

# INSTITUTE FOR LAW AND FINANCE

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## The Law of Corporate Groups in Portugal



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## I. Introduction<sup>1</sup>

After the pioneering German “Aktiengesetz” of 1965<sup>2</sup> and the Brazilian “Lei das Sociedades Anónimas” of 1976<sup>3</sup>, Portugal has become the third country in the world to enact a specific regulation on groups of companies. The Code of Commercial Companies (“Código das Sociedades Comerciais”, abbreviated hereinafter CSC), enacted in 1986, contains a unitary set of rules regulating the relationships between companies, in general, and the groups of companies, in particular (arts. 481° to 508°-E CSC).<sup>4</sup>

With this set of rules, the Portuguese legislator has dealt with one of the major topics of modern Company Law. While this branch of law is traditionally conceived as the law of the individual company, modern economic reality is characterized by the massive emergence of large-scale enterprise networks, where parts of a whole business are allocated and insulated in several legally independent companies submitted to an unified economic direction. As Tom HADDEN put it: “Company lawyers still write and talk as if the single independent company, with its shareholders, directors and employees, was the norm. In reality, the individual company ceased to be the most significant form of organization in the 1920s and 1930s. The commercial world is now dominated both nationally and internationally by complex groups of companies”.<sup>5</sup> This

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<sup>1</sup> On Portuguese group law, see ANTUNES, J., *Os Grupos de Sociedades – Estrutura e Organização Jurídica da Empresa Plurissocietária*, 2<sup>th</sup> edition, Almedina, Coimbra, 2002. As to literature on the topic in German language, see also GAUSE, B., *Europäisches Konzernrecht im Vergleich – Eine Untersuchung auf der Grundlage des portugiesischen Rechts*, Berlin Verlag/ Nomos, Berlin, 2000; LUTTER, M./ OVERRATH, H.-P., *Das portugiesische Konzernrecht von 1986*, in: 20 “Zeitschrift für Gesellschafts- und Unternehmensrecht” (1991), 394-411.

<sup>2</sup> The literature on German group law (“Konzernrecht”) is extremely vast: to a general overview, see EMMERICH, V./ HABERSACK, M., *Konzernrecht*, 8<sup>th</sup> edition, Beck, München, 2005; to an overview of the literature itself until the middle of the 80s, see KIRCHNER, C., *Bibliographie zum Unternehmens- und Gesellschaftsrecht 1950 bis 1985*, Zeitschrift für Gesellschafts- und Unternehmensrecht (Sonderheft 8), 482-530, Walter de Gruyter, Berlin, 1989.

<sup>3</sup> On Brazilian group law, see COMPARATO, F., *Les Groupes de Sociétés dans la Nouvelle Loi Brésilienne des Sociétés par Actions*, in “Revue des Sociétés” (1978), 845-868. As to literature in German language, see ROTHMANN, G., *Die Behandlung des Konzerns als gesellschaftsrechtliches Sonderproblem in Brasilien*, in: MESTMÄCKER, E.-J./ BEHRENS, P., “Das Gesellschaftsrecht der Konzerns im internationalen Vergleich”, 217-232, Baden-Baden, Nomos, 1991.

<sup>4</sup> More recently, some others countries have also adopted a specific regulation on this area, such as, for instance, Hungary, Eslovenia and Taiwan : see BRUS, M. *Das slowenische Konzernrecht in seiner Herkunft aus dem deutschen Recht der verbundenen Unternehmen*, Berlin Verlag, Berlin, 1999; KALÓ, H., *Das Recht der verbundenen Unternehmen in Ungarn*, in: “Wirtschaft un Recht in Östeuropa” (1994), 452-459; YEH, H., *Das taiwanische Konzernrecht von 1997*, in: 29 “Zeitschrift für Gesellschafts- und Unternehmensrecht” (2000), 287-310.

<sup>5</sup> *Inside Corporate Groups*, 271, in: 12 “International Journal of the Sociology of Law” (1984), 271-276. See also WEDERBURN: “We speak, teach, litigate and legislate about «company law». But the predomi-

trend, which is now observable in any of the largest economies in the world, holds also true for small markets such as Portugal. Although Portuguese economy is still dominated by small and medium-sized enterprises, the organizational structure of the group has always been extremely common. During the 70s, it was estimated that the seven largest groups of companies owned about 50% of the equity capital of all domestic enterprises and were alone responsible for 3/4 of the internal national product. Such a trend has continued and even highlighted in the next decades, surviving to different political and economic scenarios: during the 80s, due to the process of state nationalization of these groups, an enormous public group with more than one thousand controlled companies has been created (“IPE - Instituto de Participações do Estado”); and during the 90s until today, thanks to the reprivatisation movement and the opening of our national market, we assisted to the re-emergence of some large private groups, composed of several hundred subsidiaries each, some of which are listed in foreign stock exchange markets (e.g., in the banking sector, “BCP – Banco Comercial Português”, in the industrial area, “SONAE”, and in the media and communication area, “Portugal-Telecom”).

## *II. The Statutory Regime in Perspective*

### 1. General Overview

The regulation on groups and inter-company relationships is provided for in Title VI of the CSC (arts. 481<sup>o</sup> to 508<sup>o</sup>-E), under the general concept of “affiliated companies” (“sociedades coligadas”).

#### 1.1. The Concept of Affiliated Company

The entire legal regulation is based on a central concept: the concept of “*affiliated company*” (“sociedade coligada”), which thus operates as a sort of “*summun genus*” for this set of legal rules.

The law does not provides for a general definition of what is an affiliated company but it merely describes the concrete types of affiliation relationships between

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nant reality is not today the company: it is the group of companies” (*Multinationals and the Antiquities of*

companies. These types of relationships are four – the relationship of simple participation, of mutual participation, of control, and of group – and they will be analysed subsequently. Before of that, it may be useful to point out some fundamental features of the said central concept.

First of all, the concept of affiliated company is a *strict legal concept*, not a factual one. Given the fact that the legal “*numerus clausus*” of inter-company relationships does not covers all its possible economic forms or types, an affiliated company shall be deemed to exist only when fitting within the boundaries of one of those four types of relationships identified by the law: this regulatory strategy, of course, has the advantage of an increased juridical certainty, although may giving rise to regulatory gaps (take, for instance, the contrast between the relevant legal forms of a group of companies, provided for in arts. 488° and ff. CSC, and the huge diversity of its organizational economic forms). Secondly, the concept operates as a *general legal term of reference* for a particular sector of rules (arts. 481° to 508°-E CSC) to which legal regime numerous other norms of the same Code are referring to (v.g., arts. 6°, n° 3, 104°, n° 2, 290°, n° 1, 397°, n° 3, 510°, n° 2 CSC). Finally, this is a *company law concept*, not a broad concept which is valid to all branches of the law. As we shall see further on<sup>6</sup>, other legal branches are also dealing increasingly with the problem of inter-company relationships, thereby making use of similar concepts which, however, may have a specific meaning on their own (v.g., in competition law, in labour law, in tax law): therefore, the concept of affiliated company used by the CSC shall be applicable outside company law only when expressly or implicitly provided for by the law itself (v.g., art. 21°, n° 3 of “Code of Securities”).

## 1.2. The Legal Types of Relationships of Affiliation

Under Portuguese law, affiliated companies are defined as being those, and only those, companies which hold among each other a relationship of one of the following four types: relationship of simple participation, relationship of mutual participation, relationship of domination, and relationship of group (art. 482° CSC).

A *relationship of simple participation* (arts. 483° and 484° CSC) exists whenever a company holds at least 10% of the equity capital of another: in such a case,

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*Company Law*, 320, in: “Modern Law Review” (1983), 320-343).

the former company must thereafter inform by writing the latter of this fact, as well as of any further acquisitions or sales of its capital. A *relationship of mutual participation* (art. 485° CSC) exists when two companies hold each at least 10% of the capital of the other: in such an event, the company which performed its duty of information in the last place is prohibited to acquire new shares or parts of the other company. A *relationship of domination* (arts. 486° and 487° CSC) exists when one company is able to exercise directly or indirectly a dominating influence over another: this dominating influence is presumed to exist when the former company holds the majority of capital, the majority of the voting rights, or the right to nominate the majority of the members of management or supervisory organs of the latter. Finally, there is the *relationship of group*. Contrary to German law, Portuguese law does not contain a general and abstract notion of what is a group of companies, but it merely provides three types of specific instruments for its creation and organisation: these instruments are the total domination (arts. 488° to 491° CSC), the contract of horizontal group (arts. 492° CSC), and the contract of subordination (arts. 493° to 508° CSC).

A detailed analysis of each one of these types of relationships shall be made further on. Before that, it might be instructive to add a few preliminary considerations about the general goals and structure of the law.

## 2. The Regulatory Problem

Similarly to company laws all over the world, the whole system of Portuguese company law is based on the classical legal model of the *individual autonomous company*. This “ideal model” proceeds upon the assumption that the company is an independent economic and legal entity which equity capital is spread by a myriad of individual powerless shareholders interested in the best overall return on their investment (non-managing owners) and whose management is committed to a body of independent agents pursuing the best business interests of the company itself (non-owning managers). In such a model, the small voting power held by each individual shareholder would presumably ensure in advance a sort of democratic internal harmony and balance among the various individual interests around a common company interest,

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<sup>6</sup> See *infra* VIII.



which would also be a guarantee to the interests of other constituencies such as creditors and workers.

The emergence of the phenomenon of *inter-company control* in modern economic life introduced a major crisis in this model. As a matter of fact, this ideal model may enter in rupture as soon as a shareholder who is economically or entrepreneurially active outside the company (namely, another company) acquires the majority of its voting capital. The point is that, contrary to what usually happens with a single or individual shareholder, a *corporate* shareholder is most likely to use its controlling power in order to pursue within the controlled company its own business interests at the cost of the self-interest of the latter: the external business activities of the controlling shareholder thus give cause to fear that the company will no longer be run as an independent business unity according to its own interests but will be made more or less subservient to alien business strategies and goals. With the destruction of the autonomy of the company, not only the company as an economic unity, but also the status of their minority shareholders and creditors, are seriously jeopardized.<sup>7</sup>

The crucial problem to which Portuguese law tries to bring an answer has to do with this contrast or gap between the classical or ideal *legal model* of the autonomous company and the *real model* of the dependent company, which was brought about by the emergence of the modern phenomenon of inter-company control.

### 3. The Regulatory Conception

#### 3.1. The Purpose of the Law

The general goal of the law on affiliated companies is basically the one of a *law aiming to protect the subsidiary company, its minority associates and creditors*. In fact, the Portuguese legislator is mainly concerned with the problems raised by integration

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<sup>7</sup> How odd and surprising this might sound to company lawyers of today, control of a company by another company was unanimously prohibited by the founding fathers of Corporation Law (for an historical insight, see ANTUNES, J., *Enterprise Forms and Enterprise Liability – Is There a Paradox in Modern Corporation Law?*, in: II “Revista da Faculdade de Direito da Universidade do Porto” (2005), 187-225). This makes plain why in Common Law systems it became usual to describe the introduction of the legal device of inter-company stock ownership as the “turning point” in the evolution of American business corporation (CHANDLER, A., *Strategy and Structure: Chapters in the History of the American Industrial Enterprise*, 30, MIT Press, Cambridge, 1962) and in Civil Law someone could also qualify it as a “revolution” (OTT, C., *Recht und Realität der Unternehmenskorporation*, 123, Mohr, Tübingen, 1977).

and treatment of phenomena of inter-company control and groups of companies within the fold of classical company law, as the law of the individual corporation. This integration was worked out basically along two major legal policy guidelines: the *legitimation of the power of control* of the parent company over the subsidiaries affairs and the corresponding *protection for those subsidiaries*.

On the one hand, it is the essence of traditional company law that each company constitutes a self-governed autonomous unity whose affairs are to be necessarily conducted according to its own best interests. However, at the same time, the quintessence of groups of companies as a legal and economic phenomenon lies precisely in the fact that each constituent company (subsidiary) becomes a dependent sub-unit whose affairs are directly or indirectly controlled by another company (parent), becoming thus purely instrumental to external or alien business interests. The first regulatory task of the new regulation was then to solve this contradiction between law and reality, by providing for an *express legitimation of the* (otherwise unlawful or fragile) *exercise of the power of control of a parent company over the management of its subsidiary* and the primacy of the group global interest over the interests of the various individual subsidiaries. On the other hand, there was also a regulatory need to set up *the corresponding protective mechanisms for the subsidiary company, their minority associates and creditors*. In fact, the (exceptionally permitted) subordination of a company to the will and interests of another company virtually destroys its economic independence, thus deeply affecting all those constituencies whose wealth ultimately depends on the preservation of that autonomy, first and foremost minority associates and creditors. A second regulatory task of group law was then to develop adequate compensatory schemes for each subsidiary company, ensuring that no power of direction for parent companies would be allowed without establishing at the same time special legal provisions intended to protect it.

This *regulatory synallagm* or linkage expresses the ultimate conception of the Portuguese law of 1986 on affiliated companies: institutionalization of power of direction of parent corporations and of the corresponding protection for subsidiary corporations, their minority shareholders and creditors.<sup>8</sup> As a matter of fact, the main

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<sup>8</sup> For further developments on this basic purpose of the law, see ANTUNES, J., *Os Grupos de Sociedades*, op. cit., 285ff.; TRIGO, M., *Grupos de Sociedades*, 47, in: "O Direito" (1991), 41-114. For a similar interpretation of the general purpose of German group law, conceived traditionally as "ein Sonderrecht der abhängigen Gesellschaft", see EMMERICH, V./ HABERSACK, M., *Konzernrecht*, op. cit., 10 ; HOMMELHOFF, P., *Die Konzernleitungspflicht – Zentrale Aspekte eines Konzernverfassungs-*

legal effects of the new law concern basically the protection of the “passive” side of an inter-company relationship: for example, in relationships of simple participation and mutual participation, the duty of information of the participating company in view of the *participated company* (art. 484° CSC) and the connected prohibition of acquisition of shares and parts and voting rights suspension (art. 485°, n° 2 CSC); in relationships of domination, the duty of disclosure of the dominating company relating to majority holdings in the *dependent company* (art. 486°, n° 3 CSC); and, most particularly, in relationships of group, the various compensatory mechanisms for the *subsidiary company*, its minority shareholders and its creditors (arts. 494°, 500°, 501°, and 502° CSC). While being thus essentially a law of the subsidiary or dependent company, this does not mean that the Portuguese regulation did not take into account the “active” side of inter-company relationships (that is, the *parent company*) or even the *group as such*. Among others examples, one could mention the legal norms on the prohibition of acquisition by the dependent company of shareholdings on its dominating company (arts. 325°-A, 325°-B, and 487° CSC), concerning the relationships of domination, and the ruling of powers, duties and liabilities of the parent company, concerning the group relationships (arts. 503° and 504° CSC).<sup>9</sup>

### 3.2. The Structure of the Law

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*rechts*, 35ff., Carl Heymanns, Köln, 1982; SCHNEIDER, U., *Konzernleitung als Rechtsproblem – Überlegungen zu einem Konzernverfassungsrecht*, 249, in: “Betriebs-Berater” (1981), 249-259; SCHMIDT, K., *Gesellschaftsrecht*, 491, 4<sup>th</sup> edition, Carl Heymanns, Köln, 1999.

<sup>9</sup> It is a merit of the so-called “Lutter school” (Marcus LUTTER, Peter HOMMELHOFF, Wolfram TIMM, Uwe SCHNEIDER) to have drawn attention to the fact that the very existence of groups of companies leads to distortions at the level of the parent company itself (cf. LUTTER, M., *Teilfusionen im Gesellschaftsrecht*, in: “Festschrift für Carl H. Barz”, 199-218, Walter de Gruyter, Berlin/ New York, 1974; LUTTER, M., *Zur Binnenstruktur des Konzerns*, in: “Festschrift für Harry Westermann”, 347-368, Müller, Karlsruhe, 1974; LUTTER, M., *Organzuständigkeiten im Konzern*, in: “Festschrift für Walter Stimpel”, 825-854, Walter de Gruyter, Berlin/ New York, 1985). In fact, the polycorporative structure of the group enables the parent’s board of directors to effect certain fundamental corporate decisions on its own without the involvement of the shareholders general meeting, as it would be the case if the overall business were organized in a single company. Thus, the sole existence of the group structure originates an enlarged realm of powers of parent’s management, which disturbs the internal balance of powers among the parent’s corporate organs, which can empty the original powers of general meeting of any meaning when substantial parts of enterprise activity are shifted to subsidiaries, and which can even imply substantial dangers for shareholder’s dividend rights in consequence of an increased entrepreneurial risk for the assumption of which they were not consulted at all. This train of thought, characterized by its innovatory perspective of groups of companies “from above downwards” rather than as traditionally “from below upwards”, is also increasingly adopted by Portuguese doctrine (cf. ANTUNES, J., *Os Direitos dos Sócios da Sociedade-Mãe na Formação e Direcção dos Grupos Societários*, UCP Editora, Porto, 1994; FRANÇA, M., *A Estrutura das Sociedades Anónimas nas Relações de Grupo*, AAFDL, Lisboa, 1991).

This statutory conception has been carried out through a regulatory model the global understanding of which can be made in the light of a division between two major normative sectors.

One concerns the regulation of *the relationships of group* (arts. 488° to 508° CSC). The legal regime applicable to this sector of inter-company relationships constitutes the core of the Portuguese law, where the original statutory conception has found its clearest implementation and where companies may benefit from an open deviation to some of the canons of classical company law: on the one side, the law recognizes to the parent company a legal power of direction over the management of the business affairs of the subsidiary, to which, however, some contractual and legal limits have been set (arts. 493°, 503° CSC)<sup>10</sup>; on the other side, the law contains a system of protection for subsidiary companies, their outside shareholders and creditors, by imposing on the parent a duty of covering the annual losses of the subsidiary (art. 502° CSC), a direct joint liability for the settlement of subsidiary debts (art. 501° CSC), and a duty of acquisition of the parts/shares of the subsidiary's outside shareholders (art. 494° CSC)<sup>11</sup>. The legal mechanisms for the creation and organization of a group relationship are the acquisition of 100% participation of the equity capital of a company (art. 488° CSC), the celebration of a contract of subordination (art. 493° CSC) or the conclusion of a contract of horizontal group (art. 492° CSC).

The second normative sector comprehends the relationships of participation (both simple and mutual) (arts. 483° to 485° CSC) and, in particular, the relationship of domination (arts. 486° and 487° CSC)<sup>12</sup>. Since the legislator overlooked any substantial or significant legal consequences for this sector of corporate reality<sup>13</sup>, the general principles of classical company law – namely, the rule according to which a dominant shareholder is only admitted to exercise its controlling power within the strict respect of the autonomous business interest of the dependent company (art. 64° CSC) – are here fully applicable without any deviation. Given the well-known inability of these traditional rules to cope with the phenomenon of inter-company control and to offer a real protection to dependent companies, the entire system of Portuguese law seems to

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<sup>10</sup> For further developments, see ANTUNES, J., *Os Grupos de Sociedades*, op. cit., 718ff.

<sup>11</sup> ANTUNES, J., *Os Grupos de Sociedades*, op. cit., 760ff.

<sup>12</sup> ANTUNES, J., *Os Grupos de Sociedades*, op. cit., 328ff.

<sup>13</sup> As it shall be described in detail further on (see *infra* VI., 2.), the law attached to the relationship of domination (art. 486° CSC) a mere duty of disclosure of the instrument of domination in the financial statements of the corporations involved (art. 486°, n° 3 CSC), and a prohibition over the dependent

be built upon a regulatory imbalance which threatens its theoretical coherence and practical efficiency.<sup>14</sup>

### *III. Scope of Application*

The legal provisions on affiliated companies are not applicable to all types or forms of relationships between enterprises which are conceivable in economic life. Instead, their application is dependent on *three types of conditions*, regarding the legal form of the companies involved (formal scope of application), the nationality of those companies (spatial scope of application) as well as the nature of the affiliation relationship itself (substantive scope of application).

#### 1. Formal Scope of Application

The first condition regards to the legal form of the subjects of the affiliation relationship: according to art. 481<sup>o</sup>, n<sup>o</sup> 1 CSC, the law is only applicable when the enterprises involved in those relationships are either a *stock corporation* (“sociedade anónima”), a *limited liability company* (“sociedade por quotas”), or a *limited partnership by shares* (“sociedade em comandita por acções”).

Excluded from the scope of the law are therefore any other forms of enterprises, including other types of commercial companies (such as general partnerships: “sociedade em nome colectivo”), civil companies (“sociedade civil”), cooperatives, foundations, associations, individual businessman, and so on. Moreover, Portuguese law only applies to those relationships in which *all* the enterprises involved have one of the above-mentioned legal forms (and not just one of them, as it happens in German law<sup>15</sup>) and there is no tradition of jurisprudential expansion of the law<sup>16</sup>. Needless to say, this

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corporation to hold any shareholding in the equity capital of the dominant corporation (art. 487<sup>o</sup> CSC).

<sup>14</sup> From this regulatory structure, it emerges clearly the well-known distinction between “legal” and “factual” groups as well as its shortcomings. Since the legal regime applicable to situations of mere domination between companies (which correspond “grosso modo” to the reality of factual groups) is not sufficiently dissuasive in order to prevent the emergence of groups outside a legal basis, the figure of legal groups is highly devaluated and “factual” subsidiaries are thus offered no real protection. For a general critical overview of the structure adopted by Portuguese group law, see ANTUNES, J., *Os Grupos de Sociedades*, op. cit., 287ff.

<sup>15</sup> See, for instance, EMMERICH, V./ HABERSACK, M., *Konzernrecht*, op. cit., 22ff.

<sup>16</sup> There is so far no jurisprudential construction of the existing legal rules as to extend them to these other legal forms of private enterprises. Nevertheless, there are court decisions defending its application to *public enterprises* (see “Acórdão da Relação de Lisboa”, of 26-4-1990, in: “Colectânea de

requirement reduces the practical efficiency of the law, since groups may avoid their own submission to it just by ensuring that their components, either the parent or subsidiaries, are organized along a non-relevant legal form (v.g., foundation, general partnership); likewise, a discrimination within groups themselves is introduced, since the legal protection of subsidiary companies (as well as of their minority shareholders and creditors) will be different accordingly to their own legal forms.

## 2. Spatial Scope of Application

A second condition concerns the nationality of the companies involved: according to art. 481º, nº 2 CSC, the law only applies to those relationships established between companies whose “*seat*” or head office (“*sede*”) is located in Portugal.<sup>17</sup>

By excluding from the application of the law those inter-company relationships in which (at least) one of the involved companies has its head office abroad, this legal requirement seems rather problematic. On the one hand, it creates a sort of privilege of foreign groups in front of national groups: how odd and paradoxical it might appear, the fact remains that foreign parent companies may establish and run Portuguese subsidiaries without being forced to comply with the same legal constraints to which are submitted domestic parent companies<sup>18</sup>. On the other hand, the protection of Portuguese subsidiaries (as well as of their outside shareholders and creditors) is dissimilar according to the nationality of the controlling capital: subsidiaries of foreign groups may not benefit of the same protection which the law grants to subsidiaries of domestic groups. This double discrimination is not only contradictory with the very

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Jurisprudência” (1990), II, 163).

<sup>17</sup> This condition, however, has several exceptions (art. 481º, nº 2, “in fine” CSC). Any foreign company (i.e., any company whose head office is located abroad) which is considered to be a dominating company under Portuguese law is submitted to the following regime: a) the Portuguese dependent company may not acquire parts/shares of the foreign dominating company, on pain of the nullity of acquisition or the suspension of attached voting rights; b) the foreign dominating company may be held jointly liable with any member of the management or supervisory boards of the dependent company if the former causes the latter to take or omit any measure in violation of its fiduciary duties (art. 83º CSC); c) both the Portuguese dependent company and the foreign dominating company must disclose any cross shareholding or mutual participation. Moreover, as it shall be seen further on (see *infra* VII.3), a foreign company may form a group of total domination with a Portuguese wholly-owned subsidiary (arts. 481º, nº 2, d) and 488º CSC).

<sup>18</sup> For example, if a Portuguese company acquires 25% of the shares of a non listed stock corporation X whose head office is located in Portugal, the former must notify this acquisition to the latter, on pain of the prohibition of any acquisition of new shares and of the suspension of its voting rights (arts. 484º and 485º CSC); however, if the acquiring company is a foreign one, it will be not submitted to such a duty of communication, nor thus to any type of the aforesaid legal restrictions.

basic purpose of the law<sup>19</sup>, but also to the general principles of equal treatment (art. 13º, nº 2 of the Portuguese Constitution) and of non-discrimination on grounds of nationality (art. 12º of the Treaty of Rome).<sup>20</sup>

### 3. Substantive Scope of Application

Finally, a third condition concerns the *nature of the affiliation relationship* itself: as already mentioned, according to art. 482º CSC, the only relevant types of company relationships are the relationships of simple participation, of mutual participation, of domination, and of group. This means that all those economic forms of affiliation between enterprises which do not fit into the concrete legal definition of one of these four types are excluded from the scope of the law.

In principle, only the *direct and bilateral* relationships of affiliation are legally relevant: for example, if a company A owns 60% of the capital of a company B and also 60% of the capital of the company C, there will be one relationship of domination between A-B and another one between A-C, but no relationship of any kind will exist between B-C. This principle has, however, exceptions – and, as a matter of fact, important ones. On the one hand, the law admitted the existence of *indirect* relationships by adopting a material, and not merely formal, notion of participation or shareholding: according to art. 483º, nº 2 CSC, for the purpose of determining the existence or the amount of a equity participation in a company, are also relevant the shares or parts owned by a company holding a relationship of domination or of group with the former as well as the parts owned by a any third person (be it a natural or legal person) on behalf of any of those companies<sup>21</sup>. Thus, for example, if a company A owns

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<sup>19</sup> As referred to by Klaus HOPT, “the general rules of private international law applicable to groups shall be derived from the purpose of the law to protect the creditors and outside shareholders of the subsidiary in the group. Thus, in principle, the law of groups follows the system applicable to the subsidiary” (*Legal Elements and Policy Decisions in Regulating Groups of Companies*, 109, in: SCHMITTHOFF, C./ WOOLDRIGE, F. (ed.), “Groups of Companies”, 81-111, Sweet & Maxwell, London, 1991).

<sup>20</sup> For further criticism, see ANTUNES, J., *O Âmbito de Aplicação do Sistema das Sociedades Coligadas*, in: AAVV, “Estudos em Homenagem à Professora Doutora Isabel de Magalhães Colaço”, volume II, 953-975, Almedina, Coimbra, 2002; GAUSE, B., *Europäisches Konzernrecht im Vergleich – Eine Untersuchung auf der Grundlage des portugiesischen Rechts*, 66ff., Berlin Verlag/ Nomos, Berlin, 2000.

<sup>21</sup> The adoption of a material or substantial concept of participation or shareholding, instead of the traditional formal concept, seems to have become almost universal. See, for instance, in Germany, § 16, IV of “Aktengesetz” of 1965 (EMMERICH, V./ HABERSACK, M., *Aktien- und GmbH Konzernrecht*, 30, 2<sup>th</sup> edition, Beck, München, 2001), in Spain, arts. 82.º e 88.º of “Ley de las Sociedades Anónimas” of

5% of a company B, while holding 60% of company C, which also owns 5% in B, then A is considered to hold a participation of 10% in the capital of B, being accordingly submitted to the duty of communication of such participation (art. 484° CSC). On the other hand, the law admitted also the existence of *multilateral*, and not only bilateral, relationships of affiliation in the specific case of group relationships. Let us suppose that company A celebrates a contract of subordination with companies B and C and also owns 100% of the equity capital of companies D and E. At first sight, one could only speak about four individual or bilateral group relationships established between A and each one of the companies B, C, D, and E (arts. 493° and 489°) – no relationships existing among these subsidiaries themselves. However, this is not the case. As a matter of fact, several aspects of the legal regime of the group relationship show clearly the multilateral or multi-party character of this type of affiliation relationship: thus, for instance, the parent company A has a right to issue disadvantageous instructions to the management of a subsidiary (v.g., B) only if such instructions may serve the economic interest of any other subsidiary of the group (C, D, E) or the interest of the group as a whole (art. 503°, n° 2 CSC); the parent company may enter into a profit transfer agreement with one of its subsidiaries, according to which the latter is compelled to convey a part or even all its annual profits either to the parent or any other group member (art. 508°, n° 1 CSC); the board of management of the parent company has a duty of care and diligence towards, not only the parent itself, but also each individual subsidiary company as well as the group as a whole (art. 504°, n° 1 CSC); and so on.<sup>22</sup>

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1989 (DOÑA, M., *Participaciones Recíprocas entre Sociedades de Capital*, 220ff., Aranzadi, Madrid, 1998), in France, arts. L.233-3, I, 1° and II, L.233-4, L.233-9, L.233-10 of “Code de Commerce” of 2000 (GUYENOT, J., *Les Participations d'une Société dans le Capital d'Autre Société*, in: “Études à la Memoire de P. Azard”, 87-102, Paris, 1980), in Italy, art. 2359°, comma 2 of “Codice Civile” of 1942 (SBISÀ, G., *Società e Imprese Controllate nel d.l. 9 aprile 1991*, in: “Rivista delle Società” (1992), 906-934), or in the United Kingdom, secs. 93 (4) and 400 (3) of the “Companies Act” of 2006 (for the notion of “nominee holdings”, see FARRAR, J./ HANNIGAN, B., *Farrar's Company Law*, 238, 4<sup>th</sup> edition, Butterworths, London, 1998).

<sup>22</sup> The relationships of affiliation provided for by art. 482° CSC are not mutually incompatible, reason why a situation of *plurality of relationships* is possible to exist. Two types of plurality are foreseeable: *real* plurality and *apparent* plurality. The first case arises when two companies hold between them, at the same time, several different types of affiliation relationships: v.g., if A owns 60% of the capital of B and the latter owns 10% of the former, then a relationship of domination will coexist with a relationship of mutual participation (arts. 485°, n° 1, and 486°, n° 2, a) CSC). The second case consists in those situations where a company holds simultaneously with two or more others companies (and not just one) several types of relationships: v.g., if A owns 100% of the capital of B, 15% of the capital of C and 20% of the capital of D, who owns on its turn the same percentage in A, then A will be deemed to hold, at the same time, a relationship of group, a relationship of simple participation and a relationship of mutual participation (arts. 489°, n° 1, 483°, n° 1, and 485°, n° 1 CSC). In both cases of plurality, it seems that the legal provisions concerning the different types of relationships at stake should be all applicable, except when the law had expressly provided otherwise (as it happens, for example, in case of relationships of



### III. Relationship of Simple Participation

The first type of relationship between companies provided for by Portuguese law is the relationship of simple participation. The *legal definition* and its main *legal effects* are rather plain: a relationship of simple participation is deemed to exist whenever a company owns 10% or more of the capital of another company and there is between them no other affiliation relationship (art. 483<sup>o</sup>, n<sup>o</sup> 1 CSC), case in which the former has a duty to inform by writing its participation to the latter (art. 484<sup>o</sup> CSC).

#### 1. The Legal Definition

This is a basic relationship, in two different senses. From an *economic point of view*, it constitutes usually the most elementary form of inter-company cooperation, corresponding to an embryonic stage of its eventual future concentration: while small equity participations obey normally to pure financial or investment objectives (maximization of capital return), participations above a certain percentage – in Portuguese law, 10 per cent. of the equity capital of the participated company – are deemed to pursue strategic objectives of control, employed frequently as a first step of a strategy of the participating company pursuant the acquisition of the control of the participated company. From a *legal point of view*, it represents a sort of fundamental type of affiliation relationship, since it holds a logic priority in front of all others types of relationship which are based on equity holdings, namely, the relationship of mutual participation, the relationship of domination (based on a majority of capital), and the relationship of group by total domination.

The legal definition of the relationship of simple participation depends on the fulfilment of two conditions: a *positive* one and a *negative* one. While apparently unambiguous and plain, this legal definition raises some difficult questions.

The positive condition says that the participating company *should own 10% or more of the capital of the participated company* (art. 483<sup>o</sup>, n<sup>o</sup> 1 CSC). Despite the silence of the law regarding the concrete criteria orienting the calculation of equity

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simple participation: cf. art. 483<sup>o</sup>, n<sup>o</sup> 1, “in fine” CSC). With further details, see ANTUNES, J., *Os Grupos de Sociedades*, op. cit., 325f.; to a similar problem, in German law, see SCHÜBERT, W./KÜTING, K.H., *Untermehmungs-zusammenschlüsse*, 71ff., Franz Vahlen, München, 1981.

holdings, the doctrine considers that such computation is made by the comparison of two amounts: the amount of the nominal equity capital of the participated company and the nominal amount of the shares or parts owned by the participating company. Concerning the first of these amounts, it is doubtful whether an eventual *self-participation* of the participated company (i.e., shares or parts hold by this company on its own capital) should be or not deducted from it; moreover, the problem of deduction of own shares/ parts of the participated company's capital is not an exclusive problem of the relationship of simple participation, but concerns also all other types of relationships based on equity holdings. The dominant position in literature is to consider in principle as irrelevant the eventual existence of self-participations, which therefore are not to be deducted or took way from the nominal capital of the participated company for the purposes at hand<sup>23</sup>. Concerning the second of the above mentioned amounts, only shares or parts are applicable: in others words, are considered as irrelevant bonds of any type (including convertible bonds or bonds with warrant: arts. 365° and 372°-A CSC<sup>24</sup>), mere participations in the profits of the company (“associação em participação”: arts. 21° and ff. of Decree-Law 231/81), or any other financial instruments which do not represent fractions of the nominal capital of the participated company.<sup>25</sup>

The existence of a relationship of simple participation depends also on a negative condition, which prescribes that *between participating and participated companies should not exist any other type of affiliation relationship* (art. 483°, n° 1, “in fine”, CSC): e.g., if a company A owns 51% of the capital of a company B, it shall be considered to exist here merely a relationship of domination between A-B, despite the

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<sup>23</sup> A sole exception exists in the case of the relationships of group of total domination: see ANTUNES, J. *Autoparticipações e Cômputo de Participações Intersocietárias*, in: “Estudos em Homenagem ao Prof. Doutor Raúl Ventura”, 275-291, Coimbra Editora, 2003; ROCHA, M., *A Aquisição de Acções Próprias no novo CSC*, Almedina, Coimbra, 1994. The position of German law and doctrine regarding the same problem is somewhat different: thus, while the law expressly provided for the deduction of self-participations from the nominal capital of the participated company regarding the case of participations of 50% or more (§ 16, Abs. II, 2 and 3 of AktG), the doctrine agrees in the opposite solution for participations of 25% or more (cf. KOPPENSTEINER, H.-G., *Kölner Kommentar zum Aktiengesetz*, Band 6, 102 and 216, in: ZÖLLNER, W./ NOACK, U. (ed.), “Kölner Kommentar zum Aktiengesetz”, 3<sup>th</sup> edition, Carl Heymanns, Köln/ Berlin/ Bonn/ München, 2004).

<sup>24</sup> Cf. ANTUNES, J., *Wandel- und Optionsanleihen in Portugal*, in: LUTTER, M./ HIRTE, H., “Wandel- und Optionsanleihen in Deutschland und Europa”, 212-241, Walter de Gruyter, New York/ Berlin, 2000.

<sup>25</sup> The law requires the sole holding of the shares or parts by participating company, being thus considered as irrelevant the fact that the rights (namely, voting rights) attached to such shares/parts are suspended, limited or increased: e.g., preferential shares (art. 341°, n° 2 CSC), parts with double vote (art. 250°, n° 2 CSC), shares/parts with voting rights suspended (arts. 251°, 381°, n° 6, 485°, n° 3 CSC), and so on.

fact that the positive condition of the legal “facti-species” of a relationship of simple participation had been also fulfilled; if A and B own reciprocally 15% of each capital, it shall be considered to exist between them a relationship of mutual participation and not two unilateral relationships of simple participation. This legal condition leads to rather unfair and paradoxical results, since it exempts companies holding significant participations of capital from a duty of communication while imposing it at the same time to participations of a lower magnitude. Let us exemplify: if company A acquires 15% of the capital of company B, it is considered to exist a relationship of simple participation that would originate to A an obligation to notify by writing its acquisition to B (art. 484° CSC); however, if the same A would instead acquired 70% of B’s capital, it will be deemed to exist a relationship of domination, among which legal effects no similar duty of communication is provided for.<sup>26</sup>

## 2. Legal Consequences: the Duty of Communication

The establishment of a relationship of simple participation creates to the participating company a *duty of communication*: according to art. 484° CSC, as soon as the participating company owns 10% or more of the shares/parts of another company, it must inform by writing the participated company of the acquisition realized, as well as of all further acquisitions or sales on the latter’s capital made during the period in which the capital owned remains higher than the legal minimum (10 per cent.).<sup>27</sup>

Paradoxically, the law provided *no sanction* for the case that the participating company did not comply with its legal duty of communication. This omission compromises the entire efficiency of the legal regulation concerning the relationships of simple participation as well as the relationships of mutual participation. To start with,

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<sup>26</sup> In other words, only equity participations between 10% and 50% shall be relevant in terms of creating relationships of simple participation: majority participations will originate in principle relationships of domination, unless the legal presumption contained on art. 486°, n° 2, a) CSC (establishing that a company holding the majority of capital of another shall be presumed to be a dominant company) has been rebutted. Different is the solution of other legal systems which also provided for similar duties of communication: see, for Germany, § 20, IV AktG (BURGARD, Ulrich, *Die Offenlegung von Beteiligungen, Abhängigkeits- und Konzernlagen bei der Aktiengesellschaft*, 51, in: 37 “Die Aktiengesellschaft” (1992), 41-55), and for France, art. L.233-12 of “Code de Commerce” of 2000 (GERMAIN, M., *La Déclaration de Franchissement de Seuils*, in : 26 “Revue de Droit Bancaire et de la Bourse” (1990), 20-32). Critically also, ANTUNES, J., *Os Grupos de Sociedades*, op. cit., 342ff.; TRIGO, M., *Grupos de Sociedades*, op. cit., 67.

<sup>27</sup> This duty is somewhat similar to the “Mitteilungspflicht” of German law, and similar duties are also today provided for even by countries who do not have a specific law on inter-company relationships, such as the Italian “obbligo di comunicazione” and the French “déclaration de franchissement de seuil”.

the omission of any type of sanction implies that compliance with the duty of communication (and thus the achievement of the underlying regulatory goals) is left to the free will of participating companies themselves. But the same omission also jeopardizes indirectly the efficiency of the legal regime on relationships of mutual participation. As it shall be explained further on, the functioning of this regime is entirely dependent on the fulfilment of duty of communication of art. 484° CSC, that is, it is based on the assumption that at least one of the reciprocally participating companies actually notifies its acquisitions to the other company: in fact, according to art. 485°, n° 2 CSC, the legal consequences of this particular relationship of affiliation (such as the prohibition of new acquisitions of shares/parts and the suspension of voting rights) are applicable to that company which fulfilled its duty of communication in last place. Therefore, hoe odd as it might seem, mutually participating companies may paralyse “*motu proprio*” the legal effects of this affiliation relationship by simply agreeing in not communicating to each other the acquisitions made.

As a way to overcome such omission – which makes the law a true *lex imperfecta* –, the doctrine sustains the *analogical application* of the sanction provided for in art. 485°, n° 3 CSC: the rights attached to shares or parts belonging to a participating company (obliged to inform the participated company pursuant to art. 484° CSC) may not be exercised in case the former has failed to comply with its legal duty.<sup>28</sup>

#### *IV. Relationship of Mutual Participation*

The regulation of the relationship of mutual participation, both in its *legal definition* and its *effects*, is contained in art. 485 CSC: an affiliation relationship of this type shall exist whenever two companies hold reciprocally participations in the amount of 10% or more in the capital of each other (art. 485°, n° 1 CSC); in such a case, the company which performed lastly its duty of communication is prohibited to acquire

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<sup>28</sup> ANTUNES, J., *Os Grupos de Sociedades*, op. cit., 368ff. This was also the solution provided for by German law in § 20, VII AktG (HEINSIUS, T., *Rechtsfolgen einer Verletzung der Mitteilungspflichten nach § 20 AktG*, in: “Festschrift für Robert Fischer”, 215-236, Walter de Gruyter, Berlin, 1979; KLIX, R., *Wechselseitige Beteiligungen*, 33, Peter Lang, Frankfurt a.M., 1981). To a similar, though not identical problem, see the solutions of Spanish Law (suspension of all rights attached to shares: cf. DOÑA, M., *Participaciones Recíprocas entre las Sociedades de Capital*, op. cit., 321ff.) and of Italian law (suspension of voting rights: cf. LA ROSA, A., *Le Società Controllate – I Gruppi*, 655, in: Colombo, G./ Portale, G., “Tratatto delle Società per Azioni”, vol. 2, 581 -665, Utet, Torino, 1991).

new parts/shares in the other company (art. 485°, n° 2 CSC); although acquisitions made against this prohibition are not void, they render the board of management of the acquiring company liable both in civil and penal terms and the rights attached to the participation at stake may only be exercised up to a maximum of 10%, except for liquidation rights (art. 485°, n° 3 and 5 CSC).<sup>29</sup>

### 1. The Legal Definition

The regulation of mutual participations is today a common denominator in comparative company law, by being provided for even in those countries which do not have a specific set of norms on groups of companies: thus it happens, just for sake of example, in France (“participations réciproques ou croisées”: arts. L.233-29 and L.233-31 of “Code de Commerce” of 2000), in Italy (“partecipazioni incrociate”: arts. 2359°-bis and ff., 2360° of “Codice Civile” of 1942), in Spain (“participaciones recíprocas”: arts. 82° to 89° of “Ley de Sociedades Anonimas” of 1989), or even in the United Kingdom (“cross-shareholdings”: sections 136 and ff. of “Companies Act” de 2006)<sup>30</sup>. This regulatory tradition also makes plain the reason why the Portuguese regulation does not contain any significant originality in front of the precedent models.

Similarly to the relationship of simple participation, the legal notion of a relationship of mutual participation depends also on a *positive* and a *negative* condition.

The first one consists in the existence of two mutually participating companies which are connected in such a manner that *each company holds 10% or more of the capital of the other*. However, this standard situation may be more complex. One should notice that not only direct but also *indirect* mutual participations are submitted

<sup>29</sup> We are concerned here only with the case of mutual participations between independent companies. Regarding cross participations between dominant and dependent companies, the legal regime is different, consisting basically in the application of the general principles and rules of self-shareholdings (arts. 487.°, 325.°-A and 325.°-B CSC). On this regime, extensively, see ANTUNES, J., *Os Grupos de Sociedades*, op. cit., 422ff.

<sup>30</sup> In German law (§§ 19 and 328 of AktG), see EMMERICH, V., *Zur Problematik der wechselseitige Beteiligungen*, in: “Festschrift für Harry Westermann”, 55-74, Müller, Karlsruhe, 1974; KLIX, R., *Wechselseitige Beteiligungen*, op. cit.; SCHMIDT, K., *Wechselseitige Beteiligungen im Gesellschafts- und Kartellrecht*, Peter Lang, Frankfurt am Main, 1995); in French law, see FLORÉS, G./ MESTRE, J., *La Réglementation de l’Autocontrôle (Réglementation de la loi 85-705 du 12 juillet 1985)*, in: “Revue des Sociétés” (1985), 775-789; MICHAUD, P., *La Réglementation des Participations Croisées et de l’Autocontrôle des Sociétés*, in: “Gazette du Palais” (1985), 4-25; in Italian law, see COLOMBO, G., *Per una Disciplina “Comune” delle Partecipazioni Reciproche*, in: XXVII “Giurisprudenza Commerciale” (2000), 813-850; FANNELI, G., *Le Partecipazione Sociali Reciproche*, Giuffrè, Milano, 1957; in English law, FARRAR, J./ HANNIGAN, B., *Farrar’s Company Law*, op. cit., 237ff.; GOWER, L., *Principles of*

to the range of the law, where several companies are involved (v.g., if A owns 51% of B, B owns 15% of C and C owns 15% of A, A and C are considered to reciprocally participating companies pursuant to art. 485°, n° 1 CSC)<sup>31</sup>. Likewise, in terms of submission to the legal regime, is regarded as irrelevant whether the participations owned by the companies involved were acquired originally (i.e., subscription of the shares/parts in the incorporation stage of the company or in a subsequent capital increase) or on a later occasion<sup>32</sup>; as it would be irrelevant the type of assets used in the said subscription or acquisition.<sup>33</sup>

The latter condition for the existence of a relationship of mutual participation establishes that *between the reciprocally participating companies should not exist at the same time a relationship of domination*. When a accumulation of these two different types of affiliation relationship occurs (v.g., a company A owns 15% of a company B and B owns 60% of A), then the legal regime applicable to the latter relationship shall prevail over the regime of the former (arts. 485°, n° 4, 487°, 325°-A and 325°-B CSC).<sup>34</sup>

## 2. The Legal Effects

There are three major legal consequences associated to this type of relationship:

- a) prohibition of acquisition of new shares or parts of the other company (art. 485°, n° 2 CSC);
- b) in case of breach of this prohibition, voting rights coupled to the shares/parts newly acquired are suspended in the amount which exceeds 10% of the capital of the acquired company and the members of the board of management of the acquiring company may incur in civil and penal liability (arts. 485°, n° 3 and 510°, n° 2 CSC);
- c) duty of disclosure of the existence and amount of the mutual participations in the annual accounts of each of the mutually participating companies (art. 485°, n° 5 CSC).

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*Modern Company Law*, 212ff., 5<sup>th</sup> ed., Stevens & Sons, London, 1992.

<sup>31</sup> These type of cross-shareholdings are known in comparative literature as “dreieckige Verhältnisse” (E. GEßLER), “ringförmigen Beteiligungen” (V. EMMERICH) or “participations circulaires” (Y. GUYON). See also KORCH, R., *Ringbeteiligungen von Aktiengesellschaften Gesellschafts- und kartellrechtliche Aspekte*, C. Heymanns, Köln, 2002.

<sup>32</sup> On the distinction between ordinary subscription (“originäre Erwerb”) and subsequent acquisition (“derivativer Erwerb”), see EMMERICH, V., *Zur Problematik der wechselseitigen Beteiligungen*, op. cit., 60ff.

<sup>33</sup> Establishing some differentiations in the legal regime according to the concrete type of assets used, see, for instance, the Brazilian law (art. 244°, § 4, of “Lei sobre Sociedades Anônimas”) and, to a minor extent, the Italian law (art. 2359°-bis, comma 1, of the “Codice Civile”).

<sup>34</sup> See *supra* footnote 29.

A major aspect of the law is that this set of legal effects is not applicable to both mutually participating companies, but only to “the one who has fulfilled its duty of communication *in last place*” (art. 485°, n° 2 CSC). Let us suppose the case of a company A which acquires 25% of the capital of a company B, which on its turn also acquires in a later moment 10% of the capital of A. In such a case, two scenarios are possible. One is that A communicates promptly its acquisition to B: in such a case, managers of B are prevented from acquiring new shares or parts of A, on pain of suspension of the voting rights attached to the new shares/parts and of its own exposure to civil and penal liability; on the contrary, the management of A may freely acquire new participations in B and exercise unlimitedly all the thereby attached rights. In the other scenario, A does not inform B of its acquisition, thus permitting B to anticipate the fulfilment of its own duty of communication: in this case, it is company B who shall enjoy of a freedom of acquisition and rights’ exercise, whereas A shall be prohibited not only to increase its participation in B but also to exercise the rights from shares/parts own in B in the amount of 15% (that is, the amount which exceeds the legal maximum of 10% in pursuance to art. 485°, n° 3 CSC).<sup>35</sup>

The *efficiency of the core of the legal regime* associated to mutual participations – that is to say, the suspension of the voting rights of the shares/parts in the amount which exceeds the legal limit of 10% (art. 485°, n° 3 CSC) – is rather doubtful. As it is well-known, cross-participations may lead to significant dangers both from the point of view of the patrimonial structure and the organizational structure of the mutually participating companies: on the one side, cross-shareholdings display patrimonial effects similar to a self-shareholding, leading thereby to a sort of “*anacquamento*” (G. COLOMBO)<sup>36</sup>, “*Verwässerung*” (V. EMMERICH)<sup>37</sup>, or “*irrealité*” (M.

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<sup>35</sup> The rights which may not be exercised are all those which are inherent to the shares or parts in the amount exceeding 10% of the capital of the participated company, exception made for *rights issuing from a process of liquidation of the company*. Concerning the question of whether these non-exercisable rights are considered to be temporarily suspended or instead definitely extinct, the answer varies according to the concrete case: if there are rights which are non-repeatable and which should enrol in the latter hypothesis (such as voting rights or information rights), there are others where a differentiated solution may be required (on the problem, see VENTURA, R., *Estudos Vários sobre Sociedades Anónimas*, 391ff., Almedina, Coimbra, 1993; to a similar question in Germany, see GEßLER, E., *Verlust oder nur Ruhen der Aktionärsrechte nach § 20 Abs. 7 AktG?*, in: “Betriebs-Berater” (1980), 217-220; HEINSIUS, T., *Rechtsfolgen der Verletzung der Mitteilungspflichten nach § 20 AktG*, in: “Festschrift für Robert Fischer”, 215-236, Walter de Gruyter, Berlin, 1979).

<sup>36</sup> *Per una Disciplina “Comune” delle Partecipazioni Reciproche*, op. cit., 813.

<sup>37</sup> *Zur Problematik der wechselseitige Beteiligungen*, op. cit., 57.

VANHAECKE)<sup>38</sup> of the share capital of both corporations involved<sup>39</sup>; on the other side, they are also responsible for subversive effects on the internal balance of powers amongst company organs, resulting in an enlargement of the scope of management powers in detriment to shareholders' voting rights, thus operating as a mechanism of "verrouillage" (Y. GUYON)<sup>40</sup>. The type of legal sanction adopted by Portuguese law, however, seems able to cope only partially with of these dangers. While it is true that the legal sanction of art. 485°, nº 3 CSC prevents the organizational risks of cross-shareholdings (since voting rights may not be exercised, the management of the mutually participating companies may not use cross-participations as a way to control indirectly their own General Meeting), it is also true that its patrimonial dangers remain completely unaffected.<sup>41</sup>

### *V. Relationship of Domination*

The third legal type of affiliation relationship is ruled by arts. 486° and 487° CSC, regulation which is made out of a general *legal definition*, a set of *legal presumptions*, and a few *legal consequences*.

A *relationship of domination* ("relação de domínio") between two companies is deemed to exist when one of them, said the dominating company, can exercise directly or indirectly a dominating influence upon the other, said the dependent company (art. 486°, nº 1 CSC). Given the difficulties of constructing the central concept of this provision (dominating influence), the law *presumes* its existence in three situations: when a company owns the majority of the capital of another, holds the majority of its

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<sup>38</sup> *Les Groupes de Sociétés*, 90, LGDJ, Paris, 1962.

<sup>39</sup> For instance, if company A subscribes 1000 of the shares issued by company B, and the latter, in turn, subscribes 1000 of the shares issued from a raising capital operation of the former, then a *fictional* capital in the amount of 500 would have been created in both companies A and B.

<sup>40</sup> The terminology is French (see GUYON, Y., *Droit des Affaires*, tome I, 636, 12<sup>th</sup> edition, Economica, Paris, 2003), but the phenomenon is universal. Thus too D. PRENTICE: "It would appear that the reason why the cross-holding are used is to evade, or greatly reduce, the effectiveness of the provision in the Companies Act empowering shareholders to remove a director from office by simple majority vote. As votes attached to the shares held by one company in another would be cast by the directors, if the directors of various companies agreed not to vote these shares so as to remove a director from office, the directors would be virtually irremovable" (*A Survey of the Law Relating to Corporate Groups in the United Kingdom*, 8, Brussels, 1988).

<sup>41</sup> The sole method able to cope efficiently with this specific type of danger is the one consisting in imposing an obligatory sale of the participations which were acquired in breach of the legal prohibition: this is the general solution provided for by several legal orders, such as (differences of detail left aside) the Spanish law (art. 83° of the "Ley de Sociedades Anónimas"), French law (art. L.233-29, II and L.233-30, IV of the "Code de Commerce"), Brazilian law (art. 244°, §4 of the "Lei das Sociedades Anónimas")



voting rights, or has the right to nominate the majority of the members of its management or supervisory organs (art. 486°, n° 2 CSC). Paradoxically, the law associated no specific legal consequences to this type of affiliation relationship: these consequences consist just in a general duty of disclosure of the relationship in the annual accounts of both companies (art. 486°, n° 3 CSC) and in a general prohibition preventing the dependent company from acquiring any parts/shares of the dominating company (art. 487° CSC).<sup>42</sup>

### 1. The Legal Definition: the Concept of “Dominant Influence”

Taking a comparative law perspective, it appears that Portuguese law did not introduce any substantial originality concerning the classical juridical instrumentarium on the regulation of the phenomenon of inter-company control. Similarly to other legal systems, the structure of the regulation is based upon the combination of a major substantive criteria – the concept of *dominating influence* (somewhat equivalent to the notion of “beherrschende Einfluß” of the § 17, I of German corporation law, but also not very far from other similar concepts, e.g., the one of “controllo” adopted by art. 2359.° of Italian corporation law) – with a set of more or less formal legal presumptions.

The concept of dominating influence is an elusive one, as elusive as the reality it describes<sup>43</sup>. To start with, notwithstanding the limited set of legal presumptions, a dominating influence can be created through a diversity of *mechanisms*, ranging from juridical mechanisms (e.g., majority voting power) to contractual mechanisms (e.g., contract of domination, management contracts), organizational mechanisms (e.g., articles of association) or factual mechanisms (e.g., personal linkages, strategic market positions)<sup>44</sup>. Moreover, a dominating influence can assume a wide variety of *forms* and

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and Italian law (art. 121°, comma 1, of the “Testo Unico della Finanza”).

<sup>42</sup> In exception to the limited spatial scope of application of arts. 481° and ff. CSC, these rules are partially applicable also to foreign enterprises (i.e. to companies who’s head office is located abroad): see *supra* III, 2.

<sup>43</sup> On this concept, see ANTUNES, J. *Os Grupos de Sociedades*, op. cit., 451ff. For similar concepts in other legal orders, see WERNER, H., *Der aktienrechtliche Abhängigkeitstatbestand – Eine Untersuchung der Herrschaftsmöglichkeiten von Unternehmen in der faktischen Konzernverbindungen*, WiRe Verlag, Göttingen, 1979; STORCK, M., *Définition Légale du Contrôle d’une Société en Droit Français*, in: 104 “Revue des Sociétés” (1986), 385-404; LAMANDINI, M., *Il “Controllo” – Nozioni e Tipo nella Legislazione Economica*, Giuffrè, Milano, 1995; COMPARATO, F./ SALOMÃO, C., *O Poder de Controle na Sociedade Anónima*, 4<sup>th</sup> edition, Rio de Janeiro, 2005.

<sup>44</sup> Already more than forty years ago, it was noticed by Claude CHAMPAUD that “the variety of techniques of control is such that it is impossible to found a common denominator to this reality. This is why one has excluded the concept of control from the world of juridical concepts and classified it along

of *degrees of intensity* in its exercise. It can be exercised directly by the holder of the strategic controlling position or indirectly through an intermediate person, be either natural (as it happens in the case of trustees or “Treuhänder”) or legal (namely, another corporation, as it happens in the case of multi-layer groups of companies or “mehrstufige Unternehmensverbindungen”<sup>45</sup>). It can be exercised positively, when the dominating company actively determines the entire sense of the business policy and management of the dependent company, but also sometime negatively, by preventing certain key decisions to be taken, as it may be the case of blocking minorities (“Sperrminorität”, “minorité de blocage”) in the event of special general meeting resolutions requiring a qualified voting majority (such as amendment of articles of association, mergers or corporate reorganizations)<sup>46</sup>. It can be exercised exclusively by the company holding the control mechanism or instead in association to third parties, as it happens when the dominant corporate shareholder has to count on the votes of its fellow shareholders in consequence of voting agreements (“Stimmrechtsbindungsvertrag”, “convention de vote”, “patti parassociali di voto”)<sup>47</sup>. It can correspond to an influence falling upon the entire range of company affairs or exercised only over one specific business sector or decision-making area (the so-called “sectorial control”)<sup>48</sup>. It

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the open category of the *concepts of fact*” (original in French) (*Le Pouvoir de Concentration de la Société par Actions*, 154, Librairies Sirey, Paris, 1962).

<sup>45</sup> Both modalities are relevant in assessing the existence of a position of dominating influence: see, in Portuguese law, ANTUNES, J., *Os Grupos de Sociedades*, op. cit., 538ff.; on German law, see REHBINDER, E., *Gesellschaftsrechtliche Probleme mehrstufiger Unternehmensverbindungen*, in: 6 “Zeitschrift für Gesellschafts- und Unternehmensrecht” (1977), 581-649; WERNER, H., *Der aktienrechtliche Abhängigkeitstatbestand*, op. cit., 180ff.

<sup>46</sup> In principle, only the positive control (“facere”) can be considered here as relevant, the negative control by veto or omission (“non facere”) being thus insufficient to create a dominating influence over the dependent company (on Portuguese law, see ANTUNES, J., *Os Grupos de Sociedades*, op. cit., 474ff.; on German law, see RASCH, H., *Sperrminoritäten in Bankbesitz als Grundlage einer Abhängigkeit nach §17 AktG*, in: 24 “Die Aktiengesellschaft” (1979), 49-51; SURÄ, A., *Fremdeinfluss und Abhängigkeit im Aktienrecht*, 66ff., Universitätsverlag Konstanz, 1980). Exceptions to this rule are to be found in cases where the exercise of a negative control may jeopardise the very economic survival of the company itself (on the so-called “Existenzgefährdung” cases, see BARZ, C., *Der Abhängigkeitsausschlußvertrag bei der Aktiengesellschaft*, 191, in: “Festschrift für Johannes Bärmann”, 185-201, Beck, München, 1975; WERNER, H., *Der aktienrechtliche Abhängigkeitstatbestand*, op. cit., 110ff.).

<sup>47</sup> As a rule, only the control exercised autonomously by the dominating company seems relevant: cf. WERNER, H.: “The dominating influence should be at disposal of the dominating company” (original in German) (*Der aktienrechtliche Abhängigkeitstatbestand*, op. cit., 113); WÜRDINGER, H.: “The dominating enterprise must dispose *alone* of the instruments of the dominating influence” (original in German) (*Großkommentar zum Aktiengesetz*, Bd. I/1, 147, in: Gadow, W./ Heinichen, E., “Grosskommentar zum Aktiengesetz”, Walter de Gruyter, Berlin/ New York, 1970). The relevance or irrelevance of this circumstance, however, has to be decided in the light of the nature and content of the *concrete voting agreement* at stake: see ANTUNES, J., *Os Grupos de Sociedades*, op. cit., 499ff.

<sup>48</sup> There is a large debate on the relevance of the “sectorial” or “partial” company dependency. As a rule, it seems necessary that the dominating influence should cover all the areas and functions of the dependent

can consist in a stable situation of dominance over the decision-making structure of the dependent company or instead reflecting a mere sporadic situation of control, issuing from involuntary and fortuitous circumstances (as it happens in the well-known occasional or “de facto” majorities in the general meeting)<sup>49</sup>. And so the number of examples can be multiplied.<sup>50</sup>

## 2. Legal Consequences: the Regulatory Imbalance

As previously referred to, the legal effects associated by Portuguese law to the situations of inter-company domination and dependency are extremely scarce, consisting merely in a general duty of disclosure of this relationship in the annual accounts of both companies (art. 486°, n° 3 CSC) and a general prohibition upon the dependent company to acquire any parts/shares of the dominating company (art. 487° CSC).

The scenario is rather different in the context of other countries which also provided for a global regulation of the phenomenon of inter-company control. Take the case, for instance, of Germany: here, this notion gives the real center piece<sup>51</sup> around which gravitates the basic distinction upon which is constructed the German regulation on groups of companies, the distinction between *contractual* and *factual groups*. Where a contract of domination has been celebrated, the parent company is given a broad legal power of direction over the subsidiary (including the right to issue instructions prejudicial to the interests of the latter), against a duty to cover all subsidiary annual losses and a duty to compensate their outside shareholders (§§291 and ff. of

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company, that is, the relevant control is only the one stretching over the enterprise as a whole (ANTUNES, J., *Os Grupos de Sociedades*, op. cit., 464ff.). However, due to the well-known interdependency of the various business sectors and managerial functions, it has been argued that the control over a single area of enterprise business or management (mainly, finances and personal) can produce effects on the global management of the company, being therefore equally relevant (see DIERDORF, J., *Herrschaft und Abhängigkeit einer Aktiengesellschaft auf schuldvertraglicher und tatsächlicher Grundlage*, 78ff., 89, Carl Heymanns, Köln, 1978; PRÜHS, H., *Grundprobleme der aktienrechtlichen Abhängigkeit im Spiegel der neuen Literatur*, 311, in: 17 “Die Aktiengesellschaft” (1972), 308-311; WERNER, H., *Der aktienrechtliche Abhängigkeitstatbestand*, op. cit., 124).

<sup>49</sup> It seems that the concept of dominating influence should only apply to those situations where a structural and stable power of control exists: see namely in Germany, GEBLER, E.: “Stability of the influence” (op. cit., 213); PRÜHS, H.; “Dependence as structural criterion” (op. cit., 309); WERNER, H.: “Institutionalized dominance” (op. cit., 118) (originals in German).

<sup>50</sup> For a detailed analysis of this concept on Portuguese company law, see ANTUNES, J., *Os Grupos de Sociedades*, op. cit., 451ff.

<sup>51</sup> “Zentralbegriff des Aktienkonzernrechts”, in the words of EMMERICH, V./ HABERSACK, M., *Konzernrecht*, op. cit., 35.

“Aktiengesetz”). Where no contract of domination exists, the dominating company is submit to the respect the autonomy of the dependent company and may only issue instructions which are detrimental to the latter if at the same time it compensates the damages derived therefrom; moreover, in order to secure this duty of compensation, every dependent company must elaborate a so-called dependence report each year (describing and quantifying the individual transactions hold between dominating and dependent companies); finally, if the rules on detriment compensation and dependence report are disregarded, the dominating enterprise and its organs become liable for breach of these duties (§§ 311 and ff. of “Aktiengesetz”)<sup>52</sup>. The original intention of this legal regime on dominating and dependent companies was obviously the one of compelling the existing factual groups structures under legal control.<sup>53</sup>

The lack of any relevant legal consequences for the relationship of domination in Portuguese law – especially, the lack of any specific legal provisions aiming to protect and ensure the autonomy of the dependent company – creates indirectly a dangerous and odd *imbalance* in the whole regulatory model. As a matter of fact, due to the absence of specific provisions, the general principles of classical company law are here fully applicable in the regulation of this inter-company relationship: thus, the dominant company is only admitted to exercise its dominating influence within the strict boundaries of the autonomous business interest of the dependent company (art. 64° CSC), being submitted to the general rules on the protection of company patrimony (arts. 31° and ff. CSC), on the liability of members of the company organs for breach of fiduciary duties (arts. 72° CSC), on the liability of majority shareholders for the exercise of a damaging influence (art. 83°, n° 4 CSC), and so on. Given the well-known incapacity of these traditional rules to cope with the phenomenon of inter-company control and to offer a real protection to dependent companies (both in the sense that those rules are not sufficient to prevent the emergence of company groups outside a contractual basis and that they do not offer sufficient protection to “de facto”

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<sup>52</sup> The operational and juridical linkage between legal and “de facto” groups is strengthened by the legal presumption of § 18, I of the said law, according to which “if a dominating and one or more dependent enterprises are joined by the uniform direction of the dominating enterprise, then they constitute a group («Konzern»)”. For an earlier and brilliant analysis of the original system of German legal regulation, see BÄLZ, U., *Einheit und Vielheit im Konzern*, in: “Festschrift für Ludwig Raiser”, 287-338, Mohr, Tübingen, 1974.

<sup>53</sup> The official draftsman spoke about a “Vertragszwang” which only would allow to render “legally apprehensible and safe the formation of groups”: see “Begründung Regierungsentwurf”, in: KROPFF, B., *Aktiengesetz – Textausgabe des Aktiengesetzes vom 6.9.1965 und des Einführungstextes zum Aktiengesetz vom 6.9.1965*, 374 and f., Instituts der Wirtschaftsprüfer, Düsseldorf, 1965 (original in German).

subsidiaries), the law is built upon a regulatory imbalance which threatens its theoretical coherence and practical efficiency. “Factual groups” will continue to survive in the loopholes of the traditional company law, exactly as they already did before; and the figure of “legal groups” is largely devalued given the absence of any real advantages on its constitution and the lack of any type of dissuasive provisions against the formation of factual ones<sup>54</sup>. The best proof of such imbalance is that no contractual group has been so far created since the law has come into force more than 20 years ago.<sup>55</sup>

## VI. Relationship of Group

Contrary to German law, Portuguese law does not say what “is” a group of companies but it merely indicates what “are” those groups: in other words, the law does not provide for a general and abstract notion of “group of companies”, but simply points out three specific *types* of legal mechanisms for its formation and organization: these mechanisms are the *contract of subordination* (“contrato de subordinação”), the *contract of horizontal group* (“contrato de grupo paritário”), and the *total domination* (“domínio total”).

### 1. Contract of Subordination

The relationship of group created by the so-called *contract of subordination* – which is similar to the German “Beherrshungsvertrag”, to the Brazilian “convenção de grupo” as well as to “affiliation agreement” of the former European proposal of a 9<sup>th</sup> Directive or the French “Proposal Cousté”<sup>56</sup> – constitutes the core of the whole system

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<sup>54</sup> As U. BÄLZ noticed for a similar problem, “would the exercise of the same power of direction also possible without a domination contract and their associated guarantees for external shareholders and creditors, then the entire new law would be running the risk of rendering itself ineffective” (original in German) (*Einheit und Vielheit im Konzern*, op. cit., 301).

<sup>55</sup> For a general critical overview of Portuguese law, see, ANTUNES, J., *Os Grupos de Sociedades*, op. cit., 448ff. This shortcoming can only be partially solved by the new rules of financial statements of companies, namely IAS 24 on disclosure of related party transactions.

<sup>56</sup> See respectively §§ 291 to 310 of German “Aktiengesetz”, arts. 265° to 277° of Brazilian “Lei das Sociedades Anónimas”, arts. 13° to 22° of the proposal for a 9<sup>th</sup> Directive on Groups of Companies (version of 1984), and arts. 7° to 33° of the so-called “Proposition Cousté” (version of 1978). Although with a tax law nature, see also for similar agreements in Switzerland (cf. SCHLUEP, W., *Über privatrechtliche Freiheit und Verantwortung des kartellähnlichen Konzerns*, 358ff., in: “Festschrift zum Geburtstag von Arthur Meier-Hayoz”, 345-394, Stämpfli, Bern, 1982) and Austria (cf. KRECJI, W., *Partnerschaft, Verein, Konzern*, 322ff., in: “Verhandlung des 10. Österreiches Juristentages”, Vol. I/1,

of Portuguese law on affiliated companies (arts. 493° to 508° CSC). The law contains a detailed regulation concerning the preparation of this contract (namely, a favourable general meeting resolution of both companies adopted by a qualified voting majority: art. 496° CSC<sup>57</sup>), its celebration and registration (art. 498° CSC), its future amendments (art. 505° CSC) and its termination (art. 506° CSC). This contract represents a sort of organizational charter for the group relationship emerging therefrom and it is basically characterized by placing parent-subsidary relationships into a special regulatory framework.

On the one side, in open deviation from the general canons of company law (e.g. arts. 64°, 72°, 83°, 84° CSC), the parent company is given a broad *legal power of direction* over the management of the affairs of the subsidiary company (art. 493°, n° 1 CSC), including the right to issue instructions disadvantageous or contrary to the interests of the latter in so far as such instructions serve the interest of the parent corporation or of any other group affiliate. This power of direction is not unlimited, however: the parent company may issue instructions only in matters related to the management of the subsidiary (being prohibited to invade the sphere of competences of any other subsidiary organ, e.g. the general meeting); it may not issue instructions which are forbidden from the viewpoint of other branches of the law, v.g., labour law, tax law (art. 503°, n° 2 CSC) or of the articles of association of the subsidiary company; and it may not issue instructions on intragroup transfers of assets without an appropriate compensation (art. 503°, n° 4 CSC)<sup>58</sup>. On the opposite to German law, Portuguese law does not regulate any other enterprise contracts<sup>59</sup>. The sole exception is given by the *contract to transfer profits* (“contrato de transferência de lucros”: art. 508° CSC). This contract, which may only be concluded where a previous contract of subordination

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Viena, 1988).

<sup>57</sup> As things stand, *a contract exists here in form, but not in substance*: since the subsidiary company is as a rule already dependent via a majority shareholding hold by the parent company, the latter can unilaterally decide about the conclusion of such contract, its content and its termination. The law solved only partially this problem in art. 496°, n° 2 CSC, by imposing the obligatory consent of at least one-half of the subsidiary’s outside shareholders (on this norm, see ANTUNES, J., *Os Grupos de Sociedades*, op. cit., 676ff.).

<sup>58</sup> On the limits of the power of direction, see ANTUNES, J., *Os Grupos de Sociedades*, op. cit., 733ff.; for a similar question in German law, KANTZAS, I., *Das Weisungsrecht im Vertragskonzern*, 97ff., Peter Lang, Frankfurt am Main, 1988; SINA, P., *Grenzen des Konzernweisungsrechts nach § 308 AktG*, in: 36 “Die Aktiengesellschaft” (1991), 1-10.

<sup>59</sup> On this other enterprise contracts (§ 292 of “Aktiengesetz”), see VEIT, K.-R., *Unternehmensverträge und Eingliederung als aktienrechtliche Instrumente der Unternehmensverbindung*, 33ff., IdW-Verlag, Düsseldorf, 1974.

exists<sup>60</sup>, imposes on the subsidiary company a duty to transfer all or just a part of its annual profits to the parent company or to any other subsidiary of the same group.

On the other side, the law contains a system of protection for the subsidiary company, its outside shareholders and its creditors. Firstly, the parent company is forced to offer an adequate compensation to *outside shareholders or members* of the subsidiary company, which may be provided for in two major ways: one is a duty of acquisition of the shares/parts of minority shareholders/members who want to leave the subsidiary company, against a consideration in cash or in parent's own shares/parts as stipulated in the contract of subordination (art. 494°, n° 1 CSC); another is the duty to guarantee a specific annual dividend for those minority shareholders/members who decided to remain in the subsidiary (arts. 494°, n° 2 and 500° CSC). Proceeding from the assumption that the broad powers now enjoyed by the parent company can virtually void the economic and patrimonial substance of each subsidiary of the group, the law contains also a system of protection to the *subsidiary company* and its *creditors* by imposing on the parent company a duty to cover all annual losses of the subsidiary company (art. 502° CSC) and a direct joint liability for the subsidiary debts (art. 501° CSC). The first norm, which provides a system of *indirect* protection for subsidiary creditors<sup>61</sup>, faces the efficiency problems which are commonly associated to these kind of mechanisms: given the numerous avenues for manipulation of the financial statements of subsidiaries opened up to parent corporations both by its general power of direction<sup>62</sup> and by the large valuation freedom permitted by existing accounting law<sup>63</sup>, the integrity of assets of the subsidiary company can in fact be seriously affected in spite of the said legal rule. More importantly, given that the protective scope of this

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<sup>60</sup> Contrary to German law: see VAN VENROOY, G., *Isolierte Unternehmensverträge nach § 291 AktG*, in: "Betriebs-Berater" (1986), 612-616.

<sup>61</sup> Although being not able to proceed directly against the parent company to obtain the settlement of their credits, subsidiary creditors are protected indirectly by the fact that the corporate debtor may not show any net loss (that is to say, since every loss has to be compensated, the subsidiary company benefits from a sort of solvency insurance as long as the parent company remains solvent).

<sup>62</sup> Thus, according to art. 503° CSC, nothing seems to prevent parent companies to instruct the management of their subsidiaries to extinguish pre-contractual hidden reserves of the latter in order to reduce the global amount of annual losses: see ANTUNES, J., *Liability of Corporate Groups – Autonomy and Control in Parent-Subsidiary Relationships in USA, German and EU Law. An International and Comparative Perspective*, 335, Kluwer, Deventer/ Boston, 1994; PRÜHS, H., *Die Substanzerhaltung der vertraglich abhängigen Aktiengesellschaft*, 232, Diss., Bonn, 1978.

<sup>63</sup> The parent can choose the moment of termination of the contract of subordination to its own advantage: see on the topic ANTUNES, J., *Liability of Corporate Groups*, op. cit., 336; SCHATZ, S., *Die Sicherung des Gesellschaftsvermögens und der Gläubigerinteressen im deutschen Konzernrecht*, 109ff., Diss., Göttingen, 1980; WILHELM, H., *Die Beendigung des Beherrschungs- und Gewinnabführungsvertrags*, 50ff., Carl Heymanns, Köln, 1976.

legal provision is limited to stated subsidiary losses, the law indirectly permits the emptying of its real economic-patrimonial substance as long as its formal book value has not been changed, through a variety of legitimate stratagems, such as profit manipulation and syphoning, transfer pricing, use of subsidiary facilities without retribution, and the like<sup>64</sup>. These problems make rather plain the importance of the norm of art. 501° CSC, which provides for a direct liability of the parent company for subsidiary debts: this norm provides now a system of *automatic* and *direct* protection for subsidiary creditors. Under this system, the liability of parent companies is characterized by being a general liability (that is, which follows “ex lege” solely from its formal status as “parent company”)<sup>65</sup>, unlimited liability (that is, irrespective of its timing or causal origin)<sup>66</sup>, although subsidiary liability (that is, proceedings may be brought against the parent company only when the creditor has first made a written demand for payment from the subsidiary company and failed to obtain satisfaction after a period of 30 days: cf. art. 501°, n° 2).<sup>67</sup>

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<sup>64</sup> Thus, it may well occur that the subsidiary company has been increasingly drain of its assets while keeping the contrary appearance – and this not only *during* the period of duration of the contract, but also *after* it, where the subsidiary company may find itself deprived from any chance of survival as an autonomous economic entity in the open market. Perhaps, it is precisely in this sense that scholars often speak about the contract of domination as a “one way go” or “point of no return” for subsidiary companies: LUTTER, M., *Le Droit des Konzerne en RFA S’Est-Il Imposé Dans Les Faits?*, 315, in: 2 “Droit et Pratique du Commerce International” (1976), 305-324. See also ANTUNES, J., *Liability of Corporate Groups*, op. cit., 334ff.

<sup>65</sup> From the perspective of creditors of the subsidiary company, this means that they can readily obtain the settlement of their credits by the parent company, simply by alleging the formal grounds of the group relationship, i.e., the existence of a contract of subordination: thus, they need not to prove the existence of a causal linkage between the concrete subsidiary debts and the exercise of an actual control by the parent company (for a criticism on similar solutions in former EU law proposals, namely the 9<sup>th</sup> Directive on Groups of Companies, see GUYON, Y., *Examen Critique des Projets Européens en Matière des Groupes de Sociétés*, 171, in: HOPT, K. (ed.), “Groups of Companies in European Law”, 155-174, Walter de Gruyter, Berlin/ New York, 1982).

<sup>66</sup> As the full partner of a limited partnership, the parent is thus made unlimitedly liable for the debts of the subsidiary, irrespective of its origin (being also accountable for those debts which arose before the beginning of the group relationship: art. 501°, n° 1 CSC) or of their legal nature (including not only contractual liability but also tort, tax, labour or any other type of liability). In practical terms, this means that the guarantee of recovery of the creditors of each subsidiary company, tradition ally limited to the assets and the capital of the single company debtor, potentially extends itself to the assets of the group as a whole.

<sup>67</sup> The parent’s liability is thus neither a pure joint and several liability (“gesamtschuldnerich Haftung”, “responsabilité solidaire”) – in the sense that subsidiary creditors may freely chose between the assets of the subsidiary and of the parent in order to settle their claims – nor a residual liability (“Ausfallhaftung”, “responsabilité résiduelle”) – in the sense that parent companies should be made exclusively liable for the settlement of the remaining unpaid debts of insolvent or bankrupted subsidiaries. The liability of parent companies represents a sort of “subsidiary liability”, somewhere in between these two extremes: that is, parent assets are not placed side-by-side with the subsidiary assets at the free disposal of subsidiary creditors (joint liability) but creditors are not forced to wait until the insolvency of the subsidiary before proceeding against the parent (residual liability), being sufficient that they have made a written request to the corporate debtor which failed to obtain satisfaction.



## 2. Contract of Horizontal Group

The relationship of group created and organised on the basis of an contract of horizontal group – which is equivalent to the German “vertraglicher Gleichordnungskonzern” and to the Brazilian “consórcio”<sup>68</sup> – is *terra incognita* in Portuguese law and practice<sup>69</sup>. This situation may be explained not only by the fact that groups of companies in Portugal are by definition groups of subordination but also because the law did not provide for any specific rules on the organization and management of horizontal groups. In fact, art. 492° CSC merely establishes the constitutive elements of this contract (independence of the companies and subordination to an unitary management: n° 1), some elementary aspects of its preparation and conclusion (n° 2 to 5) and is subordination to general rules of competition law (n° 6). The law completely omits any reference to effects stemming from the conclusion of such a contract, that is to say, does not make clear which principles will govern the functioning of the group itself, namely, the content and form of exercise of the power of direction, and the protection of associates and creditors of the companies involved.<sup>70</sup>

## 3. Total Domination

A final and most important form of creation of a relationship of group – which has some similarity to the German “Eingliederung” and the Brazilian “subsidiária integral” – is the so-called *total domination* (“domínio total”): this shall be the case whenever a company, said totally dominating company, holds 100 per cent. of the equity capital of another company, said totally dependent. The law distinguishes

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<sup>68</sup> See in comparative literature BAYER, W., *Horizontal Groups and Joint Ventures in Europe: Concepts and Reality*, in: HOPT, K. (ed.), “Groups of Companies in European Laws”, 3-17, Walter de Gruyter, Berlin/ New York, 1982; DEFALQUE, P., *Le Groupe Horizontal de Sociétés et son Traitement en Droit de la Concurrence*, in: “Cahiers de Droit Européen” (1981), 437-448; GROMANN, H., *Die Gleichordnungskonzern im Konzern- und Wettbewerbsrecht*, Carl Heymanns, Köln, 1979; SACRISTÁN, M., *El Grupo de Estructura Paritaria: Caracterización y Problemas*, in: 165/166 “Revista de Derecho Mercantil” (1982), 375-398.

<sup>69</sup> To use the words of SCHMIDT, K., *Gleichordnung im Konzern: terra incognita? – Vorstudien und Thesen zu einem Recht der Konzernschwwestern*, in: 155 “Zeitschrift für Gesellschafts- und Unternehmensrecht” (1991), 417-446.

<sup>70</sup> As a rule, an *analogical application* of the legal provisions of the arts. 488° and ff. CSC to groups created on the basis of an horizontal group contract is forbidden: see ANTUNES, J., *Os Grupos de Sociedades*, op. cit., 926; in the opposite sense, TRIGO, M., *Grupos de Sociedades*, op. cit., 97.

between two types of total domination. One is the *originary total domination* (“domínio total inicial”): thus, equally to many other legal systems, also the Portuguese law admits a company to create a public or private limited company of which the former is “ab initio” the sole shareholder (arts. 488° and 270.º-A CSC)<sup>71</sup>. The other is the *derivate total domination* (“domínio total superveniente”), which consists in the situation in which a company acquires subsequently the entire capital of an already existing company (art. 489° CSC).

While the group formed through a contract of subordination follows very closely the German legal model and the group created through an horizontal contract still remains *terra incognita*, the Portuguese rules on groups by total domination present some original aspects<sup>72</sup>. One concerns the broader spatial scope of application the norms of art. 488° and ff. CSC: as a matter of fact, contrary to what would result from arts. 481.º, nº 2 CSC, a *foreign company* may form a group by initial total domination with a Portuguese wholly-owned subsidiary (art. 481º, nº 2, d) CSC)<sup>73</sup>. Another is that the law, while requiring the agreement of the General Meeting of the parent company for the formation of groups based on subsequent total domination (art. 489º, nº 2 CSC), apparently considered the formation of groups by initial total domination as being a mere competence of the *board of management* (arts. 488º, nº 1 and 405.º, nº 1 CSC)<sup>74</sup>.

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<sup>71</sup> The figure of the wholly-owned subsidiary corresponds to a sort of universal or general trend of company law worldwide: amongst many other countries, this is the case of Belgium (“loi du 5 décembre 1984” and “loi du 14 juillet 1987”: cf. WYMEERSCH, E., *L’Introduction de la Société Unipersonnelle en Droit Belge*, in: XXXIII “Rivista delle Società” (1988), 836-855), of Brasil (art. 251.º of “Lei das Sociedades Anónimas”: cf. COMPARATO, F., *Les Groupes de Sociétés dans la Nouvelle Loi Brésilienne des Sociétés par Actions*, op. cit., 859ff.), of France (art. L.223-1 of “Code de Commerce”: cf. DAIGRE, J.-J., *La Société Unipersonnelle en Droit Français*, in: “Revue Internationale de Droit Comparé” (1990), 665-687), of Germany (§1 of “GmbH-Novelle” and § 2 of “Aktiengesetz”: cf. FLUME, W., *Die Gründung der Einmann-Gesellschaft nach der Novelle zum GmbH-Gesetz*, in: 33 “Der Betrieb” (1980), 1781-1784), of Italy (art. 2463º, comma 1, of “Codice Civile”: cf. CHIEFFI, I., *La Società Unipersonale a Responsabilità Limitata*, Giappichelli, Torino, 1996), of Luxemburg (art. 179º of “Loi des Sociétés Commerciales”: cf. MARTIN, P./ GAETANO, C., *La Società Unipersonale nel Diritto Lussemborghese*, in: “Le Società” (1994), 125-137), of Spain (arts. 125.º e segs. of “Ley de Sociedades de Responsabilidad Limitada”: cf. CASCÓN, F., *La Sociedad de Capital Unipersonal*, Aranzadi, Navarra, 2002), of the United Kingdom (section 7 (1) of “Companies Act”: AAVV, *Palmers’ Company Law*, Vol. I, Part 2 (Companies Formation), 2.108, 25<sup>th</sup> edition, London, Sweet & Maxwell, 1992), and of the United States of America (§ 2.01 of the “Model Business Corporation Act”, § 101(a) “Delaware General Corporation Law”, §§ 201 e 505 “Michigan Business Corporation Act”: cf. FULLER, W., *The Incorporate Individual: A Study of the One-Man Company*, in: LI “Harvard Law Review” (1978), 1373 e segs).

<sup>72</sup> Groups formed by total domination are submitted to the same regime applicable to groups of subordination, above reviewed at VII, 1. (cf. art. 491 CSC), exception made, of course, to those legal provisions aiming to the protection of outside associates.

<sup>73</sup> On the spatial scope of application of the law, see *supra* III., 2.

<sup>74</sup> Notwithstanding the legal discrepancy, a part of the doctrine proposes a global system of co-participation of shareholders of parent companies in the formation of groups based in 100% shareholdings, either derivate or originary (cf. ANTUNES, J., *Os Direitos dos Sócios da Sociedade-Mãe*

Finally, one should mention the *obligatory squeeze-out of minority shareholders* (“aquisição tendente ao domínio total”): according to art. 490° CSC, whenever a company owns 90% or more of the equity capital of another company, the former has the right (and, in certain cases, the duty) of purchasing the remaining shares/parts on the dependent company, against a settlement in cash or other values<sup>75</sup>. This is probably one of the most relevant legal provisions of entire group Portuguese group law, both from a practical and theoretical point of view, giving rise to a large controversy in doctrine and jurisprudence.<sup>76</sup>

### VIII. Corporate Groups in other Branches of Law

The law of corporate groups is becoming more and more an *interdisciplinary law*. And perhaps the major recent innovations and driven forces concerning the regulation of this economic phenomenon are not originating from Company Law but from other legal branches.

Both in *tax law* and in *accounting law*, groups are being increasingly seen as a legal, and not merely an economic, unity: this is the case of the special regime on the taxation of group consolidated profits (arts. 63° and ff. of “Code on Taxation of the Income of Legal Persons”) and on the presentation of group consolidated accounts (Decree-Law n° 239/91)<sup>77</sup>. In *labour law*, the group is also treated as a unity both regarding the regulation of key aspects of the individual labour relations – for instance, allowing parent corporations to transfer workers among their subsidiaries (arts. 92° and

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*na Formação e Direcção dos Grupos Societários*, op. cit.; FRANÇA, M., *A Estrutura das Sociedades Anónimas nas Relações de Grupo*, op. cit.).

<sup>75</sup> This mechanism – whose historical origins seem to be found in the so-called “*compulsory purchase*” provided for by sec. 209 of the English “Companies Act” of 1948 – has also become well-known in several legal orders, such as the “*offre de retrait obligatoire*” of French Law (arts. 5-6-3 e 5-6-7 of the “*Réglement Général du Conseil des Marché Financiers*”: cf. BAJ, C., *Le Retrait Obligatoire des Actionnaires Minoritaires des Sociétés Cotées*, in: 44 “*Revue de Droit Bancaire*” (1994), 154-163), the “*offerta d’acquisto residuale*” of Italian law (arts. 108° e 161° of “*Testo Unico delle Disposizioni in Materia di Mercati Finanziari*”: cf. VENTORUZZO, Marco, *Offerta Pubblica di Acquisto Residuale*, in: Marchetti, P./ Bianchi, L., “*La Disciplina delle Società Quotate*”, tomo I, 407 e segs., Giuffrè, Milano, 1999), the “*Eingliederung*” and “*Ausschluss von Minderheitsaktionären*” in Germany (§§ 320 and ff., 327a and ff. of “*Aktiengesetz*”: cf. MORITZ, H., *Squeeze Out: Der Ausschluss von Minderheitsaktionären nach 327a ff AktG*, Nomos, Baden-Baden, 2004; VEIT, K.-R., *Unternehmensverträge und Eingliederung als aktienrechtliche Instrumente der Unternehmensverbindung*, op. cit., 47ff.).

<sup>76</sup> After the Supreme Court of Justice having considered the rule as being unconstitutional (cf. “*Acórdão do Supremo Tribunal de Justiça*”, of 2-10-1997), the Constitutional Court decided in the opposite sense, holding the validity of art. 490° CSC (“*Acórdão do Tribunal Constitucional n° 491/02*”, of 26-11-2002). On the issue, see ANTUNES, J., *A Aquisição Tendente ao Domínio Total*, Coimbra Editora, 2001.

324º of “Labour Code”) and imposing on them an unlimited liability for the payment of salaries of subsidiary workers (art. 378º of “Labour Code”) – and in collective labour relations – namely, the constitution a of group labour committees (art. 461º, nº 3 of “Labour Code”)<sup>78</sup>. In *banking law*, the so-called financial groups are subjected to a regime of consolidated supervision by the Portuguese central bank, meaning essentially that the parent corporation and subsidiaries must comply to a set a common prudential ratios (arts. 130º and ff. of the “Law of Credit Institutions and Financial Companies”)<sup>79</sup>. In *capital market law*, groups are bound to important information and transparency duties related to the owning of shareholdings in subsidiary listed companies (arts. 16º and ff. of “Code of Securities”), while at the same time the law grants them some specific mechanisms such as the compulsory squeeze-out of minority shareholders (arts. 194º and ff. of the said Code)<sup>80</sup>. And many other similar norms could be referred to, e.g., in *competition law* (where the group has been expressly qualified as one single enterprise for the application of the anti-trust laws: art. 2º, nº 2 of “Law of Competition”)<sup>81</sup>, in *insolvency law* (where the credits of parent corporations are treated as subordinated credits in the event of subsidiary bankruptcy: arts. 48º, a) and 49º, nº 2, b) of the “Insolvency Code”)<sup>82</sup>, and so on.

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<sup>77</sup> LOUSA, M., *Considerações sobre a Tributação dos Grupos de Sociedades*, in: 350 “Ciência e Técnica Fiscal” (1988), 199-301.

<sup>78</sup> ABREU, J., *Grupos de Sociedades e Direito do Trabalho*, in: LXVI “Boletim da Faculdade e Direito da Universidade de Coimbra” (1990), 124-149; CARVALHO, C., *Da Mobilidade dos Trabalhadores no Âmbito dos Grupos de Empresas Nacionais*, Ed. UCP, Lisboa, 2001.

<sup>79</sup> ANTUNES, J., *A Supervisão Consolidada dos Grupos Financeiros*, Ed. UCP, Porto, 2000.

<sup>80</sup> CASTRO, C., *A Imputação dos Direitos de Voto no Código dos Valores Mobiliários*, in: 7 “Cadernos do Mercado de Valores Mobiliários” (2000), 163-192.

<sup>81</sup> CORDEIRO, A., *As Coligações de Empresas e os Direitos Português e Comunitário da Concorrência*, in: XXIX “Revista de Direito e Estudos Sociais” (1987), 81-113.

<sup>82</sup> FERNANDES, L./ LABAREDA, J., *Código da Insolvência e da Recuperação de Empresas Anotado*, vol. I, 228ff., Quid Juris, Lisboa, 2005.

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