Liability of the Economic Unit – A General Principle of EU Law?

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Table of Contents ECFR 2023, 759–793

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I. Introduction

Designating a subject of liability is one of the most pressing matters in EU law today. In competition law, based on the provisions of Articles 101 et seq. TFEU, the European Court of Justice (ECJ) holds that the subject of liability is not the individual legal entity, but an entire undertaking which is to be determined from an economic perspective. This means that different legal entities can form a single undertaking under EU competition law which can lead to larger fines and a liability of parent companies for infringements caused by subsidiaries. Whether this concept of corporate liability of the undertaking in the sense of an economic unit is a general principle of EU law or its scope is limited to competition law is still largely unclear. Recently, the *Guidelines 04/2022 on the calculation of administrative fines under the General Data Protection Regulation (GDPR)* of the *European Data Protection Board (EDPB) Version 2.0* adopted on 24 May 2023 claimed that "corporate liability" is not only a principle attributing liability for acts or omissions of a natural person to a company, i.e. the legal person to which it is related (e.g. by way of employment). It went further to allege that "corporate liability" encompasses group liability of the entire economic unit, and that this concept was a general principle of EU law. Regarding fines imposed for violations of GDPR provisions, the guidelines state:[1]

"In line with the SEU doctrine, Article 83(4)-(6) GDPR follow the principle of direct corporate liability, which entails that all acts performed or neglected by natural persons authorized to act on behalf of undertakings are attributable to the latter and are considered as an act and infringement directly committed by the undertaking itself. [...] This European Union law principle and scope of corporate liability takes precedence and must not be undermined by limiting it to the acts of certain functionaries (like principal managers) by contradicting national law. It is not relevant which natural person acted on behalf of which of the entities. The supervisory authority and national courts therefore must not be required to determine or identify a natural person in the investigations or the fining decision."

A similar issue was already raised and discussed in the Deutsche Wohnen case,[2] where the ECJ, albeit without clearly distinguishing between the upper limit of

1 6.2.1 – Determining an undertaking and corporate liability, inter alia, in para. 123.

2 ECJ, Judgment of 5 December 2023 – C-807/21, ECLI:EI:C:2023:950 – *Deutsche Wohnen SE*; Advocate General Campos Sánchez-Bordona Opinion, 27 April 2023, Deutsche Wohnen v Staatsanwaltschaft Berlin, C-807/21.

the fines for infringement of the GDPR discussed in Article 83(4)-(6) GDPR and the quantification of the fine discussed in Article 83(2) GDPR, held that "it is apparent from Article 83(4) to (6) of the GDPR, which concerns the calculation of administrative fines in respect of the infringements listed in those paragraphs, that, where the addressee of the administrative fine is or forms part of an undertaking, within the meaning of Articles 101 and 102 TFEU, the maximum amount of the administrative fine is calculated on the basis of a percentage of the total worldwide annual turnover in the preceding business year of the undertaking concerned.".[3]

The relevance of the topic has been underlined by the recent request for a preliminary ruling lodged in June 2023 by the Danish Vestre Landsret, as to whether the term 'undertaking' in Article 83(4)-(6) GDPR must be understood as an undertaking within the meaning of Articles 101 and 102 TFEU, in conjunction with recital 150 of that regulation, irrespective of its legal status.[4]

In this article we argue that a general legal principle of corporate liability as asserted by the EDPB, according to which liability is generally attributed to the entire economic unit does not exist. Instead, there is a general legal principle under EU law according to which the addressee of both the primary obligations as well as the liability for violations thereof is solely the individual legal entity. Our core argument is that the EDPB's position neglects the methodological rules of inductive generalization according to which general principles of EU law must be determined.

II. General Legal Principles in EU Law

General principles of law are recognized as a source of law in the case law of the European Court of Justice (ECJ).[5] They have constitutional status under EU law.[6] Legal consequences can be derived directly from them and EU law

3 ECJ, Judgment of 5 December 2023 – C-807/21, ECLI:EI:C:2023:950, para. 57 – Deutsche Wohnen SE; see previously Advocate General Campos Sánchez-Bordona Opinion, 27 April 2023, Deutsche Wohnen v Staatsanwaltschaft Berlin, C-807/21, para. 48.

4 Request for a preliminary ruling from the Vestre Landsret (Denmark) lodged on 21 June 2023 — Anklagemyndigheden v ILVA A/S, Case C-383/23, OJEU, 2023, C 304, p. 16.

5 On the classification as an independent source of law, see *Ewert*, Die Funktion der allgemeinen Rechtsgrundsätze im Schadenersatzrecht der Europäischen Wirtschaftsgemeinschaft, 1991, 310.

6 See also *Stotz*, in: Riesenhuber, Europäische Methodenlehre, 3rd ed. 2015, § 22 para. 24 with references; *Häberle*, Europäische Rechtskultur, 1994, 43; further references in *Ewert*, Die Funktion der allgemeinen Rechtsgrundsätze im Schadenersatzrecht der Europäischen Wirtschaftsgemeinschaft, 1991, 311.

provisions can be interpreted in their light.[7] Their existence is expressly stated in Article 340(2) TFEU for the law of damages, but case law outside this area has long relied on general principles of EU law as well.[8] Such general principles may reflect abstract values, but may also have more concrete contents.[9]

General principles of law must be derived from and supported by legal provisions of EU law at least to some extent.[10] However, it is in their nature that they are usually not fully codified. Instead, they are derived from individual legal provisions by way of inductive generalization.[11] Albeit this inductive process inevitably entails some vagueness, general principles of law remain valid even if a few provisions are not in line with them.[12]

There are various sources for general principles of law, two of which are relevant in EU law:[13]

7 *Metzger*, Extra Legem, intra ius: Allgemeine Rechtsgrundsätze im Europäischen Privatrecht, 2009, 17; *Metzger*, in: Basedow/Hopt/Zimmermann, Handwörterbuch des Europäischen Privatrechts, Vol. 1, 2009, Keyword: Allgemeine Rechtsgrundsätze, 6; *Martens*, Methodenlehre des Unionsrechts, 2013, 148 and 156 et seq.

8 E.g. ECJ, Judgment of 23.10.1974, 17/74 – *Transocean Marine Paint* (General principle of the obligation to hear affected stakeholders before administrative decisions); ECJ, Judgment of 17.12.1970, 11/70 – *Internationale Handelsgesellschaft* (observance of fundamental rights); *Martens*, Methodenlehre des Unionsrechts, 2013, 147; Grabitz/Hilf/Nettesheim/*Mayer*, Das Recht der EU, 77th EL, 09/2022, Art. 19 EUV para. 59; Streinz/*Huber*, EUV/AEUV, 3rd ed. 2018, Art. 19 EUV para. 20; *Meessen*, German Yearbook of International Law 17 (1974), 283, 285.

9 See, for example, ECJ, Judgment of 16.12.2008 – C-47/07 P – *Masdar (UK) v Commission* (claim for unjust enrichment as a general principle of law). General is thus not to be understood in the sense of "universal", but in the sense of "common". See also *Metzger*, Extra Legem, intra ius: Allgemeine Rechtsgrundsätze im Europäischen Privatrecht, 2009, 18.

10 *Metzger*, in: Basedow/Hopt/Zimmermann, Handwörterbuch des Europäischen Privatrechts, Vol. 1, 2009, Keyword: Allgemeine Rechtsgrundsätze, 6.

11 See, e.g., ECJ, Judgment of 15.10.2009 – C 101/08 – *Audiolux a.o.*, para. 34: rules must "give [...] conclusive indications of the existence of such a principle." *Metzger*, Extra Legem, intra ius: Allgemeine Rechtsgrundsätze im Europäischen Privatrecht, 2009, 59.

12 *Metzger*, Extra Legem, intra ius: Allgemeine Rechtsgrundsätze im Europäischen Privatrecht, 2009, 52, 55, 60.

13 The possible historical determination of so-called superhistorical general legal principles from older legal systems becomes not relevant in the case of the European Union, because the predecessor legal systems of the Member States, in particular Roman law, are already considered by means of external induction. For example, ECJ, Judgment of 25.02.1969–23/68 – *Klomp v. Inspektie der Belastingen* (principle of continuity of interpretation in case of new regulation). Typology according to *Metzger*, Extra Legem, intra ius: Allgemeine Rechtsgrundsätze im Europäischen Privatrecht, 2009, 33; similarly, *Martens*, Methodenlehre des Unionsrechts, 2013, 149.

– *First*, there is *internal inductive generalization,* whereby a general principle is derived from individual provisions of the same legal order – in the case of the EU, the *acquis communautaire* – by means of analogy.[14] Provisions of both primary and secondary law form the basis for this generalization.[15]

– *Second,* there is *external inductive generalization*, whereby a general principle is derived from other legal orders. In EU law, this is done primarily by comparing the legal systems of the member states.[16] In a first step, the legal systems of the member states are compared and then, in a second step, the compatibility of this result with the objectives of the Union is examined.[17] The comparative law process is evaluative in that it is not necessary for *all* legal systems of the Union to affirm the principle in question.[18] Furthermore, rules of public international law can be part of the basis of an external inductive generalization.[19]

The two types of general legal principles of EU law can – but tend not to – occur separately. Usually, general legal principles will take on a hybrid form,[20] i.e. be based on both the *acquis* and the legal systems of the member states. For an inductive generalization, as a *first step*, the internal (under **III.**) and external

14 Cf. on the method, for example, ECJ, Judgment of 15.10.2009 – C 101/08, para. 34.

15 *Martens*, Methodenlehre des Unionsrechts, 2013, 152.

16 For example, ECJ, Judgment of 16.12.2008 – C-47/07 P – *Masdar (UK) v Commission*; see on the obligation to take into account Member State legal systems fundamentally ECJ, Judgment of 12.7.1957, Joined Cases 7/56 and 3-7/57, where it is stated, inter alia: "Unless the Court is to deny justice it is therefore obliged to solve the problem by reference to the rules acknowledged by the legislation, the learned writing and the case-law of the member countries." From the literature *Calliess*, NJW 2005, 929, 932 et seq.; *Stotz*, in: Riesenhuber, Europäische Methodenlehre, 3rd ed. 2015, § 22 para. 25 et seq.; *Martens*, Methodenlehre des Unionsrechts, 2013, 149; *Meessen*, German Yearbook of International Law 17 (1974), 283, 286.

17 *Stotz*, in: Riesenhuber, Europäische Methodenlehre, 3rd ed. 2015, § 22 para. 25 et seq.; *Martens*, Methodenlehre des Unionsrechts, 2013, 150 et seq.; *Meessen*, German Yearbook of International Law 17 (1974), 283, 303.

18 Against a numerical determination esp. *GA Maduro*, SchlA v. 20.02.2008 – C-120/06 P – FIAMM and others v. Council and Commission, para. 55: "Such a mathematical logic of the lowest common denominator would lead to the establishment of a regime for Community liability in which the victims of damage attributable to the institutions would have only a very slim chance of obtaining compensation." Ibid., even a minority of Member States is considered sufficient if necessary. See also *Meessen*, German Yearbook of International Law 17 (1974), 283, 299.

19 *Metzger*, in: Basedow/Hopt/Zimmermann, Handwörterbuch des Europäischen Privatrechts, Vol. 1, 2009, Keyword: Allgemeine Rechtsgrundsätze, 4.

20 *Metzger*, Extra Legem, intra ius: Allgemeine Rechtsgrundsätze im Europäischen Privatrecht, 2009, 34.

(under **IV.**) basis must be determined by compiling existing regulations in a non-evaluative manner.[21]

The *second step* is an act of evaluative generalization. Besides the internal and external basis, the process of inductive generalization must comply with certain framework conditions of EU law. Those framework conditions include the fundamental freedoms and the EU Charter of fundamental rights.[22] Within this framework, the rules that form the basis for induction must be examined more closely. It needs to be determined if they can only be explained by a general legal principle – and therefore allow an inductive generalization towards this general principle. If they, on the other hand, merely reflect idiosyncratic interests of a certain area of EU law, they are unfit to serve as the basis of a *general* legal principle and cannot be generalized[23] (under **V.**).

III. Internal Basis for Inductive Generalization: acquis communautaire

In EU law, corporate liability is regulated by primary law in the field of competition law (see under 1.). It is also addressed in secondary law such as data protection law (GDPR), the recently introduced Digital Markets Act (DMA) and the Digital Services Act (DSA) (see under 2.).

1. Primary Law

In primary law, corporate liability plays a key role in competition law. However, the phenomenon of corporate liability is not addressed uniformly in primary law as a comparison with liability in EU state aid law demonstrates.

a) Liability of the Economic Unit Under EU Competition Law (Artt. 101 et seq. TFEU)

European competition law as governed by Artt. 101, 102 TFEU links liability to the "undertaking". According to case law of the ECJ, an "undertaking" subject of Articles 101(1), (3) and 102(1) TFEU encompasses "any entity engaged in an economic activity, regardless of its legal status and the way in

21 On this approach, see, for example, *Meessen*, German Yearbook of International Law 17 (1974), 283, 304.

22 Cf. *Meessen*, German Yearbook of International Law 17 (1974), 283, 299.

23 *Metzger*, Extra Legem, intra ius: Allgemeine Rechtsgrundsätze im Europäischen Privatrecht, 2009, 55.

which it is financed."[24] Consequently, the addressee of the prohibitory rules of competition law is the economic unit, i.e. an organization of personal, tangible and intangible elements, which pursues an economic aim on a long-term basis.[25] An economic unit can consist of several natural persons or legal entities,[26] as long as they do not act independently.[27] In case of dependence, joint or separate fines can be imposed on parent companies and their subsidiaries.[28]

b) Legal Entity Principle in the Recovery of Aid (Artt. 107, 108 TFEU)

The treaties refer to the concept of undertaking in the definition of aid (Art. 107 TFEU). However, case-law and secondary law take a different position when it comes to the recovery of state aid granted in violation of EU law. The party liable to repay is the recipient of the aid (Art. 14(1) of the State Aid Procedural Regulation).[29] In the case of a company, the debtor for repayment is the legal entity[30], not the economic unit.[31] This rule has a few exceptions, which

24 See, inter alia, ECJ, Judgment of 23 April 1991 – C-41/90, ECLI:EU:C:1991:161, para. 21 – *Höfner and Elser*; ECJ, Judgment of 10 September 2009 – C-97/08 P, ECLI:EU:C:2009:536, para. 54 – *Akzo Nobel*; ECJ, Judgment of 10 January 2006 – C-222/04, ECLI:EU:C:2006:8, para. 107 – *Cassa di Risparmio di Firenze and others*; ECJ, Judgment of 11 July 2006 – C-205/03 P, ECLI:EU:C:2006:453, para. 25 – *FENIN v. Commission;* Cf. Immenga/Mestmäcker/*Zimmer*, Wettbewerbsrecht, Vol. 1, 6th ed. 2019, Art. 101(1) AEUV para. 9; Loewenheim/Meessen/Riesenkampff/Kersting/Meyer-Lindemann/*Grave/Nyberg*, Kommentar zum Kartellrecht, 4th ed. 2020, Art. 101(1) AEUV para. 100; Calliess/Ruffert/*Weiß*, Kommentar zu EUV/AEUV, 6th ed. 2022, Art. 101 AEUV para. 25.

25 General Court of the European Union, Judgment of 10 March 1992 – T-11/89, ECLI:EU:T:1992:33, para. 311 – *Shell v. Commission*; Calliess/Ruffert/*Weiß*, Kommentar zu EUV/AEUV, 6th ed. 2022, Art. 101 AEUV para. 25; *Cornelius*, NZWiSt 2016, 421, 422.

26 ECJ, Judgment of 10 September 2009 – C-97/08 P, ECLI:EU:C:2009:536, para. 55 – *Akzo Nobel v Commission*; see also ECJ, Judgment of 14 December 2006 – C-217/05, ECLI:EU:C:2006:784, para. 40 – *Confederación Española de Empresarios de Estaciones de Servicio*.

27 If the parent company holds (almost) 100% of the shares, there is a rebuttable presumption of the absence of independent market conduct of the respective subsidiary, cf. fundamentally ECJ, Judgment of September 10, 2009 – C-97/08 P, ECLI:EU:C:2009:536, para. 60 et seq. – *Akzo Nobel.*

28 Cf. ECJ, Judgment of 10 September 2009 – C-97/08 P, ECLI:EU:C:2009:536, para. 55 – *Akzo Nobel v Commission; Thomas/Legner*, NZKart 2016, 155.

29 *Wolfram/Cremer*, in: Calliess/Ruffert, EUV/AEUV, 6th ed. 2022, Art. 108 AEUV para. 36.

30 *Koenig/Ghazarian*, in: Streinz, EUV/AEUV, 3rd ed. 2018, Art. 108 AEUV para. 39; *Koenig/Förtsch*, in: Streinz, EUV/AEUV, 3rd ed. 2018, Art. 107 AEUV para. 74.

31 *Koenig/Förtsch*, in: Streinz, EUV/AEUV, 3rd ed. 2018, Art. 107 AEUV para. 74.

revolve around constellations of company acquisitions.[32] Those exceptions are only in place to prevent an otherwise possible circumvention of repayment obligations.[33] However, there are no indications that companies belonging to the same group are generally liable for repayment of state aids granted to a different group member. The limited relevance of the technical concept of undertaking in a domain that is part of the competition rules of the TFEU is noteworthy.

2. Secondary Law

Corporate liability is addressed in several acts of secondary law. The most prominent acts include the General Data Protection Regulation (GDPR), the Digital Services Act (DSA) and Digital Markets Act (DMA), the Insolvency Regulation and the Unfair Commercial Practices Directive. All of those must be considered as potential elements of the internal basis for inductive generalization.[34]

a) General Data Protection Regulation: Legal Entity Principle

The GDPR treats different legal entities separately when it comes to corporate liability. Primary obligations stipulated in the regulation bind only the respec-

32 See *Verse/Wurmnest*, ZHR 167 (2003), 403 et seqq.; *Koenig*, EuZW 2001, 37 et seqq.; *Koenig/Ritter*, EuZW 2004, 487 et seqq. If the acquisition takes place by means of a merger, liability issues may also arise under merger law, as the acquiring legal entity is generally fully liable for the obligations of the legal entity being acquired (for such an issue, see for example ECJ, Judgment of March 5, 2015 – C-343/13, ECLI:EU:C:2015:146); however, in these cases the question of liability only arises when just one legal entity remains in existence. The further question whether an economic unit consisting of several legal entities can be subject to liability does not arise.

33 The prevention of circumventing Artt. 107 seq. TFEU can then allow an extension of the repayment obligation to third parties, cf. *Wolfram/Cremer*, in: Calliess/Ruffert, EUV/AEUV, 6th ed. 2022, Art. 108 AEUV para. 36; *Koenig/Ghazarian*, in: Streinz, EUV/AEUV, 3rd ed. 2018, Art. 108 AEUV para. 39.

34 The Corporate Sustainability Due Diligence Directive will in the future be of importance for the general principles of EU law in corporate liability. However, it is still in the legislative process (see the Commission's Proposal, COM/2022/71 final). As the aim of this article is to determine the present state of corporate liability in EU law, the CSDDD is not qualified to serve as a part of the basis for inductive generalization. Based in the current draft, it will probably adhere to the legal entity principle and hence provide a further argument against a general principle of liability based on the economic unit. Cf. *Zimmermann/Habrich/Korn/Weller,* ZGR 2023, 399 et seqq.

tive legal or natural person. Fines are imposed only on the legal entity that has breached the rules of the GDPR. In our opinion, this principle of separation also applies to the calculation of fines under Art. 83(4), (5) GDPR.

aa) Primary Obligor and Party Liable to Pay a Fine: Legal Entity Principle

Rules of the GDPR primarily address controllers (Art. 24 GDPR) and – if applicable – processors (Art. 28 GDPR). Both are explicitly defined (Art. 4 no. 7 and no. 8 GDPR). The definitions refer to a "natural or legal person, public authority, agency or other body". Accordingly, in the case of legal persons, the entity responsible under data protection law is the legal entity, not the entire economic unit.[35]

The addressee of fines is also the controller or, where applicable, the processor (Art. 83(3) GDPR) and therefore a legal person, not an economic unit.

A transfer of the rules of competition law would violate the wording of the regulation and, with the exception of Recital 150 which is discussed in Section 2. A) bb) below, is also not indicated by the recitals of the GDPR.[36] Accordingly, the legal entity principle is central to the regulatory framework of the GDPR, also regarding the liability for fines.[37]

bb) Benchmark for Assessing Liability: Undertaking (Art. 83 (4), (5) GDPR)

Some take the view that the assessment of the amount of fines imposed under the GDPR diverges from the legal entity principle.[38] We think this assumption is not convincing for several reasons. It is true that Art. 83(4), (5) GDPR limits the amount of fines to a certain percentage of the annual turnover of the "un-

35 Kühling/Buchner/*Hartung*, DS-GVO BDSG, 3rd ed. 2020, Art. 24 para. 12; Sydow/Marsch/*Raschauer*, DSGVO BDSG, 3rd ed. 2022, Art. 4 para. 129 (translated): "If the GDPR in Art. 4 no. 7 refers to legal persons, bodies, institutions etc., it follows that the respective legal entity has the position of controller [...]." See also Taeger/Gabel/*Arnung/Rothkegel*, DSGVO – BDSG – TTDSG, 4th ed. 2022, Art. 4 para. 176 et seqq.; BeckOK-DatenschutzR/*Schild*, 42 ed., 01.11.2022, Art. 4 DSGVO para. 88.

36 LG Berlin, BeckRS 2021, 2985; Taeger/Gabel/*Moos/Schefzig*, DSGVO – BDSG – TTDSG, 4th ed. 2022, Art. 83 DSGVO para. 119 et seq.; *Ebner/Schmidt*, CCZ 2020, 84, 85.

37 Taeger/Gabel/*Moos/Schefzig*, DSGVO – BDSG – TTDSG, 4th ed. 2022, Art. 83 DSGVO para. 120 (translated): "This means that in data protection law, in contrast to antitrust law, there is precisely no function bearer principle, but a legal entity principle."

38 For instance, Opinion of AG Campos Sanchéz-Bordona, delivered on 27 April 2023, Case C-807/21 (Deutsche Wohnen), para. 46–48; seemingly coming to the same conclusion, despite not explicitly adopting the reasoning of the AG Opinion ECJ, Judgment of 5 December 2023 – C-807/21, ECLI:EI:C:2023:950 – *Deutsche Wohnen SE*, para. 53–59.

dertaking", and does not refer to the turnover of the "controller". However, this does not necessitate a departure from the legal entity principle. This follows *e contrario* from EU directives and regulations that ecplicitly refer to the word turnover of the parent to determine the upper limit of a fine if the subsidiary has been found guilty of an infringement (see for example Art. 111(3), (5) subpara. 1 (j), subpara. 2 MiCA Regulation).

The term "enterprise" is defined in Art. 4 no. 18 GDPR as a legal entity.[39] This definition of enterprises given in Art. 4 no. 18 GDPR is also applicable to the "undertaking" for the purposes of Art. 83 GDPR.[40] At first glance, one might object that Art. 4 no. 18 GDPR and Art. 83 (4), (5) GDPR use different terms (enterprise vs. undertaking). It is true that the two provisions use different terms in the English version of the GDPR.[41] However, most language versions of the GDPR use the same term in Art. 4 no. 18 GDPR and Art. 83 GDPR. Examples include the German ("*Unternehmen*"), French ("*entreprise*"), Dutch ("*onderneming*"), Italian ("*impresa*"), Portuguese ("*empresa*") and Spanish ("*empresa*") versions. As practically all language versions except for English use an identical term, it would hardly be compatible with the principle of equivalence of the language versions[42] to rely solely on the English version when it comes to the interpretation of Art. 83 (4), (5) GDPR. This is underlined by the fact that a differentiation between enterprise and undertaking would lead to frictions even within the English language version. Art. 4 no. 19 GDPR defines a "group of undertakings" which is to consist of various undertakings linked by certain dependencies.[43] Even the English language version therefore uses the term "group of undertakings" when addressing economic units. In turn, undertakings within the GDPR must be understood as individual legal entities.

The most common objection to our position lies in Recital 150 3rd sentence of the GDPR[44]. According to this recital, when determining the maximum amount of

39 See, for example, Sydow/Marsch/*Ziebarth*, DSGVO/BDSG, 3rd ed. 2022, Art. 4 DSGVO para. 207 (translated): "The fundamental requirement is likely to be legal capacity, i.e. the ability to acquire rights and obligations of one's own."

40 *Faust/Spittka/Wybitul*, ZD 2016, 120, 124; Taeger/Gabel/*Moos/Schefzig*, DSGVO – BDSG – TTDSG, 4th ed. 2022, Art. 83 DSGVO para. 47; differently for example BeckOK-DatenschutzR/*Holländer*, 10/2021, Art. 83 DSGVO para. 13; left open by Kühling/Buchner/*Bergt,* DSGVO BDSG, 3rd ed. 2020, Art. 83 para. 39 et seq.

41 *Faust/Spittka/Wybitul*, ZD 2016, 120, 123.

42 See, for example, Calliess/Ruffert/*Wegener,* EUV/AEUV, 6th ed. 2022, Art. 19 EUV para. 28; see also Streinz/*Kokott*, EUV/AEUV, 3rd ed. 2018, Art. 55 EUV para. 3.

43 BeckOK-DatenschutzR/*Schild*, 11/2022, Art. 4 DSGVO para. 160.

44 The relevant passage of the recital reads:
"Where administrative fines are imposed on an undertaking, an undertaking should be understood to be an undertaking in accordance with Articles 101 and 102 TFEU for those purposes."

fines, the term "undertaking" should to be understood as in Art. 101 TFEU. Some authors therefore argue that the term "undertaking" in the sense of Art. 83(4) and (5) GDPR does not refer to a legal entity but, rather, to an economic unit.[45] However, there are several reasons to reject this argument. First and foremost, there is a hierarchical relationship between the binding provisions of the GDPR and the recitals.[46] The ECJ considers the recitals to be relevant for the interpretation of legal norms within a regulation, but views them as being of secondary importance.[47] And even if Recital 150 is considered relevant, it is "relevant only" for determining the upper limit of an administrative fine (see ECJ in *Deutsche Wohnen SE*, para. 54, 57) and not for the question of who is liable for the fine. In addition, specifically in the case of Art. 83 GDPR, an extensive interpretation in line with the abovementioned recital would possibly violate the principle of legal certainty which applies to punitive provisions under EU law such as Art. 83 GDPR (cf. Art. 49 (1) 1st sentence EU Charter of Fundamental Rights).[48]

b) Digital Services Act

The DSA[49] does not expressly determine whether it addresses the individual legal entity or the economic unit. This applies to both the DSA's primary obligations and the liability for breaches of these obligations. However, there are indications in favor of a reference to individual legal entities.

aa) Primary Responsibility: Provider of Intermediary Services

The DSA imposes duties of care on "providers of intermediary services" and regulates their liability.[50] Unlike Art. 2 lit. b of the E-Commerce Directive,[51]

45 Sydow/Marsch/*Ziebarth*, DSGVO/BDSG, 3rd ed. 2022, Art. 4 DSGVO para. 209 concurringly, ECJ, Judgment of 5 December 2023 – C-807/21, ECLI:EI:C:2023:950 – *Deutsche Wohnen SE*, para. 53–59.

46 For details see *Gumpp*, ZfPW 2022, 446 et seqq.

47 ECJ, Judgment of 24.11.2005 – C-136/04, BeckRS 2005, 70929, according to which "*the preamble to a Community act has no binding legal force and cannot be relied on either as a ground for derogating from the actual provisions of the act in question or for interpreting those provisions in a manner clearly contrary to their wording.*"

48 Simitis/Hornung/Spiecker gen. Döhmann/*Drewes*, Datenschutzrecht, 1st ed. 2019, Art. 4 para. 5.

49 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), OJ L 277, 1 et seq.

50 On the Digital Services Act, see for example *Gerdemann/Spindler*, GRUR 2023, 3 et seq. and 115 et seq.

51 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000.

for example, neither the provisions nor the recitals of the DSA expressly define the term service provider.

However, both the provision on the DSA's scope of application (Art. 2 DSA) and the recitals indicate that the subject of liability is the specific legal entity and not the economic unit. The act uses the terms "place of establishment" (Art. 2(1) and Recital 7 of the DSA), "establishment" (Recital 8 of the DSA) and "location" (Recital 7 of the DSA) of the provider of intermediary services. These terms clearly relate to a specific legal entity, since EU law does not recognize a group branch or group headquarters. Moreover, Art. 44 of the DSA also suggests that the subject of liability under the DSA is the specific legal entity. It mentions the possibility that "a provider of intermediary services appoints a subsidiary undertaking of the same group as the provider, or its parent undertaking [as legal representative, cf. Art. 13 DSA]", which only makes sense if the entire group is not automatically qualified as a service provider.

bb) Liability for Fines: Providers of Intermediary Services

Art. 52(1) of the DSA stipulates that the provider of intermediary services is also liable for fines. According to Art. 52(3) of the DSA, the relevant annual turnover for the assessment of the maximum amount of fines also is that of the provider of intermediary services. Accordingly, both provisions follow the legal entity principle. Under the DSA, there is no recital like Recital No. 150 of the GDPR which could possibly suggest an introduction of the concept of an undertaking in the sense of EU competition law.[52] Consequently, the benchmark for the maximum amount of fines under the DSA is the turnover of the individual legal entity and not the turnover of the entire economic unit.[53]

c) Digital Markets Act (DMA) and Foreign Subsidies Regulation (FSR)

The Digital Markets Act (DMA)[54] addresses so-called *gatekeepers*, which are subject to a number of prohibitions and obligations pursuant to Artt. 5 et seqq. DMA as well as the addressees of the sanctions set forth in Artt. 30 et seqq. DMA.

According to Art. 2 no. 1, 3(1) DMA, gatekeepers constitute a type of undertaking which reach certain quantitative thresholds. According to Art. 2 no. 27

52 *Bartels*, in: Kraul, Das neue Recht der digitalen Dienste, 1st ed. 2023, § 5 para. 58.

53 *Schmid/Grewe*, MMR 2021, 279, 282; *Spindler*, GRUR 2021, 653, 661. Left open by *Rademacher*, in: Hofmann/Raue, DSA, 1st Ed. 2023, Art. 52 para. 8.

54 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

DMA, an undertaking is "an entity engaged in an economic activity, regardless of its legal status and the way in which it is financed, including all linked enterprises or connected undertakings that form a group through the direct or indirect control of an enterprise or undertaking by another". The DMA thereby explicitly references the definition of the economic unit in the sense of EU competition law.[55] Under the DMA, the subject of the obligations and liability is, thus, the economic unit.

The recently introduced Foreign Subsidies Regulation (FSR)[56] seeks to implement a "State aid control system [which; added by the authors] prevents Member States from granting State aid that unduly distorts competition in the internal market." (Recital 1). For the purposes of the FSR, the term "undertaking" "means 'economic operator' as defined in Article 1, point (14) of Directive 2009/81/EC" (Art. 2 para. 1 FSR). Hence, in accordance with Art. 1 point 14 and 13 of this directive, it is to be understood as "any natural or legal person or public entity or consortium of such persons and/or bodies which offers on the market to execute works, supply products and provide services, respectively". Fines under the FSR can be imposed on "undertaking or an association of undertakings" (Art. 17 para. 1 FSR) and their maximum extent is limited by the turnover of "undertaking or an association of undertakings" (Art. 17 para. 2 and 3 FSR).

d) EU Insolvency Regulation

The EU Insolvency Regulation, which deals, among other things, with the liability of insolvent legal entities, differentiates between different legal entities. In groups of companies, separate insolvency proceedings are to be conducted for each individual company.[57] The existence of group coordination proceedings[58] does not contradict this principle. The autonomy of the individual proceedings is maintained and there is no substantive (liability) consolidation.

55 Among others, see ECJ, Judgment of April 23, 1991 – C-41/90, ECLI:EU:C:1991:161, para. 21 – *Höfner and Elser*; ECJ, Judgment of September 10, 2009 – C-97/08 P, ECLI:EU:C:2009:536, para. 54 – *Akzo Nobel*; ECJ, Judgment of 10 January 2006 – C-222/04, ECLI:EU:C:2006:8, para. 107 – *Cassa di Risparmio di Firenze and others*; ECJ, Judgment of 11 July 2006 – C-205/03 P, ECLI:EU:C:2006:453, para. 25 – *FENIN v. Commission*.

56 Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market.

57 *Lutter/Bayer/J. Schmidt*, Europäisches Unternehmens- und Kapitalmarktrecht, 6th ed. 2018, 17.20; cf. *J. Schmidt*, KTS 2015, 19, 21.

58 On this in detail *Lutter/Bayer/J. Schmidt*, Europäisches Unternehmens- und Kapitalmarktrecht, 6th ed. 2018, 17.99 et seq.

Thus, in the case of groups of companies, the principles of separation of assets and limited liability are maintained for matters relating to insolvency.[59]

e) Unfair Commercial Practices Directive

The prohibition and sanction rules of the EU Unfair Commercial Practices Directive[60] also address the legal entity and not the economic unit. The addressee of obligations under the directive is the "trader". Traders are also the decisive points of reference for the amount of fines, cf. Art. 13(3) of the Directive. According to Art. 2 lit. b of the Directive, the trader and thus the subject of the obligation and liability is the respective legal entity, not the economic unit.

IV. External Basis for Inductive Generalization: Legal Systems of the Member States

The legal systems of the Member States and international law, which together constitute the external basis for inductive generalization, consistently rely on the principle of separation between legal entities (principle of separation). Even in public international law this principle applies.

1. Germany

Under German corporate law, specifically the German Stock Corporation Act (AktG), liability is attached only to the company, which is defined as a legal entity. According to Sec. 15 AktG, even affiliated companies are "legally independent companies" and according to Sec. 16(1) 1st sentence AktG, groups of companies are formed by "individual [...] group companies". The company as subject of liability under German law therefore does not refer to groups and affiliated companies.[61]

59 *Lutter/Bayer/J. Schmidt*, Europäisches Unternehmens- und Kapitalmarktrecht, 6th ed. 2018, 17.100.

60 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive).

61 Cf. Bork/Schäfer/*Weller/Lieberknecht*, GmbHG, 5th ed. 2022, Appendix § 13 para. 5 et seqq.

This focus on the company as one legal entity is, for the purpose of liability, reflected and expressed in the principle of separation.[62] According to this principle, even when a group of companies is managed in a uniform way, the companies remain legally independent and each bears its individual rights and obligations.[63] In the so-called *de facto* group[64], liabilities of individual subsidiaries extend only to corporate assets of the respective subsidiary and not to those of the parent company as their shareholder (cf. Sec. 1(1) 2nd sentence AktG; Sec. 13(2) of the German Act on Limited Liability Companies (GmbHG)).[65] The legislator thereby offers a way to compartmentalize liability as an alternative to a unitary company.[66]

Jurisprudence and doctrine only allow the piercing of this corporate veil under very restrictive conditions.[67] The few exceptions and the extensive justifications they require show that the principle of separation is a core principle of German corporate law.[68]

The principle of separation is also applicable to the liability for fines under German law. When it comes to the imposition of fines there is no room for a liability of entire economic units, since the wording of Sec. 30 of the German Administrative Offences Act (OWiG) clearly states otherwise.[69]

62 Most recently *Poelzig*, AG 2023, 97 et seqq. (translated): "The principle of separation is a fundamental principle of corporate law."; also Bork/Schäfer/*Weller/Lieberknecht*, GmbHG, 5th ed. 2022, § 13 para. 24 et seqq.

63 Cf. *Krieger*, in: Münchener Handbuch des Gesellschaftsrechts Vol. 4, 5th ed. 2020, § 70 para. 65.

64 The situation is different in the "contractual group" (obligation to offset losses) and in the "integrated" group (joint and several liability), *Krieger*, in: Münchener Handbuch des Gesellschaftsrechts Vol. 4, 5th ed. 2020, § 70 para. 65.

65 *Hommelhoff*, ZGR 2019, 379, 388 et seqq.; *Krieger*, in: Münchener Handbuch des Gesellschaftsrechts Vol. 4, 5th ed. 2020, § 70 para. 65.

66 Cf. *Krieger*, in: Münchener Handbuch des Gesellschaftsrechts Vol. 4, 5th ed. 2020, § 70 para. 65.

67 Bork/Schäfer/*Weller/Lieberknecht*, GmbHG, 5th ed. 2022, § 13 para. 34 et seqq.; MüKoAktG/*Arlt*, 5th ed. 2019, § 1 AktG para. 63 et seqq.

68 *Weller*, European Freedom of Choice of Legal Form and Shareholder Liability, 2004.

69 BGH NJW 2012, 164, 165 et seq.: „Die einzelnen konzernabhängigen Schwestergesellschaften sind im Verhältnis zueinander ebenso selbstständige juristische Personen wie in ihrem Verhältnis zur Muttergesellschaft. Eine die bußgeldrechtliche Haftung begründende Zurechnung von Vermögen könnte daher nur auf der Grundlage einer ausdrücklichen gesetzlichen Bestimmung erfolgen. An einer solchen fehlt es." Translation: "The individual group-dependent sister companies are just as independent legal entities in their relationship to each other as they are in their relationship to the parent company. An attribution of assets giving rise to liability under fine law could therefore only take place based on an express statutory provision. Such a provision is lacking."; BeckOGKOWiG/*Meyberg*, 36th ed., 1.10.2022, § 30 para. 36.

Consequently, German company law is wholly based on the legal entity principle, which attaches liability to specific legal entities and not to entire economic units.[70]

2. Austria

The principle of the separation of legal entities also applies under Austrian company law. This is exemplified[71] by Sec. 1 of the Austrian Stock Corporation Act (öAktG), according to which shareholders of a stock corporation participate in the company through capital contributions "without being personally liable" for the company's obligations.[72] Similar to German law, the piercing of the corporate veil is a rare exception.[73]

The Austrian Associations Responsibility Act (VbVG)[74], which regulates the conditions under which associations are responsible for criminal offenses and how they are sanctioned (cf. Sec. 1(1) VbVG), is also based on the legal entity principle. This follows from Sec. 1(2) VbVG, according to which associations – against which fines are to be imposed if they are responsible for criminal offenses (Sec. 4(1) VbVG) – are "legal persons as well as partnerships and European economic interest groups." In this respect, "each company in the group [...] [must] be regarded as an association in its own right"[75].

Regarding the imposition of fines specifically under the Austrian Data Protection Act (DSG),[76] the relevant Sec. 30 DSG is comparable to the German Sec. 30 OWiG.[77] Accordingly, fines are to be imposed "against a legal person", cf. Sec. 30(1) DSG.

70 BeckOGKOWiG/*Meyberg*, 36th ed., 1.10.2022, § 30 para. 36; BGH NJW 2012, 164, 165: „Diese gesetzgeberische Entscheidung für das Rechtsträgerprinzip [...]"; Translation: "This legislative decision for the legal entity principle [...]".

71 For the GmbH see § 61 para. 2 öGmbHG (translated): "Only the company's assets are liable to its creditors for the company's liabilities".

72 See on the AG MüKoAktG/*Arlt,* 5th ed. 2019, § 1 AktG para. 112, 117; on the GmbH *Kusznier,* Österreich, 1.1.2012, in: Wegen/Spahlinger/Barth (eds.), Gesellschaftsrecht des Auslands, para. 79.

73 MüKoAktG/*Arlt*, 5th ed. 2019, § 1 AktG para. 117; *Kusznier*, Österreich, 1.1.2012, in: Wegen/Spahlinger/Barth (eds.), Gesellschaftsrecht des Auslands, para. 81, 177.

74 Available at: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20004425 (last accessed 12.12.2023).

75 *Dietrich*, NZWiSt 2016, 186, 188, translated by the authors.

76 Available at: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=bundesnormen&Gesetzesnummer=10001597 (last accessed 12.12.2023).

77 On § 30 DSG as a provision comparable to the German § 30 OWiG with a focus on questions of attribution *Zelger*, EuR 2021, 478, 483.

3. France

The principle of separation also applies in French law.[78] This is exemplified by the law governing the *société à responsabilité limité*: "[Elle] *est instituée par une ou plusieurs personnes qui ne supportent les pertes qu'à concurrence de leurs apports*."[79]

French law assumes strict legal independence of legal entities.[80] This separation shields a company's shareholders against the piercing of the corporate veil, which is only allowed in exceptional cases.[81] This view is also held in French Jurisprudence. For example, the *Cour de Cassation* in 2012 explicitly decided that a group affiliation alone does not justify a liability of parent companies for liabilities of their subsidiaries.[82]

4. Italy

Under Italian law, the principle of separation also is a basic principle of corporate law.[83] This is illustrated, for example, by Art. 2325 or Art. 2462 of the *Codice Civile* (CC), according to which a stock corporation (Art. 2325 CC) or a limited liability company (Art. 2462 CC) is liable for obligations only with its corporate assets and its shareholders are, in principle, only liable to the extent of their capital contributions.

The principle of separation is reflected in the provisions on corporate groups (*società collegate*), cf. in particular Artt. 2497–2497-septies CC and Art. 2359 CC. Accordingly, each group member company (*società controllate*) has its

78 *Demeyere*, European Review of Private Law Vol. 23, Issue 3, 2015, 385, 391.

79 Article L223-1 Code de Commerce.

80 Cf. *Le Cannu/Dondero*, Droit des sociétés, 8th ed. 2019, para. 58: "L'idée de base tourne autour de l'autonomie des personnes morales"; *Cozian/Viandier/Deboissy,* Droit des sociétés, 33rd ed. 2020, para. 2280: "l'autonomie juridique des sociétés composant le groupe"; *Jung/Kühl, Wohlgemuth* in: Jung/Krebs/Stiegler (eds.), Company Law in Europe, 2019, § 13 para. 404.

81 *Jung/Kühl, Wohlgemuth* in: Jung/Krebs/Stiegler (eds.), Gesellschaftsrecht in Europa, 2019, § 13 para. 404; on the few exceptional cases in which the parent company is liable for obligations of the subsidiary *Cozian/Viandier/Deboissy*, Droit des sociétés, 33rd ed. 2020, para. 2280 et seqq.

82 Cass. Com. 12.6.2012, No. 11–16.109; on this *Jung/Kühl, Wohlgemuth* in: Jung/Krebs/Stiegler (eds.), Company Law in Europe, 2019, § 13 para. 406.

83 *Baccetti*, in Vicari/Schall (eds.), Company Laws of the EU, 2020, Part 3 Italy, chapter 7, p. 616, para. 873 et seq.; *Fasciani*, Groups of Companies: The Italian Approach, European Company and Financial Law Review, 2007, 195, 198, 214; *Mohn*, The Company Group in Italian Law, 2012, p. 96.

own legal personality and is an independent bearer of rights and obligations.[84] Creditors are not entitled to assert claims against other companies of the group.[85] This principle of separation of liability was affirmed and extended by two reforms of the Italian corporate law in 1993 and 2003.[86]

Parent companies are liable towards creditors of its subsidiaries only in the exceptional cases stipulated in Artt. 2497 et seq. CC. These provisions which govern a specific case of tort liability[87] only impose a liability on the parent company if it does not exercise its duty to manage and coordinate (*direzione e coordinamento di societa*) in line with the principles of proper corporate and entrepreneurial management.

5. Spain

In Spanish corporate law, the principle of separation applies as well.[88] For example, according to Art. 1(2) and (3) of the Spanish Law on Corporations (*Ley de Sociedades de Capital,* hereinafter LSC), shareholders of limited liability companies (para. 2) and stock corporations (para. 3) are not personally liable for the company's obligations.[89]

Although Art. 18 of the LSC defines groups (*grupos de sociedades*), the provision does not stipulate a consolidation of liabilities within a group. In Spanish Case law it is held that groups are "structurally formed by a variable number of production units, each of which nevertheless retains its legal personality".[90] The respective companies are considered legally independent, which also means that liability only relates to the separate legal entities, not to entire eco-

84 *Baccetti*, in Vicari/Schall (eds.), Company Laws of the EU, 2020, Part 3 Italy, chapter 7, p. 616, para. 873 et seq.; Fasciani, Groups of Companies: The Italian Approach", European Company and Financial Law Review, 2007, 195, 198, 214.

85 *Baccetti*, in: Vicari/Schall (eds.), Company Laws of the EU, 2020, Part 3 Italy, chapter 7, p. 616, para. 873 with further references.

86 See in detail *Baccetti*, in: Vicari/Schall (eds.), Company Laws of the EU, 2020, Part 3 Italy, chapter 7, p. 616 et seq, para. 874 et seqq. with further references.

87 *Magrini*, Italienisches Gesellschaftsrecht, 2004, p. 220.

88 Cf. for example *Fuentes*, in: Vicari/Schall (eds.), Company Laws of the EU, 2020, Part 6 Spain, chapter 7, p. 1241 et seq., para. 667 et seqq.

89 Real decreto legislative 1/2010, de 2 de julio, por el que se aprueba el texto refundido de la lwy de sociedades de capital, the English translation is available at https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Royal%20Legislative%20decree%201%2C%20of%2002%20july.pdf (last accessed 12.12.2023).

90 For this *Tribunal Supremo* (1st Senate) decision of April 29, 1985 and its translation as well as further comments on the legal independence of group companies, see *Irujo*, ZGR 1991, 289, 302.

nomic units. It is consistent with the case law of the Spanish Supreme Court that piercing the corporate veil is only possible in exceptional cases.[91]

6. Netherlands

The principle of separation also applies under Dutch company law. The liability of a Dutch joint stock company (cf. Art. 2:64 of the Dutch Civil Code) or a limited liability company (cf. Art. 2:175) is limited to the company's assets. Its shareholders are liable only to the extent of their capital contributions vis-à-vis the company.[92] The principle of separation is reflected in the rules governing company groups. The companies of a group (*groep*) are independent legal entities. The parent company can only be held liable in exceptional cases, particularly in certain (not all) cases of tort.[93]

7. Poland

In principle, only the company itself in the sense of a legal entity is liable to creditors for the debts of a Polish company.[94] This principle of separation of assets and liabilities is a fundamental principle of Polish law.[95] Even if companies form a group, they retain their separate legal personalities.[96] Each company continues to be an independent legal entity, acts independently in legal transactions vis-à-vis third parties, and is solely liable for its obligations.[97]

91 For detailed examples from the decision practice of the Supreme Court, see *Fuentes*, in: Vicari/Schall (eds.), Company Laws of the EU, 2020, Part 6 Spain, chapter 7, p. 1241 et seq., para. 667 et seqq.

92 Cf. on the Dutch AG (*Naamloze Vennootschap*) *Nuckel*, in: Jung/Krebs/Stiegler (eds.), Gesellschaftsrecht in Europa, 2019, § 16 para. 245 and on the Dutch limited liability company (*Besloten vennootschappen met beperkte aansprakelijkheid*) loc. cit., para. 349.

93 For detailed information on possible cases of corporate veil piercing, see *Olaerts,* in: Vicari/Schall (eds.), Company Laws of the EU, 2020, Part 7 Netherlands, chapter 7, p. 1419 et seqq., para. 519 et seqq.; *Nuckel*, in: Jung/Krebs/Stiegler (eds.), Company Law in Europe, 2019, § 16 para. 349 with further references.

94 For the joint stock company (Art. 301 § 4 KSH) *Schubel* in Jung/Krebs/Stiegler (ed.), Gesellschaftsrecht in Europa, 2019, § 17 para. 270; for the limited liability company *Halwa/Otto* in Wegen/Spahlinger/Barth (ed.), Company Law of Foreign Countries, Poland, as of Sepmteber 2020, para. 109; *Opalski* in: *Vicari/Schall* (eds.), Company Laws of the EU, 2020, Part 4: Poland, para. 12.

95 *Cierpial-Magnor*, WiRO 2014, 97, 98.

96 *Cierpial-Magnor*, WiRO 2014, 97, 98.

97 *Vorlat* in: Wegen/Spahlinger/Barth (eds.), Company Law of Foreign Countries, Belgium, 1.1.2012, para. 244.

8. Belgium

The liability of the shareholders of a Belgian company is generally limited to their share in the company's capital.[98] Only in narrowly defined exceptions, for example if the shareholders misuse the company for personal gain and thereby deliberately harm third parties (cf. Art. 1382 BW/CC), the corporate veil can be pierced.[99] Thus, the principle of separation applies in Belgium as well.

9. Romania

Romania's corporate law also follows the principle of separation.[100] Liability of shareholders for company obligations is a rare exception.[101] For example, such a liability may arise if the shareholders do themselves not observe the principle of separation and abuse the company and its assets as an "instrument for their own interests".[102]

10. Denmark

Under Danish law, shareholders are not liable for company obligations.[103] There is a strict separation between the company's assets and the shareholders' assets.[104] A parent company is a shareholder like any other and is in principle not liable for the liabilities of its subsidiary.[105]

98 For the joint stock company (Art. 437 BGG) *Vorlat* in: Wegen/Spahlinger/Barth, Company Law of Foreign Countries, Belgium, 1.1.2012, para. 116.

99 *Vorlat* in: Wegen/Spahlinger/Barth (eds.), Company Law of Foreign Countries, Belgium, 1.1.2012, para. 116 et seqq.

100 Cf. *Piuk/Neagu* in: Wegen/Spahlinger/Barth (eds.), Company Law of Foreign Countries, Romania, 1.1.2012, para. 98, 216.

101 Cf. *Piuk/Neagu* in: Wegen/Spahlinger/Barth (eds.), Company Law of Foreign Countries, Romania, 1.1.2012, para. 98, 216.

102 *Piuk/Neagu* in: Wegen/Spahlinger/Barth (eds.), Company Law of Foreign Countries, Romania, 1.1.2012, para. 100.

103 *Rasmussen* in: Wegen/Spahlinger/Barth (eds.), Company Law of Foreign Countries, Denmark, as of 1.1. 2012, para. 80.

104 *Rasmussen* in: Wegen/Spahlinger/Barth (eds.), Company Law of Foreign Countries, Denmark, as of 1.1. 2012, para. 80.

105 *Rasmussen* in: Wegen/Spahlinger/Barth (eds.), Company Law of Foreign Countries, Denmark, 1.1. 2012, para. 380.

11. Ireland

The principle of separation is fundamental in Irish company law. The separation of rights and obligations of a registered company and rights and obligations of shareholders is referred to as the "defining characteristic of corporate ownership".[106] The principle of separation in Irish company law was first decided upon by the House of Lords of the United Kingdom in the case of *Salomon v Salomon & Co. Ltd*[107]. The court expressly stated that the rights and liabilities of the company are separate from those of the shareholders, and that exceptions to this rule need to be expressly regulated:

> *"When the memorandum is duly signed and registered, [...] the subscribers are a body corporate 'capable forthwith [...] of exercising all the functions of an incorporated company.' Those are strong words. The company attains maturity on its birth [...]. I cannot understand how a body corporate thus made 'capable' by statute can lose its individuality by issuing the bulk of its capital to one person [...]. The company is at law a different person altogether from [its shareholders]; and [...] the company is not in law the agent of the [shareholders] or trustees for them. Nor are the [shareholders] as members liable, in any shape or form, except to the extent and in the manner provided by the [Companies] Act."* [108]

Accordingly, Sec. 17 of the Companies Act 2014 limits the personal liability of shareholders to capital contributions they have not yet made in respect of the shares they hold.[109] According to case law of Irish courts, shareholder liability can only be considered in exceptional cases,[110] such as the misappropriation of a *private limited company* for fraudulent or other illicit purposes.[111] These rules also apply (*mutatis mutandis*) to groups of companies.[112] Companies within the same group are only liable for liabilities of other group companies if a separation would create unreasonable hardship for a third party who has conducted business with the group.[113]

106 *Forde*, Company Law (1992), chapter 3: Corporate Personality, p. 51, para. 3.09.
107 Salomon v A Salomon & Co Ltd [1897] AC 22.
108 Salomon v A Salomon & Co Ltd [1897] AC 22, p. 51.
109 See also Wegen/Spahlinger/Barth/*Harrington*/*Ranalow*, Company Law of Foreign Countries, Ireland, 1.1.2012, para. 82.
110 For examples of direct liability, see Wegen/Spahlinger/Barth/*Harrington*/*Ranalow*, Company Law of Foreign Countries, Ireland, 1.1.2012, para. 83 et seqq.; *Forde*, Company Law (1992), chapter 3: Corporate Personality, pp. 56 et seqq., para. 3.19 et seqq., 3.28 et seqq.
111 Cf. Re George Newman & Co [1895], 1 Ch.674.
112 Wegen/Spahlinger/Barth/*Harrington*/*Ranalow*, Company Law of Foreign Countries, Ireland, 1.1.2012, para. 204.
113 Wegen/Spahlinger/Barth/*Harrington*/*Ranalow*, Company Law of Foreign Countries, Ireland, 1.1.2012, para. 85.

12. Slovak Republic

Under Slovakian company law, shareholders of a limited liability company (*spoločnosť s ručením obmedzeným*) are normally not liable for company obligations. They are only liable for unpaid capital contributions as recorded in the commercial register.[114] The shareholders of a joint-stock company (*akciová spoločnost*) are also generally not liable for company liabilities.[115]

13. Czech Republic

Company law in the Czech Republic follows the principle of separation, too. Shareholders of a Czech limited liability company (*společnost s ručením omezeným*) are liable for the company's obligations only to the extent of their unpaid capital contributions as recorded in the Commercial Register.[116] The shareholders of joint-stock companies (*akciová společnost*) or general partnerships (*veřejná obchodní společnost)* are also generally not liable for the company's debts.[117]

14. Hungary

Hungarian company law also strictly distinguishes company assets and shareholders' assets. Shareholders of a limited liability company (*korlátolt felelősségű társaság*) are in principle only liable to the extent of their shares.[118] Only in exceptional cases, Hungarian law pierces the corporate veil.[119] The same applies to shareholders of a joint stock company (*nyílt és zárt részvénytársaság*).[120] The principle of separation is also reflected in the Hungarian law on groups of

114 Wegen/Spahlinger/Barth/*Kovár*, Company Law of Foreign Countries, Slovak Republic, 1.1.2012, para. 96.

115 Wegen/Spahlinger/Barth/*Kovár*, Company Law of Foreign Countries, Slovak Republic, 1.1.2012, para. 254.

116 For the limited liability company, see Wegen/Spahlinger/Barth/*Kubánek*, Company Law of Foreign Countries, Czech Republic, 1.1.2012, para. 59.

117 Wegen/Spahlinger/Barth/*Kubánek*, Company Law of Foreign Countries, Czech Republic, 1.1.2012, para. 153, with regard to the general partnership ibid., para. 183.

118 Wegen/Spahlinger/Barth/*Bán/Christ/Szabó*, Company Law of Foreign Countries, Hungary, 1.1.2012, para. 92.

119 Wegen/Spahlinger/Barth/*Bán/Christ/Szabó*, Company Law of Foreign Countries, Hungary, 1.2012, para. 92 et seqq.

120 Wegen/Spahlinger/Barth/*Bán/Christ/Szabó*, Company Law of Foreign Countries, Hungary, 1.1.2012, para. 236.

companies. In principle, a parent company is not liable for the obligations of its subsidiaries.[121]

15. Public International Law

Finally, public international law also recognizes the distinction between individual legal entities. For example, the International Court of Justice (ICJ) has ruled in *Barcelona Traction* that only the state in which a legal entity has its seat can assert the entity's protection under international law against another state.[122] This excludes the exercise of rights by states in which shareholders have their seat. Protection under public international law is thus also intricately linked to the company as a separate legal entity, which is to be differentiated from other legal entities of an economic unit.

This principle of separation also applies to questions of liability. In Public International law the question has been raised whether states can be held liable for obligations incurred by International Organizations of which they are a part. The prevailing opinion in public international law holds that this is not the case.[123] This is justified with the International Organizations separate legal personality, a piercing of this corporate veil is only considered viable in exceptional circumstances.[124]

V. Inductive Generalization

On the above basis, an inductive conclusion can be drawn as to whether corporate liability (of the undertaking) in EU law follows a general principle and, if so, what the content of this principle is. In drawing this conclusion, the framework of fundamental freedoms, specifically the freedom of establishment as well as the fundamental right to entrepreneurial freedom under the EU Charter of Fundamental Rights (see under **1.**), must be taken into account.[125] Subsequently, the individual elements of the internal (see under **2.**) and the external

121 Wegen/Spahlinger/Barth/*Bán/Christ/Szabó*, Company Law of Foreign Countries, Hungary, 1.1.2012, para. 263.

122 ICJ, Judgment of 24.7.1964, Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), esp. the comments on *ius standi* p. 44 et seqq. and esp. in the same case, Second Phase, ICJ, Decision of 5.2.1970, para. 96.

123 *V. Arnauld*, Völkerrecht, 5th Ed. 2023, para. 132.

124 *V. Arnauld*, Völkerrecht, 5th Ed. 2023, para. 132.

125 On their significance, see already *supra,* B., I. For details on the relevance of such requirements, see, for example, *Meessen*, German Yearbook of International Law 17 (1974), 283, 303 et seqq.

(see under **3.**) basis will be examined as to whether they permit the assumption of a general legal principle and whether they allow conclusions as to the content of such a principle. In accordance with the standards set out at the beginning of this paper (*supra*, I.), an inference from EU law provisions to a general principle is only permissible if the specific rules that form the basis of induction cannot be explained without the existence of a particular underlying general principle.[126]

1. Freedom of Establishment and Entrepreneurial Freedom

Artt. 49 and 54 TFEU guarantee the freedom of establishment for nationals of a Member State[127] and companies formed in accordance with the laws of a Member State.[128] Particularly, this fundamental freedom guarantees the freedom to form groups (conglomeration), which requires liability segmentation. It addresses the specific legal entity, cf. Art. 54(2) TFEU,[129] thereby adhering to the principle of separation. When subsidiaries are established, for example, the parent company is the beneficiary of the freedom of establishment.[130] The same must therefore apply with regard to group *management* in the sense of Art. 49 (2) TFEU. Developing general principles for corporate liability based on economic units instead of the individual legal entities would, in our opinion, be incompatible with this freedom.

If one were to universally base corporate liability on economic units, parent companies would be forced to manage groups like a uniform company (management unit) to ensure compliance with EU obligations and they would be liable for the liabilities of their subsidiaries (liability unit). This would create severe frictions in company law: an EU-wide management of a group as a single entity is impossible in many cases, as the member state's company statutes differ. A management decision permitted in one member state might violate the provisions of another member state and obligations of the subsidiaries' man-

126 *Metzger*, Extra Legem, intra ius: Allgemeine Rechtsgrundsätze im Europäischen Privatrecht, 2009, 55.

127 *Weller*, Europäische Rechtsformwahlfreiheit und Gesellschafterhaftung, 2004, p. 29 et seqq.

128 *Weller*, Europäische Rechtsformwahlfreiheit und Gesellschafterhaftung, 2004, p. 31 et seqq.

129 Grabitz/Hilf/Nettesheim/*Forsthoff*, Das Recht der Europäischen Union, 77th EL September 2022, Art. 54 AEUV para. 3.

130 Cf. *Schön*, ZGR 2019, 343, 350 (translated): "Thus [...] the *parent company* is ultimately granted a right of choice, guaranteed by primary law, to carry out economic activities in other EU countries with and without limitation of liability"; emphasis by authors.

agements in one member state might not exist in the next.[131] In practice, basing corporate liability on economic units would largely rule out the group as a form of corporate organization, and would considerably impair activities of companies abroad.[132] This would run counter to the freedom of establishment, which guarantees cross-border activity via subsidiaries with limited liability (Art. 49(1) 2nd sentence TFEU)[133] as well as cross-border company management (Art. 49(2) TFEU).[134] Both of these guarantees of the freedom of establishment[135] would be undermined if liability was based on the economic unit instead of the individual companies.[136]

Moreover, such an approach would circumvent the limited liability of parent companies for their foreign subsidiaries. This would expunge the key difference between legally independent subsidiaries and legally dependent agencies or branches, even though Art. 49(1) TFEU expressly distinguishes between the two; consequently, "the freedom of choice and organization presupposed in Europe" would dwindle.[137]

The separation of liability within groups is, to some extent, also guaranteed by the EU Charter of Fundamental Rights ("Charter").[138] The formation of limited liability companies as an act of organization of the company falls within the scope of protection of entrepreneurial freedom (Art. 16 of the Charter).[139]

131 Cf. *Hommelhoff*, ZGR 2019, 379, 403.

132 *Hommelhoff*, ZGR 2019, 379, 403, 408.

133 Cf. *Teichmann*, ZGR 2014, 45, 66 (translated): "The possibility of cross-border group formation (by establishing subsidiaries) is [...] already inherent in Art. 49 and Art. 54 TFEU."

134 *Hommelhoff*, ZGR 2019, 379, 403, 408.

135 Cf. *J. Prütting* in: Vom Konzern zum Einheitsunternehmen, ZGR Special Issue 22, 2020, p. 191 et seq.

136 *Hommelhoff*, Ein europäisches Gruppenrecht für den Binnenmarkt, in: Geibel/Heinze/Verse (eds.), Binnenmarktrecht als Mehrebenensystem, 2023, p. 112 (translated): "only the group opens up the internal market to companies in all its diversity, including its manifold opportunities"; "without the group, freedom of establishment for companies would largely run into the void, remaining essentially 'nudum ius'".

137 Cf. *Teichmann*, ZGR 2014, 45, 66; cf. *Schön*, ZGR 2019, 343, 350 (translated): "The European Court of Justice has ruled on several occasions that national law may not restrict the choice among these different variants"; with reference to "ECJ, Case 270/83 (Commission v. France) [1986] ECR 285 ff (para. 22); ECJ, Case C-253/03 (CLT-UFA) [2006] ECR I-1861 (para. 14)"; cf. also *id,* EWS 2000, 281 et seqq.; on the exercise of freedom of establishment in group structures *Hommelhoff*, Ein europäisches Gruppenrecht für den Binnenmarkt, in: Geibel/Heinze/Verse (eds.), Binnenmarktrecht als Mehrebenensystem, 2023, p. 108 et seqq.

138 *Poelzig*, AG 2023, 97, 99.

139 *Poelzig*, AG 2023, 97, 99; in more detail *J. Prütting* in: Vom Konzern zum Einheitsunternehmen, ZGR Special Issue 22, 2020, p. 203 et seq.

Restrictions of this freedom are possible but require justification. In particular, the principle of proportionality must be observed (Art. 52(1) 1st sentence of the Charter).[140] If one were to acknowledge a general principle attaching liability to economic units, irrespective of individual legal entities, this could disproportionately restrict entrepreneurial freedom and, thus, violate Artt. 16, 52 of the Charter.

The freedom of establishment, in particular the freedom to form a group, and Art. 16 of the Charter are basic conditions for general principles of EU law. They indicate that corporate liability may be linked to the economic unit only where the particular interests and legal provisions involved justify it, but not as a general principle.

2. Internal Induction Basis

a) Competition Law as a Non-Generalizable Exception

The principles of European competition law do, in our opinion, not constitute a suitable basis to assume existence of a general principle of liability under EU law.[141] To support a general principle, the rationale behind the liability provisions of EU competition law would have to be capable of being generalized.[142] This is not the case.[143]

Attaching liability to an economic unit under EU competition law is based on competition-specific considerations.[144] German scholarly literature has even

140 *Poelzig*, AG 2023, 97, 99.

141 See ECJ, Judgment of 12.11.2014, C-580/12 P – *Guardian Industries Corp. & Guardian Europe Sàrl*, where the Court stated that the concept of 'undertaking' "is used specifically in order to implement the relevant provisions of EU competition law and, in particular, for the purpose of designating the perpetrator of an infringement of Articles 101 and 102 TFEU" but is not "applicable in the context of an action for damages, founded on the second paragraph of Article 340 TFEU. [...] such an action is an ordinary action, governed by general procedural rules, which are subject, in this instance, to company law and are independent of the principles that determine liability in anti-trust law."

142 *Metzger*, Extra Legem, intra ius: Allgemeine Rechtsgrundsätze im Europäischen Privatrecht, 2009, 55 et seq.

143 On the fact that antitrust law is based on competition-specific considerations in this respect, see in detail *Heinrich*, Rechtsfragen der wirtschaftlichen Haftungseinheit des europäischen Kartellbußgeldrechts, 1st ed. 2016, p. 73; *Heinichen*, Unternehmensbegriff und Haftungsnachfolge im Europäischen Kartellrecht, 2011, p. 78 et seq.; *Menz*, Wirtschaftliche Einheit und Kartellverbot, 2004, p. 102 et seqq.

144 *Bauermeister/Grobe*, ZGR 2022, 733, 761.

coined a special term for an economic unit's ability to be the subject to obligations and liability specifically under competition law ("*Kartellrechtsfähigkeit*", *competition law capacity*).[145]

aa) Purpose of Competition Law

The liability of an economic unit can only be justified by the special purpose of EU competition law: the protection of competition as such in the interest of a functioning internal market[146].[147] This purpose is best accommodated by addressing legal duties not just at a legal entity, but at a functional economic unit.[148] This is shown, for example, by the prohibition of the abuse of dominant market positions (Art. 102 TFEU). A decisive factor for this prohibition is the dominant market position. Whether an undertaking holds a dominant position is primarily determined by the undertaking's market share.[149] Integrating the entire economic unit in one undertaking[150] cumulates the market shares of several legal entities. This in turn subjects undertakings to Art. 102 TFEU, even if the separate legal entities would lack a sufficient market share. As a result, a larger proportion of market behavior is subject to Art. 102 TFEU. This is justified, because dependent companies within an economic unit typically influence competition like a uniform entity.[151] Since the formation of economic units can result in a reduction of competition, it is appropri-

145 *Heinichen*, Unternehmensbegriff und Haftungsnachfolge im Europäischen Kartellrecht, 2011, p. 76; similarly *Dannecker/Dannecker*, NZWiSt 2016, 162, 166, who speak of a "legal capacity specific to a legal field" (translated).

146 Immenga/Mestmäcker/*Immenga/Mestmäcker*, Wettbewerbsrecht, Vol. 1, 6th ed. 2019, Introduction, A. The significance of competition rules in the economic constitution of the EU, II. Competition and the internal market: fundamentals, para. 17 et seqq.; Fezer/Büscher/Obergfell/*Osterrieth/Schönig*, Kommentar zum Gesetz gegen den unlauteren Wettbewerb (UWG), Vol. 1, 3rd ed. 2016, Second part: Special topics under unfair competition law, General market conditions, p. 1, para. 101 et seqq.

147 ECJ, Judgment of June 4, 2009 – CL-8/08, ECLI:EU:C:2009:343, para. 38 – *T-Mobile Netherlands and others*; ECJ, Judgment of October 6, 2009 – C-519/06 P, ECLI:EU:C:2008:738, para. 63 – *Aseprofar v. GlaxoSmithKline*.

148 Paal/Pauly/*Frenzel*, Beck'scher Kompakt-Kommentar zu DS-GVO und BDSG, 3rd ed. 2021, Art. 83 DSGVO para. 20; von der Groeben/Schwarze/Hatje/*Hirsbrunner/Rating*, Kommentar zum Europäischen Unionsrecht, 7th ed. 2015, Art. 3 VO (EG) 139/2004 para. 8 et seqq.

149 See *Calliess/Ruffert/Weiß*, Kommentar zu EUV/AEUV, 6th ed. 2022, Art. 102 AEUV para. 4; for examples from practice see ECJ, judgment of 3.6.1991 – C-62/86, ECLI:EU:C:1991:286, para. 60 – *AKZO v. Commission*; ECJ, judgment of 12.12.1991 – T-30/89, ECLI:EU:T:1991:70, para. 92 – *Hilti v. Commission*.

150 *Calliess/Ruffert/Weiß*, Kommentar zu EUV/AEUV, 6th ed. 2022, Art. 102 AEUV para. 4.

151 *Dannecker/Dannecker*, NZWiSt 2016, 162, 167.

ate in competition law to attribute infringements to the economic unit and to assess the fine on the basis of the turnover of the entire group.[152]

However, this reasoning cannot be generalized. For example, the rationale of data protection law differs significantly from that of competition law. Data protection law aims to protect personal data by regulating controllers that make decisions on the means and purposes of processing data as well as entities which process personal data on behalf of controllers. Unlike in competition law, the fact that a controller is part of a larger economic unit does not *per se* increase data protection risks. The market share of an economic unit is *per se* not an additional risk for data protection, largely because of the autonomy of controllers and because there is no group privilege regarding data.[153] Economic units may increase regulatory risk where regulation seeks to prevent the misuse of market power. This purpose, however, is specific to competition law and cannot be generalized.

bb) Compensation for Hardships Specific to Antitrust Law

The extensive understanding of corporate liability in competition law also creates hardships which can be mitigated by mechanisms specific to competition law. A generalization of the competition law concept of corporate liability would lead to unjustified hardships in other areas where they cannot be mitigated. Specifically, the mitigation tools of competition law include the so-called group privilege (1) and a restriction of the assessment of fines to activities relevant to antitrust law (2).

(1) Group Privilege

The group privilege is the counterpart to the mutual attribution of competition violations within the economic unit.[154] Accordingly, the prohibition of anticompetitive agreements does not apply within an economic unit, i.e. between companies belonging to the same group.[155] This exception is justified, because companies in an economic unit do not determine their market behavior autonomously. Consequently, within a group of companies, individual legal entities

152 Cf. *Faust/Spittka/Wybitul*, ZD 2016, 120, 121.

153 Cf. on the lack of a group privilege *infra*, IV., 2., a), bb), (2).

154 *Faust/Spittka/Wybitul*, ZD 2016, 120, 124 (translated: „counterpart"). Similarly, Loewenheim/Meessen/Riesenkampff/Kersting/Meyer-Lindemann/*Grave/Nyberg*, Kommentar zum Kartellrecht, 4th ed. 2020, Art. 101(1) AEUV para. 121 (translated: "mirror image"); *Timner/Radlanski/Eisenfeld*, CR 2019, 782, 784 para. 18 (translated: "flip side").

155 Loewenheim/Meessen/Riesenkampff/Kersting/Meyer-Lindemann/*Grave/Nyberg*, Kommentar zum Kartellrecht, 4th ed. 2020, Art. 101 (1) AEUV para. 119.

do not require or merit protection against anti-competitive agreements.[156] Within the system of competition law, the attribution of infringements and the uniform sanctioning of an economic unit therefore go hand in hand with a privilege for intra-group agreements.

This concept of a group privilege is not transferable to other areas of law.[157] In data protection law, for example, it would mean that data could be passed on freely within the companies of the same economic unit. However, the European legislator has decided against such a group privilege in data protection law.[158] In terms of its purpose, the group privilege can only apply to competition law, because there is no need for sanctions when competition within groups is impaired. This thought is not transferable to other areas of law. Violations of data protection provisions can merit sanctions even when they are committed by transferring data within the same group. This is because data protection law strives to protect the interest of a data subject for whom even data transfers to other group companies can be problematic.

(2) Restriction to Products Relevant to Antitrust

One major factor in the determination of fines is turnover. If liability for fines is based on the entire economic unit, this turnover includes that of divisions bearing no significant relation to the anti-competitive conduct in question. Because of its focus on safeguarding effective competition, competition law can prevent such unreasonable results. Under antitrust law, fines are calculated by referring "to the value of the goods or services [...] as a basis"[159] in the market where the anticompetitive conduct occurred. Accordingly, only the portion of the group's revenue tied to the product affected by anti-competitive behavior is

156 This is a consequence of the antitrust law's postulate of independence. Selbstständigkeitspostulat, cf. Loewenheim/Meessen/Riesenkampff/Kersting/Meyer-Lindemann/*Grave/Nyberg*, Kommentar zum Kartellrecht, 4th ed. 2020, Art. 101 (1) AEUV, para. 121; ECJ, Judgment of 28.5.1998 – C-7/95 P, ECLI:EU:C:1998:256, para. 87 – *Deere v Commission.*

157 On data protection law, for example Schwartmann/Jaspers/Thüsing/Kugelmann/*Jacquemain/Schwartmann*, Kommentar zur DSGVO/BDSG, 2nd ed. 2020, Art. 83 DSGVO para. 75.

158 See on the requirement of a legal basis or legitimate interest for the transfer of data between "joint controllers" within the meaning of Art. 26 GDPR ECJ, Judgment of 29.7.2019 – C-40/17, ECLI:EU:C:2018:1039, para. 94 – *Fashion ID*; *Faust/Spittka/Wybitul,* ZD 2016, 120, 124; Gola/Heckmann/*Piltz*, Kommentar zur DS-GVO und BDSG, 3rd ed. 2022, Art. 26 DSGVO para. 17 et seq. See further *Cornelius*, NZWiSt 2016, 421, 425; *Grünwald/Hackl*, ZD 2017, 556, 559.

159 Cf. the European Commission's Guidelines on the method of setting fines imposed pursuant to Article 23 (2) (a) of Regulation (EC) No. 1/2003, para. 5.

taken into account.[160] Sales made by the group relating to other products that were not subject of anti-competitive agreements cannot be taken into account when it comes to the imposition of fines.[161]

Outside of antitrust law, the establishment of such a mechanism is usually not feasible. This can be exemplified by looking at data protection infringements, in relation to which the GDPR does not distinguish between different product or market segments but rather focusses on the infringement-specific factors listed in Art. 83(2) GDPR.

cc) Partial Generalization: Identity of Addressee of Prohibition and Subject of Liability

One principle in EU antitrust law can, however, be generalized: The addressee of a prohibition provision, the subject of liability for infringements and the entity whose turnover is relevant to the amount of fines must be identical. In competition law the primary breach of duty (by virtue of attribution), the liability (by virtue of joint and several liability) and, finally, the assessment of fines (Art. 23 of Regulation (EC) 2003/1) are linked to the economic unit.[162] Taking into account the turnover generated by the entire economic unit for the calculation of the fines in the sense of a group liability under competition law is only appropriate, because the economic unit is also the addressee of the primary legal obligations and prohibitions.[163]

This idea is not specific to competition law but a general principle of legal ethics: no one should be sanctioned without a breach of duty attributed to them.[164] In this – and only this – respect competition law can be generalized.

dd) Principle of Separation as a Prerequisite of Competition Law Jurisprudence

Finally, even case law of the ECJ in the field of competition law explicitly references the principle of the separation of legal entities.[165] The ECJ has repeat-

160 *Timner/Radlanski/Eisenfeld*, CR 2019, 782, 784 para. 19.

161 *Op. cit.,* para. 19.

162 Immenga/Mestmäcker/*Biermann*, Wettbewerbsrecht, Vol. 3, 6th ed. 2019, Art. 23 VO 1/2003 para. 119; ECJ, Judgment of 26 November 2013 – C-58/12 P, ECLI:EU:C:2013:770, para. 52 – *Groupe Gascogne.*

163 *Dannecker/Dannecker*, NZWiSt 2016, 162, 168.

164 Cf. already *Jhering*, Das Schuldmoment im römischen Privatrecht, 1867, 40 et seq.; cf. also *Wagner*, Lieferkettenverantwortlichkeit – alles eine Frage der Durchsetzung, to appear in ZEuP 3/2023.

165 ECJ, Judgment of 14 July 1972 – C-48/69, ECLI:EU:C:1972:70, para. 140 – *ICI v. Commission*, where there is talk of a "formal separation between these companies [par-

edly recognized the legal subjectivity of individual companies within a group,[166] and has confirmed this view in recent decisions.[167] The ECJ holds that a separation of legal entities does not prevent them from forming a single undertaking for the purposes of competition law. However, precisely this line of argumentation shows that the ECJ still views the principle of separation as the general rule. Otherwise, there would be no need to justify the extension of liability to the economic unit in competition law in the first place. This need for justification exists because economic units can themselves not commit competition violations as they lack legal capacity.[168] Therefore, in order to establish an economic unit's liability, an action of individual legal entities has to be attributed to the unit.[169] However, the legal entities remain the actual perpetrators.[170] Attribution always requires justification. In the case of competition law, it is justified by the influence which the parent company exerts over its subsidiaries[171] in conjunction with their uniform appearance on the market.[172] In conclusion, the attribution of anti-competitive behavior does not negate the principle of separation between legal entities, but presupposes it as a starting point, even though it may depart from it.

ent company and subsidiaries], resulting from their separate legal personality", even if this is overcome by the functional concept of the company. See also *Fischer*, ZfPW 2021, 310, 313.

166 Cf. e.g. also ECJ, Judgment of 16 June 2016 – C-155/14 P, ECLI:EU:C:2016:446, para. 27 – *Evonik Degussa and AlzChem v. Commission*; ECJ, Judgment of 10 September 2009 – C-97/08, ECLI:EU:C:2009:536, para. 58 – *Akzo Nobel and Others v. Commission.*

167 ECJ, Judgment of 6 October 2021 – C-822/19, ECLI:EU:C:2021:800 – *Sumal;* ECJ, Judgment of 14 March 2019 – C-724/17, ECLI:EU:C:2019:204, para. 37 – *Skanska Industrial Solutions and Others.*

168 In this regard, *Heinrich*, Rechtsfragen der wirtschaftlichen Haftungseinheit des europäischen Kartellbußgeldrechts, 1st ed. 2016, p. 72.

169 Thus explicitly ECJ, Judgment of September 10, 2009 – C-97/08, ECLI:EU:C:2009:536, para. 58 – *Akzo Nobel and Others v Commission*; *Heinrich*, Rechtsfragen der wirtschaftlichen Haftungseinheit des europäischen Kartellbußgeldrechts, 1st ed. 2016, p. 27; also Grabitz/Hilf/Nettesheim/*Schroeder*, Das Recht der EU, 78th supplementary ed. January 2023, Art. 101 AEUV, para. 451, 466a, 811; Von der Groeben/Schwarze/*Hatje*/*Schröter,* Kommentar zum Europäischen Unionsrecht, 7th ed. 2015, Before Art. 101 to 105 AEUV, para. 56.

170 ECJ, Judgment of 6 October 2021 – C-822/19, ECLI:EU:C:2021:800, para. 42 – *Sumal* (Spanish original): " [...] *una entidad jurídica perteneciente a dicha unidad económica ha infringido el artículo 101 TFUE* [...]." On the possibility of so-called companies within the company, see in detail *Bauermeister*, NZG 2022, 59, 64 et seq.

171 See in detail ECJ, Judgment of 10 September 2009 – C-97/08, ECLI:EU:C:2009:536 – *Akzo Nobel and Others v Commission.*

172 ECJ, Judgment of 6 October 2021 – C-822/19, ECLI:EU:C:2021:800, para. 41 – *Sumal.*

With regard to enforcement, EU competition law also relies on the legal entity principle.[173] Pursuant to Art. 299 TFEU, fines are enforced according to the law of the member states which adhere to the legal entity principle, not least because economic units themselves cannot hold assets.[174] It is therefore an established practice of the Commission[175] and case law of the ECJ[176] that penalty notices and orders are addressed to specific legal entities and that the economic unit mainly plays a role when it comes to a liability as joint and several debtors.

ee) Conclusions

In conclusion, the principles of corporate liability (of the undertaking) in competition law cannot be generalized. They are special rules justified solely by the specifics of competition law. Thus, EU competition law is no suitable basis for a general principle of corporate liability. Only the notion that the subject of primary obligations must also be the subject of liability as well as the entity whose turnover is relevant for the amount of fines can be generalized.

b) General Data Protection Regulation

As described above, the GDPR refers to the specific legal entity, i.e. the controller or processor. This clearly applies to the addressee of the primary obligations as well as to the subject of liability,[177] but also, in our opinion, to the calculation of maximum fines (Art. 83 (4) to (6) GDPR).[178] This focus on separate legal entities is not specific to the regulatory framework, principles or provisions of data protection law and can, thus, serve as the basis for inductive generalization.

173 Cf. *Heinrich*, Rechtsfragen der wirtschaftlichen Haftungseinheit des europäischen Kartellbußgeldrechts, 1st ed. 2016, p. 73.

174 *Bauermeister/Grobe*, ZGR 2022, 733, 760; *Kersting/Otto*, FS Wiedemann, 2020, 235, 237. The economic unit is not capable of owning assets, *Otto*, NZKart 2020, 285, 290.

175 See Commission Decision of September 20, 2000, OJ 2001 No. L 59/1 para. 172 – *Opel*; Commission Decision of September 03, 2004, OJ 2006 No. L 192/21 para. 4 et seq. – *Copper installation pipes*; see also *Bauermeister/Grobe*, ZGR 2022, 733, 760; Immenga/Mestmäcker/*Biermann*, Wettbewerbsrecht, Vol. 1, 6th ed. 2019, Before Art. 23 VO 1/2003 para. 104 et seqq..

176 ECJ, Judgment of 6 October 2021 – C-822/19, ECLI:EU:C:2021:800, para 44 – *Sumal*.

177 ECJ, Judgment of 5 December 2023 – C-807/21, ECLI:EI:C:2023:950, para. 54 – *Deutsche Wohnen SE*; AG Campos Sanchéz-Bordona, delivered on 27 April 2023, Case C-807/21 (Deutsche Wohnen), para. 48.

178 A different view is held by ECJ, Judgment of 5 December 2023 – C-807/21, ECLI:EI:C:2023:950, para. 55–59 – *Deutsche Wohnen SE*; see previously AG Campos Sanchéz-Bordona, delivered on 27 April 2023, Case C-807/21 (Deutsche Wohnen), para. 48.

c) Digital Services Act

Since the DSA does not define the provider of an intermediary service, it does not permit a clear conclusion in favor or against a certain principle of corporate liability. There are, however, some indications that the legal entity principle would be a more fitting explanation for certain provisions of the DSA. It is clear that the addressee of the primary obligations, the subject of liability, and the entity relevant for the calculation of the fines are all identical under the DSA. In that respect, the DSA confirms the generalizable aspect of the principles of corporate liability. Regarding further questions of corporate liability, the DSA is a regulation which provides a rather weak basis for generalization.

d) Insolvency Regulation and Unfair Commercial Practices Directive

The obligations under the EU Insolvency Regulation, in principle, only apply to individual legal entities. This approach is not based on specifics of insolvency law but allows generalization. Similar considerations apply to the Unfair Commercial Practices Directive.

e) Digital Markets Act and Foreign Subsidies Regulation

Of the secondary acts examined, the DMA refers to the economic unit instead of the individual legal entities. This is not rooted in a general principle of law, but in the DMA's nature as a branch of competition law.[179] The objective of the DMA is to reduce systemic risks to competition.[180] The DMA is modeled on the basis of Artt. 101, 102 TFEU in other respects, too.[181] Most duties of conduct which undertakings and gatekeepers in the sense of the DMA are subjected to, are modeled on competition proceedings relating to Artt. 101, 102 TFEU;[182] in addition, there are overlaps in substantive law between the DMA and general EU competition law.[183]

Thus, the DMA attaches liability to economic units because it is a subtype of competition law, not because it expresses a general principle of EU law. The

179 *Karbaum/Schulz*, NZKart 2022, 107.
180 *Schweitzer*, ZEuP 2021, 503, 530.
181 Cf. *Podszun/Bongartz/Kirk*, NJW 2022, 3249, 3251.
182 For specific examples, see *Harta*, NZKart 2022, 102, 103; also *Podszun/Bongartz/Kirk*, NJW 2022, 3249, 3251; *Achleitner*, NZKart 2022, 359, 360 et seq.; *Schweitzer*, ZEuP 2021, 503, 530.
183 See *Brauneck*, RDi 2023, 27, 30, para. 9.

DMA is not a suitable basis for the determination of a general legal principle of corporate liability in EU law.[184] Even the EU legislator deemed it necessary to justify the functional understanding of the term "undertaking" within the DMA by referencing EU competition law. This shows that it does not consider the attachment of liability to the economic unit as the rule but as the exception. Thus, the DMA – like general EU competition law – must be excluded from the basis for inductive generalization.

The same line of argument holds true for the FSR. The regulation does, besides the undertaking, also address associations of undertakings as the subjects of fines and it declares the turnover of such associations relevant for the maximum amount of fines in certain cases. However, this is not rooted in a general principle of EU law, but in the regulations proximity to competition law. While it regulates the subject of state aid, it first and foremost sees this as a means to ensure fair competition within the EU (cf. Recital 1 and Art. 1 FSR). Therefore, it can be considered a supplement to classic competition law. The reference to the association of undertakings can therefore not be generalized outside competition law. The FSR – like the DMA – must, hence, be excluded from the basis for inductive generalization.

3. External Induction Basis

The external basis for inductive generalization, i.e. the legal systems of the member states as well as public international law, provides a clear picture. All the abovementioned legal systems apply the principle of the separation that results in a limitation of liability to one legal entity. The national legal systems even have elevated the principle of separation to the rank of a general principle of national law, often expressly designating it as such. It has already been recognized in Roman law doctrine, that, as a matter of principle, only one's own fault leads to liability for damages.[185] As Roman law is the root of numerous legal systems of the Member States, it can be taken into account for the formation of general legal principles in EU law as part of the member states legal traditions.[186]

184 Cf. on the prerequisites of the basis for inductive generalization in this respect *Metzger*, Extra Legem, intra ius: Allgemeine Rechtsgrundsätze im Europäischen Privatrecht, 2009, 55.

185 *Jhering*, Das Schuldmoment im römischen Privatrecht, 1867, 40 et seq.; from more recent times *Wagner*, Lieferkettenverantwortlichkeit – alles eine Frage der Durchsetzung, to appear in ZEuP 3/2023.

186 For example, ECJ, Judgment of 25.02.1969–23/68 – *Klomp v. Inspektie der Belastingen* (principle of continuity of interpretation in case of new regulation).

Finally, Public International Law is also guided by the legal entity principle, allowing for a limitation of liability.

4. Conclusions

As a result, there are no rules in the basis for inductive generalization that justify a general legal principle of corporate liability based on the economic unit. Consequently, such a general legal principle of corporate liability (of the undertaking) does not exist. There is no principle of general liability for breaches of obligations by third parties. However, there clearly is a general principle that the subject of primary duty and liability as well as the relevant entity for the calculation of fines must be identical.

It remains to be decided whether there is a general principle of corporate liability which is based on the specific legal entity or whether there is no general principle of corporate liability at all and, instead, an individual decision must be made for each respective legal act. The better arguments, in our opinion, speak *in favor* of a general legal principle based on the specific legal entity. It is in line with the legal tradition of the member states, with public international law and is in conformity with the freedom of establishing groups of companies required by the freedom of establishment as well as entrepreneurial freedom. It also matches with the relevant provisions of the internal basis of inductive generalization, i.e. EU law. The variety of areas of law that follow the legal entity principle (state aid law, unfair competition law, data protection law, insolvency law) shows that basing primary obligations as well as liability and the calculation of fines on specific legal entities is a general legal principle.

VI. Result

EU law does not recognize a general legal principle of corporate liability based on the economic unit. Instead, an inductive generalization based on the *acquis communautaire*, the legal systems of the Member States and Public International Law shows that, in principle, *only the specific legal entity* is subject of primary obligations as well as liability for breaches of rules. Moreover, the legal entity, in principle, is the reference point for the calculation of fines under EU law.