Corporate Law Group

Liability of shareholders of a limited liability company

EUROJURIS INTERNATIONAL

Corporate Law Group

Formerly known as the Eurojuris Mergers & Acquisition Group, the Corporate Group focuses on cross-border issues in the field of corporate law.

Meeting at least twice a year, its members exchange information about handling cross-border mergers, the setting up of subsidiaries and other entities, including basic tax questions arising from daily advise to medium-sized companies. The impact of recent European Court decisions in the evolution of corporate law in some member states have been a major aspect of the discussions in the past two years. Short reports by the members of the group on major corporate law issues in their countries complete the regular meetings.

As the advice requested by clients includes not only the legal aspects of cross-border deals, each year the Corporate Group invites an external, non-legal speaker to provide an expert analysis of the local mergers & acquisitions market.

The group plans to meet with other Eurojuris practice groups to exchange information which can be used in merger transaction documents, due diligence etc.

This is the first brochure resulting from a new comparative law project of the Working Group Corporate.

We are looking forward to many more!

Thomas Brand (Chair)

Barbara Egger-Russe (Chair)

More information on www.eurojuris.net

Greiter Pegger Kofler Rechtsanwälte
www.lawfirm.at

Liability of shareholders of a limited liability company

1. How and to what extent can the shareholders of a limited liability company be held liable?

In principle, the shareholders are only liable up to the amount of their original contribution. This is based on the separation principle (Trennungsprinzip). In exceptional cases, the shareholders may be held personally liable.

2. Is it in principle possible to enforce the liability of the shareholders for the debts of the company? If so, please specify in more detail.

Pursuant to Section 61 para 2 GmbHG (limited liability companies act), the shareholders are generally not liable for the debts of the limited liability company. Under certain conditions, however, the possibility of a liability penetration (direct liability) of the shareholder is permitted. Liability presupposes culpable and unlawful conduct on the part of the shareholders.

3. Can a shareholder be held liable for the incomplete payment of his capital contribution and for the non-payment by his co-shareholders? If so, please specify in more detail.

The shareholder is liable not only for the full payment of his original capital contribution but also for the unpaid original capital contribution of his co-shareholder in the event of a caduceus action (Kaduzierung). The caduceus action refers to the exclusion of a shareholder due to the failure to pay in his capital contribution after a prior qualified reminder. The liability for the contribution claim continues to exist for the excluded shareholder. The company may also enforce its claims by way of legal action. In addition, the other shareholders are liable for the capital contribution of the defaulting shareholder, which has not yet been paid in, in proportion to their participation ratios.
In addition to an excluded shareholder, all his predecessors are liable who were registered as shareholders in the commercial register within the last five years prior to the issue of the payment claim.
The caducean procedure ensures that the liability funds promised by the shareholders to the abstract creditors of the company on the occasion of its formation are also paid in the event of a defaulting shareholder.

4. Is a shareholder who is de facto acting as managing director without being appointed as such subject to liability? If so, please specify in more detail.

A de facto management, which in terms of liability law can be equated with a managing director registered in the commercial register, exists when shareholders exert a significant influence on the management of the company. What is decisive and what is not naturally depends on the individual case.
Shareholders who in fact or by virtue of their right to instruct interfere in the management of the company shall be liable in the same way as managing directors in the event of a breach of due diligence (in analogous application of Section 25 GmbHG limited liability companies act).

5. Does your legal system provide for regulations on shareholder liability in the event of undercapitalization of the company? If so, please specify in more detail.

If an Austrian limited liability company was deliberately provided with too less equity capital from the beginning, liability on the part of the shareholders could arise in the case of a qualified undercapitalization. This is understood to mean an equity base by the shareholders that is clearly insufficient in relation to the scope of business from the outset, so that the creditors are particularly at risk.

6. Can the shareholders be held liable for their voting behavior e.g. a vote against the initiation of reorganization measures? If so, please specify in more detail.

Due to the duty of loyalty incumbent on the shareholders, untrustworthy resolutions can in principle be appealed. Any conduct contrary to the principle of loyalty can make the shareholder liable for damages.
Liability of the Supervisory Board and the General Meeting (Section 25 URG company reorganization act)
If a member of the executive body authorized to represent the company has proposed the initiation of the reorganization procedure but has not received the necessary approval of the Supervisory Board or the General Meeting, or if he has been effectively instructed not to initiate the procedure, he shall not be liable.
In this case, the members of the body who voted against the initiation or who gave the instruction are jointly liable in accordance with Section 22 para 1 to the extent resulting from this provision, but only up to € 100,000 per person.

7. Does your jurisdiction provide for other regulations on the liability of shareholders of a limited liability company; if so, please specify in detail.

Please see above.

8. Does your jurisdiction provide for regulations on the disclosure of information on beneficial owners of a company, foundation or trust, e.g. a mandatory register?

On January 15, 2018, the Beneficial Owners Register Act WiEReG) entered into force, obliging certain domestic legal entities to identify, verify and report their beneficial owners to a new «Register of Beneficial Owners» created at the Federal Ministry of Finance.
The background is the implementation of essential parts of the 4th EU Money Laundering Directive with the aim of preventing money laundering and terrorist financing.
A beneficial owner is defined as an individual to whom a company, foundation or trust can ultimately be economically attributed.
In case of a newly founded company, the beneficial owners are to be reported within four weeks after the initial entry in the respective master register (companies register, associations register etc.) or, in the case of trusts and trust-like arrangements, after the establishment of the administration in Austria. Changes to the data must be submitted within four weeks of becoming aware of the change. Further, it must be checked at least once a year whether the data of the registered beneficial owners are still up-to-date.

9. What precautions must be taken to prevent money laundering and which transactions are considered to have an increased risk of money laundering?

With regard to the precautionary measures to be taken by lawyers in the interest of preventing money laundering, a distinction must be made between (i) general due diligence obligations relating to the

organization of the law firm and (ii) due diligence obligations relating to a specific transaction.
Particularly in the context of client onboarding, but also beyond that, it is therefore necessary to introduce procedures that are as standardized as possible for the fulfillment of due diligence obligations, in particular for establishing the identity, the beneficial owners and the purpose of the financial transaction. It is to be ensured that associates and other employees of the law firm are familiarized with the provisions aimed at preventing or combating money laundering. Depending on the specific business activity and the type and size of the law firm, it may also be advisable to appoint a lawyer as compliance officer for the area of money laundering prevention.
Transactions that are considered to have an increased risk of money laundering are the following:

a) all financial or real estate transactions carried out by the lawyer in the name of and for the account of his party, as well as

b) transactions carried out by the lawyer, insofar as they concern:
- the purchase or sale of real estate or businesses,
- the management of money, securities or other assets,
- the opening or management of bank, savings or securities accounts, or
- the establishment, operation or administration of trusts, corporations, foundations or similar structures, including the raising of funds necessary to establish, operate, or administer such companies.
In the case of transactions that are considered to have an increased risk of money laundering, the lawyer is obliged to conduct a particularly careful examination of the transaction and the client, its representatives and/or the beneficial owner.
The lawyer is not obliged to continue his due diligence measures, in particular those relating to identification, in case

a) he knows or has a suspicion or a reasonable cause to believe that the transaction is for the purpose of money laundering or is connected with it, and

b) at the same time, he has reasonable grounds to believe that the party – by performing the required steps to establish the identity or the source of funds – would become aware of the suspicion against it.

However, the lawyer shall then be obliged to immediately submit a corresponding suspicion report to the competent Money Laundering Reporting Office without delay.

MMMag. Barbara Egger-Russe

University of Innsbruck and Université de Lausanne, Master of Commerce in Business Administration, Master of Commerce in International Economic and Business Studies, Master of Jurisprudence, Legal clerkship at the Innsbruck District Court and Innsbruck Regional Court

Eurojuris International – Chair of Practice Group “Corporate Law Group” (www.eurojuris.net) /

President Eurojuris International Austria

Lecturer at the Management Center Innsbruck (MCI, www.mci.edu); Lecturer at the University of Innsbruck

Greiter Pegger Kofler:

- Legal Expertise since 1897
- Team of 25 legal specialists, including 12 partners
- Comprehensive civil and commercial law competence
- Correspondence in German, English, Italian and French
- Various Publications, also in renowned Austrian and international professional journals
- Tuition and training in university lectures and seminars

Mag. Andrea Pegger, BSc.

University of Innsbruck Master of Law and Bachelor of Science Management and Economics, Legal clerkship at the Hernals District Court, the Public Prosecutor’s Office St. Pölten and the Labour and Social Court of Vienna, Associate in an international commercial law firm in Vienna

Member of Eurojuris Austria and Jurismus

Lecturer at the Management Center Innsbruck (MCI, www.mci.edu)

Liability of shareholders of a limited liability company

Previous note: The new Belgian Companies Code entered into force as from 1 May 2019. Reference is made to the new rules. However the old Code is still applicable for companies existing on 1 May 2019.

1. How and to what extent can the shareholders of a limited liability company be held liable?

The shareholders of limited liability companies in Belgium only com-mit their contribu-tion.
Free translation of Art. 5:1 NBBC "The private limited liability company is a company without capital in which the shareholders merely commit their contribution."
Free translation of Art 6:2 NBBC "The shareholders of a co-operative company mere-ly commit their contribution".
Free translation of Art. 7:1 NBBC "The public limited company is a company with a capital to which the shareholders merely commit their contribution."

2. Is it in principle possible to enforce the liability of the shareholders for the debts of the company? If so, please specify in more detail.

No this is in principle not possible.
However there exist some ways to try to hold (some) shareholders liable for company debts:

1. Based on the founder's liability.
2. Based on the Piercing the Corporate veil doctrine ": "Piercing the corporate veil", means that the limited liability of the shareholders is lifted in exceptional cases, as a result of which the shareholders can be held personally liable for the debts of the company.
It should be noted that important creditors of the company (such as financial institu-tions) will often request for a security of the shareholders (e.g. guarantees) when con-tracting with the company.

3. Can a shareholder be held liable for the incomplete payment of his capital con-tribution and for the non-payment by his co-shareholders? If so, please specify in more detail.

Please note that the capital is abolished for the private limited liability company and for the co-operative company. For those entities, I understand that reference is made to the payment of the contribution.
Contributions into a private limited liability company and for the co-operative company should in principle be paid in full upon the incorporation and/or capital increase (cfr 5:8 and 5:125 NBBC for the private limited liability company) (6:9 and 6:109 NBBC for the co-operative company).The incorporation deed or the deed of the capital increase can deviate from this.
For a public limited liability company at least the minimum capital 61,500 EUR should be paid in full. In addition. ¼ of each contribution in cash should be paid in full upon the incorporation/capital increase and shares that represent a contribution in kind should be paid in full within 5 years upon the incorporation/capital increase (7:11 NBBC; 7:183 NBBC)
A shareholder can be requested to pay his contribution in full by the management body (or as the case may be the bankruptcy receiver). He only needs to pay the re-maining amount of his contribution, not the contribution of his co-shareholders. In this response, it is assumed that the shares have been validly subscribed to. If this is not the case, there is a guarantee by the founders/the administrative body that the shares will be paid up in full.
Both seller and purchaser of shares for which the contribution has not been paid en-tirely are jointly liable vis-à-vis the company to pay the remaining amount in full. (5:66 NBBC for the private limited liability company, 6:55 NBBC for the co-operative com-pany; 7:77 NBBC for the public limited liability company.)

4. Is a shareholder who is de facto acting as managing director without being ap-pointed as such subject to liability? If so, please specify in more detail.

De facto directors, defined as those who have exercised effective management pow-er over the legal person, shall also be liable in the same way as formally appointed administration or supervisory bodies.
A shareholder de facto acting as managing di-rector may held liable for director's liability. (cfr 2:56 NBBC).

5. Does your legal system provide for regulations on shareholder liability in the event of undercapitalization of the company? If so, please specify in more de-tail.

Our legal system foresees the obligation to have sufficient initial equity/capital for the private limited liability company and the co-operative company, and a sufficient capital for public limited liability companies. (5:3 NBBC for the private limited liability compa-ny, 6:4 NBBC for the co-operative company and 7:3 NBBC for the public limited liabil-ity company)
The founders can be held liable for the company's debts, in a proportion to be deter-mined by the court, in the case of bankruptcy pronounced within three years of the acquisition of legal personality, if the initial equity/capital at the time of incorporation was manifestly insufficient to enable the company to carry on its business normally over a period of at least two years. This will be determined based on the detailed fi-nancial plan that need to be issued (cfr 5:16 NBBC for the private limited liability com-pany; 6:17 NBBC for the co-operative company; 7:18 NBBC for the public limited lia-bility company)

6. Can the shareholders be held liable for their voting behavior e.g. a vote against the initiation of reorganization measures? If so, please specify in more detail.

Without entering in doctrinal details it is possible in certain circumstances to challenge the votes of a shareholder (f.e. when the use of the voting rights forms an abuse of rights). Of course damages and a causal link must also be demonstrated.

7. Does your jurisdiction provide for other regulations on the liability of share-holders of a limited liability company; if so, please specify in detail.

Reference is made to the answer of question 1. The law provides that the shareholder is merely liable for his contribution and the guarantees/liabilities foreseen in the law is to make sure that the contributions are effectively made.
The law does not foresee in an additional section 'liability of shareholders'.
The liability of shareholders can be invoked based on based on jurisprudence and doc-trine applying civil law principles (cfr the piercing of the corporate veil and the abuse of law claims).

Joan Dubaere

Joan Dubaere offers a wealth of expert knowledge of commercial and company law, corporate restructuring and related employment issues.

He provides advice to clients at both national and cross-border level.
Joan is involved in transactions, negotiating and drawing up agreements or in the settlement of disputes in court and in arbitration proceedings.

He is frequently involved as a court-appointed agent for company and commercial law issues and as a court agent for restructuring operations.

He also acts as a bankruptcy curator and company liquidator.

Joan is a frequent speaker at seminars and workshops on company law and restructuring, conflicts between partners, company liquidation, …

Liability of shareholders of a limited liability company

1. How and to what extent can the shareholders of a limited liability company be held liable?

The shareholders of a limited liability company are jointly and severally liable for the company's debts up to the total sum of unpaid contributions of all shareholders to the registered capital of the company. Decisive is the amount of unpaid contributions recorded in the Commercial Register at the time the creditor calls for payment.
If contributions of all shareholders to the registered capital are fully paid (and this information is recorded in the Commercial Register) the shareholders are not in principle liable for company's debts.

2. Is it in principle possible to enforce the liability of the shareholders for the debts of the company? If so, please specify in more detail.

It is possible to enforce the liability of the shareholders for the debts of the company, if any of the shareholders has not paid his entire contribution to the register capital of the company. However the creditor must first call the company to fulfill the debt. Only if the company fails to pay the debt, the creditor can turn to the shareholders. The creditor can demand performance from any shareholder, regardless of whether or not he has already fulfilled his contribution obligation. The liability can be enforced in court by a standard action for performance (Section 79 and following of the Code of Civil Procedure).
If the invited shareholder pays to the creditor more than corresponds to the shareholder's unpaid capital contribution, he is entitled to reimbursement from the company or the other shareholders in the proportion in which they have not yet fulfilled their contribution obligation (Section 134 of the Business Corporations Act – "BCA").

3. Can a shareholder be held liable for the incomplete payment of his capital contribution and for the non-payment by his co-shareholders? If so, please specify in more detail.

Every shareholder is entitled to claim, on behalf of the company, the fulfilment of the contribution obligation against another shareholder who is in default with its fulfilment (Section 157 BCA).
Beyond that a shareholder who is in default with the payment of his or her financial capital contribution is obliged to pay to the company late payment interest amounting to double of the statutory late payment interest (currently 20 % p.a.), unless provided otherwise in the memorandum of association.
The defaulting shareholder can also be excluded from the company by a decision of the general meeting, if he fails to pay the contribution even in a reasonable period set out in a qualified reminder (Section 151 BCA). A two-thirds majority of all shareholders is required to decide on the exclusion, whereby the excluded shareholder must not vote. An excluded shareholder may, within three months from the delivery of the general meeting's decision, apply to the court for invalidity of such exclusion; otherwise this right expires.

4. Is a shareholder who is de facto acting as managing director without being appointed as such subject to liability? If so, please specify in more detail.

Anyone who uses his or her influence in a company to influence in a decisive and significant manner the behaviour of such company to its detriment (the "influential entity"), is obliged to compensate the damage incurred. Moreover the influential entity guarantees towards the company's creditors payment of debts, which cannot be partially or fully paid to them by the company as a result of the influence. These rules apply to shareholders acting as de facto managing directors as well.
The influential entity can avoid liability, if proves that he or she could have in good faith and reasonably assumed to be acting on an informed basis and in a justifiable interest of the company while exercising the influence (Section 71 BCA).

5. Does your legal system provide for regulations on shareholder liability in the event of undercapitalization of the company? If so, please specify in more detail.

New legislation effective from 1.1.2014 abandoned the so-called "guarantee function" of the registered capital in a limited liability company. The minimal shareholder's contribution to the registered capital can be CZK 1,00 (EUR 0,04). Therefore it is possible to establish a limited liability company with almost no equity from contributions of shareholders. Very low minimal capital contribution also enables significant decrease of the company's registered capital by a decision of the general meeting.
In general, the shareholders are not liable for undercapitalization of the company. It is the liability of the executive director, who acts with due diligance, to choose the right ratio between internal and external capital sources and take care of the company's financial health. However as explained under 4) hereof, acting as "influential entity" to the detriment of the company can render a shareholder liable for damage and constitute his guarantee for company' debts towards creditors. Undercapitalization may be caused for example by a decision of a major shareholder to significantly decrease the company's registered capital at a time when the company has no other resources to cover its liabilities. However in practice, it is usually difficult to prove a causal link between the actions of an influential person and the company's inability to fulfill its debts. The burden of proving the causal link lies with the creditor of the company.

6. Can the shareholders be held liable for their voting behavior e.g. a vote against the initiation of reorganization measures? If so, please specify in more detail.

Each shareholder is obliged to respect the duty of loyalty which he has towards the company. That means he has to act with respect to the company, with integrity and comply with its internal order (Section 212 Civil Code). If a shareholder violates the duty of loyalty he is liable for the damage caused.

7. Does your jurisdiction provide for other regulations on the liability of shareholders of a limited liability company; if so, please specify in detail.

Apart from general criminal liability and liability for administrative offenses the Czech jurisdiction does not provide for other, than above mentioned, regulation on the liability of shareholders.

JUDr. Ladislav Zvolský, Ph.D.

Law Degree Masaryk University in Brno, Ph.D. in civil law Charles University in Prague.
Languages: Czech (mother tongue), English, German, Slovak, Spanish.
Practicing law since 2003.

Ladislav specializes mainly in business and corporate transactions. He also has extensive experience with various types of significant commercial and corporate disputes such as breach of commercial contracts, unfair competition, trademarks or stockholders' actions. In addition to that, he also drafts and negotiates commercial and real estate contracts. He is responsible for provision of comprehensive legal counseling to English and German speaking clients of the law firm.

ZVOLSKÝ ADVOKÁTI s.r.o. provides full range of commercial legal services. Active in the Czech and Slovak legal market since 1990. The firm is particular about effectiveness, promptness, ethical conduct and top quality of its services.

Liability of shareholders of a limited liability company

1. How and to what extent can the shareholders of a limited liability company be held liable?

The liability of the shareholders of a limited liability company is limited according to Czech Law. Principally, main "burden" of liability lies upon statutory body (Executives, in Czech "jednatel") of the limited liability company, who is in charge of business man-agement and bookkeeping of the company.
a) Liability of the shareholders for the debts of the company is only up to the amount of their unpaid contributions under the status entered into the Commercial Register
The shareholder is liable for the company's liabilities only up to the amount of unpaid contributions according to the status of the entry in the Commercial Register. Accord-ing to the provision of Section 132 of Act No. 90/2012 Coll., Business Corporations Act (the "BCA") defines that:
«A limited liability company is a company, for whose debts the shareholders are jointly and severally liable up to the amount in which they have not fulfilled their contribution obligations under the status entered in the Commercial Register at the time when they were called upon to perform by the creditor.»
The shareholder is not liable for the obligations of the limited liability company with his/ her own property, but in certain situations he/she might be liable for the obligations of the limited liability company with all his property, if the creditor cannot obtain perfor-mance from the limited liability company ("LLC"). Namely, it is a situation where the contributions to the share capital of LLC subscribed by the partners were not fully re-paid to the company, or were repaid, but the repayment of the shareholders' contribu-tions was not registered in the Commercial Register. It must therefore be borne in mind that in order to exclude the liability of the shareholders, it is not enough to repay the contribution to the share capital of LLC, but the repayment of the contribution must also be entered in the Commercial Register within the principle of material publicity. If the contributions of all shareholders are repaid and the repayment of the shareholders is registered in the Commercial Register, then the shareholder is not liable for the obli-gations of the LLC at all.

b) Liability of a shareholder as "influential entity" for damages caused to busi-ness corporation (LLC) or to its creditors
BCA contains also general provisions enabling the sanctioning of the influencing per-son (e.g. a shareholder with main influence in the LLC) who has caused damage to the affected person (LLC) by his/her actions.
Definition of the influencing person is stated in Sec. 73 of BCA and it is clear from this definition that a shareholder in LLC can also be "influential entity":
Anyone who uses his or her influence in a business corporation (the "influential enti-ty") to influence, in a decisive and significant manner, the behavior of a business cor-poration (the "influenced entity") to the damage of the same shall compensate such damage, unless he or she proves that he or she could have in good faith and reason-ably assumed, in his or her influencing actions, to be acting on an informed basis and in a justifiable interest of the influenced entity.
Where the influential entity fails to compensate the damage it caused no later than by the end of the accounting period in which the damage occurred or within other agreed reasonable period of time, he or she shall also compensate any damage arising in this connection to the members of the influenced entity.
What is important - the influential entity shall be liable towards the creditors of the influenced entity for the payment of the debts, which cannot be partially or ful-ly paid to them by the influenced entity as a result of the influence referred to in previ-ous paragraphs.
Exemption from the obligation of the influential entity to compensate damage:
If the influential entity as defined above proves that the damage occurred in the inter-ests of the influential entity or another entity with whom it constitutes a concern, and was or will be settled within the concern, the liability of the influential (dominant) entity shall not apply.
However – where a dependent entity goes bankrupt as a result of acts by the influen-tial entity towards the dependent entity, exemption from the liability to compensate damage shall not apply.

c) Criminal liability of the shareholders for voting at the general meeting
Under certain, very limited, circumstances, shareholders can be held criminally liable for they voting at the general meeting. These circumstances will be rather rare and must be proven. For more detailed answer please see reply to the question No. 6.

2. Is it in principle possible to enforce the liability of the shareholders for the debts of the company? If so, please specify in more detail.

The shareholder is liable for the company's liabilities only up to the amount of unpaid contributions according to the status of the entry in the Commercial Register. Practically it will be possible to enforce the liability of the shareholder in LLC only in cases when the shareholder: a) hasn´t paid up his/ her contribution, or b) it wasn´t entered into the commercial register.
The shareholder is not liable for the obligations of the limited liability company with his/ her own property, but in certain situations he/she might be liable for the obligations of the limited liability company with all his property, if the creditor cannot obtain perfor-mance from the limited liability company ("LLC"). Namely, it is a situation where the contributions to the share capital of LLC subscribed by the partners were not fully re-paid to the company, or were repaid, but the repayment of the shareholders' contribu-tions was not registered in the Commercial Register.
A creditor can also try using general provisions regarding influential person causing damages to the creditors of LLC company, in which case the shareholders guarantee for payment of the debts by LLC to the creditors, but in practice it will be hard to prove that:

a) influential entity caused the damages by its influence in the LLC,
b) the damages occurred and its amount,
c) cause between the action of the influential entity and the damages occurred (causal nexus).

3. Can a shareholder be held liable for the incomplete payment of his capital contribution and for the non-payment by his co-shareholders? If so, please specify in more detail.

The shareholder cannot be released from the contribution obligation unless the regis-tered capital is reduced. If a shareholder is in arrears with payment of the capital con-tribution, he / she cannot exercise his/ her voting right and at the same time his votes are not taken into account when determining the quorum of the General Meet-ing.
According to Section 151 - (1) BCA a member who is in default with the payment of his or her cash contribution shall pay to the company late payment interest amounting to double of the late payment interest on the amount owed as set forth in another legal regulation, unless provided otherwise in the memorandum of association.
Secondly, a member who is in default with the fulfilment of his or her contribution obli-gation may be expelled from the company by the general meeting. Where a member holds multiple business shares, the expulsion shall affect only the business share in relation to which the member is in default with the fulfilment of his or her con-tribution obligation, unless provided otherwise in the memorandum of association.
Pursuant to § 157 et seq. BCA any shareholder may file on behalf of the company an action against another shareholder who has not fulfilled his/ her contribution ob-ligation. At the same time, the law allows to exercise the right to exclude a shareholder from the company for non-fulfillment of the contribution obligation.
There is also possibility for the court to replace the decision of the General Meet-ing according to Sec. 204 BCA. A company may request that a court expels a mem-ber who violated his or her duties in a particularly serious manner in spite of having been invited by the company to ensure their due fulfilment and notified in writing about the possibility of expulsion.

4. Is a shareholder who is de facto acting as managing director without being appointed as such subject to liability? If so, please specify in more detail.

Nobody, no matter if shareholder of the company or any other person, should act on behalf of the company and pretend he/ she is acting on behalf of the company.
If somebody does so (even shareholder) it might be considered as fraudulent and ille-gal behavior.
Any shareholder, who is acting “on behalf” of the company, should submit power of at-torney from the Executive of the company.
However, from our practice, we know that it often happens that a shareholder is acting on behalf of the company. The third parties must require power of attorney or insist upon Executive of the company acting on behalf of the company.

5. Does your legal system provide for regulations on shareholder liability in the event of undercapitalization of the company? If so, please specify in more detail.

Czech legal system doesn´t contain any specific regulation regarding shareholder lia-bility for undercapitalization of the company.
It would be very difficult to prove that a shareholder is liable for undercapitalization of the Company.
In general, the above – mentioned Sec. 73 of the BCA stipulating liability of an influen-tial entity for the damages caused to the dependent entity could be used, also in cases where the company goes bankrupt.

6. Can the shareholders be held liable for their voting behavior e.g. a vote against the initiation of reorganization measures? If so, please specify in more detail.

Czech Insolvency Legislation doesn´t contain specific provisions, according to which the shareholders might be held liable for their voting behavior against the initiation of reorganization measures.
In Czech Law, the Executives (jednatelé) as statutory body of LLC are liable for filing insolvency proceedings against the LLC when it is over-indebted.
Pursuant to Section 68 (1) of the BCA, a court may, on the proposal of the insolvency administrator or creditor of a commercial corporation, decide that a member or former member of its statutory body guarantees for the damages occurred due to failure to file the insolvency motion.
However, liability of shareholders of LLC is not given by Czech Law, with exception of the general provision of Sec. 73 BCA (influencing entity causes damages to the com-pany or its creditors) – please see reply to the question No. 1 c).

7.Does your jurisdiction provide for other regulations on the liability of shareholders of a limited liability company; if so, please specify in detail.

a) Liability of influencing entity for imposing its influence in the dependent en-tity
Our legal system contains general provision of of Sec. 73 BCA (influencing entity causes damages to the company or its creditors) – please see reply to the ques-tion No. 1 c).
b) Criminal liability of the shareholders for voting in the general meeting
Secondly, under certain (very limited) circumstances, the criminal liability of the shareholders for voting in the general meeting may arise. However, the chance to hold the shareholders liable for their voting in the general meting in result of which a criminal act is committed, is rather theoretical:
First of all, it must be said that the voting of a collective body, whether the board of directors of a legal entity or its general meeting, does not usually have the nature of acting in a civil or commercial sense. If the law or internal regulations of a legal entity require that certain legal act be given prior consent or that such an act be subsequently approved, such approval is a condition for the validity of the act, or to ensure that the person who performed the act is not liable for the damage that would have been caused to the company by such an act.
Therefore, participation in the voting of a collective body of a legal person must, as a rule, be assessed in the light of the provisions on participation in a criminal of-fense, depending on the stage reached by the conduct of the main offender.
In the event that at least an attempt to commit a criminal offense is made, the vot-ing of shareholders in the general meeting may be seen as an instruction to com-mit the criminal offense, in particular where the collective authority requires a spe-cific person to commit an offense.
Only very exceptionally, voting in a collective body alone could fulfill the features of the factual nature of a separate criminal offense, in particular the features of approving a criminal offense under Section 165 of the Penal Code. disciple.
This would be the case if the collective body subsequently approved the action al-ready taken by the person who acted on behalf of the legal person. However, criminal liability would arise only if it were a public vote and, of course, only for those who would vote in favor of such conduct.
An interesting question is whether, in the case of a vote which preceded the actual criminal conduct, it is possible to impose criminal liability on those who would ab-stain from voting on the disputed issue without voting against the illegal resolution. Abstentions, that is to say, omissions («votes against»), cannot be regarded as acts, in particular because of those votes are not in themselves acts but as preparation for or participation in a criminal offense.

8. Does your jurisdiction provide for regulations on the disclosure of in-formation on beneficial owners of a company, foundation or trust, e.g. a mandatory register?

As of 1 January 2019, all legal entities registered in the Commercial Register were obliged to notify the locally competent court of their beneficial owner, at the level of a natural person. Although the obligation to state the beneficial owner may also appear to be superfluous for legal entities that have a single natural person as the sole share-holder, these obligations also apply to these.
This obligation arose for legal entities in connection with the amendment of Act No. 253/2008 Coll., on certain measures against the legali-

zation of proceeds from crime and terrorist financing.
The beneficial owner of a company is a natural person who, legally or in fact (eg as a controlling person), directly or indirectly exercises a decisive influence in a legal per-son or in a trust fund.
The competent court of registration is the regional court according to the registered of-fice of the legal entity or trust fund to which the registration relates. Registration can also be done by direct registration through a notary. The registry court shall make the entry within the statutory period of 5 working days. The registration court does not is-sue any decision or confirmation about the registration, the records themselves are not public, however, the execution and accuracy of the registration can be determined by selected authorized persons, including lawyers, by looking at the records through re-mote access provided.

9. What precautions must be taken to prevent money laundering and which transactions are considered to have an increased risk of money laundering?

Precautions to prevent money laundering are regulated by the Act No. 253/2008 Coll., on certain measures against the legalization of proceeds from crime and terrorist fi-nancing.
The specific obligations to prevent money laundering apply to "obliged persons", such as banks, savings and credit cooperatives, electronic money institutions, a person au-thorized to issue electronic money, certain financial institutions, investment compa-nies, auditors, tax advisors, advocates, notaries etc.
a) Obligation to identify the client
Among the basic obligations that the law imposes on liable persons is the obligation to identify the client. Obliged persons generally have this obligation whenever it is clear that the value of the client's trade exceeds EUR 1,000.
The obligation to identify the client in practice means that the liable person records da-ta from the client - natural persons - in his presence and verifies these from the identi-ty card, most often an identity card, which contains all the legal requirements that the liable person is obliged to find out from the client. This information includes name, sur-name, date of birth, residence, sex, the authority that issued the identity card and its period of validity.
In the case of legal entities, the business name, registered office, identification number are ascertained, and a natural person who is a member of the statutory body of such a legal entity is also identified using the procedure described above. In the case of rep-resentation of a natural or legal person by an agent on the basis of a power of attor-ney, this agent is identified, as well as applies to the legal repre-sentative.
Client identification data is archived for a period of 10 years after the transaction. As part of the identification, the liable person should also record whether the person in question is not a politically exposed person (so-called PEP).
c) Client´s control
Another obligation imposed by the AML Act on liable persons is, in ac-cordance with the provisions of Section 8 of the AML Act, the control of the client. The liable entity carries out the client's control to the extent necessary to assess the possible risk of money laundering and terrorist financing, depending on the type of client, business re-lationship, product or trade.
For example, if the bank asks you to provide documentation on your person and the origin of the money when making a payment of EUR 100,000, you are required to pro-vide these, and the bank is entitled to make copies of the documents submitted.
In practice, the control of the client itself is often carried out by means of a solemn declaration of the client about the facts required. In some cases, the liable person is also entitled to request documentation, such as statements from accounts or relevant registers, etc.
d) Beneficial owner
The definition of the beneficial owner is now based on the AML Act, specifically on its provisions Sec. 4 par. 4. The Act considers a natural owner, resp. persons who have, in fact or in law, the possibility to exer-cise directly or indirectly a decisive influence in a legal person, or in a trust or other legal arrangement without legal personality.
e) Risk assessment
The obligated person is obliged to assess the risks of money launde-ring and terrorist financing, which may occur in the provision of his services or activities.
f) Non- realization of a transaction
As indicated above, the liable person is obliged to refuse to carry out a transaction or enter into a business relationship if the client refuses to submit identification or identification cannot be performed, refuses to provide a power of attorney or fails to provide the necessary coopera-tion.
The liable person shall also refuse to carry out the transaction in situations where he has doubts about the veracity of the information provided to him by the client or about the authenticity of the sub-mitted documents. The trade will not take place even with a politically exposed person, unless the origin of the property used in the trade is known.
g) Suspicious transaction notification
If the obligated person discovers suspicious transactions in connection with its ac-tivities, it is obliged to notify the Financial Analytical Office without undue delay, but no later than within 5 calendar days of such discovery.

Stepan Holub

Štěpán Holub is a lawyer and partner of Holubová advokáti s.r.o. in Prague, Czech Republic.
His specializations are mostly real estate law, multi-generation planning, corporate law, business law and data protection.

He studied at the law schools in Prague and Stockholmm. He speaks Czech, English, German and Swedish.

FINLAND (2020 update)

TEPERI
ASIANAJOTOIMISTO | ATTORNEYS

www.teperi.co

Liability of shareholders of a limited liability company

1. How and to what extent can the shareholders of a limited liability company be held liable?

Finnish limited liability legislation is based on a strong principle of limited liability of shareholders. According to Limited Liability Companies Act (624/2006 osakeyhtiölaki) the shareholders shall have no personal liability for the obligations of the company. However, provisions may be included in the articles of association on the liability of a shareholder to make specific payments to the company.
Liability in damages concerns shareholders. According to Limited Liability Companies Act, a shareholder shall be liable in damages for the loss that he or she, by contributing to a violation of Limited Liability Companies Act or the articles of association of the company, has deliberately or negligently caused to the company, another shareholder or a third party. Loss that has been caused by an act to the benefit of a related party, shall be deemed to have been caused negligently, unless the shareholder proves that he or she has acted with due care.
As stated above, shareholder can be held liable only in damages for the loss that he or she, by contributing to a violation of this Limited Liability Companies Act or the articles of association. Therefore, shareholder cannot be held liable, for example in the rationality of the business related to solutions of that he or she has been contributing.
The shareholder's responsibility for the general meeting decision requires that the shareholder have contributed to the decision. Shareholders who have voted for the decision are considered having contributed to the decision even if their vote had not been decisive. If a proposal is made in a general meeting and none of the shareholders opposes it or makes a counter proposal, all the shareholder shall be deemed to have contributed the decision.
If a shareholder is liable in damages under Limited Liability Companies Act, he or she must compensate all damages that he or she have caused. Where the damage has been caused by two or more persons, or they otherwise are liable in the same damages, the liability shall be joint and several. The damages payable are allocated to those liable as is deemed reasonable in view of the guilt apparent in each person liable, the possible benefit accruing from the event and other circumstances.

2. Is it in principle possible to enforce the liability of the shareholders for the debts of the company? If so, please specify in more detail.

In some occasions it might be possible. Although primarily shareholders have no personal liability for the obligations of the company, in some rare cases liability can be enforced. Situation where liability of the shareholders for the debts of the company is enforced is called disregarding the legal entity.
According to legal praxis of the Supreme Court of Finland, disregarding the legal entity is possible in cases where in the conglomerate structure the relations between the companies or the shareholder's authority are clearly used in an artificial and blameworthy way to damage for example creditors or to evade legal obligations. Disregarding the legal entity requires that the company is not administratively and economically independent, for example a parent company de facto practices its business via its subsidiary.

3. Can a shareholder be held liable for the incomplete payment of his capital contribution and for the non-payment by his co-shareholders? If so, please specify in more detail.

No. If a shareholder has not paid share capital, obligation of payment raises between the company and the shareholder. Co-shareholders cannot independently demand payment from the shareholders to their own account. The board of directors has a duty to demand payment from shareholders who has not made full capital payment when it became due. Furthermore, according to the law, the board of directors may declare the right to a share forfeited, if the subscription price, together with the possible overdue interest thereon, has not been paid, although it has become due and the board of directors has not granted an extension to the subscriber. In this event, the board of directors may award the subscription right to a third party.

4. Is a shareholder who is de facto acting as managing director without being appointed as such subject to liability? If so, please specify in more detail.

According to Limited Liability Companies Act board of directors appoints managing director. Still, according to the legal praxis, managing director who has not been appointed accordance the law has the same liability than he or she would have if he or she was appointed in correct manner. As a consequence, it is possible that person who is acting de facto managing director can be subject to liability.

Eljas Vesterbacka

Eljas Vesterbacka specialises in corporate and commercial transactions. The majority of his work focuses on M&A, corporate advisory and corporate structuring related matters. He also actively handles contractual issues and contract related litigation.

He frequently represents foreign companies and investors in connection with the formation, acquisition, structuring and contractual matters in Finland and cross-border connections. Eljas has extensive experience working with emerging companies and companies in need of restructuring. He is placed to help business to grow, solve problems and raise equity or funding.

He is keen about understanding the client's needs and challenges to develop the legal considerations needed in the client's business.

FRANCE (2021 update)

https://www.ifl-avocats.com

Liability of shareholders of a limited liability company

1. How and to what extent can the shareholders of a limited liability company be held liable?

The shareholders of a limited liability company in France only commit to their contribution.

The article L223-1 of the Commercial Code thus states that "a limited liability company is formed by one or more persons who bear losses only to the extent of their contributions."

2. Is it in principle possible to enforce the liability of the shareholders for the debts of the company? If so, please specify in more detail.

In principle, it is not possible in limited liability companies. Shareholders are only held to their contribution. However, in three hypotheses, the shareholders can be held liable for company debts.

Firstly, if they retain a different value from that proposed by the auditor for in kind contributions. They are then jointly and severally liable for this value for five years to third parties (Article L223-9 al 4 Commercial Code). This occurs even if in principle they are not obliged to accept the valuation of the contributions in kind made by the auditor.

Then, if they acted as de facto directors and as such have committed a management error resulting in a shortfall in assets and the opening of collective proceedings against the company (Article L651-2 Commercial Code).

Finally, if they have personally guaranteed one or more debts of the company.

3. Can a shareholder be held liable for the incomplete payment of his capital contribution and for the non-payment by his co-shareholders? If so, please specify in more detail.

There are no legal minimum capital requirements for sociétés à responsabilité limitée and sociétés par actions simplifiée.The liability may rather lie on the payment of the capital contribution.

Contributions into a société à responsabilité limitée should be paid in full upon the incorporation or capital increase (Article L223-7 Commercial Code).

A société par actions simplifiée (SAS) may be set up by one or more persons who are only liable to the extent of their contribution (Article L227-1 of the Commercial Code).
At the time of the company's creation, the capital may be paid up by only half of its amount. The surplus must be paid up in one or more instalments within five years of the company's registration, upon call from the company directors (L225-3 al 2 Commercial Code).

For sociétés anonymes, at least half of the nominal value of the shares shall be paid up at the time of incorporation. This fraction shall be determined by mutual agreement between the future shareholders. (Article L225-3 Commercial Code). Failure to comply is sanctioned by the suspension of the voting rights and dividend rights of the corresponding shares. (Article L225-16-1 Commercial Code).

The surplus must be paid up, in one or more instalments, within five years of the registration of the company upon a call for funds by the board of directors or the management board.

In the absence of any indication in the articles of association, the shareholders are liable for the payment divisively and not jointly and severally.

4. Is a shareholder who is de facto acting as managing director without being appointed as such subject to liability? If so, please specify in more detail.

De facto directors have not been formally appointed by supervisory bodies. They are not the company's legal representatives, but they nevertheless have real management functions in the company.

A shareholder de facto acting as managing director may be held liable for director's liability (Article L249-1 Commercial Code).

5. Does your legal system provide for regulations on shareholder liability in the event of undercapitalization of the company? If so, please specify in more detail.

There is no legal minimum capital requirement for sociétés à responsabilité limitée.
For a société par actions simplifiée the minimum capital is freely determined by the articles of association (L223-2 Commercial Code).
The undercapitalization of a company which is attributable to the partners does not constitute a management error (Cass. com., 10 march 2015, n°12-15505). Therefore, they can't be held liable.

However, for a société anonyme a minimum of 37.000 euros is required (L224-2 Commercial Code). The reduction of the capital to a lower amount than the minimum may only be decided under the suspensive condition of a capital increase regularising the company's situation. Failure to comply is sanctioned by the possibility for any interested person to ask the commercial court to order the dissolution of the company.

6. Can the shareholders be held liable for their voting behaviour e.g. a vote against the initiation of reorganization measures? If so, please specify in more detail.

The right to vote cannot be exercised in a discretionary manner. The shareholders can be held liable for their voting behaviour based on the concept of abuse of right.

There is an abuse of majority when the decision adopted by the majority of shareholders is contrary to the interests of the company and has been taken for the sole purpose of favouring the members of the majority to the detriment of the other shareholders.
Abuse of the majority generally leads to the nullity of the decision taken.

There is abuse of minority rights when the minority partner has adopted an attitude contrary to the general interest of the company by prohibiting an essential operation for the company, with the sole aim of favouring his interests to the detriment of the other partners.

The remedy for the abuse of minority may consist in an award of damages.

7. Does your jurisdiction provide for other regulations on the liability of shareholders of a limited liability company? If so, please specify in detail.

As already mentioned, the law provides that the shareholders of a limited liability company only commit to their contribution.

There is no additional section of "liability of shareholders".

8. Does your jurisdiction provide for regulations on the disclosure of information on beneficial owners of a company, foundation or trust, e.g. a mandatory register?

Article L561-2-2 of the Monetary and Financial Code states that «the beneficial owner is the natural person(s): either who ultimately controls, directly or indirectly, the customer; or for whom a transaction is executed or an activity carried out."

In order to fight money laundering and terrorist financing, a central register has been set up to identify the beneficial owners of companies.

The register of beneficial owners is managed by the commercial courts clerks.

All companies and legal entities registered in the Trade and Companies Register (RCS) have to publish information on their beneficial owners in this register.

9. What precautions must be taken to prevent money laundering and which transactions are considered to have an increased risk of money laundering?

Article L324-1 of the Criminal Code defines money laundering as "the act of facilitating, by any means, the false justification of the origin of the assets or income of the perpetrator of a crime or offence that has provided him with a direct or indirect profit."
To prevent money laundering a double obligation is imposed on all companies registered in France. On one hand, they have to obtain and keep accurate and up-to-date information on their beneficial owners. On the other hand, they must file to the registry of the commercial court a document containing the identification of the legal entity concerned and of the beneficial owner as well as the terms and conditions of the control exercised.

Moreover, the ministerial order n°2020-115 of the 12 February 2020 has strengthened the national system to fight against money laundering and terrorist financing. It transposes the directive (EU) 2018/843 of the European Parliament and of the Council.
The obligation to report to the financial intelligence unit (TRACFIN) any suspicion of activity related to money laundering or terrorist financing has thus been extended to notaries, certified public accountants, real estate agents, gambling circles, clerks of the commercial courts and the lawyers' financial settlement funds (Carpa).

The professions subject to this obligation must consult the register of beneficial owners in order to identify the natural persons behind the legal persons before concluding any transaction.
connections to a politically exposed person, if a high risk third state is involved in a transaction, or if a transaction is extraordinarily complex or lacks "economic sense". Also, the kind of goods (e.g. precious goods) or the way payments have to be made (especially in the case of cash payments) is seen to induce e higher risk of money laundry.

Olivier Vibert

After 8 years of experience specializing in matters of Banking law and Business law as an Associate lawyer at IFL-Avocats, Olivier VIBERT became a partner in the firm in 2012.
He practices Business law, and more specifically regarding international contracts, commercial contracts, banking matters, collaterals / guarantees, transports and international trade.

He also started an activity focused on sport and media rights.

After spending several years abroad, he is now largely involved in international cases.

As such, he is actively involved in the Eurojuris and Parlex networks. He chaired Jurismus International from 2013 to 2016.

He works in both French and English.

GERMANY (2019 update)

v. Einem & Partner Rechtsanwälte und Notar | CL Caemmerer Lenz Karlsruhe | WOLLWEBER RECHTSANWÄLTE

www.einem.de | www.caemmerer-lenz.de | www.wollweber-law.de

Liability of shareholders of a limited liability company

1. How and to what extent can the shareholders of a limited liability company be held liable?

The German Limited Liability Company Act (GmbHG) treats a limited liability company (GmbH) as a corporate entity separate from its shareholders. When a GmbH enters into legal transactions, or takes other measures, these only take effect in favour or to the detriment of the GmbH itself. The shareholders of a GmbH are, in principle, not liable for the debts of the GmbH. Only the company´s assets can be accessed by the creditors of the company. However, there exist some exemptions to this general rule (see 2 to 7 below).

2. Is it in principle possible to enforce the liability of the shareholders for the debts of the company? If so, please specify in more detail.

It is settled case-law that shareholders can be held personally liable under certain conditions ("piercing the corporate veil" – Durchgriffshaftung).
According to the German Federal Court (BGH), a shareholder incapable of separating his/her private assets and the assets of his/her company (Vermögensvermischung) does not deserve a limitation of liability and, therefore, can be held personally liable.
In the event of economically destructive actions that drive a company into insolvency (Existenzvernichtung), shareholders used to be personally liable to creditors. With regard to such actions, the BGH, however, changed course in 2007, with the result that shareholders are only liable to the company from that date onwards (internal liability). Nevertheless, creditors can distrain a company's claims against its shareholder. [BGHZ 173, 246 – Trihotel]

3. Can a shareholder be held liable for the incomplete payment of his capital contribution and for the non-payment by his co-shareholders? If so, please specify in more detail.

Pursuant to Section 21 GmbHG, a shareholder can be excluded from a company if he does not fulfil his obligation to pay the capital contribution (Kaduzierung). Still, the liability for the contribution claim continues to exist for the excluded shareholder. In addition, pursuant to Section 24 GmbHG, the remaining shareholders are liable for the capital contribution of the defaulting shareholder, as not paid, in proportion to their participation ratios.
Where the value of a contribution in kind (Sacheinlage) does not correspond to the value of the shares provided, the shareholder, pursuant to Section 9 GmbHG, has to pay the outstanding amount in cash (Differenzhaftung). If a shareholder fails to fulfil this obligation, the other shareholders are liable in analogous application of Section 24 GmbHG.
Pursuant to Section 19 para 4 GmbHG, a hidden contribution in kind (verdeckte Sacheinlage) does not exempt a shareholder from the obligation to pay a capital contribution. However, the value of the asset shall be credited against the shareholder's continuing obligation to pay a contribution in cash.
Pursuant to Section 16 para 2 GmbHG, the purchaser and the seller of a share are jointly liable in respect of obligations to pay capital contributions.

4. Is a shareholder who is de facto acting as managing director without being appointed as such subject to liability? If so, please specify in more detail.

Like an appointed managing director, a de facto manager can be held liable by a company for a breach of due diligence obligations in analogous application of Section 43 para 2 GmbHG. However, strict requirements have to be met for someone to classify as a de facto manager.

5. Does your legal system provide for regulations on shareholder liability in the event of undercapitalization of the company? If so, please specify in more detail.

Pursuant to Section 5 para 1 GmbHG, the minimum share capital of a German limited liability company is 25,000 €. Interestingly, the GmbHG does not set out any regulations regarding undercapitalization, disregarding the base capital. Moreover, the BGH expressively ruled that undercapitalization does not lead to shareholder liability, as such liability would circumvent the legislator's decision as to the share capital required. [BGHZ 176, 204 – "Gamma"]

6. Can the shareholders be held liable for their voting behaviour e.g. a vote against the initiation of reorganization measures? If so, please specify in more detail.

Generally, shareholders are free to vote. Nevertheless, there may be exceptions where a shareholder can be held liable for damages caused by an infringement of his duty of loyalty.

7. Does your jurisdiction provide for other regulations on the liability of shareholders of a limited liability company? If so, please specify in detail.

Pursuant to Section 15a Para 1 of the German insolvency code (Insolvenzordnung), managing directors are, in the event of illiquidity or over-indebtedness, obliged to file an application for insolvency promptly, i.e. without any undue delay, at the latest three weeks after the event. Where a manager violates this duty, he/she can be held personally liable for damages by the company's creditors. Creditors contracting with an illiquid or over-indebted company after an application for insolvency was due (Neugläubiger) may claim all of their bad debt losses. In contrast, former creditors are entitled to only demand the difference between their actual insolvency dividend and the dividend they would have obtained if the managers acted in accordance with their obligations. In the event of a GmbH lacking management, the shareholders are equally obligated to file a petition for insolvency and thus can be held personally accountable in case of a breach of duty.
Where the formation of the company failed, and it is therefore not registered in the Commercial Register, the shareholders have unlimited pro rata liability (unbeschränkte Haftung nach Maßgabe der Beteiligungsverhältnisse) for the losses sustained in the process of the company being established (Verlustdeckungshaftung).
If a company sustained losses in the foundation phase (i.e. after notarization, but before entry in the Commercial Register), the shareholders have to compensate the losses in order to re-cover the share capital re-

corded in the Commercial Register (Vorbelastungshaftung). In this case only the company itself is entitled to make a claim (Innenhaftung). If a shareholder fails to fulfil his obligations, the other shareholders are liable in analogous application of Section 24 GmbHG.
Pursuant to Section 31 GmbHG, where a payment violates the principle of capital maintenance, the receiving shareholder is obliged to refund the amount. If a shareholder fails to fulfil this obligation, the other shareholders are liable for the outstanding sum; see Section 31 para 3 GmbHG. In accordance with Section 16 para 2 GmbHG mentioned above, the purchaser of a share is also liable to refund the amount.

8. Does your jurisdiction provide for regulations on the disclosure of information on beneficial owners of a company, foundation or trust, e.g. a mandatory register?

Germany as a Member State of the EU has transposed the DIRECTIVE (EU) 2015/849 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (OJ L 141 5.6.2015, p. 73), amended by the DIRECTIVE (EU) 2018/843 of 30 May 2018 (OJ L 156 19.6.2018) into German law by the German Law on tracing profits from serious criminal offenses (Money Laundering Act - GwG). Section 4 (§§ 18 – 26a) of the GWG provides for regulations that oblige companies, foundations and trusts to collect information about their beneficial owners, keep it up to date and report it to the mandatory national register, the so-called transparency register ("Transparenzregister").

9. What precautions must be taken to prevent money laundering and which transactions are considered to have an increased risk of money laundering?

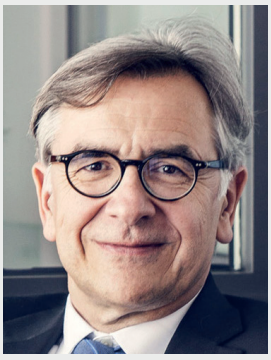
Depending on the kind and size of the business, the kind of transaction and further circumstances the GWG provides for several obligations such as:

- to conduct risk assessments,
- to provide for a system of risk management,
- to appoint a compliance officer on money laundry prevention,
- to identify the contractual partner and its beneficial owner,
- to ensure proper documentation and
- reporting requirements in the case of circumstances giving rise to suspicion of money laundry or terrorism financing.

A higher risk of money laundering may be induced if a transaction has connections to a politically exposed person, if a high risk third state is involved in a transaction, or if a transaction is extraordinarily complex or lacks "economic sense". Also, the kind of goods (e.g. precious goods) or the way payments have to be made (especially in the case of cash payments) is seen to induce e higher risk of money laundry.

Joachim Asendorf

Studies in law and business administration at the University of Göttingen
Degree in business administration (Dipl.-Kfm.)
Research assistant at the Institute of International and Foreign Commercial Law at the University of Göttingen (1994 - 1995)
Dr. jur. – Doctor of Laws – at the University of Göttingen
Admitted to Bremen Bar in 1998
Civil Law Notary since 2013
Lecturer in Commercial and Corporate Law at the University of Applied Sciences in Bremen (2006 - 2012)



Oliver Melber

Born 1960 in Karlsruhe
Studied Jurisprudence at the Universities of Saarbrücken and Freiburg
Doctor of Law 1991 (University of Freiburg)
Admitted to the bar in 1990, Partner of the law firm since 1991
Member of the Commercial and Company Law Working Group in the German Law Society and of the Company Law Association [VGR].
Member of STEP Deutschland e.V.
Member of various committees of Eurojuris Deutschland e.V. und Eurojuris International EEIG since 1996
Representing Caemmerer Lenz in the «International Business Group» of Eurojuris International
Permanent technical director of business forums for asset succession and asset planning, for example of the 'Karlsruhe Inheritance Law Day' run by CL since 2003
Publications in the fields of Commercial and Company Law
Languages: German, English, French, Spanish

Robert Wollweber

Born 1967
Studies at the University of Passau
Admitted to the bar in 1995
Postgraduate studies (LL.M.) at UTS Sydney, Australia 1994
Specialist solicitor ("Fachanwalt") for commercial and corporate law 2008
Specialist solicitor («Fachanwalt») for international business law 2018

ITALY (2019 update)

MORRI ROSSETTI

www.morrirossetti.it/en

Liability of shareholders of a limited liability company

1. How and to what extent can the shareholders of a limited liability company be held liable?

In a limited liability company only the company with its assets is responsible for its obligations, pursuant to article 2462 of the Italian Civil Code ("ICC"). The financial liability of the shareholders is limited only to (i) the amount of their initial contribution and (ii) the contributions in kind and in cash made after the incorporation of the company.
According to article 2462 par. 2 ICC, in case of insolvency of the company, for the corporate obligations arisen when the entire corporate capital was held by one shareholder, the latter is liable without limitation when the initial capital contributions were not made pursuant to article 2464 par. 4 ICC (according to which, in case of incorporation by unilateral deed, the sole shareholder shall deposit the whole amount of its contribution) or until when the company is registered in the companies' register.

2. Is it in principle possible to enforce the liability of the shareholders for the debts of the company? If so, please specify in more detail.

Under Italian law, the principle is that only the company is liable for its debts. There are only few exceptions to this principle:
(i) after dissolution of the company and its deregistration from the Companies' Register, pursuant to article 2495 ICC, the shareholders may be held responsible for the debts of the company only within the limits of the amounts cashed on the basis of the liquidation balance sheet;
(ii) according to article 2462 par. 2 ICC in case of insolvency of the company, for the corporate obligations arisen when the entire corporate capital was held by one shareholder, the latter is liable without limitation when the contributions were not made pursuant to article 2464 ICC or until when the company is registered in the companies' register.

3. Can a shareholder be held liable for the incomplete payment of his capital contribution and for the non-payment by his co-shareholders? If so, please specify in more detail.

According to the article 2466 ICC, if the shareholder does not carry out the contribution by the due date, the directors of the company admonish the defaulting shareholder to comply within 30 days.
If such contribution is not executed within the abovementioned term, the directors of the company may (a) file a lawsuit against the quota holder to obtain the payment or (b) sell his quota to the other shareholders.
In the event the other shareholders do not submit any offer for the purchase of said quota, if the by-Laws provide so, the quota will be sold by auction. If the sale cannot take place for lack of purchasers, the directors exclude the shareholder, retaining the sums collected. Then, the corporate capital must be reduced by a corresponding amount.
In light of the above, a shareholder cannot be held liable in the event the other shareholders do not perform the contribution properly.

4. Is a shareholder who is de facto acting as managing director without being appointed as such subject to liability? If so, detail.

A shareholder or any other person who systematically and concretely acts as a director of an Italian limited liability company without being appointed as such (i.e. de facto director) is subject to the same liability of the proper directors pursuant to article 2476 ICC.
Notwithstanding the above, it is specified that any shareholder - even if not de facto director - is jointly liable with the directors if it had intentionally decided or authorized the execution of a harmful transaction against the company, other shareholders or third parties (article 2476, paragraph 8, ICC). The abovementioned liability of the shareholder requires the subjective intention to violate the law, since it is necessary that the shareholder is aware that the transaction is unlawful and harmful.

5. Does your legal system provide for regulations on shareholder liability in the event of undercapitalization of the company? If so, please specify in more detail.

The Italian legal system does not provide for specific regulations concerning the shareholders' liability in the event of undercapitalization of the company.
However, article 2467 of the ICC sets forth a specific provision in respect of quotaholders loans. The reimboursment of such loans is subordinated to the payment of other creditors and, if the reimbursement took place in the year preceding the declaration of bankruptcy, must be returned.
This provision is aimed at avoiding «anomalous» financing by quotaholders who – by providing financing instead of contributions - could undercapitalize the company.

6. Can the shareholders be held liable for their voting behavior e.g. a vote against the initiation of reorganization measures? If so, please specify in more detail.

According to art. 2476 par. 7 of the ICC, shareholders may be held liable for their voting behavior vis- à-vis the Company– jointly and severally with the directors – for damages caused by the directors and arising from their failure to comply with the duties imposed on them by the law and by-laws of the company only if the directors' behavior was imposed by a resolution of the shareholders.

7. Does your jurisdiction provide for other regulations on the liability of shareholders of a limited liability company; if so, please specify in detail.

Under Italian Law, the bankruptcy of a limited liability company does not lead to the bankruptcy of the shareholders. Indeed, the company with its assets is the only entity responsible for its debts; shareholders are liable only for the payment of portions of corporate capital subscribed but not yet paid-in (art. 150 Bankruptcy Law; art. 26 Code of Business Crisis and insolvency).

Cristina Cengia

Since 2004 partner at Morri Rossetti e Associati Legal and tax firm, where she is head of the Corporate, Finance and Capital Market department. She advises mainly on public and private M&A deals, private equity minority and majority transactions, joint ventures, commercial contracts for both domestic and foreign clients, including multinationals She also advises domestic and foreign clients in IPOs, securitizations and structured finance (project finance) deals.

From 1998 to 2004 she was senior associate at Freshfields Bruckhaus Deringer Milan Office, where she advised industrial and financial clients in corporate reorganisations public and private M&A, joint ventures and commercial alliances, IPOs.

From 1994 to 1998 she was the general counsel of Intek S p A a company listed on the Milan Stock Exchange, dealing with the management of the relationship with the institutional and minority investors, Consob, managing the ordinary and extraordinary transactions carried out within the Intek group and acting as director of some companies belonging to the same group. She is member of AIFI Associazione Italiana del Private Equity e Venture Capital) Tax and Legal commission and of the M&A group committee. She is member of PWA (Professional Women's Association) Milan, belonging to EPWN (European Professional Women's Network).

On 31 March 2017 she was awarded with the LOY (Lawyer Of the Year) prize in the category 'Project Finance Lawyer'. Since some years she is teacher at the Business School of Il Sole 24 Ore within the Master Diritto e Impresa.

NETHERLANDS (2019 update)

MARREE DIJXHOORN ADVOCATEN

www.mend.nl

Liability of shareholders of a limited liability company

1. How and to what extent can the shareholders of a limited liability company be held liable?

In principle, the shareholders are not liable for the debts of the company.

However, a shareholder may be liable if he commits an unlawful act against the company.

A shareholder who acquired dividends knowing or reasonably ought to have foreseen that the company will not be able to continue its payment of due and collectable debts after the distribution of dividends, is liable for compensation of the deficit (art. 2: 216 Dutch Civil Code "DCC")

2. Is it in principle possible to enforce the liability of the shareholders for the debts of the company? If so, please specify in more detail.

In principle, the shareholders cannot be held liable for the debts of the company.

However, as stated before, a shareholder may be liable provided that he commits an unlawful act against the company or breaches art. 2: 216 DCC.

3. Can a shareholder be held liable for the incomplete payment of his capital contribution and for the non-payment by his co-shareholders? If so, please specify in more detail.

Pursuant to art.2:191 DCC, payment must be made of the nominal amount of the shares the shareholders owns / holds. There is no obligation to pay the unpaid capital contribution of the co-shareholders and/or a former shareholder.

4. Is a shareholder who is de facto acting as managing director without being appointed as such subject to liability? If so, please specify in more detail.

A de facto management, which in terms of liability law can be equated with a managing director appointed by the GM, exists when a person exerts a significant influence on the management of the company. Whether or not the 'the facto management' is a shareholder, is not relevant.

Based on article 2:239 (4) of the Dutch Civil Code, the company's articles of association may stipulate that the management must follow the instructions of another company body. This will generally be the meeting of shareholders. However, this will not result in the shareholders being the de facto management.

5. Does your legal system provide for regulations on shareholder liability in the event of undercapitalization of the company? If so, please specify in more detail.

If a Dutch limited liability company was deliberately provided with too less equity capital from the beginning, there is no liability on the part of the shareholders in the case of a qualified undercapitalization.

However, as stated before, a shareholder who acquired dividends knowing or reasonably ought to have foreseen that the company will not be able to continue its payment of due and collectable debts after the distribution of dividends, is liable for compensation of the deficit (art. 2: 216 Dutch Civil Code "DCC")

6. Can the shareholders be held liable for their voting behavior e.g. a vote against the initiation of reorganization measures? If so, please specify in more detail.

Under Dutch law, in principle the shareholders cannot be held liable for their voting behavior. However, certain behavior of the shareholder may be considered as an act of tort.

Under Dutch law, there is a special procedure before the Enterprise chamber of the Amsterdam high court: the right of inquiry. The court determines whether there has been mismanagement and who is responsible (not: liable) for this mismanagement. In a regular procedure, the court can determine whether the 'responsible' person is liable towards the company and/or third parties.

Judith Anema

Judith Anema has been working as a lawyer at Marree + Dijxhoorn since 2003, having qualified in 1991. Her area of focus is company law, with a preference for corporate litigation. This includes legal proceedings before the Enterprise Division of the Amsterdam Appeal Court. Judith is also involved with company mergers and acquisitions. Her clients include private enterprises in and outside the Netherlands, family businesses, managing directors/major shareholders and listed companies. She heads the Corporate/Mergers & Acquisitions Team.

Judith advises foreign companies seeking to launch or expand their activities in the Netherlands. For several years, Judith chaired the Corporate Practice Group at Eurojuris International, of which network Marree + Dijxhoorn is a member.

Her background as a top-level athlete is ideal when it comes to getting her teeth into a case, attaining her goals, and not giving up. These are very useful character traits to have during legal proceedings or an acquisition process.

POLAND (2020 update)

Affre & Wspólnicy Sp.K.

www.affre.pl

Liability of shareholders of a limited liability company

1. How and to what extent can the shareholders of a limited liability company be held liable?

1.1. General rule According to Polish law, a limited liability company is an entity that is independent from its shareholders. This means that the company's assets are entirely separate from the assets of its shareholders.
It is the limited liability company that bears unlimited liability for its obligations, while shareholders are exempt from such liability. There are some exceptions to this rule – situations in which the shareholder may be held liable.

1.2. Shareholder liability – in-kind contribution subject to legal or physical defects.

The shareholders bear personal liability for making in-kind contributions that are subject to legal or physical defects.
• A physical defect occurs when the in-kind contribution does not have the properties the existence of which the shareholder has assured, or when the contribution is incomplete,
• A legal defect occurs when the in-kind contribution is the property of someone else or when it is encumbered with third-party rights, and in the case of in-kind contributions in the form of rights, also when this right does not exist or is held by someone else.

If the shareholder provides a defective contribution, he or she is obliged to compensate for the difference between the value indicated in the articles of association and the actual value of the contribution. This liability applies towards the company itself, which means that only the company may claim compensation for the abovementioned difference in the value of the contribution. Making a defective contribution will not result in liability towards other shareholders or creditors of the limited liability company.
Moreover, the company may determine in the articles of association that additional rights are available to the company with regard to a shareholder who provided a defective contribution, e.g. it may demand the payment of a contractual penalty or redeem the shareholder's share.

1.3. unfulfilled performance obligations towards the company for the sale of shares.

In the case of the sale of a share or parts thereof, the new shareholder together with the former shareholder bear joint and several liability towards the company for the payment of the price or the provision of a contribution.
This shareholder liability cannot be excluded or limited. Positive knowledge or lack thereof, good faith, have no influence on the scope of liability of the new shareholder and the seller (shareholders) towards the company for unfulfilled performance obligations due to the company for the shares sold.
The new shareholder should verify on his or her own, on the basis of available documents and information, whether the seller has any obligations due to the company and whether these were fulfilled.

1.4. liability for damage caused during the incorporation of a company.

Shareholders bear personal liability when participating in the incorporation of a company if their actions go against the law and through their fault damage is caused to the company. Such shareholders are obliged to redress such damage. A shareholder will only assume liability if the company can prove:
• the shareholder's unlawful act
• the causal connection between the damage to the company's assets and the shareholder's unlawful act.
An unlawful act should be understood broadly and does not limit itself to breaches of the provisions of the commercial companies code but encompasses any action contrary to the law.
Examples of actions which may cause such liability may be: payment of remuneration for services rendered services rendered during the incorporation of the company from funds earmarked for covering the share capital or indicating false information on the value of in-kind contributions in the articles of association.

1.5. the liability of shareholders who are simultaneously members of a management board of a limited company

Unlike in the case described above, there is a different liability regime for shareholders who are also management board members. In such a situation, the liability of a shareholder applies to all the instances where it would arise for management board members.
A broader discussion of the topic would necessitate a review of the rules of liability applicable directly to management board members and not the company's shareholders, which in turn would go beyond the scope of the question.
It is necessary to indicate, however, that the liability of a shareholder who is simultaneously a member of the management board will inter alia apply in the following situations:
• when the management board member either intentionally or negligently provides a false statement to the registry court as regards the fact that the payments to cover taken up shares have been made and that the declared in-kind contributions have been provided before the incorporation of the company,
• when the management board member appropriates the assets of the company,
• when the management board member does not file for the company's bankruptcy,
• when the management board member causes damage to the company in connection with the improper performance of his or her duties that constitutes an infringement of the law or the provisions of the articles of association.

2. Is it in principle possible to enforce the liability of the shareholders for the debts of the company? If so, please specify in more detail.

The liability of shareholders for the company's debts may arise in the initial phase of the company's existence – the limited liability company in organization. It is a phase between the incorporation of a limited company (the conclusion of the articles of association) and the moment of its registration in the appropriate register. During this period, the company may in its own name acquire rights, including the property of real estate and other property rights, incur obligations, sue and be sued.
The liability for the obligation of the limited liability company in orga-

nization is borne jointly and severally by the company and the persons who acted in its name. The liability is also borne by the shareholder, subject to the condition that this liability is limited to the value of the contribution not yet made to cover taken up shares.
The shareholder is free from liability to the extent his or her contribution has been provided, i.e. completely – once the contribution has been made in full, or partially – when only in part.
A shareholder, who was held liable for obligations of a company in organization, has recourse claims to the company. After all, such a shareholder is assuming liability for the debt of a third party.

3. Can a shareholder be held liable for the incomplete payment of his capital contribution and for the non-payment by his co-shareholders? If so, please specify in more detail?

The share capital of a limited liability company must be determined in the articles of association, and its minimum value is PLN 5,000. Its coverage is achieved through shareholders' contributions in exchange for shares in the share capital. It may be covered by shareholders through they payment of cash contributions or the provision of in-kind contributions (non-cash contributions). The share capital must be covered in whole before the company's registration application is filed with the appropriate register pf entrepreneurs.
The shareholder is liable to the company if the value of the in-kind contribution has been significantly overstated in relation to its market value. In such a case, the shareholder who made such a contribution is obliged to compensate for the difference in value. This type of liability also extends over to the management board if it filed for registration of the company despite knowing that the value of the in-kind contribution has been overstated. The shareholder and the management board are then jointly and severally liable.
It is of no importance whether the provision of such an inadequate in-kind contribution has affected the financial condition of the company. What matters is the sole fact that the in-kind contribution has been overstated, and that as a result the shareholder acquired shares which have not been fully covered.

4. Is a shareholder who is de facto acting as managing director without being appointed as such subject to liability? If so, please specify in more detail.

4.1 Only a properly appointed management board member may bear liability.

Firstly, the commercial companies code does not refer to the persons who hold positions in the management board otherwise than "members" or "management board members". It does not require that the management board should necessarily include a president. Given the above, it is up to the shareholders to decide, through an appropriate provision in the articles of association or a resolution on the appointment of the management board, whether a specific management board member will hold the position of president or vice-president.
In the case of the appointment of a management board member through a resolution of the shareholders' meeting, already at the moment of appointment of a given person to this position, an internal relationship of an organizational type between the management board member and the company is created. The entry of a management board member to the register of entrepreneurs of the National Court Register is nothing but a confirmation of the appointment – it is of a declarative nature.
The liability for the obligations of a limited liability company is borne only by persons who have been appointed as management board members, and not persons without such an appointment who have actually fulfilled the role of management board members.
To be held liable, management board members need to have been appointed in accordance with the rules laid down in the law and the articles of association. The liability of an alleged management board member will be excluded if the resolution on his or her appointment is invalid for any reason whatsoever. Similarly, no liability for a limited liability company's obligations can be attributed to persons who, despite the lack of appointment to the management board, have actually fulfilled the role of management board member.
Moreover, for the abovementioned liability to arise it is of no significance whether a management board member has been disclosed in the register of entrepreneurs. The liability of the management board member is dependent on the moment when the action that caused damage to the company occurred. If the action was carried out by a person who at that time held the position of a management board member, this person will be liable even upon this person's later removal from this position.

4.2 The liability of a shareholder representing a company on the basis of a power of attorney

For limited liability companies, it is the management board that is entitled to represent the company in all court and out-of-court actions. If the board is collective, and shareholders have not decided otherwise under the articles of association, then joint representation will apply (in order to make statements on behalf of the company cooperation between two management board members, or a management board member and a commercial proxy, is necessary). This rule, though safer than sole representation, can be a bit burdensome for the management board if its members often stay outside the company's registered office. Such difficulties may be prevented by granting a shareholder a general power of attorney to represent the company.
In the case of limited liability companies, the power of attorney should be granted by persons authorized to represent the company, i.e. the management board, and in accordance with the rules of representation set out in the articles of association. A general power of attorney is the broadest type of proxy. It constitutes an authorization to perform all actions falling withing the scope of ordinary management. It should be granted in writing in order to be valid.
The basis for such a power of attorney is the relationship of mandate which should fulfil the requirements foreseen for a mandate agreement. The primary criterion for identifying a mandate agreement is the obligation to carry out a specific act in law for the mandator. A mandate agreement is an agreement of due diligence. Hence, if the shareholder acting as the mandatary fails to perform the obligation, or performs it improperly, he or she will bear contractual liability. The shareholder will thus be bound to redress the damage unless the non-performance or improper performance of the obligation (representation) is the consequence of circumstances for which the shareholder bears no responsibility.

5. Does your legal system provide for regulations on shareholder liability in the event of undercapitalization of the company? If so, please specify in more detail.

5.1 General information

Polish law also has no provisions that would directly impose liability on shareholders for undercapitalizing the company even in situations when the company's economic activity, its planned ventures, or the sector in which the company operates require considerable financial means.
Polish provisions impose a minimum amount of share capital but do not provide rules that would make the minimum share capital amounts dependent on the type of the company's economic activity (sector) with the exception of the financial sector (the minimum share capital necessary for the establishment of a bank). In this context, two rules apply, i.e. the rule of actual coverage of share capital and the rule of share capital maintenance, which means that the company should possess financial means which correspond to the share capital amount. These two rules, however, cannot prevent the undercapitalization of a company, which denotes a situation in which the company does not have funds that would be sufficient for proper management in view of the type and scope of its actual or planned activity.
Shareholder liability may arise in the situation where shareholders, on their own initiative, decide to make a capital injection to the company, which then ultimately does not take place and causes damage to the company. Examples of such situations are:
• the overstatement of the value of an in-kind contribution to the company, and
• not providing obligatory additional capital contributions.

5.2 Overstatement of the value of an in-kind contribution

An in-kind contribution, i.e. a non-cash contribution, often takes the form of real estate or movables, whose actual value is hard to determine. In such situations, there exists a risk of „overstating the value of the in-kind contribution", i.e. overestimating the value of the contribution as compared to its market value.

The liability for the overstatement of an in-kind contribution may be attributed to: the shareholder who made the contribution (regardless of the fact whether he or she was aware of the overstatement or not) and a management board member (who carried out the registration of the company in the register of entrepreneurs despite having full knowledge of the overstatement). In the case of the management board's fault and registration of the overstated contribution in the register of entrepreneurs, the liability of the shareholder and management board member towards the company is joint and several. These are the persons who are under the obligation to compensate for the missing value of the taken up shares in the company's share capital. Neither the shareholder nor the management board member may be released from this liability.

The shareholder and management board members are obligated to compensate for the missing value upon the company's request. The limitation period is six years.

5.3 Lack of additional capital contributions to the company

Additional capital contributions are a form of capital injection to the company made by its shareholders. They consist in the provision of a specified amount of cash corresponding to shares held. It is a kind of internal, obligatory loan of the shareholders to the company. The obligation to make additional capital contributions must be specified in the articles of association. In case the capital injection to the company through the aforementioned addition capital contributions proves to be necessary, the shareholders' meeting adopts a resolution on the amount of the additional capital contributions that should be made by shareholders and the time by which they should be made.

The shareholder is liable for not providing the additional capital contribution to the company. Apart from having to pay the statutory late payment interest (5.6%), the company may also demand that the damage caused by this delay be redressed.

The failure to make additional capital contributions may also constitute an important reason to dissociate the shareholder from the company by a court upon the request of the remaining shareholders if the shares of the shareholders requesting such a dissociation comprise more than a half of the company's share capital.

5.4 "Piercing the corporate veil"

The shareholder may be liable to the company on the basis of tort liability as a consequence of "piercing the corporate veil".

This liability is not directly regulated under Polish law, which makes it difficult to apply it to shareholders. According to case law, however, it is possible in justified cases.

Tort liability claims will also apply in the case of a material undercapitalization of the company. This refers to situations in which the company's share capital, despite satisfying statutory requirements, is completely inadequate to the scope of company's economic activity. The shareholder's decision to create a grossly undercapitalized company may be considered as an abuse of the company's corporate form. It is an action that negatively impacts the safety of transactions.

6. Can the shareholders be held liable for their voting behavior e.g. a vote against the initiation of reorganization measures? If so, please specify in more detail.

Polish law does not impose liability on shareholders who through their actions during voting on resolutions make it impossible for the company to function properly or adopt resolutions that are contrary to the company's interests. The situation gets even more complicated when a conflicted shareholder is also a member of the company's management board. There are, however, certain mechanisms which may be applied in circumstances like this.

6.1 Action for the revocation of a resolution

If the shareholder who holds the majority of the share in the company's share capital adopts a resolution that is contrary to the articles of association or good practice, the commercial companies code allows to launch an action for the revocation of such a resolution. The grounds for such an action is the existence of an adopted resolution that contravenes the articles of association or good practice, and that is contrary to the company's interests or whose aim is to harm a shareholder. The action is brought against the company. The right to bring the action is available to:

1) the management board, the supervisory board, the audit committee and their individual members,
2) a shareholder who voted against the resolution and, following its adoption, requested that the objection be recorded,
3) a shareholder who, without justification, was not allowed to participate in the shareholders' meeting,
4) a shareholder who was not present at the shareholders' meeting; however, only where the meeting was wrongly convened or where the resolution concerned a matter not included on the agenda,
5) in the case of a written vote, a shareholder who was overlooked during the vote or who did not consent to a written vote or who voted against the resolution and lodged an objection within two weeks of receiving notice of the resolution.

A final judgment revoking the resolution is legally effective with regard to relations between the company and all the shareholders, and relations between the company and the members of its governing bodies.

6.2 Action to declare the invalidity of a resolution

Another tool to counteract the effects of an adopted resolution that is disadvantageous to the company or a shareholder is the action to declare the invalidity of the resolution. The right to bring this action is available to the same group of entities as was the case for the action for the revocation of a resolution, discussed in section 6.1 above. The difference lies in the cause of action. The invalidity of a resolution will apply in situations when the resolution is contrary to law.

6.3 Dissociation of a shareholder

Sometimes a situation may occur in which a shareholder intentionally and effectively blocks the adoption of resolutions by the shareholders' meeting. The attitude of such a shareholder may be caused by an internal conflict between this shareholder and the remaining shareholders, and as a result this behavior may take place constantly, regardless of the subject of the resolution.

The commercial companies code allows for the dissociation of a shareholder from the company by a court upon the request of the remaining shareholders whose shares comprise more than a half of the company's share capital.

The dissociation of the shareholder by the court may only take place for important reasons concerning a given shareholder. The provisions do not define what constitutes an important reason but a certain catalogue has been developed in case law and academic legal writing. Examples comprise among others: acting to the company's detriment, the non-fulfilment of adopted resolutions by a shareholder, competitive action against the company, abusing the right to exercise individual supervision, infringing the rules of loyalty towards the company, lack of cooperation during the adoption of resolutions, illness, going abroad, etc.

The binding dissociation of a shareholder is effective as of the day on which the action was brought to the court. In the judgment, the court indicates the time by which the remuneration for the shares taken over from the dissociated shareholder should be paid. If the payment of the remuneration to the dissociated shareholder does not take pace, the dissociation becomes invalid, and the shareholder who was to be dissociated becomes entitled to claim redress of damage from the shareholders demanding the dissociation.

6.4 Judicial dissolution of the company

The final mechanism that needs discussion in the context of providing an answer to the question is the judicial dissolution of the company. Given the consequences of this measure it should be used as a last resort.

One of the grounds for the judicial dissolution of a limited liability company is the lack of possibility of achieving the company's objective, or if other important reasons originating from within the company apply.
As was the case for the important reasons that were already discussed above, also with regard to the judicial dissolution of the company these reasons have not been defined by the Polish legislator.
Example grounds for the dissolution of a company by a court are: a lasting and objective inability to achieve the objective specified in the articles of association. The reason for this may lie in a permanent conflict between the shareholders, if their personal relations exclude their ability to cooperate in managing the company's activities and the achievement of the company's objective becomes impossible.
For example, the reason for a judicial dissolution of a company will be a dispute between two shareholders who hold the same number of shares, but who fight and act against each other, which results in the inability to appoint the company's governing bodies and to adopt a resolution concerning the balance sheet and the profit and loss account. Another example would be the inability to achieve the objective of a company due to a conflict between shareholders, where frictions between two groups of shareholders holding an equal number of votes make it impossible to adopt resolutions, which in turn interferes with the proper functioning of the company.
It is considered that other examples of important reasons that justify the judicial dissolution of the company comprise: the inability to make decisions within the company (decision "deadlock"), the lack of governing bodies and the inability to appoint them, the chronic (ab)use of the majority shareholder position, a lack of shareholders' interest in the matters of the company, constant conflicts between management board members, depriving a shareholder of his or her relevant rights by other shareholders – as long as the abovementioned circumstances are of a permanent nature.

7. Does your jurisdiction provide for other regulations on the liability of shareholders of a limited liability company; if so, please specify in detail.

The personal liability of shareholders of a limited liability company is very circumscribed, almost non-existent.
It is present in tax law, and more specifically in the provisions of the tax ordinance act. It is the basic statutory act that regulates tax liabilities, tax information and tax proceedings. The act foresees that in the case of tax arrears of a limited liability company, there is a joint and several liability of the company and the management board members (who are liable to an unlimited extent). In the case of a limited liability company in organization that does not have a management board, the liability for tax arears is borne by shareholders.
The aforementioned liability is limited and arises only in the case of a company in organization. It is a phase between the incorporation of a limited company (the conclusion of the articles of association before a notary) and the moment of registration of the newly established company in the register of entrepreneurs of the National Court Register.
The liability is also dependent on the fact of there being no management board during the company's organizational period.

8. Does your jurisdiction provide for regulations on the disclosure of information on beneficial owners of a company, foundation or trust, e.g. a mandatory register

Under Polish law, this issue is regulated by a statutory act that has been significantly amended and adjusted to requirements imposed by European Union law .
The amendment introduced the Central Register of Beneficial Owners. It is an ICT system for processing data on beneficial owners of all commercial companies operating in Poland (with the exception of professional partnerships).
The register is open to the public and is run by the minister in charge of public finance.
According to the act, a beneficial owner should be understood as a natural person or natural persons who either directly or indirectly control(s) the customer (e.g. a commercial company) through their powers resulting from legal or factual circumstances (e.g. articles od association) that allow them to exercise decisive control over actions or activities undertaken by the customer (a commercial company), or a natural person or natural persons, on behalf of whom a commercial relationship is established or an occasional transaction is concluded.

The disclosure of information about beneficial owners is carried out by governing bodies that represent the company. Beneficial owners should be disclosed in the register within 7 days from one of the following events: the establishment of the company, changes to information concerning persons that must be disclosed.

The non-disclosure of data about a beneficial owner in the central register is subject to an administrative penalty of up to PLN 1,000,000.

9. What precautions must be taken to prevent money laundering and which transactions are considered to have an increased risk of money laundering?

The rules of conduct are laid down in the statutory act . The legislator determined what actions should be taken in order to identify and assess the risk of money laundering and financing of terrorism, and what due diligence measures should be taken in relation to these risks.

9.1 The obligation to apply due diligence measures

Entrepreneurs who are obliged to apply due diligence measures should identify and assess the risk of money laundering and financing of terrorism, also taking into account the type of activity carried out, risk factors concerning their clients (contractors), countries or geographic regions, products, services, transactions or distribution channels. When making their risk assessment, obligated institutions should take into account the national risk assessment and the European Commission's report on this matter.
Due diligence measures that obligated measures should apply comprise:
1) the identification of a customer (e.g. a commercial company) and verification of its identity;
2) the identification of a beneficial owner of a transaction in order to: verify its identity, define the ownership and control structure - in the case of a commercial company;
3) the assessment of a business relationship in view of its objective and nature;
4) ongoing monitoring of customer's business relationship, including: the analysis of transactions carried out throughout the course of the business relationship, examining the origin of assets available to the customer (company) - in cases justified by circumstances, ensuring that any possessed documents, data or information concerning the business relationship are updated on an on-going basis.

9.2 Simplified and enhanced due diligence measures

Depending on the type of commercial activity carried out and the degree of potential risk of money laundering or financing of terrorism, entrepreneurs in certain circumstances may apply simplified due diligence measures (when the risk of money laundering or financing of terrorism is lower).
At times, entrepreneurs are obliged to apply enhanced due diligence measures when the risk of money laundering or financing of terrorism is higher. The legislator laid down that the obligation to apply enhanced due diligence measures is justified especially when the customer (company):
1) originates from or is established in a third country,
2) participates in cross-border correspondent relationships with an institution-third country respondent,
3) participates in a business relationship with a politically exposed person.
The legislator also determined in which circumstances enhanced due diligence measures should be applied. These circumstances indicate what type of transactions give rise to a heightened risk. A higher level or risk of money laundering or financing of terrorism may in particular be inferred from such facts:
1) that business relationships are established under unusual circums-

tances;
2) that an agreement is concluded with a company whose activity is aimed at storing personal assets, a company where bearer shares were issued, whose securities are not traded on a regulated market, or a company where rights arising from stocks or shares are exercised by entities other than shareholders;
3) the subject of economic activity pursued by the customer consists in processing a considerable number of cash transactions or cash transactions for high amounts;
4) an unusual or excessively complex ownership structure of a customer taking into account the type and scope of economic activity pursued by the customer;
5) a customer's use of services or products offered within the framework of private banking;
6) a customer's use of services or products fostering anonymity or hindering the identification of the customer;
7) establishing or maintaining business relationships or performing an occasional transaction without the physical presence of the customer;
8) transactions where the customer is the beneficiary but which are ordered by unknown or non-associated third parties;
9) and other.

The abovementioned catalogue is open and non-obligatory. If one of the listed situations occurs it may only potentially indicate the existence of heightened risk. These situations may be used for assessing which transactions may carry the risk of money laundering or financing of terrorism.

When assessing the risk of money laundering and financing of terrorism one may rely on the annual activity report of the General Inspector of Financial Information (hereinafter: "GIFI"), i.e. the government body appointed to counteract money laundering and financing of terrorism. In this document, GIFI indicates which transactions have most often been analyzed in connection with the suspicion of money laundering or financing of terrorism.

Joanna Affre

Joanna is the founding partner of the firm Affre i Wspólnicy. She specialises in broadly understood competition law.

She also has wide experience in criminal business law and corporate services, including negotiations and disputes among shareholders.
She is a member of the Board of the French-Polish Chamber of Commerce and a non-governmental advisor to the President of UOKiK in the International Competition Network. She is also a member of the Competition Law Association and the European Competition Lawyers Association (ECLA).

She is a recommended lawyer in the area of competition and antitrust law in the 17th edition of the Law Firm Ranking organized by the "Rzeczpospolita" daily.
Graduate of Wrocław University and post-graduate studies in Political Science (IEP Strasbourg, France), Community Law (Lyon III, France) and Competition Law (King's College, London, UK).

BRAND & PARTNER
RECHTSANWÄLTE UND STEUERBERATER

www. bbpartners.ru

Liability of shareholders of a limited liability company

1. How and to what extent can the shareholders of a limited liability company be held liable?

Shareholders of LLC bear the risk of loss related to the company's activities within the value of their shares (cl.1 of art. 87 of the civil code of the Russian Federation, cl. 1 of article 2 of the Federal Law on LLC). However, there is a variety of situations, when the liability of shareholders is not re-stricted by their shares. These are:
- bankruptcy cases: In case of bankruptcy of the LLC caused by the shareholder, the shareholder may be held personally liable for the LLC obligations;
- incomplete payment of capital's contribution: The shareholder, who has not paid in full his contribution into the charter capital of the Company is liable up to the amount of his contribution but and also for the unpaid part of his capital contribution and the un-paid contribution of his co-shareholders.;
- prejudicing to the company;
- cases of failing good will.

Besides, there is administrative liability, which is provided for cases of violating the procedure for registering a legal entity and providing false information to the authorities (Article 14.25. of Administrative Code).. Finally, shareholders of an LLC are criminally liable if the direct participation of the shareholder in the crime is proved. For instance, falsification of information in the State register of legal entities (article 170.1 of the Criminal Code); financial documen-tation (article 172.1 of the Criminal Code); evasion of taxes and other mandatory payments (article 199, article 199.2-199.4 of the Criminal Code).

2. Is it in principle possible to enforce the liability of the shareholders for the debts of the company? If so, please specify in more detail.

As a general rule, shareholders of an LLC are not liable for the company's debts. They only bear the risk of loss related to the company's activities within the value of their shares (cl.1 of art. 87 of the civil code of the Russian Federation, cl. 1 of article 2 of the Federal law on LLC). However, in some cases, shareholders may be held jointly and subsidiarily liable.
Joint responsibility is related to the following cases:
• for obligations related to the company's establishment and arising before its state registration. It must be noted, that the company is liable for these obliga-tions, only if the subsequent actions of the founders are approved by the Gen-eral meeting of the company's participants. In any case, the company's liability cannot exceed 1/5 of the paid-up charter capital (cl. 2 of art. 89 of the civil code of the Russian Federation, cl.6 of art. 11 of the Federal law on LLC);
• for the company's obligations, if the shareholder has not fully paid his share. In this case, they are held liable within the limits of the value of the unpaid part of the share owned by this shareholder (cl.1 of art. 2 of the Federal law on LLC);
• for transactions made by a subsidiary on behalf of its founder (participant), which is the main company, or with its consent.
Exceptions to this rule: the main company voted on the issue of approval of the transaction at the General meeting of shareholders of the subsidiary; ap-proval of the transaction by the governing body of the main company, if such approval is required by the Charter of the subsidiary and (or) main company.
Subsidiary liability can occur, when shareholders brought the company to bankrupt-cy by their actions (inactions) (cl. 3 of art.3 of the Federal law on LLC).
By paying shares in the charter capital of the company not in cash but other assets shareholders of the company and independent assessors bear subsidiary liability for its obligations in case of insufficiency of company's property. Liability of shareholders is defined within the amount by which the property valuation is overestimated during five years from the date of state registration or inclusion in the company's charter relevant amendments (cl. 3 of article 66.2 of the Civil Code).

3. Can a shareholder be held liable for the incomplete payment of his capital con-tribution and for the non-payment by his co-shareholders? If so, please specify in more detail.

Shareholders must pay in full their shares in the company's charter capital within the period specified in the incorporation contract or the decision of the sole member (if LLC was established by one person). This period may not exceed four months from the moment of state registration of the company (par. 1 cl. 3 of art.90 of the civil code; cl.1 of art. 16 of the Federal law on LLC).
In case of incomplete payment of shares in the charter capital of the company within the established period the unpaid part from the date of expiration of the payment peri-od passes to the company and must be sold by the company within a year (par.2 cl.3 of art. 90 of the civil code; cl.3 of art.16 of Law on LLC).
Thus, the ground for the transfer of the share to the company is the fact of the expira-tion of the period specified by the Law on LLC or the company's charter for payment of the share. In this case, when the full share is transferred to the company, the per-son loses the status of a shareholder (Resolution of the arbitration court of the Volga district of 06.03.2017 N F06-17390/2016 in the case N A06-4712/2016).
What is more, the law does not provide for a return of the share in case of late pay-ment. A participant, who doesn't pay the share in the charter capital of an LLC in time, loses the right to contest decisions (protocols) of company's members (Resolution of the arbitration court of the East Siberian district of 17.05.2017 N F02-1631/2017 in the case N A78-5761/2016).

4. Is a shareholder who is de facto acting as managing director without being ap-pointed as such subject to liability? If so, please specify in more detail.

In this situation, we are speaking about a formal (or „nominal director") and an actual managing director.
Due to russian law, a shareholder who has the actual ability to determine the compa-ny's actions, including the ability to control the managing director , is obliged to act in the company's interests reasonably and in good faith and is liable for company's loss-es caused by his fault (art. 53.1 of the Civil Code).
However, the main risks are borne by the nominal director, who manages a company formally. On the one hand, a nominal director has full burden of proof that he is a managing director de jure, without actual company's management. On the other hand, law enforcement or supervisory authorities have no difficulties to identify the actual

head of the company. This is based on the analysis of internal corporate and account-ing documents, questioning of a nominal director and witnesses.
The most frequent disputes about bringing an actual manager to justice are bankrupt-cy cases. As a general rule, nominal and actual managing directors jointly bear subsid-iary liability for the obligations of the debtor. Due to a special regulation (cl. 9 of article 61.11 of Bankruptcy Law), the extent of nominal managing director's liability can be reduced if he provides disclosed information, which helps to find out the actual director and (or) his property, at the expense of which the creditors ' claims can be satisfied (cl. 6 of Decree of Supreme Court No. 53 in relation to holding the debtor's controlling persons to liability in bankruptcy cases). In addition, taking into account the circum-stances of the particular case, the courts may completely make the nominal director free from liability if they do not see any connection between his actions and harmful consequences that have occurred for the debtor.

5. Does your legal system provide for regulations on shareholder liability in the event of undercapitalization of the company? If so, please specify in more de-tail.

Shareholder generally is not liable in the event of undercapitalization of the company. But, in case of bankruptcy of the LLC caused by the shareholder, the shareholder may be held personally liable for the LLC obligations. The causal relationship between the guilty actions/inaction of the shareholder and the bankruptcy of the LLC shall be found be the court.
First of all, shareholders of an LLC in the event of its bankruptcy bear subsidiary re-sponsibility for its obligations, if it was caused by their fault, while they had the actual opportunity to give mandatory instructions to the company or otherwise determine its actions. The amount of subsidiary liability varies depending on the type of violation committed by the LLC shareholder (cl.3 of art.3 of Law on LLC).
Secondly, a shareholder can be declared as a controlling person of the debt-or,therefore can be held subsidiarily liable in the case, when full repayment of credi-tors ' claims is impossible due to his actions and (or) inaction (cl.1 of art.61.11 of Fed-eral Bankruptcy Law No. 127-FZ).
Shareholder is recognized as a controlling person if he has or had no more than three years prior to the occurrence of signs of bankruptcy, as well as after their occurrence before the adoption by the arbitration court of the bankruptcy petition, the actual ability to give the debtor mandatory instructions or otherwise determine its actions, including effecting deals and determining their conditions. Recognition of a shareholder as a controlling person must comply with the terms of the article 61.10 of Federal Bank-ruptcy Law No. 127-FZ.
The arbitration court may declare a person as controlling the debtor on other grounds. For instance, informal personal relationships, cohabitation (including civil marriage), long-term joint business trips (including military and civil service), joint studies (class-mates) (cl. 2.2 Of the Letter of the Federal tax service of Russia dated 16.08.2017 N CA-4-18/16148).

6. Can the shareholders be held liable for their voting behavior e.g. a vote against the initiation of reorganization measures? If so, please specify in more detail.

The shareholder generally cannot be held liable for this voting in shareholders' meeting of the company under the Law, including the voting against the reorganization initia-tion.
In case the shareholders' agreement foresees special regulation – mandatory voting of the concrete shareholder to respective agenda of the shareholders' meeting, the viola-tion of such contractual obligation may lead to civil liability of the shareholder.
Shareholders can be also hold liable for their voting behavior, in particular, they can be excluded from the company by the claim of another shareholder(s), who owns at least 10% of the shares in the LLC. This can happen only judicially.
A shareholder can only be excluded from the company by another shareholder(s), who owns at least 10% of the shares in the LLC.
Shareholders can be excluded, for example, if they caused significant harm to the company or systematically did not participate in meetings and as a result a significant decision has not been taken, which was necessary for the company's activities.
Legal grounds for shareholder's expelling are set out in cl. 1 of article 67 of the civil code; article 10 of the Law on LLC).
According to judicial practice, regarding the voting behavior, shareholders can be ex-cluded if they:
• voted for a decision , which knowingly causes significant adverse conse-quences for the company
For example, in one of the court decisions, the court excluded two sharehold-ers with a share of 33.3% of the charter capital of each of them, because they approved the sale of real estate, which is the sole asset of the LLC, at an un-dervalued price (Resolution of the arbitration court of the West Siberian district of 18.10.2016 N F04-4108/2016);
• voted against the decision that is beneficial to the LLC. (Cl.5 of the Information letter of the Presidium of the Supreme Arbitration Court of the Russian Federa-tion dated 24.05.2012 No. 151).

7. Does your jurisdiction provide for other regulations on the liability of share-holders of a limited liability company; if so, please specify in detail.

Russian jurisdiction provides an administrative liability for violating the procedure for register-ing a legal entity and providing false information to the authorities on this matter.
According to Article 14.25. of Administrative Code, shareholders can be held liable for mis-takes, inaccuracies in the information provided for registration in the State register of legal entities (EGRUL); for violation of the terms of providing and for failure to provide information. The amount of the fine can reach up to 10,000 rubles.
Shareholders of an LLC are criminally liable if the direct participation of the shareholder in the crime is proved. There are many articles in the Criminal Code of the Russian Federation that may apply to the shareholders of an LLC:
• falsification of information in the State register of legal entities (EGRUL) (article 170.1);
• falsification of financial documents (article 172.1);
• illegal formation/reorganization of the company through front persons, illegal use of documents for this purpose (articles 173.1 and 173.2);
• evasion of accounts payable (art. 177); violations during bankruptcy (art. 195-197)
• evasion of taxes and other mandatory payments (article 199, article 199.2-199.4)
Among the main penal measures are large fines (up to 2,000,000 rubles) and disqualification for up to 3 years. In worst cases imprisonment is also possible.

8. Does your jurisdiction provide for regulations on the disclosure of information on beneficial owners of a company, foundation or trust, e.g. a mandatory register?

Legal entities in Russia must have information about their beneficial owners and update it at least once a year by sending requests to their shareholders. Information about beneficiaries is included in the company's annual financial reports and submitted at the request of state agen-cies (the Federal tax service of Russia, Federal Service for Financial Monitoring and their territorial bodies).
Information about beneficiaries is not required in the following situations (cl. 2 of article 6.1 of the Law on anti-money laundering):
1) state corporations or organizations, in which the Russian Federation, administrative regions or municipalities have more than 50 % of the shares in the capital;
2) issuers of securities admitted to trading on an exchange;
3) foreign organizations whose securities have been listed on a foreign stock exchange in-cluded in the list approved by the Bank of Russia;
4) foreign structures without the formation of a legal entity, the organizational form of which does not provide for the presence of a beneficial owner, as well as a sole executive body;
5) international organizations.
For violation of the obligation to disclose information about the beneficial owners at the re-quest of the Federal Service for Financial

Monitoring or tax authorities, the company is sub-jected to administrative liability in the form of penalty amounting to 500,000 rubles (Art. 14.25.1 of Code of Administrative Offences).

9.What precautions must be taken to prevent money laundering and which trans-actions are considered to have an increased risk of money laundering?

Anti-money laundering activities are regulated by the Federal law No. 115-FZ of 07.08.2001 «On countering the money laundering", which calls mandatory control and internal control within the organization as the main measures to prevent money laundering.
Transactions that amount to or exceed 600,000 rubles (including in equivalent foreign cur-rency) are subject to mandatory control)
These transactions are:
1) transactions with cash (for example: cash withdrawal, purchase of securities, currency exchange);
2) transactions involving a company registered in a non-FATF member state;
3) operations on bank accounts and deposits;
4) other transactions with movable property (for example: placing jewelry in a pawnshop; providing non-credit organizations with interest-free loans; paying for lottery winnings);
5) transactions with real estate, if their amount is equal to or exceeds 3,000,000 rubles;
6) transactions with receipts from foreign countries, if the transaction amount is equal to or exceeds 100,000 rubles;
7) transactions on the accounts of organizations of strategic importance for the military-industrial complex, if the amount of the transaction is equal to or exceeds 10,000,000 rubles;
8) transactions on accounts opened to the contractor of the defense order, if the amount of the transaction is equal to or exceeds 600,000 rubles;
9) receipt of cash from a payment card by a natural person, if the specified card is issued by a foreign bank;
10) transactions with money or other property committed by a company or individual in re-spect of which there is an evidence of their involvement in extremist activities or terrorism.
At the legislative level, the more detailed list of precautions, which should be taken to prevent money laundering, is not enshrined. However, advisory measures for both state and business are contained in the FATF annual report (link: http://www.fatf-gafi.org/publications/mutualevaluations/documents/mer-russian-federation-2019.html). Nevertheless, according to business practice, in order to avoid suspicion of money launder-ing, the following noteworthy rules should be taken into account:
• Have a good communication with banks and do not delay the solution of finan-cial issues.
• A dormant account is a sign of lack of economic activities. Follow the flows of funds on the account.
• Check out good faith and business reputation of your partners (for example, on the website of the Federal tax service or other paid resources).
• Pay taxes on time.
• Pay salaries and make other payments to all employees and partners via bank transfers.
• Formalize all the documents during work with your counterparties properly.

Thomas Brand

The company was founded by Thomas Brand (a German lawyer), who is currently its CEO. Thomas Brand has, for more than 20 years, provided advice to foreign investors in respect of various investments and transactions in Russia, as well as trade law pertaining to joint ventures, mergers, and acquisitions, as well as real estate issues.

Mr. Brand is the Chairman of the Legal Committee of the Russian–German Foreign Trade Chamber, a Member of the Board of the Russian–German Foreign Trade Chamber, and a legal counsel for the Austrian Foreign Trade Office in Moscow.

Before setting up Brand & Partner Limited Liability Company, Mr. Brand was the manager and partner of a German company's legal department in Moscow employing more than 30 lawyers in addition to also being responsible for providing legal advice in Belarus and Kazakhstan.

Mr. Brand began his career in Clifford Chance in Frankfurt and Moscow.

Ekaterina Kabanova

Ekaterina Kabanova holds position of the Head of the Corporate Department and has over 10 years' experience in providing legal advice in company restructuring and employment matters.

PORTUGAL (2020 update)

Raposo, Sá Miranda & Associados
Sociedade de Advogados, SP, RL

www.pra.pt

Liability of shareholders of a limited liability company

1. How and to what extent can the shareholders of a limited liability company be held liable?

They can be liable towards the company, as a general rule, only if they unlawfully mix their own personal wealth with the assets of the company, or if they vote in favor of a company's resolution that aims at creating special advantages to themselves. The liability of someone who has the power to ap-point the manager(s) of the company (if such appointment is to be deemed un-lawful or otherwise wrong) is also foreseen.
We then have special rules that provide for the liability of companies that are part of the same group.

2. Is it in principle possible to enforce the liability of the shareholders for the debts of the company? If so, please specify in more detail.

No – these are exceptions that arise generally in circumstances relating to certain unlawful behaviors (as described in the previous answer).

3. Can a shareholder be held liable for the incomplete payment of his capital con-tribution and for the non-payment by his co-shareholders? If so, please specify in more detail.

The company may collect the shareholder's debt, bearing inter-est, and may forcefully acquire the shares that haven't been paid-up (with the possibility of a subsequent dismissal of the person in question as a shareholder of the company).

4. Is a shareholder who is de facto acting as managing director without being ap-pointed as such subject to liability? If so, please specify in more detail.

Such person can be held liable by the company if acting as a de facto manager. Such person is also liable towards the government for all tax obligations the compa-ny does not fulfil.

5. Does your legal system provide for regulations on shareholder liability in the event of undercapitalization of the company? If so, please specify in more detail.

No. There is no legal requirement regarding capitalization thresholds (be-yond the obligation to pay-up the subscribed shares).

6. Can the shareholders be held liable for their voting behavior e.g. a vote against the initiation of reorganization measures? If so, please specify in more detail.

If they vote in favor of a company's resolution that aims at creating special ad-vantages to themselves, they will be liable for damages. A shareholder can fur-thermore be liable towards the company when their behavior (e.g. through vot-ing) is "disloyal or seriously disturbs the operation of the company" and this is cause for "relevant damages" incurred by the company (quotes are from the Portuguese Companies Code).

7. Does your jurisdiction provide for other regulations on the liability of share-holders of a limited liability company; if so, please specify in detail.

There are specific regulations regarding liability for the payment of employees' salaries – this is within a group of companies and both the parent and the subsidiary companies may be liable for the payment of obligations the other does not fulfil.

8. Does your jurisdiction provide for regulations on the disclosure of information on beneficial owners of a company, foundation or trust, e.g. a mandatory regis-ter?

Yes – Portuguese law transposed the regulations provided for in Directives 2015/849/EU (EP and Counsel) and 2016/2258/UE (Counsel).

9. What precautions must be taken to prevent money laundering and which trans-actions are considered to have an increased risk of money laundering?

Again - Portuguese regulations on this topic transpose the European provisions.

Final note:
although this questionnaire aims at assessing the liability of shareholders, it's important to stress that, as in other jurisdictions, from the moment shareholders sit on a board of directors on, the scope of their liability is far wider than described above, notably towards the company, the government (especially regarding tax) and creditors is general.

Pedro Sá

Academic background:
Law degree by the Faculty of Law, Católica University (1997); Curricular completion of the Law Master, University of Coimbra (1999); Frequency of the Finance Course for non-financial, Oporto Business School (2002); Frequency of the Program of Instruction for Lawyers - Program on Negotiation, Harvard Law School (2006); Frequency of the Course Essentials of Leadership, London Business School (2009); Course frequency of the Accelerated Development Program, London Business School (2013-2014).

Professional experience:
Lawyer registered at the Portuguese Bar Association (since 1997); Lecturer at the Law Faculty of the University of Minho (1997 - 2002); Legal advice and Regulation to SONAE CAPITAL (1999 - 2004); Legal advice and Regulation to OPTIMUS (2005 - 2011); Director of Public Affairs of the Sonae Group (2011-2015).

Languages: English, French, Spanish.

SPAIN (2021 update)

Mariscal & Abogados
ASOCIADOS

Madrid | Barcelona | Palma de Mallorca | Miami

www.mariscal-abogados.eu

Liability of shareholders of a limited liability company

1. How and to what extent can the shareholders of a limited liability company be held liable?

In principle, the liability of a shareholder is excluded, with few exceptions. The main criterium for the limitation of liability to be effective is the due pay- ment of the capital contributions, as well as the correct inscription at the commercial registry. This must also be observed in the event of an increase in capital. Other exceptions can be found in cases of outstanding liabilities of the company after a company's extinction, or in the incorrect assessment of the value of non-monetary capital contributions.

One important exception to this principle is based on a case-law referred to as the "lifting of the corporate veil" (levantamiento del velo societario), based on similar principles as the famous 'Salomon v A Salomon Co Ltd' case from London 1897. The Spanish case-law has been established by the Spanish Supreme Court (Tribunal Supremo) since 1984, '…aiming to prevent the legal personality of a company from being used as a means or instrument of fraud or for a fraudulent purpose' (STS 1105/2007, of October 29). It is understood, amongst others, that such fraud occurs, when the real purpose of a company is not the proper purpose of a company (the exercise of commercial activi- ties) but the mere avoidance of responsibilities, such as payment of debts; in these cases, the Spanish company can be proven to be a mere façade, with the sole purpose of – fraudulently – limiting a shareholder's liability. This doc- trine mainly applies in extreme cases, which can be hard to prove.

2. Is it in principle possible to enforce the liability of the shareholders for the debts of the company? If so, please specify in more detail.

As far as the shareholders are liable for the debts of the company, an en- forcement is possible. This is important, for example, in the cases already mentioned above, in which a shareholder has not duly paid his capital contri-

butions or after the extinction of a company, if not all the company's liabilities have been correctly settled.

3. Can a shareholder be held liable for the incomplete payment of his capital con-tribution and for the non-payment by his co-shareholders? If so, please specify in more detail.

In principle, each shareholder is liable up to the amount of his own capital contribution.

4. Is a shareholder who is de facto acting as managing director without being ap-pointed as such subject to liability? If so, please specify in more detail.

Responsibility of de facto managing directors has been accepted under Spanish law. This may apply, when a managing director is closely controlled by a shareholder, only carrying out instructions, radically limiting the discre- tions and liberties inherent to a managing director's position.

In such cases, a shareholder may be held liable for certain damages of the company, of other shareholders shareholders or a third party caused by an act attributable to him.

5. Does your legal system provide for regulations on shareholder liability in the event of undercapitalization of the company? If so, please specify in more detail.

Spanish law provides for the necessity to increase capital, or else dissolve the company or file for insolvency, when the company's net equity is below 50% of the company's share capital. In case of incompliance, the company's directors may be held responsible. In principle, shareholders are not liable in such cases, except for certain cases of extreme negligence.

6. Can the shareholders be held liable for their voting behavior e.g. a vote against the initiation of reorganization measures? If so, please specify in more detail.

The general rule is, that a shareholder's right to vote is personal and may be exercised at his sole discretion. In theory, exceptions are sometimes defend- ed for certain cases, in which a majority shareholder deliberately votes against the interests of company, in pursuance of his own personal interests and in clear detriment of the company's social interests. In practice, however, this type of claim is quite difficult to enforce.

7. Does your jurisdiction provide for other regulations on the liability of share-holders of a limited liability company; if so, please specify in detail.

There are specific regulations regarding liability for the payment of employees' salaries – this is within a group of companies and both the parent and the subsidiary companies may be liable for the payment of obligations the other does not fulfil.

8. Does your jurisdiction provide for regulations on the disclosure of information on beneficial owners of a company, foundation or trust, e.g. a mandatory regis-ter?

Yes, information must be disclosed in a public deed to be issued by a notary public (declaración de titularidad real) at the time of incorporation of the company and is later inscribed in a special registry (registro de titularidad re- al). This disclosure will also be required when filing financial statements or for certain corporate transactions.

9. What precautions must be taken to prevent money laundering and which trans-actions are considered to have an increased risk of money laundering?

Several obligations apply, depending on the activities of the company, includ- ing in any case the requirements regarding the disclosure of beneficial own- ers of the company.

It should be noted that under Spanish law, lawyers, tax advisors and other professionals are subject to special obligations regarding the prevention of money laundering and must report their clients, should they become aware of such practices.

Karl Linke

Karl H. Lincke, Lawyer & Rechtsanwalt, is partner of Mariscal & Abogados and head of the German Desk. He specialises in mergers and acquisitions, company law, TMT law and real estate law.

Mr. Lincke is currently vice president of the DAV (German Lawyer's Association in Spain) and a Certified Expert of Switzerland Global Enterprise. He has been extraordinary member of the Directive Assembly of the German Chamber of Commerce in Spain (AHK), president of the Wirtschaftsjunioren (Young Managers in Spain) and founder of the Real Estate Practice Group of Eurojuris International.

His articles and studies are regularly published in prestigious legal and economic magazines and websites. He is author and co-author of various books, including Business in Spanien (GD Verlag, 2006), Business Guide-Spaien (Bundesanzeiger Verlag, 2012) and Investitionen und Steuern in Spanien (nwb Verlag, 2012).

Awarded by the independent directory Who's Who Legal as the leading lawyer in Information Technologies for the fifth consecutive year, for 2019 as World's Leading Data Lawyer and for 2020 as leading lawyer in Data Privacy & Protection and Information Technology in Spain.

Languages: English, German and Spanish.

SWITZERLAND (2020 update)

LC
Lenz Caemmerer
Basel

www.lclaw.ch

Liability of shareholders of a limited liability company

1. How and to what extent can the shareholders of a limited liability company be held liable?

In principle, the shareholders are only liable up to the amount of their contribution. hareholders may be obliged to pay up their shares in full if they have not already done so. A direct liability of the managing shareholders can only be considered on the basis of liability proceedings (Article 754 of the Swiss Code of Obligations [CO]; «Verantwortlichkeitsklage»)

2. Is it in principle possible to enforce the liability of the shareholders for the debts of the company? If so, please specify in more detail.

Pursuant to Article 771 para 1 CO, the shareholders are generally not liable for the debts of the limited liability company. It may be regulated in the articles of association that in the event of the risk of bankruptcy the shareholders must repay a maximum of twice their share contributions (Article 772 para. 2 CO and Article 795 f. CO; «Nachschusspflicht").

3. Can a shareholder be held liable for the incomplete payment of his capital con-tribution and for the non-payment by his co-shareholders? If so, please specify in more detail.

hen the company is founded, each share must be fully paid up (Article 777c para. 1 CO). The shareholder is liable only for the full payment of his capital contribution («Stammanteil»). If a shareholder has not fulfilled his capital contribution, he is excluded from the company («Kaduzierung»). In the case of capital-related companies, there are basically no relationships under company law between the shareholders. It would be possible that employment law relationships exist.

4. Is a shareholder who is de facto acting as managing director without being ap-pointed as such subject to liability? If so, please specify in more detail.

A de facto management, which in terms of liability/responsibility («Verantwortlichkeit») can be equated with a managing director registered in the commercial register, exists when shareholders exert a significant influence on the management of the company. What is decisive depends on the individual case. Shareholders who interfere in the management of the company shall be liable in the same way as managing directors in the event of intentional or negligent breach of their responsibilities (in analogous application of Article 754 para 1 CO).

5. Does your legal system provide for regulations on shareholder liability in the event of undercapitalization of the company? If so, please specify in more detail.

It is generally not possible to act against the shareholders. A direct liability of the shareholders can be considered based on liability proceedings or the statutory obligation to make additional contributions.

6. Can the shareholders be held liable for their voting behavior e.g. a vote against the initiation of reorganization measures? If so, please specify in more detail.

In principle, the individual shareholder can vote as he wishes. If the shareholder is part of the company's management at the same time, intentional or grossly negligent voting behavior may, under certain circumstances, trigger a responsibility action.
Article 803 of the Swiss Code of Obligations, which is only addressed to non-executive shareholders, also provides for an
obligation of loyalty. According to doctrine, however, this provision should not create obligations of its own, but only be used to interpret other legal or statutory obligations. A voting restriction is not part of this obligation of loyalty.

7. Does your jurisdiction provide for other regulations on the liability of share-holders of a limited liability company; if so, please specify in detail.

The shareholder is not subject to any other liabilities than those already mentioned above.
The Swiss limited liability company is characterized by a predefined capital contribution and low personal liability.

8. Does your jurisdiction provide for regulations on the disclosure of information on beneficial owners of a company, foundation or trust, e.g. a mandatory regis-ter?

Since 1 July 2015 (amended 1 November 2019) there are new dispositions in the Swiss Code of Obligations of shareholders' obligations to report. Article 697j CO provides what follows: Any person who acquires shares in a company and does reach or exceed the threshold of 25% of the share capital or voting rights must within one month give notice to the company of the first name and
surname and the address of the natural person for whom it is ultimately acting (the beneficial owner).
According to Article 697l CO the company shall keep a register of bearer shareholders and of the beneficial owners notified to the company. The register must be kept in such a manner that it can be accessed in Switzerland at any time. According to Article 697m CO the shareholders' failure to comply with obligations to give notice results in the fact that the membership rights
are suspended and the property rights can only be exercised once the obligations to give notice have been complied with. If the shareholders fail to comply with their obligations to give notice within one month of acquiring the shares, the property rights lapse. If they give notice at a later date they may exercise the property rights arising from that date. The board of directors shall ensure that no shareholders exercise their rights while in breach of their obligations to give notice.

According to Article 790a CO similar rules apply for limited liability companies.

9. What precautions must be taken to prevent money laundering and which transactions are considered to have increased risk of money laundering?

Switzerland punishes money laundering in compliance with its penal

code (Article 305bis StGB, Swiss Penal Code). Also Switzerland has a very strict Anti-Money Laundering Act, in force since 1 April 1998, lately revised in February 2020. The Act mainly applies to financial intermediaries but also to natural persons and legal entities that deal in goods commercially (dealers). The duties of due diligence include the verification of the identity of the customer, establishing the identity of the beneficial owner and specific duties in the event of a suspicion of money laundering. The financial market authority in Switzerland (FINMA) has issued an ordinance against money laundering, which includes as annex diverse clues regarding money laundering.

Beat Eisner

Banking and Capital Markets; Business Enterprises and Entrepreneurs; Litigation and Arbitration; Work and Profession; International; Inheritance and Estates

- Born 1962 in Basel.
- Studied Jurisprudence at the Universities of Basel and Geneva
- Licentiate 1986, Doctor of Law 1990 (University of Basel)
- Admitted to the bar in 1988
- Many years of experience as legal consultant to a major Swiss bank, with service abroad in the USA; later head of the legal department of a foreign bank in Switzerland and since 2000 in a Zürich law firm with a commercial bias
- With Lenz Caemmerer since 2001
- Member of the board of STEP Basel TEP (Trust & Estate Practitioner)
- Publications in the field of medical third party liability law
- Coaching activities in the fields of banking law and compliance

Languages: German, English, French

UNITED KINGDOM - ENGLAND - WALES

(2019-2020 update)

RIX&KAY SOLICITORS LLP | vwv | fbc manby bowdler SOLICITORS

www.rixandkay.co.uk | www.vwv.co.uk | www.fbcmb.co.uk

Liability of shareholders of a limited liability company

1. How and to what extent can the shareholders of a limited liability company be held liable?

The formation of a company results in two fundamental consequences:
a) A company will have a separate legal personality; and
b) The members of a limited company will have limited liability.

The principle of separate legal personality was truly established in the case of Salomon v Salomon & Co Ltd [1897]. It was held that although the defendant was in effect the only person running the company and owned the largest share of the company, the acts of the company were its own and not those of the defendant personally.

The protection granted to the individuals who own and / or run companies can also be known as the 'corporate veil'.

A company is recognised by the law as 'legal person'. It has its own rights and obligations separate from the individuals who own and run it. This means that any asset the company owns is not owned by the individuals within the company. The company can also enter into contracts where it will incur contractual rights and obligations.

Shareholders are collectively the owners of a company. As mentioned above, they cannot be held personally liable for the actions of the company they own. Their only liability is that they must pay the company the nominal value of the shares they own, as well as any premium.

However there are instances where the shareholders and directors may be held personally liable and this is known as 'piercing the corporate veil'. These instances will be discussed in the following questions. It is also to be borne in mind that English law relies on case law as well as statute so it is possible that the principles laid down in Salomon v Salomon might be subject to change or judicial discretion in certain instances.

Once such instance was the Supreme Court decision in Prest v Petrodel Resources Ltd & Ors [2013] UKSC 34, which confirmed there is a principle of English law which enables a court in very limited circumstances to pierce the corporate veil and disregard the separate personalities of the company and shareholders to potentially fix liability on the shareholders. This happens when countervailing legal policies outweigh the policy of giving effect to the company's separate personality and the limited liability of the shareholders.
The critical question is whether a person is under an existing legal obligation or liability, or subject to an existing legal restriction, that he deliberately evades or whose enforcement he deliberately frustrates, by interposing a company under his control. If so, the corporate veil may be pierced for the sole purpose of depriving the controller of the company of the advantage that they would otherwise obtain by the company's separate personality. If there is another legal remedy, piercing the corporate veil will not be necessary and will not be available.

2. Is it in principle possible to enforce the liability of the shareholders for the debts of the company? If so, please specify in more detail.

Under the principle of separate legal personality, shareholders are not liable for the company's debts. This is the benefit of a limited liability company.

The only way a shareholder could usually be held liable for the debts of the company is if he or she has provided a personal guarantee for a debt. So whilst the principle of separate legal personality is upheld in law, the use of contract law has allowed the principle to be side-stepped.

In certain circumstances, where a company has gone into insolvent liquidation or administration and the conditions for wrongful or fraudulent trading are met (explored further in response to question 4), a director may be held liable for debts incurred by the company to afford creditors limited protection against reckless or deliberate conduct by the company's directors.

Members of a company limited by guarantee are liable to pay the amount of their shares, plus the amount that they undertake to pay in the event of the company being wound up (section 74(3), Insolvency Act 1986 and section 3(3), Companies Act 2006). The owners' liability is limited to that sum, regardless of the amount of the debts of the company.

Summary: the debts of the company cannot usually be enforced against the shareholders, unless they have provided a personal guarantee or the conditions for wrongful or fraudulent trading are met. This applies both public and private limited companies.

3. Can a shareholder be held liable for the incomplete payment of his capital contribution and for the non-payment by his co-shareholders? If so, please specify in more detail.

A shareholder is subject to a liability to a company in which it is a shareholder to pay any unpaid element of the nominal value of shares issued to that shareholder.

'Co-shareholders' is not a term generally used in or understood by the law of England and Wales. Shares can be held in joint names, for example a husband and wife could jointly own a share together, or in the sole name an individual or other legal person.

Where shares are owned jointly by more than one shareholder, the register of members must state the names of each joint shareholder (section 113(5) of the CA 2006). With the idea in mind that shareholders are liable to pay the nominal value of the shares that they own, joint shareholders are jointly liable to pay this amount. It follows that if joint shareholders agree that one must pay the shares up (but fails to), they will both / all remain liable to pay the nominal value of the shares. This is because the liability will apply jointly to all joint shareholders.

A shareholders' agreement could be drafted in a way that makes a shareholder liable for the incomplete payments of capital contribution by the other shareholders in the company. However this would be a

contractual obligation as opposed to a statutory one.

4. Is a shareholder who is de facto acting as managing director without being appointed as such subject to liability? If so, please specify in more detail.

A de facto director is someone who assumes to act as a director, although never actually or validly appointed (Re Hydrodam (Corby) Ltd [1994]). Case law has held that such a person may fall within the definition of a 'director' under section 250(1) of the CA 2006. In Smithton Ltd v Naggar and others [2014], the Court of Appeal noted a number of points that assist in determining whether a person is a de facto director:
• Whether they have assumed responsibility to act as a director;
• Whether or not they acted as a director (which must be determined objectively. It does not matter whether the individual thought they were acting as a director);
• Whether the company considered the individual to be a director and held them out as such, and whether third parties considered that they were a director, are, however, relevant factors;
• The court's view of the act(s) in context and their cumulative effect; and
• Whether the person is consulted about directorial decisions, or is asked for approval, does not in general make them a director because they are not making the decision.
If a shareholder performs the functions of a director without being appointed, they could be deemed to be a de facto director. If they are deemed to be a de facto director, there is then the question of whether a de facto director could be treated as a director. As directors have a number of duties imposed upon them by the CA 2006, it is important to determine this.

De facto directors will owe the company the same fiduciary duties as appointed directors. However, whether they will fall within the meaning of «director» for the purposes of other provisions of the CA 2006 will be a matter of statutory construction. In Re Lo-Line Electric Motors Ltd and others [1988], it was said (in relation to the Companies Act 1985):
• Some sections of the Act must refer to appointed directors alone. These sections included the minimum number of directors, directors share qualification, age limits and the register of directors;
• Some sections of the Act must include de facto directors as well as appointed directors; and
• The meaning of "director" varies according to the context in which it is to be found.

De facto directors will be liable as directors for the purposes of:
• Misfeasance claims under section 212 of the Insolvency Act 1986
Misfeasance occurs when a director has misapplied or retained, or become accountable, for any money or other property of the company, or been guilty of any misfeasance or breach of any fiduciary or other duty.
• Liability for wrongful trading under section 214 and section 246ZB of the Insolvency Act 1986
Wrongful trading occurs when a director knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation or administration but the company continued to trade and incur credit. A director may incur personal liability for debts incurred by the company after the point he knew or ought to have concluded there was no reasonable prospect of avoiding insolvent liquidation or administration.
• Fraudulent trading (sections 213 and 246ZA, IA 1986) - occurs if a company has gone into insolvent liquidation or administration, and, on application of the liquidator or administrator, it is found that the business of the company has been carried on with the intent of defrauding creditors, or for any fraudulent purpose. Fraudulent trading is a criminal offence, therefore much more serious than wrongful trading. The main difference between the two is intent. Directors who take part in fraudulent trading have a clear intent to deceive and defraud their creditors and customers.
• Disqualification proceedings under section 6 of the Company Directors Disqualification Act 1986.

Summary: shareholders can be deemed to be de facto directors if they perform the functions of a director without being appointed. De facto directors are not always seen as directors. However for the purposes of misfeasance claims, liability for wrongful trading, liability for fraudulent trading and disqualification proceedings, de facto directors are treated as directors. Therefore if a shareholder is a de facto director and one of these claims is brought, that shareholder could be liable.

Please note that English law does not recognise the concept of "managing director" (Geschäftsführer) as distinct from the other statutory directors.

5. Does your legal system provide for regulations on shareholder liability in the event of undercapitalization of the company? If so, please specify in more detail.

Share capital
Private companies do not have minimum capital requirements so they cannot be 'undercapitalised'.
Public companies, however, do have minimum share capital requirements. Section 90(2) of the CA 2006 states that the company must have allotted shares at least up to the value of the authorised minimum (section 91(1)(a)), which is currently £50,000 (CA 2006, section 763) or the euro equivalent, approximately €57,100 and that each allotted share must be paid up to at least one-quarter of its nominal value together with the whole of any premium on it (section 91(1)(b)).

If it appears to the Registrar of Companies that a company has resolved to reduce its share capital and the effect of the reduction is, or will be, that the nominal value of the company's allotted share capital is below the authorised minimum, the company must not be re-registered as a public company (section 91(5)). There is no liability on the shareholders in the event of 'undercapitalisation', the company just cannot be re-registered as a public company.

Working capital
Under English law, when a company does not have sufficient funds to conduct normal business operations and pay creditors, the directors must take the appropriate action and deal with the company in the best interests of the creditors. If they do not and continue to trade, then they may be liable under the offence of wrongful trading as referred to above. A shareholder may assume liability this way, if a director appointed, de facto or shadow director.

6. Can the shareholders be held liable for their voting behaviour e.g. a vote against the initiation of reorganization measures? If so, please specify in more detail.

No, shareholders can vote as they see fit. The right to vote at shareholders' general meetings in an extremely important right for shareholders of a company, as this is the way in which shareholders exercise their powers and take decisions affecting the company. Their vote does not necessarily have to be in the best interest of the company, unlike directors who do have a duty to promote the success of the company (section 172 CA 2006).

Shareholders are sometimes subject to contractual restrictions for example, in a shareholders' agreement, or where they hold their shares in the capacity of a trustee and fail to fulfil their fiduciary duties to their beneficiaries.

NOTE: shareholders of companies (especially public companies) may have their voting behaviour scrutinised by the public. So whilst they can vote however they see fit, they may feel obliged to vote a certain way to meet the public's expectations or in response to public pressure (e.g. removing a director of the company if that director's decisions are not popular with the public).

7. Does your jurisdiction provide for other regulations on the liability of shareholders of a limited liability company; if so, please specify in detail.

The Proceeds of Crime Act 2002 (POCA 2002) allows the court to:
• Make a confiscation order for an amount equal to a defendant's benefit from criminal conduct (sections 6 and 7);
• Make a restraint order (section 41); and
• Appoint a receiver to manage any such property (section 48).
What this means for shareholders is that if they use a company to carry out criminal conduct, they could be held liable under POCA 2002.

8. Does your jurisdiction provide for regulations on the disclosure of information on beneficial owners of a company, foundation or trust, e.g. a mandatory register?

• Yes - Part 21A Companies Act 2006 - companies and other legal entities - register of people with significant control. Brief non-exhaustive summary below.
• Not companies listed on a regulated market - e.g. FTSE, but their subsidiaries - yes.
• Only individuals so need to go up the tree.
• So, one:
o Determines the nature of a person's control - direct and indirect interests.
o Generally 25% or more.
o Could be other factors such as right to influence decisions e.g. veto, certain rights in shareholders' agreements.
• Register can never be blank, so if not determined when details need to be on, then make a statement to that effect: «The company knows or has reasonable cause to believe that there is a registrable person in relation to the company but it has not identified the registrable person.» or «The company has not yet completed taking reasonable steps to find out if there is anyone who is a registrable person or a registrable relevant legal entity in relation to the company.» or «The company knows or has reasonable cause to believe that there is no registrable person or registrable relevant legal entity in relation to the company.»
• Once a company has identified and, if required, confirmed the required particulars of a registrable PSC or registrable Relevant Legal Entity («RLE»), it must enter that information in the PSC register, including the nature of that person's control, within the appropriate 14 day period specified in section 790M of the Companies Act 2006
• Although the PSC register is primarily intended to record the details of individuals who control UK companies and LLPs, Part 21A of the CA 2006 also requires companies to record the holdings of certain legal entities on the register. This is based on the government's desire to avoid duplication of entries across the registers of different companies within a group.
• To be capable of registration as a relevant legal entity (or RLE), an entity must satisfy all of the following conditions:
o it must be a legal entity for the purposes of the PSC regime;
o it would meet one or more of the specified conditions if it was an individual;
o it must be subject to its own disclosure requirements.
• An overseas company (as defined in section 1044 of the CA 2006) will be a legal entity for the purposes of the PSC regime. Although an overseas company will not be registrable if it is not subject to its own disclosure requirements, the existence of one or more overseas companies in a chain of ownership will not prevent an individual or legal entity from holding an indirect interest in the company for the purposes of paragraph 18 of Schedule 1A to the CA 2006

9. What precautions must be taken to prevent money laundering and which transactions are considered to have an increased risk of money laundering?

In brief summary:
Essentially, we as a law firm have a legal obligation to satisfy ourselves as to the identity of the individual or entity and to be satisfies as to the source of funds.
We therefore have strict requirements which we have to comply with before a file is fully open.
We need to identify the entity (if not an individual) and identify the individuals behind it unless it falls into one of the few exemptions - e.g. shares listed on an approved stock market.
Identification - essentially as above, we need to be satisfied we know the person/have identified:
• Photo id - passport/driving licence/national Identity Card
• Proof of address

Kathryn Paisley

Kathryn leads Rix & Kay's Corporate and Commercial team and is a specialist in corporate law with particular expertise in the sale and purchase of businesses and companies, as well as the establishment of partnerships and other joint ventures.

Having trained and worked for many years for two major City Law firms (CMS Cameron McKenna and RPC LLP), Kathryn has a wealth of experience of working on high-value and complex corporate transactions. Today, her clients benefit from City-level expertise and advice without the cost one might expect from a London law firm.

Areas of expertise

- Sale and purchase of businesses and companies
- Shareholders' agreements and articles of association
- Joint ventures
- Management buy-outs and buy-ins
- Partnerships

Richard Phillips

Richard specialises in transactional and non transactional corporate law. The majority of his work is in mergers and acquisitions and corporate finance. He also advises on corporate governance. He advises banks on the banking and corporate aspects of their lending in the SME sector. He has expertise and experience in advising Limited Liability Partnerships.

Richard is an active member of the firm's Life Sciences team and has a number of clients in this and in the healthcare industry.

He has developed close relationships with a number of European and worldwide law firms, which he meets regularly. Richard and the firm receive regular work from these firms, but more importantly, these relationships allow him to identify the most suitable contact for clients of the firm who need legal advice outside the UK.

David Preece

David graduated with a 2:1 (Hons) Law Degree from the University of Sheffield in 2006. He went on to complete his Legal Practice Course at the College of Law in Birmingham, achieving Distinction. David joined FBC Manby Bowdler as a Trainee Solicitor in 2008, qualified as a Solicitor in the Corporate Department in 2010 and was appointed a Partner in 2017.

David advises on all aspects of company and commercial law, from corporate transactions including the purchase, sale and re-organisation of companies to non-transactional matters, particularly drafting, reviewing and negotiating commercial agreements. In addition David has a growing construction law practice, dealing with both standard and bespoke construction contracts and he is also an established member of the Intellectual Property (IP), Technology & Media Law Group, advising clients on a range of non-contentious intellectual property matters, with a particular emphasis on protection of IP through the registration of trade marks as well as through copyright and design rights.

UNITED STATES (2019 update)

Bressler AMERY & ROSS

www. bressler.com

Liability of shareholders of a limited liability company

1. How and to what extent can the shareholders of a limited liability company be held liable?

One of the primary benefits of limited liability companies ("LLCs") is that the members generally are not personally liable for any debts or legal judgments against the company. Members are only liable for the debts and legal judgments against the company to the extent of their investment in the company. However, members may become personally liable for debts and legal judgments against the company under the theory of piercing the corporate veil, which is explained in greater detail in #2 below.

2. Is it in principle possible to enforce the liability of the shareholders for the debts of the company? If so, please specify in more detail.

Generally, members of LLCs are not personally responsible for the debts of the company. However, there are situations in which courts will "pierce the corporate veil" and put aside the limited liability of the company in order to hold members individually responsible. The purpose of the piercing the corporate veil doctrine is to hold owners of corporate entities responsible upon the showing of fraud or some inequity. Piercing the corporate veil can occur if the company is not observing legal formalities and is simply acting as an alter ego of the member. Factors relevant to whether a company is acting as the alter ego of the member include whether the company is adequately capitalized given the company's business undertaking, whether the company is solvent, whether dividends were paid, corporate records kept, officers and directors functions properly, whether the dominant member siphoned company funds, and whether, in general the company simply functioned as a façade for the dominant member.

3. Can a shareholder be held liable for the incomplete payment of his capital contribution and for the non-payment by his co-shareholders? If so, please specify in more detail.

The US does not have a requirement for minimum capital contributions. However, for practical purposes, a company should be properly funded. Banks, investors and insurance companies are unlikely to transact with companies that lack sufficient capital.
Unless specifically elucidated in the operating agreement, incomplete or non-payment of capital contributions by a member does not reduce the interest owned by the non-contributing member, nor does it increase the interest owned by the contributing member(s). Members should ensure that their LLC's operating agreement adequately explains the requirements for capital contributions as well as the consequences for not fully paying such capital contributions.

4. Is a shareholder who is de facto acting as managing director without being appointed as such subject to liability? If so, please specify in more detail.

Under agency law, an agent acts with apparent authority when a third party reasonably believes, based on the conduct of the principal, that the agent has authority to bind the principal. A member who acts as a managing director without being appointed is acting with apparent authority but without actual authority. Such a member will be liable to indemnify the company for any resulting loss or damage.

5. Does your legal system provide for regulations on shareholder liability in the event of undercapitalization of the company? If so, please specify in more detail.

As explained in #3 above, the US does not have any minimum capitalization requirements for companies. Members are not personally liable purely as a result of undercapitalization of a company. However, undercapitalization, in the presence of other factors, can be used as evidence that the company is acting as the alter ego of the member(s). In such a case, members may be held liable under the theory of piercing the corporate veil, as previously explained in Question #2.

6. Can the shareholders be held liable for their voting behavior e.g. a vote against the initiation of reorganization measures? If so, please specify in more detail.

Members are only liable to the company for their voting decisions if they hold a management position within the company. If the company is member-managed, then members owe fiduciary duties to other members and the company itself. (To the extent a member is merely a member without management responsibility, these duties do not apply). The fiduciary duties include the Duty of Loyalty and the Duty of Care. Under the Duty of Loyalty, members must place the best interests of the company above their own personal interests. Under the Duty of Care, members must act in good faith and exercise reasonable care in carrying out the obligations and activities of the company. But members are typically protected in making decisions related to these fiduciary duties by the Business Judgment Rule, which is a presumption in favor of the members exercising management authority that their decisions will be upheld in court so long as they are made (1) in good faith, (2) with the care that a reasonably prudent person would use, and (3) with the reasonable belief that the member is acting in the best interests of the corporation.

7. Does your jurisdiction provide for other regulations on the liability of shareholders of a limited liability company; if so, please specify in detail.

In addition to circumstances under piercing the corporate veil and member's fiduciary duties to each other and the company when acting in a management capacity, there are a number of other situations where members may be held personally liable, including:

- Co-signing or Personally Guaranteeing Company Debts
- If a member co-signs or guarantees a company loan, they are personally liable if the company defaults.

- Pledging Personal Property as Collateral
- If a member pledges personal property for a loan, the creditor may be able take the property in the event the company defaults.

- Fraud
- Members may be held personally liable if they committed fraud or if the company itself was created to further fraudulent purposes.

Tobias F. Ziegler

Tobias focuses his practice on corporate and business transactions, both domestic and international.

He represents foreign and domestic companies and individuals in connection with the formation of corporate entities, joint ventures, mergers and acquisitions, and corporate financing transactions. He frequently assists clients regarding intellectual property licensing matters and the negotiation of commercial contracts of various types. He also has extensive experience in real estate, trademark, and immigration matters.

With law degrees from Germany and France, Tobias is fluent in the languages of both countries.

Tobias is the author of numerous articles and publications, available in multiple languages, that are designed to assist non-U.S. companies and individuals in doing business in or with the U.S.