THE DISREGARD OF LEGAL ENTITY IN THE EUROPEAN UNION PERSPECTIVE

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1. INTRODUCTION

The economic and social advances of the last centuries caused an important transformation in the way that economic activity is executed, which turned to be even more complex and global[72]. In addition to that, the European Union assumed an essential role in the world economic development, creating a strong united market without economic frontiers and with the free circulation of goods, people, services and capitals[73].

As an attempt to follow the new and complicated scenarios created by the business dynamism, the company law, specially the European, find itself in a constant mutation and fit to the factual reality – towards beyond the traditional corporation model, the European Union is facing a challenge of regulating the new corporate groups and the resulting legal consequences

In this context, several EU directives that regulates a corporate legal personality, focused in maintaining one of its main advantages, which is the limitation of the associates equity responsibility, therefore the assets of the partners are not confused with those of the company, with

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[72] EMBID IRUJO, José Miguel. *Sobre el derecho de sociedades de nuestro tiempo*: Crisis *económica y ordenamiento societario*. Granada: Editorial Comares, 2003, p. 16.

[73] ARNOLD Rainer. Basics of European Law: Introduction to General Structures of EU Law, EU Institutions, EU Legal Order and Fundamental Freedoms – Knowledge Base -. In: ARNOLD Rainer; FAIX, Werner G.; FELDBAUM, Eva; KISGEN, Stefanie. International Business Law. Steinbeis Edition, 2015, p.69.

the fundamental intent of creating a safer environment for investors and facilitating global business by developing a more dynamic and efficient economy.

However, the autonomy created - with limited liability to the assets of the company - has also become an instrument to commit fraudulent and abusive activities in the corporate management, leading the institute of legal personality to be used to harm creditors, as when the members and their personal assets are hidden.

Therefore, concerned with the dissemination of the mentioned practice, European states, mainly through their courts, have come to envisage o institute of disregard of legal entity[74], which allows, in specific cases and within legal limits, to hold accountable the partner personally, reaching his personal property, when he commits unlawful acts.

Considering that each EU Member State has its own legislation on the subject and applies institute of disregard on the limits of its law and its jurisprudential understanding, the following questions have arisen: Is there a specific rule of the European Community, valid for all Member States, about piercing the corporate veil? What is the role of the Court of Justice of the European Union (CJEU) in the application and standardization of the institute?

The present paper intends, throughout its chapters, to seek answers to the aforementioned questions and to foster reflections on the theme. To that end, it is necessary, *a priori*, to briefly examine the concept of legal personality, its advantages and disadvantages, in order to understand the need, in certain cases, for its application. Afterwards it will be defined the institute of disregard and its application in European countries, in order to briefly analyze the European Union legislation on company law and the role of the CJEU in the defense of this legislation.

2. THE DISREGARD OF LEGAL ENTITY

2.1 Corporate legal personality: its economic advantages.

The legal personality of the corporate society was erected by law as a way to foster the development of economic activities by providing more security to a company associates and investors[75]. In other words, the collective personality encourages and facilitates business by assigning the company a distinct identity and autonomy from its people[76].

Society then becomes the holder of rights and duties and, consequently, a subject of rights able to respond with its own equity for the debts contracted - exempting the members from responding with their personal patrimony[77].

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74 In this paper we have chosen to use, preferably, the term “Disregard of Legal Entity”, however, also used the terms: “to lift the corporate”; “piercing the corporate veil”; among others.

75 It was necessary to establish a clear barrier between the company and its shareholders, so that the investors were not reached by third parties with rights or debt derived from the businesses done by the company.

76 EMBID IRUJO, José Miguel, 2003, p. 16.

77 The Company assumes its own legal personality with its due registration. KERSHAW, David. Company Law in Context: text and materials, 2 ed. Oxford: Oxford University Press, 2012, p. 30

Thus, the essence of a limited liability company (L.L.C.) lies precisely in the fact that it has a distinct legal personality from the persons who constitutes it[78], with the separation of personal and business assets, what European doctrine calls "entity shielding", as David Kershaw clarifies "The term entity shielding refers to rules that protect assets from the personal creditors of this owners"[79].

It should be emphasized that the limited liability is of the partners, not of the company, since "they must pay all of their debts, just as anyone else must (unless, in either event, they receive absolution in bankruptcy). To say 'limited' means that the investors in the Corporation are not liable for more than the amount they chip in"[80].

The limited liability of members is, therefore, a commercial law maneuver, acting as a stimulant of economic activity, reducing the risks of commercial ventures. The main objectives of this limitation are: (i) to protect the partner by limiting his responsibility to the invested equity in the company; and (ii) protect the company so that no partner can use the assets of the company for its own benefit[81].

Indeed, it is undeniable that the responsibility mode discussed here has led to the emergence of a large number of legal entities, developing commercial activity and industry, generating more jobs and wealth. Due to the separation of individual and social assets, it is possible to invest with limited responsibilities and, consequently, increased risk-taking capability and capital efficiency, providing a safer business environment[82].

Limited liability has also proved to be an effective tool for limiting business risks and a great attractive for the creation of group of companies[83], according to European Union (EU) jurisprudence, such as a parent and its subsidiary or a parent with several subsidiaries. A strong "consideration in favour of a group structure is that each company in the network is a separate legal person and its shareholders have limited liability"[84].

The ease generated by the separation of personal and corporate assets has also resulted in fraudulent and unfair practices - characterized by abuse of legal personality - by partners[85], to the detriment, above all, of the rights of creditors. In this sense, institute of disregard of legal entity

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78 DINE, Janet; KOUTSIAS, Marios. Company Law, 7 ed. Palgrave Macmillan Law Masters, 2009, p. 15

79 KERSHAW, David, 2012, p. 20

80 EASTERBROOK, Frank; FISCHEL, Daniel. The economic structure of corporate law. Cambridge, Massachusetts: Harvard University Press, 1998, p. 40.

81 ZANINI, Carlos Klein. *A responsabilidade da sociedade controladora pelas dívidas da controlada.* In ESTEVEZ, André Fernandes; JOBIM, Marcio Felix [coord.]. *Estudos de Direito Empresarial. Homenagem aos 50 anos de docência do Professor Peter Walter Ashton*. São Paulo: Saraiva, 2012. p. 388 - 393.

82 YAZICI, Alper Hakkı. Lifting the Corporate Veil in Group of Companies: Would the Single Economic Unit Doctrine of EU Competition Law set a Precedent?. Law & Justice Review, Year:5, Issue:9, December 2014, p. 131-132

83 GALGANO, Francesco. *Le Società – I Gruppi di Società*. Torino: UTET, 2001, p. 1.

84 FERRAM, Eilís. *Company law and corporate finance.* New York: Oxford University Press, 1999, p. 27.

85 DINE, Janet; KOUTSIAS, Marios, 2009, p. 15

arises, as the best way to protect third parties and seeking justice in the concrete case.

2.2 Definition of the disregard of the legal entity: the personal accountability of the associate(s).

To Lift the Corporate Veil is the procedure by which the legal entity of a company is ignored in order to reach the natural persons responsible for the corporation. Thus, the purpose of disregard is to overcome the legal barrier imposed by the commercial society and to allow, in specific situations, to move from the collective to the individual mode, ignoring the formal presence of the collective person[86].

Before this reality, the theory of disregard arose with the clear purpose of preventing the misapplication of corporate legal entity, in order to punish the partner who, using his limited liability, commits unlawful acts.

The exceptionality is a fundamental attribute of the disregard theory, always prevailing the notion of legal entity with autonomous personality while the delimitations imposed by the law for creation and use of society are respected[87]. Based on the aforementioned, the application of the disregard of legal entity can never occur in an unrestricted manner and without observance of the imposed rules, either by the legislative or by the judiciary.

Thus, the rule of responsibility limitation is not absolute, it finds limits that, when disrespected, raise the lifting of the corporate veil; the derogation of the so-called "Separation Principle" (*Trennungsprinzip*)[88].

The main reasons that lead to the abuse of collective personality and, consequently, its dissolution are: i) Confusion over Ownership (when it becomes difficult to distinguish what is owned by the partners and by the company); ii) material undercapitalization (when a company does not have the financial resources to carry out its activity, because it has not been built with enough capital); iii) decapitalization caused by members[89].

There are many arguments against the disregard of legal entity. The main allegation lies in the uncertainty[90] surrounding the instinct, given the legislations complexity, of anticipating all possibilities for its application. Being left to the courts, after a thorough analysis of the case, to put into effect this theory, when this is the only viable way of obtaining justice.

Another criticism is the complex application of this principle in cases of business groups. In this case, "EU Courts' case law has thus developed an economic unit doctrine of legal personality

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[86] MOTA PINTO, Carlos Alberto da. *Teoria Geral do Direito Civil*. 4 ed. Coimbra: Coimbra Editora, 2012, p. 141.

[87] ABREU, Jorge Manuel Coutinho. *Curso de Direito Comercial. Das Sociedades*. 5 ed. Coimbra: Almedina, 2016, p. 166.

[88] Ibidem

[89] I*bidem*, p. 166-170.

[90] This uncertainty is more evident when it comes to companies with operations in different countries, subject to different laws and possibilities of disregarding legal personality.

under Article 101 TFEU that interacts in various ways with the doctrines of legal personality followed under otherwise applicable national laws[91]", enabling accountability to the parent company, or its partners for practices performed through the other companies of the group, when decreed by the court, as will be better analyzed further on this paper.

Therefore, usually, disregard of legal entity is carried out by the judiciary power, the accountable for the development of the Disregard Doctrine, since its emergence in the English[92] and American[93] court.

In this scenario, through court decisions, the courts of several countries aim to balance the protection between the associates and the creditors safeguard, allowing partner's personal liability the partner only in specific cases, with the purpose of correcting situations against the legal system[94]. Protecting, therefore, legally relevant values such as good faith and loyalty.

Regarding the European Union, in the absence of an express uniform rule determining in which cases it will be allowed to mitigate the principle of property separation between partner and society, it is up to each Member State, given its sovereignty, to determine in which circumstances the disregard of the legal entity will be applied.

2.2.1 A brief reflection about the disregard of legal entity in European countries: the autonomy of Member States.

The doctrinal and jurisprudential movement, with respect to disregard the collective personality, has been adopted by several European countries, according to Hisaei Ito and Hiroyuki Watanabe[95], when enumerating the mold of application of this theory in some countries:

> "*German case law has developed categories of undercapitalization*, '*intermingling' of private and company capital and destruction of the economic basis of the company. The Spanish solution also mentions undercapitalization or abuse of law. In the UK, veil piercing is only allowed if a company is a 'mere façade' [..] Finnish and Italian law only seem to accept veil piercing in cases of groups of companies, while Polish and Latvian solutions indicate that courts have not yet developed a veil-piercing doctrine*".

Among the European countries, England stands out as the first to approach the subject, and Germany, due to the relevant commitment of its jurists to study deeply the incidence hypotheses of the theory of disregard of legal entity.

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[91] CORTESE, Bernardo. Piercing the Corporate Veil in EU Competition Law: The Parent Subsidiary Relationship and Antitrust Liability. Alphen aan den Rijn: Kluwer Law International, 2014, p.74.

[92] The English case Salomon Vs. Salomon and Co., judged in 1897, was known as the landmark of the beginning of the application of Disregard Doctrine, and was even quoted by some authors as the true and proper leading case of this theory.

[93] In 1939, for instance, the partner's personal accountability was discussed by the US Supreme Court in the famous "Deep Rock" case.

[94] FERRAM, Eilís, 1999, p. 31.

[95] ITO, Hisaei; WATANABE, Hiroyuki. Piercing the Corporate Veil. In CABRELLI, David; SIMES, Mathias. Comparative Company Law: A Case-Based Approach.1 ed. Oxford: Hart Publishing, 2013, p. 190.

England, in 1897, was already discussing the possibility of the partner shouldering personally to the company's debts, in the emblematic case *Salomon v. Salomon & Co (1897)*. In the case in question, the fraudulent act of Aaron Salomon regarding the personality of the society was proved, justifying the disregard of his personality by the inferior instances of the English justice. However, although Salomon used the company as a shield to harm creditors, the House of Lords, England's highest court, reformed the decisions of the lower courts, considering the arguments of the defense, to enforce the principle of patrimonial liability[96].

Although old, this case continues to be used as a reference in the United Kingdom, as can be seen in the *Prest v Recursos Petrodel Ltd*[97] case, judged in 2013, in which the Supreme Court, upon verifying the exceptional nature of the disregard of legal entity alludes that "when we speak of piercing the corporate veil, we are not (or should not be) speaking of any of these situations, but only of those cases which are true exceptions to the rule in *Salomon v A Salomon and Co Ltd* [1897] AC 22 i.e. where a person who owns and controls a company is said in certain circumstances to be identified with it in law by virtue of that ownership and control"[98].

Moreover, the Supreme Court of the United Kingdom recognizes the distress in disregard the legal entity due to the breadth of the term "façade company", which requires a close examination by the courts in order to build sound case law[99].

On the other hand, Germany stands out for its great contribution, doctrinal and jurisprudential, in the conceptualization and study of the disregard of legal entity phenomenon, referred to as "Durchgriffshaftung".

The greatest German collaboration came from Rolf Serick, an important name in the consolidation and definition of the Disregard Doctrine, with his thesis about the personal accountability of the partner when there is abuse of the commercial society, i.e. the judge can rule out the separation principle between the partner property and the company's. To Serick, when the company is used by partners as means to avoid fulfilling a legal or contractual obligation, as well as harming third parties, through bad faith[100].

Notwithstanding the doctrinal work to define disregarding application cases, the Germany' courts are reluctant to ignore the limited liability principle, only disregarding legal personality in exceptional cases, when it is essential to maintain the fairness and the good faith in the concrete case[101].

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[96] Salomon v. Salomon & Com

[97] Case Prest v Petrodel Resources Ltd & Ors

[98] Case Prest v Petrodel Resources Ltd & Ors

[99] *Ibidem*.

[100] ALTING, Carsten. Piercing the Corporate Veil in American and German Law - Liability of Individuals and Entities: A Comparative View, 2 Tulsa J. Comp. & Int'l L. 187 (1994), p. 198.

[101] ALTING, Carsten, p. 198.

In general, this shows a resilience of the European countries in overcoming the collective personality[102], and the exceptionality of the theory is a feature of extreme relevance. That's because "there has always been a judicial concern not to cread commercial uncertainty and undermine the benefits of incorporation. Having incorporated, shareholders have a legitimate expectation, as do those who deal with the incorporated entity, that the courts will respect the status of the entity"[103].

Although there is agreement on the exceptional nature of disregard, its criteria and application ways are far from being a consensus in the European Union, mainly because of the autonomy that each country has to regulate and give efficiency to the concept. In this way, companies, specially multinationals, are subject to several rules, which causes legal uncertainty and, consequently, reduces risk-taking and the companies' investment.

The different criteria for the disregard application, depending on the country in which the company is operating, may lead to the weakening of other theories, even more important, such as legal personality and limited liability. Therefore, to avoid the inappropriate use of disregard legal entity, it is vital to understand the European Union rules which surround businesses and the EU Court of Justice' role in the implementation of the principle.

3. THE LEGISLATION OF THE EUROPEAN UNION: GENERAL RULES FOR THE PROTECTION OF CREDITORS AND PARTNERS OF LIMITED LIABILITY COMPANIES.

European Union, formed by 28 countries, is considered the most powerful economic area of the world and is regulated by a supranational legal order that influences - in addition to the economic, political and legislative sphere of the Member States - the entire global community[104].

The main objective of the EU is to foster the economy and, to do it, must establish and "keep up an internal market which is a market without economic frontiers and essentially based on the so-called fundamental freedoms"[105]. The consolidation of a strong united market requires the European Union, through its legislation and its courts, prevent any obstacle (not justified) the economic activity.

In this context, European Union policy largely replaces the policy of the Member States, by primary law, - as the Treaty on the Functioning of the European Union – and secondary law - such as the Directives, Regulations and Decisions. That way, it is of the utmost importance to understand the EU's legislative and judicial contribution to companies and their institutes, such as limited liability and its possible restrictions[106].

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102 ABREU, Jorge Manuel Coutinho, 1999, p. 273-277.

103 HANNIGAN, Brenda, 2016, p. 47.

104 ARNOLD Rainer, 2015, p. 69

105 *Ibidem*.

106 *Ibidem*, p. 73

Therefore, the second paragraph of Article 54, of the Treaty on the Functioning of the European Union (TFEU), understands that “Companies or firms means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making”[107]. In the absence of a more specific definition of the company by TFEU, the Court of Justice of the European Union defines as “every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed and, secondly, that employment procurement is an economic activity”[108].

Thus, the EU has opted for a functional approach to business, focusing on economic and non-legal identity, which means that anyone involved in economic activity can be subject to EU laws. This functional approach enable a company to be constituted of a single person (physical or legal) or a group of persons (physical or legal)[109].

The various forms of company are ensured by the European Community, through several Directives which aimed at, above all, to coordinate the rules on limited liability companies and avoid any restriction on freedom of establishment.

3.1. The main directives in the field of company law: freedom of Member States to establish exceptions to limited liability.

In order to ensure freedom of establishment on the basis of Article 50 (1) and (2) (g)[110], was developed the First Council Directive 68/151/ EEC, of March 9th 1968, to coordinate the safeguards which, for the protection of the member`s interests and others, are required in the Member States from the companies.

The coordination is of paramount importance in making such safeguards equivalent throughout the European Community, specially in the case of companies limited by shares or otherwise having limited liability, since the activities of such firms often extend beyond national territory.

Therefore, by "limited liability company", the EU understands to be "a company with share capital and having **legal personality**, possessing separate assets which alone serve to cover its debts and subject under the national law governing it to conditions concerning guarantees such as are

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107 Second paragraph of Article 54, of The Treaty on the Functioning of the European Union

108 Case *Klaus Höfner and Fritz Elser v. Macrotron GmbH* (C-41/90)

109 Ezrachi, Arial. EU Competition Law: An Analytical Guide to the Leading Cases. Third Edition, Oxford: Hart Publishing, 2012, p. 1-4,

110 Article 50: 1. In order to attain freedom of establishment as regards a particular activity, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall act by means of directives. 2. The European Parliament, the Council and the Commission shall carry out the duties devolving upon them under the preceding provisions, in particular: (g) by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 54 with a view to making such safeguards equivalent throughout the Union;

provided for by Directive 68/151/EEC for the protection of the interests of members and others"[111].

Hence, companies with limited liability must comply with certain rules - of publicity, of undertaken validity of obligations and of company' nullity - provided for in the Directive. This is because, to protect the interests of third parties, these companies **only offer as safeguard their corporate patrimony**[112].

Furthermore, the Directive of 1968, demonstrates the EU's concern of the application of limited liability to harm creditors, which is why it ensures that: "the basic documents of the company should be disclosed in order that third parties may be able to ascertain their contents and other information concerning the company, especially particulars of the persons who are authorised to bind the company; and [...] the protection of third parties must be ensured by provisions which restrict to the greatest possible extent the grounds on which obligations entered into in the name of the company are not valid."[113].

In this framework, the First Directive clarifies, that the understanding about the partners personal accountability in situations of practicing before creating of partnership as predicted by the art. 7º, in the following terms: "If, before a company being formed has acquired legal personality, action has been carried out in its name and the company does not assume the obligations arising from such action, the persons who acted shall, without limit, be jointly and severally liable therefor, unless otherwise agreed"[114].

However, in the aforementioned scenario the acts were practiced before the formation of the society, that is, before acquiring legal personality. Thus, although the members respond with their personal assets, we are not facing the classic case of disregarding the legal entity.

In sequence, in 1976 the Second Council Directive (77/91/EEC[115]) was promulgated, in accordance with the First Directive, to establish rules in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, aiming to make such safeguards equivalent throughout the Community. In 1978, was developed the Third Council Directive 78/855/EEC, concerning mergers of public limited liability companies, supplemented and repealed by the Directive 2011/35/EU, of 5 April de 2011[116].

Directive 2011/35 / EU highlights the concern with creditors - including debenture holders, and persons having other claims on the merging companies - by obligating the Member States to protect them to avoid that the merge does not affect their interests. Concluding that, in cases of invalidity of the merge, all participating companies are jointly and severally liable in respect of the

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[111] Art. 2, the Directive 2005/56/EC

[112] Ibidem.

[113] Art. 7 of Directive 68/151/EEC.

[114] Art. 7 of Directive 68/151/EEC.

[115] This Directive was subsequently repealed by Directive 2012/30 / EU.

[116] In this sense, it is also the Directive 2005/56/EC, on cross-border mergers of limited liability companies.

obligations of the acquiring company[117].

Also noteworthy:

> "**Fourth Council Directive 78/660/EEC** of 25 July 1978 [...] on the annual accounts of certain types of companies and **Seventh Council Directive 83/349/EEC of 13 June 1983** [...] on consolidated accounts, respectively concerning disclosure, the validity of commitments, nullity, annual accounts and consolidated accounts, apply to all share-capital companies [...] and **Sixth Council Directive 82/891/EEC** of 17 December 1982, concerning the division of public limited liability companies, relating respectively to formation and capital, mergers and divisions, apply only to public limited liability companies[118]"

Regarding other types of partnership covered by the EU, Directive 2009/102/EC, deals with single-member private limited liability companies. In these cases, the European Community accentuate that "legal instrument is required allowing the limitation of liability of the individual entrepreneur throughout the Community, without prejudice to the laws of the Member States, which, in exceptional circumstances, require that entrepreneur to be liable for the obligations of his undertaking"[119].

Still, a private limited liability company "may be a single member company from the time of its formation, or may become one because its shares have come to be held by a single shareholder"[120]. Consequently, when this type of company is under discussion the EU allows Member States to lay down rules for personal liability of the sole shareholder, ignoring the legal personality of the company, mainly because the risks to creditors - with the practice of unlawful acts - is relatively greater.

Finally, to highlight the recent Directive (EU) 2017/1132 of the European Parliament and of the Council, of 14 June 2017, related to certain aspects of company law.

This Directive reaffirms the need to ensure a minimum equivalence in the protection for both shareholders and creditors of public limited liability companies, in order to coordinate national rules concerning the composition of such companies, as well as the preservation, increase and reduction of their capital.

Therefore, the Directive emphasizes the importance of Member States to limit, as far as possible, the causes of invalidity[121] of the obligations undertaken on behalf of limited liability companies, so that they comply with commitments made with third parties. Safeguarding the right of creditors, if not reimbursed by society, to seek their rights through the competent administrative

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117 Art. 22, 1, h, da Directive 2011/35/EU, (7).

118 Directive 2009/102/EC

119 Directive 2009/102/EC

120 Ibidem.

121 In this regard, Directive 2011/35 / EU (10) provides that: "To ensure certainty in the law as regards relations between the companies concerned, between them and third parties, and between the members, it is necessary to limit the cases in which nullity can arise by providing that defects be remedied wherever that is possible and by restricting the period within which nullification proceedings may be commenced".

or judicial authority[122].

The transposition of the Directives by all Member States is essential to avoid diverging regulations on certain matters, which could jeopardize the competitiveness of European business, legal certainty, trade between Member States and increase in global economy – priorities of the agenda of Europe 2020, thus contributing to an exit from the global economic and financial crisis[123].

In summary, the European Union is more concerned with limited liability companies, where the creditor's warranty is limited to corporate equity. By strictly protecting this type of company, the EU recognizes that the exemption of the personal liability of partners can be used to harm third parties by abusing of the legal personality.

However, although it has repeatedly affirmed the need to standardize the rules on commercial companies, the EU did not regulate the possibility of disregard of legal entity when members, using the restricted liability to the assets of the company, commit unlawful acts. In other words, the EU chose not to standardize the rules on this concept, being up to each Member State, in the use of its sovereignty, to define the cases in which the disregard, given the personal responsibility of the partner, will be applied.

By not predicting a general rule for disregarding legal entity cases, the EU provides deviations in the Member States laws can disturb the exercise of the right of establishment, due to the theory malpractices by a country, which is forbidden, as stated by the art. 49º do TFEU and in the Directive 2017/1132 when states that none of the dispositions and formalities of internal right can introduce restrictions to the free establishment or capital circulation[124]. Still, the Directive itself recognize that, in exceptional cases, these restrictions can occur when justify by the TJCEU jurisprudence and by general interests[125].

The omission of the European Parliament and the Council, it is essential to examine the understanding of the CJEU - the judicial authority of the European Union, responsible for ensuring uniform application and interpretation of EU' law - about the disregard of legal entity.

4. THE IMPORTANCE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION TO RESOLVE CONFLICTS AND STANDARDIZE THE RULES ON DISREGARD OF LEGAL ENTITY.

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[122] Directive (EU) 2017/1132. The possibility of appeal the judiciary is also guaranteed by the Article 13 at Directiva 2011/35/EU and at Directive 2012/30/EU.

[123] Directive (EU) 2017/1132

[124] Directive (EU) 2017/1132

[125] *Ibidem*

The main mission of the Court of Justice of the European Union since its creation in 1952[126] is to ensure that European law is interpreted and applied in the same way in all countries of the European Union. Within this mission, the CJEU: "reviews the legality of the acts of the institutions of the European Union; ensures that the Member States comply with obligations under the Treaties, and interprets European Union law at the request of the national courts and tribunals"[127].

Thus, if national legislation, in the application of the Disregard of Legal Entity, infringes the provisions of the European Union - such as freedom of establishment or free competition - or cause discrepancies between decisions taken by Member States, it is for the CJEU to resolve the conflicts and to adjust, in concrete case, the national rules with the supranational ones.[128]

In this context, as early as 1962, in the case *Acciaierie Ferriere e Fonderie di Modena v. High Authority of the European Coal and Steel Community* (C-16/61)[129], the Court was asked about the legality of the payment by the partners of the company's debts through its personal assets. Regarding this matter, the Advocate-General, referring to the disregard of legal entity, alludes:

> "As is known, jurisprudence tries to arrive at a satisfactory assessment of such factors and in particular asks to what extent it is possible to disregard the juridical structure of bodies corporate and have recourse against the natural persons who compose them, that is to say, under what conditions can the natural persons controlling a body corporate be identified with the actions of the latter? American case law in this connexion has recourse to the doctrine of 'disregard of legal entity', for example where someone who is subject to a legal prohibition pursues the activity prohibited through the agency of a legal person which he controls. Serick has examined this question in German law by studies in comparative law and despite Strong reservations comes to conclusions from which it is possible to draw guidance with regard to the economic law of the Community. On page 207 of his book he writes: 'For example, the evasion of a prohibition of competition imposed by statute or contract by means of the device of a legal person leads to its identification with the member who controls it and uses it for unlawful purposes and hence to the extension of the prohibition to the legal person. To give another example, if a person wishes to procure for himself illegally, a secret commission by causing it to be paid to a legal person which he controls, he must be treated as if he had received the money himself. In my opinion we should proceed in the same way in the present case. It seems to me in particular that there is no reason why the identification of legal persons with their members should be restricted to 'one-man companies".

More recently, in 2010, the institute of disregard was discussed more sharply in the case C-81/09. The CJEU has examined the reference for a preliminary ruling from the *Simvoulio tis Epikratias* (Greece), based on Article 234 EC. The application was presented in the context of a dispute between *Idryma Typou AE* (limited company whose registered office is in Athens) and

[126] "The Court of Justice of the European Union includes the Court of Justice (consisting of one judge from each member state, assisted by nine Advocates General, appointed for six years by common accord of the member states governments), the General Court (Tribunal of first instance) and specialized courts". ARNOLD Rainer,2015, p. 72

[127] Court of Justice of the European Union. General Presentation. Available in: <https://curia.europa.eu/jcms/jcms/Jo2_6999/pt/>.

[128] Stressing that the CJEU acts in a subsidiary way - only when the matter is not resolved at national level - and its decisions are binding, and must be implemented through the Member States' duty of cooperation. CASSESSE. Antonio. *International Law*. 1ed. Oxford: Oxford University Press, 2001, p. 269.

[129] Case *Acciaierie Ferriere e Fonderie di Modena v. High Authority of the European Coal and Steel Community* (C-16/61)

Ipourgos Tipou kai Meson Mazikis Enimerosis, (Minister for the Press and the Mass Media)[130].

According to the Minister, the company has violated the rules governing the operation of television channels in Greece and should therefore be subject to the penalties laid down in Article 4 of Law 2328/1995, paragraph 1, to be applied under the paragraph 3 of the same article: "the fines provided for in the preceding paragraphs shall be imposed jointly and severally on the company and **personally on its legal representative or representatives, on all the members of its board of directors and on all its shareholders** with a holding of over 2.5%."[131].

The referring court therefore asked the CJEU about the compatibility of Article 4 (3) of Law 2328/1995 with Directive 68/151 / EEC. Which means that the reference of a preliminary ruling from Greece examined whether the disregard of legal entity, with the personal liability of the shareholder, infringed the economic freedom – as stated in the European Union Directive – as well as the fundamental characteristics of a public limited company as: "(a) the strict distinction between the company's assets and those of the shareholders, and (b) the absence of personal liability of shareholders for company debts, given that the shareholders are required only to pay their capital contribution, which corresponds to the ratio of their equity participation in the total company capital"[132].

The CJUE, stated that there is no EU rule prohibiting the imputation of responsibility to the shareholders, jointly with the legal entity that is the company. The Court took into account the arguments of the majority of the *Simvoulio tis Epikratias*, namely:

> "European Union law does not prevent the national legislature either from introducing new types of companies which do not fall within the field of application of the directives relating to companies or from establishing (special) public limited companies to which provisions diverging from European Union law on public limited companies will apply, in so far, of course, as those divergent provisions are not contrary to specific provisions of the directives relating to companies or of European Union law generally [...]the fact that European Union law does not guarantee that the shareholders of a public limited company will not be liable for the legal person's debts is apparent from the fact that the principle of lifting the corporate veil, which results under certain conditions in liability being attributed to the shareholder for the obligations of a public limited company, has been established for decades in the legal systems of numerous Member States, above all through case-law, without the question of that principle conflicting with European Union law being raised, and also from the fact that no steps have been taken to harmonise the conditions for such lifting of the corporate veil"[133].

After all, the CJEU considered that the interpretation of Greek legislation does not transgress the prescripts of the Frist Directive, and concluded "that in the majority of cases shareholders of the companies listed in Article 1 of the First Directive **are not required to be personally answerable for the debts of a company limited by shares or otherwise having limited liability**, **it cannot be concluded therefrom that this is a general principle of company**

[130] Case *Idryma Typou AE* v *Ipourgos Tipou kai Meson Mazikis Enimerosis (C-81/09)*

[131] Ibidem.

[132] Case *Idryma Typou AE* v *Ipourgos Tipou kai Meson Mazikis Enimerosis (C-81/09)*

[133] *Ibidem.*

law applicable in all circumstances and without exception"[134].

In 2017, the Court of Justice considered a reference for a preliminary ruling in the proceedings brought by *Antonio Miravitlles Ciurana*, *Alberto Marina Lorente*, *Jorge Benito García* and *Juan Gregorio Benito García* against *Contimark SA* and its administrator, *Jordi Socías Gispert*, concerning arrears of wages and other restitutions that the company was doomed to pay to the employees[135].

In this process, the CJEU examined the adequacy of European Union Directives with the Articles of the Spanish Companies Act (*Ley de Sociedades de Capital*), which allow the personal responsibility of the administrator (director) of the company, when the latter commits acts contrary to the law or the statute, or does not fulfill a duty inherent to its function. In the final analysis, the Court decided, it differently from that in Case C-81/90, that, in the present case, EU Directives "must be interpreted as **not conferring on employees, who are creditors of a public limited liability company** as a result of the termination of their employment contract, a right to bring, before the same social court as that having jurisdiction over their action for recognition of their wage claims, **an action to establish the liability of the director of that company"[136]**

In the case of groups of companies, they are considered due to disregarding the legal entity as a "single economic unit" that enable a parent company or others in the group hierarchy to become accountable, even though they are not related to the infraction performed. This was clarified in the Case 90/09, nos seguintes termos:

> "In the light of those considerations, it cannot therefore be excluded that a holding company may be held jointly and severally liable for the infringements of EU competition law committed by a subsidiary of its group whose capital it does not hold directly, in so far as that holding company exercises decisive influence over that subsidiary, even indirectly via an interposed company. That is the case, in particular, where the subsidiary does not determine its conduct independently on the market in relation to that interposed company, which does not operate autonomously on the market either, but essentially acts in accordance with the instructions given to it by the holding company. In such a situation, the holding company, the interposed company and the last subsidiary in the group form part of the same economic unit and, therefore, constitute a single undertaking for the purposes of EU competition law"[137]

Thereby, with regard to the application of the institute disregard of legal entity by the CJEU, it was clear that the Court examines the specifics of each case and its adequacy with the rules laid down by the European Union. Moreover, the understanding of the Member States are freed to establish rules to limit the separation between the personal property of the partners and the society, when needed – even though it restricts the establishment and the capital circulation freedom – which "may be justified where it serves overriding requirements relating to the public interest, is

[134] *Ibidem.* However, Court has concluded that the Greek legislation is very generic in stipulating "any shareholder that has 2.5% of the shares", since the fact of having 2.5% of the shares does not necessarily mean that the shareholder exercises the profession of journalist or has some control over the company's decisions. Hence, it has determined that the national norm is opposed to articles 49 TFEU, on freedom of establishment, and 63 TFEU in the free movement of capital.

[135] Case *Antonio Miravitlles Ciurana and others v Contimark SA and Jordi Socías Gispert (C-243/16)*

[136] *Ibidem*.

[137] *General Química and Others v Commission* (C-90/09)

suitable for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it"[138].

5. CONCLUSÃO

Since the end of the nineteenth century, the European countries, through their courts, have established the institute of disregard of legal entity, but with some reluctance. For most countries, simple corporate default or insolvency does not, in and of itself, authorize the redirection of debt collection to its shareholders or managers.

The disregard should only occur in exceptional cases, when it has been established, after a thorough examination of the specific case, that the partner has abused the legal personality of the company, by fraudulent law or by its statute, for its own benefit and loss to the creditors.

It is noted throughout the present work that the rules on the institute studied are at the discretion of each Member State, i.e., the European Union has chosen not to standardize and coordinate rules on the disregard of legal entity throughout the Community. Contrarily, it preferred, as seen in the Directives, a preventive normalization, with rigid guarantees, to be adopted by all EU countries, on the formation and maintenance of companies, as well as on the limitation of cases of invalidity of obligations assumed by companies especially those with limited liability, which deserve special attention in the protection of members and creditors.

However, by not providing for a general rule for piercing the corporate veil cases, the EU makes it possible for divergences in Member States' legislation to disrupt the exercise of the right of establishment, because of the possibility of inappropriate and trivial use of the institute by a country. The role of the Court of Justice of the European Union is therefore essential to prevent non-compliance with EU rules, to avoid abuse of company's personality and to standardize, through jurisprudence, the use of disregard of legal entity.

In line with the principles of the European Union on economic development, the CJEU is concerned, and could not be different, not to create commercial uncertainty and to undermine the benefits arising from the incorporation of companies. The continuity of commercial activity is of utmost importance for the creation of a highly competitive market economy, which is why the EU recognizes that with the incorporation, shareholders (as well as investors and third parties) have a legitimate expectation of that national and regional courts will respect the status of society by removing it in exceptional cases in the name of legal certainty.

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