

Your World First

C/M/S/

Law.Tax

Liability of Holding Companies

A CMS Corporate/M&A Publication

April 2017

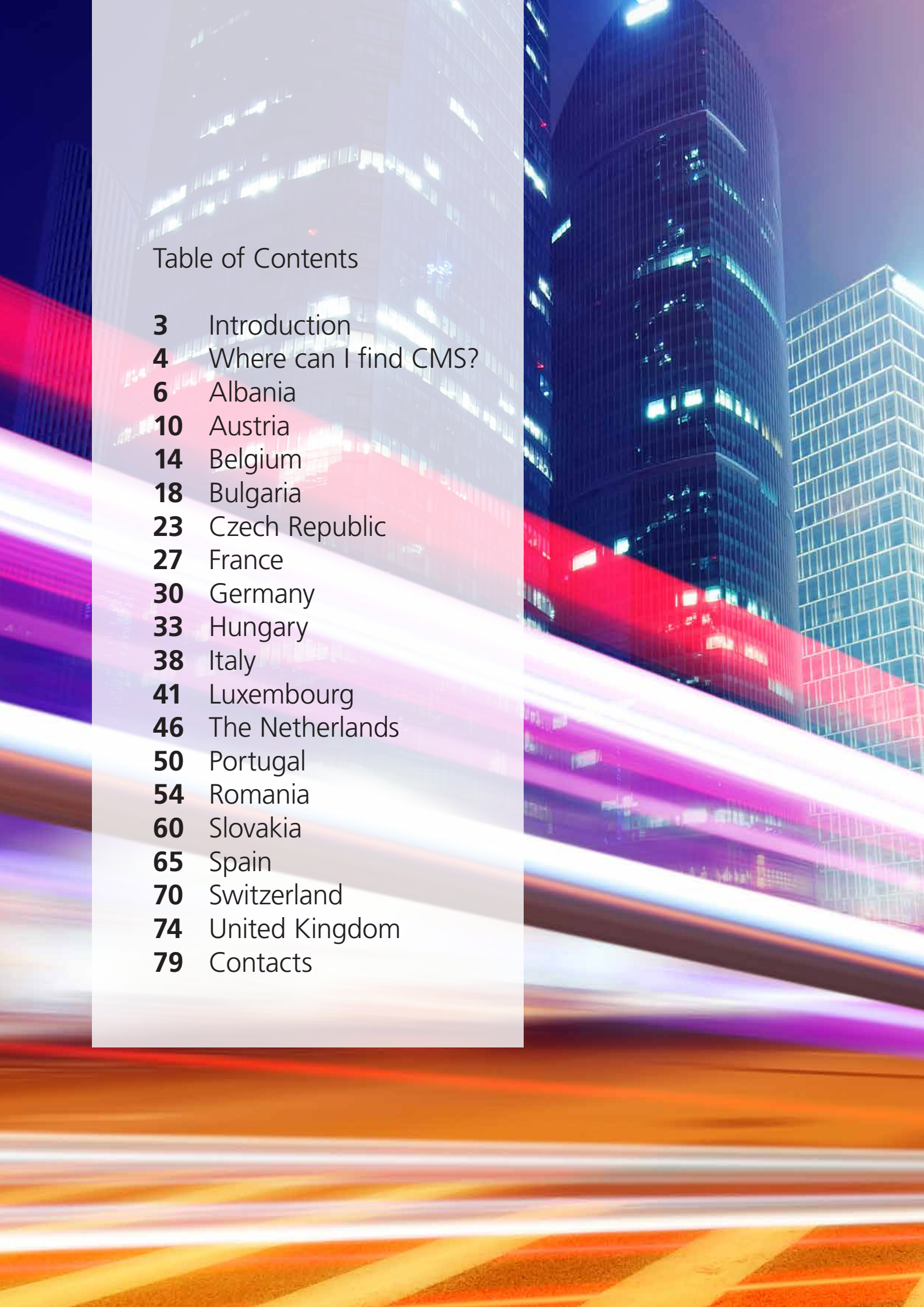


Table of Contents

3 Introduction
4 Where can I find CMS?
6 Albania
10 Austria
14 Belgium
18 Bulgaria
23 Czech Republic
27 France
30 Germany
33 Hungary
38 Italy
41 Luxembourg
46 The Netherlands
50 Portugal
54 Romania
60 Slovakia
65 Spain
70 Switzerland
74 United Kingdom
79 Contacts

Introduction

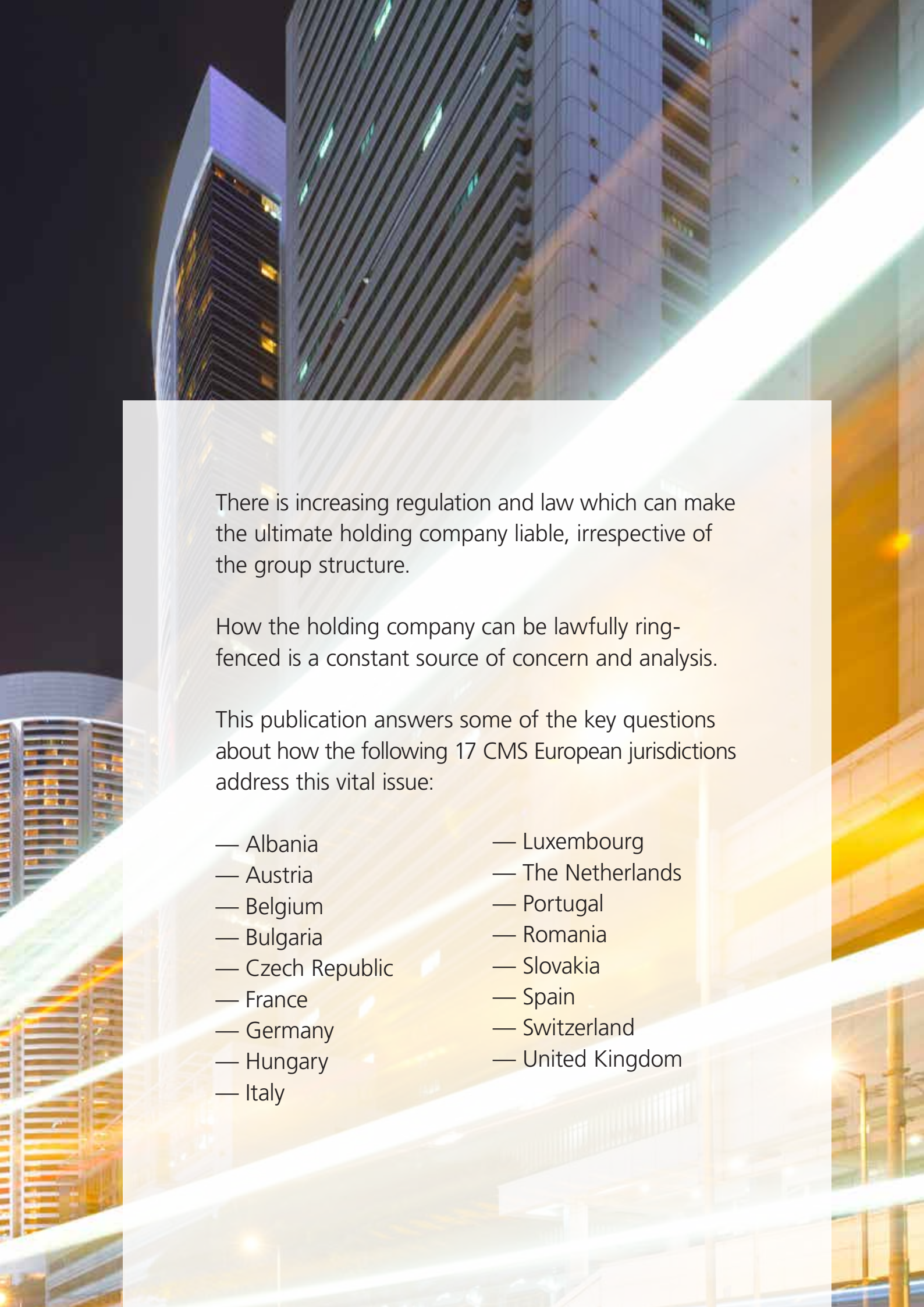
The principle of limited liability has been the central tenet of company law since it was adopted in the United Kingdom, the United States and most countries in continental Europe during the latter half of the 19th century. However, the emergence of the corporate group has forced a reassessment of this basic principle.

Corporate groups arose as a way of dealing with increasingly complex and geographically dispersed business operations. In addition, the corporate group structures exist in all sectors such as finance, chemicals, nuclear energy, aeronautics, hazardous waste disposal and biotechnology to ring-fence risky assets and insulate companies further up the corporate chain from liability. The corporate group structure can also be used to conceal improper motives and dubious transactions with inequitable results for a company's members and creditors.

As a result, legislators and judges in many jurisdictions have developed new legal principles to deal with the concept of corporate control, and in particular, who may be held legally responsible for the liabilities of companies within the corporate group. This developing body of law comprises a diverse range of liabilities including contract, tort, product liability, environmental and labour regulation, competition, insolvency and tax. It has also extended liability for acts carried out in the name of the company to cover not only those who have a close relationship with the company (e.g. members and trade creditors), but also a range of potential involuntary creditors (e.g. victims of a tort committed by a company).

Where can I find CMS?





There is increasing regulation and law which can make the ultimate holding company liable, irrespective of the group structure.

How the holding company can be lawfully ring-fenced is a constant source of concern and analysis.

This publication answers some of the key questions about how the following 17 CMS European jurisdictions address this vital issue:

— Albania
— Austria
— Belgium
— Bulgaria
— Czech Republic
— France
— Germany
— Hungary
— Italy
— Luxembourg
— The Netherlands
— Portugal
— Romania
— Slovakia
— Spain
— Switzerland
— United Kingdom

Albania



1. Companies which can be held liable for acts committed by their affiliates

1.1 A "group of companies" is a collection of corporations (either limited liability or joint-stock companies), where each of them has its own legal existence, linked together by common sources. Section VII of the Albanian law on entrepreneurs and companies no. 9901/2008 envisages the provisions that govern group of companies' operations. The law provides for two different kinds of groups, the "control group" and the "equity group", each with its own set of rules.

1.2 A "control group" is a type of parent-subsidiary relationship where a company (subsidiary) manages its activity and acts regularly in accordance with the directions and instructions of another company (parent). The law does not require the parent company to hold shares in the subsidiary to be considered in control of the latter. A contractual obligation due to a binding agreement or financial relationship will suffice.

1.3 An "equity group" is a parent-subsidiary relationship where a company, due to the participation in another company or provisions set out in agreements:

1.3.1 has the right to appoint at least 30% of the directors, administrative board or supervisory board members; or
1.3.2 controls at least 30% of the total vote of the general shareholders meeting.

2. What kind of liability may arise?

2.1 As a general principle, shareholders' liability is limited to the value of their subscribed share capital in the company.

2.2 However, the existence of a group of companies significantly alters this general principle of limited liability for control groups and equity groups.

2.3 As an exception to the limited liability principle, shareholders, directors and supervisory board members are jointly and severally liable – with all their assets – in specific circumstances of negligence, wrongdoing and/or abuse.

3. Relevant behaviour

Legal Aspects of Control Groups

(i) Compensation of Annual Losses, Creditors' Rights

3.1 Art 208, aimed at protecting creditors and minority shareholders of the subsidiary, requires the parent company to compensate the subsidiary for losses accrued in the previous financial year. The provision of the subsidiary company.

3.2 A parent company is jointly liable with and guarantor for its subsidiaries. Should the subsidiary be incapable of meeting its financial obligations, creditors may call upon the parent company – at any time – for the related obligation.

(ii) Sell-out Right

3.3 Pursuant to Art 208 of the law, shareholders of the subsidiary may require – at any time – the parent company to purchase the related shares, quote or securities. The law, however, does not specify the criteria for determining the purchase price.

Legal Consequences of Equity Groups

(i) Fiduciary Duties

3.4 In all parent-subsidiary relationships deemed as equity groups, the parent company must consider its fiduciary duties to the subsidiary (Right of Information, Abuse of Legal Form and Position, No-Competition provisions and obligations), how a decision may affect or benefit the group of companies as whole and the interests of the subsidiary. Should a representative of the parent company (generally a director) act in breach of the fiduciary duties, the parent company in whose name the representative has acted shall bear the damages caused.

Should a representative of the subsidiary contribute to the breach of the fiduciary duties it shall be jointly and severally liable together with those of the parent company. In the event the breach of fiduciary duty depends on resolutions of the related boards, the board members would be jointly and severally liable.

4. Who can be held liable?

4.1 Stakeholders, directors, and attorneys-in-fact who misuse the company to commit illegal acts, treat company assets as their own, fail to pay company debts, or fail to take the necessary steps to ensure the company has sufficient financial resources to meet its commitments to third parties, shall be jointly and severally liable to the extent of their own assets.

4.2 Directors shall be liable for breach of their duty of loyalty towards shareholders.

5. Relevant damages

Liability for Breach of Fiduciary Duties

Where a representative of the parent company acts in breach of the fiduciary duties under Article 209 of the present law, the parent company – in whose name the representative has acted – shall be deemed liable for the damages caused. The limitation period to claim such damage expires three years from the date the damage manifests.

6. Publicity requirements

6.1 Under Albanian law, the directors of a limited liability company must file and report the following data with the Company Register:

(i) value of the initial share capital;
(ii) number of shares;
(iii) nominal value of each share;
(iv) capital participation;
(v) value and kind of contribution of each shareholder;
(vi) clarification on whether the initial capital has been fully or partially paid;
(vii) any change of data incorporated already registered and filed with the company register;
(viii) annual financial statement and audit report. Financial statements concerning branches and offices of foreign companies must also be filed with the company register. All parent companies must, regardless their own annual financial statements, draft and publish the consolidated financial statements of the companies belonging to the group;
(ix) appointment of a liquidator (if any), including his identification details;
(x) termination of business activity, acts of termination, acts of transformation, merger, and acquisition, commencement of administration, liquidation or restructuring procedures.

7. Corporate control and right to withdraw

7.1 A shareholder may withdraw from the company if:

7.1.1 the company or other shareholders have acted in its detriment;
7.1.2 the shareholder has been impeded from exercising its rights;
7.1.3 the company has imposed unreasonable obligations upon it; or
7.1.4 there are other reasons, which make the continuation of its participation in the company impossible.

7.2 A shareholder seeking withdrawal must notify the company in writing, stating reasons for withdrawal.

7.3 Directors must convene the general Shareholder Meeting as soon as they are aware of the notification of withdrawal in order to determine whether the share of the shareholders seeking withdrawal will be liquidated.

7.4 The shareholder seeking withdrawal may commence legal proceedings against the company for the liquidation of its share for reasonable cause, if the general Shareholders Meeting fails to convene or does not consider as reasonable the shareholder's cause for withdrawal.

7.5 In cases where a cause for withdrawal does not exist, the shareholder seeking withdrawal from the company may be liable to the company for the liquidation of its shares.

8. Corporate control and inter-company loans

Any inter-company loan from a parent company to a subsidiary is not considered as a privilege credit toward third parties.

9. Group liability and bankruptcy

In the event of bankruptcy of a controlled company, creditors may have an action against the parent company/controlling group for the unpaid debts of the subsidiary.

10. Is it possible for the holding company to avoid liability for mismanagement of the controlled entity by contractual provisions?

No. Any attempt to limit or exclude the parent company's liability for mismanagement of the controlled company will be deemed null and void.

Austria



1. Companies which can be held liable for acts committed by their affiliates

Generally, Austrian statutory law on corporations *(Kapitalgesellschaften)* is based on the principle of separation *(Trennungsprinzip)* meaning that shareholders are not liable for the debts of the company (including debts of subsidiaries of the company) and vice versa. The doctrine of "piercing the corporate veil" has been upheld by Austrian courts in a limited number of cases under very limited circumstances. In such cases, any shareholder (irrespective of its legal form or the quota of its participation) may be held liable for liabilities of the company.

2. What kind of liability may arise?

Under the piercing the corporate veil doctrine, as applied by Austrian courts, a shareholder's liability for damages incurred by the company or its creditors may arise. Pursuant to Supreme Court rulings, depending on the legal basis of the shareholder's liability (see paragraph 3 below), such liability may arise towards the company or the company's creditors (giving such creditors a right to claim directly against the shareholder).

3. Relevant behaviour

3.1 The relevant cases and Austrian legal doctrine relating to shareholder liability can be summarised as follows:

3.1.1 shareholders negligently causing damage to their company by exercising a decisive influence over the company's business (for example by relocating the decision making powers from the managing directors to a holding company) may be held liable as if they were managing directors (i.e. de facto managing directors), allowing the company to make claims for compensation against them;

3.1.2 shareholders may be liable where it is foreseeable for the shareholders that a company is undercapitalised for the contemplated business purposes;

3.1.3 shareholders may be liable where the corporate form is abused to ring-fence assets from liability in an "artificial" manner;

3.1.4 shareholders may be liable where the company's and the shareholder's funds are co-mingled (potentially to the detriment of the company), which commonly occurs where inadequate book-keeping means no distinction between shareholder's and company funds can be made;

3.1.5 in case of insolvency, the company's managing directors are obliged to file for insolvency without any undue delay. Pursuant to Supreme Court rulings, the shareholder may be liable where it instructs the managing directors to delay such insolvency filing.

3.2 All the above-mentioned cases of piercing the corporate veil (in the absence of a statutory exemption) require an intentional or negligent act or omission by the relevant shareholders of the company in violation of mandatory laws or standards of diligence.

3.3 It should be noted that, as observed in a recent decision by the Supreme Court, the majority of cases where claimants have sought to pierce the corporate veil have been dismissed. It is therefore the general perception in Austria that there is a relatively low risk for shareholders of Austrian joint-stock companies or limited liability companies of being held liable for the liabilities of their subsidiaries.

4. Who can be held liable?

Any direct or indirect shareholder engaging in the abovementioned behaviour can be held liable, irrespective of

(i) its legal form;
(ii) the quota of its participation, and whether it controls the company.

It would appear very unlikely that an affiliate other than a direct or indirect shareholder (e.g. a sister company) could be held liable under the piercing the corporate veil doctrine, as applied by Austrian courts.

5. Relevant damages

Relevant damages depend on the legal basis of a claim arising against a shareholder of a company and whether the company or its creditors brought the claim, in theory, both the company and its creditors may collect damages. Creditors' damages would be relevant to the extent the company lacks funds to fulfil its obligations. The damages would generally include lost profits.

6. Publicity requirements

According to Austrian accounting rules, parent companies having their corporate seat in Austria are required to prepare

(i) consolidated financial statements, including all domestic and foreign subsidiaries; and
(ii) a consolidated report on the group status.

7. Corporate control and right to withdraw

7.1 Minority shareholders have no general right to withdraw from a company based on the fact that the company is controlled by another company. An exception to this general rule is the Takeover Act (which provides for a mandatory requirement for a general offer if a shareholder, or group of shareholders, exceeds 30%).

7.2 However, Austrian law grants minority shareholders a right to withdraw if a minority shareholder objects to the following measures of reorganisation:

7.2.1 a merger with a company of a different legal form (e.g. limited liability company into joint-stock company, and vice versa) *(rechtsformübergreifende Verschmelzung);*
7.2.2 cross border mergers *(grenzüberschreitende Verschmelzung);*
7.2.3 transformation of a limited liability company *(GmbH)* into a joint-stock company and vice versa *(formwechselnde Umwandlung);*
7.2.4 spin-off to a company if the pro rata participation of the shareholders of the transferring company is changed in the successor company *(verhältnisändernde Spaltung);*
7.2.5 spin-off to a company of another legal form (limited liability company to joint-stock company, and vice versa) *(formwechselnde Spaltung);* and
7.2.6 relocation of a *Societas Europaea* or merger into a *Societas Europaea.*

8. Corporate control and inter-company loans

According to mandatory Austrian law, any loan granted to a company by a shareholder (or an affiliate of the shareholder) who:

(i) controls a company;
(ii) holds a quota in the company of at least 25%; or
(iii) otherwise exerts dominant influence over the company (irrespective of whether such shareholder holds an interest in the company),

is deemed to be quasi-equity.

In such circumstances, repayment of the loan may not be demanded if, and for so long as, the company is in financial distress, which is the case when

(i) the company is unable to pay its debts;
(ii) is bankrupt; or
(iii) the equity quota (as defined in the Austrian Reorganisation Act) falls below 8% and the full discharge of the debts is not to be expected within a period of 15 years.

9. Group liability and bankruptcy

9.1 Shareholders negligently causing damage to their company by exercising a decisive influence over the company's business (for example by relocating the decision making powers from the managing directors to a holding company) can be held liable as *de facto* managing directors by the company's liquidator.

9.2 The company's creditors will only have a direct claim against the shareholders in cases where the company is not deemed bankrupt due to lack of assets. In such cases, the creditors have the burden to prove

(i) their damage;
(ii) the exercising of a decisive influence;
(iii) causation; and
(iv) shareholders' negligence under general principles.

9.3 Please note, under the Austrian Insolvency Act, a majority shareholder is obliged to file for insolvency without undue delay, and at the latest within 60 days from the time the company became insolvent. Otherwise, he can be held liable for the consequences caused by the delay. However, this obligation only applies when the company lacks organ representatives or the Shareholders negligently causing damage to their company by exercising a decisive influence over the company's business (for example by relocating the decision making powers from the managing directors to a holding company) can be held liable as de facto managing directors by the company's liquidator.

9.4 The company's creditors will only have a direct claim against the shareholders in cases where the company is not deemed bankrupt due to lack of assets. In such cases, the creditors have the burden to prove

(i) their damage;
(ii) the exercising of a decisive influence;
(iii) causation; and
(iv) shareholders' negligence under general principles.

9.5 Please note, under the Austrian Insolvency Act, a majority shareholder is obliged to file for insolvency without undue delay, and at the latest within 60 days from the time the company became insolvent. Otherwise, he can be held liable for the consequences caused by the delay. However, this obligation only applies when the company lacks organ representatives or the managing directors fail to file for insolvency within the prescribed period.

10. Is it possible for the holding company to avoid liability for mismanagement of the controlled entity by contractual provisions?

No. Generally, this is not possible. A waiver of the claim for damages by the controlled entity would amount to an unlawful and therefore unenforceable repayment of shareholder contributions.

Belgium



1. Which companies can be liable for acts committed by their affiliates?

1.1 Group liability may arise whenever a company controls or manages another company, and performs certain acts or omissions, which either are contrary to the controlled or managed company's corporate interests, or constitute a violation of the law (including tort law) or the controlled company's by-laws.

1.2 Such liability is not, as such, linked to the structural relationship between group companies, or shareholding, but to the fact that (in practice) one company, or its representatives, commits certain management faults in its control over another company. In some circumstances, liability may also be extended to third parties (individuals and companies) who, although not 'controlling' or 'managing' the relevant company (or even part of the same corporate group), have benefited from the acts or omissions leading to the group liability and were, or should have been, aware of the irregularity of such acts or omissions.

2. What kind of liability may arise?

A holding company may be liable for damages *vis-à-vis:*

(i) group companies;
(ii) minority shareholders; and
(iii) creditors of the group or other third parties such as contractors.

3. Relevant behaviour

Founders' liability

3.1 Founders' liability – the liability of a founding shareholder for the debts of its subsidiary – may arise in case of bankruptcy of the subsidiary within the first three years of its existence and if the initial share capital was clearly inadequate for the proper performance of the company's business over the first two years.

Disrespect of corporate separateness or abuse of majority

3.2 Disrespect of the concept of corporate separateness or abuse of a majority interest may lead to a parent company's liability for the debts of its subsidiary if that parent company, as a *de facto* director of the subsidiary, made a clear and severe fault, which contributed to the subsidiary's insolvency. In this respect, criminal liability may arise if a controlling entity, in its position of *de facto* director, abuses the company assets of its subsidiary, procuring for itself (or other group companies) an advantage to the detriment of the subsidiary. It should be noted that this type of liability applies to directors and *de facto* directors, and not to shareholders, except to the extent that such shareholder *de facto* runs the business of the subsidiary.

Disrespect of corporate interests, or other management faults or violations

3.3 Disrespect of corporate interests, other management faults or violations of the provisions of the Belgian Companies Code (including in relation to conflicts of interest) or the subsidiary's by-laws, may likewise lead to the liability of the subsidiary's directors (including *de facto* directors) both to the subsidiary itself (or the trustee of its bankruptcy) and to third parties. In certain circumstances, such fault can also lead to an act being declared void, if the beneficiary was (or should have been) aware of the irregularity of the act (regardless of whether such beneficiary was itself the *de facto* decision maker).

3.4 The obligation for the corporate bodies of a subsidiary to act in the corporate interest of the subsidiary does not preclude taking into account group interests; part of the corporate interest of the subsidiary resides precisely in it being part of a larger group, and the accompanying benefits of mutual assistance and integration. As long as the subsidiary's commitments undertaken on behalf of its parent or sister companies are not beyond its financial capabilities and there is a long-term balance between the resulting benefit to the other companies of its group, and the advantages the subsidiary derives from commitments taken by other group companies, disrespect of corporate interest is not an issue.

Single shareholder

3.5 Belgian law explicitly contemplates one instance of piercing the corporate veil – when a company having a corporate form which requires two shareholders has only one, and this situation is not corrected within one year. In such circumstances, the sole shareholder is deemed liable for its subsidiary's debts.

4. Who can be held liable?

The liability in question may affect:

(i) the controlling shareholder;
(ii) any director (or *de facto* director) of the subsidiary; and
(iii) in certain circumstances, the benefiting third party if such party was (or should have been) aware of the irregularity of the act.

5. Relevant damages

5.1 The relevant persons may be liable to other shareholders of the subsidiary for:

(i) loss of value of the participation; and
(ii) loss of profitability of the participation.

5.2 For creditors of the subsidiary, liability will include any loss of value of the debtor company's assets to the extent the creditors' position is affected.

6. Publicity requirements

6.1 The ultimate Belgian parent company of a group of companies is required to file consolidated financial statements (or if it is itself the subsidiary of a foreign parent company, the foreign parent company's consolidated financial statements are to be filed in Belgium). This does not apply to "small" groups of companies which have less than EUR 29m turnover and less than 250 employees).

6.2 Furthermore, participations of over 5% or a multiple thereof (or in certain cases even less) in *listed* companies are subject to a disclosure obligation

7. Corporate control and right to withdraw

7.1 Apart from the example of a public takeover bid for a listed company, the minority shareholders of a company which are subject to the management and coordination of another company are entitled to withdraw for "just cause" (i.e. serious and persistent discrepancies in the treatment of different shareholders, abuse of majority, etc.). Such withdrawal is initiated by the shareholder petitioning the court for a forced transfer of their shares to the violating shareholder. On the same basis, any shareholder can also request the court-ordered dissolution of the company.

7.2 Likewise, on the same just cause grounds, a shareholder owning at least 30% of the shares in a company can request the court to force the other shareholder (even if it is the majority shareholder) to sell its shares to the requesting shareholder, at conditions fixed by the court.

8. Corporate control and inter-company loans

Inter-company loans granted under circumstances involving the liability of shareholders or *de facto* directors such as loans made on conditions that are not at arm's length, to compensate for insufficient initial share capital, or simply granted in a manner which leads third parties to unduly believe in the creditworthiness of the subsidiary may be subject to setting-off against the damages due as a result of such liability (provided the liability of the entity granting the inter-company loan is established). As an alternative remedy for such liability, the inter-company loan may also be declared as a subordinated loan in the framework of an insolvency procedure.

9. Group liability and bankruptcy

9.1 Both receivers and disadvantaged creditors can bring actions against the holding company (and/or the directors of the subsidiary) for mismanagement of the subsidiary. The subsidiary itself (outside the context of bankruptcy) can also initiate such proceedings, e.g. after a change of control.

9.2 The burden of proof generally lies with the bankruptcy receiver, creditor or new owner. However, in specific violations of the Companies Code (e.g. late filing of accounts or lack of convening of a general meeting in the case of substantial losses) damage to third parties is presumed thereby shifting the burden of proof.

10. Is it possible for the holding company to avoid liability for mismanagement of the controlled entity by contractual provisions?

The subsidiary cannot, via contractual provisions, exonerate its *(de facto)* directors or shareholders from their liability *vis-à-vis* the company. It can however, subject to certain exceptions, hold its *(de facto)* directors or shareholders harmless from third party claims in relation to such liabilities, or execute insurance policies to cover, at least in part, the liabilities of its directors and shareholders to third parties.

Bulgaria



1. Companies which can be held liable for acts committed by their affiliates

1.1 Under Bulgarian law, a holding company is generally not liable for acts of an affiliate or group company. The holding company may however, be liable in its capacity as a member of a governing body or manager of such affiliate or group company. A governing body can be a management board or a supervisory board.

1.2 A holding company will automatically be deemed to be a member of a governing body or a manager if the holding company is:

1.2.1 elected as a board member or manager of the affiliate or group company; or

1.2.2 the sole owner of a limited liability company where the sole owner manages the company pursuant to provisions in the Commercial Act (i.e. where the sole owner has not appointed other manager/s to undertake such management).

2. What kind of liability may arise?

2.1 In its capacity as a member of a governing body/manager, the holding company may be liable to the following persons for damage suffered arising from the group company's or affiliate's conduct in breach of its statutory duties:

2.1.1 the shareholders/quota-holders of the managed company (including investors in a listed company); and

2.1.2 the creditors of the managed company.

3. Relevant behaviour

Shareholders / quota-holders

3.1 Regarding liability to shareholders/quota-holders, board members and managers have "a duty to perform their governance functions with a professional duty of care and in the best interest of the company and all the shareholders". The scope of this duty requires the board member/manager to act without conflict of interest. The professional duty of care is considered a higher standard than the duty of care owed by individuals in their own business dealings. This means that even lighter omissions or errors might be considered as negligent conduct by the board member/manager.

3.2 The board member/manager will be in breach of its statutory duty if the impugned conduct is undertaken wilfully or negligently. All board members/managers are jointly and severally liable for such conduct.

3.3 A board member/manager will not be liable if it proves that it acted with due care. In practice, this is a difficult threshold to meet and courts must assess the particular circumstances at hand to determine whether the duty of care was met.

3.4 Board members/managers have specific statutory duties in cases where a company is restructured by acquisition, merger, spin-off or division. If a board member/manager breaches these duties, the shareholders may claim against the board members/managers for their misconduct. This provision reflects the higher risk that minority shareholders are exposed to during corporate restructuring.

3.5 Shareholders in a listed company may claim against the board members/managers if the board members/managers are responsible for disclosing incorrect, misleading or incomplete information to the public about the company.

Creditors

3.6 Regarding liability to creditors, in circumstances of a capital decrease, liability may arise if the board members/managers have not provided accurate information to the Commercial Register about the capital decrease and its consequences.

3.7 Liability to creditors may also arise in circumstances of a merger or acquisition, if the board members or managers failed to ensure separate management of the merged enterprises for a period of six months following the completion of such merger or acquisition.

3.8 In circumstances of insolvency, if the board members or managers have not submitted an application for initiating bankruptcy proceedings or have damaged the bankrupt estate, this may also give rise to liability to creditors.

4. Who can be held liable?

4.1 Under Bulgarian law, when a company is part of a governing body it is jointly and severally liable together with the other board members or managers for the actions undertaken by its representative in the respective management or supervisory board.

4.2 In the case of a listed company, shareholders holding at least 5% of the share capital may commence legal action on behalf of the company against third parties or other group companies if the board members fail to commence legal action.

4.3 An upstream company that benefited from an affiliate or group company's breach may be required to return benefits arising from the breach. If the upstream company acted wilfully in connection with the affiliate or group company's breach, the upstream company may be sued in its own name.

5. Relevant damages

5.1 Damages resulting from liability to shareholders/quota-holders calculated based on:

5.1.1 the loss of value of the participation; and
5.1.2 the loss of profit from the participation.

5.2 Damages resulting from liability to creditors are calculated based on loss (of value) of the debtor company's assets.

6. Publicity requirements

6.1 Under Bulgarian law, the company must notify the Commercial Register of:

6.1.1 each quota-holder of a limited liability company (including updating the Commercial Register upon transfer of quota);
6.1.2 the original shareholders of a joint-stock company;
6.1.3 each member (including a legal entity) of a governing body of any type of company; and
6.1.4 whether a joint stock company is or becomes solely owned.

6.2 In accordance with the Bulgarian Accountancy Act, limited liability companies are obliged to publish their annual financial statements with the Commercial Register by 30 June of the following financial year. As for all other types of legal entities, the deadline is 31 July.

6.3 The Commercial Register maintains records of this information, which is publicly available through its website.

6.4 Any shareholder of a listed company must notify the company and the Financial Supervision Commission if its shareholding reaches, exceeds or falls below 5% or any multiple of 5% of the voting rights in a general meeting of shareholders. The notification shall be made within four working days from:

(i) the day on which the shareholder becomes aware of the acquisition, transfer or the option to exercise his voting rights; or
(ii) the day on which, depending on the specific circumstances, he should have become aware of the above.

6.5 In addition, the company/shareholders of a company must notify the Financial Supervision Commission of the issuance of new shares, distribution, subscription, cancellation of shares or conversion of bonds into shares by:

(i) the end of the working day following the day the relevant decision was made; and
(ii) where the decision is subject to filing with the Commercial Register, by the end of the working day following the day on which the shareholders become aware of the registration but no later than seven days from the registration.

7. Corporate control and right to withdraw

7.1 A quota-holder of a limited liability company may withdraw from the company with threemonths prior notice to the company.

7.2 A holder of bearer shares in a joint-stock company may freely dispose of those shares. However, transfer of registered shares in a joint-stock company may be subject to certain conditions in the company's Articles of Association.

7.3 In circumstances of a corporate restructure, a shareholder/quota-holder may withdraw from the company if:

7.3.1 the conditions of its participation have changed after the restructure; and
7.3.2 the shareholder/quota-holder voted against the proposed restructure.

7.4 In circumstances of entry into a new joint venture, a shareholder of a listed company may demand that the company buys all or some of its shares if the shareholder voted against entry into the joint venture.

7.5 The articles of association of a company or a shareholders' agreement may prescribe further options of withdrawal able to be exercised by minority shareholders/quota-holders.

8. Corporate control and inter-company loans

8.1 Where a controlled entity becomes bankrupt, inter-company loans granted by a holding company to the controlled entity will only be repaid after all other debts to the other creditors have been satisfied.

8.2 Bulgarian law recognizes the so-called "suspect period" for purposes of protecting the creditors' interests and safeguarding the debtor's assets.

8.3 Depending on the type of transaction, the "suspect period" under Bulgarian law covers between one and three years prior to the date of the court decision opening the bankruptcy proceedings.

8.4 Certain transactions made in the "suspect period" can be invalidated if challenged by the creditors within one year of the court decision initiating the proceedings. Certain transactions made after the initial date of the debtor's insolvency/over-indebtedness are invalid. For example, in relation to the creditors of the bankrupt entity:

8.4.1 any payment of a debt made after the date of the insolvency/over-indebtedness is deemed null and void (this applies to any payment, not only repayment to a holding company); and
8.4.2 a court may rescind any transaction between the holding company and the affiliate or other group company entered into two years prior to the initiation of the bankruptcy proceedings, if the court finds the transaction to be detrimental to the creditors' rights and interests.

9. Group liability and bankruptcy

9.1 In the event of bankruptcy, the receiver may initiate a claim against any party on behalf of the bankrupt company.

9.2 A new owner may cause the company to claim damages against former board members/managers if the new owner holds a majority stake of quotas/shares. Furthermore, in respect of a joint-stock company the law states that if the new owner holds at least 10% of the share capital of the company, it has the potential to claim damages against the former board members/managers on behalf of the company. This is a general rule that applies at all times (i.e. not only in the event of bankruptcy).

9.3 The bankruptcy receiver or the new owner have the burden to prove board members/managers' breach of statutory duties and of the damage suffered as a result of such breach.

10. Is it possible for the holding company to avoid liability for mismanagement of the controlled entity by contractual provisions?

10.1 It is theoretically possible to limit liability for negligent conduct of board members/managers, but this is unlikely to be enforceable in practice.

10.2 The relations between the board members/managers and the company are governed by management contracts. Under Bulgarian contract law, liability arising from negligent conduct may be limited, but liability for gross negligence or wilful misconduct may not be limited.

10.3 In practice, the limitation of liability will probably be unenforceable because:

10.3.1 local court practice does not make a clear distinction between negligence and gross negligence;
10.3.2 the court tends to apply the limitation of liability very carefully as it is an exception to the general rule; and
10.3.3 the standard of conduct owed by board members/managers to the company and the shareholders is high – that of a professional.

Czech Republic



1. Companies which can be held liable for acts committed by their affiliates

1.1 There are two types of Czech companies with limited liability – a limited liability company *(společnost s ručením omezeným)* and a joint-stock company *(akciová společnost)*. Limited liability companies and joint-stock companies are the most common business vehicles used in the Czech Republic.

1.2 Shareholders of a joint-stock company are generally not liable for acts committed by the company. Shareholders of the limited liability company are jointly and severally liable for the company's obligations only up to the aggregate of the unpaid portions of their contributions to the registered capital of the company (according to the entry in the Commercial Register at the time of creditor's claim). Shareholders liability for the company's obligations ends upon registration of full payment of all contributions in the Commercial Register.

1.3 However, in certain circumstances, affiliated companies and companies within a holding group structure may be liable for acts committed by their affiliates. Currently, Czech law does not distinguish between factual holdings and contract-based holdings. Therefore, the scope of liability is identical in all holding groups regardless of the basis on which they were formed.

2. What kind of liability may arise?

2.1 In general, anyone who influences the acts of a company in a decisive and significant manner (an "influential entity") to the detriment of such company shall compensate the company for sustained damages, unless the influential entity proves that it could have in good faith reasonably presumed that it acted in an informed manner and a defendable interest of the company.

2.2 Where an influential entity fails to settle the damages by the end of the accounting period in which the damages were sustained by the influenced company or in another appropriate period agreed upon between the influential entity and the company, the influential entity will be also obliged to compensate the damages arising from its influence sustained by the shareholders of the influenced company.

2.3 Furthermore, the influential entity is liable to creditors of the influenced company for the repayment of debts which cannot be fully or partially repaid by the influenced company due to its influence.

2.4 In the event that the influential entity and the influenced company form a holding group within the meaning of the Act on Corporations (i.e. the entities within such group are subject to uniform control and thus are called the controlling and controlled entities), the controlling entity is not obliged to compensate the damages sustained by the controlled company provided that the following conditions are met:

2.4.1 the controlling entity proves that the damages were sustained by the controlled company in the interest of the controlling entity or any other entity within the holding group;
2.4.2 the controlling entity proves that the damages were or will be settled within the holding group (i.e. that adequate consideration and/or other demonstrable benefits arising from the membership in the holding group and were or will be provided within a reasonable period of time);
2.4.3 the controlled company has not become insolvent due to the influence of the controlling entity; and
2.4.4 the information on the existence of a holding group is published on the websites of all holding group companies.

2.5 The controlling entity may give instructions regarding business management to the directors of the controlled company. Such instructions may be disadvantageous for the controlled company as long as they are in the interest of the controlling entity or any other company of the holding group. However, the representatives of the controlled company who follow such instructions are still obliged to observe their professional duty of care. If they breach this duty, they would be obliged, jointly and severally, to provide compensation for damages caused to the controlled company. If it is disputed whether these persons acted with due care, they would bear the burden of proof.

3. Relevant behaviour

Directors

3.1 Members of the statutory body (e.g. board of directors), members of the controlling body (e.g. supervisory board) and proxyholders are all obliged to act with a professional duty of care. Breach of this duty results in joint and several liability to provide compensation for damage caused to the company. If it is disputed whether these persons acted with due care, they would bear the burden of proof.

Influential / Controlling entity

3.2 An influential/controlling entity shall compensate the influenced/controlled company for any damage sustained as a result of decisions made or influence exercised by the influential/controlling entity, unless any of the exemptions mentioned under Section 2 apply.

4. Who can be held liable?

4.1 The liability in question may affect:

4.1.1 the influential entity or, in case of a holding, the controlling entity; and

4.1.2 members of the statutory body (e.g. board of directors), the controlling body (e.g. supervisory board) or proxyholders of the controlling entity if they did not act with due care.

5. Relevant damages

The damage caused may be either material or immaterial. Material damages must be compensated to the extent of the actual loss *(damnum emergens)* and lost profits *(lucrum cessans)*. Regarding immaterial damages, such as reputational damage, Czech law requires such damage must be compensated *"adequately"* which in practice is quite difficult to quantify.

6. Publicity requirements

6.1 According to Czech law, both controlling entities and controlled companies are required to publish information on the existence of a holding group on their respective websites without undue delay after the holding group is formed.

6.2 In addition, controlled companies are required to prepare and without undue delay file in the Collection of Deeds maintained by the Commercial Register a report on relations between the controlling entity and the controlled company and between the controlled company and other controlled companies within the holding group.

6.3 Such report must be prepared by the statutory body of the controlled company within three months after the end of each accounting period and reviewed by the supervisory board (if established). The shareholders of the controlled company must then be allowed to access the report (including the review of the supervisory board) within the same period and under the same conditions as the financial statements of the controlled company. The report must also form part of the annual report and be audited if an annual report is prepared and audited.

7. Corporate control and right to withdraw

7.1 A controlled company's shareholders have the right to withdraw from the company where the influence of the controlling entity causes a substantial deterioration to their position in the company or causes other substantial damage to their legitimate interests (and hence the shareholders of the controlled company cannot be reasonably required to retain their share in the controlled company).

7.2 In such a situation, the shareholders of the controlled company have the right to request that their shares be purchased by the controlling entity for a fair price. The price should be based on an evaluation report of a court-appointed expert.

7.3 The shareholders have the burden to prove that a substantial deterioration of their position in the controlled company or other substantial damage to their legitimate interests has been caused. On the other hand, the controlling entity has the burden to prove such deterioration or damage to shareholders has not been caused by its influence on the controlled company.

8. Corporate control and inter-company loans

8.1 The general rules regarding the relationship between controlling and controlled companies also apply to inter-company loans. It should be noted that an inter-company loan between a controlling company and a controlled company would not have any preferential regime over other liabilities.

8.2 An inter-company loan between a controlling company and a controlled company may also be subject to related party requirements defined in the Act on Business Corporations. This means that, in addition to transfer pricing rules, the provision of such a loan (with respect to payment of interest and other fees) must be notified in advance by the controlling entity to the supervisory body or the general meeting of the controlled company. The supervisory body or the general meeting of the controlled company may subsequently disallow the provision of such loan should the terms of the loan agreement not be in the interest of the controlled company.

9. Group liability and bankruptcy

9.1 When a company is declared bankrupt, only an insolvency administrator may bring an action on behalf of the company for compensation of damages or losses.

9.2 In the course of the insolvency proceedings a court may decide, on the basis of a claim of the insolvency administrator or a creditor of the controlled company, that members of the statutory body of the controlled company, the influential entity or the controlling entity are guarantors for the fulfilment of all obligations of the controlled company. Such liability may arise under the following conditions:

9.2.1 it has been resolved that the controlled company is insolvent; and

9.2.2 the member of the statutory body of the controlled company, the influential entity or the controlling entity knew or should and could have known that the controlled company was facing an imminent threat of insolvency and while breaching their obligation to act with due care failed to take all necessary and reasonably foreseeable steps to prevent such insolvency.

10. Is it possible for the holding company to avoid liability for mismanagement of the controlled entity by contractual provisions?

No. Under Czech law, the liability of the controlling entity for mismanagement of the controlled company cannot be effectively excluded by contractual provisions.

France



1. Companies which can be held liable for acts committed by their affiliates

1.1 A "group of companies" is composed of several companies, each one having its own legal existence, but they are united by various means. One of the entities in the group may be a holding company, which exerts control over the others in order to have some uniformity in decision-making.

1.2 The expression "group of companies" covers more of an economic than a legal reality. Although French law does not recognise the separate legal personality of the group as a matter of principle, the current legislation does have some relevance to groups.

2. What kind of liability may arise?

2.1 In general, a holding company cannot be liable for acts of its subsidiaries and vice versa, due to the legal autonomy of the different companies of a group. However, this principle is not absolute and there are exceptions. Many court decisions have envisaged requiring creditors of a group's subsidiary to request payment of their debts from the holding company where the creditors may have validly assumed that both companies formed only one single entity or that they were united by a community of interest, based on the theory of appearance.

2.2 The existence of a group of companies has significant implications for a holding company's liability where insolvency proceedings are brought against a member company. This liability can be extended to one or more other companies of the group when it appears that one of them does not actually exist or when the relevant companies have intermingled their property, because of the existence of financial relations or abnormal capital flow. In the same way, a holding company which in fact takes on the management of one of its subsidiaries under the authority of, or for and on behalf of, its duly authorized officers, runs the risks of bearing the debts of the subsidiaries in the case of a compulsory winding-up and of being held liable in the event of breach of French company law.

2.3 The Report Lepage in 2008 (relating to the environment and to sustainable development) aims to establish a general principle of liability of holding companies through acts, which affect their subsidiaries on the grounds of environmental and health damage.

2.4 More recently, Law n° 2010-788 of 12 July 2010 addressing the national commitment to the environment amends the code for the environment and, more particularly, the provisions addressing rehabilitation of sites that have been fully exploited. When an operator is a subsidiary company, its environmental obligations of rehabilitation may be transferred to a parent company, which has contributed to the lack of assets of its subsidiary which has, in turn, led to that subsidiary being wound up. Moreover, even in the absence of any misconduct, a parent company may assume the obligation to perform all or part of the funding obligations of prevention and repair, which are incumbent on the subsidiary if the subsidiary fails to perform.

3. Relevant behaviour

In accordance with the legal autonomy of each entity of the group, every decision must meet the corporate interest of that company. However, the legal, economic or strategic orientations of a group collectively can conflict with the interest of a member company (e.g. an upstream guarantee) and this may give rise to an offence of abuse of corporate property. Nevertheless, French jurisprudence tends to consider that this breach can be legitimised by the interest of the entire group. Consequently, every decision made by *de facto* or *ex officio* directors of a company that affects another enterprise of the same group in which they are directly or indirectly interested, must be justified by the common economic, social or financial interest of the two entities, assessed with regard to the policy undertaken for the overall group. However, this financial decision (taken in the interest of directors) must "neither be deprived of counterparts or disrupt the balance between respective commitments of the various concerned companies, nor exceed the financial possibilities of those, which bear the charge of it" (Cass. crim., 4 February 1985, n° 84-91.581, *"Rozenblum"*).

4. Who can be held liable?

With regard to third parties, directors cannot be held civility liable unless their behaviour constitutes a personal, "separable" breach of their duties to the third party. A director can be held liable if he intentionally commits an act of serious misfeasance. However, if the third party is unable to substantiate such an act, the third party cannot obtain compensation for its damage unless it brings an action against the company.

5. Relevant damages

5.1 Shareholders may bring actions for damages suffered personally through the act of a director of the company. These individual actions are only admissible if the damage suffered by the shareholder is distinct from the damage potentially suffered by the company generally.

5.2 Conversely, an action brought against the directors on the grounds of the loss of the securities' value, which results from damage caused to the company generally, does not constitute an actionable claim against the directors by a shareholder. A shareholder has no right to damages for loss of investment following the bankruptcy of a company which has voluntarily entered bankruptcy. Likewise, a deliberate reduction of a company's activity in favour of a third company does not constitute an actionable claim for shareholders.

6. Publicity requirements

French law does not impose specific publicity requirements in relation to groups of companies. However, with some exceptions relating to small groups, parent companies of all types must, independently from their annual accounts, draw up and publish consolidated accounts. All subsidiary companies and participations placed under the direct or indirect control of the dominant company or over which the latter exerts a notable influence, must be included in these consolidated accounts. In addition to these accounts, the directors of the controlling company must provide a group annual report stating the overall financial situation of the companies included in the consolidation and their activity over the past financial year.

7. Corporate control and right to withdraw

Under French law, there is no right to withdraw in favour of minority shareholders of subsidiaries in a group.

8. Corporate control and inter-company loans

The repayment of a loan granted by a holding company to one of its subsidiaries can be jeopardised by insolvency procedures against the subsidiary. Any finance granted between the date of suspension of payments and the court decision to proceed to receivership is void, if the obligations of the controlled entity exceed those of the holding company. Likewise, the court may cancel a loan agreement entered into during this period, or merely void the obligation to repay the debt, from the point in time when it is proven that, the holding company was aware of the state of suspension of payments of its subsidiary.

9. Group liability and bankruptcy

9.1 In principle, the introduction of insolvency procedures against a subsidiary has no effect on the holding company. Nevertheless, proceedings can be brought against the holding company when it is ascertained that the parent company has intermingled its property with that of its subsidiary.

9.2 Moreover, financial sanctions can be pronounced against all *ex officio* or *de facto* directors of companies submitted to an insolvency procedure. Accordingly, a holding company which has freely and independently managed and supervised its subsidiary's activities on a continuous and regular basis, is likely to be considered a *de facto* director of the subsidiary. A holding company can be held liable by the receiver on the grounds of mismanagement in respect of the subsidiary company. The receiver has the burden to prove the existence of *de facto* management (i.e. mismanagement by the holding company).

10. Is it possible for the holding company to avoid liability for mismanagement of the controlled entity by contractual provisions?

Under current French law it is unlikely to limit or preclude contractually the holding company's liability for mismanagement of its controlled companies.

Germany



1. Companies which can be held liable for acts committed by their affiliates

1.1 According to German law, companies may be liable for the liabilities of affiliates or other group companies within the meaning of § 15 of the Stock Corporation Act *(Aktiengesetz)* in the event that:

1.1.1 a profit and loss transfer agreement *(Ergebnisabführungsvertrag)* has been concluded;
1.1.2 a domination agreement (with or without profit and loss transfer provisions) *(Beherrschungsvertrag)* has been concluded;
1.1.3 the capital protection rules *(Kapitalaufbringungs- und Kapitalerhaltungsregeln)* have been violated;
1.1.4 disadvantageous instructions are given without compensation; or
1.1.5 an intervention jeopardising existence *(existenzvernichtender Eingriff)* has occurred.

2. What kind of liability may arise?

Liability may arise towards another group company which is a party to a profit and loss transfer agreement, a domination agreement, which is a target of the disadvantageous instruction, or which is the subject of a violation of the capital protection rules or an intervention jeopardising existence.

3. Relevant behaviour

3.1 A company may be liable as a consequence of the following behaviour or events:

3.1.1 acts or decisions taken in a conflict of interest situation (including conflicts between different companies of the group, i.e. actions which are not in the best interest of the subsidiary but rather are in the interest of the controlling entity or a sister company) resulting in damages to the controlled company;
3.1.2 losses suffered during the term of a profit and loss transfer agreement or domination agreement;

3.1.3 payments which result in contravention of the capital protection rules (i.e. the offsetting or settlement of inter-company liabilities in situations of company crisis or concealed contribution in kind *(verdeckte Sacheinlage);* and

3.1.4 acts contravening the prohibition on intervention jeopardising existence *(Verbot existenzvernichtender Eingriff).*

4. Who can be held liable?

4.1 The following entities may be liable for the relevant conduct:

4.1.1 the holding company;

4.1.2 the controlling entity; and

4.1.3 any individual who was involved in the relevant decision/action (including, individuals from the managing bodies of the controlling entity or subsidiary, individuals from the supervisory bodies of the controlling entity or subsidiary, and shareholders of the controlling entity).

4.2 In addition, liability is also extended in certain cases to those who took advantage of, or benefited from, the damaging action (which may include other companies in the group).

5. Relevant damages

5.1 According to the principles of German law set out above in paragraph 1, a company may be liable to another group company for:

5.1.1 damages caused as a result of an intervention jeopardising existence or a dis-advantageous instruction;

5.1.2 payments received as a result of a violation of the capital protection rules; and

5.1.3 losses which have arisen in the year for which a profit and loss transfer agreement or domination agreement exists.

6. Publicity requirements

6.1 According to German law, the directors of a holding or controlling company and the directors of the subsidiary or controlled company have an obligation to file with the Companies Registry any profit and loss transfer and/or domination agreements between the companies involved. There is no obligation to publicise purely factual domination.

6.2 Additionally, it is possible to remedy some kinds of violation of capital protection e.g. concealed contribution in kind *(verdeckte Sacheinlage)* or circular payments *(Hin- und Herzahlen)* by publication.

7. Corporate control and right to withdraw

Minority shareholders do not have a right of withdrawal.

8. Corporate control and inter-company loans

Any inter-company loan from a holding company to a subsidiary is, in the event of the insolvency of the subsidiary, deemed subordinate to the claims of all other creditors of the insolvent subsidiary. Actions that are similar to a loan may be deemed as an inter-company loan and therefore also subordinate if they are actually financing the subsidiary (for example, deferred payments or the simple non-demanding of a due claim). Any payments made by the subsidiary to the holding company under the inter-company loan during the 12 months before the company or a creditor has filed for insolvency can be contested by the insolvency administrator and must then be repaid to the subsidiary.

9. Group liability and bankruptcy

9.1 If a subsidiary becomes insolvent, an action can be brought by the insolvency administrator in respect of:

9.1.1 losses which have not been refunded;
9.1.2 damages that have not been compensated by the holding or controlling company;
9.1.3 payments made in violation of the capital protection rules that have not been repaid; and
9.1.4 repayments on inter-company loans as set out above in paragraph 8.

9.2 A new owner of the subsidiary can, in principle, advise the directors of the subsidiary to bring the same action in the name of the company itself (although there is no right for the new owner to bring such action in its own name).

9.3 The insolvency administrator (or director acting on the advice of the new owner) has the burden of proof in establishing any damages suffered by the subsidiary or controlled company or any damages suffered as a consequence of domination by the holding company.

10. Is it possible for the holding company to avoid liability for mismanagement of the controlled entity by contractual provisions?

No. Contractual provisions will not be effective to exclude the liability of a holding company in respect of its mismanagement of a controlled entity.

Hungary



1. Companies which can be held liable for acts committed by their affiliates

1.1 In principle, a parent company is not liable towards third parties for the debts and obligations of its subsidiary under Hungarian law. Furthermore, the liability of a parent company for the obligations of its subsidiary being a limited liability company or a company limited by shares, which has been terminated, is limited to the value of the assets the parent company is entitled to upon the distribution of the assets of the company.

1.2 However, there are some special situations when such limited liability is lifted, thus imposing unlimited liability on the parent company (i.e. piercing the corporate veil). Piercing the corporate veil may only occur in exceptional cases as an exceptional sanction. Hungarian law does not set out specific requirements/procedures which, if complied with by a parent company, would prevent the piercing of the corporate veil. Instead, courts will assess general criteria on a case by case basis to determine if the corporate veil can be pierced.

2. What kind of liability may arise?

In general, the liability of members of limited liability-type companies is limited to their capital contribution. Companies, however, may in some cases be held liable for the obligations of their subsidiaries. In such cases, is the parent company may be deemed liable towards the creditors of the subsidiary, most often in the course of the subsidiary's liquidation.

3. Relevant behaviour

Abuse of limited liability

3.1 In the event a company is terminated without a legal successor, any member who has abused its limited liability resulting in creditors' claims being unsatisfied may not rely on its limited liability and bears unlimited liability for the unsatisfied obligations of the terminated company. Limited liability is deemed to be abused by a member who:

(i) pursued a permanent detrimental business policy;
(ii) disposed of the assets of the company as if they had been its own; or
(iii) adopted a decision which it knew or should have known with due care to be in conflict with the lawful operation of the company.

Detrimental business policy

3.2 In the course of a liquidation process members with qualifying majority control and sole members shall have unlimited liability for the unsatisfied debts of the company if the court concludes, at the request of a creditor or the liquidator, that such member has permanently pursued a business policy detrimental to the company.

Corporate groups

3.3 Hungarian corporate law also recognises the concept of the so-called "registered group of companies" and "de-facto group of companies". In the course of a liquidation process, dominant companies in such corporate groups shall be liable for the unsatisfied liabilities of the controlled company under liquidation. The dominant company may only be exempt from liability if it proves that the insolvency of the controlled company is not a result of the unified business policy of the group.

Company management

3.4 In the course of a liquidation process the court can conclude, at the request of a creditor or the liquidator, that a manager of the company – during a period of three years prior to the commencement of the liquidation process - did not perform its management tasks considering the interests of the creditors of the controlled company, after the situation threatening the company with insolvency occurred (i.e. the date from which the manager had foreseen or with due care should have foreseen that the company would not be able to discharge its obligations when they fell due). (It is important to note that a member of the company may also qualify as a manager under this rule if it exercised actual influence on the decision of the company.) If the court finds that the manager did not perform its management tasks considering the interests of the creditors, the court may order the manager to pay the unsatisfied debts.

Transfer of interest

3.5 In addition, there is a special regulation, which establishes unlimited liability for former members of liquidated companies under certain circumstances. According to Hungarian law, if it is established in the course of a liquidation that the company's outstanding debts exceed 50% of the company's registered capital, the company's creditors or the liquidator may file charges to have the former majority control member who had transferred his interest within three years before the commencement of the liquidation assume unlimited liability for the company's outstanding debts. The former member may be liable unless he is able to evidence:

(i) that the company was solvent at the time he transferred his interest and the debts occurred subsequently; or
(ii) that although a threat of insolvency existed or the company was actually insolvent, he as a member acted in good faith and considered the interests of the creditors when transferring his interest.

4. Who can be held liable?

The following entities may potentially be held liable:

(i) companies who are owners of other companies;
(ii) companies with controlling interests in other companies (i.e. controlling company);
(iii) former controlling companies;
(iv) members and shareholders of the controlling company;
(v) the executive officers of the controlling company and the controlled company;
(vi) the supervisory board of a controlled company, if vested with certain decision making powers; and
(vii) in some circumstances, any person who actually influenced the decisions of a controlled company (i.e. shadow management) under liquidation.

5. Relevant damages

Under Hungarian law, the definition of damages includes the actual loss caused and, to the extent foreseeable at the time of the conclusion of the contract, the loss caused in the assets of the obligee and lost profit.

6. Publicity requirements

Pursuant to Hungarian law, controlling companies have the following publication obligations:

(i) controlling companies must notify the competent Court of Registration on the acquisition of at least 75% of the votes of the controlled company within fifteen days after the date of actual acquisition; and

(ii) a dominant member of a corporate group is obliged to publish a notification (containing the power contract and the notification to the creditors and shareholders of the controlled companies) in two consecutive volumes of the Company Gazette within eight days following the relevant decision of the companies participating in the establishment of the corporate group. Furthermore, the management of the dominant member is obliged to request the registration of the establishment of the corporate group with the Court of Registration.

(iii) Special disclosure obligations apply to public companies, which are not detailed herein.

7. Corporate control and right to withdraw

7.1 In the case of acquiring a qualifying shareholding (at least 75% of the votes) in a company, any other shareholder of the controlled company may request that the controlling company buy its shareholding within a sixty-day forfeit period commencing on the date on which the qualifying shareholding is published. The purchase price of the shareholding to be sold shall be the market price (at the time when the application for registration of the qualified shareholding was submitted to the competent Court of Registration) but in any case which cannot be lower than the proportionate part of the equity capital of the relevant company.

7.2 Furthermore, in case of a transformation, any member can withdraw from the company by stating that it does not wish to participate in the legal successor company. In this case, the non-participating members shall be duly compensated in connection with the transformation.

7.3 Under Hungarian law, if a company limited by shares issues redeemable shares (not exceeding 20% of the registered capital) in the form of a put option then upon the exercising of such put option, the holder of the share may withdraw from the company.

7.4 Under certain circumstances minority shareholders in public companies may have so called "reversed squeeze out rights" which allow them to withdraw from the company.

8. Corporate control and inter-company loans

8.1 Inter-company loan agreements between Hungarian limited liability companies and their members require the approval of the members' meeting. The member with whom the inter-company loan agreement is concluded cannot exercise its voting right in relation to this resolution.

8.2 Inter-company loan agreements must also comply with Hungarian transfer pricing regulations, which *inter alia* require that the terms and conditions of a contract between related parties be at arm's length.

8.3 In the course of a liquidation procedure, the liquidator is entitled to rescind/terminate any agreement concluded by the company under liquidation, including inter-company loan agreements.

8.4 Based on the claim of a creditor or the liquidator of a company, the court may terminate/rescind commitments or contracts between the company

under liquidation and the controlling/controlled company or the executive officer of the company under liquidation:

8.4.1 if the commitments/contracts were entered within five years before the date the court received the request to initiate liquidation, or any time after liquidation was initiated provided that such commitment/contract intended to conceal the company's assets or to defraud the creditors and the other contracting party had or should have had knowledge of such intent;
8.4.2 if the commitments/contracts were entered within two years before the date the court received the request to initiate liquidation or any time after the liquidation was initiated, provided that such commitment/contract intended to transfer the company's assets free of charge or to undertake any commitment for the encumbrance of any part of the company's assets, or if the stipulated consideration constitutes unreasonable and extensive benefits to a third party;
8.4.3 if the commitments/contracts were entered within ninety days before the court received the request to initiate liquidation or any time after the initiation of liquidation, provided that such commitment/contract intended to provide benefits to a specific creditor (particularly the modification of an existing contract for the benefit of a specific creditor) or to provide security to a creditor not having such security previously.

9. Group liability and bankruptcy

9.1 The liquidator and/or a creditor in the course of a liquidation process may request that the court establish any of the following against the company controlling the company under liquidation:

9.1.1 abuse of limited liability as set out in section 3.1 above;
9.1.2 pursuance of detrimental business policy as set out in section 3.2 above;
9.1.3 liability of the dominant company for unsatisfied debts as set out in section 3.3 above;
9.1.4 liability of the shadow manager as detailed in section 3.4 above;
9.1.5 unlimited liability of the former owner as set out in section 3.5 above;
9.1.6 termination/recession of agreements concluded with the controlling company as detailed in section 8.4 above.

9.2 Under Hungarian law, the new owner of a controlled company is not vested with special rights in relation to bringing any action against the former owner. However, action can be brought against the former parent company by the new owner based on the contract by which it acquired the control in the controlled company (if any)

10. Is it possible for the holding company to avoid liability for mismanagement of the controlled entity by contractual provisions?

Towards third parties (such as creditors of the controlled company), it is not possible to exclude or limit liability if the circumstances specified in section 3 are established and the corporate veil is pierced as a result.

Italy



1. Companies which can be held liable for acts committed by their affiliates

According to Italian law, liability may arise when one company is in the position of "management and coordination" of another company. The following are examples of entities holding the "management and coordination" position:

(i) so-called "controlling" companies (as defined under the Italian Civil Code);
(ii) companies that are obliged by law to prepare consolidated financial statements;
(iii) companies performing management and coordination activities pursuant to an agreement (the rules on management and coordination have been applied by Italian Courts also to cases where the management and coordination allegedly arose from contractual arrangements); and
(iv) ompanies performing management and coordination in accordance with provisions of the relevant by-laws.

2. What kind of liability may arise?

A company which manages and coordinates another company (which would be a normal situation within a group of companies), may be held liable for damages incurred by:

(i) group companies;
(ii) minority shareholders; or
(iii) creditors.

3. Relevant behaviour

3.1 The liability of a holding company (or of a company in the position of management and coordination of another company) may arise when acts or decisions are made in a conflict of interest situation. Liability may arise between different companies of a group if actions are taken in the interest of the controlling entity or of a sister company and not in the best interest of the managed and controlled subsidiary.

3.2 Liability may also arise when a violation of the principles of proper company and enterprise management occurs. Such principles are very broadly defined and definitely include decisions or actions that may affect the profitability, the distribution of dividends, or the company's objectives.

4. Who can be held liable?

4.1 The liability in question may attach to:

4.1.1 an entity which has the management and coordination of another (i.e. the controlling entity); and

4.1.2 anyone who was involved in the relevant decision/action (including managing bodies of the controlling entity/subsidiary, supervisory bodies of the controlling entity/subsidiary and shareholders of the controlling entity).

4.2 In addition, liability may also extend to those who took advantage of or benefited from the damaging action (including other companies of the group). Such liability cannot exceed the advantage/benefit received.

5. Relevant damages

5.1 For the shareholders of the managed/controlled subsidiary, damages may be in the form of loss of value or profitability of the subsidiary resulting from the management and control of the subsidiary.

5.2 For the creditors of the managed/controlled subsidiary damages may be in the form of loss (of value) of the debtor company's assets.

6. Publicity requirements

According to Italian law, the directors of the managed/controlled subsidiary have an obligation to:

(i) file notice of the corporate relationship of management and coordination between the companies involved with the Companies Registry;

(ii) disclose the corporate relationship in documents, correspondence, notes to the annual accounts and the directors' report of the company concerned.

7. Corporate control and right to withdraw

The minority quota-holders or shareholders of a managed/controlled company are entitled to withdraw as quota-holders or shareholders if:

(i) the company is transformed, implying a change in its nature and purpose (e.g. from SPA/SRL to cooperative company);
(ii) the company objectives are modified in a manner that has a material and direct impact on the economic conditions of the company and/or its value;
(iii) the controlling entity is found liable by a court for its activity of direction and coordination; or
(iv) there is a change of control in the group structure (i.e. change of control in the parent company) which affects the management and coordination regime and determines a "deterioration of the risk of the investment".

8. Corporate control and inter-company loans

A holding company financing companies controlled by it may be subject to:

(i) a deferred repayment of its loan in order to settle the debts owed to other creditors;
(ii) an obligation to return to the subsidiary or entities the sums repaid to the holding company in the year preceding the bankruptcy of the controlled entity or entities; or
(iii) a revocation of any repayment of a loan granted by it in the year preceding the declaration of bankruptcy of the controlled entity or entities.

9. Group liability and bankruptcy

9.1 In the case of the bankruptcy of a subsidiary, an action for damages can be brought by the receiver. In principle, a new owner of the subsidiary cannot bring the same action, unless he was already previously entitled to bring such an action as a minority shareholder or creditor of the subsidiary and he suffered damage as a result of that.

9.2 The bankruptcy receiver/the new owner of a subsidiary has the burden to prove both the mismanagement of the controlled entity and the damage suffered as a consequence of such mismanagement.

10. Is it possible for the holding company to avoid liability for mismanagement of the controlled entity by contractual provisions?

This would theoretically be possible only in a contractual agreement with the damaged third party, creditor or group company, which expressly covers a specifically identified action to be undertaken. A generic waiver relating to previous actions would not be valid under Italian law.

Luxembourg



1. Companies which can be held liable for acts committed by their affiliates

1.1 According to Luxembourg law, a legal entity is autonomous and thus is separate from the companies held by it and individuals that compose and represent it.

1.2 There is no Luxembourg legislation which specifically regulates the establishment, organization and liability of group companies.

1.3 Any transaction undertaken by a Luxembourg holding company contemplating to assume, for example, the debts incurred by a subsidiary (a "Transaction"):

(i) must fall within and comply with the corporate object of the holding company (as set forth in its articles of association); and
(ii) must be in the interest of the holding company.

1.4 In practice, this means that the holding company may not enter a Transaction that confers exclusive benefits to another person/entity and not at all to the holding company itself. Therefore, the holding company's board of directors/managers must assess each Transaction on a case by case basis in light of the corporate interest of the holding company.

1.5 In order for the board of directors/managers to be able to conclude that a Transaction is in the holding company's interest, the board should consider whether:

(i) the holding company could derive a benefit from the Transaction; and
(ii) the Transaction would not provoke the insolvency of the holding company.

The determination as to whether an action such as acquiring subsidiaries' debts is in the holding company's best corporate interest must be considered in light of both the legal and practical details of the situation.

1.6 If no such direct benefit and interest exists, it may be possible, in limited circumstances, to consider the group interest. However, the existence of such group interest is subject to certain conditions and its existence will depend on a case-by-case basis assessment by the Luxembourg courts.

1.7 In order to increase the chance of a court accepting the presence of a group interest, it is necessary that the following conditions (derived from French court precedent) be satisfied:

1.7.1 the existence of a structured group;
1.7.2 the existence of an overall group policy;
1.7.3 the obligations borne by the holding company must not be without consideration;
1.7.4 the obligations borne by the holding company must not exceed its assets or put the holding company seriously at risk of becoming insolvent.

1.8 In considering the specific interest of the holding company within the context of a group interest, a holding company acquiring for instance the debts of a subsidiary shall be able to benefit from the risk it is taking (which could consist for the holding company in an indirect consideration). There is a very limited doctrine accepting the mere fact of belonging to a group to be a sufficient consideration but there should normally be further corporate interest and advantage demonstrated with the parent company, such as for example, the distribution of dividends by a subsidiary to the benefit of its holding company.

2. What kind of liability may arise?

A Luxembourg holding company and/or its directors/managers may for instance be liable for damages to (non-exhaustive list):

(i) Companies of the group;
(ii) Shareholders of the holding company; and
(iii) Creditors of the companies of the group, to which the holding company provided a security.

3. Relevant behaviour

3.1 In principle, the liability of a Luxembourg holding company cannot arise from acts of its subsidiaries and vice versa, due to the legal autonomy of the companies of a group. However, there are some exceptions, such as:

3.1.1 the parent company shall be held jointly and severally liable for a company of the group, generally in financial difficulties, when it has granted joint commitment to the benefit of the concerned subsidiary;
3.1.2 pursuant to article 495-1 of the Luxembourg Commercial Code, the parent company, in case it acted as *(de facto)* director/manager of a subsidiary, shall bear totally or in part the debts of its subsidiary *("action en comblement de passif")* in the event that the director/manager's gross negligence has caused or contributed to the bankruptcy of the said subsidiary;
3.1.3 possible extension of a bankruptcy proceeding to the parent company, in the case of *co-mingling of assets* between the parent company and the subsidiary, where it could be successfully demonstrated that both entities should be considered as one and the same party. Two situations may occur:

(i) in the case of a subsidiary's bankruptcy, creditors could seek to extend the bankruptcy to the parent company if the subsidiary had a fictional existence;

(ii) the creditors could also rely on the theory of perception *("théorie de l'apparence")* if the creditors could have legitimately believed that the parent company has undertaken the obligations of its subsidiary in its own name and for its own account. This theory is a specific application of the *"doctrine of legitimate expectations"* in a group context established by the French courts and could be applied in Luxembourg. For this theory to apply, three conditions must be fulfilled:

1. a perception must have been created;
2. this perception must have been created by the parent company; and
3. the third party must have legitimately relied on the perception created.

4. Who can be held liable?

The liability may affect:

(i) the subsidiary and/or the holding company; and
(ii) the directors/managers (including *de facto* directors/managers) of the holding company, of the subsidiary and of the controlling shareholder.

5. Relevant damages

According to the provisions set out above, a Luxembourg parent company of a group of companies may, for instance, (examples below not to be considered as an exhaustive list) be held potentially liable for:

(i) its subsidiary companies' debts (if corporate veil pierced or circumvented);
(ii) damages in the form of a loss of value, or of a profitability loss of the subsidiary due to the holding company's management and control of the subsidiary (if any).

6. Publicity requirements

6.1 In principle, the Luxembourg parent company of a group of companies that holds one or more participations (directly or indirectly) will have the obligation to consolidate and to file the related consolidated financial statements, unless certain exemptions may apply.

6.2 In this regard, article 309 of the law on commercial companies dated August 10, 1915 (the "Company Law"), as amended, provides the general obligation to draw up consolidated accounts. In general, and save for exceptions, Luxembourg private limited liability companies, Luxembourg public limited liability companies, and Luxembourg partnerships limited by shares (and some other types of entities) which hold:

(i) a majority of the shareholders or voting rights in another undertaking;
(ii) have the right to appoint or remove a majority of the members of the administrative, management or supervisory body of another undertaking and are at the same time a shareholder in that undertaking; or
(iii) are shareholders in or members of an undertaking and, control alone, pursuant to an agreement with other shareholders of that undertaking, a majority of the shareholders' or members' voting.

6.3 In addition, article 311 of the Company Law provides that a parent company and all of its subsidiary undertakings shall be consolidated regardless of where the registered offices of the subsidiaries are located.

6.4 However, some exceptions apply, such as the one relating to small companies (article 313 of the Company Law). A parent company shall indeed be exempt from the obligation to draw up consolidated accounts and a consolidated management report if on the date of the parent company's balance sheet, the undertakings which would have to be consolidated do not together, on the basis of their latest annual accounts, exceed the limits of two of the three criteria set out below:

6.4.1 balance sheet total: EUR 17.5m;
6.4.2 net turnover: EUR 35m;
6.4.3 average number of full-time staff employed during the financial year: 250.

7. Corporate control and right to withdraw

Luxembourg law does not provide any particular rules with regard to the defence of minority shareholders' rights. However, and even though there is no specific legal provision, it is possible to bring an action against the majority shareholder(s) who are abusing their rights within a group of companies.

8. Corporate control and inter-company loans

8.1 While it is generally accepted that downstream guarantees may be provided by Luxembourg companies without any limitation, the issue of cross-stream guarantees is the subject of some debate amongst legal practitioners in Luxembourg.

8.2 Under Luxembourg law, there are no general prohibitions or limitations for the provision of cross-stream guarantees, nor is there any relevant Luxembourg case law. Hence, practitioners generally refer to French and Belgian case law and legal writings.

8.3 The admissibility of a cross-stream guarantee must therefore fall within the company's corporate object as set forth in its articles of association and it must be in the corporate interest of the entity providing the guarantee. In order for the board of directors/managers of the guarantor to be able to conclude that there is such a corporate interest, it is advised that (i) the guarantor should derive a demonstrable benefit from the operation for which the guarantee is being provided, and (ii) that the extent of the guarantee should not provoke the insolvency of the guarantor.

8.4 The cross-stream guarantee thus does not as such entail any liability of the directors/managers, as long as the directors/managers considered the corporate interest as follows:

8.4.1 the condition of corporate interest is obviously met when a company provides collateral to secure its own indebtedness;
8.4.2 it is also clearly fulfilled in all instances where a company provides a guarantee to secure indebtedness of third parties or other group companies in exchange for an arm's length consideration (e.g. a commission paid by the secured party, or by the debtor);

8.4.3 when a guarantee is given or collateral is provided to secure indebtedness of a group company without any such direct consideration, the corporate interest test is usually met by applying the test of the overall business interests of the group (as there is no Luxembourg legislation governing group companies, which specifically regulates the establishment, organization and liability of group companies). Consequently, the concept of group interest as opposed to the interest of the individual corporate entity is not expressly recognized. However, a company may encumber its assets or provide guarantees in favour of group companies without direct consideration if this is to the economic benefit of the group, for instance by allowing financing facilities to the group (cf. paragraphs 1.7 and 1.8 above for all necessary details in this respect).

9. Group liability and bankruptcy

Under Luxembourg law, it is possible to extend the bankruptcy opened against a subsidiary to its parent company if the parent company qualifies as a *de facto* director/manager of the subsidiary, based on one of the following grounds:

(i) piercing the corporate veil, the parent company entered into commercial transactions for its own account or benefit;
(ii) the parent company used or disposed of the assets of its subsidiary as if these were its own by ignoring the separate legal personality of the subsidiary and/or bypassing the normal operation of the subsidiary's corporate bodies; or
(iii) the parent company, in its own interest and in an abusive manner, pursued a loss making business/made a loss generating business decision, which was predestined to lead to insolvency.

10. Is it possible for the holding company to avoid liability for mismanagement of the controlled entity by contractual provisions?

Under Luxembourg law, it is not feasible:

(i) to limit or exclude by contractual provisions the liability of the holding company for mismanagement of the controlled entities; or
(ii) for a subsidiary to exonerate its *(de facto)* directors/managers or shareholders from their liability to the company, via contractual provisions. Nevertheless, subject to certain conditions and exceptions, it is possible to execute insurance policies

The Netherlands



1. Companies which can be held liable for acts committed by their affiliates

Dutch law does not contain any statutory provisions, which impose liability on a parent company for the acts of its affiliates or group companies. Extensive case law has identified various circumstances pursuant to which a parent company may be held liable for such acts.

2. What kind of liability may arise?

The potential liability of a parent company is almost exclusively based on a wrongful act *(onrechtmatige daad)* committed or deemed to be committed by the parent company to a third party.

3. Relevant behaviour

3.1 The following circumstances have led to a parent company being held liable for matters primarily concerning its subsidiaries:

3.1.1 where a subsidiary may soon be unable to fulfil its payment obligations to its creditors, and the parent company has not used its authority to instruct management (see also under 3.3) or inform the creditors of the subsidiary of such likely inability and in doing so has breached its duty of care;

3.1.2 where a subsidiary may soon be unable to fulfil its payment obligations to its creditors, and the parent company was privy to vital and detailed information concerning the subsidiary's business in circumstances where it was able to impose its will upon the subsidiary without exercising its rights as a majority shareholder and has neglected to intervene in the subsidiary's management and take appropriate action to ensure a change of policy;

3.1.3 the parent company has caused the subsidiary to distribute dividends or make capital distributions which are deemed wrongful as they prejudice creditors' rights;

3.1.4 the parent company has deliberately held itself out as the subsidiary, thus misleading the subsidiary's creditors as to the identity of the company with which they are dealing;

3.1.5 the parent company, through assurances or otherwise, has created expectations with the subsidiary's creditors that their invoices will be settled; or

3.1.6 the parent company, by intervening in the subsidiary's business, has caused the subsidiary not to treat its creditors equally, e.g. by selectively paying its creditors.

3.2 In addition, a parent company acting as a director of its subsidiary may be held liable for the subsidiary's acts and omissions. Such director's liability is an extensive topic in itself.

3.3 A parent company of a private limited liability company has a broad legal basis to influence the policy of that company by providing not just general but binding and specific instructions to the board. Such an instruction right needs to have a basis in the articles of association of the company.

3.4 A parent company receiving capital distributions (dividends or otherwise) from a subsidiary will be obliged to repay those if the subsidiary is unable to pay its debts as they become due after the distribution. The same would apply if the parent company receives a capital distribution, which has not been approved by the management board of the subsidiary, or if the parent company was acting in bad faith.

4. Who can be held liable?

The parent company or any other group company, which has acted or failed to act.

5. Relevant damages

The relevant company may be liable for direct and indirect damages incurred, including loss of profit. The concept of punitive damages is not part of Dutch law. Generally, shareholders of a company cannot claim derivative damages for the loss of value of their investment due to a third party's wrongful act or breach of contract.

6. Publicity requirements

6.1 All Dutch companies are subject to registration at the Trade Register of the Chamber of Commerce. Among other things, the relevant legislation requires the company to register its sole shareholder (name, full address and legal form). This information is publicly available and can be obtained at a nominal fee. This obligation to disclose information on the shareholder of the company is typically avoided by transferring one or more shares in the capital of the company to another party.

6. Publicity requirements

6.2 Dutch law requires each limited liability company to make its annual accounts publicly available by filing them at the Trade Register of the Chamber of Commerce. A parent company exercising control over other entities is also required to publish annual accounts consolidating the assets, liabilities and results of the group. The subsidiaries concerned may choose not to publish their stand-alone accounts as required by law. In such event, the parent company concerned is required to file a liability statement whereby it assumes a joint and several liability for the legal acts undertaken by such subsidiaries during the lifetime of the statement (the so-called 403 statement). The 403 statement is available for public inspection and third parties may rely on it. Recent case law shows that an arrangement between a creditor and a subsidiary company does not mean that the creditor has automatically waived his claim against the parent company. The liability of the parent company constitutes an independent obligation towards the creditor.

6.3 In order to counteract money laundering and tax evasion, the Dutch government has announced the introduction of a central shareholders register effective from 1 January 2016. The central shareholders register will contain detailed information on shares and shareholders of, *inter alia*, limited liability companies and unlisted public limited liability companies. Notaries transferring shares of the company are required to update the central shareholders register. The requirement for companies to keep a separate register of shareholders remains in effect. Furthermore, on 1 November 2015 the Accounting Directive Implementation Act entered into effect. As a result of this act, the latest date for a company to file its annual accounts with the Dutch trade register is 12 months (instead of 13 months) following the end of the relevant financial year.

7. Corporate control and right to withdraw

Dutch law provides rules for the settlement of disputes between shareholders. These rules provide that a shareholder may, under certain circumstances, require his co-shareholders to buy him out. A shareholder or a number of shareholders, who together hold at least one third of the company's issued capital, may also force another shareholder, who through his actions has manifestly prejudiced the company's interests, to transfer his shares to them. However, these provisions have proven to be extremely ineffective for various reasons and are rarely used.

8. Corporate control and inter-company loans

The reimbursement of an inter-company loan granted by the holding company to the controlled entity is affected by the position of "direction and coordination" of the holding company, provided that such direction and control has been exercised in an unlawful manner as set out in paragraph 3 above.

9. Group liability and bankruptcy

The receiver has, in addition to the actions that can be brought against the parent company pursuant to the matters described in paragraph 3, a number of bankruptcy-related powers that relate specifically to mismanagement of the company. These can only be used against the parent company to the extent it acted as a managing director of the subsidiary or has otherwise actively determined its policy.

10. Is it possible for the holding company to avoid liability for mismanagement of the controlled entity by contractual provisions?

Contractual exclusion of liability for wrongful acts or omissions does not usually exist between a parent and its subsidiary. However, legally such liability may be contractually excluded or limited, provided that it is not a result of gross negligence of wilful misconduct. Case law shows, however, that it is doubtful whether a third party is bound by such exclusion if it is not a party to such contractual exclusion.

In relation to liability for mismanagement (which would require the parent company to be or act as a director of the subsidiary), directors' liability insurance policies are available that cover such risks. The parent company may also obtain an indemnification from another group company higher up the chain.

Portugal



1. Companies which can be held liable for acts committed by their affiliates

1.1 Generally, Portuguese statutory law on corporations is based on the principle of separate liability meaning that shareholders are not liable for the debts of the company in which they participate and vice versa. The doctrine of piercing of the corporate veil has had limited adhesion by Portuguese courts and the lifting of the veil has only been accepted when there is an unquestionable abuse of the principle of separate liability.

1.2 Notwithstanding, there are exceptions to the principle of separate liability, namely when companies are in a group relation arising from one of the following types of legal mechanisms:

1.2.1 contract of subordination, according to which the holding company is given broad legal powers over the subsidiary company, including, on the one hand, powers of direction over the management of the subsidiary company and, on the other hand, protection of the subsidiary company, its outside shareholders and creditors, as detailed below;

1.2.2 total domination, that assumes total share capital ownership either verified initially, upon the incorporation of the affiliate, or subsequently, where the domination relation persists while the holding company holds at least 90% of the affiliate's share capital.

1.3 Generally, the legal framework of companies in a group relation applies only to companies in such relation that are domiciled in Portugal. Nevertheless, the ruling on which liability is grounded applies also when the company dominating the Portuguese affiliate is domiciled abroad.

1.4 A company that is able to exert a decisive influence over another company may, as a controlling company, be liable before the controlled company and its shareholders.

2. What kind of liability may arise?

2.1 Holding companies in a group relation have a direct joint liability for the subsidiaries' debts. This liability is considered to be:

2.1.1 unlimited: irrespective of its timing (including debts created before the beginning of the group relationship) and legal nature;
2.1.2 subsidiary: creditors may only proceed against the holding company if a debt remains unpaid after a period of 30 days has elapsed from the receipt of a written demand for payment.

2.2 Holding companies in a group relation may also be liable towards their subsidiary companies for any annual losses, which occur during the group relation, whenever these losses are not compensated by means of reserves constituted during the referred period.

2.3 Controlling companies may be liable towards the controlled companies and their shareholders as far as the directors of the controlled companies are also liable.

3. Relevant behaviour

3.1 As previously referred, according to Portuguese law, the liability of holding companies in a group relation is generally considered to be direct and unlimited, meaning that it is irrespective of timing, legal nature or origin.

3.2 Notwithstanding the above, and despite the acceptance of the holding company's responsibility for obligations arising from management acts decided by the holding company, Portuguese authors have debated the holding company's liability in the event of obligations of the subsidiary companies arising from acts decided independently – or even against – the management decisions resolved by the holding company.

3.3 Under Portuguese law, it is possible for a holding company to issue disadvantageous instructions to specific subsidiary companies, if such instructions serve the interests of the holding company or of other companies in the same group.

3.4 The liability of the controlling company towards a controlled company and its shareholders is dependent upon:

(i) the directors of the controlled company being liable before such controlled company or its shareholders; and
(ii) the election of the directors being qualified as a violation by the controlling company of the duty of care in such election, or the liability of the directors of the controlled company arising from a behaviour of such directors determined by the controlling company in the exercise of its decisive influence.

4. Who can be held liable?

4.1 Whenever there is a group relation, the following entities may be liable for the relevant conduct:

4.1.1 the subsidiary company:
4.1.2 the holding company; and
4.1.3 the directors involved in the relevant decision/action, which may include directors of the holding company and/or the subsidiary company (only for damages caused by acts or omissions resulting from dereliction of their legal or contractual duties, unless the directors can prove that they acted without fault).

4.2 Whenever there is a control relation, the following entities may be liable for the relevant conduct:

4.2.1 the controlled company:
4.2.2 the controlling company; and
4.2.3 the directors involved in the relevant decision/action, which may include directors of the holding company and/or the subsidiary company (only for damages caused by acts or omissions resulting from dereliction of their legal or contractual duties, unless the directors can prove that they acted without fault).

5. Relevant damages

5.1 According to the provisions set out above, holding companies in a group relation may be held liable for:

5.1.1 subsidiary company's debts; and
5.1.2 annual losses, which occur during the group relation, whenever these losses are not compensated by means of reserves, constituted during the referred period;
5.1.3 the controlling company may be liable to its controlled companies and their shareholders for the damages arising from the conduct of directors of the controlled companies.

6. Publicity requirements

6.1 According to Portuguese law, subordination contracts must be set forth in writing, and signed by the directors of both the holding and subordinate company, before being registered with the Commercial Registry Office.

6.2 Amendments to the company's share structure, including the total domination of a company must also be registered with the Commercial Registry Office.

6.3 The acquisition or disposal of shareholdings that represent at least 10%, 33.33% and 50% are publicised in the annual management report of a public limited liability company.

6.4 Shareholdings in a private limited liability company are publicized through the commercial register.

7. Corporate control and right to withdraw

7.1 In general, there is no right of withdrawal granted to minority shareholders. Despite this, holding companies must undertake (in the subordination agreement) to acquire the shares held by the minority shareholders that wish to leave the subordinated company by means of a cash payment or other consideration as agreed between the parties or decided by a court decision.

7.2 Also, there is a mandatory squeeze-out procedure in the event of a company owning 90% or more of the share capital of another company, according to which the dominating company has the right (or, in certain circumstances, the duty) to purchase the remaining shares in exchange for a settlement in cash or other consideration.

8. Corporate control and inter-company loans

8.1 In general, inter-company loans between companies within a group or control relation are admissible.

8.2 Credits arising from inter-company loans claimed in an insolvency procedure will be subject to subordination should the lender be considered a person or company specially related with the borrower, that is to say a company which is or has been in the two years prior to the filing of insolvency proceedings in a group or control relationship with the borrower or if the credit is considered to arise from a shareholder loan. In such case, the subordinated creditor would only be able to collect after full redemption of privileged and common credits by the insolvent estate.

8.3 Acts carried out by the insolvent company in detriment of the estate that occurred in the two years prior to the filing for insolvency are subject to voidance and claw back by the administrator. Maliciousness is assumed if the counterpart of the acts is a person or company specially related to the insolvent company. Redemptions of shareholder's loan made within one year prior to the filing for insolvency are voidable by the administrator.

9. Group liability and bankruptcy

The insolvency procedure filed against a subsidiary or controlled company will not, in principle, affect the holding or controlling company.

10. Is it possible for the holding company to avoid liability for mismanagement of the controlled entity by contractual provisions?

No. According to Portuguese law, it is not possible to contractually limit or preclude the company's liability towards subsidiaries or controlled companies.

Romania



1. Companies which can be held liable for acts committed by their affiliates

1.1 Although the notion of "group of companies" is addressed under several pieces of Romanian legislation such as those concerning company law, capital markets, insurance, competition, insolvency or tax, there are no unitary Romanian legal provisions which specifically regulate groups of companies or the liability of parent companies for the acts committed by their affiliates.

1.2 According to Romanian law, the general rule is that a company is a distinct, autonomous subject with its own legal identity, completely separate from the identity of its shareholders. This means that, as a principle, the shareholders and the company where the respective shareholders hold shares are independent entities and that the shareholders are not liable for the debts of the company and vice versa. The same independency rules apply between any companies of a corporate group.

1.3 Under Romanian company law no. 31/1990, as republished and subsequently amended (the "Company Law"), the shareholders of limited liability companies and joint-stock companies (which are the most common types of companies in Romania) shall be held liable for the company's debts only up to their contribution to the registered share capital. However, there are certain expressly provided exceptions to the principle of limited liability of the shareholders which have resulted from the principle of "piercing the corporate veil", as detailed below under section 3.

2. What kind of liability may arise?

2.1 The main types of liability recognised by Romanian law with respect to a legal entity are civil (contractual and tort), administrative (e.g. fines imposed by regulatory authorities) and criminal.

2.2 Specific liabilities are provided under special regulations such as insolvency law, tax law, and environmental law, as further detailed below under section 3.

3. Relevant behaviour

3.1 The Romanian Civil Code sets out in general terms the principle of "piercing the corporate veil", providing that no person can invoke the attribute of a legal entity of being a distinct and independent subject of law against another person of good faith, if by this the concerned person (e.g. a direct or indirect shareholder) intends to conceal a fraud, an abuse of law or a damage caused to the public order.

3.2 Romanian Company Law provides that, in case of the dissolution or liquidation of a company, the limited liability of the shareholders shall become unlimited for the unpaid debt of the company, if such shareholders have abused their limited liability and the separate legal personality of the company to the creditors' disadvantage. The shareholders liability becomes unlimited especially:

(i) when they dispose of the assets of the company as if they were their own assets; or
(ii) if they diminish the assets of the company to their own benefit or to the benefit of a third party,

to the extent such shareholders knew or should have known that in doing so the company would no longer be able to fulfil its obligations.

Furthermore, company founders (e.g. a shareholder), members of the board of directors, general directors, members of the supervisory board or of the directorate, or the legal representatives of companies shall be sanctioned by imprisonment from six months to three years or a fine if they use in bad faith the assets of the company for a purpose which is contrary to the purpose of the company or for their own interest, or in favour of another company in which they have a direct or indirect interest. However, the Company Law does recognise the prevailing interest of the group of companies over the individual interest of each company in the group; the law stipulates that such operations are not considered a criminal offence if they were carried out as treasury operations between a company and other companies controlled by it or which control it, directly or indirectly.

Romanian scholars also recognise that, within a group of companies, the interest of the group as a whole should prevail over the interest of individual companies. Therefore, an act that would be detrimental to one company but would benefit another company in the group would not be considered abusive, to the extent such act is not detrimental to the minority shareholders in the companies or to their creditors.

3.3 Also, pursuant to Romanian insolvency law no. 85/2014, as subsequently amended (the "Insolvency Law"), the shareholders may be held fully or partially liable for the insolvent company's debt if they contributed to the insolvency by carrying out one of the following actions (however, the liability will not exceed the damages caused by the respective action):

(i) they have used the assets or the creditworthiness of the company for their own benefit or for another person's benefit;
(ii) they have carried out production or trade operations or delivered services for personal reasons, under the cover of the company;
(iii) they have ordered, out of personal interest, the continuation of operations clearly leading the company to the cessation of payments;
(iv) they have kept a fictional accounting, deleted or destroyed certain accounting documents or they did not keep accounting records in accordance with the law;
(v) they have embezzled or hidden a part of the assets of the company or they have fictitiously increased its liabilities;
(vi) they have used ruinous means to obtain funds for the company, in order to delay the cessation of payments;
(vii) during the month previous to the cessation of payments, they have paid or ordered the payment with preference towards a creditor, to the detriment of other creditors;
(viii) any other wilful act, which contributed to the insolvency of the debtor.

3.4 A similar concept of piercing the corporate veil may be found under the Romanian Procedural Tax Code, which provides that, with respect to the unpaid fiscal debts of the insolvent debtor, the following will be jointly and severally liable:

(i) the shareholders who caused the insolvency of the debtor by selling or hiding, in bad faith, by any means, the assets of the debtor; and
(ii) the shareholders who, directly or indirectly, are in control of, or are under joint control with the debtor and one of the following conditions are met:

1. the shareholders have acquired, under any title, the ownership right over the assets of the debtor and the net value of such assets represents at least half of the net value of all the assets of the acquirer;
2. the shareholders have or had contractual relationships with the clients and/or providers, others than those of utilities, who had or have contractual relationships with the debtor by at least half of the total value of the transactions;
3. the shareholders have or had labour or civil services relationships with at least half of the employees or service providers of the debtor.

3.5 According to the Romanian Environmental Law, if a company has caused damage to the environment or is an imminent threat of damaging the environment is part of a consortium or a multinational company, it will be jointly and severally liable with the concerned consortium or multinational company. Although the legislation does not provide definitions for "consortium" or "multinational company", Romanian scholars have asserted that the aforementioned provision targets the group of companies and, particularly, the liability of parent companies, in the context where the subsidiaries are being often used with the purpose of limiting the liability of the parent company.

4. Who can be held liable?

4.1 The liability in question may affect:

(i) the shareholders of a limited liability company/joint stock company;
(ii) the members of the executive body (e.g. board of directors) or the controlling body (e.g. supervisory board) of the shareholders, if they did not act in the interest of the respective shareholder or with due care.

4.2 The relevant behaviour that triggers the liability of the shareholders has been detailed above in section 3. Directors can be held civilly or criminally liable as their obligations are defined both by the provisions relating to their mandate (i.e. on contractual basis) and by special provisions in the Company Law and other special laws.

4.3 Directors are liable towards the company for the breach of their obligations deriving from the mandate or the management agreement. Such liability is a civil contractual liability. At the same time, a violation of a legal obligation can be a tort or a criminal offence, in which case the liability of the directors shall be tort liability and/or criminal liability.

4.4 Directors' liability may also be towards third parties, such as creditors of the company (only in case of an insolvency procedure) or other third parties who incurred a loss as a result of the illicit actions of the directors. Given that the directors do not act in their own name, their personal liability towards third parties may be triggered only if they act beyond the scope of their powers.

4.5 Under the Romanian legislation, a director may be held liable for criminal offences such as:

(i) providing false information to the public or the parent company;
(ii) paying or receiving dividends resulting from false profits or profits which cannot be distributed;
(iii) breach of trust;
(iv) fraudulent management;
(v) fraud;
(vi) tax evasion;
(vii) possession of goods, securities, cash or other rights and obligations without registering them in the accounting books, etc.

5. Relevant damages

5.1 Relevant damages depend on the legal basis (i.e. contractual or tort) of the claim brought against a shareholder.

5.2 According to the Romanian Civil Code, the damage caused to a person as a result of a failure of another person to fulfil its contractual obligations may be material or nonmaterial (moral). Such damage includes:

(i) effective loss (damnum emergens);
(ii) lost benefits (lucrum cessans);
(iii) expenses reasonably made to avoid or limit the loss;
(iv) future loss (if the damage is certain);
(v) loss of an opportunity to obtain an advantage (such losses may be repaired pro-rata with the chance to obtain the advantage, given the specific circumstances and status of the respective creditor).

5.3 Under tort law, the damage caused by negligence or with intention by an unlawful act of a person must be repaired by the respective person. The damages may include:

(i) effective loss (damnum emergens);
(ii) lost benefits (lucrum cessans);
(iii) expenses reasonably made to avoid or limit the loss;
(iv) future loss (if the damage is undoubtedly to happen);
(v) loss of an opportunity to obtain an advantage or to avoid a loss (the compensation will be pro-rata with the chance to obtain the advantage or to avoid the loss, given the specific circumstances and status of the respective creditor).

6. Publicity requirements

There are no specific publicity requirements under the Romanian law in relation to group of companies. However, the Company Law provides that the board of directors of the parent company has the obligation to submit, independently of its own annual accounts, the consolidated annual accounts to the Romanian Ministry of Public Finance.

7. Corporate control and right to withdraw

7.1 The shareholders of a joint-stock company who did not vote in favour of a resolution of the general meeting have the right to withdraw from the company and to request to have their shares purchased by the company only if the object of the respective resolution regards:

(i) a change in the main object of activity of the company;
(ii) a move of the registered office outside the country;
(iii) a change in the company type; or
(iv) a merger or spin-off of the company.

7.2 The shareholders of a limited liability company have the option to withdraw from the company:

(i) in the cases mentioned for shareholders of a joint-stock company at 7.1 above;
(ii) in the cases and as provided by the constitutive act of the concerned company;
(iii) with the consent of all the other shareholders; or
(iv) in the absence of relevant provisions in the constitutive act or when unanimous consent cannot be obtained, the concerned shareholder may withdraw from the company for justified reasons based on a decision of the competent court of law.

8. Corporate control and inter-company loans

8.1 According to the Company Law, a founder (e.g. a shareholder), member of the board of directors, general director, member of the supervisory board or of the directorate, or the legal representative of a company who borrows, under any title, directly or through an intermediary, an amount higher than EUR 5,000, from a controlled company or from a controlling company, or determines one of these companies to give a guarantee for its own debts, shall be subject to imprisonment from six months to three years or to a criminal fine.

Notwithstanding the above, if the founder is a legal entity and the loan is given, directly or indirectly, by one of the controlled or controlling companies, such act shall not constitute a wrongdoing. Therefore, in general, intra-group loans are permitted under Romanian laws.

8.2 It should be noted however that, pursuant to the Insolvency Law, subsequent to the initiation of insolvency proceedings, a member of the group of companies may conclude a loan agreement with another member of the group in order to support the activity of the debtor, if the consent of the creditors' committee is obtained. Likewise, a member of the group may guarantee a loan agreement concluded between another member of the group (which is insolvent) and a third party, if the creditors' committee agree.

9. Group liability and bankruptcy

In principle, the introduction of insolvency proceedings against a subsidiary has no effect on the parent company. Nevertheless, the shareholders may be held liable under the Insolvency Law for the all or a part of the insolvent company's debt, as described above at section 3.3.

10. Is it possible for the holding company to avoid liability for mismanagement of the controlled entity by contractual provisions?

Under current Romanian legislation, it does not seem possible to contractually limit or exclude the liability of the parent company for the mismanagement of its controlled companies.

Slovakia



1. Companies which can be held liable for acts committed by their affiliates

1.1 The Slovak law recognizes two types of companies with limited liability: the limited liability company *(spoločnosť s ručením obmedzeným)* and the limited liability company with shares, also called a joint-stock company *(akciová spoločnosť).* They are both governed by the provisions of the Commercial Code and the vast majority of companies established in Slovakia are one of these two types.

1.2 Shareholders in limited liability companies are only liable for the obligations of the company up to the amount of the unpaid contribution to registered capital of the company. When the contributions of shareholders are fully paid, the liability for the company's obligations ceases to exist.

1.3 The joint-stock company shareholders can't be held liable for the company's obligations at all. The joint-stock company warrants the fulfillment of its obligation with all of its assets.

1.4 Nevertheless, the statutory bodies of both companies can be held liable. The executive director in a limited liability company and the board of directors in joint-stock companies can be held liable, jointly and severally for acting on behalf the companies.

1.5 This might be considered as a slight adoption of the piercing the corporate veil doctrine into the Slovak law. Nevertheless, its application is still rather ambiguous as there is no uniform method for direct piercing application. The liability of the statutory body of the company is rather a form of indirect piercing, and has been known in Slovak law for some time.

1.6 If bankruptcy on the assets of the company has begun and the shareholders cause the insolvency of the company willingly, they won't be able to establish another company for the next ten years.

2. What kind of liability may arise?

2.1 Currently, Slovak law recognizes only civil liability for legal persons. The criminal liability of legal persons will come into force on 1 July 2016.

2.2 Civil liability under Slovak law focuses actual damage that has been caused and the lost profit. The damages have to be monetarily expressible and the person held liable for caused damages is required to refund both actual damage and lost profit. The lost profit represents the income otherwise earned had the damage not occurred.

2.3 The Commercial Code recognizes "objective liability" which does not require culpability. The precondition for liability to arise is:

(i) a breach of the contractual or legal obligation;
(ii) the existence of the damage; and
(iii) a causal link between the breach and the damage.

2.4 Even if the plaintiff proves all of the preconditions for liability to arise, there is still space for the defendant, in this case the statutory body, to avoid liability. The defendant can defend against liability by proving the existence of a barrier that hindered the obligation unfulfillable. The barrier must be unpredictable and has to emerge regardless of the defendant's will. In other words, the barrier has to be objective, unpredictable and unavoidable. And all of the aforementioned attributes must be satisfied cumulatively.

2.5 Additionally, the statutory bodies of a company are legally required to act on behalf of the company with due care and in accordance with the company's interest and with the interest of all shareholders. If the statutory bodies breach their obligations, they are liable, jointly and severally, towards the company and creditors.

2.6 However, enforcing liability on statutory bodies by creditors isn't that straightforward. The creditor can try to satisfy his claim against the company through the statutory body, only if the company itself is unable to satisfy the creditor's claim. The alternative would be for statutory body or for the shareholder to voluntarily accept the guarantee for the contractual obligations of the company (indirect piercing).

2.7 There are legal opinions that creditors might enforce their claim against the parent company, since its executive performs the decisive influence in the subsidiary company. The main attribute is the control over the subsidiary. Therefore, if the creditors suffer damages and loss of profit caused by the subsidiary company, which has acted under the order of the parent company, creditors in some cases might be able to claim the damages from the person with decisive influence. However, this possibility is an extensive interpretation of law that would very probably be labeled as questionable.

2.8 Slovak law has a novel provision on companies in crisis which came into force on 1 January 2016. Under this provision, a company is in crisis when it is insolvent or it is endangered by insolvency. Insolvency in this case doesn't mean regular bankruptcy; instead the company will be considered in crisis if the ratio of its registered capital to its obligation is less than 8%. Additionally, the company in crisis provisions also address repayment of contributions to shareholders deeming these contributions to be a loan or security and precluding repayment while the company remains in crisis.

2.9 The contribution must be repaid to the company if it were granted to shareholders contrary to the law, to the extent of the difference between the provided consideration and what may be deemed as adequate consideration. Such obligation cannot be waived and the statutory body must enforce fulfillment of this obligation. Members of the statutory body, who were performing the function at the time of the contribution and at the time the repayment was not enforced guarantee jointly and severally to the company and the creditors for the return of the contribution.

2.10 Under the new law providing for criminal liability of legal persons, legal persons may be held liable if the crimes were carried out by

(i) a statutory body or its member, or
(ii) a person who performs the deciding influence in the company.

Crimes that apply to companies are mainly of an economic nature, for example tax fraud, money laundering or counterfeiting. But also include environmental crimes and crimes connected to corruption.

3. Relevant behaviour

3.1 The holding company, as the person with the decisive influence is responsible for securing the functioning of its subsidiaries.

3.2 The statutory body must perform its duties with due care, meaning that the person acting on behalf of the company is required to obtain and assess all of the information relevant to the decision. In addition, the statutory body must conduct its duties in the interest of the company. These two obligations are the expression of the loyalty principle to the company and all of its shareholders. This principle also includes the obligation not to prioritize certain shareholders, not to prioritize interest of third persons over company's interests and the non-disclosure obligation.

3.3 Breach of this loyalty principle establishes liability towards the company.

3.4 Under Slovak law if the debtor commits contestable legal acts which would hinder the satisfaction of enforced claims, the acts can be challenged at court and may be a basis for effective enforcement of the claim. This also applies to debtors who are members of the statutory body of a company. Therefore, any behavior of such manner may establish the liability of the statutory body.

4. Who can be held liable?

All of the following entities may be held liable:

(i) the statutory body;
(ii) members of the statutory body;
(iii) members of the statutory body of the controlling company, if they were performing the function of statutory body in the subsidiary company; and
(iv) the controlling company if it has decisive influence in the subsidiary company.

However, cases when the company can be held liable are very limited. As was stated before, the doctrine of direct piercing is not well recognized in Slovak law.

5. Relevant damages

Damages must be monetarily expressible and the person held liable for caused damages is required to refund both actual damage (*damnum emergens*) and lost profits *(lucrum cessans)*. Lost profits are defined as the income that would have been earned had not the damage occurred.

6. Publicity requirements

6.1 There are no special publicity requirements in relation the limited liability company, other than the requirement of registration with the respective Commercial register and the Annual Report registry. This applies to limited liability companies emitting shares as well.

6.2 The board of directors of the joint-stock company, however, is furthermore required to state such control in the annual report to the general meeting. The annual report as a part of the financial statement of the company is published in the online accessible Financial Statements Register. The financial statement is also published in the Commercial Bulletin, along with changes of the shareholders and/or any change in the Commercial register.

7. Corporate control and right to withdraw

7.1 According to Slovak law, a shareholder is not allowed to withdraw his share, or in other words to secede his share in the company by unilateral resolution.

7.2 In the case of two or more shareholders of the limited liability company, one shareholder can propose the exclusion in court. The main precondition is nevertheless not being the sole shareholder. If the controlling company is not sole shareholder, it can proceed with proposition. If the court approves the proposal for the exclusion from company, the proposer gains the right to receive remuneration for his share.

7.3 The minority shareholders are allowed to demand the repurchase of shares. Minority shareholders can do so within three months from when the offer for acceptance of shares was made. If the repurchase of shares has been rejected by the majority shareholder, the right to repurchase of shares can be claimed at court. Each transfer/repurchase must be made with adequate consideration.

8. Corporate control and inter-company loans

8.1 Intercompany loans between controlling and controlled company are admissible.

8.2 If an inter-company loan is made within two years from the formation of the controlled company, the proposal of the loan agreement must be approved by the general meeting of the controlled company.

8.3 Nevertheless, if the company were in crisis the loan would be considered as a payment replacing the company's own resources. Such payment can't be returned unless the crisis ends.

8.4 Transfer pricing is a key feature when dealing with inter-company loans and is governed by Act No. 595/2003 on Income Tax. The deciding factor is the difference in the value of the loan and the consideration for the loan, which was provided by a related entity, and the value of the loan and the consideration for the loan provided by an independent person. If the difference in value is large, it can reduce the tax base or increase tax loss.

9. Group liability and bankruptcy

9.1 Once insolvency proceedings are initiated, the insolvency administrator *(konkurzný správca)* takes over the obligation to enforce the contractual obligations of the company.

9.2 This also applies to the contractual obligations, which were unfulfilled because of the statutory body. The statutory body would be able to liberate itself proving that damage was caused by an objective, unpredictable and unavoidable barrier.

9.3 The provisions on contestable legal acts also apply to insolvency proceedings. If the statutory body of the company takes over the obligation without adequate consideration and the company becomes insolvent, creditors can contest such takeover of the obligation.

9.4 In the case of bankruptcy, the statutory body is required by law to submit a motion for bankruptcy proceedings within 30 days from when it became aware of the insolvency. Failure to do so may be deemed a violation of due care.

10. Is it possible for the holding company to avoid liability for mismanagement of the controlled entity by contractual provisions?

10.1 Holding companies cannot avoid liability for mismanagement of controlled entities by contractual provisions. The contractual provisions might in some cases mitigate the liability; however they cannot completely waive it.

10.2 Nevertheless, the company itself can waive its right for compensation of the damages or enter into settlement with the statutory body. However, this is only possible after three years from the creation of the right to compensation, if the general meeting approves such waiver and if at the general meeting none of the shareholders with 10% shares or higher object.

Spain



1. Companies which can be held liable for acts committed by their affiliates

1.1 Under Spanish law, a legal entity enjoys a different and independent identity separate from each of the members or natural persons which comprise it.

1.2 This also implies the separation of assets and the absence of liability of the individual people with regard to the debts of the legal entity. Nevertheless, abuse by its members of the recognition of a legal entity as a distinct autonomous entity with separate assets has made it possible to establish a link between the entity and its members.

1.3 According to Spanish law, a company that is the sole shareholder of another can be held jointly liable when it is in fact totally controlling such subsidiary, and the structure chosen has been set up without complying with the established publicity requirements for the valid formation of a sole shareholder company.

1.4 Moreover, in the case of a group of companies, a company can be held liable when it is controlling or managing another, directly or indirectly, and the will of the latter is in fact the will of the controlling company. However, the existence of the dominant relationship alone is not sufficient to satisfy the lifting of the corporate veil doctrine. Abusive or fraudulent conduct is necessary to justify this exceptional remedy.

1.5 ndeed, Spanish case law – in particular employment case law, where the courts are especially flexible – affirms that if a group of companies is acting as a unit, it must also respond as a unit towards creditors and other third parties. The lifting the corporate veil therefore results in the extension of liability to the controlling company regarding the debts of the controlled company or the communication of liability between companies of the same group.

1.6 Pursuant to Article 31 bis of the Spanish Criminal Code, amended in 2015, a legal entity is criminally responsible for acts committed by *de facto* or *de jure* administrators in the course of performing corporate activities and for the company's benefit. Likewise, liability of the legal entity may also arise for crimes committed by those subjected to the authority of the administrators, due to a lack of due control, when a crime has been committed while performing corporate activities and a benefit is obtained by the company.

1.7 In this regard, criminal liability of the dominant legal entity for acts committed by the affiliate, may arise:

1.7.1 due to a lack of due control by the dominant legal entity over the affiliate, assuming that the crime was committed within the framework of corporate activities, and the dominant company duly benefited;
1.7.2 when the board of a subsidiary is formally led by the dominant entity (either fully or partially), the dominant entity would be criminally responsible for the offences committed in the subsidiary.
In Spanish law, this is dubbed "*responsabilidad penal en cascada*" – vicarious criminal liability.

1.8 Criminal liability for offences committed in the subsidiary may be cut-off or reduced when the controlling company has effectively implemented a criminal compliance model, according to the following requirements:

1.8.1 Administrators have implemented an organization and management model that includes adequate surveillance, monitoring and control measures to prevent or reduce the risk of crimes, that includes the following measures:

(i) identification and assessment of criminal risk activities;
(ii) implementation of policies and procedures regarding the identified criminal risks;
(iii) financial resources management models (this element has been preliminary interpreted as funds provision for the day to day performance of the nominated compliance officer);
(iv) impose the obligation to inform about potential risks and breaches (by means, for example, of a whistleblowing system);
(v) disciplinary measures when breaches are detected;
(vi) periodically verify the compliance model (when relevant breaches are detected, or when changes in the internal organization, control structure, or in the activities performed, take place within the company).

1.8.2 Monitoring of such criminal compliance model has been entrusted to a Control Body (e.g. compliance officer/tem) with autonomous control competences.

2. What kind of liability may arise?

2.1 If a situation of control of one company by another arises (which is the normal situation within a group), then the controlling company may be held jointly liable for damages by:

2.1.1 group companies;
2.1.2 minority shareholders of a dependent company;
2.1.3 employees; or
2.1.4 creditors.

Note that the controlling company may even be held criminally liable if a crime is committed within the controlled affiliate.

2.2 Likewise, liability may be attributed to the administrators of a dominant company, in their position as 'de facto administrators' of dependent companies. This type the liability could be, in any case, criminal liability of the legal entity if the "administrators" were a legal entity.

3. Relevant behaviour

3.1 A situation of mere dependence or domination is insufficient for the purposes of attributing liability to the dominant company of the group. Specific behaviour that justifies the exceptional remedy of the 'lifting of the corporate veil', which has resulted from the improper use of the separate legal identity of a corporation, is also necessary.

3.2 The following are commonly considered as 'indications' of blameworthy conduct:

3.2.1 confusion relating to the identity of the company and its shareholders, or assets;
3.2.2 undercapitalization of companies when its members have limited liability (for example providing funding to the company that is insufficient in order for it to carry out its corporate purpose);
3.2.3 a decrease in the value of members' stakes in the company due to decisions made in benefit of the dominant company but which cause damage to the assets of the subsidiary company; and
3.2.4 formation of a company as a separate legal entity only for the purposes of evading legal or contractual duties (fraud).

4. Who can be held liable?

4.1 Liability for decisions which affect the subsidiaries of a holding group or a group of companies may attach to:

4.1.1 the subsidiary, the holding company or the controlling entity; or
4.1.2 the directors and officers involved in the relevant decision/action, which may include directors and officers of the:

(i) controlling entity and subsidiary;
(ii) supervisory bodies of the controlling entity and/or subsidiary; and
(iii) shareholders of the controlling entity.

5. Relevant damages

5.1 Damages may arise from the resolutions and decisions made by the controlling company of a group of companies.

5.2 Damages to the shareholders of the subsidiary, may include:

5.2.1 a decrease in the value of their stake in the company; and
5.2.2 a loss of the profitability of such stake.

5.3 For the creditors of the subsidiary, the relevant damage would be an eventual loss of the value of assets owned by such company.

6. Publicity requirements

6.1 According to Spanish law, the directors of a holding or controlling company generally assume,the following obligations:

6.1.1 to file the consolidated annual accounts and the management report approved by the general shareholders of the holding or controlling company with the Commercial Registry;

6.1.2 in the event of any foreign investor in the holding or controlling company, such entity must declare the Spanish investment before the General Directorate for Trade and Investment *(Dirección General de Comercio e Inversiones)* describing the economic relationship between the companies belonging to the group;

6.1.3 a company which, by itself or through a subsidiary company, comes to possess more than 10% of the capital of another listed company should notify that company immediately, with the rights pertaining to its shares remaining suspended in the meantime. This notification must also be made in the case of successive acquisitions, each time that 5% of the capital is surpassed. Such notifications will be recorded in both company's reports;

6.1.4 in the event that the domination of a listed company is exercised by two or more companies or persons who act in conjuction with regards to voting rights (or by virtue of restrictions placed on the transfer of shares), such coordination should be made public both to the affected company, through the company register, and by means of the communication of the agreement to the National Stock Market Commission; and

6.1.5 finally, in the event that the shares of the company are owned by a sole shareholder, the sole shareholder is required to:

(i) declare its sole shareholder status to the relevant Commercial Registry;
(ii) expressly record such information in all company correspondence and in all the documentation regarding the company; and
(iii) keep a registry book for the agreements entered into between the sole shareholder and the company. Such agreements will need to be described in the annual report drafted by the company.

7. Corporate control and right to withdraw

7.1 The minority quota-holders or shareholders of a company subject to the management and coordination of another company are only entitled to withdraw as quota-holders or shareholders in the following cases:

7.1.1 in the case of corporations (*Sociedades Anónimas*) where there is a:

(i) modification of the corporate purpose;
(ii) transfer of the corporate address abroad; or
(iii) takeover bid where the offeror has acquired more than 90% of the capital stock (in which case the minority shareholders have the right to demand that the offeror purchases their shares).

7.1.2 in the case of limited liability companies (*Sociedades de Responsabilidad Limitada*), where there is a:

(i) modification of the corporate purpose;
(ii) transfer of the corporate address abroad;
(iii) modification of the transfer of shares regime;
(iv) deferral or reactivation of the company;
(v) transformation into a public limited company, a civil company, a cooperative, a limited partnership (simple or by shares), a general partnership and an Economic Interest Grouping ("AIE"); or

(vi) creation, modification or extinguishment in advance of an obligation to make additional contributions, unless otherwise provided in the articles of association of the company.

7.2 In addition, the articles of association may state other reasons for withdrawal by a quota-holder or shareholder, which may be different to those stated by law.

8. Corporate control and inter-company loans

8.1 The most important rule that affects intra-group loans comes from bankruptcy legislation. Beyond the scope of bankruptcy, there is no legislation in this respect. The bankruptcy rules provide that any type of credit which has been granted among individuals who have a "special relationship" with the debtor qualifies as a subordinate credit. Special relationships occur with those individuals who have been appointed as directors of the company in the twoyear period prior to the company entering into bankruptcy, the liquidators of the company or those individuals who have received broad powers of attorney from the company. In addition, related companies (i.e. those in the same group) are also considered to have a special relationship with the company. The satisfaction of the subordinate credit may only occur after all privileged and ordinary credits have been fulfilled.

8.2 In addition, should the creditors of the subsidiary be any of its shareholders, *de facto* administrators, legal administrators or companies under the same group, such credits could be considered as subordinated.

9. Group liability and bankruptcy

9.1 In the event of bankruptcy of a subsidiary, the creditors may bring action against the holding company for the unpaid debts of the subsidiary.

9.2 The bankruptcy receiver or new owner has the burden to prove both the mismanagement of the controlled entity and the damage suffered as a consequence of such mismanagement.

10. Is it possible for the holding company to avoid liability for mismanagement of the controlled entity by contractual provisions?

10.1 A generic waiver of liability relating to previous actions or conduct would not be valid under Spanish law.

10.2 Contractual provisions would only be valid between the contracting parties and would not have any effect on third parties.

Switzerland



1. Companies which can be held liable for acts committed by their affiliates

1.1 Swiss corporate law is based on the principle of separation *(Trennungsprinzip):* only the corporation itself is liable for its debts, therefore neither its shareholders nor its directors or officers are personally liable.

1.2 The exception of piercing of the corporate veil *(Durchgriff)* is only admitted under narrow conditions (such as in the case of a dominant shareholder's blatant misuse of the corporate form amounting to a prohibited misuse of rights *(Rechsmissbrauch)).* The court has allowed the piercing of the corporate veil in very few court cases.

1.3 The insignificance of piercing of the corporate veil under Swiss law is a consequence of a set of more sophisticated rules and principles which allow liability to be attributed to a third person (i.e. a dominant shareholder, or an adversely influencing or benefiting person) without having to deny the corporate form, such as the:

1.3.1 directors' and officers' liability to which any person involved in the management of a corporation is subject *(Verantwortlichkeitshaftung),* see section 1.4 below;
1.3.2 right to claim back all benefits unduly attributed to third persons (e.g. hidden profit distributions) *(verdeckte Gewinnauschüttungen);*
1.3.3 liability of the dominant shareholder based on tort law standards;
1.3.4 liability based on inspired trust *(Vertrauenshaftung),* see section 1.5 below;
1.3.5 recharacterisation of shareholder loans to quasi-equity (*Umqualifizierung*) in circumstances of a company's financial distress; and
1.3.6 the avoidance *(paulianische Anfechtung)* of the repayment of such loans shortly before the opening of bankruptcy proceedings.

1.4 Under Swiss corporate law, group companies may be subject to liability pursuant to general principles of directors' liability *(Verantwortlichkeitshaftung)*. Under such principles, any person involved in the management of a corporation may be liable for breach of their duties. For this purpose, the class of persons involved in the management of the company is construed very broadly. Such persons may include companies usurping decision-making powers over other group companies *(faktische Organschaft)*.

1.5 Furthermore, parent companies may be liable for inspired trust *(Vertrauenshaftung)*. In the Swissair-Case, the Swiss Federal Supreme Court held the parent company liable because it had allowed a subsidiary to use logos of the group and refer to the reputation of the group. In the subsequent bankruptcy of that entity, the parent was held liable to the investing shareholders because under the circumstances, the latter were led to believe that the parent company would guarantee the solvency of the bankrupt entity.

2. What kind of liability may arise?

2.1 Any person (whether an individual or a company) involved in the management of a group entity, who violates their duties (that is, fiduciary standards or equal treatment standards) in relation to such entity may be held liable for damages vis-à-vis that entity.

2.2 Whilst the board of directors of the aggrieved company and its shareholders may sue the liable persons at any time, creditors only have standing to sue upon the commencement of bankruptcy proceedings in respect of the company. Furthermore, such right of creditors may in the first instance only be exercised by the bankruptcy trustee.

2.3 Generally, damages can only be recovered for the benefit of the aggrieved company. As an exception, however, individual shareholders and/or creditors may have cause of action to recover damages they have suffered individually. However, such individual causes of action are only available on a more restricted basis: They require, *inter alia*, a violation of a provision with a specific aim to protect the individual shareholder and/or creditor against such damages *(Schutznormverletzung)* or, alternatively, that recoverable damage has been caused to the individual shareholder/creditor alone (and not to the company as well). Consequently, liability to individual shareholders and/or creditors is, in many cases, only admitted on tort law standards or based on inspired trust *(Vertrauenshaftung)*.

3. Relevant behaviour

Any decisions made or influence exercised by a person (individual or company) involved in the management of the company which contravenes specifically stipulated duties (such as the duty to notify the bankruptcy court in the case of the company's over-indebtedness), the directors' fiduciary duty to act in the best interest of the corporation and/or their duty to treat shareholders equally may give rise to liability.

4. Who can be held liable?

4.1 Any person (individual or company) involved in the management of the company may be held liable, including:

(i) the controlling entity;
(ii) the group entity which benefits from a transaction which is not at arm's length; and
(iii) any person involved in a relevant decision violating the fiduciary or equal treatment duty or any other specific duties of the directors of the aggrieved company.

5. Relevant damages

5.1 Any damage causing a decrease in value of the company's assets entitles the board of directors, the shareholders and the creditors of the company to sue the liable persons for recovery in favour of the aggrieved company. The creditor's right to sue accrues only upon commencement of bankruptcy proceedings and is, in the first instance, exercised by the bankruptcy trustee.

5.2 Damages suffered by shareholders or creditors individually may on the other hand also be recovered individually. Such damages are only recoverable under much narrower conditions: in essence, only in situations of violation of a provision with a specific aim to protect the creditor or shareholder against such damages *(Schutznormverletzung)* or if damage has been caused to the individual shareholder/creditor alone (and not to the company as well).

6. Publicity requirements

Under Swiss law, there is no group-specific filing requirement. The group relationship as such does not need to be registered with the Commercial Registry. For limited liability companies, however, the quota-holder is disclosed in the Commercial Register. Furthermore, the group relationship may be indirectly disclosed in financial statements of the relevant entity. In addition, the shareholdings of listed group entities may be subject to disclosure under the relevant rules of the Stock Exchange Law. Moreover, shareholders and quota-holders as well as the beneficial owners of such shares or quotas are required to disclose their identity to the company. Said information is confidential and may not be made public to third parties. In criminal proceedings, the prosecution authorities may, however, order the disclosure of the relevant records.

7. Corporate control and right to withdraw

7.1 There is no specific right of withdrawal of minority shareholders of a group entity. Quota-holders of limited liability companies, however, may apply to the court to resign from the company for good cause. Furthermore, the articles of incorporation may provide for a resignation of a quota-holder from a limited liability company.

7.2 A withdrawal right may be triggered by a court decision following an action for dissolution of the company brought by a minority shareholder.

7.3 Further, the parties envisaging a statutory merger may provide for a right to withdraw in the merger agreement and thereby "squeeze-out" minority shareholders.

8. Corporate control and inter-company loans

8.1 A holding company financing its controlled companies may be subject to:

(i) a deferred reimbursement of its loan pending the settlement of other creditors' claims if the loan was granted to a financially distressed group entity which subsequently went bankrupt; or

(ii) an obligation to return to the controlled entity the sums repaid by it during the five years preceding the bankruptcy of the controlled company. In practice, however, the bankruptcy trustee is normally only able to reclaim loans, which were repaid shortly before the commencement of bankruptcy.

8.2 In the Swisscargo Case, the Federal Supreme Court held that upstream loans which are not granted at arm's-length terms effectively reduce the amount of equity and/or earnings which may be distributed as dividends to the holding company.

9. Group liability and bankruptcy

9.1 The bankruptcy trustee may bring an action for damages against any person liable for the damages caused by mismanagement.

9.2 The bankruptcy trustee has the burden to prove the mismanagement and the damage suffered as a consequence thereof.

10. Is it possible for the holding company to avoid liability for mismanagement of the controlled entity by contractual provisions?

No. This is not possible under Swiss Law.

United Kingdom



1. Companies which can be held liable for acts committed by their affiliates

1.1 If a company's subsidiary is a private or public limited company, generally the holding company's liability is limited to paying any amount not paid up on its shares in the subsidiary – even if it is a wholly owned subsidiary. Third parties have no recourse to the holding company for liabilities incurred by the subsidiary unless the holding company has assumed liability under contractual arrangements, such as guarantees or indemnities, or if the subsidiary has merely acted as its holding company's agent in dealing with the third party.

1.2 In certain exceptional situations, however, creditors and minority shareholders can have remedies against the holding company despite the principle of limited liability.

2. What kind of liability may arise?

2.1 Under English law, the exceptions to limited liability fall broadly into the following categories:

2.1.1 piercing the corporate veil. Although colloquially used as shorthand to refer to any occasion on which a shareholder loses the protection of limited liability, in fact piercing of the corporate veil is a very rarely used and narrow principle of law. It applies only when a person is under an existing legal obligation or liability, or is subject to an existing legal restriction, which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company that is under his control. The court may then pierce the corporate veil for the purpose of depriving the company or its controller of the advantage which they would otherwise have obtained by the company's separate legal personality. In many cases, the court will not have to pierce the corporate veil in order to grant a remedy against a wrongdoer, but will instead award a remedy based on a different analysis, such as those described below;

2.1.2 imposition or assumption of responsibility. The relationship between the subsidiary, the holding company and a third party might indicate that the holding company has assumed some responsibility or liability to the third party for the actions of the subsidiary; or the law might impose a duty of care on a holding company;

2.1.3 a holding company might also be a shadow director or a *de facto* director: see paragraph 3 below;

2.1.4 a holding company could be liable in tort for procuring a breach of contract by the subsidiary, for unlawful means conspiracy (for example, by acting in combination with a subsidiary's director to damage a third party's interests) or for dishonestly assisting in a subsidiary's director's wrongdoing. It could also be liable to account for trust property that it knowingly (not necessarily dishonestly) receives from the subsidiary as the result of a breach of trust (for example, on the part of the subsidiary's directors);

2.1.5 a holding company could be liable to repay to the subsidiary or compensate it for any distribution the holding company has received from the subsidiary where the holding company knew or had reasonable grounds for believing that the distribution was unlawful (whether or not those responsible in the holding company understood the law);

2.1.6 unfair prejudice and derivative claims. Under section 994 Companies Act 2006, a shareholder may apply to the court for an order on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its shareholders generally or of some part of its shareholders (including the applicant). The court may make any order it considers appropriate to remedy the prejudice. Alternatively, a shareholder might bring a derivative claim in court (in other words, seeking an order that the company must adopt a claim that its board has failed to pursue) based on an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by directors or shadow directors. The claim may be against the director (or shadow director) or any other person – including, for example, the holding company – or both;

2.1.7 statutory exceptions. These exceptions include holding company liability for bribery and corruption, environmental damage, group company liability for pension scheme deficits and group tax liability.

3. Relevant behaviour

3.1 Directors are responsible for the management of the companies of which they are directors and may be held personally liable in certain situations, but generally a holding company has no such responsibility. It is, however, possible, for a holding company, despite not being appointed formally as a director, to be regarded as a matter of law as a director of the subsidiary (known as a de facto director), and therefore to be in the same position as a normal director. This can happen where the facts show that the holding company has acted as a director – for example, by participating in the subsidiary's directors' decision-making or by dealing with third parties as if it were a director. It is more likely to occur in the case of individuals than companies. From October 2016, it will no longer be lawful for most companies to appoint corporations as directors, but this will not prevent liability from attaching to companies that act as de facto directors.

3.2 A shadow director is someone in accordance with whose directions or instructions the directors of a company are accustomed to act. A holding company could be a shadow director if a pattern were established of automatic compliance by the directors of its subsidiary with the holding company's wishes – or even merely its advice – in relation to some aspect of the subsidiary's business. A shadow director can be treated as owing the same general duties that a director has, and may be liable to contribute to the subsidiary's assets if the subsidiary goes into insolvent administration or insolvent winding up. Individual directors, or even employees, of the holding company may be deemed shadow directors if the facts indicate that that is the case.

3.3 As regards the imposition of a duty of care, the holding company could, for example, be liable for the health and safety of its subsidiary's employees where:

3.3.1 the businesses of the holding company and subsidiary are in a relevant respect the same;
3.3.2 the holding company has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry;
3.3.3 the subsidiary's system of work is unsafe, as the holding company knows or ought to know; and
3.3.4 the holding company knows or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection (especially where the evidence shows that the holding company has a practice of intervening in the trading operations of the subsidiary).

The coordination of operations, the intermingling of businesses and the shared use of resources would not alone be enough to justify imposing a duty of care on the holding company, and the court would have to be satisfied that it was fair, just and reasonable to impose the duty.

3.4 Other types of behaviour are described above – for example, in relation to unfair prejudice, conspiracy, dishonest assistance in a breach of trust and knowing receipt of trust property.

4. Who can be held liable?

Apart from the holding company itself, directors of both the holding company and the subsidiary may be held liable. The facts may be such that others, too, are exposed, such as employees and advisers involved in a conspiracy to defraud creditors.

5. Relevant damages

There are no fixed rules on what circumstances give rise to a claim for shareholders or creditors of the subsidiary. Although the court has a very wide discretion to award remedies for unfair prejudice, by far the most likely outcome for a successful claim against the holding company is an order that the holding company should buy out the minority shareholder's shares in the subsidiary at a fair value.

5.1 Damages recoverable through other types of action (for example, based on contract or tort) will be assessed according to the principles which are generally applicable in English law. Where breaches of fiduciary duty are involved – in this case, by the subsidiary's directors – there are various remedies, such as an order that the wrongdoer must account to the company for profits he has personally obtained through breaching his duty, or an award of damages by way of equitable compensation (which might, for example, include an element based on benefits a third party, such as a company owned by the wrongdoer, has indirectly obtained by virtue of the breach). Recovery would not depend on the subsidiary company's being able to show a loss.

6. Publicity requirements

Regulations made under the Companies Act 2006 require grouped companies to disclose in their accounts certain information about their subsidiary and parent undertakings, including the name and place of incorporation of the body corporate that the directors consider to be their company's ultimate parent company. The accounts must be periodically filed with the Registrar of Companies and are then open to public search.

Also, companies must take reasonable steps to ascertain and record in a publicly available register details of each individual who exercises control or significant influence over the company (known as Persons with Significant Control). Control in this context has an extended meaning and includes, for example, direct or indirect control of more than 25% of the shares or voting rights in the company.

7. Corporate control and right to withdraw

The only rights of withdrawal will be those negotiated, such as put and call options agreed with the holding company. In addition, as discussed above, section 994 of the Companies Act 2006 provides a means of redress for aggrieved minority shareholders who consider that they have suffered unfair prejudice.

8. Corporate control and inter-company loans

Inter-company loans from a holding company to a subsidiary may become voidable on an insolvent administration or insolvent winding up of the subsidiary if the repayment of the loan to the holding company is deemed by an administrator or liquidator to have been carried out in circumstances that amount to an unlawful preference (within the meaning of the Insolvency Act 1986).

9. Group liability and bankruptcy

9.1 Directors may, if the company goes into insolvent winding up, commit an offence where:

9.1.1 they have knowingly concealed or removed company assets in anticipation of a winding up (fraud in anticipation of winding up);
9.1.2 they do not cooperate with a liquidator on a winding up (misconduct in the course of winding up);
9.1.3 they omit material information in a statement about the company during winding up (material omissions); or
9.1.4 they make false representations to creditors on a winding up (false representations).

9.2 Upon the insolvent administration or insolvent winding up of a company, directors may become liable to contribute to the assets of the company in a number of situations. Directors of a company may be ordered by a court to make such a contribution where:

9.2.1 they have transferred company assets for inadequate consideration (transaction at an undervalue);
9.2.2 they have given preferential treatment to a certain creditor in the repayment of company debts (unlawful preference);
9.2.3 they have continued trading although they knew or ought to have known that insolvent administration or insolvent winding up was unavoidable (wrongful trading);
9.2.4 they have anticipated the insolvent administration or insolvent winding up but have continued trading with the intention to defraud creditors of the company (fraudulent trading); or
9.2.5 in the course of insolvent winding up it appears that they have misapplied or retained company assets or breached a fiduciary or other duty (misfeasance).

9.3 The statutory provisions relating to fraud in anticipation of winding up, misconduct in the course of winding up, material omissions, false representations and wrongful trading expressly provide that shadow directors may be liable. The provisions relating to fraudulent trading (which impose liability on 'anyone who is knowingly party to carrying on the business with intent to defraud') and the provisions relating to misfeasance (which provide for remedies for breach of duty by officers of the company or 'anyone concerned in the promotion, formation or management of the company') are clearly wide enough to apply to de facto directors.

9.4 There are wide powers in the Insolvency Act 1986 for the court to unwind transactions (including dealings between the holding company and subsidiary) that amount to transactions defrauding creditors, transactions at an undervalue and unlawful preferences.

9.5 Liquidators and administrators are required to report to the Secretary of State if it appears to them that the conditions are met for a director or shadow director to be disqualified to act as a director. The court may take account of the relevant person's conduct in relation to other companies, including overseas companies, when considering disqualification.

In all situations the burden of proof falls on the claimant.

10. Is it possible for the holding company to avoid liability for mismanagement of the controlled entity by contractual provisions?

No. A holding company which is also a director of the subsidiary could be indemnified by the subsidiary or another UK company in the same group against liabilities incurred in defending claims for negligence, default, breach of duty or breach of trust as a director, but the indemnity must not purport to apply in the case of criminal proceedings, or civil proceedings brought by the subsidiary (or another UK group company), where judgment is given against the holding company, or to fines or regulatory penalties. The same restrictions would not apply, however, to an indemnity granted by a foreign group company, but as a matter of public policy the court would not normally assist an indemnified person to enforce an indemnity that purported to make someone else financially liable for a criminal or regulatory penalty incurred by the indemnified person.

Contacts

Albania
Lulzim Alushaj
E lulzim.alushaj@cms-aacs.com

Mirko Daidone
E mirko.daidone@cms-aacs.com

Austria
Peter Huber
E peter.huber@cms-rrh.com

Aakriti Chandihok
E aakriti.chandihok@cms-rrh.com

Belgium
Carl Leermakers
E carl.leermakers@cms-db.com

Bulgaria
Atanas Bangachev
E atanas.bangachev@cms-cmck.com

Valentin Savov
E valentin.savov@cms-rrh.com

Czech Republic
Helen Rodwell
E helen.rodwell@cms-cmck.com

Patrik Przyhoda
E patrik.przyhoda@cms-cmck.com

France
Jacques Isnard
E jacques.isnard@cms-bfl.com

Bruno Zabala
E bruno.zabala@cms-bfl.com

Germany
Thomas Meyding
E thomas.meyding@cms-hs.com

Alexandra Schluck-Amend
E alexandra.schluck-amend@cms-hs.com

Hungary
Anikó Kircsi
E aniko.kircsi@cms-cmck.com

Peter Toth
E peter.toth@cms-cmck.com

Italy
Pietro Cavasola
E pietro.cavasola@cms-aacs.com

Rosida Carpagnano
E rosida.carpagnano@cms-aacs.com

Luxembourg
Julien Leclère
E julien.leclere@cms-dblux.com

The Netherlands
Roman Tarlavski
E roman.tarlavski@cms-dsb.com

Abbas Ali Hyder
E abbasali.hyder@cms-dsb.com

Portugal
João Caldeira
E joao.caldeira@cms-rpa.com

Romania
Horea Popescu
E horea.popescu@cms-cmck.com

Rodica Manea
E rodica.manea@cms-cmck.com

Slovakia
Petra Čorba Stark
E petra.corba-stark@cms-cmck.com

Spain
Cristina Coto
E cristina.coto@cms-asl.com

Switzerland
Stefan Brunnschweiler
E stefan.brunnschweiler@cms-vep.com

Max H. Albers-Schönberg
E max.albers@cms-vep.com

United Kingdom
Martin Mendelssohn
E martin.mendelssohn@cms-cmck.com

C/M/S/ Law-Now™
Law.Tax

Your free online legal information service.

A subscription service for legal articles
on a variety of topics delivered by email.
cms-lawnow.com

C/M/S/ e-guides
Law.Tax

Your expert legal publications online.

In-depth international legal research
and insights that can be personalised.
eguides.cmslegal.com

CMS Legal Services EEIG (CMS EEIG) is a European Economic Interest Grouping that coordinates an organisation of independent law firms. CMS EEIG provides no client services. Such services are solely provided by CMS EEIG's member firms in their respective jurisdictions. CMS EEIG and each of its member firms are separate and legally distinct entities, and no such entity has any authority to bind any other. CMS EEIG and each member firm are liable only for their own acts or omissions and not those of each other. The brand name "CMS" and the term "firm" are used to refer to some or all of the member firms or their offices.

CMS locations:
Aberdeen, Algiers, Amsterdam, Antwerp, Barcelona, Beijing, Belgrade, Berlin, Bogotá, Bratislava, Bristol, Brussels, Bucharest, Budapest, Casablanca, Cologne, Dubai, Duesseldorf, Edinburgh, Frankfurt, Funchal, Geneva, Glasgow, Hamburg, Hong Kong, Istanbul, Kyiv, Leipzig, Lima, Lisbon, Ljubljana, London, Luxembourg, Lyon, Madrid, Medellín, Mexico City, Milan, Monaco, Moscow, Munich, Muscat, Paris, Podgorica, Prague, Rio de Janeiro, Rome, Santiago de Chile, Sarajevo, Seville, Shanghai, Sofia, Strasbourg, Stuttgart, Tehran, Tirana, Utrecht, Vienna, Warsaw, Zagreb and Zurich.

cms.law

© CMS Legal Services EEIG (April 2017) – nordisk-buero.com