It's the Group, Stupid![*]

The Netherlands is eagerly awaiting the Supreme Court's ruling in the case brought by the Milieudefensie association against Shell Plc, which aims to achieve a (maximum) 45% reduction in the Shell group's global CO2 emissions in 2030 compared to 2019 levels. This ruling is not expected until the end of next year. As a reminder, the court in The Hague had upheld Milieudefensie's claim. However, on appeal, this judgment was overturned by the Court of Appeal in The Hague, mainly because the court did not consider any scientifically substantiated reduction percentage for scope 3 emissions to be available that could be applied to Shell. I refer to my earlier comments on this judgment in this journal.[1]

There are two possibilities before the Supreme Court: either the ruling of the Court of Appeal in The Hague will be upheld, or it will be overturned, and the case will be referred to (usually) another court of appeal for a final decision. It is therefore possible that this other court of appeal will rule that there is indeed a scientifically substantiated reduction percentage that can be applied to Shell. Shell Plc will then be ordered to ensure that the global CO2 emissions of the entire Shell group are reduced by this percentage. As Milieudefensie puts it in its appeal summons[2]: *'that Shell must reduce this emission volume, both directly and through the companies and legal entities that it includes in its consolidated financial statements and with which it together forms the Shell group'.*

However, there is a problem here. As mentioned above, only Shell Plc is the defendant in these proceedings. The (hypothetical) court order therefore only concerns this holding company. The suppliers and end users of Shell products (Scopes 2 and 3) are not involved, and Shell Plc cannot directly compel them to change their use of fossil fuels. That is why the court of first instance only imposed a best-efforts obligation on Shell Plc regarding emissions related to these entities.

But does the same not apply to Shell Plc's operating companies? They too are not parties to these proceedings. The reduction order does not directly affect them. Within the Shell group, Shell Plc only exercises (indirectly) the authority of the general meeting of shareholders of its many operating companies at home and abroad. Under Dutch law, the general meeting of shareholders may be granted statutory authority to issue concrete policy instructions to the board, but this is only optional.[3] Without using this option no such instruction right exists between parent and subsidiary. Moreover, an analysis of twenty Western-oriented jurisdictions shows that the group phenomenon is approached in quite diverse ways and that such instruction right cannot be introduced everywhere.[4] But if that is the case, how could Shell Plc be held to a reduction obligation that applies to the entire group? Would such a court order not be completely up in the air?

It is well known that central management from the top of the group does not usually operate through formal instructions, but through informal means of influencing policy and corporate culture. In the background, of course, there is always the threat of dismissal of subsidiary directors. The Dutch notary Paul Quist cites the example of the CFO explaining to the director of a group company at the bar that a change of course would be appreciated: *'We look forward to seeing your plan'*.[5] Normally this informal pressure causes sufficient incentive for the group company director to follow up on the central management's policy desires. But it is precisely this informal 'cement' of the group structure that makes it so difficult to get a grip on it from the outside, for example through a court order.

Suppose that Shell Plc issues the necessary reduction instructions to its operating companies following a court order. And suppose further that an important operating company does not comply with these instructions (either fully or on time), arguing that this would be at the expense of its profitability and undermine its competitive position. In other words, the subsidiary invokes its own corporate interest. And that's not even mentioning the more politically coloured objections from its

* *See* for a related title in this context: Arie van Hoe, Enterprise Groups and their Insolvency: It's the (Common) Interest, Stupid! ECFR 2014, 200-213.
1 S. M. Bartman, *The Shell CO2 Ruling, Considered Partly Through a Group Company Law Perspective*, 22(2) Eur. Co. L. 49–51 (Apr. 2025), doi: 10.54648/eucl2025013.
2 To be obtained from Milieudefensie's website once you are registered, https://en.milieudefensie.nl/news/unlock-our-shell-and-ing-climate-cases-with-our-new-climate-case-tool.
3 S. M. Bartman & M. Olaerts, *Van het concern* 79–86 (11th ed., Wolters Kluwer 2025).
4 *Groups of Companies. A Comparative Law Overview* (Rafael Mariano Manóvil ed., Springer 2020).
5 P. H. N. Quist, *Hoe (be)stuur je een groepsvennootschap?*, Tijdschrift Ondernemingsrechtpraktijk 15–20 no. 4 (Jul. 2025).

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country of residence that the subsidiary could possibly raise in its opposition to the instruction. Could Shell Plc then be forced to dismiss that subsidiary's management because its refusal frustrates the court order? And should Milieudefensie initiate a new court case for that? I don't see that happening. Nevertheless, both the judiciary (Milieudefensie/Shell) and the European legislator (CSDDD) seem to assume that the group management can simply enforce its ESG obligations by imposing behavioural changes on its operating companies. However, in my view a court order requiring Shell Plc to reduce its CO2 emissions worldwide can at most impose a best-efforts obligation.

This is where the fact that Europe has no effective group company law, at least not with regard to the internal structure of the group, comes back to haunt us. All initiatives to this end have died a quiet death over time. As a result, we are still living in the era of the *company and its affiliated enterprise*,[6] whereas ESG – and certainly the issue of climate control – is precisely about *the enterprise and its affiliated companies*. It is the group that must be able to be held accountable in law, with the parent company formally acting as its exclusive representative. Not the power to issue instructions within the company is important, but the power to issue instructions in the relationship between the parent company and its subsidiaries, i.e., within the enterprise. Thus, once again this is all about group company law.

Without a minimum level of statutory European group law, I believe that all ESG initiatives are unfortunately doomed to failure. In my opinion, such a minimum level of statutory group law should include the following components:

(1) Establishing the parent company's group management responsibility with regard to ESG obligations.
(2) The introduction of a formal authority to issue instructions by the parent company to all its (European) operating companies.
(3) The establishment of a supervisory body at holding company level with authority at all group levels.
(4) Jurisdiction over the parent company with regard to ESG obligations should also create jurisdiction over all its (European) operating companies.

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6 Article 2:239(5) of the Dutch Civil Code.