Cartele Enforcement*, cit., p. 7-8; I. Vanderborre, T. C. Goetz, *Rebutting the Presumption of Parental Liability – A Probatio Diabolica?*, in *The International Comparative Legal Guide to: Cartels & Leniency*, 2012, p. 17; J.D. Briggs – S. Jordan, *Presumed Guilty; Shareholder Liability for a Subsidiary's infringements of Article 81 EC Treaty*, in *Business Law International*, 2007, vol. 8, n. 1, p. 1-37; L. Bettina, *Effective enforcement of EU competition law gone too far? Recent case law on the presumption of parental liability*, in *European Competition Law Review*, 2013, vol. 34, no. 11, p. 570-582, M. Bronckers, *No Longer Presumed Guilty: The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law*, in *World Competition: Law and Economics Review*, 2011, vol. 34, no. 4, p. 535-570.

23 C. Koenig, *Comparing Parent Company Liability in EU and US Competition Law*, cit., p. 74.

24 European Court of Justice, Case C 625/13 P, *Villeroy & Boch AG, v. European Commission*, 26.01.2017, §149.

25 L. Solek – S. Wartinger, *Parental Liability: Rebutting the Presumption of Decisive Influence*, in *Journal of European Competition Law & Practice*, 2015, vol. 6, n. 2, p. 77.

has to demonstrate it has not had any control over its subsidiary's commercial policy, rather than over the illicit conduct.

4.1. Critical issues of the "parental liability doctrine" in the field of environmental criminal law.

As seen above, in the field of competition law, many Authors have criticized the parental liability doctrine as being inconsistent with the principle of personal liability and with the presumption of innocence.

The same arguments, therefore, suggest the parental liability doctrine should not be applied in the domain of EU environmental criminal law, as environmental corporate liability should be considered criminal as well – taking into account the severity of the penalties foreseen in many Member States and their deterrence aim.

In this field, moreover, corporate liability seems to be even closer to the core of criminal law, since it is intrinsically related to an *individual liability*, which is formally and substantially *criminal*. For this reason, the criminal-head guarantees should necessarily apply with their full stringency. [26]

In addition, one should bear in mind that, while competition law is primarily enforced by the Commission, environmental criminal law is exclusively enforced by national authorities.

Therefore, national courts could be reluctant to apply the parental liability doctrine as developed in the field of EU competition law, intending to safeguard the recalled guarantees, which are strongly affirmed in many Member States.

Ultimately, it is worthy of note that the parental liability doctrine has not been yet considered in respect of the more recent case law of the European Court of Human Rights on the culpability principle.

In particular, in the well-known G.I.E.M. case[27], the Grand Chamber of the European Court of Human Rights stated that "the rationale of the sentence and punishment, and the 'guilty' concept (in the English version) and the corresponding notion of 'personne coupable' (in the French version), support an interpretation whereby Article 7 requires, for the purposes of punishment, an intellectual link (awareness and intent) disclosing an element of liability in the

26 As it is well known, under ECHR case law, the criminal-head guarantees will not necessarily apply with their full stringency in all cases, in particular those that do not belong to the traditional categories of criminal law such as tax surcharges proceedings (European Court of Human Rights, Grand Chamber, *Jussila v. Finland*, 23.11.2006, § 43), minor road traffic offences proceedings (European Court of Human Rights, *Marčan v. Croatia*, 10/07/2014, § 37) or proceedings concerning an administrative fine for having provided premises for prostitution (European Court of Human Rights, *Sancakh v. Turkey,* 15/05/2018, §§ 43-52).

27 European Court of Human Rights, Grand Chamber, 28.06.2018, *G.I.E.M. S.R.L. and Others v. Italy*, §116.

conduct of the perpetrator of the offence, failing which the penalty will be unjustified. Moreover, it would be inconsistent, on the one hand, to require an accessible and foreseeable legal basis and, on the other, to allow an individual to be found 'guilty' and to 'punish' him even though he had not been in a position to know the criminal law owing to an unavoidable error for which the person falling foul of it could in no way be blamed".[28]

Therefore, the European Court of Human Rights has interpreted the principle of legality in criminal law as "a prohibition on punishing a person where the offence has been committed by another".

Recently, this principle was examined before the European Court of Justice, by Advocate General M. Priit Pikamäe in the case of Criminal proceedings against Delta Story.[29]

The Advocate General affirmed that, in the context of corporate liability, the culpability principle is assured throughout the application of the *identification theory*, as the legal person is held liable for the crime committed or permitted by a natural person who has a leading position within the corporate.

Therefore "the natural person concerned is not a third party in respect of the legal person but is the legal person, in which they identifies their self" and "it is a liability for one's own act by reason of a relationship of representation and not of substitution"[30].

For this reason, the legal person can be held liable for the crime committed by a natural person whereas an element of liability is established in its representatives, who identify the legal person itself.

As applied in domain of competition law, on the reverse, the parental liability doctrine implies parent company is strictly held liable for the infringement committed within one of its subsidiaries, even if no element of liability has been proven in respect of the parent company's representatives.

4.2. Different fields and different disciplines.

Ultimately, the extension of the parental liability doctrine in the field of the environmental criminal law appears inconsistent with the specific features of European environmental law.

In other terms, inquiring whether or not the parental liability doctrine should be applied under environmental law, one should bear in mind that this doctrine

28 European Court of Human Rights, Grand Chamber, 28.06.2018, *G.I.E.M. S.R.L. and Others v. Italy*, §116.

29 Opinion of Advocate General Pikamäe, delivered on 9 June 2022, case C-203/21, Criminal proceedings against Delta Story 2003.

30 Conclusions of the Advocate General M. Priit Pikamäe, 9.06.2022, *Procédure pénale contre DELTA STROY 2003*; §49. Please, note the text has been translated by the Author, since the document is not available in English.

has been developed in the domain of competition law and it has been shaped by the features of this field.

Therefore, the exportation of the parental liability doctrine would be inconsistent with the principles, rules, and enforcement of EU environmental law.

(a) Principles

As seen above, in the domain of competition law, the parental liability doctrine has been developed as a general rule, which has been extended to civil liability for infringement of EU competition rules.

On the reverse, considering the entire domain of environmental law, it should be noted that under the Environmental Liability Directive, which regards the prevention and remedying of environmental damage, the corporate liability is envisaged as a fault-based liability – as strict liability is foreseen in exceptional cases, as it will be showed below.

The Environmental Liability Directive – i.e. Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage – is based, among others, on the 'polluter pays' principle.[31]

In particular, as the Court of Justice affirmed in the case of Raffinerie Mediterranee, "it is apparent from Article 3(1)(b) of Directive 2004/35 that, where there is damage to protected species and habitats caused by any occupational activities other than those listed in Annex III to the directive, the directive applies, provided that it is established that the operator *has been at fault or negligent*. On the other hand, there is no such requirement where one of the occupational activities listed in Annex III has caused environmental damage, namely – as defined in Article 2(1)(a) to (c) of the directive – damage to protected species and habitats, and water and land damage"[32] (emphasis added).

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31 Under the EU Environmental Liability Directive, the liable person is the "operator", defined as "any natural or legal, private or public person who operates or controls the occupational activity". Therefore, it has been questioned if the concept of "operator" encompasses the parent company which indirectly controls the occupational activity. According to L. Bergkamp – B. Goldsmith (editors), *The EU Environmental Liability Directive: a Commentary*, Oxford University Press, Croydon, 2013, p. 53, if the term "operator" would be referred to parent companies "they would have a incentive to discontinue corporate environmental and health programmes and compliance auditing, which might be deemed indicia of 'control'". See also L. Bergkamp, *The Environmental Liability Directive and Liability of Parent Companies for Damage Caused by Their Subsidiaries ('Enterprise Liability')*, in *European Company Law*, 2016, vol 13, n. 5, p 185: if "the parent company does not exercise direct operational control, treating it as an operator can have adverse effects. It would have a strong incentive not to be deemed to be 'controlling' the activities of their its subsidiaries"; S. Cassotta – C. Verdure, *La Directive 2004/35/CE sur la responsabilité environnementale : affinement des concepts et enjeux économiques*, in *Revue du droit de l'Union Européenne*, 2012, n. 2, p. 242.

32 Court of Justice, Grand Chamber, 9.3. 2010, *Raffinerie Mediterranee (ERG) SpA, Polimeri Europa SpA and Syndial SpA v Ministero dello Sviluppo economico and Others*, Case C-378/08.

Therefore, the 'polluter pays' principle embodies a liability which is fault based for the purposes of the Environmental Liability Directive, except for those occupational activities listed in Annex III of the Directive.[33]

For this reason, the adoption of the parental liability doctrine in the field of environmental criminal law, as a form of vicarious or strict liability, would be discontinuous with this principle, which generally requires a fault-based liability for prevention and remedying of environmental damage.

In addition, since criminal penalties are usually more severe than the administrative sanctions, it should be considered that criminal liability should not be stricter or less guaranteed than the administrative one.

(b) Rules

It is worthy of note that, under competition law, the parental liability doctrine meets certain limits or adjustments under the Commission's guidelines on the method of setting fines.

In the field of competition law, the power of imposing fines on undertakings or associations of undertakings when they infringe Article 81 or 82 of the Treaty, belongs to the Commission, pursuant to Article 23(2)(a) of Regulation No 1/2003.

In exercising its power to impose such fines, the Commission enjoys a wide margin of discretion; thus, starting from January 1998, the Commission has published guidelines on the method of setting fines.

In this context, the paragraph 35 of the Guidelines on the method of setting fines published in the Official Journal of the European Union on 1 September 2006, provides:

"In exceptional cases, the Commission may, upon request, take account of the undertaking's inability to pay in a specific social and economic context. It will not base any reduction granted for this reason in the fine on the mere finding

33 Therefore, according to S. Cassotta – C. Verdure, *La Directive 2004/35/CE sur la responsabilité environnementale : affinement des concepts et enjeux économiques*, cit. p. 242, under the Environmental Liability Directive, the liability of the parent company for the pollution caused by one of its subsidiaries could be envisaged exclusively through a statutory provision, which modify the Directive itself. In addition, V. Ufbeck, *Vicarious Liability in Groups of Companies and in Supply Chains*, cit., p. 122-123, pointed out that "competition law plays a key role in the development of the common, inner market. Accordingly, market efficiency arguments are used to apply the concept of an undertaking as a 'shield' and exclude the application of competition law rules on 'inner group company agreements' and as a -logical – corollary to support the use of the concept of an undertaking as a 'sword' to establish parental liability for competition law infringements. Outside the area of competition law, the concept of the undertaking is not called for to have a 'shield function' and in general market efficiency arguments can only more indirectly support parental liability for workers' injuries and environmental damage". Notwithstanding these arguments, the Author points out as well reasons underpinning parental liability which might speak in favour of extending parental liability to the field of environmental damage.

of an adverse or loss-making financial situation. A reduction could be granted solely on the basis of objective evidence that imposition of the fine as provided for in these Guidelines would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value".

This provision introduces an adjustment mechanism which sets a limit upon the amount of the fine the Commission can impose on parent company, as the penalty can not expose the parent company to consequences which could jeopardise its own economic viability.[34]

Since in the field of environmental criminal law no such limit is provided, the importation of the parental liability doctrine could lead to undesirable results or, even, to overdeterrence, unless such adjustment is imported too.

(c) Enforcement

Regarding the enforcement of European environmental law, it should be noted that environmental law encompasses individual criminal liability, which is not foreseen under EU competition law.

This difference can be significant as, according to Koening, the parental liability doctrine has been developed primarily to ensure "effective deterrence where the primary target of liability – the corporation in the course of whose business the antitrust violation was committed – is underdeterred"[35].

In other terms, holding parent company liable for infringements by subsidiaries "prevents parent companies from opportunistically exploiting limited liability" and "contributes to *general deterrence* (deterring all undertakings from infringing competition law) by increasing parent companies' risk of being fined for competition law infringements and allowing for the imposition of higher fines"[36].

Interestingly, Koening notes this deterrence effect can be achieved as well with other enforcement instruments, such as individual liability of managers and employees.

Under this perspective, one could argue the parental liability doctrine was developed in the field of competitive law as a form of strict liability since no individual liability was foreseen for the same illicit conduct.

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34 These criteria is followed by national authorities too, since the "inability to pay as a circumstance to be considered in imposing the fine is taken into account by most competition authorities" (see International Competition Network, *Setting of Fines for Cartels in ICN Jurisdictions, Report to the 7th ICN Annual Conference, Kyoto, April 2008*, European Communities, 2008, Italy). See for instance the Italian Antitrust Authority's Guidelines on calculating fines for serious breaches of national or EU competition law, Art. VIII "Capacità contributiva".

35 C. Koenig, *Comparing Parent Company Liability in EU and US Competition Law*, in *World Competition*, 2017, vol. 41, n. 1, p. 70.

36 C. Koenig, *Comparing Parent Company Liability in EU and US Competition Law*, cit., p. 92.

On the reverse, in the field of environmental law, parental liability could be shaped in a different way – e.g. as a fault-based liability – since the "individual liability helps to maintain incentives for efficient behavior"[37].

5. The emerging of a new form of parental liability in the context of EU environmental law.

As anticipated above, in the field of EU environmental law, it is emerging a new form of corporate and parental liability, which is a fault-based liability, related to compliance failure.

This form of corporate liability is embodied in the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, adopted on 23 February 2022.[38]

The Proposal provides large companies, as listed in Article 2[39], with an obligation of deploying *due diligence process* for human rights and environmental risks and impacts.

The due diligence process implies: *(i)* identifying actual or potential adverse impacts on human right and environment; *(ii)* preventing and mitigating such potential adverse impacts, *(iii)* bringing actual adverse impacts to an end[40].

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37 C. Koenig, *Comparing Parent Company Liability in EU and US Competition Law*, cit., p. 71.

38 It is worthy of note that on June 1st 2023, the European Parliament adopted amendments to the proposal for a Directive of the European Parliament and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937.

39 With regard companies which are formed in accordance with the legislation of a Member State, Article 2, paragraph 1 sets out the following conditions: "(a) the company had more than 500 employees on average and had a net worldwide turnover of more than EUR 150 million in the last financial year for which annual financial statements have been prepared; (b) the company did not reach the thresholds under point (a), but had more than 250 employees on average and had a net worldwide turnover of more than EUR 40 million in the last financial year for which annual financial statements have been prepared, provided that at least 50% of this net turnover was generated in one or more of the following sectors: (i) the manufacture of textiles, leather and related products (including footwear), and the wholesale trade of textiles, clothing and footwear; (ii) agriculture, forestry, fisheries (including aquaculture), the manufacture of food products, and the wholesale trade of agricultural raw materials, live animals, wood, food, and beverages; (iii) the extraction of mineral resources regardless from where they are extracted (including crude petroleum, natural gas, coal, lignite, metals and metal ores, as well as all other, non-metallic minerals and quarry products), the manufacture of basic metal products, other non-metallic mineral products and fabricated metal products (except machinery and equipment), and the wholesale trade of mineral resources, basic and intermediate mineral products (including metals and metal ores, construction materials, fuels, chemicals and other intermediate products)".

40 Under Article 3, lett b), "'adverse environmental impact' means an adverse impact on the environment resulting from the violation of one of the prohibitions and obligations pursuant to the international environmental conventions listed in the Annex, Part II". Notably,

Under Article 1 of the Proposal, the due diligence obligation should be fulfilled by corporations in respect to – among others – "the operations of their subsidiaries".

In case of violations of this obligation, the Proposal provides administrative and civil liability, under Articles 20[41] and 22.[42]

Under the mentioned provisions, therefore, parent companies should prevent adverse environmental impacts in respect of their subsidiaries' activities.

Moreover, in order to fulfill this duty, parent companies should carry out a due diligence process, providing their subsidiaries with a *proper organization* to identify, prevent, mitigate and bring to an end any adverse impacts on environment and human rights.[43]

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according to the amendments adopted by the European Parliament on June 1st 2023, companies should also: establish or participate in a mechanism for the notification and out-of-court handling of complaints, monitor and verify the effectiveness of actions taken in accordance with the requirements set out in the Directive, communicate publicly on their due diligence and consult relevant stakeholders throughout this process.

41 Under Article 20, paragraph 1 ("Sanctions"), "Member States shall lay down the rules on sanctions applicable to infringements of national provisions adopted pursuant to this Directive, and shall take all measures necessary to ensure that they are implemented. The sanctions provided for shall be effective, proportionate and dissuasive". Notably, according to the amendments adopted by the European Parliament on June 1st 2023, sanctions include measures such as "naming and shaming", taking a company's goods off the market, or fines of at least 5% of the net worldwide turnover.

42 Under Article 22 ("Civil liability"), "Member State shall ensure that companies are liable for damages if: (a)they failed to comply with the obligations [of preventing potential adverse impacts (Article 7) and bringing actual adverse impacts to an end (Article 8)]; (b)as a result of this failure an adverse impact that should have been identified, prevented, mitigated, brought to an end or its extent minimised through the appropriate measures laid down in Articles 7 and 8 occurred and led to damage".

43 According to the amendments adopted by the European Parliament on June 1st 2023, Article 4a introduces a specific provision on "Due diligence support at group level". Article 4a reads at follow: "1. Member States shall ensure that parent companies may perform actions which can contribute to their subsidiaries falling under the scope of this Directive meet their obligations set out in Articles 5 to 11 and Article 15. This is without prejudice to the civil liability of subsidiaries in accordance with Article 22. 2. The parent company may perform actions which contribute to fulfilling the due diligence obligations by the subsidiary company in accordance with paragraph 1, subject to all the following conditions: (a) the subsidiary provides all the relevant and necessary information to its parent company and cooperates with it; (b) the subsidiary abides by its parent company's due diligence policy; (c) the parent company accordingly adapts its due diligence policy to ensure that the obligations laid down in Article 5(1) are fulfilled with respect to the subsidiary; (d) the subsidiary integrates due diligence into all its policies and risk management systems in accordance with Article 5; (e) where necessary, the subsidiary continues to take appropriate measures in accordance with Articles 7 and 8, as well as continues to perform its obligations under Articles 8a, 8b and 8d; (f) where the parent company performs specific actions on behalf of the subsidiary, both the parent company and subsidiary clearly and transparently communicate so towards relevant stakeholders and the public domain; (g) the subsidiary integrates climate in its policies and risk management systems in accordance with Article 15".

Ultimately, parent companies should be held liable in case of adverse impacts, if they fall to fulfill their organizational duty.

Under these terms, the Proposal for a Directive on Corporate Sustainability Due Diligence introduces a new form of parental liability, which is fault-based and related to a compliance deficiency.[44]

In particular, under this Proposal, parental liability can be established if an element of liability is recognized in respect of the parent companies' representatives, who have failed in providing a proper organization for the subsidiaries' activities.

Therefore, since this form of parental liability assures the respect of the culpability principle, its application appears desirable in the field of environmental criminal law too – safeguarding the recalled guarantee the parental liability doctrine seems to violate.

In addition, this ultimate form of parental liability would overcome an another critic issue some Authors[45] have pointed out in respect of the parent liability doctrine, which does not incentive parent companies in implementing a compliance organization, whose principal goal is preventing subsidiaries in committing crimes.

In particular, Hofstetter and Ludescher have noted that, since "parent companies are consistently held liable for the behavior of their subsidiaries, regardless of whether or not they had made every conceivable effort to ensure compliance", "fundamental structures embedded in company law are disregarded and deterrence as the ultimate purpose of cartel fines is being defeated"[46].

On reverse, parental liability "should primarily be aimed at deterrence and thereby take into account the principle of fault" as "a deficiency in [the parent company's] compliance organization"[47], to effectively prevent illicit conducts.[48]

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44 In addition, it is worthy of note that, whereas the adverse impact on environment constitutes an environmental offence, the Directive would provide the parent company with an actual duty to prevent the commission of such offence, even in respect of its subsidiaries – since the due process obligation would encompass the duty to *prevent* this crime too. On a national level, therefore, these provisions could in fact extend corporate criminal liability from the subsidiary to the parent company, whereas the latter did not prevent the offence it has the duty to.

45 See K. Hofstetter – M. Ludescher, *Fines Against Parent Companies in EU Antitrust Law – Setting Incentives for 'Best Practice Compliance'*, in *World Competition: Law and Economics Review*, 2010, vol. 33, no. 1, p. 1-19.

46 K. Hofstetter – M. Ludescher, *Fines Against Parent Companies in EU Antitrust Law*, cit., p. 16.

47 K. Hofstetter – M. Ludescher, *Fines Against Parent Companies in EU Antitrust Law*, cit., p. 2.

48 This point of view is not unanimously shared, since other scholars have concluded as well that strict liability does incentive parent companies in enforcing compliance, as "the setup of a proper compliance organization is the only tool parent companies have in their hands in order to prevent infringements of EU Competition law and ultimately their own liability"; see L. Solek – S. Wartinger, *Parental Liability: Rebutting the Presumption of Decisive Influence*, cit., p. 84. Similarly see G. Skinner, *Transnational Corporations and Human Rights. Overcoming Barriers to*

For these reasons, it would be desirable EU legislature take a further step in the field of environmental criminal law, implementing a fault-based parental liability, as the one embodied in the Proposal for a Directive on Corporate Sustainability Due Diligence.

This form of parental liability would assure the principle of culpability and incentive parent companies to provide their subsidiaries with a proper organization to prevent the commission of environmental crimes.

Judicial Remedy, 2020, Cambridge University Press, Padstow, p. 87; and C. Koenig, *An Economic Analysis of the Single Economic Entity Doctrine in EU Competition Law*, p. 326.