MASTER THESIS

Titel der Master Thesis / Title of the Master's Thesis

The Past, Present, and Future of Group Company Regulation in The United Kingdom: A Historical, Qualitative, and Comparative Study

verfasst von / submitted by

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Angestrebter akedemischer Grad / in partial fulfilment of the requirements for the degree of

Master of Laws (LL.M.)

Wien, 2021 / Vienna 2021

Studienkennzahl lt. Studienblatt / Postgraduate programme code as it appears on the student record sheet:	UA 992 548
Universitätslehrgang lt. Studienblatt / Postgraduate programme as it appears on the student record sheet:	Europäisches und Internationales Wirtschaftsrecht
Betreut von / Supervisor:	Assoz. Prof. Mag. DDr. Thomas Ratka

“What then is the right policy for the judges to adopt? On whom should the risk of negligence fall? Up till now it has fallen on the innocent victim.”

~ Lord Denning MR

(*Dorset Yacht Co Ltd v Home Office*)

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List of Abbreviations

BHR – Business Human Rights
CA – Court of Appeal
CHF – Swiss Franc
Cl. – Clause
CLRSG – Company Law Review Steering Group
CSME – Centarus Special Maritime Enterprise
CSR – Corporate Social Responsibility
CJEU – Court of Justice of the European Union
EMCA - European Model Company Act
EWCA – Court of Appeal of England and Wales
EU – European Union
FCC – French Commercial Code
GDP – Gross Domestic Product
HC – House of Commons
HDI – Human Development Index
HRH – His Royal Highness
ILO – International Labour Organization
ISO - International Organization for Standardization
KCM - Konkola Copper Mines
KiK - KiK Textilien und Non-Food GmbH
L. - Law
Ltd. – Limited Company
MNC – Multi National Corporation
MTS – Maran Tankers Shipholding Ltd.
NAP – National Action Plan
NGO – Non-Governmental Organisation
No. - Number
OECD - Organisation for Economic Co-operation and Development
OEIGWG – Open Ended Inter-Governmental Working Group
Plc – Public Limited Company
Rev. – Review
RDS – Royal Dutch Shell
SPDC – Shell Petroleum Development Company of Nigeria Limited
TNC – Trans National Corporation
UKHL – House of Lords
UKSC – United Kingdom Supreme Court
UN – United Nations
UNGPs – United Nations Guiding Principles on Business Human Rights
UTKL – Unilever Tea Kenya Limited
U.S. – United States
USD – United States Dollar
Vol. – Volume

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Zusammenfassung

Diese Dissertation untersucht die Themen und die Entwicklung der Konzernregulierung durch zivilrechtliche Haftungsansprüche in Großbritannien. Die jüngste Rechtsprechung der britischen Gerichte hat die Möglichkeit geschaffen, dass Muttergesellschaften von multinationalen Konzernen für Schäden, die von ihren im Ausland ansässigen Tochtergesellschaften verursacht werden, aus unerlaubter Handlung haften. Der Ansatz des Vereinigten Königreichs - eine allgemeine Sorgfaltspflicht für grenzüberschreitende Delikte - ist einzigartig, da er sich durch die Rechtsprechung entwickelt hat. Im Vergleich dazu entwickeln seine europäischen Nachbarn wie Frankreich, die Schweiz und Deutschland gesetzliche Regelungen, die Sorgfaltspflichten verwenden, die neuere internationale Verantwortungsstandards wie die UN-Leitprinzipien für Wirtschaft und Menschenrechte (UNGPs) widerspiegeln.

Eine ganzheitliche Untersuchung des britischen Ansatzes zur Regulierung von Konzerngesellschaften ist gerechtfertigt. Dies liegt daran, dass der britische Ansatz zur Konzernregulierung verschiedene akademische Bereiche wie das Gesellschaftsrecht, das internationale Recht und die europäische Rechtsvergleichung einbezieht, die bisher noch nicht direkt miteinander in Verbindung gebracht wurden. Dabei werden in dieser Arbeit die konzeptionellen und praktischen Grenzen des derzeitigen Ansatzes untersucht. „Konzeptionelle“ Grenzen beziehen sich auf die Frage, ob die Entwicklung der Muttergesellschaftshaftung mit den etablierten Prinzipien des britischen Gesellschaftsrechts in Einklang gebracht werden kann. Die Haftung von Muttergesellschaften weicht scheinbar von dem auf der Entitätstheorie basierenden Ansatz des britischen Gesellschaftsrechts ab, der eine formalistische Garantie für eine getrennte Rechtspersönlichkeit und damit eine begrenzte Haftung bietet. „Praktische“ Grenzen beziehen sich auf die tatsächliche Wirksamkeit einer gerichtlich festgelegten Haftung, der ein gesetzlicher Rahmen fehlt, was zu rechtlicher Unklarheit und fallweiser Festlegung geführt hat. Dies schafft Unsicherheit für Unternehmensvorstände, was Investitionen schadet, und für Kläger, die keinen Zugang zu Rechtsmitteln erlangen können.

In Anbetracht dieser Unzulänglichkeiten stellt sich die Frage, ob eine historische Untersuchung der internen Prozesse des britischen Gesellschaftsrechts und eine vergleichende Untersuchung der gesetzlichen Sorgfaltspflichtansätze in Frankreich, der Schweiz oder Deutschland als Grundlage dienen können, um den Ansatz des Vereinigten Königreichs zu untersuchen und ob ein Sorgfaltspflichtansatz entwickelt werden könnte, der intern mit dem eigenen nationalen Recht kohärent ist und ein wirksames Mittel zur Behebung von Fehlverhalten von Unternehmen auf der internationalen Ebene darstellt.

Diese Arbeit gliedert sich in vier Kapitel. Das erste Kapitel erläutert einige der Kernkonzepte und den breiteren Hintergrund, der die Entwicklung der inländischen Konzerngesellschaftshaftung in Großbritannien untermauert. Das zweite und dritte Kapitel untersucht die Vergangenheit, Gegenwart

und Zukunft der Konzernregulierung. Das zweite Kapitel ist in zwei Teile gegliedert. Der erste Teil befasst sich mit der Vergangenheit. Er stellt die Entwicklung der Konzernregulierung in einen Zusammenhang mit der historischen Entwicklung der beschränkten Haftung und der Gesellschaftsgründung, die zusammen die Grundlage des britischen Gesellschaftsrechts bilden. Dies geschieht, um zu untersuchen, ob der aktuelle Regulierungsansatz (der im zweiten Teil detailliert untersucht wird) wirklich im Widerspruch zu den historischen Präzedenzfällen steht, und um zu prüfen, ob die politischen Erwägungen, die zu diesen doktrinären Entwicklungen geführt haben, eine gewisse Erhellung für eine effektive zukünftige Regulierung bieten können. Der zweite Teil befasst sich mit der Gegenwart. Er bietet eine qualitative Studie der aktuellen gesetzlichen und gerichtlichen Methoden zur Regulierung von Unternehmensgruppen. Eine Spurenanalyse wird eingesetzt, um die Entwicklung der Haftung von Muttergesellschaften in der Rechtsprechung zu verstehen. Dabei stellt diese Arbeit fest, welche Haftungen derzeit für Unternehmensgruppen gelten und identifiziert die Grenzen des aktuellen britischen Ansatzes im Lichte der historischen Präzedenzfälle. Im dritten Kapitel hilft eine vergleichende Studie europäischer Due-Diligence-Ansätze, gemeinsame Probleme zu identifizieren, mit denen europäische Rechtsordnungen bei der Regulierung von Unternehmensgruppen konfrontiert sind, sowie mögliche Bestimmungen, die einige der in Abschnitt zwei hervorgehobenen Mängel beheben könnten. Im vierten Kapitel werden eine Reihe von Empfehlungen im Hinblick auf eine künftige Rechtsreform im Vereinigten Königreich gegeben, gefolgt von einer Schlussfolgerung.

In dieser Arbeit wird argumentiert, dass die Annahme eines Sorgfaltspflichtmodells Vorteile hat, und sie enthält eine Reihe von Empfehlungen, die einige der sowohl im Vereinigten Königreich als auch im Ausland aufgezeigten Mängel beheben. Dazu gehört ein britisches Sorgfaltspflichtsmodell, das den Anwendungsbereich von §54 des „Modern Slavery Act“ auf ein breiteres Spektrum von Umwelt- und Arbeitnehmerschäden als Teil eines neuen Regulierungsgesetzes ausweitet. Darüber hinaus würde die Einrichtung einer Überwachungs-Task-Force einen besseren Zugang zum Recht durch die Nutzung eines öffentlichen Registers und von Verwaltungsmaterialien ermöglichen, um Unternehmen bei der Überprüfung ihrer wirtschaftlichen Beziehungen zu unterstützen. Die Einführung einer Haftungsvermutung für qualifizierte Konzerne würde eine größere prozessuale Ausgewogenheit bei der Feststellung einer Pflicht schaffen. Schließlich würde die Abschaffung der deliktischen Fahrlässigkeit in grenzüberschreitenden Rechtsstreitigkeiten zugunsten eines "unverantwortlichen Muttergesellschaft-Delikts", das die Verfahrensschritte der französischen Sorgfaltspflicht nutzt, die prozessualen Hürden für die Opfer senken und den Straftatbestand konzeptionell relevanter für Fälle von unternehmerischem Fehlverhalten machen.

Part I: Introduction

1.1. The Emergence of Cross-Border Tort Litigation

In February 2021, the United Kingdom Supreme Court (UKSC) handed down the *Okpabi*[1] judgement. In it, the Court gave further acknowledgement that a UK domiciled parent company can hold a duty of care for torts caused by foreign-based subsidiaries. This liability, often referred to as parent company liability[2] is a relatively new concept. The UK's method has developed through a series of cases and relies minimally on a statutory framework to regulate corporate groups. This may be contrasted with parallel developments in multiple European jurisdictions which approach the question of corporate group regulation and intra-group liability through human right due diligence obligations.[3] The most recent judgements handed down in the UK courts are of significance, in respect to the study of company law, human rights and international law. But how effective is the UK approach? Does it suffer from any limitations, and what advantages would the adoption of a due diligence model similar to that its neighbours offer? This thesis will endeavour to answer these questions. But first, it may be pertinent to offer an example of the fact-patterns which have raised these new forms of cross-border tort litigation, in a brief case study.

1.1.1. Case Studies from Zambia and Nigeria

A) Zambia

On 31 July 2015, 1,826 residents from Chingola, Zambia brought a claim against the mining company Vedanta Resources.[4] Vedanta and its subsidiary Konkola Copper Mines (KCM) were excavating the Nchanga copper mine, which was understood to be the second largest copper mine of its kind.[5] A claim was pursued against both Vedanta and KCM, on the basis that the mining operation had resulted in personal injury, loss of income, loss of enjoyment of land and damage to property all as a consequence of toxic discharges which emanated from where KCM had been mining.[6] The Claimants moreover alleged that Vedanta had breached its duty of care

[1] Okpabi and others (Appellants) v Royal Dutch Shell Plc and another (Respondents) [2021] UKSC 3
[2] Christian A. Witting, *Liability of Corporate Groups and Networks* (Cambridge University Press, 2018) 256, 380
[3] Dalia Palombo, 'The Duty of Care of the Parent Company: A Comparison between French Law, UK Precedents and the Swiss Proposals' (2019) 4(2) Business and Human Rights Journal <https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/abs/duty-of-care-of-the-parent-company-a-comparison-between-french-law-uk-precedents-and-the-swiss-proposals/A0F7FE03FF6866A331E227FC023F1060> accessed on 18 May 2021
[4] Lungowe and others v Vedanta Resources Plc and Konkola Copper Mines Plc [2017] EWCA Civ 1528 [1]
[5] ibid., [2]
[6] ibid., [1]

to ensure its subsidiary would protect the environment and local community on the basis of the "very high level of control" and "direction" that it held over its subsidiary.[7]

In 2019, following unsuccessful attempts at lower instances, Vedanta appealed to the Supreme Court to challenge whether the English Courts had the jurisdiction to hear a case concerning liability of Vedanta (an English domiciled company) for liability alleged torts in Zambia against its subsidiary KCM (which also was domiciled in Zambia). Moreover, the appellant challenged. The court considered that the parent could be held responsible, when considering "…the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations…of the subsidiary." [8]

B) Nigeria

On 14 October and 22 December 2015[9], two claims were brought against Royal Dutch Shell (RDS), a British-Dutch oil and gas multinational corporation and its Nigerian Based subsidiary the Shell Petroleum Development Company of Nigeria Limited (SPDC). The two claims were brought by members of the Bille and Ogale communities in Nigeria[10] who in total were 42,335 in number.[11] They alleged that numerous oil spills had occurred where the parent and its subsidiary were operating an oil pipeline, which had led to widespread environment damage including water and ground contamination which hindered the local communities from accessing drinking water, and prevented them from fishing, farming and maintaining irrigation.

The claimants sought a remedy in the English and Dutch courts. In England, the claimant's case was that SPDC had operated the pipeline negligently[12], and that its parent, RDS by virtue of its significant control[13] over SPDC, owed the local communities a common law duty of care[14] and was liable for damage caused to the environment as a consequence of those oil spills.[15] On 12 February 2021, in a unanimous decision, the UKSC reversed the decision of the

[7] ibid., [3]
[8] ibid., [49]
[9] *Okpabi* (n 1) [9]
[10] 'Okpabi v Shell: Clarification from the English Supreme Court on Jurisdiction and Parent Company Liability' (Gibson Dunn, 15 February 2021) <https://www.gibsondunn.com/okpabi-v-shell-clarification-from-the-english-supreme-court-on-jurisdiction-and-parent-company-liability/> accessed 26 march 2021
[11] *Okpabi* (n 1) [3]
[12] ibid., [5]
[13] ibid., [7]
[14] ibid., [7]
[15] 'Shell lawsuit (re oil spills & Ogale & Bille communities in Nigeria - Okpabi v Shell)' (*Business and Human Rights Resource Centre* 27 November 2020) https://www.business-humanrights.org/en/latest-news/shell-lawsuit-re-oil-spills-ogale-bille-communities-in-nigeria-okpabi-v-shell/ accessed 19 June 2021

Court of Appeal, ruling that RDC had a case to answer for the actions of SPDC. In their ruling, the Court gave consideration to the "degree of control"[16] and "de facto management"[17] which RDC exercised over SPDC.

1.2. The significance of Cross-Border Tort Litigation for Company Law in The United Kingdom

These cases from Nigeria and Zambia can be seen as part of a wider trend within Europe to utilise domestic law in promoting accountability within cross-border corporate groups. The emergence of domestic regulatory solutions to international cross border torts, has engaged multiple sectors of legal scholarship. It has been recognised within scholarship that holding multi-national/trans-national corporations to account in foreign jurisdictions challenges settled principles of company law[18] and raises further questions about jurisdiction and conflict of law in international litigation. From the perspective of company law, the UK differs from jurisdictions such as the U.S. and Germany in that it has consistently maintained a strict adherence to an entity-based approach to corporate personhood which provides a limited liability for the shareholders of a given company.

This thesis is primarily concerned with exploring the conceptual and practical considerations of corporate group regulation through parent company liability from a UK company law perspective. While recent studies have already attempted to provide a broader overview of group company regulation,[19] the general trend towards these newer forms of domestic regulation[20] and indeed jurisdictional and conflict of law related issues concerning UK cross-border litigation[21] there is still a need for an in-depth study into the UK's duty of care approach, which considers whether it can be reconciled with its own tradition of company law, whether the current approach will remain viable and whether comparison with different European approaches warrants the development of a statutory regime. Before we outline the parameters

[16] *Okpabi* (n 1) [117]
[17] *Okpabi* (n 1) [147]
[18] "The original legal theories, doctrines, principals of corporate law have been outdated over the realities of this modern business development, so it is necessary to scrutinise them and seek new theories and principles." See: Urnaa Bold 'An Exploration into Liability of Corporate Groups: A Comparative Perspective' (Doctoral thesis, University of Pécs) 16
[19] ibid.
[20] Penelope A. Bergkamp, 'Models of Corporate Supply Chain Liability' (Master thesis KU Leuven 2018-2019)
[21] On matters of jurisdiction, see: Ekaterina Aristova, The Future of Tort Litigation against Transnational Corporations in the English Courts: Is Forum [Non] Conveniens Back?' [2021] Business and Human Rights Journal 1

of this thesis, it may be beneficial to present some of the key concepts and themes which describe and connect the subject matter.

1.3. Corporate Groups

The size of corporate groups has steadily grown in the last few decades, in terms of both size and capitalisation. It has been stated that the "…the fifty largest UK companies have, on average, 230 subsidiaries, sub-sub-subsidiaries and so on."[22] The very largest corporate groups have developed a wealth and presence comparable even to that of traditional sovereign nations.[23] In 2019 Royal Dutch Shell had a total revenue of 345 billion US dollars.[24] By way of comparison, the total gross domestic product (GDP) of the state of Austria in the same year was 446.31 billion US dollars.[25] But what are corporate groups? Why have they emerged as a vehicle for international trade? What problems arise from this model of enterprise, and what solutions does the academy and wider society offer? We consider these questions here to contextualise the development of domestic liability remedies in UK caselaw.

1.3.1. Company Law and International Law Definitions

How corporate groups are defined depends on the context in which they are examined. From a pure company law perspective, Christian Witting suggests that a corporate group may be defined as that which "comprises separate legal entities related hierarchically through shareholdings".[26] He notes the limitation of this description in instances where groups exist on the basis of "significant but non-controlling shareholdings combined with common management."[27] A company law perspective is grounded in the traditional *de iure* dimensions of a corporate relationship. As will be considered below, traditional company law concepts are somewhat limited in defining the broader and more nuanced economic relationships that hold relevance to corporate groups.

In addition to the term corporate group, there are two related terms which are often used within international law which require attention. These are multi-national corporations (MNCs) and

[22] *Witting* (n 2) 66; Urnaa Bold, Ferencz Barnabas and Dr. Habil. Kecskés, 'Limiting 'limited liability'' (Economics and Working Capital, 14 December 2019) <http://eworkcapital.com/limiting-limited-liability/> accessed 15 June 2021
[23] Andreas Georg Scherer and Guido Palazzo, 'Globalization and Corporate Social Responsibility' in Andrew Crane, Abagail McWilliams and others (eds), *The Oxford Handbook of Corporate Social Responsibility* (Oxford University Press 2008) 421
[24] N. Sönnichsen, 'Shell – Statistics & Facts' (statista) <https://www.statista.com/topics/1560/shell/> accessed 22 March 2021
[25] H. Plecher, Plecher H, 'Austria – Statistics & Facts' (statista) <https://www.statista.com/topics/2419/austria/> accessed 22 March 2021
[26] *Witting* (n 2) 3
[27] ibid. 4

trans-national corporations (TNCs). A definition *simpliciter* may be that both terms refer to corporations which operates in multiple jurisdictions.[28] This however does not explain the impetus behind cross-border investment from a corporate governance perspective. David Weissbrodt and Muria Kruger note that this same difficulty was experienced by the UN working group which oversaw the ill-fated *Draft Norms on the Responsibilities of Transnational Corporations* in searching for an appropriate definition of corporate groups.[29] They offer the example made by Alejo Sison which distinguishes between MNCs and TNCs. While the former, refers to "free-standing units replicated in different countries", TNCs consist of "vertically integrated units that produce goods and provide services in more than one country."[30] More recent scholarly contributions have highlighted this distinction. Lara Hutt has opined that *"MNCs operate branches in various countries, but they are managed from one home country, whereas TNCs operate a considerable number of subsidiaries without considering any particular country as their base."*[31] To a certain degree the distinction serves to highlight the challenge this presents for domestic regulation, especially where a parent company may itself be a subsidiary of another in a foreign jurisdiction. Although we will consider the issue of regulation below, for our purposes, the term corporate group will be used when discussing matters of domestic law, and MNCs/TNCs when discussing international perspectives on corporate groups.

1.3.2. How Do Corporate Groups Operate in Host States and Why?

It may be beneficial to consider the manner in which corporate groups establish subsidiaries in host countries as foreign investment and why such investments are commercially attractive. Typically speaking, parent companies, often domiciled in high human development index (HDI) countries may wish to invest in a host jurisdiction where an economic opportunity arises within a given market. This may take place through the incorporation of a subsidiary in a target host country which may then enter into a joint venture partnership, often with a nationalised industry held by a host government. Olufemi Amao provides the example of the oil industry in Nigeria, where a joint venture between the subsidiary of a foreign parent, with the Nigerian

[28] Muhammed Asif Khan, 'Making Transnational Corporations More Responsible: A Human Rights Approach' (2017) Volume 48(70) Journal of Law and Society 73, 76

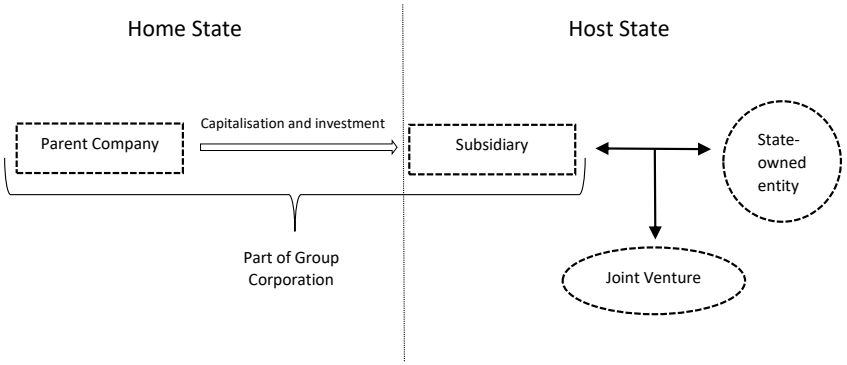
[29] David Weissbrodt and Muria Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) 97(4) American Journal of International Law, 907 <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/abs/norms-on-the-responsibilities-of-transnational-corporations-and-other-business-enterprises-with-regard-to-human-rights/34E6B4D8E66D372CB4B77695D8F23F7F> accessed on 22 March 2021

[30] ibid., 908

[31] Lara Sophia Hutt, 'German Action Plan On Business And Human Rights: A Step Forward Or Just Business As Usual?' (Master thesis University of Seville 2017-2018) 13

National Petroleum Corporation (NNPC) as a partner is typical.[32] These joint ventures, he suggests, typically are arranged whereby the governmental entity owns a 55-60% stake over the joint venture, meaning that a 40-45% stake is held by a group of foreign based shareholders.[33]

Fig. 1: An example of Group Corporate Investment in a Host State



From the perspective of company law and corporate governance, these arrangements can encourage investment and economic growth. First, it is often the case that the regulatory regimes of host countries is lower than in HDI countries, which lowers the overall capital needed for a foreign investment. Moreover, limited liability may provide further security over investments for corporate groups under the knowledge that liabilities remain with the subsidiary and does not pass to the home-based parent. These two factors allows corporate groups to minimise the risk of externalities and maximise the return on a given investment.

1.3.3. The Challenge of Corporate Group Regulation

Under factual constellations like that highlighted above, a challenge arises when the subsidiaries of a corporate group, are responsible for harms which take place in host countries. Because host countries may have lower regulatory standards, issues such as child labour, lack of safe working conditions, toxic wastes, and other environmental harms are ever present issues.[34] Scholars of international business describe the combination of limited accountability and lower regulatory regimes as a dangerous mix that increases the likelihood of such harms

[32] Olufemi Amao, and Jessica Schechinger, 'Multinational Corporations' in André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (Cambridge University Press 2017) 800
[33] ibid., 801
[34] *Weissbrodt and Kruger*, (n 29) 901

taking place. This is described as the moral hazard.[35] These phenomena are compounded further in instances where an actionable claim may succeed within the regulatory regime of a host country but still cannot establish a remedy if the offending subsidiary lacks the sufficient capitalisation to compensate damages. This has been referred to by Witting as the insolvent entity problem.[36]

Development of parent company liability in the UK courts, may be seen as a consequence of the shifting view that it may be just for host state parent companies to be liable for their subsidiaries especially where the activities of those same subsidiaries have had negative consequences in the host countries where they operate.

1.4. International Responses

The rationale for holding that parent corporations should be accountable for foreign subsidiaries in domestic litigation is not without a wider precedent. In fact, it may be seen as part of a larger international effort to address the more harmful consequences of corporate group activities. The last two decades has seen a paradigm shift within international law and legal scholarship over the regulation of TNCs/MNCs activities in host countries. Approaches have moved away from neo-classical[37] voluntarist approaches exemplified by early corporate social responsibility (CSR) initiatives to the introduction of legally binding methods of accountability within the emerging field of business human rights (BHR). These newer models reemphasise the role of nation-states to regulate through hard law provisions and explore the possibility of establishing binding cross-border treaty instruments. Academic contributions have both examined the transition from "voluntarism towards accountability"[38] and attempted to scrutinise the normative and conceptual basis for these emerging approaches.[39] For our purposes it suffices to give a brief account of this wider international background to

[35] Radu Mares, 'Liability Within corporate Groups: Parent Company Accountability for subsidiary human rights abuses' in Surya Deva (eds) *Research Handbook on Human Rights and Business* (Edward Elgar, 2020) 5
[36] *Witting*, (n 2) 1
[37] Andrew Johnston, Kenneth Amaeshi, and others, 'Corporate Social Responsibility as Obligated Internalisation of Social Costs' (2021) 170 Journal of Business Ethics, 39 <https://doi.org/10.1007/s10551-019-04329-y> accessed on 7 June 2021
[38] Anita Ramasastry, 'Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability' (2015) 14(2) Journal of Human Rights, 238 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2705675> accessed 9 March 2021
[39] E.g. Nadia Bernaz, 'Conceptualizing Corporate Accountability in International Law: Models for a Business and Human Rights Treaty' (2021) 22 Human Rights Review <https://link.springer.com/article/10.1007/s12142-020-00606-w> accessed on 24 March 2021; Karin Buhmann, Björn Fasterling & Aurora Voiculescu (2018) 'Business & Human Rights Research Methods' (2018) Volume 36(4) Nordic Journal of Human Rights <https://www.tandfonline.com/doi/full/10.1080/18918131.2018.1547522> accessed 6 June 2018

contextualise the recent innovations observed within the domestic regimes of the UK and in neighbouring European jurisdictions.

1.4.1. Corporate Social Responsibility (CSR)

Corporate Social Responsibility is understood as an "umbrella term" for a wide range of voluntarist approaches to corporate practice.[40] While debate on the scope of responsibility owed by corporations to society goes as far back as the 1930s in the legendary exchange between Berle and Dodds,[41] one of the first 21st century definitions of CSR was posited by the EU Commission in their 2001 Green Paper which described it as being:

"…a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis."[42]

Although this definition would be revised,[43] CSR initiatives have mostly aligned with this definition through "voluntary codes of conduct".[44] Olufemi, and Schechinger note[45] that the EU Commission has rubber stamped numerous CSR initiatives including[46]:

- The International Labour Organization's (ILO) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy,
- the OECD Guidelines for Multinational Enterprises,
- the ISO 26000 Guidance Standard on Social Responsibility, and;

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[40] Thomas McInerney, 'Putting Regulation before Responsibility: Towards Binding Norms of Corporate Social Responsibility' (2007) 40(1) Cornell International Law Journal, 172 <https://scholarship.law.cornell.edu/cilj/vol40/iss1/4> accessed on 22 March 2021

[41] Joseph L. Weiner, 'The Berle-Dodd Dialogue on the Concept of the Corporation' (1964) 64(8) Columbia Law Review <https://www.jstor.org/stable/1120768> accessed 9 June 2021

[42] EU Commission, 'Green Paper: Promoting a European framework for Corporate Social Responsibility' (The European Commission, July 19 2001) <https://ec.europa.eu/commission/presscorner/detail/en/DOC_01_9> accessed 9 June 2021

[43] A decade later The Commission would propose a new definition, that would omit use of the word voluntary, but otherwise introduce no fundamental change of definition. This may suggest that civil society's attitude to explicitly voluntarist positions began to find less reception. See: The European Commission, 'Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee and The Committee Of The Regions A Renewed Eu Strategy 2011-14 For Corporate Social Responsibility' (The EU Commission, October 25, 2011) <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0681:FIN:en:PDF#:~:text=The%20European%20Commission%20has%20previously,stakeholders%20on%20a%20voluntary%20basis%E2%80%9D> accessed 9 June 2021

[44] *McInerney*, (n 40) 172

[45] *Amao and Schechinger*, (n 32) 811

[46] The European Commission, 'Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee and The Committee Of The Regions A Renewed Eu Strategy 2011-14 For Corporate Social Responsibility' (The EU Commission, October 25, 2011) <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0681:FIN:en:PDF#:~:text=The%20European%20Commission%20has%20previously,stakeholders%20on%20a%20voluntary%20basis%E2%80%9D> accessed 9 June 2021

- the UN Global Compact

Of these, the *UN Global Compact* has been considered one of the largest voluntary CSR initiatives in the world, with over 8,700 participants.[47] It encouraged corporations to commit to 10 universal principles within human rights, labour law, environmental law and anti-corruption already recognised by existing UN member states.[48] Another, the *ISO 26000 Guidance Standard on Social Responsibility*, provides advice to international organisations on practicing social responsibility, communicating with stakeholders and contributing to sustainable development.[49] These methods have not been without criticism. Surya Deva has noted that while the Global Compact had been effective in raising awareness about corporate responsibility, it suffered amongst other deficiencies, directional uncertainty,[50] lacked an independent monitoring system and a system of enforcement.[51]

The reliance on voluntary initiatives in Andreas Scherer and Guido Palazzo's view represents a traditional paradigm of CSR handed down by the neoclassical school which would observe a strict separation between economics and politics. This is the view that "the [only] social responsibility of business is to increase its profits"[52] and not to hold a direct responsibility for "public problems" which is held exclusively by the nation-state.[53] Scholars such as Scherer and Palazzo however have argued that the "regulatory power"[54] of states have been impaired within the context of a global "post national constellation".[55] One explanation for this in McInerney's view is that there has been a conceptual mistake amongst many globalists that the influence of the nation-sate has been in decline warranting the need for corporate self-regulation.[56] CSR, he argues, was never intended to substitute but rather supplement the role of individual countries in regulating international corporate practice.[57] While this serves as only a very brief overview

[47] 'International Instruments and Corporate Social Responsibility: A Booklet to Accompany Training on Promoting labour standards through Corporate Social Responsibility' (International Labour Organisation, October 2012), 19 <https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/instructionalmaterial/wcms_227866.pdf> accessed 9 June 2021
[48] ibid., 19
[49] 'ISO 26000:2010 Guidance on social responsibility' (ISO, November 2010) <https://www.iso.org/standard/42546.html> accessed 9 June 2021
[50] Surya Deva, 'Global Compact: A Critique of UN's Public-Private Partnership for Promoting Corporate Citizenship' (2006) 34 Syracuse Journal of International Law & Commerce, 144 <https://surface.syr.edu/jilc/vol34/iss1/4> accessed on 9 June 2021
[51] ibid., 146
[52] Milton Friedman, 'A Friedman Doctrine – The Social Responsibility of Business is to Increase its Profits' The New York Times (13 September 1970) <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html> accessed 9 June 2021
[53] *Scherer and Palazzo*, (n 23) 422
[54] ibid., 425
[55] ibid.
[56] *McInerney*, (n 40) 174
[57] ibid., 172

of CSR, it demonstrates that within the international context, dissatisfaction has emerged over the continued challenges presented by the moral hazard, and the lack of progress that has been made by promoting CSR initiatives to address them.

1.4.2. Business Human Rights (BHR)

In light of the failures of self-regulatory responsibility, a parallel line of discourse has developed which promotes the idea of corporate accountability, through the reintroduction of domestic regulatory provisions. The Business Human Rights (BHR) debate concerns what methods, if any, there are for the international community to promote and establish corporate accountability. Given that it shares similar goals, BHR has been contrasted with CSR initiatives.[58] For Florian Wettstein, BHR may be distinguished from CSR by virtue of its pursuit of corporate accountability issues through the lense of human rights language, which has been otherwise markedly absent within CSR.[59] Another distinction, noted by Anita Ramasastry, is BHR's tendency to look beyond the private sector and redeem the regulatory role of the state.[60] Another distinction may be that forwarded by Ana Čertanec in that BHR differs in its content in that it seeks "mandatory" regulation which creates direct obligations for corporate entities.[61]

The emergence of BHR as a separate topic of discourse has been subject to interpretation. Ramasastry has located evidence of the BHR movement since the 1970s[62] whilst Wettstein to more recent debates in the 1990s.[63] Nevertheless, its contemporary manifestation may be said to coincide with the publication of Professor John Ruggie's "Protect, Respect and Remedy" Framework in 2008 and its implementation in his Guiding Principles for Business and Human Rights (UNGPs),[64] published in 2011.[65] "The overarching idea behind the framework…",

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[58] Florian Wettstein, 'CSR and the Debate on Business and Human Rights: Bridging the Great Divide' (2012) 22(4) Business Ethics Quarterly <https://www.cambridge.org/core/journals/business-ethics-quarterly/article/abs/csr-and-the-debate-on-business-and-human-rights-bridging-the-great-divide/17909DC1542DAF48F5B004425E0478BC> accessed on 18 March 2021

[59] ibid., 740

[60] *Ramasastry*, (n 38) 238

[61] Ana Čertanec, 'The Connection between Corporate Social Responsibility and Corporate Respect for Human Rights' (2019) June Danube: Law and Economics Review, European Association Comenius - EACO 103, 121 <https://sciendo.com/article/10.2478/danb-2019-0006> accessed 20 March 2021

[62] *Ramasastry*, (n 38) 240

[63] *Wettstein*, (n 58) 743

[64] John Ruggie, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework. Report on the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/17/31' (United Nations, 16 June 2011) <https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> accessed 26 March 2021

[65] *Ramasastry*, (n 38) 244

Olufemi and Schechinger rightly opine, "…is the notion that MNCs should share human rights responsibilities *with* states."[66] The societal effect of the UNGPs cannot be underestimated, given that there are practical examples of its principles encapsulated within domestic reforms which we might observe in multiple European domestic regulatory regimes. A few examples follow a brief overview of the UNGPs.

The UNGPs are comprised of three "pillars". These are I. The state's duty to protect human rights (protect), II. The responsibility of corporations to respect human rights (respect), and III. The importance of access to remedy (remedy).[67] Each pillar contains a series of foundational and operational principles which advise how states and corporate entities can achieve responsibility and accountability. For example, principle 3 of pillar I provides that states may meet their duty to "protect" by enforcing laws that do not "constrain but enable" businesses to respect human rights and "provide effective guidance to business enterprises on how to respect human rights throughout their operations".[68] In the commentary of this principle, it is stated that state guidance may include advise on human right due diligence.[69] This method has been increasingly popular in countries such as France, Switzerland and Germany to require companies to actively consider human rights abuses in their economic activities by way of annual statements. Where harms are caused, guiding principles under pillar III provide further instruction on access to justice. For example, principle 25 advises states to take "appropriate steps to ensure, through judicial, administrative, legislative, or other [laws]…that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy."[70] In the UK, access to justice is beginning to be realised judicially by the development of parent company liability through tort negligence in its caselaw. By contrast, its European neighbours have relied on legislative and administrative processes to achieve similar ends. We consider the UK approach in part II, and European approaches in part III.

1.4.3. From Soft Law to Hard Law

The apparent transition from CSR to BHR, within the international community may be seen in part to explain the simultaneous changes taking place in the domestic regimes of individual European countries. The UNGPs themselves may illustrate the possible distinction between these approaches. Ramasastry has argued that the absence of any reference to CSR in the

[66] *Amao and Schechinger*, (n 32) 811
[67] *Ruggie*, (n 64) iii
[68] ibid., 4
[69] ibid., 5
[70] ibid., 27

UNGPs is indicative of an ideological break with past approaches. BHR is exemplified by the UNGPs' emphasis of the role of "…the state as a regulator and enforcer of laws".[71] While other scholars have attempted to make sense of the connection between CSR and BHR[72] it is apparent that the primary development has been a rejection of the old orthodoxies associated with neoclassical legal and economic theory.

Although it bears mention that an area of BHR has also looked toward the creation of legally binding international mechanisms, such as a business human rights treaty,[73] this for now remains only a theoretical possibility.[74] For this reason, scholars of company law, human rights law and international law alike, may find it enriching to focus on the practical possibility of holding corporate groups to account through domestic regulation. The UK rulings concerning Zambia and Nigeria (mentioned above) may suggest that corporate accountability though the domestic courts is indeed possible, notwithstanding effective procedural laws which address conflict of laws issues.[75] It follows that a more thorough examination of the UK's legal landscape may allow for greater discussion as to whether it has kept abreast of these international changes, and to what extent the approach taken in the UK sufficiently responds to the need for a coherent regulatory framework which holds corporate groups to account.

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[71] *Ramasastry*, (n 38) 245

[72] see: Wettstein (n 58)

[73] See: Claire Methven O'Brien, 'Transcending the Binary: Linking Hard and Soft Law Through a UNGPS-Based Framework Convention' (2020) Volume 114 American Society of International Law Unbound <https://doi.org/10.1017/aju.2020.36> accessed on 24 March 2021; Sheldon Leader, 'Coherence, Mutual Assurance and the Rationale for a Treaty' in Surya Deva and David Bilchitz (eds) *Building a Treaty on Business and Human Rights: Context and Contours* (Cambridge University Press 2017) 79-101; *Bernaz*, (n 39) 45-64; Buhmann and Fasterling, (n 39) 323-332

[74] In June 2014, the UN Human Rights Council adopted a resolution drafted by Ecuador and South Africa to establish the Open-Ended Inter-Governmental Working Group (OEIGWG) tasked with proposing an international legally binding instrument. A first draft was published in 2018, with two subsequent revisions in 2019 and 2020 respectively. While the prospect of a business human rights treaty represents the 'other side' of the realisation of BHR, it is only mentioned in passing here. For an overview, see: '6th session of the IGWG' (Business and Human Rights Resource Centre, 19 June 2021), <https://www.business-humanrights.org/en/big-issues/binding-treaty/> accessed 19 June 2021; For most recent draft, see: 'Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises' (OHCHR, June 8, 2020) <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf> accessed 7 June 2021; For the most recent debates on the treaty see: David Bilchitz, 'The Necessity for a Business and Human Rights Treaty' (2016) 1(2) Business and Human Rights Journal, 203-227 <https://doi.org/10.1017/bhj.2016.13> accessed on 17 June 2021; Olivier De Schutter, 'Towards a New Treaty on Business and Human Rights' (2016) 1(1) Business and Human Rights Journal, 79-101 <https://doi.org/10.1017/bhj.2015.5> accessed 17 June 2021

[75] The question of jurisdiction which forms a separate but interrelated issue is not directly addressed in this work. For an overview of the challenges which UK law faces in the case of jurisdictional matters, see: *Aristova*, (n 21)

1.5. Research Questions and Approach

In light of the developments highlighted in the UK courts, this thesis will investigate the following questions.

1. How does UK's approach to parent company liability interact with its company law? Does the historical contextualisation of those doctrinal principles offer any lessons or valuable policy considerations for the effective regulation of group companies today?

2. What legal obligations and liabilities do UK-domiciled corporate groups currently face within statutory provisions and caselaw? Does the current approach to corporate group regulation suffer from any limitations, and what are they?

3. Do comparative due diligence regulatory methods observable in France, Switzerland or Germany serve as a theoretical model for improving upon the approach taken in the UK?

In answering these questions, this thesis will offer an in-depth guide of the UK's regulatory regime in respect to the regulation of group corporations for the benefit of scholars of company law, human rights law, and international law alike. This will be achieved in the following three parts.

Part II of this thesis is split into two parts. In the first, we consider the historical basis for legal personality and limited liability. We will consider through a historical analysis what the rational for these principles were at the time, whether they were intended to or can apply within the corporate group context and consider whether the implementation of these doctrines reveal any important policy consideration which may hold true for an effective regulation of corporate groups today. In the second part, we examine past and present statutory provisions as they pertain to corporate groups before conducting a trace-analysis of the development of parent company liability through duty of care in civil litigation. With reference to secondary academic literature, we will offer a critical analysis of this current method and identify some of the conceptual and practical limitations this creates for the UK courts in fulfilling their role in accordance with international standards.

In Part III of this thesis, we engage in a comparative study of competing domestic statutory models of group company regulation which may be observed in France, Switzerland, and

Germany. These jurisdictions have not been chosen arbitrarily[76] but each represents a different and distinguishable method of corporate group regulation that varies in distinct ways from the UK. We consider their legal content, and secondary literature that analyses their strengths and weaknesses, and consider what lessons they offer for future UK reform.

In Part IV, we offer a list of recommendations which may help to strengthen the UK's domestic regulation of corporate groups, before concluding.

Part II: The Past & Present: Corporate Group Regulation and Company Law & The Contemporary Approach to Corporate Group Regulation in the UK

2.1 Overview of the Chapter

This chapter is divided into two sections. The first investigates the historical background behind some of the foundational principles which govern English company law, and how they interact with the overarching question of corporate group regulation. As stated, the development of a tortious duty of care for parent companies, has developed in light of a historical precedent that limited liability is assumed to apply to individual legal entities within corporate groups. It is only recently, that this assumption has been questioned.[77] There is a risk that ambiguity over questions over the applicability of company law principles may arise without a sufficient appreciation for the historical context under which these principles originate. An investigation which explores the original policy considerations behind limited liability for private enterprises may assist in establishing whether it was ever intended to apply to corporate groups today. Moreover, due consideration as to the judicial determinations behind

[76] Similar provisions are developing in The Netherlands and Norway. The Dutch model is limited only to child labour and provides limited utility as a subject of comparative study (For more on 2019 Dutch Child Labour Due Diligence Act see: (Forthcoming) Giesela Ruhl, 'Towards a German Supply Chain Act? Comments from a Choice of Law and a Comparative Perspective' (2020) European Yearbook of International Economic Law, fn. 63 <https://ssrn.com/abstract=3708196> accessed 28 May 2021; Norway has very recently passed a similar general due diligence approach but that cannot be addressed by this work. See: Taylor M, 'Mandatory Human Rights Due Diligence in Norway – A Right to Know' (Blogging for Sustainability, April 12 2021) <https://www.jus.uio.no/english/research/areas/companies/blog/companies-markets-and-sustainability/2021/mandatory-human-rights--taylor.html> accessed 13 April 2021

[77] See: Phillip Lipton, 'The Mythology of Salomon's Case and the Law Dealing with the Tort Liabilities of Corporate Groups: An Historical Perspective' (2014) 40 Monash University Law Review, 480 <https://ssrn.com/abstract=2605733> accessed on 9 April 2021

the adoption of limited liability in the past may pertain to wider policy considerations which might hold relevance to the effective regulation of contemporary corporate groups.

The second section of this chapter will explore what principles apply to corporate groups by examining two sources of law, i.e., statutory provisions within primary legislation and judicially determined caselaw. For the latter, a trace-analysis of the development of parent company liability through tort litigation will provide for an in-depth analysis to ascertain specifically, what practical duties and liabilities parent companies owe within corporate groups, how this liability is conceptualised in light of historic precedent, and what challenges, both theoretical and practical this poses for businesses and claimants alike. This will serve as a basis for a comparative study in the following chapter which explores the viability of legislative regulatory schemes that are employed in France, Switzerland and Germany.

2.2. Traditional Principles of English Company Law – A Historical Investigation

2.2.1. Introduction

It has been said that there are five core principles of a company's incorporation.[78] These are (1) legal personality, (2) limited liability, (3) transferable shares, (4) centralized management under a board structure[79], and (5) shared ownership by contributors of capital."[80] A question which is raised by the development of parent company liability pertains to its reconciliation with the doctrines of legal personality and limited liability. Since the case of *Salomon*[81] English Company law has held that "…a creditor cannot reach into shareholders' personal assets and satisfy debts of a company from those assets".[82] In cross-border tort litigation, this principle may appear to no longer apply for the shareholders of a parent company which may be liable for the damages of a subsidiary. Before accepting the demise of limited liability as a foregone conclusion, a brief historical investigation may assist in understanding the purpose behind limited liability, and whether it was ever intended to apply within the context of corporate groups before delving into a more in-depth examination of the contemporary approach taken to intra-group liability today.

[78] Andreas Cahn and David C. Donald, *Comparative Company Law: Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA* (Cambridge University Press 2010) 9
[79] N.B. Board structure is subject to greater variation in countries like Germany which has a two-tier model.
[80] *Cahn and Donald*, (n 78) 9
[81] Salomon v Salomon & Co Ltd [1896] UKHL 1
[82] *Witting*, (n 2) 69

2.2.2. Before 1856

The doctrine of limited liability is a recent innovation, introduced only after an extended period of reluctance, apathy and even suspicion. The basis[83] for the modern corporation in the UK and across Europe can be found in chartered corporations and guilds.[84] Anglo-Saxon guilds were voluntary associations, that held high prominence in medieval society, and served "ecclesiastical", "social", and "protective" purposes.[85] These corporations normally operated on a not-for-profit basis and had legal personality, i.e., they were treated as separate entities from their members. At that time, legal personhood in the common law followed fiction theory[86] whereby a corporation was viewed as "being the mere creature of law"[87] recognised by The Crown through royal charter. This grant served as recognition that a corporation served in the public interest.[88] Incorporation under royal charter therefore, conferred certain advantages. One of these advantages was limited liability i.e., that the private assets held by members were safe from the corporation's creditors for debts and insolvency.[89]

Private enterprises were not subject to the same privileges. Although there would be a series of attempts to realise each of these five principles in English law for for-profit entities, such proposals were initially met with resistance. One of the first hurdles to legal reform concerned whether private enterprises should be candidates for incorporation. In the 18th century, the power to grant incorporation was held exclusively by The Crown in parliament following the Bubble Act 1720.[90] The Bubble Act carried a provision which criminalised any undertaking which claimed to act as a corporation or raise capital without an Act of Parliament, Royal

[83] Neslihan Şenocak. 'Twelfth-century Italian confraternities as institutions of pastoral care' (2016) 42(2) Journal of Medieval History, 202-225 <https://www.tandfonline.com/doi/abs/10.1080/03044181.2016.1141702> accessed on 9 April 2021

[84] Allan Hutchinson, and Ian Langlois, 'Salomon Redux: The Moralities of Business' (2012) 35(4) Seattle University Law Review, 1117 <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1458&context=scholarly_works> accessed on 9 April 2021

[85] Edwin R. A. Seligman. 'Two Chapters on the Mediaeval Guilds of England' (1887) 2(5) Publications of the American Economic Association, 10 < http://www.jstor.org/stable/2696715> accessed on 9 April 2021

[86] Barnali Choudhury and Martin Petrin have shown that fiction theory which originates from Roman law, is 'strongly connected' to the work of German jurist Friedrich Carl von Savigny who exuded considerable influence on common law scholars. Although a second school of German scholars under Otto von Gierke would promote an 'organic theory' of legal personality, the debate would be translated into American jurisprudence and ricochet back into English jurisprudence. It follows that a jurisprudential tradition ties all three jurisdictions together in the realisation of modern company law. See: Barnali Choudhury and Martin Petrin. *Corporate Duties to the Public* (Cambridge University Press 2019) 133-134

[87] Justice Marshall's now timeless quotation summarising the fiction theory of incorporation, see: Trustees of Dartmouth Coll. v. Woodward, 17 U.S. 518 (1819) [120] (Marshall Ch. J.)

[88] Ronald Harris, 'The Joint-Stock Business Corporation' in *Industrializing English Law: Entrepreneurship and Business Organization, 1720–1844*, (Cambridge University Press, 2000) 110–36

[89] Hutchinson and Langlois, (n 84) 1117-1118

[90] This was passed to bolster the economic monopoly of the South Sea Company.

Charter or Patent.[91] Following collapse of the south sea bubble, a culture of hesitance developed around the issuance of corporate status to private domestic enterprises.[92]

In the first half of the 19th century, private economic activities in England were rarely subject to the privileges of royal charter and incorporation.[93] Joint stock companies (also known as deed of settlement companies)[94] operated for economic profit. These forms of undertaking differed from traditional partnerships which were smaller both in operation and capitalisation,[95] and consisted of unincorporated partners who would combine capital to sell goods and perform services.[96] These were in effect trade partnerships, and were not recognised as corporations by the Courts of Chancery.[97] Because they could not formally benefit from separate legal personality (and as a consequence limited liability), joint stock entities entailed a higher degree of risk, and stock holders were jointly and severally liable for all debts and liabilities attached to their enterprise.[98]

For scholars of civil jurisdictions, the above sketch may subvert established narratives about English Company Law which has been caricatured as an archetypal example of a liberalised approach to business practice. Nevertheless, both incorporation and limited liability were innovations to which the UK was a relative late comer[99] in comparison to its neighbours across the Atlantic and Channel.[100] Barnali Choudhury and Martin Petrin have suggested that the dominance of fiction theory[101] in part prevented a conceptual basis for the adoption of a separate legal personality. This was because legal scholars were not convinced of legal personhood as a valid concept, as it would logically entail the possibility for a corporation to be liable for criminal and/or tortious claims[102] a view which finds validation today. However (while it cannot be addressed in detail here) liberalisation both in America[103] and in Europe[104]

[91] Andreas Televantos, *Capitalism Before Corporations: The Morality of business associations and the roots of commercial equity and law* (Oxford Legal History 2021) 35
[92] ibid., 36
[93] Cases such as Kinder v Taylor (1824–25) LJR Ch 68 addressed unlawful speculation on unincorporated companies. See: Harris. (n 88) 257
[94] *Televantos*, (n 91) 35
[95] *Lipton*, (n 77) 456
[96] *Hutchinson and Langlois*, (n 84) 1118
[97] *Televantos*, (n 91) 43
[98] *Hutchinson and Langlois*, (n 84) 1118
[99] Ronald Harris, has argued that from a sociological perspective, lethargy over reform was caused by an indifference and unfamiliarity with business amongst jurists within the legal profession. See: Harris, (n 88) 112
[100] ibid., 1118
[101] The view that a corporation was a fictitious creature.
[102] *Barnali and Petrin*. (n 86), 134
[103] ibid., 137
[104] *Harris*, (n 88) 273

in addition to the innovative attempts of private actors within the domestic market to limit risk[105] would made England's adoption of limited liability corporations an eventuality.

2.2.3. After 1856 - Statutory Reform and Crystallisation in the *Salomon* Case

Incorporation of private enterprise was introduced under the Joint Stock Companies 1844 Act[106] which established a register where an undertaking could define their economic purposes.[107] This legislative intervention by parliament came following a series of debates in the House of Commons which repeatedly transferred the power to grant incorporation in between The Crown and Parliament.[108] The attempt to introduce limited liability partnerships in England however repeatedly faltered. A Bill for its introduction in 1818 failed but prompted discussion into the 1820s.[109] The grant of Limited liability partnerships in Ireland and France renewed discussion in England yet again.[110] The 1836 report "Law of Partnership" by the legal reformer Charles Henry Bellenden Ker considered the introduction of limited liability partnership under statutory law, following the French law of *en commandite* the introduction of which was considered instrumental in creating an economic boom.[111] However, following a lack of support from the banking class with whom he conducted interviews, the recommendation for the introduction of limited liability was ultimately dropped.[112]

It was only with The Joint Stock Companies Act 1856[113] that English Company Law recognised[114] the possibility for the transfer of an undertaking into a limited liability company which had a minimum of seven shareholders.[115] Although the parliamentary debate concerning the Act's adoption exceeds the scope of this work, it suffices to say that a key question over the proposed adoption of limited liability corporations concerned the fear that extension of limited liability to corporate entities would facilitate fraud.

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[105] *Televantos*, (n 91) 44
[106] *Hutchinson and Langlois*, (n 84) 1119
[107] ibid., 1118
[108] *Harris*, (n 88) 270-273
[109] ibid., 273
[110] ibid.
[111] ibid., 273-274
[112] ibid., 274
[113] Joint Stock Companies Act 1856 19 & 20 Vict. c.47
[114] N.B. this legislation should not be confused with the Limited Liability Act 1855 which provided a separate method of establishing new Limited Liability Companies. This included separate requirements, including a minimum threshold of 25 shareholders.
[115] For full text of the Act, see: CFF Wordsworth, *The New Joint Stock Company Law [of 1856, 1857, and 1858,] with all the states, and instructions how to form a company, and herein of the liabilities of persons engaged in so doing'* (Shaw and Sons, Law Publishers, Fetter Lane 1859)

The concern was namely that shareholders would take advantage of limited liability to protect their personal assets from creditors, which would facilitate misfeasance, creating greater risk for creditors and investors. The Bill's sponsor, Robert Lowe gave a speech to the House of Commons where he argued that parliament should presume the good intentions of business owners. The cause of the Bill, in his opinion, was to affirm the "…liberty of incorporation".[116] This was not to be seen as a privilege but a right to "freedom of contract".[117] Even as a staunch supporter of the Bill, Lowe affirmed that this right for business owners was to be defended "…as long as they do not commit fraud, or otherwise act contrary to the general policy of the law."[118] "Fraudulent people…" Lowe stated, "…will never form a limited liability company. Their own liability, of course, is a mere bagatelle, unworthy of their notice."[119] This reveals that the introduction of limited liability to incorporated undertakings was from its very inception understood as an attempt to help up smaller businesses by conferring the advantages which were granted exclusively to larger corporations. Even so, enjoyment of these newfound rights, were not fundamental, but seemingly qualified by a societal expectation to a certain standard of conduct in respect to business practice.

The seminal test for the 1956 Act, came in the case of *Salomon*[120] which "…is widely viewed as *a*, if not *the*, landmark decision in the development of company law."[121] The case has received extensive treatment,[122] even by recent scholarship,[123] so only a brief summary is necessary for illustrative purposes here. The facts of case concerned Mr. Aron Salomon, who operated a boot business. In 1892, he transferred his partnership into "Salomon and Company Ltd." Salomon held 20,001 shares, and appointed his wife and five children as directors, each holding a single share in the company, to meet the form requirements of the Act which specified a minimum of seven shareholders.[124] Poor economic circumstances saw Salomon and Company Ltd. become insolvent. Mr Salomon wanted to make a claim as a secured creditor for a charge which he held as a debenture during the sale of his partnership to the newly incorporated company. The legal question that arose was whether Mr Salomon was able to

[116] HC Deb 01 February 1856 vol 140 col 128; See also Hutchinson and Langlois, (n 84) 1119
[117] HC Deb 01 February 1856 vol 140 col 129
[118] HC Deb 01 February 1856 vol 140 col 129
[119] HC Deb 01 February 1856 vol 140 col 130
[120] *Salomon* (n 81)
[121] *Lipton*, (n 77) 453
[122] Ian Ramsay, 'Models of Corporate Regulation: The Mandatory/Enabling Debate' in Charles Rickett and Ross Grantham (eds), *Corporate Personality in the 20th Century* (Hart Publishing 1998) 215-270
[123] E.g. *Hutchinson and Langlois*, (n 84) 1113-1117; *Lipton*, (n 77) 467-469; Dahal Rajib, 'Salomon v Salomon: Its Impact on Modern Laws on Corporations' (SSRN, 26 April 2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3169431> accessed 9 April 2021
[124] *Lipton*, (n 77) 467

make a valid claim as a secured creditor and recoup his investment at the cost of unsecured creditors who would receive no compensation from Salomon Ltd.[125]

When the issue was tried at first instance, the lower courts echoed the concerns raised by members of parliament prior, that incorporation would harm the claims of creditors. Adopting a purposive judicial method of interpretation, the judges ruled that incorporation was "…a device to defraud creditors."[126] It could not have been intended that 1856 Act would confer the benefits of separate liability simply because a director had nominated family members (Salomon's wife and children)[127] as shareholders to fulfil the threshold requirements for incorporation.[128] In an iconic ruling that attracts contemporary attention, the House of Lords[129] overturned the decision at lower instance. In adopting a literal interpretation of the 1862 Act, the judges made it clear that the legislation was silent on the matter of intention behind share ownership. Because Aron Salomon had met the formal requirements provided by the 1862 Act, Salmon Ltd. was for all intents and purposes a separate entity. The corporation could not be viewed as an agent of Mr Salomon to facilitate fraud. The corporate veil which existed between legal and natural persons was recognised and Mr Salomon's claim could receive priority over other creditors. The consequence of this decision has formed the core of modern company law today in that investors can rely on the separate legal personality of a company to limit their personal liability. This minimisation of risk facilitates the very basis by which MNCs and TNCs can maximise their return for an investment whilst minimising the potential liability for associated externalities in foreign jurisdictions.

For our purposes, the reason behind the crystallisation of these core principles of company law should be given consideration. Modern scholars have explored the wider policy considerations behind the ruling in *Salomon*, to consider what relevance they have to company law today. Allan Hutchinson, and Ian Langlois have viewed the House of Lords' ruling in *Salomon* as an act of pragmatism, both in respect to the Salomon family but also for company law generally. In respect to the former, they argue that there would have been an inherent sense of injustice if Mr Salomon could not rely on the formal provisions of the Act. If Aron Salomon would have

[125] ibid., 467
[126] Broderip v. Salomon, [1895] 2 Ch. 323 [339]; See: *Hutchinson and Langlois*, (n 84) 1121
[127] Lord Justice Lopes went so far as to describe Mr Salomon's single shareholding family members as "six mere dummies", Broderip (126) [347]; See: *Hutchinson and Langlois*, (n 84) 1121
[128] *Lipton*, (n 77) 468
[129] N.B. Prior the Constitutional Reform Act 2005, the House of Lords, the UK's legislative upper chamber also carried judicial function as a court of last resort. Under Part 3, Section 23(1) of the 2005 Act, this function was transferred into the UK Supreme Court which became the final court of appeal in 2009.

been unable to recover the money which was invested into Salmon Ltd., he and his family faced a very real prospect of destitution and impoverishment.[130] In the latter case, the ruling was pragmatic in terms of wider economic policy considerations. Phillip Lipton has suggested that if Salmon's limited liability for Salmon Ltd. was not guaranteed by meeting the form requirements set out in the provisions of the Act, it would have created "considerable legal uncertainty":[131] This is because:

"It would have required Judges to decide on a case-by-case basis whether incorporations were to be treated as valid or disregarded because they were 'fictions' or designed to cheat creditors."[132]

On one hand, it is the task of the judiciary to apply the law of Parliament and to clarify where ambiguities arise. On the other hand, if regulatory law falls short whereby a party is unable to rely in good faith on the law's protection by following statutory requirements, it creates uncertainty and leads to legal ambiguity. In other words, it would have defeated the intention of the Act if incorporated entities such as Salomon at the time could have no confidence in the enforcement of the rules which they otherwise relied upon when engaging in the risk of business. This tension in *Salomon* can also be seen to represent a core issue that has resurfaced for contemporary group company regulation. This is that effective corporate regulation is served by clear and accessible legal principles, which are consistently applied. This increases the confidence of a business owner, but also draws a regulatory line over responsible corporate behaviour which becomes central to the prospects of a successful claim when tort victims pursue an action against the parent of a corporate group.

2.2.4. Summary

The above historical sketch serves to illustrate the context in which the doctrines of incorporation and limited liability were realised in UK company law. Although MNCs/TNCs such as Royal Dutch Shell dwarf the corporate entities which operated during the 19th century, in both complexity and operation, the principles which were crystalised in Salomon remain the same principles which MNCs/TNCs rely upon today to determine their corporate governance structure and international activities.

[130] *Hutchinson and Langlois*, (n 84) 1122
[131] *Lipton*, (n 77) 470
[132] ibid., 470

At this juncture, this historical investigation offers two conclusions. First, it is unclear whether *Salomon*'s understanding of limited liability was ever intended to apply to corporate groups. Scholars such as Witting have argued that it was not, given that "Prior to the middle of the nineteenth century, it was believed to be beyond the legal power of a company to own shares in *another* company.[133] This, he argues, changed once English jurisprudence rejected fiction theory for entity theory whereby it was accepted that "…companies were intended to be vehicles by which groups of individuals would participate in business endeavours".[134] The application of *Salomon* to corporate groups therefore may represent a conceptual overreach which is open to reassessment. Present day MNCs and TNCs are analogous to individual family businesses. In its early days, advocates of limited liability viewed the option as a means of levelling up smaller enterprises for whom even meagre investments posed too great a risk. Although investment of capital always represents a degree of risk, even for the largest TNCs and MNCs, such corporate groups have a greater degree of capitalisation, corporate policy, and methods of risk analysis to mitigate and determine the viability of investment which transcends the imagination of 19th century family-owned boot shops.

Second, the doctrine of limited liability was intended to provide a degree of protection for smaller investors to conduct economic undertakings and compete to facilitate economic growth. A fundamental aspect to this end, was the reliance on form requirements to give investors peace of mind as to the scope of their liability in the event of a claim by a creditor. What this reveals, is that effective domestic regulation depends on a clear legal framework. As in *Salomon,* the judiciary were concerned that deviation from the form requirements of the Joint Stock Companies Act, would have undermined the presumable applicability of limited liability in disputes with creditors. This would have created legal uncertainty, and judgement on a case-by-case basis which in this case, would have undermined economic investment. If so, then future group company regulation must favour an approach which minimises legal uncertainty through a regulatory framework that establishes clear duties, obligations, and liabilities, in accordance with international standards.

[133] *Witting,* (n 2) 65
[134] ibid., 66

2.3. Previous Proposals for Statutory Regulation – The Corporate Responsibility Bill 2003

Before we consider the current regulatory regime of the UK, brief mention should be made of the Corporate Responsibility Bill 2003.[135] This was a previously proposed statutory regime that seemingly anticipated many of the problems that would emerge from the moral hazard that emanates from MNCs operating in host countries. The bill has been described as a "home state model of extraterritorial regulation".[136] Its proposal was not without precedent, given that a similar bill was debated in Australia only three years prior.[137] The 2003 Bill contained a range of provisions that directly addressed the issue of regulating corporate groups. This included the possibility for direct statutory liability of a parent company for separate corporate subsidiaries.

The Bill consisted of several provisions which addressed many of the primary questions concerning group company regulation today. The Bill's scope was intended to apply to cases concerning "subsidiaries, mergers, disposals, acquisitions and other restructurings".[138] The liability of a parent company was conceptualised in very general terms. A parent would be exposed to liabilities where "the manner in which the group's activities are organised managed or undertaken falls below the standards that can be *reasonably*[139] be expected of the group in all the circumstances of the given case."[140] If management of activities was unreasonable, this would be first established by a failure to ensure health and safety or environment protections[141] and second that the failure in question could be regarded as the cause of either a "serious physical or mental injury"[142] a "serious harm to the environment"[143] or both.[144] The bill went

[135] Corporate Responsibility HC Bill (2002-2003) [129]; See: 'Corporate Responsibility Bill' (Parliament.uk 10 July 2003) https://publications.parliament.uk/pa/cm200203/cmbills/129/03129.i.html 13 April 2021
[136] 'Human rights and Transnational corporations: Legislation and Government Regulation' (Chatham House, 15 June 2006) <https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/il150606.pdf> accessed 31 March 2021
[137] 'Corporate Code of Conduct Bill 2000 [2002]' (Australian Government - Federal Register of Legislation, 6 September 2000) <https://www.legislation.gov.au/Details/C2004B01333> accessed 31 March 2021
[138] Corporate Responsibility HC Bill (2002-2003) 129, cl 6
[139] By use of the word 'reasonably', one might understand that in a hypothetical litigation where this bill had the full force of an Act of Parliament, a court would apply the Wednesbury test as first established in Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948] 1 KB 223. Although this would raise further questions about whether the act could only have applied to companies that were carrying out public functions through a public procurement contract. These considerations, while purely theoretical highlight the conceptual weaknesses of the bill.
[140] ibid., cl 6(1)
[141] ibid., cl 6(1)(b)(i),(ii)
[142] ibid., cl 6(1)(c)(i)
[143] ibid., cl 6(1)(c)(ii)
[144] ibid., cl 6(1)(c)(iii)

so far as to distinguish between "persons working in or affected by those activities"[145] so as to avoid any ambiguity that liability could be established for claims in tort brought by both employees and non-employees. Article 10 of the Bill contained a provision that created legal standing for relevant stakeholders (even extra-jurisdictional stakeholders) against a company subject to the Bill with the effect that the "courts in the United Kingdom [would] have jurisdiction to hear any such case."[146] Because these provisions represented a potentially significant increase in judicial jurisdiction, claims were streamlined through a notification procedure with the Home Secretary, who could deny a right of claim where it was deemed to be "frivolous" or "without merit".[147] Nevertheless, such provisions 20 years ago were radical from both corporate law and private law perspectives.[148]

Although it was stated at the time that the Bill had the potential to "…revolutionize litigation claims against MNE operations abroad by a large range of claimants" and that its adoption was "almost certain"[149] the 2003 Bill (and indeed its Australian predecessor) failed to pass into law. The general view appears to be that insufficient political and business support led to the Bill's failure to pass into law.[150] Another possibility is that the provisions were a serious attempt to bring UK company law into closer harmony with the principle of enterprise theory, as opposed to entity theory which has continued to dominate Anglo-American jurisprudence throughout the 20th century. Nevertheless, the Bill seemingly contained proposals which anticipated some of the difficulties which stake holders would face in the relevant caselaw which UK courts would hear less than two decades later.

2.4. Current Statutory Provisions and the judicial development of Parent Company Liability

As stated, the UK today does not have a comprehensive statutory framework for the regulation of corporate groups. This distinguishes it from neighbouring European countries. While recent statutory provisions especially in corporate governance have perhaps set the foundations for a

[145] ibid., cl 6(1)(c)(i)
[146] ibid., cl 10(4)
[147] ibid., cl 10(2)
[148] The only major equivalent in increase of extra-judicial competence, was the Alien Tort Statute which has been used to enforce human rights standards from a Public International Law perspective. The streamlining of extra-judicial competences in Private Law disputes was at the time still a novel notion.
[149] Ilias Bantekas, Bantekas I, 'Corporate Social Responsibility in International Law' (2004) 22 Boston University International Law Journal <https://ssrn.com/abstract=3632775> accessed on 13 April 2021, 326
[150] 'Human rights and Transnational corporations: Legislation and Government Regulation' (Chatham House, 15 June 2006) <https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/il150606.pdf> accessed 31 March 2021

comprehensive framework, the recent innovation of parent company liability in recent caselaw represents a paradigm shift in how liability is conceptualised, creating legal uncertainties for litigating parties. This is in part because of the novelty of parent company liability which in only a few cases has seen rapid development. In the UK there are two recognised methods of remedying a creditor's claim with assets held by a separate corporate entity. These are through the establishment of a duty of care, and through veil piercing. Although there has already been scholarly examination of adopting a so-called 'Dutch approach' to veil piercing,[151] this work is predominantly concerned with the former as veil piercing has been ruled out in the cases with which we are concerned.[152] We therefore consider what statutory obligations already apply to corporate groups in the UK and what principles have been established by the courts.

2.4.1. Statutory Provisions Relevant to Corporate Groups

There are several statutory provisions which hold relevance for corporate groups. A brief investigation of these provisions may provide an informed discussion as to what future regulatory approaches for corporate groups might be adopted by reforming these current provisions. In the last few years, several laws have changed the obligations and duties within corporate governance which have had direct effects on corporate groups.

i) The Companies Act 2006

Two provisions relevant to corporate group regulation might be highlighted in the Companies Act 2006. These are the duties of directors under S.172, and the definition of subsidiaries under S.1159.

The former provision was part of a series of reforms designed to realise 'enlightened shareholder value'. This is a relatively novel development in English company law proposed and introduced by the Company Law Review Steering Group (CLRSG).[153] Enlightened shareholder value offers a supposed hybrid between shareholder primacy and pluralist/stakeholder theory of corporate governance. As demonstrated by Andrew Johnson, the proposals were designed to address a 'shrinking scope' of CSR initiatives within UK

[151] Magdalena Kucko, 'Piercing the Corporate Veil - Should English Law Go Dutch?' (Master thesis, London School of Economics 2017)
[152] See 2.4.2. of this work.
[153] Collins C. Ajibo, 'A Critique of Enlightened Shareholder Value: Revisiting the Shareholder Primacy Theory' (2014) 2 Birkbeck Law Review 37, 43-44.

company law from a corporate governance perspective.[154] Enlightened shareholder value was realised through two provisions, namely S.172 and S.417[155] of the Companies Act.[156]

S.172 of the Companies Act codified a set of duties for corporate directors when it otherwise was an established principle of common law.[157] We will only consider S.172(1).[158] S.172(1) expanded upon the duties of directors in the 1985 Companies Act which only referred to employees.[159] Duties are owed "…to promote the success of the company".[160] This duty is also extended to long-term decisions,[161] employees,[162] business relationships with suppliers and customers,[163] the impact of corporate activities on the local community and the environment,[164] corporate reputation,[165] and acting fairly between company members.[166] All of these stakeholders mentioned are of relevance to group company regulation, and might be described as "firm-specific investments".[167] In the context of international guidelines, this specific statutory reform was understood to serve as a domestic response to the non-binding recommendations of the OECD Principles on Corporate Governance[168] one of several CSR guidelines which called for greater communication between shareholder and stakeholder concerns. Both Keay[169] and Ajimbo[170] have suggested that these provisions were ultimately inconsequential in achieving greater consideration for wider stakeholders. This was in part due to the duty lacking a means of enforcement for alleged breaches. Taken together with the degree of separation within a corporate group, directors may have a minimal sense of urgency over

[154] Andrew Johnston, 'The Shrinking Scope of CSR in UK Corporate Law' (2017) 74(2) Washington and Lee Law Review, 1028-1036 <https://scholarlycommons.law.wlu.edu/wlulr/vol74/iss2/16> accessed on 11 September 2020
[155] It is beyond the scope of this work to consider in any detail, but S.417 refers to Business Review which aims "…to provide a greater degree of transparency and accountability as far as the work of the directors goes." See: Andrew Keay, *The Enlightened Shareholder Value Principle and Corporate Governance*, (New York: Routledge, 2013), 157
[156] ibid., 85
[157] ibid., 87
[158] S.172(3) relates to issues duties to creditors. For a discussion on S.172(3) see: Andrew Keay, *The Enlightened Shareholder Value Principle and Corporate Governance*, (New York: Routledge, 2013), 281-230
[159] S.309 Companies Act 1985; See: *Keay* (n 155) 111
[160] S.172(1) Companies Act 2006
[161] S.172(1)(a)
[162] S.172(1)(b)
[163] S.172(1)(c)
[164] S.172(1)(d)
[165] S.172(1)(e)
[166] S.172(1)(f)
[167] S.309 Companies Act 1985; See: *Keay*, (n 155) 111
[168] Luca Cerioni, 'The success of the company in s. 172(1) of the UK companies act 2006: Towards an 'enlightened directors' primacy'?' (2008) 4(1) Original Law Review, 3,7 <http://search.informit.com.au/documentSummary;dn=999621048807417;res=IELHSS> accessed on 12 May 2021 in *Ajibo*, (n 153) 38.
[169] S.309 Companies Act 1985; See: *Keay*, (n 155) 111
[170] *Ajibo*, (n 153) 50

any specific legal obligation owed to the wider stakeholders of a legally separate foreign subsidiary.

Another relevant provision is S.1159 of the Companies Act which offers a limited definition for a subsidiary. A subsidiary is a company of another holding company if (a) the holding company "…holds a majority of voting rights in it" or (b) "is a member of it and has the right to appoint or remove a majority of its board of directors" or (c) "is a member of it and controls alone, pursuant to an agreement with other members, a majority of the voting rights in it, or if it is a subsidiary of a company that is itself a subsidiary of that other company."[171] The provisions offer a formal *de iure* definition to highlight the parent-subsidiary relationship. How effective is this definition? This is considered in light of recent caselaw below.

ii) The Companies (Miscellaneous) Reporting Regulations 2018

In addition, the Reporting Regulations should be briefly mentioned. These are amendments made to provisions of the Companies Act 2006 mentioned above. Under S.414CZA, companies are required to include in their strategic reports of a company over the last financial year a statement "…which describes how the directors have had regard to the matters set out in S.172(1)(a) to (f) when performing their duty under section 172."[172] From the perspective of litigation (which we consider below), this amendment may be of some use to a court to consider claims alleged by tort claimants, in establishing the corporate relationship between a parent and subsidiary. By reviewing publicly available financial statements of a corporation at first blush. The statements made by directors of a parent companies as to the concerns of wider stakeholders may assist a court in considering the likelihood of an answerable claim, before using powers to examine internal documents, and risk falling into conducting a mini-trial.

iii) Modern Slavery Act 2015

In 2015, the British government passed the Modern Slavery Act. Although not included in the original Bill, an amendment, now S.54 of the Act, addresses issues of transparency over the use of slavery in corporate supply chains.[173] S.54(1) provides that "A commercial organisation…must prepare a slavery and human trafficking statement for each financial year of the organisation."[174] The provisions state that a statement *may* include information including

[171] S.1159(1) of the Companies Act 2006
[172] 414CZA The Companies (Miscellaneous Reporting) Regulations 2018
[173] Michael Pollitt, 'Unfinished Abolitionists: Britain Returns to the Frontline of the War on Slavery' The New Statesman (16 October 2014) <https://www.newstatesman.com/politics/2014/10/unfinished-abolitionists-britain-returns-frontline-war-slavery> accessed 9 May 2021
[174] S.54(1) Modern Slavery Act 2015

(a) organisational structure,[175] (b) its policies on slavery and human trafficking,[176] (c) any due diligence processes which have been undertaken[177] (d) parts of the supply chain where there is a risk of slavery or trafficking, and steps taken to "manage the risk"[178] (e) the effectiveness of the corporations actions in ensuring that neither have taken place[179] and (f) information about training available to employed members.[180] As a point of clarification, the term "Commercial organisation" is also defined by the Act and appears to serve as an umbrella term that applies both to incorporated entities and partnerships.[181] These provisions apply to commercial organisations which have a total turnover of £36 million[182] the amount of which is determined by the Secretary of State.[183]

The Modern Slavery Act has drawn a degree of criticism at home and abroad. At home, it has been acknowledged that the Act lacks an enforcement mechanism. Much like the aforementioned Corporate Responsibility Bill 2003[184] S.54(11) empowers the Secretary of State to bring a civil claim against non-compliant corporate entities in breach of the Act. However, a recent report led by a team of researchers at the Bingham Centre for the rule of law and the Bonavero Institute of Human Rights (University of Oxford) noted that this power has not been used. This has been attributed to the absence of a monitoring board or other "state-based oversight body"[185] to enforce compliance. Abroad, the act has drawn comparison with similar statutory due diligence laws such as the French duty of vigilance (which we consider below). In light of their own reforms, French commentators have described the Modern Slavery Act as "less stringent" in holding group companies to account.[186]

Despite these criticisms, there is evidence that future reform may broaden the utility and scope of the Act on corporate regulation. On 26 March 2020, the UK became the first country to

[175] S.54(5)(a)
[176] S.54(5)(b)
[177] S.54(5)(c)
[178] S.54(5)(d)
[179] S.54(5)(e)
[180] S.54(5)(f)
[181] S.54(12)(a)&(b)
[182] Raj Panasar, 'The Modern Slavery Act 2015: Next Steps for Businesses' (Harvard Law School Forum on Corporate Governance, 10 March 2017) <https://corpgov.law.harvard.edu/2017/03/10/the-modern-slavery-act-2015-next-steps-for-businesses/> accessed 7 May 2021
[183] S.54(3)
[184] See: S.10(1)-(4) Corporate Responsibility Bill 2003
[185] Lisa Hsin, Irene Pietropaoli. and others, 'Accountability, Monitoring and the Effectiveness of Section 54 of the Modern Slavery Act: Evidence and Comparative Analysis' (2021) London: Modern Slavery Policy and Evidence Centre, 11
[186] Stéphane Brabant and Elsa Savourey, 'A Closer Look at the Penalties Faced by Companies' (International Review of Compliance and Business Ethics, 14 December 2017), 1 <https://media.business-humanrights.org/media/documents/d32b6e38d5c199f8912367a5a0a6137f49d21d91.pdf> accessed 6 May 2021

publish a Modern Slavery [supply chain] Statement listing the steps which the government plans to take to prevent slavery in supply chains.[187] On 22 September, a Government response to a transparency in Supply Chains consultation expressed a commitment to an "ambitious package of measures" to strengthen the provisions of the act.[188] Moreover the Home Office plans to launch a digital reporting service for modern slavery statements that will "…make it easier for investors, consumers, and civil society to scrutinise action that businesses are taking."[189] Whether this entails a door to future legislation to a due diligence model of statutory regulation as observed in the jurisdiction which we consider below remains an open question.

2.4.2. The Development of Parent Company Liability Through Cross-Border Tort Litigation

It has been said that parent company liability through cross-border tort litigation is a phenomenon which has emerged at the end of the twentieth century.[190] While the courts have not yet awarded damages on the substantive merits of a claim, English jurisprudence has nonetheless recognised the possibility for a parent company to hold liability as a duty of care in tort negligence to both employees and third parties for social, environmental and workplace harms. While innovative, parent company liability through cross-border tort remains a complex area of law, governed by a nebulous set of cases which utilise language and concepts which are not typically associated with human rights.[191] This section offers a fuller and more up to date[192] overview and analysis of recent caselaw to tease out the governing principles of parent company liability in UK law. These principles will be used as a basis for comparison with European countries who have developed or are developing statutory regulatory models. Below is a table of cases which are examined. They are placed in a chronological order, by way of highest instance.

[187] '2020 UK Annual Report on Modern Slavery' (HM Government, October 2020), 5 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/927111/FINAL-_2020_Modern_Slavery_Report_14-10-20.pdf> accessed 8 May 2020
[188] ibid., 5
[189] ibid.
[190] *Aristova*, (n 21) 3
[191] ibid.
[192] *Bergkamp*, (n 20) 34-43

Fig. 2 A Caselaw Chronology of Parent Company Liability:

Case:	Court:	Decision Summary:
Adams v Cape Industries Plc (1990)	House of Lords	- Liability of a parent or viewing parent and subsidiary as a single economic entity is not possible on account of precedent in *Salomon*
Lubbe v Cape Industries Plc (2000)	House of Lords	- First *obiter* acknowledgement of a potential duty of care
Chandler v Cape Industries Plc (2012)	Court of Appeal	- Liability in tort receives first judicial acknowledgement - Proposed examination through *four indicia* - Doctrine of veil piercing irrelevant to cross-border liability claims
Thompson v The Renwick Group Plc (2014)	Court of Appeal	- Limited the elements of examination between parent and subsidiary
AAA & Ors v Unilever Plc & Anor (2018)	Court of Appeal	- *De Iure* relationships such as the number of shares held by a parent in a subsidiary are not relevant to the determination of a liability - Proximity may be determined by examining internal practices
Vedanta Resources PLC and another v Lungowe (2019)	Supreme Court	- *Four Indicia* unnecessary - *Caparo* unnecessary as liability not novel - Established under the basis of general tort negligence in *Dorset Yacht*
Okpabi v Royal Dutch Shell Plc (2021)	Supreme Court	- Limited Liability still applies - Liability not solely incumbent upon "control" - The beliefs of the parent and the relevant economic relationship are relevant to examination - Possible to view separate entities as one economic enterprise
Begum v Maran (UK) Ltd (2021)	Court of Appeal	- A contractual agreement should not preclude the possibility for a liability in tort negligence - Claimants face significant hurdles in acquiring remedies in these forms of litigation

(i) Adams v Cape Industries plc

The case of *Adams* was the first in a contemporary set of reported cases to address the category of litigation central to this work. *Adams* specifically addressed the enforcement of a foreign judgment which ruled in favour of a class action in tort against a UK domiciled parent company's U.S. based subsidiary. Cape, an English incorporated public limited company had two subsidiaries which operated in South Africa, and Texas in the United States. They were responsible for the processing and marketing of Asbestos, respectively. Workers in the American subsidiary brought a successful claim in tort negligence against both the Texan subsidiary and Cape in the U.S. courts after employed members developed asbestosis. The Court of Appeal case concerned whether the claimants could enforce the U.S. ruling in England.

The Court of Appeal considered three arguments which were submitted as to why Cape should be held liable. These were (1) an economic entity argument, (2) façade and (3) agency. For our purposes we are primarily concerned with the first submission, and the precedent it set for how liability within group companies was and has since been conceptualised by the courts. In his ruling as to whether Cape could be treated as the same economic entity as its subsidiary, Lord Justice Slade reiterated the view of Lord Justice Roskill in *The Albazero*[193] that:

"There is no general principle that all companies in a group of companies are to be regarded as one. On the contrary, the fundamental principle is that "each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate legal rights and liabilities."[194]

The applicants' counsel relied on a number of cases[195] to demonstrate that there have been at times instances where the courts have ignored legal separation that exists between two different

[193] The Albazero [1977] AC 774

[194] ibid., [807] (Roskill LJ); See also: Adams v Cape Industries plc [1990] Ch 433, [532] (Slade LJ)

[195] The Roberta (1937) 58 L1.L.R. 159. There agents acting on behalf of a certain company had conceded that by signing bills of lading they had made another company parent to the company on whose behalf they were acting; Harold Holdsworth & Co. (Wakefield) Ltd. v. Caddies [1955] 1 W.L.R. 352. The court rejected the argument of a subsidiary that a service agreement entered by a parent did not entitle a contractual party to act on behalf of those subsidiaries who had separate boards of directors; Scottish Co-Operative Wholesale Society Ltd. v Meyer [1959] A.C. 324. There an appellant had formed a subsidiary which the respondent was a member. It was alleged that the respondent had acted in an oppressive manner within the meaning of S.210 of the Companies Act 1948. The House of Lords rejected the defendants' submission that they had individually acted in an oppressive manner, and not so in respect to the affairs of the company; D.H.N. Food Distributors Ltd. V Tower Hamlets London Borough Council [1976] 1 W.L.R. 852. In this case, the Court of Appeal allowed for the corporate veil to be pierced so as to allow one company to recoup compensation from a compulsory purchase of land owned by one of its subsidiaries. In explaining the decision, Lord Denning M.R. who was characterised by his equitable judicial methodology ruled that in certain circumstances it was appropriate to pierce the veil where

incorporated undertakings. They submitted that the question whether a foreign ruling should be enforceable against an English domiciled company should be determined by a "commercial reality."[196] Lord Justice Slade distinguished from these examples, and stated that:

"…the court is not free to disregard the principle of Salomon […] merely because it considers that justice so requires. Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities."[197]

The court highlighted that a distinction must be made between a company which by itself trades in a foreign country, and when it does so through a subsidiary.[198] Because the court enforced this distinction, it also considered that as a parent company, Cape could only be considered to have been a party subject to the U.S. jurisdiction if it could be shown to have a fixed presence in the U.S. where it was ruled it did not.

(ii) Lubbe v Cape

In *Lubbe*[199] 3000 plaintiffs including one Mrs Lubbe[200] initiated proceedings and alleged personal injury and death had been caused by exposure to asbestos while under the employ of the South African subsidiary of Cape (the same defendant in *Adams*). It alleged that Cape had failed to take sufficient steps to ensure "proper safety precautions" in full knowledge.[201] *Lubbe* was primarily a conflict of laws case. Cape applied to stay the proceedings on grounds of *forum non conveniens*.[202] The primary issue was whether England rather than South Africa was the appropriate forum to hear the matter. The House of Lords' unanimous ruling was that although South Africa was more appropriate, they would not stay proceedings due to the unlikelihood of the claimants securing appropriate representation[203] for a fair hearing. Although the question

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it was appropriate. He justified his position by referring to the view of Professor Gower who suggested that "…there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group." See: L. C. B. Gower, Gower's principles of modern company law. (London: Stevens, 1969): 216.

[196] *Adams*, (n 194) [535]

[197] ibid., [532] (Slade LJ)

[198] ibid., [536]

[199] Lubbe v Cape Plc [2000] UKHL 41

[200] N.B. After the principal claimant Mrs Lubbe died, her claim was continued through the executor of her estate, Mr Lubbe. See: *Lubbe* (n 199) [7]

[201] *Lubbe* (n 199) [6]

[202] In English law, the common law doctrine of *forum Non Conveniens* states that a national court can refuse jurisdiction over a matter if a foreign court that also has jurisdiction would be more suited place for all parties involved. See: Spiliada Maritime Corporation v Cansulex Ltd [1987] UKHL 10; *Lubbe* (n 199) [7] [9] [16]

[203] *Lubbe* (n 199), [28]

of liability within corporate groups was tangential, it was directly addressed.[204] The *Obiter Dicta* of Lord Bingham's leading judgement is pertinent to the topic under examination. Whether Lubbe as a parent company could owe responsibility to the claimants, Lord Bingham stated that:

"Resolution of this issue will be likely to involve an inquiry into what part the defendant played in controlling the operations of the group, what its directors and employees knew or ought to have known, what action was taken and not taken, whether the defendant owed a duty of care to employees of group companies overseas and whether, if so, that duty was broken."[205]

While having no direct impact on the ruling, these comments suggested that a parent company within a corporate group could in English law be found to owe a tortious duty to claimants, despite the comments of Lord Justice Slade in *Adams*. It was seemingly implied that this rested on a factual basis of the conduct of the companies *and* their practical relationship. In other words, although the court considered the *de iure* relationship between a parent and subsidiary, its *de facto* activities would be considered by a court as the substantive element to a duty. It continued to be unclear where liability could only be owed to employees or whether a duty could be held for third party creditors also.

(iii) Chandler v Cape

The case of *Chandler*[206] was significant in being the first reported case that set out standards for establishing the liability of parent companies within corporate groups.[207] The Court of Appeal upheld a decision that a parent company had assumed responsibility[208] over the health of an employee who had contracted asbestosis while working for a since dissolved subsidiary of Cape.[209] While the court stated that a parent company cannot be assumed to have a duty by virtue of its status as a parent company alone, as it had "separate legal personality"[210] its emphasis on a duty arising out of *control* has been understood to have broadened the potential

[204] For example, while not relevant to the ruling, Lord Bingham raised one of the questions highlighted by the Court of Appeal, which bore relevance to the case, namely: "whether a parent company which is provide to exercise de facto control over the operations of a (foreign subsidiary) […] owes a duty of care to those workers and/or other persons in relation to the control which it exercises over and the advice which it gives to the subsidiary company?". See: *Lubbe* (n 199) [6]
[205] *Lubbe* (n 199) [20]
[206] Chandler v Cape [2012] EWCA (Civ) 525
[207] Louise Moore, Karol Shutkever and Julie Vaughan, 'Parent company liability for environmental, health and safety incidents and the implications of Chandler v Cape PLC' (Lexology, 17 May 2012) <https://www.lexology.com/library/detail.aspx?g=3e625a40-b6fe-42f6-bfd2-328d9f1f64bf> accessed 21 April 2021
[208] C.f. a duty of care, or existence of enterprise liability.
[209] *Chandler*, (n 206) [30]
[210] ibid., [11]

scope of liability, whereby future liabilities could be realised for claims brought by third parties.[211] The Court utilised the *Caparo* test[212] to determine whether it would be 'fair, just, and reasonable' in establishing a new tortious duty. As hinted in *Lubbe*, control was a factor considered by the court despite an acknowledgement that prior caselaw[213] had not established that a parent company has a duty of care where "absolute control" has been exercised over a subsidiary.[214]

Lady Justice Arden proposed four *indicia* to be followed to determine whether it was appropriate for the law to establish a novel duty. Questions which a court should consider were: (i) Whether the businesses of parent and subsidiary were "in a relevant respect the same". (ii) Whether the parent has "superior knowledge". (iii) Whether the parent knew or ought to have known that the subsidiary's system of work was unsafe. (iv) Whether the parent knew or ought to have foreseen that the subsidiary depended on their superior knowledge for employee protections and that the parent had in practice intervened in trading operations.[215]

A significant (and perhaps overlooked) development within *Chandler*, was the court's decision that the company law doctrine referred to as 'piercing the corporate veil' was not relevant matter in tort cases (but presumably only in cases where the relationship between two entities is governed by contract law). The theory of veil piercing refers to a different way liability is conceptualised within a company, or even corporate group. In the case of a corporate group, veil piercing:

"…undermines the principle of separate corporate legal personality (which normally insulates shareholders from liability for wrongs committed by the corporation) by ceasing to distinguish a company as a legal person, separate from its shareholders."[216]

[211] Dalia Palombo, 'Two Critical Issues in the UK Business and Human Rights Litigation' (Business Human Rights Resource Centre, 11 September 2018) <https://www.business-humanrights.org/en/blog/two-critical-issues-in-the-uk-business-and-human-rights-litigation/> accessed 21 April 2021
[212] Caparo v Dickman [1990] 2 AC 605
[213] Connelly v RTZ Corporation plc [1997] UKHL 30; Ngcobo & Ors v Thor Chemicals Holdings Ltd & Desmond Cowley (Maurice Kay J 7 November 1996 unreported)
[214] *Chandler* (n 206) [66]
[215] ibid., [80]
[216] Paul Hughes and Alex Melia, 'Parent Company Influence Over Group Compliance Policies' (American Society of International Law, 6 May 2021) <https://www.asil.org/insights/volume/25/issue/6/parent-company-influence-over-group-compliance-policies> accessed 7 May 2021

In English law, the UKSC's decision in *Prest v. Petrodel Resources Ltd*[217] greatly limited the circumstances in which a court would overlook the separate legal personality of a company from shareholders. The court held that veil piercing could only take place either where there has been evasion or concealment,[218] fraud,[219] or "of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality."[220]

Returning to *Chandler*, Lady Justice Arden explained the court's reasoning why veil piercing was inapplicable to the liability of a parent company within a corporate group. In her view, "the imposition of a duty of care does not "collapse the principle of limited liability".[221] The consequence is that the court can hold that there has been an assumption of responsibility without piercing the corporate veil."[222] It would appear that the nature of the decision was to ensure that future cases would circumnavigate the precedent established in *Adams*.[223] This point is highlighted to distinguish UK caselaw from its US and German counterparts where the scope of veil piercing has not been reduced to group companies. For our purposes, it establishes that the courts conclusively decided that liability within corporate groups for harms caused by subsidiaries could not be conceptualised as cases where a veil piercing takes place.

(iv) Thompson v Renwick

In *Thompson,*[224] it was held by the Court of Appeal that a parent company did not have a duty of care for harms caused by a subsidiary. The claimant developed diffuse pleural thickening by exposure to asbestos when working for two haulage companies during the 1970s.[225] A claim was brought against the parent company after it emerged that neither employer "had in place responsive liability insurance."[226] At first instance, a duty of care was found on the basis that the defendant's livery had provided a vehicle to the claimant,[227] establishing a connection. The

[217] [2013] UKSC 34; *Prest* was a family law case that had a lasting impact on company law. The case concerned whether a divorced woman could claim ancillary relief under S.23 & 24 of the Matrimonial Clauses Act 1973 and assume the equitable ownership of offshore corporate entities held solely by her former husband. In order to do so, it needed to be shown that her husband, was 'entitled' to the properties in question which were held not by him directly, but through those same separate companies.
[218] *Prest* (n 217) [28] (Lord Sumption)
[219] ibid., [83]
[220] ibid., [35]
[221] *Chandler* (n 206) [80] (Arden LJ)
[222] ibid., [80] (Arden LJ)
[223] This is acknowledged in the *obiter dicta* of Lord Neuberger. VTB Capital plc v Nutritek Int Corp [2013] UKSC 5 [127] (Neuberger LJ)
[224] Thompson v The Renwick Group PLC [2014] EWCA Civ 635.
[225] ibid., [4]
[226] ibid., [2]
[227] ibid., [13]

defendant appealed. The Court of Appeal considered two questions. First, could a parent company could assume a duty of care in "health and safety matters" where it has appointed an individual as a director of the subsidiary to oversee health and safety.[228] Second, did the facts warrant the imposition of a duty of care for injury sustained by subsidiary employees?[229]

In respect to the first question, the Court of Appeal stated that the parent company held a fiduciary duty as a shareholder, to the subsidiary, and not to the defendant. For the second, question, a duty could not be established due to lack of available evidence.[230] According to Dalia Palumbo, the ruling "limited the elements which could be taken into account to prove vicinity between a parent and its subsidiary".[231]

(v) AAA v Unilever

The case of *Unilever* is the first of a triad of recent cases that specifically address cross-border group company liability of British domiciled corporations in the UK. It concerned the aftermath of a national riot in Kenya.[232] Unilever Tea Kenya Limited (UTKL) a Kenyan-registered subsidiary of the English incorporated Unilever plc operated a tea plantation which employed 20,000 planters. Together with their families, over 100,000 individuals lived on the plantation.[233] Many of the residents descended from one of the many native tribes, including Kikuyu, Luo and Kisii tribes, the third of which formed the largest minority of around 30-50% of the resident workforce.[234]

In 2007, Kenya held a general election. It returned a favourable result for the Orange Democratic Party, whose leader was a member of the Kikuyu, and supported by the Kisi tribe. The result reignited tribal tensions which boiled over into civil unrest. Across Kenya, riots broke out leading to the loss of 1,333 lives, widespread injury, and criminal damage to property.[235] Armed rioters trespassed into UTKL's plantation and in addition to criminal damage committed a series of assaults, rapes, and murders.[236] 218 persons (some of whom perished and were represented by their estates) brought a claim to the English courts. They

[228] ibid., [24]
[229] ibid.
[230] ibid., [39]
[231] Dalia Palombo, 'Two Critical Issues in the UK Business and Human Rights Litigation' (Business Human Rights Resource Centre, 11 September 2018) <https://www.business-humanrights.org/en/blog/two-critical-issues-in-the-uk-business-and-human-rights-litigation/> accessed 21 April 2021
[232] AAA and Others v Unilever PLC and Another [2018] EWCA Civ 1532
[233] ibid., [8]
[234] ibid., [8]
[235] ibid., [11]
[236] ibid., [11]

alleged that Unilever and UTKL had failed to establish an effective crisis management system to protect their resident workforce from foreseeable danger posed by the election season.[237]

At first instance, the then Mrs Justice Laing held that the claimants had no arguable claim against either Unilever or UTKL.[238] When applying the *Caparo* test, it was held that a duty of care could not be established because it was unreasonable to hold that either Unilever or UTKL could have foreseen the harm that would take place following the elections.[239] Moreover, it would not be fair, just and reasonable for the law to impose a duty, as it would in effect imply that Unilever should have acted as "a surrogate police force".[240] However when considering the question of proximity, the court relied upon the four *indicia* posited by Lady Justice Arden in *Chandler* [241] and acknowledged the upper court's recognition in that case that a parent company's duty to intervene:

"…to prevent damage to another would arise where there was a relationship between the parties which gave rise to an imposition or assumption of responsibility on the part of the defendant."[242]

In following the guidelines set in *Chandler*, the court accepted the submissions of the claimants that a memorandum of association amongst other documents evidenced that Unilever was not a mere holding company of UTKL shares, but "sought to exercise control over the management"[243] over UTKL. Although this alone was insufficient to find for the claimants, it developed further the criteria set in *Chandler*. Consideration was given to the factual relationship that appeared to exist between parent and subsidiary. Internal documentation as to policy decisions taken at the executive level were used by the court to determine whether criteria within the *Caparo* test were satisfied. An implied consequence of the ruling was that corporate governance decisions could be considered to play a not insignificant role in future judicial determination as to whether a parent can be found to hold a duty of care.

On appeal, the Court of Appeal considered the submissions of Unilever and UTKL that it was incorrect for the court at lower instance to find that the test for proximity under *Caparo* had

[237] ibid., [12]
[238] AAA & Ors v Unilever Plc & Anor [2017] EWHC 371 (QB)
[239] ibid., [80] (Laing J)
[240] ibid., [107] (Laing J)
[241] ibid., [98-100] (Laing J)
[242] ibid., [99] (Laing J)
[243] ibid., [103] (Laing J)

been satisfied, despite the court ruling in their favour that they did not owe a duty of care.[244] The court agreed.

A central point made by Lord Justice Sales in his ruling for the Court of Appeal (that would be reiterated in the following two cases) was that "There is no special doctrine in the law of tort of legal responsibility on the part of a parent company in relation to the activities of its subsidiary, vis-à-vis persons affected by those activities."[245] Highlighting two "basic types"[246] of activity, the court focused on whether certain elements of *control* might lead to the recognition of a duty. These were (i) where a parent has "in substance taken over the management"[247] over a given activity which was managed by a subsidiary. (ii) where the parent has given "relevant advice"[248] to a subsidiary about a particular area of risk management. Upon examination of the evidence, the court ruled that there was also in this case, insufficient proximity between Unilever and UTKL. The court examined a constellation of factual evidence. They considered the evidence that external consultation did not indicate that violence within the plantation was likely.[249] Moreover it was noteworthy that UTKL carried out its own crisis management training.[250] Dismissing further appeal, the court held that proximity had not been met, and a duty in this case could not be established.

(vi) Vedanta v Lungowe

The second case in this triad is *Vedanta*[251] (the facts of which have already received treatment in the introduction of this thesis).[252] It too has contributed significantly to establishing how group companies may be currently regulated in the UK.[253] It is worth noting that *Vedanta* (as in the case of both *Adams* and *Lubbe*) turned on the question of jurisdiction but has nevertheless resulted in further development of the English question of parent company liability and group

[244] *AAA and Others* (n 232) [4]
[245] ibid., [36]
[246] ibid., [37]
[247] ibid., [37]
[248] ibid., [37]
[249] ibid., [31]
[250] ibid., [28]
[251] *Lungowe and others* (n 4)
[252] See 1.1.1. of this work.
[253] For a general overview see: Paul Sheridan, Jan Burgess and Laura Swithinbank, 'Case Comment: Vedanta Resources Plc & Anor v Lungowe & Ors [2019] UKSC 20' (UK Supreme Court Blog, 29 April 2019) <http://ukscblog.com/case-comment-vedanta-resources-plc-anor-v-lungowe-ors-2019-uksc-20/#:~:text=On%2010%20April%202019%2C%20the,in%20the%20most%20underdeveloped%20countries> accessed 24 June 2020

company regulation.[254] In 2017 the Court of Appeal[255] held that the case could proceed in the UK against Vedanta.

The Court of Appeal's ruling offered further clarification over the principles and rules which had been established by previous caselaw. As in *Unilever* and *Chandler*, the court relied upon the three-part *Caparo* test of foreseeability, proximity and reasonableness.[256] The court acknowledged that a duty of care could extend both to direct employees and third parties.[257] Moreover, the court reiterated the two circumstances where a duty may "arise"[258] where a parent has taken direct responsibility for "devising a material health and safety policy" or "controls the operations which give rise to the claim."[259] The court also gave further acknowledgement to the four *indicia* of Ardan LJ in *Chandler*, including whether a parent had a similar line of business to a subsidiary and the knowledge and expertise to assist subsidiary employees.[260]

On appeal, the Supreme Court overturned the decision. The four *indicia* proposed in *Chandler* were dispensed of as an "unnecessary straitjacket"[261] because they "increased rather than reduced the claimants' burden in demonstrating a triable issue."[262] Moreover the *Caparo* test was deemed unnecessary as parent company liability was not to be treated as a novel duty.[263] Instead parental liability for a subsidiary was deemed to follow a notion of negligence

[254] The Court's ruling concerned jurisdiction and conflict of law. Jurisdiction is a separate but related issue to group company regulation for MNCs/TNCs given the cross-border element. Although conflict of law questions are beyond the scope of this work, in brief, the court acknowledged a Court of Justice (CJEU) decision in Owusu v Jackson (Case C-281/02) [2005] QB 801 that ruled the defence of *forum non conveniens* was contrary to EU law which otherwise confers a right for a claimant to sue a person in their own EU member state in accordance with Article 2 of the Brussels Convention recast. EU law on conflict of law issues was important in both *Vedanta* and *Okpabi* (at the court of appeal) as EU law was still directly applicable to the UK during the Brexit transition period, pursuant to Art 4 European Union (Withdrawal) Act 2018. At the time of writing, it was uncertain whether the court might disapply CJEU precent, enabling for the use of forum non conveniens defences. This could have been incumbent upon the outcome of the UK's re-joining of the Lugano convention which enforces EU jurisdiction rules in non-EU countries, however the UK's application was very recently rejected by the EU. See: 'Communication from The Commission to The European Parliament and The Council Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention' (The European Commission, 4 May 2021) <https://ec.europa.eu/info/sites/default/files/1_en_act_en.pdf> accessed 6 May 2021, despite acceptance from Switzerland that the UK could join. See: 'Switzerland first to approve UK's post-Brexit joining of disputes convention' (Pinsent Masons, 15 March 2021) <https://www.pinsentmasons.com/out-law/news/switzerland-approve-uks-post-brexit-joining-disputes-convention> accessed 25 April 2021

[255] *Lungowe and others* (n 4)

[256] ibid., [83]

[257] ibid., [83]

[258] ibid., [83]

[259] ibid., [83]

[260] ibid., [83]

[261] Vedanta Resources PLC and another v Lungowe and others [2019] UKSC 2 [56]

[262] ibid., [60]

[263] ibid., [49]

established in the 1970 case of *Dorset Yacht.*[264] In that case, it was found that the Home Office, a government department which ran a school, could be held liable after several of its students escaped on a yacht which caused damage to stationary vessels moored nearby that belonged to third parties, including a claimant who initiated successful proceedings alleging tort negligence. In other words, the court utilised alternative reasoning to confirm that a parent within a group of companies could owe an effective duty to third parties, but that such a duty should be couched within the pre-existing category of negligence. This differs from previous rulings which had until *Vedanta* held that parent company liability amounted to a novel tort, to be established on a case-by-case basis.

The Court posited four different routes, (which in future would be referred to as the *Vedanta routes*) whereby a duty of care may be said to arise.[265] Ruling in favour of the respondents, the court reemphasised the importance of factual evidence in determining the outcome of a liability. It held that the materials which had been published were sufficient to demonstrate that Vedanta, as a parent company had "asserted its own assumption of responsibility for the maintenance of proper standards of environmental control over the activities of its subsidiaries."[266] In January 2021, representatives of the villagers and Vedanta Resources issued a joint statement, that there had been an agreement to a settlement addressing the claims made by the local inhabitants.[267]

(vii) Okpabi v Shell

The case of Okpabi (as covered above)[268] concerned a claim brought by 40,000 individuals in Nigeria, with the primary claimant being the King of the Ogale community HRH Emre Godwin Bebe Okpabi. They maintained that RDS owed a duty of care for oil spillages where its Nigerian subsidiary SPDC was operating. While the case did consider the more technical aspects of internal administration within RDS, it suffices here to examine how the evidence considered by the court has been reformulated into working principles for group company regulation.

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[264] Dorset Yacht Co Ltd v Home Office [1970] AC 1004
[265] *Vedanta Resources PLC* (n 261) 51
[266] ibid., [61]
[267] 'Vedanta & Konkola Copper Mines settle UK lawsuit brought by Zambian villagers for alleged pollution from mining activities' (Business and Human Rights Resource Centre) <https://www.business-humanrights.org/en/latest-news/vedanta-konkola-copper-mines-settle-uk-lawsuit-brought-by-zambian-villagers-for-alleged-pollution-from-mining-activities/> accessed 27 April 2021
[268] *Okpabi* (n 1)

At first instance, the High Court highlighted several *formal* factors why there was insufficient proximity between RDS and the claimants and why it would not be fair, just and reasonable to impose a duty.

Proximity: Mr Justice Fraser noted that RDS did not have direct shares in SPDC, but in Shell Petroleum NV which in turn held shares in SPDC which created a further degree of formal separation in respect to comparative cases such as *Chandler*.[269] Moreover RDS was not considered to be conducting operations in Nigeria and lacked the license to do so,[270] and in any case was not a member of the Joint Venture engaged in oil extraction. The Court was also convinced by the defendant's submission that the imposition of a liability would disregard the idea that proximity must apply to a limited group, following a dictum derived from the U.S. case of *Ultramares* which held that establishing proximity cannot be permitted if it creates an unlimited possibility for liability.[271]

Fair, just and reasonable duty implementation: Mr Justice Fraser posited that there is a distinction between UK tort negligence and strict liability statutes applicable in Nigeria. Because RDS was deemed to only operate as a formal holding company, it was deemed unreasonable for it to therefore provide further compensation in addition to any strict liability to which its subsidiary was liable in Nigeria.[272]

On appeal, in a decision of 2 to 1 in favour of the defendants, the Court of Appeal held that a RDS did not hold a duty of care to the claimants. The second and third elements of the *Caparo* test, proximity and whether it would fair, just, and reasonable to impose a duty were addressed.[273] It should be noted that the court employed these tests because *Okpabi* in the Court of Appeal predated the Supreme Court decision in *Vedanta*.

Proximity: Five factors[274] were examined which the claimants submitted, established the "arguable control"[275] which RDS was said to hold over SPDC's activities in Nigeria. As a

[269] Okpabi and others v. Royal Dutch Shell Plc and another [2017] EWHC 89 (TCC) [114]
[270] ibid.
[271] "…liability in an indeterminate amount, for an indeterminate time, to an indeterminate class." See: Ultramares Corporation v Touche (1931) 174 NE 441 [444] (Cardozo CJ)
[272] *Okpabi and others* (n 1) [115]
[273] The court was satisfied that foreseeability had been met. See: Okpabi (n 1) [84]
[274] These five factors were (1) the issue of mandatory policies, standards and manuals which applied to SPDC, (2) the imposition of mandatory design and engineering practices, (3) the imposition of a system of supervision and oversight of the implementation of RDS's standards which bore directly on the pleaded allegations of negligence, (4) the imposition of financial control over SPDC in respect of spending which, again, was directly relevant to the allegations of negligence and (5) a high level in the direction and oversight of SPDC's operations. Some of these factors overlap. See: *Okpabi & Ors* (n 1) [90-117]
[275] *Okpabi & Ors* (n 1) [86]

preliminary comment, Simon LJ noted the importance of distinguishing between a parent company which *formally* "…controls, or shares control of, the material operations on the one hand"[276] and another which *factually* "…issues mandatory policies and standards which are intended to apply throughout a group of companies in order to ensure conformity with particular standards".[277] The first factor considered this latter example in respect to a series of mandatory policies, reports and guidelines which were used to highlight factual control.[278] The second factor concerned whether there was further factual evidence of an imposed system of mandatory design and engineering practices.[279] The third factor concerned whether RDS had imposed a system of supervision and oversight to implement its own standards.[280] The fourth factor addressed whether RDS exercised financial control over that activities which have resulted in allegations of negligence.[281] The fifth factor addressed whether there was evidence of centralised management over matters of security.[282] For sake of brevity, it suffices to say that the court held that the evidence provided by claimants were only extracts of much larger documentary evidence and alone, and "…[e]ven putting it at its highest, the exiguous evidence of centralised assistance to SPDC…does not come close to supporting the sort of proximity on the basis of which the court might find a duty of care to exist in favour of the claimant."[283] Fair, Just and reasonable duty implementation: In a very brief examination, the court dismissed the arguments made by counsel.[284]

It is noteworthy that the decision in the Court of Appeal was not unanimous. Lord Justice Sales dissented on both aspects of *Caparo*. As regards the issue of proximity, he gave the following opinion (which on appeal would receive attention from the Supreme Court) that:

"If RDS can be shown to have taken over practical control of the management of the operation and security of the pipeline and facilities from SPDC, or to have exercised joint control with SPDC, it is well arguable that RDS would likewise be in a relationship of proximity with the claimants, or at least a significant number of them."[285]

[276] ibid., [89]
[277] ibid.
[278] ibid., [90-99]
[279] ibid., [100-108]
[280] ibid., [109-113]
[281] ibid., [114-115]
[282] ibid., [116-117]
[283] ibid., [126]
[284] ibid., [131]
[285] ibid., [142]

Lord Justice Sales expressed the opinion that it was "at least arguable that management structures of the group were intended to allow the exercise of executive power from group central management…"[286]

As regards the third criterion of *Caparo*, Lord Justice Sales made a series of points[287] which conveyed the view that when a parent company demonstrates superior knowledge, and acts in a manner that serves to convey its own interests through a subsidiary, there are grounds to hold that it may be fair to establish a duty. Lord Justice Sales also rejected the view of the High Court that the recognition of a duty on the basis of proximity between the parent company and claimants who were affected by pipe line leakages would offend the principles set out in the *Ultramares* case. In the present case of environmental harms, the damage to property alone served as a clear basis for the determination of a limited class of victims affected by the alleged negligence.

On appeal, and following on from their earlier overruling in *Vedanta*, the Supreme Court addressed three questions. These were whether the Court of Appeal had erred in its analysis of:

i) The principles of parent company liability
ii) The procedure for determining whether there is a determinable case – which warrants the hearing of further factual evidence
iii) The "overall analytical framework" of determining a duty and the utility of the *Caparo* test.[288]

For our purposes i) and iii) are the most relevant. The court reiterated a point made by Lord Briggs for the Supreme Court in *Vedanta,* that the implementation of group-wide policies at the parent company level could alone be sufficient to establish a duty of care.[289] Moreover, the court suggested that too much focus has been attributed to factual "control" in establishing a duty.[290] In his leading judgement Lord Hamblen stated that "…control is just a starting point", because:

"In a sense, all parents control their subsidiaries. That control gives the parent the opportunity to get involved in management. But control of a company and de facto management of part of

[286] ibid., [155]
[287] ibid., [172]
[288] *Okpabi* (n 1) [101]
[289] ibid., [145]
[290] ibid., [145]

its activities are two different things. A subsidiary may maintain de jure control of its activities, but nonetheless delegate de facto management of part of them to emissaries of its parent."[291]

Reiterating the view of Lord Briggs in Vedanta, Lord Hamblen stated that what is crucial to whether a parent incurs a liability is not even necessarily whether de iure or de facto control is held, but whether the parent "…holds itself out as exercising that degree of supervision and control…even if it does not *in fact* do so"[292]

The court reaffirmed its view that parent company liability is not a distinct category in tort[293] following on from similar conclusions in both *Vedanta*[294] and in *Unilever*[295] and it was incorrect for the court of appeal to suggest otherwise. It followed that the use of *Caparo* to establish liability was incorrect.[296] It considered the arguments of the appellants that RDS owed a duty of care through four different routes which were previously discussed in Vedanta. These were:

i) The parent company had taken over the management of a subsidiary in respect to a relevant activity.

ii) The parent company had offered defective advice and/or promulgated defective group-wide safety/environmental policies, which were implemented by a subsidiary.

iii) The parent company had promulgated group wide safety/environmental policies and taken steps to ensure their implementation at the subsidiary level.

iv) The parent company had insisted that it exercises a degree of supervision and control over a subsidiary.[297]

Lord Hamblen held that the first and third routes had been satisfied to permit a full hearing on whether RDS held a duty of care in a separate trial. It was suggested that the dissenting judgement of Lord Justice Sales (particularly at paragraph 155) was to be preferred in an overall analysis. It was stated that even where decisions are taken at the "corporate level" the fact that they rely on "prior advice" within vertical business structures within group structures where directors have broad ranging responsibilities can serve as evidence of group businesses that

[291] ibid., [147]
[292] ibid., [148]
[293] ibid., [150]
[294] *Vedanta Resources PLC* (n 261) [50]
[295] *AAA and Others* (n 232) [36]
[296] *Okpabi* (n 1) [151]
[297] *Okpabi* (n 1) [26]

"…are, in management terms, carried on as if they were a single commercial undertaking, with boundaries of legal personality and ownership within the group becoming irrelevant."[298]

viii) Begum v Maran (UK) Ltd

The very recent case of Begum[299] is mentioned briefly because *obiter dicta* within the judgment reveal the most recent thinking in the "forefront of the development of the law of negligence".[300] A claim was brought by a spouse on behalf of the deceased (Mr. Mollah) who died from a great fall.[301] Mr. Mollah sustained his fatal injuries while dismantling a ship in a Bangladeshi shipyard. The vessel was registered to Centarus Special Maritime Enterprise (CSME) whose entire stake[302] was held in shares by Maran Tankers Shipholdings Limited (MTS) an English domiciled company.[303] CSME entered into an agreement with MTS whereby the latter would provide shipbroking services for a group of vessels including the one from which Mr Mollah fell. Expert evidence found that the pertinent vessel belonged to a class to which safe shipbroking practices could only take place in China, despite the fact that the appellant intended to dismantle the ship in Pakistan where there are lower workplace safety standards.[304] The respondent who brought the claim, alleged that there was a contractual duty of care on the basis of the agreement between the two entities.[305] They argued that Maran was liable in negligence arising from a known danger in having the shipbroking service be performed in Pakistan and that Maran was liable for damage caused by a third party (the shipyard owner providing insufficient safety for Mr Mollah). It suffices to say here, that in a unanimous verdict, the court found that the claims could not be dismissed as fanciful and should be allowed to proceed on the merits.[306]

The *Obiter* of Lord Justice Coulson suggest that the Courts are aware of how quickly the law around negligence has developed. Despite ruling that the case should proceed, he recognised that the respondent who brought the claim faced "hurdles" in accessing a favourable remedy in tort.[307] One legal commentary suggests the Court's decision to prevent a defendant to rely on contractual clauses to discharge liability may be connected to the fact that "Companies are

[298] *Vedanta* (n 261) [51]
[299] Begum v Maran [2021] 3 WLUK 162
[300] ibid., (Coulston) [71]
[301] ibid., [13]
[302] ibid., [6]
[303] ibid., [7]
[304] ibid., [7]
[305] ibid., [38]
[306] ibid., [116]
[307] ibid., [64]

increasingly relying upon human rights focussed contractual obligations in their agreements".[308]

2.5. A Review of Current UK Precedent

This section offers an analysis and critical examination of the domestic liability which UK domiciled corporate groups currently face, their conceptualisation and what practical limitations the current law presents to claimants and corporations alike. In doing so, we then consider in the following section what lessons comparative European approaches may hold for UK law and if future reform is warranted. Three factors have been identified which hold importance to the domestic regulation of group companies, and which may be examined more closely for comparative purposes. These are a) the type of liability, b) the scope of liability, and c) the use of tort negligence in establishing liability.

2.5.1. Type of Liability

From the investigation above, cross-border tort litigation in UK domiciled group companies has pushed the boundaries of limited liability between separate entities in English jurisprudence. What was once a "…universal bedrock principle of corporate law" is now, in the context of corporate groups, "…increasingly subject to criticism."[309] Initial arguments in favour of applying an enterprise liability upon parent companies were roundly rejected on the basis of a *stricto sensu* interpretation of *Salomon* in cases such as *Adams*. The assumption that *Salomon* could not be dispensed with in the context of legal disputes emanating from corporate groups, Lipton notes, was the cause for seemingly unequitable judgements, contrary to wider public policy considerations.[310] However, the triad of cases above which have taken place since *Adams*, (*AAA*, *Vedanta*, and *Okpabi*) raise several questions. If parent companies can be held liable for the torts of their subsidiaries does separate legal personality still guarantee limited liability? Does the expansion of a tortious duty for parent companies in effect circumvent the formal unqualified protection of separate personality? Should corporate law in the UK continue to guarantee the applicability of limited liability in corporate groups, or should it be reformed or even replaced? Alongside limited liability, there are several forms of liability which are explored, these are, a modified limited liability, enterprise liability, and presumed liability.

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[308] 'Court of Appeal considers "unusual extension" to duty of care principles' (Norton Rose Fulbright, 24 March 2021) <https://www.nortonrosefulbright.com/en/knowledge/publications/f248bef3/court-of-appeal-considers-unusual-extension-to-duty-of-care-principles> accessed 7 June 2021

[309] Martin Petrin and Barnali Choudhury, 'Group Company Liability' (2018) 19 European Business Organization Law Review, 771

[310] *Lipton*, (n 77) 479

I) Reforming Limited Liability

Limited liability is still recognised as the operating principle in cross-border corporate liability cases. The English courts have repeatedly emphasised that a parent cannot be assumed to be held liable by virtue of its position as a parent alone.[311] On the other hand, the observation of the Supreme Court in *Vedanta* that factual evidence may allow a court to view a parent-subsidiary relationship "…as if they were a single commercial undertaking, with boundaries of legal personality and ownership within the group becoming irrelevant"[312] might lead to the view that limited liability may now be a qualified privilege in respect to separate legal entities in corporate groups. Another view may be to recognise that limited liability, is simply less limited for corporate groups, as MNCs/TNCs were unconceivable at the time when the principle was crystalised under *Salomon*. This has prompted Christian Witting to promote the notion of a modification of limited liability. This would be "two-pronged" and would rely on statutory provisions where a subsidiary is insolvent and faces claims of injury, that would make both parent company and *even* individual shareholders liable, for those claims.[313]

II) Enterprise Liability

Enterprise liability refers to a scenario where all of the entities within a corporate group are treated as a "…single enterprise responsible for the harm caused by any individual company".[314] This model of liability has been advocated by scholars such as Meredith Dearborn, and indicative of US corporate law, Konzernrecht[315] in German corporate law[316] and as seemingly advocated by John Ruggie's aforementioned UNGPs.[317] This assumption and the

[311] E.g., *Chandler v Cape* (n 206) 11; *Vedanta Resources Plc* (n 261) 51
[312] Vedanta Resources Plc and Konkola Copper Mines Plc (Appellants) v Lungowe and Ors. (Respondents) [2019] UKSC 20 [51].
[313] *Witting*, (n 2) 420
[314] *Petrin* and *Choudhury*, (n 309) 784
[315] Konzernrecht, refers to a set of company law and administrative law provisions contained in the 1965 Stock Corporations Act. While a few years ago, it may have served as a blueprint for reforms to UK corporate law, its limited utility in addressing cross border litigation has resulted in an entirely novel approach in Germany, which we consider in the following section. For an overview of Konzernrecht when implemented, see: Volker Bringezu, 'Parent-Subsidary Relations under German Law' (1973) 7 The International Lawyer <https://www.jstor.org/stable/40704818> accessed on 13 June 2021; For a discussion of the applicability of Konzernrecht in purely domestic matters today, see: Alexander Scheuch, 'Konzernrecht: An Overview of the German Regulation of Corporate Groups and Resulting Liability Issues' (2016) 13(5) European Company Law <https://kluwerlawonline.com/journalarticle/European+Company+Law/13.5/EUCL2016027> accessed on 9 October 2020; For a discussion on its development in the German courts, see: René Reich-Graefe, Reich-Graefe R, 'Changing Paradigms: The Liability of Corporate Groups in Germany' (2011) Volume 37 Connecticut Law Review 785, 785-817
[316] For a discussion of the types of enterprise liability, see: Meridith Dearborn, 'Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups' (2009) Volume 97(1) California Law Review 199, 220-230
[317] Gwynne Skinner, 'Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law, 72 Wash. & Lee L. Rev. 1769 (2015), 1782

general utility of enterprise liability however may (and has been) brought into question.[318] Firstly, enterprise liability is often associated with its reliance upon veil piercing to grant a legal remedy. This has been limited significantly within the UK courts[319] and effectively ruled out in cases of parent company liability. This in Witting's view, is because courts struggle with multi-faceted enterprises as a single unit of accountability.[320] Its reintroduction is unlikely and would require a deviation from judicial precedent through statutory intervention. This course of action is ill-advised, given the common law's favouring of a hermeneutic of continuity whereby codification follows (rather than revolts against) judicial precedent. Second, enterprise liability approaches are of limited use in cross-jurisdictional disputes unless accompanied by extra-territorial provisions that give standing to claimants.[321] Moreover, even where claimants do have standing, domestic enterprise liability provisions can still be rendered moot if the applicable law is that of a foreign jurisdiction which no comparative legal provision.[322]

III) Presumed Liability

A third approach is the notion of presumed liability. Martin Petrin and Barnali Choudhury have noted that this appears to be an option that has been advocated by the UN Committee which has been drafting the Business Human Rights Treaty.[323] The presumed liability is established in numerous ways, with two different approaches within the French and Swiss due diligence models. We will consider this notion in further detail in the next chapter.

Whilst all these suggestions offer something in the way of a possible alternative, what becomes clear is that the current legal regime does not provide sufficient guidance over corporate liability. This may advance the argument that a statutory framework is warranted. Without one, it would appear that the courts have had to reconcile past precedent with just remedy when viewing two separate entities as one undertaking. Whether alternative forms of liability, enshrined in statute offer clarity, we will consider through a comparative study of current and emerging European approaches in the following section.

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[318] ibid., 1822-1825
[319] Most recently in *Prest* (n 217)
[320] *Witting*, (n 2) 16
[321] For example, the Alien Tort Claims Act in the US. The applicability of this law was significantly reduced in Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013), where the Supreme Court found that the act requires the court to apply international legal norms, over domestic laws.
[322] For example, the only cross border case in Germany Jabir and others v. KiK Textilien und Non-Food GmbH (Case No. 7 O 95/15), could not consider the applicability of domestic statutory enterprise liability, because the applicable law of Pakistan, which followed UK common law, had no notion of enterprise liability.
[323] *Petrin & Choudhury*, (n 309) 784

2.5.2. Scope of Liability: Control v Special/Economic Relationship

The scope of liability refers to the sphere of influence over which a corporation is held responsible and how this is examined. Bueno and Bright have highlighted the view of Sheldon Leader that the scope of parent company liability has been conceptualised by the UK courts in two ways, one traditional, and the other modern.[324]

A traditional understanding has viewed the construction of group liability through *control,* i.e., what are the *de iure* and *de facto* relations between two corporate entities. This example, Bueno and Bright suggest, is exemplified by the Court of Appeal in *Okpabi.*[325] It may be said that limited liability and separate legal personality have continued to operate under this paradigm because the control which a parent *exerts* over a subsidiary is the scope by which a liability offence is established. A limitation in this traditional approach concerns how it accounts for the complex nature of corporate practice and wider value chains, whereby even where there is a lack of formal control, (i.e., a parent acts only as a holding company), subsidiaries still depend on expertise, and internal protocols, which are promoted at a wider corporate group level.[326]

A modern understanding, Leader suggests can also be seen within English jurisprudence. This is that "the expectation that control *should* be exercised by the former over the activities of the latter"[327] through a *special relationship*[328] is instead used to establish fault. Bueno and Bright suggest that the four *indicia* of Lady Arden in *Chandler* represent this second approach.[329] Although reliance on the *indicia* were cast aside by the Supreme Court in *Vedanta*, it would appear that the Supreme Court has maintained its focus upon examining the wider relationships which govern liability in *Okpabi*. Lord Hamblin's view that "control is just a starting point"[330] and that a parent's liability may be determined if it "…holds itself out as exercising that degree of supervision and control…even if it does not *in fact* do so"[331] may be reiterated in favour of this point.

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[324] Sheldon Leader, 'Parent Company Liability and Social Accountability: Innovation from the United Kingdom' in Amine Ghenim and others (eds) *Groupes de Sociétés et Droit du Travail* (Dalloz 2019) 113 (non visi)
[325] Nicolas Bueno, and Claire Bright, "Implementing Human Rights Due Diligence Through Corporate Civil Liability" (September 8, 2020). International & Comparative Law Quarterly, 2020, 17
[326] E.g. In the *Unilever* case, the court considered the relevance of UTKL's reliance on advice provided by consultants who were retained by Unilever. Even in scenarios where a parent is a mere holding company, background factual evidence such as this may serve as incremental in establishing the cause of a mass tort. See: AAA and others (n 232) 31
[327] *Bueno and Bright*, (n 325), 808
[328] ibid., 808
[329] ibid.
[330] *Okpabi & Others* (n 1) [145]
[331] ibid., [148]

Perhaps this secondary approach offers a broader and more nuanced scope in establishing group liability by examining the internal practices and behaviour of a group, which emanates from their *economic relationships*. While this may provide flexibility and nuance for the courts, there is no statutory definition or guideline as to what constitutes a special or economic relationship, which opens a court to inconsistent methodologies. For example, The Court of Appeal in *Okpabi*, examined five factors which entailed a mix of different objects of consideration.[332] Without a framework in place, there is no standard by which the scope of liability is examined. This may explain why in *Vedanta,* Lord Briggs, approved of the view expressed by Asplin J[333] that consideration of the relevant factors governing a given corporate relationship must be done on a case-by-case basis.[334] However, as we learned in our investigation of *Salomon,* a case-by-case legal basis is undesirable in respect to wider business-related policy considerations. It creates uncertainty in the application of the law, which can stifle investment and hinder access to justice. In the following chapter, we will consider whether approaches to the scope of liability in current European approaches address these issues.

2.5.3. Tort Negligence in Establishing a Duty of Care

Currently, liability of a UK parent company is couched within the general principles of tort law. In *Vedanta*, the Supreme Court rejected the view that such liability was novel. Instead, parent company liability was understood to fall under the pre-existing category of tort negligence in-line with the precedent set in *Dorset Yacht*.[335] Two issues that are seemingly raised by this legal precedent. First, it may be questioned whether tort negligence best reflects the factual circumstances concerning labour practices, human rights violations, and environmental damage where a duty may arise. A second issue concerns whether the procedural hurdles in establishing tort are too onerous on claimants seeking remedy.

Turning to the first of these points, the question whether *Dorset Yacht* negligence optimally represents the duty which parent companies hold has been considered by Gabriel Tan Jin Hsi. He has noted that negligence in that case concerned the imposition of a liability on the basis of a "pure omission"[336] on part of a defendant when in a position of control over another that has caused harm.[337] While Tan Jin Hsi has rightly focused on an orthodox interpretation of

[332] *Okpabi & Others* (n 1) 90-117
[333] See: Tesco Stores Ltd v Mastercard Inc [2015] EWHC 1145 (Ch) (Asplin J) [73]
[334] *Okpabi & Others* (n 1) 131
[335] Home Office (n 264) (Dorset Yacht Case)
[336] Gabriel Tan Jin Hsi, 'Vendata Resources v Lungowe: A Pre-Existing Pocket of Negligence, or a Novel Scenario?' (2019) 4(2) Cambridge Law Review, 178 < https://d7f88eea-b31a-4add-844f-0416859d1953.filesusr.com/ugd/fb0f90_40692a1488254e9c9a50c4b6dea9a0bf.pdf> accessed on 29 July 2020
[337] ibid., 179

negligence in *Dorset Yacht,*[338] its relevance here pertains to how it has been interpreted in *Vedanta* and applied to the corporate group context. The categorisation of negligence as a pure omission may appear limited in respect to the variety of fact patterns relevant to a liability claim in corporate groups. While all parent companies have some degree of control over their subsidiaries, caselaw appears to have conceptualised the possibility of liability in instances that go beyond where a parent has caused harm by omission alone. Indeed, the prevailing jurisprudence, mentioned above (as in *Unilever* and *Okpabi*) concerns whether a corporate entity believes itself to hold responsibility, and/or whether it has provided marginal assistance that could be relied upon by its subsidiaries that has led to a subsequent harm. This does not fit neatly with the description of negligence as a pure omission.

Another issue concerns whether general tort provides an efficient means for judicial examination of a cross-border liability claim. Tan Jin His has opined that reliance on traditional negligence, may create too many barriers for claimants who must establish "fairness, justness and reasonableness" in order to establish a liability, to the point where it becomes "otiose". [339] Jin His has entertained but not gone so far as to promote the creation of a novel tort in consideration to the view that it would have "implications" for the structures of MNCs/TNCs.[340] However, the most recent case of *Begum* seemingly gives further validation to the cause for a novel tort, given Lord Justice Coulson's recognition that claimants face considerable legal hurdles in establishing liability. There may be an overall benefit in establishing a new tort. Corporate Governance could execute a more effective due diligence in confidence of the scope of their legal liability, claimants would benefit from a clearer legal procedure in making a claim, and the courts would not be forced to shoehorn novel scenarios into pre-existing category offences.

Part III: Comparative Investigation: Due Diligence Obligations and Group Company Liabilities in European Countries

3.1. European Statutory Due Diligence Models

In the last few years, several European countries have faced similar questions about group company regulation. These issues have been raised by increased awareness and explicit support for soft law mechanisms which raise awareness of human rights abuses abroad, increased

[338] Where he considers that cases related to Dorset Yacht include the additional factual element where control is accompanied with an element of physical custody.
[339] *Tan Jin Hsi*, (n 336), 183
[340] ibid., 183

public pressure from NGOs and civil society, as well as jurisdictional and procedural difficulties in providing access to justice in domestic litigation. One domestic model is slowly emerging. This is a statutory liability regime that establishes a corporate liability through a duty to conduct an internal due diligence. Such models may be observed in France, Switzerland, Germany who have developed and codified their own parental duty of care into statutory law, which from a comparativist's perspective bears noteworthy similarities to one another, and to the UK's judicially developed approach.[341] This section serves as a comparative investigation to examine whether any one of these approaches might represent one possible pathway for future UK reform. We will consider the French, Swiss, and German models and consider what practical and conceptual strengths and limitations they each have.

3.1.1. France: The Duty of Vigilance

In 2017, France adopted a new law called the duty of Vigilance[342] ("la loi relative au devoir de vigilance").[343] This in effect established a set of hard laws to address group company regulation for cross-border torts through an examination of their due diligence records. The law introduces a faults-based liability regime under domestic statutory law.

i) Legal Obligations:

The Duty of Vigilance applies to French domiciled companies with a minimum of 5,000 employees or 10,000 employees worldwide.[344] It is thought that Article 1 of the law provides that at the end of two consecutive financial years, qualifying companies are required to carry out a human rights due diligence.[345] A parent company must conduct a 'vigilance plan' over subsidiaries which it controls, as well as suppliers and sub-contractors with which either the parent or a subsidiary has "an established commercial relationship."[346]

Both concepts of control and commercial relationship are given statutory definitions. Control is defined within the French Commercial Code as a power which enables a company to 'have

[341] *Palombo*, [n 3] 278
[342] *Bueno and Bright*, (n 325), 801; Elsa Savourey, and Stéphane Brabant, 'The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since Its Adoption' (2021) 6(1) Business and Human Rights Journal, 141 <https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/abs/french-law-on-the-duty-of-vigilance-theoretical-and-practical-challenges-since-its-adoption/0398716B2E8530D9A9440EEB20DB7E07> accessed on 17 March 2021
[343] Loi no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.
[344] Louis B. Buchman, 'The French Law on Duty of Vigilance. Business and Human Rights – From Soft Law to Hard Law, the French Experience' (2021) 2 Zeitschrift für Internationales Wirtschaftsrecht, 73-75 <https://www.lexforce.paris/api_website_feature/files/download/14200/art_buchman_iwrz_2-2021_-_the_french_law_on_the_duty_of_vigilance.pdf> accessed May 5 2021
[345] Art. L. 225-102-4. – I.
[346] *Buchman*, (n 344) 73

decision-making power, in particular over the financial and operational policies of another entity'.[347] Bueno and Bright have noted that this notion of control is defined broadly, by virtue of either the *de iure*, *de facto* or contractual nature of the relationship between two or more entities.[348] Likewise, commercial relationship is an established concept within both French statutory law[349] and caselaw[350] which is "not conditioned by the existence of a permanent and continuous exchange between parties".[351] Given the seemingly broad context of commercial relationships perceived under the law, qualifying companies must conduct a risk identification for the prevention of "…severe violations of human rights and fundamental freedoms, serious bodily injury or environmental damage or health risks resulting directly or indirectly from the operations of the company and of the companies it controls."[352] A vigilance plan is composed of the following key components:

1) A risk-mapping exercise which parent companies use to identify risks associated with their economic activity.
2) A due diligence which is carried out regularly over subsidiaries and suppliers (the latter only where there is a steady stream of business).
3) A whistleblowing and "up-the-ladder"[353] reporting mechanism that enables local unions to identify and raise awareness of issues that may result in harm, and;
4) A set of measures to implement and monitor the vigilance plan.[354]

Compliance with vigilance requires company directors to include their vigilance plan and corresponding implementation report in an annual management report which is presented at the annual general meeting of company shareholders. This is filed with the companies registry

[347] *Bueno and Bright,* (n 325), 802
[348] ibid., 802
[349] N.B. Article L.420-2, and Article L.442-6 of the French Commercial Code. See: 'Decision n ° 2017-750 DC of 23 March 2017 - Observations du Gouvernement' (*Conseil Constitutionnel*, 23 March 2017) <https://www.conseil-constitutionnel.fr/les-decisions/decision-n-2017-750-dc-du-23-mars-2017-observations-du-gouvernement> accessed 6 May 2021
[350] N.B. Cass. Com., 15 septembre 2009, n°08-19200, Bull. IV, n°110 See: 'Decision n ° 2017-750 DC of 23 March 2017 - Observations du Gouvernement' (Conseil Constitutionnel, 23 March 2017) <https://www.conseil-constitutionnel.fr/les-decisions/decision-n-2017-750-dc-du-23-mars-2017-observations-du-gouvernement> accessed 6 May 2021
[351] Sandrine Richard, 'La relation commerciale établie peut résulter de la succession de contrats ponctuels - Cass. com., 15 septembre 2009, pourvoi n° 08-19.200' (La Lettre des Réseaux, 10 November 2009) <https://www.lettredesreseaux.com/P-1384-451-A1-la-relation-commerciale-etablie-peut-resulter-de-la-succession-de-contrats-ponctuels-cass-com-,-15-septembre-2009,-pourvoi-n-08-19-200.html> accessed 14 May 2021
[352] Art. L. 225-102-4. – I.; 'French Duty of Vigilance Law – English Translation' (Business and Human Rights Resource Centre, 14 December 2016) <https://www.business-humanrights.org/en/latest-news/french-duty-of-vigilance-law-english-translation/> accessed 6 May 2021
[353] *Buchman,* (n 344) 73
[354] ibid., 73

as a publicly available document. In 2019, 83 vigilance plans were made publicly available[355] out of the approximately 150 multinational companies thought to be officially subject to the new duty.[356] However, this number has been disputed.[357]

ii) Remedial Mechanisms:

The duty of vigilance law has two mechanisms that makes it possible to seek a remedy in the event of a claim. In the original draft of the law, a third mechanism in the form of a civil fine was proposed. However, a decision of the constitutional court held that it was unconstitutional.[358] Below, we explore and consider both the practical and conceptual elements of both remedial mechanisms.

A) Civil Liability Claim.

Article L.225-102-5 of the FCC creates an *ex-post* route for a civil liability action if damage has been sustained. It contains a mix of requirements. For an action to have the prospect of success, it requires three procedural elements (i) the harm to be remedied is only the one which would have been averted, had the right measures been adopted. (ii) There must exist a direct causal link between the harm and a defendant company's shortcomings (a step comparable to that of proximity in UK caselaw). (iii) only the victims of the harm have standing to sue.[359]

This first mechanism acts as a "faults-based liability".[360] This means that a judicial determination of liability, concerns whether an actionable harm "…could have bene avoided had the company complied with its obligation of vigilance."[361] Liability is constructed within general principles of French tort law. In French tort, a natural or legal person can be liable for their own fault, or for the fault of someone else.[362] The liability itself is establishing in three steps where there is damage, a breach of obligations, and causation between breach and damage.[363] The claimant has the burden of proof to demonstrate that a harm has been done.[364]

One strength with this mechanism, is its relative simplicity. Questions regarding how liability are conceptualised are seemingly averted by taking it as read that qualifying companies bear a

[355] ibid., 73
[356] 'Decision n ° 2017-750 DC of 23 March 2017 - Observations du Gouvernement' (conseil-constitutionnel, 23 March 2017) <https://www.conseil-constitutionnel.fr/les-decisions/decision-n-2017-750-dc-du-23-mars-2017-observations-du-gouvernement> accessed 6 May 2021
[357] c.f. (n 305)
[358] *Stéphane Brabant and Elsa Savourey*, (n 186) 1-2
[359] *Buchman,* (n 344) 74
[360] *Bueno and Bright,* (n 325) 802
[361] ibid., 803
[362] "*Responsabilité pour faute"* and "*responsabilité du fait d'autrui",* See: *Brabant and Savourey*, (n 358)
[363] *Bueno and Bright*, (n 325) 803; *Brabant and Savourey*, (n 186)
[364] *Buchman,* (n 344) 73

unique obligation to give public account over their internal process of determining risk and comparing it to the record of their conduct. Nevertheless, application of the law still raises several theoretical and practical issues.[365]

One issue raised by Bueno and Bright relates to the point in a chain of events where liability is established. If a company is held under this mechanism to be liable for failing to "*effectively*"[366] implement their due diligence plan this creates what Bueno and Bright describe as an "obligation of means".[367] From the perspective of a claimant, building a case may be difficult, given that documentary evidence is held by the defendant, and may not be available for scrutiny in a preliminary hearing. In addition to this observation, it is submitted that an intention-focused liability suggests that culpability lies not in the substantive merits of a claim. A defendant is not liable for failing to prevent a given harm from happening. The harm in question is apparently irrelevant. Instead, the manner of the approach taken by the company is under scrutiny. This may undermine the rationale behind liability in hypothetical situations where a company can prove that it was aware of a possible risk, and even took substantive steps to reduce a given harm, but in a given context could not ensure a desirable outcome. This creates a greater scope for judicial interpretation which may undermine the advantages which arguably underly a statutory framework model. This is because a sense of proportionality and natural justice in such a liability plays a role in the legitimacy that it commands within the courts.

Another issue related to the above concerns judicial interpretation. If a company wishes to minimise liability for externalities it may adopt different approaches in carrying out a due diligence. How should a court interpret less detailed due diligence statements over in-depth ones? This depends on whether a court prioritises factual evidence or interpreted conduct. If a Court prioritises factual evidence, it might be more comfortable in establishing liability by relying on more detailed due diligence reports to be satisfied that sufficient control over a commercial relationship was exerted and responsible for a given a harm. If so, companies may be incentivised to adopt a more laissez-faire approach to diligence records. However, this arguably undermines the purpose of the law. This in effect creates a catch-22 both for the courts, and for directors aiming to execute their duties to the corporate group in a reasonable manner. Nevertheless, this issue is raised by the mechanism's novelty. It remains to be seen how such questions will be addressed by future caselaw.

[365] *Elsa Savourey & Stéphane Brabant*, (n 340), 151
[366] *Bueno and Bright*, (n 325), 803
[367] ibid., 803

As a corollary, another smaller issue that has been raised by the law's relative nascence relates to how it would interact with recognised principles of jurisdiction within private international law.[368] This will likely change with the development of caselaw.

B) Enforcement Mechanism for Injunctive Relief

Under article L.225-102-4 of the FCC,[369] claimants may also seek injunctive relief from the courts where a duty-bound company fails to meet its statutory obligations. The enforcement mechanism has a two-step process. (i) a notice to comply request followed by (ii) an application for injunctive relief.[370] A claim for injunctive relief may be sought three months after a notification has been made that a company is not complying with its own vigilance plan.[371] The law states that a judge has the competence to fine an offending corporation up to a maximum of 10 million Euros. Louis B. Buchnan has opined that this element is crucial in giving the provisions some "teeth".[372] A successful claim will require a company to make periodic penalty payments.[373] In 2019 alone, seven notices have been made under this procedural mechanism.[374] Two have been made against the oil company Total, as well as claims against Teleperformance, Suez and Casino, XPO Logistics Europe, and EDF.[375] Three cases have reached the courts.[376] Of these brief mentions should be made of the *Total case*.

The *Total* case was the first litigation to emerge under the French Duty of vigilance[377] utilised this second injunctive relief mechanism.[378] The case concerned a land acquisition and resettlement framework between the oil company Total and a group of vegetable farmers from Uganda. Dorothy Mbabazi, the owner of a 9-acre plot was one of several individuals notified that access to her land would be blocked by Total's operations and was offered a choice of cash settlement or a land-for-land deal.[379] Selecting the latter, Mbabazi waited two years before

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[368] *Savourey and Brabant* (n 342) 151
[369] *Bueno and Bright,* (n 325), 802
[370] *Savourey and Brabant* (n 342) 149
[371] Art. L. 225-102-4. – II.
[372] *Buchman,* (n 344) 74
[373] Or in French, *Astreintes*. See: *Brabant and Savourey*, (n 186)
[374] *Savourey and Brabant*, (n 342) 149
[375] *Buchman,* (n 344) 74
[376] ibid., 74
[377] Angelique Chrisafis, "French NGOs and local authorities take court action against Total" *The Guardian* January 27, 2020, https://www.theguardian.com/world/2020/jan/27/french-ngos-and-local-authorities-take-court-action-against-total. See: Les Amis de la Terre France to the January ruling: Les Amis de la Terre France, "Affaire Total Ouganda: nous faisons appel dans un contexte de justice au ralenti," March 25, 2020, https://www.amisdelaterre.org/affaire-total-ouganda-une-nouvelle-etape-malgre-une-justice-au-ralenti/
[378] *Bueno and Bright,* (n 325), 802
[379] 'Ugandan farmers take on French oil giant in game-changer case for multinationals' (Business and Human Rights Resource Centre, 10 January 2020) <https://www.business-humanrights.org/en/latest-news/ugandan-farmers-take-on-french-oil-giant-in-game-changer-case-for-multinationals/> accessed 6 May 2021

being offered a comparably worse plot of land despite Total's internal framework specifying that compensation should come prior to the acquisition of land.[380]

Launching a claim in the French high courts under the vigilance law, the applicants contended that Total's vigilance plan did not identify the potential negative human rights impact of its projects and did not put into place measures to mitigate the risks.[381] However at the time of writing, the merits of this case have not been ruled upon. In January 2020, the High Court of Nanterre ruled that it did not hold the competence to hear the case, but rather should be pursued in the commercial court.[382] On appeal, this was affirmed by the Versailles Court of Appeal.[383] The High Court in February recently ruled on its jurisdiction to hear the case, although this has now been appealed by the defendant company.[384]

This second relief mechanism also has certain practical limitations. While procedural difficulty may be a natural consequence of novel legal mechanisms that have yet to be broken in, it demonstrates a degree of inflexibility that comes as part of any statutory framework. This second mechanism has been described as complex[385] and the recent ruling in *Total* may serve as a confirmation of this view. One possible reason for this difficulty may be the same highlighted over the UK's Modern Slavery Act. Both laws lack a government body to implement the Vigilance Law and the UK's Modern Slavery Act respectively.

Another practical issue highlighted by Savourey and Brabant concerns the scope of application of the law more generally. There is no formal means of identifying which companies are subject to the law. A successful claim would need to demonstrate that a defendant is subject to the law's scope. Factors such as legal registered domicile, qualifying corporate form and total employed members are not always publicly available.[386] A recent report by two French NGOs has suggested that the law should apply to 265, rather than the 150 highlighted above. Of those

[380] ibid.
[381] *Buchman,* (n 344) 74
[382] 'Devoir de vigilance: Commentaire de la decision du tribunal judiciaire de Nanterre du 30 janvier 2020' (*Gossement Avocats*, 13 February 2020) <http://www.arnaudgossement.com/archive/2020/02/07/devoir-de-vigilance-la-loi-du-27-mars-2017-a-t-elle-pour-obj-6210940.html> accessed 16 May 2021
[383] CA Versailles, 14e ch., 10 déc. 2020, n° 20/01692; For case see: 'Affaire Total Ouganda: la cour d'appel de Versailles renvoie au tribunal de commerce' (*Les Amis de la Terre* France, 10 December 2020) <https://www.amisdelaterre.org/wp-content/uploads/2020/12/decision-ca-versailles-total-ouganda.pdf> accessed 15 May 2021
[384] Lucie Chatelain, 'First court decision in the climate litigation against Total: a promising interpretation of the French Duty of Vigilance Law' (*Business and Human Rights Resource Centre*, 25 Mar 2021) <https://www.business-humanrights.org/en/blog/first-court-decision-in-the-climate-litigation-against-total-a-promising-interpretation-of-the-french-duty-of-vigilance-law/> accessed 17 June 2021
[385] *Buchman,* (n 344) 74
[386] *Savourey and Brabant*, (n 342) 142

identified to be likely subject to the law, 27% had not complied and produced a plan.[387] Nevertheless, this limitation may be offset by the view expressed by Buchman that this additional legal mechanism has created greater access to judicial proceedings for claimants.[388] The seven recent cases highlighted above might evidence this position.

3.1.2. Switzerland: The Responsible Business Initiative

The approach taken in Switzerland both in respect to Group company regulation and parent company liability has been far from straightforward. Proposed domestic legislation known as the "responsible business initiative" would have introduced a strict liability regime for parent companies had it not failed to become codified law. The initiative was noted for providing domestic remedies and obligations that were constructed through the application of international legal standards in domestic law, rather than the revision of domestic law to meet those same international frameworks. For example, its due diligence obligation has been noted to use terms such as "business relationship" which reflects the language utilised by the UNGPs.[389] A counterproposal made by the Swiss federal government has now been adopted and serves as the governing provision for inter-group liabilities. Both the failed initiative and counter proposal which now serves as current law in Switzerland may provide valuable subjects for comparative study, in respect to future UK reform.

i) The Responsible Business Initiative

In Switzerland, the Responsible Business Initiative[390] introduced a set of due diligence obligations and statutory corporate liabilities for Swiss group companies. The proposals were made through the popular initiative constitutional mechanism[391] which enables private citizens (in this case the Swiss Coalition for Corporate Justice, a consortium of more than eighty Swiss-based NGOs)[392] to request constitutional amendments to their federal constitution.[393]

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[387] ibid.,143
[388] *Buchman,* (n 344) 74
[389] Chiara Macchi, and Claire Bright, 'Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation' (October 22, 2019), Forthcoming in M. Buscemi, N. Lazzerini and L. Magi (eds), *Legal Sources in Business and Human Rights - Evolving Dynamics in International and European Law* (Brill, 2020), 16
[390] *Bueno and Bright,* (n 325), 803
[391] Popular Initiative has existed since the creation of the Swiss federal state in 1848. So far, 313 such initiatives have been made under this mechanism. 'About the Initiative' (*Swiss Coalition for Corporate Justice*, 27 June 2018) <https://corporatejustice.ch/about-the-initiative/> accessed 19 May 2021
[392] Nicolas Bueno, 'The Swiss popular initiative on responsible business: From responsibility to liability' in Liesbeth Enneking, Ivo Giesen and others, *Accountability, international business operations, and the law: providing justice for corporate human rights violations in global value chains*. (Routledge, 2019) 11
[393] 'About the Initiative', (*Swiss Coalition for Corporate Justice*, 27 June 2018) <https://corporatejustice.ch/about-the-initiative/> accessed 19 May 2021

Following the collection of 120,000 signatures[394] it entered the process of becoming formal legislation. The process ran in parallel to the Swiss Governments development of a National Action Plan (NAP) to implement John Ruggie's aforementioned UNGPs.[395] On 29 November 2019, the Responsible Business Initiative was narrowly rejected in a national referendum. Although it won the popular vote by the narrowest of margins at 50.7%, a majority of Swiss cantons voted against adoption. Although both socio-political and procedural[396] discussions about the initiative are worthy of study, and have received some treatment, we are primarily concerned with the substantive elements of the proposal itself, and what comparative lessons it might offers the UK landscape.

A) Due Diligence

The Responsible Business Initiative itself proposed the adoption of a new constitutional provision – Article 101a of the Swiss constitution. This included three key provisions that addressed mandatory due diligence, liability, and applicable law.[397] For our purposes we are concerned only with the first two elements.[398]

The first element proscribed a due diligence obligation under Art 101a(2)(b). The provision understood due diligence as an obligation for companies to:

"*..identify real and potential impacts on internationally recognized human rights and the environment; take appropriate measures to prevent the violation of internationally recognized human rights and international environmental standards, cease existing violations, and account for the actions taken."*[399]

The due diligence provision, appeared to focus on a basic notion of control in both a *de iure* and *de facto* sense, the scope of which applies broadly to both environmental and human rights considerations. The draft stated that:

"These duties apply to controlled companies as well as to all business relationships. The scope of the due diligence to be carried out depends on the risks to the environment and human rights.

[394] ibid.
[395] *Macchi and Bright*, (n 389) 15
[396] 'Stages of The Responsible Business Initiative In Parliament' Swiss Coalition for Corporate Justice SCCJ, https://corporatejustice.ch/stages-in-parliament/
[397] *Bueno*, (n 392) 13
[398] For a discussion on jurisdictional matters and applicable law, see: Dalia Palombo, (n 3) 268-270
[399] *Bueno*, (n 392) 12; See also: 'Details About The Initiative - The Initiative Text with Explanations' (*Swiss Coalition for Corporate Justice*, 27 June 2018) <https://corporatejustice.ch/> accessed on 19 May 2021

In the process of regulating mandatory due diligence, the legislator is to consider the needs of small and medium-sized companies that have limited risks of this kind."[400]

The construction of due diligence obligations under the Swiss initiative is seemingly applied with a broad brush. There is little distinction, between instances where a company has directly caused an adverse impact, contributed to an adverse impact, and adverse impacts that are "directly linked" to a business relationship that arises from a given group company's undertakings.[401]

B) Strict Liability

The second element of the Swiss initiative contained a specific domestic liability regime for Swiss companies whose corporate groups contain foreign-based subsidiaries found to have caused harm. The liability would have applied to domestic parent companies for "…extraterritorial damages caused by the companies that they control." There are two key elements in respect to this liability provision, these are, the construction and scope of the liability itself, and the procedural burden of proof. Under Article 101a(2)(c):

"Companies are also liable for damage caused by companies under their control where they have, in the course of business, committed violations of internationally recognized human rights or international environmental standards. They are not liable under this provision however if they can prove that they took all due care per paragraph b to avoid the loss or damage, or that the damage would have occurred even if all due care had been taken."[402]

This provision would have created a strict statutory liability[403] for Swiss parent companies for extra-territorial harms caused by subsidiaries. As has been noted by Nicolas Bueno, this appears to be modelled upon a pre-existing employer's/principal liability contained in the Swiss Code of Obligations.[404] This liability applies to the controlling company[405] based on the 'economic control' it exercises over its subsidiaries. Although the explanatory note provided some criteria for identifying instances of economic control, including market position, and

[400] ibid., 12; See also: 'Details About The Initiative - The Initiative Text with Explanations' (*Swiss Coalition for Corporate Justice*, 27 June 2018) <https://corporatejustice.ch/> accessed on 19 May 2021
[401] ibid., 13
[402] ibid., 13
[403] As opposed to a fault-based duty in France, and a general tortious duty in the UK.
[404] *Bueno*, (n 392) 14
[405] ibid., 13

contractual provisions[406] Bueno and Bright have suggested that in the absence of a statutory definition for economic control, the drafted provision as it was proposed would have created a degree of "legal uncertainty" in determining if a company could be said to exert the economic control necessary for establishing possible liability.[407] A curious conceptual element of the liability was that it appeared to create a "…direct human rights obligation"[408] for companies who:

"…must respect internationally recognized human rights and international environmental standards, also abroad; they must ensure that human rights and environmental standards are also respected by companies under their control."[409]

As mentioned in Chapter I of this thesis contemporary BHR scholarship has recently entertained the possibility of a direct human rights obligation on private bodies such as MNCs through a business human rights treaty. The proposition however is not without controversy. Nadia Bernaz has argued that corporate accountability in domestic law may be achieved through the adoption of binding international agreements such as the aforementioned business Human Rights Treaty above.[410] Although there is a lingering question whether private bodies should be subject to binding international obligations, both Bernaz, and Irene Pietropaoli, have argued that international treaties in the past have created human rights obligations for private actors.[411] Although the viability of such a proposal is inconclusive, it may suggest that UK domestic law may be influenced by its future commitment to new international mechanisms.

The second element of the liability provision, concerns burden of proof. As has been noted by several commentators,[412] the liability provision would have placed the burden of proof on defendant rather than claimant. In other words, there would be a presumption of liability which depended not on the claimant using factual evidence to substantiate a claim. Instead, a parent

[406] 'Rapport explicatif de l'initiative populaire fédérale «Entreprises responsables: pour protéger l'être humain et l'environnement' (*Swiss Coalition for Corporate Justice*), 43 <https://initiative-multinationales.ch/wp-content/uploads/2018/05/20170912_Erl%C3%A4uterungen-FR.pdf> accessed 17 May 2021, in *Bueno and Bright*, (n 325) 804-805
[407] ibid., 805
[408] *Macchi and Bright*, (n 389) 16
[409] ibid., 16
[410] *Bernaz*, (n 39); See also: Claire Methven O'Brien, 'Preliminary Draft Text for a Business and Human Rights Treaty Based on the UN Guiding Principle' (SSRN, 7 June 2020) <https://ssrn.com/abstract=3644966> accessed 15 May 2021
[411] E.g. UN Convention on the Law of the Sea 1982. See: Nadia, Bernaz, and Irene Pietropaoli, 'Developing a Business and Human Rights Treaty: Lessons from the Deep Seabed Mining Regime Under the United Nations Convention on the Law of the Sea.' (2020) Business and Human Rights Journal 5, no. 2, 200–220
[412] See: *Bueno* (n 392) 13; *Bueno and Bright* (n 325) 16; *Palombo*, (n 3) 277; *Macchi and Bright*, (n 389) 16

company is assumed to be liable, unless it can demonstrate that it had taken sufficient care that it cannot be held to be responsible for the cause of action.

Palombo opines that this element made the original Swiss proposals distinct from parallel models in competing European jurisdictions, in respect to access for justice, by lowering the number of procedural hurdles faced by claimants. It may raise questions about internal practice from a corporate governance perspective. If a corporate group diligently monitors its relationship to its subsidiaries, can it be satisfied that it has sufficient evidence to disqualify claims of liability? This highlights a possible limitation with the Art 101a due diligence provision which did not create distinctions between different legal and factual relationships. It may moreover suggest that a Swiss parent can still be held liable in factual instances where a claim would have failed if the burden were held by the claimants. In any case, knowledge of whether such a provision would have been accepted let alone effective, is obscured by the historical reality of the failure to adopt the initiative.

ii) The Current Framework

An alternative "counter-proposal" was adopted by the Swiss parliament on 14 June 2018. This introduced due diligence obligations for parent companies, but with no accompanying legal liability. Because this is the current law, it is also briefly mentioned for comparative purposes.

Under the current law, Swiss-based multinational corporations with 500 employees or more, and a "high turnover threshold"[413] need only conduct an appropriate due diligence to identify risks associated with the activities of their subsidiaries. However, liability is restricted to the company's legally controlled subsidiaries and not throughout a supply chain.[414] Companies qualify for due diligence obligations if they meet any two of the three following criteria. A company much either i) have a balance sheet of 40 million CHF/USD, ii) a turnover of 80 million CHF/USD; and/or iii) a minimum of 500 full-time employees.[415]

[413] *Palombo*, (n 3) 277
[414] *Macchi and Bright*, (n 389) 16
[415] ibid., 16-17

3.1.3. Germany: The Supply Chain Law

i) Background

On the 11 June 2021, the Supply Chain Law ("lieferkettengesetz"), was voted into law by the German Bundestag.[416] The law introduces a set of human right due diligence obligations for German MNCs with foreign subsidiaries. It has been described as a "new duty of care for Human Rights".[417] Unlike the French and Swiss laws which would give standing to foreign claimants, this law would create a basis for governmental administrative monitoring to hold corporate groups to account in German domestic courts.[418] The proposals would give significant extension to the applicability of German law in cross-border group harms, where past cases have failed.[419] Whereas in Switzerland the citizen initiative was brought in parallel to the federal government's response in their own NAP, the German Supply Chain Law has been an initiative of the German Federal Government in collaboration with a consortium of NGOs. The 2018 German Government coalition agreement included a commitment to undertake a monitoring program which would examine whether German MNCs were complying with voluntary corporate due diligence commitments as outlined in their own NAP.[420] The proposed adoption of a statutory regulatory regime gained currency following findings of the monitoring exercise that only 13-17% of companies were meeting with voluntary commitments, (below the 50% target set under the NAP).[421] A government draft of proposed German model has recently been published[422] and provides an intriguing competing model for examination. The draft bill has been hailed by German federal development minister

[416] 'German Parliament passes mandatory human rights due diligence law' (Business & Human Rights Resource Centre 11 June 2021) <https://www.business-humanrights.org/en/latest-news/german-due-diligence-law/> accessed June 11 2021

[417] Johanna Kusch & Claudia Saller, 'Germany's proposed supply chain law – a glass half-empty' (Social Europe, 26 February 2021) <https://socialeurope.eu/germanys-proposed-supply-chain-law-a-glass-half-empty> accessed 1 June 2021

[418] ibid.

[419] E.g. the case of in Germany Jabir and others v. KiK Textilien und Non-Food GmbH (Case No. 7 O 95/15), the liability of a parent company for mass injury in a textile factory fire operated by one of its subsidiaries in Pakistan could not consider the substantive question of parent liability in German law. This was because the applicable law was of Pakistan where the harm took place. The case collapsed as the civil claim in tort was statute barred in accordance with Pakistani common law. For a discussion that explores the jurisdictional issues behind this case see: *Bergkamp*, (n 20) 51

[420] 'Monitoring zum Nationalen Aktionsplan Wirtschaft und Menschenrechte' (Auswärtiges Amt, October 13 2020) <https://www.auswaertiges-amt.de/de/aussenpolitik/themen/aussenwirtschaft/wirtschaft-und-menschenrechte/monitoring-nap/2124010> accessed 28 May 2021

[421] ibid.

[422] 'Due Diligence Act' (The Federal Ministry of Labour and Social Affairs, 3 March, 2021) <https://www.bmas.de/DE/Service/Gesetze-und-Gesetzesvorhaben/gesetz-unternehmerische-sorgfaltspflichten-lieferketten.html;jsessionid=A2BAF1F20EBD48B8FC81ACC4D14FBB39.delivery1-replication> accessed 19 May 2021

Gerd Müller as a model to be adopted at the European level.[423] It follows that a comparative examination is of relevance to the UK, even though it is no longer a member state of the EU. A noteworthy distinction in the German approach is a due diligence focused approach with a rigorous level of detail set to incentivise ex ante actions rather than ex post remedies. We consider some of its provisions below[424] and what limited academic discussion has already been written about these proposals.

ii) Scope of the Law

Companies - regardless of their legal form - would be subject to the duties of the law if they have their head office or registered office in Germany[425] and *normally* employ a minimum workforce of 3000 individuals.[426] This proposed threshold however would be lowered to 1000 workers from 1 January of 2024. The law would be applicable to a greater number of companies than its French equivalent. The workforce is calculated from employees of all group entities[427] and temporary employees who work for more than six months.[428] The rationale for the inclusion of temporary workers may be on account of agricultural and harvesting activities which rely on seasonal workforces .[429] The scope of the law also finds provision through an extensive list of harms which qualify as human rights abuses. These include child labour[430] slavery[431] non-compliance with occupational safety and health conditions under national law such as inadequate workplace safety standards,[432] gender pay discrimination[433] harm to the environment[434] and the unlawful deprivation of land.[435] The German government has maintained that one of the innovative aspects of the proposed supply chain law, is that liability is not conceptualised as a harm arising out of control within a parent-subsidiary relationship

[423] Rainer Brandes 'Gerd Müller: „Qualitätssprung zur Durchsetzung von Menschenrechten"' (*Deutschlandfunk*, 13 February 2021) <https://www.deutschlandfunk.de/lieferkettengesetz-gerd-mueller-qualitaetssprung-zur.694.de.html?dram:article_id=492494> accessed 21 June 2021

[424] N.B. It should be stated that at the time of writing, there is no official English translation of the new German law. All English language references to provisions of the lieferkettengesetz in this work are therefore subject to linguistic variation once an official translation is published.

[425] §1(1)1

[426] §1(1)2

[427] §1(3)

[428] §1(2)

[429] E.g., the lieferkettengesetz initiative has noted in one of its case studies that several human rights abuses take place on assam tea plantations where seasonal harvesters receive inadequate remuneration for tea picking, as well as poor access to drinking water. See: 'Für volle Kanne Menschenrechte braucht es endlich einen gesetzlichen Rahmen' (Initiative lieferkettengesetz, 10 September 2019) <https://lieferkettengesetz.de/fallbeispiel/tee-aus-assam/> accessed 5 May 2021

[430] §2(1)2

[431] §2(2)2a

[432] §2(5)

[433] §2(7); §2(8)

[434] §2(9)(a-d)

[435] §2(10)

but as a legal obligation to examine the economic relationship that exists with an entire supply chain. This includes economic relationships with indirect sub-contractors and wider stakeholder relations although groups may not be immediately liable for these relationships.[436]

iii) Due Diligence Obligation

Companies who are subject to the obligations of this bill are required to establish and conduct a due diligence plan, which consists of seven sections. Each receives its own specific provisions within the draft bill. Under the due diligence provision itself, a statutory framework provides some basis for determining how a parent company may be expected to meet its due diligence requirements. This is determined by the type and scope of business activities of the corporate group[437] the "influence" of the parent undertaking on the direct perpetrator responsible for a breach of a protected legal or environmental obligation[438] and a proximity test as to whether there is a causal contribution to human rights or environment risk.[439] Because the bill itself is subject to change and revision, it may suffice to focus on a number of key components to the due diligence itself.

A) Risk Management and Risk Analysis

Sections four and five help to establish the scope of the obligations and liabilities which qualifying group companies might expect from the regulations. Parent companies are required to conduct a risk assessment in all relevant business processes to identify human rights and environmental risks which increase the likelihood of injury.[440] The risk management system includes the additional administrative obligation to establish and appoint an individual human rights representative who reports annually to the corporate board.[441] Section five provides further guidance on the risk analysis which group companies are required to conduct as described in section four. It provides a basis to hold that indirect sub-contractors may be treated as direct sub-contractors where factual evidence points to the attempts of a parent within a group to circumvent attempts to conduct due diligence for more remote supply chain partners.[442]

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[436] 'Mehr Schutz von Menschen und Umwelt in der globalen Wirtschaft' (Die Bundesregierung, March 3, 2021) < https://www.bundesregierung.de/breg-de/aktuelles/lieferkettengesetz-1872010> accessed 18 May 2021
[437] §3(2)1
[438] §3(2)3
[439] §3(2)4
[440] §4(1), §4(2)
[441] §4(3)
[442] §5(1)

B) Remedial Measures

Section seven provides a grounds for remedy on the basis of whether a qualifying entity is in breach of its legal obligations within its own business or that of one of its suppliers. Group companies will be required to prevent, terminate or minimise a breach.[443] If a future infringement is foreseeable and possibly preventable, group companies will be required to minimise the possibility through the implementation of a set of timetabled policies.[444] The remedial provisions, recognise that group companies may suspend or even terminate a business relationship with an entity that is breaching human rights or environmental legal obligations. This may raise questions about whether the provisions facilitate a 'hit and run' style of management for parent companies who wish to minimise liability for their externalities. The provisions appear to anticipate this by laying out a series of grounds when suspension or termination of a business relationship may be deemed necessary.[445] A preliminary point this raises is whether such provisions are workable in respect to the right of corporate entities, and their shareholders to decide whether to maintain or terminate their business relationships with suppliers and subcontractors.

C) Complaints Procedure

Section eight sets out a requirement for group companies to establish a whistleblowing procedure for both parties who are aware of legal breaches and parties who are directly affected.[446] The provisions ambitiously require group companies to discuss facts with a whistle-blower and offer a procedure for an "amicable settlement".[447] The complaints procedure must be accessible provide a basis for confidentiality and protect users from disadvantage or punishment for raising awareness of a breach.[448]

D) Reporting

Group companies subject to this law would be required to document and maintain all information related to their due diligence for seven years.[449] An annual report will include how the group has met with its due diligence obligations in each past financial year, by highlighting what risks were identified, what actions were taken by the company to fulfil its obligations, a corporate assessment as to whether the measures taken have been effective and what future

[443] §7(1)
[444] §7(2)
[445] §7(3)1-4
[446] §8(1)
[447] §8(1)
[448] §8(4)
[449] §10(1)

measures may be required.[450] Reporting deadlines are made four months after the close of the financial year, should be publicly available online for seven years. Due consideration is extended to any restraint made in respect to the protection of trade and business secrets.[451]

iv) Fines

The list of legal obligations listed in the due diligence provide grounds for an enforcement against a group company that fails to fulfil their legal due diligence obligations. Unlike the French and the failed Swiss initiative which creates specific standing for third party claimants, the German model creates administrative enforcement proceedings overseen by the Federal Office of Economics and Export Control.[452] Liability creates a period penalty payments up to a maximum of 50,000 euros.[453] The scope of liability is far more limited, and constructed as an administrative offence, for wilful or negligent infringement of the list of obligations set out in the due diligence provisions of the proposed Act.[454]

Fines are calculated on a basis of annual turnover, e.g., a corporate group with an annual turnover of 400 million euros may be fined up to 2% of an annual turnover of all natural persons and legal entities that operate as an economic unit to estimate an average annual turnover.[455] Liability is assessed through a number of factual consideration including the motives for a misdemeanour, duration of an offence, the effects of a non-compliance and efforts taken by a corporate group to prevent and detect possible harms.[456]

Responses to the proposed German law have been mixed. Some academic contributions have focused more on issues raised by the law from a conflict of laws perspective.[457] However, because this work considers what advisory value competing European models have for future group company regulation UK reform, we consider responses that examine the substantive effectiveness of the proposal law from the perspective of corporate regulation and access to justice.

The first major distinction and possible limitation of the German model is the absence of a civil liability mechanism which provides a direct access to remedy for victims of corporate malpractice. The German model instead operates an administrative fine-based system, whereas

[450] §10(2)
[451] §10(4)
[452] §19(2)
[453] §23
[454] §24(1)-(5); *Ruhl*, (n 76) 14-15
[455] §24(3)
[456] §24(4)1-8
[457] *Ruhl*, (n 76)

France have developed a fault-based liability in tort, Swiss (would have had a) strict liability and the UK a limited liability model with duty of care obligations. Kusch and Saller[458] opine that without a German liability provision "…the proposal has no 'stick' to oblige corporations to prevent abuses, while providing a path to compensation claims by affected workers and other victims."[459] While they note however, that trade unions and civil society are still able to file law suits on behalf of victims[460] this still arguably falls short given that one of the initial impetus for these emerging domestic regulations, originates from the governance gap that emerges in foreign jurisdictions that have weaker labour law protections.

The possibility of liability in the domestic courts, Jaurer and Batura suggest, would be left to "pre-existing domestic regime of tort law ('*Deliktsrecht*'), which entails significant legal hurdles – of substantive and procedural nature – and therefore has only very little prospect of success."[461] The absence of a civil liability mechanism would appear to overlook the primary difficulty which victims encountered in the *KiK* case, where German law could not be applied due to the doctrine of *lex loci damni.*[462]

Jaurer and Batura, as indeed Sandra Cossart, Miriam Saage-maaβ and Robert Grabosch, have advocated for a reversed burden of proof approach (as was proposed in Switzerland) to ameliorate the limitations presented by German tort law. This suggestion is not without precedent and applies in other areas of the German legal system, such as producer liability.[463] This appears to highlight a very similar issue that has been observed in the UK, whereby older categories of tort, appear limited in establishing domestic civil liabilities in the specific case of group company regulation.

An additional point, raised by Jaurer and Batura concern the provisions reliance on monitoring from governmental departments which gives the German government a broad competence to

[458] Johanna Kusch is the co-ordinator of the Supply Chain Initiative, and Claudia Saller is the Director General of the European Coalition for Corporate Justice.
[459] 'Germany's proposed supply chain law – a glass half-empty' (Social Europe, 26 February 2021) <https://socialeurope.eu/germanys-proposed-supply-chain-law-a-glass-half-empty> accessed 1 June 2021
[460] Ibid.
[461] Nora Jauer and Justine Batura 'Don't Settle For Less: Thoughts on the Current Draft German Supply Chain Act' (Völkerrechtsblog, 22 April 2021) <https://voelkerrechtsblog.org/dont-settle-for-less/> accessed 1 June 2021
[462] However, if German tort were to apply, it has been argued that the most likely cause of action would be under Section 823(I) of the German Civil Code "…which protects persons against interferences with their life, body, freedom of movement, property and personality rights." See: Philipp Wesche, and Miriam Saage-Maaß. 'Holding Companies Liable for Human Rights Abuses Related to Foreign Subsidiaries and Suppliers before German Civil Courts: Lessons from Jabir and Others v KiK' (2016) 16(2) Human Rights Law Review, 375 <https://academic.oup.com/hrlr/article-abstract/16/2/370/2356211> accessed on 19 November 2020
[463] Nora Jauer Justine Batura 'Don't Settle For Less: Thoughts on the Current Draft German Supply Chain Act' (Völkerrechtsblog, 22 April 2021) <https://voelkerrechtsblog.org/dont-settle-for-less/> accessed 1 June 2021

investigate alleged breaches of the law. While this may carry some of the functions of a monitoring board (which the UK Modern Slavery Act and the French Vigilance law lack), this alone does not substitute the need for an "effective remedy" as outlined under international standards such as the UNGPs.[464]

Another possible limitation concerns the scope of the regulations. As has been noted, the proposed law requires corporate groups to examine their wider supply chain, in line with a more novel line of thinking that approaches group regulation on the basis of wider economic relationships, as opposed to a limited self-regulation of their internal relationship to a given subsidiary. However, this is not reflected in provisions which determine which corporate groups qualify for due diligence obligations. Instead, they are determined on a basis of a number of overall employees. However, Jaurer and Batura note an alternative proposal of Miriam Saage-maaβ whereby group companies could have been considered to hold obligations on the basis of their revenue and the market sector in which they are involved.[465] This would have allowed for more targeted obligations that apply to specific sectors. An additional benefit may be that it would be harder for corporations to circumnavigate employment practices in order to minimise due diligence obligations.

One wider criticism that has been levelled by a number of authors, is that the proposed act penalises German corporations with more onerous legal obligations than neighbouring competitors. From both a corporate governance and BHR perspective, this can have a number of negative consequences, including a subsidiary pulling out of a volatile market, or even prompt a domiciled parent company to relocate to another jurisdiction altogether. However, these concerns have been addressed by the EU Justice Commissioner who wishes to adopt a similar supply chain model on the EU level.[466] This is not the first time an EU wide framework has been proposed, given a similar endeavour was proposed only recently.[467] However, brief

[464] ibid.
[465] ibid.
[466] André Drepping & Daniel Walden, 'German Supply Chain Law: RegE (Government Draft Law), FAQ and EU' (Lexology, 9 March 2021) <https://www.lexology.com/library/detail.aspx?g=9e474dfd-6abd-49c0-98b1-141a6c00de66> accessed 1 June 2021
[467] The European Model Company Act (EMCA) was drafted as a possible tool to harmonise and assist in the regulation of companies operating within the EU. Published in 2017, the proposed act would have included specific provisions for corporate groups in chapter 15. It operated under the same traditional conceptualisation of parent-subsidiary relations as we have observed in earlier English caselaw. For example, it provides a definition of control and indeed definitions for de jure and de facto control which have since held less relevance at least within English jurisprudence, but perhaps more in the German's administrative-based system of auditing and fines. The EMCA, does not provide for non-economic due diligences, but it cannot be ruled out as a basis upon which supply chain provisions may be included in the future. Whether the German supply chain law will

comparison between the European Model Company Act (EMCA) and a European-wide supply chain law reveals that there has been a significant conceptual change in approach to the proposed harmonisation of European company law.

Returning to the original point, Jaurer and Batura suggest that this could have been avoided if the scope of the regulations applied not only to companies headquartered in Germany, but to companies operating *in* Germany. This however would raise procedural questions such as double jeopardy and extra-territoriality which lie beyond the scope of this work.

Part IV: Recommendations and Conclusion

4.1. Recommendations for Future UK Reform

From our investigation of the UK's approach to the regulation of corporate groups and our comparative examination of comparative European methods, the following recommendations are made in respect to future reform.

1. Introduction of a Due Diligence Obligation for Corporate Groups

There would be clear advantages in adopting a due diligence framework which would apply to corporate groups of a certain size, and whose parents are domiciled in the UK. The creation of a statutory duty to conduct a due diligence may add clarity for corporations who wish to determine the scope of their liability as well as defining clear procedural steps for access to justice. This may be achieved by either amending provisions within The Companies Act 2006 or through a new regulatory act which directly obliges the directors of group companies to ensure that a due diligence is conducted and to make formal statements to annual general meetings. By requiring the boards of parent companies to reflect on the activities of their economic relationships, there may be a lower risk of legal ambiguity about the outcome of civil cases, as corporations will be required to evidence their internal management process. This will likely reduce case-by-case judgements. It is advised that qualification for due diligence obligations follow on from the Modern Slavery Act and be determined on the basis of the financial turnover, rather than by workforce, given the limitations of this latter approach

be incorporated into the EMCA for wider company harmonisation remains one possibility in respect to EU law. How EU law might interact with individual domestic regulations is a complex question, beyond the scope of this study. For an explanatory of the EMCA, see: 'European Model Company Act (EMCA)' (Aarhus School of Business and Social Science: September, 2017) <https://law.au.dk/en/research/projects/european-model-company-act-emca/> accessed 21 June 2021; for full text of the act and the specific chapters for corporate groups see: Paul Krüger Andersen, Jan Bertil Andersson, and others, 'European Model Company Act (EMCA) (September 1, 2017) European Model Company Act (EMCA)' (2017) Nordic & European Company Law Working Paper No. 16-26, 369-390 <https://ssrn.com/abstract=2929348> accessed 21 June 2021

highlighted within the German supply chain law. The due diligence obligation itself could be realised by amending the provisions of S.54 of the Modern Slavery Act and consolidating them into a theoretical legislation. This would create a series of reporting requirements that addresses areas of economic activity that concern safe workplace practices, environmental sustainability, and general human rights standards. Moreover, amendments to S.172 of the Companies Act would set out the role of directors to present these statements in the annual board meetings and ensure that due diligence findings are filed. An additional statutory provision should be implemented which describes and defines the scope of what an economic relationship consists of, and how it may apply to corporate groups, given the limited level of provisions which directly concern corporate groups.

2. Introduction of a Monitoring Task Force

A due diligence framework should seek to learn from the limitations of the Modern Slavery Act, and the French Duty of Vigilance, and include provisions for a monitoring task force. This would have several roles. It would provide consultation for qualifying corporations to conduct effective due diligences. It would maintain a publicly accessible register where due diligence statements are logged and publicly accessible. It would also keep a database which monitors corporate auditing and catalogues statistics of qualifying corporations. In order to encourage corporate compliance, it may be recommended that the latter information be made privately accessible by way of an interim order for preliminary hearings in the early stages of a civil litigation, rather than available to the general public. This would prevent overly cumbersome summary hearings, create transparency as to whether corporations qualify for due diligence obligations and whether they are in compliance with their own statements, or if a given harm has occurred outside the scope of parental responsibility.

3. Introduction of a Presumed Liability for Certain Corporate Groups

Adoption of a due diligence framework, will require the recognition that limited liability in its traditional sense, would not *automatically* apply to corporate groups who qualify for due diligence obligations. For qualifying corporations, infringement of due diligence obligations which provide grounds for a claim would engage a presumption of liability standard for social and environmental harms that are caused by foreign-based subsidiaries, unless the claimant cannot substantiate, or the defendant can demonstrate that the procedural steps necessary in establishing liability are not met. However, it is not advised that any future reform adopt a procedural reverse burden of proof as was proposed in Switzerland. Such an approach remains controversial and would likely harm the prospects of achieving meaningful reform as it risks

creating scenarios where a parent can be held liable even in instances where a harm transpires beyond reasonable management. Instead, a *de minimis* presumed liability should only apply where claimants are able to demonstrate that a corporation has infringed its obligations and refused to act in a reasonable manner. This is elaborated further in point four below. For smaller group corporations and/or TNCs which do not qualify for due diligence obligations and/or are unrelated to one another by virtue of their economic activities and structure, the assumption of limited liability should continue as before.

4. Introduction of a 'Neglectful Parent' Tort

A new due diligence framework is advised to avoid the examples of Switzerland and Germany and ensure that there is a civil liability mechanism available for claimants as in the case of France. A toothless due diligence obligation, or fine-based system would defeat the point of reform. It is advised that such a mechanism continues to utilise tort law as opposed to incorporating international human right standards into domestic law. Although the duty of tort negligence is subject to permutation in the next few years as new litigation emerges, there may be rationale in considering whether a specific tort for 'neglectful parents' could be created nominally through statutory provision and left to further judicial interpretation. As has been made apparent, there are clear advantages to lowering the procedural hurdles which claimants must pass to demonstrate if a parent company is responsible and involved in a mass tort. Instead of requiring claimants to establish the traditional three steps for negligence (foreseeability, proximity and fairness) a possible alternative would be to adopt the three-step process utilised in the French model of vigilance, where it is necessary for a claimant to prove that there is damage, a breach of obligations on the basis of due diligence statements, and causation between breach and damage. This would create a fair form of presumed liability as far as due diligence statements interact with the establishment of a duty of care.

4.2. Conclusion

This thesis has offered an in-depth study into the past, present, and future of the UK's approach to the regulation of corporate groups. This work has approached the topic in this manner so as to place a broad range of interrelated disciplines into conversation. It has done so in order to serve as a resource for those interested in understanding the themes and topics that currently concern corporate group regulation in the UK. Moreover, approaching the regulation of UK corporate groups with a sense of chronology has provided us with a way to answer several of the most prominent questions which currently concern the field. These are:

1. Can the UK's approach to group company regulation be reconciled with its company law?

2. How does the current law apply to corporate groups, and what are its conceptual and practical limitations?

3. How do European due diligence approaches differ, and do they serve as a possible model to improve upon the UK's approach?

This work has concluded that the adoption of a due diligence framework could offer an opportunity to address some of the conceptual and practical limitations of the approach taken by the UK and indeed improve upon some of the weaknesses as observed abroad.

In order to reach this conclusion, we first considered the interaction of the UK's approach to group regulation with its own company law to address concerns of incompatibility. A historical examination was beneficial in establishing two key ideas. The first was that concerns of incompatibility are altogether misplaced. This is because the entity theory approach to company law which continues to govern much of company law today could not have comprehended contemporary MNCs/TNCs. The realisation of parent company liability therefore may be seen as a natural development which addresses a novel contemporary legal issue. Second, the rationale behind the doctrines of legal personality and limited liability may reveal wider policy considerations which hold relevance to how effective corporate group regulation may be attempted today. Limited liability and legal personality were designed to promote investment, but never to facilitate regulatory oversight over fraud and misfeasance. When applied to the context of the courts, effective regulation as in *Salomon* is incumbent upon legal obligations which are clear, formal and unambiguous so as to avoid case-by-case judgements.

With these preliminary ideas in mind, we then conducted an in-depth investigation of the UK's legal landscape as it applies to corporate groups. We considered what statutory provisions already apply to corporate groups, before analysing the development of parent company liability within the courts. Although there have been recent developments in both bodies of law there continues to be a great deal of regulatory uncertainty for corporate groups today much as there was for joint stock companies in the past. In respect to statutory law, the absence of specific provisions and enforcement mechanisms for the duties of directors of corporate groups, or a monitoring body as in the Modern Slavery Act in supply chains evidences a gap between where the law is and where it can be in providing clear legal duties in an accessible framework. Within the courts, parent company liability lacks clarity in respect to the type and scope of

liability which corporations may have and encumbers claimants with too many hurdles in establishing traditional negligence to succeed in a claim.

In order to consider whether statutory reforms could address these issues, an exploration of the established or developing due diligence models in France, Switzerland and Germany reveals several different approaches to the same end, namely, a statutory framework that establishes corporate duties and liabilities for the regulation of corporate groups. Of the three, the French model of vigilance bared the closest semblance and perhaps compatibility to the UK, in that it has incorporated its own tort law as a civil mechanism for establishing a remedy. It also suffered from a similar limitation in administrative enforcement due to the absence of a monitoring board. Moreover, its provision of a due diligence obligation on corporate groups alongside statutory terms such as *'commercial relationship'* provide a simple but non restricting means of establishing the type and scope of liability which corporations face. Although the Swiss and German approaches also offer alternative methods to providing clearer access to duties and liabilities, the absence of direct access to remedy and an overly intricate and perhaps onerous series of due diligence obligations represents a model of law-making that may appear administratively unworkable if not alien to UK company law. Proposals such as a reversed burden of proof in order to create a presumed liability while ambitious, highlight a perennial concern that overly zealous approaches to statutory regulation can reduce the likelihood of achieving meaningful regulatory reform.

In his ruling in *Begum*, Lord Justice Coulson aptly acknowledged that "claims based on a duty of care…are currently at the forefront of the development of the law of negligence"[468] and it appears that this will continue to be the case. While it cannot be said what will happen in the future, what can be said, as this work has endeavoured to show, is that the possibility to provide reasoned possible solutions to novel and contemporary legal problems is made possible by their historical contextualisation and their comparison to contemporary counterparts.

[468] Begum (n 299) [71]

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Abstract (English)

This Thesis investigates the themes and development of corporate group regulation through civil liability claims in the United Kingdom. Recent caselaw in the UK courts has established the possibility for parent companies of multi-national corporations to hold liability in tort negligence for harms caused by their foreign based subsidiaries. The UK's approach - a general duty of care for cross border torts - is unique as it has developed through caselaw. By comparison, its European neighbours such as France, Switzerland and Germany are developing statutory regulatory regimes which utilise due diligence obligations which reflect more recent international accountability standards such as the UN Guiding Principles for Business and Human Rights (UNGPs).

A holistic study of the UK's approach to group company regulation is warranted. This is because the UK approach to corporate groups has engaged several different areas of academic study such as company law, international law and European comparative law that have hitherto not been placed into direct conversation. In doing so, this thesis explores the conceptual and practical limitations of the current approach. By conceptual we refer to the question whether the development of parent company liability can be reconciled with established principles of UK company law. Parent company liability seemingly departs from the UK's entity theory-based approach to company law which affords a formalist guarantee to separate legal personality and therefore limited liability. By practical, we refer to the actual effectiveness of a judicially determined liability that lacks a statutory framework, which has resulted in legal ambiguity and case-by-case determination. This creates uncertainty for corporate boards which harms investment, and for claimants who are unable to acquire access to remedy.

Given these shortcomings, it may be asked whether an historical examination of the internal processes of UK company law, and a comparative investigation of statutory due diligence approaches adopted by France, Switzerland, or Germany may serve as a basis to examine the UK's approach and whether a due diligence approach could be developed which is internally coherent with its own domestic law which and provides an effective means of remedying corporate malpractice on the international stage.

This thesis is divided into four chapters. The first explains some of the core concepts and wider background which underpins the development of domestic parent liability in the UK. The second and third chapters explore the past, present and future of corporate group regulation. The second chapter is divided into two parts. The first part addresses the past. It places the

development of group company regulation into conversation with the historical development of limited liability and incorporation which together form the foundation of UK company law. This is done to investigate whether the current regulatory approach (examined in detail in the second part) is really at odds with historic precedent, and also to consider whether the policy considerations which led to these doctrinal developments may offer some illumination over effective future regulation. The second part addresses the present. It provides a qualitative study of current statutory and judicial methods of corporate group regulation. A trace-analysis is employed to understand the development of parent company liability in the courts. In doing so, this work establishes what liabilities currently may be said to apply to corporate groups and identifies the limitations of the UK's current approach in light of historic precedent. In the third chapter, a comparative study of European due diligence approaches, helps to identify common problems which European jurisdictions face in regulating corporate groups, and possible provisions which may address some of the shortcomings highlighted in section two. In the fourth chapter, a set of recommendations are made in respect to future UK legal reform followed by a conclusion.

This work will argue that there are advantages to the adoption of a due diligence model and includes a number of recommendations which address some of the shortcomings highlighted both in the UK and abroad. These include a UK due diligence model which broadens the scope of application of S.54 of the Modern Slavery Act to apply to a wider range of environmental and workforce harms as part of a new regulatory Act. Moreover, the creation of a monitoring task force would provide better access to justice through the use of a public register and administrative materials to assist corporations to review their economic relationships. The introduction of a presumed liability for qualifying corporate groups would create greater procedural balance in establishing where a duty is owed. Finally, the retirement of tort negligence in cross border litigation in favour of an 'irresponsible parent tort' which utilises the procedural steps of the French duty of vigilance would lower the procedural hurdles faced by victims and make the offence more conceptually relevant to instances of corporate malpractice.