Przegląd Prawniczy Uniwersytetu im. Adam Mickiewicza | Adam Mickiewicz University Law Review

Vol. 17, 2025
DOI 10.14746/ppuam.2025.17.08

Klaudia Modrzejewska[1]

Piercing Liability in the Polish and German Legal Systems

Abstract: Piercing liability is one of the most important and interesting issues in company law. It refers to a process of "breaking" or even "piercing" the legal separateness of several related companies in order to provide legal protection for the interests of creditors of one of them. This issue is linked to the improper, and consequently undesirable, exploitation of the distinctiveness of a subsidiary company by the parent that controls it. In a nutshell, piercing liability is seen as a legal instrument whose purpose is to give protection to creditors, even if this involves disregarding the legal personality of a particular company or even rejecting the legal and organisational personality of the entity. It is a response to the abuses of those who misuse legal personality, but also a response to the needs of the modern economy. At the same time, it raises serious doubts and even controversies in every legal system in which it is applied. This is due to the fact that clear criteria for the application of piercing liability have not been formulated in any of the legal systems mentioned. In the article, I will characterise the reasons for the introduction and development of piercing liability in the Republic of Poland and in the Federal Republic of Germany.
Keywords: piercing liability, Republic of Poland, Federal Republic of Germany, procedural solutions, comparative analysis

1 Klaudia Modrzejewska, Adam Mickiewicz University Poznań, Faculty of Law and Administration, Poznań, Poland. e-mail: klamod@amu.edu.pl, https://orcid.org/0009-0002-2719-9497.

Introduction

Piercing liability is one of the most important and interesting issues in corporate law. It is related to the concept derived from US law of '*piercing (lifting) the corporate veil*'.[2] It is the United States that is the cradle of piercing liability, as it was the US courts that first proposed the possibility of '*piercing the corporate veil*'.[3] Yet piercing liability also appears in many other foreign academic studies. There are various formulations, such as the concept of '*Durchgriff*' (piercing) used in German legal doctrine, the Rozenblum doctrine, or the theory of '*gerance de fait*' (de facto management) found in French-language academic literature, and the concept of '*superamento della personalità giuridica*' (abuse of legal personality) used in Italian legal doctrine.[4]

Piercing liability is a kind of process of 'breaking' or even 'piercing' the legal separateness of several related companies in order to provide legal protection to the legitimate interests of the creditors of one of them. However, this is a very complex and difficult issue. A creditor may be a business counterparty of the company, a minority shareholder of the company, or even an employee. This issue is linked to the inappropriate and consequently undesirable use of the subsidiary's distinctiveness by the parent that controls it. In fact, the subsidiary is reduced to a tool of the dominant entity.

Of course, nowadays it is possible to operate on the market within a network of relationships between companies that are controlled by the same parent. This is an economically acceptable solution. However, liability management in this type of situation may be to the detriment of the creditors of the subsidiaries. Therefore, they should be protected against a parent company that is harming the interests of its counterparties. In a nutshell, the management of liability is seen as a legal instrument designed to protect creditors, even

2 Maurice Wormser, "Piercing the Veil of Corporate Entity," *Columbia Law Review* 12, no. 6 (1912): 497.

3 Karen Vandekerckhove, *Piercing the Corporate Veil* (Wolters Kluwer, 2007), 15–16.

4 Magdalena Zmysłowska, "Odpowiedzialność przebijająca w prawie amerykańskim i włoskim," *Prawo w działaniu. Sprawy cywilne*, no. 34 (2018): 73.

if this involves disregarding the legal personality of a particular company or even rejecting the legal and organisational personality of the entity.[5] This legal mechanism is not only a response to abusive individuals who misuse legal personality, but also a response to the needs of the modern economy.

However, piercing liability raises serious doubts and even controversy in every legal system in which it is applied. This is due to the fact that clear criteria for the application of this mechanism have not been formulated in any of the legal systems mentioned.[6] The catalogue for the application of piercing liability has not been standardised in any way, which makes it extremely flexible. However, the aim is invariably to guarantee the protection of companies' creditors.

Piercing Liability in the Polish Legal System

The principle of limited liability (the irresponsibility of shareholders for the company's obligations) represents a milestone in the evolution of both Polish company law and also the market economy. It is inextricably linked to the axiology and the very essence of the market economy. However, it must be interpreted correctly. It limits the economic risk of the company's partners. This consists in the possibility to protect the personal assets of the partner against the claims of the company's creditors. It applies to situations in which the company does not have the capacity to settle its obligations. However, it does not serve to protect the assets of the partner, or of partners who conduct their business activities in an improper manner and thus act to the detriment of creditors.[7] Sometimes they do so criminally, which cannot be condoned.

5 Magdalena Zmysłowska and Paweł Mazur, *Odpowiedzialność przebijająca* (Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2019), 21.

6 Mariusz Stanik, *Zasada przejrzystości stosunków korporacyjnych w polskim prawie grup spółek* (Wolters Kluwer, 2017), 395.

7 Aleksander Kappes, "Odpowiedzialność wspólników za zobowiązania spółki kapitałowej w prawie polskim de lege lata," *Przegląd Prawa Handlowego*, no. 9 (2017): 30.

Unfortunately, in a market economy, this principle is often distorted and used as a 'shield' for such 'damaging partners'.

A private limited company is itself liable for its obligations towards its own creditors. Sometimes exceptions are provided for in order to increase creditor protection. Some countries have developed just such mechanisms, which are referred to as piercing liability. This applies to reprehensible behaviour by shareholders towards the company itself or its creditors. In such situations, despite the statutory exclusion of liability of the shareholders for the company's debts, they are held so liable.[8]

To date, no single and official definition of the concept of piercing liability has emerged in the Polish literature. The doctrine commonly uses concepts such as 'omission of legal distinctiveness related to abuse of legal personality', 'legal mechanisms related to piercing liability', 'piercing of the corporate veil'.[9] This is because piercing liability involves the use of legal mechanisms in different legal orders in situations of misuse of certain legal institutions. Most often, this action targets the principle of limited liability of the shareholders of a private limited company, or the very aspect of the company's separateness.

Generally speaking, piercing liability refers to the liability of the shareholders of a private limited company for its unsatisfied claims against its creditors.[10] This is a rather broad formulation. Thus, this definition by Wiórek covers not only liability of partners for the company's liabilities, i.e. piercing liability sensu stricto, but also cases of liability in its broad sense, e.g. liability for tort damage caused to the company's creditors that occurred as a result of

8 Kappes, "Odpowiedzialność wspólników," 30.

9 Zmysłowska and Mazur, *Odpowiedzialność przebijająca*, 22.

10 Piotr Marcin Wiórek, *Ochrona wierzycieli spółki z o.o. poprzez osobistą odpowiedzialność jej wspólników. Koncepcja odpowiedzialności przebijającej i nadużycia formy prawnej spółki w prawie niemieckim i polskim* (E-Wydawnictwo. Prawnicza i Ekonomiczna Biblioteka Cyfrowa. Wydział Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego, 2016), 77 and next.

certain conduct of the partners. It is worth emphasising that such a case is no longer included in piercing liability in the strict sense.[11]

Unfortunately, only a few representatives of the Polish company law doctrine discuss piercing liability and these are extremely restrained. Among the representatives of science, a negative approach prevails. The reasons for this can primarily be attributed to the legal basis in force, which does not allow liability for the company's obligations to be attributed to the company's partners, or even relatively for the damage caused to creditors by the company's insolvency.[12]

There are doubts in the academic discourse as to what the future basis for liability in respect of damages arising from the business activities of a subsidiary company would be. A good direction is to make use of certain models from competition law. This is primarily the concept of a single economic entity,[13] and is an integral part of antitrust rules. It relies on the fact that it is not the legal form of the business or the legal status of the entity itself that is of predominant importance in determining whether it is a separate business or merely a component of it. This is related to the extremely interesting issue of the so-called boundaries of an undertaking.[14] This situation was best put by Wils with the following formulation [when] 'one enterprise ends and another begins'.[15] The concept of a unitary organism constitutes an attempt to solve the problem concerning the understanding of the term 'enterprise'. The most difficult situations are those where several apparently independent entities may in fact constitute a 'single economic organism'. Some of the competition law doctrine highlights the parallels between piercing liability and the single eco-

11 Wiórek, *Ochrona wierzycieli*, 78.

12 Kappes, "Odpowiedzialność wspólników," 30.

13 Piotr Semeniuk, *Koncepcja jednego organizmu gospodarczego w prawie ochrony konkurencji* (Wydawnictwo Naukowe Wydziału Zarządzania Uniwersytetu Warszawskiego, 2015), 19.

14 Semeniuk, *Koncepcja jednego organizmu gospodarczego*, 21.

15 Wouter Wils, "The Undertaking as Subject of E.C. Competition Law and the Imputation of Infringements to Natural or Legal Persons," *European Law Review* 25, no. 2 (2000): 100.

nomic organism concept, in particular, in the framework of the attribution of antitrust liability.[16]

The Act of 21 April 2017 on Claims for Damage Caused by Breach of Competition Law is relevant in this respect.[17] It implements Directive 2014/104/EU324 referred to as the Damages Directive.[18] It is also the result of almost 10 years of work by EU bodies on harmonising standards for the recovery of damages for breach of competition law. This work has taken into account the extensive case law of the Court of Justice of the European Union on the private law consequences of anti-competitive practices.[19] It concerns the recovery of damages by both those directly and indirectly harmed by a breach of competition law. Nevertheless, this liability is of a different nature from the situation of applying piercing liability mechanisms. Firstly, the purpose of the introduction of the Act is different, as it is primarily intended to prevent parties from avoiding liability relating to infringements of competition law, while at the same time guaranteeing the deterrent nature of the penalties imposed by the antitrust authorities. Moreover, it is joint and several liability. These solutions are also universal in nature. Situations in which it is possible to punish a shareholder for some kind of abuse of the business activity carried out by a private limited company are of an exceptional nature. This legal mechanism is not intended to be applied universally, but in extreme cases.[20]

A further indication in defining piercing liability can be found in the body of case law of the Chamber of Labour and Social Security of the Supreme Court

16 Marco Bronckers and Anne Vallery, "No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law," *World Competition: Law and Economics Review* 34, no. 4 (2011): 560.

17 Journal of Laws of 2017, item 1132.

18 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance (Official Journal of the European Union L No 349 of 5 December 2014, pp. 1–19).

19 Uzasadnienie do projektu ustawy o roszczeniach o naprawienie szkody wyrządzonej przez naruszenie prawa konkurencji, 1, https://www.sejm.gov.pl/sejm8.nsf/druk.xsp?nr=1370.

20 Zmysłowska and Mazur, *Odpowiedzialność przebijająca*, 130.

in this regard. However, it should be made clear that the Supreme Court has issued few judgments in which it has advocated piercing liability. Although this jurisprudence predominantly concerns cases involving the liability of a parent company for the obligations of a daughter company towards its employees, it indirectly contains references to the concept of abuse of the separate legal personality of the company and even to precisely piercing liability.[21]

Of significance for piercing liability are the regulations of corporate (holding) law, which arouse great interest among legal theorists and practitioners. Attempts to regulate it have been made for years, e.g. in the draft amendment to the Commercial Companies Code (hereinafter: CCC) of 28 July 2009 prepared by the Civil Law Codification Commission, which is a response to the needs of the economy and entrepreneurs and initiates the discussion on the Polish law of conglomerates.[22]

The authors of the draft amendment proposed the creation of a new Section IV entitled 'Groups of companies' (Articles 211–215 of the CCC), the creation of a definition of a 'group of companies', and the removal of the criticised Article 7 of the CCC. The amendment was to introduce new obligations for companies participating in such a group, including disclosure of participation through entry in the register of entrepreneurs, consideration of the interests of creditors and minority shareholders, as well as reporting obligations regarding contracts and links with the parent company. In addition, minority shareholders would obtain the right to request a court-appointed auditor of the group's accounts, which was intended to ensure control over the group's activities.[23]

21 For example: Judgement of the Supreme Court of the Republic of Poland of November 5, 2013, II PK 50/13, LEX no. 1408889; Judgement of the Supreme Court of the Republic of Poland of September 18, 2014, III PK 136/13, LEX no. 1554335.

22 Adam Opalski and Michał Romanowski, "O potrzebie zasadniczej reformy polskiego prawa spółek," *Przegląd Prawa Handlowego*, no. 6 (2008): 7; Tomasz Staranowicz, "Podstawowe problemy regulacji koncernu w prawie spółek," *Kwartalnik Prawa Prywatnego*, no. 2 (2009): 391.

23 Andrzej Szumański, "Próby regulacji prawa grup spółek w Polsce (2009–2011)," *Monitor Prawniczy*, no. 24 (2011): 8.

This project was undoubtedly a legitimate attempt to regulate legal issues related to the operation of corporate groups. The form of limited legal regulation of company groups was appropriate, because the proposed amendment to the CCC provided an opportunity for the unhindered functioning of a capital group while simultaneously safeguarding the interests of shareholders and creditors of subsidiaries.

The holding company law was finally regulated by the amendment to the Code of Commercial Companies of 9 February 2022.[24] The law was introduced despite criticism from most representatives of the doctrine.[25] This amendment narrowly implemented the protection of creditors of companies operating as part of a group of companies, the definition of which is found in Article 4 §1 point 51 The essence of the liability regulated in Article 2114 §1 of the CCC liability is that when enforcement against a subsidiary participating in a group of companies proves to be ineffective, the parent company is liable for damage caused to a creditor of the subsidiary, unless it is not at fault or the damage did not arise as a result of the subsidiary's performance of a binding order.

It is worth noting that the drafters of the bill introducing this provision themselves explicitly indicated that this liability is not in the nature of piercing liability.[26] According to the drafters, introducing this type of liability would violate the principle of non-liability of a shareholder for the obligations of a private limited company. The authors also pointed out that the introduction of piercing liability could cause a justified fear of potentially discouraging entrepreneurs from using the structure of groups of companies, and also prevent the creation of strong economic organisms that are competitive on both the Polish and foreign markets. The regulation itself appears to be quite narrow and very

24 Ustawa z dnia 9 lutego 2022 r. o zmianie ustawy – Kodeks spółek handlowych oraz niektórych innych ustaw (Journal of Laws of 2022, item 807).

25 Aleksander Kappes, "Rzekoma ochrona wierzycieli spółki zależnej w prawie holdingowym: Czas na odpowiedzialność przebijającą?," *Przegląd Prawa Handlowego*, no. 10 (2022): 10.

26 Uzasadnienie projektu ustawy z dnia 9 lutego 2022 r. o zmianie ustawy—Kodeks spółek handlowych oraz niektórych innych ustaw, 14.

limited. According to the authors of the draft, this is a deliberate assumption, which is to make it impossible to recognise this liability as a guarantee.[27] Thus, the drafters limited the scope of liability of the parent company, which does not foster the protection of the interests of the subsidiary's creditors. At the same time, however, they introduced solutions that strengthened their position to a certain extent. These include a presumption of fault on the part of the parent company and a presumption of a causal link between the damage and the subsidiary's performance of a binding instruction, as well as the possibility of holding the parent company more broadly liable. This model of liability can be seen as an attempt to balance the interests of both parties.[28]

Such a narrow view of the scope of the parent company's liability is without prejudice to provisions establishing a more far-reaching liability of the parent company.[29] This is of great importance, as usually subsidiary companies are treated instrumentally, which may ultimately lead to their insolvency. Consequently, creditors also have other grounds to obtain satisfaction for other damages. Piercing liability is important in this context. It appears that its basis is now to be found in the Civil Code. This issue is still under consideration by the doctrine. The possibility of using the institution of abuse of subjective right under Article 5 of the Civil Code in the context of abuse of the corporate form, abuse of legal personality, as well as the tort grounds set out in Article 415 of the Civil Code is currently under discussion.[30]

Considerations concerning the use of Article 5 of the Civil Code are justified, as the usual consequence of the abuse of the company form is the insolvency of the company. This problem was already apparent in Poland in the

27 Andrzej Dunikowski and Przemysław Furmaga, in *Prawo holdingowe: Praktyczny komentarz*, ed. Mateusz Baran and Aleksandra Czarnecka (Wolters Kluwer, 2022), 36.

28 Dunikowski and Furmaga, in *Prawo holdingowe*, 37.

29 Kappes, "Rzekoma ochrona wierzycieli," 10.

30 Rafał Szczepaniak, *Nadużycie prawa do posługiwania się formą osoby prawnej* (Towarzystwo Naukowe Organizacji i Kierownictwa "Dom Organizatora", 2009); Wiórek, *Ochrona wierzycieli*; Tomasz Targosz, *Nadużycie osobowości prawnej* (Kantor Wydawniczy Zakamycze, 2004).

1930s. However, the use of the abuse of subjective right as an independent cause of action is argued against by the fact that in the Polish doctrine the view of the defensive character of Article 5 of the Civil Code prevails. It is seen only as a means of defence of the defendant and not as a cause of action.[31] However, this provision does not have to be used at all as an 'offensive' basis. Articles 151 § 4 and 301 § 5 CCC constitute a 'shield' for the shareholders of a private limited company against its creditors.

A further problem regarding Article 5 of the Civil Code is the choice of the specific subjective right on the basis of which the exercise would constitute an abuse. It is commonly held that the legal position of a shareholder cannot be viewed within the framework of a subjective right. Advocates of the use of Article 5 of the Civil Code consider these arguments to be overly conservative and even anachronistic. It should be pointed out that in this case the subjective right can be understood in a broad sense. After all, it is usually defined in a general way as 'a certain complex situation of a legal subject',[32] or as 'a sphere of possibilities to act in a certain way'.[33] Thus, only subjective rights understood as a bundle of rights are not subject to the allegation of abuse of subjective rights, but individual rights are. If we accept Radwański's concept, we must conclude that the individual elements of this situation are also subject to Article 5 of the Civil Code. The shareholder's non-responsibility for the obligations of the private limited company is in this case his privilege or even entitlement not to be held liable. This can be seen as an essential element of his legal status as a shareholder, i.e. his complex legal situation. In such a case, invoking the status of a shareholder who is not liable for the company's obligations can most certainly be regarded as an abuse of the right.[34] Furthermore, if it is assumed that the op-

31 Małgorzata Pyziak-Szafnicka, in *System Prawa Prywatnego: Prawo cywilne—część ogólna. Tom 1*, ed. Marek Safjan (C.H. Beck, 2012), 269–70.

32 Zbigniew Radwański, in *Prawo cywilne – część ogólna*, ed. Zbigniew Radwański and Adam Olejniczak (C.H. Beck, 2011), 77.

33 Stefan Grzybowski, in *System prawa cywilnego: Część ogólna. Tom 1*, ed. Witold Czachórski (Zakład Narodowy im. Ossolińskich, 1985), 216.

34 Kappes, "Rzekoma ochrona wierzycieli," 15.

eration of Article 151 § 4 of the Code of Commercial Partnerships and Companies is repealed by Article 5 of the Civil Code, the result of such considerations will be the possibility of bearing liability of a guarantee nature for the obligations of the company by the shareholder. The prerequisite for such liability would be reprehensible behaviour of the shareholder towards the company, in the light of the principles of social co-existence, and, relatively, the use of the principle of irresponsibility contrary to its social and economic purpose.

The second possibility is to use Article 415 of the Civil Code. This basis is strictly tortious in nature: it is not so much about liability for the obligations of a particular company, but about a tort committed by a partner. A partner who violates an elementary interest and separateness of the company also commits a tortious act against the company's creditors. This is due to the fact that by his conduct towards the company he has led to its insolvency, and, in turn, the result of this state of affairs is the failure to satisfy its creditors. This is indirect damage, which relates to the unsatisfied claim together with interest for delay and possible costs of proceedings against the company,[35] Contrary to the views of some representatives of the Polish doctrine, indirect damage is also subject to indemnification. This occurs if the other prerequisites of tort liability are met, in particular, in the context of the subsequent links of causation remaining within the normative consequence. It is therefore not indemnity in the strict sense, but its purpose and effect are the same.[36]

A certain substitute for piercing liability under the Commercial Companies Code itself is Article 299 of the Commercial Companies Code. However, it is a specific solution. It was created as part of the Polish legal heritage of the 1930s.[37] It is characterised by the fact that the piercing of the corporate veil does not involve the shareholders, but the members of the management board

35 Andrzej Koch, in *Kodeks cywilny. T. 1. Komentarz. Art. 1–44911*, ed. Maciej Gutowski (C.H. Beck, 2016), 1458.

36 Kappes, "Rzekoma ochrona wierzycieli," 16.

37 Art. 299 wzorowany jest na regulacjach rozporządzenia Prezydenta Rzeczypospolitej z 27.06.1934 r.—Kodeks handlowy (Journal of Laws, item 502).

of the company. This liability is related to the fulfilment of the obligation to file a bankruptcy petition against the company in a timely manner. The purpose of introducing this regulation was to guarantee protection to creditors in the face of ineffective enforcement against the company.[38] The limitations of this liability are particularly evident in two aspects. Firstly, as this liability applies only to a limited liability company, it cannot be said to be universal. Secondly, the very conditions necessary for a given member of the management board to be held liable are shaped in such a way that he or she can very easily exempt themselves from this liability. The provision only applies when enforcement against the company proves ineffective. Furthermore, board members will not be liable if they show that they filed such a petition in due time if the failure to file the bankruptcy petition in time was not due to their fault, and if the creditor's position was not worsened as a result of the failure to file the petition in time.[39]

Piercing liability has recently been the subject of debate in Polish doctrine. It is also penetrating more and more into practice, which can be clearly seen in the jurisprudence of Polish courts. At the same time, it is a rather lengthy process and will probably only gradually develop in the years to come. The position represented by the German legal system should therefore serve as a model for Polish doctrine and practice, as quite a number of possibilities for the application of piercing liability have been developed there.

Piercing Liability in the German Legal System

'Piercing liability' (*Durchgriffshaftung*) has not been statutorily defined in the German legal system.[40] Moreover, its very interpretation is a source of doubt for representatives of the doctrine. At present, the prevailing view is that pierc-

38 Marcin Jagodziński, "Odpowiedzialność członków zarządu spółki z o.o. na podstawie art. 299 k.s.h.—rozważania de lege ferenda," *Przegląd Prawa Handlowego*, no. 5 (2018): 44.

39 Jagodziński, "Odpowiedzialność członków zarządu spółki z o.o.," 45.

40 Karsten Heider, in *Münchener Kommentar zum Aktiengesetz: AktG, Monachium 2015, komentarz do § 1 AktG*, ed. Mathias Habersack and Wulf Goette (C.H. Beck München, 2022), 63.

ing liability applies to situations in which the partners are personally, unlimitedly, and jointly and severally liable for the company's obligations towards its creditors. However, it does not cover situations in which it is the partners who are liable for a self-inflicted tort against the creditors, if the source of the partners' liability is a legal act in which they undertook to be liable for the company's obligations. This is known as *unechte Durchgriffshaftung*.[41]

In the German legal system, it is not accepted that the personal creditors of the company's partners can seek satisfaction from the company's assets. Such a situation is referred to as reverse piercing liability i.e. *umgekehrter Haftungsdurchgriff*. Accepting such a possibility would be dangerous for the interests of the company's creditors. In addition, it would increase the likelihood of unsatisfied claims, and this would significantly reduce the attractiveness of performing legal transactions with entities in the form of private limited companies.[42]

However, it is clear that allowing shareholders to avoid liability for the company's obligations by using the institution of a private limited company would consequently be contrary to equity and the sense of justice.[43] Therefore, in certain cases, German law permits the use of piercing liability and consequently holding the shareholders personally liable for the company's obligations.

Piercing liability is not a single legal institution, but instead refers to a number of different situations in which it becomes possible to hold shareholders liable for the company's obligations.[44] An attempt to systematise this issue has led to the development of two basic theories.[45]

---

41 Piotr Marcin Wiórek, "Odpowiedzialność przebijająca w prawie niemieckim," *Przegląd Prawa Handlowego*, no. 9 (2017): 20.

42 Heider, in *Münchener Kommentar zum Aktiengesetz*, 63.

43 Lutz Michalski, in *Kommentar zum Gesetz betreffend die Gesellschaften mit beschränkter Haftung, Monachium 2010, komentarz do § 13 GmbHG* (C.H. Beck München, 2023), 55.

44 Lorenz Fastrich, in *Gesetz betreffend die Gesellschaften mit beschränkter Haftung. Kommentar, Monachium 2017, komentarz do § 13 ust. 2 GmbHG*, ed. Adolf Baumbach and Alfred Hueck (C.H. Beck München, 2023), 5.

45 Wiórek, "Odpowiedzialność przebijająca," 20.

The first is the theory of abuse (*Misbrauchlehre*) developed by Serick in the 1950s. According to its wording, piercing liability applies in the case of abuse of the form of a legal entity.[46] It is also referred to as a subjective concept, as piercing of the corporate veil only occurs when a shareholder deliberately and consciously uses the institution of the legal person to disadvantage other participants in trade or to circumvent the law. Examples include the use of the corporation to evade restrictions imposed on the shareholder by a contractual provision or by statute.[47]

The second theory has developed under the influence of the case law of the Federal Court of Justice (*Bundesgerichtshof*).[48] This is the concept of objective abuse of the legal entity form, although it is also referred to as the institutional theory. According to its wording, it is assumed that the use of the institution of the company by a shareholder in a manner contrary to its purpose and intended use may, as a consequence, make such a person liable for the obligations of the company. This is not affected by whether he acted with the intention of harming creditors or circumventing the law.[49]

There is also an alternative concept that focuses on the purpose of norms providing the privilege of limiting the liability of shareholders for the company's obligations, the so-called *Haftungsprivileg*. Its originator is Müller-Freienfels,[50] whose considerations have had a great influence on the contemporary concept

46 Rolf Serick, *Rechtsform und Realität juristischer Personen: ein rechtsvergleichender Beitrag zur Frage des Durchgriffs auf die Personen oder Gegenstände hinter der juristischen Person* (Mohr Siebeck, 1955), 86.

47 Targosz, *Nadużycie osobowości prawnej*, 122.

48 This refers to the BGH judgment of 14 December1959, (II ZR 187/59, NJW 1960). At that time, it was recognized that it was possible to hold the partners liable for the company's obligations in the event that the company was significantly undercapitalized. It was made clear that, in certain situations, invoking the separate legal personality of the company and the shareholder would contravene the legal order and thus violate the bona fide order expressed in § 242 BGB.

49 Wiórek, *Ochrona wierzycieli*, 98 and next.

50 Wolfram Müller-Freienfels, "Zur Lehre vom sogenannten "Durchgriff" bei juristischen Personen im Privatrecht: Rechtsform und Realität juristischer Personen. Ein rechts-vergleichender Beitrag zur Frage des Durchgriffs auf die Personen oder Gegenstände hinter der juristischen Person by Rolf Serick," *Archiv für die civilistische Praxis*, no. 156 (1958): 534.

of so-called teleological reduction. For the proponents of this concept, the justification of piercing liability lies in the view according to which the principle of limited liability is the conscious result of a decision of the legislator and not an immanent feature of the use of the construction of legal persons.[51] In their view, it is perfectly feasible to create the minimum conditions assumed by the legislator, on the maintenance of which the exclusion of liability of shareholders is conditional. If these minimum conditions are not ensured, the shareholder may be deprived of the privilege of disclaimer (*Haftungsprivileg*) and will consequently bear personal and unlimited liability for the company's obligations.[52]

Interestingly, German case law has not unequivocally endorsed any of the above concepts. Instead, there is a noticeable intermingling of different concepts in the decisions of the Federal Supreme Court.[53]

In German doctrine, it is not only problematic to indicate the dogmatic justification of piercing liability, but also to define the very cases in which it occurs. It is generally accepted that the privilege of limited liability of the shareholders for the obligations of the company i.e. *Haftungsprivileg* does not apply in the situation of confusion of the spheres of action of the company and the shareholders, i.e. the *Sphärenvermischung* and in the case of material undercapitalisation of the company i.e. *materielle Unterkapitalisierung*.[54] In addition, the possibility of holding shareholders liable for the company's debts when they take action to annihilate the existence of the company has been debated in recent years. This is the case when, among other things, assets necessary for the business are removed from the company or the company is deprived of its economic opportunities, i.e. the *Existenzvernichtung*.[55]

51 Hanno Merkt, in *Münchener Kommentar zum Gesetz betreffend die Gesellschaften mit beschränkter Haftung (GmbHG), Monachium 2015, komentarz do § 13 GmbHG*, ed. Holger Fleischer and Wulf Goette (C.H. Beck München, 2023), 332.

52 Wiórek, *Ochrona wierzycieli*, 112.

53 Florian Wünscher, *Die Durchgriffshaftung wegen Sphärenvermischung im deutschen und* österreichischen *GmbH-Recht* (Verlag Graz, 2014), 15.

54 Merkt, in *Münchener Kommentar*, 332.

55 Rüdiger Wilhelmi, *Beck'scher Online-Kommentar GmbHG, Beck-online 2017, komentarz do § 13 GmbHG*, ed. Hildegard Ziemons and Carsten Jaeger (C.H. Beck München, 2017), 143.

In the context of the confusion of the property masses of the company and the partners, it is important to limit the liability for the obligations of the company to its own assets and, consequently, to emphasise the principle of the separation of the activities and assets of the company and its partners, i.e. the *Trennungsprinzip*. This group of cases includes the mixing of the spheres of action of the company and the partner as a mixing of their assets. Confusion of spheres of activity occurs in situations where the separation of the activities of the company and the partner is problematic for third parties. Confusion of assets, on the other hand, is the inability to comply with the principle of separation of the assets of the company and the partner. It is the result of the transfer of assets between one's own and the company's assets without any relevant formalities. As a consequence, it is not known which asset belongs to the partner and which to the company.[56]

Interestingly, this is the only generally accepted and unquestioned by both doctrine and case law group of cases in which piercing liability applies.[57] In such cases, the basis for the liability of the partners is Section 128 HGB applied *per analogiam*. According to its wording, partners of partnerships are liable for the obligations of the partnership. This is most often the case where the company does not keep accounts. However, German case law indicates that it is only permissible for partners to benefit from the privilege of limited liability if there has been a clear separation of the company's assets from those of the partners. This separation manifests itself in the keeping of the company's accounts.[58]

Piercing liability does not apply when the spheres of operation of the company and the partner are mixed. The interests of creditors are protected in such situations through mechanisms other than piercing the corporate veil. These include the rules on declarations of intent and the theory of legal appearance (*Rechtscheinhaftung*), which applies to power of attorney.[59]

56 Adam Opalski, "Problematyka pominięcia prawnej odrębności spółek kapitałowych," *Przegląd Prawa Handlowego*, no. 8 (2012): 19.

57 Merkt, in *Münchener Kommentar*, 344.

58 Till Fock, in *AktiengesetzQ, komentarz do § 1* AktG, ed. Gerald Spindler and ed. Eberhard Stilz (C.H. Beck München, 2022), 57.

59 Wünscher, *Die Durchgriffshaftung*, 22.

A second widely discussed possibility for the application of personal liability of the partners for the obligations of the company is cases of material undercapitalisation.[60] This refers to situations in which the partners do not provide the necessary funds to the company. This may take the form of debt financing (e.g. the provision of a loan) as well as equity financing (e.g. an increase in share capital). It is generally acknowledged that shareholders cannot benefit from the privilege of limited liability when they furnish highly disproportionate funds to a particular company in the course of business.[61] Evidently, creditors of such companies would bear a very high risk. Such shareholder behaviour currently poses one of the biggest challenges for creditor protection in Germany.

Although the indicated concept is common in German doctrine, it was rejected by the Federal Court of Justice in its ruling of 28 April 2008 in the Gamma case (II ZR 264/06). The Court pointed out that holding shareholders liable for failing to equip the company with adequate capital would undermine the very essence of limited liability companies. Although the case law does not exclude that in certain situations the material undercapitalisation of a company may constitute a tort. Consequently, this could be a basis for liability for damages claimed against the shareholders by the company or its creditors. However, such liability would be in tort, and the specific starting point would be the provision of Section 826 BGB.[62]

The most doubtful and controversial issue in recent years has been the possibility of claiming liability for shareholders' actions aimed at annihilating the existence of the company. It has been expressed in a number of decisions of the Federal Court of Justice over the years. This possibility was first mentioned in the Bremer Vulkan judgment of 17 September 2001 (II ZR 178/99). Thus, a certain line of case law has been formed.[63]

60 Holger Altmeppen, in *Gesetz betreffend die Gesellschaften mit beschränkter Haftung: GmbHG. Kommentar. Komentarz do § 13 GmbHG*, ed. Günter Roth and Holger Altmeppen (C.H. Beck München 2015), 139.

61 Altmeppen, in *Gesetz betreffend*, 140.

62 Wünscher, *Die Durchgriffshaftung*, 16.

63 Wünscher, *Die Durchgriffshaftung*, 17.

The model of creditor protection in limited liability companies has many shortcomings that can be used to the detriment of its creditors. The German legal provisions do not guarantee the protection of company assets against the actions of shareholders, apart from leading to a comprehensive breach of the provisions on the maintenance of share capital. Nevertheless, such actions of shareholders unequivocally negatively affect the companies as a whole and their solvency in particular. Examples of such negative behaviour include depriving the company of important fixed assets or means of production, depriving the company of business opportunities by financing development projects from the company's assets, and entrusting the implementation to other parties, providing security for the benefit of shareholders or third parties without creating adequate reserves, or concentrating all economic risks on only one of the companies. These risks led the Federal Court of Justice, in this precedent-setting judgment, to guarantee the assertion of liability for the company's debts directly against the shareholder in situations where the company's creditors cannot be satisfied by returning the capital taken from the company on the basis of the share capital protection provisions. The court held that the privilege of limited liability cannot be applied to shareholders who interfere with the company's assets without regard to the company's ability to satisfy its obligations.[64]

The Federal Court of Justice departed from this line of jurisprudence after six years with its judgment of 16 July 2007 (II ZR 3/04) concerning the Trihotel case. At that time, the possibility of asserting piercing liability in the event of a partner carrying out actions that could lead to the annihilation of the company's existence was negated. At the same time, it was highlighted that it is possible for the company and its creditors to claim damages from shareholders taking such actions under the general rules for the tort regime, i.e. pursuant to Section 826 BGB.[65]

64 Wünscher, *Die Durchgriffshaftung*, 17.

65 Gerhard Wagner, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch: BGB. Band 6: Schuldrecht – Besonderer Teil IV, §§ 705–853, Partnerschaftsgesellschaftsgesetz, Produkthaftungsgesetz. Komentarz do art. 826 BGB*, ed. Mathias Habersack (C.H. Beck München, 2015), 172.

Conclusion

As a general rule, a private limited company is liable to its creditors for its debts. However, there are statutory provisions against it. Unfortunately, these are often inadequate in not sufficiently protecting creditors. For this reason, the mechanisms of piercing liability have been implemented in many countries. This applies in particular to situations in which shareholders are held liable for the company's obligations towards its creditors despite the statutory exclusion of such liability. This is related to reprehensible behaviour by shareholders towards their own company or its creditors.

Piercing liability operates in the legal systems of many countries, including the United States, Germany, Italy or France. Although the possibility of applying piercing liability is recognised in the jurisprudence of Polish courts, as well as in Polish doctrine, it has still not been statutorily regulated in Polish law. There have been numerous discussions on this topic for many years. Representatives of the Polish legal doctrine have long debated the legal basis for holding members of a company liable for its obligations towards its creditors. Over the years, a wide variety of ideas have emerged on how to regulate this particular issue. In this context, the amendment to the Commercial Companies Code of 9 February 2022 was crucial. It provided some protection to the creditors of companies within groups of companies on the basis of Article 2114 of the Commercial Companies Code. This effectively solved a particular impasse concerning this issue. Further avenues for protecting creditor rights are based on Article 5 of the Civil Code and Article 415 of the Civil Code. In view of the above, creditors currently have two possibilities to pursue their claims, i.e. Article 2114 of the Commercial Companies Code as well as Article 5 of the Civil Code in connection with Article 151 § 4 of the Commercial Companies Code, and 415 of the Civil Code. However, it seems most relevant to invoke the provisions of the Civil Code.

In contrast to the situation in the Polish legal system, the issue of piercing liability in Germany has long been regulated. In German doctrine, as well as

in the jurisprudence of the German courts, several possibilities have been developed for applying piercing liability. The wording of the provisions of the German Civil Code is commonly adopted as the legal basis. Importantly, the solutions introduced are truly modern and flexible, as the piercing liability mechanism is applied in a wide variety of cases. The most important of these cases include the mixing of property spheres, undercapitalisation of the company or annihilation of the company's existence. The essence is primarily the reprehensible attitude of the shareholder towards the company or its creditors.

References

Altmeppen, Holger. In *Gesetz betreffend die Gesellschaften mit beschränkter Haftung: GmbHG. Kommentar. Komentarz do § 13 GmbHG*, edited by Günter Roth and Holger Altmeppen. C.H. Beck München, 2015.

Bronckers, Marco, and Anne Vallery. "No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law". *World Competition: Law and Economics Review* 34, no. 4 (2011): 535–70. https://doi.org/10.54648/woco2011047.

Dunikowski, Andrzej, and Przemysław Furmaga. In *Prawo holdingowe. Praktyczny komentarz*, edited by Mateusz Baran and Anna Czarnecka. Wolters Kluwer, 2022.

Fastrich, Lorenz. In *Gesetz betreffend die Gesellschaften mit beschränkter Haftung. Kommentar, Monachium 2017, komentarz do § 13 ust. 2 GmbHG*, edited by Adolf Baumbach and Alfred Hueck. C.H. Beck München, 2023.

Fock, Till. In *AktiengesetzQ, komentarz do § 1* AktG, edited by Gerald Spindler and Eberhard Stilz. C.H. Beck München, 2022.

Grzybowski, Stefan. In *System prawa cywilnego: Część ogólna. Tom 1*, edited by Witold Czachórski. Zakład Narodowy im. Ossolińskich, 1985.

Heider, Karsten. In *Münchener Kommentar zum Aktiengesetz: AktG, Monachium 2015, komentarz do § 1 AktG*, edited by Mathias Habersack and Wulf Goette. C.H. Beck München, 2022.

Jagodziński, Marcin. "Odpowiedzialność członków zarządu spółki z o.o. na podstawie art. 299 k.s.h.—rozważania de lege ferenda." *Przegląd Prawa Handlowego*, no. 5 (2018): 44–56.

Kappes, Aleksander. "Odpowiedzialność wspólników za zobowiązania spółki kapitałowej w prawie polskim de lege lata." *Przegląd Prawa Handlowego*, no. 9 (2017): 30–36.

Kappes, Aleksander. "Rzekoma ochrona wierzycieli spółki zależnej w prawie holdingowym: Czas na odpowiedzialność przebijającą?" *Przegląd Prawa Handlowego*, no. 10 (2022): 10–17.

Koch, Andrzej. In *Kodeks cywilny. T. 1. Komentarz. Art. 1–44911*, edited by Maciej Gutowski. C.H. Beck, 2016.

Merkt, Hanno. In *Münchener Kommentar zum Gesetz betreffend die Gesellschaften mit beschränkter Haftung (GmbHG), Monachium 2015, komentarz do § 13 GmbHG*, edited by Holger Fleischer and Wulf Goette. C.H. Beck München, 2023.

Michalski, Lutz. In *Kommentar zum Gesetz betreffend die Gesellschaften mit beschränkter Haftung, Monachium 2010, komentarz do § 13 GmbHG*. C.H. Beck München, 2023.

Müller-Freienfels, Wolfram. "Zur Lehre vom sogenannten "Durchgriff" bei juristischen Personen im Privatrecht: Rechtsform und Realität juristischer Personen. Ein rechts-vergleichender Beitrag zur Frage des Durchgriffs auf die Personen oder Gegenstände hinter der juristischen Person by Rolf Serick." *Archiv für die civilistische Praxis*, no. 156 (1958): 522–43.

Opalski, Adam. "Problematyka pominięcia prawnej odrębności spółek kapitałowych." *Przegląd Prawa Handlowego*, no. 8 (2012): 10–20.

Opalski, Adam, and Michał Romanowski. "O potrzebie zasadniczej reformy polskiego prawa spółek." *Przegląd Prawa Handlowego*, no. 6 (2008): 4–11.

Pyziak-Szafnicka, Małgorzata. In *System Prawa Prywatnego: Prawo cywilne – część ogólna. Tom 1*, edited by Marek Safjan. C.H. Beck, 2012.

Radwański, Zbigniew. In *Prawo cywilne—część ogólna*, edited by Zbigniew Radwański and Adam Olejniczak. C.H. Beck, 2011.

Semeniuk, Piotr. *Koncepcja jednego organizmu gospodarczego w prawie ochrony konkurencji*. Wydawnictwo Naukowe Wydziału Zarządzania Uniwersytetu Warszawskiego, 2015.

Serick, Rolf. *Rechtsform und Realität juristischer Personen: ein rechtsvergleichender Beitrag zur Frage des Durchgriffs auf die Personen oder Gegenstände hinter der juristischen Person*. Mohr Siebeck, 1955.

Stanik, Mariusz. *Zasada przejrzystości stosunków korporacyjnych w polskim prawie grup spółek*. Wolters Kluwer, 2017.

Staranowicz, Tomasz. "Podstawowe problemy regulacji koncernu w prawie spółek." *Kwartalnik Prawa Prywatnego*, no. 2 (2009): 371–404.

Szczepaniak, Rafał. *Nadużycie prawa do posługiwania się formą osoby prawnej*. Towarzystwo Naukowe Organizacji i Kierownictwa „Dom Organizatora", 2009.

Szumański, Andrzej. "Próby regulacji prawa grup spółek w Polsce (2009–2011)." *Monitor Prawniczy*, no. 24 (2011).

Targosz, Tomasz. *Nadużycie osobowości prawnej*. Kantor Wydawniczy Zakamycze, 2004.

Vandekerckhove, Karen. *Piercing the Corporate Veil*. Wolters Kluwer, 2007.

Wagner, Gerhard. In *Münchener Kommentar zum Bürgerlichen Gesetzbuch: BGB. Band 6: Schuldrecht – Besonderer Teil IV, §§ 705–853, Partnerschaftsgesellschaftsgesetz, Produkthaftungsgesetz. Komentarz do art. 826 BGB*, edited by Mathias Habersack. C.H. Beck München, 2015.

Wilhelmi, Rüdiger. In *Beck'scher Online-Kommentar GmbHG, Beck-online 2017, komentarz do § 13 GmbHG*, edited by Hildegard Ziemons and Carsten Jaeger. C.H. Beck München, 2017.

Wils, Wouter. "The Undertaking as Subject of E.C. Competition Law and the Imputation of Infringements to Natural or Legal Persons." *European Law Review* 25, no. 2 (2000): 99–116.

Wiórek, Piotr Marcin. *Ochrona wierzycieli spółki z o.o. poprzez osobistą odpowiedzialność jej wspólników. Koncepcja odpowiedzialności przebijającej i nadużycia formy prawnej spółki w prawie niemieckim i polskim*. E-Wy-

dawnictwo. Prawnicza i Ekonomiczna Biblioteka Cyfrowa. Wydział Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego, 2016.

Wiórek, Piotr Marcin. "Odpowiedzialność przebijająca w prawie niemieckim." *Przegląd Prawa Handlowego*, no. 9 (2017): 20–29.

Wormser, Maurice. "Piercing the Veil of Corporate Entity." *Columbia Law Review* 12, no. 6 (1912): 496–518.

Wünscher, Florian. *Die Durchgriffshaftung wegen Sphärenvermischung im deutschen und österreichischen GmbH-Recht*. Verlag Graz, 2014.

Zmysłowska, Magdalena. "Odpowiedzialność przebijająca w prawie amerykańskim i włoskim." *Prawo w działaniu. Sprawy cywilne*, no. 34 (2018): 73–136.

Zmysłowska, Magdalena, and Paweł Mazur. *Odpowiedzialność przebijająca*. Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2019.

Legal Acts

Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance (Official Journal of the European Union L 349, 5.12.2014, pp. 1–19).

Ustawa z 21 kwietnia 2017 r. o roszczeniach o naprawienie szkody wyrządzonej przez naruszenie prawa konkurencji (Journal of Laws of 2017, item 1132).

Ustawa z 9 lutego 2022 r. o zmianie ustawy – Kodeks spółek handlowych oraz niektórych innych ustaw (Journal of Laws of 2022, item 807).

Judgments

Judgment of the Supreme Court of the Republic of Poland of November 5, 2013, II PK 50/13.

Judgment of the Supreme Court of the Republic of Poland of September 18, 2014, III PK 136/13.