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Piercing The Corporate Veil US Lessons From Romania And Slovakia

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PIERCING THE CORPORATE VEIL:
US LESSONS FOR ROMANIA & SLOVAKIA

Contents

Abstract: This article describes and analyzes the doctrine of piercing the corporate veil in various jurisdictions across the world. First, it introduces the development and history of this doctrine in the United States - the jurisdiction, which has nurtured this legal concept for several centuries. Second, it analyzes its possible implementation within two chosen jurisdictions in Central and Eastern Europe: Romania and Slovakia. The authors' aim is to assess their home jurisdictions and examine whether these jurisdictions apply the doctrine, if so, then in which form and to what extent. The authors analyze different areas of their respective legal systems - company law, civil law, and bankruptcy law. Lastly, the authors reason why the doctrine of corporate veil piercing is of importance to any legal system, and why the legislators in CEE region specifically should consider inserting and applying it.

Key words: Piercing the corporate veil, liability, parent company, subsidiary, fiduciary duty, Romania, Slovakia.

1. INTRODUCTION

Companies represent a fundamental part of our everyday life, and despite their "fictious" background, we live with these entities in unity, most of the time. Small, medium or multinational corporations employ people, develop our communities and nations, and have become our method of doing business. However, in this article we focus on multinational corporations that over the last decades have become extremely powerful – both economically and politically.[1] Multinational corporations have, to a large extent, superseded small and medium sized businesses all over the world, as they have been driving economic globalization across the world. Since the Industrial Revolution, large multinational corporations have come to dominate the national and global economic scene. Some of them are as economically powerful as some states.[2]

Even if we were sceptical towards corporate wealth—and would acknowledge the possible threat of these corporate monsters—it is indisputable that the role of business, trade, and industry is to form prosperity for shareholders, employees, customers, and society at large. In addition, companies do not only contribute towards the world's wealth, but also towards novel technology, new environmental solutions, and discovery of medical cures.

In order to provide a well-balanced legal environment for both natural and legal persons, we believe it is necessary to impose adequate controls over the conduct of legal persons in order to avoid and prevent deceitful and fraudulent demeanour, such as money laundering, corruption, hiding and shielding assets from creditors and other claimants, illicit tax practices, self-dealing, or market fraud and circumvention of disclosure requirements.[3] One such control is, in our perspective, the piercing of the corporate veil. Yet, this type of control has not been fully introduced in all jurisdictions. Central and Eastern Europe, being influenced by US, French or German law—all of which recognize and apply the veil piercing doctrine—do, in certain situations, disregard the limited liability doctrine. However, neither Romania nor Slovakia have implemented a clear set of standards for piercing the corporate veil. As the authors show, both countries apply unmethodical approaches that lead to non-uniform and unforeseeable court decisions. The aim of this article is not only to introduce the characteristics of the veil piercing doctrine and the circumstances when this doctrine should be applied (using the United States as an example), but also to describe and analyze different statutory provisions in Romania and Slovakia that enable in distinct situations to disregard the limited liability. In conclusion, the authors provide their *de lege ferenda* recommendations.

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[1] For the purposes of this article we define Multinational Corporation [hereinafter also as "MNC"] as, *"a cluster of corporations of diverse nationality joined together by ties of common ownership and responsive to a common management strategy."* To better understand the concept of Multinational Corporation, it is helpful to show the differences from uni-national corporations. First, MNCs operate and control their assets and across national borders. Second, the managerial organization is structured in a way to allow across border operations. More on the background of multinational corporations *see* Detlev F. Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law,* 83 HARV. L. REV 739 (1970). This article provides reader with historical challenges for the legal framework at the beginning of the rise of multinational corporations in the modern history. On the main characteristics of multinational corporations *see* Olufemi O. Amao, *The Foundation for a Global Company Law for Multinational Corporations*¸ 21 INT'L COMPANY & COM. L. REV 275 (2010).

[2] In 2009, in the world's 100 largest economic entities, there were 44 corporations. Wal-Mart Stores had revenues exceeding the respective GDPs of 174 countries including Sweden, Saudi Arabia and Venezuela. Sinopec, China's leading energy and chemical company, was bigger than Singapore. For more, *see* Tracey Keys, Thomas Malnight, *Corporate Clout: The Influence of the World's Largest 100 Economic Entities*, GLOBAL TRENDS, *available online at* http://www.globaltrends.com/images/stories/corporate%20clout%20the%20worlds%20100%20largest%20economic%20entities.pdf (last accessed April 18, 2012).

[3] More on the use of corporate entities for illicit purposes and mechanisms to prevent the misuses of corporate vehicles *see* BEHIND THE CORPORATE VEIL: USING CORPORATE ENTITIES FOR ILLICIT PURPOSES, OECD (2001).

2. STARTING WITH PRACTICAL IMPLICATIONS: *KATIE ELLEN WEST V. WILLIAM C. COSTEN*

Katie Ellen West, et al, v William C Costen et al,[4] is a famous case from 1983 that deals with consumer protection and corporations. We have chosen to start with this case because it provides the reader with a clear understanding of the purpose of the veil piercing doctrine, as well as the way US courts understand and apply it.

Briefly, the facts are the following: A class action suit was brought against MSF (a debt collection company) and its President, William C. Costen, for a number of violations of the Fair Debt Collection Practices Act.[5] The violations of the FDCPA being proven, the court awarded the plaintiffs' damages according to the provisions of the aforementioned statute. On the other hand, Costen alleged that he was not a debt collector under the FDCPA, and that even if he was, he cannot be held individually liable due to the existence of the corporate veil. As Costen was found to qualify as an indirect debt collector under the Act, the Court had to analyze whether there are any legal justifications to keep the corporate veil or to pierce it. For the purposes of this article, we will focus more on the court's reasoning on this matter.

First, the court took into account the fact that Costen was not only the President of MSF, but also its dominant shareholder, owning – even after restructuring – 64% of the company's authorized stock, the rest being actually transferred to his wife. Furthermore, the court looked at the previous jurisprudence and found that, although it was held that the "*corporate structure should never lightly be disregarded…the corporate structure is not, however, a shield for dominant shareholders to hide behind while defrauding or injuring creditors, or conducting illegal operations*."[6] Thus, the court stated, *"when substantial ownership of all the stock of a corporation in a single individual is combined with other factors clearly supporting disregard of the corporate fiction on grounds of fundamental equity and fairness the corporate entity will be disregarded and liability fastened on the individual shareholder."*[7]

Afterwards, the court conducted an analysis of the factors that were considered by past courts as determining whether to disregard the corporate shield or not, underlining that no single factor would ever be enough to pierce the veil: inadequacy of corporate capitalization for the venture undertaken (currently referred to as 'undercapitalization'), failure to observe corporate formalities, non-payment of dividends, insolvency of the debtor corporation at the relevant time, siphoning of funds of the corporation by the dominant shareholder, non-functioning of other officers or directors, absence of corporate records, and the fact that the corporation is a mere façade for the dominant shareholder.[8]

In applying the factors to the instant case, the court found that although MSF had a predictable risk of liability under the FDCPA, it did not maintain a fair amount of capital. It also established that

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[4] *West v. Costen,* 558 F. Supp. 564, 564-88 (W.D. Va. 1983).

[5] As the FDCPA does not fall within the scope of this article we will not go into many details concerning this part. But for those unfamiliar with its content, we shall emphasize that it is a Federal Statute, which regulates the activity of debt collection agencies by establishing a set of rules of conduct and also sanctions for their violation. Among the rules of conduct there are obligations to inform the debtors about their rights (to dispute the debts for example), prohibitions to use threats, to make false representations of the consequences incurred in case of non-payment, to contact third parties without their consent (as specifically provided by the act), to charge extra fees for collection services, etc. Among sanctions there are administrative fines, civil penalties and also the possibility for punitive damages, which are usually awarded for each infringement of the act and for each person that was affected by such infringements.

[6] *Id.* at 585.

[7] *Id.*

[8] *Id.*

MSF did not pay dividends, although it had paid huge amounts of money as salaries or commissions to its President. Siphoning of funds became clear when evidence showed that Costen's income grew while those of the company decreased severely. It was also established that Costen received amounts of money on the peak of MSF' s bankruptcy, and that nepotism was a rule in the company's activity, since Costen had a number of relatives on the pay role that received personal loans from the company for private purposes. Last but not least, the company failed to maintain records in accordance to the applicable laws.

But as the court held – and in this we think resides the whole idea of the veil piercing – the most important reason to disregard MSF corporate form and impose personal liability on Costen, is that "***it would be unfair to the plaintiffs and contrary to the purpose of FDCPA to uphold MSF corporate façade.*** *[…] MSF is liable to the plaintiffs for some blatantly illegal collection practices. Yet MSF is no longer doing business and it thus seems likely that its assets, if any remain, will be totally inadequate to meet plaintiffs' damages. […]. Furthermore, the FDCPA's purpose to eliminate abusive debt collection practices by debt collectors, would be frustrated if MSF's corporate façade was an effective shield against persons seeking their private remedies under the Act*."[9] As a conclusion, the court stated that "*Costen has misused the corporate form and […] justice requires that MSF's corporate form be disregarded and liability imposed on Costen*."[10]

Thus, setting aside the story of the debt collection and focusing on the veil piercing doctrine, in this case it was used for reasons of equity and fairness, in order to achieve justice and make sure that the purpose of law is not going to be frustrated by the misuse of other legal concepts. Here, we have to emphasize that although the criteria are quite strict and varied, the courts are free to use the doctrine when all the factors are met and the situation calls for it.

3. THE DOCTRINE OF PIERCING THE CORPORATE VEIL

When courts pierce the corporate veil, they make an exception to two fundamental principles of company law. One is the separate legal personality[11] and the second is the limited liability.[12] Nevertheless, in the everyday life of people and corporations, there is a need for courts to pierce the corporate veil in numerous circumstances where the company and those managing it act as a cloak for frauds, abusing the existing stated principles.[13] The challenge of understand the circumstances which

[9] *Costen,* 558 F. Supp. at 587.

[10] *Id.* at 587.

[11] Most of the worlds' jurisdictions recognize legal persons and assign those rights and obligations. The process of recognizing this legal concept varies from jurisdiction to jurisdiction. The break-through in the United States was the case *Trustees of Darmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) where the Court defined the corporation as *"a corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as an incidental to its very existence."* In Germany, the debate on the nature of legal personality began shortly after 1868 during the period of drafting the German Civil Code. More on the theories, *see e.g.* Jethro W. Brown, *The Personality of the Corporation and the State,* 21 L.Q.R. 365 (1905); George F. Deiser, *The Juristic Person,* 57 U. PA. L. REV. 131 (1908); Arthur W. Machen Jr., *Corporate Personality,* 24 HARV. L. REV. 261 (1910-1911).

[12] The reason why legal systems introduced the concept of limited liability is very simple; it was necessary to encourage investment and increase the financial capital. In Europe, France was the first one introducing this doctrine by Commercial Ordinance of 1673, *see* TOUBEAU, LES INSTITUTES DU DROIT CONSULAIRE OU LES ELEMENTS DE LA JURISPRUDENCE DES MARCHANDS, D'UN TRES-GRAND SECOURS OU PALAIS, UTILES A TOUS MARCHANDS ET NEGOCIANTS, ET NECESSAIRES AUX JUGES ET CONSULS (2nd ed. 1700). In the United States, the state governments started to grant limited liability to companies in their charter in1786, *see* JOSEPH S. DAVIS, ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS 447 (1917).

[13] A seminal 1912 law review article stipulated the application of the veil piercing doctrine in a following way: *"When the conception of corporate entity is employed to defraud creditors, to evade an existing obligation, to circumvent a statute, to achieve or perpetuate monopoly, or to protect knavery or crime, the courts will draw aside the web [i.e., veil] of entity, will*

establish the veil piercing is demonstrated also by the fact that in the United States, corporate veil piercing is the single most litigated area in corporate law.[14] Before the development of the theory behind the corporate veil piercing, the courts in the United States used their equity powers to disregard a party's attempt to shelter fraud or illegality by a corporate form. As early as in 1910, the Supreme Court of Minnesota described the threshold for veil piercing as following: "*Where the corporate form is used by individuals for the purpose of evading the law, or for perpetration of fraud, the court will not permit the legal entity to be interposed so as to defeat justice.*"[15]

3.1. Definition

The Black's Law Dictionary defines piercing the corporate veil as follows: *"the judicial act of imposing personal liability on otherwise immune corporate officers, directors, or shareholders for the corporation's wrongful acts."*[16] This definition reveals the main essence of veil piercing. Once the court decides to disregard the statutorily imposed boundaries for corporate liability, it may hold personally liable different parties, such as the corporate officers, directors, or the shareholders of the company that might be either natural or legal persons. Hence, the spectrum of possible liable persons is fairly wide. To simplify, we can differentiate between two types of persons that may be held personally liable:

a. Corporate directors or managers[17] who act on behalf of a company; and
b. Parent companies or controlling companies.

Further in the article, we discuss the veil piercing in order to hold liable directors who have personally gone into business under a company's cloak, as well as mother companies who effectively control and manage their subsidiaries. Before that, it is essential to distinguish between different types of veil piercing. Cases concerning the effect of such judiciary action as the corporate veil cases come in a great variety.

3.2. Classification of the Doctrine of Piercing the Corporate Veil

Courts use "veil" as a metaphor in various circumstances, and approach it differently which often creates confusion, since they do not differentiate between individual attitudes in their address to the company when lifting the veil.[18] Hence, as we analyze the doctrine of veil piercing in different jurisdictions, it should be clear what is meant by piercing the veil and what types of "piercing" courts may consider.

This classification is based on Smadar Ottolenghi's article,[19] where he also analyzes decisions rendered by English courts. He differentiates between four categories of "piercing:" the first category is "**the peeping behind the veil**," which is the least offensive - the veil is lifted only to discover the

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regard the corporate company as an association of live, up-and-doing, men and women shareholders, and will do justice between real persons." See Maurice I. Wormser, *Piercing the Veil of Corporate Entity,* 12 COLUM. L. REV. 496, 517 (1912).

[14] *See* Karen Vandekerckhove, *Piercing the Corporate Veil*, 4 EUR. COMP. L. 191, 191 (2007) .

[15] *Erickson v. Revere Elevator Co.,* 110 Minn. 443, 444, 126 N.W. 130 (1910).

[16] *Piercing the corporate* veil, BLACK'S LAW DICTIONARY, (9th ed. 2009).

[17] For the purposes of this article these two terms will be used interchangeably.

[18] *See* Smadar Ottolenghi, *From Peeping Behind the Corporate Veil, to Ignoring it Completely*, 53 MODERN L. REV. 338, 339 (1990).

[19] *Id.* at 339.

composition of a company and to gain information involving the management and shareholders of a company, along with their inter-relationship regarding the control of the company.[20]

The second technique of lifting the veil is "**the penetrating the veil**"– it is used in order to impose the responsibility of shareholders and directors for company's actions, or to establish their direct interest in the company's assets.[21]

The third category is '**the extending the veil**' – it aims to embrace several different legal entities as one enterprise entity or as one corporate group, so that the whole attention would be oriented towards one legal entity rather than a number of legal entities.[22]

The final form of lifting the veil is when courts are "**ignoring the veil**." This approach takes place in such cases when a court believes that the company was not founded for commercial or other sound grounds, but only as a way to defraud or defeat creditors and to circumvent laws.[23]

4. PIERCING THE CORPORATE VEIL IN THE UNITED STATES

The reason why we chose the United States among multiple jurisdictions that apply the doctrine is because the United States might be considered the cradle of the veil piercing doctrine. Throughout the decades that this doctrine has been applied in the United States, it has been greatly developed and US courts have shown a great amount of innovation and creativity when applying and delineating the character and circumstances for the application of the veil piercing doctrine.

The general rule of Corporate law in the United States is that a corporation, being a separate legal entity, limits the creditor's rights to the assets of the corporation. However, as the 1854 case *York & Maryland Line Railroad v. Winans* stated,[24] when the Supreme Court of the United States pierced the corporate veil between parent company and its subsidiary, it concluded that the subsidiary should be liable to the same extent as its parent company. Despite the fact that in this case the Supreme Court applied reversed piercing, when holding the subsidiary liable for the actions of its parent company -

[20] The most descriptive example is the *Daimler v Continental Tyre Co.* [1916] 2 AC 307 (HL), where the question was whether the defendant, a British company should pay the plaintiff, a British registered company, even though all the latter´s shareholders and directors were resident in Germany. In this case, the court lifted the veil to look who were the directors and shareholders of the company as to find out whether the company falls within the Trading with the Enemy Act 1914. This case is recognized by many jurists as the reference for lifting the corporate veil to determine the character of a company. Nevertheless, the decision held that the directors stand *in front* of the veil, so that there is no need to unveil them. Not only have their actions been regarded as those of the company, but also their mind has been regarded as the company´s, in cases where knowledge or will are required, as for assessing the negligence or criminality of the company.

[21] In the *Macaura v Northern Assurance Co.* [1925] AC 619 (HL), it was held that no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest.

[22] This technique can be illustrated by the case *Gilford Motor Co. Ltd. v Horne* [1933] Ch 935, CA, where a managing director formed a company of his own to solicit customers instead of soliciting them from his employers. The court withheld such structure and considered this company a sham to cloak his wrongdoings.

[23] *Macaura v. Northern Assurance Co.* [1925] AC 619 (HL) 351; This approach is analogous to the situations dealt with insolvency or bankruptcy acts in the U.S. as in the EU legislation, when a transfer of assets made with an intention to defraud creditors shall be held void and the court shall take steps to restore the position to what it would have been if that individual(s) had not entered into that transaction. On the other hand, if a person in order to avoid seizure of his/her assets by the creditors transfers them to a company under his/her control, the court may issue an injunction restraining him from disposing of his/her shares in the company, as well as restraining him from procuring the disposition of these assets (*Re a Company Ltd.* [1985] BCLC 333).

[24] *York & M.L.R.R. v. Winans*, 58 U.S. 30 (1854). This case involved an alleged patent infringement liability of a Pennsylvania subsidiary for parented railway cars which were operated on the subsidiary´s line from York, Pennsylvania, to the Maryland boundary, where they continued on to Baltimore on the line of its parent, a Maryland corporation. The subsidiary defended to be only a nominal organization to satisfy the formal requirements of Pennsylvania law requiring local incorporation of railroads operating in the state. The parent corporation managed the cars and operated the subsidiary´s line. However, the book entries credited the subsidiary with one third of the net profits of its line. Due to this fact, the court held the subsidiary liable.

not *vice versa* - the main implication of this case is that the Supreme Court was willing to set aside the corporate structure and look at what was inside it and decide based on the economic reality, for example, how the assets were divided and what was the decision-mechanism within the corporate group.

Since then, the doctrine of piercing the corporate veil has developed and faced numerous challenges. Unfortunately, as most of the law in the United States, it is still regulated on the state level, including corporate and enterprise law. Thus, there is no federally accepted doctrine of veil piercing. Therefore, it is the decision of state courts to what extent they apply and use this doctrine. Moreover, even if the case comes before a federal court, it will apply state law standards. To this respect, piercing of the corporate veil has become very chaotic in the United States, as many courts fail to explain the legal grounds of their decision, and hence, form confusion and unforeseeability.[25]

However, this situation could be resolved by establishing a federal doctrine, or by continuously applying one specific state veil piercing doctrine properly, and with full justification.[26]

4.1. Diverse Veil Piercing Doctrines

The case law concerning the corporate veil is not only large-scale, but it is also quite diverse, as to the given court reasoning and justification. Therefrom, courts have established several differential argumentations for piercing the corporate veil. In this part, we will describe and analyze three core veil-piercing doctrines applied by the U.S. courts from New York to California.

4.1.1. Instrumentality Doctrine

In the famous New York case of 1931, *Lowendahl v. Baltimore & Ohio,*[27] Justice Frederick Powell established his test for veil piercing where the factual circumstances indicate that a company is a mere "instrumentality." Since then, this test has been widely applied throughout the United States. In Powell's test, there exist three conditions for liability:

a) Excessive exercise of control;

b) Some wrongful or inequitable conduct; and

c) Causal relationship between the plaintiff's loss and the parent's conduct.

Evaluating the control, which needs to be 'excessive' in a case of veil piercing, depends not on a stock ownership, but on a ***de facto*** extreme intrusion in to the company's everyday decision making.

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[25] Several cases were decided without any discussion of the legal grounds or without specifically stating whether they apply a federal precedent or a state precedent. *E.g. Mas Marques v. Digital Equip. Corp*., 490 F. Supp. 56 (D. Mass. 1980) (discriminatory employment practices); *Baker v. Raymond International Inc.,* 656 F.2d 173 (5th Cir. 1981) (recovery of damages for injuries sustained while working on a barge).

[26] *See Piercing the Corporate Law Veil: The Alter Ego Doctrine under Federal Common Law*, 95 HARV. L. REV. 853, 861-865 (1982) and Thomas K. Cheng, *The Corporate Veil Doctrine Revisited: A Comparative Study of the English and the U.S. Corporate Veil Doctrines,* 34 B. C. INT'L & COMP. L. REV. 329, 376-377 (on the concerns when the federal policy and federal statute faces state corporation law).

[27] *Lowendahl v. Baltimore & Ohio RR*, 247 App. Div. 144, 154 (N.Y. App. Div. 1936). In this case plaintiff recovered judgment on a promissory note against individuals who executed the note and against a corporation to whom they transferred their business, on the grounds that the transfer of the business was made when the individuals were wholly insolvent, with intent do defraud creditors. Plaintiff sued defendants, who were majority stockholders of the corporation claiming the transfer to be fraudulent and due to the fact that the corporation had no independent existence and that defendants dominated it, the corporation was merely defendants' agent. The final decision of the appellate division held that the evidence did not show that the corporation was an agent of the defendants or defendants knew about plaintiff's claim at the time the assets were transferred. Despite the final decision, the most important thing about this ruling is the piercing of the veil and evaluating whether and how the stockholders controlled the corporation.

Furthermore, this 'supremacy' must be abused for fraud or other unlawful or unjust action.[28] Powell later specified these three conditions into a list of evidentiary guidelines for the courts to decide whether or not the company is in the control of a third party[29] (director or parent company):

- The party owns all or the majority of the stock of the company;
- The party finances the company out of its own resources;
- The party and the company share offices and directors (in case of parent company and its subsidiary);
- The party subscribes to all of the capital stock of the company or otherwise causes its incorporation;
- The company has grossly inadequate capital;
- The formal legal requirements of the company are not observed;
- The party reimburses the salaries and other expenses or losses of the company;
- The company has substantially no business except with the parent company or the director;
- The company has essentially no assets excepts those granted by the parent company or the director;
- The company operates without profit;
- In the official records of the parent company, the subsidiary is described as a department or division - or its business or financial responsibility is referred to as the parent's own;
- The party uses the property of the company as its own;
- The parent and the company file consolidated income tax returns and/or consolidated financial statements;
- The company's loan transactions benefit the party at the expense of the company;
- The directors of the company do not act independently, but they follow the orders from the parent company, whereas they prioritize the interests of the parent company before the interests of the company;
- Decision making for the company is carried out by the parent company and its directors;
- Contracts between the party and the company are more favorable to the party; and
- The Party and the company share funds, business, common directors and supervision to such an extent that they should be considered as one enterprise.[30]

Numerous instances of these indicators creates a strong suggestion for the courts to be suspicious when dealing with the parent and subsidiary company, or with a director who has excessive control. These criteria focus on the degree of financial and operational independence, as well as a possible

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[28] KAREN VANDEKERCKHOVE, PIERCING THE CORPORATE VEIL 81 (2007).

[29] [Hereinafter "The Party"].

[30] Frederick Powell, *Parent and Subsidiary Corporations*, *in* PHILLIP I. BLUMBERG, THE LAW OF CORPORATE GROUPS: TORT, CONTRACT, AND OTHER COMMON LAW PROBLEMS IN THE SUBSTANTIVE LAW OF PARENT AND SUBSIDIARY CORPORATIONS 138-140 (1987).

overlap in corporate personnel.[31] The instrumentality doctrine further requires the plaintiff to prove that the defendant's conduct heavily contributed to the plaintiff's loss.

4.1.2. Alter Ego Doctrine

On the west coast, California courts established the "alter ego" doctrine, which is also commonly used. According to this doctrine, two conditions must be met before the corporate veil might be pierced. First, there has to be such "a unity of ownership and interest" that the two affiliated companies or a director and the company itself do not represent separate personalities and the company represents an "alter ego" of the party. Secondly, there has to be an "inequitable result" if the acts in question are treated as those of the party alone. Occasionally, courts also require a third condition that the Party would "hold a control" over the company. Although, other courts consider the control to be a part of the "unity of ownership and interest" factor.[32]

Several leading legal academics do not differentiate between the "alter ego" doctrine and the "instrumentality" doctrine as the core inquiry in both theories emphasizes the same two substantive factors and the causation with the plaintiff's injury.[33] Additionally, there is also the "identity" doctrine that arises from the "alter ego" and the "instrumentality" doctrine, which was also introduced by Justice Powell in 1962.[34]

4.1.3. Sham or Shell Corporation Doctrine

Some of the early cases involved corporations with little or no existence at all. These corporations lacked assets, business, and even employees. They were only officially registered, and had an official seat, but did not exercise any activity. They represented only a "sham" or "shell," as they were only a "mere instrument" for the parent company or its director. Other cases involved transfers of individual assets without consideration to acquainted subsidiaries and companies in order to avoid creditors. In cases where the company was a part of fraudulent conveyances, courts generally granted recoveries to such transfers, disregarded the formal existence of the company as a separate entity, and invoked equitable principles.

4.2. U.S. Empirical Study of 2006

In practice, all the above stated doctrines and theories work well. Different courts apply them, and once the given requirements are met, they will pierce the veil and set aside the limited liability of either parent or director or other third party that misuses the statutory limitation of liability. In 2006, Peter B. Oh, an associate professor of law at the University of Pittsburgh, re-examined 2,908 veil piercing cases to show the probability of and reasons for veil piercing in the United States [hereinafter "2006 Study"][35] For the purposes of this article, only several findings are of essence:

- The 2006 Study shows an increased overall veil piercing rate of 48.51%, which is substantially higher than in the Thomson Study, which was approximately 40%;[36]

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[31] Thomas K. Cheng, *Form and Substance of the Doctrine of Piercing the Corporate Veil*, 80 MISS. L.J. 487, 505 (2010).
[32] *Id. 30*, pp.118-119.
[33] For more *see* Kurt A. Strasser, *Piercing the Veil in Corporate Groups*, 37 CONN. L. REV. 637, 640 (2005).
[34] This doctrine was introduced in one of the Powell's case *Zaist v. Olson,* 154 Onn. 563, 227 A.2d 552 (1962).
[35] This research represents already a second study providing such empirical data. For the first time in 1991, Professor Robert B. Thompson conducted a research on federal and state cases on the piercing of the corporate veil. This project covered all Westlaw cases since 1985 that involved attempts to pierce the corporate veil. It examined around 1,600 cases and reported also factual data of each case, *see* Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study,* 76 CORNELL L. REV. 1036 (1991).
[36] Peter B. Oh, *Veil Piercing*, 89 TEX. L. REV. 81, 107 (2010).

- Only closed corporations have been pierced;[37]
- Piercing of the corporate veil occurs more often against inter-organizational bargains and irrespective of whether the controlling shareholder is an individual or a corporate parent. However, parent corporations enjoy a bit more success defending themselves against claims by an individual creditor (36.37%) than by another organization (40.91%);[38]
- When justifying veil piercing, the court generally applies the alter ego doctrine (62.94%) or the instrumentality doctrine (61.54%), if explicitly referred to. In numerous cases, the court authorized the piercing due to the sham/shell corporation doctrine (60.14%). Alternatively, courts simply describe the facts of a case and not necessarily cross-reference a specific doctrine (domination 66.58%).[39]

Both empirical studies prove that once a veil-piercing issue arises, there is around a 50% chance that a state or a federal court in the United States will pierce the veil. However, the studies show that the courts are more likely to reach into the pocket of individual shareholders, or a director, than of a parent company, which may be surprising. The reason for such tendency is that the doctrine of limited liability is precisely to protect the parent company which diverts its risks and whose subsidiary goes bankrupt. As already described, only situations, as such confirmed by these two studies, where the courts will pierce the corporate veil between the parent company and its subsidiary, is when a parent goes beyond its normal and usual role as a shareholder and uses a subsidiary as a mere agent or instrument or a department. A corporation exposes itself to liability only if it totally ignores or circumvents the corporate formalities of the subsidiary. Hence, with sufficient planning and legal consultations, parent companies can avoid such liability.

5. PIERCING THE CORPORATE VEIL IN ROMANIA

The Romanian legal system undertook serious changes during the last three decades. Immediately after the fall of communism, a new Company Law no. 31/1990[40] was enacted in order to allow the creation and the functioning of the private business sector. From its inception, it established the principle of separate legal personality and of limited liability, yet only recently it has addressed issues such as the statute of the managers or corporate governance principles. Even so, the definition of control is still not to be found in the Company Law, but in the Capital Market Law[41]or in the Code for Fiscal Procedure[42] (though references to control are to be found also in the Fiscal Code)[43] and, recently, in the new Insolvency Law[44] or the Personal Insolvency Law.[45] Economic interest groups are addressed in a separate statute[46] which deals more with corruption than with economy, as well as with

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[37] *Id*. at 110.
[38] *Id*. at 129.
[39] *Id*. at 132-33.
[40] Company Law 31/1990 initially published in the Official Gazette no. 126-127/17.11.1990 and republished in the Official Gazette no. 1066/17.11.2004 (Rom.).
[41] Capital Market Law 297/2004 published in the Official Gazette no. 571/29.06.2004 (Rom.).
[42] The Code for Fiscal Procedure of 2015 published in the Official Gazette no. 547/23.07.2015 (Rom.).
[43] *See infra*, footnote 50.
[44] Insolvency Law 85/2014 published in the Official Gazette no. 571/29.06.2004 (Rom.).
[45] Personal Insolvency Law 151/2015 was published in the Official Gazette no. 464/26.06.2015 and will come into force on 31.12.2016 (Rom.).
[46] Law 161/2003 on introducing certain measures for ensuring transparency in exercising public dignities, public offices and the business environment, on preventing and sanctioning corruption published in the Official Gazette no.

insolvency and bankruptcy.[47] Romania remains tributary to the French and German legal systems that were its traditional sources of inspiration.[48] Traces of the doctrine of piercing the corporate veil can be found throughout the Romanian legislation, although it is not specifically named so and was not developed by courts, but by legal provisions.[49] Interestingly, many of the pre-requisites for the application of the doctrine are there, but they are not put together into a coherent body of law to be used by the courts.

5.1. Piercing the Corporate Veil under Romanian Company Law and Capital Market Law

Although constantly amended, the Romanian Company Law no 31/1990 contains no specific provision with respect to liability of shareholders, partners, managers or directors – neither *de jure,* neither *de facto* – towards third parties. The liability is usually related to the company or its owners, not towards creditors. Although it also contains sizable provisions with respect to corporate governance, the Romanian Company Law does not define in any way what "control" is or who the "controlling party" is, despite referring to controlled undertakings[50].

Such definitions are provided by the Capital Market Law no 297/2004, but their application concerns only the companies that fall within the scope of the aforementioned law[51] and the Fiscal Code.[52] Control is defined within the concept of *ties* as the relationship between a parent company and a subsidiary or a similar relationship between any natural or legal person and an undertaking. Any subsidiary of a subsidiary undertaking shall be considered a subsidiary of the parent company that is, in fact, the entity that controls those subsidiaries. It is also to be considered a close tie situation when two or more natural or legal persons are permanently linked to one and the same person by a control relationship.[53] The term reappears in defining the *involved persons*[54] (defined among others as persons

279/21.04.2003. In Romanian original: Legea nr. 161/2003 privind unele măsuri pentru asigurarea transparenţei în exercitarea demnităţilor publice, a funcţiilor publice şi în mediul de afaceri, prevenirea şi sancţionarea corupţiei.

[47] Initially, insolvency and bankruptcy were dealt by Law 64/1995 on judiciary reorganization and bankruptcy published in the Official Gazette no. 130/29.06.1995. It was replaced by Law 85/2006 on the insolvency proceedings published in the Official Gazette no. 359/21.04.2006. Currently, insolvency is covered by Law 85/2014 concerning prevention of insolvency and insolvency proceedings (see footnote 51).

[48] For example, Art. 13 of Law 85/2006 was considered a real innovation in the Romanian law, as it had no correspondent in the Romanian Commercial Code. As Art. 137 of Law 64/1995, which was its predecessor, Art 138 of Law 85/2006 was inspired by the French legislation, especially by Law 98/1985. See STANCIU CARPENARU, VASILE NEMES AND MIHAI HOTCA, LAW NO 85/2006 ON INSOLVENCY PROFEEDINGS, WITH COMMENTS 235 (2006). Currently the provisions of Art. 138 of Law 85/2006 were incorporated in Art. 169 of Law 85/2014.

[49] Foundations of the doctrine were identified also in the New Civil Code in Art 193 and 1370. Basically, the New Civil Code states that where the corporate veil is used to cover for fraudulent behavior, those seeking the veil's protection are jointly liable for the damage caused. For details, *see* Flaminia Starc-Meclejan, Groups of Companies and Environmental Liability Confronting, 2 PERSPECTIVES OF BUSINESS LAW JOURNAL 242, (2014). The author also identifies a special case of veil piercing in environmental law.

[50] *See* Company Law no. 31/1990, Provisions of Art. 138, Para 2, letters a)-f), or Art. 272, Para 1-3.

[51] *See* Art. 2, Point 16, letter b) of Capital Market Law no. 297/2004. Other mentions of control are found in Art. 2, Point 22, letter a)-c), Art. 2, Point 27, letter b) and d), Art. 13, Para 1, letter c), and Para 2, letter c), Art. 18, Para 6, Art. 180, letter b), Art. 225, Art 243, Art. 260, Para 2 of Law 297/2004.

[52] *See* Art. 7, Point 26, letters b)-d) of the Fiscal Code. Another mention can be found in Art. 8, Para 7.

[53] Art. 2, Point 16, letter b) of Capital Market Law. In Romanian original: "Legături strânse - situaţia în care două sau mai multe persoane fizice sau juridice sunt legate prin: control, care înseamnă relaţia dintre societatea-mamă şi o filială sau o relaţie similară între orice persoană fizică sau juridică şi o societate comercială; orice filială a unei filiale va fi considerată o filială a societăţii-mamă, care este în fapt entitatea care controlează aceste filiale; se consideră legătură strânsă şi situaţia în care două sau mai multe persoane fizice sau juridice sunt legate permanent de una şi aceeaşi persoană printr-o relaţie de control."

who exercise control or are controlled by the issuing company, or which find themselves under common control,[55] or, natural persons within the issuing company that exercise control or managerial attributes[56] or spouses and/or relatives of second degree of the aforementioned natural persons).[57]

Another definition of control was introduced in the Code of Fiscal Procedure.[58] For the purposes of the code, *direct control* is defined as the: majority of voting rights either with the general meeting of shareholders of a company or an association or foundation, or with the board of directors of a company or board of directors of an association or foundation. Meanwhile, *indirect control* is considered to be the activity where a person exercises control through one or more persons without distinguishing whether those persons are natural or legal. The reason for providing a slightly different definition of control than the one established in the Capital Market Law lies in the fact that the Code of Fiscal Procedure has a broader application and a wider area to cover than the Capital Market Law. It is also worth mentioning that if, in the case of Capital Market Law, the term of control is used mainly in relationship to the disclosure obligations. In the case of the Code of Fiscal Procedure, the term is used to identify those jointly liable with the actual debtor that leads, in practice, to the effect of piercing the corporate veil for collecting outstanding fiscal duties, for which reason it also derogates from the corporate veil protection established by the Company Law.[59]

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[54] The Fiscal Code speaks of *affiliated persons*, thus revealing an apparent terminological inconsistency, even though the two categories do not fully overlap. When defining the affiliated persons, the Fiscal Code deems as being affiliated those legal persons where one of them holds, directly or indirectly, a minimum of 25% of the value or the number of participating interests or voting rights of the other, or if it controls the other. In case of natural persons, the natural person that holds, directly or indirectly, a minimum of 25% of the value or the number of participating interests or voting rights of a legal person, or controls it, is deemed to be affiliated with that legal person. In Romanian original: "În înţelesul prezentului cod, cu excepţia titlurilor VII si VIII, termenii şi expresiile de mai jos au următoarele semnificaţii: persoane afiliate - o persoană este afiliată cu altă persoană dacă relaţia dintre ele este definită de cel puţin unul dintre următoarele cazuri: b) o persoană fizică este afiliată cu o persoană juridică dacă persoana fizică deţine, în mod direct sau indirect, inclusiv deţinerile persoanelor afiliate, minimum 25% din valoarea/numărul titlurilor de participare sau al drepturilor de vot deţinute la persoana juridică ori dacă controlează în mod efectiv persoana juridică; c) o persoană juridică este afiliată cu altă persoană juridică dacă cel puţin aceasta deţine, în mod direct sau indirect, inclusiv deţinerile persoanelor afiliate, minimum 25% din valoarea/numărul titlurilor de participare sau al drepturilor de vot la cealaltă persoană juridică ori dacă controlează în mod efectiv acea persoană juridică; d) o persoană juridică este afiliată cu altă persoană juridică dacă o persoană deţine, în mod direct sau indirect, inclusiv deţinerile persoanelor afiliate, minimum 25% din valoarea/numărul titlurilor de participare sau al drepturilor de vot la cealaltă persoană juridică ori dacă controlează în mod efectiv acea persoană juridică."

[55] Art. 2, Point 22, letter a) of Capital Market Law. In Romanian original: "persoane implicate: persoane care controlează sau sunt controlate de către un emitent sau care se găsesc sub un control comun;"

[56] Art. 2, point 22, letter c) of Capital Market Law. In Romanian original: "persoane implicate: persoane fizice din cadrul societăţii emitente care au atribuţii de conducere sau control;"

[57] Art. 2, point 22, letter d) of Capital Market Law. In Romanian original: "persoane implicate: soţii, rudele şi afinii până la gradul al doilea ale persoanelor fizice menţionate la lit. a) - c);"

[58] Art. 25, Para 4 of the Code of Fiscal Procedure. In Romanian original: "În înţelesul alin. (3), termenii şi expresiile de mai jos au următoarele semnificaţii: a) *control* — majoritatea drepturilor de vot, fie în adunarea generală a asociaţilor unei societăţi comerciale ori a unei asociaţii sau fundaţii, fie în consiliul de administraţie al unei societăţi comerciale ori consiliul director al unei asociaţii sau fundaţii; b) *control indirect* — activitatea prin care o persoană exercită controlul prin una sau mai multe persoane."

[59] In a case brought in front of the High Court of Cassation and Justice, on the application of the provisions contained in the current Art 25 of the Code of Fiscal Procedure, the court interpreted them to expand the limits of liability beyond the value of the registered capital for those persons who caused the insolvency of the company in bad faith. In the said case, the fiscal authorities have signed an insolvency minute with a company for outstanding tax obligations. The company did not contest the minute. Later on, by a court decision the shareholders were held liable for the outstanding tax obligations of the debtor company which was declared insolvent. In first instance, the Court of Appeals of Alba-Iulia (Decision no 108/2007) dismissed the shareholder's defense, contending they are solely liable to the limit of the registered capital, by showing that Art 27 (currently 25) of the Code of Fiscal Procedure, establishes an exemption from the provisions of Company Law 31/1990, in the sense that those who caused the insolvency of the debtor company in bad faith, by diminishing its assets, are jointly liable with the debtor company. The recourse declared by the shareholders was dismissed by the High Court of Cassation and Justice which held that the Court of Appeals correctly applied the provisions of the Code of Fiscal

The sole provision contained in the Company Law that might be used as support for the application of the doctrine of piercing the corporate veil are the provisions of Art. 237¹, paragraphs 2-4. Once again, paragraph 2 states the general rule and principle of the separate legal personality of the firm and the limited liability of the shareholders who are to be responsible only within the margins of the registered capital. In essence, paragraph 2 states that such limited liability will be maintained in case of dissolution or liquidation of the company.[60] Paragraph 3 provides limitations to the above mentioned rules by establishing the general situation in which the shareholders can be held liable beyond the threshold of their registered capital: "*The shareholder who, to the detriment of creditors, abuses the limited nature of his liability and his legal personality different than that of the company is unlimitedly liable for the due liabilities of the dissolved, respectively liquidated company*,"[61]while Paragraph 4 provides some specific details that should be taken into consideration when establishing whether the associate is liable or not: "*The liability of the associate becomes unlimited under the terms of paragraph (3), especially when such associate disposes of the company assets as if they were his own or diminishes the company assets in his own personal benefit or in the benefit of third parties, knowing or having to know the fact that in such way the company shall not be able to perform its obligations.*"[62]

Two important aspects should be noted here:

There is no distinction with respect to whom can be a shareholder – either a legal or a natural person – which means these provisions can be used to pierce the veil in both cases: subsidiary – parent company relationship; or shareholder/manager – company relationship. In establishing the liability of the parent company, the possibility to apply the doctrine remains, for the moment, at a theoretical level, with the sole exception of outstanding fiscal duties.

The place where the provision is situated within the law – Title VI, Chapter 1: Dissolution of the company – is somehow consistent with the view adopted by the Romanian legislator in the Romanian Bankruptcy Law no. 85/2014. More specifically, it appears the doctrine is applicable solely in cases of dissolution or liquidation of the company,[63] and not in other cases where the company is unable to fulfil its obligations or does not have enough funds to cover all the losses incurred by its creditors.[64]

Procedure. See Decision no 4370/2008 of the High Court of Cassation and Justice, published in Commercial Law Journal no 3 of 2009, page 124.

[60] Art. 237, Para 2, reads as follows: "When, for the duration of operation of the company, an associate is liable for the obligations thereof within the limits of the contributions to the share capital, his liability shall be limited to such contribution and in case of dissolution and, if the case, of the liquidation of the company." In Romanian original: "Atunci când pe durata funcţionării societătii, un asociat răspunde pentru obligaţiile acesteia în limitele aportului la capitalul social, răspunderea sa va fi limitată la acest aport şi în situaţia dizolvării şi, dacă este cazul, a lichidării societăţii."

[61] In Romanian original: "Asociatul care în frauda creditorilor, abuzează de caracterul limitat al răspunderii sale şi de personalitatea juridică distinctă a societăţii raspunde nelimitat pentru obligaţiile neachitate ale societăţii dizolvate, respectiv lihcidate."

[62] In Romanian original: "Răspunderea asociatului devine nelimitată în condiţiile alin 3, în special atunci când acesta dispune de bunurile societăţii ca şi cum ar fi bunurile sale proprii sau dacă diminuează activul societăţii în beneficiul personal ori al unor terţi, cunoscând sau trebuind să cunoască faptul că în acest mod societatea nu va mai fi în măsură să îşi execute obligaţiile."

[63] See also, Anca Sorina Popescu-Cruceru and Eugenia-Gabriela Leuciuc, Considerations on the Enforcement of the Doctrine of Piercing the Corporate Veil in Romania, 4 INT'L J. OF ACADEMIC RESEARCH IN BUSINESS AND SOCIAL SCIENCES 475 (2014).

[64] Other arguments sustaining this conclusion are the provisions of Art. 73, Para 2, where there is again mentioned the fact that an action can be filed by the creditors against the directors under the conditions of the bankruptcy law and the provisions of Art. 25 of the Code for Fiscal Procedure. For the exact wording of Art. 73, Para 2 see *infra* footnote 81 and for the exact wording of Art. 25, see *supra* note 64.

Thus, it is our conclusion that in Romania, the doctrine of piercing the corporate veil is mostly related to the disappearance of the company.

5.2. Piercing the Corporate Veil under Romanian Bankruptcy Law

Romanian Bankruptcy Law no. 85/2006 brought several important changes to the previous statute on bankruptcy, Law no. 64/1995. These changes were further maintained by the Bankruptcy Law no. 85/2014. The change that concerns us regards the following: "*The liability of the management's members.*" The law adopted in 1995 provided for such a liability as well,[65] but the new versions have, in our opinion. improved and opened the gate, at least in theory, for the doctrine of piercing the corporate veil.

Thus, Art. 169 – the relevant provision – states that at the request of the trustee, the bankruptcy judge may hold liable the members of the management or supervisory boards, as well as any other persons that have contributed to the insolvency of the debtor, in any of the ways described by the law. As one may notice, the decision belongs mainly to the trustee, who enjoys total freedom in exercising the right to ask for a piercing of the corporate veil.[66] However, Paragraph 2 of the same article established the right of the creditors to exercise the same right, provided the trustee did not. The application of the provisions of paragraph 1 does not impede the application of criminal law for the deeds that constitute crimes.[67] At the same time, in case of plurality, the liability of the persons nominated in paragraph 1 is established jointly, provided that the occurrence of insolvency is

[65] Art. 137 of Law no. 64/1995, providing that: "(1) Bankruptcy judge may order that part of the legal person debtor's liabilities, now insolvent, to be borne by the board members - directors, managers, auditors and any other person - who have contributed to bring debtor in this situation, by one of the following deeds: a) used the legal person's assets or receivables for itself or for another person, b) performed commercial activities for personal interests, under the cover of the legal person; c) decided for personal interests, the continuation of an activity which was obviously leading the legal person to cessation of payments; d) held a fictional accounting, wiped out some accounting documents or failed to keep accounting records in accordance with law; e) embezzled or concealed part of the legal person or assets or increased in a fictional manner its liabilities, f) used ruinous means to obtain for the legal entity funds to delay cessation of payments, g) in the previous month to cessation of payments, has paid or ordered to pay a preferential creditor to the detriment of other creditors. (2) The provisions of paragraphs. (1) do not preclude criminal proceedings for those actions that constitute crimes." In Romanian original: "**(1)** Judecătorul-sindic poate dispune ca o parte a pasivului debitorului, persoană juridică, ajuns în stare de insolvenţă, să fie suportată de către membrii organelor de conducere - administratori, directori, cenzori şi de orice altă persoană - care au contribuit la ajungerea debitorului în această situaţie, prin una dintre următoarele fapte: **a)** au folosit bunurile sau creditele persoanei juridice în folosul propriu sau în cel al unei alte persoane**; b**) au făcut acte de comerţ în interes personal, sub acoperirea persoanei juridice; **c)** au dispus, în interes personal, continuarea unei activităţi care ducea în mod vădit persoana juridică la încetarea de plăţi**; d)** au ţinut o contabilitate fictivă, au făcut să dispară unele documente contabile sau nu au ţinut contabilitatea în conformitate cu legea**; e)** au deturnat sau au ascuns o parte din activul persoanei juridice ori au mărit, în mod fictiv, pasivul acesteia; **f)** au folosit mijloace ruinătoare pentru a procura persoanei juridice fonduri, în scopul întârzierii încetării de plăţi; g) în luna precedentă încetării plăţilor au plătit sau au dispus să se plătească cu preferinţă unui creditor, în dauna celorlalţi creditori. **(2)** Aplicarea dispoziţiilor alin. (1) nu înlătură aplicarea legii penale pentru faptele care constituie infracţiuni."

[66] The law provides for a limited list of actions which may be deemed to have caused the debtor's insolvency and thus lead to the application of the doctrine: using the debtor company's assets or receivables for personal interests or for those of another person; performing commercial activities and providing services for personal interests, under the cover of the debtor company; deciding to continue for personal interests, an activity that obviously led the debtor company to a cessation of payments; holding a fictive accountability, wiping out certain accounting documents or not keeping the accounting records in accordance with the provisions of the law; embezzling or concealing part of the legal person's assets or increasing, fictitiously, its liabilities; using perilous means in order to obtain funds for the debtor company to delay the cessation of payment; paying or ordering payment of a preferred creditor, to the detriment other creditors, in the month preceding the cessation of payment as well as any other intentional deed, which led to the insolvency of the debtor company.

[67] Art. 169, Para 8 of Law 85/2015. In Romanian original: "Aplicarea dispoziţiilor alin. (1) nu înlătură aplicarea legii penale pentru faptele care constituie infracţiuni. "

contemporary or anterior to the period of time in which they have exercised their mandate or they have detained the position that might have caused the insolvency. Those persons can defend themselves against joint liability if, in the managing bodies of the legal persons, they have opposed the deeds and the acts that have caused the insolvency or they have been absent when the decisions that caused the insolvency were taken and they have asked their opposition to these decisions to be noted in written, afterwards.[68]

Another important provision in respect to the procedure is the one contained in Art 140 which states that:

> "*The amounts submitted according to the provisions of art 169, Para 1, will become part of the debtor's estate and shall be destined, in case of reorganization, for payment of the debts according to the payment schedule, for completing the necessary funds for continuation of debtor's activity, and in case of bankruptcy, for covering the debtor's liabilities.*"[69]

Several conclusions can be drawn from the legal provisions referred to above. First, piercing the corporate veil, both against shareholders or managers as well as against the parent company, is possible at least on a theoretical level. That stems out of the adagio: "*and any other persons that have caused the insolvency*." Given the fact that the legislators did not make a distinction between natural or legal person, neither should we. One can easily assume that the legal text covers both.[70] The provision is an enormous step forward, as the previous version of the law did not cover those persons involved - directly or indirectly - in the control of the company.[71] There is also no distinction made between *de facto* or *de jure* managers, which means that it makes no difference anymore whether those liable have an official position in the company or exercise their control "from the shadow."

Second, given that the legislator has strictly enumerated the deeds that can be used as legal grounds for attracting liability of third parties, the application of the doctrine is also strictly limited by the same grounds. The limitation becomes even more stringent if we take into account that both the Romanian scholars and case-law have placed the burden of proof on the claimant. Thus, the claimant has to prove the following: the existence of the prejudice, the existence of the deed, the intent of the wrongdoer, and the causal relationship between the deed and the intent of the wrongdoer.[72] It is evident that the Romanian law does not provide for a legal presumption to the benefit of the creditors but, on the contrary, they actually bear the burden of proof. The reason lies in the fact that the

[68] Art. 169, Para 4. The original Romanian version reads as follows: "(4) În caz de pluralitate, răspunderea persoanelor prevăzute la alin. (1) este solidară, cu condiţia ca apariţia stării de insolvenţă să fie contemporană sau anterioară perioadei de timp în care şi-au exercitat mandatul ori în care au deţinut poziţia în care au contribuit la starea de insolvenţă."

[69] The original Romanian version reads as follows: "Sumele depuse potrivit dispoziţiilor art 138 alin 1 vor intra în averea debitorului şi vor fi destinate, în caz de reorganizare, plăţii creanţelor potrivit planului de plăţi, completării fondurilor necesare continuării activităţii debitorului, iar în caz de faliment, acoperirii pasivului."

[70] *See* STANCIU CĂRPENARU, VASILE NEMEŞ AND MIHAI HOTCA, LAW NO. 85/2006 ON INSOLVENCY PROCEEDINGS, WITH COMMENTS 328 (2006). The commentary makes no reference to legal persons, but enumerates several categories of natural persons that may be found liable under the new wording of the text: *shareholders, associates, CFO's, departments' chiefs, accountants.*

[71] *Id.* at 328. With specific reference to shareholders and associates, the commentary makes a qualification based on Decision no. 40/2005 (unpublished, rendered by Bucharest Court of Appeals) stating that: "*they will be liable only if it is proven that they have committed one of the deeds specified expressly in Art 138, which means that they have directly involved in the administration of the debtor or they have administered in fact the activity of the debtor.*"

[72] *See* STANCIU CĂRPENARU, VASILE NEMEŞ AND MIHAI HOTCA, LAW NO. 85/2006 ON INSOLVENCY PROCEEDINGS, WITH COMMENTS 326 (2006). *See also* Decision no. 657/2007 rendered by Bucharest Court of Appeals, Decision no 1318/2007, rendered by Constanta Court of Appeals, Decision no. 471/R/2009 rendered by Bucharest Court of Appeals reproduced by Mona Maria Pivniceru A.O., Insolvency Procedure 2006-2009, Jurisprudence 252-360 (2009).

conditions adopted by both scholars and the existent case law for establishing the liability are those from Romanian tort law, art. 1357 of the New Civil Code.[73] It is one of the major issues caused by the civilian tradition to which Romania belongs.

As already stated, the creditors do not have the primacy in formulating the claim, and even when they do, it is subjected to certain conditions - only if the bankruptcy trustee failed to identify those who are liable, or, although it did identify them, he decided not to file a claim against them.[74] This creates another form of limitation, as those who are directly affected by the insolvency of the company have neither a direct recourse to court nor their own standing.[75] Their action is just subsidiary and it is filed in the name of the company.

The reason lies with the fact that according to Romanian legislation, the aggrieved (and protected) parties are not the creditors, but the company itself (the debtor). Therefore, it is in the name of the company that the bankruptcy trustee or liquidator is suing those responsible for the debtor's insolvency, and it is the company who recovers the money. Creditors get access to these amounts only indirectly, through the bankruptcy proceedings via the bankruptcy distribution rules. Thus, the doctrine of piercing the corporate veil is not only strictly limited to insolvency proceedings, but it generates only indirect effects on the creditors. Thus, in our opinion, de *lege ferenda* the right to action should be given to the creditors directly, free of any other conditions or encumbrances.[76]

5.3. Piercing the Corporate Veil under the Code of Fiscal Procedure

In dealing with joint liability, the Code of Fiscal Procedure also took the approach of the Romanian Bankruptcy Law and stated that in the case of outstanding obligations of a debtor declared insolvent, the following categories will be held liable together with the debtor: directors, partners, shareholders, and any other person who caused the insolvency of the debtor legal entity by disposing of, or hiding, in bad faith, in any form, the debtor's assets,[77] or, administrators who, during their mandate, in bad faith, did not fulfil the legal obligation to request the competent court to start the

[73] Law no. 287/2009 regarding, the Civil Code was initially published in the Official Gazette no. 511/24.07.2009 and was republished in the Official Gazette no 409/10.06.2011.

[74] Decision no. 1781/2007 rendered by Bucharest Court of Appeals, Decision no. 1318/2007, rendered by Constanta Court of Appeals, Decision no. 471/R/2009 rendered by Bucharest Court of Appeals reproduced by Mona Maria Pivniceru A.O., Insolvency Procedure 2006-2009, Jurisprudence 252-360 (2009). In the mentioned Decision, the Court held that: *"The omission of the liquidator to nominate in his reports the causes of insolvency or those who are liable for the company's insolvency, must create an inequitable situation for the creditors, in the sense that by liquidator's inaction, the creditors are unable to exercise their right to be properly informed and exercise the action themselves."*

[75] The conclusion is supported also by a provision of the Company Law no. 31/1990, Art 73, Para 2 which reads as follows: "The liability action against the directors can be filed also by the creditors of the company, who will be entitled of exerting it only in case of opening the procedure regulated by Law no. 64/1995 on the insolvency procedure, as republished." In Romanian original: "Acţiunea în răspundere împotriva administratorilor aparţine şi creditorilor societăţii, care o vor putea exercita numai în caz de deschidere a procedurii reglementate de Legea nr. 64/1995 privind procedura reorganizării judiciare şi a falimentului, republicată."

[76] For a similar opinion, *see* STANCIU CĂRPENARU, VASILE NEMEŞ AND MIHAI HOTCA, LAW NO 85/2006 ON INSOLVENCY PROCEEDINGS, WITH COMMENTS 342 (2006). The commentary pleads for the right of creditors to file the legal action, "*if the bankruptcy trustee, liquidator or creditor's committee fail to file it themselves*." The proposal does not seek to change the subsidiary character of creditors' right to file the action. We find this position too moderate, although it might improve a bit the current situation. We are on the opinion that such a right should not be subsidiary or conditional, but awarded to any creditor directly to enhance the efficiency of this legal remedy. Such a decision would not only be justified under procedural grounds but also under logical grounds, the creditors being those who are suffering the actual loss.

[77] Art. 25, Para 2, letter b) of the Code of Fiscal Procedure. In Romanian original: "Pentru obligaţiile de plată restante ale debitorului declarat insolvabil, în condiţiile prezentului cod, răspund solidar cu acesta următoarele persoane: administratorii, asociaţii, acţionarii şi orice alte persoane care au provocat insolvabilitatea persoanei juridice debitoare prin înstrăinarea sau ascunderea, cu rea-credinţă, sub orice formă, a activelor debitorului."

insolvency procedure for tax obligations afferent to the respective period and unpaid until the date of declaration of insolvency.[78]

Natural persons are not the only ones to be jointly liable. Legal persons are as well. Therefore, the Code of Fiscal Procedure established that a legal person is jointly liable with the insolvent debtor, either under the Code or Bankruptcy Law, if the legal person, directly or indirectly, controls, is controlled by or is under common control with the debtor and at least one of the following conditions is fulfilled: it acquires any title, ownership of tangible assets of the debtor, and carrying amount of these assets, represents at least half of all tangible book value of the acquirer; it has or had business contracts with customers and/or suppliers other than those providing utilities, who were or are, in a contractual relationship with the debtor of at least half the total value of the transactions; it has or has had employment or service contracts with at least half of the employees or service providers of the debtor.[79]

From these provisions, it becomes evident that the state may ask to pierce the corporate veil when claiming fiscal duties and outstanding taxes. In this case, what is problematic is that the application of the doctrine is also limited in scope, to outstanding taxes owed by insolvent debtors who satisfy the conditions imposed by the Code. Furthermore, though the procedure of establishing and collecting taxes is mainly an administrative one, references to the insolvency of the debtor lead to the conclusion that any attempts to pierce the corporate veil under the provisions of the Code of Fiscal Procedure can take place only inside bankruptcy courts, during the insolvency proceedings we referred to in Subsection 5.2.

An interesting fact is that nowhere in the commentaries of the bankruptcy law, or in the court cases studied, is there mention of the doctrine itself. “Piercing the corporate veil” was scarcely present anywhere in the Romanian scholarly works or case law. Until the first version of this article, in 2012, only Gheorghe Piperea brought the subject into discussion during an interview criticizing the amendments to the Romanian Company Law no 31/1990,[80] and in an article analysing the application

[78] Art. 25, Para 2, letter c) of the Code of Fiscal Procedure. In Romanian original: “Pentru obligaţiile de plată restante ale debitorului declarat insolvabil, în condiţiile prezentului cod, răspund solidar cu acesta următoarele persoane: administratorii care, în perioada exercitării mandatului, cu rea-credinţă, nu şi-au îndeplinit obligaţia legală de a cere instanţei competente deschiderea procedurii insolvenţei, pentru obligaţiile fiscale aferente perioadei respective şi rămase neachitate la data declarării stării de insolvabilitate.”

[79] *See* Art. 25, Para 3 of the Code of Fiscal Procedure. In Romanian original: “Persoana juridică răspunde solidar cu debitorul declarat insolvabil în condiţiile prezentului cod sau declarat insolvent dacă, direct ori indirect, controlează, este controlată sau se află sub control comun cu debitorul şi dacă este îndeplinită cel puţin una dintre următoarele condiţii: a) dobândeşte, cu orice titlu, dreptul de proprietate asupra unor active de la debitor, iar valoarea contabilă a acestor active reprezintă cel puţin jumătate din valoarea contabilă a tuturor activelor dobânditorului; b) are sau a avut raporturi contractuale cu clienţii şi/sau cu furnizorii, alţii decât cei de utilităţi, care au avut sau au raporturi contractuale cu debitorul în proporţie de cel puţin jumătate din totalul valoric al tranzacţiilor; c) are sau a avut raporturi de muncă sau civile de prestări de servicii cu cel puţin jumătate dintre angajaţii sau prestatorii de servicii ai debitorului.”

[80] BILANŢ MAGAZINE, http://www.avocatnet.ro/content/articles?id=7216 (last accessed April 19th 2012). During the interview, referring to the limited liability of a sole associate’s companies, professor Piperea said that it considers such companies “fictive companies” which should be subjected to the doctrine of piercing the corporate veil in order to protect creditors from fraudulent acts of the sole associate. In Romanian original: “Există foarte multe situaţii practice în care sunt constituite societăţi numai ca un paravan ale stăpânului afacerilor sau unele dintre ele sunt societăţi-fantomă, constituite doar pentru aventuri economice sau pentru fraudarea intereselor creditorilor. Eu le denumesc societăţi fictive. În dreptul anglo-saxon, tehnica societăţii fictive este denumită "a străpunge vălul corporatist,” adică a străpunge rolul corporatist, a lua paravanul acela al răspunderii limitate. Adică, deşi societatea este parte în contract, daca tu, creditor, ai de recuperat ceva de la acea societate, iar când faci acest lucru vezi că are un capital social de 200 de lei, constaţi că rămâi cu creanţa în aer. Demonstrând că este o societate fictivă, deci că personalitatea sa juridică este falsă, te poţi duce să-l urmăreşti direct pe

of the doctrine in two EUCJ cases related to competition law issues.[81] However, since the level of awareness increased, more works addressing the issue of piercing the corporate veil in Romania started to appear, raising the issue of the need to create a self-standing regulation for the doctrine.[82]

6. PIERCING THE CORPORATE VEIL IN SLOVAKIA

The legal system in Slovakia, as well as the other legal systems, confers upon companies separate legal personalities that are different from their shareholders. It is the Slovak Civil Code[83] that assigns upon legal persons the capacity to assume rights and obligations. However, the Civil Code does not define the notion of legal entity, but only enumerates types of legal persons—companies being one of them[84] - and defines their elementary characteristics.[85] The majority of the provisions regulating companies are to be found in the Slovak Commercial Code[86] [hereinafter "Co.C"] that, represents *lex specialis* towards the Slovak Civil Code serving as *lex generalis.*

6.1. Piercing the Veil under Slovak Company Law[87]

Pursuant to the Slovak Commercial Code, all the assets of a corporation are isolated from its shareholders, and the shareholders are liable only to the extent of the required minimum capital.[88] In the current statutory rules, there is no general set of regulations concerning piercing the corporate veil. Yet, in certain provisions, Co.C opens the door to veil piercing in connection to the managing director of a company, called "*konate.''*"[89] However, there is no compact regulation concerning corporate groups, as in the case of Germany[90] or Czech Republic,[91] referred to as "concern law." Slovak Co.C

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asociat, pe stăpânul afacerii. Aceasta este tehnica străpungerii "vălului corporatist" care are o aplicaţie puţin cam confuză în Codul de procedură fiscală."

[81] See Prof. Dr. Gheorghe Piperea, *Comisia Europeana a sanctionat opt banci austriece*, April 19, 2012,http://www.infolegal.ro/comisia-europeana-a-sanctionat-opt-banci-austriece/2011/04/05/.

[82] See Anca Sorina Popescu-Cruceru and Eugenia-Gabriela Leuciuc, Considerations on the Enforcement of the Doctrine of Piercing the Corporate Veil in Romania 4 INT'L J. OF ACADEMIC RESEARCH IN BUSINESS AND SOCIAL SCIENCES 488 (2014).

[83] Act No. 40/1964 Coll. (Slovak).

[84] Slovak legal theory divides companies into two groups: personal companies and capital companies. The same division takes place in Germany and France and other continental legal systems. In Anglo-Saxon world, it is *de facto* same, though they differentiate mainly between companies and partnerships. For the purposes of this article, the term company in the Slovak legal environment refers only to the limited liability companies: Limited Liability Company ("*spoločnosť s ručením obmedzeným"*) and Joint Stock Company ("*akciová spoločnosť"*).

[85] The general regulation of legal persons is to be found in articles 18-21 of the CC. The text in English of article 18 of the Civil Code reads: "(1) Legal entities are able to have rights and responsibilities. (2) Legal entities are: (a) associations of natural or legal persons; (b) associations of property; (c) territorial units; (d) other entities established by law."
in Slovak of article 18 of the Civil Code reads: "(1)Spôsobilosť mať práva a povinnosti majú aj právnické osoby.(2) Právnickými osobami sú: (a) združenia fyzických alebo právnických osôb, (b) účelové združenia majetku, (c) jednotky územnej samosprávy, (d) iné subjekty, o ktorých to ustanovuje zákon."

[86] Act No. 513/1991 Coll. (Slovak).

[87] The company law in Slovakia is mainly regulated by the Slovak Commercial Code, as the provisions regulating the types of companies, their characteristics and the rights and obligations stemming out of them are to be found in the II., III., IV. and V. part of the First Chapter of the Slovak Commercial Code.

[88] The principle of separation of property is directly expressed in the §105 of the Co.C.

[89] Slovak legal language is very peculiar in this aspect and calls the person who is legally responsible for managing and directing the company - "konateľ". Within the registry of companies, one can clearly see who is "konateľ" and hence who is entitled to bind the company vis-à-vis the third persons.

[90] Germany has a statutory body of law of corporate groups – 'Konzernrecht' within articles 15-19 and 291-328 of the Stock Company Act ('Aktiengesetz'). These rules are designed to protect the interests of minority shareholders and creditors. They do not form a direct majority shareholder liability vis-à-vis the minority shareholders or creditors, but rather form a system of reservation of the company's assets.

reflects on the issue only to a very limited extent – with two provisions (§66a and §66b Co.C) on "Controlled and Controlling person" and 'Proceedings in Accordance."

6.1.1. Liability of "Parent"–"Controlling" Company

Article 66a defines who the controlled and controlling persons are. Under section 1 of the Co. C, the controlled person is "*a corporation in which a person owns a majority of the voting rights, either because it owns such a participation or it owns company's shares, which involve a majority of voting rights, or because, due to the agreement with other shareholders the controlling person is entitled to perform the majority of the voting rights, regardless of the validity or invalidity of such an agreement.*"[92] The subsequent provisions deal with the proportion of the voting rights and their exercise (section 3 and 4). This provision, forming the general part of the Co.C., is applicable to all types of corporations and partnerships, irrespective of whether the shareholder or partner is legal or natural person.

Article 66a sets out only the conceptual features that are required to be fulfilled, in order to acquire the status of a controlled or controlling person. Other provisions of the Slovak Commercial Code that reflect on the status of the legal person being a controlled or controlling person consider only part of the issues related to the relationship between a controlled and controlling person. For example, an acquisition of individual share, when a company acquires assets from 'close' or 'controlling' companies of a value at least 10% of the capital of a company, or when a company creates a lien on the shares of the controlled person or in case of protection of the minority shareholders of the controlled person, etc.[93] But none of the provisions indicates any awareness of numerous liability issues inherent in the relationship between the parent company and its subsidiary.

Furthermore, the authors were not able to find one single case that would hold the mother company liable in Slovakia for the actions of the subsidiary, except the competition cases for the breach of competition or abuse of dominant position that, which is not the subject of this article. Hence, concerning this type of veil piercing between two interconnected companies, it is obvious that the notion of corporate limited liability is very strong and for the time being also bulletproof.

6.1.2. Liability of Managing Director ('Konateľ"/ Člen predstavenstva)

All managing directors owe a fiduciary duty to the company and to the company's shareholders. They should act with due care and in accordance with the interests of the company. They

[91] The Czech legislator went further with the concept of controlled and controlling person, and defined that the controlling person together with the controlled ones form a corporate group ["koncern"]. *See* §66a, section 7, second sentence of the former Czech Commercial Code no. 513/1991 Coll. On 1st January 2014, Czech private law underwent an extensive revision, and former Czech Commercial Code no 513/1991 Coll. was replaced by the Act on Business Corporations no. 90/2012 Coll. The new act directly reflects on the corporate groups in its section no. 9, §§71-91. The Act defines the corporate group ["koncern"] in§79. According to §82, it is the obligation of the statutory authority of the controlled person, within three months after the accounting period, to draft a written report on relations between the controlling and controlled person and between the controlled person and other controlled persons, which are controlled by the same controlling person, for the previous accounting period. The act defines the content of the report. Afterwards, this report is disclosed to the controlling person. Moreover, each shareholder of the controlled person is also entitled to familiarize himself/herself with the report.

[92] The text in Slovak of 513/1991 §66a of the Co.C reads: "Ovládaná osoba je spoločnosť, v ktorej má určitá osoba väčšinový podiel na hlasovacích právach preto, že má podiel na spoločnosti alebo akcie spoločnosti, s ktorými je spojená väčšina hlasovacích práv, alebo preto, že na základe dohody s inými oprávnenými osobami môže vykonávať väčšinu hlasovacích práv bez ohľadu na platnosť alebo na neplatnosť takejto dohody (article 186a Co.C)."

[93] *E.g.* §59a sec. 3, § 120, 161f§, 196a of Co.C.

are obliged to obtain and consider all available information before deciding on a specific issue. Furthermore, they are prohibited from disclosing confidential information to third parties, and when exercising their powers, they should always prefer and prioritize the interest of the company over their own interests, interests of only some shareholders or interests of third parties.[94] The duties of managing directors are fairly well stated in the Co.C. However, the question is what the consequences are in the event of a breach of these duties. Section 2 of article 135a of the Co.C establishes a joint and several liabilities of managing directors once he/she/they breached fiduciary duty – particularly, they are obliged to compensate the company those damages that are the result of:

(a) *"Managing directors providing performance to a shareholder contrary to the provisions of this Act;*

(b) *Managing director acquiring property contrary to article 59a."*[95]

Following the provisions of article 135a, a managing director is not held liable if he or she proves that he or she acted with due care and in *bona fide*.[96] Hence, the Slovak provisions comply with the general fiduciary duty standards, and the legal provisions regulating the liability of a managing partner or a member of a statutory body towards the company itself comparable with other legal regulations.[97]

Concerning the manager's liability vis-à-vis a creditor, if the creditor cannot satisfy itself from the company's assets, the creditor can claim damages from the manager. Even if there was some kind of agreement that the company would not pursue any kind of claims against the manager for the company's losses, it does not affect the entitlement of the creditor.[98] According to Article 135a(5) of the Co.C, the creditor may bring an action against the managers in the amount of its claims towards company. This statutory construction extends the liability of the managers, in the sense that in the event they breach their fiduciary duty, they could be held liable for the damage they caused with their entire personal property. However, the Co.C recognizes "objective liability" which does not require culpability, but nevertheless the preconditions for this liability to arise are: (i) a breach of the contractual or legal obligations; (ii) existence of the damage; and (iii) a causal link between the breach and the damage. The burden of proof lies on the shoulders of the creditor who would have to prove all

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[94] Article 135a, section 1 of the Co.C. The text in Slovak reads: Konatelia sú povinní vykonávať svoju pôsobnosť s odbornou starostlivosťou a v súlade so záujmami spoločnosti a všetkých jej spoločníkov. Najme sú povinní zaobstarať si a pri rozhodovaní rozhľadniť všetky dostupné informácie týkajúce sa predmetu rozhodnutia, zachovávať mlčanlivosť o dôverných informáciách a skutočnostiach, ktorých prezradenie tretím osobám by mohlo spoločnosti spôsobiť škodu alebo ohroziť jej záujmy alebo záujmy jej spoločníkov, a pri výkone svojej pôsobnosti nesmú uprednostňovať svoje záujmy, záujmy len niektorých spoločníkov alebo záujmy tretích osôb pred záujmami spoločnosti."

[95] The text in Slovak of article 135a, section 2 of the Co.C. reads:"Konatelia, ktorí porušili svoje povinnosti pri výkone svojej pôsobnosti, sú povinní spoločne a nerozdielne nahradiť škodu, ktorú tým spoločnosti spôsobili. Najmä sú povinní nahradiť škodu, ktorá spoločnosti vznikla tým, že (a) poskytli plnenie spoločníkom v rozpore s týmto zákonom; (b) nadobudli majetok v rozpore s §59a.

Article 59a regulates the contracts between the company and its shareholders or between the company and its managing director. In such cases, if the consideration is at least 10% of the authorized capital, the value of the contractual object has to be determined by an expert.

[96] Article 135a, section 3 of the Co.C. The provision on further reads that the managing directors are not responsible for any damage caused by conduct, which was carried out under the resolution of the General Assembly, unless such action would be contrary to law, articles of association or to memorandum of a company. If a company has established a supervisory body, even if the supervisory body approved the actions of managing directors, they are still liable. The text in Slovak reads: Konatelia nezodpovedajú za škodu spôsobenú spoločnosti konaním, ktorým vykonávali uznesenie valného zhromaždeniaô to neplatí, ak je uznesenie valného zhromaždenia v rozpore s právnymi predpismi, spoločeskou zmluvou alebo stanovami. Ak má spoločnosť ozornú radu, konateľov nezbavje zodpovednosti, ak ich konanie dozorná rada schválila.

[97] The same standard is applicable in a case of joint stock company and the members of statutory bodies and supervisory bodies.

[98] Article 135a, 513/1991 §5 of the Co.C.

three elements of the breach of fiduciary duty, the damage and the causal link between the occurrence of the damage, and the manager's breach of fiduciary duty. Even if the creditor proves all these preconditions for liability, there is still space for the managing director to avoid liability, by proving the existence of a barrier that rendered the obligation unfulfillable. The barrier shall be unpredictable and has to emerge regardless of the manager's will.

In addition to the above stated, Slovak law has a novel provision defining "companies in crisis" which came into force on January 1st, 2016. Under this provision, a company is in crisis when it is insolvent or it is endangered by insolvency. In this case insolvency does not mean regular bankruptcy, rather it is considered as a specific economic momentum in respect to the governance and management of the company. The company is considered in crisis if the ratio of its registered capital to its obligation is less than eight percent (8%). Additionally, the contributions to shareholders are deemed to represent a loan or security and preclude the company to repay those while the company remains in crisis. In which case the contributions provided to the shareholders contrary to the law must be repaid. This shareholder's obligation cannot be waived and the management board must enforce fulfillment of this obligation. Otherwise, the managing director(s) is jointly and severally liable to the company and the creditors for the return of the contribution.

In conclusion, the Slovak Commercial Code gives the possibility to a creditor to sue the managing directors for the debts of a company, and hence, partially pierce the veil between the company and the director. Nevertheless, it remains questionable to what extent a creditor may bear its burden of proof and show the breach of managing director's fiduciary duty.[99]

6.2. Civil Code as a possible path?

As has been already stated, the Slovak Commercial Code is *lex specialis* towards the Slovak Civil Code that, serves as *lex generalis*. Therefore, if the Co.C does not govern some specific problem, the Civil Code steps in, and the harmed party may rely on its provisions. Theoretically, one of such provisions is article 424 – a general liability clause that states "A person is liable for the damage caused intentionally against good manners."[100] The equivalent of this provision, article 826 of the German Civil Code was applied in the *Trihotel* case.[101] Pursuant to article 826, a person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to compensate the damage.[102] This provision could have been used in a way to pierce the corporate veil, however the bankruptcy proceeding in this particular case has commenced, and therefore, any other claims were stayed.

Nevertheless, in the *Trihotel* case, the German Federal Court has acknowledged article 826 as a possible way a creditor could claim directors' and shareholders' personally liable for their breach of good manners. Concerning Slovak case law, such option has not yet been exercised, but this possibility still remains open.[103]

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[99] In the decision of the Regional Court Bratislava 3Cob/17/2013, the court reflects on the necessity to prove the causality between the actions of the managing director and the damage caused.

[100] The text in Slovakian of article 424 of the Civil Code reads:"Za škodu zodpovedá aj ten, kto ju spôsobil úmyselným konaním proti dobrým mravom."

[101] 173 BGHZ 246 (Ger.).

[102] BURGERLICHES GESETZBUCH [BGB][CIVIL CODE], § 826 (Ger.) "*Wer in einer gegen die guten Sitten verstoßenden Weise einem anderen vorsätzlich Schaden zufügt, ist dem anderen zum Ersatz des Schadens verpflichtet*."

[103] Postanovlenie Prezidiuma VAS RF ot 24 aprel 2012 g. No. 16404/11 [Ruling of the Presidium of the Highest Arbitration Court of the Russian Federation of April 24, 2012, No. 16404/11], For the first time in its practice the Highest

6.3. Piercing the Veil under Slovak Bankruptcy Law

Slovak Bankruptcy Act[104] [hereinafter 'BA'] was adopted on 9th December 2004. Following the legislator's memorandum when adopted, the core objective of this novel regulation was to strengthen the creditors' position. The entire regulation was drawn in a way to provide creditors with effective legal tools in order to protect themselves in case of debtor's insolvency, and subsequent bankruptcy or restructuring proceedings.[105] In addition, the restructuring should always be considered as the first option.[106] Restructuring should encourage and stimulate all the stakeholders to modify their contractual relationships in order to reach a collective satisfaction rather than 10% of their claim. Since BA's adoption the act went through numerous adjustments and changes.

Concerning the veil piercing, the BA imposes a system where legal acts of a company might be held null and void in the case they have been carried out with a 'related party' to the detriment of other creditors. Here, the parent Company, as well as the managing director, comes into picture.
Article 9 of the BA specifies who a "related party" ("*spriaznená osoba*") might be:

- *(a) A statutory body or a member of a statutory body, managing employee, proxy or a member of a supervisory board;*
- *(b) Natural person or other legal person who has a qualified interest in the legal entity;*
- *(c) A statutory body or a member of statutory body, managing employee, proxy or a member of a supervisory board of a legal person referred to in point (b);*
- *(d) Close person to a natural person referred to in subparagraphs (a) to (c);*
- *(e) Other legal entity in which the legal person or any of the persons mentioned in subparagraphs (a) to (d) have a qualified interest.*[107]

Arbitration Court specifically named the doctrine of piercing the corporate veil. The Court ruled that respondent companies (Latvian joint-stock companies AS «Parex banka» and AS «Citadele banka») could be sued in Russia notwithstanding the fact that they had had no official branches in the country, because in fact they had been providing services in Russia through affiliated legal entities for the purpose of evasion of the legislation on bank control. The Russian HCC relied on the ECJ judgment of 09.12.1987 in SAR Schotte GmbH v. Parfums Rothschield (Case No. 218/86). Arguably, it was not the first case when Russian courts happen to apply the principles similar to the doctrine of piercing the corporate veil (commercial courts tended to apply analogous approaches before mostly in tax cases), but the first time when the court actually named the latter and cited the external legal source it borrowed the doctrine from. The case could be seen as a path breaking one, given the absence of specific provisions in Russian law related to the doctrine and embryonic character of Russian legal discourse pertaining to this issue. See Корпоративная вуаль, ВАС вводит новый тренд. ("Corporate Veil" - the Higher Commercial Court establishes a new trend)
http://pravopress.ru/node/635 & Корпоративная вуаль, ВАС вводит новый тренд. | ПравоПРЕСС ВАС приподнял и снова опустил корпоративную вуаль (The Higher Commercial Court lifted and again pulled down the corporate veil) http://pravo.ru/news/view/71525/.

[104] Slovak Bankruptcy Act No. 7/2005 Coll.

[105] The former bankruptcy legislation has been extremely ineffective, as the bankruptcy proceedings lasted for approximately from 3 to 7 years and creditors were able to secure around 5-10% of their claims.

[106] Restructuring refers to a similar procedure as reorganization under Chapter 11 of the UCC, which allows the debtor to enter into an agreement with creditors under which all or part of the business continues. Based on this agreement, the debts are restructured, so as the debtor could continue its business. Act No. 7/2005.

[107] The text in Slovakian of Act. No. 7/2005, article 9, section 1 of the BS reads: "Spriaznenou osobou právnickej osoby sa na účely tohto zákona rozumie (a) štatutárny organ alebo člen štatutárneho orgánu, vedúci zamestnanec, prokurista alebo člen dozornej rady právnickej osoby; (b) fyzická osoba alebo iná právnická osoba, ktorá má v právnickej osobe kvalifikovanú účasť; (c) štatutárny orgán alebo člen štatutárneho orgánu, vedúci zamestnanec, prokurista alebo člen dozornej rady právnickej osoby uvedenej v písmene (b); (d) blízka osoba fyzickej osoby uvedenej v písmenách (a) až (c); (e) iná právnická osoba, v ktorej má právnická osoba alebo niektorá z osôb uvedených v písmenách (a) až (d) kvalifikovanú účasť."

To begin with, it is necessary to specify what a qualified interest means. Section 3 of article 9 states that "*The qualified interest for the purposes of this Act means a direct or indirect involvement representing at least 5% share of the authorized capital or of voting rights of the legal person or the possibility of applying influence on the management of the legal person which is comparable to the influence corresponding to this share; the indirect involvement for the purposes of this Act is the share held indirectly through entities in which the holder has a qualified interest*."[108]

Based on the above defintion, in the case of bankruptcy proceedings, the court may pierce not just one veil, but several veils, if the company aims to hide some assets in the courtyard of a related person or a person of a related person. In order to help the court in such discovery, according to the Slovak BA, all 'related parties' have to be stated once the bankruptcy proceeding begins by the company.[109] The BA lays down the necessary requirements that, once fulfilled, the legal acts between the legal entities undergoing bankruptcy proceeding and the 'related party' are to be held void. These provisions do not serve for the purposes of extending the liability, but to protect the creditors against fraud, which is the fundamental element of any veil-piercing case.

The given provisions are very broad and entitle creditors to be far-reaching in their interest protection. However, another question that needs an answer is connected to the burden of proof. According to the BA, the burden of proof is shifted from the creditor to the insolvent company, by presuming the insolvency of the debtor in case of legal action taken in favour of a 'related person'. Such shift helps the creditor to prove the necessary link between actions of the debtor – insolvent company and its parent company alias 'related person' and the subsequent insolvency of the debtor (see the following paragraph).[110] Moreover, from a pragmatic perspective, the insolvent company has sufficient time and means to investigate the legal and natural persons with whom the company signed the contract. Within the bankruptcy proceeding, the entitled person that should carry out not only the formal actions but also carefully assess all business transactions of the company is the trustee. Once the trustee finds out the improper agreements and dealings between the company and the related party, the trustee can petition the court to hold such legal acts void and bind the parties to restitution or compensation of creditors. If the trustee does not act within an adequate period of time, only then can the creditor petition the court.[111]

The BA established two requirements in order to hold a contractual agreement void. First, there was no adequate consideration. Secondly, such an agreement caused the bankruptcy of the debtor.[112] These requirements apply to any contractual agreement with a non-related party. However, in the case of a related party, the causation is anticipated, unless proven otherwise.[113] Hence, the burden of proof connected to the causation shifts, which simplifies the entire procedure of submitting evidence.

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[108] The text in Slovakian of Act No. 7/2005, article 9, section 1 of the BA reads: "Kvalifikovanou účasťou sa na účely tohto zákona rozumie priamy alebo nepriamy podiel predstavujúci aspoň 5 % na základnom imaní právnickej osoby alebo hlasovacích právach v právnickej osobe alebo možnosť uplatňovania vplyvu na riadení právnickej osoby, ktorý je porovnateľný s vplyvom zodpovedajúcim tomuto podielu; nepriamym podielom sa na účely tohto zákona rozumie podiel držaný sprostredkovane prostredníctvom právnických osôb, v ktorých má držiteľ nepriameho podielu kvalifikovanú účasť."

[109] Act No. 7/2005 §12.

[110] Act No. 7/2005 §58(2).

[111] Act No. 7/2005 §57.

[112] Act No. 7/2005 §58.

[113] Act No. 7/2005 §58, section 2 of the BA. The text in Slovakian reads: "Právnemu úkonu bez primeraného protiplnenia možno odporovať, ak spôsobil úpadok dlžníka alebo bol urobený počas úpadku dlžníka. Ak ide o právny úkon urobený v prospech osoby spriaznenej s dlžníkom, úpadok dlžníka v case urobenia právneho úkonu sa predpokladá, ak sa nepreukáže opak."

In conclusion, Slovak bankruptcy law gives certain leeway for just and fair court actions in case of fraudulent demeanour of a company, managing director, or other parties. There is also the positive aspect of shifting the burden of proof in case of related parties. However, in practice, waiting till the trustee commences the procedure might impede the procedure and tighten the hands of creditor. Therefore, to speed up the process, the creditors should have standing from the very beginning and should not have to wait until the trustee's inaction.

7. 'NEW' DEVELOPMENT IN EU

On the June 20, 2013, the Court of Justice of the European Union [hereinafter "CJEU"] rendered a decision in Case C-186/12 in Impacto Azul Lda v. BFSA 9 Promoção e Desenvolvimento de Investimentos Imobiliários SA, Bouygues Imobiliária – SGPS Lda, Bouygues Immobilier SA, Aniceto Fernandes Viegas, Óscar Cabanez Rodriguez, concerning the interpretation of Article 49 TFEU.[114]

In this case, the CJEU had, under the preliminary ruling, to interpret the provisions of the Portuguese law on companies in a control relationship that, which forms part of Title VI of the Code on Commercial Companies.[115] According to this law, parent companies seated in Portugal and abroad are treated differently. Where the first are liable for the claims of creditors under the principle of the joint and several liability of the parent company, the others are not.[116] Thus, the question the CJEU faced was whether this different treatment of parent companies is discriminatory, and whether the Article 49 TFEU precludes such treatment.[117]

The CJEU ruled that, given that the law on corporate groups has not yet been harmonized on the EU level, the Member States remain responsible for the law determining the relationship between the parent and subsidiary. Thus, imposing liability does not create a restriction of the freedom of establishment within the meaning of the Article 49 TFEU.**[118]**

Concerning purely the legal question posed in the above stated case, the CJEU could not, under the notion of right of establishment, in any way drag in parent companies of other Member States simply as less favourable treatment, for national companies does not form discrimination of the companies established in other Member States. However, as to the policy question, in the light of this ruling, one may conclude that for now Member States of the EU have not yet come to the same determination of holding parent companies' *alias* controlling companies liable together with their subsidiaries in case of direct or indirect control.

Academics have long challenged the reluctance of the European Union to adopt legislative measures towards unification of European corporate group law. Substantive work has been carried out by the Forum Europaeum on Group Law,[119] the High Level Group of Company Law Experts[120] or the Reflection Group.[121] Nevertheless, with current challenges that the EU faces, a new directive on corporate law group is highly uncertain.

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[114] Treaty on the Functioning of the European Union, Art 49, December 13, 2007 regulates the Right of Establishment.
[115] *See* CÓDIGO DAS SOCIEDADES COMERCIAIS (Code on Commercial Companies) art. 481 et seq.
[116] *See* Case C-186/12 Impacto Azul Lda v. BFSA 9 Promoção e Desenvolvimento de Investimentos Imobiliários SA, Bouygues Imobiliária – SGPS Lda, Bouygues Immobilier SA, Aniceto Fernandes Viegas, Óscar Cabanez Rodriguez para. 31.
[117] *Id*. at para. 33-34.
[118] *Id*. at. para 38.
[119] There is no supporting citation
[120] *See* A Modern Regulatory Framework for Company Law in Europe, High Level Group of Company Law Experts, European Commission (Nov. 4, 2002).
[121] *See* Rep. on the Future of EU Company Law, Reflection Group, European Commission (Apr. 5, 2011).

8. CONCLUDING REMARKS

The focus of this article was primarily on the current legal situation in the CEE region and the (in)application of the doctrine of piercing the corporate veil. It is our belief that the list of abuses that could be prevented or solved by piercing the corporate veil is extensive, with applications in various legal areas, such as bankruptcy, public finances or even environmental tort. It is our common view that the benefits of the corporate veil piercing doctrine cannot be denied, and the doctrine should be implemented in a form that would allow its application through all the legal sectors while stipulating specific conditions that would have to be fulfilled.

It can be easily noted that the differences between the jurisdictions are quite large, but steps are slowly being taken towards the application of the piercing the corporate veil doctrine in the CEE region.[122] However, there still is a lot of work to do and many problems to be solved. A major problem has to do with the development of law and with adopting and implementing the right terminology and a consistent legal framework. As shown above, some applications of the doctrine are already available (in both Romania and Slovakia), despite that the 'piercing of the corporate veil' is very sporadically mentioned as such in the legal literature yet never in the subsequent case law. On the theoretical level, there is also reluctance and resistance towards the doctrine with respect to its application. Legal certainty, protection, and encouragement of business or investments, are always mentioned when the issue of piercing the corporate veil is brought up in the discussion with practitioners, as many fear that it might have a chilling effect on investments.

Even more, the formalism of European civil law systems represents also a serious obstacle. The European approach is that everything should be strictly mentioned and regulated through specific provisions of the law, while in the US, given the peculiarities of the common law system, courts and their case law develop diverse doctrines, including the veil piercing. Europeans need to understand that not everything can be comprised in the law, and that when it comes to such issues, some liberty must be awarded to the courts. Here, the Court of Justice of the European Union might also have something to say in the future and it might give certain incentives to the courts for applying the doctrine of piercing the corporate veil.

The above mentioned concerns related to the potential chilling effect are contradicted by the actual facts and by the US example, which shows that the doctrine does not have a general application and was not created to circumvent or infringe the patrimonial separation between the company's founders and the company itself or the principle of limited liability. On the contrary, the doctrine was, and remains, just an exception from these principles and evidence that formality should never trump the reality. One judicial method that requires judges to carefully analyze the situation and make sure that there will not be more abuses than the ones that the doctrine is trying to prevent. It is a quest for balance and a continuous concern for establishing clear standards that are constantly developed by the courts. More so, its application is still limited, as shown by the empirical study described in our article.

Nevertheless, a discussion must take place. The doctrine of piercing the corporate veil needs to draw the attention of both practitioners and theoreticians in our countries, and we hope that this article will do that. We believe that the US model has many lessons to teach us in this respect, and our scholars should dedicate more time to this topic, as it is the only way to learn and advance. We also

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[122] For more on the CEE region and the applicability of doctrine of piercing the corporate veil, *see* STEFAN MESSMANN & TIBOR TAJTI, THE CASE LAW OF CENTRAL AND EASTERN EUROPE 33-186 (2007).

know that our work is not exhaustive, and there are still related topics to be covered. We just need to start from somewhere.