Limited liability and the principle of separate corporate personality is a fundamental principle of company law in England & Wales and has been with us since the end of the 19th century.

This fundamental principle drives the structuring of transactions and affords directors of companies the freedom to act as company office-holders within the “protection” of limited liability status – but not with impunity and/or in breach of their duties and responsibilities as company officers.

It is important that directors of companies and their holding companies have an appreciation of the risks posed to them by inappropriate actions and conduct and the kind of situations where the fundamental principle of separate corporate personality can be blurred or, at worst, punctured or set aside. This is especially so in complex group situations where there are portfolio companies operating across international boundaries where the rules and regulations regarding separate corporate personality and director liability differ to those in the UK.

**TRENDS**

There appears to be an increasing trend in the Courts towards seeking to hold parent companies accountable for the activities of their subsidiaries (based upon duty of care principles) where the former is shown to have effectively taken over the management of the subsidiary, or has given relevant advice to the subsidiary. The Court of Appeal, for example, recently considered this issue in the context of claims brought by victims of violence in Kenya that erupted after the presidential elections in December 2007. However, the victims’ claims were not successful in establishing the parent company as “an anchor defendant”\(^1\).

In the course of compiling this publication, we came across cases in other jurisdictions where shareholders have been held accountable for the management of subsidiary companies, especially where such activities have resulted in financial difficulties and insolvency. Whilst each of the jurisdictions reported on have well-established principles of separate corporate personality, it is also the case that these principles cannot be abused by directors for fraudulent or illegal purposes nor where parent companies are shown to be responsible for the management and decision-making of their subsidiary undertakings. All of the jurisdictions in this publication impose additional obligations upon “directors” in circumstances where a company is financially distressed and/or insolvent and it is shown that the misconduct of the directors has caused or contributed to this outcome.

This publication, the first in a series, aims to give the reader a helicopter view of the issues to be grappled with in 14 different jurisdictions, including England & Wales, by posing some basic questions to experienced, commercial lawyers within DLA Piper which seek to identify key principles in those jurisdictions and situations where directors and holding companies may find themselves in the potential firing line.

The law in this area is constantly evolving with legislators and the judiciary showing themselves to be adept at devising new legal principles in order to hold accountable those persons responsible for abusing corporate structures in order to conceal improper transactions to the detriment of shareholders and creditors.

We hope that you find the contents interesting.

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1. In England & Wales we have a well-established principle of separate corporate personality to divide a corporate entity from its owners.

Every company has its own separate legal personality and identity separate to the identity of directors, shareholders, subsidiary and parent companies.

Shareholder liability is limited to the amount to be paid up on their shares and, generally speaking, shareholders of companies are not liable for the debts and liabilities of those companies.

Shareholders have rights and responsibilities arising from the company’s constitutional documents and any other relevant governance arrangements. Shareholders must pay for their shares and are entitled to profits earned on their shares.

These are fundamental principles of English law dating back to the seminal decision of the House of Lords in *Salomon-v-Salomon & Co Ltd* [1897] AC 22.

Exceptions to these fundamental principles are narrow and rare (see below).

2. Is this principle established by statute or by common law (i.e. case law)?

Long established common law principle dating back to the 19th century (see above).

Section 16 of the Companies Act 2006 sets out the effect of registration of a company. A body corporate is capable of exercising all the functions of an incorporated company and has its own existence as an entity.

The legal personality of a company is separate from that of the directors and shareholders.

A company must act at the direction and with the authority of its directors. As a basic proposition, the acts (and omissions) of the directors become the acts (and omissions) of the company according to the rules of agency. A director, exercising his duties and responsibilities on an appropriate basis, is not liable personally for the acts (and omissions) of the company.

When a company goes into liquidation, shareholders are only liable up to the nominal amount of their shares (section 74(2)(d) of the Insolvency Act 1986). Shareholders are not, as a general rule, liable for the general debts of the insolvent company. The situation is different, however, for shareholders of an unlimited company or a company limited by guarantee.
Part 3: “Corporate Veil Piercing”: in what circumstances is the principle of separate corporate personality susceptible to challenge?

Piercing the corporate veil means disregarding the separate personality of a company. It is possible to “pierce the corporate veil” but only in very limited circumstances. In an English law context, “piercing the veil” means looking beyond the principle of separate corporate personality in order to fix shareholder(s) with liability for the unlawful acts of the company. In addition, there are instances where it is possible to “look behind” a company’s separate corporate personality but this is not the same as veil piercing. The distinction is important and was considered by the Supreme Court in Prest-v-Petrodel Resources Ltd & Ors [2013] UKSC 34, in the context of re-casting the principle.

Part 4: In what circumstances would an English court go behind the principle of separate corporate personality and “pierce the veil”?

In Prest-v-Petrodel, the Supreme Court unanimously held that it is possible, in very limited circumstances, to pierce the corporate veil. To do so requires evidence of a person with an existing legal obligation or liability, or subject to a legal restriction, deliberately evading or frustrating any such obligation or liability by interposing a company under his control (i.e. abusing the corporate structure). The court may, in those limited circumstances, order that the principle of separate corporate personality no longer applies. If there is an alternative legal remedy, however, piercing the corporate veil will be unavailable.

There are two distinct principles: the “concealment principle” and the “evasion principle”. The former does not involve piercing the corporate veil and relates to the interposition of a company or companies in order to conceal the identity of the real controllers. In those cases, the court looks behind the “façade” to discover the true position. The latter is different and in those cases the court can disregard the principle of separate corporate personality and “pierce the veil”. Cases in this latter category are limited to those where the corporate veil has been abused to evade or frustrate the law being enforced. It is relevant in these limited cases for the court to consider the purpose of the corporate structure.

Part 5: Are you aware of any legislation which seeks to hold “owners and controllers” of companies accountable for the actions of those companies?

Under English law there are statutory exceptions to the principle of separate corporate personality. For example:

- In the production of group accounts (Section 399 Companies Act 2006).
- Regulation 4 of the TUPE Regulations.
- Various European competition matters.
- In relation to third party costs orders.
- COMI (centre of main interests) analysis for EU insolvency jurisdiction purposes (Recast Insolvency Regulation 2015/848).
- Unfair prejudice petitions (Section 994 Companies Act 2006).
In what circumstances can directors of companies in financial distress be held personally responsible for the liabilities of companies where they fail to take into account the interests of creditors?

Directors have responsibility for the day-to-day management of a company and can be held personally liable in certain situations where they fail to discharge their duties and responsibilities. Generally speaking, in such situations, a holding company will not be responsible for any such failure. However, whilst it is the case that it is no longer lawful for most companies to appoint corporations as directors, this does not prevent liability attaching to companies acting as de facto directors (where they participate in decision-making or dealings with third parties as if a director) or, indeed, persons in a holding company acting as a shadow director. A “shadow director” for these purposes is defined “as a person in accordance with whose directions or instructions the directors of the company are accustomed to act” (Section 251 of the Insolvency Act 1986). A shadow director can in certain situations be held personally liable to contribute to a company’s assets where the company has gone into insolvent liquidation or administration (see further below).

As a matter of general law, it is possible that a holding company might be held liable in tort for inducing a breach of contract by its subsidiary, conspiracy and/or dishonest assistance. It could also be liable to account for property received in breach of trust. A holding company might also have assumed some responsibility or liability to a third party for the actions of a subsidiary or its directors, the most obvious example being a guarantee or indemnity.

In certain situations, it might be possible for a holding company to assume a duty of care to parties dealing with a subsidiary, particularly in the field of health & safety and environmental law. Assessing the risk potential in this respect is highly fact-sensitive and will depend on the evidence available regarding the extent of the knowledge to be imputed to the holding company and whether or not it should have acted to avoid the consequences of a breach of the relevant legislation by the subsidiary.

6. In what circumstances can directors of companies in financial distress be held personally responsible for the liabilities of companies where they fail to take into account the interests of creditors?

Directors have responsibility for the day-to-day management of a company and can be held personally liable in certain situations where they fail to discharge their duties and responsibilities. Generally speaking, in such situations, a holding company will not be responsible for any such failure. However, whilst it is the case that it is no longer lawful for most companies to appoint corporations as directors, this does not prevent liability attaching to companies acting as de facto directors (where they participate in decision-making or dealings with third parties as if a director) or, indeed, persons in a holding company acting as a shadow director. A “shadow director” for these purposes is defined “as a person in accordance with whose directions or instructions the directors of the company are accustomed to act” (Section 251 of the Insolvency Act 1986). A shadow director can in certain situations be held personally liable to contribute to a company’s assets where the company has gone into insolvent liquidation or administration (see further below).

There is a myriad of potential offences which a director (being an “officer” which term is not defined with precision in the Insolvency Act 1986 but includes a director, manager or secretary) can commit in the context of an insolvent liquidation of a company. These offences, being criminal in nature, in the main relate to fraudulent activities in anticipation of an insolvent liquidation, falsification of books and records and false representations made to creditors. Directors and officers can be penalised for misfeasance in these respects where it is shown that they have misapplied or retained, or become accountable for, any money or other property of the company or breach of any fiduciary duty or other duty in relation to the company.
Upon the insolvent liquidation or administration of a company, directors can be held liable for “wrongful trading” (Section 214 of the Insolvency Act 1986) by a court to contribute to the assets of the company where they have continued to trade a company when they knew, or ought to have known, there was no reasonable prospect that the company would avoid going into insolvent liquidation or entering insolvent administration and, at that point, failed to take every step with a view to minimising the potential loss to the company’s creditors as they ought to have taken. “Director” in this context expressly includes a shadow director. If a director carries on trading with intent to defraud creditors then he can be held liable for “fraudulent trading” (Section 213 of the Insolvency Act 1986). Directors can also be held to account by an insolvency office-holder in relation to transferring assets for inadequate consideration (“transactions at an undervalue”) and where they give preferential treatment to creditors in the repayment of debts prior to insolvent liquidation or administration (“preferences”), provided certain conditions and relevant time periods are met (Sections 238 and 239 respectively of the Insolvency Act 1986). These provisions are wide enough to render de facto directors liable to account.

It is also possible for any “victim” of a transaction defrauding creditors to challenge it (“victim” being defined as anyone who is, or is capable of being, prejudiced by the transaction) and there is no requirement for the debtor to be insolvent either at the time of the transaction or at the time of making the application, under section 423 of the Insolvency Act 1986.

Note also a recent Supreme Court ruling in misfeasance proceedings (section 212 of the Insolvency Act 1986) whereby the appellant directors were to be regarded as trustees of company property for statutory limitation purposes. The appellants failed to persuade the Supreme Court that this approach equated to lifting the corporate veil, the directors being regarded as fiduciary stewards of company property (Burden Holdings (UK) Limited-v-Fielding and another [2018] UKSC 14).

Liquidators and administrators are obliged to report to the Secretary of State on the conduct of directors and ex-directors (3 year “look back” period). Where it is shown, on the evidence, that a director is unfit to be concerned in the management of a company, that person may be disqualified under the Company Directors Disqualification Act 1986. The maximum period of disqualification is 15 years.

New liability for holding company directors?

On 26 August 2018, UK Government (BEIS) published its response following consultation in March 2018 on insolvency and corporate governance reform in the wake of high profile corporate failures such as BHS and Carillion. At the heart of this response is the desire to protect stakeholders from unethical or irresponsible decision-making by company directors, especially involving the sale of financially distressed subsidiary companies which end up in administration or liquidation (within 12 months of sale). Accordingly, measures are proposed seeking to make directors of holding companies accountable for such transactions where they fail to have a reasonable belief that the subsidiary’s stakeholders would be no worse off as a result of the sale than if the subsidiary entered administration or liquidation. Precisely when these measures will be implemented is not yet known but, once implemented (if not already), they will be of concern to sponsors in traditional private equity structures because directors of holding companies will be at increased risk in the event of a former subsidiary (which is sold) going into insolvency proceedings. Having said that, the UK Government does not intend to take forward the proposed measure of creating an administrator or liquidator action for personal liability of a director. These measures are likely to create a number of difficulties for sponsors when it comes to being represented on the boards of holding companies with subsidiaries in financial distress. Certainly, directors of holding companies impacted by these measures will need to ensure they seek appropriate professional advice on any sale process and alternatives whilst ensuring they are in possession of sufficient evidence to defend any allegations of unethical or irresponsible conduct made by stakeholders of the subsidiary should the subsidiary company (which is sold) later fail.

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1. **In England & Wales we have a well-established principle of separate corporate personality to divide a corporate entity from its owners. Do you have a similar principle in your jurisdiction?**

There is a similar principle under Austrian law. Corporate entities, such as joint stock corporations (Aktiengesellschaften, “AG”) and limited liability companies (Gesellschaften mit beschränkter Haftung, “GmbH”) are legal entities with separate corporate personality. As a general principle, only the entity itself is liable for its obligations to third parties (Haftungsprivileg). Shareholders of corporate entities are only liable to the extent of their respective contributions to share capital. The assets of the corporate entity are separated from the assets of the shareholders (Trennungsprinzip).

2. **If yes, is this principle established by statute or by common law (i.e. case law)?**

The principle of separate corporate personality is established by statute: section 61, paragraph 2, Austrian Act on Limited Liability Companies (GmbH-Gesetz, “GmbHG”) and section 1, Austrian Stock Corporation Act (Aktiengesetz, “AktG”).

3. **“Corporate Veil Piercing”: in what circumstances is the principle of separate corporate personality susceptible to challenge?**

The principle of separate corporate personality is susceptible to challenge in the following cases:

- **No separation between the assets of the entity and the assets of the shareholders (Vermögens – oder Sphärenvermischung)**
  The assets of an entity must be separated from the assets of the shareholders in order to be able to assess whether a shareholder enriched himself at the expense of the entity.

- **Qualified undercapitalisation (Qualifizierte Unterkapitalisierung)**
  Shareholders can be held liable where the entity is not vested with sufficient equity in comparison to its purpose and, therefore, resulting loss to creditors is very likely.

- **De facto management (Faktische Geschäftsführung)**
  If a shareholder acts as a director in respect of third parties and assumes the duties of a managing director within the entity, without being officially appointed as director, the shareholder shall be liable under the same circumstances as an appointed director.
Liability for destruction of economic basis (Existenzvernichtung)
A shareholder may be held liable if he is responsible for a negative impairment of the entity’s assets, destroying the economic basis and causing illiquidity.

Abuse of corporate structure (Rechtsformmissbrauch)
Shareholders can be held liable in the context of an abuse of corporate structure, meaning that shareholders shall be liable where a restructuring of the entity, or the group, is used only for the purpose of limiting liability. Shareholders may not use the corporate form to harm creditors or to circumvent compulsory legal provisions.

Ignoring need for reorganisation (Ignorieren von Reorganisationsbedarf)
Shareholders may be liable if they instruct directors to refrain from initiating reorganisation procedures according to section 25, Austrian Reorganization Act (Unternehmensreorganisationsgesetz, “URG”); or do not approve initiation of such procedure.

Delay in filing for insolvency (Insolvenzverschleppung)
Shareholders may be liable if they instruct directors to refrain from initiating insolvency proceedings.

4. In what circumstances would a court in your jurisdiction go behind the principle of separate corporate personality and “pierce the veil”?

An Austrian court may go behind the principle of separate corporate personality and “pierce the veil” where a claim is brought by an aggrieved creditor or a liquidator in insolvency proceedings.

5. Are you aware of any legislation which seeks to hold “owners and controllers” of companies accountable for the actions of those companies?

If “owners and controllers” act as de facto directors, they can be held accountable for the actions and omissions of those companies.

6. In what circumstances can directors of companies in financial distress be held personally responsible for the liabilities of companies where they fail to take into account the interests of creditors?

Generally, under Austrian law, directors have to act with the diligence of a prudent businessman. This principle is also established by statute (section 25, paragraph 1a GmbHG and section 84, paragraph 1a AktG). However, directors have enhanced obligations and liability risks if an entity is in financial distress:

Insolvency
An entity is insolvent where it is either (permanently) illiquid (dauerhaft zahlungsunfähig) or over-indebted (überschuldet), meaning the assets do not cover the liabilities and the continuance forecast is negative. As soon as one of these tests is satisfied, directors are obliged to file an application for the opening of insolvency proceedings immediately, but at the latest within 60 days of the insolvency event. If the application is culpably delayed, the responsible directors are liable to the creditors for any resulting loss.

Additionally, directors must ensure they do not commit any criminal offences as set out in the Austrian Penal Code (Strafgesetzbuch, “StGB”):

- Fraudulent bankruptcy offences (betrügerische Krad)
- Gross negligent impairment of creditors’ interests (grob fahrlässige Beeinträchtigung von Gläubigerinteressen)
- Preference of one specific creditor (Begünstigung eines Gläubigers)
- In addition to appointed directors, shadow directors (de-facto Geschäftsführer) and “persons exercising control” (leitende Angestellte) can also be held criminally liable.
■ **Need for reorganisation**

If there is a need for reorganisation within the meaning of the URG, an extraordinary general meeting must be immediately convened and an application for initiating a reorganisation procedure filed with the competent court of first instance. This decision is taken by the directors, but if they decide against it, their liability risk increases should insolvency proceedings subsequently commence.

Furthermore, if the directors become aware that 50% of the share capital of the entity has been lost, they must immediately call an extraordinary general meeting in order to plan further steps and, if necessary, decide on any restructuring measures.

■ **Equity-replacing benefits to shareholders**

According to the Austrian Equity Replacement Law (Eigenkapitalersatzgesetz “EKEG”), during the financial distress of an entity, repayment of equity-replacing shareholder loans is prohibited. The directors are responsible for ensuring that such loans are not repaid. If directors fail to comply with this duty, they may be liable to third parties for any loss suffered.

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In this context, please note that Belgian company law will significantly be reformed in the near future, and on 25 May 2018, the Belgian Federal Council of Ministers has approved the preliminary draft of (i) the law ‘on the reform of the company law’ and (ii) the law ‘introducing the Belgian Companies and Associations Code’, which can now be submitted to the Chamber of Representatives (one of the two chambers of the bicameral Federal Parliament of Belgium). It is expected that the Federal Parliament will further discuss and approve the preliminary draft, and the new Belgian company code is expected to enter into force (i) in March/April 2019 for companies established thereafter; and (ii) on 1 January 2020 for already existing companies, which will have until 1 January 2024 to fully comply with the new Belgian Company Code. The new Belgian Company Code will, in principle, not have an impact on the principle of corporate personality and limited liability, yet the description of the company forms will be amended, which will also amend the analysis thereof. In this respect, it could be that, under the new Belgian company code, the “gathering of all shares in one hand” would no longer be a ground for piercing the corporate veil (see Question 3).

I. In England & Wales we have a well-established principle of separate corporate personality to divide a corporate entity from its owners. Do you have a similar principle in your jurisdiction?

The principle of corporate legal personality exists in Belgium and, from a legal perspective, there is a distinction between corporate personality and limited liability.

- A legal person is defined by doctrine as “a carrier of rights and obligations, that is not a living being, and that is established to realise an object set by the incorporators”.

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12 | Corporate Personality: International Perspectives, Part I
2. If yes, is this principle established by statute or by common law (i.e. case law)?

The principle of separate corporate personality has been established by law, and more specifically in the Belgian Company Code.

Article 2(2), Belgian Company Code lists the entities that are recognised as commercial entities having separate corporate personality:

- General Partnership (vennootschap onder firma/société en nom collectif, "VOF/SNC");
- Limited Partnership (gewone commanditaire vennootschap/société en commandite simple, "Comm. V/SCS");
- Closed Limited Liability Company (besloten vennootschap met beperkte aansprakelijkheid/société privée à responsabilité limitée, "BVBA/SPRL");
- Co-operative Limited Liability Company (coöperatieve vennootschap met beperkte aansprakelijkheid/société coopérative à responsabilité limitée, "CVBA/SCRL");
- Co-operative Unlimited Liability Company (cooperatieve vennootschap met onbeperkte aansprakelijkheid/société coopérative à responsabilité illimitée, "CVOA/SCRI");
- Public Limited Liability Company (naamloze vennootschap/société anonyme, "NV/SA");
- Limited Partnership Limited By Shares (commanditaire vennootschap op aandelen/société en commandite par actions, "Comm. VA/SCA");
- Economic Enterprise (economisch samenwerkingsverband/groupement d'intérêt économique, "ESV/GIE");
- European Company (Europese vennootschap/société européenne, "SE"); and
- European Co-operative Company (Europese coöperatieve vennootschap/société coopérative européenne, "SCE").

3. "Corporate Veil Piercing": in what circumstances is the principle of separate corporate personality susceptible to challenge?

Three instances of “piercing the corporate veil”, whereby the shareholder(s) will be held liable for the obligations of the company, should be distinguished: (i) “voluntary” piercing of the corporate veil; (ii) piercing of the corporate veil provided for by law and (iii) piercing of the corporate veil based on case law.

I. “Voluntary” piercing of the corporate veil

For example, where a shareholder of a company provides personal or real guarantees to a contracting party for the obligations of the company.
II. Piercing of the corporate veil provided for by law

The Belgian Company Code foresees the following four instances where the corporate veil of a company will be pierced:

■ A public limited liability company should have two shareholders. If all of the shares would, however, be “gathered in the hand of one sole shareholder”, that shareholder will, after one year, become jointly and severally liable for all obligations of the company, running from the date all shares became owned by that shareholder.

■ If the sole shareholder in a closed limited liability company is a corporate entity, it will be liable jointly and severally for all obligations of the company. If the sole shareholder is a natural person, this person will be liable jointly and severally for all obligations of any other BVBA/SPRL incorporated solely by him or of which he becomes the sole partner.

■ In the event a company is declared bankrupt within three years of incorporation, the incorporators could be held liable, without any limitation, for the debts of the company. This will be contingent on the Court deciding, on the basis of the financial plan (which must be drafted at incorporation), that the capital contributed by the incorporators was, at the time of incorporation, prima facie insufficient to allow the continuation of the normal activities of the company for at least two years.

■ Where a limited liability company is declared bankrupt and the debts exceed the income, the directors, past directors and de facto directors can be held personally and/or jointly and severally liable for all or part of the debts of the company, up to the amount of the deficit, if it is established that they have committed serious misconduct in the management of the company, which has contributed to the bankruptcy.

In this context, Belgian Company law does not define the concept of a de facto director; however, it is generally accepted that the following cumulative criteria must be met:

■ The person is involved in the company’s management without statutory or contractual basis for such involvement.

■ The person performs certain positive acts of administration and regularly takes key decisions for the commercial, financial or industrial future of the company. Mere supervision, monitoring, provision of advice and technical support are not sufficient.

■ The person acts with complete independence and sovereignty with regard to the company and not further to an assignment bestowed upon him by the company.

III. Piercing of the corporate veil based on case law

General

Courts will, when certain conditions developed by case law have been met, pierce the corporate veil upon request of certain creditors of the company or, in the event of bankruptcy, upon request of the receiver, and hold the shareholders liable for the debts of the company. The piercing of the corporate veil based on case law is very fact specific. The most important instances where the corporate veil was pierced based on case law are discussed under Question 4.

Directors’ Liability

Furthermore, the liability of directors could also be relevant in the context of the “piercing the corporate veil”. Under Belgian law, there are several grounds for director liability. In accordance with Article 527, Belgian Company Code, any director is liable to the company for any shortcomings in the management and administration of the company. Under this fiduciary duty, each director is required to manage the company’s business and affairs to the best of his ability and in the best interests of the company and its stakeholders.

Additionally, Belgian law contains several specific grounds on the basis of which a director might be found liable, the most important of which are set out below:

■ Violation of the company’s articles of association and of any provision of the Belgian Company Code.

■ Self-dealing (conflicts of interest).

■ Capital increase: directors incur joint liability for the legally valid subscription and (partially) effective payment of capital in a capital raise.

■ Manifestly serious mistakes contributing to a bankruptcy.

■ Specific liability for unpaid taxes and social security contributions.

■ Liability in tort (including for violations of criminal statutes).
4. In what circumstances would a court in your jurisdiction go behind the principle of separate corporate personality and “pierce the veil”?

Belgian courts would “pierce the veil” in any of the four instances mentioned under part II at Question 3 (piercing of the corporate veil provided for by law).

The cases where the corporate veil would be pierced by the Courts are determined on a case by case basis. However, it is relevant to distinguish the specific situation where the corporate veil could be pierced in a group context. The situation where a group company, usually a parent company, could be held liable for the debts of another group company, generally a subsidiary, has occurred in exceptional circumstances. Such exceptional circumstances include:

- Manifest undercapitalization of the subsidiary.
- Maintenance of loss-making activities.
- Attribution of a wrongful pretence of creditworthiness of the subsidiary.

Legal doctrine has further elaborated on these matters, whereas jurisprudence (i.e. case law as precedent) is less developed.

5. Are you aware of any legislation which seeks to hold “owners and controllers” of companies accountable for the actions of those companies?

In principle, shareholders of Belgian limited liability companies will not be held accountable for the actions of those companies.

However, in certain cases concerning health and safety legislation, the persons who are in charge of implementing such legislation within a company can be held personally liable for breaches of the health and safety legislation. If in such cases a shareholder is considered to be a de facto director, they could also be held liable for breaches of health and safety legislation (if they are considered to be in charge of compliance with safety legislation).

6. In what circumstances can directors of companies in financial distress be held personally responsible for the liabilities of companies where they fail to take into account the interests of creditors?

As explained above, the following categories of person may be held liable and/or jointly and severally liable for all or part of the debts of the company, up to the amount of the deficit, in the event of bankruptcy:

- Directors
- Past directors
- De facto directors
- Past de facto directors

In order for such a party to be held liable, it must be established that he/she is guilty of serious misconduct in the management of the company which has contributed to the bankruptcy.

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1. In England & Wales we have a well-established principle of separate corporate personality to divide a corporate entity from its owners. Do you have a similar principle in your jurisdiction?

A comparable principle of separate corporate personality exists under French Law; however, this principle solely applies to limited liability companies (excluding other corporate forms such as civil companies).

Whereas shareholders of limited liability companies are fully protected, in principle, by the corporate veil, their liability being limited to the amount of their contribution in the share capital, shareholders of other types of companies (for example société civile; société en nom collectif; société en commandite simple or société en commandite par actions) remain fully or partially liable for the company’s liabilities.

2. If yes, is this principle established by statute or by common law (i.e. case law)?

The principle of corporate personality is provided for in statute (Art. 210-6, French Commercial Code for commercial companies and Art. 1842, French Civil Code for other companies). Case law has drawn several consequences from the corporate veil principle and, in particular, considered that it shall prevent a director or a shareholder from being held liable for the loss suffered by a third-party.

This principle is, however, subject to exceptions. Therefore, if the conditions for piercing the corporate veil of a company are met, the directors or shareholders may be held liable for the wrongful acts they have committed. In order to pierce the corporate veil, all following conditions shall be cumulatively met:

- The loss has been caused by the wrongful act of a director or a shareholder.
- The wrongful act is intentional.
- The wrongful act is a gross misconduct.
- The wrongful act is not intrinsically linked to the performance of the duties of a director or is incompatible with the normal exercise of the prerogatives attached to the status of shareholder.
3. “Corporate Veil Piercing”: in what circumstances is the principle of separate corporate personality susceptible to challenge?

The principle of separate corporate personality is susceptible to challenge in the following circumstances:

1. **Abuse of corporate veil/extension of insolvency proceedings (specific to insolvency law)**

   The corporate veil may be pierced where there is intermingling of estates, either by an intermingling of accounts or by abnormal financial relations, leading to the main insolvency proceedings initially filed against the debtor being extended to its shareholders (Art. L. 621-2, French Commercial Code).

   The objective of the law is to demonstrate an abuse of the corporate veil by the debtor who either did not really intend to establish a company in the first place (“shell companies” where the company is a fictitious construct, albeit validly incorporated); or, in the course of its existence, has intermingled its assets with another person (legal entity or individual). In such case, the estates (assets and liabilities) of the two entities would be aggregated into one single insolvency proceeding.

2. **Director & shareholder liability in tort for gross misconduct**

   If the conditions for piercing the corporate veil are met, the directors or shareholders may be held liable for the wrongful acts they have committed. In order to pierce the corporate veil of a company, the four cumulative conditions detailed above must be met.

3. **Liability of the parent company for its subsidiary operating a classified installation for the protection of the environment**

   Further discussion is provided at Question 5.

4. In what circumstances would a court in your jurisdiction go behind the principle of separate corporate personality and “pierce the veil”?  

   French courts would go behind the principle of separate corporate personality and “pierce the veil” in the following situations:

   1. **Extension of insolvency proceedings**

      The extension of the debtor’s insolvency proceedings may be ordered either if (a) the debtor is deemed to be fictive; or (b) there is an intermingling of estates between the debtor and another person (usually its shareholder).

      (a) **Extension of insolvency proceedings in cases of a fictive debtor**

      The debtor may be deemed to be fictive, albeit validly incorporated, if it can be demonstrated that one of the conditions required by the law for the constitution of a company is not met under Art. 1832, French Civil Code. Article 1832, French Civil Code (applicable to all types of companies) requires that the shareholders contribute to the share capital, share the benefits and contribute to the losses and, tacitly, share an “affectio societatis”.

      “Fictiveness” may be found if a subsidiary has been set-up for the sole purpose of containing all the liabilities of a group and therefore compartmentalising the risks. In such a case, a court may consider that the contribution to the share capital was fictitious, since it only consisted of liabilities and had no real substance. This is found in the case of TC Honfleur, 20 nov. 1970, JCP G, 1971, II, 16628 when an independent business branch contributed to the share capital but was pledged to the extent that the pledge fully absorbed the value of the contribution.

      In addition, there may be fictiveness of a debtor when its corporate interest is infringed by a parent company when, for instance, the parent company acts as though there was no separate corporate personality and as if the subsidiary was not an independent legal entity, but merely a business unit. This ground for piercing the veil was seen in Cass. com., 13 oct. 1998, Bull. Joly, 1999, p. 58, (10), obs. B. Saintourens.
5. Are you aware of any legislation which seeks to hold “owners and controllers” of companies accountable for the actions of those companies?

In environmental matters, where a subsidiary company operates a classified installation for the protection of the environment, the parent company may be held liable and ordered to finance all or part of the measures for the restoration of its subsidiary’s sites if liquidation proceedings are filed against the subsidiary and it can be demonstrated that the parent company has committed a fault which has contributed to the shortfall of assets of the subsidiary (Art. L. 512-17, Environment Code).

The 3-stage test for liability to be found is set out below:

- A characterised fault of the parent company (case law has not yet tested what may qualify as a characterised fault; however, commentators consider that it should be more serious than just mismanagement).
- The subsidiary operates a classified installation for the protection of the environment.
- A shortfall of assets of the subsidiary leading to its liquidation proceedings.

The action may be filed by the liquidator, the public prosecutor or the “préfet”.

(b) Extension of insolvency proceedings in cases of intermingling of estates

An intermingling of estates may be reflected either by an intermingling of the accounts or by abnormal financial relations:

- **Intermingling of accounts**: when the accounting is held in common between two entities and payments are made indifferently by one or the other and it is no longer possible to differentiate between the transactions of each entity (Cass. com., 3 avr. 2001, n° 98-16.070, NP, n° 719, RJDA 2001/8-9, n° 874).

- **Abnormal financial relationships**: when there is abnormal cash flows between two entities or transfer of assets or liabilities for no consideration.

There are no known cases in which a private equity fund has been held liable on either of the above grounds.

2. Director and shareholder liability in tort for gross misconduct

The liability of a director or a shareholder is rarely sought on this ground since the specific action of liability for shortfall of assets is generally the route that is chosen. However, a new kind of liability has recently emerged to hold the majority shareholder liable to the employees, based on general tort liability. It follows that if a shareholder has committed a fault or gross negligence that contributed to the insolvency and subsequent redundancies, that shareholder may be liable to the employees directly.

Pursuant to case law, the shareholder could be held liable in the event its decisions:

- hurt the subsidiary;
- aggravate the already difficult financial situation of the subsidiary;
- have no usefulness for the subsidiary; or
- benefit exclusively the shareholder.

In the *Lee Cooper* case, the Court considered that the shareholder’s fault, for having entered into a management agreement with an affiliated company which created disproportionate and unjustified expenses for the company, contributed to financial difficulties, leading to its insolvency (CA, Amiens, 5e ch. soc., 28 June 2016 – n° 16/02351).

In the *Sofarec* case, shareholder liability was found on the same grounds and, in particular, for having invoiced exorbitant fees for commercial and marketing services to the detriment of a subsidiary and executing a consulting agreement worth €400,000, with no real consideration for the subsidiary (Cass. soc. 8 July 2014 n° 13-15.573 FS-PB et 13-15.845 FS-D).

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18 | Corporate Personality: International Perspectives, Part I
6. **In what circumstances can directors of companies in financial distress be held personally responsible for the liabilities of companies where they fail to take into account the interests of creditors?**

In France, this category of liability is covered by the Commercial Code (directors’ liability for shortfall of assets).

A shareholder acting as a shadow director or any director could be held liable and be ordered to contribute, from its own assets, to address a company’s shortfall in assets, if it is demonstrated that:

- it has acted as a director;
- acting as a director, it is responsible for mismanagement that contributed to reduce the assets of the company; and
- as a result caused the insolvency of the company.

This specific action is known as “*responsabilité pour insuffisance d’actif*”, namely “liability for shortfall of assets” (Art. L. 651-1 s. French Commercial Code).

A shadow director is any person or entity, irrespective of any de jure director, who exercised a positive and independent activity in the general administration of a company and was, therefore, indirectly in charge of the business decisions.

The mismanagement act can be an active action or an abstention, but not a simple negligence. Some examples include:

- A shadow director who abstained from implementing an appropriate structure and prudent management tools in order to be able manage the economic and financial situation of the company and take any necessary remedial actions.
- Financing improper work and the pursuit of an insolvent activity.
- Any delay in filing for bankruptcy.
- Misuse of the company’s assets.

The action can be filed by the liquidator, on behalf of creditors, or by the *Ministère Public* (the Public Prosecutor).

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1. In England & Wales we have a well-established principle of separate corporate personality to divide a corporate entity from its owners. Do you have a similar principle in your jurisdiction?

The corporation is a legal entity designed to shield its owners from individual liability for its debts. As a general rule, the shareholders of a Stock Company (“AG”), Societas Europaea (“SE”) or German limited liability company (“GmbH”) enjoy this privilege of corporate protection and do not become liable for anything beyond the amount of their subscription for the share capital or the price of their shares.

Pursuant to the general principle set out in section 13, paragraph 2, German Limited Liability Company Law (“GmbHG”) the liability is limited to the GmbH’s assets or capital and, thus, does not include personal liability of the company’s shareholders.

However, this general principle applies only to those capital companies which were incorporated effectively and were already registered in the commercial register, and not to those GmbHs which are in the course of formation. To the latter, different rules may apply and the shareholders may be held personally liable without limitation. Such extra risk for the interim period until registration may be avoided by purchasing a shelf GmbH which is already registered in the commercial register and, therefore, is subject to the provisions of the GmbHG.

2. If yes, is this principle established by statute or by common law (i.e. case law)?

GmbH

Section 13, paragraph 2.

AG

Section 1, paragraph 1 of the German Stock Corporation Act (“AktG”) the stock corporation’s liability is limited to the company’s assets. Shareholders are, in general, not liable to creditors of the company.

SE

According to Art. 1 SE-VO (SE-Regulation) the SE liability is limited to the company’s assets. Shareholders are, in general, not liable to creditors of the company.
3. “Corporate Veil Piercing”: in what circumstances is the principle of separate corporate personality susceptible to challenge?

Pursuant to general principles of German law, shareholders may be held liable for their own personal contractual obligations as a contracting party or their individual conduct, e.g. fraud/tort. Shareholder liability may arise where some or all of the shareholders assume contractual obligations towards the company or its creditors, e.g., by entering into guarantee agreements or by issuing comfort letters (Patronatserklärungen) in favour of the company. Shareholders may also become subject to a pre-contractual liability towards third parties if, for instance, they are involved in contract negotiations between the company and a third party and such third party enters into the contract with the company in reliance on incorrect or misleading representations made by the shareholders. In exceptional cases, such as fraudulent abuses of the corporate veil, shareholders may even become liable in tort to the company's creditors.

Independently of such personal obligations, the shareholders may only exceptionally be held liable for the company's obligations if the corporate veil is pierced. In the absence of any written law in this regard, it is highly contested in German case law and literature as to what circumstances must exist for the corporate veil to be pierced. German literature has developed the following categories that may trigger shareholder liability:

- **Confusion of assets/capital**
  Each shareholder must ensure that its assets/capital are strictly separated from the company's assets/capital to avoid any personal liability. In the case that a differentiation of shareholders' and company's assets/capital is impossible due to inadequate/non-existent accounting, or if a differentiation between those assets/capital has been concealed, the shareholders may be held personally liable without limitation.

- **Confusion of spheres**
  Furthermore, in legal relations the shareholders may be deemed personally liable if they do not explicitly point out that they are not acting in their own name but in the name of the company represented by them.

- **Undercapitalisation**
  Undercapitalisation is defined as (a) insufficient share capital (nominal undercapitalisation) or (b) issuing in exchange for insufficient funds (material undercapitalisation). However, German courts have not ruled that the corporate veil will be pierced, holding shareholders personally liable, in this regard.

- **Destruction of the company's existence**
  A shareholder may be held personally liable if he participates in reducing the company's share capital while not adequately considering the company's ability to pay its debts and, thereby, triggering the company's insolvency.

- **Acting against the principles of good faith**
  Pursuant to German case law, the GmbH and its shareholders are to be regarded as a unit if that is deemed necessary to enable a third party (the creditor) to satisfy its claims consistent with the general principle of good faith.

German case law has developed based on the special circumstances of each individual case and is very restrictive in finding shareholders personally liable. In the majority of cases, the courts revert to the shareholders' general liability in tort under section 826, German Civil Code (“BGB”). However, the above mentioned categories may provide a basis for indicating in which cases the piercing of the corporate veil may occur.

**Pre-incorporation liability**

The personal liability of shareholders for liabilities incurred by the company during the pre-incorporation period depends on the question of whether the company is subsequently registered in the commercial register or not. If the company is registered, the shareholders must ensure that the registered share capital of the company is available at the time of registration. Otherwise, the shareholders will be liable for the shortfall, in proportion to their shares (Differenzenhaftung). Where the company is not registered, the shareholders remain jointly and severally liable for the liabilities of the company.
4. In what circumstances would a court in your jurisdiction go behind the principle of separate corporate personality and “pierce the veil”?

The GmbHG does not provide for any explicit regulation regarding the abuse of the limited liability of a GmbH. This unintended regulatory gap has been closed by the German Federal Court of Justice (Bundesgerichtshof, “BGH”) with the concept of piercing the corporate veil thus extending potential liability to the shareholders.

According to the BGH, the corporate veil shall be disregarded if the company’s economic existence had been deliberately destroyed by the shareholders. The limited liability privilege in section 13, paragraph 2 GmbHG, according to which the GmbH has its own legal personality and possesses separate assets, which alone serve to cover its debts, should only be available if the privilege is not misused by the shareholders. The Court ruled that “misuse” is an underlying prerequisite to pierce the corporate veil.

As noted, German courts have been reluctant to extend the circumstances in which personal liability can be found. In line with this restrictive approach, the BGH, to a certain extent, abandoned piercing the corporate veil on grounds of destruction of the company’s existence in the Trihotel judgment in 2007. The court held that shareholders are only liable to the company for destruction of the company’s existence but not directly to creditors (internal liability only).

However, in the later Gamma judgment, the court made a further differentiation to the effect that internal liability under section 826 BGB presupposes the GmbH’s own pecuniary loss, which must be strictly separated from the creditors’ loss in circumstances of a destruction of the company’s existence.

Where a creditor has suffered loss from the destruction of the company’s existence, not covered by the pecuniary loss of the company, an external liability (direct liability to the creditors) under section 826 BGB can be imposed.

5. Are you aware of any legislation which seeks to hold “owners and controllers” of companies accountable for the actions of those companies?

There is no known secondary legislation under which “owners and controllers” can be held directly liable for the conduct of the company.

6. In what circumstances can directors of companies in financial distress be held personally responsible for the liabilities of companies where they fail to take into account the interests of creditors?

Directors

It is primarily the duty of the directors of a German company to file for insolvency proceedings if the company is insolvent.

In the event of a violation of this duty, directors can face civil liability to compensate the company, as well as the creditors of the company, for the loss suffered due to the late filing or lack of filing.

Creditors who already had claims before the time filing was required (“old creditors”) only have a claim for loss on a pari passu basis in the insolvency proceedings. Creditors who have entered into business relations with the company after the filing was required (“new creditors”), have a claim for compensation of the entire financial loss resulting from entering into arrangements as a creditor.
Shareholders may face civil liability if they are held to be *inciters* or *accessories* in the failure by directors to meet their obligations to file for insolvency; for example, if they have instructed the directors not to file for insolvency.

**Shadow directors and persons “exercising control”**

As far as liability is concerned, a person who de facto assumes the position of a director is liable both to the company and to third parties as a director.

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1. In England & Wales we have a well-established principle of separate corporate personality to divide a corporate entity from its owners. Do you have a similar principle in your jurisdiction?

Under Italian Law the principle of separate corporate personality applies only to certain types of companies (“società di capitali”), namely:

- Joint Stock Company (“società per azioni”).
- Limited Liability Company (“società a responsabilità limitata”).
- Limited Partnership By Shares (“società in accomandita per azioni”).

Pursuant to Article 2452, Italian Civil Code, in limited partnerships by shares there are two types of partners: (i) the general partners (so called “soci accomandatari”) who, by statute, hold office as directors of the company and are personally liable without limitation for the company’s obligations; and (ii) special partners (so called “soci accomandanti”) who are not involved in the company’s management and liable only within the limit of the portion of the corporate capital they have subscribed.

2. If yes, is this principle established by statute or by common law (i.e. case law)?

The principle is established by statute. As regards joint stock companies and the limited liability companies, pursuant to, respectively, Articles 2325 and 2462, Italian Civil Code, the company is liable within the limits of its assets for the company’s obligations; however, the assets of the company remain separate from the assets of its shareholders.

Nevertheless, in the event of insolvency, in respect of the company’s obligations in the period during which the shares were held by a sole shareholder, such shareholder has unlimited liability where: (i) the initial contributions (which should have been made by the sole shareholder at the company’s incorporation) were not made in accordance with the law, or (ii) the publicity formalities required by law have not been complied with.

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1 When a company is incorporated by a sole shareholder, the initial corporate capital must be entirely paid up simultaneously with the company’s incorporation.

2 Where there is a sole shareholder, it is necessary to file with the Italian Companies Register a public notice declaring that the corporate capital is held by a sole shareholder (“comunicazione di socio unico”).
3. “Corporate Veil Piercing”: in what circumstances is the principle of separate corporate personality susceptible to challenge?

Regarding joint stock companies and limited liability companies, pursuant to Article 2331, Italian Civil Code, the company acquires a corporate personality upon completion of its registration in the Companies Register. Transactions entered into by and on behalf of the company before such registration gives rise to joint, personal and unlimited liability to third parties for those individuals executing those transactions. Such personal liability applies also to shareholders who have preliminarily authorised, agreed and decided upon the implementation of such transactions.

In addition to the above, with respect to limited liability companies, under Article 2476, Italian Civil Code, shareholders who have intentionally decided or authorised the implementation of transactions or other acts which are detrimental to (i) the company; (ii) other shareholders or (iii) third parties will be personally and jointly liable with the company’s directors.

Furthermore, pursuant to Article 2497, Italian Civil Code, if an entity directs and co-ordinates other companies pursuing its own entrepreneurial interests (or those of third parties) and violates the rules of correct business management, it will be directly responsible to the shareholders of the “directed” company for loss caused to the profitability of that company and the value of its shares, as well as being liable to the creditors of that company for non-preservation of corporate assets. The same article provides that shareholders and creditors of the “directed” company are entitled to act against the “directing” company in the event the “directed” company has not previously satisfied its claims.

Moreover, the principle of separate corporate personality is susceptible to challenge in limited partnerships by shares where the special partners interfere in the company’s management and displace the general partners. In such circumstances, the special partners become personally liable, without limitation, for the company’s obligations.

Additionally, in Italy, it is possible to challenge the principle when an abuse of corporate personality (“abuso della personalità giuridica”) occurs. This ground has been developed by case law and occurs when a joint stock company, or a limited liability company, is speciously incorporated for the sole purpose of obtaining limited liability for its shareholders and the shareholders acted, and the company was managed, in complete disregard of the fundamental rules governing the company.

In this situation, the legal personality of the company is reduced to a mere fiction. Consequently, the company’s shareholders are deemed to have lost the benefit of limited liability and, in the event of insolvency, can be declared personally bankrupt. In particular, pursuant to case law, it would be possible to fall within an abuse of corporate personality in the following circumstances:

- Habitual “confusion” between the company’s assets and shareholders’ assets.
- Where shareholders treat the company’s assets as their individual property.
- Where shareholders use personal money to pay the company’s creditors.
- Habitual practice of repaying shareholders’ loans to the company.
- Habitual practice of shareholders predetermining decisions to be adopted by the board of directors.

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3 The “direction activity” (attività di direzione) consists of giving constant direction to other entities, having an effect or influence on its management decisions, or any strategic and operational choices in financial, industrial and commercial matters.

4 The “co-ordination activity” (attività di coordinamento) consists of the implementation of synergies between companies belonging to the same group, in the context of a unique and strategic policy applying to all group companies.
4. In what circumstances would a court in your jurisdiction go behind the principle of separate corporate personality and “pierce the veil”? 

A court may go behind the principle of separate corporate personality and “pierce the veil” if it believes that incorporation was for the purposes of abusing the principle through disavowal of the company's legal personality, and hold to account the person who is the real and true manager of the company (“socio tiranno”). It follows that unlimited liability will be attributed to such an individual (Trib. Milano No. 6295/2013; Cass. Civ., n. 13338/2009; Cass. Civ., 11258/2007). 

Another circumstance in which the court can “pierce the veil” is the abuse of the “direction and co-ordination activity” by a company which does not act in compliance with the rules on such activity and, instead, prioritises only its own economic interests. The liabilities for loss to the “directed” company’s creditors and/or shareholders may be extended to a holding company if it can be shown that the “directing” company acted in breach of the rules on correct business management. Furthermore, pursuant to Article 2497, Italian Civil Code, such liability may be reduced in accordance with the “theory of compensatory advantages” (teoria dei vantaggi compensativi) under which “there is no liability when no damage is caused in light of the total result of the direction and co-ordination activity or when the damage is eliminated also as a consequence of specific transactions carried out to this purpose”. In other words, no conflict of interest exists among companies of the same group when it is reasonable to foresee that a company acting in the interest of another company of the same group (even though against its own corporate interest) will be compensated for any prejudice in light of the indirect and future benefit arising out of the general economic policy of the group in the medium or long-term.

5. Are you aware of any legislation which seeks to hold “owners and controllers” of companies accountable for the actions of those companies?

In relation to employment and pension-related matters, there is no legislation or applicable regulation according to which “owners and controllers” of a company can be held accountable for the actions of an owned/controlled company.

However, according to a number of case law studies, when a group formally composed of separate legal entities de facto acts, in the context of an employment relationship, as a “sole centre of legal interests”, the court may disregard the formal separation and consider all (or some of) the companies of the group as co-employers of the concerned employees. This principle is mainly applicable in the context of trials for unfair dismissals, where employees of smaller companies seek to obtain the protection of the law (i.e. reinstatement or indemnity up to 24 months’ salary rather than a much more limited protection).

In principle, the above situation should not apply to private equity funds that own and control portfolio companies. It applies when the separation of group companies into distinct legal entities is deemed by the court to be deceiving, and connections can be practically identified.

6. In what circumstances can directors of companies in financial distress be held personally responsible for the liabilities of companies where they fail to take into account the interests of creditors?

Directors’ Liability

Generally, directors must fulfil the duties imposed on them by law with the diligence required by the nature of the appointment and by their specific skills and competences.

Under Italian law, there are three levels of directors’ liability: the directors are jointly and personally liable to (i) the company; (ii) the company’s shareholders; and (iii) the company’s creditors for breaches of duty to act with diligence and to pursue the company’s interests.
As far as directors’ liability to shareholders and third parties (including creditors) is concerned, each shareholder or third party who has been directly injured as a result of a wilful misconduct or negligence of the directors can sue them for damages. “Directly injured” means that the directors’ conduct has directly affected the assets of the shareholders or third parties.

With specific reference to creditors, the company’s creditors can take action against the directors if the directors breach their duty to preserve the company’s assets when such assets are not sufficient to satisfy creditors’ claims (according to case law, Article 2934, Italian Civil Code concerning directors’ liability to creditors in joint stock companies also applies to limited liability companies).

Creditors’ lawsuits against the company’s directors are normally brought within bankruptcy and insolvency proceedings. Liability of directors for the company’s bankruptcy/insolvency can be declared in circumstances where it is considered that the bankruptcy/insolvency of the company was caused or aggravated by the wilful misconduct or negligence of the directors.

For example, should the company be declared bankrupt, the receiver may file a lawsuit against the directors for damages suffered by the company’s creditors if the directors performed acts without aiming to minimise losses and maintain the value of the company’s assets (Sentence of the Court of Bologna No. 375/2018 and Sentence of the Court of Milan No. 1718/2017, Trib. Milano No. 10652/2015). However, the receiver is required to prove the existence of the damages and the acts/omissions of the directors, so that the measure of the damages resulting from the directors’ breach or delay to fulfil their duties shall include the losses to creditors, such losses being a direct and immediate consequence of the directors’ acts/omissions (Sentence of the Italian Supreme Court (Cass. Civ. Sez. Un.) No. 9100/2015).

In addition to the above, directors may also incur criminal liability. Such “corporate crimes” (“reati societari”) include fraudulent bankruptcy; unlawful manipulation of company’s annual accounts and unlawful misappropriation or transfer of company’s assets.

Moreover, in the event of dissolution or winding-up of the company, the directors have a duty to ascertain without delay the circumstances causing the dissolution or the winding-up. Should the directors delay or omit to do that, they will be personally and jointly liable for loss suffered by (i) the company; (ii) the company’s shareholders; and (iii) third parties (including the company’s creditors). Upon occurrence of an event of dissolution or winding-up, the directors also have a duty to manage the company with the sole purpose of preserving the company’s assets and value. Breach of this duty will result in directors’ personal and joint liability to (i) the company; (ii) the company’s shareholders; and (iii) third parties (including the company’s creditors).

Shareholders’ Liability (applicable only to limited liability companies)

Under Article 2476, Italian Civil Code, the company’s shareholders might be deemed personally and jointly liable with the company’s directors to (i) the company; (ii) other shareholders; and (iii) the company’s creditors, in the event that such shareholders have intentionally pursued or authorised the implementation of detrimental transactions.
1. In England & Wales we have a well-established principle of separate corporate personality to divide a corporate entity from its owners. Do you have a similar principle in your jurisdiction?

The principle of separate corporate personality applies in Norway.

2. If yes, is this principle established by statute or by common law (i.e. case law)?

The principle of limited companies being independent legal entities is based on non-statutory law confirmed and applied by the Norwegian courts. Additionally, Norwegian legislation for private and public limited companies also states that no shareholder is liable to creditors for the obligations of the company.

For unlimited liability partnerships, and limited partnerships, the principle of independent legal entities is established by statute (section 2 – 1), Partnership Act 1985).

3. “Corporate Veil Piercing”: in what circumstances is the principle of separate corporate personality susceptible to challenge?

Section 17-1 (1), Norwegian Private Limited Liability Companies Act (the same applies for public limited companies) states:

“The company, a shareholder or others [creditors] may hold the general manager, a member of the board of directors, member of the corporate assembly, investigator or shareholder liable for any damage which they, in the capacity mentioned, have intentionally or negligently caused such part.”

This might be applicable, for example, in cases where shareholders abuse the corporate structure of limited liability.

The doctrine of piercing the corporate veil has been heavily discussed in juridical theory. Although legislators have left this question to be answered by the courts, they have indicated that the doctrine is to be reserved for circumstances where the environment or third parties have suffered damage [Ot.prp. nr.23 (1996-1997) page 177, Ot.prp. nr.55 (2005-2006) page 125].

The doctrine on piercing the corporate veil has not yet been applied by the Norwegian courts.
4. In what circumstances would a court in your jurisdiction go behind the principle of separate corporate personality and “pierce the veil”?

There is one reported case where it can be argued that the outcome in reality is a piercing of the veil, although the doctrine was not explicitly applied by the court.

In Rt. 2010 s. 306 (Hempel), the Supreme Court of Norway decided whether a subsidiary company can be held liable for the parent company’s default on taking account of environmental considerations. The Confederation of Norwegian Enterprise (NHO) as a third party argued imposing such a liability would be “unfortunate” since the principle of limited liability is of crucial importance to industry and commerce. However, based on an interpretation of the Pollution Control Act, the Supreme Court decided the subsidiary company could be held liable.

5. Are you aware of any legislation which seeks to hold “owners and controllers” of companies accountable for the actions of those companies?

- Section 51, Pollution Control Act (as noted in Rt. 2010 s. 306 (Hempel) above).
- Section 15-7 and 15-11, Environmental Working Act: according to the Supreme Court of Norway (Rt. 1993 s. 345), a subsidiary and a parent company can in some situations be treated as one in cases of unfair dismissal.
- Section 71, Penal Code: according to the Supreme Court of Norway (Rt. 2011 s. 868) regarding criminal acts of companies, confiscation of proceeds can in some cases be enforced against a shareholder in that company.
- Non-statutory law (case law) regarding the corporate entity in tax issues: according to the Supreme Court of Norway (Rt. 2007 s. 209), shareholders can be held liable in cases of abuse of tax regulations.

6. In what circumstances can directors of companies in financial distress be held personally responsible for the liabilities of companies where they fail to take into account the interests of creditors?

According to section 17-1 (1), Norwegian Private Limited Liability Companies Act, a member of the board of directors can be held liable for intentionally or negligently having breached section 3-4: “The company shall at all times have equity and liquidity which is adequate in terms of risk and scope of the company’s business”.

The Supreme Court of Norway decided such a case in HR-2016-1440-A (Håheller), where one person (the company’s sole shareholder, the leader of the board of directors and general manager) had transferred personal obligations in the amount of 40 million NOK to a limited company which he had formed with a share capital of 100,000 NOK and further financed through various insufficient family loans. The court also noted that the financing plan was unrealistic and inadequate, meaning there was no reasonable prospect of the company fulfilling its obligations.

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1. In England & Wales we have a well-established principle of separate corporate personality to divide a corporate entity from its owners. Do you have a similar principle in your jurisdiction?

The principle of separate corporate personality to divide an entity (i.e. a company) from its owners (i.e. the shareholders) is a primary and well-established principle of Polish company law.

2. If yes, is this principle established by statute or by common law (i.e. case law)?

The principle of separate corporate personality is established by statute, specifically the Commercial Companies Code. According to this basic principle, the shareholders of a company (i.e. a limited liability company (“LLC”) or a joint stock company (“JSC”)) are not liable for its obligations. Therefore, liability of shareholders is limited to the amount of contribution they pledge to pay into the company’s share capital.

A company acquires separate corporate personality upon its registration in the company register (the National Court Register).

Under the Commercial Companies Code, members of management and supervisory bodies may be held liable for any damage caused to the company by their actions or omissions that are unlawful or contrary to the provisions of such a company’s articles of association. Furthermore, should enforcement proceedings against a company be ineffective, management board members are jointly and severally liable for its obligations.

3. “Corporate Veil Piercing”: in what circumstances is the principle of separate corporate personality susceptible to challenge?

In general, the concept of piercing the corporate veil has neither been incorporated directly into Polish law nor has it been accepted by Polish courts or legal academics. In the case of Polish companies, shareholders’ economic risk is limited to their share capital contributions. Therefore, Polish courts have no legal basis for transferring liability for a company’s actions or omissions to its shareholders. However, it does not mean that personal liability of shareholders is always excluded.
Polish law provides for certain circumstances where liability for a company’s obligations is transferred from the company to other associated persons. For example:

- **Persons who acted on behalf of a company “being incorporated”** (i.e. once the company is incorporated, but before it has been entered on the register) are jointly and severally liable, together with the company in organisation, for its obligations.

- **Where case enforcement proceedings against an LLC prove ineffective**, management board members are jointly and severally liable for the company’s liabilities. Where a shareholder of an LLC is a member of its management board, he bears the aforementioned liability.

### 4. In what circumstances would a court in your jurisdiction go behind the principle of separate corporate personality and “pierce the veil”?

Polish company law is underpinned by the primacy of the principle of separate corporate personality of companies. This overarching concept has been confirmed in numerous court rulings of civil and administrative courts, which have reaffirmed that shareholders cannot be held liable for companies’ liabilities since companies operate as separate corporate entities. However, Polish courts have pierced the corporate veil on a handful of occasions, in some very unique cases.

In the judgment of 7 February 2007 (*I ACa 1033/06*), the Court of Appeal in Warsaw stated that two affiliated limited liability companies (due to the presence of the same parent company in the shareholding structure), which held shares in the same real property, should be treated as one unit, having the majority of shares in that real property. The court confirmed, in that case, that the principle of separate corporate personality should be waived, in effect “piercing the corporate veil”. However, this ruling has not been followed in subsequent similar court rulings, so its significance is rather limited (although it does provide a unique example of piercing the corporate veil under Polish law).

In addition to the above, in some employment cases where the employees’ best interests are at stake, Polish courts have held that employees hired by a subsidiary should be treated as employees of a parent company. In the judgment of 18 September 2014 (*III PK 136/13*), the Supreme Court considered the differences in the legal position of employees of a subsidiary and came to the conclusion that a close economic and operational link between companies may justify going behind the principle of separate corporate personality of the companies in the same capital group.

### 5. Are you aware of any legislation which seeks to hold “owners and controllers” of companies accountable for the actions of those companies?

In general, under Polish law “owners and controllers” may not be held liable for actions or omissions of companies. The company itself should be liable for any administrative fines or tax burdens which are imposed. As highlighted, a parent company may in some employment cases be regarded as the actual “employer” instead of its subsidiary, but this would more readily apply in cases of “Poland-based parent company – Poland-based subsidiary” relationships than to a “PE fund – Poland-based subsidiary” relationship.

Further, under Polish company law, a parent company and its subsidiary may agree to authorise the parent company to manage the subsidiary’s affairs or transfer profit accrued by the subsidiary to the parent company. These types of agreements contain provisions on the scope of the parent company’s liability for damage caused to the subsidiary by non-performance or improper performance of the agreement; and the scope of the parent company’s liability for debts of the subsidiary towards its creditors. However, these are very infrequent in practice and are not usually utilised by PE funds in Poland.
In what circumstances can directors of companies in financial distress be held personally responsible for the liabilities of companies where they fail to take into account the interests of creditors?

According to Polish company law, management board members (or liquidators) of an LLC are jointly liable to the company’s creditors, should enforcement proceedings against the company be ineffective. A management board member may be exempted from such liability if he proves that:

- A petition in bankruptcy was filed on time.
- An order to open restructuring proceedings was issued on time.
- An arrangement with creditors was approved on time.
- Failure to file a petition in bankruptcy was not the management board member’s fault.
- A creditor did not suffer damage despite the fact that none of the exemptions from liability above apply.

Similar provisions apply also in the case of a JSC in Poland.

In addition to the above, acting to the detriment of a creditor by a management board member in the event of financial distress of a company is regulated by the Polish Criminal Code. Where a company faces the threat of insolvency or bankruptcy, if any person exercising control over a company’s financial matters frustrates or diminishes the satisfaction of creditors’ claims, and, being unable to satisfy the claims of all creditors, satisfies only the claims of some creditors, thereby acting to the detriment of others, such person is subject to criminal liability.

A management board member (or a liquidator) who does not file a petition in bankruptcy, despite the circumstances requiring him to do so, will also be subject to a fine, restriction of liberty (community works) or imprisonment for up to one year.
1. In England & Wales we have a well-established principle of separate corporate personality to divide a corporate entity from its owners. Do you have a similar principle in your jurisdiction?

The general rule under Romanian law is that a company is a distinct, autonomous entity, completely separate from its shareholders.

Therefore, as a principle, the company and its shareholders are independent entities. The shareholders are not liable for the debts of the company as long as the company still exists, and vice versa.

2. If yes, is this principle established by statute or by common law (i.e. case law)?

Under Law no. 31/1990 on companies (“Company Law”), the shareholders may be held liable for the company’s debts only up to their contribution to the registered share capital.

However, there are certain expressly provided exceptions to the principle of limited liability of the shareholders, as detailed below.

3. “Corporate Veil Piercing”: in what circumstances is the principle of separate corporate personality susceptible to challenge?

The Romanian Civil Code sets out in general terms the principle of “piercing the corporate veil”, providing that no person can invoke the distinct legal personality of an entity against another person in good faith, if the concerned person (e.g. a director or indirect shareholder) intends to conceal a fraud, an abuse of law or damage to public order.

Company Law provides that, on the dissolution or liquidation of a company, the limited liability of the shareholders shall become unlimited for the unpaid debts of the company, if such shareholders have abused limited liability privilege and the separate legal personality of the company to the creditors’ disadvantage. The shareholders’ liability becomes unlimited especially:

- when they dispose of assets of the company as if they were their own; or
if they diminish assets of the company to their own benefit or to the benefit of a third party, to the extent such shareholders knew, or should have known, that in doing so the company would no longer be able to fulfil its obligations.

Pursuant to Romanian Insolvency Law No. 85/2014 ("Insolvency Law"), any person (including shareholders) may be held fully or partially liable for the insolvent company’s debts, if they contributed to the insolvency by carrying out one of the following actions:

- used the assets or the credit worthiness of the company for their own benefit or for another person’s benefit;
- carried out production or trade operations or delivered services for personal reasons under cover of the company;
- ordered, out of personal interest, the continuation of operations clearly resulting in the cessation of payments;
- kept fictional accounting records, deleted or destroyed certain accounting documents or failed to keep accounting records in accordance with the law;
- embezzled or hidden a part of the assets of the company or fictitiously increased its liabilities;
- used ruinous means to obtain funds for the company in order to delay the cessation of payments;
- during the month previous to the cessation of payments, paid or ordered the payment with preference towards a creditor, to the detriment of other creditors;
- any other wilful act, which contributed to the insolvency of the debtor.

The Romanian Tax Procedural Code provides that, with respect to the unpaid fiscal debts of the insolvent debtor, the following will be jointly and severally liable:

- any person who caused the insolvency of the debtor through various means (such as acquiring, selling or hiding, in bad faith, the assets of the debtor or non-payment of the fiscal debts on their due date); and
- any person who, directly or indirectly, is in control of, or is under joint control with the debtor and one of the following conditions is met:
  - it has acquired, under any title, the ownership right over the assets of the debtor and the net value of such assets represents at least half of the net value of all the assets of the acquirer;
  - it has or had contractual relationships with the clients and/or providers, other than in respect of utilities, who have or had contractual relationships with the debtor representing at least half of the total value of the transactions;
  - it has or had employment or civil services relationships with at least half of the employees or service providers of the debtor.

According to Government Emergency Ordinance no. 68/2007 on environmental liability, if a company that has caused damage to the environment or which poses an imminent threat of damaging the environment, is part of a consortium or a multinational company, it will be jointly and severally liable with the concerned consortium or multinational company.

4. In what circumstances would a court in your jurisdiction go behind the principle of separate corporate personality and “pierce the veil”? Any examples of cases would be very useful, especially if they involve private equity owners.

In theory, a court could go behind the principle of separate corporate personality and “pierce the veil” in any of the cases mentioned at Question 3 above.

However, the Romanian courts tend to extend the company’s liability to its shareholders mainly in insolvency cases, both under the Insolvency Law and the Tax Procedural Code.
5. Are you aware of any legislation which seeks to hold “owners and controllers” of companies accountable for the actions of those companies?

Owners and controllers may be held accountable for the actions of the company they own or control in the cases mentioned at Question 3 above.

6. In what circumstances can directors of companies in financial distress be held personally responsible for the liabilities of companies where they fail to take into account the interests of creditors?

As the Insolvency Law refers to “any person” who contributed to the insolvency of the respective company, it is the case that the liability of de facto/shadow directors may also be triggered where they caused (directly or indirectly) the company’s insolvency.

As regards liability under the Tax Procedural Code, the legal provisions refer expressly to the company’s directors but liability may also extend to de facto/shadow directors, where it is shown that they caused, in bad faith, the company’s insolvency.

Persons exercising control may also be held liable, as the legal texts refer to “any person” who contributed to the insolvency of the respective entity.

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1. In England & Wales we have a well-established principle of separate corporate personality to divide a corporate entity from its owners. Do you have a similar principle in your jurisdiction?

Russian Law provides for a well-established principle of separation of a corporate entity from its owners.

2. If yes, is this principle established by statute or by common law (i.e. case law)?

This principle is established by statute.

Article 48, Russian Civil Code stipulates that where a corporate entity has in its ownership, operative management or control, separate property/assets, it is liable for its obligations in relation to this property and may on its own behalf acquire and exercise property and personal non-proprietary rights, discharge duties and act as a plaintiff or a defendant in court.

Article 56, Russian Civil Code stipulates that an owner (shareholder) of the legal entity is not liable for the obligations of the legal entity, and the legal entity is not liable for the obligations of the owner, with the exception of cases expressly set forth by the law.

Russian courts also take a leading role in outlining the doctrine of corporate veil piercing as described below in Question 4.

3. “Corporate Veil Piercing”: in what circumstances is the principle of separate corporate personality susceptible to challenge?

Russian corporate law sets out two types of cases in which the principle of separate corporate personality may be challenged:

- **Bankruptcy “corporate veil piercing”:** in case of bankruptcy, owners, controllers and directors may be deemed as controlling persons of the debtor and may be held liable as described in Question 6;

- **Non-bankruptcy cases:** for example, in accordance with Article 67.3, Russian Civil Code, a parent company may be deemed liable for the obligations of its subsidiary, assumed by the subsidiary due to the orders given by the parent company.
4. In what circumstances would a court in your jurisdiction go behind the principle of separate corporate personality and “pierce the veil”?

Presently, the Russian courts apply the concept of piercing the corporate veil. Elements required to pierce the veil have not yet been fully established, but the courts tend to attribute the principle of “piercing the corporate veil” to certain tortious acts, e.g. abuse of rights, evasion of law, etc.

The first case where the corporate veil piercing principle was directly defined was the case of LLC Olimpiya v. Latvian banks Parex banka and Citadele banka. In this case, the Supreme Commercial Court directly referred to the doctrine of “piercing the corporate veil” and concluded that the corporate veil of the parent Latvian bank may have to be lifted by the Russian courts because, among other things, Russian representative offices of the other Latvian companies functioned as unlicensed representative offices of the parent (Latvian Parex bank and Citadele bank), and thus rendered bank services of these Latvian banks in Russia. The Supreme Commercial Court emphasised that the courts may pierce the corporate veil if the corporate entity is used for purposes of evasion of the law (Ruling of the Supreme Commercial Court dated 24 April 2012 No. A40-21127/2011).

The Russian courts “pierce the veil”, generally, in order to hold the controlling persons liable for the debts of the company. However:

- in 2014, the Supreme Court recognised the possibility of “piercing the corporate veil” to provide an opportunity to challenge the decision of the company’s general meeting, not only holding accountable the actual shareholders of the company, but also the ultimate beneficiary of the company owning shares therein through an entire chain of companies (Ruling of the Supreme Court dated 31 March 2016 No. 305-ЭС15-14197); and
- in 2016, the Moscow Arbitration Court refused to include the claim of a creditor affiliated to the debtor and its sole executive body in the register. The court concluded that if the claim was satisfied at the expense of the debtor’s property, this property would be returned to the debtor, and the inclusion of this requirement in the register of creditors of the debtor would allow the debtor to control the bankruptcy procedure (Ruling of the Supreme Court dated 19 December 2016 No. A40-156294/16).

5. Are you aware of any legislation which seeks to hold “owners and controllers” of companies accountable for the actions of those companies?

The doctrine of “corporate veil piercing” is also used in other legal spheres, e.g. tax law (real income recipient doctrine). According to Article 45, Russian Tax Code, the tax arrears may be seized from the affiliated persons, if it is deemed a real recipient of the income of the debtor: in several decisions of the Supreme Court in 2015, the Russian tax authority seized tax arrears of the debtor having proved the transfer of assets from the debtor to an affiliated company for the purposes of tax avoidance (Ruling of the Supreme Court dated 2 November 2015 No. 305-KG15-13737 and Ruling of the Supreme Court dated 27 January 2015 No. 81-KF14-19).
6. In what circumstances can directors of companies in financial distress be held personally responsible for the liabilities of companies where they fail to take into account the interests of creditors?

Russian law distinguishes between:

- liability for damages to the company itself, regardless of the company being insolvent. The amount of compensation is based on the amount of real damages caused to the company by the action or inaction of the executive, as well as the loss of expected profit; and

- subsidiary liability of the executive or controlling person in the event of bankruptcy of the company and causing losses to company’s creditors. Imposition of subsidiary liability stipulates recovery of the deficiency in order to satisfy the demands of all creditors.

Subsidiary liability is a very similar concept to wrongful trading: both concepts state that directors continuing trading when the company is approaching insolvency might be held liable.

Russian law stipulates general rules of:

- directors and controlling persons assuming liability for their dishonest or unreasonable acts which caused damage to the legal entity (Article 53.1, Russian Civil Code); and

- controlling persons of the company assuming secondary liability in case of failure to file the bankruptcy petition (or late filing thereof) and impossibility to fully satisfy the creditors’ demands.

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1. In England & Wales we have a well-established principle of separate corporate personality to divide a corporate entity from its owners. Do you have a similar principle in your jurisdiction?

The KSA Companies Law enacted by the Saudi Council of Ministers, on November 9, 2015, which came into effect on May 2, 2016 ("Companies Law"), explicitly states that a limited liability company is legally and financially separate from its shareholders. The limited liability company is, by law, solely responsible for its debts and obligations.

2. If yes, is this principle established by statute or by common law (i.e. case law)?

The principle of limited liability companies having a separate legal and financial personality from shareholders is established by the Companies Law.

The Companies Law may be elaborated upon or clarified by Ministerial Resolutions issued by relevant authorities such as the Ministry of Commerce and Investment which, pursuant to the Council of Ministers Regulations, Royal Order No. A/3 of 20th Muharram 1414 H., must be published in the Official Gazette (Umm Al Qura) in order to be effective.

The Companies Law may also be amended by Royal Decrees, which may be issued by the King from time to time.

3. “Corporate Veil Piercing”: in what circumstances is the principle of separate corporate personality susceptible to challenge?

The Companies Law provides specific circumstances when principles of separate corporate personality may be challenged. For example, if a shareholder or shareholders:

- in bad faith, liquidate the company or stop its activity before the expiration of its term or achievement of the objective for which it is incorporated;
- do not separate the business of the company from their own business; or
- carry out the business of the company before it gains the corporate body (i.e. obtains its commercial registration certificate from the Ministry of Commerce and Investment ("MOCI")).
4. In what circumstances would a court in your jurisdiction go behind the principle of separate corporate personality and “pierce the veil”?

Overall, the courts generally look into the merits of the case and rely upon Shariah (i.e. Islamic) law principles and applicable statutes in resolving disputes. Therefore, a court may look to the Companies Law, its limitations and intent, when resolving a dispute related to limitation of shareholder liability and, where warranted, in addition to the Companies Law, it may rely on Shariah principles of equity and fairness to pierce the veil and extend corporate liability to shareholders.

There is no system of legal precedent in KSA, and previous cases are generally not relied upon in resolving new cases. More recently, however, the concept and use of previous cases as persuasive argument is becoming increasingly common in KSA courts; however, is still not deemed binding. Therefore, reliance on previous cases for resolving corporate disputes, especially related to piercing the veil, is still largely untested.

5. Are you aware of any legislation which seeks to hold “owners and controllers” of companies accountable for the actions of those companies?

Generally, there is limited legislation in KSA that would hold “owners and controllers” of companies accountable for the action of those companies. There are certain instances when the liability of a company may flow up to the shareholders of that company, as explained above in response to Question 3. However, irrespective of whether the shareholders are part of a larger group of companies outside KSA, the liability may not go past the shareholders of the limited liability company and extend to the larger group.

For example, the existing workers’ compensation schemes in KSA under the regulations of the Ministry of Labor and Social Development (“MOL”) and the General Organization for Social Insurance (“GOSI”) may hold a company liable for losses to an employee for work-related injury, depending on the classification of the company. Such losses, subject to the merits of the scenario, would be covered either by the company or the GOSI. Generally, unless the facts and evidence support otherwise, MOL and GOSI will not exercise jurisdiction and reach out to the group members of the shareholders’ wider group organisation to impose liability on those members of the group outside of KSA (or perhaps even inside KSA).

Examples, similar to the ones above, can be given when it comes to payment of tax to the General Authority of Zakat and Tax, minus facts and evidence, the liability of the due taxes will rest with the limited liability company, or extend to the shareholders of that company, but rarely go up to the wider group organisation of which the shareholders are part.
6. In what circumstances can directors of companies in financial distress be held personally responsible for the liabilities of companies where they fail to take into account the interests of creditors?

In respect of limited liability companies, there are certain circumstances in which directors/managers may be held personally responsible. For example, the Companies Law outlines that managers (also may be called directors) may be held personally liable to the company, its shareholders or third parties (which may be the creditors of the company) if they:

– violate any provisions of the Companies Law;
– the articles of association of the limited liability company; or
– commit wrongful acts in performance of their duties.

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1. In England & Wales we have a well-established principle of separate corporate personality to divide a corporate entity from its owners. Do you have a similar principle in your jurisdiction?

Under Spanish Law, there is a principle of separate corporate personality between a company and its owners. The principle is based on the grounds that shareholders create a separate group of assets that shall act under the form of a mercantile company with independence and different personality than that of its shareholders (who shall not be held personally liable for company debts).

2. If yes, is this principle established by statute or by common law (i.e. case law)?

This principle is established by the Spanish legislature. In particular, it is contained in the Royal Decree Legislative 1/2010 of 2 July (“Spanish Companies Act” or “SCA”), which states that mercantile companies, once registered, acquire such legal status.

Shareholders of limited companies (sociedades limitadas) and public limited companies (sociedades anónimas) will not be liable for the debts of the relevant company. Thus, the shareholders will not be responsible for the liabilities of the company. However, it should be noted that there is a particular type of limited company, being the limited partnership (sociedad comanditaria por acciones), in which at least one of the shareholders can be held personally liable for the company debts.

3. “Corporate Veil Piercing”: in what circumstances is the principle of separate corporate personality susceptible to challenge?

Under Spanish law, there are no specific legal provisions regarding “corporate veil piercing”. However, there is case law, based on “judicial creation” by the Spanish courts influenced by judgments made in foreign courts (predominantly US and UK), demonstrating the existence of a doctrine of “corporate veil piercing”.

In this regard, recent case law sets out that a corporation cannot be treated as a separate legal person from its shareholders when said “separation of legal entity” is a mere fiction used for fraudulent or illegal purposes. As such, this principle may be used in cases of fraud: when the incorporation of a company is simulated in order to avoid the fulfilment of a contract; when the company is used to conceal an immoral objective; or as an instrument of deviation or distortion in the application of legal rules.
4. **In what circumstances would a court in your jurisdiction go behind the principle of separate corporate personality and “pierce the veil”?**

The doctrine of “corporate veil piercing” is very rarely used in Spain, and tribunals usually respect the separation of personalities between shareholders and companies, treating them as separate entities.

However, there are **four** scenarios in which the doctrine can be applied:

- **Identity of subjects or confusion of assets**: this is the case when it is impossible for third parties to distinguish between the legal personality of a company and the personality of the shareholders; or between the assets of the company and the assets of the shareholders. For example, when two or more companies share the same shareholders and/or directors; or when the company has a sole shareholder (or even a main shareholder and one or several minor shareholders acting as figureheads for the main shareholder).

- **When the shareholders provide the company with insufficient funds to carry out the corporate business**: there are very few judgments on this circumstance and such cases usually turn on additional grounds further to provision of insufficient funds.

- **Group companies**: this is the case when a company effectively controls another related company, without the latter having its own will, separated from the will of the dominant company. This is applicable in labour disputes; for example, where an employee works for a subsidiary which only provides services for the parent company.

- **Contravention of law or fraud**: this is the case when a corporation is wilfully used to elude the fulfilment of legal, contractual or even non-contractual liabilities, thus obtaining a result contrary to the law, which is unfair or harmful to third parties.

5. **Are you aware of any legislation which seeks to hold “owners and controllers” of companies accountable for the actions of those companies?**

The main applicable legislation is set out in tax and employment regulations:

- Firstly, according to The Spanish General Tax Law, shareholders may be held “secondarily liable” for the tax debt and sanctions of the controlled entities, whenever they have effective control, totally or partially, directly or indirectly, over a company that was incorporated or used as an abusive or fraudulent means to avoid tax obligations and there is either a group of persons or economic spheres or confusion/deviation of goods and assets.

- Secondly, although there are no specific employment regulations on this point, case law has created the concept of “groups of companies for employment purposes”. The existence of such implies that the entities involved would be seen as a single employer and would, therefore, be jointly and severally liable in respect of all employment obligations and duties arising in connection with their respective employees. In order to determine the existence of a “group of companies for employment purposes”, the following circumstances are taken into account by the employment courts:
  - asset confusion;
  - employees performing services successively or simultaneously for several group companies;
  - common management; and/or
  - if the entities have the same or similar external appearance.

However, it is very unlikely that the above circumstances and their related liabilities would apply with regard to private equity funds.
6. In what circumstances can directors of companies in financial distress be held personally responsible for the liabilities of companies where they fail to take into account the interests of creditors?

Directors are responsible for the management of the company and representing it in and out of courts and to third parties in all matters within the scope of the company’s ordinary course of business.

As a general rule, the liability of the directors of a company derives from the duties and obligations imposed on them by law and, where relevant, by the articles of association and the resolution of the general shareholders’ meeting.

Directors of a company can be held personally liable for direct damages by the company, its shareholders or third parties (including creditors), caused by acts or omissions against the law, or the by-laws of the company, or for having failed to fulfil their duties due to misconduct or negligence. In this regard, guilt shall be presumed in cases where loss is caused to the company by an act against the law or the provisions of the by-laws of such company. For example, directors could be found liable for not keeping prudent accounts, not drafting the relevant balance sheets, or not declaring the insolvency of the company when the legal conditions are met.

This liability is joint and several (responsabilidad solidaria) and, therefore, all directors who voted in favour of, participated in, or knew about, the damaging act or omission and did not expressly try to avoid the loss or oppose the harmful act, may be jointly and severally liable for the loss.

It should be noted that, all members of the managing body of a company can be held jointly and severally liable unless they prove they did not participate in the adoption or implementation of, and were unaware of, the act/omission causing loss, or, being aware, took all reasonable measures to prevent loss, or objected to it.

The most common claims that may be filed against directors are:

- **Corporate liability action** (acción social de responsabilidad) may be filed by any shareholder in order to remedy any damage suffered by the company and is approved by the company’s general shareholders’ meeting (junta general de socios).

- **Individual liability action** (acción individual de responsabilidad) may be filed by any shareholder or third party in order to remedy any damage suffered by such claimant.

- **Mandatory winding up**: (causa legal de disolución) when the company’s equity figure is less than half of its share capital and no appropriate measures to restore the equity position have been adopted, the directors are required to call a general shareholders’ meeting within a two month period from the date on which they became aware of the mandatory winding up event, in order to adopt a resolution to wind up the company or take necessary actions (such as a capital increase/decrease to offset the losses). Failure to comply with this legal obligation by the directors would make them jointly and severally liable (responsables solidarios) for the company’s debts and obligations which arise after the equity imbalance became known.

- **The directors may file a declaration of insolvency** if the company is not able to comply with its payment obligations, or will become insolvent in accordance with the regulations under The Spanish Insolvency Act 22/2003, 9 July 2003 (Ley 22/2003, de 9 de julio de 2015, Concursal). This becomes particularly serious if the insolvency is classified by the judge as “guilty of fraud” (concurso culpable), which means that the insolvency was caused or aggravated by the wilful misconduct (dolo) or gross negligence (negligencia grave) of the company’s directors (including de facto directors).

Such liabilities are personal, which means they are personally attributed to those declared liable, based on their own behaviour. This liability may reach not only the formal members of the board, under the Commercial Registry, but also those individuals or entities which may be deemed as de facto administrators or directors, and may even extend to any attorney of the company or any accomplice in any of the actions having led to the finding of liability.

The finding of guilt may be based on: the list of irregular behaviours (lack of accounts, false accounts, fraud, default on a previous agreement with creditors, tunnelling of assets to other entities, etc.) leading to an irrefutable presumption of guilt; the list of actions (lack of filing for insolvency, lack of adequate co-operation with the Court and the trustees, etc.) leading to a presumption of guilt; or on the judicial finding that the person, either with intent or recklessness, contributed to the insolvency of the company.
In the event that the insolvent company is found guilty of fraud, the judge may decide that the directors and those who have fulfilled management duties for the two years before the declaration of insolvency shall:

- be disqualified from managing assets or becoming a director for a period between 2 and 15 years;
- lose any credits that they may hold against the debtor company; and
- indemnify any loss caused and, in the event that the insolvency proceedings lead to liquidation, pay the amount of the loans that remain unpaid after the liquidation of the debtor company.

If the directors fail to comply with these duties they will be jointly and severally liable for the company’s obligations (including all the company’s debts).

- **Directors’ liability regarding employment matters:** under the Spanish Criminal Code, directors can be held liable as active subjects in relation to infractions committed by the company against its employees or against the Spanish Social Security system.

- **Directors’ liability regarding tax matters:** Spanish tax and criminal legislation provides for additional grounds for directors’ liability. As regards tax infringements, directors of a company can be held liable to tax authorities either (a) on a subsidiary basis; or (b) on a joint and several basis, depending on the nature of the offence.

- **Criminal liability:** directors may incur criminal liability if they commit a crime in either corporate-related criminal offences or other criminal offences. The so-called “corporate crimes” include, without limitation, the following:
  - unlawful manipulation of annual accounts;
  - unlawful misappropriation or transfer of company assets;
  - offences against shareholders’ rights;
  - crimes against the rights of employees;
  - obstructing authorities from carrying out an inspection;
  - insolvency status being provoked or aggravated by the debtor company;
  - filing false documents with the purpose of obtaining a declaration of insolvency; and
  - obstructing the enforcement of any creditor’s right.

Claims for liability against directors shall expire four years from the day they could have been exercised.

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The responses to the questions below assume that the relevant company is incorporated in the United Arab Emirates (“UAE”) under Federal Law No. 2/2015 (“Company Law”) rather than in one of the UAE’s many free zones. There are several free zones within the UAE which are often used by foreign investors because, amongst other things, they offer 100% foreign ownership of companies. Companies established outside of the free zones have minimum local ownership requirements. Each of the free zones have adopted their own rules which apply to companies incorporated therein. Such rules are not considered in these responses.

The Company Law offers an investor a number of corporate structures which can be established in the UAE. For the purpose of this publication we refer only to limited liability companies (“LLC”).

1. In England & Wales we have a well-established principle of separate corporate personality to divide a corporate entity from its owners. Do you have a similar principle in your jurisdiction?

Under the Company Law a company shall “from the date of entry in the Commercial Register with the competent authority, acquire a corporate personality” (Article 21). The Company Law goes on to provide that a shareholder in an LLC shall only be liable to the extent of that shareholder’s share capital (Article 71).

2. If yes, is this principle established by statute or by common law (i.e. case law)?

The principle is enshrined in statute – the Company Law.
3. “Corporate Veil Piercing”: in what circumstances is the principle of separate corporate personality susceptible to challenge?

There are situations under the Company Law where liability can be imposed on shareholders despite the limited liability afforded under Article 71 of the Company Law. These include:

- Where the company is not properly incorporated under the Company Law or declared void by a court, any shareholder contracting with a third party in the purported name of the company can be held personally and jointly liable for all obligations arising from such a contract (Articles 9 and 16).

- If a company distributes false profits or violates any provisions of the Company Law, a company’s creditors have a right to demand that the shareholders repay such profits, even if the profits were received in good faith (Article 30).

- If, at any time after the incorporation of an LLC, the number of shareholders exceeds the statutory limit (50), the competent authority will issue a rectification notice. If the company fails to rectify its position within six months after the notice date the company is deemed dissolved and the shareholders are personally and jointly liable (from their personal assets) for the debts and obligations of the company from the date when the limit is exceeded (Article 85). Shareholders can avoid this liability if they can either (a) prove that they were not aware of such an increase in the number of shareholders or (b) prove that they objected to such an increase.

- If a shareholder grants a share in kind, that shareholder will be liable towards third parties for the accuracy of the estimated value of such share in kind (Article 78). If it is determined that shares were valued above their true value, the shareholder contributing the share must pay the difference in cash to the company.

The persons responsible for the management of an LLC are its managers and, in particular the general manager, who is an individual named on the trade licence of the company. Please note that in Arabic, the original language of UAE laws, the words for ‘manager’ and ‘director’ are interchangeable and so liability cannot be avoided by using an alternate title.

Managers can either be named in the LLC’s memorandum of association or are otherwise appointed by methods set out in Article 83 of the Company Law. It is common for shareholders to also act as managers.

A manager may incur personal liability in certain circumstances, for example:

- If managers fail to use the expression “Limited Liability Company” or “LLC” after the name of the company, they are jointly liable for the obligations of the company (Article 72).

- If managers fail to register the memorandum of association of the company, they will be held jointly liable to indemnify the company, shareholders or third parties for any damage suffered as a result of the non-registration (Article 15).

- Managers are liable towards the company, its shareholders and third parties for acts of fraud, misuse of power, violations of the Company Law or the company’s articles of association, or an error in management (Article 84).

A person (whether a shareholder or manager) who violates any provision of the Company Law may be liable for a fine of between AED 10,000 and AED 100,000 (Article 360).

4. In what circumstances would a court in your jurisdiction go behind the principle of separate corporate personality and “pierce the veil”?

Case judgments are not published in the UAE and in any event, the UAE does not have a system of judicial precedent and so any court decision does not bind the courts’ judgments on future cases. There have been, however, cases where the UAE courts have imposed liability on shareholders, particularly where the shareholders have benefitted from fraudulent behaviour and have sought to avoid liability through the protections that an LLC offers.
5. Are you aware of any legislation which seeks to hold “owners and controllers” of companies accountable for the actions of those companies?

As a general rule, UAE legislation will impose liability on managers of companies (for example, under the labour law, environmental laws and health and safety laws) in certain situations. There are no known circumstances where such liability has been extended to shareholders, unless such shareholders have also been acting in the capacity of managers, nor are there any known situations where liability has been imposed on group companies. However, there are provisions in the UAE Civil Code which could ultimately be relied upon by a court to impose cross-group liability in specific circumstances.

6. In what circumstances can directors of companies in financial distress be held personally responsible for the liabilities of companies where they fail to take into account the interests of creditors?

The UAE Bankruptcy Law (Federal Law No. 9/2016) ("Bankruptcy Law") provides that anyone who has a role in decision making in a company will be deemed to be a manager for the purposes of the Bankruptcy Law (Article 196). This also extends to those under whose direction a manager acts.

The Bankruptcy Law requires a company to initiate bankruptcy procedures if the company ceases to repay debts for more than 30 consecutive business days (Article 68). There is, however, no explicit sanction in the Bankruptcy Law for a failure by the shareholders or the company’s managers to start the proceedings as required.

The Bankruptcy Law provides that a court may require managers of a company which does not have sufficient funds to meet at least 20% of its debts to meet all or part of the company’s debts in circumstances where they are held responsible for the company’s losses according to the Company Law (Article 144). The Company Law states that managers are liable towards the company, its shareholders and third parties for acts of fraud, misuse of power, violations of the Company Law or the company’s articles of association, or an error in management (Article 84). A finding by a court of an error in management or misuse of power could, therefore, render the managers of a UAE company personally liable under Article 144 of the Bankruptcy Law.

The Bankruptcy Law also enables a court to bankrupt a party (including a shareholder or a manager) who is acting on his own account but conducting business in the name of the company (Article 143).

There is no explicit requirement in either the Company Law or the Bankruptcy Law for managers to specifically consider the interests of creditors once a company is insolvent. However, the Bankruptcy Law enables a court to impose financial penalties and penal sanctions against managers of a bankrupt company for certain actions. As well as including penalties for entering into antecedent transactions and committing fraudulent acts, these penalties can also be imposed on those who caused a bankrupt company to engage in speculative business activities. As the Bankruptcy Law is relatively new, the approach the UAE courts will take to such provisions is as yet unknown (and in any event, the UAE courts do not follow a system of precedent); however, it is arguable that the prohibition on “speculative business activities” effectively places an obligation on managers to operate an insolvent company in a manner which will minimise loss to creditors.

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1. In England & Wales we have a well-established principle of separate corporate personality to divide a corporate entity from its owners. Do you have a similar principle in your jurisdiction?

The same principle applies in Ukraine. Most Ukrainian companies are incorporated in the form of a limited liability company ("LLC") or a joint-stock company ("JSC"). There are other forms of incorporation, but in practice their overall number is insignificant.

A shareholder of an LLC is called a “participant”, while a shareholder of a JSC is a “shareholder”. The practice of lifting the corporate veil is, in the vast majority of cases, limited to direct participants and shareholders of LLCs and JSCs. In other words, these exceptions do not apply to the ultimate beneficial owners ("UBOs") of these companies provided that such UBOs are not direct participants or shareholders thereof. The only exceptions to this rule are: (i) insolvency proceedings and (ii) banks, where liability of UBOs was recently incorporated into Ukrainian legislation.

2. If yes, is this principle established by statute or by common law (i.e. case law)?

This principle is established by Article 96(3) of the Civil Code of Ukraine according to which “a participant (founder) of a legal entity shall not be liable for the obligations thereof, while a legal entity shall not be liable for the obligations of its participant (founder) unless otherwise provided by constitutional documents or by law”.

3. “Corporate Veil Piercing”: in what circumstances is the principle of separate corporate personality susceptible to challenge?

Pursuant to the Civil Code of Ukraine, exceptions to the principle of separate corporate personality may be established by constitutional documents of a legal entity or by law. In practice, constitutional documents of a legal entity usually do not provide for any additional exceptions other than those provided by law. Nonetheless, Ukrainian legislation envisages the following exceptions to the principle of separate corporate personality:

Exceptions deriving from the special form of a legal entity

There are several forms in which a legal entity may be incorporated in Ukraine. Although the most widespread legal entities are LLCs and JSCs, it is possible to establish an entity in some “exotic” form such as an additional liability company, full partnership or limited partnership. All these forms incorporate additional liability for their participants (founders) in respect of the obligations of the legal entity.
For instance, participants (founders) of an additional liability company bear additional liability for the obligations of the legal entity in the amounts/proportions provided by the charter (Article 151(2)). Partners of a full partnership are jointly and severally liable with all their assets for the obligations of the legal entity (Article 124(1)) and the same applies to full partners in a limited partnership (Article 133(1)). A company incorporated in the form of a “holding company” may be held liable for the obligations of a legal entity wherein it is a major participant/shareholder if such legal entity becomes insolvent and is declared bankrupt due to the fault of the holding company.

Other exceptions provided by law

- Shareholders of a JSC and their nominee(s) to the supervisory board of the company shall be jointly and severally liable for any damages caused to the company by such nominee(s).
- Founders of a legal entity (regardless of the form in which it was established) shall be jointly and severally responsible for any obligations thereof accumulated prior to the date of incorporation, provided that such obligations were not approved by the legal entity following its incorporation (Article 96(4)).
- Participants of an LLC who failed to pay, in full, their contributions to the charter capital shall be jointly and severally responsible for the obligations of the LLC in the amount limited to the unpaid portion of their contributions (Article 140(2)).
- Participants of an LLC as well as officials thereof shall be jointly and severally liable for fraudulent misrepresentation concerning the financial position of the company, leading to unlawful distribution of dividends (Article 26(5) Law on Limited Liability and Additional Liability Companies, effective June 17, 2018).
- Shareholders of a JSC who failed to purchase, in full, their shares in the JSC shall be jointly and severally responsible for the obligations thereof provided that such liability is envisaged by the charter of the JSC (Article 152(2)).
- A participant of a legal entity (regardless of the form in which it was incorporated) which conducts heat supply or heat generating activities shall be liable for the debts of such legal entity owed to the suppliers of energy products (Article 22(5), Law of Ukraine “On heat supply”.
- A legal entity incorporated following a “split-up” or a “spin-off” of another shall bear additional liability for the obligations of its parent company.
- Shareholders of a JSC and their nominee(s) to the supervisory board of the company shall be jointly and severally liable for any damages caused to the company by such nominee(s).

4. In what circumstances would a court in your jurisdiction go behind the principle of separate corporate personality and “pierce the veil”?

When interpreting legislation, Ukrainian courts will not usually go beyond their texts. This essentially means that cases of lifting the corporate veil are strictly limited to those that are envisaged by the applicable legislation.

5. Are you aware of any legislation which seeks to hold “owners and controllers” of companies accountable for the actions of those companies?

Two examples may be mentioned here.

- **Insolvency proceedings**

  - If a legal entity that entered into insolvency proceedings becomes bankrupt due to the fault of its participants, shareholders or controllers, such participants, shareholders or controllers shall bear additional liability for the obligations of such legal entity (Article 41(5), Law of Ukraine).

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1 In Ukraine it is a special type of joint stock company. Its name shall contain words “holding company” and it shall be a major (50%+1 shares) participant/shareholder in two other legal entities.

2 According to the general principle of Ukrainian civil law, any person shall be deemed to be not at fault (or “unguilty”), if such person manages to prove that he took all measures for the proper performance of an obligation. At the same time, civil liability is possible only when all elements of a civil wrongdoing are present, namely (i) fault, (ii) wrongfulness of an action, (iii) damages and (iv) causal link between wrongful action and damages.
If the owner or director of a legal entity that entered into insolvency proceedings fails to file for bankruptcy where such legal entity cannot settle with its creditors, they are jointly and severally liable for any claims of the creditors in excess of the liquidation estate.

On a separate note, a participant or shareholder of a legal entity, or any official thereof, may face **criminal liability** for intentional and “profiteering” actions leading to the bankruptcy of such entity (Article 219, Criminal Code).

### Banks

A person considered by the law as a “**bank-related person**” bears:

- civil, administrative and criminal liability for violations of Ukrainian legislation, performance of high-risk operations that could affect investors or creditors of the bank, as well as actions leading to the insolvency of the bank; and/or
- civil liability for damages caused to the bank by actions or inactions of such person, provided that the fault of the latter has been proved.

The “**bank-related person**” includes:

- controllers;
- owners (direct/indirect) of substantive shares;
- directors, head of internal audit service and members of committees;
- associated or affiliated persons, members of the bank group;
- owners of substantive shares in associated or affiliated entities;
- associated persons of individuals mentioned above;
- legal entities in which individuals mentioned above hold the position of directors or are owners of substantive shares; and/or
- any person/entity used to perform a transaction in the interest of persons mentioned above, or any person influenced by other persons mentioned above through employment, civil or other relations.

#### 6. In what circumstances can directors of companies in financial distress be held personally responsible for the liabilities of companies where they fail to take into account the interests of creditors?

In addition, from June 17, 2018, members of executive bodies of LLCs and additional liability companies will be jointly and severally liable for the obligations of such entities if they failed to convene a general meeting of participants thereof within 60 calendar days following the day on which the value of net assets of the entity has decreased by more than 50% from their value as at the end of the previous year.

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