Transnational Legal Theory

ISSN: 2041-4005 (Print) 2041-4013 (Online) Journal homepage: www.tandfonline.com/journals/rtlt20

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To cite this article: John Quinn & Rónán Condon (2025) Beyond the individual-company: from corporate social responsibilities to corporate social liability, Transnational Legal Theory, 16:1-2, 226-253, DOI: 10.1080/20414005.2025.2479318

To link to this article: https://doi.org/10.1080/20414005.2025.2479318

Published online: 13 May 2025.

TRANSNATIONAL LEGAL THEORY
2025, VOL. 16, NOS. 1–2, 226–253
https://doi.org/10.1080/20414005.2025.2479318

Routledge
Taylor & Francis Group

Beyond the individual-company: from corporate social responsibilities to corporate social liability

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ABSTRACT

Private law, into which company law is assimilated, follows two basic models of liability: individual liability, which is the priority model, and organisational liability, which applies in special circumstances. Yet neither of these models map directly on to the fragmented or 'networked' structure of transnational value chains. The Corporate Sustainability Due Diligence Directive demonstrates this point. EU legislators attempted to translate the organisationally framed responsibilities set out in the UNGPs into a private law framework. However, in doing so, they reverted to individual liability, the hallmark of national company law, due to, we believe the lack of a clear justification for making individual companies responsible for their value chain. We argue that addressing the issues raised by transnational value chains requires going beyond this dichotomy and developing a network liability model from within interpersonal law.

ARTICLE HISTORY Received 28 June 2024; Accepted 18 December 2024

KEYWORDS Transnational governance; due diligence; network liability; business and human rights

Introduction

The modern company, as a piece of legal technology,[1] and legal form, has proven to be a highly successful way to pool resources and diversify risk.[2] While a robust domestic corporate law has long been regarded as a motor of capitalism,[3] the most successful corporations today tend to be those that have broken free of territorial boundaries, and regulatory law, have a global

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[1] See Christopher Bruner, *The Corporation as Technology: Re-Calibrating Corporate Governance for a Sustainable Future* (OUP, 2022).

[2] See Richard Posner, *Economic Analysis of Law* (Wolters Kluwer, 8th edn 2011) 14–16.

[3] This argument has been a (controversial) feature of legal origins theory in which those jurisdictions with shareholders' primacy model, strong property rights and contract enforcement are meant to contribute to economic growth. See Rafael La Porta, 'The Economic Consequences of Legal Origins' (2008) 46(2) *Journal of Economic Literature* 285.

footprint and have created their own regimes of regulatory governance.[4] These transnational corporations (TNCs), as they are called, have not only disaggregated into M-form organisations (governance of a 'company of companies') but they have also steadily been eroding the formerly clear lines between market and hierarchy by engaging dependent contractors in wider value chain governance (governance of a 'network of companies').[5] Value chains are the sites of complex transnational regulatory governance regimes whereby so-called lead or peak firms coordinate, through supplier codes of conduct and other contractual techniques, and 'embed' compliance with environmental, human rights and labour standards.[6] In this way, the largest TNCs, and indeed platforms,[7] have arrogated for themselves considerable 'private authority' which impacts upon the lives of millions of, often vulnerable, people.[8]

While regulatory governance by TNCs in the name of public goods is certainly beneficial for business[9] and signals a willingness of firms to take on more a 'societal' role and responsibilities, it rarely[10] leads to *legal* consequences for those firms who do not live up to their stated commitments.[11] There is therefore a well-known 'accountability gap'[12] between high sounding commitments and our responsibility practices. Human rights lawyers in the guise of the United Nation's Guiding Principles on Business and Human Rights (UNGPs),[13] have stepped into the breach by laying down a robust responsibility to respect human rights which requires TNCs to conduct due diligence in their supply chains; however, for these (soft law) *responsibilities* to become mandatory and carry a deterrent, they must be translated into

[4] Analysed in Larry Cáta Backer, 'Theorizing Regulatory Governance Within Its Ecology: The Structure of Management in an Age of Globalization' (2018) 24(5) *Contemporary Politics* 607.

[5] It is of course the case that not all disaggregation has the structure of dependent contracting; in areas of high technology in the knowledge economy, relationships may be more symbiotic even if power relations and imbalances can be identified. Seminal, Ronald Gilson and others, 'Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration' (2009) 109 *Columbia Law Review* 431.

[6] Backer (n 4) 608.

[7] Jaakko Salmeinen and others, 'Digital Platforms as Second-Order Lead Firms: Beyond the Industrial/Digital Divide in Regulating Value Chains' (2022) 6 *European Review of Private Law* 1059.

[8] Claire Cutler, 'Locating "Authority" in the Global Political Economy' (1999) 43(1) *International Studies Quarterly* 59.

[9] The business case for CSR is analysed, from a critical perspective, in Ronen Shamir, 'The Age of Responsibilization: on Market Embedded Morality' (2008) 37(1) *Economy and Society* 1, 11–13 esp.

[10] For theory and explanation, see Gunther Teubner, 'Self-Constitutionalizing TNCs? On the Linkage of "Private" and "Public" Corporate Codes of Conduct' 18(2) *Indiana Journal of Global Legal Studies* 617. Views it as societal self-constitutionalisation beyond or perhaps more accurately, alongside, the state. While not overlooking external impulses on societal constitutionalism, these are cognitive, not normative relations. There is, therefore, no room for sanctions. Without sanctions, a lot of trust is being placed in self-constitutionalisation, and it is unclear why one might not expect 'pathologies'.

[11] At a basic level, there is societal responsibility, but without societal justice understood as a union of moral responsibility and legal liability to use H-W Micklitz's terms. See Hans-Wolfgang Micklitz, *The Politics of Justice in European Private Law: Social Justice, Access Justice, Societal Justice* (CUP, 2018) 394–5 esp., ch 4 more generally.

[12] See Christian Witting, *Liability of Corporate Groups and Networks* (OUP, 2018).

[13] Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (2011), https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

legal *liability* rules.[14] An attempt to do has come in the form of due diligence laws that have been implemented in France[15] and Germany[16] and by the European Union's (EU) Corporate Sustainability Due Diligence Directive (CSDDD).[17] The CSDDD is based on the UNGPs[18] and expressly aims to limit the environmental harms and human rights abuses caused by the operations of transnational value chains. Hence, it represents a significant reorientation of European company law which traditionally sought to facilitate the common market[19] and is an important paradigm shift towards specific value chain regulation with transnational effects.[20]

Yet, despite consensus on the need for this reorientation among member states and EU legislative bodies, fitting human rights principles into a company law framework proved both politically and conceptually fraught. The Commission's original proposal for the CSDDD[21] deviated from the UNGPs term of 'business enterprise' and instead applied to individual companies that met financial and employee thresholds who could then be made civilly liable for a failure to conduct due diligence across their value chain that resulted in damage. The mechanisms used for identifying and demarcating liability, indeed, became the subject of objections by the European Council.[22] The final Directive[23] significantly increased the thresholds of application and introduces a more complex model of civil liability that requires 'intentional or negligent' fault,[24] must now affect a person's interest under national law[25] and limits recovery by excluding the activities of its indirect, downstream business partners.[26]

[14] There is no direct continuity between moral responsibility and legal liability. See Peter Cane, 'Role Responsibility' (2016) 20(1/3) *The Journal of Ethics* 279, 290: 'sanctions are not intrinsic to responsibility'.
[15] The French Duty of Vigilance (French Law No. 2017-399 *Loi de Vigilance*).
[16] The German Supply Chain Due Diligence Act (*LkSG—Lieferkettensorgfaltspflichtengesetz* 2021).
[17] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859.
[18] Ibid, Recitals 5–7.
[19] Traditionally, European company law has adopted enabling rules aimed at facilitating the functioning of the common market, for example, by resolving issues of establishment (see *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459) and enabling cross border mergers (see Directive 2005/56) with Enriques describing it the area as 'optional, market-mimicking, unimportant'. Luca Enriques, 'EC Company Law Directives and Regulations: How Trivial Are They?' (2006) 27 *University of Pennsylvania Journal of International Economic Law* 1, 7.
[20] Peer Zumbanssen, 'Global Value Chain Legislation, Modern Slavery, Climate Change and Finance: Lessons from the European Corporate Sustainability Due Diligence Directive' (2024) McGill SGI Research Paper in Business, Finance, Law and Society, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4784608.
[21] Corporate Sustainability Due Diligence Directive EU 2019/1937, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071.
[22] Germany and Italy leading the objections, see https://www.reuters.com/markets/europe/eu-postpones-decision-proposed-supply-chain-due-diligince-law-2024-02-09/.
[23] Final CSDDD (n 17).
[24] Ibid, art 29(1)(a).
[25] Ibid, art 29(1)(b).
[26] Ibid, art 3(g), downstream referring to distribution, transport and storage. See section 3 below.

It is our core argument that this is not *only* a result of political expediency or capture, but a consequence of the significant conceptual difficulties in translating human rights responsibilities into liability law.[27] Company law, in its form, has for a long time been 'assimilated' to the form of private law, which not only constitutes the facilitative rules for companies, but also constitutes the company's boundary rules.[28] Beneath its doctrines, there is a deep tension between two liability models: individual liability, which is the priority model, and organisational liability, which applies in special circumstances. Both liability models are, themselves, based on different concepts of how and why liability should be ascribed to actors. They also have distinct rationales, and moral imperatives.[29] But neither model maps well onto global value chains or provide convincing justifications for singling out lead firms or other regulatory gatekeepers for liability. This underlying theoretical difficulty, it seems to us, resulted in the EU legislator, in *dubio*, shifting in the course of drafting and redrafting the CSDDD further and further towards a purely individual liability model. The final CSDDD applies only to the very largest of companies, and has a high bar for civil liability ultimately mirroring more traditional exceptions to the company's distinct boundary of rights and liabilities which apply only in narrowly defined contexts. This is, it is admitted, hardly surprising because from a theoretical perspective there is a lack of clear justification in private law for making the lead firm quasi-*respondeat superior* either for its supply chain or for global value chains more broadly understood. However, if one considers the governance of value chains as a complex organisational technology, it is time to develop adequate legal conceptualisations more adjusted to the complexities of the value chain and ultimately, move beyond the individual liability model woven into company law, and indeed beyond organisational liability. While individual liability overlooks systemic risks and regulatory governance beyond dyadic relationships, organisational liability, which in reality is a 'moral enterprise liability' does not fit well with a diffuse value chain in which there is insufficient integration or control to justify the imputation of wrongdoing to lead firms. This solution will, we argue, require instead further 'internal differentiation' in private law in response to external differentiation in society.[30]

[27] The political dimension of the problem is well-documented, but the conceptual-theoretical dimension is under-appreciated. For a recent overview discussion that emphasises the political dimension, see Nicolas Bueno and others, 'The EU Directive on Corporate Sustainability Due Diligence (CSDDD): The Final Political Compromise' (2024) *Business and Human Rights Journal* 1.

[28] Peter Muchlinski, *Multinational Enterprises and the Law* (OUP, 3rd edn 2021) 303.

[29] Jane Stapleton, *Product Liability* (Butterworth & Co, 1994) ch 8 ['moral enterprise liability']. Stapleton focuses on its central features, as an alternative to, in our terms, individual liability. The latter is not discussed, but it is well-known. Its most elaborated modern proponent is Ernest Weinrib, *The Idea of Private Law* (Harvard University Press, 1995).

[30] Gunther Teubner, 'My Numerous Detours – Toward Private Law as Society's Constitution' (2024) 44(1) *Zeitschrift für Rechtssoziologie* 213, 232. See also, Pour Kjaer, 'Law of the Worlds: Towards an

The article proceeds as follows: Section 1 provides an overview of the tensions between individual liability and organisational liability frameworks on which we base our argument and aims to demonstrate its operation through company law doctrine and how that doctrine has limited applicability to value chains. Section 2 focuses on due diligence and aims to demonstrate the difficulties in translating human rights principles into a company law has resulted in a return to the individual liability model. Section 3 sketches how we might get beyond this troublesome dichotomy by inserting a different, 'network liability'.

1. Human rights, private law and the *individual* company

The basic demand from human rights lawyers, and those who believe in global justice, is that TNCs should be responsible for *their* supply chains.[31] The duty of due diligence in the UNGPs sets out this responsibility to respect human rights.[32] While not itself legally binding on companies, its *legal* operationalisation is understood within a human rights law discourse. The difficulty, which concerns us, is how to translate the concept of responsibility inherent to human rights principles into liability rules.[33] While it is true that, at a deep level, there is a commitment to common values across the public/private divide,[34] they are internal differentiations of law, and boundary crossing is not straightforward. Private law, in this respect, is not a cipher for human rights principles.[35] This is particularly evident in the common law, but it is sometimes overlooked in civil law discussions of the relationship between fundamental rights and private law. In the

Inter-systemic Theory' in Stefan Keller & Stefan Wiprächtiger, *Recht Zwischen Dogmatik und Theorie: Marc Amstutz zum 50 Geburtstag* (Dike Verlag, 2012) 159, 170. Rather than understanding world society as a zero-sum game between cognitive and normative expectations, increased cognitivsation requires increases in 'immanent' normative complexity for its stabilisation.

[31] See Aditi Bagchi, 'Production Liability' (2019) 87(6) *Fordham Law Review* 2501, 2524–5 ['public wrong' applying Rawls to a transnational context].

[32] UNGPs (n 13) principles 11–18.

[33] In other words, following Teubner (n 10) 636–7 the UNGP can be understood as a cognitivisation of expectations, which downplays legal sanctions in favour of 'learning' impulses. However, attempts to legislate it on a binding footing can be understood as redesigning the UNGP as normative expectation on companies. The human rights discourse is premised on positive obligations; the further difficulty we are considering is how it might be 'translated' into a private law discourse. Some might reject this framing understanding private and public as semantic, not analytical, categories. While this is true, it is a simplification. It is possible to see public/private as contingent, if real, internal differentiations of the legal system with contingent, but relatively well-defined, boundaries.

[34] Dawn Oliver, *Common Values and the Public-Private Divide* (Butterworths, 1999) [albeit strongly emphasising classic public values across the divide while challenging the dichotomy]. For a comparative perspective, see Lukas van den Berge, 'Rethinking the Public-Private Law Divide in the Age of Governmentality and Network Governance' (2018) 5 *European Journal of Comparative Law and Governance* 119.

[35] See Oliver Gerstenberg, 'Private Law and the New European Constitutional Settlement' (2004) 10(6) *European Law Journal* 766 [dialogical model]; Florian Roedl, 'Fundamental Rights, Private Law, and Societal Constitution: On the Logic of the So-Called Horizontal Effect' (2013) 20(2) *Indiana Journal of Global Legal Studies* 1015 [legitimising private law, but private law required by fundamental rights].

common law,[36] fundamental rights tend to be understood as gap-fillers. If there is an existing basis for private law liability, fundamental rights have no, or a very indirect relevance.[37] In civil law jurisdictions, it is more typical to think of fundamental rights as being values that are relevant to, and a background framework for, private law rules.[38] However, while a source of values, the values must be translated *through* private law's norms.[39] There is, importantly, no *ipso facto* union of private and public law, no *ubi jus*, *ibi remedium*. It is important to make this point at the outset because organisational or systematic models of responsibilities in human rights imaginaries, namely responsibilities to protect or respect, do not immediately transfer into private law and its liability rules. They require 'translation' into private law's 'discourse'.[40]

The main point of distinction between the private law discourse and human rights discourse is between their starting points in positive and negative obligations. While human rights, and fundamental rights, start from the position that states owe individuals positive obligations of protection, and now companies owe positive obligations of respect, private law's basic concept of interpersonal obligation, namely individual liability, is limited to a duty of non-interference. In general, *individuals*, in the common law are at liberty to do as they please so long as they do not infringe upon the rights of others.[41] In civil law jurisdictions, particularly in France, there is a more pronounced emphasis in tort on social solidarity and compensation. But the basic framework is one of negative obligation. Negative obligations are, it must be emphasised, general obligations individuals owe each other symmetrically. Positive obligations, which are typical and organisational, in human rights law are exceptional and tightly restrained in private law. They require, essentially, special justification in private law because they are asymmetrical duties. In private law, tort is the background law, and

[36] This is obviously to adopt a very broad brushstroke, eg, in Ireland, and the US in particular, there are variations on the theme outlined above in respect of the common law. Ireland, for instance, recognises constitutional torts (direct horizontal effect) as a remedy of last resort where there is a gap in the remedial framework of tort law, or semble if a tort remedy is basically unjust. See *Blehein v Minister for Health Children* [2018] IESC 40.

[37] Lord Sales, 'Constitutional Values in the Common Law of Obligations' Cambridge Freshfields Annual Law Lecture (10 March 2023) ['social propositions', ie, they may be a source of inspiration when developing the private law].

[38] In Germany, values that have a radiating effect. Mattias Kumm, 'Who is Afraid of the Total Constitution? Constitutional: Rights as Principles and the Constitutionalization of Private Law' (2004) 7(4) *German Law Journal* 341.

[39] This appears to be the best understanding of *Lueth* and subsequent judgments in Germany. Gert Brüggemeier, 'Constitutionalisation of Private Law – The German Perspective' in Tom Barkhuysen and Siewert Doewe Lindenbergh (eds), *Constitutionalisation of Private Law* (Brill, 2006) 59, 81 [changes the balance of interests in private law, but not its form or structure]; Jan Smits, 'Private Law and Fundamental Rights – a Sceptical View' in ibid 9.

[40] Hugh Collins, 'On the (In)compatibility of Human Rights Discourse and Private Law' LSE Law, Society and Economy Working Papers 7/2012, https://www.lse.ac.uk/law/working-paper-series/2007-08/WPS2012-07-Collins.pdf.

[41] R Stevens, *Torts and Rights* (OUP, 2007) 9.

there is no general duty to look out for the welfare of others.[42] In many respects, notwithstanding the differences in policies, content and legal cultures[43] between the main jurisdictions all systems, in practice, define broadly similar boundaries for those situations in which affirmative duties are permitted and those in which they are not.[44] Indeed, when it comes to the liability for a 'pure omission',[45] 'problems' of demarcating boundaries 'have arisen in all jurisdictions'.[46] It must be shown that there is a special relationship whether of status, undertaking, or of significant control between the tortfeasor and the victim or a third party who injures the victim.[47] Where there is third party wrongdoing, in all jurisdictions there must be something more than mere inaction which results in an affirmative duty to act. This restrictive and qualified approach to affirmative duties in tort only makes sense against the background commitment to interpersonal justice in which responsibility as liability is modelled on the individual or person and her (equal) obligations towards others.[48] This focus precludes,

[42] Contract is a specific undertaking to perform a task for another and is a well-known exception to the general lack of a background positive obligation.

[43] Whether, as Cees van Dam, *European Tort Law* (OUP, 2nd edn 2013) 137 puts it, they are 'casuism' or 'conceptual' legal systems.

[44] The main difference affirmative duties in 'easy rescue' situations; apart from rescue in emergency situations, the scope and situation in which omissions liability is permitted is largely similar. On easy rescue in France, Walter Van Gerven and others, *Tort Law: National, Supranational & International* (Hart Publishing, 2000) 281; Van Dam (n 43) 521ff. The other notable differences between common law and civil law is in relation to child tortfeasors, particularly in France. See Claire McIvor, *Third Party Liability in Tort* (Hart Publishing, 2006) 146ff noting status. In relation to other third parties, eg *Blieck* (153), control and undertaking are more important factors.

[45] French law draws no principled distinction between acts and omissions; German law has a special duty of care (*Verkehrspflichten*) for omissions. See Van Dam (n 43) 85–87 [safety duties]. In both cases, the actual rationale for boundary setting is show 'important similarities' (248) to common law where there is a reluctant to recognise recovery for pure omissions. Per Van Dam, 248–50, there must be 'something more' than inaction before recovery is permitted, eg, relationship with an object, a relationship with the tortfeasor, connection to the place of the accident, relationship with the victim. This can be further specified in terms of status, undertaking, or control, ie proximity and directness in common law terms. This it is argued is because of the more fundamental commitment in all legal systems to personalism as defined above.

[46] Van Dam (n 43) 246.

[47] While there are acknowledged differences in terms of the scope of the omissions' principle in each jurisdiction, the underlying interpersonal framing of the problems is the same. All three jurisdictions must grapple with defining the boundaries of omissions, distinguishing unrecoverable pure omissions from situations in which liability is permitted against a background assumption of negative obligation unless special circumstances pertain. For instance, in France, a rugby club may be liable towards third parties for injuries during the course of a match because it 'organis[ed], direct[ed] and control[ed] the activities of its members' for the duration of the camp', which is a striking parallel with the 'something more' rationale in *Vedanta v Lungowe* in relation to lead firm liability. See McIvor (n 44) 156.

[48] Regarding status, all main jurisdictions recognise 'occupiers' liability', and vicarious liability. Their scope is largely similar, but there are differences in terms of thresholds for liability (standards of care), which reflect cultural/policy differences as well as doctrinal routes. But the background framework of interpersonal justice is the same. None recognise supply chain liability or more extended forms of organisational responsibility. All recognise a personal undertaking as a source of obligation but limit its scope more or less to specific reliance. All recognise control over another as relevant to liability, but it tends only to be relevant where proven to a high degree or in specific categories of relationship. For an interesting overview of third party injury, see Birke Häcker, 'Faute d'autrui in

in other words, a background assumption that one is another's keeper and that there is a general liability for organisational failures.[49]

The company fits within this private law model as merely another person,[50] the default position being that no positive obligations are owed to others. Across all jurisdictions companies are recognised as legal persons and while they must effectuate their will through others, usually directors,[51] the company remains 'individually' responsible for its conduct. This legal position does not change merely because the company forms part of a wider organisation such as a corporate group[52] or a transnational value chain. A 'lead firm' that influences standards across a transnational value chain and sets the context in which injuries or environmental harms occur remains a formally separate person with no responsibility for harms accruing from activities further down the chain. As above, the lead firm has no positive duty to the world at large and typically has no direct contract or 'special' relationship under tort with victims further down the chain. Another company in the chain, with whom the victim does have a legal relationship may well have broken their obligations but there is no obvious means through which their liability can be transferred up the chain and attributed to the lead firm. Hence, the accountability gap emerges, as the company directly responsible may be insolvent, poorly capitalised or located in a jurisdiction with comparatively low legal protection for employees, human rights, or the environment. Of course, rights and liabilities can be transferred between formally separate companies, but the above describes a powerful legal assumption which flows from the company's 'personality' and the interpersonal structure of private law.

The precise bases on which rights and liabilities can be transferred between formally separate companies vary across jurisdictions but it can be said that such examples are confined to narrow contexts only where either consent, impropriety, or extensive economic and organisational integration exists. A company's rights or liabilities can be extended to third

Comparative Perspective' in Jean-Sébastien Borghetti and Simon Whittaker (eds), *French Civil Liability in Comparative Perspective* (Hart Publishing, 2019) 143.

[49] Even in France where there is a general regime of liability for others, it is tightly confined in practice if not in principle. See Van Gerven (n 44) 517–19 requiring some element of control or custody or undertaking. Vicarious liability can be understood as organisational responsibility – indeed it is explicitly viewed in this way in Germany – but it is tightly confined employment situations. Wider forms of *respondeat superior* existing in eg France, but as discussed in a previous note, they require special justification.

[50] Of course, companies must company with the regulatory provisions within company law such as disclosing and filing information in national registers.

[51] The default position in company law is that directors are automatically delegated authority to act *as* the company while shareholders retain authority over fundamental decisions such as electing and removing directors and altering the company's constitutional documents and third parties may be expressly granted authority by an agency agreement. See H Hansmann and others, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (OUP, 3rd edn 2017) Chapter 3.

[52] Referring to the common ownership of shares between companies, where typically, one parent owns shares in multiple subsidiaries. See Janet Dine, *The Governance of Corporate Groups* (OUP, 2000) 40.

parties where they have agreed to be so bound, for example, where a third party provides contractual guarantee or security for a specific company liability. Another example is where two companies form a principal-agent relationship which, depending on the scope of the agreement, may allow for the principal to be liable for the actions of its agent.[53] While common law agency is based on the concept of 'authority'[54] and civil law on 'mandate',[55] they both rest on consent as the basis for transferring liabilities between persons. Liabilities can also be extended beyond the boundary of the company in instances of impropriety, for example, when an officer's actions warrant personal liability under statute,[56] or where the courts decide to 'pierce the corporate veil' and impose a company's liability on to a shareholder.[57] In *Prest vs Petrodel Resources Ltd*,[58] the UK Supreme Court provided a detailed examination of 'veil piercing' under the common law with Lord Sumption concluding that only two grounds—concealment or evasion—justified piercing the veil.[59] Concealment involves using a company to hide illegality[60] while evasion involves interposing a company to prevent the enforcement of a pre-existing right against the appropriate individual or, in other words, using a company to evade existing legal obligations.[61] In civil law jurisdictions, veil piercing is also a narrow doctrine to be applied in 'extreme circumstances' where shareholders engage in fraud, misrepresentation, or opportunism.[62] While the law on veil piercing is notoriously complex[63] in

[53] See Sarah Worthington, 'Corporate Attribution and Agency: Back to Basics' (2017) 133 *Law Quarterly Review* 118.

[54] Which may be express, implied or ostensible based on express contractual agreement or implied from behaviour. See Peter Watts, *Bowstead and Reynolds on Agency* (Sweet and Maxwell, 22nd edn 2020) [1.001–1.035].

[55] Where the agent has direct or indirect powers of representation See Ioan Schiau, 'A Comparative Assessment of the Agency Concept: With Special Regard to the Romanian Approach' (2021) 11(2) *Juridicial Tribune* 219.

[56] These examples vary widely across jurisdictions but frequently include failing to uphold corporate formalities such as non-compliance with financial recording and filing requirements and harming the interests of creditors when the company insolvent.

[57] See Gregory Allan, 'To Pierce or not to Pierce? A Doctrinal Reappraisal of Judicial Responses to Improper Exploitation of the Corporate Form' (2018) 7 *Journal of Business Law* 559.

[58] *Prest v Petrodel Resources Ltd* [2013] UKSC 34.

[59] Ibid, [28]. Not all judges this dual characterisation of the UK position with Lady Hale saying the doctrine may include a principle of 'unconscionable advantage' at [92].

[60] For example, *Gencor ACP v Dalby* [2000] 2 B.C.L.C. 734 involved a director who breached his fiduciary duties by profiting personally at the plaintiff company's expense and then transferring the proceeds to a foreign company which conducted no legitimate business.

[61] For example, *Jones v Lipman* [1962] 1 ALL ER 442 where the defendant transferred property to a company in an attempt to circumvent an order for specific performance under a previous agreement.

[62] This description is taken from Hansmann and others (n 51) 132–4, specifically referring to German, French and Italian law. Hopt similarly states that German and French courts 'lift the corporate veil only rarely and under very strict requirements'. Klaus Hopt, 'Groups of Companies: A Comparative Study of the Economics, Law, and Regulation of Corporate Groups' (2024) ECGI Working Paper Series in Law 752/2024 at 49–50, https://www.ecgi.global/sites/default/files/working_papers/documents/groupsofcompanies.pdf.

[63] For an attempt to clarify the US position see Jonathan Macey and Joshua Mitts, 'Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil' (2014) 99 *Cornell Law Review* 100.

both common law and civil law contexts, it is certain that veil piercing depends on some form of impropriety or illegality[64] and does not apply where companies are merely part of a group, have contractual links with other companies, or where companies are intentionally used as a shield from future, potential liability.[65]

Another basis for transferring rights and liabilities between formally separate companies is organisational in nature, where companies are merged into a single 'enterprise' or 'economic entity'. The justification is that the formal legal assumptions of corporate personhood do not reflect the factual and economic realities, and to ignore those realities would result in injustice. The need for such a doctrine is most clearly articulated by Berle[66] who claimed a variety of problems in company law were caused by the 'divergence' between a company's distinct legal personality 'and the underlying economic facts'[67] and presented an argument for a reconceptualisation of the company as an 'enterprise bounded by economics'.[68] From a broader theoretical standpoint, enterprise liability is aligned with the real entity theory of the company, which views the company's legal personality as a recognition by the state of what already exists, namely an entity that is more than the sum of the contributions of its participants.[69] While formal registration of the company by the state is one legal mechanism to recognise a group's distinctiveness, others also exist such as partnerships, undertakings in competition law, and the enterprise entity doctrine in company law.

The doctrine was applied in a series of UK cases between 1950 and 1970,[70] the leading case being *DHN Food Distributors Ltd v Tower Hamlet London Borough Council*[71] which involved an application from a parent company seeking permission to initiate proceedings for a wrong committed against its two subsidiary companies. Lord Denning stated that the three companies 'should not be treated separately so as to be defeated on a technical point',[72] that the court 'is entitled to look at the realities of the situation'[73] and that the

[64] See Alan Dignam and Peter Oh, 'Rationalising Corporate Disregard' (2020) 40 *Legal Studies* 187, 189 stating that all judges in *Prest v Petrodel* (n 58) unanimously concluded that a company's legal personality could not be disregarded in the absence of impropriety.

[65] This was expressly stated in *Adams v Cape Industries plc* [1990] Ch 433, 544 where the English Court Appeal held there was nothing illegal or improper in using a corporate group structure to ensure that future liabilities fell on one member of that group. This is no surprise given the fundamental rationale for the company is to reduce the future risk of conducting business.

[66] Adolf Berle, 'The Theory of Enterprise Entity' (1947) 47(3) *Columbia Law Review* 343.

[67] Ibid, 344.

[68] Ibid, 345.

[69] See Eva Micheler, *A Real Entity Theory of Company Law* (OUP, 2017) and Otto von Gierke, *Political Theories of the Middle Age* (Frederic Maitland tr, OUP, 1900; reprinted in 1996 by Thoemmes Press).

[70] See *Scottish Cooperative Wholesale Society v Meye* [1962] 2 Q.B. *Wallersteiner v Moir* [1969] 1 W.L.R. 1241 (A.C.) *Littlewoods Mail Ltd v Inland Revenue Commissioners* [1969] 1 W.L.R. 1241 CA (Civ Div) 324.

[71] [1976] 1 W.L.R. 852.

[72] Ibid, 860.

[73] Ibid, 861.

'three companies should, for present purposes, be treated as one'.[74] The doctrine was also applied in an Irish case, where a non-compete clause entered into by a parent company was enforced against its subsidiary due to the economic connection between them and to avoid injustice on the contracting party.[75] Costello J. stated 'a court may, if the justice of the case so requires, treat two or more related companies as a single entity so that the business notionally carried on by one will be regarded as the business of the group or another member of the group if this conforms to the economic and commercial realities of the situation'.[76] The doctrine is also applied in the US,[77] with several state courts citing Berle's Article.[78] For example, *Gartner v Snyder*[79] involved a real estate developer who owned shares and controlled three companies working a single housing project that failed to uphold separate corporate formalities.[80] Based on the high degree of integration, the Second Circuit in New York treated the three companies as one enterprise that was responsible for the labilities of one of the companies. Many US states also apply a substantively similar 'alter ego' doctrine.[81] The specific elements differ between states but, in general, there is a requirement of control to such a degree that there is no operational distinction between a parent and subsidiary.[82] In Germany, the statutory regime for corporate groups (*Konzernrecht*)[83] provides that parent companies who have a 'control agreement'[84] must indemnify its subsidiaries for any losses suffered from acting in the group's interest and if they fail to do so, creditors of the subsidiary company may claim damages from the parent company.[85]

[74] Ibid, 860.

[75] *Power Supermarkets Ltd v Crumlin Investments Ltd and Dunnes Stores (Crumlin) Ltd* (1981) HC.

[76] Iin recent years the UK and Irish courts have owed back on the enterprise entity doctrine. In *Ord v Belhaven Pubs Ltd* [1998] 2 B.C.L.C. 447 the UK Court of Appeal held that in the absence of impropriety, there were no grounds to ignore the separateness of companies and *Bank of Tokyo Ltd v Karoon* [1987] A.C. 45 directly rejected an enterprise entity argument stating 'we are concerned not with economics but with law. The distinction between the two is, in law, fundamental' at 64. For an Irish equivalent see *Allied Irish Coal Ltd v Powell Duffryn Ltd* [1998] 2 I.R. 519.

[77] See Stephen Presser, 'The Bogalusa Explosion, "Single Business Enterprise," "Alter Ego," and other Errors' (2006) 100 *Northwestern University Law Review* 405, 422.

[78] For example, *State Dep't of Envtl. Prot. v Ventron*, 468 A.2d 150, 164 (N.J. 1983) and *Walkovsky v Carlton*, 223 N.E.2d 6, 8–10 (N.Y. 1966).

[79] *Gartner v Snyder* 607 F.2d 582, 586 (N.Y. 2d Cir. 1979).

[80] Documents for all three companies were kept in a single file, all financial records were kept in a single account and letters were sent on the same letterhead.

[81] The doctrine was developed by the California, see in *Riddle v Leuschner* 335 P 2d 107, 110–11 (Cal, 1959). See also Stephen Bainbridge, 'Abolishing LLC Veil Piercing' (2005) 1 *University of Illinois Law Review* 77.

[82] The extent of control necessary is based on a broad range of factors which include: commingling of funds and other assets; the confusion of the records of the companies; the failure to adequately capitalise the subsidiary company; the disregard of legal formalities and both entities having the same controllers. See *Kinney Shoe Corp. v Polan* 939 F.2d 209 (4th Cir. 1991) and *Middendorf v Fuqua Indus., Inc.*, 623 F.2d 13, 17 (6th Cir. 1980).

[83] See Volker Emmerich and Mathia Habersack, *Konzernrecht* (CH Beck, 10th edn 2016).

[84] As described by s 302 *Aktiengesetz.*

[85] S. 309 *Aktiengesetz.* See Alexander Scheuch, 'Konzernrecht: An Overview of the German Regulation of Corporate Groups and Resulting Liability Issues' (2016) 13 *European Company Law* 191.

In EU law, the clearest expression of the enterprise entity doctrine is under competition law which applies to undertakings,[86] defined in the case law as an 'economic unit' that can be comprised of several natural and legal persons.[87] A corporate group will be determined to be an undertaking where a parent exercises such control that the subsidiary has no real freedom to determine its course of action on the market.[88] In this respect, company law mirrors tort law and the principle from *Vedanta v Lungowe* which requires a parent company to have ' … take[n] over, intervene[s] in, control[s], supervise[s] or advise[s] the management of the relevant operations (including land use) of the subsidiary'.[89]

The enterprise entity doctrine demonstrates that company law occasionally moves beyond individual liability to apply a form of organisational liability. At a conceptual level, the enterprise entity doctrine may appear applicable to the value chain given the disparity between its constitution in formal law as a set of distinct persons and the practical realities of its governance architecture and sophisticated systems of coordination. However, as evident from the above examples, the enterprise entity doctrine is dependent upon high degrees of economic and organisational integration, only found where a parent company is functionally in control over its subsidiary such that there is no meaningful difference between the two. In the absence is such integration, fundamental difficulties emerge in drawing the boundaries of the enterprise.[90] Even competition law, which expressly overlooks legal personhood in favour of economic realities, has rejected the notion that a supply chain comprised of different companies could be a single undertaking.[91]

The bases in national law for extending rights and liabilities beyond the formal boundary of the company are important doctrines to prevent the company becoming an engine of impropriety or, to the extent that the enterprise entity doctrine is applied, parent companies escaping liability for what is clearly within their control. However, they remain available in narrowly construed contexts, and their doctrinal principles, which privileges individual liability as the priority model, prevents them being mapped on to the typical value chain that operates without the impropriety required for veil

[86] Articles 101–106 of the Treaty on the Functioning of the European Union (TFEU) prohibiting practices have the objective or effect of preventing, restricting or distorting competition within the internal market.

[87] See *Shell International Chemical Company Ltd v Commission,* case T-11/89, [1992] ECR II-757, [311] and *Mo Och Domsjö AB v Commission*, Case T-352/94 [1998] ECR II-1989, [87].

[88] *Corinne Bodson v Pompes Funèbres des Régions Libérées,* case 30/87 [1988] ECR 2479, [19] and *Michelin v Commission*, case T-203/01, [2003] ECR II-4071, [290].

[89] *Vedanta v Lungowe* [2019] UKSC 20, [49]. See also *HRH Okpabi v Royal Dutch Shell Plc* [2021] UKSC 3.

[90] See Martin Petrin and Barnali Choudhury, 'Group Company Liability' (2018) 20 *European Business Organization Law Review* 1, 13–15.

[91] *Établissements Consten SàRL and Grundigverkaufs-GmbH v Commission,* Cases 56 & 58/64 [1966] ECR 299.

piercing or the directly controlled parent-subsidiary relationships required by the enterprise entity doctrine. Similarly, the codes of conduct, monitoring procedures and general contractual governance used in value chains falls well short of a consensual agency agreement which could allow for the transfer of liabilities. Thus, against this private and company law background, the CSDDD is a measure that is clearly meant to extend the extent of responsibilities and the liability of companies. The question is whether it succeeds in its mission.

2. Due diligence: from human rights principle to company law

The continuing harms resulting from value chains[92] and the limits of national company law doctrine resulted in a renewed emphasis on company law reform.[93] In Europe, this resulted in the introduction of due diligence laws derived from the United Nation's Guiding Principles on Business and Human Rights (UNGPs).[94] The UNGPs were based on John Ruggie's 'Protect, Respect and Remedy' framework[95] which emphasised the principle of 'do no harm'.[96] Ruggie believed most companies were unaware of their impact, could not support a claim of doing no harm, and therefore needed to implement due diligence—a process whereby companies could understand their impact and avoid or at least mitigate human rights harms.[97] The UNGPs aimed to 'operationalise' Ruggie's framework[98] and outlined a detailed due diligence process for business enterprises[99] that was intentionally free of legal terminology.[100]

In 2017, France became the first European country to impose legal obligations on companies to conduct due diligence through their supply

[92] See British Institute of International and Comparative Law, Civic Consulting and the London School of Economics on behalf of the European Commission, 'Study on Due Diligence Requirements Through the Supply Chain' (2020), https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en.

[93] Calls for reform of company law in the context of tort victims have long been made, most notably in Henry Hansmann and Reinier Kraakman, 'Toward Unlimited Shareholder Liability for Corporate Torts' (1990) 100 *The Yale Law Journal* 1879.

[94] UNGPs (n 13).

[95] Protect, Respect and Remedy: A Framework for Business and Human Rights, Report to the UN Human Rights Council (2008), https://www2.ohchr.org/english/bodies/hrcouncil/docs/8session/a-hrc-8-5.doc.

[96] Ibid, [24].

[97] Ibid, [25].

[98] Report to the UN Human Rights Council on 'Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework' (2011) [9], https://www.ohchr.org/sites/default/files/Documents/Issues/Business/A-HRC-17-31_AEV.pdf.

[99] UNGPs (n 13) Guiding principle 17. Principles 19–24 introduce supplementary concepts on how due diligence should be operationalised which include concepts such as 'leverage' (the ability to affect change) and 'tracking' (monitoring the effectiveness of responses to human rights impact).

[100] Ruggie emphasised that the UNGPs existed 'over and above' legal requirements and were grounded in a company's social license to operate rather than legal principle. See John Ruggie and John Sherman, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale' (2017) 28(3) *The European Journal of International Law* 921, 924.

chain.[101] In 2021, Germany introduced similar obligations in its Supply Chain Act.[102] In 2022, following consultations and a detailed report,[103] the European Commission published its proposed Corporate Sustainability Due Diligence Directive (CSDDD).[104] The EU's market size, number of companies, and its potential to shape legal norms globally,[105] means the CSDDD had the greatest potential impact of the due diligence laws. While the UNGPs sought to reduce the harms caused by companies through norm setting and relying on voluntary engagement, due diligence laws imposed mandatory obligations overseen by regulatory authorities. The failure to comply with due diligence obligations could result in civil liability which had the potential to reduce the effectiveness of judgment proofing[106] through connected companies, thereby closing the accountability gap and lowering the incentive to externalise costs.[107] However, these laws, rather than attempting to establish an organisational form of liability based on developing a legal concept of 'business enterprise', sought to fit within the primarily individual liability model of company law.

The European Commission's proposed CSDDD was to apply to individual companies registered in EU Member States with over 500 employees and a turnover of over €150 million.[108] Those thresholds were to be reduced to 250 employees and a turnover of over €40 million if 50% of that turnover was generated from a 'high risk' sector, which included

[101] The French Duty of Vigilance (French Law No. 2017-399 *Loi de Vigilance*) applies to French companies that employ 5000 employees in France, or 10,000 globally and requires them to implement a 'vigilance plan' which should include measures to identify and prevent human rights and environment harms arising from the activities of the company itself, its subsidiaries or suppliers and subcontractors with whom the company has an established commercial relationship. See Alain Pietrancosta, 'Codification in Company Law of General CSR Requirements: Pioneering Recent French Reforms and EU Perspectives' *ECGI Working Paper Series* in Law, https://www.ecgi.global/sites/default/files/working_papers/documents/codificationfinal_0.pdf.

[102] The German Supply Chain Due Diligence Act (*LkSG—Lieferkettensorgfaltspflichtengesetz* 2021) applies to any company that 3000 has 3000 employees in Germany, the threshold being reduced to 1000 from January 2024. It requires companies to conduct risk analysis on human rights and environmental risks and develop a policy to implement preventive measures against such risks arising from its own operations and across its supply chain. See Andreas Rühmkorf, 'The German Supply Chain Law: A First Step Towards More Corporate Sustainability' (2023) 20(1) *European Company Law* 6.

[103] British Institute of International and Comparative Law, Civic Consulting and the London School of Economics on behalf of the European Commission, 'Study on Due Diligence Requirements Through the Supply Chain' (2020), https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en.

[104] Commission's draft CSDDD (n 21).

[105] Referring to what has become known as the Brussels Effect see Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (OUP, 2019).

[106] Described by LoPucki as a relationship between two or more entities in which one entity generates disproportionately high risks of liability and another owns a disproportionately high level of assets. Lynn LoPucki, 'The Essential Structure of Judgment Proofing' (1998) 51 *The Stanford Law Review* 147, 149.

[107] See Alessio Pacces, 'Civil Liability in the EU Corporate Sustainability Due Diligence Directive Proposal: A Law & Economics Analysis' (2023) ECGI Working Paper, 6–8, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4391121.

[108] art 2 of the Commission's draft CSDDD (n 21).

the manufacturing of textiles or metal products, the wholesale trade of clothing and footwear; agriculture, forestry, and the extraction of minerals.[109] Companies subject to the Directive would be required to identify actual and potential adverse human rights and environmental impacts arising from their own or their subsidiaries' operations or from 'established business relationships'[110] in their 'value chain'.[111] Once potential adverse impacts were identified, companies would be required to take 'appropriate measures' to bring an end to, or if that was not possible, to minimise the extent of the impact.[112] The company could be civilly liable for damages if it failed to comply with these due diligence obligations and as a result of that failure, an adverse impact that should have been identified, prevented, mitigated, and/or ended led to damage.[113] The company could also be liable if it conducted due diligence actions but these actions were such that it would be unreasonable to expect them to be adequate to prevent, mitigate, or end the adverse impact arising from the activities of a company with whom it had an established business relationship.[114] Hence, companies who conducted due diligence but to an insufficient level could still be held civilly liable.

The general framework of due diligence in the proposed CSDDD was maintained in the final Directive. For example, companies must prepare a due diligence policy and code of conduct[115] that is to be applied to subsidiaries and other companies throughout its value chain.[116] Compliance is to be overseen by national supervisory authorities,[117] and a European Network of Supervisory Authorities which are to facilitate the alignment of regulatory, investigate, sanctioning, and supervisory practices.[118] All drafts of the CSDDD allowed for territorial extension, given the fundamentally transnational nature of the issue,[119] and it applies to companies registered outside the EU if they meet the turnover threshold from business conducted inside the EU.[120] Additionally, once a company falls within the thresholds,

[109] Ibid.
[110] Ibid, art 3(f) defined as 'a business relationship, whether direct or indirect, which is, or which is expected to be lasting, in view of its intensity or duration and which does not represent a negligible or merely ancillary part of the value chain'.
[111] Ibid, art 6.
[112] Ibid, art 8.
[113] Ibid, art 22.
[114] Ibid.
[115] Ibid, art 5; Final CSDDD art 5 (n 17).
[116] Ibid, art 5; Final CSDDD art 7 (n 17).
[117] Ibid, art 19; Final CSDDD art 24 (n 17).
[118] Ibid, arts 17 and 18 and 21; Final CSDDD art 28 (n 17).
[119] Joanne Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62 *American Journal of Comparative Law* 87 differentiating between direct application of law to parties outside a jurisdiction and 'territorial extension' where a party within the jurisdiction is required to affect conduct or circumstances abroad.
[120] art 2 of the Commission's draft CSDDD (n 21); Final CSDDD art 2(2) (n 17).

their due diligence obligations apply regardless of the size or geographical location of the other companies in their value chain.[121]

The Commission's draft CSDDD seemed on course for entry into law until objections were raised in the European Council.[122] After further negotiations, an amended version was agreed by the Council in April 2024, [123] was published in the Official Journal in June 2024,[124] and entered into force in July 2024.[125] The structure of the amended CSDDD remained the same: large EU companies must develop due diligence practices and policies and implement them across their international value chain with a view to ending or mitigating adverse human rights and environmental impacts, with the failure to do so creating exposure to civil liability. While the underlying framework remained, the thresholds of application were significantly raised. The CSDDD will now apply to companies or parents of a corporate group with more than 1000 employees and a net worldwide turnover exceeding €450 million.[126] While there is now a provision for consolidated thresholds for the parents of corporate groups,[127] in line with other EU company law Directives,[128] the amendments doubled the number of required employees, tripled the required turnover, while the lower thresholds for high-risk activities were removed.

The model of civil liability also underwent fundamental change. The CSDDD now includes an element of fault such that the company can only be liable where it 'intentionally or negligently' fails to comply with its due diligence obligations and requires that the failure caused damage to a person's legal interest under national law.[129] The Directive also expressly states that a company cannot be liable if the damage was caused *only* by its business partners in its chain of activities[130] while it no longer includes the provision which allowed for the imposition of liability where it was unreasonable to expect the due diligence actions to be adequate. A further

[121] See Luca Enriques and Matteo Gatti, 'The Extraterritorial Impact of the Proposed EU Directive on Corporate Sustainability Due Diligence: Why Corporate America Should Pay Attention' (2022) *Oxford Business Law Blog*, https://blogs.law.ox.ac.uk/business-law-blog/blog/2022/04/extraterritorial-impact-proposed-eu-directive-corporate.

[122] Germany and Italy leading the objections, see https://www.reuters.com/markets/europe/eu-postpones-decision-proposed-supply-chain-due-diligince-law-2024-02-09/.

[123] European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, https://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/definitif/2024/04-24/0329/P9_TA(2024)0329_EN.pdf.

[124] Final CSDDD (n 17).

[125] See https://commission.europa.eu/business-economy-euro/doing-business-eu/sustainability-due-diligence-responsible-business/corporate-sustainability-due-diligence_en#:~:text=On%2025%20July%202024%2C%20the,across%20their%20global%20value%20chains.

[126] Final CSDDD art 2 (n 17).

[127] Ibid.

[128] For example, art 29A of the Corporate Sustainability Reporting Directive (EU) 2022/2464, https://eur-lex.europa.eu/eli/dir/2022/2464/oj.

[129] Final CSDDD art 29(1) (n 17).

[130] Ibid.

change is a greater emphasis on risk management,[131] as exemplified by a new mapping requirement to identify where adverse impacts are most likely to occur and to be most severe.[132] As part of this focus on risk, companies must, where it is not feasible to prevent, mitigate, bring to an end, or minimise all identified adverse impacts, prioritise impacts based on the severity and likelihood of occurrence.[133] While high-risk, high-severity impacts should be prioritised, it does provide an additional defence to companies where they can claim that they only failed to conduct due diligence because they are prioritising other human rights or environmental impacts.[134] One final change regards the terminology used with 'value chain' being replaced by 'chain of activities'.[135] While 'value chain' in the Commission's draft included direct (contractual) and indirect (non-contractual) relationships in both upstream[136] and downstream[137] business operations, 'chain of activities' excludes indirect, downstream business partners.[138] In plain language, companies are now freed from obligations to conduct due diligence in second tier business partners involved in downstream operations such as distribution, transport and storage.

The amendments have greatly diminished the legal significance of the CSDDD, and any claims of a due diligence liability revolution need to be rethought.[139] While the Directive may still affect the norms of doing business, bringing the importance of due diligence into focus and attracting new attention to the UNGPs, any impact based on the deterrent effect of exposure to civil liability now seems remote. First, the increased thresholds limit the Directive's application to all but the largest of companies,[140] and make it easier for business enterprises to further fragment their operations such that no single company or parent company meet the thresholds. Second, the requirement to establish an 'intentional or

[131] For example, the fundamental obligation to conduct due diligence set out by Art. 5 was amended to include the words 'risk based'. The text now states 'Member States shall ensure that companies conduct ***risk-based*** human rights and environmental due diligence'.
[132] Final CSDDD art 8(2) (n 17).
[133] Ibid, art 9.
[134] Pacces (n 107) 5.
[135] Final CSDDD art 3(g) (n 17).
[136] 'Upstream' relating to the production of goods or the provision of services by the company, including the design, extraction, sourcing, manufacture, transport, storage and supply of raw materials, products or parts of the products and development of the product or the service.
[137] 'Downstream' relating to distribution, transport and storage of the product.
[138] Final CSDDD art 3(g) (n 17) stating that a chain of activities extends to 'downstream' 'business partners' who carry out those activities *for* the company or *on behalf* of the company.
[139] Youseph Farah, Valentine Kunuji and Avidan Kent, 'Civil Liability Under Sustainability Due Diligence Legislation: A Quiet Revolution?' (2023) 24(3) *King's Law Journal* 499.
[140] The amendments will reportedly lead to a 67% reduction in the number of companies to whom it will apply, although it is difficult to estimate the actual effect of the changes with precision. https://www.euractiv.com/section/economic-governance/news/scope-of-eu-supply-chain-rules-cut-by-70-ahead-of-key-friday-vote/.

negligent' failure adds an additional burden for claimants and determining that standard will be left to Member States for interpretation. Third, the requirement that the damage must affect a person's interest under national law changes the reference point from the damage caused and the company's due diligence practices to the national law of member states. While a company implementing a code of conduct across its international value chain may raise employment and human standards above national law, a victim will be unsuccessful in attempts to impose civil liability unless their interest under national law is harmed regardless of the company's code of conduct or its failures to implement due diligence. This reliance on national law adds another doctrinal restriction on civil liability claims and further illustrates how the CSDDD remains embedded within traditional liability frameworks. Fourth, the provision that companies will not be responsible for damage caused *only* by its business partners adds a new layer of uncertainty by implying a need for a causal connection between the actions of the company subject to the Directive and the damage. It is unclear whether a failure to comply with due diligence obligations is sufficient to create that link as breaching due diligence requirements and *causing* damage are substantively different actions. Fifth, companies now have a defence of prioritisation, which, of course, would require the company to adduce evidence of their efforts to mitigate or end more severe impacts but nevertheless adds a further element to a claim for civil liability. Taking these factors together, the CSDDD now involves overcoming significantly more hurdles when compared to the original proposal.[141] Further, as Lafarre has noted, the Directive has not addressed the traditional barriers facing tort claimants such as high costs and potentially asymmetric power relations.[142] Another related issue is the burden of proof.[143] Both the Commission's Draft and the final CSDDD provide that national law should decide which party must prove the 'conditions for liability'.[144] Presumably, the burden will fall on the claimant under national law and while the final CSDDD allows for courts to require disclosures from a company subject to a claim for damages,[145] successfully establishing the multiple elements required is still likely to prove onerous for claimants. Now, the most likely avenue for enforcement is

[141] This also applies to supervisory authority who, in order to impose civil liability on a company, must do so in accordance with the updated model for civil liability. European Parliament adopted text (n 17) Art. 25(4).

[142] Anne Lafarre, 'Mandatory Corporate Sustainability Due Diligence in Europe: The Way Forward' (2022) *ECGI Blog*, https://www.ecgi.global/publications/blog/mandatory-corporate-sustainability-due-diligence-in-europe-the-way-forward.

[143] For analysis see Pacces (n 107) 12–13.

[144] Final CSDDD Recital 81 (n 17).

[145] Ibid, art 29(3)(e) where a claimant presents a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of their claim for damages.

through penalties imposed by supervisory authorities,[146] the basis for which are to be set by national law.[147]

At a conceptual level, due diligence laws represent a significant development in company law. Unlike the bases in national law for transferring liability between companies, due diligence laws are adapted to the dispersed and transnational realities of the value chain and expressly aim to reduce human rights abuses and environmental harms through, in part, providing a new basis for exposure to civil liability. This may, at first glance, create an impression that such laws create an organisational form of liability or *respondeat superior*. However, due diligence laws remain thoroughly individualistic in form. While charting new conceptual and doctrinal ground in EU company law, the CSDDD applies to *individual* companies that cannot be liable for the harm caused by another person, regardless of the severity of the harm or the relationship between it and the company whose actions led directly to the harm. Due diligence remains a personal, constrained positive obligation to carry out a process to prevent or limit harm rather than a wide positive duty to take care of potential victims further down the chain and does not create responsibility for the actions of another person or establish group responsibilities.

The effort to convert human rights principles into the individualistic framework of company law required disaggregating the value chain and finding methods to identify the appropriate individual and demarcate their responsibility. Problems of fit seemed inevitable given the structurally fragmented nature of the transnational value chain, potentially comprised of multiple autonomous actors. One assumed, based on the Commission's proposal, these problems would emerge through corporate fragmentation to avoid thresholds or in difficulties in establishing the company did, in fact, fail in its due diligence obligations and that the failure led to damage. However, these difficulties surfaced earlier, in the form of political objections at the Council level which specially focused on the two points of personal responsibility: identification of the individual (thresholds), and demarcation of the responsibility (the model of civil liability). The ensuing political compromise resulted in significantly higher thresholds of application and a multi-layered model of liability where intention or negligence, damage under national law, and causation are necessary elements for any claim. Now, the CSDDD can be categorised alongside the national company law bases for transferring liability between companies as applicable only in narrowly defined contexts and fail to

[146] Ibid, art 27. The maximum limit of pecuniary penalties shall be not less than 5% of the net worldwide turnover of the company in the financial year preceding that of the decision to impose the fine.
[147] Ibid, art 27 stating such bases must be 'effective, proportionate and dissuasive'.

disincentivise the general externalisation of costs which gives rise to the accountability gap.

3. The great beyond: network liability

It seems opportune to take stock. While the CSDDD is a landmark piece of legislation which confirms that the company has societal responsibilities, and not only private interests, it falls far short of providing a comprehensive remedial framework for victims of human rights and environmental abuses. It does not, in short, close the accountability gap. More precisely, the European legislator has limited the CSDDD's scope of application to very large companies and is also explicit, as we have argued, in its *renvoi* to national law. By confining its application to individual companies, explicitly ruling out liability for harm caused only by its business partners and including intent or negligence under national law as a necessary element, it becomes assimilated into the individual liability model: either liability is premised on positive conduct or, if not, there is a very limited carve out for quasi-organisational liability. Even the carve out requires some direct or personal involvement or relationship.

What might be surprising to some, against this background, is that the EU legislator, when devising a liability principle, did not rely on its own wider enterprise (or fully organisational) liability 'carve out', namely the basic model of liability in Directive 85/374/EEC ('PLD').[148] After all, unlike recourse to national law, the PLD is not hamstrung by a norms of coherence and consistency with existing law. The PLD liability principle's rationale and justification is consumer protection and, more specifically, distributive justice.[149] It provides that victims of defective products may claim against producers defined as manufacturers of finished products or components, producers of raw materials, importers to the EU, those who affix their name or trade mark to a product, and allows in certain circumstances, for liability to be shifted to product suppliers.[150] In this way, the Directive treats the production and distribution chain as a *de facto* common enterprise

[148] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (https://eur-lex.europa.eu/eli/dir/1985/374/oj). This will soon be replaced by the revised DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on liability for defective products COM(2022) 495 final. The revised directive is, basically, consistent with the logic of the existing PLD but attempts to future proof it in the light of Artificial technology and the circular economy. It also codifies CJEU case law.

[149] Fair allocation of risks between groups in recital 2. That is, a deliberate policy of changing the entitlements as between groups, or what Cane has called the benefits and burdens of liability. See Peter Cane, 'Distributive Justice and Tort Law' (2001) *New Zealand Law Review* 401, 406.

[150] Art 3: although recourse against suppliers can also be obtained as a next-best remedy. In the proposed revision, next best remedy provisions will be extended to service fulfilment providers, and online platforms in certain circumstances. See arts 7(3) & 7(5), 2022 proposal.

or organisation *from the point of view of the victim*.[151] It has not gone unnoticed that this model of liability could be transposed from producer-driven chains to buyer-driven supply chains. As Ulfbeck argues,[152] the same underlying rationale of 'distributive justice and risk distribution according to the cheapest cost avoider principle'[153] applies if one replaces the goal of consumer protection with that of corporate societal responsibility and recourse for the victims of defects in supply chain management. It seems to us that the analogy goes so far, but not all the way. The analogy is successful where there is a single, lead firm buyer because it is possible to view the buying chain as single or common enterprise or organisation. Following the analogy with producer-driven chains, the different legal persons who make up the supply chain can be overlooked from the perspective of victims compensation. This is likely to arise where there is dependent contracting or, more realistically, a type of vertical disintegration of convenience.[154] But where there are multiple buyers, which is a common occurrence, the boundaries of the common enterprise are difficult to demarcate. The same factory, for instance, may be selling its garments to all the main retailers in a particular market, at the same time, or at different times. What appears to be lacking is sufficient integration to say that with any confidence, there is a connection between the tort and anyone in particular beyond the immediate tortfeasor. This also highlights another feature of liability under the Directive—while several actors are deemed responsible-liable to the victim based on reasons of consumer protection and distributive justice, it is primarily a form of *enterprise* moral responsibility;[155] the Directive has a liberal understanding of the boundaries of the enterprise but nonetheless it is fundamentally about *imputing*, what Keating calls the 'characteristic risks' of enterprise activity to the enterprise and not simply about *attributing* losses to parties in the absence of any wrongdoing.[156] In other words, it distributes rights or entitlements but does so within an interpersonal framework. Like the enterprise entity doctrine discussed in section 1, it dispenses with formal boundaries, but not with an actor-centred, moral responsibility-liability.[157] If

[151] It does not entirely eliminate the concept of personal responsibility, but effectively makes it a problem for the defendant-side, ie, Art. 8 refers to the national law rules on 'contribution or recourse', which would enable importers, for instance, to make arguments based on comparative fault. It incentivises the defendant-side to use contract law to allocate risks. This is different, in kind, from a more generic form of organisational liability like 'market share liability'.

[152] Vibe Ulfbeck, 'Supply Chain Liability for Workers' Injuries—Lessons to be Learned from Products Liability?' https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2943407.

[153] Ibid, 11.

[154] Ie, transparent judgment proofing, LoPucki (n 106).

[155] See Stapleton (n 29) ch 8.

[156] Gregory Keating, 'Enterprise Liability' (2022) USC Law Legal Studies Paper No. 22-25, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4194039. Keating distinguishes a fairness-based from more instrumental justifications of enterprise liability. In global value chains, the risk creation-fairness justification is missing.

[157] Anna Beckers, 'Global Value Chains in EU Law' (2023) 42 *Yearbook of European Law* 322, 323 ['actor-centred'].

it were purely based upon distributive justice and the allocation of risks, there would be no need to identify a producer, howsoever widely defined, it would be sufficient to attribute liability to firms based on a principle of market share or cognate.[158] In effect, that would amount to a tax on industry.[159] However, if the whole point of closing the accountability gap is to reinforce *firms'* societal responsibility via liability, that is via private law, it is normatively incoherent to do so in such a 'blunderbuss' way.[160] The chief problem for demarcating and imputing liability is, clearly, the boundary issue which is markedly different in buyer*s*-driven supply chains than it is in classical produce*r*-driven chains. For similar reasons, any proposal based on vicarious liability is unlikely to succeed. There are too many potential principals, and if vicarious liability is understood as enterprise liability, it encounters the same difficulties as producers' liability in terms of demarcating the boundaries of the common enterprise.[161]

Thus, in the end, the EU approach to products liability is unworkable as a model of liability for global value chains, and its non-use which may seem surprising, at first, becomes understandable on reflection. At a deeper level, moreover, rather than challenge the national law frame of reference the PLD analogy rather replicates its tendency to view the problem either as a matter of individual liability or organisational liability thereby excluding any third possibility. Either responsibility-liability is imposed based on individual liability or via an extension of the individual obligation such that it amounts to a quasi-organisational responsibility (eg, *Vedanta*), or, like the PLD, imposed, exceptionally, as a fully organisational liability. But the latter does not map well onto buyer-driven supply chains. It is also structurally identical to national law. In both cases, the rule is individual liability for positive conduct, and organisational liability carved out for exceptional circumstances. The parent-subsidiary relationship is an obvious site for quasi-organisational liability since whether considered in terms of vicarious liability, as some argue it should be,[162] or in terms of an extended individual liability where involvement, control, or undertaking is present, there is justification for organisational liability in substance if not in form.[163] The

[158] One might get this impression from reading the recitals of the directive, which talk in terms of fair apportionment of risks, but it is not a regime of liability *in solidum*.

[159] Ie, a political principle of distributive justice, as distinct from a local application of it within a corrective justice scheme, see Cane (n 149) 413 esp. on this distinction.

[160] Stapleton (n 29) 200 [stating the PLD is based on moral responsibility for risk creation].

[161] See Daniel Harris, 'The Rival Rationales of Vicarious Liability' (2021) 20 *FSU Business Review* 49 [distinguishing the modern, enterprise liability, and traditional agency or individualistic-based justifications of vicarious liability. He tends to over-simplify enterprise liability as simply deep pocket recovery].

[162] Philip Morgan, 'Vicarious Liability for Group Companies: The Final Frontier of Vicarious Liability?' (2015) 31(4) *Journal of Professional Negligence* 276.

[163] Simon Deakin, 'The Evolution of Vicarious Liability' Allen & Overy Annual Law Lecture, Faculty of Law, University of Cambridge, 8 November 2017, https://resources.law.cam.ac.uk/privatelaw/the_evolution_of_vicarious_liability_(lecture%20text).pdf [argues that non-delegable duties, and

global value chain—and this is the important point—does not meet this threshold requirement for organisational liability because it lacks the features of integration, hierarchy and control which are characteristic of organisational liability, and which parallel the enterprise entity doctrine, so the CSDDD *faute de mieux* defaults back to its classical norms of individual responsibility-liability for 'lead firms'. This is particularly obvious if one considers that in the CSDDD, the lead firm is absolved of liability if damage is only caused by business partners in its chain of activities. This is, as we have argued, the underlying tension in the CSDDD as it oscillates the between the Scylla of individual liability and the Charybdis of organisational liability.[164]

How does one, or more pertinently *should,* the EU legislator, get out of this dilemma? The answer is quite straightforward: differentiate a third basis of liability within, and consistent with, the interpersonal form of private law.[165] Both individual liability and organisational liability are different ways to attribute and impute liability, which have distinct justifications. However, it should be remembered, though, that 'organisational liability' is not a fundamental break with individual liability; instead, it is an internal differentiation within the legal system to a particular problem, namely the vertically integrated firm.[166] Organisational liability is, however, ultimately in the form of an interpersonal obligation: it is liability for characteristic risks of the enterprise widely understood. For this reason, Stapleton has called it moral enterprise liability. It seems obvious, as we have argued, that neither model of liability fits the particular role or function of lead firms (and others) as regulatory gatekeepers.[167] There is therefore a need to develop a third form of liability, interpersonal in form, and therefore *of* private law, which is specifically geared to the problem of 'private' regulatory governance. In this respect, it does not need to correspond to or replicate the complexities of global value chains;[168] instead, it needs to provide a

control duties should be understood alongside vicarious liability as 'exaptions' for a missing, explicit doctrine of organisational liability in national law].

[164] This is not to dismiss or deprecate the politics of the CSDDD – what we referred to earlier as 'capture' – but it is not only a problem of politics or power, but also a problem of a lack of sufficient legal conceptual complexity in private law to model reality. On the dynamic and generative relationship between fact and norm, see Karl-Heinz Ladeur, 'The Emergence of Global Administrative Law and Transnational Regulation' (2012) 3(3) *Transnational Legal Theory* 243.

[165] From our perspective, the public law responsibilisation of companies – their societal responsibilities – should be viewed as a catalyst for greater differentiation within private law. This is nothing new under the sun; in fact, as I have argued elsewhere, the notion of organisational liability is, itself, a private law internal differentiation based upon legislative and statutory impetus. See Rónán Condon, *Network Responsibility* (CUP, 2022) ch 2. Later, ch 4, I also argue that the basic features of network liability are already present in EU law in incipient form.

[166] It is achieved either through 'exaption', or like the PLD explicitly. See Deakin (n 163) on 'exaption'.

[167] For an elaborate discussion, see Rory van Loo, 'The New Gatekeepers: Private Firms as Public Enforcers' (2006) 106(2) *Virginia Law Review* 467.

[168] The network is not a legal concept; it is a cognitive irritation of the legal system. It is only through the internal evolution of legal concepts that normative stabilisation norms emerge. This is our understanding of Kjaer (n 30) 'mutual increase'/'co-evolution' idea.

legally coherent model of liability which recognises the normative role and significance of regulatory gatekeepers with societal responsibilities.

This is an urgent need because private regulatory governance has proliferated, as a form of private authority, through the capillaries of the transnational body politic. It is, as the CSDDD affirms, a distinctive societal role responsibility, which its occupiers have freely assumed, as watchmen of their supply chains. This role responsibility, while societal, is delimited to a particular and intense network of contracts, ie, a supply chain, and the role of liability law, now as public law, should be to reinforce it.[169] Liability should be understood as an incident of assuming this role responsibility.[170] The role responsibility is for the supervision of a network of actors for their compliance with human rights norms,[171] and includes their relationship with those outside the production network.[172] It recognises the normative salience of a regulator of a network of actors. While the PLD, as a form of moral enterprise liability in essence, defines a common enterprise qua 'producer' for normative purposes, the liability of lead firms, but not only lead firms, should be defined by reference to its role as a *regulator* of a supply chain.[173] This does not make the regulator *respondeat superior* for the network of actors that comprise the supply chain. This would collapse the global value chain or supply chain into a single common enterprise. Nor does not fall back on norms of individual liability either and its dyadic negative obligations and 'exceptions'.[174] The responsibility is neither dyadic nor organisational; it is, rather, better conceptualised as a form of normative secondary liability for a failure to supervise. It might better be described as a type of network liability: the distinctive role responsibility of regulators is to supervise a network of actors: suppliers of various tiers. This does not require any great legal revolution; it is innovation or differentiation within the form of private law—it is the recognition of a new interpersonal responsibility-liability towards victims. It is a positive obligation to regulate a supply

[169] While the form and structure of private law is relational, private law as state law has a role in articulating the public interest distinct from 'societal constitutionalism'. On this point, see Christoph Menke, *Critique of Rights* (Polity, 2020) 20–24 esp. on the public dimension of private law.

[170] To be clear, we do not mean the doctrine of assumption of responsibility in common law. The role of gatekeeper has a social meaning and entails certain legal responsibilities including the responsibility to take preventative measures where it is necessary to do so (ie, due diligence in public law). The invitation in this article is to extend from responsibility to liability, but in such a way that is coherent with private law.

[171] To the extent they comply with recognised private law forms of misconduct. It is not liability for 'constitutional torts'.

[172] Technically speaking, employees of suppliers are outside the governance network of actors. They are governed, not governing.

[173] But not the only one, see Lary Cáta Backer, 'The Problem of the Enterprise and the Enterprise of Law: Multinational Enterprises as Polycentric Transnational Regulatory Space' in Peer Zumbansen (ed), *The Oxford Handbook of Transnational Law* (OUP, 2021) 777, 785 [on the polycentricity of sites of transnational regulatory authority].

[174] It is not clear that these are true exceptions because as detailed in section 1, the exceptions involve some positive conduct, ie, control, involvement, undertaking.

chain; the boundaries of the obligation are set by the connected contracts of production.

This way of framing responsibility-liability, by its very nature, recognises *from the perspective of private law* the normatively secondary or 'peripheral' position of the regulator.[175] From the point of view of attribution, supervisory responsibility is *attributed* to them for *their* supply chain; from the point of view of rules of imputation, their responsibility is calibrated in recognition of the normatively secondary position they occupy. Concretely, a new 'duty of care' arises from fulfilling the societal role of regulator of a network of actors. This recognises their distinct role and function within the governance of global value chains by imputing a liability upon them. However, to give due to regard to that role and function as a normatively secondary actor (or peripheral party), and to distinguish this as a genuine model of liability distinct from individual liability (negligence-based) and organisational liability (stricter liability), the 'standard of care' should be calibrated. It is only gross negligence—conduct that falls *far* below what is expected of a prudent regulator—which should attract liability.[176] This qualification is not unknown in private law and has close parallels in respect of the private law responsibility of public supervisors. When 'private' actors occupy functionally equivalent roles there is no reason in principle why they should not be subjected to similar rules on normative grounds.[177] There is, it should be noted, no principled or conceptual reason why other normatively secondary actors which occupy regulatory roles in the same supply chain should not also be subject to the same principle of liability.[178] In supply chains, there are usually several nodal, governance points.[179] It is perhaps the search for the organisational actor quasi-*respondeat superior* which has obscured this reality. It is regrettable that, *inter alia*, the failure to find the enterprise *respondeat superior* has resulted in a retreat at the EU level into individual liability. These are two, existing alternative models of liability in national law, but there is no reason why the EU legislator should have deferred, conceptually, to them, and many reasons why it could and should have gone

[175] To be ascribed as a regulator is to be, by definition, a secondary actor. Of course, if a regulator intervenes, or makes specific undertakings, their legal, normative characterisation may change for then they are no longer at one step remove from the tortfeasor or the tort.

[176] Donal Nolan, 'Varying the Standard of Care in Negligence' (2013) 72 *Cambridge Law Journal* 651 [his formulation of the gross negligence standard].

[177] There are policy reasons why public authorities' liability is so qualified, but they are not relevant in the context of 'lead firms', ie, discretionary powers, excessive demands on the public purse, and chilling effects. This leaves their normative peripheral party role as the remaining justification. There are, to the contrary, good policy reasons why liability ought to be imposed, Mark A Geistfeld, 'The Law and Economics of Tort Liability for Human Rights Violations in Global Supply Chains' 10(2) *Journal of European Tort Law* 1.

[178] The problem of dividing up responsibility where there is more than one gatekeeper should be backended to the issue of contribution. Let the gatekeepers fight it out and leave victims to their remedy!

[179] The keyway to uncover the gatekeepers of supply chains is through tracing contractual chains. But tort liability is independent of contract.

beyond them.[180] The EU legislator could have taken the lead for others to follow. Unfortunately, it has simply amplified the pathologies and path dependencies of national law.[181]

Conclusion

Two opposing realties emerge from the above analysis. First, the principle that a company marks a distinct boundary of rights and liabilities is not sacred. It can, and frequently is, sacrificed in certain contexts due to consent, impropriety, or high degrees of economic and organisational integration.[182] The company's legal personality is not fixed, rather, the company is embedded in a broader set of legal rules which shift its boundaries in certain contexts.[183] However, a second picture emerges of company law following a *form* of individual liability. While the individual liability model admits exceptions that allow transfer of liabilities between individual companies, it nevertheless ensures they remain applicable in narrowly defined contexts and put a break on doctrinal developments which seek to expand towards broader group modes of responsibility. The first point could be viewed as demonstrating the malleability of company law, something that can be reformed and adapted to modern challenges such as those presented by transnational value chains and human rights and environmental issues more broadly.[184] The second point sounds a note of caution. We believe the underlying individual *form* of company law has been paid insufficient attention leading to the difficulties of *translating* organisationally focused human rights principles *into* company law being underestimated. That is not to say that legal personality itself has been under analysed, its significance, if anything, and as Pargendler notes, has been overplayed.[185] Rather, there are powerful legal

[180] There is some evidence in CJEU jurisprudence to think that the Court is already experimenting with more encompassing network models of liability. See Condon (n 165) ch 4 [on the concept of network liability, and responsibility]. The case law discussed in that chapter has already impacted upon the allocation of risk in the proposed, revised products liability directive, and it is clear that the concept of gatekeeper liability it also embodies could be deployed in the context of global value chains.

[181] Pathologies identified by Hugh Collins as far back as 1990. See Hugh Collins, 'Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Integration' (1990) 53(6) *Modern Law Review* 731.

[182] For further exploration see Mariana Pargendler, 'The Fallacy of Complete Corporate Separateness' (2024) 14 *Harvard Business Law Review* 1 stating that creation of a company as 'a new right-and-duty bearing unit—does not and should not beget complete legal insulation from other persons' at 3.

[183] See Eric Orts, 'The Complexity and Legitimacy of Corporate Law' (1993) 50(4) *Washington and Lee Law Review* 1565 and Eric Orts, *Business Persons: A Legal Theory of the Firm* (OUP, 2013).

[184] See Kent Greenfield, 'Saving the World with Company Law?' (2007) 57 *Emory Law Journal* 947 and Kent Greenfield, 'New Principles for Corporate Law' (2005) *Hastings Business Law Journal* 87.

[185] Mariana Pargendler (n 182) and 'Veil Peeking: The Corporation as a Nexus for Regulation' (2021) 169 *University of Pennsylvania Law Review* 718.

assumptions governing the relationships between companies. These assumptions are inherited and reflect private law's general schema of negative obligations between individual actors, where positive obligations and group responsibility can only be justified by special circumstance.

The CSDDD is a case in point, the Commission attempted to introduce a model of due diligence derived from the UNGPs by translating those principles into a company law framework. In doing so, the organisational term 'business enterprise' from the UNGPs was replaced by thresholds to identify *individual* companies who could be civilly liable for failure to conduct due diligence across *their* value chain. However, the models of identification and demarcation of liability proved politically controversial which led to significantly increased thresholds and a narrowly constrained model of civil liability. One may argue that the issue was not in translating human rights due diligence into company law but rather the lack of political will to follow through with the Commission's proposal. Certainly, the original Commission proposal provided a greater scope for civil liability claims, and thereby an incentive to internalise costs, while remaining within an interpersonal structure. Such arguments have merit, to a point. We believe any model of liability based on individual *or* organisational responsibility will be ill-equipped to meet the challenges posed by the complex networked structure of transnational value chains. The Commission's proposal was still beset by issues of 'fit' such as the arbitrariness of the thresholds, the potential for corporate fragmentation to avoid the thresholds and the potential difficulties in a claimant establishing that a company did, in fact, fail in its due diligence obligations and that failure resulted in harm. The interpersonal difficulties have merely become more pronounced in the amended proposal, through the higher thresholds, the multi-layered model of civil liability, leaving the CSDDD applicable only in narrowly defined contexts.

We believe that environmental harms and human rights abuses arising from the operation of value chains are a context which warrants legal innovation to prevent the principles of company law acting as a shield for the relevant actors. However, we question the extent to which company law, given its individualistic form, can be reshaped to ensure such accountability. Like certain doctrines in tort, due diligence offered promise over and above traditional company law doctrine, yet it too, at least in the EU context, has failed to conquer the fundamental disparity that exists between existing models of responsibility and the realities of the networked governance of the value chain. We hope that the, albeit brief, discussion of network liability may provoke further thought regarding how alternate modes of responsibility may be better suited to addressing the value chain accountability gap. More broadly, this article is a contribution towards bringing private transnational governance to account.

Disclosure statement

No potential conflict of interest was reported by the author(s).

Funding

John Quinn wish to acknowledge that this research was supported by a Marie Curie Research and Innovation Staff Exchange scheme within the H2020 Programme [grant acronym: LABOUR, GA: 101007766]. Rónán Condon would like to acknowledge and thank the Royal Irish Academy for their support via the Charlemont Mobility Grant in the writing of this article. All errors are ours.