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> By now, 'group interest' has after all become a commonly accepted concept, and one that implies dependency on the parent company (B. Wachter, 1988).**

1. INTRODUCTION

The group, always a slippery legal phenomenon, is once again drawing headlines. The catalyst generating this renewed attention appears to be the European company law and corporate governance Plan of Action that the European Commission announced on 12 December 2012.[1] This initiative has been followed-up in 2013 by a proposal from the Forum Europaeum on Company Groups (FECG) to distinguish between *Service Companies*, being to a large extend instrumental to the parent company, and *Ordinary Companies*, which deserve a certain autonomy within the system of the law. Service Companies should observe all directions from central group management, Ordinary Companies should be given much more leeway to structure their own businesses albeit taking good notice of the group's policies and interests.[2]

One of the suggestions put forward in the Commission's Plan of Action is indeed to have the concept of 'group interest' recognized by all Member States. No doubt this will also be part of the final proposal for a European Model Company Act, which is expected to be published shortly. It is unclear, however, how recognition of such legal concept at the European level would impact law practice in individual Member States, for example, the Netherlands. Would it move the Dutch system closer to the Anglo-American 'shareholder' approach, requiring greater alertness and counteraction from Dutch subsidiaries' management, or would it in fact reflect an upward expansion of the 'stakeholder' concept preferred in the Rhineland region toward the holding company level, with greater focus on other aspects and business values besides shareholder value alone?[3]

However this turns out, I believe that recognition of the concept of 'group interest' in Europe will not cause any major changes in the Netherlands. It is already established here as a relevant interest at law: in statute, but also and more prominently in case law. This does not mean, though, that recognition of this concept in European laws will go unnoticed – nor does this in turn mean that the Supreme Court of the Netherlands has approached the issue of groups over time with sufficient consistency and a clear concept in the back of its mind.

This article begins with an attempt to sketch the Supreme Court's tentative approach using judgments that I feel are the most noteworthy. I freely admit that the selection of judgments is somewhat arbitrary and that I present them with little in the way of nuance. It would likely be possible to write a PhD thesis on each and every one of them.[4] Nevertheless, I feel that a very rough outline is the best way to discuss how the law has developed in this area[5]: not to ignore the finer points, but to reflect the problems that the Supreme Court has had with the subject matter over time, which is the purpose of the present contribution. It ends with some thoughts on the potential impact of European recognition of the group interest on Dutch company law and the legal practice.

2. THE RISE OF THE GROUP IN DUTCH COMPANY LAW ...

First, I discuss a related matter: recognition of the group as an independent, legally relevant unit by sources other than the Supreme Court. The group as such is already generally recognized in the employee participation laws of the Dutch Works Councils

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** Translated from: B. Wachter, *Concernrecht en bewijs(on)mogelijkheden*, in the collection *Van Vennootschappelijk belang*, liber amicorum for Professor J.M.M. Maeijer LLM, W.E.J. Tjeenk Willink, Zwolle, 1988, p. 380.

1 COM (2012) 740 final, para. 4.6.

2 ECFR 2015, p. 299–306. This distinction by the FECG, intended to be laid down in a Directive, seems rather parallel to the one I suggested the judiciary to make between Instrumental and Autonomous Subsidiaries, in my dissertation *Concernbeleid en aansprakelijkheid*, Kluwer-Deventer 1989, p. 116–120.

3 Cf. M(ieke) Olaerts's column in the Journal European Company Law (ECL), Volume 13, Issue 3, June 2016, p. 89, titled *The 'European' Group Interest and Stakeholder Protection. Of course the recent "Brexit" puts this question in a somewhat different light.*

4 For example, see my own efforts based on the *Albeda Jelgersma II* judgment, NJ 1988/487, notes by Van der Grinten, in my dissertation *Concernbeleid en aansprakelijkheid*, published as vol. 6 in the series by the Institute for Corporate Law, Deventer-Kluwer, 1989.

5 See the discussion by G. van der Sangen, *Concernleiding en aansprakelijkheid: het delicate evenwicht tussen unitaire leiding en juridische zelfstandigheid*, TvOB 2009, no. 6, p. 146.

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Act (*Wet op de Ondernemingsraden*). Although the concept used in that Act does not overlap entirely with the definition given in Article 24b Book 2 Dutch Civil Code, [6] it is now generally accepted that central works councils have specific group-based powers that do not derive exclusively from those of their constituent works councils. In fact, in 1998 this was more or less explicitly formalized in the Act, specifically section 25(1). [7] That was not always the case, however: as late as in 1981 Honée vigorously defended the position that central works councils could not exercise advisory powers that did not accrue to a majority of their associated works councils. [8] This included decisions to form partnerships with other groups or adopt strategic group plans. Honée refused to acknowledge a 'group-law interpretation' of the Act (as it read at the time). As noted above, however, ultimately the legislature rejected this position (sometimes called the *nemo plus* principle), 'as it is evident that this concerns matters that are of common interest for all the associated undertakings, or at least the majority of them (…)'. [9]

Since then, it has been primarily case law of the Enterprise Division of the Amsterdam Court of Appeal (hereinafter 'Enterprise Division') that has further defined the group for purposes of employee participation. The Enterprise Division fully recognizes the concept of 'group interest', although that interest is not necessarily given decisive importance. Therefore, if the group's interests have not been evidently and comprehensibly weighed against the interests of the individual undertaking, a resolution by the undertaking (that is, the subsidiary) will not satisfy the requirements of section 26(5) of the Works Councils Act. This line of reasoning, which the Enterprise Division has long adopted in its case law, is reflected in its judgment in *Watts* from 2013:

> Given the fact that WINL is part of the Watts group, which operates internationally, it is inevitable and logical that WINL's interests are determined in part by the group's interests. This does not diminish the fact that WINL, when preparing and making its decision, should independently weigh the group's interests alongside or against WINL's other interests and that WINL should provide the works council with details of how it weighed those interests. The group strategy carries weight in that consideration, though not by definition decisive weight. Any other view, to the effect that WINL should merely carry out a consolidation decision taken at the level of WIEU, would unacceptably prejudice the legal system of employee participation.[10]

My summary of Supreme Court case law commences with the well known inquiry decision in *OGEM* from 1988.[11] That judgment (paragraph 9.3) contains the Supreme Court's first reference to the top-tier holding company's *powers of instruction* that effectively exist in intragroup relationships (and which can be enforced in a variety of ways, including powers of suspension and dismissal) to obtain the information from its subsidiaries and sub-subsidiaries that it needs to pursue sound group policies. Failure to timely demand and/or obtain such information is not a valid defence against assertions of negligence on the part of the parent company. As such, it is not at all strange that Raaijmakers (Sr.) sees confirmation in *OGEM* of '(…) the idea that the parent company's shareholders (and other stakeholders) may demand that the directors manage the parent company's assets to the best of their abilities and conduct sound active overall group management in respect of the subsidiaries'.[12]

Since that judgment, under Dutch law parent companies are said to have a 'duty of group management' (*concernleidingsplicht*).[13] Although the precise nature and scope of that duty have yet to be fully defined, *OGEM* is nevertheless held to be a landmark decision in the development of Dutch group law. In it, the Supreme Court derives standards from facts (powers of instruction lead to a duty to intervene) and so recognizes – albeit not in so many words – that groups and group interests are legally relevant units.

Personally, I do not consider the much-debated decision in *Cancun* from 2014 to be a step backward in this development.[14] Following its judgments in relation to ABN AMRO and ASMI,[15] it was not to be expected that the Supreme Court would accept the ground for cassation that argued (paragraph 1.9.2) that management of a joint venture company should focus primarily on the interests and wishes of the shareholders. Although this might be the case in practice, until the laws change it is not a principle on which Dutch company law is based.

6 Judgment rendered by the Supreme Court of the Netherlands, 14 Mar. 2008, JOR 2008/94, notes by Holtzer (*TNT/COR*).

7 Act of 3 Mar. 1998, Dutch Bulletin of Acts and Decrees 107.

8 H.J.M.N. Honée, *Concernrecht en medezeggenschapsregelingen*, vol. 21 in the series by Van der Heijden Institute, Deventer-Kluwer, 1981, p. 164. For an alternative approach, see my own *Inleiding concernrecht*, Samsom H.D. Tjeenk Willink, Alphen aan den Rijn 1986, p. 62.

9 Translated from: Parliamentary Papers II, 24 615, no. 3, p. 15 (Explanatory Memorandum).

10 Translated from: judgment rendered by the Enterprise Division, 9 July 2013, JAR 2013/223, notes by Zaal (*Watts*). For a similar judgment concerning rights of inquiry, see the judgment rendered by the Enterprise Division on 8 Oct. 2013, JOR 2014/94, notes by Verburg (*FNV c.s./Prins Dokkum*). For more on this matter, *see also* the PhD thesis by L.G. Verburg, *Het territoir van de (Nederlandse) ondernemingsraad in het internationale bedrijfsleven*, Monografieën Sociaal Recht no. 40, Deventer-Kluwer, 2007.

11 Judgment rendered by the Supreme Court of the Netherlands, 10 Jan. 1990, NJ 1990/465, notes by Ma (*OGEM*). *See also* the notes by M.J.G.C. Raaijmakers on that judgment in the collection *Jurisprudentie Ondernemingsrecht 1897/2014*, Ars Aequi Libri, 2015, p. 225 (hereinafter 'AA collection').

12 Translated from: M.J.G.C. Raaijmakers, AA collection p. 225.

13 Cf. Bartman/Dorresteijn, *Van het concern* 107ff (8th ed., Deventer-Kluwer 2013, listing further reading).

14 Judgment rendered by the Supreme Court of the Netherlands, 4 Apr. 2014, NJ 2014/389, notes by PvS, JOR 2014/290, notes by De Haan, AA collection p. 710, notes by Raaijmakers (*Cancun*).

15 Judgment rendered by the Supreme Court of the Netherlands, 13 July 2007, NJ 2007/434, notes by Ma, JOR 2007/178, notes by Nieuwe Weme (*ABN AMRO*) and the judgment rendered by the Supreme Court of the Netherlands on 9 July 2010, NJ 2010/544, notes by PvS, *JOR* 2010/228, notes by Van Ginneken (*ASMI*).

The direction chosen by the Supreme Court in *OGEM* is also evident in *Sobi/Hurks* from 2001, on the issue of piercing the corporate veil.[16] In paragraph 5.3.8.3 of that judgment, the Supreme Court in fact in so many words refers to *OGEM*. The judgment also confirms the earlier approach that the Supreme Court had adopted to the issue of piercing the corporate veil in *Albeda Jelgersma II*, which like *OGEM* was rendered in 1988.[17] The essence of that approach is that, where a parent company is closely involved in a subsidiary's business prior to that subsidiary's insolvency, this creates an obligation for the parent company to actively oversee its subsidiary in order to prevent (or at least minimize) any loss or damage. This is sometimes referred to as a *parental duty of care*.[18]

The fact that the scope of this parental duty of care is not limited to the subsidiary alone (internal operation), but also extends to the subsidiary's creditors (external operation), can be inferred from the fact that any breach thereof may serve to pierce the subsidiary's corporate veil in favour of those creditors and, consequently, to the holding company's detriment. Confirmation of this can be found in *Comsys Holding* from 2009.[19] From this judgment we may conclude that, although an entrepreneur is free to shape its business by using multiple legal entities, it is obliged to compensate creditors of a specific subsidiary if the chosen group structure created disproportionate risks for them. In the Comsys-case all costs of business were allocated to one subsidiary, while all profits were made by another one. The Supreme Court held that under these circumstances the holding company was under the obligation to compensate the loss sub's creditors when it went bankrupt after the holding terminated its funding.[20]

In the meantime, in 2001, the Supreme Court evidently felt that it was necessary to take a step back. Apparently it felt that the evolution of the group as a distinct legal institution threatened to go too far. In *Juno*, which deals with directors' and officers' liability, the Supreme Court held that management of a subsidiary may not determine its positions based exclusively on the group's interests.[21] The court considered (paragraph 4.6) that '[t]he interests of the group may factor into this, but may not be decisive in that they take precedence over the other interests concerning the separate companies'.

Presumably, the Supreme Court means that group interests are not *necessarily* decisive, not that they may never carry the greatest weight under certain circumstances[22]: the latter interpretation would be impossible to reconcile with the Supreme Court's presumed view of corporate interests that requires that all relevant interests be considered at all times.[23] Inevitably, group interests will then sometimes carry the greatest weight.

It should be mentioned here that *Juno* drew some criticism. In her note on the judgment rendered by the Court of Appeal of Arnhem-Leeuwarden on the bankruptcy of the EAF group, Verboom legitimately draws attention to the 'confused' position of subsidiaries' management in crisis situations.[24] In her view, this finding invites the following, somewhat drastic decision:

> However, I do not feel that it is undesirable that the court now seems to be accommodating the demand in professional literature that the discrepancy between the economic reality of the common figure of the group and the legal denial thereof be partially eliminated, for example by attaching greater weight, when judging acts of management, to group interests and showing more awareness of the economic practicalities of the group's policies.

This problem is in fact what caused the Reflection Group on the Future of EU Company Law ('Reflection Group') in 2011 to suggest offering management of subsidiaries a safe harbour against the threat of personal liability by recognizing the phenomenon of group interests (see also below).[25]

Where *Juno* might be regarded as a degree of reluctance by the Supreme Court to move forward in the process of institutionalizing the group, in *Landis* (2005) it continued along the previously adopted course. The judgment in that case marks an important development in the ongoing institutionalization of the group in Dutch company law, through recognition of what is commonly known as a *group inquiry*.[26] The law implies that only direct

16 Judgment rendered by the Supreme Court of the Netherlands, 21 Dec. 2001, NJ 2005/96, notes by Kortmann, JOR 2002/38, notes by Faber/Bartman (*Sobi/Hurks*).

17 Judgment rendered by the Supreme Court of the Netherlands, 19 Feb. 1988, NJ 1988/487, notes by G, AA collection p. 178, notes by PvS (*Albeda Jelgersma II*).

18 For example, see M. Olaerts, *Herstructurering in concernverhoudingen: het vennootschappelijk belang, instructierechten en de autonomie van het bestuur van de dochtervennootschap*, TvOB 2015, no. 6, p. 228.

19 Judgment rendered by the Supreme Court of the Netherlands, 11 Sept. 2009, NJ 2009/565, notes by PvS, JOR 2009/309, notes by Spinath, AA collection p. 572, notes by Bartman (*Comsys*). For an example of how the 'Comsys doctrine' has been applied in practice by a lower court, see the judgment rendered by the Court of Appeal of Den Bosch on 25 Feb. 2014, RO 2014/38 (*RGB Solutions/Med Trust*). The concept of a duty of care as grounds for piercing the corporate veil is also evident in the judgment rendered by the Court of Appeal of Leeuwarden on 6 Dec. 2012, JOR 2012/39, notes by Holtzer (*KHE Group/FNV*). For a recent example where the corporate veil was pierced in preliminary relief proceedings, see the judgment rendered by the Court of Appeal of Amsterdam on 13 Jan. 2015, JIN 2015/49, notes by Tersteeg.

20 See for piercing the corporate veil in an international, but Dutch related, legal setting: Cees de Groot, *The 'Shell Nigeria Issue': Judgments by the Court of Appeal of the Hague, the Netherlands*, ECL June 2016, p. 96 and Steef M. Bartman, *Piercing the Corporate Veil in Haitian poisoning Affair Rejected in Firts Instance: German Helm AG not found Liable under Dutch Corporate Law*, ECL June 2016, p. 103.

21 Judgment rendered by the Supreme Court of the Netherlands, 26 Oct. 2001, NJ 2002/94, notes by Ma, JOR 2002/2, notes by Bartman (*Juno*).

22 Cf. *Asser/Maeijer, Van Solinge & Nieuwe Weme 2-II** 2009/827.

23 Cf. Casper Hamersma & Rik Mellenbergh, *Derdenwerking van het vennootschappelijk belang*, Ondernemingsrecht 2013/58.

24 Judgment rendered by the Court of Appeal of Arnhem-Leeuwarden, 12 Nov. 2013, JOR 2014/32, notes by Verboom (*Rosenberg Polak q.q./Van Ommen*).

25 *Report of the Reflection Group on the Future of EU Company Law*, 2011. In this connection, see J.N. Schutte-Veenstra & M.A. Verbrugh, *Openbare raadpleging over de toekomst van het Europese vennootschapsrecht; een kritische bespreking*, Ondernemingsrecht 2012/136.

26 Judgment rendered by the Supreme Court of the Netherlands, 4 Feb. 2005, NJ 2005/127, notes by Ma, JOR 2005/58, notes by I, AA collection p. 512, notes by Raaijmakers (*Landis*).

providers of the company's risk capital (holders of shares and depositary receipts) may apply to the Enterprise Division to investigate the company's policies and business, provided there are justified and serious doubts regarding the quality of such policies and business (Article 346(1)(b) and (c) Book 2 Dutch Civil Code). Yet in *Landis* the Supreme Court found that *indirect* capital providers may also initiate inquiries, through their capital holdings in the parent company: not only aimed at that parent company, but also at its subsidiaries. The implication is that if mismanagement is established by the Enterprise Division this court may then also impose final injunctions on both the parent company and any subsidiaries that fall within the scope of the investigation pursuant to Article 356 Book 2 Dutch Civil Code, for example, the dismissal of and appointment of new directors, the amendment of the articles of association, the transfer of shares to a trustee, and so on.

This is necessitated by the *economic reality* of group relationships, the Supreme Court explained. Within a close group, the policies and business at the level of the subsidiary also impact the interests of the holding company's capital providers: after all, the parent company conducts its business with input from its subsidiaries. For purposes of the right of inquiry, the group is much more relevant as a unit than the individual group companies.[27] Here, recognition of the phenomenon of a group inquiry is a logical reflection of the earlier recognition of the holding company's group management duty.

Lastly, the institutionalization of groups in Dutch company law as presented here culminates in *Bruil* (2007). On the question of whether a particular juristic act or decision creates a conflict of interests for a member of management, the Supreme Court explicitly made an exception for the group's shareholders/directors (paragraph 3.6):

> Particularly in cases where a natural person acts in the capacity of a director of and at the same time shareholder in multiple companies that together make up a group, conflicts of interests within the meaning of article 256 Book 2 will be uncommon, since it is in fact the intention that by retaining ultimate control in one place the consideration of all the interests involved in these group companies is concentrated with that person. In that situation, the interests of the company and its associated undertaking and the interests of the director/shareholder in question correspond so closely that conflicts will only arise in very extraordinary circumstances.[28]

In paragraph 3 of his note in *NJ* to this judgment, Maeijer legitimately raises the rhetorical question of why this exception should not similarly apply to a holding company at the head of a group. Assuming that it does, this *group exception* undeniably echoes the view that groups as distinct legal institutions are commonly characterized by parallel interests, owing precisely to the central control from the parent company, where the group's interests form the connecting *Leitmotiv*.[29]

3. ... BUT NOT TOO FAST

On typical company law matters – for example employee participation, rights of inquiry, piercing the corporate veil and conflicts of interests – the Supreme Court is arguably unafraid to recognize the group as a relevant unity. However, it is considerably more reluctant to do so in respect of themes that traditionally fall more within the sphere of property law. This was already visible in *Juno*, in connection with directors' and officers' liability for torts. The same goes for the issues of contribution obligation within the context of group financing and joint and several liability based on a guarantee under Article 403 Book 2 Dutch Civil Code.

That reluctance – which might perhaps better be typified as indecision – in terms of the group financing contribution obligation is strongly present in *JVS Beheer* from 2012.[30] What apportionment key should the court in the fact-finding instance apply where the group companies, as is common practice, have omitted to arrange this among themselves? Given the earlier judgment in *Rivier De Lek* from 2003,[31] the Supreme Court might be expected to again attribute decisive weight to the fact of a group relationship, in the form of a proportionate obligation to contribute unless fairness demands otherwise, yet following *JVS Beheer* this is more hope than expectation.[32]

The Supreme Court evidently was unable to reach a decision when phrasing its judgment. It falls back on a section from the Parliamentary history to Book 6 of the Dutch Civil Code that does little to provide clarity, and finally simply refers the fact finding court to 'all other relevant circumstances surrounding the matter'. It remains unclear whether factors such as indirect profit from intercompany transactions might also be considered in connection with the apportionment of the contribution

27 However, this does not mean that group inquiry should be seen as a specific category within the right of inquiry compared with those of others with derived rights. On this matter, see my contribution entitled *Het goudschaaltje van Ingelse*, in the collection: *Ik ben niet overtuigd, Opstellen aangeboden aan mr. P. Ingelse*, Ars Aequi Libri 2015, p. 43.

28 Translated from: judgment rendered by the Supreme Court of the Netherlands, 29 June 2007, NJ 2007/420, notes by Ma, JOR 2007/169, notes by Leijten/Bartman (*Bruil*). In this connection, *see also* my analysis entitled *From Autonomy of Interests to Concurrence of Interests in Dutch Group Company Law*, European Company Law (ECL), Oct. 2007, p. 207.

29 Cf. Bartman/Dorresteijn, *supra* n. 13, at 287.

30 Judgment rendered by the Supreme Court of the Netherlands, 13 July 2012, NJ 2012/447, JOR 2012/306, notes by Bergervoet, AA collection p. 663, notes by Bartman (*Janssen q. q./JVS Beheer*). *See also* my article titled *The Obligation to Contribute in the Case of Group Financing under Dutch Law: How to Allocate the Pain?*, European Company Law (ECL), Volume 10, issue 1, 2013, p. 15–20.

31 Judgment rendered by the Supreme Court of the Netherlands, 18 Apr. 2003, JOR 2003/160, notes by Bartman (*Rivier De Lek*).

32 Cf. Bartman/Dorresteijn, *supra* n. 13, at 277.

obligation, and if so to what degree. This issue almost becomes a classic one that keeps returning, where the question is asked again and again of how the reality of the group can be reflected in the system of legal apportionment.[33] The persistent recurrence of this theme caused Rijkers, in her notes to *JVS*, to lament, 'One might wonder if it is not simply intrinsic in the matter that group companies should in principle share in the group's debts'.[34]

The Supreme Court's case law on joint and several liability under what are commonly known as '403 parent guarantees' (*403-verklaringen*) also reveals its concern about awarding group relationships special meaning and weight in this area. The 403 parent guarantee serves as one of the requirements under Dutch law to exempt a subsidiary from the obligation to publish its own annual accounts.[35] For example, in *SNS* (2014)[36] the Supreme Court, to establish the price of expropriated SNS bonds, was faced with the task of determining whether the claims were subordinated not only in the capital of SNS Bank NV (the issuer), but also in the capital of its parent company SNS Reaal NV. They were not, the Supreme Court ruled, since SNS Reaal was a third party, and nothing more, in respect of SNS Bank's creditors. The Supreme Court held as follows (paragraph 4.34.4):

> The circumstance that the creditors involved have agreed on subordination with SNS Bank only has bearing on their position in the event of recourse against SNS Bank's capital. If the contracts 'have no bearing' on these creditors' recourse position in respect of a third party, as established by the enterprise division, this Court sees no reason why (…) the risk that the creditors have accepted in their dealings with SNS Bank should also apply in respect of such third parties. (…) A subordination clause that a creditor has agreed with SNS Bank therefore has no influence on that creditor's recourse against the capital of a third party, for example SNS Reaal, which under a 403 guarantee is jointly and severally liable for the contract in question and was not party to the subordination clause.

Given that – again – the parent company and the subsidiary operated largely as a single economic unit, it is somewhat curious that the Supreme Court qualified SNS Reaal NV as a complete outsider in respect of its subsidiary's creditors. Nor does it presumably properly reflect the manner in which the bondholders viewed the SNS group when they agreed to the subordination. In this situation, evidently, the legal reality and the legal perception diverge. The view of the group that is evident from the text quoted in any case has little in common with the previously discussed institutional view that is evident in other case law of the Supreme Court.

4. EVALUATION AND FINAL CONCLUSION

Based on this overview of the Supreme Court's case law, it is difficult to avoid the conclusion that the Court has trouble placing the phenomenon of groups in Dutch company law. Although in some judgments it seems to lovingly embrace the group (*OGEM*, *Albeda Jelgersma II*, *Landis*, *Bruil*), in others it seems to trigger alarm among the Supreme Court and cause it to shrink back (*Juno*, *JVS Beheer*, *SNS*). This is not necessarily very surprising: company law is a random collection of rules ranging from organizational laws to accountability and liability laws and pure property laws. Since all these separate areas serve different purposes, it is understandable that the Supreme Court displays a variety of attitudes in respect of the group as an entity for which the Dutch legal system does not make a specific and detailed provision.

The Supreme Court's view of the group, being the most common form of undertaking, as a relevant unit for giving shape to employee participation and accountability by management through inquiry rights illustrates only that the country's highest court refuses to ignore reality. It would require a great deal more courage to link group financing contribution obligations to profit forms that cannot easily be directly and quantifiably identified as increases in a group company's capital. It would be equally bold to rule that a contract of subordination with a subsidiary should also apply at the level of a parent company that is not party to the contract: the potential impact on the basic principles of property law in this country is the reason for the Supreme Court's caution.

Does this analysis represent a complete overview of the current situation of group law in the Netherlands? No: last but not least some words should be spent on the classical theme of piercing the corporate veil. What strikes me in this connection is that, although the Supreme Court is willing to attribute an *upward* liability-apportioning influence to groups, based on the parental duty of care (*Albeda Jelgersma II*, *Sobi-Hurks*, *Coral-Stalt*, *Comsys*), no *downward* absolving influence based on the same considerations has to date been recognized. As discussed the holding company and its management are required to intervene in the subsidiary's business at a particular moment in time, or become obliged to pay damages to its creditors, yet I am unaware of any conclusive judgment in which the director of a

33 For what to my mind is still one of the most convincing analyses of this issue, *see* J.M.H.P. van Neer-Van den Broek, *Enige gedachten over hoofdelijkheid, omslag en regres*, in the collection: *Handelsrecht tussen 'Koophandel' en Nieuw BW*, Deventer-Kluwer, 1988, p. 115.

34 Cf. D.H.J. Rijkers, *Draagplichtverdeling bij concernfinanciering: wie krijgt de schuld?*, V&O 2012, no. 10, p. 172. *See also* P.P. Jongen, *M&A: Regresrisico bij uitvaren dochtervennootschap uit concernfinanciering*, Bb 2015, vol. 6, p. 61, and A.W.N. Oomen, *Externe aansprakelijkheid en/of interne draagplicht?*, JuTD 2012, no. 21, p. 16.

35 As permitted in Art. 57 of the Fourth EC Directive on annual accounts.

36 Judgment rendered by the Supreme Court of the Netherlands, 20 Mar. 2015, NJ 2015/361, notes by PvS/Winter, JOR 2015/140, notes by Josephus Jitta, JIN 2015/82, notes by Van der Kraan (*SNS*).

subsidiary successfully argued that he or she had acted at the instructions of the parent company.[37]

In this connection I have already mentioned *Juno*, and I share Verboom's criticism on this judgment. I too feel that the group's interests, as seen by group management, should in principle decide the actions of the subsidiary's management. Naturally, a lower limit should apply, viz. breaches of third parties' rights or disproportionate negligence in respect of the company's own interests. I also believe that 'safe harbour' is not the appropriate term here: the subsidiary's management must always check the lawfulness and practicality of the parent company's instructions. Nevertheless, it is possible that recognition of the concept of 'group interest' within the EU will cause the Supreme Court to recognize the downward absolving effect of the group in the near future. Specifying concrete powers of instruction in the subsidiary's articles of association, based on Article 239(4) Book 2 of the Dutch Civil Code as introduced in 2013, will presumably help in this regard.[38]

Of course a converse effect may also occur. The longer central group management delays in shaping its authority by way of creating a formal instruction right in its subsidiary's articles of association, the more difficult it will become to convince the judge in a potential case that the latter's interest should be set aside in favour of the group's interests. Modern principles of corporate governance require the legal relations within the group to be clearly structured. Should group management fail to do so it will not just lead to the absence of an instruction right but it may also lead to further consequences. In this respect one could say that Article 239 (4) of the Dutch Civil Code, in combination with an even stronger recognition of the group interest in our system of company law, forces the holding company to be more clear about the nature of its relationship with subsidiaries. In my view this is a good development.

At the same time, general recognition of the group interests throughout the EU might cause a small revolution in the apportionment of the duty to provide facts and proof in disputes between parent companies and their subsidiaries.[39] This aspect of procedural law has its roots in substantive law. If the group interests (as perceived by group management!) becomes an integral part of Dutch company law, it would be the responsibility of the subsidiary's management to argue and prove that carrying out a particular instruction infringes on third parties' rights, or else presents too much risk for the individual company's interests. This shift in the burden of proof in legal proceedings might in fact be the most concrete consequence of the introduction of an EU-wide group interest for Dutch legal practice.

37 An example is available in case law in a lower instance, albeit that the case concerned internal liability of directors and officers pursuant to Art. 9 Book 2 Dutch Civil Code. *See* the judgment rendered by the District Court of Amsterdam, 12 Jan. 2011, JOR 2011/250, notes by Bulten (*Canicula/ING Trust*). *See also* in this context the judgment of the Court of Appeal of The Hague, 26 Nov. 2015, JIN 2015/199, notes by Wolf (*Culi d'Or*), in which the Court held that a group may be managed as a sole business and that, consequently, intragroup loans need not necessarily be secured, provided that it is not foreseeable that the company to which the loan is granted will get into financial trouble shortly thereafter.

38 Alternatively, if I understand him correctly, *see* R.G.M. Dahmen, *De aanwijzingsbevoegdheid van het gewijzigde artikel 2:239 lid 4 BW: toepassing, toetsing, afdwingbaarheid en aspecten van aansprakelijkheid in concernperspectief*, TvOB 2014-2, p. 61. An interesting case in this respect is the judgment rendered by the Court of Appeal of Arnhem-Leeuwarden, 11 Aug. 2015, JOR 2015/326, notes by Van Thiel (*X c.s./Gustenhoven q.q.*).

39 Cf. Bartman/Dorresteijn, *supra* n. 13, at 96.