

PACSA & CAMEIRA
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***“THE RELATIONSHIP BETWEEN A PARENT COMPANY
AND ITS FOREIGN SUBSIDIARY”***

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3. Civil liability

- How is the civil liability of (i) individuals such as directors/managers, and (ii) legal entities such as the parent company regulated in your jurisdiction? Please comment on the use of “comfort letters” and their effects in your jurisdiction, etc.
- How is the conflict between the interests of the subsidiary and the interests of the group generally addressed in your jurisdiction (e.g. statutory protection, hold harmless clauses in trustee agreements)?

❖ How is the civil liability of (i) individuals such as directors/managers, and (ii) legal entities such as the parent company regulated in your jurisdiction? Please comment on the use of “comfort letters” and their effects in your jurisdiction, etc.

Directors Liability

➤ **General Principle:** Portuguese Company Law sets out a general duty for directors to act with *the diligence of a prudent businessman*, in the interests of the company and of its shareholders. Its breach may trigger directors' civil liability.

The breach of directors' duties may trigger directors' civil liability:

❖ In respect of the abovementioned general duty of diligence, directors are bound to the following duties which breach may trigger their civil liability:

- Not carrying out a competing activity in their own name and representation or third parties;
- Keep the integrity of the assets of the company;
- Submit the annual report;
- Submit the company's books and accounts;
- The articles of association may additionally provide for complementary duties.

Who may trigger civil action?

The directors who breach the aforementioned duties may be liable towards the company, towards individual shareholders, towards company creditors if, due to the wilful non-compliance of legal or contractual provisions aimed at protecting those creditors, the company's assets become insufficient to satisfy their claims.

Type of Liability:

When addressing directors' civil liability, Portuguese company law provisions set out their joint and several liability for the damages caused, and the reversal of the burden of proof.

Exclusion of liability:

- They did not participate in the approval and execution of the damaging resolution;
- They voted against the damaging resolution and stated such opposition in the minutes of the board of directors; or
- They did everything within their power to prevent the resulting damages.

The Liability of the Parent Company:

Applicable provisions of the Portuguese Companies Code dispose that the parent company must cover all annual losses and is jointly liable for the settlement of debts of the subsidiary.

The Liability of Directors of the Parent Company:

- Directors may be held liable whenever they issue instructions in matters unrelated to its management, instructions contrary to the dispositions of the subsidiary's articles of association, instructions on intragroup transfers of assets without an appropriate compensation, or, generally, instructions that are disadvantageous to the interests of the subsidiary.
- Directors of the Parent Company are bound by a general duty of diligence regarding the entire group.

Please comment on the use of “comfort letters” and their effects in your jurisdiction:

- Comfort letters are not specifically regulated by Portuguese Company Law;
- Jurisprudence has, however, distinguished “comfort letters”, as regards their contents, in “weak comfort letters” and “strong comfort letters”;
- The binding effect of comfort letters is only admitted in exceptional circumstances.

❖ How is the conflict between the interests of the subsidiary and the interests of the group generally addressed in your jurisdiction (e.g. statutory protection, hold harmless clauses in trustee agreements)?

- Portuguese Company law does not address conflict between the interests of the subsidiary and the interests of the group directly ;

- The general provisions of the Portuguese Companies Code concerning conflict of interests between the company and individual shareholders, are applicable;

- Exclusion of voting rights;

➤ This preventive mechanism is triggered when a decision is being taken on:

-The shareholder's exclusion from the company;

- Granting the shareholder a right;

- Releasing the shareholder from certain obligations, either as a shareholder or as a director of the company;

- Waive or settlement of the corporate claim for damages and vice versa;

- Dismissal with just cause, of a shareholder from the Board of Directors.

The articles of association and the contract of subordination may frame other situations deemed to constitute a conflicts of interest situation and provide further preventive mechanisms of such conflicts of interest.

➤ Publicly held companies are bound by the duty to disclose in the annual corporate governance report, the details of any business concluded between the company and the dominant shareholders provided that this business is economically significant for the parties involved.

- Conflicts of interest between directors or managers and the company are addressed by the relevant Portuguese Company Law provisions:
 - a) Companies cannot enter into certain types of contracts with their directors or managers;
 - b) Directors or managers are prevented from entering into any labour or service agreements with their respective companies or with companies in a group relationship with the former, either during the appointment period or immediately after the said appointment;
 - c) Competition between directors or managers and their respective companies is forbidden;
 - d) The appointment of directors in companies with a two-tier management structure is subject to several restrictions.

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THANK YOU!

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