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Liability of Holding Companies

A CMS Corporate Publication

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Today companies face what may be the most protracted and severe period of economic downturn in a century. The result of this, on the one hand, is that companies are being forced to scrutinise and manage their liabilities ever more closely. On the other hand, a range of potential creditors and litigants are seeking to recover losses as companies fail in increasing numbers. In this context, the principles of liability as they relate to corporate groups are becoming extremely important.

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 has been employed in sectors such as finance, chemicals, nuclear energy, aeronautics, hazardous waste disposal and biotechnology to ring-fence risky assets and insulate from liability companies further up the corporate chain. 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).

This publication sets out a summary of the basic principles pertaining to liability within corporate groups as applied in 14 of the CMS European jurisdictions:


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Albania



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

1.1 Albanian law recognises a parent company and controlled company relationship, where a company conducts itself and acts regularly in accordance with the directions and guidelines of another company. This control is referred to as a controlling group.

A parent company and controlled company relationship also arises where a company, based on its capital holding in another company or based on an agreement with that other company:

(a) has the right to appoint at least 30% of directors, administrative board or supervisory board members; or

(b) controls at least 30% of the total vote on the general assembly.

This control between the parent company and controlled company is referred to as an influencing/equity group.

2. What kind of liability may arise?

2.1 As a general principle, shareholders/quotaholders liability is limited to the value of their subscribed but not paid share/quota capital in the company.

2.2 However, Albanian law provides for an exception to the limited liability principle in a specific set of circumstances of abusive conduct.

2.2.1 Shareholders/quotaholders, directors and supervisory board members will be jointly and severally liable, with all their assets, if they perpetrate one or more of the following acts:

(a) abuse the form of the company for the attainment of illegal objectives;

(b) treat company's assets as if they were their own;

(c) if they knew or under the given circumstances should have known the margin incapacity of the company, they did not take the relevant measures necessary to ensure that the company, depending on the type of activity exercised, has sufficient capital in order to fulfil duties and obligations owed to third parties.

2.3 In addition to the above, liability may arise as a result of the breach of duty of loyalty owed by directors to shareholders/quotaholders.

3. Relevant behaviour

Directors

3.1 As regards the director's liability to shareholders/quotaholders, the following conduct is pertinent.

3.2 Albanian law imposes a duty of loyalty upon directors. Directors are required to execute their duties specified in law and company's by-laws in good faith and in the best interest of the company in its entirety. In performance of their duties, directors are liable to the company for every act or omission which is reasonably connected to the objectives of the company. Prevention and elimination of conflict of interest falls within the scope of this duty.

3.3 Directors found to have acted in breach of these duties and professional standards are liable in damages to the company as a result of their breach and are required to transfer any personal profit which they or others connected to them have accrued from their misconduct. Where the breach was caused by more than one director, they will be held jointly liable.

3.4 The burden of proof falls on directors to demonstrate that they performed their duties properly and in accordance with requisite standards.

3.5 As regards the director's liability to creditors, the conduct set out below is relevant.

3.6 Liability to creditors may arise where the directors are in breach of their duties stipulated by law or company's by-laws.

3.7 In circumstances of insolvency, liability to creditors may arise where directors have allowed the company to continue its commercial activity where they should have foreseen that the company lacked the margin capacity to fulfil its duties.

Controlling Group

3.8 One legal consequence stemming from the recognition of a "controlling group" is that the parent company is required to cover the annual losses of the controlled company.

3.9 Another consequence is that creditors are entitled to request at any time that the parent company provides sufficient guarantee for credit advanced to the controlled company.

3.10 Creditors of a controlled company who have incurred damage as a result of acts of the controlled company will be recognised as such irrespective of creditors' country of incorporation.

Influencing / Equity Group

3.11 The recognition of an influencing/equity group gives rise to a duty of loyalty. Representatives of the parent company are required to take into consideration the interests of the parent company, the interests of the entirety of the company grouping and the interests of the controlled company. Furthermore, parent company representatives are under an obligation to act in the best interest of the controlled company, incorporating into the management of the parent company what are effectively the administrative duties of loyalty of the controlled company.

3.12 Where the parent company representative has breached his duty of loyalty, the parent company in whose name the representative has acted, is liable to compensate any damage so caused.

3.13 In such events, board members of the parent company will be held jointly liable in damages. Administrative board members of the controlled company who breach their duty of loyalty will be held jointly liable, together with board members of the parent company.

4. Who can be held liable?

4.1 Under Albanian law, the shareholders/quotaholders, directors and board members may be liable for abuse of power and form of the company.

4.2 Directors may be liable for breach of their duty of loyalty towards shareholders/quotaholders.

4.3 Liability of the parent company may be triggered in the specific set of circumstances outlined above under Section **3**.

5. Relevant damages

5.1 A claim in damages can be mounted by shareholders/quotaholders of a controlled company controlling at least 5% of the total vote on the general assembly or a smaller value specified by company's by-laws, and by every creditor of the controlled company.

5.2 The law in this area is based on the principle that those who have suffered a loss resulting from a breach of statutory or contractual duties ought to be able to recover damages. In the absence of legislative guidance, the value of damages is left to be assessed and determined by the law courts on a case-by-case basis.

6. Publicity requirements

6.1 Under Albanian law, the Commercial Register sets out the following requirements in relation to limited liability companies:

6.1.1 At the stage of initial registration, the Commercial Register must be notified of: **(i)** value of the initial capital contracted for; **(ii)** number of capital shares; **(iii)** nominal value of each share; **(iv)** capital participation; **(v)** value and type of contribution of each shareholder; and **(vi)** clarification setting out whether or not the initial capital has been paid.

6.1.2 Further to initial registration, the Commercial Register makes compulsory the notification of:

(a) any changes to the details and accompanying documents already registered and filed in the register;

(b) the annual balance sheet and audit report, maintained according to statutory provisions on financial accounting and statements, in events where the maintenance of these documents is obligatory. With regards to branches and offices representing foreign companies, the annual accounting balance of the foreign company ought to be deposited.

(c) the appointment of a liquidator, including his identification details;

(d) termination of business activity, acts of termination, closure or distribution, acts of transformation, merger, separation, commencement of administration, liquidation or restructuring procedures, including other intermediate acts. With regards to branches and offices representing foreign companies, acts of transformation, merger, separation, commencement and termination of liquidation or bankruptcy procedures relating to the foreign company ought to be registered.

6.2 The Commercial Register is administered and maintained by the National Centre of Registration.

7. Corporate control and right to withdraw

7.1 A shareholder/quotaholder may withdraw in situations where:

7.1.1 the company or other shareholders have acted to his detriment;

7.1.2 the shareholder has been impeded from exercising his rights;

7.1.3 the company has imposed unreasonable obligations upon him; or

7.1.4 there exist other reasons which render continuing shareholding impossible.

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

7.3 Directors must call the general assembly as soon as they are made aware of the notification of withdrawal, so as to determine whether or not the share of the shareholders seeking withdrawal will be liquidated, as a result of a withdrawal for reasonable cause.

7.4 The shareholder seeking withdrawal is entitled to commence legal proceedings against the company for the liquidation of his share, which is the result of a withdrawal for reasonable cause, if, on notification of withdrawal, the general assembly fails to convene or does not consider as reasonable the shareholder's cause for withdrawal and liquidation of his shares.

7.5 The shareholder seeking withdrawal from the company may be liable to the company for the liquidation of his share, if it transpires that his withdrawal was based on unreasonable cause.

7.6 The withdrawing shareholder is entitled to commence legal action against the company and/or other shareholders who were the cause of his withdrawal and seek compensation, for which they are jointly liable, for any loss suffered.

8. Corporate control and inter-company loans

8.1 Albanian law does not expressly regulate inter-company loans. However, pursuant to Bankruptcy Law repayment of creditors' debts takes a higher priority on an insolvent winding up than that of inter-company loans from a parent company or sister company to a controlled company.

9. Group liability and bankruptcy

9.1 In the event of bankruptcy of a controlled company, the creditors may have an action against the holding 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?

10.1 No. Any attempt to limit or exclude the holding company's liability for mismanagement of the controlled company will be held invalid.

Austria



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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 and vice versa. The doctrine of 'piercing of 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 doctrine of 'piercing of the corporate veil' 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 **(i)** the company, or **(ii)** 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 In case of an insolvency the affiliate'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.

3.1.2 Shareholders negligently causing damage to their company by exercising a decisive influence (for example by relocating the decision making powers from the managing directors to a holding company) over the company's business 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.

3.1.3 Shareholders may be liable where it is foreseeable for the shareholders that a company is undercapitalised for the contemplated business purposes.

3.1.4 Shareholders may be liable where the corporate form is abused to ring-fence assets from liability in an 'artificial' manner.

3.1.5 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.

3.2 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 Austrian 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 **(iii)** whether such shareholder 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

Depending on the legal basis of a claim arising against a shareholder of a company and whether the company or any of the company's creditors bring(s) the claim, either the company's or the company's creditors' damages are relevant. The creditors' damages are 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 such company is controlled by another company except under 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 provides for 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 by the company's liquidator (acting for the company) as if they were managing directors (i.e. de facto managing directors).

9.2 The company's creditors will only have a direct claim against the shareholders in cases where the company is not adjudged bankrupt due to lack of assets. In such cases, the creditors have the burden of proof in respect of **(i)** their damage, **(ii)** the exercising of a decisive influence, **(iii)** causation, and **(iv)** shareholders' negligence under general principles.

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



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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 are either contrary to the controlled or managed company's corporate interests, or constitute a violation of the law (including torts 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 the shareholding, but to the fact that (in practice) one company, or its representatives, in 'controlling' or 'managing' another company, commits certain management faults. In some circumstances, the liability may also be extended to third parties (individuals and companies) who, although not 'controlling' or 'managing' the relevant company (or even being 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?

The liability of a holding company may arise for damages vis-à-vis:

(a) group companies;
(b) minority shareholders; and
(c) 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 being liable for the debts of its subsidiary if that parent company, as a *de facto* director of the business of the subsidiary, made a clear and severe fault which contributed to the insolvency of the subsidiary. 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, or other management faults or violations of the provisions of the Belgian Companies Code (including in relation to conflicts of interest) and the subsidiary's by-laws, may likewise lead to the liability of the directors (including the *de facto* directors) of the subsidiary; both vis-à-vis the subsidiary itself (or the trustee of its bankruptcy) and vis-à-vis third parties. In certain circumstances, such fault can also lead to an act being declared void, if the beneficiary thereof (regardless of whether such beneficiary was itself the *de facto* decision maker) was (or should have been) aware of the irregularity of the act.

Single shareholder

3.4 There is one instance of 'piercing the corporate veil' which is explicitly contemplated by Belgian law: it occurs when a company having a corporate form which requires two shareholders has only one, and this situation is not regularised within one year. In such circumstances, the sole shareholder is deemed to be liable for its subsidiary's debts.

4. Who can be held liable?

The liability in question may affect:

(a) the controlling shareholder;

(b) any director (or *de facto* director) of the subsidiary; and

(c) 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, as the case may be) shareholders of the subsidiary for:

(a) loss of value of the participation; and

(b) loss of profitability of the participation.

5.2 For the creditors of the subsidiary, liability will include any loss of value of the debtor company's assets.

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 (e.g. groups which have less than EUR 29 million 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 effected by the shareholder petitioning the court for a forced transfer of their shares to the shareholder to whom this 'just cause' pertains. On the same basis, any shareholder can also request the court-ordered dissolution of the company.

7.2 Likewise, a shareholder owning at least 30% of the shares in a company, can request the court, for the same 'just cause', to force the other shareholder (even if he 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 – (e.g. 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 the receivers and the disadvantaged creditors can bring an action 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, for certain specific violations of the Companies Code (e.g. late filing of accounts or lack of convening of a general meeting in case of substantial losses) the damage of third parties is presumed to result from such violation, 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 vis-à-vis third parties.

Bulgaria



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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?

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

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

(b) the creditors of the managed company.

3. Relevant behaviour

Shareholders/quota-holders

3.1 In the case of liability to shareholders/quota-holders (including shareholders in a listed company), the conduct set out below is relevant.

3.2 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 that the duty of care that shall be applied by individuals in their own business dealings. This means that even lighter omissions or errors might be considered as negligent misperformance by the board member/manager.

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

3.4 A board member/manager will not be liable if it proves that it, he or she acted with due care. In practice, this is a difficult threshold to meet. The courts always decide specifically in the context of the particular circumstances, whether the duty of care was complied or not.

3.5 Board members/managers have specific statutory duties 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 restructure.

3.6 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

3.7 In the case of liability to creditors, the following conduct is relevant.

3.8 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.

3.9 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.

3.10 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's or group company's breach may be required to return benefits arising from the breach to the claimant. 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 in respect of liability to the shareholders/quota-holders of the relevant affiliate or group company are calculated by reference to:

5.1.1 the loss of value of the participation; and

5.1.2 the loss of profit from the participation.

5.2 Damages in respect of liability to the creditors of the relevant affiliate or group company are calculated by reference to 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 if a joint-stock company is or becomes solely-owned.

6.2 In accordance with the Bulgarian Accountancy Act, limited liability companies shall be obliged to publish their annual financial statements with the Commercial Register by 30 June of the next financial year. As for all other types of legal entities, including joint-stock companies, 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%, and any multiple of 5%, of the voting rights in a general meeting of shareholders. The notification shall made within four working days as of **(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 Financial Supervision Commission shall be notified about 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 of taking of the relevant decision, 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 as of 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 three months prior notice to the company.

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

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 has 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 The holding company will only be repaid an inter-company loan granted to the controlled entity after all other debts to the bankrupt controlled entity's 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 the 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.

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 null and void. For example, in relation to the creditors of the bankrupt entity:

8.3.1 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

8.3.2 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 it holds a majority stake of quotas/shares. Furthermore, in respect of a joint-stock company the law grants certain rights: 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 of proof in evidencing board members'/managers' breach of statutory duties and of the damage suffered in consequence 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 to meet the duty of care required by the board members/managers to the company and the shareholders is high – that of a professional.

10.4 A preferable option may be to appoint a natural person to the board/management body rather than the holding company or other group company.

Czech Republic



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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 not liable for acts committed by the company.

1.3 Shareholders of the limited liability company are jointly and severally liable for their company's obligations but only up to the aggregate of the unpaid portions of their investment contributions according to the entry in the Commercial Register. On entry of full payment of all investment contributions in the Commercial Register, the shareholders' liability for the company's obligations expires.

1.4 Affiliated companies and companies within the holding group structure may be liable, under certain circumstances, for acts committed by their affiliates:

1.4.1 pursuant to a Controlling Agreement concluded between controlling company and controlled company; or

1.4.2 if there is a control situation by virtue of exercising shareholders' rights.

1.5 There are no publicly available court decisions in the Czech Republic in this respect, but it is the general perception in the Czech Republic that the risks for shareholders of limited liability companies to be held liable for the liabilities of their subsidiaries is relatively low.

Controlling Agreement

1.6 Under the Controlling Agreement, a controlled company undertakes to be subject to uniform control by a controlling company. The Controlling Agreement must be approved by three quarters of votes at a general meeting of the controlled company. The statutory bodies of the companies must prepare a written report for the shareholders explaining the reasons for entering into the Controlling Agreement, unless all shareholders waive this right. The draft controlling agreement shall be reviewed on behalf of each of the contractual parties by an expert appointed by the court, or jointly by two experts appointed by the court for all the participating contractual parties unless all shareholders waive this right.

1.7 The controlling company is entitled to give instructions to the statutory body of the controlled company, including instructions that may be disadvantageous for the controlled company if such instructions are in the interests of the controlling company or the company in the same holding group.

1.8 Any individual giving instructions on behalf of the controlling company is obliged to observe a duty of care. If he or she breaches this duty, he or she would be obliged, jointly and severally, to provide compensation for damages caused thereby to the controlled company. If it is disputed whether or not such person acted with an appropriate duty of care, he or she would bear the burden of proof.

1.9 The controlling company is liable for **(i)** discharging the obligations of the controlled company (unless they may be discharged from the reserve fund or other disposable sources of the controlled company) and **(ii)** providing compensation for damages. The right to compensation for damages may be exercised on behalf of the controlled company by each of its shareholders.

1.10 If a creditor of the controlled company incurs damage as a result of a breach of the duty of care, all persons breaching the obligation are liable, jointly and severally, for the damage caused to the creditor if the creditor's claim cannot be satisfied from the assets of the controlled company.

1.11 The liability for the damage caused can also be borne by the persons who comprise the statutory body of the controlled company or its members if there was a breach of their duty of care. However, these persons are not liable for damage if they acted in accordance with the instructions given by the controlling company.

1.12 The Controlling Agreement becomes effective not prior to the publication of the filing of the Controlling Agreement in the collection of documents maintained by the relevant Commercial Registry. It can be terminated only after the end of each accounting period. The approval of the general meeting is also required for the termination of the Controlling Agreement.

1.13 If the Controlling Agreement becomes effective or terminates on a date which is not balance sheet date, interim financial statements must be prepared.

Liability when no Controlling Agreement has been concluded

1.14 Generally speaking, if no Controlling Agreement has been concluded, a controlling company may not exert its influence to force the controlled company to take any action (measure) or conclude any agreement which may cause any detriment to the property of the controlled company. The exception to this is if the controlling company settles such detriment by no later than at the end of the accounting period when the detriment occurred (or unless within the same time-limit specified in an agreement which is concluded specifically to give the appropriate period during which the controlling company is to settle such detriment and in what way).

1.15 If the controlling company requires a controlled company to adopt a specific measure, take specific action or to conclude a specific agreement from which a detriment arises to the controlled company and without the obligation mentioned in the previous paragraph being fulfilled, the controlling company must compensate the damage (detriment) that arose therefrom. In addition to that, the controlling company must compensate any damage suffered therefrom by shareholders (members) of such controlled company, and it shall do so separately from the obligation to compensate detriment (harm) to the controlled company.

1.16 The obligation to provide such compensation does not arise if the agreement had been concluded by, or such measure adopted or such action taken by, a person who is not a controlled company provided that this person would have otherwise fulfilled his or her duties with all due managerial care (duty of care test).

1.17 Members of the controlling company's statutory body shall be jointly and severally liable for discharging the obligation to settle such damage. The members of the controlled company's statutory body are also liable for discharging the controlled company's obligation to settle such damage if they did not include in the report on relations with related parties details of the contract or measure from which the detriment arose, and such detriment was not settled by the controlling company (and no special agreement on its settlement was concluded). This shall not apply if such persons acted on the basis of a resolution duly adopted by the general meeting of the controlled company.

2. What kind of liability may arise?

2.1 There are two types of liability which may arise:
- **2.1.1** civil law liability; and
- **2.1.2** criminal law liability.

Civil law liability

2.2 The civil law liability is mainly the liability for damages. Damages are defined under Czech law as actual damage and loss of profit. The plaintiff must prove the consequential link between act and damage, and in standard cases, the burden of proof rests with the plaintiff. However, if there is an argument that the act was unlawful because of a breach of the duty of care by the statutory body of a company (or member of such statutory body), the burden of proof of acting with due care would be with the defendant, i.e. the manager would have to prove that s/he acted with due care.

2.3 If a Controlling Agreement is in place, the controlling company has the liability to discharge all obligations of the controlled entity (and to compensate losses of the controlled company) regardless of whether any damage was caused.

2.4 Shareholders of the controlled company may independently make a claim against the controlling company. The shareholders have the right to raise such claim regardless of whether it has been raised by the controlled company against the controlling company.

Criminal law liability

2.5 In certain cases criminal liability may arise, most commonly the crime of 'breach of duties in administration of assets of another entity'.

2.6 While the criminal court has the ability to impose an obligation to compensate for damages (noting that in such case, the civil law concept of damages is applicable) on a guilty person(s), more often the result is that the criminal court will instruct the damaged (affected) party to sue the manager in civil proceedings instead.

3. Relevant behaviour

Acting without due care

3.1 Persons giving instructions on behalf of the controlling company to the statutory body of the controlled company are obliged to act with due care. If they breach this obligation, they are obliged, jointly and severally, to provide compensation for damage caused to the controlled company. If it is disputed whether or not these people acted with due care, they would bear the burden of proof themselves.

Acting with due care

3.2 It is possible that a person giving instructions on behalf of the controlling company acts with due care, but that such act still causes harm to the controlled company. In such case, liability would turn on whether a Controlling Agreement has been entered into. If it has, the controlling company would be responsible for any and all losses of the controlled company. If a Controlling Agreement has not been entered into, the controlling company shall compensate any damages thus incurred. In addition, the controlling company shall compensate any damage incurred by shareholders or members of such controlled company, notwithstanding the obligation to provide compensation for damage to the controlled company.

4. Who can be held liable?

The liability in question may attach to:

(a) the controlling company;

(b) members of the statutory body of the controlling company; and

(c) members of the statutory body of the controlled company (if they did not act with due care, but noting that they shall not be liable for such damage if they acted according to instructions given by the controlling (managing) company).

5. Relevant damages

The definition of damages includes only the actual loss *(damnum emergens)* and lost profits *(lucrum cessans).*

6. Publicity requirements

6.1 According to Czech law, the controlling and controlled entities are required:

6.1.1 to publish the invitation to the general meeting which has on its agenda the approval (amendment) of the Controlling Agreement;

6.1.2 to file the Controlling Agreement in the collection of documents maintained by the relevant Commercial Registry (noting that the publication of such filing is done by the court);

6.1.3 if there is no Controlling Agreement, to prepare and file in the collection of documents maintained by relevant Commercial Registry, a report on relationships between related parties. Note that this duty applies only to controlled companies (i.e. not to controlling companies).

6.2 Such report must be prepared by the statutory body of the controlled company within three months after the end of each accounting period, reviewed by the supervisory board (if a supervisory board exists) and approved by the shareholders at a general meeting within six months after the end of each accounting period. It must form part of the annual report and be audited if an annual report is prepared and audited. The filing must be finished within one month after the general meeting.

7. Corporate control and right to withdraw

The Controlling Agreement must provide the other shareholders with the right to withdraw from the company for reasonable compensation. However, this right is only exercisable during a limited period of time which cannot be less than three months after the date on which the Controlling Agreement becomes effective. If the compensation provisions in the Controlling Agreement are held to be invalid, this would not necessarily result in the whole Controlling Agreement being invalid. In these circumstances, the shareholders would be entitled to seek such compensation through court proceedings.

8. Corporate control and inter-company loans

8.1 The general rules regarding the relationship between controlling and controlled companies apply also to the provision of 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 Czech Commercial Code. This means that, in addition to transfer pricing rules, the provision of such a loan (with respect to payment of interest and other fees) could be subject to an evaluation by a certified expert appointed by the court and approval by the general meeting.

9. Group liability and insolvency

9.1 In the event that a company becomes a party to the insolvency proceedings, only an insolvency administrator may on behalf of the company bring an action for compensation for damages or losses.

9.2 The burden of proof rests with the defendant (being a member of a statutory body of the company) in the case of a breach of the duty of care. Otherwise, the burden of proof is on the plaintiff.

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

10.1 It is possible to contractually (i.e. settlement agreement) waive or limit the right to compensation of damage even before breach of the obligation from which damage may arise. However, the right to compensation of damage caused intentionally may not be waived or limited.

England and Wales



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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 – even if it is a wholly-owned subsidiary – generally the holding company's liability is limited to paying any amount not paid up on its shares in the subsidiary, and there is no right of redress against the holding company for liabilities incurred by the subsidiary unless the holding company has assumed liability under contractual arrangements, such as guarantees or indemnities.

1.2 In certain exceptional situations, however, creditors and minority shareholders can have recourse to 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:

(a) Piercing the corporate veil. Where a subsidiary is merely a device or façade – a puppet, in effect – being wrongfully used to conceal the truth, so that the holding company can avoid or conceal its liability, the court can grant a judicial remedy against the puppeteer as well as the puppet company. The puppeteer could, for example, be liable in the tort of deceit; the relevant transactions might be unwound; or it might be ordered that property held by the puppet is to be available to the puppeteer's creditors. Piercing the corporate veil does not mean, however, that the court would treat a contract entered into by the puppet as if it had in fact been entered into by the puppeteer.

(b) 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.

(c) A holding company might also be a shadow director or a de facto director: see paragraph **3** below.

(d) 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).

(e) 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).

(f) 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.

(g) 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, and therefore to be in the same position as a normal director, if 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). This is less likely to happen than is the case with individuals.

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 does not usually have the same general duties that a director has, but may be liable to contribute to the subsidiary's assets if the subsidiary goes into insolvent liquidation. Individual directors, or even employees, of the holding company may be deemed to be 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 **(1)** the businesses of the holding company and subsidiary are in a relevant respect the same; **(2)** the holding company has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; **(3)** the subsidiary's system of work is unsafe, as the holding company knows or ought to know; and **(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).

3.4 Other types of behaviour are described above – for example, in relation to piercing the corporate veil, 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

5.1 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.

5.2 Damages recoverable through other types of action (for example, on the basis of 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 equitable compensation or an account of profits; 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.

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 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, upon insolvency of their company which leads to a winding up, commit an offence where:

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

9.2 Upon the winding up of a company, the company's creditors and shareholders enjoy certain rights of recovery. Directors may become liable to contribute to the assets of the company for the purposes of a winding up in a number of situations. Directors of a company may be ordered by a court to make such a contribution where:

(a) they have transferred company assets for inadequate consideration (transaction at an undervalue);

(b) they have given preferential treatment to a certain creditor in the repayment of company debts (unlawful preference);

(c) they have continued trading although they knew or ought to have known that insolvent liquidation was unavoidable (wrongful trading);

(d) they have anticipated the insolvent liquidation but have continued trading with the intention to defraud creditors of the company (fraudulent trading); or

(e) they have misapplied or retained company assets or breached a fiduciary or other duty in the course of the winding up (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.

9.6 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 English 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 English group company), where judgment is given against the holding company, or to fines or regulatory penalties. The same English law restrictions would not apply, however, to an indemnity granted by a foreign group company.

France



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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. French law does not recognise the legal separate personality of the group as a matter of principle. Having said that, the current legislation does have some relevance to groups.

2. What kind of liability may arise?

2.1 The liability of a holding company cannot arise from 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 certain 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, on the basis of 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 is fictional (i.e. it 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, the holding company which in fact takes on the management of one of its subsidiaries behind the authority of, or for and on behalf of, its duly authorized officers, runs the risk, on the one hand, of being ordered to bear in whole or in part the debts of the subsidiaries in the case of a compulsory winding-up and, on the other hand, to be held liable in the event of breach of the company law provisions.

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

2.4 More recently, the Law no. 2010-788 of 12 July 2010 of national commitment to the environment amends the Code for the environment and, more particularly, the provisions about the 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, a parent company may assume the obligation, even in the absence of any misconduct, to perform in the case of a failure to perform on the part of its subsidiary, all or part of the funding obligations of prevention and repair which are incumbent on the subsidiary.

3. Relevant behaviour

3.1 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, 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 a 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 one 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, no. 84-91.581, "Rozenblum").

4. Who can be held liable?

With regard to third parties, civil liability of directors cannot be incurred unless the relevant behaviour constitutes a personal ("separable") breach of their duties as against the third party. A director can be held liable if he intentionally commits an act of serious misfeasance. 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. Nevertheless this rule is valid only in a matter of civil liability.

5. Relevant damages

5.1 Every shareholder may bring an action for damages suffered personally through the act of a director of the company. This individual action is 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 been voluntarily bankrupted. In the same way, a deliberate reduction of the activity of a company 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. All the same, with some exceptions relating to small groups, parent companies of all types must, independently from their annual accounts, draw up and publish consolidated accounts. As a matter of principle, 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, a group annual report established by the directors of the controlling company is required and it must state the overall financial situation of the companies included in the consolidation and their activity over the past financial year.

7. Corporate control and a 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 the 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 avoid 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 With regard to the holding company, the introduction of insolvency procedures against one of its subsidiaries has, in principle, no effect. Nevertheless, proceedings can be made against the parent 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 as a de facto director of this company. A holding company can be held liable by the receiver on the grounds of mismanagement in respect of the subsidiary company. The receiver bears the onus of proof in relation to 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?

It does not seem possible, under current French law, to limit or preclude contractually the holding company's liability for mismanagement as against controlled companies.

Germany



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

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

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

2. What kind of liability may arise?

A liability may arise vis-à-vis the other group company which is a party to the profit and loss or domination agreement or which is a target of the disadvantageous instruction or which is the subject of a violation of the capital protection rules or the intervention jeopardising existence.

3. Relevant behaviour

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

(a) acts or decisions taken in a conflict of interest situation (including conflicts between different companies of the group, i.e. actions taken which are not in the best interests of the subsidiary but rather are in the interests of the controlling entity or a sister company) resulting in damages of the controlled company;
(b) losses suffered during the term of a profit and loss transfer agreement or domination agreement;
(c) 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
(d) acts contravening the prohibition on intervention jeopardising existence *(Verbot existenzvernichtender Eingriff)*.

4. Who can be held liable?

4.1 The following 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 (e.g. 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

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

(a) damages caused as a result of an intervention jeopardising existence or a disadvantageous instruction;

(b) payments received as a result of a violation of the capital protection rules; and

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

6. Publicity requirements

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.

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 to be subordinated to the claims of all other creditors of the insolvent subsidiary. Any payments made by the subsidiary to the holding company under the inter-company loan during the 12 months before the insolvency proceedings commenced 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; and

9.1.3 payments made in violation of the capital protection rules that have not been repaid.

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 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

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

1.1 As a principle under Hungarian law, a parent company is not liable towards third parties for the debts and obligations of its subsidiary that is an operating limited liability company. Furthermore, the liability of a parent company for the obligations of its subsidiary being a limited liability company which has been terminated is limited to that share of the assets distributed upon the termination of the subsidiary, which is due to the parent company.

1.2 There are some exceptions, however, when, under special situations such limited liability is lifted, thus imposing unlimited liability on the parent company (i.e. piercing the corporate veil). The piercing of the corporate veil with regards to groups of companies may only occur in exceptional cases as an exceptional sanction. These special cases in which the corporate veil is deemed to be pierced are assessed against a number of general criteria and there are no specific requirements/ procedures set out in Hungarian law which, if complied with by a parent company, would prevent the piercing of the corporate veil, if the necessary general criteria are otherwise satisfied. Additionally, Hungarian corporate law also recognises the concept of the so-called 'registered group of companies' and 'de-facto group of companies'. This is a relatively new concept in Hungarian corporate law; therefore it has not yet been tested by Hungarian courts.

2. What kind of liability may arise?

In general, the liability of members of limited liability-type companies is limited to their capital contribution. In relation to companies controlling other companies, however, there are some exemptions from this general rule. Controlling companies may be held liable for damages caused by them (or their controlled companies) to the following persons:

(a) creditors of the controlled company; and
(b) the controlled company itself.

3. Relevant behaviour

3.1 In the event of the termination of a company without a legal successor, any member who has abused its limited liability or the company's legal personality to the detriment of creditors may not rely on its limited liability and bears unlimited, joint and several liability for the unsatisfied obligations of the defunct company. The liability of such members applies in particular if:

3.1.1 the member disposed of the assets of the company as if they had been its own; or

3.1.2 it reduced the assets of the company for the benefit of others or for its own benefit such that it knew or should have known with due care that the company would not be able to satisfy its obligations towards third parties as a result thereof; or

3.1.3 the member provided a contribution in kind to the company at a higher value than the actual value of the in kind contribution at the time of its provision.

3.2 In the course of a liquidation process, controlling companies having a qualifying majority control over a controlled company (at least 75% of the votes directly or indirectly), which applied a permanently disadvantageous business policy from the point of view of the creditors (of the controlled company) shall be potentially liable to the extent of their entire assets upon the dissolution of the controlled company under liquidation to cover the liabilities of the company under liquidation.

3.3 It is to be highlighted that the relevant Hungarian laws also cover the potential liability of the members that were the registered members at the time of the termination of the company. In addition, there is a special regulation which establishes unlimited liability for former members 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 member with majority control who had transferred his shareholding 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 provide evidence that the company was solvent at the time he transferred his shareholding and the losses occurred subsequently, or that although the company was insolvent but he as a member had acted in good faith and taken the interest of the creditors in account when transferring his shareholding.

3.4 In the course of a liquidation process the court can conclude, at the request of a creditor or a liquidator, that a manager of the company (a member of the company may also qualify a manager for the purpose of this rule if it exercised actual influence on the decision of the company) under liquidation during a period of three years prior to the commencement of such liquidation process failed to perform its management tasks for the benefit of the creditors (of the controlled company) after the occurrence of a situation threatening the company with insolvency (i.e. the date from which it had foreseen or with due care should have foreseen that the company would not be able to discharge its obligations when they fell due). In such circumstances, the court may order that the damages caused must be reimbursed to the company under liquidation (or to its creditors).

4. Who can be held liable?

The following entities may potentially be held liable:

(a) the controlling company (including in some cases former controlling companies);

(b) the executive officers of the controlling company;

(c) the members or the shareholders of the controlling company;

(d) the executive officer of the controlled company;

(e) the supervisory board of a controlled company, if vested with certain decision making powers; and

(f) in some circumstances, any person who actually influenced the decisions of a controlled company under liquidation.

5. Relevant damages

5.1 Under Hungarian law, the definition of damages includes:

5.1.1 the actual loss *(damnum emergens);*

5.1.2 lost profits *(lucrum cessans);* and

5.1.3 any other potential expenses incurred in relation to the mitigation and restoration of damages.

5.2 Damages which are proven to have been caused as a result of the actions set out in paragraph **3** above to the persons listed in paragraph **2** above shall be reimbursed.

6. Publicity requirements

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

(a) controlling companies must notify the competent Court of Registration on the acquisition of at least 75% of the votes of the controlled company within 15 days after the date of actual acquisition; and

(b) a dominant member of an accredited group of companies is obliged to publish a notification (containing the names, registered seats, company registration numbers of the relevant companies, the draft of the power contract etc.) in two consecutive volumes of the Company Gazette within eight days following the relevant decision of the companies participating in the establishment of the accredited group. Furthermore, the dominant member is obliged to send the power contract to the competent court of registration in order to publish it in the Company Gazette within 15 days after the approval thereof.

7. Corporate control and right to withdraw

7.1 In the case of acquiring a qualifying shareholding (i.e. at least 75% of the votes) in a company, any other shareholder of the controlled company may wish that the controlling company buys its shareholding within a 60 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 10% of the registered capital) representing a put option for the benefit of the holder of such share, upon the exercising of such put option, the holder of such share may withdraw from the company.

8. Corporate control and inter-company loans

8.1 For the conclusion of an inter-company loan agreement between a Hungarian limited liability company and its member(s), the approval of the members' meeting must be obtained. The member with whom such inter-company loan agreement shall be concluded cannot exercise its voting right in relation to this resolution.

8.2 The transfer pricing regulations of Hungary (which requires that the terms and conditions of a contract between related parties must be on arms' length basis) should also be complied with in relation to the conclusion of the underlying contract and the repayment of such loan.

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 under liquidation, the court may terminate/rescind commitments or contracts of the company under liquidation concluded with the controlling/controlled company or with the executive officer of the company under liquidation:

8.4.1 within a period of five years preceding the date of the receipt by the court of the request to initiate liquidation or after the initiation of liquidation, 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 within a period of two years preceding the date of the receipt by the court of the request to initiate liquidation or after the initiation of liquidation, 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 within a period of 90 days preceding the date of the receipt by the court of the request to initiate liquidation or 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.

8.5 Under Hungarian law the burden of proof is generally on the plaintiff. In relation to paragraphs **8.4.1** and **8.4.2** above, however, the burden of proof is reversed (i.e. the defendant must prove that the plaintiff's claim is not true).

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 establishes the following against the company controlling the company under liquidation:

9.1.1 that the company controlling the company under liquidation during a period of three years prior to the commencement of the liquidation, failed to perform its management tasks for the benefit of the creditors (of the company in liquidation) after the occurrence of a situation threatening the company under liquidation with insolvency (i.e. the date from which it had foreseen or with due care it should have foreseen that the company shall not be able to discharge its obligations when they fell due) and therefore the assets of the company under liquidation have decreased in value;

9.1.2 that the company controlling the company under liquidation has abused its limited liability or the company's legal personality to the detriment of creditors (of the company in liquidation), and therefore may not rely on its limited liability and bears unlimited, joint and several liability for the unsatisfied obligations of the company under liquidation;

9.1.3 that the company controlling the company under liquidation made a decision of which it knew or, according to the generally expectable level of due care, should have known, would obviously infringe the material interests of the company under liquidation and that the controlling company is therefore jointly and severally liable towards the company under liquidation for any damage this causes. In relation to power contracts, however, the controlling company is exempted from the above liability if the controlling company has been acting in accordance with the provisions of the power contract;

9.1.4 that commitments/contracts described in paragraphs **8.4.1 – 8.4.3** above are void or should be modified;

9.1.5 that the company having a qualifying majority control is fully and unlimitedly liable as set out in paragraph **3.2** above.

9.2 Under Hungarian law the burden of proof is generally on the plaintiff. In relation to paragraph **9.1.1** above, however, the burden of proof is be reversed, as the controlling company is exempted from the above liability, if it proves that it has made all reasonable efforts to decrease the amount of loss of the creditors.

9.3 Under Hungarian law, the new holder of a controlled company is not vested with special rights in relation to bringing any action against the former member. However, action can be brought against the former member by the new member 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?

10.1 This is only possible within a contractual relationship between the controlling and controlled company which provides for compensation payable from one party to the other.

10.2 As a general rule under Hungarian law, members of a company who made a decision of which they knew, or according to the generally presumed level of due care should have known, would obviously infringe the material interests of the company, shall be jointly and severally liable towards the company for any damage caused. In relation to power contracts, the controlling company shall be exempted from the above liability if it is acting in accordance with the power contract.

10.3 In relation to further claims against a controlling company, please see paragraph **9** above.

Italy



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

According to Italian law, a liability may arise when one company is in the situation of 'management and coordination' of another company. The following are examples of entities which may have this 'management and coordination':

(a) so-called 'controlling' companies (as defined under the Italian Civil Code);
(b) companies that are obliged by law to prepare consolidated financial statements;
(c) companies performing 'management and coordination activities' pursuant to an agreement; and
(d) companies performing management and coordination in accordance with statutory provisions.

2. What kind of liability may arise?

If a situation of 'management and coordination' of one company by another arises (which would be a normal situation within a group of companies), then the company which exercises such role may be held liable for damages by:

(a) group companies;
(b) minority shareholders; or
(c) creditors.

3. Relevant behaviour

3.1 The liability of a holding company (or of a company in the situation of 'management and coordination' of another company) may arise when there are acts or decisions taken in a conflict of interest situation. Liability may arise as between different companies of a group if actions are taken that are not in the best interest of the subsidiary but have instead been taken to satisfy an interest of the controlling entity or of a sister company.

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

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, such liability may also be extended to those who took advantage of or benefited from the damaging action (including therefore other companies of the group). Such liability cannot exceed the advantage/benefit.

5. Relevant damages

5.1 For the shareholders of the subsidiary which is subjected to the 'management or control' of another entity, damages may be in the form of loss of value of, or loss of profitability of, the subsidiary due to such management and control of the subsidiary.

5.2 For the creditors of the subsidiary which is subjected to the 'management or control' of another entity, 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 a holding or controlling company have an obligation to:

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

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

7. Corporate control and right of withdraw

The minority quota-holders or shareholders of a company that is subject to the 'management and coordination' of another company are entitled to withdraw as quota-holders or shareholders if:

(a) there is a transformation of the company implying a change in the nature and purpose of the same (e.g. from SPA/SRL to cooperative company);

(b) there is a modification to the company objectives having a material and direct impact on the economic conditions of the company and/or its value;

(c) the controlling entity is found liable by a court for its activity of direction and coordination; or

(d) 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:

(a) a deferred repayment of its loan in order to settle the debts owed to other creditors;

(b) an obligation to return to the controlled entity or entities the sums repaid to the holding company in the year preceding the bankruptcy of the controlled entity or entities; or

(c) 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. A new owner of the subsidiary in principle cannot bring the same action, except if he was already previously entitled to bring such action because of his position of minority shareholder or creditor of the subsidiary, and if he suffered damage as a result of that.

9.2 The bankruptcy receiver or the new owner have the burden of proof, both of the mismanagement of the controlled entity and of 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 or 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.

The Netherlands



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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. However, 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 vis-à-vis 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 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 Moreover, a change of the rules on Dutch private limited liability companies which entered into force on 1 October 2012 entails, *inter alia*, that a parent company receiving distributions from a subsidiary will be obliged to repay those if the distributions are found illegitimate based on the subsidiary's financial position and 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. As a general rule, 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 and full address). This information is publicly available and can be obtained at a nominal fee. The obligation is typically avoided by transferring one or more shares in the capital of the company to another party.

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 liability for the legal acts undertaken by such subsidiaries during the lifetime of the statement (the so-called 403 statement). The statement is available for public inspection and third parties may rely on it.

7. Corporate control and right to withdraw

Not as such. 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?

10.1 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.

10.2 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



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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 a broad legal powers over the subsidiary company(ies), including, on the one hand, powers of direction over the management of the subsidiary company(ies) and, on the other hand, protection of the subsidiary company, its outside shareholders and creditor, as detailed hereunder;
- **1.2.2** total domination, that assumes total share capital ownership either verified initially, upon the incorporation of the affiliate, or subsequently, even though the domination relation persists while the holding company holds at least 90% of the affiliate's share capital.

1.3 As a general rule, 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 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: being 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 as from presentation of a written demand for payment.

2.2 Holding companies in a group relation may also be liable towards the subsidiary company(ies) 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 company(ies) and its 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, unlimited, meaning that it is irrespective of timing, legal nature or origin.

3.2 Notwithstanding the above, and despite being accepted 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 company(ies) arising from acts decided independently – or even against – the management decisions resolved by the holding company.

3.3 It should also be referred that disadvantageous instructions may be issued to a specific subsidiary company(ies) by the holding company, 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 is dependent upon: **(i)** the directors of the controlled company(ies) being liable before such controlled company(ies) or its shareholders; **(ii)** and the election of the directors being qualified as a violation by the controlling company of the duty of care in such election; or **(iii)** the liability of the directors of the controlled company(ies) 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 may be liable for the relevant conduct:
- **4.1.1** the subsidiary company, the holding company; and
- **4.1.2** 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 may be liable for the relevant conduct:
- **4.2.1** the controlled company, the controlling company; and
- **4.2.2** 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(ies) debts;
- **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.

5.2 The controlling company may be liable for the damages arising from the conduct of directors of the controlled company(ies).

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 subordinated company(ies), before being registered with the Commercial Registry Office.

6.2 Amendments to the company's share structure, including the total domination of a company are also subject to registry 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 a right to withdraw

7.1 There is no right of withdrawal granted to minority shareholders in general. Notwithstanding, a holding company 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 payment of a consideration in cash or other values as agreed between the parties or decided by a court decision.

7.2 Also, in the event of total domination, 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 it has the right (or, in certain circumstances, the duty) to purchase the remaining shares, against a settlement in cash or other values.

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 past 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 any portion of its credit 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 are subject to voidance and claw back by the administrator in the two years prior to the filing for insolvency. Maliciousness is assumed if the counterpart of the acts is a person or company specially related to the insolvent. 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.

Spain



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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 people that compose 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 separated 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 that 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. But 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 Pursuant to Article **31.1** of the Spanish Criminal Code, 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 benefit thereof. Accordingly, should the board of a subsidiary be led by another legal entity belonging to the company group, said entity would be criminally responsible for any offence committed in said subsidiary by the administrator. In Spanish law, this is dubbed *"responsabilidad penal en cascada"* – vicarious criminal liability.

1.6 Indeed, Spanish case law – in particular employment case law, where the tribunals 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 application of the 'lifting of the corporate veil' doctrine 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 pertaining to the same group.

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.

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 social object);

3.2.3 a decrease in the value of members' stakes in the company due to decisions taken to the 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 the decisions taken which affect the subsidiaries of a holding group or a group of companies may attach to:

(a) the subsidiary, the holding company or the controlling entity; and

(b) 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 taken by the controlling company of a group of companies.

5.2 In these circumstances, for the shareholders of the subsidiary, damages may arise from:

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 have in general terms, the following obligations:

- **(a)** 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;
- **(b)** in the event there is any foreign investor in the holding or controlling company, such entity must declare the Spanish investment before the General Directorate on Trade and Investment *('Dirección General de Comercio e Inversiones')* describing the economic relationship between the companies belonging to the group;
- **(c)** a company which, by itself or through a subsidiary company, comes to possess more than ten percent of the capital of another listed company should notify that company of this 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;
- **(d)** in the event that the domination of a listed company is exercised by two or more companies or people that act in concert in respect of voting rights (or by virtue of restrictions placed on the transfer of shares), that 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
- **(e)** finally, in the event that the shares of the company are owned by a sole shareholder, such sole shareholder is required to:
  - **(i)** declare such 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 that is subject to the management and coordination of another company are only entitled to withdraw as a quota-holder or shareholder in the following cases:

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

- **(a)** modification of the corporate purpose;
- **(b)** transfer of the corporate address abroad; or
- **(c)** takeover bid where the offeror has acquired more than the 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:

- **(a)** modification of the corporate purpose;
- **(b)** transfer of the corporate address abroad;
- **(c)** modification of the transfer of shares regime;
- **(d)** deferral or reactivation of the company;
- **(e)** 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
- **(f)** 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 in the law.

8. Corporate control and inter-company loans

8.1 The most important rule that affects intra-group loans is established in bankruptcy legislation. Beyond the scope of bankruptcy there is no legislation in this respect. The bankruptcy rules provide that any type of credit that has been granted among individuals who have a 'special relationship' with the debtor qualify as 'subordinate credit'. Those with such a 'special relationship' are those individuals who have been appointed as directors of the company in the two year period prior to the company entering into bankruptcy, the liquidators of the company or those individuals who have received wide 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 subordinate credit may only occur after all privileged and ordinary credits have been fulfilled.

8.2 Also 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 have an action against the holding company for the unpaid debts of the subsidiary.

9.2 The bankruptcy receiver or the new owner have the burden of proof both of the mismanagement of the controlled entity and of 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



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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, neither its shareholders nor its directors and officers are personally liable therefore.

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

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 to 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. Relevantly, 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 make reference 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 taken 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 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?

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

(a) the controlling entity;

(b) the group entity which benefits from a transaction which is not at arms' length; and

(c) 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. The group relationship may, however, 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.

7. Corporate control and right to withdraw

7.1 There is no specific right of withdrawal of minority shareholders or quota-holders of a group entity.

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

A holding company financing its controlled companies may be subject to **(i)** a deferred reimbursement of its loan as against 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.

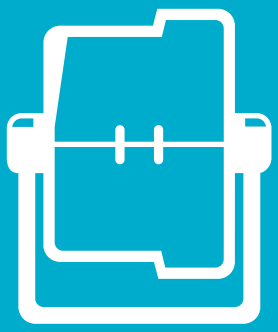
9. Group liability and bankruptcy

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 of proof in establishing 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.



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