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On the Tort Liability of the Parent Company for Breaches of Duty by the Subsidiary: Grounds and Limitations

German corporate group law is characterized by the principle of the legal independence of group companies. Nevertheless, the question repeatedly arises as to what extent the parent company is liable for tortious breaches of duty by its subsidiaries. This question has significant practical implications for corporate group organization and risk management. The following article provides an overview of the corporate law foundations, the grounds for the parent company's liability, and its limitations.

Starting Point: Separation and Independence

Under German corporate law, the principle of separation (the so-called "**separation principle**") applies. Each company is an independent legal entity and is generally liable only for its own obligations. This gives rise to one of the central issues in group law: the question of who, within the context of a group as defined by Section 18 of the German Stock Corporation Act (AktG), is liable for the debts of the individual group companies. In principle, the following options are considered: sole liability of the group company, liability of the respective subsidiary, or liability of the entire group.

The principle of separation and the resulting independence of the respective subsidiaries mean that, even within a contractual group, a subsidiary is generally solely liable for its own obligations. Liability on the part of the parent company or other group companies is generally ruled out because general piercing of the corporate veil within a group is alien to German law (see*Emmerich/Habersack/Lüdeking*in: Emmerich/Habersack, Konzernrecht, 12th ed. 2023, § 20 n. 25).

Consequently, the direct liability of the parent company for the liabilities of a subsidiary is always an exception that requires special justification and is generally only considered under the same narrow conditions under which liability is otherwise extended from legal entities to their shareholders, particularly in cases of abuse and commingling of assets (ibid., § 20, para. 26).

In the literature on legal economics as well, the limitation of liability within a corporate group is today predominantly regarded as objectively justified, in particular to promote investment and reduce transaction costs (ibid., § 20 n. 26;*Habersack/Zickgraf*, ZHR 182 (2018), 252, 260). On the other hand, however, doubts are growing regarding the current scope of the limitation of liability and, consequently, the statutory exceptions to the separation principle.

When is the parent company liable nonetheless?

While the contractual inclusion of other group companies in the liability network through suretyship (§ 765 BGB), accession to debt or guarantee (§ 311(1) BGB), and through letters of comfort is possible at any time (see*Emmerich/Habersack/Lüdeking*in: Emmerich/Habersack, Konzernrecht, 12th ed. 2023, § 20 n. 28), the parent company’s liability for tortious acts of the subsidiary is only conceivable under specific conditions.

Case law and legal literature discuss various categories of cases in which a piercing of the corporate veil is said to be possible:

- **Piercing the corporate veil (liability through the corporate veil):** Liability through the corporate veil is possible only in exceptional cases, such as abuse of rights, blurring of corporate spheres, or an intervention that destroys the subsidiary’s existence (BGHZ 81, 311 (317) – Sonnenring ruling; BGHZ 166, 85, para. 57). Mere control of the subsidiary is not sufficient. It should be noted that the controlling shareholder's own duty is at issue, and therefore it is difficult to speak of "piercing the corporate veil" in the strict sense. Nevertheless, it must not be overlooked that organizational duties often constitute a functional equivalent to a liability rule based on the principle of*respondeat superior*, such that their generous application to group-related circumstances would come quite close to a piercing of the corporate veil in functional terms (see*Habersack/Zickgraf*, ZHR 182 (2018), 252, 282).

- **Inducement Liability:**The parent company may be liable if it induced or contributed to the subsidiary's breach of duty. The decisive factor is active influence over the source of danger: If the controlling shareholder assumes substantive control over risk management, there is a risk that the subsidiary's governing bodies will merely implement the directives without independently reviewing them. A breach of the duty of care exists if, hypothetically, compliance with the instructions would lead to a situation contrary to the duty of care at the corporate level (see*Habersack/Zickgraf*, ZHR 182 (2018), 252, 288 et seq.).
- **Organizational fault:**If the parent company breaches its supervisory duties and thereby enables unlawful acts by the subsidiary, liability under § 823(1) BGB may arise. If the shareholder sets specific guidelines for the organization of business processes, it effectively exercises organizational authority. Under the principle of control of risk, this authority must be accompanied by corresponding tortious liability (see*Habersack/Zickgraf*, ZHR 182 (2018), 252, 277 et seq.).

- **Legal Exceptions:** There is a growing number of statutory exceptions to the separation principle, such as the Act on Extended Liability of January 27, 2017, the Supply Chain Act (liability for human rights violations by subsidiaries), and the EU-law obligation of parent companies to assume liability for antitrust violations by their subsidiaries where an economic unit exists (Art. 101, 102 TFEU). Since the ECJ's Skanska ruling (2019), this also applies to civil liability under Sections 33 et seq. GWB in conjunction with Articles 101 and 102 TFEU (see*Emmerich/Habersack/Lüdeking*in: Emmerich/Habersack, Konzernrecht, 12th ed. 2023, § 20, para. 27).

What is the basis for liability?

The liability of the parent company is based on general principles of tort law, in particular § 823 BGB. A prerequisite is always the parent company's own culpable conduct. Mere participation in the subsidiary or the exercise of influence is not sufficient. Duties of care and organizational duties generally rest with the company itself – it creates the sources of danger and controls them through its organs and employees (see*Habersack/Zickgraf*, ZHR 182 (2018), 252, 272 et seq., 295).

The situation is different in the case of active influence by the controlling shareholder: duties giving rise to liability appear justified if the shareholder actively influences business operations and can assert his interests due to a controlling position. In the absence of such a position, liability is generally excluded (see*Habersack/Zickgraf*, ZHR 182 (2018), 252, 265 et seq.).

Where are the limits of liability?

The liability of the parent company is limited for good reasons:

- **Legal certainty and promotion of investment:** Excessive liability would undermine legal certainty and entrepreneurial freedom. The limitation of liability within a group helps reduce agency costs and promotes business investment. Furthermore, if general organizational duties were imposed on the controlling shareholder, monitoring and information-gathering costs would rise, as the controlling shareholder would have to constantly monitor the company's activities in order to effectively avoid liability for a breach of organizational duties (see *Habersack/Zickgraf*, ZHR 182 (2018), 252, 285 et seq.).
- **Protection of the Parent Company and Group Organization:** The parent company should not be held liable for all risks of the subsidiary as long as it acts in compliance with the law. The establishment of comprehensive organizational duties would create a strong incentive for centralized group management, which would be questionable from an organizational theory perspective and, moreover, would run counter to the principles of Sections 311 et seq. of the German Stock Corporation Act (AktG). In particular, the creation of efficient holding structures could prove unattractive due to significant liability risks (see *Habersack/Zickgraf*, ZHR 182 (2018), 252, 285 et seq.).
- **Limitation to active influence:** The controlling shareholder's duty of care

relates only to the legality and appropriateness of its instructions, not to their implementation by the company. The shareholder has no genuine duty to investigate or monitor third parties (see*Habersack/Zickgraf*, ZHR 182 (2018), 252, 290).

- **No Liability of the Managing Director for Breach of Duty of Care:** In any event, there is generally no basis for holding the managing director of a corporation liable for a breach of duty of care, because the source of risk is attributed to the corporation and not to the managing director, and only the corporation – not the managing director – directly benefits from the economic activity. Viewed in this light, the principle of separation also has a protective effect in favor of the managing director (see*Habersack/Zickgraf*, ZHR 182 (2018), 252, 293 et seq.).

Conclusion and Recommendation

Under German law, the parent company's tortious liability for breaches of duty by the subsidiary remains the exception. It requires culpable conduct on the part of the parent company itself, such as instigation, complicity, or organizational negligence. The concept of duty of care assigns the duties protecting third parties to the legal entity that actually controls the event giving rise to the risk (see*Habersack/Zickgraf*, ZHR 182 (2018), 252, 295). This ensures that the right behavioral incentives are precisely targeted, and the investment-promoting effect of the limitation of liability is preserved.

In practice, this means that group companies should carefully review their organizational and supervisory structures. Particularly when actively influencing subsidiaries, care must be taken to ensure that instructions lead to a lawful and appropriate state of affairs. Early legal advice can help identify liability risks and minimize them through appropriate compliance measures.

Our experts are happy to assist you in this regard.

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