Piercing the Corporate Veil in Haitian Poisoning Affair Rejected in First Instance: German HELM AG Not Found Liable under Dutch Corporate Law

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1 INTRODUCTION

The article by Cees de Groot about the Shell Nigeria case in this issue of ECL illustrates that piercing of the corporate veil of a foreign subsidiary aimed at its parent company's liability is a topical issue. In said proceedings the Dutch judge, i.e, the Court of Appeal of The Hague, deals with the merits of the case on the basis of applicable Nigerian (common) law. In a similar case, however, it was precisely the other way around. The question whether the German parent company HELM A.G. (hereafter '*HELM*') could be held liable for the damage caused by its Dutch subsidiary Vos B.V. (hereafter '*Vos*') was ruled on the basis of Dutch 'piercing law', in accordance with what parties had consented to be the applicable law.

Claimants in this case were Marie Payen, mother of the deceased Pamela Sue Payen, and other parents and representatives of Haitian children who died or were severely injured for life by the use of an over-the-counter cough syrup by the end of the last century (hereafter '*Claimants*'). The syrup contained glycerine contaminated with diethylene glycol, which chemical is commonly used in automobile anti-freeze. When consumed by human beings it causes serious kidney, liver and heart defects. Pamela Sue Payen was five years old when she died.

2 JURISDICTION

Initially Claimants sued both Vos and HELM in the US (Florida). However, in its award of 15 July 2009 the Florida District Court of Appeal (Third District) ruled that it had no jurisdiction to decide over the claim against Vos because of the latter's lack of continuous and systematic business contacts with Florida, the requisite threshold. However, HELM's many business contacts with Florida over the years were undeniable and because of that HELM had already conceded to Florida jurisdiction. So in conclusion the Court of Appeal's award resulted in US jurisdiction over the parent (HELM), but not over the subsidiary that had actually caused the damage in Haiti (Vos).

3 PIERCING THE CORPORATE VEIL

To get a clear picture of the impact of the case let me quote from the rather emotional introduction into the facts, as presented by the Court of Appeal in its ruling on (the lack of) jurisdiction regarding Vos:

> *The facts and circumstances underlying this case can only be described as heart-breaking. From 1995 through 1997, a tainted batch of children's fever medicine was distributed in Haiti causing the deaths of more than seventy children, and the serious illness of a number of other children. Public health officials traced the deaths and illnesses to a shipment of glycerine that was manufactured in China, purchased through a German company, and eventually sent to Haiti by Vos. The plaintiffs are either the personal representatives of the estates of the deceased children, or the parents of the survivors.*
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> *The complaint alleges that in 1994, Vos purchased seventy-two drums of glycerine from China, tested samples, found them to be impure and tainted with diethylene glycol, but nevertheless proceeded to sell the glycerine to one of its customers in Haiti after affixing false labels to the drums. The tainted glycerine was incorporated into a children's fever medicine, and the injuries and deaths followed.*

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After the Court of Appeal's award Vos was clearly off the hook. Criminal action against Vos and its management in the Netherlands had led to a sloppy financial settlement with the public prosecutor. Although critical questions were raised in Dutch Parliament and the disaster even inspired an author to write a novel about it,[1] no further action was taken.

However, the case against Vos' German parent company HELM picked up where it was left in first instance before the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, and where it was initiated as early as 1997. As a next step parties agreed on a way to proceed before this Court. The arrangement, which was supported by the Court, entailed not only that Dutch law would ultimately apply to the piercing issue but also that the *possibility* of piercing Vos' corporate veil to HELM's detriment under Dutch law would be dealt with first, while HELM's *actual* liability and the size of Claimants' damage would be decided at a subsequent stage. It was a generally recognized fact that right from its incorporation Vos would simply never be able to cover damage in an amount as caused in Haiti. Hence the decision to aim the arrows of liability at HELM alone after the court's establishment of Florida jurisdiction over that company. The Court refers to this procedural arrangement in the second last paragraph of its verdict where it states: *'(. . .) the Court bifurcated the piercing issue from the liability and damage trials.'*

Obviously the agreement to let the Court decide first whether under Dutch law granting the claim against HELM would be a (theoretical) option logically implies the assumption that parties (and the Court itself) were also in agreement that something went horribly wrong at subsidiary level. If not, there would be no (realistic) ground for piercing Vos' corporate veil in the first place and hence this whole procedural exercise would serve no goal from the start. Still, and painful as it is, this is exactly the conclusion of the Court in its verdict of 2 July, 2015, after numerous and extensive hearings of witnesses and experts had taken place. The Court establishes a *'logical flaw'* in the set up of proceedings *'which compels this court to decline to pierce the corporate veil under Dutch law.'*

It should be noted that a piercing claim under Dutch law against a parent company is based on general tort law, i.e., Article 6:162 of the Dutch Civil Code (hereafter '*DCC*'). Such a claim is not derived from, let alone dependant on the subsidiary being found liable in earlier legal proceedings, but follows from the parent's *own* illegal action by violating its *duty of care* or otherwise acting in tort toward Claimants. Hence, the established lack of jurisdiction over Vos alone does not and could not preclude the Court from imposing liability on HELM, on the basis of Article 6:162 DCC. Nevertheless the Court reasons as follows:

> *It has already been determined that that there is no jurisdiction over Vos. Therefore, Vos's liability will never be fixed here. Without an adjucation of liability, Plaintiff will not acquire the creditor status currently necessary under Dutch law for piercing to occur. (. . .) The court is compelled to conclude that a Dutch court would not pierce the corporate veil for a non-creditor personal injury claimant under these circumstances.*

This of course is a bitter conclusion from the Claimants' standpoint. Moreover, the conclusion is based on a wrong interpretation and perception of applicable Dutch law. The Court should have realized at a far earlier stage that not formally-established liability (the status of creditor), but the recognition by the Court of an actual disaster caused by the subsidiary for which it is *or might have been* held liable, is indeed a *conditio sine qua non* for successfully bringing a piercing the corporate veil-action against a parent company. If it were different, the mere fact of a subsidiary's bankruptcy would in practice always prevent a successful claim against the parent. Why sue a bankrupt subsidiary company which offers no prospect for any compensation at all, or which might not even exist any longer upon or shortly after its liquidation?[2] By the way, this is not only the situation according to Dutch corporate law, but as far as I know it is in line with the situation in any (western) jurisdiction, including the US.[3]

4 LEX DURA SED LEX?

This being said, the wordings of the final paragraph of its verdict clearly demonstrate that the Court had great trouble in accepting its own conclusion, especially in light of the fact that over the years HELM consistently refused to offer adequate compensation to the injured Haitian children and the parents of the deceased ones. For a company that spends so much effort and money on the *Kindergarten* facilities of its own employees, this surely must have been a tough decision.[4] The Court, trapped in its own erroneous reasoning set forth above, sadly concludes:

> *Given the facts as described by the Third District Court of Appeal, this is a troubling result from a moral standpoint. If the allegations are true, Vos decided that the profit from 72 drums of contained glycerine was more important than the lives it would destroy. These lives mattered. These children mattered. However, this is the result required under the law. Plaintiffs chose to sue in*

1 Marjolijn Februari, *De literaire kring*, Prometheus Amsterdam, 2008.

2 See e.g. Samantha Reussen's contribution in this issue of ECL about the Dutch practice of the so-called turbo-liquidation of a company. In fact Vos BV legally merged with and disappeared into HELM Holland BV in 2006.

3 *cf.* Karen Vandekerckhove, *Piercing the Corporate Veil*, Volume 2 in the Book Series from the Centre for European Company Law (CECL), Kluwer Law International, 2007.

4 http://www.helmag.com/career/what-we-offer/helm-benefits/kindergarten/.

Florida where Vos had insufficient contacts. This ruling does not address the question of liability for the despicable alleged acts elsewhere.

5 APPEAL

The reader will find the full text of the Court's verdict printed hereafter. By appellate brief of 23 March 2016, Payen c.s. filed an appeal against it with the Florida Court of Appeal (Third District). ECL's editorial board has decided to closely monitor the continuation of this interesting case, which illustrates the ever-growing interconnection of the world's various legal systems. Hence to be continued.

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

MARIE PAYEN, as Personal Representative of the Estate of Pamela Sue Payen (deceased) et al.,

Plaintiff,

HELM AG,

Defendant(s),

CASE NO. 1997-29728 CA 01
DIVISION 03

FINAL ORDERS AS TO ALL PARTIES
SRS DISPOSITION
NUMBER 3
THE COURT DISMISSES THIS CASE AGAINST ANY PARTY NOT LISTED IN THIS FINAL ORDER OR PREVIOUS ORDER(S). THIS CASE IS CLOSED AS TO ALL PARTIES.
Judge's Initials

FINAL JUDGMENT

This matter came before the Court for non-jury trial on the bifurcated issue of liability of Defendant Helm A.G. ("Helm") for the acts of its subsidiary, Vos, B.V. ("Vos") Prior rulings in this case rendered by the Third District Court of Appeals determined that the courts of Florida have no jurisdiction over Vos, originally a defendant in this case, Vos, B.V. v. Payen, 15 So.3d 734 (Fla. 3rd DCA 2009). The remaining defendant is Helm, the parent corporation and sole shareholder of Vos. The court does have jurisdiction over Helm due to unrelated business activities in Florida.

Procedural History

This case involves wrongful death and personal injury claims for dozens of children who died as a result of contaminated medicine in Haiti. In order to manage this litigation in a cost-effective manner, the Court and the parties determined that the initial question of whether Helm could be held liable for the actions of its subsidiary Vos should proceed first, prior to extensive liability and damages trials for the individual plaintiff families. The parties have agreed that the law of the Netherlands applies to the question of Helm's liability, also referred to as the question of "piercing the corporate veil."

As described in the Third District opinion, the allegations are these: "...that in 1994, Vos purchase seventy-two drums of glycerin from China, tested samples, found them to be impure and tainted with diethelyne glycol, [...an industrial chemical normally incorporated into anti-freeze and lacquer] but nevertheless proceeded to sell the glycerin to one of its customers in

Haiti after affixing false labels to the drums. The tainted glycerin was incorporated into a children's fever medicine, and the injuries and deaths followed." *Id.* at 735. The product sold by Vos is claimed to have caused the death of more than seventy children and injuries to a number of others. "The Plaintiffs are either the personal representatives of the estates of the deceased children, or the parents of the survivors." *Id at 735.* The appellate court determined that Vos could not be constitutionally subjected to a lawsuit in Florida based on its lack of business activities in the state of Florida, *Id.* at 738. Vos was dismissed from the case for lack of jurisdiction following the appellate mandate. Helm remains before the court, and Plaintiffs seek to hold Helm liable, as parent and shareholder, for the acts of its subsidiary.

Factual Findings

The evidence at the bench trial the following facts by the greater weight of the evidence:

1. Under Dutch law, a B.V. is a private company with limited liability and an independent legal personality. Shareholders are not personally liable for acts performed in the name of the company. Dutch Civil Code, Book 2, Section 1, Article 175.
2. Vos B.V. is a single shareholder Dutch corporation. The single shareholder is Helm A.G., its German parent corporation. Helm is in the business of chemical trading across the globe. It has multiple foreign subsidiaries in the chemical trading business. The company is controlled by the Schnabel family. Dieter Schnabel held the position of chief executive officer at Helm and was appointed commisaris, or supervisory director of Vos. Under Dutch law, there is a board of directors only and there is not normally a supervisory board. The commisaris is a separate board from the board of directors. Each Dutch B.V. should have a board of directors, but in this case, there was a single director, Ernst Huisman, for Vos.
3. Vos's corporate structure was Dutch on paper, but not in practice. Dieter Schnabel was the sole appointed commisaris for Vos, but delegated his authority to Joern Hinrichs. Under Dutch law, the appointment to the commisaris position

is personal and cannot be delegated.

4. The Vos board of directors consisted of one person, Ernst Huisman, as sole director. Under Dutch law, the board of directors runs day-to-day operations. As sole director, Huisman ran Vos. He established company policy and procedure. The evidence also established that he heavily consulted with Hinrichs, who had no formal role or title with Vos other than the authority granted him by Schnabel.

5. Helm purchased Vos in an effort to expand its business model from chemical trading into chemical distribution. Vos was acquired to test this model. As such, Helm invested significant sums into Vos and retained significant control under Vos's Articles of Association over decisions likely to have significant bottom line impact such as debt acquisition, real estate, expansion, etc. This is not typical under Dutch law, but there is no evidence that it is illegal or inappropriate either. While Helm, through Hinrichs, was consulted frequently, there is no evidence in this record that Helm injected itself in day-to-day business decisions of running Vos, particularly in terms of what to sell, to whom to sell, or in terms of product integrity.

6. The record is devoid of any evidence that Helm enriched itself at the expense of Vos or Vos's creditors. The evidence established that Helm ensured Vos was and remained a going concern.

7. Vos never declared bankruptcy. There is no evidence that Vos was ever insolvent. The evidence failed to establish any action of Helm which deprived Vos of assets sufficient to respond to a verdict. Accountants debated undercapitalization, but the evidence failed to show that the company was without the ability to respond to a verdict. Plaintiff presented significant evidence regarding Vos's finances. There is no question that Vos required capital investment from its parent corporation and that lenders required Helm's promise as to its relationship with Vos in order to induce them to lend to Vos. However, the evidence did not establish that on an ongoing basis Vos's assets were insufficient to compensate for risks. The analysis suggested by Plaintiffs

contemplates an inability on the part of Vos to respond to a potential verdict/s on these claims in order to assert undercapitalization as a factor under Dutch law.

8. There is no evidence that Vos failed to pay any of its business creditors.
9. The evidence established that the product, allegedly contaminated glycerin, was imported from China by Vos through the Netherlands and ultimately shipped to Haiti. The glycerin was not distributed to or utilized in the European Union states.
10. There is no evidence in this case that Plaintiffs received any judgment in their favor directly against Vos for the allegedly adulterated glycerin. No judgment will ever be rendered in this case directly against Vos and in favor of the Plaintiffs because the court has determined that Vos is not subject to this court's jurisdiction.

Legal Analysis

The Court heard the testimony of two experts on Dutch law, Mr. Steef Bartman and Mr. Jan Bitter, both of whom agreed on the law but diverged on its application to these facts.

There is no Dutch legal theory analogous to Florida's common law "alter ego" theory of piercing. The Netherlands is a civil code jurisdiction. As such, the preeminent legal authority is statutory law. There is no Dutch statute directly addressing "piercing the corporate veil." In tort generally, "A person who commits a tort against another which is attributable to him must repair the damage suffered by the other in consequence thereof...A tortfeasor is responsible for the commission of a tort if it is due to his fault or to a cause for which he is accountable by law or pursuant to generally accepted principles." Dutch Civil Code, Book 6, Title 3, Section 1, Article 162. The question is under what circumstances a Dutch court would hold Helm responsible for Vos's commission of a tort. The Plaintiff's expert, the very qualified Steef Bartman, persuasively testified that there are three methods to this remedy under Dutch law: statutory code, Identification and indirect piercing. Bitter agreed. These methodologies have all been recognized in Dutch cases. Under civil code, case decisions are not binding as precedent as they would be in a common law jurisdiction. Instead, the cases serve to give this court an understanding of how a Dutch court would analyze this issue if it were pending before a Dutch judge. The question before this court as framed by the Plaintiffs is "...whether a Dutch

court would pierce the corporate veil in this instance as to Vos's creation and hold the shareholder responsible to Vos's creditors, including Payen, in this case." Transcript at 74. Bartman testified that under Dutch law, piercing the corporate veil is normally a commercial issue as opposed to a tort issue. There is no Dutch court that has pierced the corporate veil in a product liability case, indeed, there is no case in which the veil was pierced in a personal injury tort case. There is certainly no case that addresses liability in a mass injury tort case such as this.

Statutory piercing

Under Book 6, Article 185 of the Dutch Code, companies in a chain of distribution may be held liable if the manufacturer cannot be found or is insolvent. This provision of the Dutch code was adopted as a matter of uniformity under directives with regard to legal consistency among the member states of the European Union. The parties did not strenuously argue this as a viable piercing theory in this case and there was no evidence adduced to support this theory. Vos would did not put the material into circulation in the EU. It transshipped the material through the Netherlands to Haiti. With regard to the potential liability for the transshipment, the EU directive looks to the native law of the home country, which would redirect the analysis to an indirect piercing evaluation, referenced below. Bartman testified that perhaps Vos could be held liable as a distributor unable to identify the upstream manufacturer and therefore be held liable, and if unable to cover the verdict, the corporate veil could be pierced and Helm could be held responsible as parent. However, there is no ability to acquire a verdict against Vos in this case. There is no liability for Helm under the Dutch code.

Identification

There is no liability under the theory of identification because there was no unlawful act or fraud undertaken by the parent through the vehicle of the subsidiary. Identification, both experts agreed, is an extraordinary remedy. It contemplates essentially switching a new corporate identity for the original company in order to avoid execution, as was the case in the Rainbow decision at SC 13 October 2000, NJ 2000, 689. The evidence in this case does not support application of the identification theory.

Indirect piercing

Evaluating this case under the persuasive Dutch authority, the parties agreed in large part on the seminal cases. These cases generally involved claims against insolvent or bankrupt subsidiaries brought by ordinary business creditors who provided good or services to the subsidiary.

Bartman described a roadmap to piercing as laid out by the Dutch cases:

1) There must be a close relationship between parent and subsidiary and inherent potential power of the parent to intervene in the subsidiary's affairs
2) As a result of this power, the parent has a duty of care toward its subsidiary's creditors
3) The parent must become aware of the deteriorating financial situation of the Subsidiary, which fixes the activation date of the duty of care and
4) The parent must have breached that duty of care towards the subsidiary's creditors.

As to corporate structure, Bartman testified that corporate structure alone does not justify piercing, even where the parent is 100% shareholder. The evaluation of potential liability contemplates whether the parent employed the subsidiary as a sham to commit fraud, whether it diverted the subsidiary's assets to the benefit of the parent at the expense of the subsidiaries creditors, and/or whether the parent failed to act responsibility by standing by and allowing the subsidiary to continue to do business with creditors while knowing of impending insolvency. These questions involve looking at the formal relationship between parent and subsidiary, how much control the parent had over the subsidiary and whether the subsidiary was financially dependent.

Bartman acknowledged that while the corporate structure of Vos was unorthodox and noncompliant with the formal requirements of Dutch law, that there was no evidence that Helm ever abused its subsidiary, Vos, to the benefit of Helm or to the detriment of Vos creditors. The same cases were cited by both experts, Bartman and Bitter. In the seminal cases of Osby, 25 September 1981, NJ 1982, 443; Albada-Jelgersma, 19 February1988, NJ 1985; and Sobi-Hurks, 21 December 2001, NJ 2005, 96, the parent corporation either diverted assets away from

creditors in the face of subsidiary insolvency, failed to warn creditors of impending subsidiary insolvency, or cross-collateralized the subsidiary to the detriment of creditors. All involved bankrupt subsidiaries. In other cases cited, insolvency of the subsidiary was evident.

In the Comsys case, SC September 2009, NJ 2009, the parent actually structured the subsidiary so that it was financially dependent on the parent. Income and profit from the subsidiary's business activities was diverted to another subsidiary of the parent. In other words, the subject subsidiary incurred the accounts payable while the other subsidiary received the income from accounts receivable. The parent then pulled financial support from the payable subsidiary which owed money to the the creditors, to the detriment of creditors, while seeking to keep the receivables. The Dutch court rejected the switch.

The case law all speaks to some financial benefit to the parent. This record is devoid of any evidence of any corporate structure, management, decision-making or other indicia that benefitted the parent corporation, Helm, at the expense of Vos or its creditors. To the contrary, the record reflects consistent support of this subsidiary throughout the time frames discussed in the evidence, even after the Haitian disaster. The testimony reflected that Vos continued in business as a division of Helm in 2006 and that Helm absorbed both its assets and liabilities. If a court had jurisdiction over Vos, there is no evidence that Vos would not be able to respond to a verdict or that Helm would not be held accountable if Vos could not pay a verdict. The third component, which requires an awareness of the inadequate finances of the subsidiary in face of creditors' claims, was not proven. There is insufficient evidence of inability to pay creditors.

In the face of lack of precedent on the question of whether personal injury claimants would be treated as creditors for purposes of indirect piercing, Dutch scholarly debate appears split. One view is that personal injury claimants should be treated as preferential creditors because they did not choose to have a commercial relationship with the tortfeasor in contrast to a business creditor who would presumably be in a better position to assess the financial risk of doing business with the company. However, this theory still relies upon the subsidiary being liable to the Plaintiffs and the existence of a court-approved claim or judgment. There is no claim or judgment against Vos possible in this case.

These cases all involve business creditors of the subsidiary. Plaintiff's theory of liability for piercing the corporate veil to hold Helm liable for Vos's conduct is dependent on the Plaintiff's status as creditors. Bartman acknowledged multiple times that his opinion is dependent on the Plaintiffs' status as creditors, and Vos's ability to pay a judgment. Bartman based his testimony as follows: "I have considered this case in the light of the ability of Vos to be able to pay its debts arising from the effects of products that it has delivered and such as suffered by Payen." Transcript at p. 261. Bartman reiterated again: "I thought we were working here on a basic assumption, underlying assumption—that assumption that we...are asked to opine on the possibility of piercing the corporate veil of Vos, B.V. to the detriment of its parent company, Helm AG. That assumes that the claim of the creditor, of Payen, has already been recognized in court or will be recognized in court, okay." Transcript at p. Bartman assumes a basic fact which is never going to happen in this case. Payen will never be recognized as a creditor of Vos because of the jurisdictional ruling.

This theory reveals a logical flaw which compels this court to decline to pierce the corporate veil under Dutch law. There is significant question as to whether the Dutch courts would, in a product liability case, extend the piercing concepts discussed above to find a parent liable where personal injury claimants were creditors or potential creditors of a subsidiary. There is no Dutch case which has recognized this theory. Such an extension is properly the prerogative of a Dutch judge, not this court sitting in Florida. However, even assuming that this court would take that leap, it is dispositive under current Dutch legal theory that these Plaintiffs do not and will never hold a judgment against Vos rendered in this court. It has already been determined that there is no jurisdiction over Vos. Therefore, Vos's liability will never be fixed here. Without an adjudication of liability, Plaintiff will not acquire the creditor status currently necessary under Dutch law for piercing to occur. Piercing under Dutch law is a remedy for loss of ability to collect, for diversion of financial resources away from creditors. It is not a theory which substitutes the parent's liability for the subsidiary's liability.

Plaintiff's counsel argued at trial that to reach this result would be unfair since the Court bifurcated the piercing issue from the liability and damage trials. Such an argument misapprehends the problem. This court will never try the culpability of Vos due to lack of jurisdiction, and there will never be a verdict against Vos. The piercing remedy is sought to

hold Helm accountable for Vos, but that has not been recognized under Dutch law for a potential claim outside a commercial relationship. The court is compelled to conclude that a Dutch court would not pierce the corporate veil for a non-creditor personal injury claimant under these circumstances.

The court does not determine that had Plaintiff pursued Vos in a forum where jurisdiction would have been proper, Plaintiff could not have pursued this piercing remedy. Payen will not be able to collect against Vos in this court not because of insolvency but because of lack of jurisdiction. This court is determining that in the absence of any possibility of creditor status as to the subsidiary, Dutch law does not authorize the direct liability of the parent for the actions of the subsidiary in this forum on these facts. Given the facts as described by the Third District Court of Appeal, this is a troubling result from a moral standpoint. If the allegations are true, Vos decided that the profit from 72 drums of contaminated glycerin was more important than the lives it would destroy. These lives mattered. These children mattered. However, this is the result required under the law. Plaintiffs chose to sue in Florida where Vos has insufficient contacts. This ruling does not address the question of liability for the despicable alleged acts elsewhere.

Therefore, the Court renders its judgment on the greater weight of the evidence and Under Dutch law in favor of the defendant Helm A.G.

It is therefore ORDERED AND ADJUDGED:

Judgment is rendered in favor of Defendant Helm, A.G. Plaintiffs in this case shall take nothing by this action and Defendant Helm A.G. shall go hence without day.

The Court retains jurisdiction to enter such further orders as may be appropriate.

DONE and **ORDERED** in Chambers at Miami-Dade County, Florida, this 2nd day of July, 2015.

JENNIFER D. BAILEY
CIRCUIT COURT JUDGE