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Directors' duties and liabilities survey

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Directors' Liabilities in Europe: A Multi-Jurisdiction Survey on Current Set of Rules and Best Practices

State of play in a fast-changing legal environment

Directors' duties and liabilities have always been at the forefront of corporate governance. It has become a hot topic in the wake of new regulations in the field of sustainability, which directly impact directors' responsibilities and exposure. How are directors' liabilities implemented in practice in the various jurisdictions covered by Allen & Overy in Europe? What are the main differences and commonalities among the legal frameworks and the case-law? What are the best practices for directors to comply with their duties and to mitigate their risks, in particular in the context of sustainability?

To answer these questions, Allen & Overy, a leading global law firm, has in collaboration with ecoDa[1], the European institute for directors, a unique organisation representing the main national institutes of directors in Europe, and with local input from PWC (Greece) and RTPR (Romania), conducted a multi-jurisdiction survey on directors' liabilities in Europe, covering 15 countries and providing an overview of the current state of play (the Survey). The Survey is based on a questionnaire that covers topics such as the legal basis, the scope, the enforcement, and the sanctions of directors' liabilities, with a focus on concrete actions taken against directors in practice. The Survey also highlights the key challenges and opportunities for directors in relation to sustainability and corporate social responsibility.

The Survey is based on input from our local Allen & Overy experts covering the jurisdictions set out in Part 1. Questions in relation to Sweden, Finland, Bulgaria, Greece and Romania were addressed by ecoDa local members, PWC and RTPR and are set out in Parts 3, 4 and 5.

The Survey aims to provide valuable insights into the legal risks and best practices for directors in Europe, as well as to foster a dialogue and a benchmark among the different jurisdictions. The Survey is intended for directors, board members, legal counsel, compliance officers, and anyone interested in the topic of directors' liabilities and sustainability. We hope you will find it useful and informative.

1_ecoda.eu/

Guidance to navigate the survey

Allen & Overy and ecoDa, with local input from PWC (Greece) and RTPR (Romania), have put together an overview of the main rules with regard to directors' liabilities in a number of key jurisdictions across Europe. This includes a brief general description of directors' duties and key areas of potential directors' liability in each country, as well as some answers to the questions listed above. Obviously, the duties and liabilities that may arise will always be dependent on the circumstances. Therefore, this publication should not be used as legal advice when faced with a specific dilemma. However, we hope it may help to alert directors and their in-house advisors to the duties, pitfalls and liability risks that exist in major jurisdictions across Europe.

About the partnership between Allen & Overy and ecoDa

Allen & Overy and the European institute for directors share a vision of promoting responsible and effective leadership in a changing and challenging environment. By developing joint insights and combining our expertise in the field of directors duties and liabilities, including in a sustainability context, we inspire leaders across Europe and provide practical guidance to boards and managers on how to navigate legal and ethical risks and opportunities.

Executive summary

Guidance to navigate the survey

The responses to the survey conducted in 14 European Union member countries (plus England and Wales) in June-September 2023, detailed below on a country-by-country basis, can be summarized as follows.

Statutory and court laws in all European jurisdictions address the definition of duties and liability of corporate directors, based on sometimes different basic legal concepts, but with similar outcomes, providing redress to shareholders and third parties, taking into account the specific nature of corporate management.

1. Diversity of governance framework

– There is a large diversity of the governance set-ups available to companies: some countries recognize only a one-tier structure (board of directors, with a chief executive who may be a member of the board or not), or only a two-tier structure (supervisory board and management board); many jurisdictions give an option between these two forms and in Italy companies may (and generally do) elect a structure with a board of directors and a separate "audit committee" (*collegio sindacale*).

– In most jurisdictions, a set-up with a sole director is also available and widely used by smaller companies, but also by larger, unlisted companies.

2. Directors' duties and responsibilities

– The law generally specifies a form of "duty of care" applicable to the company: although not recognized under that name and based on a different conceptual approach (e.g. a form of civil fault applied to mismanagement), in all jurisdictions directors are expected to exercise a duty of reasonable diligence.

– This duty is in general explicitly aimed at protecting/promoting the interests of the company as a legal person, sometimes with specific mention of the interests of shareholders (more exceptionally, their long-term interest, or the continuous profitability of the company is specified), creditors, stakeholders.

– Owing to the fact that company management is recognized as an activity naturally involving risk-taking, a form of safe harbour is granted by either statutory or case law and directors' duties are appreciated as an "obligation of means", or the expected diligence is termed "reasonable", or the liability is involved if the acts of mismanagement are incompatible with the normal exercise of the mandate (*faute détachable*).

– In all jurisdictions, there is an emphasis on the prevention of conflicts of interests.

– Recently, increased attention has been given to the duties towards stakeholders: this has been accelerated by the enactment of CSRD, and the laws on non-financial due diligence obligations in certain jurisdictions.

– More exceptionally, a duty for directors to "create value" is specified.

3. Directors' liability: basic principles

– Civil liability: it can be based on a breach of contractual obligations towards the company (in most cases, even without employment contract), claimed on behalf of the company by its governing body, or by shareholders themselves (with or without a minimum share); or on tortious liability, claims being available to third parties, in application of general principles.

– Criminal liability: as a minimum, the general principles relating to fraud apply, sometimes specific causes of indictment are applicable to directors such as "misappropriation of company assets".

– Limitation of liability: no cap amount is provided for by law (with the exception of one jurisdiction), but courts may sometimes mitigate the obligation to pay damages; indemnity agreements with the company are sometimes permissible; conversely, in one jurisdiction, directors have to deposit a guarantee bond to secure their liability.

4. Directors' liability: who?

– Usually there is no difference between executive and non-executive directors' liability, except in some jurisdictions for supervisory board members, but generally a difference results from their duties not being the same.

– *De facto* (or shadow) directors are usually treated the same way as *de jure* directors, at least for criminal liability; when legal persons can be appointed directors, the natural person representing them usually incurs the same liabilities; courts are often willing to "pierce the corporate veil", i.e. to claim the liability of a parent company if it appears that the decisions are actually taken at that level.

– Usually, directors are subject to joint and several liability of for collective decisions, with a possibility to escape if the director has opposed the decision.

– In most jurisdictions (but not all), criminal liability of legal persons is recognized, which may impact the approach to directors' personal liability.

5. Directors' liability in case of bankruptcy

– Civil liability of directors to the creditors if their actions have contributed to the bankruptcy is the general principle; the case when they have increased the damage to creditors by delaying filing for bankruptcy is often specified.

– Sometimes, directors may possibly incur a disqualification order.

– Sometimes, specific criminal charges are provided for in case of bankruptcy.

6. Directors' liability: how often and how much in practice?

– No specific statistics available in any jurisdiction, either on frequency of cases or amounts awarded; general appreciation is that cases are infrequent.

– Plea bargaining is available in the majority of jurisdictions

7. Directors' liability and the CSR

– Increased attention to CSR has not changed the principles of directors' liability as such, but has increased (or will increase) the scope of their responsibilities and created a wider diversity of potential claimants, especially as a result of the enactment of NFRD and CSRD.

Jurisdictions covered in our survey

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1. Directors' duties and liability in the jurisdictions covered by Allen & Overy

Belgium

No.	Question	Answer
1.	Which jurisdiction will be covered?	Belgium
2.	How does the governance framework apply to different types of boards (one-tier or two-tier)?	The Belgian Code for Companies and Associations (**BCCA**) provides several options for governance structures, depending on the legal form of the company. In private limited liability companies (*BV/SRL*) and cooperative companies (*CV/SC*), the following options are available: (a) one sole director, (b) several directors with each having individually full decision and representation powers, and (c) a board of directors (one-tier structure) which is a collegial body (ie decisions are made by majority and there is a presumption of joint liability). In private limited liability companies and cooperative companies, there is no possibility of a two-tier structure. For public limited liability companies (*NV/SA*), a company may opt for one of the following options: (i) One sole director (but this option is subject to restrictions in listed companies), (ii) A board of directors (one-tier structure) which is a collegial body and has to consist of at least three directors (unless the company has no more than two shareholders, in which case two directors suffice), or (iii) A two-tier structure consisting of a supervisory board and management board, in which the supervisory board is responsible for determining the general policy and strategy and overseeing the management board, while the latter is responsible for the operational management and representation of the company. The general duties and liabilities of directors are set out in Book 2 of the BCCA and apply to all directors in the different governance systems. The day-to-day management of the company may be delegated by the sole director, board of directors or management board to one or more persons, who will bear similar liabilities towards the company and third parties (see articles 2:51 and 2:56 BCCA) (hereafter referred to as "executive manager"). The responsibility for the day-to-day management of the company may be combined with the position of director ("executive director").

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No.	Question	Answer
3.	Does the legal set-up (statute or case law) specify that the legal responsibilities of directors are towards the shareholders, the company as a legal person and/or society?	Article 2:51 of the BCCA specifies that members of a management body or persons charged with the day-to-day management of the company are obliged to perform the mandate entrusted to them in a proper manner towards the legal entity. Directors thus owe a contractual duty to act in the best interest of the company, and the failure to do so results in contractual liability on the part of the director. There is some discussion in Belgian legal sources concerning the definition of the interest of the company (and in particular whether it should be interpreted in a narrow manner as the interest of the shareholders, or in a broader manner as also comprising the interests of other stakeholders such as creditors, employees and the general public). Although, the Belgian Supreme Court has defined the interest of the company as the collective profit interest of all current and future shareholders (opting for the more narrow interpretation), it has clarified that the focus should be on the continuity of the company and that the term "interest of the company" should be interpreted in a dynamic and future-oriented manner. As such, the interests of other stakeholders could still be taken into account to the extent that these could impact the collective profit interest of all current and future shareholders. Furthermore, since the entry into force of the BCCA in 2019, companies are allowed to adopt other objectives in their articles of associations next to the objective of capital gain, which could include *inter alia* environmental, social or sustainability objectives. According to the preparatory works of the BCCA, such other objectives adopted by companies in their articles of association are not subordinate to the classic objective of capital gain. This implies that directors should also consider these objectives of the company when carrying out their duties.

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No.	Question	Answer
4.	Does the legal set-up (statute or case law) specify that the directors have to act with care?	**Standard of care** Directors have a responsibility to perform the mandate entrusted to them "*in a proper manner*" (article 2:51 BCCA). In exercising their mandate, they must use their "*best efforts*"; they are not obliged to achieve a certain result. The law explicitly provides that courts must afford directors a margin of discretion when evaluating their behaviour. Article 2:56 BCCA stipulates that directors can only be held liable for "*decisions, acts or conduct that fall manifestly outside the range in which normally cautious and prudent directors, placed in the same circumstances, could reasonably have diverging opinions*". In addition, directors are expected to act in accordance with the general duty of care (article 1382 (old) civil law), failing which they can be held liable under tort law for any damage to third parties caused by such failure.
	And that they have to avoid conflicts of interest?	**Conflict of interest** In accordance with articles 5:76 BCCA (private limited liability companies), 6:64 BCCA (cooperative companies), and articles 7:96, 7:102 and 7:115 BCCA (public limited liability companies), directors with a conflict of interest have to disclose this to the rest of the board before the board makes a decision and may not participate in the deliberations or the decision-making in relation thereto. If the sole director or all directors have a conflict of interest, the shareholders' meeting has to approve the decision after which the sole director/the board of directors may execute the decision. Under articles 5:78 (private limited liability companies), 6:66 (cooperative companies) and 7:122, first paragraph (public limited liability companies) of the BCCA, directors are jointly and severally liable for damages suffered by the company or third parties as a result of decisions or transactions, even when they have been made or concluded in accordance with the conflict of interest procedures of the BCCA if, as a result of the decision or transaction, one or more directors have received an illegitimate financial benefit to the detriment of the company. In addition, the general duty to avoid conflicts of interest in article 1.8, §6 of the (new) Belgian Civil Code may apply. This article provides that any person required to perform legal acts on behalf of another person may not act as a counterparty or intervene in the event of a conflict of interest. Legal acts performed in violation of this article may be declared null and void.
	Do directors have to consider the interests of other parties, such as employees, creditors, or the environment?	**Consideration of other interests** As mentioned above, directors may have to take the interests of other stakeholders into account in so far that these may impact the collective profit interest of the current and future shareholders. Furthermore, if the articles of association of the company mention other objectives aside from capital gain, directors should also take these other objectives into account (see question 3). In addition, directors may also be inclined to attach greater weight to the interests of the creditors of the company in case of insolvency due to the specific liability grounds that apply in case of bankruptcy. Once adopted, the EU Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 may also require EU member states (incl. Belgium) to oblige directors to take into account the interests of other stakeholders (see question 16).
	Do directors have to create value for the company and its shareholders?	**Duty to create value** As mentioned above, directors have a duty to act in the interest of the company, which will generally result in an increase in value of the company (at least in the long term).

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No.	Question	Answer
5.	How can directors be held liable for breaching their duties or causing harm to the company or others?	Directors can be held liable on several grounds: – Directors may be held **contractually** liable for breach of specific duties or obligations towards the company (article 2:56 BCCA). This liability can be invoked by: – the company (*actio mandati*, which requires a majority decision taken by the shareholders' meeting), – the minority shareholders (minority claim, which can only be instituted if certain conditions are met), – creditors (on the basis of article 5.142 (new) Belgian Civil Code if the company fails to act), or – the trustee (in case of bankruptcy of the company). – Directors are also liable towards third parties (including creditors) for any loss caused by any negligent act or omission **on the basis of tort law** (article 2:56 BCCA, and articles 1382-1383 of the (old) Belgian Civil Code). – The former and/or present directors of a company may incur specific liabilities in case of **insolvency or bankruptcy** of the company. – Directors may also incur **criminal liability** for certain offences (next to the company, article 5 of the Belgian criminal Code). Examples of such offences may be found in the BCCA (eg failure to make mandatory publications), the Belgian Code of Economic law (eg for certain accounting obligations), the Belgian Criminal Code (eg the failure to timely declare bankruptcy), the Belgian Social Criminal Code (for breaches of the health and safety regulations), environmental regulations.

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No.	Question	Answer
6.	What is the liability framework for *de facto* (or shadow) directors?	Article 2:56 BCCA provides that *de facto* directors (defined as "*all other persons who have actual power of management with respect to the legal entity*") are also liable towards the company and third parties. Legal doctrine accepts that a *de facto* director can be held liable in the same way as formally appointed directors (including for a failure to properly fulfil his or her mandate) in case the company has (tacitly or explicitly) accepted the *de facto* management by the *de facto* director. In the absence of such acceptance by the company, however, there is some discussion in legal doctrine concerning the extent of the liability of *de facto* directors (in particular whether the *de facto* director can be held liable for regular management errors, and for violations of the BCCA or the articles of association of the company). In addition, the liability regime for *de facto* directors differs from that of formally appointed directors in the following respects: – a claim against a *de facto* director will (always) have to be based on tort law (articles 1382-1383 (old) Civil Code) due to the lack of a contract; – the board of directors of the company will decide on the institution of a claim against *de facto* directors (and not the shareholders' meeting as is the case with a liability claim against formally appointed directors); – it is disputed whether the liability caps (see question 8) apply to *de facto* directors; – *de facto* directors are not jointly and severally liable with formally appointed directors (even for violations of the BCCA or articles of association, see question 11).
7.	Are executive and non-executive directors treated differently in terms of liability?	Executive directors are subject to the same liability regime as non-executive directors. The general rules on directors' liability in the articles 2:56-2:58 BCCA and the specific liabilities in case of insolvency of the company (articles XX.225, XX.226 and XX.227 of the Code of Economic Law (**CEL**)) are applicable to both executive managers/directors and non-executive directors. However, in practice, the possible exposure of these two categories to liability will differ in light of their different roles. Non-executive directors are primarily responsible for strategic oversight, control and supervision on the management of the company, while executive managers/directors have more exposure to liability for operational decisions and actions.

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No.	Question	Answer
8.	Is the liability of directors capped up to a certain amount?	The BCCA has introduced caps on director's liability (article 2:57 BCCA). These caps also apply to the liability of executive managers. Whether the caps also limit the liability of *de facto* directors forms a point of contention. The caps apply per fact or set of facts that can give rise to the liability and are independent of the number of claimants or defendants. The caps apply both towards the company and towards third parties, for contractual liability, tort liability, liability in case of wrongful continued trading and any other loss liability under the BCCA or any other laws and regulations. The caps do not apply in case of habitual minor errors, serious errors or fraud/intent to harm nor in case of some specific cases (such as the liability of directors for unpaid corporate income tax, social security contributions or VAT), which makes the application of the liability caps in practice rather limited. 9.The caps as set out in article 2:57 BCCA are the following: – **EUR125,000** (average annual turnover of less than EUR350,000 (excl. VAT) and an average total balance sheet of no more than EUR175,000); – **EUR250,000** (average annual turnover of less than EUR700,000 (excl. VAT) and an average total balance sheet of no more than EUR350,000); – **EUR1,000,000** (average annual turnover (excl. VAT) of more than EUR9,000,000 or an average total balance sheet of more than EUR4,500,000 (but not both, see (4))); – **EUR3,000,000** (exceed both thresholds under (3) but do not meet or exceed any of the criteria under (5)); and – **EUR12,000,000** (average annual turnover (excl. VAT) of more than EUR50,000,000, and/or average total balance sheet: EUR43,000,000; and public interest entities (no thresholds)). The liability of directors cannot be limited in advance beyond the liability caps included in article 2:57 BCCA. Article 2:58 of the new BCCA prohibits all mechanisms pursuant to which a company in advance exempts or exonerates its directors from liability both towards the company and towards third parties. Any provision that violates this principle is null and void and will not be applied. Director's liability beyond the applicable caps can, however, be insured through a D&O policy but such policies generally do not cover liability arising from fraud, intentional conduct or criminal or regulatory fines.

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No.	Question	Answer
10.	Can directors shield off their liability through management companies?	No. In accordance with article 2:55 of the BCCA, a legal person that assumes a mandate as a (non-)executive director, is required to appoint a natural person as its permanent representative (thus prohibiting a chain of legal persons). This permanent representative is charged with carrying out the director's mandate in the name and, on behalf of the legal person, has to comply with the same requirements as the legal person and is jointly and severally liable with the legal person as if the permanent representative [him-/herself] had carried out the mandate in question in his/her own name and for his/her own account.
11.	Are the directors' liability risks collective (ie when acting in a collegial body) or individual?	If the management body is collegially organised, the contractual liability of a director towards the company entails a joint and several liability of all the members of the management body of which the director is a member. This presumption of joint liability can be rebutted and an individual director can escape liability by proving that (i) he/she did not take part in the decision or action which has caused the plaintiff's loss, and (ii) he/she has disclosed the (alleged) breach to the board of directors or, in a two-tier structure, to the collectively organised management body and the supervisory board (article 2:56 BCCA). Even if the management body is not collegially organised, the members of the management body are jointly liable for violations of the BCCA or the articles of association. In addition, the BCCA provides for specific instances of joint liability of the management body, eg in case one of the directors obtains an unjustified financial advantage to the detriment of the company in the context of a transaction for which the conflict of interests procedure was followed. The majority of the doctrine accepts that the abovementioned regime of joint liability does not apply to *de facto* directors. Outside of the hypotheses described above, directors (including *de facto* directors) may also be held liable in *solidum* on the basis of ordinary law if the fault in question was committed jointly by several directors who knowingly contributed to the occurrence of a harmful act.

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No.	Question	Answer
12.	What are the consequences of directors' liability in case the company goes bankrupt? Under what circumstances can directors be held personally liable for (part of) the debts of the bankrupt company?	Directors may incur specific liabilities in the event of insolvency or bankruptcy of the company, including (in some cases) personal liability for all or part of the company's debts: – **Liability for gross negligence contributing to the company's bankruptcy (article XX.225 CEL)** – any current director, former director and *de facto* director may be jointly and/or severally liable for all or part of the company's debts if it is shown that their gross negligence has contributed to the company's bankruptcy and to the extent there is a deficit of the company's liabilities compared to its remaining assets (which will almost always be the case in the event of a bankruptcy). This liability does not apply to directors of small companies, which are defined as companies with an average turnover of less than EUR620,000 (excl. VAT) during the past three financial years and a total balance sheet at the end of the last financial year not exceeding EUR370,000. Examples of situations which may trigger personal liability in accordance with article XX.225 CEL are: the continuation of a significantly loss-making activity, the total absence of any administration or book-keeping and making investments which significantly exceed the company's financial means. – **Liability for the company's social security contributions (article XX.226 CEL)** – Directors may be held liable for the company's unpaid social security contributions if, during the five years preceding the bankruptcy, they were involved – as director or *de facto* director – in at least two bankruptcies, liquidations or similar operations in which debts owed to an institution authorised to collect social security contributions were left unpaid. – **Liability for wrongful trading (article XX.227 CEL)** – A director may be held personally (or jointly and severally) liable for all or part of the remaining debts of the bankrupt company on the basis of article XX.227 CEL if the director in question continues trading while he/she knows or should know that there is no reasonable prospect to continue the company's activities and avoid a bankruptcy on the condition that the directors failed to act as normal, prudent and diligent directors in the same circumstances. – **Decrease in net assets (alarm bell procedure, articles 5:153, 6:119 and 7:228 BCCA)** – If the directors fail to convene a shareholders' meeting following a decrease in net assets below a certain level, the directors may be held jointly and severally liable for all or part of the losses occurring after the date the shareholders' meeting should have been convened. – **Breach of the liquidity test (articles 5:144 and 6:117 BCCA)** – A distribution by a private limited liability company (BV/SRL) is subject to a liquidity test. Directors may be held jointly and severally liable if it is proven that they have decided to proceed with a distribution while they knew or ought to have known that as a result of such distribution, the company, taking into account the circumstances, would not be able to pay its debts as they fall due for a period of at least 12 months.

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No.	Question	Answer
		– **Failure to timely file for bankruptcy (article XX.102 CEL)** – A failure to file for bankruptcy within one month of the fulfilment of the bankruptcy conditions (durable cessation of payments and inability to obtain credit) may lead to: – personal liability for any increase in the level of indebtedness of the company because of the delay in filing for bankruptcy; – joint and several liability for all debts of the company, if the actions of the relevant directors have contributed to the company's insolvency and their actions constitute an apparent gross error; and/or – criminal liability, but only if it can be shown that the directors had the intent to postpone or avoid a bankruptcy order. – **Founders' liability (articles 5:16, 6:17 and 7:18 BCCA)** – The founders (who may be directors) of a company can be held jointly and severally liable for the company's debts (or parts of it) if the company is declared bankrupt within three years of its incorporation and if the company's assets at the time of incorporation, were clearly insufficient for the normal operation of the intended business activity for a period of at least two years. – **No distinction between director's and company's affairs** – In certain very exceptional circumstances, the courts may "extend" a bankrupt company's liability to the directors personally. An example of such a situation may be when in practice there is no distinction between the company's assets and activities and those of the directors. Several actions of directors of distressed or bankrupt companies are also criminally sanctioned, such as: – entering into significant obligations without adequate compensation (article 489 of the Belgian Criminal Code); – failing to assist the bankruptcy trustee without valid reason (article 489 of the Belgian Criminal Code); – entering into transactions below market prices to postpone bankruptcy (article 489bis of the Belgian Criminal Code); and – failing to timely file for bankruptcy (article 489bis of the Belgian Criminal Code).

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No.	Question	Answer
13.	How often are directors sued for civil or criminal liability in court? What are the typical damages, fines, or penalties imposed on directors in such cases?	**Frequency of suits** It is difficult to say how frequently directors are sued for civil or criminal liability as such data is not readily available in Belgium. The 2022 annual report of the Belgian enterprise courts mentions that in 2022 a total of 93 new cases were introduced under the code "*founders' and administrators' liability*" but it is unclear whether this comprises all new (civil) cases concerning directors' liability in 2022. Possible damages, fines, or penalties In general, directors may face the following consequences: – **Civil liability:** As mentioned above, directors may have to pay compensation for the damages caused to the company, its creditors, or third parties by the directors' wrongful acts or omissions. In light of the liability caps introduced by the BCCA, the directors' maximum liability will range from EUR125,000 to EUR12,000,000 (based on the size and turnover of the company), except in those cases where the cap does not apply in which case the directors' liability is in principle unlimited (see question 8). – **Criminal liability:** Directors may be held liable for criminal offenses committed in the course of their duties, such as fraud, embezzlement, forgery, tax evasion, money laundering, insider trading, market manipulation, breach of trust, or environmental crimes. The penalties for these offenses vary depending on the severity and the applicable legal provisions, but may include imprisonment, fines, confiscation, disqualification, or publication of the judgment. Directors may also be held liable for the criminal offenses committed by the company, if the facts giving rise to that offence and the intention behind the offence can be attributed to that individual director. – **Administrative liability:** The regulatory authorities, such as the Financial Services and Markets Authority (FSMA), the National Bank of Belgium (NBB), the Data Protection Authority (DPA), or the Competition Authority, may also impose administrative sanctions on company directors. These sanctions may include fines, warnings, injunctions, suspensions, revocations, or a publication of the decision.

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No.	Question	Answer
	Is there a procedure of plea bargaining in criminal court available to directors?	There is no formal procedure of plea bargaining in criminal court available to directors in Belgium. However, depending on the nature and gravity of the offence in question, there are some alternative mechanisms that may allow directors to avoid or reduce criminal prosecution or sanctions, such as: – **Guilty plea (article 216 of the Belgian Code for Criminal Procedure)** – The public prosecutor can propose to deal with the case in a simplified manner (with a reduced sentence (but not below the minimum for the offence in question) or a suspended sentence) on the condition of a guilty plea. The guilty plea must be approved by the court, which will then also rule on the civil liability of the director. – **Settlement (article 216bis of the Belgian Code for Criminal Procedure)** – The public prosecutor may offer a settlement to the director, consisting of the payment of a fine and the surrender of any seized assets, in exchange for dropping the charges. Depending on the stage of the criminal proceedings, the investigative judge or the court seized of the matter may have to approve the settlement. A settlement does not imply an admission of guilt or a criminal record but the payment of the fine constitutes an irrefutable proof of fault for the purpose of civil liability. In any case, a condition for the settlement is that the director has compensated all (non-contested) (civil) damage resulting from the offence. – **Mediation (article 216ter of the Belgian Code for Criminal Procedure)** – The public prosecutor may refer the case to a mediator, who will attempt to facilitate an agreement between the director and the victim concerning the compensation of the damage. For the mediation to be successful, there must be an agreement on the compensation of the non-contested damage. In addition, the mediator will also discuss appropriate remedies for the reparation of the offence, which may consist of a certain amount of hours formation or service, which have to be performed within a year. Successful mediation will lead to the dismissal of the charges.

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No.	Question	Answer
14.	Can shareholders or third parties sue directors directly or on behalf of the company? Under what circumstances can third parties other than shareholders sue directors (in)directly?	**Shareholders** The shareholders' meeting generally decides on liability claims against the directors by majority vote (*actio mandati*). By way of exception, minority shareholders achieving certain participation thresholds may also bring a minority claim triggering the directors' liability (see question 5 above). However, a minority claim cannot be considered as a proper claim of the minority shareholders given that any proceeds of such a successful minority claim will go to the company and not to the minority shareholders that instituted the claim. Individual shareholders that do not meet the thresholds for a minority claim, do not have a right of action against directors for any damage to the company assets given that there is no right to claim for such 'derivative damage' under Belgian law. Shareholders can, however, bring a claim against the directors if they have suffered 'special' damage which differs from the depreciation of the value of their shares. An example of such 'special' damage is the situation where a shareholder bought shares based on fraudulent or incorrect information issued by the directors. For the purposes of such a claim, shareholders will be considered as third parties and they will thus have to base their claim on tort law (see below). **Third parties** Third parties (eg creditors or tort victims) may bring an action for liability in case the directors commit an extra-contractual error (articles 2:56 BCCA and 1382-1383 (old) Belgian Civil Code). Please note, however, that contracting parties of the company can only bring a claim against the company directors if (i) the negligent act amounts to a breach of the general duty of care and not just to a breach of contract and (ii) the negligent act has caused damage which is not solely resulting from the contractual breach. In case the company refuses to act against the directors, creditors may also institute the *actio mandati* (as described in question 5) on behalf of the company (article 5.242 (new) Belgian Civil Code) as long as the company has not entered insolvency proceedings. In the case of the bankruptcy of the company, the creditors may still have other possibilities to bring a claim against directors. For instance, article XX.225 of the Code of Economic Law allows creditors to institute the claim for gross negligence contributing to the bankruptcy (see question 12) if the bankruptcy trustee has not instituted this claim within a certain period of time.
15.	In practice, do prosecutors frequently seek redress for non-executive directors' wrongdoings?	In Belgium, prosecutors do not frequently seek redress for non-executive directors' wrongdoings, unless there is evidence of fraud, corruption, insider trading, or other serious offences that harm the public interest or the company's shareholders. Non-executive directors are generally not liable for the day-to-day management of the company, but only for their own negligence or misconduct in the exercise of their supervisory or advisory role. Therefore, prosecutors usually focus on the executive directors or managers who are directly responsible for the company's operations and decisions.

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No.	Question	Answer
16.	Has the attention recently given to the concept of corporate social responsibility increased the liabilities of directors?	At this point in time, the increased attention on corporate social responsibility has only had a limited impact on the liabilities of directors under Belgian law. In accordance with the obligations under the Non-Financial Reporting Directive (**NFRD**), the Belgian legislator has adopted an obligation for certain companies (such as listed companies, banks, insurance companies and clearing agencies that meet certain thresholds) to report in their annual report on policies concerning the environment, human rights, social and employee issues and corruption and bribery to the extent necessary for an understanding of the development, performance and position of the company and the impact of its activities. However, these reporting duties do not necessarily oblige directors to actually take into account corporate social responsibility considerations in their decisions (as long as their reporting in relation therewith is accurate). Nonetheless, the recent attention given to the concept of corporate social responsibility may influence the standard employed by courts when evaluating director's liability. In light of the increased focus on sustainability, courts may well consider that "*normally cautious and prudent directors*" would afford a greater deal of attention to corporate social responsibility considerations, thus in practice raising the standard for directors. Changes in the Belgian statutory laws increasing directors' liability in this regard will likely come from the adoption and implementation of the contemplated EU Corporate Sustainability Due Diligence Directive (which is currently still under review by the EU institutions). Article 26 of the current proposal for the EU Corporate Sustainability Due Diligence Directive provides that Member States have to ensure that, when fulfilling their duty to act in the best interest of the company, company directors "*take into account the consequences of their decisions for sustainability matters, including, where applicable, human rights, climate change and environmental consequences, including in the short, medium and long term*".

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England and Wales

No.	Question	Answer
1.	Which jurisdiction will be covered?	England and Wales.
2.	How does the governance framework apply to different types of boards (one-tier or two-tier)?	General duties of the board of companies incorporated in England and Wales are set out in the Companies Act 2006 (**CA 2006**). They are the core duties owed by a director to the company, but are not exhaustive. Certain common law duties and specific statutory and regulatory requirements may also apply. Under English law, the "one-tier" board can comprise of executive and non-executive directors but all directors, whether executive or non-executive, owe the same general duties to the company as set out in the CA 2006. Non-executive directors participate in directors' meetings on the same basis as executive directors and they do not constitute a separate board, or organ of the company. Unlike certain continental jurisdictions, "two-tier" board structures are not recognised in England and Wales. The standard of care required of an executive director and non-executive are also the same but there will be some differences in the functions which a non-executive director will be expected to fulfil.
3.	Does the legal set-up (statute or case law) specify that the legal responsibilities of directors are towards the shareholders, the company as a legal person and/or society?	The CA 2006 specifies that a director "*must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole*". It is for the directors to make a good faith judgement about what this means. Essentially it is what the members want the company to achieve and, for a commercial company (unless the articles say otherwise), it generally means a long-term increase in value. CA 2006 also requires directors to have regard to certain other factors, including the company's employees, business relationships and the impact of the company's operations on the community and the environment, when deciding how best to promote the success of the company (see question 4 below). However, when a company finds itself in financial distress (either approaching insolvency or actually insolvent), the duty of the directors change. Instead of promoting the success of the company for the benefit of its members, directors will be obliged to consider or act in the interest of the company's creditors.

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No.	Question	Answer
4.	Does the legal set-up (statute or case law) specify that the directors have to act with care? Do they have to avoid conflicts of interest? Do directors have to consider the interests of other parties, such as employees, creditors, or the environment? Do directors have to create value for the company and its shareholders?	**Standard of care** A director must exercise reasonable care, skill and diligence of a reasonably diligent person with: (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company; and (b) the general knowledge, skill and experience that the director has. There is both an objective test and a subjective test. A person should not take on a directorship unless sufficiently qualified or experienced to be able to carry out the functions that might reasonably be expected of a director in that position. Also, a director who has a greater level of knowledge, skill or experience, will have to meet that higher standard. It is also important that the board, as a whole, is comprised of directors having the full range of necessary skills. **Avoiding conflicts of interest** Directors of a company have a duty to avoid a situation in which they have, or can have, a direct or indirect interest that conflicts, or possible may conflict, with the interests of the company. This duty is very wide. It catches potential conflicts as well as actual conflicts. However, there is a materiality threshold; there will be no breach if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest or if the matter has been authorised by the board. In addition, a director has a duty to declare any interest he/she has in a transaction or arrangement with the company.

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No.	Question	Answer
		Interest of other parties In relation to the duty to promote the success of the company (and, generally, generating value for the members), the CA 2006 contains a non-exhaustive list of six factors which a director must have regard to when making decisions which includes factoring the interest of other parties. The list covers: (a) likely long-term consequences of any decision; (b) interest of the company's employees; (c) fostering good business relationships; (d) impact of the community and environment; (e) maintaining a reputation for high standards of business conduct; and (f) acting fairly as between the members of the company. When making a decision, a director should give proper consideration to the listed factors (to the extent appropriate), and to other relevant factors. Nevertheless, having regard to these listed factors is subordinate to the overriding duty to promote the success of the company. **Creating value for shareholders** The duty of a director is to promote the success of the company, which generally means a long-term increase in value of the company.
5.	How can directors be held liable for breaching their duties or causing harm to the company or others?	A director's duties are owed to the company so it is only the company which can hold directors liable for a breach of these duties. In the case of a solvent company, the company can bring an action against a director for breach of duty either if the board decides to commence proceedings (which, perhaps unsurprisingly, is relatively rare in practice) or through a derivative claim. A derivative claim is a claim brought by a member, on behalf of the company, against a director in relation to conduct involving negligence, default, breach of duty or breach of trust. More details on derivative claims are provided in question 13 below. A director could also, potentially, incur criminal liability for certain offences if appropriate steps are not taken. Some examples include offences under the CA 2006 (eg failure to deliver copies of the company's annual accounts), general legislation (eg breach of health and safety legislation) or corporate manslaughter.

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No.	Question	Answer
6.	What is the liability framework for *de facto* (or shadow) directors?	The CA 2006 defines a director as any person who occupies the position of director, by whatever name called. This covers more than just formally appointed (*de jure*) directors and extends to a person who acts as a director (a *de facto* director) or a person in accordance with whose directions or instructions the directors of a company are accustomed to act (a shadow director). The liability risks are therefore the same for *de jure* directors and *de facto* and shadow directors. For shadow directors, the general duties of a director apply to the extent that they are capable of applying.
7.	Are executive and non-executive directors treated differently in terms of liability?	In principle, executive and non-executive directors are under the same duty to exercise reasonable care, skill and diligence (as seen in question 2 above) and thus have the same liability. However, the roles, duties and experience of each director will be taken into account when assessing the level of care and skill expected. The application of that may result in executive directors being held to a different standard as non-executive directors since executive directors are likely to have greater knowledge, skill or expertise than the non-executive director and are likely to have a more detailed understanding of the company's affairs. There are also some differences in the functions which a non-executive will be expected to fulfil. Under the terms of the UK Corporate Governance Code (applicable to UK listed companies), non-executive directors will be expected, in particular, to: (a) constructively challenge and help develop proposals on strategy; (b) scrutinise the performance of management in meeting agreed goals and objectives and monitor the reporting of performance; and (c) satisfy themselves on the integrity of financial information and that financial controls and systems of risk management are robust and defensible.
8.	Is the liability of directors capped up to a certain amount?	No, a director's liability is uncapped. However, there are two common ways a director can be protected against unlimited liability: (i) directors and officers insurance; or (ii) in limited circumstances, an indemnity agreement with the company (for claims made by third parties or if applicable, in relation to their duties to manage certain pension schemes). That said, neither an insurance policy nor a corporate indemnity can provide a director with protection against liability arising by reason of the director's dishonest, fraudulent or criminal conduct or criminal or regulatory penalties. A director may also be able to avoid liability for breach of duty if his acts have been authorised or ratified by the company or if the court uses its powers under CA 2006 to grant relief to that director.

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No.	Question	Answer
9.	Can directors shield off their liability through management companies?	It is unclear if directors can shield off their liability through management companies. It is a fundamental principle of English law that a company is a legal entity separate from its members and the court will not generally hold its members accountable for the actions of the company. In principle, if a management company has been found in breach of its director's duties, the members or directors of that management company would not be personally liable. A court may be willing to disregard the separate legal personality of the management company only in very limited circumstances such as if the management company is being deliberately used in order to evade an existing liability. At the moment, the use of corporate directors is permitted under English law and the CA 2006 only requires companies to have at least one director who is a natural person. However, there have been discussions and consultations by the government with the view of prohibiting the use of corporate directors in the UK, except in limited circumstances. However, this prohibition is not in force yet.
10.	Are the directors' liability risks collective (ie when acting in a collegial body) or individual?	Directors owe their duties individually as opposed to the board being collectively responsible. This means that each director has to form their own views independently as they consider appropriate. Directors may be allocated specific responsibilities – Finance Director or Sales Director, for example – and they will have primary responsibility in that area. However, that does not absolve the other directors from responsibility for ensuring these duties are being discharged appropriately by the director concerned. This may involve challenging their actions and views in certain circumstances. In practice, boards will try to reach a unanimous decision on major issues such as whether to file for insolvency. Where, say, one director feels strongly that the company should file and the rest of the board consider it is reasonable to continue trading, that director may feel compelled to resign as director to avoid being in breach of his duties. There is a general defence under the CA 2006 to a breach of duty claim where a director has acted honestly and reasonably and, in the circumstances, the court concludes that they ought fairly to be excused.
11.	What are the consequences of directors' liability in case the company goes bankrupt? Under what circumstances can directors be held personally liable for (part of) the debts of the bankrupt company?	There are four main consequences for directors of a company that is insolvent or bordering on insolvency: **General Duties** The general duties of a director to act in the interests of the shareholders (expressed as a duty to promote the success of the company for the benefits of its members as a whole) is modified so that the directors have to consider the interests of the general creditors. Where the company is insolvent or bordering on insolvency, the directors must balance the creditors' interests against those of the shareholders; where insolvency proceedings are unavoidable, the creditors' interests become paramount.

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No.	Question	Answer
		Wrongful Trading Where a director (or shadow director) becomes aware (or should have become aware) that there is no reasonable prospect of avoiding insolvency proceedings, the director could be liable for wrongful trading if the director fails to take every step with a view to minimising loss to creditors. This is a civil action that can be brought by a liquidator or administrator or any person to whom the liquidator or administrator assigns the cause of action. The director is liable to make such contribution to the company's assets as the court thinks proper; this is intended to be compensatory rather than penal and so the starting point for quantifying the contribution is to identify the increase in the net deficiency during the period under review. The required steps to minimise loss to creditors will depend on the circumstances; in some cases, this could mean ceasing to trade and seeking to place the company into insolvency proceedings immediately but in other cases, it could be appropriate to continue trading with a view to trading out of insolvency if the director genuinely believes that it will be possible to avoid insolvency proceedings. **Fraudulent Trading** A director (or any person who is knowingly party to the transaction in question) can also be liable for fraudulent trading if, in the course of a liquidation or administration of the company, it appears that any business of the company has been carried on with the intent to defraud creditors. Fraudulent trading carries both criminal and civil liability, with a maximum sentence of ten years imprisonment. Actual dishonesty is an essential element of the criminal offence. A civil action can be brought by a liquidator or administrator or any person to whom the liquidator or administrator assigns the cause of action. The director is liable to make such contribution to the company's assets as the court thinks proper. An example of conduct that may amount to fraudulent trading is incurring further indebtedness in circumstances where the director does not genuinely believe that the company will be able to repay that indebtedness. **Disqualification Order** A court may also make a disqualification order of between 2 to 15 years (preventing the director from being a director or otherwise being involved in the management of any company) if the company goes into insolvency proceedings and the conduct of the person as a director was such that the person is unfit to be concerned in the management of a company. Liability for wrongful trading or fraudulent trading may be considered in determining whether a director is unfit to be concerned in the management of the company. The court can also make a compensation order against a director who is the subject of a disqualification order, requiring the director to pay for the company's losses. A liquidator, administrator or administrative receiver has a duty to send a report to the UK Department for Business and Trade regarding the conduct of all directors of the insolvent company who were in office in the last three years of the company's trading. This is to allow the Secretary of State to decide whether to bring disqualification proceedings.

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No.	Question	Answer
12.	How often are directors sued for civil or criminal liability in court? What are the typical damages, fines, or penalties imposed on directors in such cases? Is there a procedure of plea bargaining in criminal court available to directors?	**Frequency of prosecutions** It is difficult to say how frequently directors are sued for civil or criminal liability as such data is not readily available and not all cases are widely reported. Anecdotally, it is rare for criminal proceedings to be brought against directors and when they are, it is usually in the context of insolvency. In an insolvency context, prosecutions for fraudulent trading are rare (as proof of dishonesty is a high bar) but actions for wrongful trading and disqualification orders are more common. **Remedies** It is not possible to say what the typical remedy would be for a director's breach of duty as it depends on the nature of the breach. It could include an injunction, account of profits, equitable compensation, a proprietary remedy or a rescission of a contract. In criminal cases, a range of sentences from fines to imprisonment are possible. **Plea Bargaining** Plea bargaining is normally understood to include: (i) judicial indications of possible sentence prior to an accused's decision on whether to plead guilty or not guilty; and (ii) agreements between the prosecution and defence concerning the plea. As to: (i), there are strict rules in England and Wales on whether, when and how a sentence indication can be given by a judge prior to plea. One condition is that it can only be given when requested by the defendant; and (ii) it is common practice for the prosecution and defence to agree through counsel prior to plea that, in the event of an accused pleading guilty to parts of the indictment, the prosecution will not seek to prove the accused guilty as charged. Such an arrangement may take the form of accepting a plea of guilty to a lesser offence, or of offering no evidence on counts to which the accused pleads guilty. The Code for Crown Prosecutors states that prosecutors should only accept the defendant's plea if they think the court is able to pass a sentence that matches the seriousness of the offending, particularly where there are aggravating features. Prosecutors must never accept a guilty plea just because it is convenient. The court must be informed on what basis any plea is advanced and accepted.

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No.	Question	Answer
13.	Can shareholders or third parties sue directors directly or on behalf of the company? Under what circumstances can third parties other than shareholders sue directors (in)directly?	**Shareholders** As seen in question 5 above, the company is the proper claimant in respect of a breach of directors' duties. However, there may be circumstances in which a member can commence proceedings against a director, on behalf of the company, through a derivative claim. For example, in the event that the other directors have indicated a reluctance to commence a claim on behalf of the company against one of their fellow directors. The statutory derivative claim procedure enables a member to sue, on behalf of the company, a director (including a former or shadow director) and/or other person in relation to conduct (or proposed conduct) involving negligence, default, breach of duty or breach of trust by the director. The claim can only be brought by the member if the court gives its permission. This is a two-stage process. At the first stage, the member will need to show a prima facie case for giving permission, or the claim will be dismissed. The second stage hearing will be a fuller one and may involve evidence from all parties, including the company. Unmeritorious claims are therefore usually weeded out at an early stage. In the case of successful claims, any damages recovered will be payable to the company, rather than the member bringing the claim. **Third parties** A third party might be able to pursue a claim against a director for their actions in limited circumstances, such as when: (i) a company is insolvent; or (ii) under tort. Question 11 above sets out the circumstances where a liquidator or administrator may be entitled to bring claims against directors during insolvency. A third party may also be able to pursue a tort claim against a director for negligence, negligent misstatement or misrepresentation but there must be an element of personal responsibility by that director.
14.	In practice, do prosecutors frequently seek redress for non-executive directors' wrongdoings?	As mentioned in question 7 above, it does not make any difference whether a director is an executive director or a non-executive director as they would generally have the same liability. Please refer to question 11 above on the frequency of prosecutions against directors.

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No.	Question	Answer
15.	Has the attention recently given to the concept of corporate social responsibility increased the liabilities of directors?	This is an interesting question, to which there is no clear answer. There is no general statutory obligation for directors to consider their corporate and social responsibility (**CSR**) (other than in relation to the list of factors to be considered when discharging the duty to promote the success of the company). However, there has been guidance issued on good corporate governance which companies and directors may need to consider in the context of their CSR activities and reporting. For example, the UK Corporate Governance Code (**UKCGC**) sets out guidance on principles of good corporate governance and includes a requirement that directors include a statement in their annual report on the company's longer term viability. In preparing this statement, the directors are required to take into account the company's current position and principal risks and explain how they have assessed the prospects of the company. For many companies, CSR-related factors will be highly relevant considerations when making this statement. The UKCGC applies to premium listed companies whether they are incorporated in the UK or elsewhere. Companies that are not required to comply with the UKCGC sometimes choose to adhere voluntarily to certain of its principles in the interests of best practice. That said, this has not strictly increased the liabilities of directors especially where they can explain how their actions otherwise comply with their duty to promote the success of the company. For example, in a recent 2023 case brought by ClientEarth (an environmental non-governmental organisation) against Shell, ClientEarth alleged that Shell's directors were in breach of their duties by failing to implement an energy transition strategy that aligns with the Paris Agreement on Climate Change 2015. The High Court concluded that ClientEarth did not have a prima facie case as the issue of how to best meet climate targets is an issue of business judgment for the directors with which the court was reluctant to interfere. There are also specific statutory requirements which may be considered to have CSR roots, such as the requirement in the CA 2006 for directors to factor in the impact of their decisions on the community and environment, and directors are of course responsible for ensuring that their company complies with all applicable legislation.

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France

No.	Question	Answer
1.	Which jurisdiction will be covered?	France
2.	How does the governance framework apply to different types of boards (one-tier or two-tier)?	Under French law, there are two main types of companies, which are civil and commercial companies. Civil companies are those to which the law does not attribute another character by virtue of their form, nature or purpose (see Articles 1845 to 1851 of the French Civil Code "the **FCivCo**"). The commercial nature of a company is determined by its form or by its purpose. The rules applicable to these companies are set out in the French Commercial Code "**FComCo**". Companies that are commercial by form are "*sociétés en nom collectif (SNC)*", "*sociétés en commandite simple (SCS)*", "*sociétés en commandite par actions (SCA)*", "*sociétés à responsabilité limitée (SARL)*", "*sociétés anonymes (SA)*", "*sociétés par actions simplifiées (SAS)*" (see Article L. 210-1 of the FComCo). Companies that are commercial by object are those whose purpose is the performance of commercial acts (French Court of Cassation, Commercial Chamber, 5 May 2009, No. 08-17.599). Civil companies are managed by one or several managers known as "*gérants*". These managers manage the company on a day-to-day basis and, as a result: (i) perform all acts of management required in the company's interest; and (ii) have all powers to act on behalf of the company when dealing with third parties, provided that they act within the limits of the corporate purpose (see Articles 1846, 1848 and 1849 of the FCivCo).

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No.	Question	Answer
		Commercial companies have various governance structures depending on the type of company: – Some are managed by one or several managers known as "*gérants*", responsible for managing the company on a day-to-day basis. As to SNC (see Articles L. 221-4 and L.221-5 of the FComCo) and SCS (see Article L. 222-2 of the FComCo), their managers perform all acts of management required in the company's interest and have all powers to act on behalf of the company when dealing with third parties, provided that they act within the limits of the corporate purpose. As to SARL, their managers' management powers are determined by the shareholders in the Articles of Association and, in dealings with third parties, they are vested with the broadest powers to act in all circumstances on behalf of the company, subject to the powers expressly granted by law to the shareholders (see Article L. 223-18 of the FComCo). – Some are managed by a two-tier structure consisting of: (i) a management board; and (ii) one or several directors, in which the management board is responsible for determining the general policies and strategies of the company and the directors are responsible for implementing them on a day-to-day basis and to represent the company when dealing with third parties. This is the case of SA which have opted for a board of directors ("*conseil d'administration*") and a CEO ("*directeur general*") (see Articles L. 225-17 and seq., L. 225-35 and L. 225-56 of the FComCo). – Some are governed by a two-tier structure consisting of: (i) a supervisory board; and (ii) a management board or manager, in which the management board/manager is responsible for determining the general policy and strategy of the company and to implement it on a day-to-day basis, and the supervisory board is responsible for overseeing the management board/manager's actions. This is the case of SA which have opted for a management board ("*directoire*") and a supervisory board ("*conseil de surveillance*") (see Articles L. 225-58 and seq. of the FComCo), and of SCA which have one or several managers, known as "*gérants*" and a supervisory board known as "*conseil de surveillance*" (see Articles L. 226-2, L. 226-4 and L. 226-7 of the FComCo). – Finally, *SAS* are managed by a chairman known as the "*president*", which is vested with the broadest powers to act in all circumstances on behalf of the company within the limits of the corporate purpose. In addition, the shareholders may also choose to create *ad hoc* boards in the Article of Associations, the powers of which are also determined by the shareholders (see Articles L. 227-5 and L. 227-6 of the FComCo). Please note that in most companies, the companies' management bodies may delegate to one or more other persons the power to perform, on behalf of the company, certain specific acts relating to the day-to-day management of the company.
3.	Does the legal set-up (statute or case law) specify that the legal responsibilities of directors are towards the shareholders, the company as a legal person and/or society?	The legal responsibilities of directors are, under French law, mainly towards the shareholders and/or the company as a legal person. Indeed, the directors may be held liable towards the company, the shareholders and third parties for their actions (see questions 5 and 13 below for more information).

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No.	Question	Answer
4.	Does the legal set-up (statute or case law) specify that the directors have to act with care? And that they have to avoid conflicts of interest? Do directors have to consider the interests of other parties, such as employees, creditors, or the environment? Do directors have to create value for the company and its shareholders?	Under French law, directors have a duty of care and a duty of loyalty towards the company. If they do not comply with it, they may be held liable for a fault committed in their management, being noted that their misconduct can vary, ranging from simple negligence or imprudence (eg negligent investment of funds, imprudent cash management) to fraudulent manoeuvres (eg false account statements, misappropriation of corporate assets). Fault is assessed on a case-by-case basis by judges being noted that a director's behaviour that is not in line with the company's interests will in most likelihood be considered as a fault. Article 1833 of the FCivCo, which is applicable to all companies, specifies that any company must be managed in its corporate interest (which is distinct from the shareholders' interest), taking into account the social and environmental stakes of its activity. In addition, the provisions applicable to most companies stipulate that directors shall act in the company's best interest (see for instance Articles 1848 of the FCivCo for civil companies, L. 221-4 of the FComCo for SNC and SCS, L. 225-35 and L. 225-64 of the FComCo for SA). As regards to the social and environmental stakes of the company's activities, they are particularly taken into account in certain large companies (provided that they meet certain conditions), which are required to implement a vigilance plan to identify the risks and prevent serious infringement to fundamental human rights, health and safety and the environment resulting from the activities of the company and those of the companies it controls (see Article L. 225-102-4 of the FComCo). In these companies, directors and/or management bodies will have to take into account this vigilance plan in the performance of their duties. As they shall act in the company's best interest, directors are also prohibited from acting in their sole own interest. This is particularly reflected in certain companies, in which certain types of agreements (such as loans or guarantees) cannot be entered into between the company and its directors and/or some management bodies and the shareholders must approve other types of agreements entered into between the company and its director in order to avoid conflicts of interest (see Articles L. 225-38 and seq., L. 225-43 and seq., and L. 225-86 of the FComCo for *SA* and *SCA*, L. 227-10 for SAS). Directors also have a general duty of loyalty towards the company which, among others, prohibits them from setting up and/or running a business that competes with that of the company they are acting on the behalf of (see for instance French Court of Cassation, Commercial Chamber, 7 June 1994, No. 92-13.935).

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No.	Question	Answer
5.	How can directors be held liable for breaching their duties or causing harm to the company or others?	Under French law, companies' former/present directors are generally liable towards the company, the shareholders and third parties for their actions: – They are liable to the company for the infringement of legislative or regulatory provisions, breaches of the company's Articles of Association, or for fault committed in their management (see Article 1850 of the FCivCo for civil companies, Article L. 223-22 of the FComCo for *SARL*, Article L. 225-251 of the FComCo for *SA*, *SCA* and *SAS*). – They are also liable to the shareholders for the same infringement and breaches as described above (Article 1843-5 of the FCivCo, this provision, although applicable to all companies, has also been included in Articles L. 223-22 of the FComCo for *SARL*, and L. 225-252 of the FComCo for *SA*, *SCA* and *SAS*). However, there is a practical limit to this liability because shareholders can only act against directors to seek compensation for their personal losses meaning when such losses cannot be compensated through the compensation of the loss suffered by the company. For instance, the depreciation of shares is not a personal loss, separate from the damage suffered by the company, because in such case, a compensation from the directors of the company's loss would increase the company's share value (eg French Court of Cassation, Commercial Chamber, 8 October 2013, No. 12-18.252). – They are finally liable to third parties. Please note, however, that the directors' personal liability towards third parties is exceptional in nature and can only be triggered under very specific conditions set out by case law (for further details, see question 13 below). Former and/or present directors of a company may also incur specific liabilities in case of insolvency or bankruptcy of the company (for further details, see question 11 below), and criminal liability for certain offences (for further details, see question 12 below).
6.	What is the liability framework for *de facto* (or shadow) directors?	The liability of *de facto* or shadow directors is different from the liability regime applicable to *de jure* directors described above. *De facto* directors may be held liable under general tort law which requires the claimant to establish, inter alia, (i) a misconduct committed by the *de facto* director, (ii) a damage suffered by the company or a third party and (iii) a causal link between the misconduct and the damage. *De facto* directors may, however, incur the same criminal liabilities as *de jure* directors (see Articles L. 241-9 of the FComCo for *SARL*, L. 244-4 of the FComCo for *SAS*, L. 246-2 and L. 245-16 of the FComCo for *SA* and *SCA*). In addition, they may also incur the same specific liabilities in case of insolvency or bankruptcy of the company as *de jure* directors.

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No.	Question	Answer
7.	Are executive and non-executive directors treated differently in terms of liability?	Under French law, executive directors and non-executive directors may be subject to the same rules regarding the individual and joint liability of directors. However, this depends on the rules applicable to each company so an analysis on a case by case basis should be made. The distinction between executive directors and non-executive directors is mostly made for companies which have a two-tier structure. For instance, in *SA*, (i) executive directors will be either the directeur general or the president and members of the *directoire* (depending on the governance structure), and (ii) non-executive directors will be either the president and members of the conseil *d'administration* (provided that the president is not at the same time the *directeur* general of the company) or the president and members of the conseil de surveillance (depending on the governance structure chosen). For instance: – In *SA* with a director ("*directeur general*") and a management body ("*conseil d'administration*"), both the *directeur general* and the members of the *conseil d'administration* are individually or jointly liable (as the case may be), for the infringement of legislative or regulatory provisions, breaches of the company's Article of Associations, or for fault committed in their management. The regime of their liability, which is governed by Articles L. 225-251 and seq. of the FComCo, is therefore the same; and – To the contrary, in *SA* with a management body ("*directoire*") and a supervisory board ("*conseil de surveillance*"), members of the *directoire* incur the same liability as described in the bullet point above, whereas members of the *conseil de surveillance* do not incur any liability for management actions and their results (save where they interfered with the management of the company and acted as *de facto* directors), but only for misconduct committed in their mission (see Articles L. 225-256 and L. 225-257 of the FComCo). Therefore, in this type of company, executive and non-executive directors are treated differently in terms of liability.
8.	Is the liability of directors capped up to a certain amount?	Under French law, directors' liability for their actions is not capped up to a certain amount.

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No.	Question	Answer
9.	Can directors shield off their liability through management companies?	Directors cannot, as a matter of principle, shield off their liability through management companies. Indeed, for civil companies, Article 1847 of the FCivCo provides that if a company exercises management functions, its directors incur the same civil and criminal liabilities as if they were directors on their own behalf, and they may be held jointly and severally liable with the company they manage. The same rule applies to managers who have the status of "*gérants*" of companies such as *SNC*, *SCS* and *SCA* (see Articles L. 221-3, L. 222-2 and L. 226-1 of the FComCo), to members of management and supervisory boards of *SA* and *SCA* (see Articles L. 225-20 and L. 225-76 of the FComCo – being noted that in SA, directors ("*directeur general*") cannot be companies, see Article L. 225-54 of the FComCo) and to chairmen of *SAS* (see Article L. 227-7 of the FComCo).
10.	Are the directors' liability risks collective (ie when acting in a collegial body) or individual?	Under French law, a management body (such as a "*conseil d'administration*" or a "*directoire*") does not have legal personality, ie it may not be held liable for the decisions it has taken. As a result, its members may be individually held liable for the decision taken by the management body. It is settled French case law that any member of a collegial body who, through his or her action or abstention, participates in a decision taken by the collegial body, can be held liable for this decision. However, he/she may escape such liability if he/she has acted in a prudent and diligent manner, in particular by opposing the decision taken by the collegial body (French Court of Cassation, Commercial Chamber, 30 March 2010, No. 08-17.841).

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No.	Question	Answer
11.	What are the consequences of directors' liability in case the company goes bankrupt? Under what circumstances can directors be held personally liable for (part of) the debts of the bankrupt company?	Opening of insolvency proceedings does not [per se] entail liability for directors. Directors may be however held liable under certain conditions: – Shortfall of assets liability (*responsabilité pour insuffisance d'actif*): in case of judicial liquidation proceedings (*liquidation judiciaire*), the judicial liquidator (*liquidateur judiciaire*) or the public prosecutor (*ministère public*) can bring a claim against *de jure* or *de facto* directors to hold them liable for the insolvent debtor's shortfall of assets, if any, caused by their mismanagement (*responsabilité pour insuffisance d'actif*). – Sanctions and criminal liability: in case of judicial reorganisation (*redressement judiciaire*) or judicial liquidation proceedings, "*faillite personnelle*" proceedings or criminal bankruptcy (*banqueroute*) proceedings may be initiated against directors for a wide range of breaches and failures including: – Fraudulent increase of the liabilities; – Use of the debtor's assets against its corporate interest; – False accounting; – Non-compliance with the obligation to file for insolvency; and – Embezzlement of assets. Penalties may notably include prohibition from managing a company (up to 15 years in case of "*faillite personnelle*"), as well as fines and imprisonment (for criminal liability only). Further, the managers may be liable for any outgoing payments that were made in breach of the stay on payment of prepetition claims rule. – Tax liability: directors can be held jointly and severally liable along with the insolvent debtor in case of serious and repeated breaches of the company's tax obligations making tax collection impossible.

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No.	Question	Answer
12.	How often are directors sued for civil or criminal liability in court? What are the typical damages, fines, or penalties imposed on directors in such cases? Is there a procedure of plea bargaining in criminal court available to directors?	As to civil liability, directors are increasingly being sued for faults they committed in the management of the company. They are sued for damages, the amount of which will depend on the damage suffered by the company, the shareholders or the third party. As to criminal liability, directors are increasingly being prosecuted next to their companies by French criminal authorities, in particular within tax-related and corruption matters. The penalties imposed on directors may include heavy fines, prohibitions to carry out certain functions or activities, imprisonment penalties (suspended in the vast majority of cases, although this would very much be fact driven), joint liability with the company for the payment of evaded taxes or financial penalties. The French-style deferred prosecution agreement, known as a Convention *judiciaire d'intérêt public* (**CJIP**), is only available to legal persons and for specific offences. In their capacity as natural persons, directors may only use the French guilty plea mechanism (ie plea bargaining) in order to settle with a prosecutor, which amounts to a criminal conviction.
13.	Can shareholders or third parties sue directors directly or on behalf of the company? Under what circumstances can third parties other than shareholders sue directors (in)directly?	**Shareholders** Shareholders can bring an action on behalf of the company in order to obtain full compensation for the losses suffered by the company due to the director's actions: (i) if the company itself, through its legal representatives, has not brought any action; (ii) in the event of a deadlock resulting from a conflict between the company's legal representatives; or (iii) when the legal representative has acted but in a way that is manifestly insufficient to obtain full compensation for the damage suffered by the company. Please note that the relevant company must be a party to this action, and if the claim is successful, the damages will be allocated to the company and not to the shareholder. Shareholders can also act directly against directors to seek compensation for their personal losses meaning when he/she has personally suffered losses as a result of the director's actions that cannot be compensated through the compensation of the loss suffered by the company (see question 5 above). **Third parties** Third parties may bring an action directly against the company's directors only if the director commits a fault that is detachable from his or her duties. A director's fault is considered detachable when he/she willingly commits a particularly serious fault that is incompatible with the normal exercise of his or her corporate duties (eg French Court of Cassation, Commercial Chamber, 20 May 2003, No. 99-17092).

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No.	Question	Answer
14.	In practice, do prosecutors frequently seek redress for non-executive directors' wrongdoings?	In the current French environment, it is not often and actually quite rare that prosecutors seek redress for non-executive directors' wrongdoings. This is in particular the case, since actual participation in the offence has to be shown for a natural person to be prosecuted. However, a non-executive director's knowledge that an offence was being committed by the company during their tenure would be sufficient to constitute participation for aiding and abetting purposes, if it can be shown that the said natural person knew about the offence being committed and did nothing to prevent it from continuing (ie they turned a blind eye).
15.	Has the attention recently given to the concept of corporate social responsibility increased the liabilities of directors?	Yes, the recent vote of a European Directive on corporate sustainability due diligence, which follows the enactment of the French corporate sustainability legislation of March 2017, has significantly raised the attention given to the concept of corporate social responsibility. In addition, the discussions revolving around these on-going evolutions in the French legislative landscape confirm that one way or the other, the concept of corporate social responsibility will gradually become an important source of potential liabilities for directors.

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Germany

No.	Question	Answer
1.	Which jurisdiction will be covered?	Germany
2.	How does the governance framework apply to different types of boards (one-tier or two-tier)?	Directors of German companies, especially stock corporations (*Aktiengesellschaften*, *AG*) and limited liability companies (*Gesellschaften mit beschränkter Haftung, GmbH*), are subject to various duties and responsibilities under the German Stock Corporation Act (*Aktiengesetz, AktG*), the German Limited Liability Companies Act (*Gesetz betreffend die Gesellschaften mit beschränkter Haftung, GmbHG*), and the German Civil Code (*Bürgerliches Gesetzbuch, BGB*) as well as the German Insolvency Code (*Insolvenzordnung, InsO*). German corporate law generally provides for a one-tier system for companies with limited liability. (*Kapitalgesellschaften*). Depending on the company's legal from, deviations from this structure may be implemented in the articles of association, ie *Section 52 GmbHG* for the GmbH. The two most important company forms are the GmbH and the KG in the form of the GmbH & Co. KG. The GmbH only consists of executive managing directors. There is no distinction between non and executive directors in Germany. However, the AktG only allows for one type of board in a German Stock corporation: the two-tier model, consisting of a management board and a supervisory board. In the two-tier model structure, the management and the supervision of the company are divided between the management board and the supervisory board respectively.
3.	Does the legal set-up (statute or case law) specify that the legal responsibilities of directors are towards the shareholders, the company as a legal person and/or society?	In German corporate law, the legal responsibilities of the directors are towards the company as a legal person. The directors are directly committed only to the company, not to the shareholders or specific groups of shareholders. An example of this is *Section 93 AktG* for the stock corporation and *Section 43 GmbHG* for the GmbH.

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No.	Question	Answer
4.	Does the legal set-up (statute or case law) specify that the directors have to act with care? and that they have to avoid conflicts of interest? Do directors have to consider the interests of other parties, such as employees, creditors, or the environment? Do directors have to create value for the company and its shareholders?	**Duties** *Section 93 AktG* and *Section 43 GmbHG* stipulate the duty of care (*Sorgfaltspflicht*) and the duty of loyalty (*Treuepflicht*). The directors must exercise the care, skill and diligence of a reasonably diligent businessperson with the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions in relation to the company; and the general knowledge, skill and experience that the director has. The director must promote the interests of the company, exercise due care in their affairs and avert damage to the company. Within the scope of his entrepreneurial activities, the director has, under certain conditions, a degree of discretion that cannot be reviewed by a court – the "Business Judgment Rule", applicable for the duty of care. In close accordance with the wording of *Section 93 para.1 s. 2 AktG*, the "Business Judgment Rule" only applies to a GmbH if the following five elements – stipulated in *Section 43 GmbHG* – are present: (a) entrepreneurial decision; (b) acting on the basis of appropriate information; (c) acting without extraneous influences and conflicts of interest; (d) acting for the benefit of the company; and (e) acting in good faith. The duty of loyalty includes the duty of the director to put his/her professional manpower and his/her skills, knowledge and experience unreservedly at the service of the company. The duty of loyalty has various individual forms such as the non-competition clause and the duty of confidentiality.

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No.	Question	Answer
		Avoiding conflicts of interest The obligation to disclose conflicts of interest is usually derived from the duty of loyalty. Directors have to be objectively unbiased. A director may not pursue its own interests when making decisions on behalf of the company, but only allow him-/herself to be guided by the interests of the company. Business opportunities are to be seized for the benefit of the company and not exploited for one's own purposes. Furthermore, potential conflicts of interest within the management board must be disclosed. **Interests of other parties** The director has not only to take into account the commercial interests of the company, but also the interests of the shareholders and creditors as well as the well-being of the employees. The members are entitled and obliged to weigh diverging interests against each other within the scope of their discretionary powers, but they need to base their decisions on the company's interests. According to *Section 43 GmbHG* and *Section 93 AktG* the directors have to put the company's interests first. By doing this, they also indirectly take third-party interests into account. **Creating value for shareholders** The director has to ensure the continued existence of the company and thus long-term profitability. By putting the company's interests first, the director indirectly creates value for the shareholders.
5.	How can directors be held liable for breaching their duties or causing harm to the company or others?	Directors can be held liable for an intentional or negligent breach of their duties pursuant to *Section 93 AktG* and *Section 43 GmbHG*. This norm is applicable in cases where a director intentionally or negligently causes harm to the company by breaching his duties. His behaviour or action has to be causal for the damage incurred. A director's duties are owed to the company so it is only the company which can hold directors liable for a breach of these duties. In parallel to the liability norms from the AktG and the GmbHG, the director can also be liable under tort law or the service contract with the company.
6.	What is the liability framework for *de facto* (or shadow) directors?	Shadow directors are liable pursuant to *Section 93 AktG* and *Section 43 GmbHG*. The liability pursuant to those norms do not require a formal act of appointment.

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No.	Question	Answer
7.	Are executive and non-executive directors treated differently in terms of liability?	The differentiation between 'executive' and 'non-executive' directors only exists within the one-tier structure of an SE. Directors of the supervisory board and directors of the management board are both liable pursuant to *Section 93 AktG* and *Section 116 AktG* if their actions cause damage to the company.
8.	Is the liability of directors capped up to a certain amount?	No, a director's liability is uncapped. However, it is a common way to mitigate this risk of unlimited liability with a directors and officers insurance (**D&O Insurance**). In addition to a D&O Insurance, non-insurance-contractual exemptions from liability for managing directors are also playing an increasingly important role. Furthermore, analogous to Section 670 BGB, the managing director may file a statutory exemption claim against his own company if he/she has incurred a liability towards third parties in the performance of his official activity without violating his or her duties as an organ.
9.	Can directors shield off their liability through management companies?	In Germany there is no possibility of shielding off the personal liability through management companies. According to *Section 6 GmbHG* and *Section 76 Section 3 AktG* a directors has to be natural person.
10.	Are the directors' liability risks collective (ie when acting in a collegial body) or individual?	In general the liability of directors is joint and several, meaning that each director can be sued for the full amount of the damage, regardless of their individual fault or contribution. However, they can claim recourse from their co-directors. The liability in accordance with *Section 421 BGB* applies regardless of the type of breach of duty and the degree of fault.

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No.	Question	Answer
11.	What are the consequences of directors' liability in case the company goes bankrupt? Under what circumstances can directors be held personally liable for (part of) the debts of the bankrupt company?	Some of the most common grounds for directors' liability in case of bankruptcy are: **Delayed filing for insolvency:** Directors have a duty to file for insolvency without undue delay, but no later than three weeks after the company becomes illiquid or overindebted, unless there is a realistic prospect of restoring solvency (*Section 15a InsO*). If they fail to do so, they can be held liable for the increase in the insolvency deficit, ie the difference between the company's assets and liabilities at the time of the filing and at the time when the filing should have been made. Furthermore, the managing director must reimburse the amount provided for the application for insolvency if he/she has not filed for insolvency in good time. (*Section 26 para. 3 InsO*) **Payments after the occurrence of insolvency:** The managing directors, who are obliged to file a request may, following the commencement of insolvency or of overindebtedness of the legal entity, no longer make any payments on its behalf. Where payments are made contrary to *Section 15b para. 1 InsO*, the managing directors are obliged to refund the payments made. This provision established a separate claim for compensation. Above all, it protects the creditors from a reduction in the insolvency estate. *Section 15b section 5 para 1 InsO* also provides for liability of the managing directors for payments to shareholders, insofar as these had to lead to the insolvency of the company, unless they were compatible with the diligence of a prudent and conscientious manager. **Consequences for managing director under criminal law:** *Section 283 para. 1 StGB* stipulates that in the event of over-indebtedness or – even imminent – insolvency, and consequently if the requirements for an obligation to file for insolvency pursuant to *Section 92 para 2 AktG* are met, various actions that decrease the value of the company's assets are punishable, such as concealing or putting away goods or commercial documents of the company. Since German criminal law does not recognise direct criminal liability for legal entities, *Section 14 para. 1 no. 1 StGB* leads to criminal liability of the board members instead of the company.
12.	How often are directors sued for civil or criminal liability in court? What are the typical damages, fines, or penalties imposed on directors in such cases? Is there a procedure of plea bargaining in criminal court available to directors?	Firstly, corporate criminal liability does not exist in Germany. Criminal and misdemeanour proceedings for alleged operational violations (corruption, tax evasion, fraud, etc.) are therefore directed against the executives of companies, often directly against the managing directors due to their comprehensive responsibility for the company. The penalties or fines depend on the alleged violation and can range from smaller fines to several years in prison. In practice, agreements in economic criminal or administrative offense proceedings are common. Secondly, it is very difficult to say how frequently directors are sued for civil or criminal liability as such data is not readily available.

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No.	Question	Answer
13.	Can shareholders or third parties sue directors directly or on behalf of the company? Under what circumstances can third parties other than shareholders sue directors (in)directly?	**Shareholders** Typically, only the company will hold the directors liable. Only pursuant to *Section 117 para 2 s. 2 AktG* claims for damages arise in favour of the shareholder against the management board member. The members of the supervisory board and the management board are jointly liable for damages. **Third Parties** The company's creditors are allowed to sue the directors of the management board but they are only entitled to litigate the company's claim if the company will not be able to fulfil the creditors' claims, *Section 93 para 5 AktG*. The GmbHG does not have such a provision. The creditors of a GmbHG are instructed to first obtain a title against the GmbH and then to seize their claims for compensation against the managing director (*Section 829 Code of Civil Procedure, Zivilprozessordnung ZPO*) and to have them transferred for confiscation (*Section 835 ZPO*). Third party claims based on tortious liability remain unaffected and can be asserted by anyone.
14.	In practice, do prosecutors frequently seek redress for non-executive directors' wrongdoings?	Proceedings against members of the supervisory board are less common, but do occur.
15.	Has the attention recently given to the concept of corporate social responsibility (**CSR**) increased the liabilities of directors?	A distinction has to be made: (a) **Liability to company:** More CSR leads to more targets that the board must reconcile. We are currently seeing this trend in corporate law. As mentioned, this leads to development away from the single target of maximising shareholder value towards an increased balancing of interests (such as environmental protection, ESG and so on). Once the management has to take more interests in consideration, this leads to more freedom, since there can be less liability for such decisions. (b) **Liability to the capital market:** In academia, there is a tendency towards more liability, especially regarding information obligations. The new sustainability information requirements under capital market law strengthen the protection of the individual investor's freedom of decision and bring this to the fore. The new sustainability-related information requirements not only aim to satisfy existing information needs but are also intended to change the investment climate and create new information needs. In view of this objective, there are concerns about the comprehensive liability reinforcement of these duties. However, reliable court data is still lacking.

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Italy

No.	Question	Answer
1.	Which jurisdiction will be covered?	Italy
2.	How does the governance framework apply to different types of boards (one-tier or two-tier)?	Pursuant to the Italian Civil Code (**ICC**), Italian *società per azioni* (joint-stock companies[2]) are entitled to choose one of **three different governance systems:** (a) **Italian traditional system** – Pursuant to Art. 2380 ICC and ff. the traditional system is the default model, which applies if the company's articles of association do not provide otherwise. It includes two corporate bodies, in addition to the general meeting of shareholders: (1) the board of directors (so-called *consiglio di amministrazione*)[3]; and (2) the board of auditors (so-called *collegio sindacale*). The shareholders' meeting appoints the board of directors and the board of auditors, as well as the external registered auditing company. The board of directors takes care of the company's management, while the board of auditors is in charge of the control activities and the external auditors audit the company's accounts. (b) **The two-tier system** – The two-tier system (Art. 2409-octies ff. ICC) also includes two bodies, in addition to the general meeting: (i) the supervisory board (consiglio di sorveglianza); and (ii) the management board (*consiglio di gestione*). In essence, the latter has the same functions as the board of directors under the Italian traditional system, while the supervisory board, further to the powers of the board of auditors under the Italian traditional system, also has certain functions usually attributed to the general meeting of shareholders (for example, the supervisory board approves the balance sheets). The general meeting, in its turn, appoints the supervisory board, which nominates the management board. (c) **The one-tier system** – The one-tier system (Art. 2409-sexiesdecies ff. ICC) also includes two bodies: (i) the board of directors (*consiglio di amministrazione*); and (ii) the audit committee (*comitato per il controllo sulla gestione*). The main difference from the Italian traditional system, is that there is no board of auditors. The general meeting appoints the board of directors, which selects the audit committee's members from its independent directors (unless the articles of association attribute the relevant power to the shareholders' meeting). As a general remark, please note that while the traditional system is widely spread among Italian companies, only a few Italian companies have opted for one of the alternative governance structures which have been introduced more recently (ie two-tier/one-tier systems).

2_Please note that for the purpose of this survey we focused on the rules set out by the ICC for the Italian società per azioni (joint-stock companies) since the majority of the relevant rules, as analysed below, apply also to other kind of companies, such as Italian società a responsabilità limitata (ie limited liability companies). However, please consider that such principles could apply differently and/or subject to adjustments depending on the type of company involved.
3_Please note that under the Italian Traditional system, unless the joint-stock company is listed, it is possible to appoint even one sole director instead of a board of directors.

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No.	Question	Answer
3.	Does the legal set-up (statute or case law) specify that the legal responsibilities of directors are towards the shareholders, the company as a legal person and/or society?	Specific legal provisions included in the ICC specify that directors are personally liable towards: (i) the company (Art. 2392, 2393 and 2393-bis ICC); (ii) the company's creditors (Art. 2394 ICC); and (iii) individual shareholders or third parties (Art. 2395 ICC). Accordingly, the legal responsibility of the directors is towards all the entities/individuals listed above, who in turn – respectively and in principle – have legal standing to start relevant claims vis-à-vis the directors.
4.	Does the legal set-up (statute or case law) specify that the directors have to act with care, and that they have to avoid conflicts of interest? Do directors have to consider the interests of other parties, such as employees, creditors, or the environment? Do directors have to create value for the company and its shareholders?	**Duty of care** Directors have a specific duty of care when carrying out their activities, as in fact they are expressly required by law to "*fulfil the obligations set out by the law and by the company's by-laws with the diligence required by their office and their professional competence*" (Art. 2392 ICC). In more practical terms, the duty of care requires the directors to, inter alia: (a) perform their activities with the diligence required by the nature of their appointment (ie the position held by the director within the board of directors, such as president, executive director, non-executive director) and by their specific professional competences (ie the specific technical skills possessed by the director); (b) weigh up the pros and cons of a specific transaction with respect to the company's interest; and (c) pursue the company's purpose in compliance with the law and the by-laws of the company without conflict of interest. **Conflict of interest** Pursuant to Art. 2391 ICC, directors have a duty to act avoiding conflict of interest. More specifically, directors must, among others: (a) notify the other directors and the board of auditors of any interest the directors have on their own behalf or of third persons in a specific transaction, specifying the nature, terms, origin and relevance of the transaction; (b) in the event the directors are "*executive directors*", refrain from carrying out the transaction, investing the board with the same; and (c) in the event of a sole director, disclose the personal interest also during the first upcoming shareholders' meeting. Resolutions passed: (i) in breach of the conditions above; and/or (ii) with the decisive vote of the director in conflict of interest, may be challenged by the other directors and the board of auditors within 90 days, if they could cause damage to the company. Furthermore, pursuant to Art. 2391 ICC, the director acting in conflict of interest is liable for damages caused to the company.

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No.	Question	Answer
		Interest of other parties In implementing and pursuing the company's purpose (*oggetto sociale*), the directors must act in compliance with several duties provided for by the more specific Italian law rules comprising, inter alia, (i) tax duties; (ii) labour law/employment duties; (iii) environment protection duties; and (iv) duties connected to the possible insolvency of the company. Furthermore, companies are continuously more interested in the ESG values (ie *Environment, Sustainability and Governance*). From a legal perspective, pursuant to Legislative Decree 254/2016, implementing Directive (EU) 2014/95, large companies – such as listed companies and banks – are indeed required to draw up the so-called "*non-financial statement*". Such document is aimed at giving specific evidence of the environmental, social, personnel-related, human rights and anti-corruption profiles relevant to the analysis of management, performance and results of the companies. As such, directors have not only to take into consideration, but also to report such interest in the non-financial statements. The implementation of the so-called "*Corporate Sustainability Reporting Directive*" (CSRD, Directive (EU) 2022/2464), which is expected for mid-2024, is likely to impact further on such reporting duties. **Duty to create value** In general terms, the directors have a general duty to create value for the company/shareholders, since "*exercising an economic activity for the purpose of dividing the profits*" is the main purpose of a company (Art. 2247 ICC). Furthermore, pursuant to Art. 2380-bis ICC, directors have a duty to carry out the activities necessary for the implementation of the company's purpose (*oggetto sociale*), meaning that they have a duty to carry out all those material activities aimed at fulfilling the economic interest of the company. However, the purpose of creating value is not exclusive and shall be coordinated with the sustainability principle and the aim of creating a "l*ong-term value*" for the company taking into consideration the interest of the relevant stakeholders. In this respect, the 2020 Code of Corporate Governance – which is a soft-law instrument applicable to listed companies – clearly states that "*the board of directors shall lead the company in pursuing its sustainable success*". The latter is defined as "*the purpose that guides the action of the board of directors and which takes the form of the creation of long-term value for the benefit of the shareholders, taking into account the interests of the other stakeholders relevant to the company*".

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No.	Question	Answer
5.	How can directors be held liable for breaching their duties or causing harm to the company or others?	As advanced under question 3 above, directors are personally liable towards: (i) the company (Art. 2392, 2393 and 2393-*bis* ICC); (ii) the company's creditors (Art. 2394 ICC); and (iii) individual shareholders or third parties (Art. 2395). **(a) Liability towards the company** In general terms, directors are liable vis-à-vis the company when: (i) they have not fulfilled the duties imposed upon them by the law and by the by-laws with the duty of care required by the nature of their appointment and by their specific competences; (ii) the company suffered a damage; and (iii) such damage is an immediate consequence of the directors' default. In particular, Article 2392 ICC provides that directors are jointly and severally liable: – for damages deriving from non-compliance with their duties, except for functions vested solely on either the executive committee or one or more directors; and/or – if, knowing of existing conducts prejudicial to the company, they omit doing what is in their powers to prevent the same and either remove or reduce its harmful consequences. The liability does not extend to the director who, not being at fault, has his dissent entered in the minute book of the board without delay and gives immediate notice in writing to the chairman of the board of auditors. Based on case law, directors have been held liable vis-à-vis the company, among others, in the following cases: (i) omission in informing the shareholders and in adopting the required measures to prevent the implementation or to mitigate the harmful effects of irregularities in the activities carried out by prior management harmful for the company, which directors, by acting diligently, could have been aware of; (ii) omission in preventing or in mitigating possible negative consequences of detrimental activities carried out by the general manager, managers and attorneys of a company; (iii) irregularities in accounting books, drafting of untrue financial statements hiding losses, overestimation or underestimation of the corporate capital aimed at diverting corporate funds; and (iv) carrying out of management activities after the company enters into a state of liquidation which are not directed to the conservation of the integrity and value of the company's assets. Please note that in certain circumstances set out by Law, insolvency bodies could be entitled to start this kind of liability claims in the context of insolvency procedures.

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No.	Question	Answer
		(b) Liability towards company's creditors Directors are liable vis-à-vis the company's creditors when: (i) they have breached their obligation to maintain the integrity of the corporate assets; and, consequently, (ii) the corporate assets were not sufficient to satisfy the creditors. Based on case law, directors have been held liable vis-à-vis the company's creditors especially in case of an omission to adopt measures required by the law in the event of corporate capital losses. In particular, directors have a specific duty of calling without delay the shareholders' meeting when the operating losses have drawn on the corporate capital over a third, so that the shareholders' meeting can adopt one of the following resolutions: (i) carry forward of losses or corporate capital reduction (if losses did not reduce the corporate capital under the minimum amount required by law, ie Euro 50,000 for Italian S.p.A.); or (ii) corporate capital reduction and concurrent corporate capital increase over the minimum amount required by the law or change of the corporate form of the company to a form requiring a lower minimum corporate capital (if losses reduced the corporate capital under the minimum amount required by law). Usually, insolvency bodies are entitled to start this kind of liability claims in the context of insolvency procedures. **(c) Liability towards individual shareholders/third parties** Directors are liable vis-à-vis individual shareholders and third parties when: (i) they have committed a negligent or fraudulent act connected to their office, and (ii) such negligent or fraudulent act directly harms the assets of an individual shareholder or third party. Based on case law, directors have been held liable vis-à-vis individual shareholders, among others, in the following cases: (i) untrue corporate documents; or (ii) untrue representation of the corporate assets of a company aimed at persuading a shareholder not to sell its equity interests or to vote in a certain manner; or (iii) untrue financial statements; or (iv) actions directed to prevent the participation of a shareholder in the shareholders' meetings. On the other hand, also based on case law, directors have been held liable vis-à-vis third parties, among others, in the following cases: (i) untrue representations persuading a third party to enter into an agreement with a company subsequently proving to be harmful to the third party; or (ii) unlawful actions causing damages to an entity holding encumbrances over the corporate capital of a company; or (iii) contractual default willingly directed to cause damages to a third party; or (iv) drafting of untrue financial statements persuading a third party to purchase equity interests in the corporate capital of a company.

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No.	Question	Answer
6.	What is the liability framework for *de facto* (or shadow) directors?	According to Italian case law, *de facto* directors are defined as those individuals/entities who substantially and systematically participate in the management of the company without being formally appointed to do so, effectively exercising the powers usually attributed to directors. Among the most frequent cases of *de facto* directors are those of individuals/entities who actually exercise directors' powers: (a) despite not having been duly invested with the relevant function; or (b) despite having ceased from the office; or in any case; or (c) absent the requirements set out by the Italian law or by the company's bylaws for being a director. According to Italian case law, *de facto* directors could be civilly and/or criminally liable as *de iure* directors and the same rules governing directors' liability apply.
7.	Are executive and non-executive directors treated differently in terms of liability?	In very essence, under Art. 2381 ICC it is possible that the board can delegate some of its functions – if permitted either by the company's by-laws or the shareholders' general meeting – to an **executive committee** or to one or more directors (**executive directors**). To the extent that board functions are delegated, the board has a monitoring role. In such an event: (a) **executive directors** have to make sure that the organisational, administrative and accounting structures are adequate for the nature and size of the company. They must report to the board of directors and to the board of auditors, at least every six months, on the general course of the company's business, on its projected development and on major transactions entered into by the company or its subsidiaries (Art. 2381 (5) ICC); whereas (b) **non-executive directors** have to monitor the general course of the company's business and assess the adequacy of the organisational, administrative and accounting structure of the company on the basis of the information received from the executive directors. In addition, they examine the company's strategic, operational and financial plans (Art. 2381 (3) ICC). As recalled under answer no. 5 above, Article 2392 ICC provides that directors are jointly and severally liable for damages deriving from non-compliance with their duties, **except for functions vested solely on either the executive committee or one or more directors**. In such joint and several liability framework, according to the different functions of the executive/non-executive directors, there could be different degrees of liability to be considered in the context of the recourse claims; also, in general terms, the non-executive directors are mainly liable for breach of their monitoring duty.

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No.	Question	Answer
8.	Is the liability of directors capped up to a certain amount?	Italian law does not provide for any cap on director's liability. However, directors can be protected against unlimited liability, inter alia, by resorting to directors and officers insurance (D&O insurance). In particular, D&O insurance generally covers civil liability for damages and losses caused by directors for breach of their duties (inclusive of expenses and damages liquidated under any Court judgments, provided that (i) there is no reason to believe the director has acted unlawfully and that (ii) he/she has acted in good faith). Indemnity agreements are also common means of protections against uncapped liabilities. These agreements usually provide for the company to hold harmless its directors from the liabilities deriving from the management activity they carried out during a given period and are usually negotiated in the context of a director's resignation/termination of the office.
9.	Can directors shield off their liability through management companies?	Under Italian law, it is possible to appoint one or more legal persons or entities to the office of director. However, each director who is a legal person must designate, for the exercise of the function of director, a representative individual belonging to his organisation. This individual undertakes the same obligations and the same civil and criminal liabilities envisaged for directors who are natural persons, and is jointly liable with the director-legal person. Accordingly, shortcuts towards forms of exemption or limitation of the duties and responsibilities of the directors by means of shielding behind management companies are unlikely.
10.	Are the directors' liability risks collective (ie when acting in a collegial body) or individual?	As mentioned, directors' liability is joint and several, which means that all the directors can be held liable for breaches of director's duties committed even if committed by only one of the directors. However, this rule does not apply in the event some of the directors' functions are vested solely in either the executive committee or in one or more executive directors. In such cases these latter shall, in principle, be held liable. Please consider, however, that the non-executive directors can be held jointly and severally liable with the executive director/committee in the event they are in breach of their monitoring duties. For further details, please see above answer 5 and 7.
11.	What are the consequences of directors' liability in case the company goes bankrupt? Under what circumstances can directors be held personally liable for (part of) the debts of the bankrupt company?	As advanced (see answer 5), pursuant to Art. 2394 ICC directors are liable *vis-à-vis* the company's creditors when: (a) they have breached their obligation to maintain the integrity of the corporate assets; and, consequently, (b) the corporate assets were not sufficient to satisfy the creditors. In the context of insolvency procedures, the insolvency bodies usually exercise the liability claim set out by the above rule pursuant to Art. 2394-bis ICC. This claim is aimed at compensating those damages that are directly linked to the breach of director's duties (ie the loss of the creditors). Based on case law, the damage could be liquidated in an amount equal to the difference between the company's net asset on the starting date of the insolvency procedure, and the net asset on the date on which the directors should have proceeded with the liquidation of the company. At certain conditions, breach of directors' duties aimed at protecting the integrity of the company's assets could be considered also criminal offences (Art. 2629 ICC).

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No.	Question	Answer
12.	How often are directors sued for civil or criminal liability in court? What are the typical damages, fines, or penalties imposed on directors in such cases? Is there a procedure of plea bargaining in criminal court available to directors?	It is unclear how frequently directors in Italian jurisdiction are sued for civil or criminal liability as such data is not publicly available, judicial proceedings of this kind are not widely reported and, as far as civil proceedings are concerned, they are often subject to private settlements. From a criminal standpoint, directors can be held liable for several offences committed during the performance of their activity, such as corporate crimes, breaches of trust, insolvency crimes, tax crimes, offences related to the violation of health and safety at workplace laws, etc. Also, for the sake of completeness, most corporate crimes committed by directors can trigger a criminal liability of the company under Legislative Decree 231/2001, in addition to the individual criminal liability of directors. Directors can be punished with imprisonment and/or pecuniary fines. Disqualifying measures can also be applied. In general terms, when criminal proceedings start, damaged parties who are willing to seek compensation for damages could lodge the relevant claim against the wrongdoers either before the civil court in a separate civil proceedings, or in the context of the criminal proceedings itself (ie *costituzione di parte civile*). An action for damages could, therefore, be brought against the director for the damages deriving from his criminal conduct both in a civil court or, alternatively, in the context of the criminal proceedings against the director. As to plea bargains, we confirm that the relevant rules could apply also to directors. In particular, pursuant to Article 444 of the Italian Code of Criminal Procedure (**ICCP**), during the preliminary investigation and at least before the beginning of the trial, the defendant may plea bargain (so-called *patteggiamento*). In general terms, plea bargain is a special proceeding whereby the defendant declines to dispute or admits the fact of his guilt. The request of plea bargain is submitted to the Judge that checks the acceptability of such request and the legal qualification of the offence. The Judge also assesses whether the case should be acquitted. According to Article 445 of the ICCP, the agreement to accept the punishment sentence equals to a conviction. Indeed, certain effects are the same: application of a penalty, even though decreased up to one third, as established in the plea bargain agreement; possible confiscation and possible conviction in the criminal proceeding to pay damages. However, plea bargain judgement do not have binding effects in civil or administrative proceedings which may arise from the same allegation.
13.	Can shareholders or third parties sue directors directly or on behalf of the company? Under what circumstances can third parties other than shareholders sue directors (in)directly?	Please refer to answer under no. 5 (ie "*liability towards individual shareholders/third parties*").

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No.	Question	Answer
14.	In practice, do prosecutors frequently seek redress for non-executive directors' wrongdoings?	It is unclear how frequently prosecutors in Italian jurisdiction seek redress for non-executive directors as such data is not publicly available. In more general terms, certain case law maintains that non-executive directors could be held criminally liable for their intentional or negligent omission, deriving from their position of guarantee pursuant to the Art. 40 of the Italian Criminal Code, which imposes on them the legal obligation of preventing the commission of a crime. In this respect, recent case law affirms that such liability cannot be automatic and has to be ascertained in a material way. In particular, the non-executive director could be considered negligent if he/she knew – or had to know – any warning signs revealing the commission of illicit acts which required him/her to intervene to prevent it or eliminate/mitigate its harmful consequences.
15.	Has the attention recently given to the concept of corporate social responsibility increased the liabilities of directors?	As mentioned, companies are continuously more interested in the ESG values (ie *Environment, Sustainability and Governance*). From a legal perspective, pursuant to Legislative Decree 254/2016, implementing Directive (EU) 2014/95, large companies – such as listed companies and banks – are indeed required to draw up the so-called "*non-financial statement*". Such document is aimed at giving specific evidence of the environmental, social, personnel-related, human rights and anti-corruption profiles relevant to the analysis of management, performance and results of the companies. As such, directors have not only to take into considerations, but also to report such interest in the non-financial statements. The implementation of the so-called "*Corporate Sustainability Reporting Direc*tive" (CSRD, Directive (EU) 2022/2464), which is expected for mid-2024, is likely to impact further on such reporting duties which, in future, might entail relevant liability claims. In such context, also the 2020 Code of Corporate Governance – which is a soft-law instrument applicable to listed companies – clearly states that "*the board of directors shall lead the company in pursuing its sustainable success*". The latter is defined as "*the purpose that guides the action of the board of directors and which takes the form of the creation of long-term value for the benefit of the shareholders, taking into account the interests of the other stakeholders relevant to the company*".

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Luxembourg

Please note that our answers are mainly based on the functioning of public limited companies (ie société anonyme in French – SA) considering that they are the most common form of companies in Luxemburg.

No.	Question	Answer
1.	Which jurisdiction will be covered?	Luxembourg
2.	How does the governance framework apply to different types of boards (one-tier or two-tier)?	SAs can organise themselves by choosing between two structures: – **One-tier:** composed of a board of directors; or – **Two-tier:** composed of a management committee (*directoire*), which is supervised by a supervisory board. In SAs with a two-tier structure, the rules governing the potential liability of the members of the management committee are identical to those applicable to directors in a classic single-tier management structure. Members of the supervisory board are liable according to the same principles and duty of care as directors in a single-tier SA, with the only difference that their role is to supervise the actions of the management committee, and not to intervene in the management of the company.

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No.	Question	Answer
3.	Does the legal set-up (statute or case law) specify that the legal responsibilities of directors are towards the shareholders, the company as a legal person and/or society?	– Directors can be held liable towards the company itself (as the case may be through the so called "*action minoritaire*" – please see questions 5 and 13) based on the principles of contractual liability for acts of mismanagement[4]. Acts of mismanagement are assessed in *abstracto* against the standard of the conduct of a normally prudent and diligent director[5]. – Directors can only be held liable towards an individual shareholder acting in its individual capacity as shareholder under certain conditions. An individual shareholder only has a right of action if he/she can establish a "personal" loss different from the loss suffered by the company as a whole (the mere loss of value of its shareholding is not sufficient). – Directors can be held liable towards any third party based on the principles of liability in tort. Proceedings may be initiated by any individual, but he/she must establish that the director committed a personal fault outside of his/her ordinary duties (*faute séparable des fonctions*)[6].
4.	Does the legal set-up (statute or case law) specify that the directors have to act with care, and that they have to avoid conflicts of interest? Do directors have to consider the interests of other parties, such as employees, creditors, or the environment? Do directors have to create value for the company and its shareholders?	– As a matter of principle, directors have a duty to act with the highest degree of honesty and loyalty and in the best interest of the company (the corporate interest). – The concept of corporate interest (which is not legally defined) receives more and more attention in legal literature and the trend goes generally towards a broader interpretation of the concept by the courts, by not only taking into account the interests of the shareholders (ie the internal corporate interest) but also the interests of other stakeholders such as the company's creditors, suppliers, employees, and others (ie the external corporate interests). – Pursuant to article 441-7 of the law of 10 August 1915 on commercial companies, a director who has directly or indirectly a financial interest contrary to the interest of the company in any transaction that is submitted to the approval of the board of directors must (i) disclose such opposing interest to the board of directors, (ii) procure that the existence of such opposing interest is mentioned in the minutes of the meeting of the board of directors and (iii) abstain from voting on the relevant resolution. This matter has to then be specifically reported to the next general meeting of shareholders prior to any resolution on any other matter being taken. Pursuant to article 441-9 of the law of 10 August 1915 on commercial companies, directors are jointly and severally liable towards the company and third parties if they do not comply with the conditions set out in article 441-7 of the law of 10 August 1915 on commercial companies and such non-compliance causes harm to the company or a third party. The company cannot seek nullity of transactions taken in violation of the provisions of article 441-7 of the law of 10 August 1915 on commercial companies.

4_Under the terms of article 441-9 of the law of 10 August 1915, "Directors are liable to the company in accordance with common law for the mandate they have received and for the faults committed in their management".
5_Luxembourg District Court, 15 March 2001, n°48959: "The fault of a director is assessed in abstracto, that is to say by reference to the conduct of a bonus pater familias, in other words, of a prudent, diligent and active director". See also: Luxembourg District Court, 28 November 2007.
6_Luxembourg Court of Appeal, 14 July 2017, n°40543 : "The liability of directors towards third parties presupposes the demonstration of a fault separable from the functions, defined by the French Court of Cassation as "an intentional fault of a particular gravity incompatible with the normal exercise of social functions (Cass.com. May 20, 2003, No. 99-17092; JCPE, 2003, 1399, p.1580, note Hadji-Artinian). This position was maintained by the Court of Cassation in subsequent judgments concerning the liability of company directors with regard to third parties (Cass.com. March 29, 2011, No. 10-11-027; Cass.com. January 31, 2012, no. 11-14.154)."

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No.	Question	Answer
5.	How can directors be held liable for breaching their duties or causing harm to the company or others?	– The company (on the initiative of a majority of its shareholders or, in certain cases, a minority of shareholders representing at least 10% of the voting rights) and, as set out in question 3 above, under certain conditions shareholders and third parties, can initiate civil proceedings against the directors. – The Public Prosecutor may initiate criminal proceedings against directors. The Luxembourg Criminal Code provides that criminal sanctions may apply to a legal person, but this does not exclude the criminal liability of the representatives of such legal person including directors. A classic example of an offence for which a director could be prosecuted in Luxembourg would be misuse of company assets (*abus de biens sociaux*). Directors can furthermore be prosecuted for all criminal offences specifically foreseen by the law of 10 August 1915 on commercial companies (articles 1500-1 to 1500-14), the Luxembourg Commercial Code (simple and fraudulent bankruptcy) and all other criminal offences under Luxembourg law (such as set out, eg in the Luxembourg Criminal Code, the Commercial Code and tax and social security laws).
6.	What is the liability framework for *de facto* (or shadow) directors?	With a few exceptions, shadow and *de facto* directors are liable in the same way as the official directors. Liability for mismanagement on the basis of article 441-9 of the law of 10 August 1915 on commercial companies is not applicable to *de facto* directors, which are, however, liable towards the company and third parties according to the principles of tort liability on the basis of articles 1382 and 1383 of the Luxembourg Civil Code. According to case law, "*the notion of de facto director refers to any person who, directly or through an intermediary, carries out a positive and independent activity in the general administration of a company, under the cover of or in place of its legal representatives. De facto authority is not linked exclusively to the holding of a fraction of the capital (Traité de droit commercial, Georges Ripert, René Roblot, Volume 2, p. 1220)*[7]."
7.	Are executive and non-executive directors treated differently in terms of liability?	Executive and non-executive directors are treated equally. There is no legal distinction between executive and non-executive directors. The applicable liability regime is exactly the same. With certain exceptions[8], directors will only be held liable for civil offences that they have participated in. Considering that non-executive directors are generally less involved in the management of the company, it could be said that it is less probable that they participate in civil offences. The applicable liability regime is, however, exactly the same as for executive directors and we are not aware of any distinction that would be made by Luxembourg courts in practice.

7_Luxembourg District Court, 21 January 2010, jugement n°277/2010.
8_Pursuant to article 441-9 of the law of 10 August 1915 on commercial companies, all directors are presumed jointly and severally liable for any harm caused as a result of a breach of the provisions of the law of 10 August 1915 on commercial companies or the articles of association of the company, unless they can prove that they have not participated in the breach and have denounced it at the next general meeting.

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No.	Question	Answer
8.	Is the liability of directors capped up to a certain amount?	Under Luxembourg law, the principle is that damages should compensate the entirety of the harm suffered, not more not less. The amount of damages depending on the actual harm suffered, there is no liability limitation as such. Punitive damages do not exist. In this context, it should also be noted that under Luxembourg law, parties may contractually exclude or limit the liability of one party towards the other party by way of a limitation or exclusion of liability clause. The relationship between the company and its directors being of contractual nature, limitation and exclusion of liability clauses would in principle be conceivable between the company and its directors.
9.	Can directors shield off their liability through management companies?	A company can be appointed director, member of the management committee or general director. However, according to article 441-3 of the law of 10 August 1915 on commercial companies, such company is then required to appoint a natural person as permanent representative in charge of the execution of this mission in the name and on behalf of the legal entity and the permanent representative "*is subject to the same conditions and incurs the same civil liability as if he carried out this mission in his own name and for his own account, without prejudice to the joint and several liability of the legal person he represents*".
10.	Are the directors' liability risks collective (ie when acting in a collegial body) or individual?	There are mainly two general liability regimes for directors under Luxembourg law (other specific regimes may exist, for example, in connection to tax liability): – **For acts of mismanagement:** the liability imposed is personal for each director and it is necessary to show that the individual director committed the wrongful act, was complicit in the act or ought to have taken action against it but failed to do so; and – **For breaches of the articles of association of the company or breach of the provisions of the Companies Act:** the liability is joint and several. A director may be personally relieved of his or her liability if he/she proves that he/she did not take part in the alleged breach and that he/she reported such violation at the first general meeting after he/she acquired knowledge thereof.

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No.	Question	Answer
11.	What are the consequences of directors' liability in case the company goes bankrupt? Under what circumstances can directors be held personally liable for (part of) the debts of the bankrupt company?	– **Liability for the company's debts in the event of bankruptcy** (art 495-1 Commercial Code): when directors have committed severe faults which contributed to the company's bankruptcy and the liabilities of the bankrupt company exceed its assets. – **Extension of the company's bankruptcy to a director** (art. 495 Commercial Code): a director may be declared personally bankrupt (together with the company in order to constitute one single bankrupt estate). A company's bankruptcy will be extended to any of its *de jure* or *de facto* directors, if he/she: (a) under the cover of the company, carried out commercial acts in a personal interest; or (b) disposed of the company's assets as his own; or (c) proceeded abusively, in his personal interest, a loss-making operation which could only lead to the cessation of payments by the company. – **Criminal bankruptcy** (art. 573 and seq. Commercial Code; art. 489 Criminal Code): if directors commit one of the actions set out in the Commercial Code, which are qualified as simple bankruptcy (*banqueroute simple*), eg payment of a creditor to the detriment of the bankruptcy estate in order to postpone the bankruptcy, or as fraudulent bankruptcy (*banqueroute frauduleuse*), eg fraudulently embezzling or concealing part of the assets of the company. Simple and fraudulent bankruptcy are criminal offences which expose directors to the sanctions set out in article 489 of the Criminal Code (imprisonment of one month to two years in case of simple bankruptcy and imprisonment of five to ten years in case of fraudulent bankruptcy). Pursuant to article 444-1 Commercial Code, the Court must also necessarily pronounce against these directors a prohibition to exercise a function of director, manager or any function conferring the power to bind a company.

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No.	Question	Answer
12.	How often are directors sued for civil or criminal liability in court? What are the typical damages, fines, or penalties imposed on directors in such cases? Is there a procedure of plea bargaining in criminal court available to directors?	– Directors are regularly sued for civil and criminal liability in court. – The typical damages, fines, or penalties given to directors in such context depend on the case and on the director's acts. It is therefore not possible to give a concrete answer. – The Criminal Procedural Code provides for a plea bargaining option (*jugement sur accord*). However, this option is only available under the following conditions: (a) the offence the director is prosecuted for must either be of correctional nature (*délit*) or, if the offence qualifies as a crime, it must only be punishable either by imprisonment for a maximum of five years or by a fine (as the case may be following the admission of mitigating circumstances); and (b) no first-instance judgment exists in relation to the offence, ie the director cannot already have been convicted (or acquitted) of the offence by a first-instance judgment. The plea bargaining procedure (if available) can be initiated by the public prosecutor or by the prosecuted director him-/herself. The prosecuted director must be assisted by a lawyer during the procedure. At the end of the procedure, the prosecuted director can either accept or refuse the proposed "agreement" (*accord*). If the director refuses, all communications and documents in relation to the agreement and the bargaining procedure in general must be destroyed and the standard criminal procedure will resume. If the director accepts, he/she thereby acknowledges having committed all the offences that are listed in the agreement (accord) and accepts the penalties set out in the agreement (accord). Following the conclusion of the agreement, the director must still appear at a court hearing. At this hearing, the court will check the existence of (i) the director's consent to the agreement (*accord*) and (ii) the legality and adequacy of the proposed penalties and compensations to third parties.

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No.	Question	Answer
13.	Can shareholders or third parties sue directors directly or on behalf of the company? Under what circumstances can third parties other than shareholders sue directors (in)directly?	Please refer to our answers to questions 3 and 5. A claim can be made against an individual director, multiple directors or the board as a whole by: – the company (*actio societatis*), acting through the General Meeting at a majority of half of the votes cast; – one or several shareholders of the company holding at least 10% of the voting rights (*action minoritaire*). It should be noted that this action is brought in the exclusive interest of the company; – the creditors of the company, to the extent the company itself fails to act (*action oblique*). This is an indirect action in the event of any failure or default on the part of the company to sue its responsible directors. In such case, the creditors exercise the rights of the company itself (ie the *actio societatis*) on behalf of the company and the result of such action will only benefit the company; – third parties on the basis of general tort liability (articles 1382 and 1383 of the Civil Code). As mentioned in question 3, a personal fault outside of his/her ordinary duties (*faute séparable des fonctions*) has to be established; and – the receiver in case of bankruptcy of the company. Moreover, as mentioned above, an individual shareholder can act against the director(s) on his own behalf (and not on behalf of the company) only if he/she can establish a “personal” loss different from the loss suffered by the company (the mere loss of value of its shareholding is not sufficient).

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No.	Question	Answer
14	In practice, do prosecutors frequently seek redress for non-executive directors' wrongdoings?	Executive and non-executive directors are treated equally. There is no legal distinction between executive and non-executive directors. The applicable liability regime is exactly the same. A prerequisite to holding a person criminally liable is that such person has participated in the criminal offence. Criminal offences can be committed either by act or by omission. The burden of proof of participation lies with the public prosecutor. Considering that non-executive directors are generally less involved in the management of a company, it could be said that is less probable that they participate in criminal offences in this context. The applicable liability regime is, however, exactly the same as for executive directors and we are not aware of a distinction that would be made by Luxembourg courts in practice.
15.	Has the attention recently given to the concept of corporate social responsibility increased the liabilities of directors?	It follows that CSR in Luxembourg is based on a voluntary basis by companies. It does not result from Luxembourg case law that corporate officers have been declared liable for non-compliance with the company's commitments related to CSR. However, as already mentioned above in relation to question 4, the current trend going toward extending the scope of the concept of corporate interest, it cannot be excluded that CSR aspects might be included in the concept of corporate interest in the future.

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The Netherlands

No.	Question	Answer
1.	Which jurisdiction will be covered?	The Netherlands
2.	How does the governance framework apply to different types of boards (one-tier or two-tier)?	The Dutch governance framework is largely based on (a) the Dutch Civil Code (**DCC**), which regulates the legal structure, duties, and liabilities of corporate bodies, and (b) the Dutch Corporate Governance Code (**DCGC**) (revised in December 2022), which sets out principles and best practices that regulate relations between the respective organs of a listed company (based on a "*comply-or-explain*" principle). Although the DCGC formally applies to listed Dutch companies only, certain of its provisions may affect general standards regarding proper management and governance of non-listed Dutch companies as well. This depends largely on the specific circumstances of a particular company or organisation and on the precise objectives underlying the various principles and provisions of the DCGC. Moreover, many unlisted companies voluntarily comply with the DCGC. The DCC allows for two board structures: one-tier and two-tier. In a two-tier model structure, management and supervision are divided between the management board respectively the supervisory board. The managing directors are responsible for the management of the company and the supervisory directors have the task to supervise the policy of the management board and the general course of affairs of the company and its affiliated business. The supervisory directors also advise the managing directors. In a one-tier board structure, the duties of the board are divided among executive and non-executive board directors. Non-executive directors are (unlike supervisory directors) together with executive directors directly accountable for the decision-making on the general policy lines. The articles of association may provide that the management tasks are divided among one or more non-executive directors and one or more executive directors. Some of the duties and powers are vested by mandatory law in the non-executive directors: the supervision of the executive directors, the chairmanship of the board, the making of proposals for the appointment of directors and the determination of the remuneration of executive directors. Contrary to executive directors, non-executive directors may only be natural persons. The DCGC stipulates that the independence requirements that apply to supervisory directors also apply to non-executive directors, and that the non-executive directors are obliged to render account of the supervision exercised in a report. The two-tier model is the most common structure in the Netherlands.

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No.	Question	Answer
3.	Does the legal set-up (statute or case law) specify that the legal responsibilities of directors are towards the shareholders, the company as a legal person and/or society?	Dutch corporate law is based on the stakeholder approach as opposed to the shareholder approach. The directors have to act in the best interest of the company and its affiliated business (meaning the legal entity (ie the company) and the economic activities performed by such company (ie the business)). The content of that interest depends on the circumstances of the case. If the company has an affiliated business, the company's interest is usually mainly determined by promoting the long-term (*bestendig*) success of such business. According to case law, in the performance of their duties, directors should also – partly on the basis of the provisions of Section 2:8 DCC (reasonableness and fairness) – exercise care (*zorgvuldigheid*) with respect to the interests of all stakeholders who are involved with the company and its affiliated business (such as employees, shareholders and creditors). This obligation of care (*zorgvuldigheid*) may entail that directors, in serving the company's interest, ensure that the interests of all those who are involved with the company or its affiliated business (including relevant societal interests) are not unnecessarily or disproportionately harmed.
4.	Does the legal set-up (statute or case law) specify that the directors have to act with care, and that they have to avoid conflicts of interest? Do directors have to consider the interests of other parties, such as employees, creditors, or the environment? Do directors have to create value for the company and its shareholders?	Directors have to act in the best interest of the company and its affiliated business. In the performance of such duty, directors should exercise care (*zorgvuldigheid*) with respect to the interests of all those involved with the company (see also question 3). According to Principle 1.1 of the DCGC, the management board is responsible for the continuity of the company and its affiliated business and for sustainable long-term value creation by the company and its business. "*The management board takes into account the impact the actions of the company and its affiliated enterprise have on people and the environment and to that end weighs the stakeholder interests that are relevant in this context*" (see also question 15 in this regard). As mentioned in response to question 2, although the DCGC applies to listed companies, it may affect general standards regarding proper management and governance of non-listed Dutch companies as well. In the event of an (in) direct personal conflict of interest, a director must refrain from the deliberations and decision-making within the management board. We speak of a conflict of interests when the director is unable to serve the interests of the company and the business with the required level of integrity and objectivity. All the circumstances of the case have to be taken into account. In general, as this is an internal rule of decision-making, if the conflicted director nevertheless participates in the decision-making, the company cannot avoid being bound by contracts or other legal acts performed on the basis of such resolution, but the director with a personal conflict of interest may be liable towards the company on grounds of improper performance of duties.

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No.	Question	Answer
5.	How can directors be held liable for breaching their duties or causing harm to the company or others?	The starting point for the doctrine of directors' liability is that there is a distinction between internal and external liability of directors. **Internal liability** exists towards the company and stems from the contractual and corporate relationship between the directors and the company. Pursuant to Section 2:9 DCC, each director is obliged to "properly fulfil" its duties. If the director fails in this regard, he/she will in principle be liable for the damage suffered by the company due to this improper performance of duties. Internal liability towards the company is, in principle a collective liability of the management board. Individual directors may invoke individual exculpation (see question 10 for a more detailed description of collective and individual directors' liability). With the company being represented by the management board and with directors not being quickly inclined to hold themselves liable, the former directors are the ones who should most fear Section 2:9 DCC. This Section is then invoked by the (partly) new management board, or by the bankruptcy trustee once the company has gone bankrupt. It is not possible for shareholders to hold directors directly liable based on Section 2:9 DCC, (see also question 13). **External liability** is an individual liability of directors towards third parties, such as creditors, individual shareholders, employees and the tax authorities on the basis of tort (*onrechtmatige daad*). We refer to question 13 for a more detailed description of external directors' liability. The Dutch Supreme Court has brought the various standards for liability close together. With the exception of a number of specific statutory provisions which establish a quasi-strict liability, a director is only liable, both internally and externally, if he/she personally acted "seriously culpable" (*persoonlijk ernstig verwijt*). In all cases a high threshold applies. Whether this threshold is met, must be assessed on the basis of all the circumstances of the case.
6.	What is the liability framework for *de facto* (or shadow) directors?	Pursuant to the DCC, the liability of directors in bankruptcies (see question 11) also applies to the person who determines or co-determines all or part of the policy of a company as if he/she were a director with the exclusion of the statutory directors. For example, a shareholder who is intensively involved in policymaking. Also, outside of bankruptcy *de facto* directors may be held liable based on tort.

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No.	Question	Answer
7.	Are executive and non-executive directors treated differently in terms of liability?	As mentioned in response to question 2 above, the DCC allows two board structures: one-tier and two-tier. In relation to internal liability: In a **two-tier board**, the grounds for directors' liability (Section 2:9 DCC) are also applicable to supervisory directors having regard for the fact that their role is "only" a supervisory one. A supervisory director is not automatically liable when the management board has performed its management task improperly. A supervisory director is only liable when the claiming party asserts and – in case of a reasoned dispute – proves that the supervisory board has failed to fulfil its supervisory task properly. In a **one-tier board**, a non-executive director formally forms part of the management board, which means the non-executive directors can be held jointly and severally liable on the same grounds as the executive directors. This means that the non-executive director, too, under Section 2:9 DCC, will be responsible for the general affairs, like the company's strategy and the main aspects of its financial policy. What is different, though, is that the non-executive director, because of the specific division of duties, may exculpate him/herself of improper management easier than an executive director. In proceedings about directors' liability, the non-executive director will tend to lean heavily on this division of duties, and the fact that certain duties were specifically not allocated to him/her. As for the difference in liability risk between non-executive directors and supervisory directors, the literature is divided. Ultimately, it depends largely on how the decision-making and cooperation of the different bodies of the respective company works in practice.
8.	Is the liability of directors capped up to a certain amount?	In principle, directors are liable for the entire damage due to their improper performance of duties. However, the court may mitigate the statutory obligation to pay damages if it would lead to manifestly unacceptable circumstances (Section 6:109 DCC). In some provisions the amount of damages are related to the specific improper performance by the directors: – Pursuant to Section 2:138/248 DCC in the case of bankruptcy, each director is jointly and severally liable for a deficit in the estate of an insolvent company. A court can mitigate the amount for which the director is liable on various grounds (see question 11). – Pursuant to Section 2:216 DCC, if the company cannot continue to pay its debts after a distribution to shareholders, the directors (who knew or reasonably ought to have foreseen at the time of the distribution) are jointly and severally liable towards the company for the deficit caused by the distribution.

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No.	Question	Answer
9.	Can directors shield off their liability through management companies?	A managing director who is a natural person cannot hide behind a legal entity where it concerns personal liability. Section 2:11 DCC provides that if a managing director of a company is not a natural person but a (Dutch) legal entity, the liability also lies jointly and severally with each of the (statutory) managing directors of that legal entity. Section 2:11 DCC is applicable to all legal basis of directors' liability. Supervisory or non-executive directors are always natural persons.
10.	Are the directors' liability risks collective (ie when acting in a collegial body) or individual?	Internal liability towards the company is in principle a collective liability. Each director is jointly and severally liable for the improper performance of duties by one or more of the other directors. In other words: if serious culpability applies to the acts of one of the directors, the company/the bankruptcy trustee, may hold the entire (former) management board liable. However, it is possible that a director invokes individual exculpation. A director may exculpate him/herself if the following two conditions have been met: (a) he/she cannot be regarded as having acted with serious culpability taking into account the tasks assigned to others; and (b) he/she is or was not negligent in taking measures to avert the consequences of mismanagement. The division of duties is thus an important building block for exculpation but does not automatically result in exculpation. If a director notices that a fellow director does not properly perform his/her duties and this may result in a threat of mismanagement, such director must take action to avoid liability, even if the duty concerned had been assigned only to his/her fellow director. As a director, he/she cannot only rely on the other directors to provide him/her with information, but he/she also has a duty to gather information from his/her fellow directors when required and appropriate. It should also be kept in mind that each director is responsible for the general course of affairs. This may include matters like, for instance, the strategy and the main features of the financial policy. Any allocation of these duties in the articles of association or the by-laws is no defence. (See also question 7). With the exception of liability based on misleading annual report and accounts, there is no collective liability of the management board with external liability (based on tort).

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No.	Question	Answer
11.	What are the consequences of directors' liability in case the company goes bankrupt? Under what circumstances can directors be held personally liable for (part of) the debts of the bankrupt company?	When confronted with a company in financial distress, the general view is that the duty of care of the management board shifts from the wider group of stakeholders, including shareholders, to a more narrow group of employees, creditors and (other) debt providers. The management board should take care that the company should not continue to trade if it is not satisfied that liabilities incurred in the process will be met and complied with in full. There is no formal rule in Dutch law obliging a financially distressed debtor to apply for its own bankruptcy at a given point in time. It would nevertheless be prudent to file for court protection if there is no reasonable perspective to continue trading, ie if there is no so-called "light at the end of the tunnel". Filing under these circumstances would help to ensure that all creditors receive equal treatment to which they are entitled and limit the risk on personal liability on the part of directors as a result of "wrongful trading". At the same time, the management board will not want to resort to formal insolvency proceedings as long as these can be avoided at all. It is highly recommendable, the management board takes advice from insolvency professionals as to the (threatening) insolvency situation. Directors may be held liable on several grounds and parties in connection with an insolvency scenario. We list the most evident grounds below. **Bankruptcy trustee** Pursuant to 2:138/248 DCC, in the case of bankruptcy, each director is jointly and severally liable for a deficit in the estate of an insolvent company if the management board "appears to have performed its duties improperly" in the three years preceding the bankruptcy and if it is apparent that the insolvency has, to a large extent, been caused by such improper performance of duties (kennelijk onbehoorlijk bestuur). Evidence of improper management is involved if, taking into account all relevant circumstances, no reasonable director would have acted in such a manner in the same circumstances. An individual director can exculpate him/herself by proving (a) that he/she was not him/herself negligent in so far as the improper management is concerned, and (b) that he/she was not negligent in preventing the consequences of such improper management. The court may reduce the amount for which the directors are liable if it considers the full deficit excessive, taking into account, for example, the nature and seriousness of the improper performance by the management board and potential other causes of the bankruptcy. The court may also reduce the amount of damages an individual director must pay if this seems excessive considering the time that the director was in office in the period in which the improper performance of duties occurred. The liability of directors is towards the estate (the joint creditors) and not the bankrupt company. The bankruptcy trustee acts on behalf of the estate and is the only person who can lodge a claim for liability against a director for the deficit. The evidential position between bankruptcy trustee and the director is regulated by Section 2:138/248(2) DCC, which contains two statutory presumptions. There is an irrebuttable presumption that the management board has improperly performed its duties (throughout) if it has not complied with its obligation under Section 2:10 DCC to keep proper records or its obligation under Section 2:394 DCC to publish the annual report and accounts on time. In this case there is a rebuttable presumption that the improper performance of these duties was a major cause of the insolvency. A director can produce proof to the contrary, but the burden of proof will lie with the director concerned.

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No.	Question	Answer
		Creditors Directors can be held liable by creditors on the bases of tort. A few examples: – According to established case law, a director is liable on the basis of tort if he/she has concluded an agreement on behalf of the company and knew, or reasonably should have known, when he/she concluded the agreement that the company would be unable to fulfil its obligations resulting therefrom or would be unable to fulfil them within a reasonable period of time and would not offer recourse for the damage suffered by the contractual party as a result of the breach of contract. This is referred to as the "Beklamel standard". – Another category are cases where a director allows or procures that the company does not perform a contract or other clear legal obligation, thus causing damage to the creditor. – A director may also incur liability in case of a fraudulent conveyance of assets of the company. Transactions can be voided on the basis of fraudulent conveyance if: (a) there was no enforceable legal obligation for the company to enter into the transaction; (b) the rights of one or more of the other creditors of the company are prejudiced as a result of the transaction; and (c) the company and its counterparty knew, or should have been aware, of such prejudicial effect. – In the event of selective payment by directors of an insolvent company to itself or to group companies, there is also the risk of personal liability for the directors. These are individual forms of liability and not joint and several of the entire board. Since these acts of representation are usually performed by the executive director, the risk for these types of liability are mostly relevant for executive directors. However, if the legal act is based on a board decision, liability risks can come into play more quickly for non-executive directors as well. **Tax authorities** Directors are liable to the tax authorities for specific taxes, social insurance premiums and compulsory contributions to company pension funds. This regulation can be traced to Article 36 of the Collection of State Taxes Act 1990 (*Invorderingswet*) and Article 23 of the Sectoral Pension Fund Obligatory Participation Act (*Wet verplichte deelneming in een bedrijfstakpensioenfonds*). The obligation on a company (and therefore its directors) to make immediate written notification to the competent authorities in the event it is unable to fulfil its payment obligations is crucial in this legislation. The notice must give reasons for the company's inability to pay and subsequent questions must be answered. If a company does not fulfil or does not properly fulfil its notification obligation, each director is jointly and severally liable for payment of the amounts of taxes or premiums due.

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No.	Question	Answer
12.	How often are directors sued for civil or criminal liability in court? What are the typical damages, fines, or penalties imposed on directors in such cases? Is there a procedure of plea bargaining in criminal court available to directors?	It is unclear how often directors are sued for civil and criminal liability in court as such numbers are not publicly available (and not all judgments are published). As regards criminal liability, directors who are prosecuted are often prosecuted as actual directors (*feitelijk leidinggevers*). Actual directing is a form of participation in a criminal offence, whereby a person who has a certain influence or authority over a legal entity or an organisation facilitates or enables the execution of that offence. Actual directing is regulated in Section 51(2) (2) of the Dutch Criminal Code, which stipulates that as perpetrator of a criminal offence is punished: "the person who has actually directed the prohibited conduct, as well as the person who, with the intention to promote such conduct, has given instructions for it or has provided directions for it while doing so." Actual directing requires an offence committed by a legal entity. Actual directors are not held liable for the prohibited conduct of the legal entity, but for their own involvement in the offences committed by the legal entity. This reproach does not have to coincide with the reproach that is made to the legal entity, nor with the reproach that is made to any other actual directors. There is no clear-cut answer as to what constitutes a typical punishment for actual directors, as this depends on the nature, severity, scale and consequences of the criminal offence, and the role and the responsibility of the actual director. Moreover, the punishment can consist, theoretically, of a combination of different modalities, such as imprisonment, community service, a fine, a confiscation order, a professional ban, a compensation order or a suspended sentence with special conditions. Dutch criminal procedural law does not have a formal plea bargaining procedure. However, it does have some mechanisms that are in certain aspects comparable to plea-bargaining, such as (a) the penal order (*strafbeschikking*), (b) the (high) transaction ((*hoge*) *transactie*) and (c) procedural agreements (*procesafspraken*). (i) A penal order is a penalty that the Public Prosecutor can impose for relatively minor criminal offences without a trial. The Public Prosecutor can choose from different types of penalties, such as a fine, a community service order or a compensation order. A penal order cannot include imprisonment. The Public Prosecutor can use a penal order for offences and crimes that have a maximum penalty of six years imprisonment. (ii) A transaction is a settlement that the Public Prosecutor and the suspect negotiate to avoid a trial. Transactions are mainly used for legal entities nowadays and less frequently for natural persons. In practice, there is a trend of more prosecution of natural persons after a legal entity has settled with the Public Prosecutor in a high transaction. (iii) A procedural agreement is a recent development in criminal procedural law that is closest to plea-bargaining. It is an agreement between the Public Prosecutor and the defence about how the criminal procedure and/or the criminal case will be resolved. Procedural agreements are based on reciprocity. For example, a procedural agreement could involve the defence giving up certain procedural rights (such as requesting a witness to be heard) and the Public Prosecutor reducing the charges against the suspect. This makes the criminal process and the outcome more predictable. The Supreme Court ruled in September 2022 that procedural agreements are allowed.

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No.	Question	Answer
13.	Can shareholders or third parties sue directors directly or on behalf of the company? Under what circumstances can third parties other than shareholders sue directors (in)directly?	A director only has a direct relationship with the company, and not with its shareholders. This means that any legal action by third parties against a director cannot be based directly on Section 2:9 DCC, and only on tort (Section 6:162 DCC). The threshold for liability of a director based on tort is high. To assume such liability, it is a requirement that this director personally acted seriously culpable for the tortious act (see also question 5). A shareholder can sue a director personally based on tort. In the Netherlands is not possible for shareholders to sue directors on behalf of the company (a derivative suit). Also, a shareholder cannot sue directors on the basis that the company and thereby the shares have lost value as a result of mismanagement. There must be a tort directly violating the shareholder's rights and damages for the shareholder following therefrom (such as a misleading statement of the company which led to the shareholder buying shares at too high a price). A creditor can also sue directors based on tort; we refer to question 11 for examples. In addition, shareholders, creditors and employees can sue directors on the basis of "balance sheet liability". Pursuant to Section 2:139/249 DCC, if the company has given a misleading representation of its financial position in the annual accounts, the annual report or interim figures, the directors are jointly and severally liable towards third parties for the damage consequently suffered by those third parties. The article does not require that the directors acted (seriously) culpable. A director is presumed to be jointly and severally liable if there is a misleading representation of affairs. Such director has the possibility to exculpate him/herself; however, this is difficult as the financial policy is a collective task of the management board. A non-executive director, because of the specific division of duties, can exculpate him/herself easier than an executive director but he/she is not at liberty to stay entirely uninvolved in the financial policy.

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No.	Question	Answer
14.	In practice, do prosecutors frequently seek redress for non-executive directors' wrongdoings?	According to case law, for actual directing there must be (a) a legal entity or organisation that has committed or participated in a criminal offence, (b) a natural person or other legal entity/organisation that actually directed that criminal offence and (c) criminal intent. The formal position of the latter can be an indication of actual directing, but is not decisive. In other words, it is not decisive whether someone is a director of the legal entity, but whether someone has actually directed the prohibited conduct. Under certain circumstances, a more passive role can also lead to the conclusion that a prohibited act has been promoted to such an extent that it can be regarded as actual directing. This can be the case in particular for the defendant who (a) has the authority and reasonable obligation to take measures to prevent or end prohibited conduct, (b) fails to take such measures and (c) consciously accepts the substantial risk that the prohibited acts will occur. In principle, non-executive directors can be prosecuted if they fulfil the conditions for actual directing. However, considering the division of duties (a supervisory role instead of an executive role), it is less likely that non-executive directors are qualified as factual leaders. In practice, we do not see a particular focus on non-executive directors.
15.	Has the attention recently given to the concept of corporate social responsibility increased the liabilities of directors?	Under Dutch law, directors are only liable if they personally acted "seriously culpable" (*persoonlijk ernstig verwijt*). This is a high threshold to establish liability. What is considered to be "seriously culpable" depends on the specific circumstances of the case. This open norm can be subject to changing societal expectations. There is an increasing demand on companies in the context of corporate social responsibility and in the long run this could affect such norm. So far, this demand has not led to (an increase of) directors' liability.

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Poland

No.	Question	Answer
1.	Which jurisdiction will be covered?	Poland
2.	How does the governance framework apply to different types of boards (one-tier or two-tier)?	The Polish governance framework is largely based on the Polish Commercial Companies Code, which regulates the types of companies available in Poland, the principles of management and supervision, and the duties of the corporate bodies. The Polish Commercial Companies Code allows for two board structures. The two-tier structure is available for all company types, while the one-tier structure is an option provided only for a simplified joint stock company and a European company. In a two-tier structure, management is the task of the management board, while supervision is the task of the supervisory board. The management board run the company's affairs and represent it before third parties. The supervisory board and the audit committee exercise permanent supervision over the company's operations, but have no right to issue binding instructions to the management board. In a one-tier structure, it is possible to appoint executive and non-executive directors. The specific responsibilities of non-executive directors include control over all of the company's operations. In terms of managing the company's operations and its representation, the division into executive and non-executive directors has only internal, organisational significance. Non-executive directors are treated the same as board members in a two-tier structure.
3.	Does the legal set-up (statute or case law) specify that the legal responsibilities of directors are towards the shareholders, the company as a legal person and/or society?	The Polish Commercial Companies Code specifies that the directors are responsible towards the company as a legal person "*for damage caused by an act or omission contrary to the law or the provisions of the articles of association, unless he is not at fault*". The directors are also responsible towards the shareholders, creditors and other third parties who have suffered damage as a result of the acts or omissions of the directors. Specific liability towards creditors applies to the company's insolvency (see question 11). The Polish Commercial Companies Code does not contain provisions on directors' responsibilities towards the society. However, directors representing Polish companies have many environmental protection responsibilities under other laws. These responsibilities include the need to obtain appropriate permits, keep measurements and records, and pay fees for the use of the environment.

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No.	Question	Answer
4.	Does the legal set-up (statute or case law) specify that the directors have to act with care, and that they have to avoid conflicts of interest? Do directors have to consider the interests of other parties, such as employees, creditors, or the environment? Do directors have to create value for the company and its shareholders?	The directors should exercise due diligence in the performance of their duties and maintain loyalty to the company. The general due diligence standard is related to the professional nature of the directors' activities. Court jurisprudence shows that it includes the obligation to: (a) know the law and the company's internal regulations, (b) anticipate the effects of the assumed actions, (c) take all available factual or legal measures to satisfy the company's liabilities, and (d) show forethought, diligence, caution and care to achieve a result consistent with the interests of the company. The increased standard of due diligence also means that the liability of a management board member is not excluded by ignorance of the company's finances or a subjective assessment of the company's financial situation, and in particular hope for future inflows and profits. These circumstances can be easily verified by a member of the management board. In practice, the court's assessment whether the director exercised the required diligence depends on the specifics of the situation. In the event of a conflict of interests, the directors should disclose the conflict of interests and refrain from participating in the adoption of the resolution on such matters. The directors may not, without the company's consent, engage in competitive business or participate in a competitive company as a member of its governing body. This also includes a director possessing at least 10% of shares in a competitive company or the right to appoint at least one member of its management board. In addition, in contracts between the company and a member of the management board and in disputes with such member, the company shall be represented by the supervisory board or an attorney in fact, appointed under a resolution of the general meeting. The directors have to consider the interests of an environment and the other parties, such as employees, creditors. In the event of bankruptcy, the interests of the company's employees and creditors prevail over those of the company's shareholders. In practice, this means that the claims of employees and third parties are satisfied before some claims of shareholders. There is no explicit obligation in law for directors to create value for the company or its shareholders; however, the directors should act in the best interest of company.

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No.	Question	Answer
5.	How can directors be held liable for breaching their duties or causing harm to the company or others?	The directors are liable to the company for damage caused by an act or omission contrary to the law or the provisions of the articles of association, unless they are not at fault. When assessing whether a particular director is at fault for a breach of law or the provisions of the articles of association, the due diligence principle referred to in the answer to question 4 should be followed. A body member shall not violate the duty to exercise due diligence if, remaining loyal to the company, he/she acts within the limits of justified economic risk, including based on the information, analyses and opinions which should be taken into account in given circumstances while making a detailed assessment. The directors are also liable for damages caused to shareholders or third parties, who may claim compensation from them. The directors of a limited liability company and simple joint stock company (this provision does not apply to other companies) are jointly and severally liable for its civil law obligations in case the enforcement carried out against the company by the creditors proves to be ineffective. This usually means that in order to pursue the company's obligations against a director, the creditor should first obtain an enforcement title against the company, and then the enforcement proceedings against the company should be discontinued by the bailiff. However, in certain cases, when the impossibility of enforcing from the company is obvious, or when, for example, the creditor invokes the ineffectiveness of enforcement carried out by another person, directors could be sued even without first suing the company itself. As far as liability for tax law obligations is concerned, such liability is borne by the directors of a limited liability company, a simple joint-stock company, and a joint-stock company. The directors are criminally liable for acting to the detriment of the company and failing to comply with certain statutory obligations resulting from the Commercial Companies Code and the Act on the National Court Register. The directors are criminally liable under the Penal and Fiscal Codes for persistent failure to pay tax on time and for failure to pay the collected tax on time. The civil, administrative and criminal liability of the directors in connection with the bankruptcy of the company will be described in question 11.

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No.	Question	Answer
6.	What is the liability framework for *de facto* (or shadow) directors?	*De facto* (or shadow) directors are not liable for damages caused to the company, its creditors or third parties. Only in exceptional cases could they be held liable under the general principles of the Civil Code, ie for causing culpable damage and for non-performance or improper performance of an obligation for reasons for which the shadow director is responsible. According to the Bankruptcy Law, concerning individuals who effectively manage businesses, the court may impose a ban on conducting business activities if the insolvency of the entrepreneur or deterioration of their financial situation is a result of intentional actions or gross negligence on the part of these individuals. *De facto* (or shadow) directors are equally liable under the Penal Code and Penal and Fiscal Code as the actual directors.
7.	Are executive and non-executive directors treated differently in terms of liability?	Members of the management board are more directly responsible for operational actions and decisions related to the day-to-day operations of the company, whereas the supervisory board plays a role in control and oversight. The responsibility of members of the management board is often more individual, while the responsibility of supervisory board members is associated with overseeing the management's conduct of the company's affairs. In the case of a simple joint-stock company organised in a one-tier system, both executive and non-executive directors are treated the same in terms of their liability. In this scenario, the division into executive and non-executive directors holds only internal organisational significance. A simple joint-stock company and one-tier system is still new a regulation in the Commercial Companies Code, and not so popular.
8.	Is the liability of directors capped up to a certain amount?	Each director's liability for damages extends to all of its assets.
9.	Can directors shield off their liability through management companies?	The directors can shield off their liability resulting from damages caused to the company, its creditors and third parties. In the case of limited liability companies and a simple joint-stock company, if enforcement against the company proves to be ineffective, the members of the management board are jointly liable for its obligations. However, they can exempt themselves from liability if they demonstrate specific conditions, such as if they prove that a bankruptcy petition was timely filed or if a restructuring proceeding was opened at the same time. The directors cannot shield off their criminal liability under the Penal and Fiscal Codes.

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No.	Question	Answer
10.	Are the directors' liability risks collective (ie when acting in a collegial body) or individual?	In the case of joint-stock companies, the general rule is that directors act collectively as a collegial body; therefore, they may share collective liability for their decisions and actions. This means that all directors involved in a particular decision or action may be jointly liable for any resulting damages or legal consequences. Of course, each of the members can exempt themselves from liability by demonstrating that they are not at fault. In the case of limited liability companies, the general rule is that each member of the management board can conduct the company's affairs and is therefore held responsible for those actions.
11.	What are the consequences of directors' liability in case the company goes bankrupt? Under what circumstances can directors be held personally liable for (part of) the debts of the bankrupt company?	Types of liability **Liability for damages** – persons obliged to file for bankruptcy of the company (including directors) are liable for damage caused as the result of a failure to submit the petition on time (ie no later than 30 days from the date on which the basis for declaring the company's bankruptcy, ie insolvency, occurred) unless they are not at fault. The petition returned due to the formal defects does not have any effects, and therefore does not release the directors from liability. The director may release him/herself from liability if he/she proves that within the time limit for submitting the bankruptcy petition, restructuring proceedings were opened or an arrangement was approved in the arrangement approval proceedings. In the event of a claim for compensation by a creditor of the insolvent debtor, it is presumed that the damage will cover the amount of the unpaid claim of that creditor against the debtor. The presumption is intended to facilitate the creditor's pursuit of a claim. It is of a rebuttable nature and does not limit the debtor's right to show that the creditor's damage is actually less. **Liability for civil obligations of the company** – the directors of a limited liability company and simple joint stock company (this provision does not apply to other companies) are jointly and severally liable for its civil law obligations if the execution against the company proves ineffective. Evidence of an enforcement's ineffectiveness could be a document confirming that it will not be possible to satisfy the entire claim in bankruptcy proceedings. It could also be a decision dismissing a petition for bankruptcy due to the fact that the debtor's assets are not even sufficient to cover the costs of the proceedings or are only sufficient to cover these costs, or if it is found that the debtor's assets are encumbered to such an extent that their remaining property is insufficient to cover the costs of the proceedings. For a director to be released from liability under this provision, the petition for bankruptcy must be filed not only within the time limit resulting from the Bankruptcy Law, but also at a time when it is possible to satisfy all creditors, at least partially. As with the liability described above, the director is discharged if within the time limit for filing for bankruptcy restructuring proceedings were opened or an arrangement was approved in the arrangement approval proceedings. In addition, even if the circumstances described above do not occur a director may be released from the liability if the creditor has not suffered any damage. **Liability for tax obligations of the company** – the directors are jointly and severally liable for their tax law obligations if the execution against the company proves ineffective. The rules of this liability are therefore similar to the liability for civil obligations. In the case of this liability, this is particularly important as the case law gives the tax authorities the right to independently determine the moment at which the bankruptcy petition should be filed.

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No.	Question	Answer
		Prohibition on conducting business activity – in the event of a director's culpable failure to file a bankruptcy petition on time, the court may prohibit that person from running a business on its own account or as part of a civil partnership, or to be a member of a body of a company, cooperative, foundation or association. The prohibition period can be from one to ten years. The prohibition proceedings can only be initiated at the request of the creditor, the proceedings authority, the prosecutor, the President of the Office of Competition and Consumer Protection (*Prezes Urzędu Ochrony Konkurencji i Konsumentów*) or the Financial Supervision Authority (*Komisja Nadzoru Finansowego*). The court may dismiss an application for prohibition on conducting business activity if a petition has been filed to open accelerated arrangement proceedings, arrangement proceedings or remedial proceedings, and the extent of the harm to the creditors is insignificant. **Criminal liability under the Commercial Companies Code** – a director who fails to file a bankruptcy petition, despite the existence of conditions justifying its bankruptcy, ie insolvency, is criminally liable under this provision. Liability for a breach of the obligation to file a bankruptcy petition arises both when the bankruptcy petition has not been filed at all, and when the petition has been filed but the deadline resulting from the Bankruptcy Law has lapsed. **Criminal liability under the Penal Code** – a debtor who, in the event of impending insolvency or bankruptcy, frustrates or reduces the satisfaction of its creditor by removing, hiding, selling, donating, destroying, actually or seemingly encumbering or damaging assets, is criminally liable. A debtor of several creditors who frustrates or restricts the satisfaction of their receivables by creating a new economic entity based on the provisions of law and transferring its assets to it, is criminally liable. Deliberate insolvency or bankruptcy is also punishable. A debtor who, in the event of impending insolvency or bankruptcy, and being unable to satisfy all creditors, repays or secures only some to the detriment of others, is criminally liable. The debtor only commits this crime when the payment or securing of selected creditors exceeds the limits of ordinary activities necessary to preserve the debtor's property in a non-deteriorated condition and to maintain it on a daily basis. The debtor may also pay or secure creditors who have priority over others. This liability of the debtor is shared with the persons who handle its property matters – including the executive directors, non-executive directors and shadow directors.

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No.	Question	Answer
12.	How often are directors sued for civil or criminal liability in court? What are the typical damages, fines, or penalties imposed on directors in such cases? Is there a procedure of plea bargaining in criminal court available to directors?	Directors' liability for damages and civil or tax obligations of the company applies to all their assets. Penalties imposed on the basis of the Penal Code or the Penal and Fiscal Code depend on many factors, including, first of all, the amount of damage and the number of creditors who are victims. Penalties can range from a fine, restriction of liberty and imprisonment. There are no publicly available statistics on how often directors are sued and what damages are awarded in cases against directors. The Polish Code of Criminal Procedure provides for plea bargaining procedure that is available also to directors. Until the first examination of all the accused persons at the main trial is completed, the accused may apply for a conviction and the imposition of a specific penalty without examining evidence. The court may grant an application for a conviction when: (a) the circumstances of the crime and guilt are not in doubt, (b) the objectives of the proceedings will be achieved despite the fact that the trial has not been conducted in its entirety and (c) the application is not opposed by the prosecutor and the victim who was duly notified of the date of the trial and instructed about the possibility of the submission of such an application by the accused. The court may also declare that the application of the accused will be granted provided that an amendment specified by the court is incorporated.
13.	Can shareholders or third parties sue directors directly or on behalf of the company? Under what circumstances can third parties other than shareholders sue directors (in)directly?	As described in section 5, the directors are liable to the company for damage caused by an act or omission contrary to the law or the provisions of the articles of association, unless they are not at fault. A company can bring an action against its directors for compensation for damages caused by them if it has approval from the general assembly. If the company does not bring an action for compensation for damage caused to it by the director within one year from the date of disclosure of the act causing the damage, each shareholder may bring an action for compensation for damage caused to the company. Shareholders or third parties may claim compensation from the directors if the damage was inflicted on them directly. On the basis of Polish regulations, it is controversial as to whether shareholders and third parties can claim compensation for so-called "indirect damage".

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No.	Question	Answer
14.	In practice, do prosecutors frequently seek redress for non-executive directors' wrongdoings?	Polish law does not specifically cover non-executive directors' wrongdoings. They are criminally liable under the same rules as executive directors. It comes from our experience that prosecutors quite rarely seek redress for directors' wrongdoings.
15.	Has the attention recently given to the concept of corporate social responsibility increased the liabilities of directors?	Polish laws regarding the directors' liabilities have not undergone any significant changes recently. However, the obligation for directors to maintain loyalty towards the company was recently added to the provisions of the Commercial Companies Code. Maintaining loyalty towards the company is in line with the standard of its professional management and the expected behaviour (attitude) of management board members. The new regulation only confirms the principle that has already been expressed in jurisprudence and literature.

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Slovakia

No.	Question	Answer
1.	Which jurisdiction will be covered?	Slovakia
2.	How does the governance framework apply to different types of boards (one-tier or two-tier)?	The Slovak Commercial Code (the Act No. 513/1991 Coll., the Commercial Code, as amended) (**SCC**) does not explicitly recognise one-tier/two-tier governance structure, but provides several options for governance structures depending on the legal form of the respective company. The mandatory corporate bodies in limited liability companies are as follows: (a) the General Assembly, being the highest decision-making body of the company comprising all shareholders of the company; and (b) one or more directors who act on behalf of the company. Shareholders of limited liability company may decide to set up a Supervisory Board which shall consist of at least three members and which supervises the directors and the execution of the company's business activities. The mandatory corporate bodies in joint-stock companies are as follows: (a) the General Assembly; (b) the Board of Directors, whereas the number of board members is not limited by a minimum or maximum number; and (c) the Supervisory Board, which shall consist of at least three members.

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No.	Question	Answer
3.	Does the legal set-up (statute or case law) specify that the legal responsibilities of directors are towards the shareholders, the company as a legal person and/or society?	Directors who act on behalf of a limited liability company owe a duty of care to the company and all its shareholders, and must subordinate their personal interests to those of the company and its shareholders. The Slovak courts have confirmed and enforced this duty of care.
4.	Does the legal set-up (statute or case law) specify that the directors have to act with care? And that they have to avoid conflicts of interest? Do directors have to consider the interests of other parties, such as employees, creditors, or the environment? Do directors have to create value for the company and its shareholders?	The SCC stipulates a general duty of care of directors and obligation of directors to act in line with the interests of the company and all of its shareholders. In particular, they are obliged to obtain and, when making decisions, take into account all available information regarding the subject of the decision, to maintain confidentiality about confidential information and facts, the disclosure of which to third parties could cause damage to the company or threaten its interests or the interests of its shareholders, and in the exercise of their powers, they must not prioritise their interests, the interests of only some shareholders or the interests of third parties before the interests of the company. The SCC does not recognise the concept of conflict of interest as such. The SCC however partially addresses the conflict of interest by way of provisions on "ban on competition", pursuant to which, the directors are prohibited from conducting the following activities: (a) to enter into transactions in their own name or on their own account which are related to the company's business; (b) to facilitate the deals of the company for other parties; (c) to participate in the business of another company as a shareholder with unlimited liability; and (d) to act as a statutory body or as a member of a statutory or other body of another legal person having a similar scope of business, unless the company, of whose statutory body they are a member, has any interest in the other company's business. The SCC does not stipulate an explicit obligation of directors to consider the interests of other parties, such as employees, creditors, nor the environment. The SCC also does not provide for an obligation of directors to create value for the company and its shareholders.

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No.	Question	Answer
5.	How can directors be held liable for breaching their duties or causing harm to the company or others?	Directors who have breached their duties in the performance of their function are jointly and severally obliged to compensate the damage they have caused to the company. The directors shall not be liable for damage if they prove that they proceeded in the performance of their function with professional care and in good faith that they acted in the interest of the company. The directors shall further not be liable for any damage caused to the company upon implementation of a resolution of the general assembly, unless the resolution conflicts with the law, the memorandum of association, or the articles of association. If there is a Supervisory Board established within a company, the directors shall not be discharged of their liability if their conduct has been approved by the Supervisory Board. The conclusion of agreements on limitation or exclusion of directors' liability is prohibited.
6.	What is the liability framework for *de facto* (or shadow) directors?	*De facto* (or shadow) directors have the same duties and liability as regular directors under the SCC. Article 66(7) of the SCC defines *de facto* director as "*a person who actually exercises the function of a statutory body without having been appointed or designated to such function*".
7.	Are executive and non-executive directors treated differently in terms of liability?	The concept of non-executive directors is not recognised by the SCC.
8.	Is the liability of directors capped up to a certain amount?	The directors' liability is not capped.

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No.	Question	Answer
9.	Can directors shield off their liability through management companies?	The concept of shielding off liability by directors through management companies is not recognised in Slovakia – the SCC allows for appointment of natural persons as directors only.
10.	Are the directors' liability risks collective (ie when acting in a collegial body) or individual?	Directors are jointly and severally liable to compensate the damage they have caused to the company. The liability of directors is objective, ie it will be assessed regardless of the director's extent of culpability. See also question 5 in this regard.
11.	What are the consequences of directors' liability in case the company goes bankrupt? Under what circumstances can directors be held personally liable for (part of) the debts of the bankrupt company?	In the event of the company's insolvency, directors are personally liable for: (a) breach of the obligation to prevent the company's bankruptcy – directors are obliged to constantly monitor the company's financial situation, as well as the status of the assets and liabilities, so that they can learn about impending bankruptcy in time and, without unnecessary delay, take suitable and adequate measures to avert it. Directors are also obliged to refrain from actions that could threaten the viability of the debtor's business. If the directors do not have enough professional knowledge or experience, they are obliged to seek the help of an expert to assess whether the company is at risk of bankruptcy and what measures need to be taken to overcome the impending bankruptcy. The aforementioned obligations are related to the director's duty of care and professional judgement and their breach establishes liability for damage; and (b) the failure to submit a bankruptcy petition with the relevant court within 30 days from the date on which they became aware of, or in the exercise of professional care could have become aware of, the ground for filing of the petition. The directors shall be liable for the damage caused to the creditors and shall be obliged to pay a fine in the amount of EUR12,500. There are certain statutory exceptions from the liability and obligation to pay a fine such as entrusting the administrator with the preparation of a restructuring plan and filing a motion to authorise the restructuring within 30 days from the date on which the director became aware or could have become aware of the bankruptcy, which was approved by the court, etc.

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No.	Question	Answer
12.	How often are directors sued for civil or criminal liability in court? What are the typical damages, fines, or penalties imposed on directors in such cases? Is there a procedure of plea bargaining in criminal court available to directors?	The Criminal Code contains several provisions that explicitly criminalise the actions of directors, such as non-payment of wages and severance pay, credit fraud, fraudulent bankruptcy, unfair liquidation, and misuse of information in commercial dealings. Damage and restitution claims against directors have been initiated in Slovakia as well. Directors are however not sued frequently for neither civil nor criminal liability in court. The Slovak criminal legislation allows plea bargains, which are not restricted when it comes to directors. The following conditions need to be fulfilled for the purpose of the plea bargains: (a) the results of the investigation or summary investigation sufficiently justify the conclusion that the act is a criminal offence; (b) the act was committed by the accused; (c) the accused has confessed to committing the act; (d) the accused has pleaded guilty; and (e) the evidence points to the truthfulness of the accused's confession. The accused pleads guilty to the offence and, based on the agreement, the prosecutor expresses his agreement with the proposed criminal sentence. The accused *de facto* waives his right to a hearing and a trial, and the court imposes a sentence on him/her without taking evidence at the main hearing. The plea bargain is concluded between the prosecutor and the accused, but is still subject to approval by the court.

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No.	Question	Answer
13.	Can shareholders or third parties sue directors directly or on behalf of the company? Under what circumstances can third parties other than shareholders sue directors (in)directly?	Any shareholder is entitled, on behalf of the company, to sue directors for the damage caused to the company. In addition to the shareholders, the company's creditors (in their own name and on their own account) may sue directors for the damage caused to the company as well, provided that the creditor has a claim against the company that the creditor is impossible to satisfy from the company's assets.
14.	In practice, do prosecutors frequently seek redress for non-executive directors' wrongdoings?	N/A, since the concept of non-executive directors is not recognised by the SCC.
15.	Has the attention recently given to the concept of corporate social responsibility increased the liabilities of directors?	No, the SCC has not undergone any significant changes recently (neither concerning the concept of corporate social responsibility). Recent case law does not indicate any development when it comes to corporate social responsibility, whereas courts pay rather no attention to the concept in question in their decision-making practice.

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Spain

No.	Question	Answer
1.	Which jurisdiction will be covered?	Spain
2.	How does the governance framework apply to different types of boards (one-tier or two-tier)?	The governance framework for one tier boards in Spain is mainly regulated by the Spanish Companies Act (*Real Decreto Legislativo 1/2010 de 2 de julio de 2010, Ley de Sociedades de Capital*) (**LSC**), which sets out the general aspects of the corporate governance of Spanish companies, including the functions and responsibilities of the board of directors. One tier boards in Spain are composed of a single body of directors, who collectively exercise the management and supervision of the company. The LSC establishes the general principles and obligations of the board of directors, such as the fiduciary duty, the duty of care, the duty of loyalty, the duty of confidentiality, and the duty to avoid conflicts of interest. The LSC also regulates the composition, appointment, removal, remuneration, and liability of the directors, as well as the functioning of the board.

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No.	Question	Answer
3.	Does the legal set-up (statute or case law) specify that the legal responsibilities of directors are towards the shareholders, the company as a legal person and/or society?	The LSC sets out the specific duties that a diligent director is expected to perform towards the company as a legal person. The LSC does provide for the obligation of directors to act on the best interest of the company and resolutions taken against the corporate interest (including those in which majority shareholders abuse of their rights against minority shareholders) can be challenged. Legal scholars have traditionally defined corporate interest as "*the common interest of all shareholders to maximize the value of their investments*". This approach only takes into consideration the interest of shareholders. However, this approach is now being challenged by some scholars, who support that the stakeholders who have an interest in the company should also be considered in the director's decision-making process. The latter approach is not reflected in Spanish regulations so far; however, it has been included as a recommendation in the corporate governance code for listed companies. Implementation of the NFRD has obliged companies (up certain level of assets or turnover) report extensively on ESG matters and such report has to be approved by the general shareholders in the corporate governance code for listed companies. Future CSDD will include new responsibilities of director with respect to stakeholders. The LSC does not provide for specific fiduciary duties that directors have to comply with regarding shareholders and/or society. However, directors have certain responsibilities towards shareholders, including convening both the ordinary and extraordinary shareholders' meeting, requesting the mercantile registry to appoint auditors in the event the shareholders' meeting fails to appoint them and drawing up the annual accounts and the annual report – required within three months from the end of the company's financial year – for them to be approved by the general shareholders' meeting.

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No.	Question	Answer
4.	Does the legal set-up (statute or case law) specify that the directors have to act with care, and that they have to avoid conflicts of interest? Do directors have to consider the interests of other parties, such as employees, creditors, or the environment? Do directors have to create value for the company and its shareholders?	(a) The LSC establishes that directors have to comply with a duty of "*fidelity*" (or duty of care), which consists on the following: (i) directors have to perform their positions and comply with the duties imposed by the laws and the by-laws, acting with the diligence of a proper businessman, having in mind the nature of their standing and the duties assigned; (ii) directors must have the appropriate dedication to the company and shall adopt the relevant measures for the right direction and management of the company; and (iii) directors have the duty to require and the right to gather from the company the appropriate and necessary information in order to meet their obligations. (b) With respect to conflicts of interest, Law 31/2014 (which amended the LSC to improve corporate governance) (*Ley 31/2014, de 3 de diciembre, por la que se modifica la Ley de Sociedades de Capital para la mejora del gobierno corporativo*) expressly introduced the duty to avoid conflict of interest situations. In particular, such duty obliges the director to refrain from: (i) carrying out transactions with the company, except ordinary transactions, made in standard conditions for clients and with minor significance; (ii) using the name of the company or invoking their position as directors of the company in order to unduly influence the closing of private transactions; (iii) using corporate assets or including confidential information of the company, with private purposes; (iv) taking advantage of the business opportunities of the company; (v) obtaining advantages or compensations from third parties other than the company and its group of companies related to the performance of their duties, except when these are mere courtesy attentions; and (vi) carrying out activities for themselves or by third parties that constitute an effective existing or potential competence with the company or that in any other manner consist a permanent conflict with the company. (c) The duties of fidelity and loyalty are towards the company as a legal person. However, it could be construed that acting in the company's best interest also requires considering the interests of the company's stakeholders. See answer to question 3 on taking into account stakeholders' interest. (d) There is no legal duty to create value for the company or its shareholders, but acting in the best corporate interest means that decisions should be taken with the purpose of maximising such value and directors will be liable if the required diligence standards are not met. The diligence standard will be considered to have been met when the directors act in good faith, without personal interest in the matter subject to decision, with enough information and under an appropriate decision-making process. In this sense, the business judgement rule is established in the LSC as a valid defence against errors of judgement. In fact, directors' accountability for the adoption of strategic and business decisions is limited when there is not a breach of the duty of diligence but an error of judgement.

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No.	Question	Answer
5.	How can directors be held liable for breaching their duties or causing harm to the company or others?	There are several legal mechanisms available for requesting that the management body or director carrying out a harmful act be held liable[9]. (a) **Liability under LSC:** (i) Action taken by the company (*acción social de responsabilidad*): the company may decide to bring legal action against the directors requesting liability by simple majority of the votes of the shareholders attending a shareholders' meeting. In this regard, a resolution may be adopted by the shareholders even if this was not included on the agenda of the meeting and it entails the automatic removal of the directors in question. In the event: (A) directors do not call the shareholder's meeting; (B) the shareholders' meeting decides not to pursue an action against the management body or directors; or (C) within a month from the adoption of the resolution to file a claim against the director(s), no action has been initiated, the LSC grants minority shareholders (ie those who individually or jointly hold, at least, 5% of the company's shares capital) standing to file suit against the directors or the management body. Furthermore, the aforementioned shareholders may take legal actions directly when these are based on the infringement of the duty of loyalty, without the requirement of having to submit the decisions to the general shareholders' meeting prior to bringing the claim. The company's creditors are, likewise, entitled to call for director's liability if the company or its shareholders have not done so, provided that the company's assets are not sufficient for the payment of their credits. (ii) Individual action (*acción individual de responsabilidad*): Shareholders and third parties who believe they have been directly harmed by the director's activity are entitled to bring an individual action against the directors for any damages they have suffered[10], (b) **Liability under Insolvency Law** (i) Liability in the "qualification phase" of insolvency proceedings. The Royal Legislative Decree 1/2020, dated 5 May, which approves the consolidated text of the Insolvency Law (*Real Decreto Legislativo 1/2020, de 5 de mayo, por el que se aprueba el texto refundido de la Ley Concursal*) (the **Insolvency Law**) regulates the possibility to qualify an insolvency as "culpable" (guilty, as opposed to the insolvency that has been caused fortuitously), when a company has been placed into liquidation or when a composition agreement with creditors has been approved. A "culpable" insolvency will be declared in circumstances where the legally appointed or *de facto* directors of the insolvent company (or those who held such positions in the two years prior to the declaration of insolvency) have acted on wilful misconduct or with gross negligence and the relevant acts have caused or aggravated the insolvency status of the Company. The insolvency administration and creditors who represent, at least, 5% of the debt (or who have debt over one million euros) can file within insolvency proceedings a report on the facts they deem relevant for the qualification of the insolvency as "*culpable*".

9_Note that this Note does not cover Tax, Labour and Environmental liability.

10_Additionally, pursuant to Article 1902 of the Spanish Civil Code, any third party who has been affected by the breach of directors' duties may bring extra-contractual liability. In order to be successful before the Spanish Courts, the Supreme Court has traditionally required the plaintiff to prove: (i) that the defendant has carried out an action or, on the contrary, when obliged to act has failed to act; (ii) that the defendant's action or omission caused harm to the plaintiff; and (iii) that the harm caused to the plaintiff is directly connected (is a consequence of) to the defendant's action or omission. However, please bear in mind that although this is a possibility from a Spanish Law perspective, in practise, director's liabilities are never sought through this route (because there is a specific action (the individual action) for these claims).

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No.	Question	Answer
6.	What is the liability framework for *de facto* (or shadow) directors?	The liability regime explained above also applies to *de facto* directors. Note that according to the LSC, a *de facto* director is a person that, without any title or with a null or extinguished title, effectively executes the authorities inherent to the position of a director, as well as the person under whose instructions the directors of the company act.
7.	Are executive and non-executive directors treated differently in terms of liability?	Both executives and non-executives are subject to the general regime of liability. However, Spanish regulations provide for the possibility to exempt a director from liability if: (a) they did not participate in the adoption and execution of the harmful resolution (eg they were absent), as they were unaware of the existence of such a resolution; or (b) if they were aware of the adoption of the harmful resolution, they did their best to prevent any damages, or, at least, they expressed their opposition to the adoption of the harmful resolution.
8.	Is the liability of directors capped up to a certain amount?	Liability is not capped to a certain amount. It will depend on the harm caused to either the company, shareholder or creditor bringing the claim forth as a result of the directors' "*acts carried out in breach of their duties inherent to their office provided that there has been wilful misconduct or gross negligence*". Additionally, note that when a director infringes their duty of loyalty, there are other remedies, in particular, an action for the annulment of any act or contract entered into by a director in violation of the duty of loyalty can be brought by any third party affected by the director's acts. There could also be an action of challenge; an action of cessation; an action of removal of effects; or an action of unjust gains (with their subsequent economic consequences).
9.	Can directors shield off their liability through management companies?	No. The individual representative (ie natural person) of a legal entity being a director shall be subject to the same duties and shall be jointly and severally liable with such legal entity having the condition of director. There is no rule or case law concerning management companies. In principle, directors of such companies, unless appointed representatives of the management company in the board of directors, are not liable, because the management company is a separate legal entity. However, arguably, if the management company has been set up in order to avoid liability precisely, it is likely that it could be considered that the lifting of the veil doctrine should be applied, and liability transferred to the directors of the management company themselves.

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No.	Question	Answer
10.	Are the directors' liability risks collective (ie when acting in a collegial body) or individual?	As mentioned in question 7 above, all members of the management body which passed the resolution or performed the act causing damage shall be jointly and severally liable (*responsables solidarios*), except if: (a) they did not participate in the adoption and execution of the harmful resolution (eg they were absent), as they were unaware of the existence of such a resolution; or (b) if they were aware of the adoption of the harmful resolution, they did their best to prevent any damages, or, at least, they expressed their opposition to the adoption of the harmful resolution. Legal scholars debate on what are the consequences of the liability of directors after the last reform of the LSC in which the duty of care of directors is qualified by the nature of their position and by the function entrusted to the directors.
11.	What are the consequences of directors' liability in case the company goes bankrupt? Under what circumstances can directors be held personally liable for (part of) the debts of the bankrupt company?	With respect to liability arising from insolvency, directors could be considered liable in the qualification phase (*sección de calificación*) for their actions prior to (or during) the insolvency if it is determined that they have caused or aggravated the insolvency (*concurso culpable*). In case of aggravated insolvency, directors may be: (a) required to cover all or part of the debtor's financial imbalance; (b) required to pay damages to the insolvency estate; (c) prevented from managing third-party assets from two to 15 years; and (d) required to return assets received from the insolvency estate as well as lose their position as creditors of the company. In this regard, under the Insolvency Law, directors could be held liable if they participate in the following actions: (a) conceal assets for the detriment of creditors; (b) move/hide assets in order to prevent or jeopardise any enforcement; (c) make fraudulent transfers of assets or rights; (d) breach accounting obligations; (e) not file for insolvency in due course; (f) perform any acts to show a fake financial position of the debtor; (g) not cooperate with the insolvency administration or the insolvency court; or (h) file false or misleading documentation at court.
12.	How often are directors sued for civil or criminal liability in court? What are the typical damages, fines, or penalties imposed on directors in such cases? Is there a procedure of plea bargaining in criminal court available to directors?	Proceedings requesting directors' liability are very usual both in criminal and civil court. The damages will consist on the compensation of the harm caused to whomever brings forth the claim (whether it be the company, a creditor, a shareholder or an affected third party), whichever that amount may be, depending on the case. Although Spanish Law does not regulate plea bargaining (as understood in common law jurisdictions), pursuant to Articles 655, 688,784.3 and 787 of Royal Decree of September 14, 1882, by which the Criminal Procedure Law, there are conformity agreements (*acuerdos de confirmidad*), which are mechanisms that resemble plea bargaining. In essence, conformity agreements are those reached between the prosecution and the defence, whereby the accused recognises the facts attributed to them, waives the presumption of innocence and thus frees the prosecution from the burden of proof. In exchange, the sentence provisioned for the crime is reduced in one third. Note, however, that this mechanism is only applicable for crimes with sentences that do not exceed six years of imprisonment, and provided that the judge or court considers it appropriate in view of the personal circumstances of the offender, the nature of the act, his or her behaviour and the damage caused or the danger arising from it.

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No.	Question	Answer
13.	Can shareholders or third parties sue directors directly or on behalf of the company? Under what circumstances can third parties other than shareholders sue directors (in)directly?	Under an action taken by the company (*acción social de responsabilidad*) the original standing to file a suit belongs to the company. Therefore, the action will always be brought in the interest of the company, for acts that have harmed the company and not for acts that have harmed its shareholders or creditors. In this sense, the Supreme Court (Civil Chamber)[11] has determined that "*what characterizes the social action, is that the damage is done to the company*". In case neither the company nor the shareholders have initiated the action (see question 5 above regarding shareholders' standing), the law grants subsidiary standing to creditors, as long as the company's assets are insufficient to satisfy their claims. However, note that any favourable judgement would oblige to compensate the damage caused to the company and not to the shareholders or the creditor who, if applicable, filed the action. Regarding an individual claim (*acción individual*) it can be initiated by creditors or shareholders directly. In this sense, the standing of the third party to file the lawsuit is not subject to a prior refusal by the company to exercise it, and any amount that the managers were ordered to pay would go to the claimants and not the company itself.
14.	In practice, do prosecutors frequently seek redress for non-executive directors' wrongdoings?	As mentioned in question 7, non-executive directors are subject to the same liability regime as executive directors and said liability is joint and several. Thus, in most cases, actions (whether they be civil or criminal) are directed towards all directors.
15.	Has the attention recently given to the concept of corporate social responsibility increased the liabilities of directors?	Yes. The incorporation of corporate social responsibility to the company's bylaws as part of the object of the company may qualify the standard of diligence directors may face in the context of an individual liability action, as it could broaden: (a) standing for third parties who can initiate an action; and (b) the range of unlawful behaviours –contrary to the bylaws- that can be attributed to the directors.

11_Supreme Court Decision no. 1194/2000 of 29 December 2000.

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2. Directors' duties and liability in Sweden, Finland and Bulgaria

Bulgaria

No.	Question	Answer
1.	Which jurisdiction will be covered?	Bulgaria
2.	How does the governance framework apply to different types of boards (one-tier or two-tier)?	The laws (Commercial law, Public Offering of Securities Act, Law for Public Enterprises/State-Owned Enterprises, Law for Credit Institutions-Banks) and the National Corporate Governance Code envisage one-tier and two-tier governance structure. The National Corporate Governance Code includes detail specification of the functions of one-tier structure (Board of Directors) and of the Supervisory Board and Management Board (two-tier structure). The Code prescribes clear division and communication between the Supervisory Board and Management Board.

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No.	Question	Answer
3.	Does the legal set-up (statute or case law) specify that the directors have to act with care?	The laws (Commercial Act, Public Offering of Securities Act, Law for Public Enterprises/State Owned Enterprises; Law for Credit Institutions- Banks) and the National Corporate Governance Code specify that the directors have to act with care.
	And that they have to avoid conflicts of interest?	The laws (Commercial Act, Public Offering Securities Act, Law for Credit Institutions-Banks), as well the National Corporate Governance Code specify that the board members have to avoid conflict of interest.
	Do directors have to consider the interests of other parties, such as employees, creditors, or the environment?	The Public Offering of Securities Act (Art.110b) stipulates that any public company shall ensure equal treatment of the shareholders enjoying equal status, including participation and voting right in the company's general meeting.
	Do directors have to create value for the company and its shareholders?	The National Corporate Governance Code (chapter Boards; chapters Stakeholders) stipulates stakeholders engagement of corporate boards (Board of Directors; Supervisory Board)
4.	Is the liability of directors capped up to a certain amount?	Commercial Act, Law for Public Offering of Securities, Ordinance for public enterprise/SOEs stipulate that board members have to deposit guarantee bond equal to three months remuneration. This is a guarantee against of non-compliance with the law (breaking the law) of the board members.
5.	Are the directors' liability risks collective (ie when acting in a collegial body) or individual?	Collegial: Commercial Act (Art. 237., Para 1) The members of the boards shall have equal rights and obligations, regardless of any internal allocation of the functions among them and the grant of right of management and representation to some of them. Commercial Act (Art 240, para 2) The members of the boards shall be jointly and severally liable for any damages caused through a fault of theirs.

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No.	Question	Answer
6.	What are the consequences of directors' liability in case the company goes bankrupt? Under what circumstances can directors be held personally liable for (part of) the debts of the bankrupt company?	For approximately ten years, proceedings have been going on against the directors of a financial institution that went in bankrupt. There is no final decision yet.
7.	How often are directors sued for civil or criminal liability in court?	No information.
	What are the typical damages, fines, or penalties imposed on directors in such cases?	The Public Offering of Securities Act (Chapter 21) envisages administrative responsibilities and sanctions for different damages.
	Is there a procedure of plea bargaining in criminal court available to directors?	The Penal Code (Art 260 a) envisages prison(four years) and fine up to BGN3000 (approx. EUR1500) for corporate board members for inside trading.
8.	Can shareholders or third parties sue directors directly or on behalf of the company? Under what circumstances can third parties other than shareholders sue directors (in)directly?	Yes. Commercial Act and Public offering of Securities Act envisage the right of the shareholders to sue the corporate boards members Public Offering of Securities Act (Art 118) stipulates that: any persons holding, whether jointly or separately, at least 5% of the capital of any public company may bring before the court the actions of the company against third parties upon an omission of the management bodies of the said company to do so should any such omission jeopardise the interests of the company.

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Finland

No.	Question	Answer
1.	Which jurisdiction will be covered?	Finland
2.	How does the governance framework apply to different types of boards (one-tier or two-tier)?	One-tier board is predominant. In listed companies, the managing director/CEO is usually not a member of the board. Companies Act regulate limited liability companies. The Corporate Governance Code is part of the regulations of the Helsinki Stock Exchange and is binding on listed companies.
3.	Does the legal set-up (statute or case law) specify that the legal responsibilities of directors are towards the shareholders, the company as a legal person and/or society?	According to Chapter 1, Section 8 of Companies Act: "Duty of directors The directors of the company shall act with due care and promote the interests of the company." If not, and damage is caused, directors may be liable for damages. The burden of proof is reversed when the damage was caused by a breach of a specific clause of the Companies Act or Articles of Association or in a related party transaction.

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No.	Question	Answer
4.	Does the legal set-up (statute or case law) specify that the directors have to act with care? And that they have to avoid conflicts of interest? Do directors have to consider the interests of other parties, such as employees, creditors, or the environment? Do directors have to create value for the company and its shareholders?	**Duty of care** The duty of care of directors includes a requirement of loyalty towards the company. **Conflict of interest** Situations where there is a conflict of interest, are regulated by disqualification as follows. “Chapter 6 of Companies Act Section 4 **Disqualification** A Member of the Board of Directors shall not participate in the consideration of a matter pertaining to a contract between the Member and the company. A Member shall likewise not participate in the consideration of a matter pertaining to a contract between the company and a third party, if the Member is to derive an essential benefit in the matter and that benefit may be contrary to the interests of the company. The provisions of this section on a contract apply correspondingly to other legal transactions and court proceedings. Section 4a (512/2019) **Disqualification of a Member of the Board of Directors of a listed company** By derogation from what is provided in the second sentence of section 4 above, a Member of the Board of Directors of a listed company shall not, in the Board of Directors of the company or its subsidiary, participate in the consideration of a contract where a party to the contract is in a related-party relationship to him or her as referred to in chapter 1, section 12 and the legal transaction is outside the ordinary course of business of the company or it is not concluded on normal market terms. A decision concerning such contract is valid if the decision is supported by the required majority of the Members of the Board of Directors of the listed company or its Finnish subsidiary who are not in a related-party relationship to the matter to be decided. The provisions of this section on a contract apply correspondingly to other legal transactions and court proceedings. The Board of Directors of a listed company decides on a transaction by the listed company referred to in section 4 and in subsection 1 or 2 of this section unless otherwise provided in this Act or in the Articles of Association on the division of competence in the company. The provisions of this section above do not apply to a transaction between a listed company and its subsidiary, if the company and its other subsidiaries own all the shares in the first-mentioned subsidiary or, if the company and its subsidiaries do not own all the shares in the first-mentioned subsidiary, another party in a related-party relationship has no financial interest in the first-mentioned subsidiary.”

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No.	Question	Answer
		Interests of other parties Creditors, employees and the environment are protected by specific legislation, such as bankruptcy crimes, labour law and environmental law. Eg there is a Supreme Court (2016:58) case where board members were given a criminal sentence for gross negligence when they did not familiarise themselves with the environmental licence of the sole factory of the company. Creditors have many protective clauses in the Companies Act. **Creating value for shareholders** According to the Companies Act "Chapter 1, Section 5 Purpose The purpose of a company is to generate profits for the shareholders, unless otherwise provided in the Articles of Association." According to the explanatory text of the law (government bill): "The provision does not require a company to generate as much distributable assets as possible in short term. The generation of profits is assessed in longer term. The generation of profits in long term and creation of share value often require that companies apply socially acceptable standards even if it is not required by legislation. For example, public image of a company may be of significant importance in relation to business and value of company's shares."
5.	How can directors be held liable for breaching their duties or causing harm to the company or others?	The company or its bankruptcy estate may sue directors for causing damage to the company. A decision of the General Meeting on the discharge of Directors from liability is not binding, if the General Meeting has not been given essentially correct and adequate information about the decision or measure underlying the liability in damages. A decision on discharge from liability is not binding on the bankruptcy estate of the company or the administrator referred to in the Restructuring of Enterprises Act, if the company is declared bankrupt or if restructuring proceedings are begun upon an application filed within two years of the decision. Derivative action is explained below.

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No.	Question	Answer
6.	What is the liability framework for *de facto* (or shadow) directors?	Lifting/piercing the corporate veil has long been recognised in the Finnish legal literature/jurisprudence, although not stipulated in the Companies Act. With its KKO 2015:17 decision, the Supreme Court of Finland accepted veil piercing without the support of any statutory provision. The decision directly addressed veil piercing, shed some light on its requirements, and confirmed the relevance of some opinions found in legal literature. Based on KKO 2015:17, the veil piercing requirements can be defined as follows: (a) The use of corporate group structure, intercorporate relationships or shareholder's control; (b) in a way that is artificial and reprehensible; and (c) causing damage to the corporation's creditors or evasion of a legal duty. Juris Doctor thesis on the topic by Anssi Kärki: Piercing the Corporate Veil in Finland **lauda.ulapland.fi/bitstream/handle/10024/64105/Karki.Anssi.pdf?sequence=1&isAllowed=y**
7.	Are executive and non-executive directors treated differently in terms of liability?	No. However, as for executive directors, the Companies Act covers only the managing director/CEO, no other executive team members. Naturally, there may be situations where executives or managers are found to have breached specific legislation such as labour or environmental law and may be liable for even criminal sanctions.
8.	Is the liability of directors capped up to a certain amount?	No.
9.	Can directors shield off their liability through management companies?	No, only physical persons can be elected to be board members.

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No.	Question	Answer
10.	Are the directors' liability risks collective (ie when acting in a collegial body) or individual?	Joint and several liability.
11.	What are the consequences of directors' liability in case the company goes bankrupt? Under what circumstances can directors be held personally liable for (part of) the debts of the bankrupt company?	Bankruptcy as such does not cause liability. However, the Criminal Act contains rules for bankruptcy crimes. And normal duty of care stipulated by Companies Act also applies. Bankruptcy cases are such that there are court cases regarding directors' duties.
12.	How often are directors sued for civil or criminal liability in court? What are the typical damages, fines, or penalties imposed on directors in such cases? Is there a procedure of plea bargaining in criminal court available to directors?	Not often. But there are some cases. If it is a criminal act, fines and possibly damages. In civil cases, damages. No plea bargaining.

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No.	Question	Answer
13.	Can shareholders or third parties sue directors directly or on behalf of the company? Under what circumstances can third parties other than shareholders sue directors (in)directly?	Yes, a derivative claim is stipulated in the law. According to Companies Act Chapter 22, Section 7 "One or several shareholders have the right to bring an action in their own name for the collection of damages to the company, if it is probable at the time of filing of the action that the company will not make a claim for damages and: 1) the plaintiffs hold at least one tenth (1/10) of all shares at that moment; or 2) it is proven that the non-enforcement of the claim for damages would be contrary to the principle of equal treatment The shareholders bringing the action bear the legal costs themselves, but they have the right to be reimbursed for the same by the company, in so far as the funds accruing to the company by means of the proceedings suffice for the same. A shareholder does not have the right to damages for loss caused to the company."
14.	In practice, do prosecutors frequently seek redress for non-executive directors' wrongdoings?	No. However, if a company has neglected the payment of taxes before bankruptcy and has paid other bills, the public sector will seek redress from directors.
15.	Has the attention recently given to the concept of corporate social responsibility increased the liabilities of directors?	It may have an impact in the interpretation of what is a breach of duty of care or specific legislation, such as environmental law (eg the environmental Supreme Court case mentioned above).

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Sweden

No.	Question	Answer
1.	Which jurisdiction will be covered?	Sweden
2.	How does the governance framework apply to different types of boards (one-tier or two-tier)?	One-tier board is predominant, although the Swedish corporate governance model differs from the traditional one-tier model as the shareholders' meeting has a clearly stated superior position in relation to the company's board and CEO. The board of directors usually consists of members who are not employed by the company. The board of directors has extensive authority to decide on how the company is to be run, but the board can be dismissed by the shareholders' meeting. The CEO is appointed and may be dismissed by the board at any time. The regulatory framework primarily includes the Swedish Companies Act, which stipulates which bodies are to be found in a company and the tasks and responsibilities of each body. In addition, the Swedish Corporate Governance Code (the **Code**) is also applicable for companies listed in Sweden. The Code is a collection of guidelines for the good corporate governance of a company and they apply to the regulated market on which a company's shares are admitted to trading. The Code complements the law by setting higher requirements in some areas, while allowing companies to deviate from them if it is believed that this would lead to better corporate governance in the individual case.
3.	Does the legal set-up (statute or case law) specify that the legal responsibilities of directors are towards the shareholders, the company as a legal person and/or society?	The overall duties of the Board are regulated by Chapter 8 Section 4 of the Swedish Companies Act. The Board is responsible for the organisation of the company and the management of the company's affairs. The Board must regularly assess the company's and the group's financial position, as well as ensuring that the company's organisation is arranged so that the company's accounts, asset management, and finances in general are satisfactorily monitored.

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No.	Question	Answer
4.	Does the legal set-up (statute or case law) specify that the directors have to act with care? And that they have to avoid conflicts of interest? Do directors have to consider the interests of other parties, such as employees, creditors, or the environment? Do directors have to create value for the company and its shareholders?	**Duty of care** The Board hold fiduciary positions in relation to the company and must therefore exercise due care and act in what they consider to be the interests of the company. They are required to comply with the Swedish Companies Act and other applicable rules and regulations and must not take actions that would harm the company or that are likely to result in an undue advantage to a shareholder or any other person, to the disadvantage of the company or another shareholder. **Conflicts of interest** Conflicts of interest are regulated in Chapter 8, Section 23 of the Companies Act which states that: "A member of the board of directors may not participate in a matter regarding: an agreement between the board member and the company; an agreement between the company and a third party, where the board member in question has a material interest which may conflict with the interests of the company; or an agreement between the company and a legal person which the board member is entitled to represent, whether alone or together with another person. The provisions of the first paragraph shall not apply where the board member owns all of the shares in the company, whether directly or indirectly through a legal person. Nor shall the provisions of the first paragraph, point 3 apply where the party contracting with the company is an undertaking in the same group or in a group of undertakings of a corresponding nature. Litigation or other legal proceedings shall be equated with agreements referred to in the first paragraph." **Interests of other parties** Creditors, employees and the environment are protected by specific legislation, such as bankruptcy law, labour law and environmental law. Creditors have many protective clauses in the Companies Act. Rules concerning the protection of creditors are in most cases mandatory without exception. The purpose of the rules on creditor protection is that the company must always maintain a certain minimum level of net assets, and the reason for this is the limited liability Creditors have many protective clauses in the Companies Act.

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No.	Question	Answer
		Creating value for company and shareholders The Companies Act assumes that the Company's operation is conducted with the aim of generating profit. It is, however, allowed to provide another purpose in the Articles of Association. Chapter 3, Section 3 of the Companies Act states that: "Where the company's operations, in whole or in part, shall have an object other than the generation of profits for distribution to the shareholders, such fact shall be stated in the articles of association. In such case, information shall also be provided regarding the manner in which the company's profits and retained assets shall be applied upon liquidation of the company." The Board hold fiduciary positions in relation to the company and must therefore exercise due care and act in what they consider to be the interests of the company. The interest of the company is set out by the shareholders' meeting and the Articles of Association, including *inter alia* the company's object.
5.	How can directors be held liable for breaching their duties or causing harm to the company or others?	According to Chapter 29, Section 1 of the Companies Act, a Board member who, in the performance of his or her duties, intentionally or negligently causes the company damage may be liable to the company for such damages.
6.	What is the liability framework for *de facto* (or shadow) directors?	The liability framework in Chapter 29, Section 1 of the Companies Act only regulates liability for founders, directors and CEOs. However, the liability of the company's formal representatives has been extended in case law to include so-called *de factor* representatives. A distinction is sometimes made between the concepts of *de facto* director and shadow director, the latter referring to a person who exercises a controlling influence in the company without being either formally or actually a member of the board of directors and thus acts in secret. In the Supreme Court case NJA 1997 s. 418, the court established that a (natural) person can, for contractual or indemnity liability reasons, be considered a *de facto* director even when not formally appointed as a director if the person is in fact in charge of decision making. It should also follow from the Supreme Court's statement that a shadow director can be held liable in the same way as a board member.

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No.	Question	Answer
7.	Are executive and non-executive directors treated differently in terms of liability?	No. But the liability framework in the Companies Act only includes the CEO, no other executive team members. Instead, there may be situations where executives or managers are found to have breached specific legislation such as labour or environmental law and may even be liable for criminal sanctions.
8.	Is the liability of directors capped up to a certain amount?	No, but the damages may be adjusted in accordance with what is reasonable according to Chapter 29, Section 5 of the Companies Act.
9.	Can directors shield off their liability through management companies?	No, a legal person may not be a member of the board of directors according to Chapter 8, Section 9 of the Companies Act.
10.	Are the directors' liability risks collective (ie when acting in a collegial body) or individual?	While the Board is a collective body, the liability of a Board member is of individual nature, meaning that some Board members – but not others – may be liable for damages, for example, where the responsibilities of the Board has been divided between Board members or where a Board member has declared a reservation against a certain resolution. However, where several persons are liable for the same damage, they shall be jointly and severally liable insofar as the liability according to Chapter 29, Section 6 of the Companies Act.
11.	What are the consequences of directors' liability in case the company goes bankrupt? Under what circumstances can directors be held personally liable for (part of) the debts of the bankrupt company?	Bankruptcy does not cause liability per se. However, according to Chapter 29, Section 14 of the Companies Act, where the company has been placed into insolvent liquidation, the estate in insolvent liquidation may bring proceedings pursuant to sections 1–3 notwithstanding that discharge from liability in damages has been granted pursuant to section 7, 8 or 10. Normal duty of care stipulated by Companies Act also applies.

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No.	Question	Answer
12.	How often are directors sued for civil or criminal liability in court? What are the typical damages, fines, or penalties imposed on directors in such cases? Is there a procedure of plea bargaining in criminal court available to directors?	It is not that common that the court imposes liability. If the court imposes liability, the penalty is usually a fine and possibly damages in a criminal act, and damages in civil cases. There is no plea bargaining.
13.	Can shareholders or third parties sue directors directly or on behalf of the company? Under what circumstances can third parties other than shareholders sue directors (in)directly?	Yes, Board members may also be liable to third parties, including individual shareholders, creditors and employees if the Board member intentionally or negligently breaches the Swedish Companies Act, certain other regulations or the Articles of Association. Chapter 29, Section 1 of the Companies Act states that: "A founder, member of a board of directors or a managing director who, in the performance of his or her duties, intentionally or negligently causes damage to the company shall compensate such damage. The aforesaid shall also apply where damage is caused to a shareholder or other person as a consequence of a violation of this Act, the applicable annual reports legislation, or the articles of association."
14.	In practice, do prosecutors frequently seek redress for non-executive directors' wrongdoings?	No. However, if a company has neglected the payment of taxes before bankruptcy and has paid other bills, the public sector will seek redress from directors.
15.	Has the attention recently given to the concept of corporate social responsibility increased the liabilities of directors?	It may have an impact in the interpretation of what is a breach of duty of care or specific legislation, such as environmental law.

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3. Directors' duties and liability in Greece

Greece

No.	Question	Answer
1.	Which jurisdiction will be covered?	Greece
2.	How does the governance framework apply to different types of boards (one-tier or two-tier)?	As companies limited by shares (Société Anonymes) are extensively used as the most common type of business entity in Greece, for the purposes of this review, our input will be focused on the governance framework of Greek Sociétés Anonymes ("**Greek SAs**"). In principle, Greek SAs follow a one-tier governing model. According to Greek law 4548/2018 governing the Greek SAs (the "**Corporate Law**"), a Greek SA is managed and represented (judicially and out of court) by a single corporate body, the Board of Directors (or "**BoD**"), although it is at the BoD' s discretion to appoint an executive committee (Article 87 par. 4 of the Corporate Law). The BoD consists of at least three (3) members and no more than fifteen (15) members in total, the composition of which can be determined by virtue of the general meeting of the company's shareholders ("**GM**") or by the provisions of the company's Articles of Association ("**AoA**"). The Corporate Law also provides for the option to appoint legal entities (instead of individuals) as BoD members, provided that an individual shall be appointed by the legal entity as a representative to exercise the legal entity's powers and responsibilities under its capacity of a BoD member. According to the Corporate Law, small or micro Greek SAs, may also opt to appoint a sole director-administrator (single-member administrative body), instead of a BoD. Said individual is elected by the GM. In respect of Greek SAs with shares or other securities listed on a regulated market in Greece ("**Greek Listed SAs**"), Greek law 4706/2020 (the "**Corporate Governance Law**") provides the general corporate governance framework of such companies. According to Article 5 par.1 of the Corporate Governance Law, the BoD of Greek Listed SAs consists of executive, non-executive and independent non-executive members. At least 1/3 of the total number of the BoD members should be independent non-executive members, and in any case, such number cannot fall below two (2) members. In general, executive board members are entrusted with the implementation of the company's strategy, whereas non- executive BoD members are mandated to monitoring the fulfilment of the company's objectives.

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No.	Question	Answer
3.	Does the legal set-up (statute or case law) specify that the legal responsibilities of directors are towards the shareholders, the company as a legal person and/or society?	According to the national legislative framework, BoD members have, in principle, fiduciary, non- compete, transparency and care duties towards the company and are liable vis à vis the company for any damage caused to the latter due to said BoD member's act and/ or omission. Notwithstanding the above, direct liability of BoD members vis-à-vis shareholders or third parties can also be established on the grounds of direct violations of various laws (e.g. civil law, penal law) provided that several prerequisites are met (please refer to question 13 below for additional information). In the event of the company's insolvency, if the BoD fails to promptly file a bankruptcy application according to Article 79 par. 5 of the Greek law 4738/2020 (the "**Greek Bankruptcy Code**"), the BoD is fully liable for the restoration of any damage caused by such omission to the company's creditors. According to the current legal framework, there is no specific provision establishing a direct liability of the BoD towards society. However, in light of the significant increase of considerations relating to the dynamic between ESG issues and corporate activities, the EU legal framework has taken a robust swift towards the safeguarding and promotion of ESG initiatives. In this respect, Article 151 of the Corporate Law introduces the responsibility of Greek SAs with public interest that employ more than five hundred (500) employees, to include in their management report, a non- financial statement entailing information relating to the company's ESG oriented activities and initiatives.

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No.	Question	Answer
4.	Does the legal set-up (statute or case law) specify that the directors have to act with care? And that they have to avoid conflicts of interest? Do directors have to consider the interests of other parties, such as employees, creditors, or the environment? Do directors have to create value for the company and its shareholders?	**A) Duty of Care** As per the applicable provisions of the Corporate Law, the BoD members have the duty of care, i.e., the duty to manage the corporate affairs so as to promote the lawful interests of the company. This general principle of the duty of care also includes the following duties: – The duty to comply with the law (e.g. labor and tax legislation, capital market, competition law etc.), the company's AoAs and the lawful decisions of the GM. The collective duty to ensure the preparation and publication of the annual financial statements, the annual management report, the corporate governance statement (when required) and the remuneration report (when required) in accordance with the provisions of the law, or where applicable, in accordance with the international accounting standards adopted as per the relevant EU legislation. – The duty to monitor the application and implementation of the decisions of the BoD and GM. – The duty to inform the other BoD members on corporate affairs. – The duty to keep the company's books and records in accordance with the law. – The duty to duly convene the GM. – The duty to file the company's claim against any member of the BoD, who is responsible for causing harm to the company. The duty of care applies to all BoD members (executive and non- executive) of the company and to any third party who has been delegated with the power to manage the corporate affairs and represent the company in accordance with Article 87 of the Corporate Law.

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No.	Question	Answer
		B) Duty of Loyalty- Conflicts of Interest Generally, BoD members owe a duty of loyalty towards the company, which requires the promotion of the company's interests and the duty to abstain from any action that could potentially harm the company's interests. Thus, the duty of loyalty entails the duty to prevent conflicts of interest, which mandates that all BoD members should not pursue any personal interests that contradict with the company's interests. In this respect, BoD members are required to disclose to other BoD members in a timely and adequate manner their personal interests which may derive from the company's transactions which fall within the spectrum of responsibilities, as well as any other conflicts of interests with those of the company. BoD members should also disclose any conflicts of interests between the company's interests and of the persons referred to in Article 99 par.2 of the Corporate Law if they are related to those persons ("**Related Parties**"). Further to the above, BoD members must always ensure that all corporate affairs and the company's private matters remain confidential. In cases where a conflict of interests exists between the company's interests and the personal interest of a BoD member and/or of the Related Parties, said BoD member is required to abstain from voting on any matters relating to such conflict of interests. **C) Duty of Non- Competition** BoD members who participate in any way in the management of the company, as well as the company's directors, are prohibited from carrying out, without the GM's previous authorisation or a relevant provision in the AoA, on their own account or on behalf of third parties, acts falling within the company's business scope. Said persons are also prohibited from participating as general partners or as sole shareholders or partners in companies pursuing such business purpose.

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No.	Question	Answer
		D) Duty of Transparency The conclusion of contracts between the company and any Related Parties (including BoD members), as well as the provision of securities and guarantees to third parties in favour of such persons, without the BoD's or GM's previous special authorisation, are not permitted and (if concluded) are null and void. **E) Interest of other parties** In circumstances where a company becomes insolvent, BoD members have the responsibility to preserve and safeguard the interests of the company's creditors. Apart from the above, there is no explicit law provision establishing a direct responsibility of BoD members to consider the interests of the stakeholders or the environment in their decision-making process. In practice though, the recent increased interest and upcoming legislation, touching upon corporate social responsibility has led companies and BoD members to consider interests of other groups such as creditors, employees, consumers, and the protection of the environment. Following this global trend, the Hellenic Corporate Governance Code issued by the Hellenic Corporate Governance Council provides specifically for sustainability stating that "*Sustainability is determined by the impact of the company's activities on the environment and the wider community and is measured on the basis of non- financial factors related to the collective interests of key stakeholders, such as employees, customers, suppliers, local communities and other important stakeholders.*" **F) Duty to create value** As mentioned above, BoD members have the duty to promote the general corporate interest. This means that BoD members have principally the duty to preserve the continuous profitability of the company, which ultimately results to financial returns to shareholders.

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No.	Question	Answer
5.	How can directors be held liable for breaching their duties or causing harm to the company or others?	Under the Greek legal framework, the BoD members' liability can either be internal and/ or external. In principle, BoD members are primarily liable towards the company, and in cases of a breach, the company is entitled to instigate court proceedings against the BoD members which are liable and claim compensation (internal liability). A breach of BoD members' duties could result in an array of liabilities (including civil, criminal, tax, social security liabilities) as analyzed below. **Civil law liability** Any BoD member is liable against the company for any damage suffered by the latter, as a result of any actions and/ or omissions, in breach of their management duties. The liability ceases to exist if the BoD member in breach, proves that they have displayed the care and diligence of a prudent businessman when performing their duties. Such diligence shall be measured on the merits of each BoD member's status and duties as these were assigned to them by law, by the company's AoA or decision of the company's competent corporate body. Notwithstanding the above, no such liability exists when said actions are based on a lawful decision of the GM of the company or are realized within the context of a reasonable business decision taken (i) in good faith, (ii) on the basis of sufficient information per case, and (iii) solely in favour of the company's corporate interest. **Criminal law liability** With respect to criminal law sanctions, the Corporate Law explicitly provides for a number of acts or omissions of the members of the BoD which have occurred in the course of their duties and which entail the imposition of criminal sanctions. Such breaches include, indicatively, misleading public statements regarding the company's share capital, misleading or inaccurate financial statements, false or incomplete management reports, distribution of profits not reflected in the financial statements etc. Furthermore, even if an act or omission does not explicitly constitute a crime or entail a criminal sanction, a company may press charges against a BoD member for breach of trust, given that, as elaborated above, BoD members have by law a fiduciary duty towards the company. **Administrative liability** It is worth mentioning that the civil and criminal liability does not preclude the possibility of administrative sanctions being imposed on the BoD members. The administrative sanctions can range from reprimand to various fines. For instance, the Hellenic Capital Market Commission may impose fines (up to EUR 3,000,000 for every offender) for any deviation from the provisions of the Corporate Governance Law. For BoD members' liabilities against shareholders and other stakeholders please refer to question 13 below.

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No.	Question	Answer
6.	What is the liability framework for *de facto* (or shadow) directors?	According to Greek case law, directors, whose instrument of appointment as BoD members is defective, share the same level of liability towards the company and third parties as the legally appointed BoD members ("*de jure*" directors). To this end, the concept of "*de facto*" directors is often interpreted by the courts in a restrictive way and is defined only as directors, whose act of appointment as BoD members is defective. However, it should be noted that recent court cases - mainly on cases of non-payment of company's creditors- concluded that shadow directors (i.e., individuals, who are not formally appointed as BoD members, but they are carrying out administration or representation actions or substantially influence the decisions of BoD members) are considered "*de facto*" directors.
7.	Are executive and non-executive directors treated differently in terms of liability?	In principle, executive and non-executive BoD members are treated the same in terms of liabilities towards the company and third parties. However, as already mentioned, the liability of a BoD member is measured against the diligence of a prudent businessman. This diligence is assessed on the basis of the corporate role and capacity of each BoD member, as well as the duties entrusted to them. Therefore, in practice, the role of a BoD member as an executive or non – executive member is taken into consideration for the admission of liability. Also, there may be specific legal regimes that impose liabilities to executive BoD members or even more specifically to CEO or executive chairman (e.g. tax criminal liabilities).
8.	Is the liability of directors capped up to a certain amount?	BoD members' liability is not capped up to a certain amount. However, in practice said risks may be mitigated with the conclusion of insurance policies ("**D&O Liability Insurance**").
9.	Can directors shield off their liability through management companies?	Under the Greek law, a legal entity can be appointed as a BoD member, provided that an individual is designated to exercise the legal entity's powers as a BoD member. However, liability is not by anyway limited or eliminated, given that the designated individual is jointly and severally liable with the legal entity for the management of the company and any liability arising thereof.
10.	Are the directors' liability risks collective (ie when acting in a collegial body) or individual?	Each BoD member is personally liable towards the company for any loss sustained as a result of any breach of their duties. Notwithstanding the above, if more than one BoD member have caused damage, they shall all be jointly and severally liable. The same applies where several persons have acted simultaneously or successively, and it cannot be determined whose action caused the damage. The court may, however, decide on the allocation of responsibility among those responsible, depending on the severity of the act, the degree of fault and the distribution of the duties of the BoD members.

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No.	Question	Answer
11.	What are the consequences of directors' liability in case the company goes bankrupt? Under what circumstances can directors be held personally liable for (part of) the debts of the bankrupt company?	With respect to insolvency proceedings, BoD members may incur both civil and criminal liability, including, inter alia, personal liability for all or part of the company's debts. **A) Civil Liabilities** – Liability for failure to timely file for bankruptcy: If BoD members have failed to timely apply for bankruptcy, namely within one (1) month of the fulfilment of the bankruptcy conditions, they shall be jointly and severally liable against the corporate creditors for any loss they may have occur from this delay. This liability could be extended to "*de facto*" directors. – Liability for causing a cessation of payments: BoD members may be held jointly and severally liable towards the company's creditors if their fraudulent behavior or gross negligence have led to a cessation of payments. Similarly, this liability applies also to "*de facto*" directors. **B) Criminal Liabilities** – In principle, BoD members' omission to provide any required information to the competent authorities in relation to the bankruptcy proceedings, is faced with criminal sanctions and penalties. Such illegal acts or omissions include, but are not limited to: – Shortfall of assets liability; – Fraudulent increase of liabilities; – Breach of their obligation to maintain the integrity of the company's assets; – Conduct of loss-making, speculative or risky legal transactions; – Failure to keep, or the act of disappearance, or concealment of trade books; – Failure to comply with the statutory provisions for the preparation of balance sheets; – Preferential treatment of one creditor over others. In such cases, BoD members can be punished with imprisonment and pecuniary fine. – BoD members may also be punished with imprisonment of at least two (2) years and/or a fine, when they receive advances higher of those specified by the company. – Furthermore, BoD members can be held personally and severally liable for the debts of the company resulting from tax and social security obligations of the company.

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No.	Question	Answer
12.	How often are directors sued for civil or criminal liability in court? What are the typical damages, fines, or penalties imposed on directors in such cases? Is there a procedure of plea bargaining in criminal court available to directors?	**Frequency of Prosecutions** It is not possible to measure the exact frequency of BoD members facing prosecutions, as no relevant information is publicly available. However, it is observed that managing directors are quite often being sued by the Greek State for the non- payment of tax and social security debts of the company and in general the bar for pressing charges to BoD members is in practice rather low, especially since there is no framework for a corporate criminal liability. **Typical Damages, Fines and Penalties** In principle, the typical penalties a BoD member could face are the following: – Civil liabilities: it is difficult to determine the typical penalties, since the fine depends on the nature of the transaction, the gravity of the breach, the degree of fault and the role of the BoD member, as well as any other information necessary to assess the level of liability. – Criminal liabilities: the penalties for criminal offences may vary from fines (EUR 5,000 to 100,000 depending on the offense) to imprisonment. **Plea Bargaining** Plea-bargaining provisions are applicable mainly to financial and economic crimes. In such cases, a BoD member may request for the initiation of the proceedings with the prosecutor and, if the negotiations are successful, the Minutes of Criminal Negotiation are drafted, which include the defendant's confession, the agreed sentence to be imposed and the way of the service of said sentence.
13.	Can shareholders or third parties sue directors directly or on behalf of the company? Under what circumstances can third parties other than shareholders sue directors (in)directly?	In principle, according to the Corporate Law, it is the company that has the main right to sue BoD members for damages. However, direct liability of BoD members towards shareholders and/or third parties can be established under the provisions of tort liability. More specifically, any damaging acts or omissions of a BoD member may also establish tort liability, provided that the following prerequisites are met: (a) illegal and wrongful conduct, (b) existing damage and (c) causal link between the wrongful conduct and the damage that has occurred. Tort liability is established not only for wilful misconduct, but also for (gross or minor) negligence. Negligence is established in cases when the liable person has not shown the diligence required to trade/transactions. The concept of wilful misconduct coincides with the definitions given by criminal law, according to which a person acts in a state of wilful misconduct when such person demonstrates an intention to cause a fact that, according to law, should be considered as an illegal act, or is aware that his/her behavior might cause such illegal act and accepts such consequence. Finally, in case of tort liability, and irrespective of the compensation for pecuniary damage, the court may award a reasonable compensation for moral damage, according to its discretion.

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No.	Question	Answer
14.	In practice, do prosecutors frequently seek redress for non-executive directors' wrongdoings?	In principle, no. However, as such information is not publicly available and no other sources have been identified in relation to this type of information, a safe conclusion cannot be reached.
15.	Has the attention recently given to the concept of corporate social responsibility increased the liabilities of directors?	The implementation of the EU Non- Financial Reporting Directive 2014/95 (the "**NFRD**") which was transposed into the national legislation by virtue of the Corporate Law, introduced a requirement on large undertakings and listed companies to report information on, as a minimum, what they see as the risks and opportunities arising from social and environmental issues, and on the impact of their activities on people and the environment. According to Article 151 of the Corporate Law, large undertakings (as these are defined by law) are required to include in their management report a non-financial statement containing information relating to environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters. In addition to the NFRD, the 2022/2464 EU Directive on corporate sustainability (the "**CSRD**") entered into force in January 2023 whilst compliance with this Directive commences from 2024. The CSRD modernises and strengthens the rules concerning the social and environmental information that companies have to report. In this respect, the CSRD amends and updates the NFRD not only by expanding the scope of the companies covered by its provisions, but also by broadening the reporting requirements to include additional environmental considerations. The new reporting framework aims to ensure that investors and other stakeholders have access to the information they need to assess the impact of companies on people and the environment and for investors to assess financial risks and opportunities arising from climate change and other sustainability issues. The NFRD shall remain in force until companies have to apply the new rules of the CSRD. In respect of Greek Listed SAs, the internal regulation of operation of a Greek Listed SA should include the sustainable growth policy as produced by the company, which can be seen as an expression of a duty of care towards society. Although this is primarily a responsibility of the company (as a legal entity), the liability could be shifted to BoD members, since they could be held personally liable for failing to comply with the above obligation in accordance with the provisions of Corporate Governance Law or for failing to overview the implementation of the sustainable policy. Finally, it should be noted that since corporate social responsibility is constantly evolving and growing, there may be a significant greater risk with respect to BoD members' liability towards this end in the near future.

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4. Directors' duties and liability in Romania

RTPR

Romania

No.	Question	Answer
1.	Which jurisdiction will be covered?	Romania
2.	How does the governance framework apply to different types of boards (one-tier or two-tier)?	The two-tier board system may only be employed by joint-stock companies (*SAs*). Under the one-tier system the company may be managed by one or more directors. If more directors are appointed, they will be organised as a board. Under the one-tier system, the board may choose to delegate the management of the company to managers (which may or may not be members of the board), while under the two-tier system the management must be delegated to the management board by the supervisory board. Under the one-tier system, if the company has a legal obligation to audit its financial statements, delegation of the management is mandatory. The board of directors (under a one-tier system) and supervisory board (under a two-tier system), respectively, oversee the management duties performed by the managers or members of the management board. The applicable standard of care is similar for all persons occupying board, manager or member of the management board positions (for more details please see the considerations under section "*Directors' duties and liabilities*" below). The two systems' governance framework are similar overall, with a few notable exceptions: – While members of the board under the one-tier system may also be managers, members of the supervisory board cannot also hold a position as member of the management board; – Under the one-tier system, the board retains key duties such as establishing the company's activity and development directions, accounting policies, preparing the annual report and organising the general meeting of shareholders (the **GMS**), which are under the management board's responsibility in the case of the two-tier system, the supervisory board only exercising oversight duties in relation to their performance by the management board; – The supervisory board is prohibited from exercising management duties, with the exception of approving certain types of operations carried out by the management board.

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No.	Question	Answer
3.	Does the legal set-up (statute or case law) specify that the legal responsibilities of directors are towards the shareholders, the company as a legal person and/or society?	In Romania, the directors owe duties to the company. Under Romanian law, in the case of a solvent company, the director can be actioned for breach of duty by the company if, as a general rule, the GMS decides to start proceedings. A director must act in accordance with the company's articles of association, the shareholders' resolutions and the relevant legal provisions.
4.	Does the legal set-up (statute or case law) specify that the directors have to act with care? and that they have to avoid conflicts of interest? Do directors have to consider the interests of other parties, such as employees, creditors, or the environment? Do directors have to create value for the company and its shareholders?	**Directors' duties and liabilities** The duties and liability of directors are, as a rule, the ones applying to the mandate agreement, as set out under the Romanian Civil Code. According to the latter, a person that has powers delegated via a remunerated mandate agreement (such as a director of a company) is under a duty to act with prudence and diligence when performing the tasks assigned to him/her which is measured by a special (higher) standard when assessing the fulfilment of his duties (diligence of a bonus *pater familias*). Therefore, failure to perform or inadequate performance of any duties delegated to the directors by the shareholders shall be judged using the highest standard of care and diligence (*culpa levis in abstracto*). In addition to the general rule governing the directors' duties and liabilities set by the Romanian Civil Code, the Romanian Companies Law (Law no. 31/1990) sets that the members of the board of directors shall exercise their mandate with the prudence and diligence of a good director and shall exercise their mandate with loyalty, in the company's interest. Therefore, the business judgment rule described in question 5 supplements the general provisions of the Romanian Civil Code as the Romanian Companies Law further states that it is not considered a breach of the director's duties to act with prudence and diligence if, at the time of making a business decision, the director is reasonably entitled to consider that he/she acts in the company's interest and based on certain adequate information (business decision being defined by the law as any decision to take or not to take certain measures with regard to the management of the company). **Conflicts of interest** Under Romanian law, a director should declare his direct or indirect interest which conflicts with that of the company and refrain from deliberation and voting with respect to the specific matter. Apart from damages, failure to observe this obligation could potentially represent a criminal offence (in the case of joint stock companies). The situations in which a director may vote although his own interest is at stake are strictly set out by law for joint stock companies and rather represent beneficial actions for the company itself (eg loan granted by the director to the company, etc.)

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No.	Question	Answer
		Interest of stakeholders Under Romanian law, the directors may perform any operations required in order to fulfil the company's business activity, with the observance of the restrictions set forth by the company's articles of association, the shareholders' resolutions and the law. Furthermore, if the company is in difficulty, the directors must also consider the following: – The interests of the creditors, other participation holders and other interested parties; – The need to take reasonable and adequate measures to avoid insolvency and reduce the damages incurred by creditors, employees, participation holders and other interested parties to a minimum; and – The need to avoid conducting the business in a manner which threatens its sustainability.
5.	How can directors be held liable for breaching their duties or causing harm to the company or others?	In most cases, a director will only incur personal liability (criminal and/or civil) where there is some personal fault (eg where the director commits a breach of duty, or commits a statutory or criminal offence). If directors comply with their duties (for more details please see the considerations under section "*Directors' duties and liabilities*" above), courts will generally defer to the decision making of the board and not second guess their decisions (the "business judgment" rule, ie, if, upon taking a decision, the director was reasonably entitled to consider that he/she would be acting in the benefit of the company on the basis of adequate information, his duty of care is not breached). This provides a generally high standard of protection for directors. Please note that there is not such an express provision for limited liability companies (**SRLs**) and, therefore, it is questionable if the "business judgement rule" applies. In relation to their oversight over the activity of the managers, board members are liable for the damages caused by the acts of the managers or employed personnel, when such damages would not have arisen had they exercised the necessary supervision required by their role. The directors' personal liability can also be triggered if it can be proven that the company's insolvency was a result of their actions. In principle, the directors' liability may be triggered on behalf of the company by: – the GMS; – the supervisory board (against the members of the directorate), under two-tier board systems; – the shareholders holding individually or jointly at least 5% of the share capital, if the GMS does not initiate legal action against the liable director.

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No.	Question	Answer
6.	What is the liability framework for *de facto* (or shadow) directors?	*De facto* (shadow) directors are jointly liable with *de jure* directors, both being subject to the same liability framework, both in regular or insolvency scenarios.
7.	Are executive and non-executive directors treated differently in terms of liability?	No, both categories are subject to the same standard of care. In practice, however, executive directors are more likely to be held liable given the wider scope of responsibilities entailed by their position and closer involvement in the company's management.
8.	Is the liability of directors capped up to a certain amount?	There is no statutory liability cap. The law does require for directors to have a professional liability insurance policy.
9.	Can directors shield off their liability through management companies?	Under corporate law, if a management company is appointed as director, it must also nominate a permanent representative acting on behalf of said management company. Such permanent representative is subject to the same conditions and has the same civil and criminal liability as a physical person appointed as director or (supervisory) board member, both the management company and the permanent representative being jointly liable.
10.	Are the directors' liability risks collective (ie when acting in a collegial body) or individual?	Where a company's management is ensured by a collegial body, the directors' liability risks are collective. By exception, the liability would not be collective in the case of the directors who recorded their opposition regarding a management decision in the board's decisions' registry and informed in writing the internal and financial auditors in this respect.

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No.	Question	Answer
11.	What are the consequences of directors' liability in case the company goes bankrupt? Under what circumstances can directors be held personally liable for (part of) the debts of the bankrupt company?	Directors may be held liable for a part of or the whole debt of the insolvent company, if they: – used the goods or credit of the company for their own or a third party's benefit; – carried out manufacturing, trade or service activities in their own interest, under the guise of the company; – decided, in their own interest, to continue an activity clearly leading the company into payment default; – held fictitious accounting, made some accounting documents disappear or did not hold accounting in accordance with the law; – misused or hid part of the assets of the company or artificially increased its debts; – incurred exorbitant debt in order to delay payment default; – in the month preceding payment default, made preferential payments in favour of a creditor to the detriment of the other creditors (except for payments made in good faith in the context of restructuring agreements with creditors which seemed likely to lead to financial recovery, without the intent to harm or discriminate against other creditors); – any other intentional act contributing to the company's state of insolvency. Similarly, in case of collegial bodies, the liability will not be collective as regards the members of the relevant body who opposed the actions or deeds leading to the state of insolvency or were absent when such decisions were taken and made the record reflect their opposition, after the fact. However, according to legal literature, this procedure does not exclude the directors' separate tort liability towards the shareholders for the damages incurred by them personally, under the general liability framework.

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No.	Question	Answer
12.	How often are directors sued for civil or criminal liability in court? What are the typical damages, fines, or penalties imposed on directors in such cases? Is there a procedure of plea bargaining in criminal court available to directors?	Most often, civil litigation against directors is brought up if the company enters insolvency or bankruptcy. If they are found guilty of causing the company to become insolvent, they are usually forced to pay damages. In the rare cases identified by us in which directors are prosecuted and successfully sentenced, it is usually for tax evasion, less often for felonies under general criminal law and almost never for company law matters. Sentencing spans between criminal fines and jail time. Additionally, when a company itself is found guilty of a criminal act, directors tend to also be sentenced, usually for the same felonies. Since companies usually end up being prosecuted only in serious, high-profile cases, punishments for directors in these cases are correspondingly severe, typically amounting to jail time. Plea bargaining is available to directors under the general procedural framework.
13.	Can shareholders or third parties sue directors directly or on behalf of the company? Under what circumstances can third parties other than shareholders sue directors (in)directly?	In principle, if third parties incur any damages as effect of the actions/inactions of a director acting as representative of a company, then the third party may not directly sue the director, it may only sue the company. In such a case the company may decide if it shall trigger the directors' liability or not. The directors' liability may be triggered on behalf of the company by: – the GMS; – the supervisory board (against the members of the directorate), under two-tier board systems; – the shareholders holding individually or jointly at least 5% of the share capital, if the GMS does not sue the liable director; – the creditors of the company, only after the latter enters insolvency proceedings. In specific cases where the directors acted outside the limits of their mandate then they may be held directly liable by third parties for their actions under tort law. Otherwise, under the Romanian Companies Law and the Civil Code (which governs the mandate agreement) considering also the above, the director's liability may only be triggered by the company.

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No.	Question	Answer
14.	In practice, do prosecutors frequently seek redress for non-executive directors' wrongdoings?	Most available data is by and large related to executive directors, since their actions are more likely to trigger criminal liability, however, if the conditions are met, non-executive directors' liability cannot be excluded.
15.	Has the attention recently given to the concept of corporate social responsibility increased the liabilities of directors?	Although speculated in the legal literature, in our experience, corporate social responsibility has not resulted in any increase of the legal liability of directors so far.

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Conclusion

The survey on directors' duties and liabilities reveals a complex and diverse landscape of legal rules and practices across different jurisdictions, reflecting different corporate governance models, legal traditions and policy choices. While the core principles of directors' duties and liabilities are broadly similar, the survey shows important differences across the jurisdictions, such as, with regard to the composition and role of the board, the standard and scope of the duty of care, the limitations of liability, and the enforcement of liability in practice. Furthermore, the survey indicates that the nature and extent of directors' duties may vary depending on the national legislative regimes (criminal law, civil law, insolvency law, etc.) that govern their conduct and liability.

The survey also reveals that the increased attention to corporate social responsibility (**CSR**) in recent years has not fundamentally altered the legal framework of directors' duties and liabilities, but that it may expand the range and intensity of the challenges and expectations that directors face in practice. Based on the survey, there is currently already an expectation in several jurisdictions that CSR and sustainability considerations may influence the interpretation of the duty of care. New developments at EU-level may also spur further legislative intervention in this regard. For instance, if adopted, the proposed EU Directive on Corporate Sustainability Due Diligence will likely have significant implications for directors' duties and liabilities, as it would create new sources of risk and liability, as well as new opportunities and incentives for responsible business conduct.

Concerns may be raised about the possible adverse consequences of the increased focus on directors' liability, both for the individuals involved and for the functioning and performance of the companies they lead or oversee. The heightened liability risk may deter qualified and competent persons from accepting or retaining directorships, especially in cross-border or complex situations, and may hamper the ability of companies to attract and retain the best talent. Moreover, the increased liability risk may induce directors to adopt a defensive or intrusive approach to management (for example, by non-executive directors) which may undermine the proper division of roles and responsibilities within the board (executive vs. non-executive) and between the board and management, and may stifle innovation. Finally, the increased attention on directors' liability may erode the confidence and trust in companies as responsible actors, and may shift the focus and responsibility away from the company as a whole to the individual directors.

The survey provides a valuable overview of the current state of directors' duties and liabilities in various European jurisdictions.

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