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## **THE FINANCIAL RESPONSIBILITIES OF THE BOARD OF DIRECTORS IN THE GROUP**

According to a further decision of the commercial court of the canton of Zurich in the Swissair case, the centralized management of the financing of a group of companies does not constitute a breach of the non-transferable and inalienable financial responsibilities of the board of directors of the controlled company. The board of directors of the controlled company shall, however, remain responsible for the performance of certain residual tasks. These residual responsibilities namely include the liquidity planning to ensure continuous solvency of the controlled company. Furthermore, the board of directors shall continue to supervise compliance with the provisions applicable to the controlled company, in particular with respect to capital protection (prohibition of hidden distribution of profits and of repayment of capital contributions) (decision of the commercial court of the canton of Zurich, judgement HG130083 of March 16, 2018).

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### **Subject Matter of the Proceedings**

Subject matter of the proceedings before the commercial court were claims for damages raised by the liquidator against 14 former managers and members of the board of directors of the ultimate parent company SAir Group and of Swissair resulting from liability under corporate law in connection with the participation of Swissair in the group-wide cash pool and the granting of fixed deposit loans to SAir Group. Swissair was a sub-subsidiary of SAir Group that was in charge of the uniform financial management of the centralized group financing established in 1999.

## Swissair: The Unlawful Group?

The commercial court comments on several important aspects of liability under corporate law. The group structure of the SAir Group was one significant point of contention: the claimant asserted that the controlled company was not a financially independent legal entity, but was managed as an incorporated business unit of the group.

The commercial court is of a different view: it holds that as a result of the integration of the controlled company into the group, the parent company became inevitably entitled to the uniform management. According to the prevailing doctrine this "entitlement to uniform management" obviously conflicts with the independence of the controlled company. It is in the very nature of a group of companies that important tasks of the board of directors of the controlled company are, due to the integration into the group, carried out at the group level (i.e., by the parent company). This applies in particular to financial responsibilities that are usually performed by the group management. As a consequence, financial responsibilities of the board of directors of the controlled company are *to a large extent* withdrawn. In the present case, thus, the group management had performed the financial responsibilities at group level in the context of the existing group of companies; this was not contrary to the law.

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## Transfer of Financial Responsibilities

According to the commercial court, the financial responsibilities were not unlawfully transferred, either: according to the legal doctrine, and in line with the case law of the courts in Zurich, a limitation of the responsibilities at the level of the controlled company resulting from the assumption of responsibilities by the parent company is permitted so long as certain financial residual responsibilities remain with the controlled company (ensuring the solvency of the controlled company and its compliance with provisions regarding protection of the capital). These requirements for a lawful group organisation have to be met not only when the cash pool is established and the fixed deposit loans are granted, but also during the time of its operation and while fixed deposit loans are maintained. Hence, in order to perform the aforementioned residual responsibilities with due care, the board of directors of the controlled company is, within its financial responsibilities, obliged to continuously monitor and supervise the financial transactions.

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## Further Aspects

The commercial court goes on to analyse further interesting aspects of the law on corporate liability. According to its deliberations, the parent company or its corporate bodies, respectively, would only be viewed as *de facto* corporate body of the controlled company if actual responsibilities are allocated at the parent company level (i.e. a mere exertion of influence by the parent company would not be sufficient). The commercial court also states that an arrangement with a person being a corporate body both at the level of the controlled company and of the parent company is a lawful means of group management as provided for by law. According to the federal supreme court, such arrangement lies in the nature of a group of companies. With regard to the cash pool and the fixed term loans, the commercial court further analyses whether or not the respective terms and conditions were agreed at arm's length, and denies this for the time when the group was facing financial difficulties. Even though certain respondents would, thus, have been obliged to remedy this unlawful situation, they could not be accused of having breached their duties as the claimants had not sufficiently substantiated their lawful obligations. Furthermore, damages were not proven, either. Finally, the commercial court denies the presence of a causal connection and dismisses the case.

It remains to be seen whether the claimant will appeal the judgement to the federal supreme court.

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